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**MOST RECENT UPDATES**

**QUALIFIED IMMUNITY IN POLIC USE OF FORCE CASE**

**White v. Pauly 580 U.S.\_2017, No 16-67** This case addresses the situation when an officer who arrives late to the scene of a police action having witnessed shots being fired by one of two suspects at police. The late arriving officer shoots and kills an armed suspect without first giving a warning.

In an unanimous opinion of the Supreme Court it reversed both the Trial Court and the Federal Appeals Court and found the officer had immunity from suit.

This case is significant because it seems the Justices want to clearly establish that law suits against police are far too many and the lower courts should confer qualified immunity on police in many more circumstances.

The officer's failure to give a warning before he shot the suspect did not constitute a 4th Amendment violation. This case presented unique set of facts and circumstances. No settled 4th Amendment principle requires an officer to second guess the earlier steps taken by the officer on the scene. "Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action from assuming that proper procedures such as officer identification have already been followed ".

**SHOOTING PIT BULLS DURING SEARCH WARRANT**

**Brown v. Battle Creek Police, LEXIS 22447, (6th Cir) 2016** Officers executed a search warrant at a house where the subject had a criminal history, gang affiliations, and was involved in the drug trade. They encountered 2 large pit bulls barking and aggressively jumping. The officers felt they could not safely clear the house so they shot both dogs. The court agreed the officers acted reasonably and that there was no history of officer's needless killing of animals in the course of searches.

**DEADLY FORCE AGAINST FLEEING SUSPECT NOT COMMITTING VIOLENT FELONY**

**Wallace v. Cumming, #15-3279 (8th Cir) 2016** An officer's use of deadly force to shoot and kill a fleeing man was not reasonable as a matter of law because the record did not show that the man committed a violent felony of aggravated assault or that he posed a significant immediate threat to the safety of the officer or others. The man was not holding a gun when shot and the prior physical struggle was minimal.

**TERRY FRISK / REASONABLE SUSPICION**

**Sellman v. State of Maryland, 2016 WL 4470904** Under Terry v. Ohio an officer can do a Terry Frisk on the basis of reasonable suspicion that someone is armed and dangerous. This case examines the "totality of the circumstances" viewed through the eyes of a reasonably prudent officer.

Under the law an officer must have specific and articulable facts which taken together with rational inferences reasonably warrant a frisk.

In this case, officers conducted a valid traffic stop and issued a warning ticket. The driver gave consent to search the car but that consent did not give officers the right to frisk a passenger. The officers failed to detail factors that made them suspicious the passenger was armed. A generalized concern about criminal activity fell short of reasonable suspicion.

The court held the frisk was unconstitutional.

**Utah v. Strieff, U.S Supreme Court 2016**  The discovery of a valid arrest warrant is sufficient intervening event to break the casual chain between an unlawful Terry Stop and the SEIZURE of evidence.

**Ortiz v. Kazimer, (2016) 811 F. 3d 848 6th Cir.** Officers responding to an armed robbery call chased a 16-year-old with Down Syndrome. The boy stopped running when he reached his parents. The boy was slammed to the ground, cuffed and pinned by officers saying racial slurs at the Hispanic boy and his family. Officers were notified by radio that the robbers had been caught and released the boy saying as they did so "you were so lucky we didn't shoot you". The court held that the officers were not entitled to immunity.

**Stamps v. Town of Franningham, (2016) U.S. App Lexis 2026 ( 1st Cir )** Swat Executed a warrant at a known drug houselooking for two known dealers. One officer pointed a loaded Automatic Rifle at the head of an older man who was at the house. The safety was off and the officer's finger was on the trigger, the officer mistakenly fired one shot probably as a result of sympathetic reaction/ contraction. The old man died. In ruling against the officer the court held it was clearly established that the officers actions were not constitutional or permissible.

