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THE -QUARTERLY REVIEW-

LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

EDITOR'S COMMENTS

Welcome to the second installment of Volume 7 of The Quarterly Review (QR). The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. The QR is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding The QR can be directed to Robert Cauthen at (912) 267-2179 or robert.cauthen@dhs.gov. You can join The QR Mailing List, have The QR delivered directly to you via e-mail, and view copies of the current and past articles in The QR by visiting the Legal Division web page at: http://www.fletc.gov/legal. This volume of The QR may be cited as "7 QUART. REV. ed.2 (2006)".

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New Associate Editor

I am pleased to welcome **Angela McCravy**, a new Senior Instructor in the Legal Division, as Associate Editor of *The Quarterly Review*. In 1983, Angela graduated from Georgia State University with a Bachelor of Science degree in Criminal Justice. She went through basic agent training here at FLETC in 1984, and upon graduation served as a Special Agent with the Drug Enforcement Administration until 1988. After graduating with honors from Stetson University College of Law in 1993, Angela served as an Assistant Attorney General for the state of Florida for eleven years.

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Further DoJ guidance on *Garrity/Kalkines*

In January, 2006, Criminal Division Assistant Attorney General Alice S. Fisher issued additional guidance on the use of and language of *Garrity/Kalkines* warnings.

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2006 Uniform Code of Military Justice Changes

The Defense Appropriations Bill, 109 P.L. 163 / H.R. 1815, Title V, passed by Congress and signed by the President on January 6, 2006, made significant changes to the UCMJ by adding new offenses and substantially rewriting others.

Sec. 551. OFFENSE OF STALKING UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(a) Establishment of Offense.--

(1) New punitive article.—

"Sec. 920a. Art. 120a. Stalking

(a) Any person subject to this section--

(1) who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family;

(2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and

(3) whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family, is guilty of stalking and shall be punished as a court-martial may direct.

(b) Covers definitions for 'course of conduct', 'repeated', and 'immediate family.'

Applicability. Applies to offenses committed after the date that is **180 days after the date of the enactment of this Act.**

Sec. 552. RAPE, SEXUAL ASSAULT, AND OTHER SEXUAL MISCONDUCT UNDER UNIFORM CODE OF MILITARY JUSTICE.

Article 120 of the Uniform Code of Military Justice is extensively rewritten to greatly broaden the scope of conduct covered, including many of the offenses currently charged under Article 134.

(a) Rape.
(b) Rape of a Child.
(c) Aggravated Sexual Assault.
(d) Aggravated Sexual Assault of a Child.
(e) Aggravated Sexual Contact.
(f) Aggravated Sexual Abuse of a Child.
(g) Aggravated Sexual Contact With a Child.
(h) Abusive Sexual Contact.
(i) Abusive Sexual Contact With a Child.
(j) Indecent Liberty With a Child.
(k) Indecent Act.
(l) Forcible Pandering.
(m) Wrongful Sexual Contact.
(n) Indecent Exposure.

There are many other sections dealing with definitions, defenses, statute of limitations, punishments….

(f) Effective Date.--The amendments made by this section shall take effect on October 1, 2007.

Sec. 553. EXTENSION OF STATUTE OF LIMITATIONS FOR MURDER, RAPE, AND CHILD ABUSE OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(a) No Limitation for Murder or Rape.
(b) Special Rules for Child Abuse Offenses.

Sec. 554. REPORTS BY OFFICERS AND SENIOR ENLISTED MEMBERS OF CONVICTION OF CRIMINAL LAW.

(a) Requirement for Reports.--

(1) In general.-- The Secretary of Defense shall prescribe in regulations a requirement that each covered member of the Armed Forces shall submit to an authority in the military department concerned designated pursuant to such regulations a timely report of any conviction of such member by any law enforcement authority of the United States for a violation of a criminal law of the United States, whether or not the member is on active duty at the time of the conduct that provides the basis for the conviction. The regulations shall apply uniformly throughout the military departments.

(2) Covered members.-- In this section, the term "covered member of the Armed Forces" means a member of the Army, Navy, Air Force, or Marine Corps who is on the active-duty list or the reserve active-status list and who is--

(A) an officer; or

(B) an enlisted member in a pay grade above pay grade E-6.

……

(g) Deadline for Regulations.--The regulations required by subsection (a), including the requirement in subsection (e), shall go into effect not later than the end of the 180-day period beginning on the date of the enactment of this Act.

(h) Applicability of Requirement.--The requirement under the regulations required by subsection (a) that a covered member of the Armed Forces submit notice of a conviction shall apply only to a conviction that becomes final after the date of the enactment of this Act.

CASE BRIEFS
UNITED STATES SUPREME COURT and CIRCUIT COURT UPDATES

2nd CIRCUIT

U.S. v. Estrada
430 F.3d 606
December 29, 2005

SUMMARY: **The "public safety exception" to *Miranda* allows officers to follow their legitimate instincts when confronting situations presenting a danger to public safety. There must be an objectively reasonable need to protect the police or the public from an immediate danger. Furthermore, the question must not be investigative in nature or designed solely to elicit evidence.**

FACTS: An arrest warrant was executed at the defendant's apartment. Officers were aware that the defendant had two prior assault convictions. The defendant was lying face down and handcuffed but had not yet been given *Miranda* warnings when an officer asked him whether there were any weapons in the apartment. The defendant responded, "I got a gun in my pocket," gesturing with his face toward a jacket on a chair. A gun and heroin were found in the jacket pocket.

