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EDITOR'S COMMENTS

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CIVIL LIABILITY FOR FALSE AFFIDAVITS

Bryan R. Lemons
Acting Division Chief

"Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause,"[1] and "great deference" is to be given to magistrate's determination of the matter.[2] Generally, a law enforcement officer is not expected to question a probable cause determination made by a magistrate judge.[3] Instead,

> a magistrate's determination of probable cause is to be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the magistrate could reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated.[4]

However, a plaintiff may challenge the presumption of validity afforded a warrant where the magistrate was misled by information contained in the affidavit that the affiant either (1) knew was false or (2) would have known was false had he not recklessly disregarded the truth. The purpose of this article is to discuss the liability that a law enforcement officer may incur in such a situation. Part I of the article discusses the mechanisms through which civil rights lawsuits are generally brought against state and federal law enforcement officers. Part II generally discusses the concept of "qualified immunity." And Part III discusses the requirements for holding a law enforcement officer liable for submitting an affidavit with false or misleading information in it.

I. BACKGROUND

The primary federal statute under which lawsuits are filed against state and local law enforcement

[1] *United States v. Leon*, 468 U.S. 897, 914 (1984)
[2] *Id*.
[3] *United States v. Krull*, 480 U.S. 340, 349 (1987)
[4] *United States v. Spry*, 1909 F.3d 829, 835 (7th Cir. 1999)(internal quotation marks omitted), *cert. denied*, 528 U.S. 1130 (2000)

officers for violating a person's constitutional rights is Title 42 U.S.C. Section 1983.[5] This statute was directed at state officials who used the authority granted them to deprive newly freed slaves of constitutional rights. The purpose of the statute "is to deter state actors from using their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[6] While section 1983 may be used to sue *state* actors acting under color of *state* law, it may not be used against the federal government or federal employees acting under federal law.[7] However, "a victim of a constitutional violation by federal officers may (in certain circumstances) bring a suit for money damages against the officers in federal court," even though no statute exists granting such a right.[8] This type of lawsuit is referred to as a *Bivens* action, after the 1971 Supreme Court case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[9] Similar in purpose to section 1983, the purpose of a *Bivens* action is to "deter *federal* officers … from committing constitutional violations."[10] While the *Bivens* decision addressed a violation of the Fourth Amendment, the Supreme Court has also "recognized an implied damages remedy under the Due Process Clause of the Fifth Amendment, … and the Cruel and Unusual Punishment Clause of the Eighth Amendment."[11] However, the Supreme Court has responded cautiously to suggestions that *Bivens* be extended to cover constitutional violations other than those noted.[12] While section 1983 and *Bivens* apply to different actors, the analysis in either type of suit is the same, with appellate courts generally "incorporat[ing] section 1983 law into *Bivens* suits."[13]

II. QUALIFIED IMMUNITY

When a law enforcement officer is sued under either section 1983 or *Bivens*, the officer is entitled to claim qualified immunity. Qualified immunity "is an *immunity from suit* rather than a mere defense to liability,"[14] and entitles an officer "not to stand trial or face the other burdens of litigation."[15] The doctrine is designed to protect "all but the plainly incompetent or those who knowingly violate the law."[16] "The rationale behind qualified immunity for police officers is two-fold - to permit officers to perform their duties without fear of constantly defending themselves against insubstantial claims for damages and to allow the public to recover damages where officers unreasonably invade or violate" a person's constitutional or federal legal rights.[17] Law enforcement officers are entitled to qualified immunity where

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[5] Title 42 U.S.C. Section 1983 provides as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

[6] *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)

[7] *See, e.g., Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994)

[8] *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 66 (2001)

[9] 403 U.S. 388 (1971)

[10] *Malesko*, 534 U.S. at 70 (emphasis added)

[11] *Id*. at 67 [citing *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980)]

[12] *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)

[13] *Ellis v. Blum*, 643 F.2d 68, 84 (2d Cir. 1981)

[14] *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)(emphasis in original)

[15] *Saucier v. Katz*, 533 U.S. 194, 200 (2001)

[16] *Malley v. Briggs*, 475 U.S. 335, 341 (1986)

[17] *Green v. City of Paterson*, 971 F. Supp. 891, 901 (D.N.J. 1997)(citation and internal quotation marks omitted); *see also Lennon v. Miller*, 66 F.3d 416, 424 (2d Cir. 1995)(Qualified immunity "serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances")(citation omitted)

their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[18] Stated differently, where law enforcement officers reasonably, albeit mistakenly, violate a person's constitutional rights, those "officials - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable."[19]

In deciding whether to grant an officer qualified immunity, courts use a two-part analysis. This analysis "is identical under either section 1983 or *Bivens*."[20] First, the court must determine whether a constitutional violation occurred; if no violation has occurred, that ends the inquiry.[21] If a constitutional violation can be established, the court must then decide whether the right was "clearly established" at the time of the violation.[22] "Deciding the constitutional question before addressing the qualified immunity question … promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."[23] In addressing what is meant by the term "clearly established," the Supreme Court has stated:

> "Clearly established" for purposes of qualified immunity means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[24]

Although courts differ, typically, a right is "clearly established" for qualified immunity purposes where the law "has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state in which the action arose."[25] In these circumstances, the decisions "must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting."[26] "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, … but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[27] "The determination whether a right was clearly established at the time the defendant acted requires an assessment of whether the official's conduct would have been objectively reasonable at the time of the incident."[28]

III. LIABILITY FOR FALSE AFFIDAVITS

Before an arrest warrant is issued, the Fourth Amendment requires a truthful factual showing in the

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[18] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)
[19] *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)
[20] *Wilson v. Layne*, 526 U.S. 603, 609 (1999)
[21] *Saucier*, 533 U.S. at 201
[22] *Id.*
[23] *Wilson*, 526 U.S. at 609
[24] *Id*. at 614-15
[25] *Norwood v. Bain*, 166 F.3d 243, 252 (4th Cir.), *cert. denied*, 527 U.S. 1005 (1999); *see also Wilson v. Strong*, 156 F.3d 1131, 1135 (11th Cir. 1998)(citation omitted);*Durham v. Nu'Man*, 97 F.3d 862, 866 (6th Cir. 1996)(citation omitted)
[26] *Durham*, 97 F.3d at 866 (citation omitted)
[27] *Anderson*, 483 U.S. at 640 (citations and internal citation omitted)
[28] *Kinney v. Weaver*, 301 F.3d 253, 263 (5th Cir. 2002)(citation and internal quotation marks omitted)

affidavit used to establish probable cause.[29] Because "the Constitution prohibits an officer from making perjurious or recklessly false statements in support of a warrant,"[30] a complaint that an officer knowingly filed a false affidavit to secure an arrest warrant states a claim under section 1983 or *Bivens*.[31] And, "where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, … the shield of qualified immunity is lost."[32]

