THE -QUARTERLY REVIEW-

LEGAL COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

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EDITOR'S COMMENTS

Welcome to the first installment of Volume 7 of *The Quarterly Review* (*QR*). The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. *The QR* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The QR* can be directed to Robert Cauthen at (912) 267-2179 or robert.cauthen@dhs.gov. You can join *The QR* Mailing List, have *The QR* delivered directly to you via e-mail, and view copies of the current and past articles in *The QR* by visiting the Legal Division web page at: http://www.fletc.gov/legal. This volume of *The QR* may be cited as "7 QUART. REV. ed.1 (2005)".

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New on the
LEGAL DIVISION WEB SITE

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The DoJ "Wray Memo" of May, 2005, regarding *Garrity / Kalkines* Warnings

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Export CLETP

Please join me in extending best wishes to Bryan Lemons, Chuck Adkins, and Margaret Wright who are no longer a part of the Legal Division. They have each gone on to bigger and better things and will be sorely missed. In addition, Keith Hodges is currently serving as the Assistant to the Presiding Officers and Commissions Trial Clerk for the Military Tribunals in Guantanamo Bay, Cuba. Because we have lost these outstanding instructors, and because the training tempo at the FLETC has increased, we have decided to put the Export CLETP Program on hold until at least Jan 2006. I hope to be back in full swing early next year. Look for the announcements in future issues of *The Quarterly Review* and on the website. Thanks for your patience.

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LAW ENFORCEMENT CASES TO BE DECIDED IN THE OCTOBER 2005 TERM

A. FOURTH AMENDMENT

1. *Georgia v. Randolph*[1] - **Is the consent to search common areas given by one occupant valid even when another occupant is present and objects to the search?**

   Officers seized evidence from defendant's home in a warrantless search conducted pursuant to consent given by defendant's wife in defendant's presence after defendant had refused to give the officers permission to search.

2. *Hudson v. Michigan*[2] - **Does the Inevitable discovery doctrine create a per se exception to the exclusionary rule for evidence seized after a "knock and announce" violation?**

   Officers went to defendant's home to execute a search warrant for drugs. When they arrived at the door, several officers shouted, "Police, search warrant." They did not knock, and they only waited three to five seconds before opening the door and going inside. Drugs were found and seized during the search. The prosecution conceded a "knock and announce" violation.

3. *U.S. v. Grubbs*[3] - **Does the Fourth Amendment require suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched?**

   The 9th Circuit's opinion is briefed on page **14** of this issue.

B. FIFTH AMENDMENT

Maryland v. Blake[4] - **Can curative measures and/or other intervening circumstances overcome an officer's improper communication with a suspect after invocation of the suspect's right to counsel?**

Defendant was arrested between 4:30 a.m. and 5:00 a.m. for his participation in a murder and transported to the Annapolis Police Station. He was given *Miranda* warnings and invoked

[1] 604 S.E.2d 835 (GA 2004)
[2] An Unpublished Opinion
[3] 377 F.3d 1072 (9th Cir. 2004)
[4] 849 A.2d 410 (MD App. 2004)

his right to counsel at approximately 5:25 a.m. At 6:00 a.m., Detective Johns and Officer Reese went to defendant's cell to present him with a copy of the warrant and explanation of charges. The explanation of charges erroneously stated that defendant faced the death penalty. Officer Reese then said in a loud and confrontational tone, "I bet you want to talk now, huh?" Detective Johns then admonished Officer Reese loudly within defendant's hearing by saying, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Approximately one-half hour later, Detective Johns went back to the cell to deliver some clothing. Defendant asked, "I can still talk to you?" The detective asked, "Are you saying you want to talk to me now?" Defendant replied, "Yes." Defendant was taken to the intake room, re-advised of his *Miranda* rights and agreed to provide a statement without a lawyer present. Defendant made incriminating statements and agreed to a polygraph examination. He was transported to the Maryland State Police Barracks, where at about 8:30 a.m. or 9:00 a.m. another officer gave *Miranda* warnings and obtained a waiver. Defendant then made more incriminating statements.

