THE

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LEGAL COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

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EDITOR'S COMMENTS

Welcome to the first installment of Volume 6 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 "6 QUART. REV. ed.1 (2004)".

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Footnotes

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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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A NEW FEATURE !!

You can get the court's full opinion by clicking on the case cite at the beginning of each brief.

*****

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SUPREME COURT PREVIEW
LAW ENFORCEMENT CASES TO BE DECIDED IN THE OCTOBER 2004 TERM

A. FOURTH AMENDMENT

1. *Muehler v. Mena* [1] - **Authority to detain occupants during the service of a valid search warrant. Authority to question persons detained.**

Several officers from the Simi Valley Police Department (SVPD) SWAT team executed a valid search warrant as part of their investigation of a gang-related drive-by shooting. Mena was a resident in the house. The officers found Mena in bed, and, pointing a submachine gun at her head, turned her over onto her stomach and handcuffed her. After searching her person and her room, the officers led Mena -- barefoot and still wearing her pajamas -- outside through the rain to a cold garage. Although she was absolutely compliant, the officers detained Mena in handcuffs for approximately two to three hours. During her detention, an immigration officer who had joined the police on the search asked Mena questions concerning her citizenship status. The police officers did not release Mena from the handcuffs until after they completed the search of the premises, at which time they finally informed her why she had been detained. Mena filed suit under 42 U.S.C. § 1983.

ISSUES: Was the seizure at gun-point and two to three hour detention in handcuffs of a compliant occupant unreasonable under the 4th Amendment? Absent probable cause, was the questioning of the detainee about criminal activity unreasonable under the 4th Amendment?

2. *Illinois v. Caballes* [2] - **Suspicion threshold for dog sniffs during routine traffic stops.**

An Illinois State Police Trooper stopped defendant for speeding. When the trooper radioed dispatch that he was making the traffic stop another trooper heard and announced that he was going to the stop to conduct a canine sniff.

The trooper told defendant he was only going to write a warning ticket for speeding and then called the police dispatcher to ascertain the validity of defendant's license and to check for outstanding warrants. While waiting for a response, the trooper asked defendant for permission to search his vehicle, and defendant refused to give consent.

While he was still writing the warning ticket, the second trooper arrived with his drug-detection dog and began walking around defendant's car. The dog alerted at

[1] 332 F.3d 1255 (9th Cir. 2003)
[2] 802 N.E.2d 202 (Il., 2003)

defendant's trunk in less than a minute. Troopers searched defendant's trunk and found marijuana.

ISSUE: Is a reasonable, articulable suspicion needed under the 4th Amendment to conduct a canine sniff during a routine traffic stop?

3. *Devenpeck v. Alford* [3] - **Validity of an arrest if probable cause exists for an offense different than the one articulated by the officer at the time of arrest.**

An officer initially suspected Alford of impersonating a police officer. After pulling Alford over, the officer noticed that Alford's license plate was nearly unreadable because of a tinted license plate cover and that Alford had an amateur radio broadcasting the communications of the Kitsap County's Sheriff's Office, a microphone attached to the radio, a portable police scanner, and handcuffs. Alford's car also had wig-wag head lights.

While talking with Alford, officers noticed a tape recorder on the passenger seat recording the traffic stop. Alford was then informed that he was under arrest for making an illegal tape recording in violation of the Washington Privacy Act. At trial, the Officer testified that at the time of the arrest, he believed that he had probable cause to arrest Alford based solely on his view that Alford had violated the Privacy Act. A state court judge later dismissed the charge.

Alford filed suit under 42 U.S.C. § 1983 claiming a 4th Amendment violation for his arrest without probable cause for a violation of the Privacy Act. In defense of the suit, the officers alleged that they had probable cause to arrest for impersonating a police officer and obstruction of justice, and, therefore, Alford's rights were not violated.

ISSUE: Does an arrest violate the 4th Amendment when an officer has probable cause to arrest for an offense, if that offense is not "closely related" to the offense articulated by the officer at the time of the arrest?

B. SIXTH AMENDMENT

U.S. v. Booker [4]*; U.S. v. Fanfan* [5] - **The Confrontation Clause and the Federal Sentencing Guidelines in light of *Blakely v. Washington*, 124 S. Ct. 2531 (2004).**

In *Booker*, a jury found the defendant guilty of possessing with intent to distribute at least 50 grams of cocaine base, for which the statute prescribes a minimum sentence of 10 years in prison and a maximum sentence of life. At sentencing, the judge found by a preponderance of the evidence that the defendant (1) had obstructed justice and (2). had distributed 566

[3] 333 F.3d 972 (9th Cir. 2003)
[4] 375 F.3d 508 (10th Cir. 2003)
[5] 2004 U.S. Dist. LEXIS 18593 (D. Me., 2004)

grams over and above the 92.5 grams that the jury had to have found (the defendant did not contest that it was the amount of crack in his duffel bag--he just claimed he hadn't put it there).

In *Fanfan*, the jury convicted the defendant of Conspiracy to Distribute Drugs. The District Court Judge concluded, based upon *Blakely*, that it was unconstitutional to apply the federal guidelines' enhancements to defendant's sentence because to do so would have unconstitutionally impinged on defendant's 6th Amendment right to a jury trial. This was because the jury verdict only permitted the court to conclude that defendant was guilty of a conspiracy and that it involved at least 500 grams of cocaine powder. It did not permit the court to reach a conclusion about crack cocaine or about defendant's leadership role in the conspiracy.

