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Meggan Sullivan Smith
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FRISK MANAGEMENT: The dos and don'ts of protective searches
A Case Law Update

Meggan Sullivan Smith
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Federal Law Enforcement Training Center

When there is reasonable suspicion to believe that criminal activity is afoot, a law enforcement officer may stop and question the suspect. When there is reasonable suspicion to believe the suspect is presently armed and dangerous, the officer may conduct a frisk for weapons. A frisk, or protective search, is limited to a search of outer clothing for weapons. Protective searches do not include broad authority to conduct a general search for evidence. While an officer may want to conduct a frisk for "officer safety" purposes, the law requires more than that. It requires specific, articulable facts to support a reasonable conclusion that the suspect has a weapon or something that could be used against the officer, partner or innocent third party.

By its decision in Terry v. Ohio[1], the Supreme Court delivered into the hands of officers a very necessary tool that greatly aids officers in their effort to prevent crime and apprehend criminals. The holding of the case indicates that the Court intended to confine the power to frisk to one situation *(but not one technique)*: where the person stopped is likely armed *and* may be dangerous. From its holding, it's clear the Supreme Court did not limit frisking to Terry's specific facts (why or how Officer McFadden stopped and frisked suspects Terry, Chilton, and Katz). Its holding was fashioned to anticipate the variety of suspicious conduct which authorities meet every day during the course of stops and consequently a variety of ways in which the authorities attempt to address that conduct when it threatens their safety or the safety of other citizens. As such, frisking is often misunderstood and becomes a controversial subject even in the most experienced law enforcement or legal circles.

Adding to this dilemma, in the over forty years since Terry, the Supreme Court has only commented on frisking in six other cases.[2] The interpretation of permissible frisk techniques has been left up to the various circuit courts of appeals. Consequently, law enforcement has a less than consistent base of bright line rules to follow. This article attempts to manage the scope of a frisk technique and relay the message of the Terry Court in meaningful terms to officers, with the use of appropriate examples of what is and what is not reasonable action in a protective search situation.

How Can I Frisk?

A typical protective search is an external pat-down of the suspect's clothing. In fact, courts often characterize and refer to (some might say mistakenly) the protective search as a "pat-down." An external pat-down is the prototypical Terry frisk because the Court described it that way. It is *not*, however, the *sole* type of limited intrusion contemplated by Terry and its progeny. The "pat down frisk," as routinely depicted in movies and television shows, is so often not an effective method of discovering concealed weapons on a suspect. Back in the 1960s, when Terry was decided, officers were mostly concerned about traditional guns and knives. The nature of the threat has changed dramatically since then. Certainly, traditional guns and knives still pose a significant danger; but weapons now come in all sorts of shapes, sizes, and disguises – cell phone guns, lipstick knives, credit card razors, cigarette lighter switchblades, and stun guns, just to

name a few.[3] The Terry decision left various frisking techniques available to law enforcement for protective searches. The holding of Terry limited the search's technique *only to its objective*: a limited search to discover weapons readily available to a suspect or hard items that may be used as a weapon against the officer, not to ferret out carefully concealed items that could be accessed only with some difficulty.[4]

Look, Feel, Crush and Twist

Any technique used to frisk a suspect must be constitutional in its intensity and its scope. The crux of any analysis of whether an officer's technique exceeds the scope of a Terry "frisk" is simply whether the actions go beyond the basic determination of whether a suspect is armed. If the officer's actions are reasonable and executed only to determine whether the suspect possesses a weapon, then the frisk is constitutionally proper. Conversely, the officer exceeds the constitutional constraints of a Terry frisk when trying to determine, through sense of touch, the nature or identity of an object he knows cannot be a weapon.

It is paramount that officers understand that the frisk is an exception to the warrant requirement and that the Supreme Court jealously guards the exceptions to the warrant requirement. The temptation to conduct a general exploratory search in the guise of a frisk for weapons is ever present. A lawful frisk can easily and quickly turn into an unlawful manipulation. Federal law enforcement officers must testify extensively as to the measures taken during a frisk to ensure that a suspect was not armed.

