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And The Intent that Counts

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## **The Intended Object of a Fourth Amendment Seizure - And The Intent that Counts**

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Dwight Pink had already shot one man when he commandeered a school van and took the driver and teenage passengers hostage.<sup>1</sup> The Connecticut State Police were in pursuit, but held their fire out of fear of shooting an innocent victim. It was like a Hollywood movie. Pink had a gun, 50 rounds of ammunition, and he held innocent people hostage while shooting at the police trying to save them.

But this was not a movie, and the ranking officer ordered the troopers to stop the van when it approached a more populated area of the city. The plan was to maneuver the police cruisers to ram and pin the van against a guard rail. The plan worked. Pink, however, did not give up.

The record is silent as to how young Joshua Sawicki felt as the troopers charged his kidnapper. Joshua was one of the passengers. He had sat in his seat and watched Pink hold a gun to the driver's head and fire most of his rounds at the police while screaming, "I'll kill you, I'll kill you!" Now his rescuers were just outside. Three troopers were in front of the van. Trooper O'Connell came from the rear. All fired. O'Connell fired the fatal bullet and Pink was dead. But one of O'Connell's bullets also passed through the rear passenger seat, was deflected off of a metal support bar, and struck Joshua. Joshua died 15 months later.

Joshua's estate sued the troopers who tried to save him. Claims of excessive use of force by victims and representatives of people who are hurt, maimed, or killed during law enforcement actions are not uncommon.<sup>2</sup> But their ability to remain in court and to hold police officers personally liable largely depends on whether they, or the people they represent, were the intended object of a Fourth Amendment seizure.

### **A Fourth Amendment Seizure**

The Fourth Amendment provides in part for, "the right of the people to be secure in their persons...against unreasonable...seizures..."<sup>3</sup> The Supreme Court defines a seizure as a governmental termination of movement by a means intentionally applied.<sup>4</sup> The Court stated that a "seizure" is an intentional acquisition of physical control.<sup>5</sup>

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<sup>1</sup> *Medeiros as Administratrix of Estate of Joshua Sawicki v. O'Connell* 150 F.3d 164, 166 (2<sup>nd</sup> Cir. 1998)

<sup>2</sup> Claims may be made under either Title 42 U.S.C. 1983 or with a *Bivens* action. In a "1983 action" the plaintiff may allege that the officer acted under color of state, D.C., or territory law to violate his right to be free from unreasonable seizures. A *Bivens* action, coined after the 1971 Supreme Court decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) is 1983's federal counterpart. The Court created an analogy to 42 USC 1983, which allows federal officers to be sued for certain constitutional torts committed under color of federal law.

<sup>3</sup> U.S. Const. amend. IV.

<sup>4</sup> *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989)

<sup>5</sup> *Id.* at 596

## The Intended Object of a Seizure

The first step in a Fourth Amendment seizure analysis should be to identify the object the officer intended to seize. If the intended object's movement is terminated by a means intentionally applied by the officer, the Fourth Amendment is triggered. The object is considered seized, and that has legal significance for any person who may be that intended object, because the seizure must be objectively reasonable.<sup>6</sup>

In Joshua's case, the intended object was the man in the van with the gun. Trooper O'Connell shot that man. O'Connell terminated his movement by a means intentionally applied, which triggered Fourth Amendment protection for a person later identified as Dwight Pink. The Fourth Amendment required O'Connell to seize Pink like an objectively reasonable officer on the scene.<sup>7</sup> Given the facts, deadly force appeared to be an objectively reasonable force option.<sup>8</sup>

But Joshua did not get Fourth Amendment protection from the court. The court held that "...no Fourth Amendment seizure occurred ...because the police did not intend to restrain Joshua."<sup>9</sup> A hostage or by-stander, tragically struck down by the errant bullet of a police officer, is not seized within the meaning of the Fourth Amendment.<sup>10</sup> This could be a case where an officer shot at person A, but missed and hit person B. B was not the intended object of the seizure. To remain in court and sue the officer, B must find another tort claim theory.<sup>11</sup>

The result may have been different had Trooper O'Connell mistook Joshua for Pink. An unintended person may be the intended object of a Fourth Amendment detention, so long as the detention is willful.<sup>12</sup> In other words, if a police officer shoots person A, believing he is person B, A is still the *object* the officer intended to seize.

Such a case of mistaken identity occurred when DuPage County officers tackled a man stopped on his motorcycle at an intersection.<sup>13</sup> The officers made a mistake. They intended to seize an armed and dangerous drug trafficker named Ptak. The man, however, was Jonathan Catlin. Catlin was still seized. He received Fourth Amendment protection – or in his case a decision by the court as to whether a reasonable officer on the scene could have mistaken Catlin for Ptak.<sup>14</sup>

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<sup>6</sup> *Graham v. Connor*, 490 U.S. 386, 395-396 (1989)

<sup>7</sup> *Id.*

<sup>8</sup> *Tennessee v. Garner*, 471 U.S. 1, 10 (1985)(Where the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force.)

<sup>9</sup> *Medeiros*, 150 F.3d at 169

<sup>10</sup> *Id.* at 168-169; see also *Warfield v. City of Chicago*, 565 F. Supp. 2d 948 (7<sup>th</sup> Cir. (2008) (bullet fired at a fleeing suspect that hit a bystander did not seize the bystander within the meaning of the Fourth Amendment); *Schultz v. Braga*, 455 F.3d 470, 480 (2006); *Rucker v. Harford County, Md.*, 946 F.2d 278, 281 (4<sup>th</sup> Cir. 1991); *Childress v. City of Arapaho*, 210 F.3d 1154 (10<sup>th</sup> Cir. 2000); and *Landol-Rivera v. Cosme*, 906 F.2d 791, 798 (1<sup>st</sup> Cir. 1990); but see also *Roach v. City of Fredericktown, Mo.*, 882 F.2d. 294 (8<sup>th</sup> Cir. 1989)

<sup>11</sup> See *Medeiros* at 150 F.3d at 169 (the other claim that the officer violated Sawicki's due process right was "doomed to fail" because the officers' actions did not shock the conscience within the meaning of the 14<sup>th</sup> Amendment); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Warfield v. City of Chicago*, 565 F. Supp. 2d 948; *Childress*, 210 F.3d at 1157; and *Landol-Rivera v. Cosme*, 906 F.2d 791, 798 (1<sup>st</sup> Cir. 1990)

<sup>12</sup> See *Brower*, 489 U.S. at 597; *Brendlin v. California*, 551 U.S. 249, 254 (2007)

<sup>13</sup> *Catlin v. DuPage County Major Crimes Task Force*, 2007 U.S. Dist. LEXIS 50390.

<sup>14</sup> *Id.* at 9 (the court held that the officers mistake was reasonable because Catlin met Ptak's description.)

Arguments like, “I intended to seize Ptak, not Catlin” may come naturally - and may seem relevant - when trying to identify the intended object of a seizure; however, the Supreme Court has consistently refused to consider the subjective beliefs of the officer.<sup>15</sup> Excuses that begin with, “I thought...” or “I didn’t know...” or “We believed...” invite legal error in the Fourth Amendment analysis.

