# THE -QUARTERLY REVIEW-

LEGAL COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

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## EDITOR'S COMMENTS

Welcome to the fourth 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.4 (2005)".

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# Qualified Immunity – A Defense Available to Law Enforcement Officers In Civil Lawsuits

*Dean Hawkins*
*Senior Legal Instructor*

Qualified immunity is an affirmative defense available in civil suits for damages alleging violations of Constitutional rights by government officers. Civil suits for "negligent or other wrongful acts" by federal employees must be pursued under the Federal Tort Claims Act which will be the subject of a separate article

Scenario 1. You prepare an affidavit for a search warrant and a proposed search warrant to search a residence. When preparing the search warrant, you inadvertently do not insert a description of the items to be seized. You present the [faulty] search warrant and the affidavit to a magistrate judge who signs the search warrant. You serve the warrant. In a subsequent lawsuit, will you be allowed to assert a "good faith" claim of qualified immunity?

Scenario 2. You are attempting to arrest the victim for a nonviolent crime. He locks himself in his vehicle. He ignores your commands, issued at gun point, to get out of the vehicle. You shatter the driver's side window, reach into the car, but fail to grab the keys. You strike the victim on the head with your gun. Still undeterred, he succeeds in starting his vehicle and begins to slowly drive away. You fire one shot through a window of the vehicle, and hit the victim in the back. At the subsequent lawsuit, you state that you shot him because you were fearful for the safety of other officers you believed were on foot in the immediate area, for the occupied vehicles in the victim's path, and for any other citizen who might have been in the area. Will this justification support the successful assertion of qualified immunity?

## Introduction

Title 42 U.S.C. § 1983 allows suit for damages for "deprivations of rights, privileges, or immunities secured by the Constitution and laws…." One of the limitations of § 1983 is that the action must have occurred under color of state, territorial or District of Columbia law. In the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court established that, even in the absence of federal legislation creating such a remedy, an action for damages may be brought against federal law enforcement officers. One of the defenses available against such actions is "qualified immunity." The court has generally held that for "executive officials in general…qualified immunity represents the norm" and is available to public officials, including law enforcement officers.

Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions. Accordingly, qualified immunity for government officials is recognized where it is necessary to preserve their ability to serve the public good or to ensure that talented candidates are not deterred by the threat of damage suits from entering public service. In short, qualified immunity acts to safeguard government, and thereby to protect the public at large, not to benefit individual agents. *See Wyatt v. Cole,* 504 U.S. 158 (1992).

Common civil actions under 42 U.S.C. § 1983 or *Bivens* allege violations of the Fourth Amendment for unlawful searches or seizures,

including claims of excessive force.

## Elements of Qualified Immunity

There is a qualified immunity defense for both federal officials sued under *Bivens* and state officials sued under 42 U.S.C. §1983. The qualified immunity defense analysis is identical under both situations. *See Wilson v. Layne*, 526 U.S. 603 (1999). In both situations, officials performing discretionary functions generally are shielded from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Johnson v. Fankell*, 520 U.S. 911 (1997); *Anderson v. Creighton*, 483 U.S. 635 (1987).

## Qualified Immunity Is Available to Law Enforcement Officers

Law enforcement officers are "public officials" for whom qualified immunity is available.

In *Malley v. Briggs*, 475 U.S. 335 (1986), the Supreme Court held that the defense of qualified immunity is available to a police officer when it is alleged that the officer caused the victim to be unconstitutionally arrested by presenting a complaint and affidavit which failed to establish probable cause.

## Scope of Official Duties

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), one of the foundational *Bivens* cases, the Supreme Court held that qualified immunity applies to suits for civil damages arising from actions within the scope of official duties and in objective good faith. Generally, for an act to be within the scope of employment it must arise out of a foreseeable job-related activity with the purpose of furthering the employer's interest. An employee acts within the scope of employment if the activity is typical of the kind he was hired to perform, occurs within authorized time and space limits, and is done with the intent, at least in part, to serve the master.

## Discretionary Functions

Government officials performing discretionary functions are generally entitled to qualified immunity from civil liability. How to investigate, who to investigate, and how to present evidence to the proper authorities are classic examples of discretionary conduct.

## "Objective" Reasonableness Test

In *Harlow*, the Supreme Court adopted an "objective" test for qualified immunity. *See also Behrens v. Pelletier*, 516 U.S. 299 (1996).

In *Graham v. Connor*, 490 U.S. 386 (1989), a 42 U.S.C. § 1983 case alleging excessive use of force, the Supreme Court stated that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

## "Clearly Established" Constitutional Rights

*Harlow* also held that public officials are generally shielded from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have had knowledge.