C. STATUTES

1. *Gonzales v. Oregon*[5] - 18 U.S.C. § 801 *et. seq.* – Controlled Substances Act (CSA) – **Does the Act prohibit the distribution of controlled substances for the purpose of assisted suicide regardless of the state law authorizing such distribution?**

   A doctor, a pharmacist, several terminally ill patients, and the State of Oregon challenge an interpretive rule issued by Attorney General John Ashcroft which declares that physician assisted suicide violates the CSA. This so-called "Ashcroft Directive," published at 66 Fed. Reg. 56,607, criminalizes conduct specifically authorized by Oregon's Death With Dignity Act, Or. Rev. Stat. § 127.800-897.

2. *Gonzales v. O Centro Espirita Beneficiente Uniao Do*[6] - 42 U.S.C. § 2000bb *et. seq.* – Religious Freedom Restoration Act of 1993 (RFRA) – **Does the Act require the government to allow the importation, distribution, possession, and use of a Schedule I hallucinogenic?**

   O Centro Espirita Beneficiente Uniao Do, also known as Uniao do Vegetal (UDV), invoked the RFRA to obtain declaratory and injunctive relief preventing the government from prohibiting UDV's importation, possession, and use of *hoasca* for religious purposes and from attempting to seize the substance or prosecute individual UDV members.

D. CIVIL LIABILITY

Hartman v. Moore[7] - **Are law enforcement agents liable under *Bivens* for retaliatory prosecution in violation of the First Amendment when the prosecution is supported by**

[5] 368 F.3d 1118 (9th Cir. 2004)
[6] 389 F.3d 973 (10th Cir. 2004)
[7] 388 F.3d 871 (D.C. Cir. 2004)

probable cause?

Moore was indicted, charged with criminal offenses that were later dismissed. Moore sued under *Bivens* alleging that Postal Inspectors had charged him in retaliation for his political activities. The Inspectors countered that since the charges were supported by probable cause, they are entitled to qualified immunity. The clearly established law of the D.C. Circuit barred government officials from bringing charges they would not have pursued absent a retaliatory motive, regardless of whether they had probable cause to do so.

Compiled by Bob Cauthen, Editor.

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CHANGES TO THE MANUAL FOR COURTS-MARTIAL OF INTEREST TO LAW ENFORCEMENT OFFICERS

Anthony Bell, Capt, USAF
Senior Legal Instructor

On 3 December 2004, President Bush signed Executive Order 13365 and on 18 October 2005 signed Executive Order 13387 amending the Manual for Courts-Martial (MCM). Those provisions of interest to law enforcement officers are summarized here, and most will be reflected in the MCM 2005 edition.

CHANGES TO THE NATURE OF OFFENSES AND AVAILABLE DEFENSES

Article 119a. Death or injury of an unborn child. This new punitive article was enacted by Congress with the passage of Lacey and Connors law. Article 119a is contained in the MCM 2005 edition, but the MCM at this point only contains the text of the statute. The implementing provisions, including elements, explanation, and sample specifications will be added at a later date after Presidential approval. These are new offenses, and the maximum sentence that may be imposed upon a conviction is the maximum sentence that may be imposed for the crime committed against the mother - with the exception of the death penalty. **Example.** If the accused is convicted of aggravated assault against a pregnant woman in which grievous bodily harm is intentionally inflicted using a firearm in violation of Art. 128, the accused may also be charged with an additional offense under this new Punitive Article if the child is also injured. The maximum penalty will be 10 years for each offense for which the accused is convicted.

Article 111 (b)(1)(A). Drunken or reckless operation of vehicle, aircraft, or vessel. When charging an accused with drunken operation of a vehicle, the prosecution may charge the lesser of a State's BAC cut off or .10 grams of alcohol per 210 liters of breath or 100 milliliters

of blood as provided by the MCM. **Example.** If a member is operating a vehicle with a BAC of .09 and the State cut off is .08, the prosecution may use the State cutoff to charge the offense. If a base sits in two States, the prosecution can charge the lesser of the two State BAC cutoffs or .10. When choosing the lesser of the two BAC cutoffs, one can only look to the State where the base sits or to the MCM cutoff.