The "look, feel, crush and twist" technique (currently taught at the FLETC), does not go beyond what is necessary to determine whether a suspect is armed. The "look, feel, crush and twist" technique begins by first looking at the area of the suspect's body which is to be frisked in order to minimize injury by visible needles or other sharp objects. The officer then places the flat palm on and, in a brief but aggressive single motion, crushes that portion of clothing inside his fist, simultaneously twisting that clothing with his hand in order to maximize the detection and identification of hard objects that may be concealed there. He then moves quadrant by quadrant across the body repeating this technique until assured that there are no weapons which are immediately accessible to the suspect.

By doing so, an officer pays no greater attention to a suspect's person than is necessary to rule out the presence of a weapon. The officer should immediately move to another quadrant of the body if he identifies an object and senses it is too small or a soft object not capable of becoming a weapon. Officers may retrieve that item only if its incriminating nature is immediately apparent. An officer must not linger on a too small or soft item or manipulate it in any way other than to determine if it is a hard object and can be a weapon. Once an officer has determined that the object is not a weapon and its shape or size does not indicate its contraband nature, the search of that item must stop and he must move on.[5]

The current, but limited, case law supports the "look, feel, crush and twist" technique because it is limited in scope to its proper purpose: the discovery of weapons. Assuming that an officer is authorized to conduct a Terry search at all, he is authorized to assure *himself* that a suspect has no weapons (an officer with little or no law enforcement experience may need more reassurance than a more experienced officer). Recognizing that the purpose of a frisk is to dispel the

suspicion of weapons, some courts recognize that Terry contemplated more than a gingerly patting of the clothing. In fact one state court has recognized that, a gripping or "claw-type" motion does not exceed the scope of Terry.[6] This movement is not so exploratory in nature and intensity to be likened to a groping of the suspect. This motion (similar to the look, feel, crush and twist motion) the court said is necessary to determine the weight and consistency of an object in order to rule out the presence of a weapon. In addition, the officer is allowed to slide or manipulate an object in a suspect's pocket in this same manner until the officer is able to reasonably eliminate the possibility of a weapon.[7]

Moving beyond a pat-down: going beyond the outer clothing

An officer may take additional protective steps to ensure a suspect is not armed even after a frisk is completed. In such cases, the government would face a heavier burden in showing that the investigative step was reasonably related in scope to the circumstances which justified the frisk in the first place. Consequently, an officer must show (1) whatever action taken was justified as a *protective* step and (2) it was a step that would prevent the possibility of armed violence while the police continued the Terry stop. The Fourth Amendment does not impose a rigid "one-frisk" rule requiring authorities to ignore new information that might lead them to realize that an initial frisk was an inadequate safeguard. They may re-frisk or utilize additional protective steps until they are convinced the suspect is not armed and is not dangerous.

When an officer decides to move beyond a pat-down or to re-frisk a suspect, the constitutional inquiry focuses on whether the officer took protective and investigative steps that were objectively reasonable under the circumstances. In plain terms, the Fourth Amendment's concern with 'reasonableness' allows officers to take additional, perhaps non-traditional, steps *if the circumstances dictate those steps are necessary.*[8]

The Federal 4th Circuit Court of Appeals has held that an officer may, in addition to a pat-down of outer clothing, go beyond the outer clothing by directing a suspect to unzip his jacket or lift up his shirt.[9] The officer must always *justify intrusion into the outer clothing* as a *protective* step, not an *investigative* step. This technique is justified if the officer can articulate that the nature of the clothing (too bulky, big or plush) prevented the officer's assurance that the suspect was not armed and dangerous. The boundaries of Terry frisk techniques are not limited to the suspect's clothing itself. The least intrusive means to determine whether there are in fact weapons can extend beyond the outer clothing if the officer cannot assure himself no weapons exist because the nature of the clothing prevents it.

Dispensing with Any Pat-Down: Other Accepted Techniques

When the safety of the authority warrants it or where the suspect's conduct prevents a routine frisk, courts have recognized the validity of Terry frisks that extend beyond techniques traditionally taught at training academies. These techniques are permitted as long as their intrusion is limited and their purpose is to discover a weapon. However, in cases where the courts have said these alternative protective steps were warranted, extenuating circumstances have placed the officer's safety in such jeopardy that alternative means of determining whether the suspect was armed were justified and reasonable.

A New Jersey appellate court has held that an officer may dispense with a pat-down and immediately *search a suspect's pockets*.[10] The facts which justify this technique are those where the officer is able to articulate that the suspect's conduct prevented the officer from doing a traditional technique. For example, (1) where the suspect prevents the officer from conducting a pat-down by grabbing the officer's hands or (2) where the suspect backs away from the officer when the officer attempts to touch a bulge in the suspect's clothing.