**COMMUNITY CARE TAKER**

**State v. Matalonis 2016 WL 514150 (Wisc)**

Community Care Taking doctrine is interpreted differently in many states. In this case, cops responded to a call for medical and found blood splatter in the snow and on the house door. The cops heard two bangs from the house and knocked on the door and the door was opened by a man who showed no sign of blood but admitted he had fought with his brother.

The officers were allowed to enter to do a security sweep. They smelled pot and saw blood splatter on a locked door. The cops asked him to open the door and he refused. When told the cops would break the door down he told them where to find the key. There were pot plants inside the locked room.

The Defendant argued the search was a constitutional violation. The State argued the search was justified under Community Caretaking Exception. The Court reasoned the potential of finding pot when they searched the room did not render it impossible that there was also an injured person in that locked room.

The dissenting view asserted the Court was embracing an ever expanding version of the Community Caretaking Exception and the Court should be careful to avoid turning this Exception into an "investigating sword."

**LONG TERM POLE CAMERA SURVEILLANCE**

**U.S. v. Houston, 2016 WL 482210 (6th Cir 2016)**

The Defendant was acquitted in the murder of two police officers. He lived with his family in a rural area and had signs depicting the bodies of the dead officers. The view of the property was blocked by blue tarps and trees. Cops suspected the Defendant was involved in various crimes, he had an extensive felony record.

Agents tried drive by surveillance of the property but they were not successful. The cops had a utility company install a surveillance camera on a nearby pole and monitored the pole camera for 10 weeks before getting a warrant.

The bad guy was arrested for being a felon in possession of a firearm based upon video showing him carrying a gun during the non-warrant surveillance and argued that evidence should be suppressed under the Supreme Court ruling in Jones where the court ruled that long term surveillance is worrisome because it evades ordinary checks that constrain abusive law enforcement practices.

The court ruled against the Defendant holding that there was no 4th Amendment violation because the bad guy had no reasonable expectation of privacy in video footage taken by a camera located on top of a utility pole on public property since that view could be captured by any passerby.

A strong dissent argued a 24/7 video raises privacy concerns.

**FAILURE TO TRAIN**

There is a line of cases going back to the 1970's that have held in multiple jurisdictions that civil liability may attach either under Common Law Negligence or 42 U.S.C. Sec 1983 where the city or county, the chief of police or sheriff, the instructor and the officer may be held liable for failure to train because of;

1. Department and/or instructors omitted vital subjects from training curriculum.

2. Failed to raise trainers to sufficient level of proficiency.

3. Taught obsolete and/or dangerous techniques.

4. City or County had a deliberate policy of improper training.

5. Officers responsible for department training acted with reckless disregard for the inadequacies of the training program.

Popow v. City of Margate 476 F Supp 1237 (D.N.J. 1979)

Camancho v. City of Cudahy (UC 009187 LA Superior Court 1994)

Watson v. City of Los Angeles (NO BC085132 LA Superior Court 1995)

**No Terry Stop When Suspect Is Inside Home**

**Moore v. Pederson (2015) WL 5973304**

Cops responded to a call of a disturbance in an apartment parking lot. When they arrived they learned the bad guy had gone into a nearby apartment. They did a knock and talk and the bad guy refused to come out or let them in but stood in the threshold and refused to give his name.

The cop told the bad guy to turn around and place his hands behind his back and the reached across the threshold of the door and handcuffed the bad guy who made a claim of unlawful arrest. The bad guy won.

The Supreme Court has loudly said in numerous recent opinions that the physical entry into a home is the chief evil against which the 4th Amendment is directed.

Without a warrant, any physical invasion of the structure of a home even by inches is too much absent the most exigent circumstances.

**MENTAL HEALTH**

**Some Duty to Accommodate a Mental Disability**

**Taylor v. Schaffer (2015) LEXIS 16119**

A mental patient reported suicidal intent. Troopers were dispatched to the scene, were told by the landlord that the man had a mental condition and should be left alone. She also told the cops there were no guns in the house.

