THE

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EDITOR'S COMMENTS

Welcome to the fourth installment of Volume 5 of *The Quarterly Review* (QR). The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. *The QR* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The QR* can be directed to Robert Cauthen at (912) 267-2179 or Robert.Cauthen@dhs.gov. You can join *The QR* Mailing List, have *The QR* delivered directly to you via e-mail, and view copies of the current and past articles in *The QR* by visiting the Legal Division web page at: http://www.fletc.gov/legal. This volume of *The QR* may be cited as "5 QUART. REV. ed.4 (2004)".

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Special thanks go to the following members of the Legal Division who voluntarily contributed to *The Quarterly Review*.

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SUPREME COURT

Sabri v. U.S.
124 S.Ct. 1941
May 17, 2004

SUMMARY: 18 USC § 666 is constitutional even though it does not require proof, as an element of culpability, of a connection between the federal funds and the alleged bribe.

FACTS: Sabri offered three separate bribes to a Minneapolis councilman to facilitate construction in the city. He was charged with violating 18 U.S.C. § 666(a)(2), which prohibits bribery of state and local officials of entities, such as Minneapolis, that receive at least $10,000 in federal funds during any 12 month, contiguous period.

ISSUE: Is 18 U.S.C. § 666 unconstitutional for failure to require proof of a connection between the federal funds and the alleged bribe, as an element of culpability?

HELD: No.

DISCUSSION: Congress has Spending Clause authority to appropriate federal moneys to promote the general welfare, Art. I, §8, cl. 1, and corresponding Necessary and Proper Clause authority, Art. I, §8, cl. 18, to assure that taxpayer dollars appropriated under that power are in fact spent for the general welfare, rather than frittered away in graft or upon projects undermined by graft.

Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. It is enough that the statute condition an offense on a threshold amount of federal dollars to the local government such as that provided here and a bribe.

Section 666(a)(2) addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of federal dollar recipients.

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Groh v. Ramirez
124 S.Ct. 1284
February 24, 2004

SUMMARY: A search warrant that does not particularly describe the things to be seized does not meet Fourth Amendment standards. Warrants may cross reference other documents if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.

FACTS: ATF agents constructed a search warrant application to seek "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers." The warrant itself, however, was less specific. In the section of the warrant that calls for a description of the "person or property" to be seized, the agents

provided a description of the home to be searched rather than the weapons listed in the application. The magistrate signed the warrant and the following day the agents executed the warrant.

ISSUE: Does a search warrant that does not particularly describe the things to be seized meet Fourth Amendment standards?

HELD: No.

DISCUSSION: "[T]he warrant was plainly invalid." As stated in the Fourth Amendment, "… no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (underline added)." While the oversight in the warrant might appear to be superficial, and the items to be seized are clearly described in the application, the search warrant serves an important function for the person whose privacy is being intruded upon. It provides notice. The purpose of the Fourth Amendment's particularity requirement is to (1) limit general searches and (2) assure the person whose property is being seized that the officer has authority to conduct a search, the need to search, and the bounds of that search. The Fourth Amendment does not prohibit warrants from cross referencing other documents if the warrant "uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Here, the warrant did not incorporate by reference any other document.

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Thornton v. U.S.
124 S.Ct. 2127
May 24, 2004

SUMMARY: The *Belton* bright-line rule, that a lawful, custodial arrest of the "occupant" of an automobile allows a search of the passenger compartment of that automobile, is extended to include "recent occupants." While an arrestee's status as a "recent occupant" may turn on how close in time and space he is to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car when the officer first initiated contact with him.

FACTS: Before a police officer had the opportunity to stop Thornton for a license plate violation, Thornton pulled into a parking lot, parked, and got out of his car. He was walking away from his parked car as the officer pulled in behind him. The officer stopped him, and asked for his driver's license. During this encounter, the officer obtained Thornton's consent to pat him down for weapons and narcotics. The officer found a controlled substance and placed Thornton, a convicted felon, under arrest. The officer then searched the car where he found a weapon under the driver's seat.

ISSUE: Does the *New York v. Belton*, 453 U.S. 454 (1981), bright-line rule (a lawful, custodial arrest of the occupant of an automobile allows a search of the passenger compartment of that automobile) allow the officer to search the passenger compartment of a vehicle even when the officer does not make contact until the arrestee has left the vehicle?

HELD: Yes.

