
THE -QUARTERLY REVIEW-

LEGAL COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

January 2005 Vol. 6, Ed. 2

EDITOR'S COMMENTS

Welcome to the second 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.2 (2005)".

Table of Contents

By clicking on the page number for the article or case name, you will be taken directly to the beginning of the article or case brief. Clicking on your computer's "Back" button will return you to the Table of Contents.

Footnotes

By placing your cursor on the footnote number in the article, a textbox will appear with the reference. By clicking the footnote number, you will be taken directly to the footnote reference.

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

Ed Zigmund Gary Ainley Kenny Anderson Margaret Wright
Keith Hunsucker Bill McAbee Chuck Adkins

NATIONAL SUSPENSION and DEBARMENT TRAINING PROGRAM (NSDTP)

A proposed three-day training program for agents, agency attorneys and prosecutors covering the legal and practical uses of administrative sanctions during civil and criminal investigations.

NEEDS SURVEY

Go to

<https://www.fletcsurvey.com/asp/takeSurvey.asp?surveyID=85>

**** DEADLINE IS JANUARY 21 ****

If you are unable to access the survey, please e-mail us at Janice.Teich@dhs.gov and provide a mailing address or fax number and a survey will be sent to you accordingly.

LEGAL DIVISION WEB SITE

www.fletc.gov/legal

**Visit our newly redesigned, expanded,
and user friendly web site.**

Join The Quarterly Review **E-mail Subscription List**

It's easy! Go to

www.fletc.gov/legal

Click on the “QUARTERLY REVIEW” link at the top.

Click on the “SUBSCRIBE” link in the middle.

Fill in your e-mail address. Change your address or unsubscribe here also.

THIS IS A SECURE SERVICE. No one but the FLETC Legal Division will have access to your address, and you will receive mailings from no one except the FLETC Legal Division.

A NEW CRIMINAL CODE REFERENCE BOOK

The Legal Division is currently working on a criminal code reference book which will include a discussion of the most relevant Federal criminal statutes enforced by Federal law enforcement officers. We ask that you consider the common crimes that you primarily investigate as part of your responsibilities, and that you please send us an e-mail telling us what code sections those are.

Your input is greatly appreciated. If you have any questions, please contact

Bryan Lemons at (912) 267-2945 or **bryan.lemons@dhs.gov** .

Table of Contents

CIVIL LIABILITY FOR INTERROGATION VIOLATIONS	5
<u>SUPREME COURT</u>	8
<i>Leocal v. Ashcroft</i> (Aggravated Felony - Deportation)	8
<i>Jama v. ICE</i> (Removal Without Consent of Destination Country)	9
<i>Clark v. Martinez</i> (Detention of Alien After Removal Order)	9
<i>Brosseau v. Haugen</i> (Excessive Force - Qualified Immunity)	10
<i>Devenpeck v. Alford</i> (Probable Cause / Arrest - Unnamed Offense)	12
<i>Whitfield / Hall v. U.S.</i> (Conspiracy to Commit Money Laundering - Overt Act)	13
<i>U.S. v. Booker / U.S. v. Fanfan</i> (Federal Sentencing Guidelines)	14
<u>5th CIRCUIT</u>	15
<i>U.S. v. Wallen</i> (Terry Frisks of Vehicles)	15
<u>7th CIRCUIT</u>	16
<i>U.S. v. Arnold</i> (Terry Frisk of Trunk Through Backseat Armrest)	16
<i>U.S. v. Cellitti</i> (Illegal Arrest - Involuntary Consent - Standing to Object)	17
<u>8th CIRCUIT</u>	19
<i>U.S. v. Hill</i> (Felon in Possession - "In or Affecting Commerce")	19
<i>U.S. v. Kirchoff</i> (Felon in Possession - Restoration of Rights)	19
<i>U.S. v. Va Lerie</i> (Illegal Seizure of Bag - Consent to Search)	20
<i>U.S. v. Martin</i> (Photo Arrays)	21
<u>10th CIRCUIT</u>	22
<i>U.S. v. Rogers</i> (Miranda - "In Custody")	22
<u>11th CIRCUIT</u>	23
<i>U.S. v. Wright</i> (Felon in Possession - "Knowing" Possession)	23

CIVIL LIABILITY FOR INTERROGATION VIOLATIONS

Edmund Zigmund
Senior Instructor

Police questioning is an effective tool for the enforcement of criminal laws.¹ However, coerced statements taken in violation of the Fifth Amendment right against self-incrimination are inadmissible. Also, since *Miranda*,² courts have protected this right by suppressing any custodial statement if police fail to comply with certain procedural safeguards.³ There are other remedies as well, including civil liability. When and how can law enforcement officers be held civilly liable for their actions during police interrogation?

The Fifth Amendment Self-Incrimination Clause

In *Chavez v. Martinez*, 538 U.S. 760 (2003), police officers shot Martinez during an investigation. Chavez, a patrol supervisor, accompanied Martinez to the hospital and then questioned Martinez while he was receiving medical treatment. Eventually Martinez admitted that he took a gun from the officer's holster and pointed it at the police. He also admitted that he used heroin regularly. At no point during the interview was Martinez given *Miranda* warnings. Martinez was never charged with a crime, and his statements were never used against him in any criminal prosecution. He sued Chavez and others under Title 42 U.S.C. §1983, alleging violations of his Fifth Amendment right against self-incrimination and Fourteenth Amendment due process rights.

¹ *Moran v. Burbine*, 475 U.S. 412, 426 (1986)

² 384 U.S. 436 (1966)

³ *Mason v. Mitchell*, 320 F.3d 604, 631 (6th Cir. 2003)

The Fifth Amendment Self-Incrimination Clause states that “No person...shall be *compelled in any criminal case* to be a witness against himself....” The Supreme Court held that a violation of this clause occurs only when statements are used in a “criminal case.” Martinez was not prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case. Therefore, this Constitutional privilege was not violated and Chavez is entitled to qualified immunity.