ISSUE: Are the defendant's statement and the physical evidence recovered as a result of that statement admissible under the "public safety" exception to the *Miranda* rule?

HELD: Yes.

DISCUSSION: The purpose of the public safety exception is to allow officers to follow their legitimate instincts when confronting situations presenting a danger to public safety. For the exception to apply, there must be an objectively reasonable need to protect the police or the public from an immediate danger. Furthermore, the question must not be investigative in nature or designed solely to elicit evidence.

The officers were justified in asking the defendant about weapons in the apartment prior to the advisement of *Miranda* because: 1) they had reason to believe that the defendant was capable of violence based on his prior assault convictions; 2) they knew he was a drug dealer who kept drugs in his apartment; so it was reasonable for them to believe he also kept guns there, because firearms are a tool of the drug trade that are commonly kept on the premises of narcotics dealers; and 3) there was another person in the apartment at the time.

The court cautioned as to the second factor, the "public safety" exception must not be distorted into a per se rule while questioning people in custody on narcotics charges. This is a very narrow exception to the *Miranda* requirement, and will only apply where there are sufficient facts supporting an objectively reasonable need to protect the police or the public from immediate harm.

This defendant's statement in

response to a police question before he was read *Miranda* – that he had a gun in his jacket – fell within the "public safety exception" to the *Miranda* requirement. Therefore the statement, as well as the gun and drugs found in the defendant's jacket, were admissible.

* * * *

Pena v. DePrisco
432 F.3d 98
December 9, 2005

SUMMARY: Drunk driving may form a basis for a "state-created-danger" claim, as long as the supervisors actively facilitated the wrong and did not merely passively fail to stop it. Repeated inaction by supervisors over a sustained period of time, even without explicit advance approval or encouragement of the misbehavior, might constitute implicit "prior assurance" rising to the level of an affirmative act, creating personal civil liability for the harm caused by their employee.

FACTS: When Officer Gray applied for his position, he disclosed his history of drinking problems. After being hired he continued to drink heavily but was never questioned, disciplined, or counseled. It was common for both on and off duty officers to drink near the precinct with full knowledge of supervisors. While off-duty and heavily intoxicated after a 12-hour drinking binge, Gray drove his car through several red lights and struck three people, one of whom was pregnant, killing them all. Pursuant to 42 U.S.C. 1983, Gray's supervisors were sued under a claim that they denied the victims' due process right to be free from state-created danger by implicitly encouraging and sanctioning Gray's alcohol abuse and driving under the influence.

ISSUE: Can repeated failure of supervisors to question discipline or counsel an officer with a longstanding drinking problem rise to the level of an affirmative act sufficient to constitute a state-created danger, when the heavily-intoxicated officer drove his vehicle into three people, killing them?

HELD: Yes.

DISCUSSION: Drunk driving may form a basis for a state-created-danger claim, as long as the defendant supervisors actively facilitated the wrong and did not merely passively fail to stop it. Repeated inaction by supervisors over a sustained period of time, even without explicit advance approval or encouragement of the misbehavior, might constitute implicit "prior assurance" rising to the level of an affirmative act. Moreover, supervisors might implicitly send a message of official sanction by engaging in related misconduct themselves. The behavior of the supervisors, if true, falls within the realm of behavior that can properly be characterized as "conscience shocking" to sustain a due process claim.

Law enforcement supervisors never questioned, disciplined, or counseled an officer with a serious drinking problem who, while off duty and heavily intoxicated, struck and killed three people. Repeated inaction by supervisors over a sustained period of time may constitute an implicit "prior assurance" rising to the level of an affirmative act, and may also be characterized as "conscious shocking" to

sustain a due process claim of state-created danger.

However, the supervisors were not on notice that their conduct violated a clearly established constitutional right. It had not clearly been established prior to this case whether repeated inaction by supervisors over a long period of time, without explicit statements of approval, might constitute an implicit "prior assurance" that could rise to the level of an affirmative act. Nor was it clearly established that supervisors may implicitly send a message of official sanction by engaging in related misconduct themselves, or by participating in or tolerating such a practice. Therefore the supervisors were entitled to qualified immunity.

* * * *

3rd CIRCUIT

U.S. v. Jacobs
431 F.3d 99
December 14, 2005

SUMMARY: Even though an informant was regularly admonished not to engage in unlawful acts except as authorized, a ten-year relationship between the handler and the informant resulted in an understanding that gave the informant reason to believe that the handler was significantly less likely than the average officer to use the informant's statements against her. As such, the informant's admission that she had participated in a smuggling operation without authorization was neither voluntary nor admissible.

FACTS: Jacobs, a confidential informant for the FBI for ten years, was regularly admonished not to engage in any unlawful acts except as authorized. She was occasionally authorized to engage in criminal activity, including the smuggling of cocaine, to provide intelligence.

In March, 2000, Jacobs contacted her handler, Sullivan. Jacobs related information about a large-scale drug smuggler, Stewart. Sullivan suspected that Jacobs was involved in Stewart's organization. Sullivan told Jacobs, "if you did, just tell me, because if it comes out later, I can't cover you." Jacobs denied involvement. Subsequent investigation revealed that Jacobs had in fact participated in three smuggling trips for Stewart.

