
THE FEDERAL LAW ENFORCEMENT - INFORMER -

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW
ENFORCEMENT OFFICERS AND AGENTS

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The Informer – November 2019

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FLETC Office of Chief Counsel Podcast Series

Fundamentals of the Fourth Amendment – A 15-part podcast series that covers the following Fourth Amendment topics:

A Flash History of the Fourth Amendment What is a Fourth Amendment Search? What is a Fourth Amendment Seizure? Fourth Amendment Levels of Suspicion Stops and Arrests Plain View Seizures Mobile Conveyance (Part 1 and Part 2)

Exigent Circumstances Frisks Searches Incident to Arrest (SIA) Consent (Part 1 and Part 2) Inventories Inspection Authorities
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FLETC Informer Webinar Schedule

1. Warrantless Vehicle Searches and the Fourth Amendment (1-hour)

Presented by Mary M. Mara, Attorney-Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

When may law enforcement officers search a vehicle without a warrant in accordance with the Fourth Amendment? Where can they look and what are they authorized to look for? This webinar will examine each of these critical questions with respect to Terry frisks, searches incident to arrest, warrantless vehicle searches according to Carroll v. United States, consent searches, and inventory searches of vehicles.

Wednesday, December 4, 2019: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

To participate in this webinar: <https://share.dhs.gov/artesia>



2. Right of Free Speech for Government Employees (1-hour)

Presented by Henry W. McGowen, Attorney-Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

We all know that the U.S. Constitution guarantees the right of free speech. But what about those who work for the government? Do they enjoy the same rights as everyone else? In particular, what about law enforcement officers – are there valid limits to what an officer can say on duty? What about off duty? And what about comments, photographs, videos on social media? Are law enforcement officers free to criticize the government, some parts of the government, and/or their employer? Tune in to this webinar as we look at these important First Amendment issues for law enforcement.

Tuesday, December 17, 2019: 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific

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CASE SUMMARIES

Circuit Courts of Appeal

Seventh Circuit

United States v. Holly, 940 F.3d 995 (7th Cir. 2019)

Two uniformed Chicago Police Department (CPD) officers were patrolling a housing complex on the city's south side when the officers saw David Holly walking on a sidewalk toward their police car. As Holly neared the car, he formed a surprised and anxious look and then turned sharply and walked in another direction. The officers lost sight of Holly after he went behind a building. At this point, one of the officers exited the patrol car and jogged after Holly. The officer located Holly standing outside an apartment door ringing the doorbell. The officer identified himself as police and asked Holly, "Do you have drugs or a gun?" In response, Holly told the officer that he had a gun in his pocket. The officer seized the gun and arrested Holly.

The government indicted Holly for being a felon in possession of a firearm. Holly filed a motion to suppress the gun. Holly claimed that he never saw the police car before being stopped and handcuffed. Holly also claimed that when the officer approached him outside the apartment, the officer had his gun drawn and ordered Holly to raise his hands. As a result, Holly argued that when the officer approached him outside the apartment, the officer unlawfully seized him under the Fourth Amendment.

The court disagreed. First, the court credited the officers' testimony over Holly's testimony concerning the encounter. The court found that Holly's testimony was implausible noting that Holly was a four-time convicted felon, had an incentive to lie to escape punishment, and in the course of the proceedings, offered three inconsistent explanations for why he had a gun.

Next, the court held that the officer's initial encounter with Holly was consensual. The court noted that not every police encounter implicates the Fourth Amendment. A Fourth Amendment seizure occurs when a reasonable person would not feel free to leave. On the other hand, a consensual encounter takes place if a reasonable person would feel free to ignore the police and go about his business. In addition, the court recognized that "it is well established that a seizure does not occur merely because a police officer approaches an individual and asks him or her questions."

In this case, the court held that Holly's encounter with the police was voluntary because the officer: was alone when he jogged after Holly; nor did he draw his firearm, touch Holly, or order Holly to put his hands up. Instead, the officer promptly asked Holly if he had drugs or a gun and Holly immediately answered him. Given these circumstances, the court held that a reasonable person in Holly's position would have felt free to disregard the officer and leave.

Holly also argued that the indictment should have been dismissed, arguing that an officer's failure to preserve video footage of his arrest from a nearby Chicago Housing Authority (CHA) camera violated his right to due process.

