THE
-QUARTERLY REVIEW-

LEGAL COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

April 2005 Vol. 6, Ed. 3

EDITOR'S COMMENTS

Welcome to the third 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.3 (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.

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. Thanks for your input.

If you have any questions, please contact **Bryan Lemons at (912) 267-2945** or bryan.lemons@dhs.gov .

Table of Contents

CASE BRIEFS
UNITED STATES SUPREME COURT
and CIRCUIT COURT UPDATES

SUPREME COURT

Muehler v. Mena
125 S.Ct. 1465
March 22, 2005

Prepared by Scott Wright

SUMMARY: Officers are permitted to detain individuals during the execution of a search warrant so long as there is a valid search warrant and the individual detained is an occupant of the home.

Where the individual is already lawfully detained, no level of suspicion is required for questioning.

FACTS: Officers executed a warrant on a violent gang member's home to search for weapons and evidence of gang membership. They entered Mena's room and found her on the bed. She was handcuffed, frisked, and then moved to a garage where she remained in handcuffs for 2-3 hours. Mena was not a suspect, was fully compliant, and posed no immediate threat (once frisked). Officers questioned her as to her immigration status and examined her papers while she was detained.

ISSUES: 1. When executing a potentially dangerous search warrant, can officers handcuff and detain occupants for the duration of the search, even if they are compliant and not suspects?

2. Do officers need reasonable suspicion to question a lawfully detained individual as to immigration status?

HELD: 1. Yes.

2. No.

DISCUSSION: Officers are permitted to detain individuals during the execution of a search warrant. The only things required are that a valid search warrant exists and the individual to be detained is an occupant of the home. Where, as here, the warrant involves a clear danger to the officers, the use of handcuffs is also justified, even for the whole duration of the detention.

Mere police questioning does not constitute a seizure. In order to stop and question an individual (Terry stop) as to their immigration status, an officer does need reasonable suspicion. But, where the individual is already lawfully detained, no level of suspicion is required for questioning; the police may ask what they will.

*****

Illinois v. Caballes
125 S. Ct. 834
January 24, 2005

Prepared by Margaret Wright

SUMMARY: A drug dog sniff conducted during a lawful traffic stop does not require reasonable suspicion and does not

violate the Fourth Amendment.

FACTS: Caballes was stopped for speeding. When the Trooper radioed to report the stop, a second trooper overheard and immediately headed toward the scene with a narcotics detection dog. While the first Trooper was writing a warning ticket, the dog alerted on the trunk of Caballes' car. The troopers searched the trunk, discovered marijuana, and arrested Caballes. This entire encounter lasted less than ten minutes.

ISSUES: Does the Fourth Amendment require reasonable suspicion to justify using a drug dog to sniff a vehicle during a lawful traffic stop?

HELD: No.

DISCUSSION: The initial seizure of Caballes, based on probable cause, was lawful. The duration of the traffic stop was entirely justified by the traffic offense and the ordinary inquiries incident to the stop. The dog sniff was performed on the exterior of Caballes' car while he was lawfully seized for a traffic violation and did not change the character of this traffic stop. It revealed no information other than the location of a substance that no individual has any right to possess. Reasonable suspicion is not required to justify the dog sniff. Therefore, it did not violate the Fourth Amendment.

1st CIRCUIT

U.S. v. Cacho-Bonilla
2005 U.S. App. LEXIS 6519
April 14, 2005

Prepared by Chuck Adkins

SUMMARY: For mail fraud (18 U.S.C. §1341) the use of the mails need not be an essential element of the scheme. It is enough for the mailing to be incident to an essential part of the scheme or step in the plot.

It is not necessary for the defendant to personally use the mails, so long as it is reasonably foreseeable that the mails would be used in the ordinary course of business to further the scheme.

FACTS: Cacho was Executive Director of a non-profit corporation, ASPRI, which provided services to the needy and received funds from the Department of Health and Human Services (HHS). In 1988 the Defendant and her Associate Director formed (without authority) a second company, the Center, as a non-profit charity. It was actually a "straw" company whose sole purpose was to purchase products which were then re-sold to ASPRI at inflated prices, thereby giving the Defendants a source of income to embezzle.

ASPRI submitted monthly reports which reflected amounts paid to the Center for food and supplies, including the fraudulent markups. ASPRI submitted these reports by messenger, but the state agency which received the reports compiled them into a summary reports which were mailed at HHS's direction to an entity which collected the data for HHS.

ISSUE: 1. Can a defendant be convicted of mail fraud when the defendant did not personally use the mail?

2. Does use of the mail have to be an essential element of the scheme?

HELD: 1. Yes.

2. No.

DISCUSSION: Although the connection between this scheme and the mailing was

unusually "thin", the use of the mails need not be an essential element of the scheme. It is enough for the mailing to be incident to an essential part of the scheme or step in the plot. *Schmuck v. United States,* 489 U.S. 705, 710-11 (1989). The defendant's embezzlement scheme which utilized fraudulent mark-ups on Center purchases depended upon the continuation of funding for ASPRI which would occur only by the submission of the monthly reports to HHS. Therefore, the perpetuation was essential to the scheme and the mailings of the reports were incidental to the perpetuation. Even though the defendant in this case did not personally use the mails, it was reasonably foreseeable that the mails would be used in the ordinary course of business to further the scheme.

*****

U.S. v. Ribeiro
397 F.3d 43
February 8, 2005

Prepared by Ed Zigmund

SUMMARY: Controlled substances were lawfully seized pursuant to a "documentary search warrant." Probable cause existed for issuance of the warrant, and the plain view exception applied because the search was within the scope of the warrant.

FACTS: A police officer working with a Drug Enforcement Agency (DEA) task force obtained a search warrant for defendant's apartment. The affidavit contained information from a confidential informant who said that he made three controlled buys of ecstasy from the defendant. The warrant was also based on four controlled buys of 100 ecstasy tablets for $900.00 by an undercover officer at a local restaurant. Through surveillance, police were virtually certain that defendant left his residence carrying the ecstasy tablets. The search warrant affidavit also described the affiant's knowledge about drug crimes in general based on his extensive experience in police work and drug investigations. As a way to tie the defendant's observed criminal activity to his residence, the affidavit stated:

> Based upon my training and experience, I know that drug traffickers find it necessary to store large sums of cash received from the sale and distribution of controlled substances outside of the normal banking system. I also know that drug traffickers frequently maintain books, records, receipts, notes, ledgers and other documents relating to the transportation, ordering, sale and distribution of controlled substances and monetary instruments and other assets. Such documents are generally maintained where they have ready access to them, such as at their residences. They also commonly keep addresses and telephone numbers in books or papers that reflect names, addresses, telephone numbers and/or paging numbers for their criminal associates. Drug traffickers usually keep paraphernalia for packaging, weighing and distributing controlled substances that may include but are not limited to baggies and packaging materials.

The warrant did not authorize a search for drugs. Instead, it covered records, currency,

baggies, and other drug paraphernalia. When the warrant was served, police found and seized large amounts of cocaine, heroin, "crack" cocaine, and ecstasy tablets, which were exposed to their plain view in the bottom of a speaker cabinet. Elsewhere in the apartment, police found and seized scales, a laptop computer, plastic baggies, $65,000 in cash, and some identifying documents.