DISCUSSION: The arrest of a defendant who is near a previously occupied vehicle presents the same safety and destruction of evidence concerns as the arrest of a defendant who is inside the vehicle. The stresses associated with an arrest are not lessened by the fact that the arrestee exited the vehicle before an officer initiated the contact. Therefore, the *Belton* bright-line rule is extended to include "occupants" and "recent occupants" of motor vehicles. While an arrestee's status as a "recent occupant" may turn on how close in time and space he is to the car at

the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car when the officer first initiated contact with him.

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Yarborough v. Alvarado
124 S.Ct. 2140
June 1, 2004

SUMMARY: Although perhaps relevant to the issue of the "voluntariness" of a statement, a suspect's age or experience is not relevant to the *Miranda* custody analysis.

FACTS: 17-year old Alvarado became involved in a murder. About a month later, at the request of a police officer, Alvarado's parents brought him to a police station. With only the officer and Alvarado present, the officer conducted a two-hour interview. At the conclusion of this interview, Alvarado made incriminating statements. At no time did the officer provide *Miranda* warnings.

ISSUE: Must Alvarado's youth and inexperience be considered in determining whether a reasonable person in his position would have felt free to leave?

HELD: No.

DISCUSSION: Custody must be determined based on a how a reasonable person in the suspect's situation would perceive the circumstances. In making this determination, the Supreme Court has never held that "a suspect's age or experience is relevant to the *Miranda* custody analysis." These factors (as well as education and intelligence) are useful in viewing whether a suspect has "voluntarily" made a statement to law enforcement officers. However, age and experience are not proper factors in determining custody.

Missouri v. Seibert
2004 U.S. LEXIS 4578
June 28, 2004

SUMMARY: Purposefully taking an unwarned, custodial statement with the intention of then providing *Miranda* warnings and obtaining a second, duplicate statement makes the second statement effectively unwarned and, therefore, inadmissible.

FACTS: Seibert was arrested for setting a fire to a residence which resulted in a death. The officers made a "conscious decision" to question Seibert without *Miranda* warnings. The plan was that after obtaining a confession from her, the officers would then provide her *Miranda* warnings, and using the admissions she made earlier, obtain a warned, recorded confession, repeating questions until they get "the answer that [Seibert] already provided once." The plan worked. After confessing to the crime at the station without the benefit of *Miranda* warnings, and given a 20 minute break, Seibert was given warnings and provided a waiver. She was then reminded of her pre-warning confession and soon confessed a second time to the officer who performed the first questioning.

ISSUE: Was the second, warned statement admissible?

HELD: No.

DISCUSSION: The "question-first" technique, which has gained acceptance in some law enforcement circles, is intended to render *Miranda* warnings ineffective and undermine them. Therefore, using this technique will yield an effectively unwarned, and therefore inadmissible, statement. The court said

> " .... it is likely that if the interrogators employ the technique of withholding

> warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again."

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U.S. v. Patane
2004 U.S. LEXIS 4577
June 28, 2004

SUMMARY: Failure to give a suspect *Miranda* warnings does not require the suppression of the physical fruits of the suspect's unwarned but voluntary statements. Such unwarned statements are suppressed but not the real evidence obtained as the result of an otherwise voluntary statement. Real evidence obtained as the result of actually coerced statements is inadmissible.

FACTS: Patane was arrested for violating a restraining order. During the giving of *Miranda* warnings, Patane interrupted and said he knew his rights. Neither of the two state officers attempted to finish the rights advisement or obtain a *Miranda* waiver. At the time of the arrest, one of the officers had information that Patane possessed a weapon in violation of federal law, and began to question Patane about its whereabouts. After some reluctance, Patane told them where the weapon was in the house. The weapon was seized and admitted into evidence against Patane notwithstanding Patane's motion to suppress the weapon as the fruit of a statement he made without *Miranda* warnings or waiver. (The statement itself was not offered into evidence.)

ISSUE: Does failure to give a suspect *Miranda* warnings require suppression of the physical fruits of the suspect's unwarned but otherwise voluntary statements?

HELD: No.

DISCUSSION: The 4th Amendment protects against unreasonable searches and seizures, and the exclusionary rule (along with the fruit of the poisonous tree doctrine) provides the remedy for its violations. The Self-Incrimination Clause of the 5th Amendment protects against the admission of compelled *testimonial* evidence, and the clause "is not implicated by the admission into evidence of the physical fruit of a voluntary (but unwarned) statement."(parenthesis added). Furthermore, the remedy for the Self-Incrimination Clause is "self-executing" and complete. Compelled statements are not admissible. There is no need to apply the fruit of the poisonous tree doctrine to the 5th Amendment because the 5th Amendment has its own remedy. However, real evidence obtained as the result of actually coerced statements is inadmissible.