ISSUE: Does the 6th Amendment Confrontation Clause prohibit the imposition of an enhanced sentence under the Federal Sentencing Guidelines based on the sentencing judge's determination of facts by a preponderance of the evidence which were not found by the jury beyond a reasonable doubt or admitted by the defendant?

C. EIGHTH AMENDMENT

Roper v. Simmons [6] - **Death penalty for those who were juveniles at the time of the crime.**

In early September 1993, Simmons, then age 17, discussed with his friends, both minors, the possibility of committing a burglary and murdering someone. On several occasions, Simmons described the manner in which he planned to commit the crime: he would find someone to burglarize, tie the victim up and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it."

During a burglary, Simmons and another bound the victim's hands behind her back with duct tape and also taped her eyes and mouth shut. They placed her in the back of her minivan, and Simmons drove the van to Castlewood State Park in St. Louis County.

At the park, Simmons drove the van to a railroad trestle that spanned the Meramec River. Simmons bound the victim's hands and feet together, hog-tie fashion, with the electrical cable and covered her face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, the victim was alive and conscious. Later that day, Simmons went to a friend's trailer and bragged that he had killed a woman "because the bitch seen my face."

ISSUE: Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual" and thus barred by the 8th and 14th Amendments?

[6] 112 S.W.3d 397 (Mo., 2003)

D. IMMIGRATION

1. *Leocal v. Ashcroft* [7] - **Driving under the influence causing serious bodily injury in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) as a "crime of violence" under 18 U.S.C. § 16(a) rendering a person removable as an aggravated felon.**

   Leocal immigrated from Haiti to Florida in 1980, becoming a permanent legal resident in 1987. In 2000, he pled guilty to driving under the influence causing serious bodily injury, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2). The INS asserted that Leocal's conviction was for a "crime of violence," and therefore, he was removable as an aggravated felon After serving two years in prison, Leocal was deported in 2002." The 11th Circuit affirmed that Leocal's conviction was for a "crime of violence" as defined by 18 U.S.C. § 16(a).

   ISSUE: Is driving under the influence causing serious bodily injury in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) a "crime of violence" under 18 U.S.C. § 16(a) rendering a person sentenced to a year or more an "aggravated felon?"

2. *Jama v. INS*[8] - **Removal of an alien to a country listed in 8 U.S.C. § 1231(b)(2)(E) without that country's prior approval.**

   More than three years after he entered the United States, Somalian refugee Jama pleaded guilty to third degree assault in Minnesota state court. As a result of this felony conviction, the INS initiated removal proceedings against Jama as an alien who had been convicted of "a crime involving moral turpitude." Jama conceded his removability, and the immigration judge rejected his applications for humanitarian relief. After the INS issued a warrant of removal to Jama, he filed a petition for a writ of habeas corpus to prevent the execution of his removal order arguing that under 8 U.S.C. § 1231(b)(2), the INS could not remove him to Somalia without first establishing that Somalia would accept his return.

   ISSUE: Can an alien be removed to a country listed in 8 U.S.C. § 1231(b)(2)(E) without that country's prior approval?

3. *Benitez v. Wallis* [9] - **Indefinite detention of inadmissible aliens.**

   In 1980, Benitez attempted entry into the United States from the port of Mariel, Cuba. Benitez then was paroled into the United States.

   In 1983, Benitez was convicted in Florida of second degree grand theft and was sentenced to three years probation. Thereafter, Benitez submitted an application to adjust his status to that of a lawful permanent resident. In 1985, Benitez's application

[7] 124 S. Ct. 1405 (2004)
[8] 329 F.3d 630 (8th Cir. 2003)
[9] 337 F.3d 1289 (11th Cir. 2003)

for permanent resident status was denied because his criminal conviction for grand theft was a crime involving moral turpitude.

In 1993, Benitez pled guilty in Florida state court to armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful possession, sale or delivery of a firearm with an altered or removed serial number. The state court sentenced Benitez to 20 years' imprisonment.

Based on his 1993 criminal convictions in Florida, the INS determined that Benitez's continued immigration parole was against the public interest. The INS revoked Benitez's immigration parole. In 1994, Benitez was found excludable and deportable to Cuba because of his criminal convictions in Florida.

In 2001, Benitez was released into INS custody. A Cuban Review Panel concluded that Benitez was releaseable under the criteria established by the Cuban Review Plan at such time as the INS determined that a suitable sponsorship to a half-way house could be arranged. In 2003, Benitez's Notice of Releaseability was revoked because the INS concluded, without a hearing, that Benitez was involved in a planned jail escape. Therefore, Benitez's current detention results not only from his inadmissible alien status, but also from his violations of the conditions of his earlier immigration parole and the INS's determination that he has not refrained from criminal conduct while in custody.

The district court concluded that the INS reasonably determined that Benitez was a danger to the community and was likely to engage in future criminal conduct. The district court further concluded that these determinations warranted Benitez's detention until he could be removed to Cuba.

ISSUE: Do 8 U.S.C. § 1231(a)(6) and *Zadvydas v. Davis*, 533 U.S. 678 (2001) allow the United States to indefinitely detain inadmissible aliens?

E. STATUTES

1. *Hall v. U.S.*[10] - 18 U.S.C. § 1956 – Conspiracy to Commit Money Laundering - **Proof of an overt act as an element.**

Hall was convicted of mail fraud conspiracy, money laundering conspiracy, and three counts of mail fraud for his part in a fraudulent investment scheme managed and promoted by Hall and the co-defendants as principals in Greater Ministries International Church. Hall argues that the district court erred in not requiring the jury to find proof of an overt act to support his conviction for conspiracy to commit money laundering under 18 U.S.C. § 1956(h).
ISSUE: Is the commission of an overt act a required element of money laundering

[10] 349 F.3d 1320 (11th Cir. 2003)

conspiracy under 18 U.S.C. § 1956?