A plaintiff in a section 1983 or *Bivens* action who alleges misrepresentations or omissions in the affidavit of probable cause "must satisfy the two-part test developed in *Franks v. Delaware*."[33] The first part of the test requires a plaintiff to show "that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant."[34] The second part of the test requires the plaintiff to show that the false statements or omissions were "material, or necessary, to the finding of probable cause."[35] A closer examination of this two-part test makes it clear that, in order to obtain a hearing under *Franks*, a plaintiff must make a "substantial preliminary showing" of three separate facts.[36]

First, the plaintiff must make a showing that the warrant affidavit includes false information.[37] In addition to a false statement in the affidavit, "a material omission of information may also trigger a *Franks* hearing,"[38] because "by reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw."[39]

After showing that a false statement or material omission was made, the defendant must next show that the false statement or omission was made either (1) knowingly and intentionally, or (2) with reckless disregard for the truth. "Knowingly and intentionally" requires a separate analysis for false statements as opposed to omissions. With regards to false statements, it should be remembered that the Supreme Court does not require that all statements in an affidavit be completely accurate. Instead, the Court simply requires that the statements be "believed or appropriately accepted by the affiant as true."[40] "The fact that a third party lied to the affiant, who in turn included the lies in a warrant affidavit does not constitute a *Franks* violation. A *Franks* violation occurs only if the affiant knew the third party was lying, or if the affiant proceeded in reckless disregard of the truth."[41] Accordingly, "misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause."[42] With regard to omissions, "the defendant must show that the facts were omitted with the intent

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[29] *Franks v. Delaware*, 438 U.S. 154, 165-66 (1978)("When the Fourth Amendment demands a factual showing sufficient to compromise 'probable cause,' the obvious assumption is that there will be a truthful showing")
[30] *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994)(citation omitted)
[31] *See Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000)(citation omitted)
[32] *Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir. 1991), *cert. denied*, 505 U.S. 1221 (1992)
[33] *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997); *see also Velardi v. Walsh*, 40 F.3d 569, 573 (2d Cir. 1994)("A section 1983 plaintiff challenging a warrant on this basis must make the same showing that is required at a suppression hearing under *Franks v. Delaware*")
[34] *Id*.
[35] *Id*.
[36] *See United States v. Whitley*, 249 F.3d 614, 620 (7th Cir. 2001)
[37] *Franks*, 438 U.S. at 155
[38] *United States v. Castillo*, 287 F.3d 21, 25 (1st Cir. 2002)
[39] *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985)
[40] *Franks*, 438 U.S. at 165
[41] *United States v. Jones*, 208 F.3d 603, 607 (7th Cir. 2000)
[42] *United States v. Hammett*, 236 F.3d 1054, 1058 (9th Cir.), *cert. denied*, 534 U.S. 866 (2001)

… to make the affidavit misleading."[43] As with false statements, "negligent omissions will not undermine the affidavit."[44]

Like "knowingly and intentionally," the phrase "'reckless disregard for the truth' means different things when dealing with omissions and assertions."[45] Assertions are made with "reckless disregard for the truth" when, "viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported."[46] Omissions, on the other hand, are made with "reckless disregard for the truth" when a law enforcement officer omits facts that "any reasonable person would have known the judge would wish to have brought to his attention."[47]

Finally, the plaintiff must show that the false statements or omissions were "material" to a finding of probable cause. "Disputed issues are not material if, after crossing out any allegedly false information and supplying any omitted facts, the 'corrected affidavit' would have supported a finding of probable cause."[48] Thus, "even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause."[49]

IV. **CONCLUSION**

State and federal law enforcement officers may be sued for violating a person's Fourth Amendment rights under either section 1983 or *Bivens*, accordingly. When such suits are brought, the officer may be entitled to qualified immunity in situations where the arrest was based on a valid warrant. However, qualified immunity will not be granted in those cases where the magistrate or judge issuing the warrant was misled by information contained in the affidavit that the affiant either (1) knew was false or (2) would have known was false had he not recklessly disregarded the truth.

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[43] *United States v. Clapp*, 46 F.3d 795, 799 (8th Cir. 1995)
[44] *United States v. McCarty*, 36 F.3d 1349, 1356 (5th Cir. 1994)
[45] *Wilson*, 212 F.3d at 787
[46] *Clapp*, 46 F.3d at 801 n.6
[47] *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993)
[48] *Velardi*, 40 F.3d at 574 (citation omitted)
[49] *United States v. Dickey*, 102 F.3d 157, 161-162 (5th Cir. 1996)(citation omitted)

CASE BRIEFS
UNITED STATES SUPREME COURT
and CIRCUIT COURT UPDATES

SUPREME COURT

United States v. Recio
2003 U.S. LEXIS 901
January 21, 2003

SUMMARY: A conspiracy does not end through "defeat" when the Government intervenes, making the conspiracy's goals impossible to achieve, even if the conspirators do not know that the Government has intervened and are totally unaware that the conspiracy is bound to fail.

FACTS: Police stopped a truck carrying illegal drugs, seized the drugs, and, with the help of the truck's drivers, set up a sting. The drivers paged a contact who said he would call someone to get the truck. Respondents Jimenez Recio and Lopez-Meza appeared in a car, and the former drove away in the truck, the latter in the car.

The Ninth Circuit held that the conspiracy ended when the police stopped the truck and seized the drugs and that the evidence was insufficient to show that defendants joined the conspiracy before then.

ISSUE: Does a conspiracy automatically terminate simply because the Government has defeated its object?

HELD: No.

DISCUSSION: A conspiracy does not end through "defeat" when the Government intervenes, making the conspiracy's goals impossible to achieve, even if the conspirators do not know that the Government has intervened and are totally unaware that the conspiracy is bound to fail.

The agreement to commit an unlawful act is "a distinct evil," which "may exist and be punished whether or not the substantive crime ensues." *Salinas v. United States*, 522 U.S. 52, 65. The conspiracy poses a "threat to the public" over and above the threat of the substantive crime's commission -- both because the "combination in crime makes more likely the commission of [other] crimes" and because it "decreases the probability that the individuals involved will depart from their path of criminality." E.g., *Callanan v. United States*, 364 U.S. 587.

Where police have frustrated a conspiracy's specific objective but conspirators (unaware of that fact) have neither abandoned the conspiracy nor withdrawn, these special conspiracy-related dangers remain, as does the conspiracy's essence -- the agreement to commit the crime. Second, this Court's view is that of almost all courts and commentators but for the Ninth Circuit. No other Federal Court of Appeals has adopted the

Ninth Circuit's rule, and three have explicitly rejected it.

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4th CIRCUIT

United States v. Breza
308 F.3d 430
October 28, 2002

SUMMARY: First, aerial surveillance conducted from navigable airspace does not violate the Fourth Amendment. Second, applying the four *Dunn* factors, the warrantless entry of defendant's vegetable garden and seizure of more than 100 marijuana plants did not breach his curtilage. Without an intrusion upon a reasonable expectation of privacy, the Fourth Amendment did not apply to this seizure and the evidence was admissible.