One case of legal error occurred in the Sixth Circuit. The Sixth Circuit Court of Appeals reversed a district court’s decision because it was based in part on what the officer *did not know*.<sup>16</sup> The case began when Michael Murray offered Rebecca Rodriguez a ride home. Rodriguez accepted Murray’s offer and stepped inside his truck. While exiting the parking lot, Murray spotted police. He was on parole, and having consumed alcohol in violation of his parole terms, he attempted to elude the officers before pulling into an alley and shutting off his engine and lights. Murray ducked down in the truck, so as not to be seen by the officers, and told Rodriguez to do the same.

Having noticed Murray’s suspicious driving, two police officers approached the truck on foot. One of the officers said that the driver started the engine and accelerated directly towards him. The officer fired 12 shots at the vehicle and the truck crashed. The officers found Murray, slumped over the wheel of the truck, and dead. Rodriguez, who had been hidden from the officers, was found trapped inside.

The district court concluded that Rodriguez was not seized under the Fourth Amendment because the officer *did not know* she was a passenger in the truck and because she was not shot. The Sixth Circuit disagreed. The Court believed that by shooting at the driver of the moving truck the officer intended to stop the vehicle, and effectively seized everyone inside, including Rodriguez.<sup>17</sup>

### **The Reasonable Person Test and the Intent that Counts**

But if Rodriguez was seized, how is it that Joshua was not? They were both passengers in vehicles that were stopped by police officers. A test – one that identifies who receives Fourth Amendment protection – would be helpful.

The Supreme Court used the reasonable person test in the case of a routine traffic stop for a possible moving violation.<sup>18</sup> The officer activated his overhead lights, which successfully terminated the movement of a passenger car. The Court held that everyone inside the vehicle was seized, to include the passenger.<sup>19</sup> The Supreme Court explained that a person is seized if a reasonable person in his position would have believed he was not free to leave.<sup>20</sup> The Court believed that during a traffic stop a reasonable person in the passenger’s position would feel

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<sup>15</sup> See *Brendlin v. California*, 551 U.S. 249, 260 (2007) (“...the State Supreme Courts approach [in deciding who was seized when an officer stopped a vehicle for a possible moving violation] shifted the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we have repeatedly rejected attempts to introduce this kind of subjectivity into the Fourth Amendment analysis.”); *United States v. Mendenhall*, 446 U.S. 544, n. 6 (1980); *Michigan v. Chestnut*, 486 U.S. 567, 575, n 7 (1988); *Whren v. United States*, 517 U.S. 806, 813 (1996)

<sup>16</sup> *Rodriguez v. Passinault*, 637 F.3d 675 (6<sup>th</sup> Cir. 2011)

<sup>17</sup> *Id.* at 687 (citing *Fisher v. City of Memphis*, 234 F.3d 312 (6<sup>th</sup> Cir. 2000))

<sup>18</sup> *Brendlin v. California*, 551 U.S. 249, 260 (2007)

<sup>19</sup> *Id.* at 257

<sup>20</sup> *Id.* at 258 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980))

subject to enough government suspicion or scrutiny that if he tried to leave, the officer would object.<sup>21</sup>

The Supreme Court refused to consider the subjective beliefs of the police officer.<sup>22</sup> Who the officer intended to seize, or whether the officer knew that there was a passenger in the car, was not relevant. The only intent that counts, stated the Court, is the intent that the officer *objectively* manifests – or makes known – to the person confronted.<sup>23</sup> In short, would a reasonable person feel that the officer’s show of authority was directed towards him?<sup>24</sup>

The test works in all of the cases discussed so far. Obviously, a reasonable person in Catlin’s position would feel that the officers’ force was directed towards him and that he was not free to leave after the officers tackled him. Due to her close association to Murray, a reasonable person in Rodriguez’ position would feel subject to government suspicion – especially after Murray said to duck down in the truck to avoid being seen by the officers. Her Fourth Amendment protection was triggered after the officer *objectively manifested* his intent to stop the truck by shooting at the vehicle and it crashed.

But Joshua remains without Fourth Amendment protection. From the moment he boarded the van, the officers’ actions were directed at Pink. Pinning the van against the guard rail was meant to stop Pink. The troopers charged the van to get Pink. The bullet that struck Joshua, was meant for Pink. A reasonable person in Joshua’s position would not see the troopers as trying to seize him. They were his liberators.

### **Questions and Answers**

Some questions come to mind. One is how to reconcile the Supreme Court’s reasonable person test with another statement by the Court that a seizure requires a “...an *intentional* acquisition of physical control.” Justice Stevens recognized the conflict and wrote, “The intentional acquisition of physical control of something is no doubt a characteristic of the typical seizure, but I am not entirely sure that it is an essential element of every seizure or that this formulation is particularly helpful in deciding close cases.”<sup>25</sup> In other cases, the Court specifically cautioned against examining the subjective intent of the officer.<sup>26</sup> The reconciliation may be simple. The officer must intend to commit some type of act. He must intend to say something or to put something in motion. From there, the reasonable person test takes over. Based on the facts, would a reasonable person in the position of the person confronted believe that the officer’s use of force was directed towards him?<sup>27</sup> In other words, the “intent,” in the “intended object” of a seizure, is from the perspective of reasonable person.

Another question is what facts “the reasonable person” should consider? The Supreme Court said to view all the circumstances surrounding the incident to determine whether someone is

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<sup>21</sup> Id. at 25

<sup>22</sup> Id. at 260

<sup>23</sup> Id. at 260-261 (citing *Michigan v. Chestnut*, 486 U.S. 567, n. 7 (1988))

<sup>24</sup> Id. at 262

<sup>25</sup> *Brower*, 489 U.S. at 596 (Stevens, J., Brennan, W., Marshall, T., and Blackmun, H., concurring)

<sup>26</sup> *Brendlin*, 551 U.S. at 261 (citing *Chestnut*, 486 U.S. 567, n. 7) (“...the criterion of willful restriction on freedom of movement is no invitation to look at the subjective intent when determining who is seized.”)

<sup>27</sup> *Brendlin*, 551 U.S. at 255 and *Michigan v. Chestnut*, 486 U.S. 567, 575 (1988).

seized.<sup>28</sup> One warning is in order. An objective test would consider everything up to the point when the person is allegedly seized. Considering what was said or done after that point would be subjective; it would make an after-the-fact argument like, “I intended to seize Ptak, not Catlin” relevant.

### **Put the Test to the Test**

Here is the proposed test: Would a reasonable person in the position of the person confronted believe that the officer’s show of force or physical force was directed towards him for purposes of terminating his movement? If he does, and the person confronted submits to governmental control,<sup>29</sup> the person is seized.

Now put the test to the test with two more cases. The first involves multiple suspects, and multiple uses of force. The courts in these cases must decide who receives Fourth Amendment protection for each use of force. The reasonable person test would look at each person, and each use of force, individually.