In April, 2000, Stewart was arrested and the FBI "closed" Jacobs as an informant without telling her. The next day Sullivan called Jacobs to meet him at the FBI office. When confronted, Jacobs admitted that she had participated in Stewart's smuggling operation, but claimed that she had done so only to obtain information for the FBI. She admitted that she had two of Stewart's suitcases at her residence. Jacobs was sent home. The following day Jacobs turned over the suitcases and led agents to another participant in the Stewart organization. Jacobs was prosecuted for various drug offenses, and the government sought to use both the March and April against her.

ISSUE: Are the March and April statements admissible at trial even though Jacobs was not given her *Miranda* warnings?

HELD: The March statements were admissible, but the April statements were not.

DISCUSSION: As to the March statements, Jacobs was not in custody. The statements were voluntary because the FBI had not yet begun an investigation, and Jacobs was not yet a suspect.

As to the April statements, Jacobs was in custody at the time she made the statements. Because she was not advised of *Miranda*, the statements could not be used against her. Also the statements were not voluntary. The ten-year relationship between Jacobs and Sullivan resulted in an understanding or custom that gave her reason to believe that Sullivan was significantly less likely than the average officer to use Jacobs' statements against her. Jacobs continued to act as an informant rather than a suspect at the April meeting; she did not know she was a target, nor that she was no longer an informant. "Jacobs could have reasonably inferred that, if Sullivan repeatedly went out of his way to get her out of trouble that she was already in, he would not then turn around and affirmatively get her into trouble by using her statements to him against her."

* * * *

Estate of Smith v. Marasco
430 F.3d 140
November 30, 2005

SUMMARY: A decision to deploy and employ a SWAT-type team can constitute excessive force if it is not "objectively reasonable" to do so under the circumstances. "Objective reasonableness" is determined by analyzing the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, whether he is actively resisting arrest or attempting to evade arrest by flight, whether the physical force applied was of such an extent as to lead to injury, the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.

FACTS: Smith was a Vietnam veteran with a variety of mental and physical problems. Several prior encounters with police stemmed primarily from an ongoing feud with a neighbor, Schafer, during which a few officers became aware of Smith's problems.

Schafer called police complaining that Smith was shining a light in his yard. Police arrived but received no response to their knock or attempts to telephone the residence. Upon entering the backyard, one officer observed a red light in a window of the house and also noticed a red dot on his partner's clothing. Concluding it was a laser sight from a firearm, the officers retreated and called for assistance.

The Special Emergency Response Team (SERT), trained to deal with high-risk volatile situations, was activated. They arrived wearing riot gear, camouflage, and armed with weapons. An arrest warrant for Smith was obtained for the laser sight incident, as was a search warrant for the

residence. When telephone and public address system efforts were unsuccessful in making contact with Smith, SERT stormed the residence using tear gas and "flash bang distraction devices." Smith was not in the residence, but officers found his heart medication. A search of the woods behind the house revealed Smith's cell phone, but not Smith. After two hours the search was abandoned. A week later Smith's body was discovered in the woods, not far from where his phone was found. He had died of heart failure.

ISSUE 1: Did activating a SWAT-type team on the residence of an individual who was known to have extensive mental and physical problems constitute excessive force?

ISSUE 2: Can storming the residence of an individual with flash-bang distraction devices, when the person was known to have extensive mental and physical problems, constitute excessive force?

HELD 1: No.

HELD 2: Yes.

DISCUSSION: A decision to activate a SWAT-type team can constitute excessive force if it is not objectively reasonable to do so under the circumstances. Officers did not use excessive force in activating a SWAT-type team to respond to the residence of Smith, who had mental and physical problems. Officers believed Smith was armed and had targeted an officer with a laser-sighted weapon. At the time SERT was activated, the officers could have reasonably believed that he posed a serious threat, and they had limited knowledge of Smith's condition.

But a reasonable officer would not have stormed Smith's house in such a manner. The threat had significantly lessened in the six hours between the time SERT was activated and the decision to enter the house. During that time SERT had learned more about Smith's medical condition. A reasonable officer would have concluded that Smith no longer posed a threat sufficiently serious and immediate to require storming his house, and that Smith would suffer serious harm as a result of doing so.

* * * *

4th CIRCUIT

U.S. v. Gilbert
430 F.3d 215
November 28, 2005

SUMMARY: "Innocent possession" is not available as an affirmative defense to the crime of being a felon in possession of a firearm. Neither the defendant's motive, nor the length of his possession, is a relevant consideration.

FACTS: Police stopped Gilbert while he was walking down the street carrying a backpack and a bundle wrapped in a blanket. The stock of a weapon was protruding from the blanket. The bundle and backpack contained shotguns, rifles, and other weapons. Gilbert admitted all the elements of being a felon in possession of a firearm, but asserted an affirmative defense of "innocent possession," claiming his possession was both transitory and without illicit motive. Gilbert claimed that he had found the bundle and backpack and was in the process of taking them to the police

station.

ISSUE: Is "innocent possession" available as an affirmative defense to the crime of being a felon in possession of a firearm?

HELD: No.

DISCUSSION: The felon in possession statute does not invite investigation into why the defendant possessed a firearm or how long he possessed it. To the contrary, the statute expressly avoids inquiry into the motive of a felon caught with a firearm. Had Congress intended to allow an innocent possession defense, it would have required a willful violation rather than a mere knowing one.