In *Robinson v. Gunja*, 92 Fed. Appx. 624 (10th Cir. 2004), a federal prisoner appealed the dismissal of his Title 42 U.S.C. §1983 complaint filed after a warden decided to terminate his telephone access to legal personnel. In his complaint, the prisoner asserted that prison authorities violated his Fifth Amendment right against self-incrimination by providing him with purportedly unmonitored telephone access for legal purposes, monitoring these conversations, and using these conversations as the basis for terminating his legal telephone access. The Tenth Circuit Court held the prisoner could not establish a claim for the violation of his right against self-incrimination because he did not allege that any of the information obtained from the monitored calls was used against him in any “criminal proceeding.”

See also *Gibson v. Picou*, 101 Fed. Appx. 154 (7th Cir. 2004); *Allison v. Snyder*, 332 F.3d 1076 (7th Cir. 2003).

When is there a “case?”

In *Chavez*, the Supreme Court stated: “In our view, a ‘criminal case’ at the very least requires the initiation of legal proceedings.” “We need not decide today the precise moment when a ‘criminal case’ commences; it is enough to say that police questioning does not constitute a ‘case’....”

Renda v. King, 347 F.3d 550 (3d Cir. 2003), followed the *Chavez* case. In *Renda*, Trooper King was investigating Renda's allegations of domestic abuse against a state trooper who lived with her. By telephone, Renda told King she had been slammed into a wall by the trooper at their residence earlier that day during an argument. Renda also said she did not want to give a statement or file charges and that she wanted to be left alone. After further investigation, King interviewed Renda in-person at her friend's apartment. He did not provide *Miranda* warnings to Renda. She gave a written statement which did not mention the assault that she had reported earlier that evening. When asked why, Renda admitted that she had lied earlier. Based upon that statement, King then charged Renda with giving false reports to law enforcement authorities. The state court suppressed Renda's statements because she had not been given *Miranda* warnings prior to what it concluded was a custodial interrogation. The District Attorney then dismissed the case. Renda sued under Title 42 U.S.C. §1983.

The Third Circuit Court noted the factual difference between *Chavez* and *Renda*. In *Chavez*, the plaintiff was never charged with a crime. In *Renda*, the plaintiff was charged with a crime but the charges were later dropped after the state court suppressed the statements obtained in violation of *Miranda*. The Court said that the plaintiff's statement was used in a criminal case in one sense, i.e., to develop probable cause sufficient to charge her. However, the court said, "It is the use of coerced statements **during a criminal trial**, and not in obtaining an indictment, that violates the Constitution." (emphasis added). As such, Renda's constitutional right against self-incrimination was not violated.

See also *Jacobs v. Md. Dep't of Natural Res.*, 90 Fed. Appx. 677 (4th Cir. 2004).

Miranda

In *Dickerson v. U.S.*, 530 U.S. 428 (2000), the Supreme Court ruled that "*Miranda* announced a **constitutional** rule that Congress may not supersede legislatively." The *Miranda* warnings have taken on **constitutional** stature. (bold added). Is there civil liability then for failing to give the warnings or giving them improperly?

In *Chavez*, six Supreme Court Justices agreed that mere custodial interrogation absent *Miranda* warnings is not a basis for a Title 42 U.S.C. §1983 claim. The "procedural safeguards" required by *Miranda* are "not themselves rights protected by the Constitution but measures to insure that the right against compulsory self-incrimination was protected...." (see *Michigan v. Tucker*, 417 U.S. 433 (1974)). "All the Fifth Amendment forbids is the introduction of coerced statements at trial. Accordingly, Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a §1983 action."

Following the guidance of *Chavez*, the Third Circuit Court in *Renda* held that a plaintiff may not base a §1983 claim on the mere fact that the police questioned the plaintiff in custody without providing *Miranda* warnings where there is no claim that the statements obtained in violation of *Miranda* were used against the plaintiff. Violations of the prophylactic *Miranda* procedures do not amount to violations of the Constitution itself.

The Fourteenth Amendment Due Process Clause

(Fifth Amendment Due Process Clause for federal officers/agents)

The Supreme Court's views on the proper scope of the Fifth Amendment's Self-incrimination Clause do not mean that police torture and abuse that result in confessions is constitutionally permissible so long as the statements are not used at trial. The Fourteenth Amendment (and the Fifth Amendment Due Process Clause) provides that no person shall be deprived of life, liberty, or property, without due process of law. In *Chavez*, the Supreme Court held that convictions based on evidence obtained by methods that are so brutal and so offensive to human dignity, that "shock the conscience," violate this Due Process Clause and that this type of police behavior may be the basis of a §1983 action. In *Miller v. Fenton*, 474 U.S. 104, 109 (1985), the Supreme Court said: "Certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." A majority in *Chavez* agreed that additional consideration was necessary to determine whether Chavez's actions were so brutal and offensive that they shocked the conscience and, therefore, could support Martinez's claim for a substantive Fourteenth Amendment Due Process violation. This issue was remanded to the Ninth Circuit Court of Appeals.

On remand, the Ninth Circuit Court held that "If Martinez's allegations are proven, it would be impossible not to be shocked by Sergeant Chavez's actions....Under the facts alleged by Martinez, Chavez violated Martinez's clearly

established due process rights."⁴ The case is now pending trial in the District Court.

Conclusion

Civil liability under the Fifth Amendment Self-Incrimination Clause and for *Miranda* violations is limited to those cases where the obtained statements are used against the defendant in a criminal trial. Liability does not exist if the statements are used for other purposes, like investigating police misconduct or developing probable cause to arrest a suspect in a criminal case.

However, there can be civil liability under the Fourteenth Amendment when police use physical or mental interrogation techniques so brutal and offensive that they "shock the conscience." This civil liability exists even if the obtained statements are never used in a criminal case against the person who was subjected to the interrogation.⁵

Edmund Zigmund is a Senior Legal Instructor at the Federal Law Enforcement Training Center. He has served as a local police officer, state prosecutor, police legal advisor in Pennsylvania, and a legal instructor for the North Carolina Justice Academy.