Article 134. Pandering and Prostitution. A new specification of patronizing a prostitute was added to the existing charge of pandering and prostitution. The elements of patronizing a prostitute are as follows:

(a) That the accused had sexual intercourse with another person not the accused's spouse;
(b) That the accused compelled, induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation; and
(c) That this act was wrongful, and
(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

This change will be effective 15 November 2005.

Article 134. Threat or Hoax designed or intended to cause panic or public fear. Executive Order 13387 amended paragraph 109 - Article 134 (Threat or Hoax: bomb) to read (Threat or Hoax designed or intended to cause panic or public fear). The charge and its specifications were changed to include threats from explosives, weapons of mass destruction; biological or chemical agent, substance, or weapon; or hazardous material. Additionally, the maximum punishment was increased from five to ten years confinement a dishonorable discharge is still authorized.

This change will be effective 15 November 2005.

Article 43 (b)(2)(A). Statute of Limitations. Congress amended the statute of limitations with regard to crimes committed against children to mirror the amendment to the federal statute of limitations for similar offenses. In order to prosecute the offense under the new statute of limitations, the charges and specifications must be received by an officer exercising Summary Court Martial jurisdiction over the accused prior to the victim's attaining 25 years of age. This applies to sexual or physical abuse of a person who has not attained the age of 16. The old statute of limitations prohibited charging a non-capital offense which occurred five years and one day prior to the receipt of charges.

CHANGES TO COURTS-MARTIAL PROCEDURE

R.C.M. 307 (c)(3). Referral of Charges. This rule was amended to require that facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. The rule specifically excludes having to set forth the aggravating factors that are admissible pursuant to R.C.M. 1003(d) and 1004.

R.C.M. 707 (b)(3)(D). Speedy Trial. This rule was amended to also apply to rehearings, and requires that a rehearing that is ordered must take place within 120 days of when the responsible convening authority receives the record of trial and the appellate opinion ordering the rehearing. Violation of this rule for a sentencing rehearing is possible sentence relief.

CHANGES TO MILITARY RULES OF EVIDENCE

Mil. R. Evid. 902(11). Self Authentication of "business records" and records of regularly conducted activity. This change permits certain records to be "self-authenticating" thus relieving the proponent of such a document from having to call a witness to lay a foundation at trial. It mirrors a similar change made to Federal Rule of Evidence 902(11) in 2000. The change provides that the original or a duplicate of a domestic record of regularly conducted activity that would be admissible as a business record if accompanied by a written declaration of its custodian or other qualified person is admissible without a foundation witness. The certificate must provide that the record (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice. The certification can and should be obtained when receiving the documents pursuant to a subpoena, or other request. The party at trial must give advance written notice to opposing counsel if this provision is to be used at trial. In conjunction with this change to MRE 902(11) is a change to MRE 803(6) which provides that properly self-authenticated records of regularly conducted activity are admissible notwithstanding the hearsay rule.

Anthony is a graduate of Florida State University (B.S.) and Texas Southern University (J.D.). Anthony is currently a Captain Judge Advocate with the United States Air Force and detailed to the Legal Division at FLETC. His assignments include: ASJA 96 ABW, Eglin AFB, Area Defense Counsel, Eglin AFB, and is currently serving as military legal instructor and legal advisor for USAFSIA.. He may be contacted at (912)267-2212.

CASE BRIEFS
UNITED STATES SUPREME COURT
and CIRCUIT COURT UPDATES

2nd CIRCUIT

U.S. v. Rivera
415 F.3d 284
July 18, 2005

By Ken Anderson

SUMMARY: A convicted felon can be convicted of unlawful possession of a firearm even when the firearm has been rendered inoperable.

FACTS: A jury convicted Rivera of unlawful possession of a firearm by a convicted felon. The loaded pistol taken from him had been rendered inoperable by damaging the firing pin and firing pin channel.

ISSUE: Does an inoperable gun fall within 18 U.S.C. § 921(a)(3)'s definition of a "firearm"?

HELD: Yes.