In so holding, the 4th Circuit aligns itself with the 1st and 7th Circuits, which have both also held there is no innocent possession defense available for this crime. These three circuits are in conflict with the D.C. Circuit, which has held that such a defense is available.

* * * *

5th CIRCUIT

Bridgers v. Dretke
431 F.3d 853
December 2, 2005

SUMMARY: Informing a suspect that he has the right to the presence of counsel *prior* to questioning does not satisfy the *Miranda* requirement. A suspect must be explicitly informed that he is entitled to counsel *during* questioning.

FACTS: Prior to custodial interrogation, Bridgers was advised of his *Miranda* rights from the police department's issued card, which included the statement, "You have a right to the presence of an attorney/lawyer prior to any questioning. If you cannot afford an attorney/lawyer, one will be appointed for you before any questioning if you so desire." Bridgers waived his rights and confessed to murder. Bridgers claimed that the warnings were inadequate because they did not explicitly state that he had a right to consult with an attorney *during* questioning.

ISSUE: Does *Miranda* require a defendant to be explicitly advised that he has the right to have an attorney present during questioning?
HELD: Yes.

DISCUSSION: *Miranda* held that a defendant must be clearly informed that he has the right to consult with a lawyer and to have the lawyer present during questioning. The Supreme Court has not addressed whether informing a suspect that he has the right to the presence of counsel *prior* to questioning adequately conveys that counsel may remain *during* questioning. The federal circuit courts are divided on this issue. The 5th, 6th, 9th, and 10th Circuits hold that a defendant must be explicitly informed that he is entitled to counsel during questioning. But the 2nd, 4th, 7th and 8th Circuits hold that warnings are adequate without explicitly stating that the right to counsel includes having counsel present during the interrogation.

* * * *

6th CIRCUIT

U.S. v. McClain
430 F.3d 299
December 2, 2005

SUMMARY: The "good faith exception" to the Exclusionary Rule can apply to uphold a search even when the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment and is, thus, fruit of the poisonous tree.

FACTS: A neighbor called police to report a light on in a house which had been vacant for several weeks. Police found no sign of forced entry or illegal activity, but noticed the front door was ajar. Concerned that a burglary might be in progress, the officers entered, announced their presence, and then proceeded from room to room to clear the house of potential perpetrators. In the basement they found indications that a marijuana growing operation was being set up. They left the residence. Surveillance confirmed that McClain and others were engaged in establishing a marijuana growing operation at the residence. A search warrant was obtained based on an affidavit which relied in part on evidence obtained during the initial warrantless search. Execution of the warrant resulted in the seizure of 348 marijuana plants and growing equipment.

ISSUE: Can the "good faith exception" to the Exclusionary Rule be used to validate a search, even though the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment, and is thus fruit of the poisonous tree?

HELD: Yes.

DISCUSSION: The initial warrantless search of the residence was illegal, because the officers did not have probable cause to believe a burglary was in progress. Therefore the information in the affidavit for the later search warrant contained fruit of the poisonous tree. But this is one of those rare cases in which the initial warrantless search was "close enough to the line of validity to make the officer's belief in the validity of the [later] warrant objectively reasonable."

In so holding, the 6th Circuit aligns itself with the 2nd and 8th Circuits, which have also held that the good faith exception may apply to uphold a search conducted pursuant a warrant based in part on tainted evidence. The 9th and 11th Circuits have held to the contrary, stating that the "good faith exception" may not be used to sustain a search when the affidavit supporting the warrant is tainted by fruit of the poisonous tree.

* * * *

U.S. v. Thomas
430 F.3d 274
December 1, 2005

SUMMARY: Officers may be deemed in law to have crossed the threshold of a residence even when they have not done so in fact. "Constructive entry" occurs when police deploy overbearing tactics that essentially force the individual out of the home. These actions would constitute "such a show of authority that the Defendant reasonably believed he had no choice but to comply."

FACTS: Police suspected Thomas of attempting to steal a precursor chemical used to manufacture methamphetamine. Four patrol cars containing a total of five officers went to Thomas' home. Two officers went to the primary door of the house and knocked. Two went around to the secondary door, and one waited in a patrol car. When Thomas answered, the officers "told him that investigators wanted to talk to him and asked him to come out of the residence." Thomas complied, but once outside refused to talk and requested an attorney. At that point he was arrested. Incriminating evidence was found on his person.

ISSUE: Was the show of force exhibited by the officers sufficient to constitute a "constructive entry" of Thomas' residence, rendering his arrest and subsequent search illegal?

HELD: No.

DISCUSSION: Officers may be deemed to have crossed the threshold of a residence in law when they have not done so in fact. A consensual encounter at the doorstep may evolve into a constructive entry when police deploy overbearing tactics that essentially force the individual out of the home. These actions would constitute "such a show of authority that the Defendant reasonably believed he had no choice but to comply." The officers' conduct in this case did not rise to that level. There were no drawn weapons, raised voices, or coercive demands. The number of officers was neither inherently coercive nor unjustified. Thomas responded to a simple knock and request, not an order to emerge or the threat of firearms.