Again, the court disagreed. After Holly's arrest, an officer following CPD policy left a voicemail requesting the video from the CHA. However, the officer did not know that the individual he contacted was on military leave and the video was not saved. While the officer's failure to follow-up with the CHA may have been negligent, the court held that it did not rise to the level of a violation of Holly's right to due process. The court concluded by commenting "that CPD would do well to revisit its preservation protocol – all to protect the interests of CPD itself, citizens, and those like Holly who find themselves charged with crime."

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/19-1216/19-1216-2019-10-18.pdf?ts=1571414416>

United States v. Haldorson, 941 F.3d 284 (7th Cir. 2019)

On June 1, 2015, a confidential informant (CI) made a controlled purchase of cocaine from Michael Haldorson in the parking lot of a shopping center. After the purchase, a police surveillance team followed Haldorson's vehicle for a short distance but lost him when they were stopped at a red light. Regardless, the surveillance team had not planned to arrest Haldorson that day. The CI attempted to set up another controlled buy on June 2nd and June 5th but was unsuccessful.

One June 23, 2015, the CI contacted Haldorson and arranged to purchase drugs from him again. This time the officers planned to stop Haldorson on the way to the deal and arrest him for the sale of the cocaine to the CI on June 1. When officers spotted Haldorson's vehicle, they conducted a traffic stop, arrested Haldorson, and searched the vehicle. Inside Haldorson's vehicle, officers found a variety of illegal drugs, fireworks, and several pipe bombs.

After finding the pipe bombs, the officers were concerned that Haldorson might have additional explosive materials at his residence. When officers asked Haldorson for his current address, he initially stated that he was homeless but eventually told the officers that he lived with his parents. Officers were skeptical of Haldorson's claim, as their investigation had revealed that Haldorson lived in a different area of town with a woman whom he was dating. When asked if there were any additional explosives at his parents' home, Haldorson responded: "there could be."

The officers went to Haldorson's parents' home at approximately 2:45 a.m. on June 24 2015. Haldorson's parents gave the officers consent to search Haldorson's room, which revealed drug-related items but no explosives. Haldorson's father told the officers that his son did not live in the residence but that he lived in a downtown apartment.

At approximately 4:00 a.m., officers located Haldorson's apartment and knocked on the door. A woman answered the door and told the officers that Haldorson lived there. The woman gave the officers consent to search the common areas of the apartment. While inside, the officers discovered that Haldorson had a separate bedroom, which was locked. The officers used Haldorson's keys, taken during his arrest, opened his bedroom door, and searched for explosives. Inside Haldorson's bedroom, the officers seized additional explosives. Afterward, the officers obtained a warrant to search the apartment and seized drug-related items and two laptop computers.

After Haldorson was indicted on a variety of federal charges, he filed a motion to suppress the drugs and explosives seized during the search of his vehicle after his arrest. Haldorson argued

that the information from the controlled buy on June 1, 2015 was too stale on June 23, 2015 to support probable cause for an arrest.

The court disagreed. First, the court noted, it is “well-established” that there is no requirement that officers arrest a suspect at “the moment probable cause is established.” Next, the court found that the passage of time does not automatically dissipate the probable cause for an arrest, a position supported in cases decided by the First, Fifth, Sixth, and Tenth Circuit Courts of Appeal. The court added that the concept of staleness is generally more relevant in applications for search warrants because, unlike arrests, the focus is on whether evidence of a crime will be found in a particular place and often involve a search for perishable or transportable objects, like drugs or guns. The court recognized there could be circumstances in which the subsequent investigation uncovers new facts or evidence that disproves or discredits the original information that established probable cause. However, in this case, the court held that the information provided by the CI and the June 1st controlled buy provided probable cause to arrest Haldorson on June 23, 2015.

Haldorson also claimed that the warrantless entry and search of his bedroom in the apartment he shared with his girlfriend violated the Fourth Amendment.