Joseph Shultz and Kristen Harkum were two young people out for a drive who unfortunately met the description of a bank robber and his girlfriend.<sup>30</sup> Federal agents used a tactic called a “dynamic vehicle stop” to terminate the movement of their car. Agents in one car pulled alongside the couple. Another car veered in front of them and a third blocked their retreat. Harkum and Schultz were seized by the vehicle stop.<sup>31</sup>

But that was just the first use of force. With guns drawn, the agents surrounded the couple. Agent Braga was instructed to control the passenger and suspected robber, Schultz. Braga ran to Schultz’ side of the car, pointed a gun at Schultz, and yelled “show me your hands.”<sup>32</sup>

From that point, Braga and Schultz disagree about the facts. Schultz claimed that he did what the agents ordered him to do - meaning that he put his hand up and that he tried to unlock the passenger door. Agent Braga claimed that Schultz leaned away from the passenger door, towards the center console, as if he was reaching for a gun.<sup>33</sup> There was no dispute that Braga shot Shultz. Based on the facts, a reasonable person in Shultz’ position would believe that the shot was directed towards him, for purposes of terminating his movement.<sup>34</sup>

The issue for the Fourth Circuit was whether Harkum should also receive Fourth Amendment protection from the shot fired by Braga? She did not. “...Agent Braga had no intent to seize Harkum by firing his weapon...” held the Court of Appeals.<sup>35</sup>

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<sup>28</sup> *Mendenhall* 446 U.S. at 554.

<sup>29</sup> *Brower*, 489 U.S. at 596-596; (“Violations of the Fourth Amendment requires an intentional acquisition of control”); *Brendlin*, 551 U.S. at 254 (“A police officer may make a seizure by a show of authority and without use of physical force, but there is no seizure without actual submission.”); *Mendenhall*, 446 U.S. at 553; *Garner*, 471 U.S. at 7; *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *Brooks v. Gaenzle*, 614 F.3d 1213, 1217 (10<sup>th</sup> Cir. 2010); but see, *California v. Hodari*, 499 U.S. 621, 626 (1991)(a seizure occurs when there is “an application of physical force to restrain movement, even when it is ultimate unsuccessful.)

<sup>30</sup> *Schultz v. Braga*, 455 F.3d 470 (4<sup>th</sup> Cir. 2006)

<sup>31</sup> *Id.* at 478 (The agents reasonably believed that the occupants of the vehicle were the robber and his girlfriend)

<sup>32</sup> *Id.* at 474.

<sup>33</sup> *Id.* at 475.

<sup>34</sup> *Id.* at 479 (the district court would decide whose version of the facts was correct and whether deadly force was objectively reasonable).

<sup>35</sup> *Id.*

The reasonable person test would reach the same conclusion as the Fourth Circuit's, but not refer to the officer's subjective intent. Agent Braga did not position himself on Harkum's side of the car. He did not point his weapon at Harkum. He did not issue any commands to Harkum. A reasonable person in Harkum's position would not believe that Agent Braga's physical force was directed at her.

In the last case, an officer confused his pistol for a Taser.<sup>36</sup> Deputy Purnell had a warrant for Frederick Henry's arrest. The warrant was for failure to pay child support. Henry tried to flee and Deputy Purnell pulled his Glock pistol and shot him in the elbow. The parties stipulated as a fact that Purnell intended to draw his Taser.<sup>37</sup>

Deputy Purnell made the seemingly logical argument that there was no Fourth Amendment seizure with a firearm. Purnell believed that since he did not intend to shoot Henry with a firearm, he did not terminate Henry's movement "through means intentionally applied."<sup>38</sup> The Fourth Circuit disagreed. "Purnell's specific intent was to stop Henry from fleeing by means of firing a weapon, and Henry was in fact stopped by the very instrumentality (i.e. the Glock pistol) that Purnell set in motion" held the Court.<sup>39</sup>

What would the reasonable person say? Henry was seized, but not for anything Deputy Purnell specifically intended. Henry should receive Fourth Amendment protection because a reasonable person in his position would believe that Deputy Purnell's use of force was directed towards him for purposes of terminating his movement.

## Conclusion

The reasonable person test is true to the Fourth Amendment's objective analysis and brings clarity to the often difficult process of deciding who is entitled to its protection. Would a reasonable person in the position of the person confronted believe that the officer's show of force or physical force was directed towards him for purposes of terminating his movement? If he does, and the person confronted submits to government control, he is seized.

From there, another person takes over – the reasonable *officer*. Would a reasonable officer believe that the force used to seize the person was objectively reasonable? But that is a discussion for another time.

**Editor's Note:** Part 3 of Senior Instructor Jeff Fluck's *Confrontation Clause* article will be published after the United States Supreme Court issues an opinion in *Williams v. Illinois*.

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<sup>36</sup> *Henry v. Purnell*, 428 F. Supp. 2d 393 (D.Md.2006), *aff'd*, *vacated on other grounds*, *remanded* 501 F.3d 374 (4<sup>th</sup> Cir. 2007).

<sup>37</sup> *Henry v. Purnell*, 501 F.3d 374, 379 (4<sup>th</sup> Cir. 2007).

<sup>38</sup> *Id.* at 380.

<sup>39</sup> *Id.* at 381 ("We recognize that Purnell did not intend to use the Glock, but we are also mindful of the [Supreme Court's] admonition that we should not draw too fine a line in determining whether the means that terminate a person's freedom of movement is the very means that an officer intended.") (citing *Brower*, 489 U.S. 593).

# CASE SUMMARIES

## United States Supreme Court

*Smith v. Cain*, 2012 U.S. LEXIS 576, January 10, 2012

Smith was convicted of murder based on the testimony of a single eyewitness, Larry Boatner. During postconviction relief proceedings, Smith obtained police files containing statements by Boatner that contradicted his trial testimony. Smith claimed that the prosecution's failure to disclose those statements, prior to trial, violated *Brady v. Maryland*.

Under *Brady*, the state violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. The state conceded that Boatner's statements in the police files were favorable to Smith, but argued that they were not material to a determination of his guilt.

The court disagreed. Boatner's testimony was the only evidence linking Smith to the crime, and his undisclosed statements directly contradicted his trial testimony. Boatner told the jury that he had "no doubt" that Smith was the gunman he stood "face-to-face" with on the night of the crime. However, the officer's notes indicated that Boatner said that he "could not identify anyone because he could not see faces" and "would not know them if he saw them." Boatner's undisclosed statements were both favorable to the defense and material to the verdict and they were sufficient to undermine the confidence in Smith's conviction.

Click [HERE](#) for the court's opinion.