FACTS: Defendant once lived on a 92-acre farm in rural West Virginia but now lives in prison. A perimeter fence encircled his farmhouse, the surrounding lawn and a garden. The garden began about 50 feet across the lawn from the farmhouse's back door and ended against the perimeter fence. Separating the garden from the lawn was a gated, post-and-wire fence, several trees and some ornamental plants. The marijuana was in the garden and was behind some artichokes and grapevines—someone on the lawn couldn't see the marijuana.

Officers, conducting an aerial surveillance from a helicopter flying at 500 feet, spotted the marijuana amid the artichokes, dropped to 200 feet to confirm their observation and called colleagues on the ground. These officers immediately went to the farm and seized several hundred marijuana plants from the garden.

Breza lost his motion to suppress and was convicted upon his conditional plea of guilty. He appealed on the basis that aerial surveillance and warrantless entry violated his Fourth Amendment rights.

ISSUES: 1. Does surveillance from an aircraft fully complying with applicable regulations regarding proper altitude violate the Fourth Amendment?

2. Was the garden within the curtilage such that warrantless entry into it and seizure of marijuana a violation of the Fourth Amendment?

HELD: 1. No.

2. No.

DISCUSSION: 1. Aerial surveillance. Applying *California v. Ciraolo*, 476 U.S. 207 (1986) and *Florida v. Riley,* 488 U.S. 435 (1989), the Fourth Circuit quickly disposed of Breza's first objection. The lower court had found that the helicopter not only had complied with prevailing altitude restrictions, but also that such flights "were a regular occurrence in the area where Breza's farm was located." These findings satisfied both the *Riley* plurality test that the flights follow aviation regulations and Justice O'Connor's tie-breaking opinion in the same case that flights at such altitudes must be a routine part of the skies from

which the surveillance was conducted.

2. Curtilage or open fields. In resolving the lawfulness of the warrantless garden entry and plant seizure, the Fourth Circuit used the four factors first applied by the Supreme Court in *United States v. Dunn,* 480 U.S. 280 (1987). The four factors are: (1) proximity; (2) enclosures; (3) activities; and (4) visibility. In doing so, the Fourth Circuit quoted the Supreme Court's cautionary observation that "these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration— whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."

a. Proximity. When the distance between the suspect area and the home itself is either very short or very long, this factor weighs heavily in the ultimate determination. Here, given the rural character of the area, the 50-foot distance between the farmhouse door and the garden's edge could cut either way. So, after citing a case in which 50-60 yards was "'inconclusive' by itself" and a second case in which an "82-foot distance was of 'no decisive help' in curtilage determination", the court stated that while the 50-foot distance "would permit a conclusion that the garden was within the curtilage… it does not compel such a conclusion."

b. Enclosures. Both interior fencing and landscaping separated the garden from the farmhouse and lawn. Hence, the court found that this factor put the garden in open fields rather than curtilage.

c. Activities. The court, while conceding that vegetable gardening was an activity often conducted within the curtilage, looked more broadly at the whole horticultural undertaking. The court did not ignore the large number and high market value of Breza's marijuana plantings. The three-judge panel decided that tending his own garden was not Breza's hobby-- it was his job. This put the garden outside the curtilage.

d. Visibility. The court found that this factor weighed against finding that the garden was within the farmhouse's curtilage. Not only was the garden difficult to see from the farmhouse, no apparent effort had been taken to screen visibility from the backside of the garden either.

e. Conclusion. Although the distance between the farmhouse and the marijuana patch was inconclusive, an analysis of the remaining three *Dunn* factors placed the patch outside the curtilage. The Fourth Circuit's consideration of the presence of enclosures and visibility was unusual. In the typical case, enclosures like fences keep outsiders from entering, and screens like thick vegetation keep outsiders from observing. Hence, the presence of fences and screens usually argues for curtilage. But placement matters. In this case, the Fourth Circuit developed the logical converse by holding that when landowners build fences and plant hedges between their homes and the suspect area, their actions have the effect of putting the suspect area outside the curtilage.

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6th CIRCUIT

Burchett v. Kiefer
310 F.3d 93

November 19, 2002

SUMMARY: Law enforcement may lawfully detain someone who approaches a property being searched pursuant to a warrant, pauses at the property line, and flees when the officers instruct him to get down. But, holding him in custody in a patrol vehicle for three hours in 90 degree heat with the windows up is unreasonable use of force.

FACTS: Police officers were in the process of executing a search warrant for drugs on a house in Oak Hill, Ohio, that belonged to Charles Burchett's brother who lived next door. The houses were approximately 50 feet apart. When unmarked vehicles pulled into his brother's driveway, Burchett walked to the edge of the property line between the two houses for a better view. When one of the members of the raid team yelled at him to get on the ground, Burchett turned and ran onto his porch, fearing for the safety of his baby who was on a porch swing nearby. Officers chased Burchett and apprehended him on his porch just as he was reaching for his baby.

One of the pursuing officers testified, "as I saw him standing there in the yard he had something in his hand and I could see it was something black and looked like it was a weapon at the time, ... So he turned and ran, he was leaving [the brother's] property and wasn't obeying my command to get on the ground. So I gave chase because I felt he was a threat."

As Burchett was being seized on his porch, his wife came outside and took the baby from the swing. At this point, Burchett had nothing in his hands; the black object that looked like a weapon turned out to have been Burchett's sunglasses, which were now lying on the porch. Burchett was handcuffed by the officers and placed in a marked police car. Burchett remained handcuffed in the police car for three hours in ninety-degree heat with no ventilation while the search was executed at his brother's house.

Plaintiff sued under 42 U.S.C. § 1983, alleging violations of his Fourth Amendment rights. The District Court granted summary judgment for defendants.

ISSUE: 1. Did the detention of Burchett violate his Fourth Amendment rights against unreasonable seizures?

2. Did the detention of Burchett in the police car with the windows rolled up in ninety-degree heat for three hours constitute excessive force in violation of the Fourth Amendment's prohibitions on unreasonable searches and seizures?

HELD: 1. No.

2. Yes.

DISCUSSION: In *Michigan v. Summers*, 101 S. Ct. 2587 (1981), the Supreme Court ruled that a warrant to search for contraband founded on probable cause implicitly carries with it the "limited authority to detain occupants of the premises while a proper search is conducted." In cases following *Summers***,** the Sixth Circuit has extended the *Summers* doctrine to include nonresidents who are present at the scene of a search warrant when police arrive (*United States v. Fountain*, 2 F.3d 656,663 (6th Cir.) cert. Denied, 510 U.S. 1014(1993), and

overruled on other grounds, *Trepel v. Roadway express, Inc.,* 194 F.3d 708, 717 (6th Cir. 1999) and individuals who arrive at the scene of a search, even if they were not inside the residence or present when police first arrived (*United States v. Bohannan*, 225 F.3d 615, 616 (6th Cir. 2000)).