DISCUSSION: The term "firearm" as defined in § 921(a)(3) includes, in part, "any weapon . . . which will, or is designed to, or may readily be converted to expel a projectile by the action of an explosive (underline added). Where a weapon designed to fire a projectile is rendered inoperable, whether on purpose or by accident, it still a "firearm" under the statute although it is temporarily incapable of firing a projectile. The firearm continues to be "designed" to fire a projectile.

A weapon originally designed to fire a projectile could be re-designed or modified so as to remove it from the definition of a "firearm" under § 921(a)(3). For example, a gun with a barrel filled with lead or otherwise plugged might no longer be deemed "designed to" or "readily be converted" to fire a bullet.

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3rd CIRCUIT

U.S. v. Dobson
419 F.3d 231
August 16, 2005

By Ken Anderson

SUMMARY: "Culpable participation" is a substantive element of mail fraud. A defendant must have knowledge of the illicit objectives of the fraudulent scheme and willfully intend that those objectives be achieved.

FACTS: Dobson worked for Universal Liquidators (UL). Universal Liquidators located and re-sold surplus and liquidated merchandise from brand name manufacturers who were unable to sell the items. As a UL salesperson, Dobson marketed UL broker positions. She told potential brokers that they could buy into UL's brokerage opportunity for $5,000. In return the brokers were promised training, materials, and lists of manufacturers and distributors from whom they could buy brand-name merchandise a below market price which they could then re-sell to the public at a profit.

In her sales pitch to prospective brokers, Dobson used UL brochures and written

materials that contained false and fraudulent information about UL's relationship with these brand name manufacturers. Dobson also lied to potential brokers by claiming to be a broker herself when she was actually an employee of UL whose job it was to sell broker positions. In doing so she falsely told prospective brokers that her success as a broker had allowed her to earn enough money to buy a horse ranch in Montana.

ISSUE: Must the government prove that Dobson knowingly participated in UL's scheme to defraud?

HELD: Yes.

DISCUSSION: One of the substantive elements of mail fraud is "culpable participation" by the defendant - that is, participation by the defendant with the specific intent to defraud. The defendant must have knowledge of the illicit objectives of the fraudulent scheme and willfully intend that those objectives be achieved. The government must prove that Dobson knowingly participated in UL's fraudulent scheme of selling worthless brokerages.

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U.S. v. Naranjo
2005 U.S. App. LEXIS 20870
September 25, 2006

By Ken Anderson

SUMMARY: Before admitting a subsequent warned statement that follows an unwarned statement, courts will consider whether the agent's failure to warn was intentional or inadvertent and whether the second statement is sufficiently attenuated.

FACTS: While in "custody" for *Miranda* purposes Naranjo made incriminating statements to an agent in response to questioning without having first been advised of his *Miranda* warnings. An agent subsequently advised Naranjo of his *Miranda* warnings, and again Naranjo made incriminating statements in response to questioning. The court denied Naranjo's motion to suppress his post-*Miranda* statements and he was convicted.

ISSUE: Did the agent's failure to initially read Naranjo his *Miranda* warnings "taint" the subsequent incriminating statements that he made after he had been advised of, and waived his *Miranda* rights?

HELD: Undecided.

DISCUSSION: Subsequent statements obtained after *Miranda* warnings are not automatically suppressed if the agent inadvertently failed to give *Miranda* warnings and did not use deliberately coercive or improper tactics in obtaining the initial statements. Admissibility of the subsequent statement depends upon whether the defendant knowingly and intelligently waived his *Miranda* rights. See *Oregon v. Elstad,*

If the agent intentionally withheld *Miranda* rights, referred to as the "question first" interrogation method, any post *Miranda* warning statements that related to the substance of the pre-warning statements must be excluded unless curative measures were taken before the post-warning statement was made. Such curative measures may include whether or not the defendant was informed that his prior unwarned statement can not be used as evidence. See *Missouri v. Seibert,* The court of appeals remanded the case to the district court to make appropriate factual findings.