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*Perry v. New Hampshire*, 2012 U.S. LEXIS 579, January 11, 2012

Around 3 a.m., police officers responded to an apartment complex to investigate the report of an African-American man breaking into cars. When the first officer arrived, she saw Perry standing between two cars. He walked toward the officer, holding two car stereo amplifiers in his hands. The officer went into the apartment building to interview the witness who had reported the break-ins. She left Perry standing in the parking lot with another officer who had arrived on scene. The officer asked the witness to describe the person she had seen breaking into the victim's car. The witness told the officer that the man she saw breaking into the car was the same African-American man that was standing next to the other officer in the parking lot. Perry was arrested and charged with the break-ins.

At trial, Perry argued that the witness' identification of him as the perpetrator, while he was standing next to the police officer in the parking lot, amounted to an unduly suggestive one-person show-up. He claimed that this procedure all but guaranteed that the witness would identify him as the person she had seen committing the break-ins. The trial court disagreed. The witness' identification testimony was allowed and the jury convicted Perry.

The Supreme Court held that the *Due Process Clause* did not require the trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification, made under suggestive circumstances, when those circumstances were not arranged by the police.

The *Due Process Clause* provides a check on the reliability of an identification only after the defendant establishes improper police conduct. First, the police in this case did not arrange the suggestive circumstances surrounding the witness' identification. Second, even if the defendant could have established that the police used an identification procedure that was both suggestive and unnecessary, the identification would not have automatically been excluded. Instead, the court would have determined, after considering the totality of the circumstances, whether there was a substantial likelihood of misidentification because of the unnecessarily suggestive identification procedure. The trial court never had to determine this issue.

In this case, the police did not arrange the identification procedure; therefore, the *Due Process Clause* was not implicated. In addition, other protection such as the right to counsel and cross-examination provided the defendant the opportunity to challenge the reliability of the identification at trial.

Click [HERE](#) for the court's opinion.

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***Ryburn v. Huff***, 2012 U.S. LEXIS 910, January 23, 2012

Four officers went to the Huffs' residence to investigate after their son, Vincent, had allegedly written a letter in which he threatened to "shoot-up" his school. Two officers went up to the front door and two remained on the sidewalk. After knocking on the front door and receiving no answer, one of the officers called Mrs. Huff on her cell phone. She said that she was inside the house but quickly hung up the phone. A few minutes later, she and Vincent stepped out onto the front steps. The officer asked Mrs. Huff if they could talk inside, but she refused. When the officer asked Mrs. Huff if there were any guns in the house, she immediately turned around and ran into the house. Based on Mrs. Huff's behavior, the two officers entered the house behind her. The two officers on the sidewalk also entered the house, having assumed that Mrs. Huff had given the other two officers permission to enter. Once inside the home, Mr. Huff challenged the officers' authority to be there. The officers remained inside the home for five to ten minutes and left after they were satisfied that Vincent had not threatened anyone.

The Supreme Court reversed the Ninth Circuit Court of Appeals, which had held that the two officers who initially entered the house were not entitled to qualified immunity. The Court found that the officers could have reasonably believed they were justified in making a warrantless entry into the house if there was an objectively reasonable basis for fearing that violence was imminent. In this case, a reasonable officer could have reached that conclusion. Mrs. Huff's behavior, especially after she ran into the house without answering the question of whether there were any guns inside, allowed the officers to reasonably believe that there could be weapons inside, and that family members or the officers themselves were in danger.

Click [HERE](#) for the court's opinion. See [2 Informer 11](#) for the case brief from the court of appeals opinion, *Huff v. City of Burbank*, 632 F.3d 539 (9th Cir. 2011).

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*U.S. v. Jones*, 2012 U.S. LEXIS 1063, January 23, 2012

The police installed a Global-Positioning-System (GPS) tracking device on a vehicle registered to Jones's wife, without a valid warrant, and tracked its movements twenty-four hours a day for four weeks.

The Supreme Court held that the government's installation of a GPS device on a target's vehicle, in this case the vehicle registered to Jones's wife, and its use of that device to monitor the vehicle's movements, constituted a "search." The court found that the government physically occupied private property for the purpose of obtaining information when it installed the GPS device on the vehicle, and that such a physical intrusion would have been considered a "search" under the *Fourth Amendment* when it was adopted.

The government argued that even if the attachment and use of the GPS device was a search, it was reasonable, and therefore lawful, under the *Fourth Amendment* because "the officers had reasonable suspicion and indeed probable cause" to believe that Jones was involved in a drug trafficking conspiracy. The court declined to decide this issue because the government did not raise it on appeal and as a result, the court of appeals did not have the opportunity to address it.

Click [HERE](#) for the court's opinion. See [9 Informer 10](#) for the case brief from the court of appeals opinion, *U.S. v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).

See the Legal Division Case Note [HERE](#) for more in-depth analysis and discussion of the decision in *Jones*.

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## Circuit Courts of Appeals

### 1<sup>st</sup> Circuit

*U.S. v. Brake*, 2011 U.S. App. LEXIS 26019, December 30, 2011

An officer stopped and frisked Brake after seeing him walk away from a van parked near a residence where it had been reported a man was threatening others with a gun. During the frisk, the officer felt a "squishy" object in the front pocket of Brake's sweatshirt that felt like a plastic bag. Realizing that it was not a weapon, the officer asked Brake what he had in his pocket. Brake told him it was a plastic bag he had found in the bushes. The officer asked Brake if he would mind taking the bag out of his pocket. Brake said, "sure" and without hesitation he took the bag out of his pocket. After asking Brake if he was curious about the bag's contents, Brake opened the bag revealing hundreds of OxyContin tablets. Brake dropped the bag and disclaimed ownership of its contents.

The court held that the officer lawfully detained Brake after he saw him stop at a parked van, open the door, do something inside and then walk away from the officer. The court concluded that Brake's proximity to the residence, baggy clothing and activity at the van gave the officer reason to believe that he may have retrieved or deposited a weapon.

The court held that the officer conducted a lawful *Terry* frisk on Brake. Brake did not immediately respond to the officer when he tried to get his attention, but rather kept walking away from him. Brake's failure to heed the officer's attempt to stop him supported the officer's concerns for his safety and the eventual frisk. Brake's cooperative demeanor and lack of any threatening or furtive gestures after he finally stopped did not lessen the officer's concern that Brake may have posed a risk to him.

Finally, the court held that Brake voluntarily consented to removing the plastic bag from his pocket and opening it for the officer to see its contents. The officer did not coerce Brake in any way. Instead, Brake chose to cooperate with the officer of his own freewill, having decided to pursue a strategy of cooperation and ignorance about the origin and contents of the bag.

Click [HERE](#) for the court's opinion.

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*U.S. v. Davila - Nieves*, 2012 U.S. App. LEXIS 249, January 6, 2012

Davila went to a mall where he had arranged to meet a thirteen-year-old girl, named Vanessa, prior to engaging in sexual activity with her. When he arrived for the meeting, he was met by police officers and arrested. The thirteen-year-old girl with whom he had been communicating was actually an undercover police officer.

Davila claimed that the trial judge should have given a jury instruction on entrapment. To be entitled to a jury instruction on entrapment, the defendant must establish that the government induced him to commit the crime and that he was not already predisposed to commit that crime.