Courts have held that an officer may dispense with a pat-down of a person and immediately *search a specific place* when the officer has reasonable suspicion the weapon will be located in that specific place. For example, officers who develop reasonable suspicion that a weapon is in specific area of a car or in a specific pocket of the suspect's clothing may go straight to that area and seize it. Such searches are more intrusive but will be reasonable and justified if the suspect's conduct (failure to comply with the officer's directive) results in the officer's inability to conduct an effective pat-down. Under those circumstances, the police officer remains within the bounds of "what was minimally necessary" to ensure his protection.[11]

The Federal 4th Circuit Court of Appeals has held that an officer may dispense with a pat-down of a person and direct the suspect to *lift his shirt*.[12] When an officer has reasonable suspicion, this technique will always be less intrusive (because it is only searching one area of the body and the officer does not have to put his hands on the suspect) than a traditional frisk and consequently be justified.

State courts have held that an officer may dispense with a pat-down of a person and force open a suspect's hand if the officer has reason to believe that a suspect may have a concealed weapon in his hand.[13]

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Meggan especially thanks Brad Lawrence, Chief, Advanced Training Branch, Physical Techniques Division, for his contribution of the description of the "look, feel, crush, and twist" frisk technique.

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[1] Terry v. Ohio, 392 U.S. 1(1968).

[2] Sibron v. New York, 392 U.S. 40, (1968); Adams v. Williams, 407 U.S. 143, (1972); Pennsylvania v. Mimms, 434 U.S. 106 (1977); Michigan v. Long, 463 U.S. 1032, (1983); Minnesota v. Dickerson, 508 U.S. 366 (1993); Florida v. J.L., 529 U.S. 266 (2000).

[3] There are an ever growing number of web sites, law enforcement publications, and subscriptions available through which an officer can keep up with disguised weapons. Click http://www.fletc.gov/training/programs/legal-division/videocasts/terry-frisks.html/ for a FLETC LGD videocast on Terry Frisks.

[4] Terry at 23 holding a police authority's interest in self protection arises when he reasonably believes that a suspect is armed and dangerous; at that point, he has an interest in "taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."

[5] Minnesota v. Dickerson, 508 US 366 (1993).

[6] People v. Lee, 194 Cal. App. 3d 975, 985 (Cal. Ct. App. 1987) holding that an authority who pressed the outside of a suspect's clothing with the palm of his right hand and then used "a kind of grabbing or claw-type of motion to ascertain the object" was reasonable. The Court went on to recognize that in order to dispel the suspicion that a person is armed, something more is contemplated than a gingerly patting of the clothing. The Court said it failed to see how an object's weight (or hardness) could be ascertained without some type of gripping motion.

[7] U.S. v Yamba, 506 F.3d 251 (3rd Cir. 2007) holding that if an authority is authorized to conduct a Terry search, he is authorized to assure himself that the suspect has no weapons. In order to do that, he is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk, until the authority is able to eliminate the possibility of a weapon.

[8] U.S. v. Reyes, 349 F.3d 219, 225 (5th Cir. 2003) held that Terry and its progeny do not limit a weapons search incident to a stop to a pat-down or frisk. The Fourth Amendment permits non-intrusive, reasonable means other than a frisk, where, as here, the other means are necessary in the circumstances to ensure the suspect is not armed.

[9] U.S. v. Baker, 78 F.3d 135, 137 (4th Cir.1996). "Indeed, this act was less intrusive than the patdown frisk sanctioned in Terry. The authority avoided the "serious intrusion upon the sanctity of the person" necessitated by the patdown frisk, which requires the authority to "feel with sensitive fingers every portion of the prisoner's body." Terry, 392 U.S. at 17 & n.13. In sum, based on a balancing of the necessity for the search against the intrusion caused by the search, directing that Baker raise his shirt constituted a reasonable search limited to discovering whether he was carrying a concealed weapon."

[10] See State v. Kearney, 183 N.J. Super. 13, 443 A.2d 214 (1981): police authority may dispense with a pat-down and immediately search a suspect's pockets where the suspect prevents the authority from conducting a pat-down by grabbing the authority's hands or backing away from the authority when the authority attempts to touch a bulge in the suspect's clothing.