Shortly thereafter, a cop saw the man in the woods nearby and while pointing a rifle at him, ordered him to show his hands. The man walked towards the trooper with one hand clinched and the cop fired his taser. He died. The courts found the trooper knew of the mental disability and could have left him alone as requested.

**Dealing with Suicide**

**City of San Francisco v. Sheehan (2015) LEXIS 3200**

Police were called to the home by the wife who told cops she had argued with her husband who was now in the garage with a shotgun in his mouth. The police kicked in the door and shot the man 4 times within three minutes of arriving at the scene.

The court ruled against the officers noting they never tried to talk with the guy and that they lacked reasonable belief that the man posed a threat.

**DO NOT EXTEND A TRAFFIC STOP WAITING FOR**

**A DRUG DOG WITHOUT REASONABLE SUSPICION**

**Rodriguez v. U.S, (2015) WL 1780927** Police stopped the bad guy for a traffic violation. Air freshener and nervousness of the driver made the officer suspicious. The cop issued a warning citation and called for backup. When backup arrived he sought permission to do a dog sniff. The bad guy refused and was removed from the car. Seven or so minutes later the dog gave a positive response and meth was found.

The United States Supreme Court has ruled that the seven or so minute extension of the stop exceeded the time needed to issue the warning ticket and was an unconstitutional violation of the Fourth Amendment and was an unreasonable seizure.

The Court, in its ruling, has established a bright line rule that prolonging of the stop for a drug dog sniff must be based on reasonable suspicion.

**SHORT EXTENSION OF STOP FOR DRUG DOG SNIFF MAY BE O.K.**

**U.S. v. Winters, (6th 2015) 782 F. 3d 289** This interesting decision was releasedafter the Rodriquez decision by the Supreme Court.

After a warning ticket was issued the officers had the dog do an outside sniff of a car within three minutes of the stop. The dog hit on the car and when that occurred the bad guy tossed a bag of pot to the side of the road. The cops, before the sniff, had developed some reasonable suspicion in conversations with the driver and passenger.

The officer did not stop the dog sniff after the throw down pot and found a kilo of heroin. The bad guy was charged with trafficking and argued the stop had been unlawfully prolonged do to the dog sniff.

The Court held that nervousness, inconsistent travel plans and odd rental arrangement, when considered in the aggregate, justified a brief wait (3 or 4 minutes) for another officer to arrive for safety reasons and that the dog search was constitutional under all these factors.

**CAN YOU DO A KNOCK & TALK AT A BACK OR SIDE YARD?**

**Carroll v. Carmon, (2014) 135 S. Ct 348** Officers were looking for a man who had stolen a car and went to an address they had for him. The Officers parked in the first available spot near the house which was at the far rear of the property.

The Officers went to a rear deck (the first door to the house from their approach) and confronted a man who walked away from them and then gained access to the house with permission from the homeowner's wife to search for the car thief.

The homeowner, Carmon, sued for a violation of the 4th Amendment alleging the cops violated their rights by entering the backyard and going onto the deck.

The 3rd Circuit found the Officers did violate the 4th Amendment and that the violation was clearly established law.

The U.S Supreme Court says they found it "perplexing" that the 3rd Circuit could consider the law "clearly established" when the 3rd Circuit was clearly announcing a new rule that contradicted numerous other Court decisions. Several decisions from other Circuits have held an Officer may do a Knock & Talk at any reasonable door that is "open to visitors".

Whether a Knock & Talk can only be done at the front door was not answered by the Supreme Court. It is noteworthy that several Circuit Court decisions have not restricted Knock & Talks to the front door.

**CO-TENANT MUST AFFIRMATIVELY OBJECT**

**TO ENTRY TO DEFEAT OTHER TENANT'S CONSENT**

U**.S. v. Moore, (9th Cir 2014) WL 5368855** When a co-tenant gives on o.k. to search a home, any co-tenant must expressly object or the rule of GA v. Randolph, (2006) 547 U.S. 103 does not apply.