The court first noted that there was no improper government inducement. Although Vanessa reinitiated contact with Davila after a seven-month break in their communication, this government conduct did not rise to the level of actually planting in his mind the idea to commit the crime. Davila was eager to get back to where he started when the pair last spoke and he quickly steered the conversation with Vanessa toward sexual topics. Davila repeatedly engaged in sexually explicit conversations with Vanessa, which clearly demonstrated an eagerness to commit the crime, rather than reluctance that was overcome only by government inducement.

In addition, while Vanessa may have initiated contact with Davila, she never broached the subject of engaging in a sexual relationship with him. Davila not only discussed engaging in sexual relations with Vanessa, he followed through with that idea by attempting to meet her for that purpose. Providing a suspect the opportunity to commit a crime does not constitute an inducement that would entitle the suspect to a jury instruction on entrapment.

Because the court determined that no reasonable jury could conclude that there was improper government inducement, the court declined to consider the second factor of predisposition.

Click [HERE](#) for the court's opinion.

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*U.S. v. Rehlander*, 2012 U.S. App. LEXIS 766, January 13, 2012

Rehlander and Smalls were involuntarily admitted to psychiatric hospitals under Maine's "emergency procedure," *Me. Rev. Stat. tit. 34-B § 3863*. Each was later convicted for possessing firearms after having been "committed to a mental institution" under *Title 18 U.S.C. § 922 (g)(4)*.

The court held that *section 3863* proceedings do not qualify as a "commitment" for federal purposes. After the Supreme Court's decision in *Heller*, the right to possess arms is no longer something that can be withdrawn by the government on a permanent and irrevocable basis without due process.

*Section 3863* permits three-day involuntary hospitalization without any adversary proceeding and with no finding by an independent judicial or even administrative officer that the subject is either mentally disturbed or dangerous. This is all that is practical for an emergency hospitalization and provides adequate due process for that purpose. However, this temporary hospitalization procedure does not provide due process to deprive individuals permanently of their right to bear arms.

The court noted that another Maine code provision, *Section 3864*, allows for involuntary commitment for psychiatric reasons, but only after the court holds an adversary proceeding. In this proceeding, the patient has counsel, the right to testify and the right to call and cross-examine witnesses. If committed after this proceeding, the patient would be banned from future possession of firearms under *Title 18 U.S.C. § 922 (g)(4)*.

Click [HERE](#) for the court's opinion.

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## 2<sup>nd</sup> Circuit

*U.S. v. Barner*, 2012 U.S. App. LEXIS 768, January 13, 2012

Barner was on parole for a state felony conviction. A condition of his parole was that his person, residence and property were subject to search and inspection by his parole officer. During this time, the parole officer received a report that Barner had fired a weapon at another person. The parole officer arrested Barner when he appeared at their next scheduled meeting. The parole officer took Barner back to his apartment and conducted a search. Officers found several firearms, ammunition and illegal drugs in a locked storage closet to which Barner had a key.

Warrantless searches conducted as a condition of parole are permitted as long as they are reasonably related to the performance of the parole officer's duty. Parole officers have a duty to investigate whether a parolee is violating the conditions of parole, one of which is that the parolee commits no further crimes. Here, the search was conducted in direct response to information the parole officer obtained and she had a duty to investigate further, both to determine if a crime had been committed and to prevent the commission of further crimes. As a result, the court held that the search of the storage room was proper under the "special needs" exception to the *Fourth Amendment* warrant requirement because it was reasonably related to the parole officer's duties, and was performed in furtherance of the special needs of the New York State parole system.

Click [HERE](#) for the court's opinion.

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## 4<sup>th</sup> Circuit

*U.S. v. Jones*, 2012 U.S. App. LEXIS 784, January 13, 2012

Officers arrested Jones on an outstanding arrest warrant while he was standing in the open doorway of his house. While one officer placed Jones in handcuffs, other officers entered the house through the front door to conduct a protective sweep, even though Jones and his wife had told the officers that there was no one else present. The officers saw several items in plain view that they knew to be precursor materials for the manufacture of methamphetamine. The officers secured the house while a search warrant was obtained. The subsequent search of the house uncovered additional evidence of methamphetamine manufacturing.

The court held that the protective sweep was lawful. Officers are permitted to perform a protective sweep, beyond areas immediately adjoining the arrest area, when they have articulable facts that would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. Here, the officers saw seven vehicles parked at the Jones residence at 1:00 a.m., while only encountering Jones and his wife. The officers also had first-hand knowledge that known drug users frequented the house. As a result, was reasonable for the officers to believe that there were others in the house that could have posed a threat to them.

Click [HERE](#) for the court's opinion.

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*U.S. v. Ramos - Cruz*, 2012 U.S. App. LEXIS 946, January 18, 2012

The court held that the search warrant for Ramos-Cruz's home was supported by probable cause. The search warrant affidavit clearly stated that an officer had identified the individual in a photograph, who was spray-painting graffiti, as Ramos-Cruz. In addition, another officer stated that based on his training and experience in gang investigations, individuals who create graffiti typically keep their materials at their homes.

Finally, without deciding if the officers violated the knock-and-announce rule before they entered Ramos-Cruz's home, the court reiterated that in *Hudson v. Michigan*, the Supreme Court held that the exclusionary rule does not apply to knock-and-announce violations.

Click [HERE](#) for the court's opinion.

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*U.S. v. Gaines*, 2012 U.S. App. LEXIS 1492, January 27, 2012

Officers stopped the vehicle in which Gaines was a passenger for a traffic infraction. An officer ordered Gaines out of the car and while conducting a *Terry* frisk, he felt the trigger guard of a firearm in his waistband. Gaines struck the officer in the face with his elbow, punched another officer, and tried to flee. The officers subdued Gaines and arrested him. During the struggle, the firearm fell from Gaines's waistband and the officers recovered it.

The trial court granted Gaines's motion to suppress the firearm, holding that the initial traffic stop was not supported by reasonable suspicion, therefore it was unlawful. On appeal, the government conceded that the traffic stop and pat down of Gaines was unlawful. However, the government argued that the taint of the unlawful stop was purged when Gaines assaulted the officers. Because the firearm had not been physically seized when the assault occurred, the government argued that it could later be lawfully seized pursuant to a valid arrest for the assault on the officers and introduced into evidence against Gaines.

The court disagreed. The discovery of the gun, which the officer felt during the unlawful frisk, occurred before the independent criminal act of assaulting the officers. Consequently, that criminal act could not be considered an intervening event for determining whether the taint of the unlawful search had been purged. The court focused on when the officers discovered of the firearm and not when they seized it. There would have been a different outcome if the officers had discovered the firearm after Gaines assaulted them, even though the initial stop and frisk was unlawful.

The First and Sixth Circuits agree.

Click [HERE](#) for the court's opinion.

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***Sennett v. U.S.***, 2012 U.S. App. LEXIS 1692, January 30, 2012

Sennett was a photojournalist who covered a protest in which several individuals committed acts of vandalism at a hotel. Officers identified Sennett from hotel security cameras and obtained a warrant to search her apartment for evidence connected to the vandalism at the hotel.