6th CIRCUIT

U.S. v. Bursey
416 F.3d 301
July 25, 2005

By Scott Wright

SUMMARY: To constitute a federally restricted area under 18 U.S.C. § 1752, the site must be posted, cordoned off, or otherwise restricted. The presence of officers stationed on the perimeter equates to posting or cordoning off the area. Refusing to leave the area after all persons not authorized by regulation to be present were cleared out amounts to a violation of the statute regardless of whether the defendant knows that he was violating a statute.

FACTS: The defendant went to protest at the site of a Presidential visit. He entered an area that the Secret Service designated as restricted. Certain traffic was allowed to pass through the area prior to the arrival of the President, but it was then completely shut down to unauthorized persons. The defendant still refused to leave and was arrested. No physical barriers were erected to demarcate the area, but officers and agents were stationed on the perimeter.

ISSUE: 1. Are the boundaries of a federally restricted area sufficiently demarcated when officers are posted on the perimeter, and all other persons not authorized by regulation are cleared from the area?

2. Does a violation occur if a defendant simply intends to remain in an area he knows to have been restricted by the Secret Service, unaware that this violates any statute?

HELD: 1. Yes.

2. Yes.

DISCUSSION: In defining a federally restricted area, the statute, 18 U.S.C. § 1752, requires that it be posted, cordoned off, or otherwise restricted. The court does not decide what "otherwise restricted" means, but does state that the presence of officers on the perimeter is tantamount to posting or cordoning off. Regulations pertaining to § 1752 allow for certain persons (e.g., family, staff, invitees, and law enforcement) to remain in a restricted area, but permits enforcement against all others. While warned repeatedly in advance, defendant was not arrested until all unauthorized persons had been cleared out and he still refused to leave. Defendant claimed to be unaware he was violating any federal statute, and was therefore not acting with the requisite intent (willfully and knowingly). The court stated that since he clearly intended to remain in an area he knew to be restricted by the Secret Service, this element was fully satisfied, and the conviction was affirmed.

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7th CIRCUIT

U.S. v. Blackwell
416 F.3d 631
July 26, 2005

By Keith Hunsucker

SUMMARY: Where evidence would have been inevitably discovered through use of a warrant, legitimacy of consent or scope of protective sweep are irrelevant.

FACTS: Pursuant to a warrant, police arrested Blackwell just outside his front door. While placing Blackwell in custody, officer

saw a head appear inside the front door. The officer approached the door and, while still outside, smelled marijuana coming from inside. The officer entered the front room and discovered an adult male inside and a bag of marijuana. The officer called for a team of drug specialists, and then swept the house, finding two other individuals inside. Blackwell consented to a search of the premises, and the police located drugs and guns. Blackwell was convicted of unlawful possession of a firearm, and appealed. Blackwell claimed that the police should not have entered the house, and presumably argues that his subsequent consent to search was invalidly obtained.

ISSUE: Is the evidence admissible under the inevitable discovery doctrine if the entry and consent were unlawful?

HELD: Yes.

DISCUSSION: The smell of marijuana was observed from outside the home, giving probable cause for a search warrant. Even if consent was denied or unlawful and a protective sweep unjustified, the police would have still found the guns after inevitably obtaining a search warrant for the drugs based on lawfully obtained probable cause. Therefore, the guns found during the search were admissible evidence.

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8th CIRCUIT

Walker v. City of Pine Bluff
414 F.3d 989
July 21, 2005

By Kevin Manson

SUMMARY: No arguable probable cause exists to support the arrest on an obstruction charge of an on-looker who stood a considerable distance from police officers conducting a traffic stop, who only spoke when spoken to, and who complied with an officer's request for identification after pointing out that he had done nothing wrong.

FACTS: African American civil rights attorney Walker stopped some 40-50 feet from police to watch the traffic stop of two black men. When approached by an officer, he answered several questions and produced identification after identifying himself and asserting that he had done nothing wrong. He was arrested for obstructing governmental operations. Walker sued alleging an unlawful arrest in violation of his 4th Amendment rights.

ISSUE: Did even arguable probable cause exist to support the arrest?

HELD: No.

DISCUSSION: The argument of the officer that one more silent, non-interfering on-looker – Walker – created a distraction that prevented the arresting officer from safely completing the traffic stop is "preposterous." No reasonable police officer could believe that he had arguable probable cause to arrest such an on-looker in this situation.