If the law was not clearly established at the time an action occurred, an official cannot be expected to anticipate subsequent legal developments. If the state of the law did not give "fair warning" that the actions of the officer violated a statutory or Constitutional right, qualified immunity should be available to the officer. However, if the law was clearly established, the immunity defense ordinarily should fall, since a reasonably competent public official should know the law governing his conduct. *United States v. Lanier*, 520 U.S. 259 (1997).

After monitoring two telephone calls pursuant to a court-authorized wiretap, a law enforcement officer obtained arrest warrants for drug related charges. The charges were subsequently dismissed and a § 1983 action was filed. In *Malley v. Briggs*, the Supreme Court held that (1) officers are not entitled to *absolute immunity*; (2) for executive officers, in general, qualified immunity represents the norm (citing *Harlow*); (3) immunity should be recognized "if officers of reasonable competence could disagree on this issue [whether a warrant should issue]"; and (4) immunity would be lost only where a warrant application so lacked indicia of probable cause as to render its existence unreasonable.

*Anderson v. Creighton* involved a *Bivens* claim against an FBI agent regarding the agent's participation in a warrantless search. The plaintiff asserted that the Fourth Amendment right to be protected from warrantless searches of homes unless the officers have probable cause and there are clearly established exigent circumstances. The Supreme Court held that qualified immunity generally turns on (1) the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time the action was taken; (2) whether the contours of the right were sufficiently clear that a reasonable officer would understand that what he is doing violates that right; and, (3) whether, as a matter of law, a reasonable officer could have believed, in light of clearly established law and information then known to the officers, that the search comported with the Fourth Amendment even though it actually did not.

In the *Harlow* standard, the Supreme Court equated the qualified immunity defense with a violation of a clearly established constitutional right. Under the Court's subsequent *Creighton* standard, an officer may be able to successfully assert the qualified immunity defense even though he violated a clearly established constitutional right. The focus of the qualified immunity defense in *Creighton* is not on whether the constitutional right was established or not, but on whether a reasonable police officer would have believed that the actions violated clearly established constitutional rights.

This standard does not mean that an officer's action is protected by qualified immunity unless the very action in question has been previously, specifically held unlawful. It means that in the light of pre-existing law, the unlawfulness must be apparent. The touchstone is whether it was at the time reasonably clear that the conduct was unlawful. Rights can be clearly established despite notable factual distinctions between prior cases and the conduct at issue. In effect the test is simply the adaptation of the fair warning standard to give officials that same

protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. *See United States v. Lanier*.

In *Wilson v. Layne*, the Supreme Court stated that in evaluating a claim of qualified immunity, the first determination must be whether the plaintiff has alleged an actual constitutional violation at all. If so, you then determine whether that right was clearly established at the time of the alleged violation. The Court, for purposes of the "clearly established" test, stated that the contours of the right must be sufficiently clear that a reasonable officer would understand that what the officer is doing violates that right.

If it would be clear to a reasonable officer that the officer's conduct was unlawful in the situation which the officer confronted, then the right is "clearly established." If the law did not put the officer on notice that the officer's conduct would be clearly unlawful, then summary judgment based on qualified immunity is appropriate. *Saucier v. Katz*, 533 U.S. 194 (2001).

**Immunity From Suit - Not Just A defense**

Qualified immunity is the right to avoid the rigors of the lawsuit rather than a mere defense to liability. One of the purposes of qualified immunity is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit. *Siegert v. Gilley*, 500 U.S. 226 (1991).

If the defendant is found to be entitled to qualified immunity, the suit should not survive a motion to dismiss. Damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on qualified immunity. *Harlow v. Fitzgerand*.

**Scenario Explanations**

Scenario 1 is based on *Groh v. Ramirez* wherein the Supreme Court held that the warrant to search the residence was invalid, and that the search of the residence pursuant to the warrant was clearly unreasonable, in violation of the Fourth Amendment. This warrant, on its face, violated the Fourth Amendment in that it did not describe "with particularity" the items to be seized. It should have been clear to a reasonable agent that the agent's conduct was unlawful. The warrant was constitutionally infirm. This right was clearly established at the time of the officer's conduct. The agent was not entitled to qualified immunity. The agent's argument that he served the warrant in "good faith" because a magistrate judge had approved it was unsuccessful.