2. *Small v. U.S.*[11] - 18 U.S.C. § 922(g)(1) – Felon in Possession of a Firearm - **Foreign convictions.**

In 1994, Small was convicted in Japan for violations of the Japanese Act Controlling the Possession of Firearms and Swords, the Gunpowder Control Act, and the Customs Act, all of which were offenses punishable by a term of imprisonment exceeding one year. In 2000, a federal grand jury returned an indictment against Small, charging him with, *inter alia*, possessing a firearm in violation of 18 U.S.C. § 922(g)(1). Small conditionally pled guilty to the § 922(g)(1) violation.

ISSUE: Does the term "convicted in any court" include convictions entered in foreign courts?

3. *Shepard v. U.S.* [12] - 18 U.S.C. § 924(e) – Armed Career Criminal - **Mandatory 15 year minimum sentence.**

In 1999, Shepard pled guilty to a charge of felon in possession of a firearm. Shepard already had on his record dozens of prior state convictions, including eleven for breaking and entering, using boilerplate language which included "generic burglary"(unlawful entry into a building or other structure) along with other acts. The government sought to have Shepard sentenced as an armed career criminal, arguing that at least five of these breaking and entering convictions were violent felonies under the Act.

Under the Act, the phrase "violent felony" is not limited to crimes in which violence actually occurs; instead, the phrase is defined to include *inter alia* "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson or extortion . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another."

ISSUE: If the charging language of the previous offenses is not clear, how do you determine whether the offense is a "violent felony," triggering the mandatory minimum sentence?

4. *Ashcroft v. Raich* [13] - 21 U.S.C. § 801 et. seq. – Controlled Substances Act - **Possession, use or distribution of marijuana for "medicinal" purposes.**

Two of the appellants, Angel McClary Raich and Diane Monson, are seriously ill Californians who use marijuana for medical purposes on the recommendation of their doctors. Such use is legal under California's Compassionate Use Act. Monson grows

[11] 333 F.3d 425 (3d Cir. 2003)
[12] 348 F.3d 308 (1st Cir. 2003)
[13] 352 F.3d 1222 (9th Cir. 2003)

her own medical marijuana. The remaining two appellants, John Doe Number One and John Doe Number Two, assist Raich in growing her marijuana. The appellants filed suit against John Ashcroft, the Attorney General of the United States, and Asa Hutchinson, the Administrator of the Drug Enforcement Administration, seeking injunctive and declaratory relief based on the alleged unconstitutionality of the federal Controlled Substances Act. The appellants also seek a declaration that the medical necessity defense precludes enforcement of that act against them.

ISSUE: Does the Controlled Substances Act exceed Congress' power under the Commerce Clause as applied to intrastate cultivation, possession, and use of marijuana for medical purposes?

5. *Pasquantino and Hilts v. U.S.* [14] - 18 U.S.C. § 1343 – Wire Fraud - **Schemes to defraud foreign governments of tax related to the importation and sale of liquor.**

Brothers David and Carl Pasquantino devised and headed a smuggling operation, which constituted a scheme to defraud Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor in Canada. While in New York, Carl or David Pasquantino would place a large order for low-end liquor by telephone with a discount liquor store in Maryland. A driver such as Arthur Hilts used a rented truck to pick up the liquor from the discount liquor store in Maryland and transport it to New York for storage. Then drivers smuggled a lesser quantity of the liquor across the Canadian border in the trunk of a vehicle where it was sold in violation of Canadian law.

The "Revenue Rule," a common law doctrine dating back to Britain, generally bars courts of one country from enforcing the laws of another country.

ISSUE: Does the Wire Fraud statute, 18 U.S.C. § 1343, prohibit schemes to use the interstate wires in the U.S. to defraud a foreign government of tax related to the importation and sale of liquor?

Compiled by Bob Cauthen, Editor.

[14] 336 F.3d 321 (4th Cir. 2003)

CASE BRIEFS
UNITED STATES SUPREME COURT
and CIRCUIT COURT UPDATES

1st CIRCUIT

U.S. v. Liranzo
2004 U.S. App. LEXIS 20570
September 30, 2004

SUMMARY: Mere proximity to a gun is not enough to show actual or constructive possession. However, the government need not produce evidence foreclosing all reasonable alternatives inconsistent with possession.

FACTS: Members of a police task force investigating gang activity stopped a vehicle after the vehicle committed traffic violations. There were four occupants in the vehicle. Liranzo was the front passenger. The occupants of the car were watching the officers approaching from the rear of the stopped vehicle, but did not observe another officer coming from in front of their vehicle. When the officer in front was about eight feet away, he shined his flashlight into the car. The startled passenger, Liranzo, made a reaching movement under his seat. The officer yelled for everyone to get their hands up. All four complied. As the three officers approached, they smelled burning marijuana and saw several open beer bottles. The officers conducted frisks of the occupants and of the passenger compartment of the car. Under the front seat, a Llama .380 semi-automatic handgun was found propped up between the seat and floor at a 45-degree angle. Liranzo, a convicted felon, was charged with and convicted of one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1).

ISSUE: Other than mere proximity, was there sufficient evidence to find the defendant in constructive possession of the handgun?

HELD: Yes.