⁴ *Martinez v. City of Oxnard*, 337 F.3d 1091 (9th Cir. 2003)

⁵ *See Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992)

CASE BRIEFS

UNITED STATES SUPREME COURT and CIRCUIT COURT UPDATES

SUPREME COURT

Leocal v. Ashcroft
125 S. Ct. 377
November 9, 2004

SUMMARY: A Florida conviction for driving under the influence of alcohol (DUI) and causing serious bodily injury is not a crime of violence as defined under 18 U.S.C. § 16. Therefore, an alien convicted of such an offense is not subject to removal as one who has committed an “aggravated felony” as defined in section 101(a)(43)(F) of the Immigration and Nationality Act (INA).

FACTS: Leocal, a lawful permanent resident of the United States, was convicted of two counts of driving under the influence (DUI) causing serious bodily injury in violation of Fla. Stat. § 316.193(3)(c)(2). This Florida statute makes it a felony to operate a vehicle under the influence, and “by reason of such operation, cause . . . serious bodily injury to another.” This statute requires proof of causation of injury, but does not require proof of any particular mental state regarding causation. Leocal was sentenced to two and a half years imprisonment for these offenses.

The Immigration and Naturalization Service (INS) initiated removal proceedings against him under § 237(a) of the INA, alleging that Leocal was subject to removal for having been convicted of an aggravated felony. Leocal was ordered removed as an aggravated felon

and appealed, arguing that the Florida DUI statute was not an aggravated felony.

ISSUE: Is the Florida DUI statute (and other similar statutes), which makes it a felony to operate a vehicle under the influence and thereby cause serious bodily injury an aggravated felony as defined by section 101(a)(43)(F) of the INA?

HELD: No.

DISCUSSION: Section 101(a)(43)(F) defines aggravated felonies to include any crime of violence (as defined by 18 U.S.C. § 16) where the term of imprisonment is at least one year.

18 U.S.C. § 16 consists of two parts. 18 U.S.C. § 16(a) defines a crime of violence as one which has “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 16(b) defines a crime of violence as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

The Florida DUI statute is not a crime of violence under 18 U.S.C. § 16(a) because there is no element requiring any use, attempted use or threatened use of physical force. Where a statute merely requires negligent or accidental force, that does not constitute “use” of force.

Likewise, the Florida DUI statute is not a

crime of violence under 18 U.S.C. § 16(b). While 18 U.S.C. § 16(b) is more broadly worded, it still requires substantial risk that physical force may be “used” in the course of committing the offense. Since the Florida DUI statute requires only that negligent or accidental force be employed towards the victim, the crime is not one that involves a substantial risk that force will be used in its commission.

Many states have enacted heightened DUI statutes criminalizing DUI which results in death or serious bodily injury without requiring proof of any mental state regarding the use of force against the victim. Other states merely require a proof of a negligent mental state regarding the force used against the victim. The word “use” as employed by 18 U.S.C. § 16 requires proof of a mental state beyond that of mere negligence. Therefore, DUI statutes which criminalize DUI resulting in death or serious bodily injury, absent a mental state beyond negligence in causing the injury, are not “aggravated felonies” as defined in section 101(a)(43)(F) of the INA.

The Court specifically declined to determine whether crimes requiring proof of “reckless” use of force would qualify as “use” of force under 18 U.S.C. § 16.

Jama v. ICE
2005 U.S. LEXIS 626
January 12, 2005

SUMMARY: An alien who is ordered removed from the United States may be removed to another country under 8 U.S.C. § 1231(b)(2)(E)(iv) [INA § 241(b)(2)(E)(iv)] without the consent of that country’s government.

FACTS: Jama is a native and citizen of Somalia. He was admitted into the United States as a refugee, but subsequently ordered removed from the United States because of a criminal conviction. Jama declined to designate a country for removal. The Immigration Judge ordered Jama removed to Somalia, the country of Jama’s birth and citizenship. Jama instituted habeas proceedings challenging the designation of Somalia. Jama claimed that Somalia had no functioning government, and therefore could not consent to accept him. Jama argued that the United States was barred from removing him to Somalia absent advance consent from the country of Somalia.

ISSUE: Under 8 U.S.C. § 1231(b)(2)(E)(iv), can an alien be removed to a country without the advance consent of that country’s government?

HELD: Yes.

DISCUSSION: This Court decision primarily consists of lengthy statutory analysis. However, in the end, the majority concludes an alien may be removed to the country of his birth without advance consent from that country. (The practical applicability of this decision is limited by the difficulty of removing an alien to a country without the advance consent of that country).

Clark v. Martinez
2005 U.S. LEXIS 627
January 12, 2005

SUMMARY: Under 8 U.S.C. § 1231(a)(6) [INA § 241(a)(6)], the Secretary of the Department of Homeland Security may detain an inadmissible alien beyond the 90-day removal period, but only so long as this

is reasonably necessary to achieve removal of the alien. This law applies equally to aliens regardless of whether or not they have been admitted to the United States.

FACTS: Petitioners were citizens of Cuba who were paroled into the United States in 1980. Because of various criminal convictions, petitioners were not admitted to the United States. Their parole terminated, and they were ordered removed from the United States.

Following their orders of removal, both aliens were detained beyond the 90-day removal period authorized by 8 U.S.C. § 1231(a) [INA § 241(a)]. (Given the difficulty of removing individuals to Cuba, these aliens faced an indefinite, but likely lengthy, period of detention.) They both filed a petition for writ of habeas corpus challenging their continued detention.

ISSUE: Are inadmissible aliens entitled to the same treatment as aliens admitted to the United States regarding detention prior to removal?

HELD: Yes

DISCUSSION: While 8 U.S.C. § 1231(a)(6) does authorize the detention of inadmissible aliens beyond the removal period, it does not authorize indefinite detention. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court ruled that in regard to aliens who had been admitted to the United States but become subject to removal, six months was the presumptive period in which to reasonably remove the alien. Following this six month period, these aliens must be conditionally released if there is “no significant likelihood of removal in the reasonably foreseeable future.” *Id.* at 701. In the present case, the Court extended this presumption to inadmissible aliens. The 90-day statutory removal period and the

presumptively reasonable 6 month period to effect removal apply equally to removable aliens whether they have been admitted to the United States or not.

Brosseau v. Haugen
125 S. Ct. 596
December 13, 2004

SUMMARY: Claims of excessive force are to be judged under the Fourth Amendment “objective reasonableness” standard. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.