Scenario 2 is based on *Brosseau v. Haugen*. The Supreme Court held that case law clearly showed that this area was one in which the result depended very much on the facts of each case. Furthermore the Court suggested that the officer's actions fell in the hazy border between excessive and acceptable force and did not clearly establish that the officer's conduct had violated the Fourth Amendment. The officer was entitled to summary judgment based on qualified immunity.

**Summary**

The Supreme Court in *Hunter v. Bryant*, 502 U.S. 224 (1991) held that (1) under the *Harlow* standard with respect to reasonableness in the light of clearly established law, the entitlement to qualified immunity is an immunity from suit, rather than a mere defense to liability; (2) the qualified immunity standard gives ample

room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law; (3) this accommodation for reasonable error exists because officials should not err always on the side of caution for fear of being sued; and (4) a court ought to ask whether the officers acted correctly under settled law in the circumstances, not whether another or more reasonable, interpretation of the events could be constructed 5 years after the fact.

Similarly, *Groh v. Ramirez* is significant because it narrows the mistake justification for clear violations of the Constitution to almost zero tolerance. Even though there is no suggestion of bad faith on behalf of Agent Groh, he will likely now be found liable for his drafting of the warrant. Nevertheless, the Court was willing to withhold immunity from Groh because a violation of clear constitutional language cannot be reasonable. The particularity requirement is one of the few clear and precise clauses of the Constitution - most others use vague terms such as "cruel and unusual punishment" or "probable cause" that are open to debate over their meaning.

*Dean Hawkins is a Senior Legal Instructor at the Federal Law Enforcement Training Center, Artesia campus. He has served as Special Agent with Internal Revenue Service, Criminal Investigation Division, and with Resolution Trust Corporation, Office of Inspector General. He is a member of the California State Bar Association.*

# CASE BRIEFS
## UNITED STATES SUPREME COURT
## and CIRCUIT COURT UPDATES

**SUPREME COURT**

*Small v. U.S.*
*125 S. Ct. 1752*
*April 26, 2005*

*By Ken Anderson*

**SUMMARY: Title 18 U.S.C. § 922(g)(1) makes is unlawful for any person who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year, to possess any firearm. The term "convicted in any court" encompasses only domestic, not foreign convictions.**

FACTS: Smalls was convicted in a Japanese court for a weapons violation and sentenced to five years imprisonment. After his release Smalls returned to the United States where he purchased a firearm from a gun dealer. The government charged Smalls with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), based on his foreign conviction.

ISSUE: Does the "convicted in any court" provision in 18 U.S.C. § 922 (g)(1) include a conviction from a foreign court?

HELD: No.

DISCUSSION: Congress generally passes legislation with domestic concerns in mind. The Supreme Court presumes that Congress, unless stated otherwise, intends its statutes to have domestic, not extraterritorial application. The statute's legislative history does not indicate that Congress intended to include anything other than domestic convictions as the predicate for a felon-in-possession prosecution.

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*Arthur Andersen, LLP v. U.S.*
*125 S. Ct. 2129*
*May 31, 2005*

*By Keith Hodges*

**SUMMARY: To convict under 18 U.S.C. § 1512(b) (witness tampering), the government must prove that the defendant knew his actions were corrupt, and that there was a connection between the corrupt actions and a pending proceeding.**

FACTS: Arthur Anderson, LLP, was an accounting firm for the failed Enron Corporation. After becoming aware of an SEC investigation of Enron, but before being formally asked for accounting documents pertaining to the subject of the investigation, the defendant had its employees follow their "document retention policy." That policy included the regular and systematic destruction of documents. (The policy also provided that when threatened with litigation, advised of litigation, or served with a subpoena, relevant documents would not be destroyed.)

Arthur Anderson, LLP, was convicted for violating 18 U.S.C. § § 1512(b)(2)(A) and (B) for *knowingly*, intentionally and corruptly persuading its employees to withhold documents from, and alter documents for use in, official proceedings,

namely: regulatory and criminal proceedings and investigations.

ISSUES: (1) Must the defendant's action be *knowingly* corrupt?

(2) Must there be a connection between the defendant's action and a pending proceeding?

HELD: (1) Yes.

(2) Yes.

DISCUSSION: "To 'persuade' is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word 'corruptly' means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Not only do the defendant's actions have to be corrupt, the defendant has to *know* that.

There also must be a nexus (connection) between the "persuasion" to destroy documents and a particular proceeding. While the statute provides that a proceeding "need not be pending or about to be instituted at the time of the offense" the court held that, a "'knowingly . . . corrupt persauder' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material."