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Hiibel v. Sixth Judicial District Court of Nevada
2004 U.S. LEXIS 4385
June 21, 2004

SUMMARY: The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop if the request for identification is reasonably related to the circumstances that justified the stop.

FACTS: A Deputy Sheriff was dispatched to investigate a report of an assault by a man in a truck. The deputy located a truck parked on the side of the road. The defendant was standing by the truck, and a woman was sitting inside it. Skid marks in the gravel behind the vehicle led the deputy to believe it had come to a sudden stop. The deputy explained to the defendant that he was investigating the report of a fight and asked if he had "any identification on [him]." The defendant refused and insisted in knowing why the deputy needed his identification. The deputy responded that the identification was required for the investigation. His eleven requests for the defendant's identification were denied. The defendant was arrested for violating a Nevada statute which provides (in part) that during a *Terry* stop

> …Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer. (Underlining added.)

ISSUE: Is a state statute constitutional when it requires persons to identify themselves during a *Terry* stop?

HELD: Yes.

DISCUSSION: Based on reasonable suspicion of a crime, a suspect may be stopped for identification, brief questioning, or brief detention while attempting to obtain additional information. *Terry* v. *Ohio,* 392 U.S. 1 (1968). The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. However, an officer may not arrest a suspect under these types of statutes if the request for identification is not reasonably related to the circumstances that justified the stop.

The Fifth Amendment privilege only covers those communications that are testimonial, compelled, and incriminating. Although there may be circumstances otherwise, Hibbel's "refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him."

*****

1st CIRCUIT

U.S. v. Grace
367 F.3d 29
May 7, 2004

SUMMARY: A defendant can be convicted of possession of a firearm in furtherance of a drug trafficking offense where a reasonable inference could be drawn from the evidence that she obtained the gun to protect her drug supply and drug proceeds even though the unloaded gun was found in a drawer in a different room than where the drugs were located, the drawer was blocked by a duffel bag and a box, and no ammunition was located in the house.

FACTS: Grace sold and distributed Oxycontin and cocaine from her house for twelve to eighteen months. After two burglaries of her house, Grace obtained the .38 caliber handgun, supposedly for protection of herself and her daughter. While she claimed the gun was totally unrelated to her drug transactions, an officer testified that drugs were taken in the first burglary. There was also testimony that Grace believed one of her drug sources committed the second burglary. Grace kept her drugs in her

computer room, which was separated from her bedroom by a curtain. The gun was located in a drawer under the bed in Grace's bedroom. A duffel bag, a box of books and a trash can were blocking the drawer where the gun was located. No ammunition was located during the search of the house. There was a set of electronic scales in the bedroom. She was convicted in a bench trial and appealed.

ISSUE: Can a defendant can be convicted of possession of a firearm in furtherance of drug trafficking where the firearm is unloaded, not easily accessed, in a different part of the house than the drugs were located, when evidence is introduced that reasonably implies the gun was obtained to protect the drug supply?

ANSWER: Yes.

DISCUSSION: While there was considerable testimony from the defendant that she only possessed the firearm to protect herself and her daughter due to recent burglaries of their house, there was sufficient contrary evidence for the trial court to conclude she obtained the firearm to protect her drug supply and proceeds of her drug sales. The gun need not be located with the drugs, loaded, or operable.

*****

U.S. v. Hilton
363 F.3d 58
April 2, 2004

SUMMARY: In a child pornography prosecution under 18 USC § 2252A(a)(5)(B), the burden is on the Government to prove the images were produced using actual children as opposed to virtual images.

FACTS: Based on images found during execution of a valid search warrant, Hilton was indicted for the knowing possession of child pornography. The defense did not argue that the images were not of actual children. The Government presented expert medical testimony that from analysis of the images, using the "Tanner Scale," all of the images except one were of children and not adults. The one image that was not a child had the head of a child morphed onto an adult female body. Apparently, the expert was not asked whether the images were of real children or were "virtual" images. Hilton was convicted. While an appeal was pending, the United States Supreme Court decided *Ashcroft v. Free Speech Coalition*, which held that the "appears to be a minor" language in the Child Pornography Protection Act violated the First Amendment protection against abridgement of the freedom of speech.

ISSUE: Does the Government have to introduce additional relevant evidence beyond the images themselves to prove that the children are real?