ISSUES: 1. Did probable cause exist for the search warrant that was used to search the defendant's apartment?

2. Were the drugs found and seized by the police within the plain-view exception to the warrant requirement?

HELD: 1. Yes.

2. Yes.

DISCUSSION: Probable cause for the search warrant A warrant application must demonstrate probable cause to believe (1) that a crime has been committed—the "commission" element, and (2) that enumerated evidence of the offense will be found at the place to be searched—the "nexus' element." In determining whether the nexus element is satisfied, a magistrate has to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The details of the defendant's sales derived from police surveillance, when combined with the generalities of the illicit drug trade attested to by the affiant, provided a sufficient basis for the magistrate judge's finding of probable cause to issue the search warrant.

Plain-View Exception As long as the search was within the scope of the warrant, it does not matter that the officers may have hoped to find drugs. So long as the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement, the fact that an officer is interested in an item of evidence (not listed on the warrant) and fully expects to find it in the course of a search does not invalidate its seizure.

2nd CIRCUIT

Rosa v. McCray
396 F.3d 210
January 27, 2005

Prepared by Keith Hodges

SUMMARY: Booking questions (sometimes also referred to as "administrative" or "pedigree" questions) are not designed to collect information of crime and may be asked without *Miranda* warnings. The question about true hair color was designed to complete the booking forms. Because it was a "booking question," defendant's response "I colored my hair yesterday" is admissible at trial to show the defendant attempted to change his appearance.

FACTS: Juana made her living by selling jewelry. She was robbed at gun point, and gave detectives a detailed description to include that the robber's hair was brown. Efforts to locate the robber the day of the crime were unsuccessful. The next day, Juana saw the robber (Rosa) on the street, though now Rosa's hair was blonde. She informed nearby officers who took Rosa into custody. Without *Miranda* warnings, a detective asked Rosa standard booking and identification questions (name, date of birth, age, race, height, weight, eye color, and hair color.) Noticing that Rosa's hair was "flaming" blonde, including the roots, the detective asked Rosa**:** "What is your real hair color?"

Rosa responded, "Brown. I colored my hair yesterday." The prosecution offered this statement at trial to show Rosa's "consciousness of guilt" as he had dyed his hair soon after the robbery.

ISSUE: Is the statement about true hair color, and when it was dyed, admissible against the defendant?

HELD: Yes.

DISCUSSION: Custodial interrogation by law enforcement must be preceded by *Miranda* warnings. "Interrogation" includes that which "the police should know are reasonably likely to elicit an incriminating response from the suspect." In this case, the booking questions (sometimes also referred to as "administrative" or "pedigree" questions) are not designed to collect information of crime. The detective testified, and the court accepted, that the question about true hair color was designed to complete the booking forms. Because it was a "booking question", it could be asked without *Miranda* warnings. This is well established law. The Supreme Court in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) said, "a routine booking question exception . . . exempts from *Miranda's* coverage questions to secure the biographical data necessary to complete booking or pretrial services" and that permissible questions include those that "appear reasonably related to the police's administrative concerns."

The detective's question ("What is your real hair color?") was crafted to obtain information necessary to complete the booking form. Rosa, however, not only responded to the question, but also volunteered a response beyond the scope of the question and without any elicitation from the detective. The detective could not have reasonably expected Rosa to offer additional inculpatory information that was outside the scope of the question.

(Note: Had the detective asked instead, "Did you dye your hair recently," the result of this case might have been different)

4th CIRCUIT

U.S. v. Stevenson
396 F. 3d 538
February 1, 2005

Prepared by Gary Ainley

SUMMARY: A defendant surrenders all reasonable expectations of privacy in his apartment when his actions clearly demonstrate that (1) that he had no intention of returning to his apartment, and, (2) he no longer considered himself a resident of the premises.

FACTS: Stevenson was arrested when he failed appear in court for sentencing on a felony conviction for sexual misconduct. While in custody, Stevenson wrote to his former girlfriend and transferred to her all of his personal property stored in his apartment. He referred to himself in this letter as the "former renter."

With consent from Stevenson's landlord, a sheriff's deputy searched the apartment and seized a rifle and a revolver. Stevenson was charged with and convicted of being a felon in possession of firearms.

ISSUE: Did Stevenson surrender his reasonable expectation of privacy in his apartment when, in a letter to a former girl-friend, he gave her all of his personal property, and referred to himself as the apartment's "former renter?"

HELD: Yes.

DISCUSSION: The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Supreme Court has held that, with few exception, *warrantless* searches are unconstitutional *Katz v. United States*, 389 U.S. 347 (1967). Stevenson contended that at the time of the *warrantless* search he was still the apartment's legal tenant and had a reasonable expectation of privacy in the premises. He also argued that his option to return to the apartment was curtailed not by his intent, but by his arrest.

Stevenson had not communicated to his landlord his intention to formally quit the premises. But, a letter to his girlfriend clearly demonstrated (1) that he had no intention of returning to his apartment, and, (2) he no longer considered himself a resident of the premises. Since the letter was sent after his arrest, but before the search, as a matter of law, by "relinquishing all rights to his personal property and all duties as a renter, Stevenson waived any reasonable expectation of privacy in his former apartment.

*****

U.S. v. Grossman
400 F.3d 212
February 23, 2005

Prepared by Jeff Fluck

SUMMARY: The nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where such evidence would likely be kept. A drug dealer has to secure drugs, cash and paraphernalia somewhere. Simple logic dictates that the places the dealer stays are the places where his drugs and money are likely to be found. It is reasonable to suspect that a drug dealer stores drugs in a home to which he owns a key. A sufficient nexus can exist between a defendant's criminal conduct and his residence even when the affidavit supporting the warrant contains no factual assertions directly linking the items sought to the defendant's residence.

FACTS: Coleman Avenue house. A confidential source with a credible track record told a detective that the defendant "was selling cocaine and keeping large quantities of it in 'stash houses' in northeast and west Baltimore," moving the drugs in either a Toyota or a Mercedes. The detective followed Grossman as he drove a Mercedes to the Coleman Avenue house. Grossman took a 10-block detour on his way to the house, a tactic the detective recognized as consistent with attempting to identify and dodge surveillance.

Grossman scanned the street before opening the front door with one of many keys on a ring. When he came out 40 minutes later, he approached a Toyota and was stopped and questioned by the detective. Grossman repeatedly lied and changed his story when confronted with the detective's observations. When the detective asked for consent to a search, Grossman declined saying only his girlfriend could do that, but he could not remember how to contact her or spell her name. Grossman said, "I stay here, but that doesn't mean I live here."

A warranted search yielded $10,000, a loaded handgun with an obliterated serial number, and documents addressed to Grossman or to "Michael Gregory" (a known alias for Grossman) at a Gwynns Falls Parkway apartment. Grossman denied knowing anyone at or having a key to the apartment.

Gwynns Falls Parkway apartment. The next

day the detective went to the apartment and discovered that Grossman's key ring had a key to the front door. A warranted search produced more than $12,000 and about 4.5 kilograms of cocaine. The apartment was leased to Lawson. She told police that Grossman not only stay with her there, but that he also stayed with an aunt in a house on North Milton Avenue.