**Note:** The error in this case was due to improper jury instructions – something which is beyond the control of agents and officers. However, this case does tell us that agents must document not only that a subject's actions were corrupt, but also develop evidence on how the defendant knew their actions were corrupt.

## 1st CIRCUIT

*U.S. V. Barboza*
*412 F.3d 15*
*June 15, 2005*

*By Bill McAbee*

**SUMMARY: As part of a lawful frisk, placing a finger into the instep of a mid-top sneaker is a minimally intrusive search that does not exceed the proper scope. It is not unreasonable merely because the Defendant might have been fractionally delayed in employing a weapon against the officers or others.**

FACTS: The defendant was charged with being a felon in possession of a firearm following the discovery of a weapon in his shoe during an investigatory *Terry* stop. Because the searching officer had discovered a handgun concealed in the shoe of a previous suspect, he ran his index finger between the ankle and inside of the Defendant's mid-top sneaker. He felt a hard object between the sole of the Defendant's shoe and his foot. A search of the shoe uncovered a .25 caliber pistol loaded with eight rounds of ammunition.

ISSUE: Did the insertion of an index finger into the instep of a suspect's mid-top sneaker exceed the proper scope of a protective *Terry* frisk?

HELD: No

DISCUSSION: Limited searches of a person for weapons are constitutionally permissible as part of a *Terry* stop if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." The purpose of a protective search is not to discover evidence of a crime but to neutralize the threat of

physical harm to police and others. The minimally intrusive search of the Defendant's sneaker for the purpose of locating a concealed weapon was not unreasonable merely because the Defendant might have been fractionally delayed in employing it against the officers or others.

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*U.S. v. Lawlor*
*406 F.3d 37*
*April 27, 2005*

*By Margaret Wright*

**SUMMARY: A protective sweep can follow an arrest made just outside of the home as long as it is reasonable based upon the circumstances.**

FACTS: Maine State Trooper Fiske went to the residence of Lawlor to investigate a report of a gunshot and an altercation between two men. Fiske was familiar with the residence and its occupants, having previously arrested Lawlor's father and brother at the residence. Fiske believed that Lawlor was living in the residence and that his brother also lived there "from time to time," and that the Maine State Police had received intelligence connecting the residence and its occupants with illicit, drug-related activities. When Fiske arrived at the residence, he saw Lawlor and another man yelling at each other with Lawlor holding a two-by-four. The men were visibly intoxicated. Fiske did not see a gun. Fiske detained the two men, and then noticed two spent shotgun shells on the ground in front of the doorway to the residence. Fiske, "was concerned that there may still have been an assailant with a gun in or around the residence." Lawlor initially denied knowledge of a gun, but a short time later, asked Fiske which gun he was referring to, implying that there were several guns in the house. After Fiske said that he wanted to know the location of the gun from which the shells had been fired, Lawlor shrugged his shoulders. Fiske then went inside the house where he found a shotgun on the floor in plain view. The shotgun smelled of gunpowder, an indication that it had been fired recently. Fiske picked up the gun and went outside. As Fiske made his way through the house, he noticed a straw and a plate covered with white powder, which he believed to be cocaine.

ISSUE: Can a protective sweep inside follow an arrest made just outside of the home?

HELD: Yes.

DISCUSSION: In *Maryland v. Buie*, 494 U.S. 325 (1990), the Supreme Court announced that following an in-home arrest, police officers may conduct a protective sweep of the premises if "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonable prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Buie* did not address whether a protective sweep can follow an arrest made just outside of the home. Nevertheless, a number of circuits have allowed protective sweeps in this situation. An arrest that occurs just outside the home can pose an equally serious threat to arresting officers as one that occurs in the home. A protective sweep may be conducted following an arrest that takes place just outside the home, if sufficient facts exist that would warrant a reasonably prudent officer to fear that the area in question could harbor an individual posing a threat to those at the scene. A reasonably prudent officer in Fiske's position would have been warranted in fearing that the residence harbored an individual posing a danger to those at the scene. Fiske's entry into and cursory inspection of the residence was reasonable.

*Rivera v. Rhode Island*
*402 F.3d 27*
*March 22, 2005*

*By Tim Miller*

**SUMMARY: To be liable under 42 U.S.C. §1983 for failing, after promising, to protect a witness, the death must be caused by intentional or reckless government conduct.**

FACTS: Jennifer was a 15 year old child and the state of Rhode Island's chief witness in a murder trial. The defendant threatened to kill her if she testified. State law enforcement officers promised to protect her. They failed. The defendant shot Jennifer dead in front of her house. Mrs. Rivera, Jennifer's mother, brought an action under 42 U.S.C. §1983 alleging that the state violated her daughter's constitutional due process right to life by failing, after promising, to protect Jennifer from the dangers posed by her murderer.