HELD: Yes.

DISCUSSION: Although some Circuits have held that the pornographic images themselves are sufficient for the jury to determine whether the images are of real children or virtual images, the First Circuit holds that proof that the children in the images are real rather than virtual is an element of the offense that must be proved by the Government. The Government has this burden even where the defense has not raised the issue whether the images are of real children or virtual children. The court rejected the Government's argument that even if the expert did not specifically testify that the children in the images were real, his expert medical testimony that the images were of children rather than adults should be sufficient to infer that they were real children. Images of children must be supplemented by additional evidence that the images are of "real" children.

*****

2nd CIRCUIT

U. S. v. Alejandro
368 F.3d 130
May 13, 2004

SUMMARY: Officers do not violate 18 USC § 3109, the knock and announce rule, by obtaining entry to an apartment by means of a ruse.

FACTS: An arrest warrant was issued for Jose Alejandro for conspiring to distribute and to possess with intent to distribute cocaine.

Sheriff's Deputy Rojas and three other law enforcement officers were sent to execute the arrest warrant. Rojas pretended to be an employee of the local public utility company. At the door he announced that there was a gas leak in the area, and that he needed to get into the apartment. Alejandro came to the door and opened it. With weapons drawn the four officers identified themselves as law enforcement and told Alejandro that he was under arrest. The officers thus gained entry to the apartment without the use of physical force and without causing any physical damage to the apartment or its entrance way. As a part of a search incident to arrest inside the premises, the officers seized money and drugs.

ISSUE: Does the use of a ruse to get a suspect to open his door violate 18 USC § 3109, the knock and announce rule?

HELD: No.

DISCUSSION: Evidence seized in violation of section 18 USC § 3109 must be excluded unless the noncompliance was excused by exigent circumstances. "Breaking" is unlawful where the officer fails first to state his authority and purpose for demanding admission. When a suspect is persuaded to open the door to his or her residence, under false pretenses or otherwise, the government has not applied force to open it. Misrepresentation of identity in order to gain admittance is not a breaking within the meaning of the statute. Rojas's successful ruse to get Alejandro to open his door by proclaiming himself to be a utility worker was not a "breaking" prohibited by 18 USC § 3109.

*****

3rd CIRCUIT

U.S. v. Bonner
363 F.3d 213
March 30, 2004

SUMMARY: Flight from a non-consensual, legitimate traffic stop gives rise to reasonable suspicion.

FACTS: An officer noticed a sports utility vehicle that had one headlight out and an expired inspection sticker leaving the housing project. He signaled for the vehicle to stop. The driver complied. As an officer approached the driver's side of the vehicle, the front seat passenger jumped out and ran. Other officers chased him on foot, repeatedly yelling for him to stop. After catching the fleeing passenger, officers seized money and, from his hand, a clear plastic bag containing seven golf ball sized rocks of crack cocaine. The District Court suppressed all the evidence seized during the stop including the drugs.

ISSUE: Did the officers have reasonable suspicion to stop the passenger?

HOLDING: Yes.

DISCUSSION: The initial traffic stop was lawful under the Fourth Amendment. A police officer who observes a violation of state traffic laws may lawfully stop the car committing the violation.

During such a stop, a police officer has the authority and duty to control the vehicle and its occupants, at least for a brief period of time. In this case, the occupant of the stopped vehicle ran from the scene of a legitimate traffic stop without the authorization or consent of the officers. The passenger prevented the officer from controlling the stop by running from the vehicle. The passenger did not simply flee upon "noticing" police, nor did he simply refuse to cooperate during a consensual encounter. The passenger fled before the officers had the chance to announce the purpose of the stop. He continued fleeing despite repeated orders to stop, and he did not stop running until he was tackled by an officer. The passenger's flight from a lawful police traffic stop, where that flight prevented the police from discharging their duty of maintaining oversight and control over the stop, provided the officers with reasonable suspicion to detain the passenger for further investigation. Upon effecting the stop the drugs were revealed, giving probable cause to arrest.

*****

U.S. v. Fulani
368 F.3d 361
May 20, 2004

SUMMARY: Although a person has a Fourth Amendment protected privacy interest in the contents of personal luggage, that protection is forfeited when "abandoned." Whether property has been abandoned is determined from an objective viewpoint. Proof of intent to abandon property must be established by clear and unequivocal evidence.