North Milton Avenue house. Based on the evidence found in the earlier searches and Ms. Lawson's statement, police obtained a warrant to search the North Milton house for evidence of drug dealing. A key on Grossman's key ring opened the padlocked basement where wrappers with cocaine residue and more papers with the names Kenneth Grossman and Michael Gregory were found.

ISSUE: Was there a sufficient nexus between Grossman's drug dealing and the places searched to support probable cause to believe that evidence would be found in each?

HELD: Yes.

DISCUSSION: Search warrants are valid when there is probable cause to find that: (1) evidence of a crime (2) will be found in the place to be searched (3) when the search is conducted. Does the fact that Grossman stayed at these three locations mean that he stored drugs there?

Coleman Avenue house. The corroboration of the tip concerning Grossman's drug dealing activities and his behavior when confronted by the detective supported probable cause that police would find evidence of drug dealing in the house. Although the fact that he refused consent to search cannot be used to build probable cause, the manner in which he did so is a factor that can be considered. Grossman's mode of withholding consent is particularly telling given that he had a key to the door.

A drug dealer has to secure drugs, cash and paraphernalia somewhere. Simple logic dictates that the places the dealer stays are the places where his drugs and money are likely to be found.

> "a sufficient nexus can exist between a defendant's criminal conduct and his residence even when the affidavit supporting the warrant 'contains no factual assertions directly linking the items sought to the defendant's residence.'"
> *U.S. v. Servance*, 394 F.3d 222, 230 (4th Cir. 2005).

The nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence. It is reasonable to suspect that a drug dealer stores drugs in a home to which he owns a key.

Gwynns Falls Parkway apartment. Probable cause existed for the second search based upon the facts and inferences which supported the first search warrant and the additional facts discovered during and after the first search.

North Milton Avenue house. Facts continued to accumulate in support of probable cause to search the third location.

*****

Argaw v. Ashcroft
395 F.3d 521
January 31, 2005

Prepared by Chuck Adkins

A resident alien with Khat
Was recently put on the spot.
When Immigration said "GO"
The Fourth Circuit said "NO"
Cause Khat, a controlled substance, is NOT.

SUMMARY: Immigration and Naturalization Service may not deport a defendant as an illicit trafficker in controlled substances (in this case the plant "Khat") without first proving that the suspected plant material actually contains chemicals listed as "controlled substances."

FACTS: Argaw, a permanent resident alien, returned to the U.S. and while clearing Customs was found to be in possession of a plant named "Khat" whose leaves are chewed as a stimulant. Customs agents seized the Khat and Argaw signed forms agreeing to pay a $500 fine for failing to declare a controlled substance on his Customs Declaration form. INS initiated removal proceedings based upon the admitted possession of Khat and his written admission that Khat was a controlled substance.

The Board of Immigration Appeals concluded that Khat contains two controlled substances, Cathinone (Schedule I) and Cathine (Schedule IV), however the Khat plants in this case were never submitted for laboratory analysis. The plant Khat itself is not listed in 21 U.S.C. §812 as a controlled substance.

ISSUE: Does the government have to prove that the plant "khat" contains chemicals listed as controlled substances?

Held: Yes.

DISCUSSION: During the hearing, INS submitted documents which stated that "cathinone is khat" and the Board also took administrative notice of the fact that khat contains cathinone based upon two court opinions and one statement issued by DEA. Two of the sources indicated that the controlled substance cathinone actually degrades rapidly after the plant is harvested, raising the question as to whether the plant material in this case actually contained <u>any</u> of the controlled substances. Since no laboratory analysis had been performed, and since the plant khat itself is not listed as a controlled substance, there were no grounds to conclude that the defendant had committed any drug trafficking offense for which he could be deported.

*****

U.S. v. Ickes
393 F.3d 501
January 4, 2005

Prepared by Keith Hodges

SUMMARY: The U.S. Code, and well-established authority, permit officers to conduct suspicionless searches at the border to include a search of CDs and computers and "expressive" materials contained therein.

FACTS: Ickes entered the U.S. from Canada. A Customs Inspector diverted Ickes to a secondary inspection point. At this inspection point, the inspector discovered a video camera containing a tape of a tennis match which focused excessively on a young ball boy. A further search revealed marijuana seeds, marijuana pipes, and a copy of a state warrant for Ickes's arrest. Also found were several albums containing photographs of "provocatively-posed prepubescent boys,

most nude or seminude." Officers confirmed there were two outstanding warrants for Ickes arrest. Ickes was arrested, and the continued search of the van revealed 75 computer disks and files on his computer that contained child pornography. Based on the results of these searches - and admissions by Ickes - he was charged with transportation of child pornography.

ISSUE: Did the search of the computer disks and computer violate either Ickes Fourth or First Amendment rights?

HELD: No.

DISCUSSION: *Application of the Fourth Amendment.* However one views the Fourth Amendment, border searches are different. A starting point is 19 U.S.C. §1581(a) which provides in part:

> "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters, ...or at any other authorized place ...and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board. ..."

This broad power on its face authorized the search. While Congress did not specify "computers," what was in Ickes van was certainly "cargo," and the generous use of the word "any" makes clear Congress' intent was to grant broad, border search authority.

Of course a statute can not authorize activities the Fourth Amendment would prohibit. On this point the court again ruled against Ickes. Quoting generously from the recent Supreme Court case in *United States v. Flores-Montano*, 541 U.S. 149 (2004), the opinion noted: "The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. *Time and again, we have stated that searches made at the border ...are reasonable simply by virtue of the fact that they occur at the border."* The reason for this broad authority is as old as the nation itself, the court said, and further quoting *Flores-Montano*, it is "axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity."

The customs officers needed neither probable cause nor reasonable suspicion to search the disks and the computer because the search was done at the border.

Note: *Flores-Montano* was discussed in the April 2004 issue of the Quarterly Review available at:
http://www.fletc.gov/legal/qr_articles/2CQR-5-3a.pdf

Application of the First Amendment.
Ickes then claimed that even if the search was permissible notwithstanding the Fourth Amendment, the search was forbidden by the First Amendment because the items seized were "expressive" in nature. The court held that there is no First Amendment exception to the border search doctrine.

*****

U.S. v Smith
395 F.3d 516
January 27, 2005

Prepared by Jim King

SUMMARY: By voluntarily entering government property without authorization

and approaching a guarded barrier, that individual consents to the employment of customary security precautions.

FACTS: At 1:38 AM Smith drove to the call box on the CIA access road outside the main gate of the CIA headquarters and said he was lost and needed directions. A CIA Officer directed Smith to pull to the Jersey barrier, which was about 75 meters from the call box and closer to the main gate to the CIA. Smith did so. When Smith reached the barrier he was approached by armed CIA Security Protection Officers who yelled at Smith and his passengers to put their hands up. Through questioning, the officers determined that Smith, the driver, was driving while under a suspended driver's license. Smith lied to the officers about his name and date of birth. Smith consented to a pat down for weapons. Smith smelled alcohol, and, after he failed a field sobriety test, he and was arrested. Upon a search of Smith incident to arrest, the officer found a paraphernalia pipe used to smoke a controlled substance. Smith was convicted in magistrate judge's court of possession of cocaine, driving with a suspended license, and providing false information to an authorized person investigating a violation of law or regulation.