ISSUE: Is the failure of state officials to protect, after promising, a witness from private violence a Constitutional violation that will support a 42 U.S.C. §1983 action?

HELD: No.

DISCUSSION: To establish a due process claim, the plaintiff must first show a deprivation of a protected right to life, liberty, or property. Jennifer was deprived of her life. Secondly, the plaintiff must show that the deprivation of this right was caused by government conduct. Jennifer, however, was killed by a private party. The Due Process Clause acts as a check on government, not private action. Some special relationships create a constitutional duty to protect someone. Such a duty might exist if the state restrains someone's freedom so that she is no longer able to care for herself. For example, the state has a duty to protect incarcerated inmates. A duty might also exist if the state creates the danger that harms the plaintiff. When such a relationship exists, the state officials' conduct must "shocked the conscience," meaning that they deliberately intended to injure Jennifer or were deliberately indifferent about protecting her.

*****

## 3rd CIRCUIT

*U.S. v. Guadalupe*
*402 F.3d 409*
*March 31, 2005*

*By Keith Hodges*

**SUMMARY: In a prosecution for witness tampering under 18 U.S.C. §1512(b)(3), there neither has to be a federal investigation or inquiry underway at the time of the tampering, nor knowledge that information might be communicated specifically to a federal official.**

FACTS: The defendant was a deputy warden of a state prison. He knew that one of his inmates was beaten by prison officers. The defendant told prison guards to provide false or misleading information during an internal, state inquiry. Federal authorities later opened an investigation to determine whether there was a federal civil rights violation. Telling the officers to make false or misleading reports formed the basis for the conviction.

The defendant claimed at trial that at the time of the alleged witness tampering, there was no *federal* investigation underway, and further, that he did not intend to prevent the flow of information to *federal* authorities.

ISSUE: Under 18 U.S.C. § 1512(b)(3), does there have to be a federal investigation

underway or an intent to impede the flow of information to specifically a federal authority?

HELD: No.

DISCUSSION: 18 U.S.C. § 1512(b)(3) makes it unlawful to tamper with a witness with "intent to hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense ... ." The defendant was properly convicted because he intended to influence an investigation *which later became federal*, though it was not federal at the time he spoke with the prison guards. Based on the defendant's position in the prison system, he knew that the allegations of a beating in a state prison often lead to a federal inquiry for civil rights offenses.

*****

## 4th CIRCUIT

*U.S. v. Johnson*
*410 F.3d 137*
*June 8, 2005*

*By Keith Hunsucker*

**SUMMARY: A law enforcement officer may perform a search without a warrant or probable cause when performing a community-caretaking function which is not related to the detection, investigation or acquisition of criminal evidence.**

FACTS: A U.S. Park Police officer arrived on the scene of an auto accident. The driver was conscious, but unresponsive to the officer's inquiries about his condition. Thinking the driver might be responsive if referred to by name, the officer opened up the glove compartment to look for identification. Inside, the officer discovered an illegal handgun.

ISSUE: Absent a warrant or probable cause, was the officer's search of the glove compartment legal?

HOLDING: Yes.

DISCUSSION: A law enforcement officer may perform a search without a warrant or probable cause when performing a community-caretaking function which is not related to the detection, investigation or acquisition of criminal evidence. Learning the identity of the injured driver was a legitimate community-caretaking function which authorized the officer opening the glove compartment. Accordingly, the handgun discovered in the glove compartment was admissible into evidence.

*****

## 6th CIRCUIT

*Baranski v. Fifteen Unknown ATF Agents*
*401 F.3d 419*
*March 14, 2005*

*By Gary Ainley*

**SUMMARY: A Special Agent cannot claim Qualified Immunity from civil liability if that agent serves a patently unconstitutional search warrant.**

FACTS: Plaintiff Baranski was a licensed importer of firearms and ammunition. He maintained these items in an approved storage facility operated by Pars International, Inc. Pars leased space in a multiple occupancy commercial structure. Pars, like Baranski, was also a licensed broker of automatic weapons. The ATF believed that Baranski was associated with a known felon who was allegedly importing firearms under an

assumed name.