FACTS: At a scheduled stop and with the driver's permission, two agents from the Pennsylvania State Attorney General's Bureau of Narcotics Investigation boarded a Greyhound Lines bus. One agent made a general announcement over the public address system identifying themselves and stating that their purpose was to investigate drug trafficking. The agent advised the passengers that their "cooperation was appreciated, but not required."

When the agent asked Fulani if he had any luggage, Fulani pointed to a plastic shopping bag at his feet. Next, the agent asked him if that was his only bag, and Fulani said it was. The agent then specifically asked him if he had any luggage in the overhead rack, and Fulani gave a negative response.

After the agents finished questioning all of the passengers, they identified an unclaimed suitcase located almost directly above Fulani's seat. One agent retrieved it and held it over his head, asking all the passengers if anyone owned it. After 15 to 20 seconds elapsed without a response, the agent removed the bag from the bus. He then noticed a Greyhound tag twisted around the bag's handle and saw that the tag had Fulani's name on it. He brought the bag back onto the bus and again asked if anyone claimed it. Again, no one claimed the bag.

The agents searched the bag, finding five plastic bags of heroin, a Nigerian passport bearing Fulani's name and photograph, and a receipt for an airline ticket bearing Fulani's name. The agents re-boarded the bus, requested to see Fulani's bus ticket, and arrested him.

ISSUE: Did the agents violate Fulani's Fourth Amendment rights when they searched his suitcase?

HELD: No.

DISCUSSION: Although a person has a Fourth Amendment protected privacy interest in the contents of personal luggage, that protection is forfeited when "abandoned." Whether property has been abandoned is determined from an objective viewpoint. Proof of intent to abandon property must be established by clear and unequivocal evidence.

Fulani manifested his intent to abandon his overhead bag in a clear and unequivocal way by: (1) his express statement that none of the baggage in the overhead rack belonged to him; and (2) his implicit denial of ownership of the bag when he remained silent in the face of an agent's questioning directed to the entire bus. This silence was no mere passive failure to claim ownership.

While the presence of a nametag on one's luggage may be an indicia of an expectation of privacy, the Fourth Amendment protects only a reasonable expectation of privacy. Fulani's refusal on several separate occasions to claim luggage with his nametag on it negated any reasonable expectation of privacy.

*****

4th CIRCUIT

U. S. v. Foreman
369 F.3d 776
June 4, 2004

SUMMARY: An officer's decision to terminate a traffic stop does not prevent the reliance on factors developed before and during the traffic stop to support reasonable suspicion to detain a suspect to conduct further investigation.

FACTS: As Foreman passed Trooper Wade's position, the officer noted that the suspect drove in "a tense posture" with both hands on the wheel and his eyes straight ahead.

Trooper Wade decided to follow Foreman and soon caught him violating the speed limit and the Virginia law prohibiting hanging items from the rearview mirror which obstruct the driver's vision. When Trooper Wade spoke to Foreman, he could see that Foreman's pulse was beating through his shirt and throbbing his carotid artery more noticeably "than the 'thousands of people' that Trooper Wade had stopped in the past." Foreman's hands were shaking. Trooper Wade could also see that the items on the rearview mirror were several air fresheners, that Foreman had some currency in the SUV and no visible luggage.

The two went to the patrol car while Trooper Wade checked Foreman's license. Meanwhile, another trooper and a drug dog had arrived at the scene. In response to questioning, Foreman said he was returning from a one-day trip to New York City that he had taken to help his brother after the brother had been evicted from his apartment. When Trooper Wade raised the subject of drug and gun smuggling on Route 13, Foreman's breathing rate increased and his carotid throbbed more violently.

Trooper Wade ended the traffic stop with a verbal warning and walked Foreman back to his SUV. When asked for consent to search, Foreman first gave consent but almost immediately changed his mind. At this point, Wade detained Foreman, and the drug dog circled the SUV and alerted. A search of the SUV produced $800, 10.5 grams of cocaine base, and one kilogram of cocaine.

ISSUE: Can an officer rely on factors observed before ending a traffic stop to decide that reasonable suspicion exists to further detain a suspect?

HELD: Yes.

DISCUSSION: 1. Reliance on earlier factors permitted. In a similar federal case, *U.S. v. Williams*, 271 F.3d 1262, 1271 (10th Cir. 2001), the Tenth Circuit rejected the argument that the Kansas trooper's returning license and registration to a driver somehow "nullified any of the suspicion that had developed throughout the stop." The Fourth Circuit agreed with this thinking.