ISSUE: Does entering government property without authority and voluntarily driving up to a secured barrier constitute consent to submit to customary security precautions.

HELD: Yes

DISCUSSION: The defendant voluntarily proceeded from the call box to the security barrier to obtain directions from the officers. A reasonable person would certainly know that officers at the CIA gate would be armed when approaching an unidentified car, and that such officers would seek to determine who was entering the property without authorization. As such a reasonable person would view a decision to initiate a consensual encounter with officers near the gate of the CIA to consent to these foreseeable circumstances. Therefore, if any seizure occurred it was within the scope of Smith's consent and thus reasonable within the meaning of the Fourth Amendment.

6th CIRCUIT

U.S. v. Chambers
395 F.3d 563
February 2, 2005

Prepared by Ken Anderson

SUMMARY: Warrantless searches based on exigent circumstances are permitted only when probable cause exists and the reason for the search is based on an unanticipated emergency. Officers cannot create the exigency in order to justify the warrantless search.

Consents to a search given after an illegal entry is not valid. Suppression of the evidence seized is required unless the taint of the initial illegal entry has been dissipated before the consent to search was given.

FACTS: Police had been investigating the defendant for several months. Then they received an anonymous tip that the defendant was currently manufacturing methamphetamine at his residence. Three cars of deputies went to the defendant's residence where they planned to conduct a "knock and talk." When the officers arrived they knocked on the glass entry door of the trailer home. A woman came to the door, retreated when she saw the police, and called out that there were police at the door. The officers heard footsteps inside the trailer as the woman went into another room. The officers then entered the

residence, using the officer's knock and the woman's refusal to talk as justification for entry.

The officers searched for a few minutes and found evidence that the defendant was manufacturing methamphetamine. The officers arrested the defendant and his wife, and advised them of their *Miranda* rights. The defendant then signed a consent to search form.

ISSUES: 1. Did exigent circumstances exist that permitted the officers to enter and search the defendant's residence without a search warrant?

2 Did the officers obtain valid consent to search from the defendant after entering his residence?

HELD: 1. No.

2. No.

DISCUSSION: Warrantless searches are *per se* unreasonable under the Fourth Amendment, subject only to a few established and well delineated exceptions. One of the exceptions is when the officers have probable cause to search, and the cause of the search is based on an "emergency", and hence "inadvertent" or unanticipated. Officers may only forego a warrant in the case of a true exigency or emergency, and the officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves.

The police had been investigating the defendant over a four month period, including extensive surveillance of the defendant's residence. The police had probable cause to seek a warrant, which is what they should have done. The circumstances at the door did not constitute an exigent circumstance. A retreat and refusal to allow armed officers into the home is every citizen's right under the Fourth Amendment. Exercising the constitutional right to not talk, or allow a search of his home, does not create an exigency justifying a warrantless entry. The actions taken by the officers were deliberate conduct on their part to evade the warrant requirement. It is clear that the situation was calculated by the police in order to facilitate their warrantless search.

The consent to search form was signed only minutes after the illegal entry, search and discovery of evidence of a methamphetamine lab. The defendant was no longer free to leave and therefore effectively under arrest. This created a highly coercive atmosphere, and it would be reasonable for the defendant to think that refusing consent would be a futile gesture. Considering the totality of the circumstances, the defendant's consent was the product of the prior illegal entry into his residence, and not obtained voluntarily.

*****

U.S. v. Martin
399 F.3d 750
January 13, 2005

Prepared by Ken Anderson

SUMMARY: The Fourth Amendment does not apply to anything a suspect may abandon while fleeing the police, even when the officer's show of authority is unlawful.

FACTS: Two people who had been issued "Notice of Trespass" letters from the housing authority were seen walking on the sidewalk of a street adjacent to the housing project. Officers pulled their car over to the sidewalk with the intention of arresting them. The defendant failed to stop at the officer's command. The defendant ran and the officer

chased him. During the chase the defendant tossed away a revolver. The officer eventually caught the defendant and arrested him. The defendant was charged as a felon in possession of a firearm.

The sidewalk upon which the defendant was walking was not part of the housing authority's property. Therefore, no reasonable suspicion of criminal activity existed.

ISSUE: Is property abandoned by a defendant before he was seized admissible when the officer's show of authority was unlawful?

HELD: Yes.

DISCUSSION: A suspect is seized under the Fourth Amendment when he submits to police authority. The Fourth Amendment does not apply to anything abandoned while fleeing the police in an attempt to avoid seizure, even if the attempted seizure or show of authority is unlawful.

Once a suspect submits or is forced to submit to an officer's show of authority he is seized under the Fourth Amendment, and subsequent abandonment cannot be a result of unlawful police conduct.

*****

U. S. v. Pierce
400 F.3d 176
March 7, 2005

Prepared by Tim Miller

SUMMARY: Mailings after the fraud is accomplished are within the mail fraud statute if they are designed to lull the victim into a false sense of security, postpone their complaint, and therefore make the crook's apprehension less likely than if no mailing had taken place.

FACTS: State law authorized Bristol to hire the defendants to sell bingo games at bingo events, but not to share in Bristol's profits. The defendants devised a scheme to defraud Bristol. They sold bingo games without Bristol's knowledge, kept the profits from the unauthorized sales, and then "fudged" the records, preventing Bristol from learning about the scheme. The money was taken out of the cash drawers before the falsified records were sent in the mail to Bristol.

ISSUE: Were the mailings after the money had already been taken made for the purpose of executing the scheme to defraud Bristol?

HELD: Yes.

DISCUSSION: Mailings after the fraud is accomplished are within the statute if they are designed to lull the victim into a false sense of security, postpone their complaint, and therefore make the crook's apprehension less likely than if no mailing had taken place.

*****

Parks v. City of Columbus
395 F.3d 643
January 25, 2005

Prepared by Tim Miller

SUMMARY: A city may not issue an organization a permit to hold a public event on city property and then prohibit certain persons from attending based solely on their speech.

FACTS: Parks routinely attended public events to express his religious beliefs. Wearing a sign with a religious message, he attended an art festival sponsored by the Columbus Arts Council (Council) in downtown Columbus, Ohio. The permit

required Council, to carry liability insurance and use "special duty police." An off-duty Columbus police officer, hired by the Council for security and wearing his uniform, approached and told Parks that he would be arrested if he did not leave the area and stay beyond the barricades.

ISSUE: Did the officer's actions violate Park's First Amendment freedoms of expression.

HELD: Yes.

DISCUSSION: The officer was a public official. A public official may trigger the Bill of Rights in two ways - with official authority or under color of law. Although the officer was not on official duty, he was acting under color of law. His status as a police officer materially facilitated his action, and he purported to exercise official authority.

Religious speech has long been protected. But, protected or not, the Constitution does not give people unfettered access to *all* Government property. Freedom of speech is contingent on the forum.