Qualified immunity shields an officer from suit when decisions that, even if constitutionally deficient, reasonably misapprehend the law governing the circumstances confronted. Qualified immunity is not available when it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. However, qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force.

FACTS: Officer Brosseau responded to a 911 report of a fight. When she arrived, she found Haugen and two others in a fight. Haugen ran through his mother’s yard and hid in the neighborhood. During the subsequent police search, officers instructed other persons in the immediate area, including a woman and child, to remain in their vehicles. With Brosseau in pursuit, Haugen jumped into the driver’s side of his Jeep and closed and locked the door. Brosseau believed that he was running to the

Jeep to retrieve a weapon. Brosseau arrived at the Jeep, pointed her gun at Haugen, and repeatedly ordered him to get out of the vehicle. She hit the driver's side window several times with her handgun, and on the third or fourth try, the window shattered. She unsuccessfully attempted to grab the keys and struck Haugen on the head with the barrel and butt of her gun. Haugen, still undeterred, succeeded in starting the Jeep. As the Jeep started or shortly after it began to move, Brosseau jumped back, firing one shot through the rear driver's side window at a forward angle, hitting Haugen in the back. She later explained that she shot Haugen because she was fearful for the other officers on foot who she believed were in the immediate area, and for the occupied vehicles in Haugen's path and for any other citizens who might be in the area. Despite being hit, Haugen drove away. After about a half block, Haugen realized that he had been shot and brought the Jeep to a halt. He suffered a collapsed lung and was airlifted to a hospital. He subsequently pleaded guilty to a felony of "eluding" where he admitted that he drove his Jeep in a manner indicating "a wanton or willful disregard for the lives of others." Haugen brought this 42 U.S.C. § 1983 action against Brosseau, alleging excessive force in violation of his federal constitutional rights.

ISSUE: Was the officer entitled to qualified immunity for the shooting?

HELD: Yes.

DISCUSSION: When confronted with a claim of qualified immunity, a court must ask first the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194 (2001) The constitutional question in this case is governed by the principles enunciated in *Tennessee v.*

Garner, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989). Claims of excessive force are to be judged under the Fourth Amendment "objective reasonableness" standard. Specifically with regard to deadly force, it is unreasonable for an officer to seize an unarmed, non-dangerous suspect by shooting him dead. But where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.

While expressing no view on whether the officer violated Haugen's right to be free from excessive force, the court held that the officer was entitled to qualified immunity. Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation. The contours of the right must be sufficiently clear. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Here, the situation the officer confronted was whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. A review of cited cases undoubtedly shows that this area of the law is one in which the result

depends very much on the facts of each case. None of the cases squarely governs the case here; rather, they suggest that the officer's actions fell in the hazy border between excessive and acceptable force. As such, the cited cases by no means clearly establish that the officer's conduct violated the Fourth Amendment.

Devenpeck v. Alford
125 S. Ct. 588
December 13, 2004

SUMMARY: A warrantless arrest by a law officer is reasonable under the 4th Amendment if, given the facts known to the officer, there is probable cause to believe that a crime has been or is being committed, even if it is not the one invoked by the arresting officer at the time of the arrest. The offense establishing probable cause need not be "closely related" to, and based on the same conduct as, the offense the arresting officer identifies at the time of arrest.

FACTS: 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 because a Washington State Court of Appeals decision had clearly established that the recording was not a crime. 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, not the one invoked by the arresting officer at the time of the arrest, if that offense is not "closely related" to the offense invoked by the officer?

HELD: No.

DISCUSSION: A warrantless arrest by a law officer is reasonable under the 4th Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. *Maryland v. Pringle*, 540 U.S. 366 (2003).

An arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. See *Whren v. U.S.*, 517 U.S. 806, 812-813 (1996) (reviewing cases); *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam). That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.

The 4th Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. *Horton v. California*, 496 U.S. 128, 138 (1990).

Whitfield / Hall v. U.S.
2005 U.S. LEXIS 625
January 11, 2005

SUMMARY: Commission of an overt act is not a required element of 18 U.S.C. § 1956(h), conspiracy to commit money laundering.

FACTS: Whitfield and Hall were convicted of mail fraud conspiracy, money laundering conspiracy, and three counts of mail fraud for their parts in a fraudulent investment scheme managed and promoted by them and the co-defendants as principals in Greater Ministries International Church (GMIC). GMIC operated a "gifting" program that took in more than \$ 400 million between 1996 and 1999. Under that program, petitioners and others induced unwary investors to give money to GMIC with promises that investors would receive double their money back within a year and a half. Petitioners marketed the program throughout the country, claiming that GMIC would generate returns on investors' "gifts" through overseas investments in gold and diamond mining, commodities, and offshore banks. Investors were told that GMIC would use some of the profits for philanthropic purposes. Most of these claims were false. GMIC made none of the promised investments, had no assets, and gave virtually nothing to charity. Many participants in

GMIC's program received little or no return on their money, and their investments indeed largely turned out to be "gifts" to GMIC representatives. Petitioners together allegedly received more than \$ 1.2 million in commissions on the money they solicited.

The indictment did not allege an overt act, and the trial judge did not instruct the jury that they must find proof of an overt act to support 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 conspiracy under 18 U.S.C. § 1956?

HELD: No.

DISCUSSION: In 1992, Congress enacted the money laundering conspiracy provision at issue in these cases, now codified at 18 U.S.C. § 1956(h). Section 1956(h) provides that "Any person who conspires to commit any offense defined in §1956 or §1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

In *U.S. v. Shabani*, 513 U.S. 10 (1994), the court held that the nearly identical language of the drug conspiracy statute, 21 U.S.C. §846, did not require proof of an overt act. ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy").

Absent contrary indications, Congress intends to adopt the common law definition of statutory terms. The common law understanding of conspiracy does not make the doing of any act other than the act of conspiring a condition of liability. The general

conspiracy statute, 18 U.S.C. §371, supersedes the common law rule by expressly including an overt-act requirement. (“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, *and one or more of such persons do any act to effect the object of the conspiracy*, each shall be fined under this title or imprisoned not more than five years, or both” (italics added)). In *Nash v. U.S.*, 229 U.S. 373 (1913), and *Singer v. U.S.*, 323 U.S. 338 (1945), the court held that, where Congress had omitted from the relevant conspiracy provision any language expressly requiring an overt act, no such requirement would be read into the statute. Such is the case with 18 U.S.C. § 1956(h).