DISCUSSION: The court rejected the defendant's argument that the government must produce evidence foreclosing all reasonable alternatives inconsistent with the defendant's possession of the handgun. The defendant claimed he could have been attempting to retrieve the registration from the glove box, tying his shoe, scratching his leg, or any one of a number of innocent behaviors. The court found his constant eye contact with the officer as he reached down inconsistent with those behaviors. The court found that the precarious position of the gun was inconsistent with having been in that location while the car was moving. The officers testified about the lack of movement by the driver and the inability of the back seat passengers to put the gun in the position where it was located. While mere proximity to the gun is not enough to show actual or constructive possession, there was much more than mere proximity shown in this case.

*****

2nd CIRCUIT

Burrell v. U.S.
2004 U.S. App. LEXIS 20570
September 14, 2004

SUMMARY: A felony conviction entered upon an *Alford* plea constitutes a felony conviction for purposes of 18 U.S.C. § 922(g).

FACTS: In 1990, Burrell entered an *Alford* plea in Connecticut to charges of third-degree assault and possession of a weapon in a motor vehicle. A defendant entering an *Alford* plea "voluntarily, knowingly, and understandingly consents to the imposition of a prison sentence even though he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25 (1970).

Burrell was convicted in Federal Court in 1995 of being a felon in possession of a firearm. Although Burrell has completed serving a ten-year term of incarceration for his § 922(g)(1) crime, because he is a Jamaican national, he is presently detained awaiting deportation based in part on that 1995 conviction.

18 U.S.C. § 921(a)(20) states that predicate convictions under § 922(g)(1) should be "determined in accordance with the law of the jurisdiction in which the prior [felony] proceedings were held." Burrell argues that he is innocent of § 922(g)(1) because Connecticut does not recognize an *Alford* plea as a conviction.

ISSUE: Does a felony conviction entered upon an *Alford* plea constitute a felony conviction for purposes of 18 U.S.C. § 922(g)?

HELD**:** Yes.

DISCUSSION: In deciding whether a defendant has been convicted of a predicate felony as required by § 922(g)(1), the determinate factor is the defendant's criminal record at the time of the charged possession. It is the mere fact of a prior conviction at the time of the charged possession, not the reliability of the conviction, that establishes the § 922(g) (1) predicate. Thus, a § 922(g) (1) conviction is not subject to attack on the ground that a predicate conviction is subsequently reversed, vacated or modified. It is intended that a defendant with a felony conviction on his record clear his status before obtaining a firearm.

An *Alford* plea is the functional equivalent to an unconditional plea of nolo contendere, which itself has the same legal effect as a plea of guilty on all further proceedings within an indictment. The only practical difference is that the plea of nolo contendere may not be used against the defendant as an admission in a subsequent criminal or civil case.

There is no distinction among *Alford*, nolo contendere, and standard guilty pleas in the disposition of criminal cases. All three pleas have the weight of a final adjudication of guilt and, thus result in judgments of conviction.

*****

3rd CIRCUIT

U.S. v. Augustin
376 F.3d 135
July 23, 2004

SUMMARY: 18 U.S.C. § 922 (g)(3) prohibits the possession of a firearm by anyone who is an "unlawful user" of or addicted to any controlled substance.

"Unlawful user" requires proof of drug use at or about the time of the firearm possession and proof of regular use over a period of time proximate to or contemporaneous with the possession of the firearm. Evidence of a single use of marijuana is insufficient to support a conviction under § 922 (g)(3).

FACTS: Early one evening, Augustin, along with others, smoked marijuana. About six hours later, the group began a crime spree involving two armed carjackings and assaults.

Augustin was arrested, prosecuted, and convicted of several crimes, including two counts of possession of a firearm by a drug user under 18 U.S.C. § 922(g)(3). The only evidence of drug use was the single use that had occurred earlier that evening.

ISSUE: Can proof of a single drug use six hours before the firearms possession support the conviction under 18 U.S.C. § 922(g)(3)?

HELD: No.

DISCUSSION: 18 U.S.C. § 922 (g)(3) prohibits the possession of a firearm by anyone who is an unlawful user of or addicted to any controlled substance. The term "unlawful user" is not otherwise defined in the statute. The evidence of defendant's single use of marijuana is insufficient to prove that he was an "unlawful user of or addicted to any controlled substance."

Congress chose to criminalize firearm possession by any person "who *is* an unlawful user," intending the statute to cover unlawful drug use at or about the time of the possession of the firearm. That drug use can not be remote in time or an isolated occurrence. One must use drugs at or about the time of the firearm possession and have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm.

There was no evidence that Augustin had ever used drugs prior to the single use or that he ever used drugs again. All the evidence disclosed was that Augustin used drugs on the day of these events and possessed a firearm roughly six hours later. That evidence is insufficient to support his conviction under § 922(g)(3).

*****

5th CIRCUIT

U.S. v. Brigham
382 F.3d 500
August 19, 2004,

SUMMARY: A traffic detention may last as long as is reasonably necessary to effectuate the purpose of the stop, including the resolution of reasonable suspicion, supported by articulable facts within the officer's professional judgment, that emerges during the stop.

FACTS: Brigham and three friends were stopped for a traffic offense by a Texas trooper. Brigham, the driver, produced an Arkansas driver's license and a rental agreement that did not list any of the occupants as lessee or as an authorized driver.

Interviews with all the occupants produced significantly conflicting stories about their travels. One occupant had no identification, and another produced a fraudulent ID. The trooper described the occupants as "extremely nervous," stressing that they avoided eye contact with him, and that their hands were shaking. In addition, the trooper observed that none of the subjects was 25 years old, the required age to legally possess the rental car.