Public forums are those that are historically used for communication and expression. Public streets, sidewalks, and parks are public forums. The festival was a public forum.

Actions that restrict speech at public forums must satisfy a heavy burden. Restrictions must be content neutral, narrowly tailored to serve a significant government interest, and leave open alternative channels of communication. The officer's action was not content neutral, but specifically aimed at controlling Park's religious message. The government could not demonstrate a compelling state interest for stopping Parks. Therefore, Park's First Amendment rights were violated.

*****

U. S. v. Bruce
396 F3rd 697
February 3, 2005

Prepared by Anthony Bell

SUMMARY: Two elements must be shown in order to treat ostensibly private action as a state-sponsored search: (1) the police must have instigated, encouraged, or participated in the search; and (2) the private individual must have engaged in the search with the intent of assisting the police.

FACTS: Defendant and others checked into two rooms at a hotel. The hotel manager contacted the police to report that hotel employees had detected the smell of burning marijuana and suspected it was coming from one of defendant's rooms. At the request of police, and in accordance with a hotel interdiction program operated in cooperation with the police, the hotel manager directed the cleaning crew to save, separately secure, and mark the trash bags obtained from defendant's rooms.

In the trash taken from defendant's rooms, police found a partial marijuana cigarette, some loose tobacco and a hollowed-out cigar.

ISSUE: Were the hotel staff government actors to whom the Fourth Amendment applied when they entered defendant's room, removed trash, and separately bagged it and tagged it so that law enforcement could identify and search it later?

HELD: No.

DISCUSSION: Police can convert a private person into a government actor. Two elements must be shown in order to treat ostensibly private action as a state-sponsored search: (1)

the police must have instigated, encouraged, or participated in the search; and (2) the private individual must have engaged in the search with the intent of assisting the police. *United States v. Lambert, 771 F2d. 83 (6th Cir.1985).* In this case neither prong of the *Lambert* test had been satisfied. When the hotel staff contacted the police and notified them of the smell of marijuana, the police did not request that the hotel staff enter the rooms and conduct a search of either the room or the garbage. The hotel cleaning staff did not engage in any sort of "search" of the trash gathered from defendant's rooms, nor did they conduct a search of the rooms, at the encouragement of the police.

8th CIRCUIT

U.S. v. Luker
395 F. 3d 830
February 2, 2005

Prepared by T.K. Caldbeck

SUMMARY: No *Miranda* warnings and waiver are required before questions posed to an arrestee concerning items that may harm officers conducting a search incident to arrest.

FACTS: Luker was arrested for DUI. The arresting officers had personal knowledge of his methamphetamine use. Prior to the search incident to arrest, and without providing *Miranda* warnings, they asked Luker if there was anything in his vehicle that shouldn't be there or that they should know about. Luker replied, "Just my .410 shotgun." Luker is a convicted felon. The shotgun was in the trunk and, since the search of an automobile incident to arrest involves only the passenger compartment, the shotgun would not have been discovered absent Luker's statement.

ISSUE: Are *Miranda* warnings and waiver required prior to public (officer) safety questions posed to an arrestee regarding an impending search incident to arrest?

HELD: No.

DISCUSSSION: Answers to police questions that are reasonably prompted by a concern for public safety are admissible. The known drug history of the defendant raised public safety concerns regarding needles and sharp objects associated with such use in the car. These circumstances fit the public safety exception to *Miranda*. See *New York v. Quarles*, 467 U.S. 649 (1984).

*****

U.S. v. Lloyd
396 F.3d 948
February 2, 2005

Prepared by Jeff Fluck

SUMMARY: An outstanding arrest warrant coupled with the reasonable belief that the defendant is inside permits entry.

The explosive ingredients and haphazard assembly of methamphetamine labs present dangers justifying immediate warrantless entry when probable cause arises to believe that such a lab is concealed inside.

FACTS: Defendant leased half a building in which he operated a garage and lived. The landlord, concerned with some abandoned cars on Defendant's side, called police. Defendant had an outstanding misdemeanor arrest warrant.

Two officers and the landlord went to the building. Defendant had a surveillance camera trained on the front, so the two officers went around back while the landlord knocked on the front door. No one answered

the door. The officers heard a fan inside, noticed that the windows were blacked out, and detected a strong smell of ether coming from inside. The officers also spotted two discarded cans of ether with holes punched in them.

The landlord and the others then went into the other side of the building where they ran into Hines, who said that defendant had been next door earlier, but thought he was gone now. Using the connecting door, the landlord went into defendant's side of the business. The landlord asked the officers to come in and help find the light switches. The officers entered and immediately smelled ether. When a methamphetamine lab and a dog "intoxicated from the ether fumes" were discovered in the bedroom they ordered the landlord out of the premises for safety and contacted the DEA. A DEA agent arrived and advised the officers to secure a search warrant.

They obtained a search warrant an hour and twenty minutes later. The search led to seizure of the methamphetamine lab and eleven grams of methamphetamine concealed near the lab. Later, the officers discovered that the search warrant's description of the items to be seized had been left blank.

ISSUES: 1. Was the initial entry lawful resulting in a plain view seizure of the methamphetamine lab?

2. Is the methamphetamine admissible pursuant to an exigency despite the defective warrant?

HELD: 1. Yes.

2. Yes.

DISCUSSION: Initial LEO entry. The outstanding arrest warrant coupled with the reasonable belief that defendant was inside permitted the entry. This reasonable belief sprang from the noises that came from within the premises and was not dispelled by Hines' statement that defendant was gone and the fact that nobody came to the door when the landlord knocked.

While lawfully inside defendant's premise, the officer's saw the methamphetamine lab in plain view. Therefore, it is admissible.

Deficient warrant and good faith exception. The lack of a description of the items to be seized in this warrant is reminiscent of the recent Supreme Court case of *Groh v. Ramirez*, 540 U.S. 551 (2004). In that case, a BATF agent mistakenly described the items to be seized by inserting, instead, a description of the premises to be searched. The Supreme Court found this to be a clear error and permitted a civil suit against the federal agent. This warrant is likewise deficient. However, there is a useful difference between these two cases. This case involves a volatile, jury-rigged, operating methamphetamine lab, presenting exigencies not present in *Groh v. Ramirez*. These exigencies provided the basis for admitting the bowl of methamphetamine.

Exigent circumstances and meth labs. The explosive ingredients and haphazard assembly of methamphetamine labs present dangers justifying immediate warrantless entry when probable cause arises to believe that such a lab is concealed inside. There is no reason to believe that these dangers somehow dissipated while officers secured the perimeter and sought a search warrant. The circuit court applauded the officers' decision to seek a search warrant as "show[ing] the officers' respect for the Fourth Amendment despite the exigent circumstances they encountered." But, the decision to seek a warrant did not preclude relying on the exigencies to justify the search when the warrant turned out to be

defective.

*****

U.S. v. Fellers
397 F.3d 1090
February 15, 2005

Prepared by Chuck Adkins

(The Eighth Circuit is reviewing this case for the second time after remand from the Supreme Court. See the January 2004 Quarterly Review at http://www.fletc.gov/legal/quarterly_review.htm)

SUMMARY: A defendant's in-custody admissions following his waiver of his right to counsel are not subject to exclusion merely because police previously violated the defendant's Sixth Amendment right to counsel during questioning at another location.