**U.S. v. Iraheta, 2014 WL 4086372** Consent to search did not apply to passengers who did not hear request to search the car. An officer stopped a bad guy for a traffic violation. When the officer learned the bad guy had an expired license he asked him to step out of the car where he asked for and got a consent to search the car. The passengers in the car never heard the search request or the consent.

Meth and Coke were found in a bag and the driver contented he did not know who the bag belonged to. The passengers claimed they never gave consent and the driver's consent did not apply to them.

Prior rulings have extended a driver's consent to search any bag when the passengers did not object to the search. Their three bags (one for each occupant) should have put the officer on notice that all bags did not belong to the consenting driver. It seems clear that an officer should get consent from the driver and each passenger before searching as the court tossed this search as a constitutional violation.

**Wurie and Riley (2014)** U.S Supreme Court says police cannot search cell phones without a warrant. The United States Supreme Court has issued a unanimous decision in two cases before it related to cell phone searches incident to arrest. In both the California case against David Riley and the Massachusetts case against Brima Wurie, the court ruled that smart phones and cell phones cannot be searched without a warrant. Chief Justice Roberts said that "we cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime".

The Court in its unanimous decision said "Privacy comes at a cost". The California case involved an extensive search of the phone while the Massachusetts case involved a search aimed only at incoming calls and addresses.

The Court has now solidly shown its intent to secure privacy rights. Police now need a warrant to attach a GPS to a suspect's car and to bring a drug-sniffing dog up to the door of a suspects house, but do not need a warrant to swab a suspect's cheek for DNA to put into an unsolved crime data base. As technology advances creating new 4th Amendment issues for police to solve, there will likely be more decisions from the Supreme Court that will limit the ability of police officers to investigate crime.

**Prado Navarette v. California (2014) 134 S. Ct 1683.** An anonymous tip is sufficient for an investigatory stop according to a 5-4 decision of the Supreme Court. An unnamed caller contacted police about a silver Ford F-150 that almost ran the caller off the road. The truck was stopped, the smell of marijuana was strong, and a search of the driver, passenger and truck found four bags of pot. The California courts sided with the cops as did the U.S. Supreme Court, holding that the totality of the circumstances justified the stop even though the tipster was anonymous. The tipster identified the make, model, and license plate and claimed firsthand knowledge of reckless driving. The Supreme Court ruled that there were "appropriate circumstances" to justify a brief detention to corroborate or dispel suspicion.

**State v. Nguyen (2013) WL 683501 N.D.** Unlike a single family home, apartment tenants do not have an expectation of privacy in the common hallways and shared spaces of an apartment building. Even though the bad guy had a key to the common hallway door, he could not restrict access to others letting in visitors or delivery persons. Even though the cops might be considered trespassers because they followed someone into the locked area, the court still held there is no expectation of privacy in the area where they trespassed.

**U.S. v. Christy (10th Cir 2014) WL 26455** Illegally seized evidence need not be suppressed if the state convinces the Court that the evidence would inevitably have been discovered by lawful means.The Court in this case held that the "inevitable-discovery doctrine" requires only that the lawful means of discovery be independent of the constitutional violation.

In this case the cops could observe through a window to the house an adult having sex with an under age girl who had been transported across state lines. While the Trial Court agreed the cops lacked justification to make a warrantless entry, the Court reasoned under the inevitable discovery rule as set forth in Nix v. Williams, 467 U.S. 431 (1984 Supreme Court) that the officers would have obtained a search warrant even if they had not entered. Therefore the charges of child pornography were not suppressed.

**Barnard v. Theobald (9th Cir 2013) LEXIS 13415.** Jury awarded 2 million dollars to man who alleged excessive force was used to arrest him. Officers claim that use of a chokehold and chemical spray was the amount of force necessary to arrest. The argument was rejected by the Appellant Court who reasoned the officers were only entitled to use force reasonably necessary and not "any force". The fact the plaintiff suffered 5 collapsed vertebrae in his spine seemed to suggest to the Court that the force used was unreasonable.