The license, registration, and ID checks and interviews all took approximately 25 minutes.

The trooper provided Brigham with a written warning for following too closely and returned Brigham's driver's license, while explaining that one of his responsibilities as a state trooper was to intercept illegal contraband such as guns, stolen property, and narcotics. The trooper then asked for and received Brigham's consent to search the car. While the trooper was searching the car, the dispatcher responded with additional information regarding an occupant's identity. In the trunk, the trooper discovered a Minute Maid juice container holding liquid codeine. all four occupants were then arrested. The incident, from the initial stop until the arrests, took approximately 29 minutes.

ISSUE: Did the trooper unreasonably extend the original, valid traffic stop, resulting in an unlawful detention that invalidates the consent to search?

HELD: No.

DISCUSSION: The legality of police investigatory stops is tested in two parts. Courts first examine whether the officer's action was justified at its inception, and then inquire whether the officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop. Courts are required to consider the facts and circumstances of each case, giving due regard to the experience and training of the law enforcement officers, to determine whether the actions taken by the officers, including the length of the detention, were reasonable under the circumstances. A detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop, unless further reasonable suspicion, supported by articulable facts, emerges. There is no constitutional impediment to an officer's request to examine a driver's license and vehicle registration or rental papers during a traffic stop and to run a computer check on both. An officer may also ask about the purpose and itinerary of a driver's trip. Such questions may efficiently determine whether a traffic violation has taken place, and if so, whether a citation or warning should be issued or an arrest made.

Courts may not scrutinize the motives behind otherwise permissible police actions. There is no constitutional stopwatch on traffic stops. Instead, the relevant question in assessing whether a detention extends beyond a reasonable duration is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." On the facts of this case, the trooper's investigative methods were reasonable, proceeded with deliberation in response to evolving conditions, and evince no purposeful or even accidental unnecessary prolongation.

*****

6th CIRCUIT

U.S. v. Montgomery
377 F.3d 582
July 27, 2004

SUMMARY: A law enforcement officer may conduct a full search of an arrestee's person incident to a lawful custodial arrest. The officer may conduct a full search of an arrestee's person *before* he is placed under lawful custodial arrest as long as the formal arrest follows quickly on the heels of the challenged search of his person and the fruits of that search are not necessary to sustain probable cause to arrest him.

FACTS: An Ohio State Trooper stopped a vehicle for speeding and learned that the driver had a suspended license. The defendant was the right rear seat passenger. According to the trooper, the vehicle's passengers

appeared very nervous. Another trooper arrived, and while checking the other occupants' identifications observed a marijuana stem, approximately one-inch long, on the driver's floorboard near the center console. The front seat passenger reached for the stem, and the trooper yelled at him to put it down.

The trooper advised the occupants that they were going to search the vehicle and that the occupants were in "investigative custody." The trooper observed, the left rear passenger shove a blue object underneath the back seat's armrest. Upon searching the vehicle's interior, the troopers recovered the large marijuana stem on the driver's side, marijuana seeds, and a blue digital scale, which the passenger had hidden underneath the backseat armrest and which had marijuana and cocaine residue on it. After searching the vehicle, the troopers asked defendant to exit the patrol car. With the intent of checking defendant for any narcotics or paraphernalia, the defendant was again patted down and then ordered to remove his shoes. A bag containing crack cocaine lay in one of defendant's shoes. Defendant was then placed under custodial arrest.

ISSUE: Was the search of defendant's shoes lawful?

HELD: Yes.

DISCUSSION: Under the "search-incident-to-a-lawful-arrest" exception to the warrant requirement, a law enforcement officer may conduct a full search of an arrestee's person incident to a lawful custodial arrest. The search-incident-to-a-lawful-arrest rule also permits an officer to conduct a full search of an arrestee's person *before* he is placed under lawful custodial arrest as long as the formal arrest follows quickly on the heels of the challenged search of his person and the fruits of that search are not necessary to sustain probable cause to arrest him.

Probable cause existed to support defendant's arrest independent of the cocaine found in his shoe. Defendant had both visual and physical access to the marijuana stem in plain view on the driver's floorboard near the center console. Defendant had been sitting directly next to the other passenger when the digital scale, visibly covered in drug residue, was concealed. Therefore, defendant had ready physical access to the drug scale. Moreover, based upon that passenger's perceived need to conceal it in the first instance, one could reasonably conclude that the drug scale had been in plain view and, thus, that defendant had visible access to it as well. The others' attempts to conceal the marijuana stem and the scale from the troopers, respectively, demonstrated a shared interest in concealing the fruits of their wrong-doing. In addition, the drugs along with the digital scale, covered in drug residue and commonly used in the distribution of drugs, indicated a drug-dealing enterprise. As the Supreme Court has observed, guilty parties would not likely admit an innocent person into such a criminal enterprise for fear of that person furnishing incriminating evidence against them. See *Maryland v. Pringle*, 540 U.S. 366 (2003).

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U.S. v. Jacob and Gallardo
377 F.3d 573
July 26, 2004

SUMMARY: In determining reasonable suspicion, the question is not whether there is a possible innocent explanation for each of the factors, but whether all of them taken together give rise to reasonable suspicion that criminal activity may be afoot. A court may not discount each factor that is readily susceptible to innocent explanation. A series of seemingly innocent

acts can, taken together, give rise to reasonable suspicion.