Again, the court disagreed. Under the exigent circumstances exception, “a warrantless entry into a dwelling may be lawful when there a pressing need for the police to enter but not time for them to secure a warrant.” First, explosive materials, including pipe bombs, were found in Haldorson’s car. Second, state and federal explosives experts testified that pipe bombs are very volatile and dangerous, especially “homemade” pipe bombs. Third, Haldorson admitted that more explosives could be at his residence and he falsely told the officers that he lived at his parents’ house, and a search of that house uncovered no explosives. Fourth, Haldorson’s actual residence was at a apartment, which was surrounded by residential neighbors and businesses. Finally, because of the significant concern for public safety and at the hour at which the officers were urgently proceeding, around 4:00 a.m., there was no time to obtain a warrant. Based on these facts, the court held that the warrantless search of Haldorson’s bedroom fell within the exigent circumstances exception to the Fourth Amendment’s warrant requirement.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca7/18-2279/18-2279-2019-10-23.pdf?ts=1571844640>

Ninth Circuit

United States v. Norris, 938 F.3d 1114 (9th Cir. 2019)

A special agent initiated an investigation into the possession and distribution of child pornography through a peer-to-peer file-sharing network (P2P network). On two separated dates, the agent downloaded child pornography from username “boysforboys1.” After the second download, the agent determined the suspect used an Internet Protocol Address (IP address) of 64.160.118.55 registered to AT&T Internet Services (AT&T). In response to a subpoena, AT&T identified the subscriber associated with the IP address as residing in Apartment 242.

The agent obtained a search warrant for Apartment 242. Upon execution of the warrant, agents discovered that the password-protected wireless internet router (router) located in Apartment 242 used an IP address of 69.105.80.128 rather than the 64.160.118.55 IP address previously used by

"boyforboys1." The search revealed that no devices in Apartment 242 contained any evidence of child pornography or of the P2P file-sharing program used by "boyforboys1."

The agents identified all the devices that had recently connected to the router located in Apartment 242 and discovered two unknown devices identified as "bootycop" and "CK." The agents were able to identify the media access control address (MAC) address for the "CK" device. Because the apartment residents could not identify either unknown device, the agents suspected that "CK" and "bootycop" accessed the router in Apartment 242 without the owners' permission.

The agents attempted to identify the location of the "CK" device using "Moocherhunter" software. Moocherhunter is an open-source wireless tracking software program designed to identify computers trespassing on wireless computer networks. Moocherhunter enables the detection of wireless traffic without directly accessing any device. With Moocherhunter in passive mode and using a wireless antenna, agents captured signal strength readings to locate the MAC address associated with the "CK" device. Specifically, Moocherhunter was installed on a laptop computer and connected to a directional antenna. The Moocherhunter program was provided the MAC address from the "CK" device and approximately seventeen location readings were taken in the vicinity of Apartment 242. The readings were significantly higher when the antennae was aimed in the direction of Apartment 243. As a result, the agents concluded that the "CK" device was most likely located in Apartment 243. After identifying Apartment 243 as the target apartment, the agents waited for "boyforboys1" to log on to the P2P network.

A week later, "boyforboys1" logged onto the P2P network and distributed child pornography from the 69.105.80.128 IP address linked to the wireless router in Apartment 242. The agents downloaded child pornography files from "boyforboys1," and went to Apartment 242 to confirm whether "boyforboys1" utilized the "CK" or "bootycop" devices to distribute the child pornography. With the consent of a resident of Apartment 242, the agents determined that the "CK" and "bootycop" devices were currently logged into the wireless router belonging to the residents of Apartment 242.

After a short time, "CK" disconnected from the router, leaving only "bootycop" connected to the router. Again using the Moocherhunter software and a wireless antenna, the agents measured the signal strength of MAC address associated with "bootycop," taking readings from Apartment 242 and from a nearby vacant apartment, with permission from the apartment manager. The agents concluded that: (1) "CK" and "bootycop" exhibited similar signal strengths; (2) "CK" and "bootycop" were associated with each other; (3) Apartment 243 housed both devices; and (4) both had gained unauthorized access to the password-protected router in Apartment 242.

Based on the Moocherhunter data, the agents obtained a search warrant for Apartment 243. When the agents executed the search warrant, they discovered evidence of child pornography.

The government charged Alexander Norris with two child pornography-related offenses. Norris filed a motion to suppress the evidence seized from his apartment. Norris claimed that the use of the Moocherhunter software constituted a warrantless search of his apartment in violation of the Fourth Amendment.

The district court denied Norris' motion. First, the court held that no Fourth Amendment search occurred because the agents did not intrude upon Norris' property. Second, the court held that Norris lacked a subjective, reasonable expectation of privacy because he connected to a third party's router without authorization. Consequently, the court concluded that Norris assumed the risk that his signal would reveal the MAC addresses from his devices to law enforcement officers.