2. Reasonable suspicion to detain. Five factors, taken together, amounted to reasonable suspicion to detain Foreman while the drug dog worked: (1) Foreman's 14-hour round trip to spend a single night with an evicted brother was "unusual"; (2) Foreman's posture was tense; (3) Foreman's several visible signs of extreme nervousness; (4) the presence of multiple air fresheners in the car was consistent with the practice of attempting to mask the odor of drugs; and (5) Trooper Wade's testimony that Route 13 had become a well-used route for moving drugs from New York to Tidewater Virginia. Taken together, these factors served "to eliminate a substantial portion of innocent travelers and, therefore, amount to reasonable suspicion that Foreman was engaged in drug trafficking."

*****

6th CIRCUIT

U.S. v. Combs
369 F.3d 925
June 4, 2004

SUMMARY: 18 USC §924(c) criminalizes two distinct offenses: (1) *using or carrying* a firearm *during and in relation to* any crime of violence or drug trafficking crime, and (2) *possessing* a firearm *in furtherance of* any such crime.

FACTS: Miller traded three rifles to Combs for drugs. Miller told police about this trade and many others that had taken place in Combs' residence. During a search pursuant to a warrant, police found the three rifles and, when they search Combs, found a loaded pistol and some drugs on his person.

Regarding the rifles, Combs was charged in one count with possessing firearms "in furtherance of a drug trafficking crime." In a separate count concerning the pistol, Combs was charged with possessing a pistol "during and in relation to a drug trafficking crime."
ISSUE: Does 18 USC § 924(c) describe two separate offenses?

HELD: Yes.

DISCUSSION: 18 USC §924(c) criminalizes two distinct offenses: (1) *using or carrying* a firearm *during and in relation to* any crime of violence or drug trafficking crime, and (2) *possessing* a firearm *in furtherance of* any such crime.

Use offense. The United States Supreme Court interprets **"use"** of a firearm as "connoting more than mere possession of a firearm," and requiring some active employment of the firearm. *Bailey v. U.S.*, 516 U.S. 137 (1995). The United States Supreme Court interprets **"carry"** to mean that the firearm must be on the person or accompanying the person as when "a person…knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car…." It need not be immediately available for use. *Muscarello v. U.S.*, 524 U.S. 125 (1998). **"During and in relation to"** requires that the firearm "furthered the purpose or effect of the crime and its presence or involvement was not the result of coincidence."

Possession offense. **"In furtherance of"** requires a higher standard of participation that the "during and in relation to" language. The government must show that the "firearm was possessed to advance or promote the commission of the underlying [drug trafficking] offense." Factors indicative of "possession in furtherance of" include accessibility, type, whether loaded, whether stolen or lawfully possessed, the time and circumstances under which the firearm was found, and the type of drug activity conducted.

*****

7th CIRCUIT

Hadley v. Williams
368 F. 3d 747
May 14, 2004

SUMMARY: Consent procured by an outright and material lie is ineffectual. Although the law permits the police to pressure and cajole, conceal material facts, and actively mislead, it draws the line at outright fraud.

Answering the door is not necessarily consent to enter.

FACTS: Detective Williams ordered police officers to bring Hadley in for questioning. Williams telephoned Hadley's mother and asked whether she'd be willing to permit the police to enter her house and arrest her son. Hadley's mother agreed to do so only if they had a warrant. Williams advised Hadley's mother that "Yes, we've got everything we need. It's all covered." In fact, Williams had no such warrant.

Hadley's mother didn't want to be home when her son was arrested, so at Williams' suggestion, she sent her daughter, Hadley's sister, to the house to let in the police. When the police approached the house, Hadley saw them and told his sister, "I'm going in my room. Answer the door. Just tell them I ain't here." Hadley's sister opened the door to the police, who entered the house and arrested Hadley.

ISSUE: 1. Is consent valid when obtained through an outright and material lie?

2. Is answering the door consent to enter?

HELD: 1. No

2. No.

DISCUSSION: Arresting a person in his home without a warrant is normally a violation of the Fourth Amendment, even if there is probable cause to arrest him. However, there are exceptions, such as consent by either the owner of the home or the arrested person himself. Hadley's mother could have given consent to the police to enter her home, but she didn't—not effective consent at any rate. Her consent was predicated upon the fraudulent misrepresentations of Detective Williams. "The consent of Hadley's mother was procured by an outright and material lie, and was therefore ineffectual." Although "the law permits the police to pressure and cajole, conceal material facts, and actively mislead," it draws the line at outright fraud.