[11] Adams v. Williams, 407 U.S. 143 (1972). See also, Lee v. State, 311 Md. 642, 537 A.2d 235 (1988).

[12] Baker at 138 holds this approach minimizes the risk that the suspect could draw his weapon before the authority could attempt to neutralize the potential threat. See also, U.S. v. Reyes, 375 U.S. App. D.C. 440 (D.C. Cir. 2007); U.S. v. Hill, 545 F.2d 1191 (9th Cir. 1976).

[13] State v. Williams, 249 Neb. 582, 544 N.W.2d 350 (1996), See also, People v. Shackelford, 37 Colo. App. 317, 546 P.2d 964 (1976).

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CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Gardner, 2010 U.S. App. LEXIS 5029, March 10, 2010

Deciding this issue for the first time, the court decides:

Although acquiring a firearm using drugs as payment does not constitute "using" the gun "during and in relation to a drug trafficking crime" (see Watson v. United States, 552 U.S. 74 (2007)), it does constitute "possessing" that firearm "in furtherance of a drug trafficking crime" in violation of 18 U.S.C. § 924(c)(1)(A).

The 1st, 3rd, 4th, 9th, and 10th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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U.S. v. Navas, 2010 U.S. App. LEXIS 4780, March 08, 2010

After getting consent to enter a warehouse, agents conducted a warrantless search of the unhitched trailer part of a tractor/trailer rig. The cab was not in the warehouse.

The Supreme Court has relied on two rationales to explain the reasonableness of a warrantless search pursuant to the automobile exception: vehicles' inherent mobility and citizens' reduced expectations of privacy in their contents.

A vehicle's inherent mobility — not the probability that it might actually be set in motion — is the foundation of the mobility rationale. When the Supreme Court introduced the mobility rationale in Carroll v. U.S., 267 U.S. 132 (1925), it referenced "wagon[s]," which,

like trailers, require an additional source of propulsion before they can be set in motion. At least for purposes of the Fourth Amendment, a trailer unhitched from a cab is no less inherently mobile than a wagon without a horse. The trailer remained inherently mobile as a result of its own wheels and the fact that it could have been connected to *any* cab and driven away. The fact that the trailer was detached from a cab with its legs dropped, did not eliminate its inherent mobility. Even where there is little practical likelihood that the vehicle will be driven away, the automobile exception applies when that possibility exists because of the vehicle's inherent mobility.

The very function of the automobile exception is to ensure that law enforcement officials need not expend resources to secure a readily mobile automobile during the period of time required to obtain a search warrant.

Click **HERE** for the court's opinion.

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3rd CIRCUIT

Revell v. Erickson, 2010 U.S. App. LEXIS 5803, March 22, 2010

The Firearm Owners' Protection Act ("FOPA"), 18 U.S.C. § 926A, allows gun owners licensed in one state to carry firearms through another state under certain circumstances. In essence, § 926A allows a person to transport a firearm and ammunition from one state through a second state to a third state, without regard to the second state's gun laws, provided that the traveler is licensed to carry a firearm in both the state of origin and the state of destination and that the firearm is not readily accessible during the transportation. A person transporting a firearm across state lines must ensure that the firearm and any ammunition being transported is not readily accessible or directly accessible from the passenger compartment of the transporting vehicle.

Only the most strained reading of the statute could lead to the conclusion that having the firearm and ammunition inaccessible while in a vehicle means that, during the owner's travels, they can be freely accessible for hours at a time as long as they are not in a vehicle.

Click **HERE** for the court's opinion.

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5th CIRCUIT

U.S. v. Williams, 2010 U.S. App. LEXIS 5997**,** March 24, 2010

Looking at this issue for the first time, the court decides:

Title 18 U.S.C. § 111(a)(1) provides that

> **(a) In general—Whoever—**

> **(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [federal officer] while engaged in or on account of the performance of official duties;**
> **. . .**
>
> **shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both,….**

The statute contains two ambiguities. First, it distinguishes between misdemeanor and felony conduct by use of the undefined term "simple assault." Second, and central to this case, the statute appears to outlaw several forms of conduct directed against federal officers, only one of which is assault, but then distinguishes between misdemeanors and felonies by reference to the crime of assault.

Simple assault as an attempted or threatened battery.