The district court also ruled that society was not prepared to recognize an expectation of privacy for an individual who gains access to a third-party's password protected router. Norris appealed.

The Ninth Circuit Court of Appeals agreed with the district court and found that Norris lacked any subjective expectation of privacy in the emission of the signal strength of the MAC addresses emanating from outside his apartment. Although physically located in his apartment, Norris' wireless signal reached outside his residence to connect to the wireless router in Apartment 242. The agents captured Norris' wireless signal strength outside Norris' residence to determine the source of the signal. The court noted that the agents' actions in this case may be likened to locating the source of loud music by standing and listening in the common area of an apartment complex. Although the music is produced within the apartment, the sound carries outside the apartment. Just as no physical intrusion inside the apartment would be required to determine the source of the loud music, no physical intrusion into Norris' residence was required to determine the strength of the wireless signal emanating from the devices in his apartment.

The court added that even if Norris had a subjective expectation of privacy in the wireless signal transmitted outside his apartment, it felt that society is not prepared to recognize an expectation of privacy as reasonable when an individual gains access to the internet through the unauthorized use of a third party's password-protected router located outside his residence. Consequently, the court concluded that no Fourth Amendment search occurred in this case.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/17-10354/17-10354-2019-11-04.pdf?ts=1572890497>

Tenth Circuit

Lech v. Jackson, 2019 U.S. App. LEXIS 32393 (10th Cir. CO Oct. 29, 2019)

On June 3, 2015, officers from the City of Greenwood Village police department responded to a burglar alarm at Leo and Alfonisa Lech's home. At the time, the Lechs' son, John, lived at the home with his girlfriend and their nine-year old son. Upon arrival, officers discovered that Robert Seacat, an armed criminal suspect, who was attempting to evade capture by the Aurora Police Department, was inside.

To prevent Seacat from escaping, officers positioned their vehicles in the driveway of the Lechs' home. Seacat then shot at the officers from inside the garage, striking one of the police vehicles. For approximately five hours, negotiators attempted to convince Seacat to surrender. After these efforts to negotiate proved unsuccessful, officers employed increasingly aggressive tactics, i.e., they fired several rounds of gas munition into the home, breached the home's doors with a BearCat armored vehicle so they could send in a robot to deliver a "throw phone" to Seacat, and used explosives to create sight lines and points of entry to the home. The officers also sent in a tactical team to apprehend Seacat. However, Seacat fired at the officers while they were inside, requiring them to leave. The officers eventually used the BearCat to open multiple holes in the home and again deployed the tactical team to apprehend Seacat. During their second entry, the officers disarmed Seacat and arrested him.

As a result of this 19-hour standoff, the Lechs' home was rendered uninhabitable. While the City offered to help with temporary living expenses while the Lechs demolished and rebuilt their home, it otherwise denied liability for the incident and declined to provide further compensation.

The Lechs sued the City of Greenwood Village and several of its police officers claiming violations of the Takings Clause of the Fifth Amendment of the United States Constitution and Article II, Section 15 of the Colorado Constitution. In support of their claims, the Lechs argued that the defendants violated their constitutional rights by first damaging their home during their attempt to apprehend Seacat and afterward by refusing to compensate the Lechs for cost of reconstruction.

The district court dismissed the case against the defendants. First, the court held that when a state acts pursuant to its police power, rather than the power of eminent domain, under which property may not be taken for public use without compensation, its actions do not constitute a taking. Next, the court held that because the officers destroyed the Lechs' home while attempting to enforce the state's criminal laws, they acted pursuant to the state's police power. Consequently, the court held that any damage to the Lechs' home fell outside the scope of the Takings Clause.

The Lechs appealed. First, the Lechs argued that any physical appropriation of private property by the government, whether committed pursuant to the power of eminent domain or the police power, gives rise to a per se taking and therefore requires compensation under the Takings Clause.

The Tenth Circuit Court of Appeals disagreed. A state exercises its authority under its police power when it "controls the use of property by the owner for the public good," while it exercises its power of eminent domain when it "takes property for public use." The court found that three federal circuit courts of appeal and the Court of Federal Claims have distinguished between the state's police power and the power of eminent domain in cases involving the government's direct physical interference with private property and allegations of Takings Clause violations.

In addition, the court cited a case decided in 1997 in which it held that a plaintiff failed to establish a Takings Clause violation where federal agents physically damaged his property by tearing out doorjamb and removing pieces of interior trim from his home while executing a search warrant. Consequently, the court held that when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for purposes of the Takings Clause.

