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EDITOR'S COMMENTS

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THE SCOPE OF A SEARCH INCIDENT TO ARREST IN A VEHICLE THAT DOES NOT HAVE A TRADITIONAL"TRUNK"

Bryan R. Lemons
Branch Chief

I. INTRODUCTION

It has long been recognized that a search conducted incident to a lawful custodial arrest "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."[1] In the 1969 case of *Chimel v. California,*[2] the Supreme Court outlined the permissible scope of a search incident to arrest, holding "[t]here is ample justification ... for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[3] Unfortunately, "[w]hile the *Chimel* case established that a search incident to arrest may not stray beyond the area *within the immediate control of the arrestee*,"[4] defining exactly what was meant by that phrase was problematic, especially when dealing with vehicles. Twelve years after *Chimel* was decided, the Supreme Court addressed "the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants" in *New York v. Belton*.[5]

In *Belton*, the Supreme Court established the following bright-line rule for the scope of a search incident to arrest of an occupant of a vehicle: "When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[6] Further, law enforcement officers "may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."[7] A "container" was defined in *Belton* as "any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like."[8] While this definition did not expressly address "locked" containers, several subsequent federal cases can be interpreted as including locked containers within the scope of a lawful search incident to arrest.[9] The "bright-line" rule formulated in *Belton* was based on the "generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach

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[1] *United States v. Robinson*, 414 U.S. 218, 235 (1973)
[2] 395 U.S. 752 (1969)
[3] *Id*. at 762-763
[4] *New York v. Belton*, 453 U.S. 454, 460 (1981)(emphasis added)
[5] *Id*.
[6] *Id*. at 460
[7] *Id*. (citation omitted)(footnote omitted)
[8] *Id*. at 453 U.S. at 461 n4
[9] *See Knowles v. Iowa*, 525 U.S. 113 (1998) (Law enforcement officers may "even conduct a full search of the passenger compartment, including *any* containers therein, pursuant to a custodial arrest")(emphasis added); *United States v. Tavolacci*, 895 F.2d 1423, 1428 (D.C. Cir. 1990)(locked bag); *United States v. Gonzalez*, 71 F.3d 819, 825-26 (11th Cir. 1996)(*Belton* rule allowed searches of glove boxes, locked or unlocked); *United States v. Valiant*, 873 F.2d 205, 206 (8th Cir. 1989)(noting that, "because the locked briefcase was a closed container within that vehicle, it lawfully could be searched" incident to arrest of occupant); and *United States v. Woody*, 55 F.3d 1257, 1269-70 (7th Cir. 1995)(search of locked glove box reasonable during search incident to arrest)

in order to grab a weapon or [evidence]."[10] Based on this same rationale, the trunk of a vehicle is not considered to be within the immediate control of an arrestee and cannot be searched during a search incident to arrest.[11]

II. THE SCOPE OF A SEARCH INCIDENT TO ARREST WHEN THE VEHICLE DOES NOT HAVE A TRUNK

While *Belton* appeared to answer any questions regarding the proper scope of a search incident to the arrest of the occupant of a vehicle, one question was not directly addressed: What about vehicles which do not have a "trunk?" What is the proper scope of a search incident to arrest when the arrestee is driving a van, a vehicle with a hatchback, a station wagon, or a sport-utility vehicle? None of these vehicles has a trunk (at least in the traditional sense), so determining the exact scope of the "passenger compartment" becomes more difficult. Here is how various courts have addressed this issue.

A. VANS

The issue of where within a van law enforcement officers may conduct a search incident to arrest has been considered in only a few cases. The Tenth Circuit Court of Appeals has twice addressed the issue, first in *United States v. Lacey*[12] and then in *United States v. Green*.[13] In both cases, the defendants were arrested while driving vans. In both cases, the court upheld full searches of the interiors of the vans as incident to the defendants' arrests. In *Lacey*, the court held that "because the agents in [the] case effectuated a lawful arrest of Lacey, no warrant was required … to contemporaneously search the passenger compartment of his van."[14] Likewise, in *Green*, the court ruled that, because the arrest of the defendant was lawful, "the arresting officers were entitled to search the passenger compartment of Green's [van] incident to his arrest."[15]

The issue of the proper scope of a search incident to arrest in a van was also addressed by a New York District Court in *United States v. Nunez*.[16] Citing *Belton*, the court held that "the scope of the search, which included the entire interior of the van, was within permissible limits because the entire interior of the van was accessible to the occupants without their having to exit the vehicle."[17]

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[10] *Belton*, 453 U.S. at 460 (internal quotation marks and citation omitted).
[11] *Id*. at 461 n.4 ("Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk"). *See also United States v. Thompson*, 906 F.2d 1292, 1298 (8th Cir.), *cert. denied*, 498 U.S. 989 (1990); *United States v. Hernandez*, 901 F.2d 1217, 1220 (5th Cir. 1990); *United States v. Schechter*, 717 F.2d 864, 868 (3rd Cir. 1983); *United States v. Freire*, 710 F.2d 1515, 1521 (11th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); and *United States v. Wright*, 932 F.2d 868, 878 (10th Cir. 1991)
[12] 86 F.3d 956 (10th Cir.), *cert. denied*, 519 U.S. 944 (1996)
[13] 178 F.3d 1099 (10th Cir. 1999)
[14] *Lacey*, 86 F.3d at 971
[15] *Green*, 178 F.3d at 1107
[16] 1999 U.S. Dist. LEXIS 6877 (S.D.N.Y. 1999)
[17] *Id*. at *6

B. HATCHBACKS / STATION WAGONS

"A long line of cases … has clearly established that police officers may search hatchback … areas in vehicles without a 'trunk' (in the traditional sense) as constituting part of the passenger compartment for purposes of search incident to arrest."[18] Typical of these cases is *United States v. Doward*,[19] where the defendant was stopped for making an illegal turn while driving a Ford Mustang. When the officers discovered there was an outstanding warrant for the defendant, he was arrested and the vehicle was searched. The hatchback, accessible from the back seat, contained two partially zipped suitcases. Searches of those suitcases uncovered handguns that were illegal for the defendant to possess based upon a previous felony conviction. On appeal, the defendant claimed the search was impermissible because the hatchback was "more akin to an automobile trunk, which *Belton* was careful to differentiate from the 'passenger compartment.'"[20] The defendant also claimed that the hatchback "had large interior dimensions which would make it impossible to reach into the hatch area from his position in the front seat."[21] The First Circuit Court of Appeals rejected both arguments, concluding that "*Belton* ummistakably foreclose[d] … inquiries on actual 'reachability.'"[22] According to the court, the only question that must be addressed in these situations is whether "the area to be searched is generally reachable without exiting the vehicle, without regard to the likelihood in the particular case that such a reaching was possible."[23] In this case, the hatch area of the vehicle "unlike a trunk, generally is accessible from within the passenger compartment."[24] For this reason, the search was permissible under *Belton*.