Sennett brought suit against the United States claiming that the search of her apartment violated the *Privacy Protection Act (PPA) 42 U.S.C. § 2000aa*.

The court held that the "suspect" exception to the *PPA* barred her claim because there was probable cause to believe that Sennett was involved in the criminal activity at the hotel and the search of her apartment related to the investigation of that incident.

Sennett arrived at the hotel at 2:30 a.m., within seconds of the vandals, and she was dressed as they were in dark clothing and a backpack. After the vandalism occurred, she fled the area in the same direction as the vandals.

Click [HERE](#) for the court's opinion.

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## **5<sup>th</sup> Circuit**

***Cantrell v. City of Murphy***, 2012 U.S. LEXIS 63, January 4, 2012

Officers responded to a residence on October 2, 2007 after Ave Cantrell called 911 when she found her twenty-one month old son entangled by his neck and arm in soccer net. The officers pulled Ave away from her son and had her wait in an adjacent bedroom. To the officers, the child appeared to be deceased. Two minutes later, paramedics arrived. They carried the child to the

ambulance and began life-saving procedures. During this time, Ave was extremely distraught and at one point asked one of the officers for her gun so she could kill herself. The officers took Ave out of the residence and to the police station in an attempt to interview her and because of her suicidal statements. At the station, Ave made more suicidal statements, which prompted the officers to seek an emergency mental health commitment. The child died two days later at the hospital.

The Cantrells claimed that the officers denied their son his due process rights by interfering with attempts to perform life saving measures and by failing to perform such measures themselves. They argued that the officers created a “special relationship” with their child when they separated him from his mother and that this relationship imposed a duty upon them to care for and protect the child from his death. They claimed that the officers breached this duty by failing to administer aid and by delaying treatment from the paramedics.

The court held that the officers were entitled to qualified immunity. At the time of the incident there were no cases involving sufficiently similar situations that would have provided reasonable officers with notice that they had an affirmative constitutional duty to provide medical care and protection to a young child when they temporarily physically separate the child from his mother.

Next, the court held that the officers were entitled to qualified immunity on the Cantrells’ claim that the officers unlawfully seized Ave under the *Fourth Amendment* when they transported her from her house to the police station.

Based on the suicidal statements made by Ave at her home, a reasonable officer would have had probable cause to detain her for emergency mental commitment under Texas law.

Click [HERE](#) for the court’s opinion.

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***U.S. v. Ochoa***, 2012 U.S. LEXIS 63, January 13, 2012

Federal agents arrested Ochoa after he met with a government informant who was supposed to deliver a quantity of cocaine to him. The informant had used a contact; known only to him as “Julio4,” to set up the meeting with Ochoa. After his arrest, an agent drove Ochoa’s car to his office. During the drive, the agent heard a cell phone ringing but he could not locate it. Once at the office, agents searched the car, located the cell phone and searched through its contact list. The contact list included the name “Julio4” and indicated that Ochoa had called the phone number associated with “Julio4” several times that evening.

The court held that the agents had probable cause to arrest Ochoa. First, he arrived several minutes after “Julio4” told the informant that someone would meet with him shortly with instructions with what to do with the cocaine. Second, after Ochoa entered the parking lot, he drove directly to the informant’s car and parked behind it. Finally, the agents had arranged for the informant to give the “bust” signal once the person with whom he was supposed to meet identified himself by a code name. The agents saw the informant give the “bust” signal shortly after he began talking with Ochoa.

Even though Ochoa argued that the “Julio4” information obtained from the warrantless search of his cell phone should have been suppressed, the court never directly addressed this issue. Instead, the court simply concluded that search of Ochoa’s vehicle, that led to the discovery of

his cell phone was lawful. The court reasoned that the agents would have inevitably discovered Ochoa's cell phone pursuant to their inventory search of the car.

Click [HERE](#) for the court's opinion.

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*U.S. v. Cavazos*, 2012 U.S. App. LEXIS 1103, January 19, 2012

Federal agents executed a warrant on Cavazos's home between 5:30 a.m. and 6:00 a.m. searching for evidence that he had sent sexually explicit material to a minor female. Approximately fourteen agents and officers entered the residence and handcuffed Cavazos as he was getting out of bed. After the home was secured, agents removed the handcuffs and took Cavazos to a bedroom for an interview. Agents told Cavazos that it was a "non-custodial" interview, that he was free to get something to eat and drink during it, and that he was free to use the bathroom. The agents then began questioning Cavazos without reading him his *Miranda* rights. Cavazos admitted that he had been "sexting" the victim and he described communications he had been having with other minor females.

The court affirmed the trial court and held that Cavazos was subjected to a custodial interrogation when the agents questioned him in his home. As a result, the incriminating statements made by Cavazos were properly suppressed.

A suspect is in custody for *Miranda* purposes when placed under formal arrest or when there is a restraint on his movement to the degree associated with a formal arrest, even when there is no arrest. The key question is under the circumstances, would a reasonable person have felt he was at liberty to terminate the interrogation and leave. Here, the court said no. First, fourteen agents entered Cavazos's home, in the early morning, without his consent. Second, although Cavazos was free to use the bathroom or get a snack, when he did, he was followed by the agents and closely monitored. Third, although Cavazos was allowed to use a telephone to call his brother, the agents had him position the phone so they could listen to the conversation. This indicated the agents' control over Cavazos while implying that he had no privacy.

While the agents told Cavazos the interview was "non-custodial," such a statement made to a reasonable lay-person is not the same as telling him that he can terminate the interrogation and leave. Also, such a statement, made in a person's home does not have the same effect as if the agents had offered to leave at any time upon request.

Click [HERE](#) for the court's opinion.

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## 6<sup>th</sup> Circuit

*U.S. v. Taylor*, 2012 U.S. App. LEXIS 785, January 13, 2012

Officers went to Taylor's house and arrested him and another woman pursuant to valid warrants. During the protective sweep, officers recovered a handgun and bag of marijuana on a dresser and a machine gun in a closet. The officers also recovered a handgun concealed in a couch. Based on these findings, the officers obtained a search warrant and discovered more drugs.

The court held that officers' initial entry into the home was lawful. The officers knocked on the door, which they were entitled to do. After realizing that the woman who answered the door had an active arrest warrant, they lawfully entered the house to arrest her.

The court also held that the officers had conducted a valid protective sweep of the home. The police can search a home pursuant to arresting someone there if there are articulable facts that would warrant a reasonably prudent officer in believing that the area to be swept harbors a person posing a danger to those on the arrest scene. Here, the officers had reason to believe there were more people in the house. Prior to their entry, the officers had seen several people entering the house and earlier surveillance suggested that it had been a hub for a drug trafficking organization. Additionally, during a previous search of the house, officers had discovered guns and the current arrest warrants included charges for weapons violations. Finally, the officers saw other people in the house when they entered. The officers were entitled to sweep the areas where they had seen these people and it was in these areas that the first guns and drugs were found.