**Thomas v. Holly (4th Cir 2013) U.S. App. LEXIS 14437.** A North Carolina officer acted in an objectively reasonable manner when firing a taser in the dart mode after warning bad guy who's crime of property destruction was not a minor crime.

A second officer, who used his taser three times in the dart mode while the bad guy lay prone and unarmed on the ground with an officer sitting on his back, was found not to have used excessive force since the arrestee was not effectively secured. The taser was also used several times in the stun mode before the suspect was handcuffed and that was also found not to be excessive force.

**Arnold v. Buck (2013 U.S. District) LEXIS 108629.** The use of a taser during a pursuit of a tire slasher was reasonable as the officers were aware he had a knife, he was argumentative and fled and disobeyed orders to stop. The use of the taser after the bad guy was subdued was a constitutional violation.

**George v. Morris (2013 9th Cir) LEXIS 15579**.Officers were not entitled to immunity for fatally shooting a 64 year old homeowner on the patio of his home even though he was armed with a gun. The bad guy was walking with the use of a walker and his gun was pointed at the ground. The Court reasoned a jury could find the bad guy had not posed an immediate threat to officer 's safety in this domestic disturbance call.

**Tourie v. Weber County (2013 Utah) LEXIS 120.** Officers engaged in a high speed pursuit owe a duty of care to all persons, even fleeing suspects who are driving to 100 mph.

**DRIVERS CONSENT FOR SEARCH TRUMPS PASSENGER'S OBJECTION**

**State v. Copeland (2013) WL 1909157 (Texas Crim. App. 2013**).Cops saw a man and woman drive away from a drug house. The car was stopped for a traffic violation. The driver consented to a search of the car, the passenger (common law wife) objected to the search.

The trial judge suppressed the drugs found in wife's possession. (She claimed she was holding them for a friend). Reasoning that the case of GA v. Randolph 547 U.S. 103 (2006), controlled when the United States Supreme Court held that one resident's objection to a residential search trumps another resident's consent to search.

The Appellate Court declined to equate a car with a person's castle. Vehicles have less constitutional protection than homes. The Court reasoned that unless the occupants of the car who objected to the search, fell within some "recognized hierarchy" (maybe owner but not driver?) society recognizes the superior legal right in a car is held by the driver not the passenger.

**EXIGENT CIRCUMSTANCES**

**Turrubiati v. State (2013) WL 1438172 (TX Criminal App 2013).** The Texas Appellate Court held that the mere odor, plus knowledge of police presence did not create exigent circumstances to justify a warrantless entry.

The officer claimed the warrantless entry was necessary to prevent the bad guy from destroying evidence. Courts now seem to be suggesting after the King decision, that additional evidence of imminent destruction must be necessary to justify warrantless entry (sounds of toilet flushing, running feet?).

Talk with your local District attorney or United States Attorney and seek their guidance. The recent cases suggest that Kentucky v. King's ruling is in the process of being redefined by other courts.

**UPDATE TO KENTUCKY V. KING**

**EXIGENT CIRCUMSTANCES**

**State v. Campbell (2013) WL 1850747 (Kansas 2013).** Officers responded to a noise complaint at apartment of bad guy. Officer could smell marijuana coming through an open window. The officer covered the peep hole in front door and knocked. Bad guy came to the door holding a gun. The cop hit the door hard forcing it open and secured the bad guy and two other occupants. A search of the apartment found a gun, marijuana and a bong.

The bad guy sought to suppress evidence based upon a warrantless search claiming the officer created the exigency by covering the peep hole. The Kansas Supreme Court held the officer exceeded the scope of implied consent to approach and knock on the apartment door when he prevented the bad guy from seeing who was at the door. The court stated they did not fault the officer for protecting his safety but stated the preceding act of covering the peep hole was unreasonable and violated the 4th Amendment.