A *Terry* stop, when conducted unreasonably, can ripen into an arrest for which probable cause is required. What is reasonable in a *Terry* stop will vary with the particular facts and circumstances of each case. Officers who stop a person reasonably suspected of carrying drugs are entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions, and to take reasonable measures to protect themselves. Placing defendants in the back of a locked patrol car does not, per se, require probable cause.

FACTS: Based on information from a confidential source, a task force began surveillance of Gallardo. A drug dog alerted on a car thought to be associated with Gallardo. The next morning, Gallardo, in the same car, was followed to a motel, where, while waiting on Jacob, he was seen constantly scanning the driveway and parking lot. The defendants were observed doing several other things suggestive of counter surveillance. The surveillance continued from the motel after the defendants loaded several suitcases and a duffle bag into the car. Because of the erratic manner in which Jacob was driving, the investigators believed their surveillance had been compromised. When the car pulled into a club parking lot and drove behind the club, an officer engaged his lights and siren. The car sped up and then stopped. When other officers pulled in front of the car to block it in, the car lunged forward. With weapons drawn, the officers removed the defendants from the car, placed them on the ground, and patted them down. A small amount of marijuana and $1,000.00 were found on Jacob. Nothing was found on Gallardo. Both defendants were handcuffed and placed in a patrol car. A drug dog alerted and the car was searched revealing eight bricks of cocaine.

ISSUE: 1. Was the stop of the car and the frisk of the defendants lawful?

2. Did the circumstances of Gallardo's seizure amount to an arrest for which there was no probable cause?

HELD: 1. Yes.

2. No.

DISCUSSION: An investigatory stop of a vehicle is permissible under the 4th Amendment if supported by reasonable suspicion. A reviewing court must consider the totality of circumstances to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. Considering all the circumstances, the question is not whether there is a possible innocent explanation for each of the factors, but whether all of them taken together give rise to reasonable suspicion that criminal activity may be afoot. A court may not discount each factor that is readily susceptible to innocent explanation. A series of seemingly innocent acts can, taken together, give rise to reasonable suspicion. See *United States v. Arvizu*, 534 U.S. 266 (2002).

Based upon the facts of this case, a well trained officer could reasonably conclude that criminal activity was possibly afoot. Therefore, the investigators were permitted to conduct a stop to investigate their suspicion.

A *Terry* stop, when conducted unreasonably, can ripen into an arrest for which probable cause is required. When establishing that a *Terry* stop was reasonable, the government must demonstrate that the detention and investigative methods used were reasonable

under the circumstances. The degree of force utilized by officers during a detention must be reasonably related in scope to the situation at hand.

What is reasonable in a *Terry* stop will vary with the particular facts and circumstances of each case. The defendants' vehicle lunged forward as if they were attempting to escape. Under these circumstances, the investigators' decision to draw their weapons to prevent an escape was reasonable. The investigators" decision to order the defendants out of the vehicle as they approached the car and to handcuff them was also reasonable, as concern for the investigators' safety was at its height. Officers who stop a person who is reasonably suspected of carrying drugs are entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions, and to take reasonable measures to protect themselves. Placing defendants in the back of a locked patrol car does not, per se, require probable cause.

Since the investigators' conduct in effectuating the stop and in detaining the suspects while they diligently pursued a means of investigation that was likely to confirm or dispel their suspicions was reasonable under the circumstances, the detention did not ripen into an unlawful arrest.

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7th CIRCUIT

U.S. v. Garcia
376 F.3d 648
July 15, 2004

SUMMARY: Police may follow an arrested suspect wherever he goes, even inside a residence. They are forbidden to do the same with persons stopped under *Terry*.

FACTS: When an officer noticed that the defendant was driving suspiciously slow, he ran the license plate, and it came back to a car other than the one defendant was driving. The officer then stopped defendant. The defendant said that his name was "Hector Bazan," but could produce no driver's license or other identification. After smelling alcohol on the defendant's breath, the officer administered a breathalyzer test which indicated that the defendant was intoxicated. At this point the officer had probable cause to believe that defendant had committed the following: (1) a traffic infraction for driving without a valid license plate, and the crimes of (2) driving without a valid operator's license, and (3) driving under the influence of alcohol.

The officer told defendant that if he could produce his identity he would receive only citations and summonses. Otherwise he would be fingerprinted and booked at the stationhouse. Defendant said that he had identification at his home and offered to show the officer where he lived. The officer handcuffed defendant and put him into the back of his patrol car for the drive. Defendant went into his home and the officer followed. He was joined by another officer. Defendant searched throughout his house for his identification and the officer tagged along. During this period the officer observed evidence of a bogus-ID mill. He ordered defendant to sit on a couch and obtained a telephonic search warrant. The resultant search discovered that the occupants of the house were making false identification documents. Defendant was arrested for a violation of 18 U.S.C. §1028 (a) (5).

At trial the officer testified that he did not plan to arrest defendant unless he failed to produce valid identification, and that while defendant was in handcuffs he was "detained."

ISSUES: Can police officers follow a suspect around his home while he searches for identification if they have probable cause to make an arrest?

HELD: Yes.

DISCUSSION: Police may follow an arrested suspect wherever he goes, even inside a residence. They are forbidden to do the same with persons stopped under *Terry*. See *Washington v. Chrisman*, 455 U.S. 1 (1982). Regarding the officer's use of the word "detention," it does not matter what the officer was thinking or planning. Applying the "objective reasonableness" standard, the officer's use of the word "detention" fell within the definition of "arrest." The officer was not acting on reasonable suspicion, but on probable cause. Since he had probable cause to arrest defendant, he had the right to follow him around his house while he searched for his identification. Defendant could have been looking for a weapon or means of escape instead of personal identification. The officer acted reasonably in light of the "totality of the circumstances."