Other cases that have found the hatchback area to be part of the passenger compartment include *United States v. Russell*,[25] in which the District of Columbia Circuit Court of Appeals held that "a hatchback reachable without exiting the vehicle properly ranks as part of the interior or passenger compartment,"[26] and *United States v. Rojo-Alvarez*,[27] where the court found the search of a hatch area lawful under *Belton* because the hatch area was "within the defendant's reach."[28]

Finally, in *United States v. Pino*,[29] the Sixth Circuit Court of Appeals dealt with the proper area of a search incident to arrest in a station wagon. Analogizing this situation to one in which a vehicle has a hatchback, the court found that "the rear section of a mid-sized station wagon" fell within the "passenger compartment" of the vehicle, because the area was "reachable without exiting the vehicle."[30] Thus, the rear section of the wagon was subject to search under *Belton.*

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[18] *United States v. Olguin-Rivera*, 168 F.3d 1203, 1205 (10th Cir. 1999)(footnote omitted)
[19] 41 F.3d 789 (1st Cir. 1994), *cert. denied*, 514 U.S. 1074 (1995)
[20] *Id*. at 793-794 (citation omitted)
[21] *Id*. at 794
[22] *Id*.
[23] *Id*. (internal quotation marks and citation omitted)
[24] *Id*.
[25] 670 F.2d 323 (D.C. Cir.), *cert. denied*, 457 U.S. 1108 (1982)
[26] *Id*. at 327
[27] 944 F.2d 959 (1st Cir. 1991)
[28] *Id*. at 970
[29] 855 F.2d 357 (6th Cir. 1988)
[30] *Id*. at 364

C. SPORT UTILITY VEHICLES

In *United States v. Olguin-Rivera*,[31] the Tenth Circuit Court of Appeals addressed the scope of a search incident to arrest in a sport-utility vehicle (SUV). Specifically, the defendant was a passenger in an SUV being driven by another man. After being stopped for a possible traffic violation, the driver of the SUV was arrested for failing to produce a driver's license. The officers began searching the interior of the vehicle, which had a "built-in, vinyl cover pulled over the top."[32] According to evidence presented at the suppression hearing:

> the vinyl cover operated much like a rolling window shade that could be extended over the top of the cargo and then retracted when not in use. This particular cover was drawn from the front of the cargo area near the back of the passenger seat and latched at the back of the vehicle near the tailgate.[33]

Two large bags were found after the tailgate was opened. The defendant admitted they were his and that marijuana was inside. The defendant was arrested and a search of the bags revealed 118 pounds of marijuana. The District Court suppressed the evidence found during the search of the covered area, holding the "rear compartment of the sport-utility vehicle created the 'functional equivalent of the trunk of an automobile,' and therefore caused the [officers] search to 'exceed the proper scope' of an automobile search incident to arrest."[34] On appeal, the Tenth Circuit Court of Appeals reversed.

Initially, the court reiterated the rule outlined in *Belton* that the trunk of an automobile is beyond the permissible scope of a search incident to arrest. However, the court noted a "long line of cases" dealing with vehicles without "trunks" that found those areas to be encompassed within the passenger compartment of the automobile. Finding the reasoning of those cases persuasive, the court held "the extension of the built-in, vinyl cover over the top of the cargo area simply [did] not make it tantamount to a trunk for search and seizure purposes."[35] The court's rationale was threefold. First, "trunks are inaccessible from the passenger compartment, whereas the cargo area in the vehicle in this case, whether covered or not, [was] still accessible to the vehicle's occupants."[36] Second, consistency in interpreting the Supreme Court's decision in *Belton* required finding the cargo area within the passenger compartment. *Belton* allows law enforcement officers to search containers found in the passenger compartment incident to arrest. "The search of a closed container within the passenger compartment is so closely analogous to looking under a covered area of the passenger compartment" that these areas must be treated "the same for purpose of search incident to arrest."[37] Finally, the need for a clear, "bright-line" standard was necessary, because "both law enforcement and private citizens benefit from clear rules in the context of search and seizure."[38] Based on these rationales, the court held "officers may search the entire passenger compartment, including the interior cargo or luggage area, of sport-utility vehicles or similarly configured

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[31] *Olguin-Rivera*, *supra* note 18
[32] *Id*. at 1204
[33] *Id*.
[34] *Id*.
[35] *Id*. at 1206
[36] *Id*.
[37] *Id*.
[38] *Id*.

automobiles, whether covered or uncovered."[39]

Similarly, in *United States v. Henning*,[40] a full search of the interior of a Chevrolet Suburban was found to be Constitutional under *Belton*. According to the court, "where … the vehicle contains no trunk, the entire inside of the vehicle constitutes the passenger compartment and may be lawfully searched."[41]

III. CONCLUSION

When the occupant of a vehicle is arrested, law enforcement officers may conduct a search incident to arrest of the person, the passenger compartment of the vehicle, and all containers found within the passenger compartment. A vehicle's trunk is beyond the permissible scope of a search incident to arrest. In vehicles that do not have a traditional "trunk," the question of what constitutes the "passenger compartment" of a vehicle has been addressed in various contexts, including when the vehicle is a van, a hatchback, a station wagon, and a sport-utility vehicle. Courts have consistently defined the "passenger compartment" of a vehicle "as including all space reachable without exiting the vehicle, excluding areas that would require dismantling the vehicle."[42] Thus, a search of these areas incident to the arrest of an occupant is permissible.

