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THE -QUARTERLY REVIEW-

LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

Welcome to the third 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.

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New Legal Division Web Site Format

The format of our web site has changed. Please bear with us as we work out the kinks. We value and sincerely solicit your comments and suggestions. E-mail them to robert.cauthen@dhs.gov

New QR Format

Please look at the new format making THE QR shorter and more efficient for readers. We deleted the case-name table of contents. We will continue to "brief" Supreme Court cases, but have reduced the Circuit Court cases to a summary along with a link to full case briefs on our web site. E-mail your comments to robert.cauthen@dhs.gov

Click HERE for SUPREME COURT Briefs.

Click HERE for CIRCUIT Case Summaries.

UNITED STATES SUPREME COURT
CASE BRIEFS

Click HERE for the briefs with links to the court's opinions.

U.S. v. Grubbs, 126 S. Ct. 1494, 2006 U.S. LEXIS 2496, March 21, 2006

"Anticipatory search warrants" are constitutionally permissible so long as there is probable cause at the time the warrant is served.

When the defendant ordered child pornography from a web site operated by the U.S. Postal Service, agents applied for an anticipatory search warrant. The affidavit stated that "[e]xecution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence. . . . At that time, and not before, this search warrant will be executed[.]" When the parcel was delivered, and taken into the defendant's residence, the warrant was executed.

The fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe it will be there when the warrant is executed. "Anticipatory search warrants" require that (1) there be probable cause to believe the triggering event will occur, and (2) if the triggering event occurs, that there be a fair probability that the evidence sought will be in the place described. The triggering event must be some event other than the mere passage of time. If the triggering event is not described in the affidavit (or does not occur), the search warrant cannot be executed. The warrant need not specify the triggering event as long as the affidavit does.

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Georgia v. Randolph, 126 S. Ct. 1515, 2006 U.S. LEXIS 4677, March 22, 2006

A warrantless search of a shared dwelling pursuant to consent granted by one tenant over the express refusal by a physically present co-tenant is unreasonable under the Fourth Amendment. Anything found during the search will be suppressed as to the person refusing to grant consent to search.

Police were called to a home on a domestic disturbance and were told by the defendant's wife that her husband had cocaine in the house. She granted officers permission to enter and search the house, but her husband was present and unequivocally refused consent to enter and search. The police relied upon the wife's consent and were led to the defendant's bedroom where they saw evidence of cocaine use.

The ruling only applies where an objecting co-tenant is physically present. Police may not sequester or physically remove a potentially objecting co-tenant from the scene for the sake of preventing an objection. Police need not seek out other non-present tenants to obtain their permission to search. Exigent circumstances, such as removal, destruction of evidence, protecting the safety of the police or others present (such as in a domestic dispute), or hot pursuit, may still allow an entry over a co-tenant's objection.

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Brigham City v. Stuart, 126 S. Ct. 1943, 2006 U.S. LEXIS 4155, May 22, 2006

An officer's ulterior, subjective motive for entering a residence is immaterial if the officer has an objectively reasonable basis to believe that someone inside is seriously injured or imminently threatened with such an injury.

When police officers responded to a loud party call, they heard shouting inside. They saw through a screen door and windows that there was a fight in progress in the kitchen. A juvenile punched an adult in the face, causing the adult to spit blood into a sink. No one noticed when an officer opened the screen door and announced his presence. The officer entered the kitchen and announced himself again. This time the fight stopped as people noticed the police. The officers arrested the defendant for contributing to the delinquency of a minor, disorderly conduct and intoxication, and seized evidence in the house.

It is irrelevant that the officers' primary motive in entering the home was not to prevent further injury, but to make an arrest. An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's *subjective* state of mind, as long as the circumstances, viewed *objectively*, justify the action. The officers had an objective basis for believing that an occupant had been seriously injured. Circumstances were sufficiently serious enough to rise to the level of an emergency. Police officers are not mere referees, stepping in only when a fight becomes too one-sided. The law does not require officers to stand by until someone is unconscious or semi-conscious before they may intervene and restore order.

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Hudson v. Michigan, 126 S. Ct. 2159, 2006 U.S. LEXIS 4677, June 15, 2006

Violation of the Fourth Amendment "knock and announce" rule, without more, will not result in suppression of evidence at trial.

State police obtained a search warrant for drugs and firearms at the defendant's home. When the police arrived, they announced their authority and purpose, but waited only perhaps "three to five seconds" before entering the home. During the search, police found large quantities of drugs and a loaded gun. The State conceded that the entry did not comply with the knock and announce requirement.