In the present case, Burchett neither was a resident of the searched premises nor arrived at the searched premises but remained on his own adjacent property at all times. Although the officers here were not within the strict limits of *Summers*, the court held that officers act within their *Summers* powers when they detain an individual who approaches a property being searched pursuant to a warrant, pauses at the property line, and flees when the officers instruct him to get down The court reasoned that Burchett's presence on the property line and his flight upon encountering the officers would suggest to a reasonable law enforcement official that he posed a similar risk of flight and danger to others as an individual who arrived at the premises during a search. Therefore, the officer's seizure and detention of Burchett did not violate his fourth amendment rights.

The Supreme Court has noted that under certain circumstances "unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to deprivation of bathroom breaks" can violate the Eighth Amendment's prohibition on "unnecessary and wanton infliction of pain." *Hope v. Pelzer,* 122 S.Ct. 2508, 2516-17 (2002). Such actions a fortiori violate the Fourth Amendment, which requires a showing of objective reasonableness rather than any particular subjective motivation. *See, Graham v. Connor,* 109 S.Ct. 1865 (1989).

The officers had many equally effective alternative ways of detaining Burchett that would not have subjected him to excessive heat, but their denial of his request that they roll down the windows to allow him air indicates a wanton indifference to this important safety factor. Thus, the court concluded that those responsible for detaining Burchett for three hours in ninety-degree heat with no ventilation violated his Fourth Amendment right against unreasonable seizures and reversed the District Courts summary judgment for defendant's regarding plaintiff's civil action brought under 42 U.S.C. § 1983.

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United States v. Bass
2002 U.S. App. LEXIS 22417
October 28, 2002

SUMMARY: Lifting a box spring to check under a bed during a protective sweep was reasonable under the circumstances and the sawed off shotgun that became visible between the box spring and mattress when the officer dropped the bed back into place was lawfully seized.

FACTS: Police officers responded to a disturbance at an apartment complex in Jackson, Tennessee. The caller, Ernestine James explained to the officers that she had just witnessed a black male fire several gunshots at two men, one of whom was her son, and then flee into an upstairs apartment. Officers proceeded to the upstairs apartment identified by James. Niketa Jordan answered their knock. When the officers asked who else was in the apartment, Jordan answered that her children and her husband Shawn Bass were there. Officers Ellis and Headon then entered the apartment without permission and commanded the man to appear. After Bass exited the bedroom, the officers brought him into the apartment's living room and handcuffed him. Officer Ellis proceeded to conduct a protective sweep of the apartment. In the course of checking to see if anyone was hiding under the bed, he lifted the box springs. When he dropped the bed back into place, he noticed a sawed-off shotgun hidden between the box springs

and mattress.

ISSUE: Did the scope of the search exceed constitutional parameters?

HELD: No

DISCUSSION: The Fourth Amendment permits officers affecting an arrest to briefly inspect the premises if they have articulable facts that "would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie,* 494 U.S. 325,334 (1990).

In reviewing the facts, the court made the following determinations. When the officers arrested Bass, they were not certain that he was the shooter whom they were seeking. The description of the apartment's occupants given by Jordan was not sufficient to make this identification, because the officers had no assurance that she was either truthful or accurate. They were therefore justified, under the circumstances, in inspecting those spaces in the apartment where another person could have been hiding. Officer Ellis testified that the sawed-off shotgun became visible when he lifted the box springs to check under the bed, and he affirmed that the bed was on a frame sufficiently high enough for a person to be hiding under the bed. Therefore, the shotgun was discovered during a constitutionally permissible search.

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7th CIRCUIT

United States v. Husband
312 F.3d 247
November 4, 2002

SUMMARY: Administering a drug to the defendant in executing a search warrant to extract items from his mouth was constitutionally reasonably where defendant faced a serious medical emergency, and the method of obtaining evidence was a relatively low risk procedure which was medically necessary to protect his life and health.

FACTS: When police officers investigating possible drug dealing approached defendant, he appeared to place something in his mouth. The officers arrested defendant, who refused to open his mouth. When defendant appeared to be having a seizure, he was taken to a hospital. A warrant was obtained to search his body.

When the ambulance arrived at the hospital, Dr. Alan Wayne Gravett attended to defendant. Gravett informed defendant of the dangers presented by the foreign object in his mouth. Dr. Gravett and others attempted to pry defendant's mouth open with a ceramic spoon. This method failed and was abandoned. Dr. Gravett informed defendant that drugs would be administered to render defendant unconscious if he did not open his mouth. Dr. Gravett also informed defendant that a search warrant had been obtained.

Defendant did not open his mouth. Dr. Gravett then consulted with a colleague to determine the best course of action. Additionally he reviewed two medical texts. Dr. Gravett then administered a drug (Etomidate) to

defendant. Defendant's mouth relaxed and Dr. Gravett removed the objects, 20.3 grams of crack cocaine in plastic baggies. As a result of the Etomidate, Defendant stopped breathing and Dr. Gravett used a bag and mask to administer forced breathing until Defendant began breathing on his own.

ISSUE: Was the intrusive method of executing the warrant reasonable considering the low risk of danger associated with the anesthetic and the life-threatening medical emergency caused by defendant's refusal to open his mouth?

HELD: Yes.

DISCUSSION: In determining whether a search that intrudes below the surface of the body is reasonable, courts must weigh a variety of factors to determine whether society's interest in conducting the search outweighs the individual's interest in privacy and security.

The balancing test for determining whether a search that intrudes below the surface of the body is reasonable requires a court to consider the following facts: (1) the extent to which the procedure may threaten the safety or health of the individual; (2) the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity; and, (3) the community's interest in fairly and accurately determining guilt or innocence.

The low risk involved with the administration of Etomidate and the emergency posed to Husband by the foreign object in his mouth taken together show that the timing and manner of the search were reasonable.

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United States v. Westmoreland
312 F.3d 302
December 3, 2002

SUMMARY: The initial disclosure of a crime to one's spouse is covered by the marital communications privilege, but if the spouse later joins the criminal enterprise, communications after that point are not protected

FACTS: Defendant revealed his participation in the murder to his wife before she undertook any actions that made her an accessory-after-the-fact.

The District Court admitted defendant's statement to his wife that he had supplied a co-conspirator with the phone number of a hit-man.

ISSUE: Does the marital communications privilege protect communications made both before and after the spouse joins in the criminal enterprise?

HELD: No.

DISCUSSION: The marital communications privilege is well-established in the federal courts. However,

because this privilege places a limitation on truthful disclosure, the federal courts have recognized an exception to the privilege when both spouses are joint participants in the underlying offense.

In this case, Mr. Westmoreland revealed his participation in the murder before his wife undertook any actions that made her an accessory-after-the fact.

The initial disclosure of a crime to one's spouse, without more, is covered by the marital communications privilege. If the spouse later joins the conspiracy, communications from that point certainly should not be protected.