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[39] *Id*. at 1207
[40] 906 F.2d 1392 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991)
[41] *United States v. Henning*, 906 F.2d 1392, 1396 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991)
[42] *Pino*, 855 F.2d at 364 (internal quotation marks and citation omitted); *see also Thompson*, 906 F.2d at 1298 ("'Passenger compartment' has been interpreted broadly by most courts following the Supreme Court's decision in *Belton* and generally includes whatever area is within a passenger's reach.")

CASE BRIEFS
UNITED STATES SUPREME COURT
and CIRCUIT COURT UPDATES

SUPREME COURT

U. S. v. Banks
124 S. Ct. 521
December 2, 2003

SUMMARY: After knocking and announcing as required by 18 USC §3109, in the face of silence, officers must wait a "reasonable" time before using force to gain entry. What is "reasonable" depends upon the totality of the facts and circumstances of each situation. There is no "formula for determining reasonableness."

FACTS: Law enforcement officers went to the defendant's apartment around 2 P.M. with a search warrant for cocaine. It was unclear whether anyone was home. The officers called out "police, search warrant" and knocked on the front door loudly enough to be heard by officers at the back door. The officers waited fifteen to twenty seconds and did not obtain a response. They then broke open the door. The defendant was in the shower and later testified that he heard nothing until the breaking of the front door.

ISSUE: Did the law enforcement officers wait a reasonable amount of time before forcing entry into the home?

HELD: Yes.

DISCUSSION: A reasonable amount of time is determined by a "totality of the circumstances." "We have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." There is "no formula for determining reasonableness." Each case must be decided "on its own facts and circumstances."

The Court determined that, under the facts of this case, the officers' actions of waiting fifteen to twenty seconds before using force was reasonable. The fact that the defendant was in the shower was unknown to the officers. Therefore, the Court could not use that fact in judging the length of a reasonable amount of time. The Court also noted that in this case the crucial timeframe is not the time it would take a defendant to open the door but rather the time it would take to destroy evidence. After fifteen to twenty seconds, an exigency existed and the officers were then justified in using force to gain entry.

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Maryland v. Pringle
124 S. Ct. 795
December 15, 2003

SUMMARY: Probable cause is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." Probable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules. To determine if probable cause exists, examine the facts and decide whether an objectively reasonable officer would reach that conclusion.

FACTS: A police officer lawfully stopped the operator and two passengers of a vehicle for speeding. He asked the operator of the vehicle for the registration. When the operator opened the glove compartment, the officer saw a large sum of rolled-up money concealed inside. The officer asked for and received consent to search the vehicle for narcotics. He retrieved $763.00 of rolled-up cash from the glove compartment and five small bags of cocaine in the back-seat armrest area. All three men denied ownership of the cocaine and the money. The officer arrested each of them.

ISSUE: Did the officer have probable cause to arrest each of the occupants of the vehicle without having specific knowledge that linked any of them to possession of the evidence?

HELD: Yes.

DISCUSSION: The Court reaffirmed its position by stating probable cause is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances". Based on the facts in this case, the Court found it a reasonable inference "that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine." Therefore, the officer had probable cause to believe that all the defendants committed the crime.

The defendant and his two associates were in a relatively small automobile, not a public place. It was reasonable of the officer to suspect a common enterprise among the three men. Also, the quantity of drugs and cash found indicate a likelihood of drug dealing, an activity which a dealer would be unlikely to conduct in front of an innocent party. Therefore, the Court concluded that probable cause existed to arrest all three suspects.

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Illinois v. Lidster
2004 U.S. LEXIS 656
January 13, 2004

SUMMARY: Stopping a motorist at a highway checkpoint is a "seizure" in Fourth Amendment terms. Special law enforcement concerns will sometimes justify highway stops without individualized suspicion. In judging reasonableness of a highway checkpoint stop, the Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

FACTS: Police set up a highway checkpoint to obtain information from motorists about a hit-and-run accident occurring about one week earlier at the same location and at the same time of night. Officers stopped each vehicle for 10 to 15 seconds, asked the occupants whether they had seen anything happen there the previous weekend, and handed each driver a flyer describing and requesting information about the accident. As Lidster approached, his minivan swerved, nearly hitting an officer. The officer smelled alcohol on Lidster's breath. Another officer administered a sobriety test and then arrested Lidster. He was convicted in Illinois state court of driving under the influence of alcohol.

ISSUE: Is it unconstitutional for the police to set up a highway checkpoint to solicit information and assistance regarding an earlier crime, making it unlawful to stop a motorist, absent individualized suspicion?

HELD: No.

DISCUSSION: Stopping a motorist at a highway checkpoint is a "seizure" in Fourth Amendment terms. In *Indianapolis v. Edmond*, 531 U.S. 32 (2003), the Court held that, absent special circumstances, the Fourth Amendment forbids police to make stops without individualized suspicion at a checkpoint set up primarily for general "crime control" purposes. Specifically, the checkpoint in *Edmond* was designed to ferret out drug crimes committed by the motorists themselves. In this case, the stop's primary law enforcement purpose was ***not*** to determine whether a vehicle's occupants were committing a crime, but to ask the occupants, as members of the public, for help in providing information about a crime in all likelihood committed by others.

The Fourth Amendment does not treat a motorist's car as his castle, and special law enforcement concerns will sometimes justify highway stops without individualized suspicion. "Information-seeking" highway stops are less likely to provoke anxiety or to prove intrusive, since they are likely brief, the questions asked are not designed to elicit self-incriminating information, and citizens will often react positively when police ask for help.

This checkpoint stop was constitutional. In judging its reasonableness, the Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." The relevant public concern was grave, as the police were investigating a crime that had resulted in a human death, and the stop advanced this concern to a significant degree given its timing and location. Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line and contact with police for only a few seconds. Viewed subjectively, the systematic contact provided little reason for anxiety or alarm, and there is no allegation that the police acted in a discriminatory or otherwise unlawful manner.

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Fellers v. U.S.
No. 02-6320
January 26, 2004

SUMMARY: "Deliberately eliciting" incriminating statements from an indicted defendant outside the presence of counsel without a waiver of counsel is a Sixth Amendment violation.