Since the officers had a right to be in defendant's home predicated upon probable cause, he had a right to make observations of evidence that was in plain view. The resultant search warrant was not obtained in violation of the fourth amendment.

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8th CIRCUIT

U.S. v. Poggemiller
375 F.3d 686
July 13, 2004

SUMMARY: When a police officer makes a lawful arrest of an occupant of a vehicle, the officer may search the passenger compartment of the vehicle as a contemporaneous incident of the arrest even when the officer does not make contact until the person arrested has left the vehicle.

The search of the passenger compartment of the vehicle incident to arrest extends through a trap door in the back seat into the trunk since it was an area within reach of and accessible to the arrestee.

FACTS: An officer, seeking the defendant on an arrest warrant, spotted and followed what he believed to be the defendant's car. When the officer finally caught up with the car, he found it parked in the middle of a rural road with the defendant and another man standing within fifteen feet of it. The officer arrested the defendant and then began to search the passenger compartment of the car. He folded down the armrest in the middle of the back seat revealing a plastic trap door which, when opened would "allow things longer than the trunk to get passed into the back seat like a fishing pole." When he opened the trap door, he saw marijuana just inside the threshold. Using his flashlight, he discovered more marijuana and a firearm.

ISSUES: 1. Was the search of the car valid even though the defendant had already exited the car prior to the officer's arrival?

2. Does a search of a car incident to arrest extend through a trap door into the trunk?

HELD: 1. Yes.

2. Yes.

DISCUSSION: In accordance with *Thornton v. United States*, 124 S. Ct. 2127 (2004), when a police officer makes a lawful arrest of an occupant of a vehicle, the officer may search the passenger compartment of the vehicle as a contemporaneous incident of the arrest even when the officer does not make contact until the person arrested has left the vehicle.

In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court held that when police search a vehicle incident to the arrest of an occupant, they "may also examine the contents of any container found within the passenger compartment…." Since the trap door leading to the trunk was within reach and accessible to the defendant, it was within the *Belton* rule, making the search lawful.

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9th CIRCUIT

U.S. v. Grubbs
377 F.3d 1072
July 26, 2004

SUMMARY: Anticipatory search warrants are invalid absent "clear, explicit and narrow triggering conditions." The triggering conditions may appear on the face of the warrant itself or in an attachment to the warrant. But whatever document contains the information must be presented to the people whose property is being searched.

FACTS: Inspectors with the U.S. Postal Service presented an anticipatory search warrant to a federal magistrate judge to search the residence of Grubbs. The warrant was based on Grubbs allegedly ordering a videotape from a website that advertised the sale of illegal child pornography. The anticipatory warrant did not state on its face what triggering conditions would cause it to become valid, but instead relied on an attached affidavit. The affidavit set forth the operative event, which was the receipt of the videotape by someone at the defendant's residence. The search took place two days later after an undercover postal inspector delivered the videotape to the Grubbs home and Grubbs' wife accepted it and took it into the house. The search warrant was shown to the defendant about 30 minutes after the search began. The warrant did not include the affidavit that contained the "triggering event" authorizing the search. The affidavit was in the possession of the lead agent at all times during the search, but he never showed it to the defendant or his wife.

ISSUE: If the property owner/occupier is not informed of the triggering conditions or events of an anticipatory search warrant, then is the search illegal?

HELD: Yes.

DISCUSSION: Anticipatory search warrants are invalid absent "clear, explicit and narrow triggering conditions." The triggering conditions may appear on the face of the warrant itself or in an attachment to the warrant, but whatever document contains the information must be presented to the people whose property is being searched. A warrant must satisfy the particularity requirement of the Fourth Amendment, which serves to give notice to the property owners of the law enforcement officers' authority and need for the search as well as their limitations. If the property owner is not informed of the conditions or events which set the anticipatory search warrant in motion, then the search is illegal. Because the affidavit which set out

events serving to activate the warrant was never presented to the defendant or his wife, the warrant was inoperative and the search illegal.

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10th CIRCUIT

U.S. v Jackson
381 F.3d 984
August 18, 2004

SUMMARY: The law enforcement officer did not exceed the scope of the consent to search the defendant's bag when he opened a baby powder container that was in the bag. The warrantless search of that container was justified under the plain view exception to the 4th Amendment's warrant requirement.

Before an officer may destroy or render useless a container after having been granted consent to search, the officer must obtain explicit authorization to do so from the consenting person or have some other lawful basis upon which to proceed.

FACTS: DEA Agent Perry obtained a passenger name record from Amtrak which showed that Jackson had paid cash for a one-way coach ticket from Los Angeles to Akron, Ohio. Based on his experience, Perry testified that Jackson's travel arrangements were consistent with drug smugglers. When the Amtrak train arrived in Albuquerque, Perry approached Jackson and identified himself as a DEA Agent. Perry asked Jackson if he would speak with him and Jackson replied that he would. When asked, Jackson denied that he was carrying any contraband, and consented to a search of his bag for contraband, including narcotics. Inside Jackson's bag Perry found a shaving kit. Within the shaving kit was a container of baby powder which bulged and appeared heavier and harder than normal baby powder containers. Perry removed the lid from the container, moved some of the baby powder aside and saw a clear plastic bag which contained a white powdery substance. The color and texture of the substance was consistent with that of powdered cocaine. Based on his training and experience Perry believed the substance was narcotics and he arrested Jackson. Back at the DEA office Perry cut off the top section of the container to remove the plastic bag. The plastic bag was heat sealed and contained another clear plastic bag. The inner bag held approximately five hundred grams of cocaine.