Finally, the court held that the search of the couch was reasonable. One of the women in the house told the officers that there was a gun in that location after he directed her to sit there to nurse her baby. Although this search was not part of the protective sweep, it was reasonable for the officer to search this area, before he relinquished control of it to an occupant of the house, and take possession of the gun.

Click [HERE](#) for the court's opinion.

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*U.S. v. Fofana*, 2012 U.S. App. LEXIS 1263, January 24, 2012

During a search of Fofana's personal items at the airport, TSA officials found three passports bearing Fofana's photo but different names. One of the passports contained Fofana's picture and the name Ousamane Diallo. At this point, the government was already involved in a bank fraud investigation in which identification bearing Diallo's name was used to open two bank accounts. Investigators were now able to connect Fofana to these bank accounts.

The government indicted Fofana on three counts of possession of a false passport and two counts of bank fraud. The trial court held that the TSA officials' search of Fofana's belongings at the airport was unlawful and suppressed the three passports. The government dismissed the possession of false passport charges but elected to go forward with the bank fraud charges.

Fofana argued that the government be precluded from introducing bank account records in the name of Ousamane Diallo as fruits of the unlawful airport search. The trial court agreed, holding that the government had not established that the connection of Fofana to his alias, Diallo, would have been made through an independent source or through inevitable discovery.

The court of appeals disagreed. First, the bank records at issue were already in the government's possession and had been obtained independently of the airport search. These records included at least one photograph of Fofana that could link him to the bank accounts once his identity was known. The court held that the bank records did not need to be suppressed just because their relevance or usefulness became apparent as a result of the unlawful airport search.

Second, the unlawful airport search was not directed to the crime of bank fraud, for which the discovered information turned out to be useful, therefore, eliminating much of the deterrent effect of suppression in this case.

Third, a more direct and effective way to deter unlawful searches is to exclude the items that are actually discovered during the search. Here, the government was not permitted to use the passports as evidence.

Finally, exclusion of the bank records in this case would burden the truth-seeking function of the court. Once the investigators learned who “Diallo” really was, it would be extremely difficult for them to identify him without using information obtained because of the unlawful search.

Click [HERE](#) for the court’s opinion.

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## 8<sup>th</sup> Circuit

*U.S. v. Houston*, 2012 U.S. App. LEXIS 596, January 11, 2012

Houston’s niece told her mother that Houston, who lived in South Dakota, had molested her six years earlier in Wisconsin. State police in South Dakota seized Houston’s computer pursuant to a South Dakota state search warrant. An investigator from Wisconsin obtained a warrant from a Wisconsin state magistrate to search the seized computers for evidence relating to sexual assault and possession of child pornography in violation of Wisconsin statutes. During this search, investigators found several hundred images of child pornography. Based on this evidence, the federal government charged Houston, in South Dakota, with possession of child pornography in violation of federal law.

Houston argued that the search warrant issued in Wisconsin was invalid because there was no probable cause to search his computers, located in South Dakota, for child pornography. Houston also argued that the *Leon* good-faith exception to the exclusionary rule should not apply. He claimed the warrant was so obviously deficient that no officer could reasonably presume that it allowed a search of computers seized from South Dakota, for evidence relating to violations of Wisconsin statutes.

Without deciding whether probable cause existed, the court held that the officers in Wisconsin conducted the search of Houston’s computers in good faith. The court stated that an officer aware of Houston’s alleged molestation of his niece and contemporaneous viewing of pictures of naked children in her presence could have reasonably presumed the warrant to search for child pornography on his computer to be valid. The court has previously acknowledged that there is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography. Because the officers acted reasonably in obtaining the search warrant, the court declined to rule on whether the law prohibited a Wisconsin judge from authorizing a search in South Dakota for a violation of Wisconsin law.

Click [HERE](#) for the court’s opinion.

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***Bernini v. City of St. Paul***, 2012 U.S. App. LEXIS 781, January 13, 2012

On the first day of the Republican National Convention in 2008 in St. Paul, crowds of protestors broke windows, threw objects at cars and buses and vandalized police cars. After marches with permits had ended, the police ordered that no one be allowed to enter the downtown area so a law enforcement presence could be reestablished around the convention site. Officers arrested one hundred sixty people who had refused their commands to disperse after they threw rocks and other objects at them.

Thirty-two people filed suit claiming that the officers violated their *Fourth Amendment* rights by conducting mass arrests when they only had probable cause to arrest a smaller number of individuals. The court disagreed, holding that a reasonable officer could have concluded that the entire group was acting together as a whole and that they intended to break through the police line in an attempt to access downtown St. Paul. While the officers arrested one hundred sixty people, they did release approximately two hundred others in an attempt to avoid custodial arrest of innocent bystanders. Even if mistaken, it was objectively reasonable for the officers under the circumstances to believe that the one hundred sixty people were part of the unit that had gathered to enter downtown St. Paul.

The court also held that it was objectively reasonable for the officers to use non-lethal munitions to direct the crowd away from an intersection and toward a park where they could be controlled.

Finally, the court held that the officers did not arrest anyone in retaliation for exercising their *First Amendment* free speech rights. Although the protestors were engaged in protected speech, officers did not arrest anyone until the group moved towards them in a threatening manner and began to block traffic along a major roadway. The group's conduct, not the protected speech, motivated the officers' actions.

Click [HERE](#) for the court's opinion.

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***U.S. v. Dunning***, 2012 U.S. App. LEXIS 1510, January 27, 2012

Officers arrested Adam Henderson after employees of a vacation lodge discovered that he had rented one of their cabins using stolen credit card information. A red Ford pick-up truck was listed on the registration card along with a second occupant named "Dennis." A lodge employee changed the electronic key card lock for Cabin 618 and an officer kept it under surveillance while other officers obtained a search warrant

During this time, the officer saw a red Ford pick-up truck park outside Cabin 618. A person got out carrying a bag over his shoulder and tried to use his key card to enter the cabin. When it did not work, he called out for "Adam." The officer approached the person and asked him to accompany him to an adjacent cabin. Once at the cabin the person identified himself as "Dennis." Dennis gave the officer consent to search and the officer found illegal drugs on his person. The officer saw more illegal drugs in plain view in an open pocket on the bag. Dunning argued that the officer had unlawfully detained him; therefore, the evidence seized from his person, the bag and later from his truck should have been suppressed.

The court disagreed, holding that the officer had reasonable suspicion to conduct a *Terry* stop of Dunning. The officer knew that two men were staying at the cabin where other officers had

found evidence of criminal activity. One of the occupants, named Adam, had used a false name to rent the cabin. A red Ford pick-up truck was listed as the vehicle the occupants drove. When Dunning approached the cabin he was driving a red Ford pick-up truck and when his key card did not work to open the door, he called out for “Adam.” Finally, when the officer confronted him, Dunning stated that his first name was “Dennis,” the name of the other occupant on the registration card.