FACTS: Police officers went to Fellers' home and told him that they had come to discuss his involvement in a drug distribution ring. The officers also told Fellers that a grand jury had indicted him for conspiracy to distribute methamphetamine and that they had a warrant for his arrest. During a brief discussion Fellers made incriminating statements to the officers. Officers transported Fellers to jail and then advised him of his *Miranda* rights for the first time. Fellers signed a waiver of those rights and repeated his earlier statements to the police. At trial Fellers moved to suppress the incriminating statements he made to the police at his home and later at the jail. The trial court suppressed the statements Fellers made to the police at his home because of a Fifth Amendment *Miranda* violation. The court concluded that Fellers was in custody when he made the incriminating statements, and that the officers used "deceptive stratagems" to prompt him into giving those statements without having first advised Fellers of his *Miranda* rights. The trial court, however, admitted the statements Fellers made to the officers at the jail pursuant to *Oregon v. Elstad*, 470 U.S. 298 (1985), concluding that Fellers had knowingly and voluntarily waived his *Miranda* rights before making the incriminating statements; therefore, any taint from the earlier unwarned statements was removed. After he was convicted Fellers appealed, arguing that the statements he made to the officers at the jail should have been suppressed as fruits of the statements previously obtained at his home in violation of his Sixth Amendment right to counsel, and not under the standard set forth in *Elstad* for Fifth Amendment *Miranda* violations. The court of appeals held that his statements given to the officers at the jail were properly admitted under the guidelines set forth in *Elstad,* and that the officers had not violated his Sixth Amendment right to counsel because they did not "interrogate" him at his home.

ISSUES: 1. Did the officers violate Fellers' Sixth Amendment right to counsel when, after he was indicted, they discussed with him his involvement in methamphetamine distribution without first getting a waiver of his right to have counsel present?

2. Does the Sixth Amendment require suppression of incriminating statements if they are the fruits of previous questioning conducted in violation of the Sixth Amendment?

HELD: 1. Yes.

2. Undecided.

DISCUSSION: An individual's Sixth Amendment right to counsel is triggered once he has been indicted. Officers may approach and interview an indicted defendant, without counsel present, if the defendant waives that right. Advising the defendant of his *Miranda* rights can be used for this purpose. A violation of a defendant's Sixth Amendment right to counsel occurs when officers "deliberately elicit" incriminating statements from an indicted defendant, which are later used against him at trial, without first obtaining a waiver of the right to counsel.

The Eighth Circuit Court of Appeals held that Fellers' incriminating statements made at his home were properly suppressed because of a Fifth (not Sixth) Amendment *Miranda* violation. The court held, however, that the incriminating statements made at the jail were properly admitted pursuant to *Oregon v. Elstad,* 470 U.S. 298 (1985), because the officers advised Fellers of his *Miranda* rights which he knowingly and voluntarily waived before making those statements.

The Supreme Court reversed the Eighth Circuit. If officers "deliberately elicit" incriminating statements from an indicted defendant without a waiver of counsel there is a Sixth Amendment violation. There was no question that the officers deliberately elicited information from Fellers. Because this discussion took place after Fellers had been indicted, outside the presence of counsel, and without any waiver of Fellers' right to counsel, the officers' actions violated the Sixth Amendment.

The Court of Appeals had not addressed the question of whether the earlier Sixth Amendment violation requires suppression of Fellers' written, jailhouse statement as the fruit of a poisonous tree. Therefore, the case was sent back to the Court of Appeals to rule on this specific issue.

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2nd CIRCUIT

U. S. v. Kavoukian
2003 U.S. App. LEXIS 24309
December 3, 2003

SUMMARY: A defendant can be convicted of possessing or making a firearm silencer even where there is no evidence that he knew from experience that the device actually functions.

FACTS: Kavoukian frequently spoke to his friends of his intent to make a silencer. He made a device from materials he purchased at Home Depot. When tested by agents from the Bureau of Alcohol Tobacco and Firearms, the device proved capable of reducing the volume of a shot fired from a 22-caliber firearm by about 3.2 decibels. The silencer did not fit onto any of the firearms Kavoukian possessed, and it had not been used before ATF tested it.

ISSUE: Can a defendant can be convicted of possessing a firearm silencer where there is no evidence that he knew from experience the device actually functions?

HELD**:** Yes.

DISCUSSION: The government had to prove beyond a reasonable doubt that the device possessed the characteristics that make it a silencer, and that the defendant knew the device had those characteristics. The tests performed by the ATF agents proved the device possessed the characteristics of a silencer. Knowledge can be inferred from circumstantial evidence. Knowledge by the defendant that the device had those characteristics was shown by the defendant frequently telling his friends of his intent to make a silencer. It was not necessary to prove that the defendant had ever fired a firearm using the silencer or that he had tested the silencer.

3rd CIRCUIT

Renda v. King
347 F.3d 550
October 16, 2003

SUMMARY: Failing to provide *Miranda* warnings during a custodial interrogation cannot be the basis of a 42 U.S.C. §1983 lawsuit.

FACTS: During a telephone call with police, Renda accused her boyfriend of physical abuse. At 2:30 a.m., despite being told that Renda did not want to press charges or be bothered about it, Pennsylvania State Troopers King and Kelsey interviewed Renda in-person at her friend's apartment. They did not provide *Miranda* warnings to her. The written statement she gave them did not mention the assault that she reported earlier that evening. When asked, Renda told the Troopers that she had lied about it. Trooper King thereafter charged Renda with giving false reports to law enforcement authorities.

The state court suppressed Renda's statements because the Troopers had not provided her with *Miranda* warnings prior to what it determined to be a custodial interrogation. The case against her was dismissed by the District Attorney because of the evidence problems. Renda filed a §1983 lawsuit against the two Troopers alleging several Constitutional violations, including her Fifth Amendment right against self-incrimination for failure to give *Miranda* warnings. The District Court granted summary judgment to the Troopers on the *Miranda* claim.

ISSUE: Can failing to provide *Miranda* warnings during a custodial interrogation be the basis of a 42 U.S.C. §1983 lawsuit?

HELD: No.

DISCUSSION: In *Miranda*, the Supreme Court held that the Self-Incrimination Clause of the Fifth Amendment prohibits a prosecutor from using statements, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination, i.e., *Miranda* warnings. A plaintiff may not base a § 1983 claim on the mere fact that the police questioned the plaintiff in custody without providing *Miranda* warnings where there is no claim that the statements obtained in violation of *Miranda* were used against the plaintiff. The right protected under the Fifth Amendment is the right not to be compelled to be a witness against oneself in a criminal prosecution, whereas the right to counsel during custodial interrogation recognized in *Miranda* is merely a procedural safeguard, and not a substantive right. Violations of the prophylactic *Miranda* procedures do not amount to violations of the Constitution itself.