When someone answers a knock at the door it doesn't necessarily mean that he agrees to let the person who knocked enter. *Sparing v. Village of Olympia Fields*, 266 F.3d 684, 688-690 (7th Cir. 2001).

*****

8th CIRCUIT

U.S. v. Gill
354 F.3d 963
January 20, 2004

SUMMARY: Exigent circumstances surrounding Gill's capture excused the limited warrantless acts of placing a ladder against the building and peering through Gill's open apartment window. The sight of a handgun then justified the warrantless sweep of the apartment. Suspicious items in plain view provided sufficient probable cause for the subsequent warrant.

FACTS: Police responded to a suspicious person report and noticed Gill, who matched the report

description. Gill became belligerent, and it required four officers to subdue him. Officers suspected that Gill was under the influence of PCP because he was "very disoriented," demonstrated extraordinary strength, and sweated profusely even though it was not warm. Blood was found on the back of Gill's shirt. The source of the blood was not apparent.

While using a ladder to look into the open window of Gill's apartment to check for evidence of foul play, an officer saw a handgun lying in the middle of the room. Officers conducted a warrantless sweep of the apartment to "clear the residence to make certain there wasn't someone hiding or a body lying in the apartment or evidence of some other crime in plain view." During the sweep, officers observed an assault rifle, a stack of currency, a scale, and white residue. The items were seized after a search warrant was obtained.

ISSUE: Did exigent circumstances justify peering through the window by the use of a ladder and the subsequent sweep of the apartment?

HELD: Yes.

DISCUSSION: The court declined to determine whether peering into the room by use of a ladder constituted a "search," holding that even if it were, the facts of the case established exigent circumstances that justified the limited intrusion to ensure that no one inside was in need of assistance.

"The sight of a handgun visible through the open window, coupled with the circumstances that justified peering through the window, changed the nature of the exigency and magnified the necessity of a sweep. Accordingly, based on the expanded information and heightened concern that accompanied the presence of a gun in an already suspicious and dangerous setting, entry… and a plain sight search of the apartment were reasonable under the Fourth Amendment."
All of the facts were legally observed and together constituted probable cause to support the search warrant.

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9th CIRCUIT

U.S. v. Bennett
363 F.3d 947
April 9, 2004

SUMMARY: The original of a "writing, recording, or photograph" is required to prove its contents, and the original (or a duplicate) must be produced or its absence explained. "Other evidence" of the contents of a writing, recording, or photograph is admissible only when the original is lost, destroyed, or otherwise unobtainable.

FACTS: Bennett's boat was stopped and searched as it entered the San Diego Bay. 1,541.5 pounds of marijuana were seized. Bennett was charged with importation of marijuana under 21 U.S.C. §952. Illegal importation occurs when a defendant imports a controlled substance into the United States from "any place outside thereof." Because no one saw the boat cross the border, the key piece of evidence supporting the conviction for importation was the testimony of an officer who discovered a global positioning system on the boat. The device included a "backtrack" feature, which tracked and recorded the boat's journey that day. The officer testified that the system display indicated the defendant had traveled from Mexican territorial waters to U.S. waters. During cross-examination, the officer acknowledged that he did not confiscate the GPS device or obtain any written record of its data.

ISSUE: Did the officer's testimony about the global positioning system data violate the best evidence rule?

HELD: Yes.

DISCUSSION: The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove its contents and the original (or a duplicate) must be produced or its absence explained. The best evidence of the data on the GPS device would be the device itself or a printout or copy of the data it contained. The government offered neither. Instead, the government offered the testimony of a witness, who never actually saw the border-crossing, but who after reviewing the GPS data testified that the boat crossed the border. "Other evidence" of the contents of a writing, recording, or photograph is admissible only when the original is lost, destroyed, or otherwise unobtainable. The government did not offer evidence that the GPS data would have been impossible or difficult to download or print. Thus, the court found that the GPS-based testimony was inadmissible under the best evidence rule and the conviction for importation was reversed.

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10th CIRCUIT

U.S. v. Rambo
365 F.3d 906
April 23, 2004

SUMMARY: Once a suspect, who has been advised of his *Miranda* rights, indicates that he wishes to remain silent, all questioning must stop, and that right must be scrupulously honored. Officers can reinitiate questioning only if, at the time the defendant invoked his right to remain silent, the questioning ceased. Fresh *Miranda* warnings are not alone sufficient to cure this violation.