**DNA SAMPLES FROM SOMEONE ARRESTED**

**ON SUSPICION OF A VIOLENT CRIME**

**Alonzo King v. Maryland (June 2013).** A Supreme Court's decision's (5-4) upheld a Maryland law that allows a DNA cheek swab that would be matched against a nationwide DNA data base for unsolved crimes. The Maryland Court of Appeals ruled the DNA sample violated the 4th Amendment which requires probable cause.

Justice Kennedy agreed with the State that argued that DNA sampling was allowed to confirm identity as well as an invaluable tool to solve cold cases. Kennedy felt there was little difference between a DNA swab and finger printing.

The Maryland law applies only to those arrested on suspicion of violent crimes or burglary and the samples must be destroyed if charges are dismissed.

In a strongly worded dissent, Justice Scalia contended the court has opened the door to wider use of mandatory DNA sampling and warns that it won't be long before if you are ever arrested your DNA can be entered into a National Database despite the safeguards in the Maryland law.

**TRASH SEARCH/WHAT CONSTITUTES CURTILAGE**

**Commonwealth v. Ousley, (2013) WL 1181956**. An informer told cops the bad guy was selling meth. An officer went to the side of the bad guy's townhouse and took garbage bags from trash containers that had not yet been taken to the curb for collection. Meth residue in plastic bags was found in the trash, a warrant was obtained and the bad guy appeals saying the trash was still stored within the curtilage of the home and could not be searched without a warrant. The courts have disagreed on whether trash not yet taken to the curb is subject to a warrantless search.

While police have been given some guidance regarding what constitutes the curtilage of a home (U.S. v Dawn, 480 U.S. 294) where the Supreme Court suggested four factors: (1) whether the area is included in an enclosure with the home; ( 2) whether the resident has taken steps to prevent observation from people passing by; (3) how the area is used; (4) the area's proximity to the home, the Supreme Court has now given further guidance in this case and suggested that in most cases if the trash is still within the curtilage of the home, it should not be searched without a warrant. The court did not address trash readily accessible to the public but not yet put out for collection. Like its decision in the Fla v. Jardines case, the Supreme Court seems to be saying that once you enter the curtilage of a home there is greater protection to the bad guy under the 4th Amendment . (Get clear direction from your legal officer on how to proceed in your state).

**CANINE SNIFF- FRONT DOOR MAY BE CURTILAGE**

**Jardines V. State, (March 2013).** The U.S. Supreme Court has ruled that police may not bring a drug sniffing dog onto a suspect's property to look for evidence without first getting a search warrant.

The High Court split 5-4 to uphold the Florida Supreme Court ruling that threw out evidence seized when a drug dog had a positive hit on the front door of the bad guy's house and a warrant was obtained based on upon that alert.

Justice Scalia said "the police can't, without a warrant, hang around on the lawn or side garden trawling for evidence...the front porch is the classic example of an area intimately associated with the life of the home and is part of the curtilage."

**SEARCH WARRANTS**

**Bailey v. U.S. (2013) WL 598438.** The Supreme Court has reversed the lower court and ruled that officer's may not stop and detain persons who have just left the search warrant target premises and are some distance away. The Supreme Court said in ruling against the cops "once an individual has left the immediate vicinity of a premises to be searched, detectives must be justified by some other rationale". The court did not clearly define what is meant by immediate vicinity. Is it line of sight? A particular distance? Those questions will go back to the Court of Appeals to provide an answer.

**SEARCH AND SEIZURE**

**State v. Howell (2012) WL 527851**. The bad guy sought to suppress 2 pounds of weed found when the officer cut open a gift wrapped package found in the back of the bad guy's car.

Courts have held that a consent to search a vehicle and its trunk would not include breaking open a locked brief case in the trunk (Fla v. Jimeno). Other courts have held that officers' should consider whether damaging a package destroys the utility of the package or its contents.