* * * *

Smith v. Cupp
430 F.3d 766
December 2, 2005

SUMMARY: It is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head. The Constitution does not permit the use of deadly force to prevent the escape of any and all fleeing felons. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. A decision to shoot an unarmed suspect in a car chase must be based on a reason to believe that the car presents an imminent danger.

FACTS: Officer Dunn arrested Smith for making harassing telephone calls. Smith was patted down, handcuffed behind his back, the cuffs double-locked, and was secured with a seatbelt in the back of a patrol car. When a tow truck arrived, Dunn left the engine running to provide air conditioning for Smith as the officer got out to talk to the tow truck driver, Rutherford. Smith climbed into the front seat and took control of the cruiser. Dunn claimed that Smith directed the cruiser at him and Rutherford, and that the officer shot Smith in self-defense as the cruiser was bearing down on them. But the bullet trajectory and Rutherford's statements indicated that Smith was merely trying to flee in the cruiser and Dunn shot Smith when there was no threat to Dunn or anyone else. Three shots struck the cruiser. A fourth struck Smith in the left ear, killing him. Smith's family brought an excessive force claim against Dunn under 42 U.S.C. §1983.

ISSUE: Can shooting an unarmed suspect who has taken over a patrol car as he was driving the car away constitute excessive force?

HELD: Yes.

DISCUSSION: It is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head. The Constitution does not permit the use of deadly force to prevent the escape of any and all fleeing felons. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. A decision to shoot an unarmed suspect in a car chase must be based on a reason to believe that the car presents an imminent danger.

This is a close issue in this case, given the short time Dunn had to react. However, in deciding whether a case should be dismissed before it goes to trial, the court must look at disputed facts in the light most favorable to the suing party. A reasonable jury could conclude that Dunn did not fire as the vehicle was bearing down on him threatening his life. Instead, a jury could conclude that Dunn fired as he ran toward the car after it had passed him. The court distinguished this case from those in which officers have shot unarmed suspects in car chases after an extended interaction between the police and the suspect. A suspect's repeated attempts to ram cruisers and officers proves that he was likely to continue to threaten the lives of those around him in an attempt to escape.

* * * *

U.S. v. Waller
426 F.3d 838
October 24, 2005

SUMMARY: The expectation of privacy in one's luggage is not lessened by storing it on the premises of a third party. Rather, "the expectations may well be at their most intense when such effects are deposited temporarily or kept semi-permanently…in places under the general control of another."

When circumstances make it unclear whether a suitcase is subject to "mutual use," officers have a duty to inquire before searching pursuant to consent.

FACTS: Waller, a convicted felon, was arrested after Green claimed that Waller threatened her with a firearm. Waller was released on condition that he not return to Green's residence. Waller obtained permission from Howard to store Waller's personal belongings in the one-bedroom apartment Howard shared with Frazier. Waller stored one suitcase and other items at the apartment. Waller ate, showered and changed clothes at Howard's apartment but did not sleep there. Three days after his arrest, Waller returned to Green's residence in violation of his bond. Waller was arrested in the parking lot outside of Howard's apartment. Howard gave consent for his apartment to be searched. A zipped suitcase in the bedroom closet was searched and found to contain two firearms.

ISSUE: Was the search of the suitcase was lawful?

HELD: No.

DISCUSSION: Waller's conduct showed that he expected privacy in the contents of his suitcase: he did not inform Howard or Frazier of the contents, did not give authority for them to look inside it, and he left it zipped and stored in a closet. Waller's expectation of privacy was reasonable. Howard did not have actual authority to consent to the search of the suitcase because he did not have joint access or control and mutual use of it. Neither did Howard have apparent authority over the suitcase. The circumstances made it unclear whether Waller's suitcase was subject to "mutual use" by Howard, and therefore the officers had a duty to inquire. The expectation of privacy in one's luggage is not lessened by storing it on the premises of a third party. Rather, "the expectations may well be at their most intense when such effects are deposited temporarily or kept semi-permanently…in places under the general control of another."

* * * *

Widgren v. Maple Grove Township, et al
429 F.3d 575
November 17, 2005

SUMMARY: A criminal investigation is more intrusive than an administrative or regulatory investigation. Housing code and property tax inspections conducted within the curtilage of the exterior of a house in a remote rural setting do not constitute a Fourth Amendment search. But appraisers should obtain consent or a warrant before breaching the curtilage.

FACTS: Widgren owned twenty acres of undeveloped land which was mostly dense vegetation. He built a house in the middle of the lot without a permit. The area immediately surrounding the house was cleared but not enclosed by a fence. A 1,000 foot long driveway connected the house to the road, where Widgren erected a gate with a "No Trespassing" sign. The house could only be seen from the adjoining parcel, and from the air.

Zoning administrator Lenz observed a reflection from the house's roof. Knowing that no land use permit had been issued, he drove up the driveway to within 200 feet of the house. Lenz revisited the property to post a civil infraction on the front door. Later Tax Assessor Beldo drove to the neighboring property from which he observed Widgren's house. He then walked onto Widgren's property and came within four to six feet of the house. He photographed it and measured its dimensions by counting the foundation blocks. Widgren claimed that the intrusions onto his property were unlawful searches under the Fourth Amendment.

ISSUE: Did housing code and property tax inspections conducted within the curtilage of the exterior of a house in a remote rural setting constitute a Fourth Amendment search?

HELD: No.