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8th CIRCUIT

United States v. Yousif
308 F.3d 820
October 7, 2002

SUMMARY: First, the use of "ruse checkpoints" to interdict illegal drugs violates the Fourth Amendment. Second, the impropriety of *Terry* stops generated by these checkpoints will negate the voluntariness of consent given by drivers to search their automobiles.

FACTS: On April 13, 2000, Salwan Yousif and his wife were driving east through Missouri on I-44 in a rented Ford Explorer with Oklahoma plates. He was approaching the Sugar Tree exit between Fort Leonard Wood and Rolla when he saw a sign warning, "DRUG ENFORCEMENT CHECKPOINT ¼ MILE AHEAD." This first sign was about a quarter-mile from the Sugar Tree exit ramp. About one hundred yards before the exit ramp, a second set of signs warned, "DRUG DOG IN USE AHEAD." Yousif took the Sugar Tree exit ramp off I-44, only to see as he crested an uphill grade that the checkpoint the signs warned about was at the top of this one-way exit ramp.

Yousif had been duped by a so-called "ruse checkpoint." State and local officers had selected this particular exit for their checkpoint because it was infrequently used by local traffic and had no gas stations, restaurants or other commercial establishments. Moreover, eastbound travelers passed through Waynesville shortly before the ruse checkpoint, and that town has a number of gas stations, restaurants, and convenience stores near its exits. Signs posted a short distance before the ruse checkpoint advise travelers of a "rest area with facilities" on the far side of the Sugar Tree exit.

Checkpoint procedures were standardized and in writing. At least two marked highway patrol vehicles were at the checkpoint. All vehicles were stopped and approached by at least one uniformed LEO, who asked for the usual documents. While recording the vehicle information, the LEO would ask the driver if he had seen the signs and why he had taken that exit. If the responses suggested the possibility of illegal behavior, the LEO would ask more questions.

> "If there was any reason to believe the vehicle contained illegal drugs… the officer would ask for consent to search…. If consent were denied, but the officer still had a reasonable suspicion of illegal activity, the officer would ask the occupants to step out of the vehicle.

The officer would then turn off the ignition and have a drug dog walk around the exterior of the vehicle."

When Yousif saw the checkpoint at the top of the exit, he slowed and nearly stopped halfway up the exit ramp. Lisenbe, a uniformed highway patrol officer, motioned him forward. During the ensuing contact, Lisenbe learned that the Explorer as a rental, that an unusually powerful berry-like odor saturated the Explorer's interior and that Yousif's hands were shaking sufficiently to cause him to nearly drop his Arizona driver's license. When Lisenbe asked Yousif why he had taken the exit, Yousif's wife said they wanted to walk their dog.

Yousif denied that he had anything illegal in the vehicle and consented to a search of the vehicle and its contents. Before the search began, Yousif's wife asked Lisenbe if he could search the Explorer without a warrant. Lisenbe said he could if he was given consent or had probable cause. Lisenbe's wife then said, "That's OK, I was just asking." When Lisenbe opened six large suitcases under a blanket and pillows, he found each contained bundles of marijuana. After receiving *Miranda* warnings, Yousif made several incriminating admissions.

Yousif was convicted upon his conditional plea of guilty and sentenced to 37 months in prison, 4 years supervised release and a $100 special assessment. He appealed on the basis that the checkpoint and stop were illegal and that these violations rendered both his consent to search and his *Miranda* waiver involuntary.

ISSUES: 1. Was the Sugar Tree checkpoint illegal under standard established by the Supreme Court in *Indianapolis v. Edmond*?

2. Even if the checkpoint was unconstitutional, did Lisenbe have reasonable suspicion to stop Yousif's car?

3. Even if the checkpoint and the stop were unconstitutional, did the circumstances surrounding Yousif's consent to search purge the taint of the earlier illegalities?

HELD: 1. Yes.

2. No.

3. No.

DISCUSSION: 1. <u>Constitutionality of ruse checkpoint</u>. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), decided while Yousif's case was being litigated, rendered this precise type of checkpoint unconstitutional. The *Edmond* analysis was simple: Universal or random vehicle stops at checkpoints on public highways are unreasonable UNLESS: (a) individualized suspicion justifies the stop; or (b) the checkpoint serves "special needs, beyond the normal need for [criminal] law enforcement." The Supreme Court decided that the *Edmond* checkpoint met no "special needs" and was instead in the primary business of law enforcement… as its own sign declared, the Indianapolis operation was a "NARCOTICS CHECKPOINT [with] NARCOTICS K-9 IN USE, BE PREPARED TO STOP." Similar signs at the Sugar Tree exit coupled with the LEO procedure of stopping all vehicles that took the exit inescapably leads to the same characterization. The Government's best hope of saving this evidence turned on arguing that

there was sufficient individualized reasonable suspicion to stop Yousif's Explorer.

2. Individualized reasonable suspicion to stop Yousif's Explorer. At the time Lisenbe executed his stop, three observations together constituted the total picture from which to draw reasonable suspicion. First, Yousif had chosen to take the Sugar Tree exit. Second, his Explorer had out-of-state plates. Third, Yousif slowed and almost stopped his car on the ramp when he saw the checkpoint at the top of it. The court rejected each of these piecemeal in finding that reasonable suspicion to stop did not exit.

a. Regarding the first two observations, the court noted "[T]he fact that some vehicles took the exit [as 'a way to *avoid* [emphasis in the original] a police checkpoint'] does not, in our opinion, create individualized reasonable suspicion of illegal activity as to every one of them…. Moreover, because there is nothing inherently unlawful or suspicious about a vehicle (even one with out-of-state plates) exiting the highway, it should not be the case that the placement of signs by the police in front of the exit ramp transforms that facially innocent behavior into grounds for suspecting criminal activity."

b. As to Yousif's slowing once he spotted the checkpoint, the court noted that, "[T]he checkpoint was not where the police signs indicated it would be and, therefore, any motorist would likely be surprised upon discovering it. Under such circumstances, even an innocent traveler might be inclined to hesitate out of surprise, annoyance or nervousness."

c. The court was not persuaded by statistics presented by the Government. During 54 randomly selected days in 1997, 644 vehicles "not engaged in local traffic" took the exit and were stopped. Of these, 501 (78%) were arrested. The majority of arrests (395 or 61% of the non-local vehicles) were for drug violations. Most of these (339 or 53%) were for misdemeanor drug violations.

3. Consent and waiver did not purge taint of earlier illegalities. The court used three factors first announced by the Supreme Court in *Brown v. Illinois,* 422 U.S. 590 (1975): (1) How much time passed between the illegal stop and Yousif's consent and waiver; (2) Were there intervening circumstances reducing the impact of the illegality on Yousif's decisions; and (3) How flagrant was the illegality of the stop and what was its purpose. The court determined that none of these factors dissipated the taint. First, in the court's view "little time" elapsed between Lisenbe's improper stop and Yousif's consent. Second, the court believed that Lisenbe's response that he could search the car with either consent or probable cause was insufficient to purge the taint because "a reasonable and most likely inference for Yousif to have drawn from Lisenbe's statement was that, if Yousif refused to consent to the search, the officers would search the vehicle anyway, on probable cause." Third, the court characterized the overall impact of the many officers, vehicles and canines at the checkpoint as "intimidating and coercive."