FACTS: Police went to Defendant's home with an arrest warrant and told him that a Grand Jury had indicted him for a drug conspiracy. No *Miranda* warning was given at his home, and officers questioned him for about 15 minutes (violating his 6th Amendment right to counsel). Officers then arrested Defendants and took him to jail where they gave him a full *Miranda* Warning. The defendant waived his *Miranda* rights then made further admissions.

ISSUE: Should a defendant's in–custody admissions (after a *Miranda* warning and waiver) be excluded as "fruits of the poisonous tree" if made subsequent to prior police questioning which was conducted in violation of the defendant's Sixth Amendment right to counsel?

Held: No.

DISCUSSION: There are similarities between unwarned statements taken in violation of *Miranda* and un-counseled statements obtained in violation of the Sixth Amendment. Both may be used for impeachment purposes.

There was no evidence the defendant's statements at his house were coerced, compelled, or otherwise involuntary. Although the defendant's right to counsel existed after the indictment, the defendant always held the right to waive counsel and did just that following the *Miranda* warning at the jailhouse.

The following factors are used to determine if *Miranda* rights and waiver overcome the taint of a prior statement taken in violation of the Constitution: (1) the extent of the first interrogation; (2) the extent to which the first and second interrogations overlap; (3) the timing and setting of both interrogations including continuity of police personnel; and (4) the extent to which the police questions in the second setting were treated as a continuation of the first. *Missouri v. Seibert,* 124 S.Ct. 2601 (2004).

The unwarned conversation at defendant's home was relatively brief. The jailhouse interrogation took place almost one half hour later in a new and distinct setting. The jailhouse interrogation went well beyond the scope of defendant's initial statements by inquiring about different coconspirators and different allegations. There is also no indication that the officers used statements from the unwarned conversation to prompt admissions in the second interrogation

There was no evidence that the police employed a "deliberate strategy" designed to obtain incriminating statements in violation of Miranda. See *Seibert.*

9th CIRCUIT

U.S. v. Mayo
394 F.3d 1271
January 14, 2005

Prepared by George Hurst

SUMMARY: The search of a car incident to arrest includes the hatchback area behind the rear seat regardless of whether the area is covered or open.

FACTS: A motel owner called a narcotics officer to report suspicious activity and provided four car tag numbers. Only Mayo's car was still there when the patrol officer arrived. The officer obtained Mayo's driver's license and vehicle sales license. The registration on Mayo's car had expired in 1999 but the license plate had a 2003 sticker. He was arrested for the felony vehicle registration violation, and the officer searched the car incident to arrest. The car was a Honda Civic hatchback. In the hatchback area behind the rear seat, the officer found stolen mail.

ISSUE: Does the search of a car incident to arrest include the hatchback area behind the rear seat?

HELD: Yes.

DISCUSSION: A search of an automobile incident to arrest includes the passenger compartment and all containers within the passenger compartment, but does not include a search of the trunk. The hatchback space is part of the passenger compartment and not the equivalent of a trunk. Officers may search the hatchback cargo area whether covered or uncovered.

*****

U.S. v. Combs
394 F. 3d 739
January 11, 2005

Prepared by T.K. Caldbeck

SUMMARY: Whether an actual "knock" is required prior to the execution of a search warrant is a Fourth Amendment issue of reasonableness determined by the totality of the circumstances of each case.

FACTS: Anchorage police executed a state search warrant for methamphetamine production that authorized entry at any time day or night at the defendant's house they knew was physically occupied. Police cars made a public approach to the front of house with overhead lights flashing. For a period of 30 to 60 seconds prior to entry, the police loudspeakers in the cars in front of the house were used to announce the message, "Anchorage Police with a warrant for 1502 West 32nd Avenue." The search warrant entry team announced "Anchorage Police with a warrant" and used a battering ram 6 to seven times to gain entry through the back door, taking 10 to 12 seconds to breach. There was no formal "knock" conducted by the entry team prior to entry.

ISSUE: Is an actual "knock" required under the 4th Amendment prior to entry on a search warrant?

HELD: No.

DISCUSSION: The Fourth Amendment's flexible requirement of reasonableness does not mandate a rigid rule of knock and announce. A physical knock is but one factor to be considered when determining what is reasonable under the totality of the circumstances. Other factors include officer safety, destructibility of evidence, size of the

residence, nature of the offense, etc. Prior notice of entry by the police and the likelihood it alerted the occupants are also factors to consider. The focus of knock and announce is how these words and other actions of police will be perceived by the occupants. Knock and announce rules protect the sanctity of the home, prevent unnecessary destruction of property through forced entry, and avoid violent confrontations if the occupants perceive law enforcement for intruders. The facts of this case clearly indicate the Fourth Amendment's reasonableness requirement has been met. Rigid rules for knock and announce distort the totality of circumstances principle – facts determine if police actions are reasonable. (For federal warrants see 18 U.S.C. §3109.)

*****

U.S. v. Bichsel
395 F.3d 1053
January 13, 2005

Prepared by Jeff Fluck

SUMMARY: GSA regulations require persons on federal property to obey "the lawful direction of Federal police officers." However, these regulations also require facilities to post notice of this requirement in a "conspicuous place on the property." Signs inside the entryway are not conspicuous to visitors outside, but a verbal warning from an officer of intent to arrest a misbehaving visitor is an adequate substitute.

FACTS: Defendant chained himself to the federal courthouse doors to protest the looming war in Iraq. The courthouse had not yet opened, but an FPS officer was already on duty in uniform. He told defendant to unchain himself and that he would arrest him if he failed to follow this order. Defendant refused. The officer gave defendant five minutes to get unchained and left to get bolt cutters. When the officer returned, the defendant was still shackled. The officer repeated his order, the defendant repeated his refusal. The officer cut the chains and arrested the defendant for violating 41 C.F.R. § 102-74.385.

41 C.F.R. § 102-74.385 provides:

> Persons in and on property must at all times comply with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized officials.

Other portions of this regulation require facilities wanting to enforce this provision to post notice of it "at each public entrance to each Federal facility" and "in a conspicuous place on the property."

The sign in the courthouse was "not accessible, let alone within reading distance, to an outside courthouse visitor."

ISSUE: Does an officer's verbal warning that he will arrest an individual who does not comply with his lawful order amount to actual notice sufficient to meet the conspicuous posting requirement?

HELD: Yes.

DISCUSSION: The purpose of requiring that written notice be posted in a conspicuous place is to let visitors know the rules. Face-to-face verbal warnings do this better than a posted sign; hence, the officer's warnings, providing actual notice to defendant, excused the sign's deficient location. The officer gave the defendant more than enough time to abandon his misconduct, and he gave the

defendant a second chance to avoid arrest. While neither of these is legally required, they impart a reasonable, prudent tone to the officer's actions in this situation.

*****

U.S. v. Younger
398 F.3d 1179
March 1, 2005

Prepared by Bobby Louis

SUMMARY: A defendant's conduct in making a spontaneous statement and continuing to respond to questioning constitutes an implied waiver of *Miranda* rights. To invoke the right to counsel, a suspect must unambiguously request counsel.