Section 111(a)(1) prohibits more than assault, simple or otherwise. A misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct. The dual purpose of the statute is not simply to protect federal officers by punishing assault, but also to deter interference with federal law enforcement activities and ensure the integrity of federal operations by punishing obstruction and other forms of resistance.

The 6th Circuit agrees (cite omitted).

The 9th and D.C. circuits disagree (cites omitted).

Click **HERE** for the court's opinion.

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7th CIRCUIT

U.S. v. Doody, 2010 U.S. App. LEXIS 6908, April 02, 2010

Looking at this issue for the first time, the court decides:

When a defendant receives a gun for drugs, he "possesses" the firearm in a way that "further[s], advance[s], or help[s] forward" the distribution of drugs in violation of 18 U.S.C. § 924(c)(1)(A).

The 1st, 5th, 6th, 9th, and 10th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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9th CIRCUIT

Brooks v. Seattle, 2010 U.S. App. LEXIS 6293, March 26, 2010

The use of the Taser in drive-stun mode is painful, certainly, but also temporary and localized, without incapacitating muscle contractions or significant lasting injury. This amount of force is more on par with pain compliance techniques, which this court has found involve a "less significant" intrusion upon an individual's personal security than most claims of force, even when they cause pain and injury. This quantum of force is less than the intermediate.

The Officers were attempting to take Brooks into custody for refusing to sign the Citation to Appear. Her behavior also gave the officers probable cause to arrest her for obstructing a police officer in the exercise of his official duties. Although obstructing an officer is a more serious offense than the traffic violations, it is nonetheless not a serious crime.

It would also be incorrect to say Brooks posed *no* threat to officers. While she might have been *less* of a threat because her force so far had been directed solely at immobilizing herself, a suspect who repeatedly refuses to comply with instructions or leave her car escalates the risk involved for officers unable to predict what type of noncompliance might come next. That Brooks remained in her car, resisting even the pain compliance hold the officers first attempted, also reveals that she was not under their control.

There is little question that Brooks resisted arrest: the district court noted she "does not deny that she used force to resist the [O]fficers' efforts," she grasped the steering wheel and wedged herself between the seat and steering wheel, and she refused to get out of the car when asked. Her conduct is classified as "active resistance."

The officers gave multiple warnings that a Taser would be used and explained its effects. Even though the Taser was used three times in this case, which constitutes a greater application of force than a single tasing, in light of the totality of the circumstances, this does not push the use of force into the realm of excessive.

This case presents a less-than intermediate use of force, prefaced by warnings and other attempts to obtain compliance, against a suspect accused of a minor crime, but actively resisting arrest, out of police control, and posing some slight threat to officers. The officers' behavior did not amount to a constitutional violation.

Editor's Note: The Court did not hold that the use of a Taser in drive-stun mode can never amount to excessive force, but solely that such use was not excessive based upon Brooks's conduct. See also Bryan v. McPherson**,** 590 F.3d 767 (9th Cir.), December 28, 2009.

Click **HERE** for the court's opinion.

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U.S. v. Maciel-Alcala, 2010 U.S. App. LEXIS 6187, March 25, 2010

Looking at this issue for the first time, the court decides:

The word "person" as used in 18 U.S.C. § 1028A, Aggravated Identity Theft, includes the living and the dead. The government does not have to prove the defendant used the identification of a person he knew at the time was alive.

Click **HERE** for the court's opinion.

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U.S. v. Nevils, 2010 U.S. App. LEXIS 5696, March 19, 2010

The 9th Circuit, *en banc*, vacates and reverses the earlier panel decision dated November 20, 2008, and reported in 12 Informer 08, that held the government had failed to prove Nevils had *knowing possession* of the firearms. The conviction for felon in possession of firearms is now affirmed.

The evidence is sufficient to support a reasonable conclusion that Nevils knew he possessed firearms and ammunition. Nevils's actual possession of two loaded weapons, each lying on or against Nevils's body, would permit a reasonable juror to infer that Nevils knew of those weapons. Further, Nevils initially reached toward his lap when the officers first awakened him, raising the inference that he knew a loaded weapon was within reach. Nevils later cursed his cohorts who had left him in this compromising situation without warning him that the police were in the vicinity. Finally, and contrary to Nevils's representations, there was evidence tying Nevils to the particular apartment where he was found: Nevils had been arrested on narcotics and firearms charges in the same apartment just three weeks earlier. This evidence, construed in favor of the government, raises the reasonable inference that Nevils was stationed in Apartment 6 and armed with two loaded firearms in order to protect the drugs and cash in the apartment when he fell asleep on his watch.