But see: *United States v. Flynn (10th Circuit) below.*

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9th CIRCUIT

Francisco Gallegos v. City of Los Angeles
308 F.3d 987

October 11, 2002

SUMMARY: Whether a *Terry* stop is reasonable depends upon analysis of the totality of the circumstances. There is no "bright line rule" in determining when a *Terry* stop turns into an arrest, requiring probable cause. This issue also requires a consideration of "all of the circumstances surrounding the encounter between the individual and the police."

FACTS: On July 4th, 1999, Jessica Morales called 911 to report that her father was trying to break into her house. Morales told police that she had obtained a restraining order against her father, whom she described as a Hispanic male wearing a red shirt and blue pants. The Los Angeles Police Department (LAPD) classified the call as a burglary and dispatched two police officers to the area in a helicopter.

Across the street from where Morales lived, Francisco Gallegos was leaving his daughter's house just as the police helicopter approached. Gallegos is Hispanic and was wearing a red shirt and tan shorts. He walked to his pickup truck and departed. From the air, the two officers believed Gallegos to be Morale's father. The helicopter then requested that officers on the ground stop and detain Gallegos.

LAPD officers pulled Gallegos over a few miles from Morales's house. They ordered him from his truck at gunpoint, handcuffed him, and placed him in the back of the police car. Although Gallegos was fully cooperative, the LAPD officers never asked him who he was or for his driver's license or registration. The police officers only knew a Hispanic male wearing a red shirt had attempted to enter a home in violation of a restraining order.

Gallegos was taken back to the Morales neighborhood, where a neighbor confirmed he was not the man trying to break into the Morales home. Almost one hour after being initially detained, Gallegos was released.

Gallegos sued the City of Los Angeles and the individual officers under 42 U.S.C. §1983, alleging his Fourth Amendment rights had been violated.

ISSUE: Did the actions of the Los Angeles police officers constitute a lawful investigatory stop justified by reasonable suspicion?

HELD: Yes.
DISCUSSION: "The Fourth Amendment prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arizu*, 534 U.S. 266 (2002)(citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Using this as a guideline, the Ninth Circuit concluded that Gallegos's detention by the police officers amounted to a seizure for Fourth Amendment purposes, as a reasonable person in his situation would not have felt free to "disregard the police and go about his business." *California v. Hodari*, 499 U.S. 621 (1991).

The court had to then determine whether this situation was a lawful detention or amounted to an illegal arrest not supported by probable cause. The defendants in this case asserted that while they lacked probable cause to arrest Gallegos, the detention was a valid investigatory stop based on reasonable suspicion. The standard as set forth under *Terry* and its progeny allows police to conduct a brief,

investigatory seizure, so long as "they have a reasonable, articulable suspicion that justifies their actions."

While the court stated that there is no "bright line rule" in determining when an investigatory stop turns into an arrest, it is however, a fact-specific inquiry. This inquiry requires a consideration of "all of the circumstances surrounding the encounter between the individual and the police." *Florida v. Bostick*, 501 U.S. 429, 439 (1991). The court ultimately applied a totality of the circumstances test.

Gallegos argued that the police conduct went beyond an investigatory stop. He pointed to the fact that he was ordered from his truck at gunpoint, he was handcuffed, he was held in the patrol car and was ultimately detained for over forty-five minutes. He claimed that less intrusive methods were available to the police. The court disagreed and found that it was not unreasonable for the police officers to draw their guns in ordering Gallegos from the truck when unsure if he was armed. It was also not unreasonable for police officers to handcuff Gallegos until they determined who he was. Additionally, it was not unreasonable for the officers to bring him back to the Morales neighborhood to determine if he was indeed the person they were looking for. The court found that the detention was not only reasonable but was brief. While the length of Gallegos's detention was a relevant factor, *Terry* imposes no particular time limitation for a *Terry* stop. Critical to the court's conclusion that Gallegos was not arrested was that the officers diligently pursued their investigation to determine if it was necessary to further detain him. In sum, the court concluded that the actions of the officers were objectively reasonable under the totality of the circumstances. Therefore, the detention did not exceed the boundaries of a valid investigatory stop.

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10th CIRCUIT

United States v. Flynn
309 F.3d 736
October 25, 2002

SUMMARY: The Fourth Amendment allows for the warrantless search and seizure of abandoned property. The test for abandonment is whether the defendant retained a reasonable expectation of privacy in the property. The defendant must voluntarily discard the property in order to lose his reasonable expectation of privacy in it. Illegal police conduct will cause an abandonment to be deemed "involuntary." The posting of signs along a highway to create a ruse that a drug checkpoint lies ahead does not constitute illegal police activity. Property discarded by an individual after observing the posted drug checkpoint signs, but before being stopped by police is deemed to be "abandoned" property. Therefore, the police were permitted to conduct a warrantless search and seizure of the property.

FACTS: Mack Flynn was driving with his girlfriend Connie Ketcher on Interstate 40 in Muskogee County, Oklahoma on the afternoon of October 30, 2000. He passed a sign posted along the side of the interstate that read "Drug Check Point 1/3 Mile Ahead". Shortly thereafter he passed another sign that read "Drug Dogs In Use" and saw a police car parked further down the interstate with its lights on. Before Flynn reached the parked police car he made an abrupt lane change and got off the interstate at the Ross Road exit. At the top of the exit ramp, before reaching Ross Road, Flynn stopped the car while Ketcher opened

her door and dropped a large sack from the car on to the roadway. Two police officers standing on the center median of Interstate 40 saw this drop, and radioed the information to two other officers who were hidden in the underbrush near the top of the exit ramp. Those officers examined the sack and determined that it contained a quantity of illegal narcotics. This information was relayed to other officers who stopped Flynn as he approached the stop sign at Ross Road. The contents of the package dropped from the car later tested positive for methamphetamine. As it turned out there was no drug checkpoint on Interstate 40 that day. The signs and the unoccupied police car were set up as a ruse by the police to observe suspicious behavior by those drivers who might take the nearest exit after seeing them. Flynn pled guilty to possession with intent to distribute methamphetamine, but appealed the District Court's denial of his motion to suppress the evidence obtained by the officers. He argued that the drugs were seized in violation of his Fourth Amendment rights. The United States Court of Appeals for the Tenth Circuit disagreed and affirmed Flynn's conviction.

ISSUE: Was the package dropped from Flynn's car voluntarily abandoned, thereby allowing the police to conduct a warrantless search and seizure of it?

HELD: Yes.