DISCUSSION: Lenz's first search occurred in open fields. Lenz's second visit was not a Fourth Amendment search because no search of any kind occurred.

As for Beldo's search, a criminal investigation is more intrusive than an administrative or regulatory

investigation. Beldo's actions were not unduly intrusive because he did not use technological enhancements, he was not forced to contort his body unnaturally to survey the house, and he did not touch, enter, or look in the house. The troubling aspect of Beldo's search is that he went on the curtilage. But Widgren's expectation of privacy in the plainly visible attributes and dimensions of the exterior of his home "is at the Fourth Amendment's periphery, not its core." Even so, tax appraisers would be well advised to obtain consent or a warrant before breaching the curtilage, because such an intrusion may in many circumstances be a Fourth Amendment search.

* * * *

7th CIRCUIT

Jones v. Wilhelm
425 F.3d 455
October 3, 2005

SUMMARY: When it is apparent on its face that a warrant lacks particularity in the description of the place to be searched, an officer may not use personal observations to resolve the ambiguity. He must seek clarification from a magistrate.

FACTS: An apartment building had two units upstairs, Jones (Unit 1) and Anderson (Unit 2). Staircases at both the front and back led to the second floor. Detective Wilhelm surveilled the building based on a tip that an upstairs resident was involved in drugs. Detective Finch then received information that Anderson was manufacturing methamphetamine. Finch obtained a search warrant for Unit 2, but the warrant did not contain Anderson's name and only specified "the upstairs apartment on the right." Wilhelm was given the warrant to execute. He knew the building had two staircases facing opposite directions, and realized that the warrant was unclear about which upstairs unit should be searched. Wilhelm deduced from his prior surveillances that it targeted Unit 1. Police entered Unit 1 before realizing it was the wrong unit. The Joneses sued Wilhelm under 42 U.S.C. §1983.

ISSUE: When a warrant is ambiguous on its face as to which of two apartments may be searched, may an officer use his personal observations and knowledge to resolve the ambiguity instead of seeking clarification from a magistrate?

HELD: No.

DISCUSSION: A warrant that fails to conform to the particularity requirement is invalid. The confirmation of particularity is not meant to be left to the discretion of officers. Wilhelm knew that the warrant was open to more than one interpretation and therefore was ambiguous and invalid on its face. He should have sought clarification from a magistrate before executing the warrant. Instead, he "acted as his own magistrate to issue his own personal amended warrant" to clarify the ambiguity.

* * * *

8th CIRCUIT

U.S. v. Hill
430 F.3d 939
December 8, 2005

SUMMARY: Unexpected and

dangerous events that arise during an arrest can create exigent circumstances that justify officers entering a residence to protect themselves from any additional and unknown threats.

FACTS: Hill was arrested on a warrant for aggravated robbery as he exited his residence. Hill's wife and another man were in the doorway watching the arrest, and the man ran back inside. Detective Wishard pulled open the door and asked Mrs. Hill who else was in the house. She replied no one. Wishard drew his gun, entered the house, and found the man in the bathroom. A shotgun was in plain view against the wall. A protective sweep revealed two more firearms in plain view.

ISSUE: Was the search of Hill's home justified by exigent circumstances?

HELD: Yes.

DISCUSSION: A man running inside the home of an aggravated robbery suspect upon seeing the suspect being arrested outside gave rise to exigent circumstances justifying the officers' warrantless entry into the home. Wishard had a reasonable concern for the officers' safety. Because of the aggravated robbery charge, there likely was a firearm in the house. Wishard was concerned that the man may have been going inside to retrieve it. Mrs. Hill's denial of the presence of the man raised further concern. "Unexpected and dangerous events that arise during an arrest can create exigent circumstances that justify …officers entering a residence …to protect themselves from any additional and unknown threats."

U.S. v. Kennedy
427 F.3d 1136
November 7, 2005

SUMMARY: Probable cause must be based on information that is not stale. Information of an unknown and undetermined vintage relaying the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale in the absence of information indicating an ongoing and continuing narcotics operation.

FACTS: Kennedy's girlfriend told police that he had stolen her safe. She provided a description of Kennedy's car. Kennedy was stopped and arrested for driving without a license. After arranging to tow the car, Officer Abbot drove to the girlfriend's house. She stated that Kennedy dealt in methamphetamine, and that he "keeps" it under a loose speaker in the trunk of his car. She gave no indication of the last time she had seen Kennedy with the drug. Abbot returned to Kennedy's vehicle, which had not yet been towed. In the trunk he saw that one speaker was not screwed down. He lifted it and found methamphetamine and $6,000 in cash.

ISSUE: Was the warrantless search of the area under the speaker in the trunk lawful?

HELD: No

DISCUSSION: Officer Abbot was not justified in searching the area under a loose speaker in the trunk of a car. He did not have probable cause because he failed to ensure that the information was not stale. Officer Abbot assumed the

information provided by the girlfriend was not stale without having ascertained its recency. Her use of the present tense when giving the information was insufficient. "Information of an unknown and undetermined vintage relaying the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale in the absence of information indicating an ongoing and continuing narcotics operation."

While a full inventory search of the vehicle would have been proper, there was no evidence that such a search, absent the stale information, would have uncovered the evidence under the speaker.