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U.S. v. Sanders
2005 U.S. App. LEXIS 20396
September 23, 2005

By TK Caldbeck

SUMMARY: A suspect can withdraw consent to search his person through

unequivocal acts that are inconsistent with the previously obtained verbal consent.

FACTS: Police who suspected drug dealing, got verbal consent from a motel room occupant to search both his room and him. The officer patted down the suspect and found no weapons. After being ordered to raise his hands so the officer could reach into the his pants pockets during the consent search, the occupant lowered his hands and blocked the officer from reaching into his pockets. This scenario occurs five times. The officer then handcuffed the occupant and found rock cocaine in the pants pocket.

ISSUE: Can consent to search a person be withdrawn by a person's acts that are inconsistent with the previously obtained verbal consent.

HELD: Yes.

DISCUSSION: Once given, consent may be withdrawn. Withdrawing consent must be made by unequivocal acts or statements. An unambiguous act inconsistent with the consent to search is sufficient to withdraw consent. A reasonable person standard is used to determine if the facts are sufficient to support withdrawal of consent. Here the act of blocking the officer's hands from reaching into the pocket on five occasions was unambiguous. A reasonable person would understand that consent to search the pockets had been withdrawn. Furthermore, the acts of the officer in commanding the suspect to stop interfering with the consent search were improper. The only way the officer could complete the "consensual search" was to place the suspect in handcuffs. If the suspect has to be handcuffed to prevent interference with a search of his person, the search is not consensual.

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U.S. v. Flores-Sandoval
2005 U.S. App. LEXIS 19198
September 6, 2005

By Ed Zigmund

U.S. Immigration and Customs Enforcement (ICE) cannot take custody of a person and fingerprint him without a lawful reason to believe the person is an illegal alien.

FACTS: Defendant was taken into custody and questioned by local law-enforcement officers. The circumstances of his initial arrest are unavailable. Because he spoke Spanish, the officers called a U.S. Border Patrol agent to act as an interpreter. Defendant admitted to the Border Patrol agent that he was in the country illegally and was then placed in jail without being charged. He was held pursuant to a civil administrative detainer issued by the Border Patrol pursuant to 8 C.F.R. § 287.7 (2005), and ICE was notified that defendant was being detained as a possible illegal alien.

The next day, at the ICE office, while still in custody, an ICE agent scanned defendant's fingerprints and determined that defendant previously had been deported as an alien. After learning this, the ICE agent read him his *Miranda* rights in Spanish. Defendant waived his *Miranda* rights and admitted he previously had been deported. At that point, the agent took a full set of his fingerprints in ink and retrieved his alien registration file. Defendant was subsequently indicted under 8 U.S.C. § 1326(a) (2000) for re-entry after deportation.

After determining that the initial detention by local law enforcement officers was unlawful, the district court suppressed defendant's statement to the Border Patrol and the evidence obtained by ICE, including his fingerprints and the admission that he previously had been deported. This appeal

followed.

ISSUE: Can U.S. Immigration and Customs Enforcement (ICE) take custody of a person and fingerprint him without any lawful reason to believe the person is an illegal alien?

HELD: NO.

DISCUSSION: Because the circumstances of defendant's initial detention are not in the record, the detention was without justification and in violation of the Fourth Amendment. His fingerprints obtained as a result of the detention must be suppressed. *Miranda* warnings may, in some cases, break the causal chain between the illegal arrest and a statement, thereby rendering a statement admissible. But, there was no showing that defendant received *Miranda* warnings before he made the statement to the Border Patrol. Therefore, the statement defendant must also be suppressed. Even though there is no indication of improper conduct by ICE, neither the fingerprints nor the statement may be invoked to provide a proper basis for ICE to place defendant in custody and obtain additional statements and fingerprints.