DISCUSSION: The Fourth Amendment allows for a warrantless search and seizure of abandoned property. The test for abandonment is whether the defendant has retained a reasonable expectation of privacy in the property. The defendant must voluntarily discard the property to have an effective abandonment. Involuntarily abandonment occurs when the defendant discards the property as a result of illegal police conduct or if it results from a violation of the Fourth Amendment.

Flynn argued that the package was only discarded from the car because of the police drug checkpoint. Flynn based his argument on *City of Indianapolis v. Edmond* 531 U.S. 32 (2000) for the proposition that drug checkpoints constitute illegal police conduct; therefore, the abandonment of the package should have been considered involuntary, and the evidence suppressed since the package was searched and seized by police without a warrant.

The Court did not agree, holding that Flynn never reached a drug checkpoint, and that the property was discarded before the police stopped him. It did not matter that police posted signs to create a ruse. In *U.S. v Klingsmith,* 25 F.3d 1507 (10th Cir. 1994) the Court held that the posting of signs to create a ruse did not constitute illegal police activity. Since the property was not discarded as the result of illegal police conduct, and since the police stopped Flynn only after they suspected the package contained contraband, the Court held that Flynn had voluntarily abandoned the property. Once this happened Flynn gave up any reasonable expectation of privacy he had in the package; therefore he could not later argue that his Fourth Amendment rights were violated on the basis that the police conducted a warrantless search and seizure of the package.

But see : *United States v. Yousif (8th Circuit) above.*

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United States v.Gallegos
2002 U.S. App. LEXIS 25449

December 11, 2002

SUMMARY: Agents violate the Fourth Amendment right against unreasonable searches and seizures and the "knock and announce" rule of 18 USC 3109 when, executing a search warrant at 4:00 A.M. in a house with no lights on, they forcibly enter the house after waiting only 5-10 seconds after knocking and announcing.

FACTS: FBI agents obtained a search warrant for Mr. Gallegos' home, a two-story house with the bedrooms on the second floor. The warrant provided that it could be executed at any time, day or night. On February 5, 1999, at approximately 4:00 a.m., the agents approached the house to execute the warrant. It was dark outside and there were no lights on in the house. A member of the entry team knocked loudly on the front door as the agent in charge yelled "police, FBI, search warrant." After waiting approximately five to ten seconds and hearing no response from inside, the agents forcibly entered the house with a battering ram.

Inside the house, they encountered Mr. Gallegos exiting an upstairs bedroom with a loaded handgun, which he dropped at their direction. Mr. Gallegos was arrested and charged with federal drug and firearm crimes. After the District Court denied Mr. Gallegos' motion to suppress the physical evidence recovered from his house, including the handgun, he entered a conditional plea of guilty, reserving his right to appeal the denial of his motion to suppress.

ISSUE: Did the officers' execution of the search warrant violate the Fourth Amendment and the "knock and announce" rule of 18 USC 3109?

HELD: Yes.

DISCUSSION: The Supreme Court has held that the "knock and announce" rule codified at 18 USC 3109 "forms a part of the reasonableness inquiry under the Fourth Amendment." An officer's <u>unreasonable</u>, unannounced entry (e.g. without exigent circumstances) will be constitutionally defective under the Fourth Amendment, resulting in suppression of all evidence that is seized in a subsequent search.

The "knock and announce" rule provides that a law enforcement officer may:

> break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, <u>if, after notice of his authority and purpose, he is refused admittance</u> or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The Supreme Court has held that the privacy interests advanced by the "knock and announce" rule include: (1) permitting individuals to comply with the law by peaceably permitting officers to enter their homes; (2) avoiding the unnecessary destruction of property that attends a forcible entry; and (3) providing an opportunity for occupants to "prepare themselves" for entry by law enforcement officers by, for example, pulling on clothes or getting out of bed.

It is well-established that an occupant of a home "need not affirmatively refuse admittance to trigger the right of the police to enter by force" and that the refusal may be "constructive" or "reasonably inferred"

from the circumstances, for instance "where the occupants do not admit the officers within a reasonable period of time."

There is no bright-line rule for determining how much time is enough. Clearly the amount of time that officers must wait after knocking and announcing depends on the particular facts and circumstances of each case. Some relevant factors include the time of day, activity inside the target location (as observed from outside), the physical characteristics of the target location, and the occupant's probable location inside the target location. Law Enforcement Officers must use their judgment based upon an analysis of the facts and circumstances of each case and be able to articulate relevant facts that justified forcible entry after a certain period of time.

Gallegos argued that the evidence recovered from his house should be suppressed because the agents executing the search warrant forcibly entered his house without waiting a reasonable period of time to establish that Gallegos refused admittance.

The Tenth Circuit agreed, holding that under the circumstances known to the officers – the time of day that the warrant was executed, the absence of any indication of activity in the house, and the known upstairs location of the bedroom – no objectively reasonable officer would believe that Gallegos refused admittance within five to ten seconds.

Suppressing the evidence recovered from Mr. Gallegos' house, the Tenth Circuit reasoned that no objectively reasonable officer would expect a sleeping occupant of a house to arise, get dressed, go down the stairs to the front door, and admit the officers within such a short time frame. Thus, the officers violated the Fourth Amendment and the "knock and announce" rule of 18 USC 3109 by forcibly entering Mr. Gallegos' home without evidence that they were refused admittance.

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11th CIRCUIT

United States v. Edgar and Ward
304 F.3d 1320
September 12, 2002

SUMMARY: 18 USC 666 is a criminal statute that has increasingly been used by the United States government to pursue theft and fraud in the healthcare field. The statute is triggered if the victimized entity receives a threshold amount of money in federal benefits. Congress' use of power to enact the federal program fraud statute is a valid exercise of Congressional authority under the Spending Clause and the Necessary and Proper Clause of the United States Constitution.

FACTS: Appellant Ward served as the President and Chief Executive Officer of the Cape Coral Hospital from 1976 to 1994. Edgar joined the Cape Coral Hospital as Chief Operating Officer in 1978. Through a series of transactions spanning the years 1987 to 1994, Ward and Edgar misappropriated hundreds of thousands of dollars from the hospital for their own benefit. The Cape Coral Hospital participated in the

Medicare, Part A program which provides federal assistance payments to hospitals and other institutions. Appellants Ward and Edgar used their positions to illegally convert Hospital funds to their own benefit. Appellant Ward appeals his convictions for conspiracy to defraud the United States in violation of 18 USC 371, theft from an organization receiving federal funds under 18 USC 666, money laundering, in violation of 18 USC 1956(a), and bank fraud under 18 USC 1344. Edgar appeals his convictions for conspiracy to defraud the United States in violation of 18 USC 371, theft from an organization receiving government funds, in violation of 18 USC 666, money laundering in violation of 18 USC 1956(a)(1), and tax evasion. Appellant Edgar argued that 18 USC 666 is facially unconstitutional because Congress lacks the power to enact criminal laws under the Spending Clause of the Constitution. Appellant Ward argued that 18 USC 666 is unconstitutionally vague and is unconstitutional as applied.