U.S. v. Booker / U.S. v. Fanfan
2005 U.S. LEXIS 628
January 12, 2005

SUMMARY: 18 U.S.C. §3553(b), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the Sixth Amendment right to trial by jury and therefore must be severed and excised from the Sentencing Reform Act of 1984. Section 3742(e), which depends upon the Guidelines’ mandatory nature, also must be severed and excised. So modified, the Act makes the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges, but permitting it to tailor the sentence in light of other statutory concerns.

FACTS: 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 grams over and above the 92.5 grams that the jury had to have found (the jury never heard such evidence).

In *Fanfan*, the jury convicted the defendant of conspiracy to distribute drugs. The District Court Judge concluded, based upon *Blakely v. Washington*, 125 S. Ct. 21 (2004), 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 Right to Trial by Jury 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?

HELD: Yes.

DISCUSSION: In addressing Washington State’s determinate sentencing scheme, the *Blakely* Court found that *Jones v. United States*, 526 U.S. 227; *Apprendi v. New Jersey*, 530 U.S. 466; and *Ring v. Arizona*, 536 U.S. 584, made clear “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” As *Blakely*’s dissenting opinions recognized,

there is no constitutionally significant distinction between the Federal Sentencing Guidelines and the Washington State procedure at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges. Title 18 U.S.C. A. § 3553(b) directs that a court “shall impose a sentence of the kind, and within the range” established by the Guidelines, subject to departures in specific, limited cases. Because they are binding on all on judges, this Court has consistently held that the Guidelines have the force and effect of laws. Thus, in *Booker* as in *Blakely*, the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact(s). In the *Booker* case there were no factors the Sentencing Commission failed to adequately consider. Therefore, the judge was required to impose a sentence within the higher Guidelines range.

18 U.S.C. §3553(b), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the Sixth Amendment right to trial by jury and therefore must be severed and excised from the Sentencing Reform Act of 1984. Section 3742(e), which depends upon the Guidelines’ mandatory nature, also must be severed and excised. So modified, the Act makes the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges, but permitting it to tailor the sentence in light of other statutory concerns.

On remand in the *Booker* case, the District Court should impose a sentence in accordance with today’s opinions. In the *Fanfan* case, the Government (and Fanfan should he so choose) may seek resentencing under the system set forth in today’s opinions. As these dispositions indicate, today’s Sixth Amendment holding and the Court’s remedial

interpretation of the Sentencing Act must be applied to all cases on direct review.

5th CIRCUIT

U.S. v. Wallen
388 F.3d 161
Oct. 11, 2004

SUMMARY: *Terry* frisks of vehicles are lawful when an officer has “an articulable and objectively reasonable belief that the suspect is potentially dangerous.”

The fear of a person’s gaining immediate control of weapons is not limited to the time of the stop, but extends through the entire interaction between the suspect and the officers.

FACTS: A local Texas police officer stopped the defendant’s truck at night for speeding and, as he approached the vehicle, the officer observed two rifles on the passenger side of the truck. Stating that his wallet with license and proof of insurance was on the passenger side of the truck, the defendant exited and walked to the passenger side at which time the officer noticed the defendant was barefoot. As the defendant moved some of the clutter in the truck, the officer saw a pistol protruding from underneath a bag and immediately ordered the defendant to stand at the rear of the truck. While radioing for a background check, the officer saw the defendant move toward the cab of the truck and had to twice order him back to the rear of the truck. Upon receiving information about an outstanding warrant in another county, the officer handcuffed the defendant, put him in the back of the patrol car, and explained that he was temporarily detaining him until the warrant could be confirmed. The officer then

searched the truck and while searching received word that the outstanding warrant could not be executed in the county where he was now located. The search revealed an unregistered short barrel rifle and an unregistered fully automatic rifle for which the defendant was arrested. An unregistered silencer was later found.

The trial court suppressed the guns and silencer as being found during an unreasonable search citing *Michigan v. Long*, 463 U.S. 1032 (1983) reasoning that the defendant could not have gained control of the weapons because he was already handcuffed and at that point, was not dangerous.

ISSUE: Is the warrantless search for weapons of defendant's vehicle legal after the defendant was handcuffed, placed in the patrol car, and posed no apparent threat to officer safety?

HELD: Yes.

DISCUSSION: The search of defendant's truck was proper under both *Michigan v. Long*, supra, and *Terry v. Ohio*, 392 U.S. 1 (1968), where the officer has "an articulable and objectively reasonable belief that the suspect is potentially dangerous." The suspect was "suspiciously barefoot" at night and had walked toward the truck cab where weapons had already been seen, disobeying instructions to "sit tight." Roadside encounters with suspects are particularly hazardous. The fear of a person's gaining immediate control of weapons is not limited to the time of the stop, but extends through the entire interaction between the suspect and the officers.

7th CIRCUIT

U.S. v. Arnold

388 F.3d 237

November 2, 2004

SUMMARY: Reasonable suspicion allows an officer to search the trunk of a suspect's vehicle, if the suspect's furtive movements cause him to believe that a weapon may be concealed and readily available in the trunk area behind an armrest.

FACTS: Officer Ford spotted Arnold driving with a burned-out headlight. Arnold was the sole occupant of the vehicle and, when he swerved off and onto the road, Ford pulled him over. Ford pulled his patrol car behind the vehicle and illuminated the inside of it with his spotlight.

Officer Ford observed Arnold turn around and look in his direction, and then "worm" his way between the front seats and into the back seat. Officer Ford testified that although he could not see below Arnold's shoulders, Arnold appeared to have been either retrieving or placing something in the back seat. Arnold then returned to the driver's seat.

Ford conducted a "pat down" of Arnold because he feared that Arnold had retrieved a gun from the backseat. Arnold had no weapon, and was placed in the back seat of the patrol car until the traffic stop was complete. Arnold appeared "nervous." A driver's license check revealed that Arnold only had a learner's permit which required him to be accompanied by a fully licensed driver.