In *Chavez v. Martinez*, 538 U.S. 760 (2003), six Justices (Chief Justice Rehnquist, together with Justices Thomas, O'Connor, Scalia, Souter, and Breyer) agreed that mere custodial interrogation absent *Miranda* warnings is not a basis for a § 1983 claim.

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U. S. v. Lawrence
349 F.3d 109
November 13, 2003

SUMMARY: Police photo array was not unduly suggestive and prejudicial so as to require suppression or disallowance of subsequent in-court identifications.

The exemption for antique firearms is an affirmative defense that must be raised by a defendant and supported by some evidence before the government has to prove the contrary beyond a reasonable doubt. The evidence was sufficient to establish that the weapon involved was a "firearm" for purposes of 18 U.S.C. §§ 922 and 924.

FACTS: Hodge ("victim") was shot in a bar in St. Thomas. Sitting nearby was Harrigan who saw a man he knew pull out a gun, shoot the victim, and run away. Frederiksen, who was on a nearby beach, saw a man he knew with a gun and one of the victim's gold necklaces run through some bushes with a stocking cap pulled over his face. The victim told police that the shooter grabbed his gold chain and shot him. However, he gave no description, and said nothing else that was helpful to the investigation.

The policed showed the victim two photo arrays but the victim did not identify the defendant. The victim died. Thereafter, the witnesses were shown a photo array and separately identified the defendant as the shooter. The photo array consisted of six pictures all on the same page. The picture of the defendant differed from the other pictures in the array because (1) it was an informal picture taken by a friend, not a "mug shot"; (2) the defendant wore a gold chain while the others pictured did not; (3) the defendant was the only person not wearing a shirt; and (4) the defendant was pictured with a more pronounced smile than anyone else.

The gun was never recovered. At trial, the government presented expert testimony that bullet casings recovered from the scene of the shooting were from a .38 caliber firearm. On cross-examination, two experts conceded that this type of bullet could have been fired from a firearm that had been manufactured before 1898. The defendant was convicted of first degree murder under Virgin Islands law and several "firearms" violations under federal law.

ISSUES: 1. Was the photo array unduly suggestive and prejudicial requiring it to be suppressed as well as any subsequent in-court identifications by the government witnesses?

2. Was the evidence sufficient to establish that the weapon involved was a "firearm" for purposes of 18 U.S.C. §§ 922 and 924?

HELD: 1. No.

2. Yes.

DISCUSSION: <u>The Identifications</u>

A due process violation can result when an identification procedure is so suggestive that it undermines the reliability of the resulting identification. A photographic array can deny due process when police attempt

to emphasize the photograph of a given suspect, or when the circumstances surrounding the array unduly suggest who an identifying witness should select. Using an array consisting of six photographs reproduced on a single page as opposed to serially presenting individual pictures to witnesses does not prejudice a defendant. To the contrary, showing all of the photographs at once can be a very fair way to proceed depending on all circumstances surrounding the identification.

A witness is less likely to identify a personal photo than one appearing to be a "mug shot" that suggests a prior police record. Although the defendant's photograph may have made it stand out, given the totality of circumstances, due process was not denied because the circumstances establish the reliability of the identifications. Each of the government's witnesses had a clear, unobstructed opportunity to observe the shooting. Harrigan even spoke to the assailant immediately before the shooting. All three witnesses had an opportunity to view the assailant at close range. None of them had any trouble seeing the shooting. There was an adequate opportunity to observe the shooter before any violence that could distract, frighten and compromise their observation. Most importantly, two of the witnesses knew the defendant and had seen him on multiple occasions before the shooting. Given the totality of circumstances, admitting the photographic identifications or allowing the witnesses to identify the defendant in court was proper.

The Evidence Was Sufficient to Prove the Weapon Was a "Firearm"

Section 922 specifically excludes firearms manufactured before 1898 from the definition of "firearms" included under §§ 922 and 924. The exemption for antique firearms contained in §921(a)(16) is an affirmative defense that must be raised by a defendant and supported by some evidence before the government has to prove the contrary beyond a reasonable doubt. Here, the defendant established only the *possibility* that the firearm that was used to kill Hodge could have been manufactured before 1898. Since it was never recovered, there was no way of determining when it was manufactured. Accordingly, the evidence established only that the gun was manufactured at some point before it was used to kill Hodge; hardly a remarkable revelation. However, there was no evidence to suggest the firearm actually was manufactured before 1898. The defense failed to produce sufficient evidence to raise the exception. Accordingly, the evidence was sufficient to sustain his convictions.

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4th CIRCUIT

U. S. v. Jones
2004 U.S. App. LEXIS 1033
January 23, 2004

SUMMARY: Deciding the validity of consent searches of a "container-within-a-container" requires figuring out "what the typical person [would] have understood by the exchange between the officer and the suspect. If the ordinary person would find it reasonable for an officer to assume that the suspect's consent to search an item includes consent to search containers found inside, then evidence within the second container is admissible.

FACTS: In response to a report of drug use in a hotel and after smelling burning marijuana themselves, police knocked on the door and were let in by a person who claimed to have rented two rooms. After the

police told him they were investigating a report of marijuana use, they were given permission to search both rooms.

Officers found an overflowing toilet and what looked like marijuana and cocaine residue on a nearby sink. As one of the officers approached a duffel bag, Jones said, "What you're looking for is in that bag and it's all mine, no one else's, it's all mine." The officer asked Jones, "What am I looking for?" Jones answered, "What's in that bag." The officer then picked up the duffel bag and asked Jones if the bag belonged to him. When Jones claimed ownership of the bag, the officer asked him if he could search it. Jones said, "Sure, go ahead."

The officer found a loaded handgun, a set of keys, and a locked metal box. He opened the locked box with one of the keys and found $7,779 cash, 169.5 grams of cocaine base and 66.9 grams of powder cocaine.

Jones was convicted of drug and weapons offenses and was sentenced to life imprisonment for the drug conviction and a consecutive 5-year sentence for the firearms conviction.