Words or actions on the part of the police officers that they should know are reasonably likely to elicit an incriminating response from the suspect are considered the functional equivalent of questioning and are not permitted.

FACTS: The police took Rambo into custody as a suspect in two armed robberies. Officer Moran interviewed Rambo's accomplice first, then he interviewed Rambo. At some point prior to the interview another officer had read Rambo his *Miranda* rights which he waived. Officer Moran began the interview telling Rambo that a large part of the responsibility for the robberies was going to fall upon him. He asked Rambo, "Do you want to talk to me about this stuff?" Rambo answered, "No." Officer Moran told Rambo to think back over the last few months and reflect on the criminal activity he had been involved in, and about all of the other agencies that would be interested in talking to him, and of the evidence that they had against him. Rambo then told Officer Moran that he did not know the car in which he was apprehended had been stolen. After a brief exchange Officer Moran determined that Rambo now wanted to talk to him about the robberies. Officer Moran re-advised Rambo of his *Miranda* rights, and Rambo confessed to being an active participant in the two robberies.

ISSUE: Did Officer Moran violate Rambo's *Miranda* rights by not ceasing the questioning?

HELD: Yes

DISCUSSION: When a custodial interrogation of a suspect occurs the suspect is entitled to be advised of his *Miranda* rights. Once the suspect invokes his right remain silent, interrogation must stop and that right must be "scrupulously honored." Officers can reinitiate questioning only if, at the time the defendant invoked his right to remain silent, the questioning ceased. *Michigan v. Mosley,* 423 U.S. 96 (1975).

The use of express questions by Officer Moran was not required to show that his interrogation of

Rambo continued after he invoked his right to remain silent. Interrogation includes not only express questions but any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291 (1980). The statements to Rambo were designed to refocus the discussion on the robberies and were reasonably likely to produce an incriminating response. Therefore, they were considered "questioning." Although Officer Moran re-advised Rambo of his *Miranda* rights, *Mosley*, among other things, requires that there must be some break in the interrogation before an officer may reinitiate contact with the suspect. Since Rambo clearly invoked his right to remain silent, and Officer Moran did not "scrupulously honor" that right, any confession that followed was taken in violation of the Fifth Amendment and must be suppressed.

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11th CIRCUIT

U.S. v. Heard
367 F.3d 1275
April 30, 2004

SUMMARY: A tip with sufficient indicia of reliability given face-to-face by an informant may provide reasonable suspicion to permit a *Terry* stop and frisk. A face-to-face anonymous tip is presumed to be inherently more reliable than an anonymous telephone tip because the officers receiving the information have an opportunity to observe the demeanor and perceived credibility of the informant.

FACTS: Gore, a MARTA police officer, received information that a fight was in progress inside the station. Gore went to investigate and saw a woman yelling at Heard, demanding fifty dollars. The woman told Gore, and Heard admitted, he owed her fifty dollars. Heard paid the woman after Gore suggested that he handle the matter in a professional manner. While walking away, the woman told Gore that Heard was carrying a weapon. Gore placed Heard in handcuffs and performed a *Terry* frisk, finding and seizing a handgun. Meanwhile, the woman got on the train, never to be seen again. Heard was indicted for possession of a firearm by a convicted felon.

ISSUE: Can a tip with sufficient indicia of reliability given face-to-face by an informant provide reasonable suspicion to permit a *Terry* stop and frisk?

HELD: Yes.

DISCUSSION: A tip given by a face-to-face informant, with sufficient indicia of reliability, may provide an officer with reasonable suspicion to justify a *Terry* stop and reasonable suspicion that the suspect is presently armed and dangerous sufficient to permit a protective pat-down. Even an anonymous tip can, under certain circumstances, give rise to reasonable suspicion, as long as the information provided contains "sufficient indicia of reliability to justify the investigatory stop." A face-to-face anonymous tip is presumed to be inherently more reliable than an anonymous telephone tip because the officers receiving the information have an opportunity to observe the demeanor and perceived credibility of the informant. In this case, reasoning that Heard knew the woman, Gore could reasonably conclude that she would have reliable information about whether Heard possessed a weapon. The reliability of a tip is considered in light of all relevant circumstances, which includes, but is not limited to, a consideration of whether the officer can track down the tipster again. Her reliability is further supported by the fact that because she and Heard apparently knew each other, she may have subjected herself to reprisal from Heard based on the tip she gave to Gore. Considering the totality of the circumstances, in this case, Gore

reasonably concluded that the unknown woman's tip was reliable.