While the "knock and announce" rule is a command of the Fourth Amendment, not every Fourth Amendment violation triggers the exclusionary rule. The purposes of the knock and announce rule are to protect police from being mistaken for unlawful intruders, to prevent unnecessary damage to property, and to preserve the dignity of homeowners who may need to prepare for the entry of police. The rule is not intended to preclude the government, when armed with a warrant, from searching for or seizing items. Violations of the rule, therefore, should not cause suppression of evidence otherwise validly obtained. Civil liability and administrative action are sufficient to deter police from violating knock and announce rule.

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Sanchez-Llamas v. Oregon, 2006 U.S. LEXIS 5177, June 28, 2006

After the state arrest of a foreign national, failure to give "consular notification" rights as required by the

Vienna Conventions on Consular Relations (VCCR) does not trigger the exclusionary rule to suppress statements made to state law enforcement officers by the foreign national. However, failure to provide the notification can be a factor in determining the voluntariness of a confession.

The United States is a signatory to the VCCR which provides that when a national of one country is detained by authorities in another, those authorities must notify the consular officers of the detainee's home country if mandated by the treaty, or if the detainee so requests when reporting is not mandatory. The VCCR further provides the authorities shall inform the detainee, without delay, of the right to have the consular authorities notified.

Police arrested Sanchez. After waiving his *Miranda* rights, Sanchez made admissions. At no time, however, did authorities inform him that he could ask to have the Mexican Consulate notified of his arrest. At trial, Sanchez moved to suppress the statements, arguing they were made involuntarily and in violation of the VCCR. US law does not trigger the exclusionary rule when state law enforcement violate the VCCR. Failure to provide the notification, however, can be a factor in determining the voluntariness of a confession.

CIRCUIT COURTS OF APPEALS
CASE SUMMARIES

Click HERE for the full briefs with links to the courts' opinions.

1st CIRCUIT

U.S. v. Samboy, 433 F.3d 154, December 29, 2005

There is no legal rule requiring police to seek a warrant as soon as probable cause likely exists. An exigency may exist even when police might have foreseen the circumstances. An exigency may be negated when the government unreasonably and deliberately delays or avoids obtaining a warrant.

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U.S. v. Coker*, 433 F.3d 39, December 28, 2005*

For Sixth Amendment right to counsel purposes, a federal charge is a different "offense" from a state charge, even when both deal with the same underlying conduct and have essentially the same elements. Federal agents can interview and take a statement from the suspect without notification to and the presence of the attorney representing the suspect on the state charge.

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3rd CIRCUIT

U.S. v. Kiam*, 432 F.3d 524, January 3, 2006*

A person seeking entry into the United States does *not* have a right to remain silent regarding matters

concerning admissibility. An alien at the border must convince a border inspector of his or her admissibility to the country by affirmative evidence. While an alien is unquestionably in "custody" until he is admitted to the country, persons seeking entry at the border may be questioned about admissibility without *Miranda* warnings.

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4th CIRCUIT

***U.S. v. Rizzi**, 434 F.3d 669, January 9, 2006*

Search warrants for controlled substances are governed exclusively by 21 U.S.C. § 879, and may be executed at any time of day or night without any showing or finding by the judge that a nighttime execution is necessary.

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6th CIRCUIT

***Armstrong v. City of Melvindale**, 432 F.3d 695, January 6, 2006*

The Fourth Amendment requires probable cause to believe that *fruits, instrumentalities, or evidence of a crime* will be found at the place to be searched. Search warrants for items that lack any criminal link are unconstitutional.

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***U.S. v. Dillard**, 438 F.3d 675, February 27, 2006*

Tenants of apartments and duplexes have a reasonable expectation of privacy in *locked* common areas.

Because a duplex is more akin to a single-family home than a large apartment building, tenants may also have a reasonable expectation of privacy in unlocked areas such as a basement.

* * * *

8th CIRCUIT

***U.S. v. Morris**, 436 F.3d 1045, January 31, 2006*

Opening the locked screen door, although it gave access only to the small space between the screen door and the inner door, was a search for purposes of the Fourth Amendment.

To go ahead and enter, police must have reasonable suspicion that further compliance with the knock-and-announce requirement would inhibit the effective investigation of the crime.

***U.S. v. Richardson**, 439 F.3d 421, March 2, 2006*

The Court overrules its prior decisions and now holds that convictions for being a felon in possession, and being a drug user in possession, based upon a single act of possession of a firearm, violate Double Jeopardy.

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9th CIRCUIT

***U.S. v. Gourde**, 440 F.3d 1065 (en banc), March 9, 2006*

Paid membership in a child pornography download site can establish probable cause that there are child pornographic images, or evidence of same, on the suspect's computer.

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***U.S. v. Lopez-Perera**, 438 F.3d 932, February 21, 2006*

An illegal alien who presents himself at a port of entry, and is found in possession of a firearm before he leaves the port, cannot be convicted of being an illegal alien in the United States in possession of a firearm.