Officer Ford searched the passenger compartment of Arnold's car. During his search of the backseat, Ford observed a middle armrest, which from experience Ford

knew opened directly into the trunk. He pulled the armrest down and discovered a loaded handgun that was visible in the immediate space of the trunk. Arnold had no permit for this weapon and was arrested for carrying a handgun without a permit.

ISSUE: Did Officer Ford exceed the scope of a protective search when he pulled down the armrest in the back seat and looked into the trunk?

HELD: NO.

DISCUSSION: In *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court held that an officer with reasonable suspicion that a motorist may be armed and may be able to gain immediate control of weapons may conduct a protective search of the *passenger compartment* (italics added) of the vehicle without a warrant.

“Officer Ford had reasonable suspicion that Arnold may have retrieved or concealed a weapon based on his unusual movements.” Ford properly focused his search on the location into which Arnold had climbed—the back seat—and the areas immediately accessible to Arnold while he was there. See *U.S. v. Veras*, 51 F.3d 1365 (7th Cir. 1995); *U.S. v. Evans*, 994 F.2d 317 (7th Cir. 1993).

U.S. v. Cellitti
387 F.3d 618
October 19, 2004

SUMMARY: When given consent to search a residence for some particular item, officers must constrain their search for that item. Items may be seized in “plain view” if they appear to be contraband or of an incriminating nature.

Being 1) placed in handcuffs, (2) driven to the police station, (3) and chained to a bench for several hours amounts to an arrest. Absent probable cause, such an arrest is illegal.

Consent given during an illegal detention is presumptively invalid unless facts establish that it stems from an independent act of free will.

A party may give consent to search a place in which both that party and the defendant have legitimate expectations of privacy. However, the defendant can challenge the validity of the consent given by that other party.

FACTS: Police responded to a complaint that someone was threatening an individual with a rifle. When they arrived they found three people hiding behind a building. One of them, Singleton, stated that he observed Cellitti exit a house, load, and brandish an assault rifle in his direction.

Officers went to the address and entered a breezeway behind the house. When officers shouted for the occupants to come outside, Cellitti and four others, including Melissa Bauer, exited. They were all placed in handcuffs by the officers. After approximately five minutes the officers entered the house and conducted a protective sweep. They found four additional adults, whom they brought outside and also handcuffed and two children. At the scene Singleton identified Cellitti as the one brandishing the rifle.

Bauer, the owner of the house where she resided with Cellitti, gave the officers consent to search it for the assault rifle. The search failed to locate the rifle. Officer Combs found a set of car keys under a sofa cushion, which

did not fit the car at the house.

Bauer, Cellitti and the other adults were transported to the police station. Bauer was placed in handcuffs, driven to the police station in a patrol car, locked in a holding cell, and ultimately handcuffed to a bench.

The officers on the scene were able to locate Bauer's Buick approximately two blocks from the house. The keys taken from the house fit this vehicle. It was towed to an impound lot.

While this was going on two officers spoke to Bauer, who signed a consent form allowing to a search of the Buick. After she signed this form she was promptly released. Approximately six hours had elapsed from the time the officers first responded to the call and Bauer signed the consent form. At no time was she placed under formal arrest. Police found a loaded Sturm Ruger .223 caliber rifle in the trunk of the Buick.

Cellitti sought to suppress the evidence, arguing (1) they exceeded the scope of Bauer's consent to search her house when they seized the keys from under the sofa, and that her late consent to search the Buick was coerced.

ISSUES: 1) Did the seizure of the car keys under the couch cushion exceed the scope of Bauer's consent to search the house?

2) Did the detention of Bauer amount to an illegal arrest?

3) Was Bauer's consent to search the car a product of her illegal arrest and, therefore, involuntary?

4) Does Cellitti have 4th Amendment standing to challenge the consent search of a vehicle belonging to Bauer?

HELD: 1) Yes.

2) Yes.

3) Yes.

4) Yes.

DISCUSSION: The officer's seizure of the keys, while searching for a rifle, was outside of the scope of the consent given by Bauer. When given consent to search a residence for some particular item, officers must constrain their search for that item, *Florida v. Jimeno*, 500 U.S. 248 (1991). The officer could not rely on "plain view" doctrine to justify the seizure of the keys. An officer may seize items in "plain view" if they appear to be contraband, or of an incriminating nature. *U.S. v. Bruce*, 109 F.3d 323 (7th Cir. 1997). There was nothing apparently criminal about these keys that would, standing alone, warrant seizure per Bauer's consent or under the "plain view" doctrine.

Reviewing the facts Bauer's custody, the Court found that (1) she had been placed in handcuffs, (2) driven to the police station, (3) and chained to a bench for several hours. Given this the Court reasoned that her investigatory detention had progressed to an arrest long before she consented to the search. The prosecution conceded that the police had no probable cause to arrest Bauer. Therefore, the Court concluded, Melissa's detention amounted to an illegal arrest.

The Court analyzed the voluntariness of Bauer's consent according to a "totality of the circumstances," including (1) her age and intelligence, (2) if she was advised of her constitutional rights, (3) how long she was detained before questioning, (4) whether she consented immediately, or only after repeated requests, (5) if physical coercion was used, and (6) if she was in police custody at the time

she gave consent. *U.S. v. Strache*, 202 F.3d 980 (7th Cir. 2000).

Consent given during an illegal detention is presumptively invalid. *U.S. v. Jerez*, 108 F.3d 684 (7th Cir. 1997). However, consent given during an illegal arrest may be voluntary if it stems from an independent act of free will. There were no facts that would make Bauer's consent an act independent of her illegal arrest. "Under these circumstances we conclude that her consent to search the car was tainted by her illegal arrest and was therefore invalid."

The prosecution conceded at trial the Cellitti also had a legitimate expectation of privacy in the car. A defendant can claim protection under the Fourth Amendment if he has a legitimate expectation of privacy in the invaded place. *Rakas v. Illinois*, 439 U.S. 128 (1978). A party may give consent to search a place in which both she and the defendant have legitimate expectations of privacy, and the defendant can challenge the validity of the consent given by that third party. *U.S. v. Matlock*, 415 U.S. 164 (U.S., 1974). Cellitti had standing to challenge the voluntariness of Bauer's consent to search the car. Since her rights were violated because she was coerced into giving consent, then Cellitti's rights to privacy in the car were in like fashion violated.