ISSUE: Did Jones' consent to search the duffel bag permit opening and searching the locked box inside it?

HELD: Yes.

DISCUSSION: In deciding whether unlocking and opening the box was within the scope of Jones' consent, the Fourth Circuit relied on the earlier Supreme Court case of *Florida v. Jimeno*, 500 U.S. 248 (1991). Deciding these "container-within-a-container" cases, the Supreme Court said, requires figuring out "what the typical person [would] have understood by the exchange between the officer and the suspect. If the ordinary person would find it reasonable for an officer to assume that the suspect's consent to search an item includes consent to search containers found inside, then evidence within the second container is admissible.

When officers announced they were investigating illegal marijuana use, Jones told them that what they were looking for was inside his duffel bag. He consented to a search of the bag, and when no drugs were found loose in the bag, he failed to limit or withdraw his consent, leaving him little room to argue that he had not consented to opening closed containers found within the duffel bag. Officers unlocked the box while Jones watched silently. As the Fourth Circuit noted, Jones "confirmed the propriety of the search by not objecting to Officer Petty's use of the keys to unlock the box in [accused's] presence."

Jones also argued on appeal that even if officers could assume his general consent included allowing them to open unlocked containers, they could not reasonably assume they could open locked ones. The Fourth Circuit did agree that if the police had broken the locked box open, that would have "likely" been outside the scope of his general consent to search the duffel bag and its contents. But the police used a key to unlock the box that they found in the same duffel bag Jones had already (1) admitted contained "what they were looking for," and (2) consented to their searching.

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5th CIRCUIT

U.S. v. Reyes
349 F.3d 219
October 28, 2003

SUMMARY: The temporary investigative detention by a Border Patrol Agent and his drug dog did not violate the Fourth Amendment because the officer was able to develop reasonable suspicion that the defendant was in possession of illegal narcotics. The agent's request that the defendant empty his pockets and raise his shirt was no more intrusive than a pat down frisk permitted under "Terry".

FACTS: With the consent of the El Expresso Bus Company, U.S. Border Patrol Agent Morales had his trained drug dog search the cargo area of a bus in which Reyes was a passenger. The dog alerted on a blue bag belonging to Reyes' companion. The companion, who admitted he had smoked marijuana earlier that morning, consented to a search, but nothing was found in the bag. When the dog walked past the bus door, it alerted, indicating there were drugs in the passenger compartment. Agent Morales had the driver remove the passengers so the dog could search bus interior. As the passengers got off the bus the dog alerted to Reyes and his companion, alerting only on Reyes when the two were sufficiently separated. The companion again admitted to having smoked marijuana that day. Based on his training that guns were often associated with drugs, the agent asked both to empty their pockets and lift their shirts. Reyes' lifted his shirt revealed a package taped to his back. Reyes took off running and abandoned the package, which was found to contain over 500 grams of cocaine.

ISSUES: 1. Was the bus driver's instruction to the passengers to get off the bus at Agent Morales' request a seizure under the 4th amendment?

2. Did agent Morales' positioning the dogs 5 feet from where Reyes got off the bus constitute an illegal search since the agent had no individualized suspicion that Reyes was involved in any illegal activity?

3. Was asking Reyes to empty his pockets and raise his shirt an unreasonable search?

HELD: 1.Yes.

2. No.

3. No.

DISCUSSION: Having the bus driver instruct the passengers to get off the bus was a seizure. But, Agent Morales had a reasonable suspicion that there were illegal drugs in the passenger compartment and would have been derelict in his duty if he had not searched the bus interior. It is Border patrol policy to have the passengers get off the bus for such a search of the passenger compartment. The court cited "totality of the circumstances" and concern for safety of the passengers to support Morales' decision to follow this policy.

Agent Morales did not have the dog come in contact with or sniff Reyes individually. The dog was waiting to get on the bus after the passengers got off. The dog simply alerted to an odor emanating from Reyes as he passed by. This does not constitute a search.

Agent Morales had reasonable suspicion that Reyes was involved in criminal activity. Agent Morales' reasonable suspicion began building when the dog alerted on the blue bag. It continued to build when the dog tried to go into the passenger compartment, then alerted on Reyes and his companion. The dog then alerted only on Reyes when he was alone. The bus station was 2 blocks form the Mexican border in Brownsville, which was known as a gateway for drug smugglers. All these facts clearly established a reasonable suspicion. The detention of Reyes lasted no longer than necessary to investigate the reasonable suspicion. Furthermore, Agent Morales was clearly justified in his request to have them raise their shirts. Guns are associated with drugs and both men were wearing large jackets which could conceal a weapon. Morales was out numbered 2 to 1 and the stop was conducted at a public bus station crowded with other people. Agent Morales' request to Reyes to empty his pockets and raise his shirt was less intrusive than the "pat down" allowed under the "*Terry* Frisk" doctrine.

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6th CIRCUIT

U. S. v. Herbin
343 F.3d 807
September 15, 2003

SUMMARY: Pretext stops (stops upon a violation of one set of laws e.g., run-of-the-mill traffic laws) in order to subjectively enforce another set of laws (e.g. drug trafficking laws) and subsequent consent searches and seizures are alive and well provided:

1. **The initial stop is a lawful one,**
2. **The detention is objectively reasonable, and**
3. **The consent to search is voluntarily given.**

The subjective intent of the officer is not relevant even if and when they do nothing to pursue the initial reason for the stop.

FACTS: Narcotics detectives driving in unmarked cars were following two vehicles. The first car was driven by Thompson and included Herbin in the passenger seat. The second car was driven by Herbin's brother. The officers had information that Herbin was in the area for the purpose of distributing narcotics. The officers admitted that their primary mission was to pursue a drug-trafficking investigation, not to enforce the traffic laws. During the surveillance, the officers observed both cars run a red light and, later, saw Thompson's car cross the center line twice. When the two cars eventually pulled into a parking lot, the officers activated their lights and initiated a traffic stop.

As the agents approached the cars, Herbin's brother exited the second car as if to flee. The officers drew their weapons and ordered him to stop. One of the officers then reached into Thompson's car through the window and removed the key from the ignition. The officers asked Thompson and Herbin to exit the vehicle and to remain at the scene. They asked Thompson for permission to search her car for contraband.