FACTS: Defendant was identified as the person who threw a backpack onto the roof when police arrived to serve a search warrant. Officers retrieved the backpack and found narcotics and firearms inside it.

Police advised defendant of his *Miranda* rights and asked if he understood each right. Defendant spontaneously responded with several incriminating statements, admitting knowledge of and ownership of the backpack and its contents.

At the beginning of the interview at the police station, the following took place:

Defendant: But, excuse me, if I'm right, I can have a lawyer present ….

Officer: (interrupting) Yeah.

Defendant: …through all this, right?

Officer: (interrupting) Yeah. Why, don't we read your Miranda rights, yeah.

Defendant: Okay, yeah.

Defendant was then given and waived his *Miranda* rights. In response to a question concerning the backpack, defendant stated:

> The bag? I don't know about the bag. We'll talk about that in front of a lawyer or something, I don't want to say anything that will incriminate myself in court, you know what I'm saying.

ISSUE: 1. Was the defendant's conduct in making spontaneous statements and continuing to respond to questioning an implied waiver of his *Miranda* rights?

2. Did defendant unambiguously invoke his right to counsel at the police station?

HELD: 1. Yes.

2. No.

DISCUSSION: A valid waiver Of *Miranda* rights depends on the totality of the circumstances where defendant "was aware of the nature of the right being abandoned and the consequences of the decision to abandon it."

A *Miranda* waiver need not be express. Police officers need not use a waiver form nor ask explicitly whether a defendant intends to waive his or her rights. *United States v. Cazares*, 121 F.3d 1241, 1244 (9th Cir. 1997). There is, however, a presumption against waiver. *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998).

"Voluntariness of a waiver" has always depended on the absence of police over-reaching, not on "free choice" in any broader sense of the word. *Cazares*, 121 F.3d at 1244 (quoting *Colorado v. Connelly*, 479 U.S. 157, 170 (1986)). There was an implied waiver at the house based on evidence that after being advised of his *Miranda* rights but before questioning, defendant made a spontaneous statement and then responded to further questioning without reference to counsel.

Defendant's interview at the police station was a continued conversation at a new location that did not require another waiver. Officers, who re-advised defendant of his rights after he asked about counsel, responded to defendant in a way "that was not unfair."

A suspect who invokes the right to counsel cannot be questioned unless an attorney is present or the suspect reinitiates the conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Invocation of the right to counsel requires some statement that reasonably can be construed to be an expression of a desire for the assistance of an attorney. *Paulino v. Castro*, 371 F.3d 1083, 1087 (9th Cir. 2004). To invoke the right to counsel, a suspect must unambiguously request counsel.

Defendant's words did not unambiguously invoke the right to counsel. Therefore, police were not required to stop questioning, and subsequent statements are admissible.

*****

U.S. v. Becerra-Garcia
397 F.3d 1167
February 2, 2005

Prepared by Keith Hodges

SUMMARY: The 4th Amendment does not apply to tribal governments, but a federal statute provides identical guarantees. Further, the 4th Amendment as interpreted under federal law will determine whether government action was reasonable. Though not authorized to perform stops, the actions of tribal rangers were still reasonable as they had reasonable suspicion the person being stopped was a trespasser.

FACTS: The tribal police department for the Tohono O'odham Indian Reservation in Arizona had numerous complaints of unidentified vehicles in the area. Because trespassing contrary to tribal nation law is a significant problem, and only local ranchers typically use the roads in the vicinity, the rangers make a practice of calling in the license plate numbers for all unknown vehicles transiting that area. The rangers saw the defendant's van which they did not recognize and which did not have a reservation license plate. When they followed the car and turned on their emergency lights, the van stopped. This was a seizure.

When the driver (and defendant) stopped, he got out of the van and approached the officers. A ranger went to the van, looked in the open door, and saw "more than twenty undocumented aliens stuffed inside." The rangers were instructed by the police department to detain the defendant, and the police and Border Patrol soon arrived.

At his trial for alien smuggling, the defendant unsuccessfully attempted to suppress the evidence of aliens being discovered in his van because the stop was unlawful.

ISSUES: 1. Does the 4th Amendment apply to tribal governments?

2. Are there any 4th Amendment-like provisions that apply to tribal governments?

3. Were the rangers operating as agents of the government?

4. Was the stop of the defendant lawful?

HELD: 1. No.

2. Yes.

3. Yes.

4. Yes.

DISCUSSION: The U.S. Constitution does not apply to tribal governments, but those on tribal land have identical protection under the Indian Civil Rights Act. Specifically, 25 U.S.C. § 1302(2) provides, "No Indian tribe in exercising powers of self-government shall--(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

This case involves a special class of officers known as "tribal rangers." Unlike tribal police, tribal rangers, "do not have authority to stop suspicious vehicles. Vehicles that stop voluntarily may be detained until the arrival of officials who have authority to arrest. .... Thus, the rangers' primary duties are to patrol, looking for suspicious activity, to report to the police department and other authorities (usually the Border Patrol), and to detain suspects who voluntarily stop."

Though the rangers exceeded their authority by stopping (seizing) the defendant, they were still agents of the government because the government knew of and acquiesced in the officer's activities, and the rangers performing the seizure intended to assist law enforcement and did not act to further their own ends.

Though the rangers exceeded their authority in making the stop, that fact did not make the stop automatically unreasonable. Indian tribes are sovereigns with the power to enforce their own internal laws to include excluding trespassers. The stop was reasonable because the rangers had a reasonable suspicion the van was trespassing.

10th CIRCUIT

U.S. v. Munro
394 F.3d 865
January 5, 2005

Prepared by Bobby Louis

SUMMARY: A violation of 18 U.S.C. § 2422(b), use of a computer to attempt to coerce or entice a minor to travel in interstate commerce to engage in illegal sexual acts, constitutes a crime of violence, that supports a conviction under 18 U.S.C. § 924 (c).

FACTS: Defendant started an online chat with an undercover police officer who he thought was a 13 year old girl. Defendant indicated that he wanted to perform oral sex on the "girl," and they arranged to meet. Defendant was arrested when he showed up at the meeting. A loaded handgun was found in his pocket. Defendant was convicted of using a computer to attempt to persuade a minor to engage in illegal sexual acts and carrying a firearm during the commission of a crime of violence, in violation of 18 U.S.C. §§ 2422(b) and 924(c).

ISSUE: Is a violation of 18 U.S.C. § 2422(b) a crime of violence, that supports a conviction under 18 U.S.C. § 924 (c)?

HELD: Yes.

DISCUSSION: Possession of a firearm during the commission of a violent crime violates 18 U.S.C. § 924 (c). The language of 18 U.S.C. § 924(c)(3) defines a crime of violence as one that "by its nature involves a substantial risk that physical force … may be used in the course of committing the offense."

In cases involving sex crimes against minors, "there is always a substantial risk that physical force will be used to ensure a child's compliance" with an adult's sexual demands. *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993). Actual sex with or sexual abuse of a minor is a violent act.