ISSUE 1: Did Perry exceed the scope of the consent granted by Jackson when he searched the baby powder container he found within Jackson's bag?

ISSUE 2: Was the warrantless search of the baby powder container and its contents at the DEA's office valid?

HELD 1: No.

2: Yes.

DISCUSSION: The search of a container within a bag does not exceed the scope of consent to search the bag when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open the container. Perry told Jackson that he wanted to search his bag for narcotics. Jackson's consent to search the bag for this reason could reasonably be construed as consent to search any containers within the bag which could hold narcotics, such as the baby powder container. Jackson stood near Perry throughout the search and did not object when Perry searched the baby powder container.

Perry did not exceed the scope of the consent when he removed the lid from the container because he did not destroy or render the container useless. Before an officer may destroy or render useless a container after having been granted consent to search, the officer must obtain explicit authorization to do so from the consenting person or have some other lawful basis upon which to proceed.

The court also found that the warrantless search of the baby powder container and its contents at the DEA's office was valid. A warrantless search of a legally seized container can be conducted if law enforcement officers see, within plain view, the contents of a container, and it is apparent that such contents are contraband. In situations where the police already possess knowledge approaching certainty as to the contents of a container, the search of the container does not unreasonably infringe upon the individual's interest in preserving the privacy of those contents. When Perry searched the container pursuant to Jackson's consent he saw a white powdery substance that resembled cocaine, inside a plastic bag hidden within the baby powder container. Based on his training and experience Perry knew that Jackson's travel arrangements were consistent with those of a drug smuggler, and that drug smugglers sometimes conceal narcotics within baby powder containers. At this point it was apparent to Perry that the plastic bag contained cocaine.

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11th CIRCUIT

Bourgeois, et al vs. Peters, et al
2004 U.S. App. LEXIS 21487
October 15, 2004

SUMMARY: Mass, suspicionless, warrantless magnetometer searches of people gathered to protest violates their 4th Amendment rights to be free from unreasonable searches and seizures.

Mass, suspicionless, warrantless magnetometer searches of people gathered to protest also violates their 1st Amendment rights of freedom of speech and assembly.

FACTS: School of the Americas Watch ("SAW") engages in various forms of nonviolent protest seeking to pressure the federal government to cut funding to the Western Hemisphere Institute for Security Corporation, better known as the "School of the Americas" (SOA). Each November the SAW protests on property open to the public immediately outside Fort Benning. Approximately 15,000 people attend the demonstration each year. Throughout the 13 year history of these protests, no weapons have ever been found at the protest site, and no protestor has ever been arrested for an act of violence. A week before the 2002 protest, the City of Columbus instituted a policy requiring everyone wishing to participate in the protest to submit to a magnetometer, (essentially a metal detector) search at a checkpoint "a couple of long city blocks" away from the SAW protest site. If the magnetometer indicated the presence of metal as a protestor was walking through it, police would physically search that individual's person and belongings. The City contends that it based its decision to conduct mass searches on several factors. (1) The Department of Homeland Security threat assessment level was "elevated" indicating a "significant" risk of attack. (2) Protestors in previous years had demonstrated a history of "lawlessness" because many on them engaged in frenzied dancing and did not immediately disburse at the end of the scheduled protest, and "formed a 'global village' from large debris." Some of them ignited a smoke bomb, and a few entered onto Fort Benning in a

peaceful march to the SOA. (3) Finally, SAW had invited several "affinity groups" to attend the protest, in particular, the Anarchists, that had allegedly instigated violence at other, unrelated protests such as the Seattle World Trade Organization in 1999.

ISSUE: Do the mass, suspicionless, warrantless, magnetometer searches of people gathered to protest against the School of the Americas violate 1st and 4th Amendment rights.

HELD: Yes.

DISCUSSION: The mass, suspicionless, warrantless magnetometer searches of people gathered to protest violates their Fourth Amendment rights to be free from unreasonable searches and seizures. The type of search here does not fall within the "special needs" exceptions recognized by the Supreme Court. If the police have reasonable suspicion that a suspect is involved in criminal activity they can perform a *Terry* stop. If the police have a reasonable suspicion that the suspect is presently armed and dangerous, then they can conduct a *Terry* frisk. If they have probable cause to believe anyone is carrying a weapon, they may conduct a full-fledged exigent circumstances search. Armed with these alternatives, the City cannot plausibly claim that it has no alternative but to conduct mass, suspicionless, warrantless searches for people who show no indication of possessing contraband or weapons.

The mass, suspicionless, warrantless magnetometer searches of people gathered to protest also violates the 1st Amendment. The 1st Amendment does not permit the government to place burdens on speech and assembly in such an unprincipled, ad hoc manner. The decision to implement searches appears to be left to the Chief's personal discretion, to be based on whatever factors he deems appropriate at the time. Because the individuals must, in effect, receive the permission of police to enter the area of the protest and to exercise their rights to freedom of speech and assembly, the search policy establishes a prior restraint on protected expression. The policy here fails to provide constitutionally adequate procedural safeguards for potential speakers. This case presents an especially malignant unconstitutional condition because citizens are being required to surrender a constitutional right, freedom from unreasonable searches and seizures, not merely to receive a discretionary benefit, but to exercise two other fundamental rights, freedom of speech and freedom of assembly.