An ATF Special Agent applied for a search warrant for the portion of the building occupied by Pars International. The application described the premises to be searched, and stated "See Attached Affidavit" (1) as to a description of the property to be seized, (2) the basis for the search, and, (3) supporting probable cause. A U.S. Magistrate Judge granted the application and a search warrant was issued. This search warrant described the premises to be searched, and in the portion that begins…"there is now concealed …" stated "See Attached Affidavit." However, the Application and Affidavit were sealed and not attached to the warrant.

ISSUE: Should the Special Agents have been granted qualified immunity after serving a search warrant that did not meet the "particularity" requirements of the Fourth Amendment?

HELD: No.

DISCUSSION: The facts in this case are not materially different from those in *Groh v. Ramirez,* 540 U.S. 551 (2004). In *Groh*, an ATF Special Agent served a search warrant that did not describe with particularity the property to be seized. At the conclusion of the search he left the suspect a copy of the search warrant, but not a copy of the application, which, like this case, had been sealed. The Supreme Court in *Groh* ruled that as a result the warrant was "plainly invalid" because it provided no description of the contraband sought as required by the Fourth Amendment. This defect could have been corrected had the agents left a copy of the application/affidavit along with the search warrant. But, since they did not, the agents violated a clearly established constitutional right that they knew, or should have known, and are not entitled to Qualified Immunity.

*****

*U.S. v. Hunyady*
*409 F.3d. 297*
*May 17, 2005*

*By George Hurst*

**SUMMARY: A son, who was living in his father's home at the time of the father's death and who continued to live in the house after the personal representative of the estate ordered him to leave, had no reasonable expectation of privacy in the home to contest a search of the premises by ATF agents.**

FACTS: The defendant had been living in his father's home prior to the father's death. After the father died, the personal representative of the estate ordered the son to vacate the premises twice, but the defendant did not leave. The representative observed two machine guns and silencer in the house and reported that information to ATF. After determining the defendant was a convicted felon, the agents searched the house with the consent of the personal representative, finding an unregistered machine gun, a silencer and several hundred rounds of ammunition.

ISSUE: Did the defendant have a reasonable expectation of privacy in the house?

HELD: No.

DISCUSSION: Although the son had resided at this particular residence for some time, the court determined that the son was a trespasser who had no reasonable expectation of privacy in those premises. The lawful title to the house rested with the personal representative of the estate, who had unsuccessfully tried to evict the son from the house twice. The son's

continued possession of the house did not create a legitimate expectation of privacy.

*****

## 8th CIRCUIT

*U.S. v. Bach*
*400 F.3d 622*
*March 14, 2005*

*By Margaret Wright*

**SUMMARY: The relevant definition of a "minor" for federal child pornography offenses is any person under the age of *eighteen* years, even though the child victim is the age of consent under state law.**

FACTS: Officers obtained a search warrant to search Bach's residence for evidence of the possession or distribution of child pornography or the enticement of children online. Among the effects seized were seven digital camera images which Bach had taken of a *sixteen* year old boy engaging in sexually explicit conduct. These pictures were of RH, who testified at trial that he was the boy in the photos and that he had been sixteen at the time they were made. The age of consent under state law was *sixteen* years. One photograph of RH had been sent on the internet from Bach's computer to another minor with whom he corresponded.

ISSUE: Can defendant be convicted of child pornography involving sex with a minor over the age of consent but under the age of eighteen as set by the child pornography statutes?

HELD: Yes.

DISCUSSION: The relevant definition of a minor for these offenses is found in 18 USC § 2256, which defines a minor as any person under the age of *eighteen* years. Even though the age of consent may be less than that, Congress had a rational basis for criminalizing pornography involving this age group.

*****

*U.S v. Maltais*
*403 F.3d 550*
*April 7, 2005*

*By TK Caldbeck*

**SUMMARY: In determining whether or not the amount of time involved in a detention is excessive, the law enforcement purpose to be served must be considered in relation to the time reasonably necessary to accomplish that purpose. Reasonableness requires due diligence on behalf of the police to ensure no unnecessary delay in carrying out the stated law enforcement purpose.**

FACTS: Maltais, who is parked in a Manitoba licensed vehicle / trailer deep in a South Dakota forest, 500 yards south of the Canadian border, and six miles from a paved road, is confronted at 1AM by a Border Patrol Officer. During a license/immigration check, Maltais provided information concerning his recent travel route that the Officer knew did not exist. Another officer, upon hearing the license check on the radio, notified the detaining officer that the vehicle/trailer is suspected of being used in drug smuggling. This officer, who is 100 miles away, requests Maltais be detained until he can arrive at their location. Due to the distance, terrain, and difficulty of locating a drug detection dog and handler in the wee hours of the morning, Maltais is detained for almost 3 hours. The drug dog alerts on the trailer and drugs are found.