An attempt under 18 U.S.C. § 2422(b) also constitutes a crime of violence. 18 U.S.C. § 924 (c) speaks in terms of probability, i.e., a 'risk' of physical harm. Thus, physical injury need not be certain for a crime to pose a serious risk of physical injury. Other courts have found that attempted sexual abuse of a minor is a crime of violence. See *United States v. Pierce*, 278 F.3d 282, 290 (4th Cir. 2002); *United States v. Butler,* 92 F.3d 960, 963-64 (9th Cir. 1996). The risk involved in attempted sexual abuse of a minor is significant enough to render it a crime of violence.

11th CIRCUIT

U.S. v. Drury
396 F.3d 1303
January 18,2005

Prepared by Scott Wright

SUMMARY: In planning to have his wife killed, the defendant placed telephone calls to an undercover officer located in the same city. The call signal was routed across state lines on the way to its destination. This is sufficient to satisfy the interstate commerce element of both the old and amended versions of the Murder-for-Hire statute, 18 U.S.C. § 1958.

FACTS: Drury, a physician, approached his temporary houseguest, who he knew to be a Special Agent with ATF, about the possibility of having his wife killed. The ATF agent introduced Drury to another agent working undercover, posing as a hit man. In making the arrangements for the murder, a total of four telephone calls were placed between Drury and the undercover agent, both of whom were in the same local area in Georgia. Drury used payphones to contact the agent at a cell phone number. The phone signals were routed through a switching center in Florida before being sent back to the agent's cell phone. Had Drury been calling the agent at a land line number, instead of the cell, the signal never would have left Georgia.

ISSUE: Is the interstate commerce element of both the old and amended versions of the Murder-for-Hire statute, 18 U.S.C. § 1958, satisfied, creating federal jurisdiction, if the defendant places a phone call to someone in the same state, but the phone signal is routed across state lines before reaching its destination?

HELD: Yes.

DISCUSSION: In an 18 U.S.C. § 1958 (Murder-for-Hire) prosecution, federal jurisdiction exists where the defendant uses a "facility of interstate commerce," which would include a means of communication such as the telephone. Where, as here, the call signal crosses state lines, the jurisdictional requirement is clearly satisfied. Furthermore, because of the use of the preposition "of" in the statutory language, even if the signal had not crossed state lines, federal jurisdiction would still exist since a telephone is a facility capable of interstate commerce.

Under the previous version of the statute, effective at the time of Drury's offense, the language read "facility *in* interstate commerce." This could arguably be interpreted to require the signal cross state lines before there is jurisdiction. Since the signal crossed in this case, either version of the statute would apply to Drury. In any event, the fact that the signal's final destination was in the state of origin is not an issue, since the signal itself crossed the state line.

D.C. CIRCUIT

U.S. v. Hardwick
396 F.3d 412
January 25, 2005

Prepared by Bill McAbee

SUMMARY: Arrest by an on duty special police officer employed by the GPO at a GPO building was under his federal authority, not "under color of" D.C. law. The unlawful arrest case could be brought under *Bivens,* not 42 U.S.C §1983.

FACTS: Williams, a handicapped employee working at the GPO's D.C. office, was arrested by a special policeman as he was returning to the building after mailing a letter. After the arrest Williams was taken to the D.C. police station where he was charged with the misdemeanor offense of disorderly conduct under D.C. Code Ann. Section 22-1321. Williams filed a 42 U.S.C §1983 lawsuit against the special policeman and the GPO in U.S. District Court, claiming violations of his 4th and 5th Amendment rights.

ISSUE: Did the special officer act under federal authority or under color of D.C. law?

HELD: Federal authority.

DISCUSSION: The special officer's authority to make arrest for violations of D.C. law came from the federal government alone. The District of Columbia did not have authority over the officer and did not "exercise… coercive power" through him. D.C. officials did not provide encouragement or otherwise participate in the arrest. This action could be brought against the special officer under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

*****

In re GRAND JURY SUBPOENA, Judith Miller
397 F.3d 964
Feb 15, 2005

Prepared by Keith Hodges

SUMMARY: There is no First Amendment privilege that permits a newspaper reporter to refuse to testify before a grand jury in relation to a confidential source, though some federal courts may recognize a qualified common law privilege.

FACTS: Various news reporters wrote that government officials had disclosed that a certain person was a covert agent of the CIA. If true, such a disclosure would be a violation of 50 U.S.C. § 421. A special counsel was appointed to investigate the matter, and a grand jury issued subpoenas to reporters and publishers to seek testimony and documents to discover who may have revealed the agent's identity. The reporters and publishers moved to quash the subpoena, their motion was denied, they were held in contempt by the District Court, and they appealed.

ISSUE: Is there any privilege under the

Constitution or federal common law that would allow a reporter to lawfully refuse to honor a grand jury subpoena in a criminal matter?

HELD: No.

DISCUSSION: *The First Amendment.* The court followed the Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) that held there was no such First Amendment privilege. The First amendment does not permit a reporter to refuse to comply with a subpoena in a criminal matter. The only Constitutional privilege is the 5th Amendment.

Federal common law. Federal Rule of Evidence 501 recognizes federal common law privileges "as they may be interpreted by the courts of the United States in the light of reason and experience." There is no common law privilege - or if there is, it was qualified and the qualifications were overcome in this case.

(Note that 28 C.F.R. § 50.10 and the United States Attorney's Manual, § 9-2.161, provide guidelines in obtaining information from media sources. In addition, the Privacy Protection Act (42 U.S.C. § 2000aa) offers special protections to items in the hands of third parties that are intended for publication.

*****

U.S. v. Hewlett
395 F.3d 458
January 18, 2005

Prepared by Ed Zigmund

SUMMARY: Arrest and search of a suspect is lawful despite the passage of eleven months as it was reasonable for the arresting officers to believe that the warrant and probable cause remained valid until the time of arrest.

FACTS: After receiving a tip from a reliable informant that the defendant was a fugitive wanted for murder, an FBI Agent checked the NCIC database and confirmed the existence of an outstanding arrest warrant. Approximately eleven months later, the same informant called the agent and told him where the defendant was. Without attempting to confirm the continued validity of the warrant, the agent, along with police officers, arrested defendant, searched him, and seized a loaded pistol in the front waistband of his pants and a loaded ammunition magazine in his pocket. Afterwards, officers confirmed that the arrest warrant was still outstanding.

ISSUE: After eleven months, was it reasonable for the arresting officers to believe that the warrant was still valid and outstanding?

HELD: Yes.

DISCUSION: In the course of making a lawful arrest, a police officer may search the person arrested in order to remove any weapons that the arrestee might seek to use in order to resist arrest or effect his escape. Police officers who arrest a suspect based on a warrant that they did not themselves seek are entitled to assume that the officers who did obtain the warrant offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Despite the passage of eleven months since the agent confirmed the existence of the warrant, the support for the warrant did not so diminish as to reduce it below the level of probable cause. The nature of the charge (murder) and the relative brevity of the elapsed time period eliminate the possibilities that the warrant could have been quashed, withdrawn or executed. It was thus reasonable for the arresting officers to believe that the

warrant, and the finding of probable cause that it evidenced, remained valid until the time of arrest. Accordingly, the defendant's arrest and the search incident thereto were lawful.