Next, the Lechs argued that even if the defendant's destruction of their home was not a per se taking under the Takings Clause, the officer's actions that caused the destruction of their home did not fall within the scope of the state's police powers.

Again, the court disagreed. The court cited a case decided by the Court of Federal Claims in 2017, which held that entering a person's property to effect an arrest was "perhaps the most traditional function of the police power." In that case, the court concluded that the plaintiffs did not suffer "a taking of their property for public use" when the United States Marshals Service "used gunfire, smoke bombs, tear gas, a battering ram, and a robot to gain entry to the plaintiff's rental property" to apprehend a fugitive.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/18-1051/18-1051-2019-10-29.pdf?ts=1572364865>

Eleventh Circuit

United States v. Bishop, 940 F.3d 1242 (11th Cir. 2019)

Deputy Floyd was in a marked patrol car when he saw a pickup truck disregard a stop sign while exiting an apartment complex. Deputy Floyd began following the truck and saw it disregard another stop sign. Deputy Floyd stopped the truck and as he approached, he saw Antonio Davis in the driver's seat and Michael Bishop in the passenger seat. Earlier that day, Deputy Floyd had stopped a woman that he subsequently arrested for possession of heroin. The woman told Deputy Floyd that she was going to Michael Bishop's house. Deputy Floyd called for a K-9 unit to come to the scene because of the woman's earlier statement to him and because he knew Davis had been involved with illegal drugs in the past.

Deputy Miller, a K-9 handler, and Deputy Dunsford arrived to assist Deputy Floyd. Deputy Dunsford had worked as a corrections officer at the county jail and recognized Davis and Bishop as former inmates.

Deputy Dunsford approached the driver's side of the truck and asked Davis to exit the vehicle. Davis complied without issue. As Deputy Dunsford was performing a Terry frisk of Davis, Bishop, still seated in the truck, told him that he had no right ask Davis to get out of the truck. At this point, Bishop was agitated, fidgeting around in his seat, and acting defensively. When Deputy Dunsford asked Bishop to exit the truck, Bishop adamantly refused and stated that Deputy Dunsford had no right to ask him to get out of the truck. After multiple requests to exit the truck, Bishop complied. Based on Bishop's general behavior and reluctance to exit the truck, Deputy Dunsford was concerned that Bishop might be hiding a firearm or a weapon on his person, so he decided to conduct a Terry frisk. While conducting a pat-down of Bishop's outer clothing, Deputy Dunsford felt a firearm magazine in Bishop's left pocket, which he removed. Deputy Dunsford then found a handgun in Bishop's left pant leg, which he also removed. Afterward, it was determined that the firearm was a stolen semi-automatic handgun with a high-capacity magazine.

The government charged Bishop with being a felon in possession of a firearm. Bishop filed a motion to suppress the firearm. While conceding the traffic stop was lawful, Bishop argued that the Terry frisk was unlawful because Deputy Dunsford lacked reasonable suspicion to believe that he was armed and dangerous.

The court disagreed. To determine whether a suspicion is reasonable, the court must evaluate the totality of the circumstances surrounding the stop, including the collective knowledge of all officers involved in the stop. In addition, the court noted that reasonable suspicion may exist "even if each fact alone is susceptible of innocent explanation." In their collective knowledge, the deputies knew that (1) Bishop had been an inmate at the county jail; (2) a woman who was arrested with heroin on her person earlier that day told Deputy Floyd that she was heading to Bishop's house; (3) Bishop was argumentative and noncompliant, adamantly refusing to comply with lawful orders to exit the truck; and (4) Bishop was agitated, fidgeting, moving around in his seat, and very defensive. Based on the totality of the circumstances, the court held that it was reasonable for Deputy Dunsford to believe that his safety or the safety of the other deputies was in danger; therefore, he was justified in conducting a Terry frisk of Bishop.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca11/17-15473/17-15473-2019-10-11.pdf?ts=1570804228>

United States v. Ochoa, 28 Fla. L. Weekly Fed. C 508 (11th Cir. 2019)

Police officers obtained a warrant to arrest Daniel Ochoa for the robbery of an armored Brinks truck in which Ochoa shot one of the truck's crewmembers and stole a bag containing \$30,000. A SWAT team was dispatched to arrest Ochoa at his residence. Upon arrival, the SWAT team leader, FBI Special Agent Geoffrey Swinerton, ordered everyone out of the residence. Five people, including Ochoa, exited the residence. Ochoa was arrested; however, before allowing the SWAT team to conduct a protective sweep, Agent Swinerton asked Ochoa if there were any dangerous items inside the residence. Ochoa told Agent Swinerton that there was a handgun in a drawer in one of the bedrooms. Agent Swinerton then gave the SWAT team permission to conduct a protective sweep of the residence; however, the SWAT team did not search for, or retrieve, the handgun.