ISSUE: Is the three hour detention of a

suspect/vehicle while waiting for the arrival of a drug detection dog reasonable?

HELD: Yes.

DISCUSSION: Reasonable suspicion can be based on innocent facts that, when coupled with the officer's experience and information provided by others not present at the scene, would lead a reasonable person to suspect criminal activity. The detaining officer can rely upon the circumstances, his own knowledge, and the collective knowledge of other officers involved in the stop.

In determining whether or not the time of detention is excessive, the law enforcement purpose to be served by the detention must be considered in relation to the time reasonably needed to perform the stated law enforcement purpose. In this case, the location of the detention, the time of day, and the distances involved determined what is reasonable as to the length of time of the detention. Reasonableness requires due diligence on behalf of the police to ensure no unnecessary delay in carrying out the stated law enforcement purpose.

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*U. S. v. Parker*
*412 F.3d 1000*
*June 28, 2005*

*By Anthony Bell*

**SUMMARY: The ATF agent's act of searching under the mattress of a bed located in a trailer while searching for a fugitive was reasonable when that officer had consent to enter and the place searched could have hidden a person.**

FACTS: Local police officers and an ATF agent went to the defendant's mobile home looking for a federal fugitive. They received permission to enter the mobile home. Once inside the ATF agent saw boxes of ammunition sitting on a shelf. The agent continued his search for the fugitive and looked under the mattress of the bed located in the kitchen area because "in his experience those types of beds are wooden frames with a mattress on top and the area under the mattress is large enough to hide a person." He found a gun. The defendant eventually admitted to being a felon and told officers where to locate additional firearms.

ISSUE: Did searching under the mattress exceed the scope of consent to search for a fugitive?

HELD: No.

DISCUSSION: Finding of the gun was incidental to a search of an area that, based on the agent's knowledge and experience, could have hidden a person. Searching under the mattress was reasonable.

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## 9th CIRCUIT

*U.S. v. Marquez*
*2005 U.S. App. LEXIS 14442*
*June 7, 2005*

*By Margaret Wright*

**SUMMARY: Airport screenings of passengers and their baggage constitute administrative searches and must be reasonable under the Fourth Amendment. To judge reasonableness it is necessary to balance the right to be free from intrusion with "society's interest in safe air travel. An airport screening search is reasonable if: (1) it is no more extensive or intensive than necessary, in light of current**

**technology, to detect weapons or explosives; (2) it is confined in good faith to that purpose; and (3) passengers may avoid the search by electing not to fly.**

FACTS: Marquez attempted to board a domestic flight to Anchorage from Seattle. At the TSA security checkpoint, he was diverted to a second checkpoint. Passengers routed to this second checkpoint are subjected to a more thorough search, regardless of whether or not the x-ray luggage scan reveals something suspicious or the walkthrough magnetometer sounds an alarm. The additional screening involves a full-body wanding with a handheld magnetometer that uses technology similar to but more sensitive than the walkthrough magnetometer. Passengers are randomly selected for the secondary check either by airlines at the time of check-in or by TSA employees stationed at the security checkpoint entrance when the passenger presents his or her identification and boarding pass. When Marquez was scanned the wand "alarmed" as it passed over his right hip. Marquez denied permission to touch his hip, and swatted the screener's hand away from him when he tried to touch the area. Even so, the screener felt a "hard brick type of thing" and based on his military and TSA training, he feared that the object might be C-4 explosives. Marquez continued to protest the screener's attempts to determine what was causing the alarm. After entering a private screening room and in response to repeated requests to determine what had caused the alarm, Marquez revealed bricks of cocaine in his crotch area.

ISSUE: Is an airport screening procedure, subjecting passengers to a handheld magnetometer wand scan, in addition to the standard walk-though magnetometer and x-ray luggage scan, constitutionally reasonable where the passengers are randomly selected for more intrusive screening upon or before entering the TSA security checkpoint?

HELD: Yes.

DISCUSSION: Airport screenings of passengers and their baggage constitute administrative searches and must be reasonable under the Fourth Amendment. Airport screenings are considered to be administrative searches because they are conducted as part of a general regulatory scheme where the essential administrative purpose is to prevent the carrying of weapons or explosives aboard aircraft. To judge reasonableness it is necessary to balance the right to be free from intrusion with "society's interest in safe air travel.: An airport screening search is reasonable if: (1) it is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) it is confined in good faith to that purpose; and (3) passengers may avoid the search by electing not to fly.