8th CIRCUIT

U.S. v. Hill
386 F.3d 855
October 20, 2004

SUMMARY: Title 18 USC 922(g)(1) requires the government prove that the defendant, a felon, possessed the weapon "in or affecting commerce." The

government is not required to allege or prove a "substantial effect" on interstate commerce.

FACTS: Defendant Hill, a convicted felon, was arrested on an outstanding warrant after being stopped for a traffic violation. A drug dog alerted on the car and a firearm and a large bag of crack cocaine were found in the glove box.

ISSUE: Does the statute prohibiting felons from possessing firearms (18 USC 922(g)(1) require the government to allege and prove that possession of the weapon had a "substantial effect" on interstate commerce.

HELD: No.

DISCUSSION: Title 18 USC 922(g)(1) requires the government prove that the defendant, a felon, possessed the weapon "in or affecting commerce." The government was not required to allege or prove a "substantial effect" on interstate commerce. The Court affirmed its earlier decisions in *U.S. v. Stuckey*, 255 F.3d 528 (8th Cir. 2001), and *U.S. v. Speakman*, 330 F.3d 1080 (8th Cir. 2003).

U.S. v. Kirchoff
387 F.3d 748
October 20, 2004

SUMMARY: 18 U.S.C. §922(g)(9) prohibits firearms possession by one who has been convicted of a misdemeanor domestic violence offense.

The restoration-of-rights exception under 18 U.S.C. §921(a)(33)(B)(ii) does not apply unless and until there has been a loss of civil rights.

FACTS: In April, 2001, Kirchoff entered guilty pleas in Missouri state court to two misdemeanor counts of domestic violence. Execution of his one year sentence on each count was suspended, and he was placed on probation for two years. On August 7, 2002, while on probation, he was charged in federal district court with possession of a 12 gauge shotgun, a .45 caliber pistol and a .556 caliber rifle from April to June, 2002. On August 14, 2002 his state probation was revoked and he began serving a one-year sentence.

Kirchoff moved to dismiss the indictment contending §922(g) did not apply to him because of the restoration-of rights exception contained in §921(a)(33)(B)(ii). This statute in pertinent part provides that a person will not be considered to have been convicted of a crime of domestic violence if:

the conviction has been expunged or set aside, or **is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)** (bold added) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not... possess... firearms.

Missouri law provides that a person who is convicted “of any crime shall be disqualified from registering and voting in any election under the law of this state **while confined under a sentence of imprisonment**” (bold added).

ISSUE: Had Kirchoff’s civil rights been “restored” effectively preventing the charge under 18 U.S.C. §922(g)(9)?

HELD: No.

DISCUSSION: A convicted person under

Missouri statutes only loses civil rights while confined under a sentence of imprisonment. From April to June 2002 when Kirchoff possessed the firearms, he was serving a probated sentence and had not been confined by a sentence of imprisonment. Consequently, his civil rights had not been taken away. Therefore, his civil rights could not have been “restored,” and he did not come within the exception of §921(a)(33)(B)(ii).

The defendant’s rights were not “restored” until May 19, 2003, when he finished serving his prison sentence, a year after he committed the violations of §922(g).

U.S. v. Va Lerie
385 F.3d 1141
October 14, 2004

SUMMARY: This is search of passenger luggage being carried by bus. The removal of a garment bag from the bus to a room in the bus station constituted an impermissible seizure under the Fourth Amendment which was not cured by a subsequent consent to search from the owner.

FACTS: Defendant Va Lerie was traveling by bus from Los Angeles, California, to Washington, D.C. While the bus made a fuel stop, a Nebraska State Patrol officer, performing duties for the Commercial Interdiction Unit at the station, observed a garment bag that appeared to be new and had a name tag attached to it. A computer check was run on the name and it was learned that a passenger using the name of Valerie Keith was traveling one way to Washington, D.C. The bag was removed from the bus, taken to a room in the rear of the baggage terminal, and the passenger was summoned by station

intercom. The passenger, Va Lerie, was questioned concerning ownership of the bag and advised that the officers were investigating narcotics trafficking. Va Lerie gave permission to search the bag, and one minute later five bags of cocaine were found in the bag.

ISSUES: 1) Was the removal of the bag an impermissible seizure under the 4th Amendment?

2) Does subsequent consent to search cure any taint from an impermissible seizure?

HELD: 1) Yes.

2) No.

DISCUSSION: A seizure occurs when there was some meaningful interference with the owner's possessory interest in item. The removal of Va Lerie's bag and its sequestration in a room of the bus terminal constituted a seizure under the 4th Amendment. The seizure violated the 4th Amendment because it occurred without consent, reasonable suspicion, probable cause, or a warrant. Va Lerie's subsequent consent to search the bag was a direct product of the illegal seizure and, therefore involuntary. Little time had transpired between the seizure of the bag and the consent, and there were no significant intervening events. The government was unable to show that the consent was an independent act of free will which broke the causal connection between the constitutional violation and the consent that led to the discovery of the cocaine.

U.S. v. Martin
2004 U.S. App. LEXIS 25759
December 14, 2004

SUMMARY: A two step analysis is used to determine the reliability of a photographic identification. First, the defendant must establish that the photo spreads were impermissibly suggestive. If the spreads were impermissibly suggestive, a second inquiry must determine whether, under the totality of the circumstances, the spread created a substantial likelihood of irreparable misidentification.

FACTS: Martin visited a used car dealership posing as a customer. He later went back and robbed the dealership and beat up its owner. He was charged with a Hobbs Act robbery in violation of 18 U.S.C. 1951 and using a firearm during the course of a violent federal crime in violation of 18 U.S.C. 924(c). Martin was invited to the police station where the investigating detectives made his Polaroid photo. Martin refused to exhibit a straight face for the photo and kept "bugging his eyes and making funny or strange faces with his mouth." This photo was put in a photo identification array and was shown to the victims, who were unable to make a positive identification but said Martin's photo resembled the robber. A second photo was obtained from a police database and included in a second photo array shown to the victims four months later. Martin's photo was the only one to appear in both arrays. Martin was identified as the robber from the second array.