* * * *

U.S. v. Waldner
425 F.3d 514
October 10, 2005

SUMMARY: A protective sweep may be justified in a non-arrest situation. However, the sweep must be based on a reasonable belief and may only be for the purpose of locating individuals posing a danger to those on the scene. A protective sweep for weapons or contraband is not allowed.

FACTS: Waldner and his wife resided together. The wife obtained a protective order. Her affidavit stated that Waldner possessed guns and had threatened to kill her. Officers went to the residence, served the order on Waldner, and instructed him to vacate the house. They told Waldner that he could go inside to gather his things, but only if they accompanied him. Waldner consented. The officers told Waldner that before he would be allowed in a room, they would first need to look around it for weapons or people. It was disputed whether Waldner indicated his intent to enter an office area. Although Waldner was several feet from the office, and another officer stood between him and the office, Officer Starr entered the office and saw a gun cabinet containing a rifle and attached silencer. Waldner was arrested for possession of a firearm by a prohibited person and possession of an unregistered silencer.

ISSUE: Were the officers justified in conducting a protective sweep of the office for weapons?

HELD: No.

DISCUSSION: In an arrest situation, a protective sweep is authorized when the officer has a reasonable belief that the area harbors an *individual* posing a danger to those on the scene. A protective sweep for weapons or contraband is not allowed. This rule has been extended to non-arrest situations only where there is a reasonable suspicion of dangerous individuals in the house. But it has not been extended to allow a sweep for weapons or contraband. Even though the officers knew that Waldner might possess guns, he was under control, and there were no facts to believe that there was anyone else present. Therefore, entry into the office exceeded the scope of a lawful protective sweep.

In a concurring opinion (which does not have the force of law), one judge acknowledged that serving domestic protection orders can be dangerous, and officers doing so should not always be foreclosed from

performing a protective sweep. The problem in this case was that Waldner "was apparently under control" when Officer Starr decided to enter the office, and Officer Starr himself could not recall whether Waldner had shown an intent to enter the office.

* * * *

U.S. v. VaLerie
424 F.3d 694
October 3, 2005

SUMMARY: Removal of a commercial bus passenger's luggage from the bus's lower luggage compartment to a room inside the terminal to seek the passenger's consent to search does not constitute a seizure.

FACTS: VaLerie was on a Greyhound bus which stopped for refueling. Passengers were required to get off the bus and wait in the terminal. A detective looked in the lower luggage compartment and observed VaLerie's checked bag, which had a claim ticket but no phone number or passenger name. A computer check revealed VaLerie's name and the fact that he had paid cash on the day of travel for a one-way ticket. The bag was removed from the bus and taken to a room in the terminal. VaLerie responded to a page and was told he was not under arrest. He confirmed the bag was his. The detective declared he was watching for people who might be transporting drugs. VaLerie consented to a search of the bag, which took about one minute. Five bags of cocaine were found inside.

ISSUE: Does the removal of a commercial bus passenger's luggage from the bus's lower luggage compartment to a room inside the terminal to seek the passenger's consent to search it constitute a Fourth Amendment seizure?

HELD: No.

DISCUSSION: A seizure occurs when there is some meaningful interference with the owner's possessory interest in the property. The bag was not seized because the removal of the bag did not: 1) delay VaLerie's travel or significantly impact his freedom of movement; 2) affect the timely delivery of the checked bag, or 3) deprive Greyhound of its custody of the bag. If even one of these factors had been satisfied, then a seizure would have occurred.

A bus passenger has less possessory interest in checked luggage than he has in carry-on luggage in his immediate possession. He should reasonably expect his checked luggage to endure a fair amount of handling, and that its removal from the luggage compartment might be required. Travelers today expect and want checked luggage X-rayed, sniffed, felt, and handled in a manner that is as non-intrusive as possible but consistent with ensuring that it does not contain items that threaten their safety. Brief, non-intrusive detention of checked bags for such examination no longer invades a traveler's reasonable expectation of privacy, nor unduly interferes with possessory rights.

* * * *

U.S. v. Williams
431 F.3d 1115
December 21, 2005

SUMMARY: When Officers are reasonable in concluding there is a meth lab inside a home, the volatile nature of meth labs creates exigent circumstances justifying warrantless entry into the home to conduct a protective sweep.

FACTS: An informant told police that he recently helped Williams manufacture methamphetamine in a lab located in Williams' home. Officers approached Williams at his residence and saw two propane cylinders with discolored valve fittings through an open door of a detached building - a sign of unauthorized containers storing anhydrous ammonia, an ingredient for meth. Williams was detained and officers approached the front door to see if other people were inside. Before entering they smelled ether. Knowing the dangers of meth labs, the officers entered and saw in plain view the components of a lab. They obtained a search warrant and found additional evidence of meth production and distribution.

ISSUE: Was the warrantless entry into the home lawful?

HELD: Yes.

DISCUSSION: The presence of the cylinders with discolored valves and the ether smell made it reasonable for the officers to conclude there was a meth lab in the home. The volatile nature of meth labs justifies exigent circumstances. Several cars at the residence indicated there might be other people inside. It was reasonable for the officers to conduct a protective sweep for the safety of the officers, neighbors, and people potentially inside.

* * * *

10th CIRCUIT

U.S. v. Brooks
427 F.3d 1246
October 26, 2005

SUMMARY: The scope of a consent search is limited by the breadth of the consent given. Applying an "objective reasonableness" standard by examining the totality of the circumstances, scope of consent is based upon what the typical reasonable person would have understood by the exchange.