18 USC 666 provides in part:

(a) Whoever, if the circumstance described in subsection (b) of this section exists
  (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof,
    (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to use of any person other than the rightful owner or intentionally misapplies, property that
      (i) is valued at $5,000.00 or more, and
      (ii) is owned by, or is under care, custody, or control of such organization, government or agency…

  shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

ISSUES: Is 18 USC 666 facially unconstitutional, unconstitutionally vague, or unconstitutional as applied in this case?

HELD: No.

DISCUSSION: Federalizing thefts and frauds under the statute is reasonably related to Congress' exercise of the spending power. 18 USC 666 is a valid exercise of Congress' powers under the Spending Clause. A basis for the enactment of 18 USC 666 may be found in Congress' authority under the Necessary and Proper Clause to protect its capacity to fruitfully exercise the spending power. As a means of ensuring the efficacy of federal appropriations to comprehensive federal assistance programs, the anti-corruption enforcement mechanism bears a sufficient relationship to Congress' spending power to dispel any doubt as to its constitutionality. For Congress to exercise its spending power effectively, it must be assured that the instrumentalities through which the federal government pursues comprehensive aims can be trusted to apply appropriated funds toward their intended objectives. 18 USC 666 established a safeguard to assure that federal benefits would be used for their intended purposes.

18 USC 666 provides such assurance by authorizing the federal prosecution of individuals who corrupt

entities which receive (1) more than $10,000 in federal funds (2) in connection with programs defined by a sufficiently comprehensive "structure, operation, and purpose to merit characterization of the funds as benefits under section 666(b)." Medicare payments do more than compensate for services already provided. They sustain healthcare providers in their future operations and ensure persons covered by the Medicare program. This broader purpose shows the federal government to have a continuing interest in the sound administration of Medicare Reimbursement funds long after any particular patient's course of treatment. 18 USC 666 is not unconstitutional as applied. The corruption of health care providers participating in the federal Medicare program affords a sufficient basis for prosecution under 18 USC 666. The government had sufficient evidence of a "federal interest" in the stolen funds to merit prosecution under the statute.

18 USC 666 is not unconstitutionally vague. Transactions for which Ward was convicted included the following: converting hospital monies into unauthorized bonuses to himself; profiting from the Hospital's use of a warehouse that he, Edgar, and another officer in effect sold to the Hospital on two separate occasions, participating in the diversion of Hospital funds to himself and others through the use of fictional invoices, collecting a finder's fee from the Hospital in premiums on insurance policies for which he was solely responsible, and profiting from the Hospital's purchase, at an inflated price, of a real estate option from a partnership in which he held an undisclosed interest. Any reasonable person would understand that the funds involved in these transactions could not be construed as lawful payments or reimbursements made in the "usual course of business."

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D.C. CIRCUIT

United States v. Arrington
309 F.3d 40
November 5, 2002

SUMMARY: The government does not have to prove that the defendant intended to use the vehicle as a deadly weapon, but only that the defendant intended to use the vehicle - and that the vehicle is a deadly weapon because it is, "capable of inflicting serious bodily injury or causing the death of another person."

FACTS: Three US Park Police officers stopped the defendant's vehicle because there was no front license plate. While standing at the driver's door, one officer noticed a small ziplock bag with white powder on the floor. At the rear of the vehicle, he notified the other two officers and they decided to remove the driver and passenger. Instead of exiting the vehicle when asked, the driver reached for the gearshift. Two officers reached through the open window and grabbed him around the chest while the other officer reached through the passenger window to turn off the ignition. The driver stepped on the gas and dragged one of the officers 50 feet. The three officers pursued the driver at high speed until he crashed. He jumped

out and ran, and during the ensuing foot pursuit and struggle, he shot one of the officers in the face.

ISSUE: Must an item, which is not an inherently deadly weapon (like a vehicle), be intentionally used as a weapon to satisfy the "forcibly" provision of §111(a) and the "deadly or dangerous weapon" requirement of §111(b)?

HELD: No,

DISCUSSION: 18 U.S.C. §111(a) punishes anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [designated federal officer] while engaged in or on account of the performance of official duties," while §111(b) increases the maximum penalty to ten years for anyone who, "in the commission of any acts described in §111(a), uses a deadly or dangerous weapon." The government does not have to prove that the defendant intended to use the vehicle as a deadly weapon, but only that the defendant intended to use the vehicle - and that the vehicle is a deadly weapon because it is, "capable of inflicting serious bodily injury or causing the death of another person." Arrington used his vehicle in a manner that made it a deadly weapon while forcibly violating §111(a).The court cited *U.S. v. Feola*, 420 U.S. 671 (1975) where the Supreme Court recognized that, "Congress intended § 111 to protect federal officers to the maximum extent possible, a consideration that led the *Feola* Court to reject an 'unexpressed requirement' that the defendant know that his intended victim is a federal officer…All the statute requires is an intent to assault, not an intent to assault a federal officer."

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Johnson v. Executive Office For US Attorneys
310 F.3d 771
November 22, 2002

SUMMARY: Exemption 7(c) under the Freedom of Information Act (FOIA) protects the privacy interests of people other than the requester who are named in the records requested. The death of an individual whose privacy interest provides the rationale for a 7(c) FOIA exemption is a relevant factor in the balancing in which the agency engages when it determines whether to withhold or release the material. The department or agency must take "basic steps" to investigate the information that could affect the privacy interests protected by Exemption 7(c).

FACTS: Pursuant to FOIA, Johnson, an inmate, requested the release of records pertaining to his own conviction. The Executive Office of the United States Attorney (EOUSA) withheld various documents pursuant to Exemption 7(c) to protect the privacy interests of other people named in the records. Johnson informed the EOUSA of the possible death of two people identified in the documents. The EOUSA attempted to verify his information by contacting, among others, state and federal probation officers in Connecticut, where the prosecution took place. The two individuals could not be located nor their status verified, so the information was again withheld. The inmate sued the government and the individual

attorney.

ISSUE: Did the EOUSA comply with the FOIA by taking "basic steps" to investigate the information that could affect the privacy interests protected by Exemption 7?

HELD: Yes.

DISCUSSION: In *Schrecker v. DOJ*, 254 F.3d 162 (2001), this Court recognized that the death of an individual whose privacy interest provides the rationale for a 7(c) FOIA exemption is a relevant factor in the balancing in which the agency engages when it determines whether to withhold or release the material. However, the Court refrained from establishing specific steps that an agency must follow to establish an individual's status before proceeding to balance the interests. In this case, the Court found that the EOUSA took sufficient "basic steps" to investigate Johnson's information. Johnson's additional *Bivens* claim against the responding attorney was dismissed because the FOIA is a comprehensive statutory scheme precluding the creation of a *Bivens* remedy.

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