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*U.S. v. Pulliam*
*405 F.3d 782*
*April 21, 2005*

*By Scott Wright*

**SUMMARY: A passenger with no interest in the vehicle searched lacks standing to object to any evidence found in it. Real evidence is suppressed when it is the direct result of an illegal detention.**

FACTS: Officers observed the defendant, Pulliam, and a known gang member, Richards, acting in a suspicious manner at a gang hangout. The officers secreted their vehicle nearby and waited for the two men to leave. Pulliam got into Richards' car and they drove off. The officers followed with the intent to find a reason to pull them over. Richards committed a minor traffic violation and the officers made a lawful traffic stop.

They then detained the two men and searched the car. During the search, a gun was found under Pulliam's seat. Pulliam, a convicted felon, was arrested for being in possession of a firearm.

ISSUES: (1) Does a passenger with no ownership or interest in a vehicle have standing to object to evidence found during an illegal search?

(2) Should evidence found during a passenger's illegal detention be suppressed if it is not the product of that detention?

HELD: (1) No.

(2) No.

DISCUSSION: The vehicle stop was legal, but both the search of the car and the continued detention were unlawful because they were not based upon reasonable suspicion, and because they exceeded the scope of the original stop. The government did not challenge these findings. Since the defendant had no interest in Richards' vehicle, he had no reasonable expectation of privacy in it. Therefore, he could not object to the search.

The defendant failed to demonstrate that the gun was in some sense the product of his unlawful detention. The officers conducted no interrogation of him before searching the car, and found nothing incriminating during his pat-down. Even if they had immediately released him rather than detaining him, the search of the car would still have occurred, and the gun would have been found.

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*U.S. v. Quaempts*
*411 F.3d 1046*
*May 31, 2005*

*By George Hurst*

**SUMMARY: Even though officers never crossed the threshold of defendant's home, a warrantless arrest of defendant was unlawful where the officers told the defendant he was under arrest through the open front door, and the defendant complied with their instructions. Statements made by defendant as a result of the unlawful arrest are suppressed.**

FACTS: Officers had probable cause to arrest the defendant for rape, but did not have an arrest warrant. Arriving at the defendant's trailer, an officer knocked on the door and said he needed to talk to the defendant. The defendant reached the door from his bed and opened it, but stayed in bed. From outside, the officers told the defendant he was under arrest, to get out of bed and get dressed. The defendant did so. He made some incriminating statements in response to the officer's statements. As soon as defendant stepped outside, he was placed in handcuffs and taken to jail.

ISSUE: Even where the officers never crossed the threshold of defendant's home, was the warrantless arrest of the defendant unlawful where the officers told the defendant he was under arrest through the open front door and the defendant complied with their instructions and came outside.

HELD: Yes.

DISCUSSION: In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court prohibited warrantless arrests inside a person's home absent consent to enter or

exigent circumstances. In this case, the officers had probable cause to arrest, but did not have an arrest warrant. The defendant opened the door in response to the officer's knock, but the officers never entered the trailer. Defendant's seizure, and therefore the arrest, occurred inside the house where the defendant submitted to the officer's commands. It did not matter that the officers never actually entered. Since the defendant was in the trailer at the time of the warrantless arrest, the arrest was unlawful, and any statements resulting from the unlawful arrest must be suppressed.

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*U.S. v. Vo*
*413 F.3d 1010*
*June 27, 2005*

*By Keith Hodges*

**SUMMARY: The marital communications privilege does not apply to those communications made during joint criminal activity.**

FACTS: The husband-defendant was convicted of drug trafficking offenses. At the trial, the defendant's wife testified for the prosecution that her husband had asked her to mail certain packages, and in so doing, to falsify the name of the sender. (By agreeing to testify, the wife waived her privilege, as the defendant's spouse at the time of the trial, to refuse to testify against her husband.) All these communications were made while the defendant and his wife were married, and in a confidential setting.

ISSUE: Does the marital communications privilege apply to statements made during a joint criminal enterprise?

HELD: No.

DISCUSSION: The communications between the parties met the criteria of the private marital communication privilege. But because the communications were part of a joint criminal activity, the privilege does not apply.

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**D.C. CIRCUIT**

Quarterly Review Update

In the April Edition of the Quarterly Review, we reported on the case of *In re GRAND JURY SUBPOENA, Judith Miller*, 397 F.3d 964 (D.C. Cir, 2005.) The summary of that case was 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. The Supreme Court refused to hear an appeal in *Miller v. United States*, 125 S.Ct. 2977 (2005).