Following his arrest, Ochoa was transported to the FBI field office where Task Force Officer Starkey interviewed him. Officer Starkey provided Ochoa with an "Advice of Rights" form, which included Ochoa's Miranda rights. Officer Starkey reviewed each statement on the form with Ochoa, and Ochoa answered "Yes" when asked whether he understood each right.

The final portion of the form was entitled "WAIVER OF RIGHTS" and stated: "I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present." After Officer Starkey read this provision, Ochoa stated that he did not "really agree with that one." Ochoa expressed concern that if he said "yes" that it meant he was "willing to cooperate." At this point, Officer Starkey attempted to further explain the Waiver of Rights provision by telling Ochoa that he had the right to have an attorney present and if that Ochoa requested an attorney, he would not ask him any questions. Ochoa told Officer Starkey that he understood, signed the Advice of Rights form, and agreed to speak to Officer Starkey without an attorney present. While Ochoa did not confess to the robbery, he told Officer Starkey that there was a gun in a drawer in one of the bedrooms.

While Officer Starkey interviewed Ochoa, other agents remained at Ochoa's residence to secure the area until a search warrant could be obtained. The search warrant application referenced Ochoa's pre-Miranda statement to Agent Swinerton and Ochoa's post-Miranda statement to Officer Starkey concerning the presence of a gun in the residence. After obtaining the warrant, agents searched Ochoa's residence and found evidence that linked Ochoa to the robbery, including a handgun.

First, Ochoa filed a motion to suppress his pre-Miranda statements to Agent Swinerton. Ochoa argued that his statements about the gun in the residence were the result of questioning that occurred after his arrest but before he was informed of his Miranda rights.

The Eleventh Circuit Court of Appeals held that Ochoa's statements to Agent Swinerton fell within the public safety exception to the Miranda requirement. Law enforcement officers must inform suspects of their Miranda rights before conducting custodial interrogations to protect the suspects' Fifth Amendment right against self-incrimination. However, in [New York v. Quarles](#), the Supreme Court established the public safety exception to the Miranda requirement. The public safety exception allows law enforcement officers to question a suspect without first informing him of his Miranda rights when they reasonably believe doing so is necessary to protect either themselves or the public.

Here, it was undisputed that Ochoa was “in custody” for Miranda purposes when Agent Swinerton questioned Ochoa about the presence of weapons in the residence and that Ochoa had not been informed of his Miranda rights. Nonetheless, the court concluded that Agent Swinerton asked questions he reasonably believed were necessary to secure the residence following Ochoa’s arrest. Agent Swinerton knew he was dealing with a potentially violent suspect who might be in possession of a firearm and it was reasonable for him to ask Ochoa about the presence of firearms before he sent the SWAT team into the residence.

Next, Ochoa filed a motion to suppress the statements he made to Officer Starkey during his post-Miranda interview. Ochoa argued that he made statements to Officer Starkey that clearly indicated that he did not wish to speak to Officer Starkey without a lawyer present, but Officer Starkey questioned him anyway.

The court recognized: “[w]hen a person undergoing a custodial interrogation states that he wishes to remain silent, the questioning must end and if he expresses a desire to consult with an attorney, the questioning must cease until one is provided for him.” However, a suspect’s invocation of his rights must be unequivocal. Specifically, a suspect must articulate his desire to have an attorney present with sufficient clarity that a “reasonable police officer” would understand the statement to be a request for an attorney or to cease further questioning. If a suspect does not do so, officers do not have an obligation to stop questioning.