Thompson consented, and the search revealed a loaded .38 caliber handgun beneath the passenger seat in which Herbin had been sitting.

Although the officer testified that he stopped the vehicle to issue a citation and to determine whether Thompson was intoxicated, the officers never pursued the traffic violations. They did not ask for drivers' licenses, "run the tags on the vehicles," perform any field sobriety tests, or issue any tickets.

Herbin was indicted for felon in possession of a firearm under title 18 U.S.C. § 922 (g).

ISSUE: Since the initial stop was a pretext which the officers never pursued, was the consent to search a submission to authority as the product of an unlawful stop rather than voluntary?

HELD: No

DISCUSSION: In *Whren v. United States, 517 U.S.806, 812-813 (1996),* the Supreme Court held that the legality of a traffic stop turns on the validity of the officers' objective explanation for making the stop, not on the subjective intentions of the officers. Further, continuing to detain a motorist does not become unlawful just because the officer has determined in his own mind not to pursue the traffic violation. *Ohio v. Robinette,* 519 U.S. 33, 38 (1996). From beginning to end, the constitutionality of a traffic stop under the Fourth Amendment depends on the objectively reasonable justifications for the officers actions, not their subjective intentions.

The court ruled that this initial stop was justified, and the continued detention objectively reasonable under the circumstances although they did not ask for drivers' licenses, run the tags, attempt to perform a field sobriety test, or issue a ticket.

The court also found that once the scene was under control, there was nothing unreasonable about asking Ms. Thompson for permission to search her car. An officer need not advise a detained motorist that he or she is free to go before asking whether the motorist would consent to a search for contraband.

Because the seizure of the handgun was the product of a lawful traffic stop, followed by the driver's voluntary consent to search, the evidence is admissible.

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8th CIRCUIT

U.S. v. Shranklen
315 F.3d 959
January 10, 2003

SUMMARY: If the officer has reasonable suspicion to believe that suspect is dangerous and may gain immediate control of a weapon in a vehicle, he can frisk the passenger compartment of the automobile, limited to those areas in which a weapon may be placed or hidden. Where the suspect attempted to hide a container in a vehicle, the officer had sufficient reason to believe it might contain

a weapon. The officer was not constitutionally required to pat-down the container instead of opening it.

FACTS: At 1:40 a.m. on a quiet country road, a police officer lawfully pulled over a vehicle for an investigative stop. Upon the officer's request, the defendant, a passenger, got out of the car, and requested if he could retrieve a black pouch located under the front passenger seat. The officer retrieved the pouch and searched it to ensure it did not contain weapons. Upon opening the pouch, the office discovered illegal drugs.

ISSUE: If an officer has reasonable suspicion to frisk a container, may he constitutionally open the container instead of conducting a pat down?

HELD: Yes.

DISCUSSION: A person's privacy interest in an item such as a pouch, while protected by the Fourth Amendment, is not sacrosanct during an investigative stop. Defendant's privacy interest in the pouch did not rise to the level that would require a pat-down search of the pouch. Had the pouch contained a weapon, there is no guarantee that merely feeling the pouch would have led the officer to discover the weapon. For example, some type of padding could have enveloped the weapon, or the weapon could have been a pocketknife with an unexposed blade. It was therefore reasonable for the officer to open the pouch in order to inspect for weapons with his sense of sight and not solely with his sense of touch.

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9th CIRCUIT

Meredith v. Erath
342 F.3d 1057
September 8, 2003

SUMMARY: Absent justifiable circumstances, the detention of a person in handcuffs during the execution of a search warrant violates the Fourth Amendment. The use of excessive force in handcuffing the detained person and detaining the person in handcuffs that are too tight and painful also violate the Fourth Amendment.

FACTS: Erath and twelve Internal Revenue Division agents executed a search warrant for evidence of tax fraud on a three-story office building owned by Meredith. As the agents reached the third floor, they encountered Bybee, who was using that floor as her residence. Bybee demanded to see a copy of the agents' search warrant and loudly proclaimed the search to be illegal. When she repeated her demand, Bybee said Erath grabbed her by the arms, threw her to the ground, and placed handcuffs on her wrists so tightly that it caused great pain. Although Bybee continued to complain about the too-tight handcuffs, the officer did not loosen them until 30 minutes into her detention. Bybee's handcuffs were not removed until several hours later.

ISSUE: Is the detainment, absent justifiable circumstances, of a person in handcuffs during the execution of a search warrant a violation of the Fourth Amendment?

HELD: Yes.

DISCUSSION: Police may detain persons without probable cause while executing a search warrant if justified by the circumstances. The detention rises to the level of a Fourth Amendment violation when it "is unreasonable" or when "it is carried out in an unreasonable manner." Because the use of handcuffs "aggravates the intrusiveness" of a detention, such conduct demands even more justification and the reasonableness is determined by the totality of the circumstances. Based on the circumstances of this case, the court found that the officer was not justified in detaining Bybee in handcuffs. The IRS agents were investigating tax fraud, a non-violent offense; thus, the agents had no reason to believe Bybee or any other occupant of the residence would be a danger to their safety. Bybee was loud and demanding, but she did not try to flee or attempt to impede the officers' search for evidence. However, the court said Erath was entitled to qualified immunity on the detention-in-handcuffs claim because at the time of the search it was not clearly established that the unreasonable handcuffing of someone during a search for evidence was a Fourth Amendment violation. The Court's decision places officers on notice and establishes that such conduct will constitute a Fourth Amendment violation for which they could be personally liable. Furthermore, the Court held that Erath was not entitled to qualified immunity on the remaining claims of (1) using excessive force in placing the handcuffs on Bybee and (2) detaining Bybee in overly tight handcuffs for a short period. The court said a reasonable officer in Erath's position would have known that the use of excessive force in applying the handcuffs and the detainment of someone in "too-tight" handcuffs were Fourth amendment violations.

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10th CIRCUIT

U.S. v. Cline
349 F.3d 1276
November 21, 2003

SUMMARY: Before a court will issue an order that authorizes a wiretap on a suspect's telephone the government must demonstrate sufficient "necessity." To meet the "necessity" requirement, an application for a wiretap order must contain a full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or why they may be too dangerous to attempt.