8 U.S.C. § 1357(a)(1) allows immigration officials to interrogate any alien or person *believed to be an alien* as to his right to be or to remain in the United States. This statute requires the government to show that immigration officials *believed* defendant was an alien before questioning him. Similarly, 8 C.F.R. § 287.7(a) allows immigration officials to issue a detainer to seek custody of an alien presently in the custody of another agency, for the purpose of arresting and removing the alien. The regulations further provide, in Section 287.8, that prior to an arrest, an immigration officer must have a *reason to believe* the person is an illegal alien. ICE, however, formed a reason to believe Defendant was an illegal alien based on his initial, now suppressed, admission to the Border Patrol agent. This admission cannot be used as a proper basis for ICE to place him in custody. Consequently, the authority for his full-blown custodial arrest, overnight detention, transportation, and fingerprinting is not found in the statute or regulation.

Defendant did not consent to the taking of his fingerprints by the ICE agent, and it is unlikely that he felt free to decline the agent's request and to terminate the encounter. In addition, the fingerprints were taken during a custodial detention by ICE that has not been constitutionally justified. Finally, his fingerprints were taken for the purpose of assisting the ICE investigation. Thus, these fingerprints are also suppressed.

(Despite this appellate ruling, ICE may issue a detainer to re-take custody of defendant because his body and identity cannot be suppressed as fruit of the poisonous tree. ICE will likely obtain a new set of fingerprints from defendant for civil deportation proceedings, and the government may recharge him with illegal re-entry after deportation. Yet there is value in reminding the government that it must do things "the right way.")

*****

9th CIRCUIT

U.S. v. Grubbs
377 F3rd 1072
July 26, 2004

Petition for certiorari granted by the Supreme Court on September 27, 2005

By Kevin Manson

SUMMARY: Failure to include the

triggering conditions in an anticipatory search warrant or to incorporate and present an affidavit designating the triggering conditions to residents at the search site renders the warrant constitutionally invalid.

FACTS: A Postal Inspector presented an application and affidavit for an anticipatory search warrant. The affidavit set out the triggering requirements -"received by the person(s)" and "taken into the residence." Two attachments to the warrant contained the premises description and the items to be seized but did not contain the triggering events. Grubb's wife accepted delivery of the package by an undercover postal inspector took it into the premises. The warrant, which included the two attachments, was presented to Grubbs. The affidavit containing the triggering events was never presented to Grubbs or left at the premises.

ISSUE: Does the Fourth Amendment require suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched?

HELD: Yes.

DISCUSSION: In *Groh v. Ramirez*, 540 U.S. 551 (2004), the Supreme Court declared a warrant facially deficient that did not describe with particularity the items to be seized. A "particular" warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.

Anticipatory warrants present a potential for abuse beyond that which exists in more traditional settings. In such cases "the warrant itself must state the conditions precedent to its execution, and these conditions must be clear, explicit, and narrow." The condition precedent need not be within the four corners of the warrant. However, an affidavit containing the triggering conditions only counts as such when it actually accompanies the warrant. Since that did not occur in this case, this search was conducted in effect without a warrant and all evidence obtained during the search and following the officers' announcement at the door must be suppressed.

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U.S. v. Saechao
418 F.3d 1073
August 12, 2005

By Gary L. Ainley

SUMMARY: Statements obtained pursuant to a probation condition that requires a probationer to choose between making incriminating statements or jeopardizing his conditional liberty by remaining silent are "compelled" and, therefore, inadmissible.

FACTS: Defendant pled guilty to a domestic violence offense and was sentenced to state probation. His terms of probation required him to promptly and truthfully answer all reasonable inquires from the probation officer or face revocation of his probation. When questioned by his probation officer, defendant admitted that he did own a hunting rifle which was kept at the apartment that he shared with his parents. The probation officer confiscated the firearm, and the defendant was charged with being a felon in possession of a firearm.

ISSUE: Are statements obtained under threat

of revocation of conditional release compelled in violation of the Fifth Amendment right against self-incrimination?

HELD: Yes.

DISCUSSION: Requiring a probationer to answer all questions, even if they incriminate him in another crime, "compels" him to incriminate himself in violation of the Fifth Amendment. If an individual's refusal to answer incriminating questions subjects him to a penalty, the Fifth Amendment is self-executing and any statements made under threat of such penalty are inadmissible. In the probationary context, although the state is permitted to require a probationer to appear and discuss matters affecting his probationary status, the probationer may not be required under threat of revocation of probation to respond to questions put to him, however relevant to his probationary status, that call for answers that would incriminate him in pending or later criminal proceedings.