In this case, the court held that Ochoa did not validly invoke his right to counsel or his right to remain silent. While Ochoa’s statement that he did not “really agree” with the Waiver of Rights provision could have been interpreted as a request for an attorney it was also an expression of confusion as to what he was agreeing to by signing the form, which is how Officer Starkey understood it. Under these circumstances, the court held that it was appropriate for Officer Starkey to ask follow-up questions to clarify what Ochoa meant by his ambiguous statement. Afterward, Ochoa told Officer Starkey that he would “speak without an attorney.” Because Ochoa did not unequivocally and unambiguously invoke either this right to counsel or his right to remain silent, the court held that Officer Starkey was not obligated to stop questioning him.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca11/16-17609/16-17609-2019-10-25.pdf?ts=1572039039>

United States v. Ross, 28 Fla. L. Weekly Fed. C 522 (11th Cir. 2019)

Police officers with a joint state-federal task force went to a Pensacola motel to arrest Wali Ross, a known fugitive with a history of violence and drug crimes, on three outstanding felony warrants. Although the officers had received information that Ross was staying at the motel, he was not a registered guest. While conducting surveillance, an officer saw Ross leave Room 113, walk to a truck in the parking lot and then return to his room. A few minutes later, Ross exited his room and approached the truck again. However, Ross saw the officers and fled. The officers pursued Ross but he eluded them. Realizing that none of the officers had remained at the motel, the officers thought that Ross might have gone back to Room 113.

When the officers returned to the motel ten minutes later, they saw Ross’ truck in the parking lot and the door to Room 113 closed. An officer retrieved a room key and a copy of the room’s registration from the manager, which showed that the room was rented for one night to a woman named Donicia Wilson.

Using the key, the officers entered Room 113 to locate and arrest Ross. Once inside, the officers conducted a protective sweep but Ross was not in the room. However, while exiting the room, one of the officers saw in plain view a grocery bag in which the outline of a firearm was clearly visible. The officer seized the gun and left.

After securing the firearm at approximately 10:45 a.m., the officers asked the motel manager for consent to search Room 113. The manager refused to allow the officers entry into Room 113 until 11:00 a.m., the motel's standard checkout time. At 11:00 a.m., the manager gave the officers permission to search Room 113 where the officers found a quantity of heroin, a digital scale, and a cell phone.

The government charged Ross with being a felon in possession of a firearm and possession of heroin with intent to distribute. Ross filed a motion to suppress the evidence found during both entries into his motel room.

Ross argued that the officers' initial entry and protective sweep, in which the firearm was seized, violated the Fourth Amendment because it was not reasonable for the officers to believe that he was inside Room 113.

First, the court rejected the government's argument that Ross abandoned any reasonable expectation of privacy in his room when he fled, which would have precluded Ross from challenging the officers' initial entry and sweep of his room. When Ross fled, he locked the room and kept the key with him. In addition, only 10 minutes elapsed from the time Ross fled and the officers entered Room 113. The court concluded this was not enough time for Ross to have abandoned his privacy interest in the room.

Next, the court held that the officers' initial entry and protective sweep of Ross's room did not violate the Fourth Amendment. An arrest warrant, based on probable cause, implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is inside. A person's hotel room is considered a "dwelling" in this context. To enter a hotel room to execute an arrest warrant, a law enforcement officer must have a reasonable belief that: (1) the room is in fact the suspect's and; (2) the suspect is inside. Once inside the room, officers may perform a protective sweep of the premises and they are allowed to seize any contraband in plain view.

In this case, the court found that the officers knew that Ross was staying in Room 113, as they had watched him exit the room, approach a truck in the parking lot, return to the room, and then reemerge. The court also found that it was reasonable for the officers to believe that Ross had returned to Room 113 after their failed pursuit, given that the pursuit lasted no more than 10 minutes and when officers returned to the motel they saw Ross' truck in the parking lot. Because the officers reasonably believed that Ross was in Room 113, the court held the officers had authority: (1) to enter the room to execute the arrest warrants; (2) to conduct a limited protective sweep of the room to ensure that no one inside posed a danger to them, and (3) to seize the gun, which they found in plain view.

Ross further argued that the officers' second entry and search of his room violated the Fourth Amendment, regardless of the manager's consent, because it would not have occurred without the officers' first unlawful entry.

The court held that Ross had no reasonable expectation of privacy in Room 113 after the 11:00 a.m. checkout time and that the motel manager gave the officers valid consent to search the room at that point. As a result, the court concluded that Ross had no standing to object to the officers' second entry and search of the room that uncovered the drug-related evidence.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca11/18-11679/18-11679-2019-10-29.pdf?ts=1572375638>