The court in this case held that the cops did not exceed the scope of the consent because the gift wrapped package was not equivalent to a locked container and was not destroyed and the consent was not withdrawn.

**DRUG DOG**

**Florida v. Harris (2013) WL 598440**. The U.S. Supreme Court has overturned the Florida Supreme Court's decision that held that a dog alert by a trained and certified dog is not enough to establish probable cause to search the interior of a car and the driver. The U.S. Supreme Court said that the Florida court "flouted well established principles of probable cause when it created an inflexible check list for the State to satisfy in order to establish that a detector dog's final response provided probable cause to search a vehicle".

The U.S. Supreme Court held that if the dog is certified and tested and under goes continuous training, the courts should presume the dog's final response provides probable cause to search.

**Note:** Be sure the dog teams certification is from a "bona fide" certifying organization that uses single blind testing and that the team under goes regular training.

**HIGHWAY TRAFFIC STOP**

**U.S. v. Cochrane (December 2012).** Sixth Circuit held no constitutional violation during a traffic stop where officer's first asked about the presence of drugs and guns before they asked for a driver's license.

The Sixth Circuit Court of Appeals held that the stop was not unreasonably prolonged by extraneous questions unrelated to the purpose of the stop (failure to have front license plate) ruling that the questions did not measurably extend the duration of the stop. The court went on to state that there is "no rule that officers must ask questions in a certain order" (they asked about contraband before asking for his license). The court found the duration and scope of the stop was reasonable and not a 4th Amendment violation.

**RUSE DRUG CHECK POINT**

**U.S. v. Neff 681 F 3d 1134 (10th Cir. 2012).** A road block checkpoint sign indicating a drug detector dog was in use, was placed on a rural highway. There was no road block.

The bad guy saw the sign and exited the highway onto a gravel road. The cops stopped him and he appeared nervous. He had 7 kilos of cocaine.

This court held that the cops may not rely solely on a driver's decision to use a rural or dead exit following check point signs. The court stated the cops must identify additional suspicious circumstances or independently evasive behavior to justify stopping a vehicle that uses an exit after ruse drug checkpoint sign.

**FACEBOOK SEARCH**

**U.S. v. Meregildo (2012) Case 1: 11 C R 00576.** Bad guy moves to suppress evidence seized

from his facebook account pursuant to a warrant. Cops used one of bad guys "friends" to gain access to the bad guy's private profile.

When social media user disseminates his postings to the public they are not protected by the 4th Amendment (Katz 389 U.S. at 351). Postings using more secure private settings may be constitutionally protected.

The cops viewed the bad guys profile using a cooperating witness who was a "friend" on his facebook account. This did not violate the 4th Amendment as the bad guy had no justifiable expectation that his "friends" would keep his profile private.

**CONSENT TO SEARCH**

**People v. Strimple, WL 130870 (Colorado, 2012).** Girlfriend's consent to search valid after boyfriend taken from house. Cops responded to domestic dispute. Boyfriend said no to search but then gave the o.k. Cops found gun during protective sweep and arrested boyfriend and took him to jail. Girlfriend told cops of other guns in home and asked officers to search. They found guns and drugs and boyfriend claims the search was unconstitutional. The court ruled only "an express refusal by a physically present resident could defeat consent by another resident", consent valid.

**WARRANTLESS PLACEMENT OF GPS**

**United States v. Jones, United States Supreme Court (January 2012**). After obtaining a warrant to place a GPS tracker on the bad guy's car within 10 days, the cops placed the GPS on the car on the 11th day while parked in a public parking lot. Over the next 28 days, they used the device to track all movements and replaced the battery on the GPS one time. Based in part on the information obtained from monitoring the car's movements, the government obtained a multiple count indictment and conviction of Jones for conspiracy to distribute and possess 5 kilos of coke.

The bad guy filed a motion to suppress and the district court reversed his conviction because the evidence was obtained by a warrantless use of a GPS in violation of the Fourth Amendment.