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10th CIRCUIT

U.S. v. Nielson
415 F.3d 1195
July 21, 2005

By Bobby Louis

SUMMARY: Law enforcement officers violated the Fourth Amendment when they executed a no-knock search warrant that was not supported by sufficient facts of increased risk to safety.

FACTS: In support of an application for a no-knock warrant, police provided an affidavit reciting three facts to establish probable cause for the search and to support reasonable suspicion for an exemption to the knock and announce requirement. First, when executing the 1999 search warrant at defendant's home, five weapons and marijuana were found, resulting in charges of possession of a firearm by a convicted felon and misdemeanor possession of marijuana. Second, police received a anonymous report in August 2003 that defendant possessed an automatic weapon and narcotics which were located in the garage. Third, detectives searched defendant's garbage, seizing marijuana seeds and "five round cloth patches" which they believed to have been used to clean firearms. The application and affidavit requested a no-knock warrant for officer's safety based on defendant's past history of possessing firearms and the potential for violence. The judge issued a no-knock warrant.

ISSUE: Did the warrant application and affidavit set out sufficient facts to justify a no-knock entry?

HELD**:** No.

DISCUSSION: The no-knock warrant should not have been issued because the officers made no claim that defendant was distributing narcotics or that he had engaged in any prior violent conduct. Moreover, the prior search of defendant's home resulted in no violence. Although the police had evidence that a firearm was present, that fact by itself does not demonstrate an increased risk beyond that normally faced by law enforcement officers, especially where, as here, their information was that a firearm was in a loft in the garage, and they had no information leading them to believe that defendant had interior access to the garage. Further reasons, such as counter-surveillance activities or children playing nearby, to believe that knocking and announcing police presence would be dangerous or futile are also absent in this case.

Without a prior history of violence with police, without a record of prior convictions that indicate a predilection towards violence, without a suspicion that defendant was engaged in narcotics trafficking, or without any other exigent circumstances, the police had insufficient justification in the case for a no-knock warrant.

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D.C. CIRCUIT

U.S. v. Jackson
415 F.3d 88
July 22, 2005

By George Hurst

SUMMARY: An officer's experience that he had found the vehicle's real tag in the trunk in 6 or 7 cases out of 10 involving stolen tag was not sufficient to provide probable cause to conduct a warrantless search the trunk.

FACTS: Two U.S. Park Police Officers stopped a vehicle for a license plate light out. Before approaching the vehicle, a records check indicated the temporary license tag on the car was stolen. Also, the temporary tag had been altered to match the car's make, model, and VIN. The driver was not able to produce a registration or driver's license. Another check revealed the operator's driver's license was suspended. A check of the VIN revealed an old listing for the vehicle in Virginia, but no current registration. There was no computer record that the car was stolen. The driver was arrested for the stolen tag. No vehicle documentation, evidence, or contraband was discovered in the passenger compartment during a search incident to arrest. The officers then searched the trunk and seized a gun and ammunition found in a child's backpack. One of the officers testified that in about 10 vehicle stops involving stolen tag, he had found the vehicle's real tag in the trunk on 6 or 7 occasions.

ISSUE: Whether the officers had probable cause to search the trunk?

HELD: No.

DISCUSSION: The officer's experience was not sufficient to provide probable cause for the search of the trunk. The information available to the officers was not sufficient to show that the car may have been stolen, so the officers were not justified in looking into the trunk to determine if items in the trunk would indicate who owned the vehicle. The facts that the tag light was out which obscured a view of the tag, a stolen tag was on the vehicle, the stolen tag had been altered to match this vehicle, the driver could not produce a registration for the vehicle, record checks revealed an old listing in Virginia but did not identify the defendant as the previous owner, record checks revealed no current registration, the driver had no driver's license because he was under suspension, and there was no current listing of the car as stolen where not sufficient to give the officers probable cause that the car may be stolen.