ISSUE: Was the use of the two photo spreads impermissibly suggestive?

HELD: No.

DISCUSSION: A two step analysis is used

to determine the reliability of a photographic identification. First, the defendant must establish that the photo spreads were impermissibly suggestive. If the spreads were impermissibly suggestive, a second inquiry must determine whether, under the totality of the circumstances, the spread created a substantial likelihood of irreparable misidentification.

The four month lapse in time between the two photo lineups lessened any suggestive tendency. Additionally, when the photos showing Martin's intentional facial distortions were removed from the lineup, the victims were able to confidently identify him. Even if the spreads were impermissibly suggestive, they would not have created a substantial likelihood of an irreparable misidentification because the victims had ample opportunity to view Martin during the commission of the crime.

10th CIRCUIT

U.S. v Rogers
2004 U.S. App. LEXIS 26349
December 17, 2004

SUMMARY: *Miranda* warnings and waiver are required only when a person is subject to “custodial interrogation.” A person is not in custody for *Miranda* purposes unless his freedom to act is curtailed to a degree associated with formal arrest. The “in custody” determination is based on how a reasonable person would understand the situation, not the subjective and unstated views of the officer or the individual.

FACTS: After a domestic protective order was issued, officers went to Rogers' house with his girlfriend so she could remove her possessions from the residence. Rogers invited the officers into the house where officers told him the purpose of their visit, and read him the protective order. Rogers was told that pursuant to the protective order the officers would remain until his girlfriend removed her belongings, and that Rogers had to remain separated from her during this time. One of the officers then asked Rogers if there were any weapons present in the house. Rogers said that there were, and after the officer asked Rogers to show him the weapons, Rogers took the officer to a back bedroom. The officer saw a case for a long gun and a case for a handgun in the room. The officer asked Rogers if there were guns in the cases, and Rogers replied that there was a shotgun in one case, and a handgun in the other. The officer obtained a key to the room from Rogers so he could secure the firearms until the girlfriend had removed all of her property from the house. Rogers went to his bedroom for the duration of the move, and the officer returned the key to him before leaving.

A short time later the officer contacted an agent of the Bureau of Alcohol Firearms and Explosives and told him what he had heard and observed at Rogers' home. The agent used this information to obtain a search warrant for Rogers' home. After the execution of the warrant, Rogers was arrested on charges of possessing firearms in violation of 18 U.S.C. § 922 (g) (8) and (g) (9).

Rogers testified that he did not “feel free to roam around the house.” The officer testified that he would not have allowed Rogers to roam around the house unescorted, because of the terms of the protective order. The district court suppressed Rogers' incriminating statements made to the officer who served the protective order, and the firearms which were later seized pursuant the search warrant,

ruling that Rogers was in custody for *Miranda* purposes during his entire encounter with the officer and that the officer should have informed Rogers of his *Miranda* rights before

asking him about the presence and location of weapons in the house.

ISSUE: When the officer asked Rogers about the presence and location of weapons in the house, was Rogers “in custody” for the purposes of *Miranda*?

HELD: No.

DISCUSSION: Police officers are not required to read *Miranda* warnings to everyone they question. *Miranda* only applies when a person is subject to “custodial interrogation.” A person is not in custody for *Miranda* purposes unless his freedom to act is curtailed to a degree associated with formal arrest. The “in custody” determination is based upon the totality of the circumstances and on how a reasonable person would understand the situation, not the subjective and unstated views of the officer or the individual.

Objectively viewed, the interaction between the officers and Rogers was cordial. The officers never raised their voices or exhibited any intimidating behavior. Nothing in this sequence of events would lead an ordinary person to believe that he was under arrest at the time the officer asked Rogers the questions about the presence and location of weapons in the house.

11th CIRCUIT

U.S. v. Wright

2004 U.S. App. LEXIS 25181

December 8, 2004

SUMMARY: 18 U.S.C. §922 (g) (1) requires the government to prove that the defendant was in knowing possession of a firearm. The government need not prove actual possession in order to fulfill the “knowing” requirement. It may be shown through constructive possession. The firearm need not be on or near the defendant’s person in order to amount to knowing possession.

FACTS: Officer Knox stopped Wright for speeding and weaving through traffic lanes. After administering the standard field sobriety tests, Knox determined that Wright was intoxicated and told him to put his hands behind his back. Wright refused and a struggle ensued, requiring three officers to subdue him.

Once Wright was in custody, the officers conducted a search of Wright’s car. Under the front seat, they found a nine millimeter Smith and Wesson firearm wrapped in a bandana, along with a cold open bottle of beer. In the trunk of the car, officers found a cooler packed with ice and more of the same beer. After his arrest, Wright told the officers that they were lucky he had not made it to his car because, “it would have been lights out,” and he made a gesture with his hand in the shape of a gun.

Wright was charged with 18 U.S.C. §922 (g) (1), felon in possession.

ISSUE: Did the government prove Wright knowingly possessed the firearm?

HELD: Yes

DISCUSSION: Under Title 18 U.S.C. Section 922 (g) (1), it is unlawful for a felon to possess a firearm. Title 18 U.S.C. Section 922 (g) (1) requires the government to prove three distinct elements: (1) that defendant was a convicted felon, (2) that the defendant **knew** he was in possession of a firearm; and (3) that the firearm affected or was in interstate commerce. The government need not prove actual possession in order to fulfill the “knowing” requirement of Section 922 (g) (1). Rather, it may be shown through constructive possession. The firearm need not be on or near the defendant’s person in order to amount to knowing possession. There is no dispute that there was a weapon in Wright’s car. The gun was located under the Wright’s seat, next to an open bottle of cold beer. Wright owned the car and had been driving the car when the officer pulled him over. Wright aggressively resisted arrest which could indicate that he realized that officers would impound his car and discover the gun. When the defendant commented that it would be “lights out” if he made it back to the car and gestured with his hand in the shape of a gun, a jury could infer that the defendant knew of the firearm and was prepared to use it.