Agents are not required to specify a search methodology or protocol in a warrant to search a computer.

FACTS: When officers arrived at Brooks' home to investigate a report of an unattended child, they smelled marijuana. A warrant was obtained to search for evidence of marijuana use. When it was executed, images of child pornography, apparently printed from a computer, were found in the trash. A second warrant was obtained to search the residence for child pornography, to include a search for computer equipment. Agents asked Brooks for permission to search his computer, explaining that the search would involve inserting a "pre-search" disk which would search image files and display them in a thumb format for easy review. Brooks agreed. He signed a consent

form authorizing a "complete search" including a "pre-search for child pornography on his computer tower." When the pre-search disk did not function, agents did a manual search for image files through the computer's "file search" function. Images of boys engaged in sex were found. The computer was shut down and seized, and agents sought a warrant authorizing its search by a laboratory.

ISSUE 1: Did the manual search for image files exceed the scope of consent?

ISSUE 2: Did the warrant authorizing the search of Brooks' computer by a laboratory fail to meet the particularity requirement because it did not specify a search methodology or protocol?

HELD 1: No.

HELD 2: No.

DISCUSSION: Agents did not exceed the scope of consent when they searched a computer manually instead of using a "pre-search" disk. The written consent form authorized a "complete search" of the computer. Even if the agents' oral explanation to Brooks limited the scope of the search, the manual search did not exceed the scope of the disk search orally described to Brooks. The manual search was the functional equivalent of the pre-search disk – it was no more invasive, and did not include a search of text files. The agent simply entered commands manually instead of allowing that to be done by a pre-programmed disk.

As for the warrant authorizing the lab search of the computer, there is no requirement that the government describe a specific search methodology; only the object of the search must be described with particularity. Given the number of ways information is stored on computers, a search can be as much an art as a science.

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D.C. CIRCUIT

U.S. v. Thomas
429 F.3d 282
November 18, 2005

SUMMARY: Officers are required to have only a reasonable belief, which is something less than probable cause, that a person is located at a residence before serving an arrest warrant there.

If an apartment is small enough that all of it "immediately adjoins the place of arrest" and all of it constitutes a space or spaces "from which an attack could be immediately launched," then the entire apartment is subject to a protective sweep.

FACTS: Officers served an arrest warrant for Thomas at a one-bedroom apartment. Thomas answered the door. Thomas was followed into the living room, where there were two other people, and he was arrested there. A protective sweep was done of the kitchen, bathroom, bedroom, and bedroom closet, which were all off of the hallway. Ammunition and handguns were seen in plain view during the sweep less than one minute after the officers entered.

ISSUE 1: Were officers required to have probable cause to believe that

Thomas was in the residence before executing the arrest warrant?

ISSUE 2: Were officers entitled to conduct a protective sweep of the entire residence?

HELD 1: No.

HELD 2: Yes.

DISCUSSION: Officers need only a "reasonable belief" that an individual is located at a residence before serving an arrest warrant there. The D.C. Court of Appeals joins five other circuits in holding that "reasonable belief" means something less than probable cause. Only the 9th Circuit has held that "reasonable belief" means the same as probable cause.

As for the scope of the protective sweep, if an apartment is small enough that all of it "immediately adjoins the place of arrest" and all of it constitutes a space or spaces "from which an attack could be immediately launched," then the entire apartment is subject to a protective sweep of spaces where a person could be found. Thomas' apartment met this requirement.

A regular quarterly review will help you understanding what brings success and what brings chaos. Learn how to conduct a quarterly review with your teams.Â When you start setting goals using OKR methodology, you should see improvement and progress as a company or a team. But succeeding with OKRs doesnâ€™t equate with the achieved percentage of the Objective. Where is the Bruckner of my youth? The 1980s saw a proliferation of Bruckner performances in London: a visionary Bernard Haitink in the Ninth with theÂ Nicholas Horsfall, Fifty Years at the Sybylâ€™s Heels: Selected Papers on Virgil and Rome. Oxford University Press, 2020. Pp. i-xv; 1-522, reviewed by Darrell Sutton. Technical studies of Virgilâ€™s texts exist in abundance. Periodicals do not lack submissions on esoteric themes that are discoverable in his poems. The Quarterly review | Read 504 articles with impact on ResearchGate, the professional network for scientists.Â The Suffolk Bank earned extraordinary profits, and note-clearing may have been a natural monopoly. There is no consensus in the literature about whether unfettered operation of markets with natural monopolies produces an efficient allocation of resources. ; Reprinted in Quarterly Review, Fall 2002 (v. 26. no. 4). View. Expand abstract. The subject matter may be theoretical, empirical or policy related. Emphasis is placed on quality, originality, clear arguments, persuasive evidence, intelligent analysis and clear writing. At least one Special Issue is published per year. The Quarterly Review was a literary and political periodical founded in March 1809 by the well known London publishing house John Murray. It ceased publication in 1967. It was referred to as The London Quarterly Review, as reprinted by Leonard Scott, for an American edition. Initially, the Quarterly was set up primarily to counter the influence on public opinion of the Edinburgh Review. Its first editor, William Gifford, was appointed by George Canning, at the time Foreign Secretary, later Prime Minister.