Click **HERE** for the court's opinion.

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Espinosa v. City & County of San Francisco, 2010 U.S. App. LEXIS 4905, March 09, 2010

Pointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force. The pointing of a gun at someone may constitute excessive force, even if it does not cause physical injury.

Where a police officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force. If an officer intentionally or recklessly violates a suspect's constitutional rights, then the violation may be a provocation creating a situation

in which force was necessary and such force would have been legal but for the initial violation.

Click **HERE** for the court's opinion.

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U.S. v. Cha, 2010 U.S. App. LEXIS 4906, March 09, 2010

There are four factors used for determining the reasonableness of a seizure of a residence pending issuance of a search warrant: (1) whether there was probable cause to believe that the residence contained evidence of a crime or contraband; (2)whether there was good reason to fear that, unless restrained, the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether the police make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and (4) whether the police imposed the restraint for a limited period of time — in other words, was the time period no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.

Because the police refused to allow defendant into his home even with an escort to obtain his diabetes medicine and because there was a 26.5 hour delay between seizing the home and obtaining the warrant, the seizure violated the Fourth Amendment. The test asks only how long was reasonably *necessary* for police, acting with diligence, to obtain the warrant. Even absent evidence of bad faith, the delay was too long.

The evidence was not the "product" of the unconstitutional action because the unconstitutional seizure was not the "but for" cause of the discovery of the evidence. The evidence was seized pursuant to a search warrant issued on probable cause. Even so, the evidence is suppressed as a direct result of the unconstitutional seizure of the home pending the warrant.

Click **HERE** for the court's opinion.

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11th CIRCUIT

U.S. v. Davis, 2010 U.S. App. LEXIS 5131, March 11, 2010

In an incident that predated the Supreme Court decision of Arizona v. Gant, Davis, a passenger in a car stopped for a traffic offense, was arrested after giving the officer a false name. During a search of the car incident to the arrest, the officer seized a gun from the pocket of Davis' jacket left on the seat. The search violated the Fourth Amendment pursuant to the Gant decision because neither Davis nor the driver had access to the car and because it was not reasonable to believe that evidence of the crime of arrest was in the car.

However, the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on well settled precedent, even if that precedent is subsequently overturned. The gun is admissible evidence.

The 10th Circuit agrees (cite omitted).

The 9th Circuit disagrees (cite omitted).

Before Gant, the 5th Circuit refused to apply the exclusionary rule when police had relied in good faith on prior circuit precedent (cite omitted).

Before Gant, the 7th Circuit expressed skepticism about applying the rule's good-faith exception when police had relied solely on caselaw in conducting a search (cite omitted).

Click **HERE** for the court's opinion.

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U.S. v. DuBose, 2010 U.S. App. LEXIS 4180, March 01, 2010

Looking at this issue for the first time, the court decides:

Title 18 U.S.C. § 922(g)(8) prohibits possession of a firearm while subject to a protective order. Among other requirements, the protective order must either include a finding that such person represents a credible threat to the physical safety of such intimate partner or child (§ 922(g)(8)(C)(i)) or by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury (§ 922(g)(8)(C)(ii)). Since the protective order issued against DuBose, a lawyer and judge, did not include a specific finding that he was a credible threat, it must satisfy § 922(g)(8)(C)(ii).

Section 922(g)(8) does not require that the precise language found in subsection (C)(ii) must be used in a protective order for it to qualify under the statute. This order "restrained and enjoined" DuBose "from intimidating, threatening, hurting, harassing, or in any way putting the plaintiff, [], her daughters and/or her attorney in fear of their lives, health, or safety." The definition of "hurt" as a verb includes "to inflict with physical pain." Thus, the order's language restraining DuBose from "hurting" his wife or her daughters, at the very least, satisfies subsection (C)(ii)'s requirement that the order explicitly prohibit the use, attempted use, or threatened use of "physical force" that would reasonably be expected to cause bodily injury.

The 1st and 4th circuits, the only other circuits to address this specific issue, agree (cites omitted**).**

Click **HERE** for the court's opinion.