The court also held that Dunning voluntarily consented to the search of his person. Dunning appeared to have normal mental ability and while he smelled of marijuana, he did not appear to be under the influence of drugs. The time the officer detained Dunning until the time he obtained consent was less than five minutes, the officer did not threaten or intimidate him, and Dunning did not object to the search.

Click [HERE](#) for the court’s opinion.

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## 9<sup>th</sup> Circuit

*U.S. v. Russell*, 2012 U.S. App. LEXIS 131, January 5, 2012

An officer working with a narcotics task force at the Seattle-Tacoma International Airport suspected that Russell might be a drug courier. The officer approached Russell, identified himself as a police officer investigating narcotics and told him that he was free to go and that he was not under arrest. The officer then asked Russell for consent to search his bag and his person. Russell consented and spread his arms and legs to facilitate the search. While searching Russell’s groin area the officer felt something hard and unnatural. The officer arrested Russell. The entire search occurred outside Russell’s clothing and the officer never patted or reached inside the pants. The officer later discovered 700 Oxycodone pills in Russell’s underwear.

The court held that Russell voluntarily consented to the search of his person and that the officer’s full-body pat-down, including the groin area outside Russell’s pants, was reasonable and did not exceed his consent.

The officer specifically told Russell that he was looking for narcotics. After consenting to the search, Russell cooperated with the officer by lifting his arms and spreading his legs. Russell could have objected and revoked his consent before the officer began his search or any time after the officer had begun his search. Additionally, it would be reasonable for a person in Russell’s position to understand that a search for drugs would include a pat-down of all areas of the body, including the groin area.

The 11<sup>th</sup> and District of Columbia Circuit Courts of Appeal agree.

Click [HERE](#) for the court’s opinion.

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## 10<sup>th</sup> Circuit

*U.S. v. Ruiz*, 2012 U.S. App. LEXIS 473, January 10, 2012

Ruiz flew a rented airplane to a small airport in Kansas. At the airport, Ruiz paid cash for fuel and for storing the plane overnight in a hangar. The hangar was secure but it contained airplanes belonging to other customers.

During Ruiz's flight, the Air and Marine Operations Center (AMOC) became suspicious because Ruiz had not filed a flight plan and an aircraft carrying drugs had landed at that airport six months earlier. The AMOC contacted an agent with Immigration and Customs Enforcement who arranged for local law enforcement officers to bring a drug detecting dog to the hangar. Once at the hangar, officers walked a certified drug dog around Ruiz's airplane and the dog alerted several times to the presence of narcotics. Officers obtained a search warrant for the airplane and discovered a suitcase containing twenty-eight kilograms of cocaine.

The court agreed with the Sixth Circuit Court of Appeals, holding that Ruiz had no objectively reasonable expectation of privacy in the airplane hangar. Here, the owner of the airport maintained control over the hangar at all times. The hangar stored aircraft and equipment belonging to the owner and other customers and Ruiz had no access to it after business hours. Even if Ruiz had a subjective expectation of privacy in the hangar, it was not an objectively reasonable one.

Additionally, Ruiz argued that the search warrant affidavit improperly omitted the fact that the drug dog had falsely alerted his handler to the presence of drugs on three of his last ten sniffs.

The court disagreed. Generally, a search warrant based on a narcotics canine alert will be sufficient on its face if the affidavit states that the dog is trained and certified to detect narcotics. The court does not require the affiant to include a complete history of a drug dog's reliability beyond the statement that the dog has been trained and certified to detect drugs. Here, it was established that the drug dog was certified to detect heroin, cocaine methamphetamine and marijuana by the State of Oklahoma and by the National Narcotic Detector Dog Association.

Ruiz also contested an unrelated search of a rental home in which police officers found cocaine. Ruiz sent the owner a letter stating that he would no longer need to rent the house. The owner entered the house and called the police after he found several thousand dollars in the bathroom. Officers saw what appeared to be kilo packages of cocaine on a rafter in the basement ceiling. The officers stopped their search and obtained a search warrant.

The court held that the officers' warrantless entry and initial search of the rental home was valid. When Ruiz sent the owner the letter terminating the lease, he effectively abandoned the rental house and any reasonable expectation of privacy he had in it when the police searched it at the request of the owner.

Click [HERE](#) for the court's opinion.

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## 11<sup>th</sup> Circuit

*U.S. v. Miranda*, 2012 U.S. App. LEXIS 501, January 10, 2012

Miranda gave two undercover police officers fifty grams of heroin in exchange for seven firearms. After Miranda placed the bag containing the firearms in his vehicle, federal agents arrested him. The government indicted Miranda for five offenses, including possession of a firearm in furtherance of a drug trafficking crime in violation of *Title 18 U.S.C. § 924(c)(1)(A)*.

Miranda argued that his “passive receipt” of firearms did not further a drug trafficking offense.

The court disagreed. The court held that bartering drugs to acquire firearms constitutes “possession in furtherance of” a drug trafficking crime.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> Circuits agree.

Click [HERE](#) for the court’s opinion.

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*Terrell v. Smith*, 2012 U.S. LEXIS 1689 January 30, 2012

Officers in an unmarked police car requested that officers in a marked police cruiser “check out” a car that had been driving down the street in the middle of the night without headlights. Two officers approached the car, which was now parked. The officers ordered the driver and passenger out of the car and they complied. The driver, Aaron Zylstra, acted as if he was going to kneel down, but instead he turned and jumped back into the car. Officer Smith ran after Zylstra and placed himself in the open doorway of the car. As Zylstra attempted to make a U-turn in Smith’s direction, Smith ran alongside the car as it moved forward. Smith repeatedly warned Zylstra to stop the car but Zylstra turned the car causing the door and frame to strike Smith. After multiple warnings, Smith fired two shots, killing Zylstra.

Zylstra’s family claimed that Officer Smith used excessive force against him in violation of the *Fourth Amendment* and brought suit under *Title 42 U.S.C. § 1983*.

The court held that Officer Smith was entitled to qualified immunity. First, Officer Smith was justified in stopping Zylstra’s car in order to write a traffic citation for driving at night without lit headlights. Second, Officer Smith was permitted to ask for identification and order the driver and passenger out of the car. Finally, under the circumstances that developed, it was objectively reasonable for Officer Smith to use deadly force.

The Eleventh Circuit has consistently upheld an officer’s use of force and granted qualified immunity in cases where the decedent used or threatened to use his car as a weapon to endanger officers or civilians immediately preceding the officer’s use of deadly force. Here, Officer Smith pursued Zylstra in order to arrest him and clearly instructed him to stop the car. Instead of complying with Smith’s orders, Zylstra attempted to turn the car in a manner that caused it to strike the officer. Officer Smith was forced to make a split-second decision concerning whether the use of lethal force was necessary. In addition to himself, two other people were within a few feet of the moving vehicle as these rapidly unfolding and uncontrolled events transpired. Officer Smith’s actions were reasonable and did not violate Zylstra’s *Fourth Amendment* rights.

Click [HERE](#) for the court’s opinion.

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