FACTS: Cline was convicted on a multiple count indictment for drug violations, including possession with intent to distribute controlled substances and conspiracy to manufacture controlled substances. His convictions were the result of an investigation into a drug trafficking organization in southeast Kansas, conducted by the DEA and Kansas Bureau of Investigation in 1998 and 1999. Part of the investigation focused on Biker's Dream, a motorcycle store owned and operated by Cline. Agents believed that Biker's Dream was the source of large quantities of pseudoephedrine, a precursor chemical for the production of methamphetamine, and that Cline and others were involved in methamphetamine production and

distribution. As part of their investigation agents used court–authorized wire taps on several different telephone lines including the business telephone line for Biker's Dream and the residential telephone line for Cline. The agents obtained information from these wiretaps that led to a traffic stop of Cline that yielded a large quantity of pseudoephedrine. A subsequent search warrant of Cline's residence uncovered numerous firearms and some drugs.

ISSUE: Did the government make an adequate showing of "necessity" for the issuance of the wiretap order on the defendant's telephone lines?

HELD: Yes

DISCUSSION: An application for a wiretap order must contain a full an complete statement by the agents as to whether or not traditional investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or why they may be too dangerous to attempt. The authorizing judge then must determine whether these facts establish the necessity for a wiretap before a wiretap order will be issued.

Traditional investigative procedures include: standard visual and aural surveillance, questioning and interrogation of witnesses or participants, the use of search warrants, and infiltration of conspiratorial groups by undercover agents or informants.

In their applications for wiretap orders the agents detailed the difficulties encountered in conducting standard surveillance in the rural area in which they were working. The agents explained how their vehicles stood out among the locals and how Cline used sophisticated counter-surveillance techniques. The agents also stated that Cline and members of the drug organization were familiar with and used back roads where surveillance was easily detected, and that surveillance of Cline's business was hampered by the fact that some suspects in the drug organization were county employees or local business persons.

The agents' applications stated that while several individuals with pertinent information regarding the drug organization had been interviewed, further questioning was not likely to be productive. The applications stated that although they provided investigators some information, these people stated they would not testify in court because of fear for their safety.

In their applications the agents also explained the limited success they had achieved with the use of search warrants. Up until this point the use of search warrants had resulted in the seizure of some drugs and proceeds, but had failed to uncover the scope of the drug operation, or identify the sources of the precursor chemicals, the methods of distribution, and other members of the conspiracy.

The agents' applications also stated that they had developed three reliable confidential informants, who had some degree of success in infiltrating the drug organization, but that they would be virtually useless in the future. The first individual was suspected of being an informant therefore he was unable to make any meaningful contact with anyone in the drug organization. The second individual was incarcerated on an unrelated charge, and the third individual had stopped cooperating with the agents and had gone back to working with the drug organization. The agents explained how infiltration by undercover agents had been unsuccessful because most members of the drug organization had lived in the same area for years, had known each other for years, and were suspicious of any outsiders.

Cline argued that the information provided in the applications for the wiretaps on the phones in his home and business was not based on facts, but were mere "conclusions" of the agents. Cline argued that these conclusory statements failed to adequately demonstrate the government's necessity for the use of the wiretaps on his telephone lines; therefore, any evidence derived from these wiretaps should be suppressed.

The court disagreed with Cline and affirmed his convictions. The court held that the applications submitted by the agents contained sufficient factual details that explained the traditional investigative techniques that had been used, and why any future use of them would likely be futile; thereby satisfying the "necessity" requirement for the issuance of the wiretap orders.

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11th CIRCUIT

U.S. v. Young
350 F.3d 1302
November 18, 2003

SUMMARY: A "right to inspect" notice defeats a reasonable expectation of privacy when an individual sends a package through a service such as Federal Express, containing cash, and the individual authorizes the carrier, Federal Express, to consent to a search of the package.

FACTS: IRS opened an investigation of defendant, suspecting a money-laundering scheme involving drug proceeds through the sale of diesel fuel. Employees of defendant's business, Dry Tortugas Marine, would send packages to defendant in Florida from the Texas office several times a month, using Federal Express delivery service. As part of the investigation, an IRS agent contacted a Federal Express operations manager requesting the delivery service to allow agents to inspect new packages bearing Young's and his co-defendant, Ahmed's, names. The Federal Express manager agreed to cooperate with the IRS. Without a search warrant, Federal Express turned over several packages, and the IRS x-rayed several of the packages. Fourteen packages were x-rayed by the IRS and found to contain large amounts of cash. Based upon these results, search warrants were obtained in Florida and Louisiana to open two of the cash-stuffed packages and to search defendant Young's residence and business.

As part of the contract and on the reverse of each and every Federal Express airbill used by the defendants the following notice was given:

RIGHT TO INSPECT
"We may, at our option, open and inspect your packages prior to or after you give them to us to deliver."

These airbills were placed in the front pouch of each of the Federal Express Pak envelopes used to ship the currency. Just above the pouch was a plainly visible warning, in all capital letters, which read: "DO NOT SEND CASH."

ISSUE: Did the warrantless seizure and search of Federal Express packages by the government violate defendant's rights under the Fourth Amendment.

HELD: No.

DISCUSSION: Defendant did not have any legitimate expectation of privacy in the packages x-rayed by the government agents. First, *Katz v.U.S.*, 389 U.S. 347 (1967), requires us to ask whether defendant's actions exhibited an actual, subjective, expectation of privacy. Defendant Young and his co-defendants sealed the money in closed containers. They were trying to hide the contents from the world. They certainly had a subjective expectation, or hope, of privacy. Second, *Katz* requires us to ask whether this subjective expectation of privacy is one that society is prepared to recognize as reasonable. No reasonable person would expect to retain a privacy interest in a packaged shipment after signing an airbill containing an explicit warning that the carrier is authorized to act completely opposite to that interest. Federal Express specifically told its customers two things: (1) do not send cash, and (2) we may open and inspect your packages at our option. This notice eliminates any reasonable expectation of privacy. As an alternative basis, the Court also found a consent to search through the bailment relationship. Just as the "right to inspect" notice defeated Defendant's privacy interest it also served to defeat defendant Young's Fourth Amendment challenge because it authorized Federal Express as a bailee of the packages to consent to a search.