The US Supreme Court held "we have no doubt that such a physical intrusion (placing the GPS tracker on the car for 28 days) would have been considered a search within the meaning of the Fourth Amendment".

**SEARCH OF EVERYONE IN A GROUP**

**Williams v. Commonwealth of Kent, (2011).** Search of all not generally allowed but due to officer safety concerns where a group is "hanging out" with persons who are openly violating the law, a brief detention and search may be justified.

**RIGHT TO RECORD POLICE ACTION**

**Glik v. Canniffer, (12th Cir., 2011, Mass).** The public has a right to record police action in a public place as long as they do not interfere with the ongoing investigation. Question: Does this mean the public can film an officer who is working undercover? Couldn't such filming pose both an officer safety concern as well as interference with an ongoing investigation?

**COMPUTER SEARCHES**

**United States v. Stabile, Fed. 3d (2011), Westlaw 294036 (3d Cir., 2011).** Secret service agents looking for evidence of financial crimes searched a computer belonging to the bad guy with permission of his presumed spouse. The search revealed material for making counterfeit checks and a warrant was obtained. In looking for evidence of financial crimes the officer highlighted a file that apparently contained videos of child porn. A second search warrant was obtained to search the files containing child pornography.

A number of courts are trying to create limits on the application of the Plain View Doctrine to computer searches. The item may be seized under the Plain View Doctrine if three factors are present: (1) the initial intrusion is lawful; (2) the item seized is in actual plain view; and (3) the incriminating nature of the item is immediately apparent. Some courts have held that a search should be limited by using narrow search terms. *See* U.S. v. Carey, 172 Fd. 3d 1268 (10th Cir.) States v. Mann, 592 Fed. 3d 779, 7th Cir. (2010). This case reminds officers that when a suspicious file is located that is outside the scope of the initial search warrant it is always better to obtain a second warrant.

**SEARCH AND SEIZURE**

**Kentucky v. King (2011) Westlaw 1832821.** Sometimes cop-created exigent circumstances will justify a warrantless entry. The Supreme Court has just ruled that the Exigent Circumstance Doctrine will justify a warrantless entry even when police create the exigency so long as the police do not violate or threaten to violate Fourth Amendment rights. Justice Alito, for the majority, stated “warrantless searches are allowed when circumstances make it reasonable within the meaning of the Fourth Amendment to dispense with a warrant requirement.”

In this case, cops saw King, the bad guy, go into an apartment building after buying drugs in an undercover operation. Police went to the apartment door and could smell marijuana. The cops knocked on the door and identified themselves as police officers. They could hear movement in the apartment. No one answered the door. Believing evidence was being destroyed inside the officers kicked in the door and entered. They found one bad guy smoking marijuana and saw coke in plain view. The bad guy was convicted of selling drugs and being a habitual offender. The Kentucky Supreme Court reversed the conviction holding that exigent circumstances do not apply because the police should have known that their own conduct of knocking and announcing would prompt the occupants to destroy evidence. It was the Kentucky Supreme Court’s view that police created the exigency. The U.S. Supreme Court saw the case differently.

Remember, the Exigent Circumstance Doctrine allows police to enter a home to prevent imminent destruction of evidence even if they don’t have a warrant but they must have probable cause.

Many state courts disapprove of warrantless entries following a police-created exigency. The Supreme Court in the King case held that occupants who choose not to stand on their constitutional rights, but instead elect to attempt to destroy evidence, have only themselves to blame for the warrantless exigent circumstance search that took place.

The officers in this case merely knocked on the door and announced their identity. Those acts did not violate the Fourth Amendment and their conduct was lawful.

Caution: the King decision does not mean that if cops knock on a door of a home, sense movement, and no one answers, that a warrant requirement is excused. The Supreme Court footnote stated very strongly that “in most circumstances the Exigent Circumstance Rule should not apply where the police, without a warrant or other legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted.”

**FRISKING ALL GROUP MEMBERS**

**Williams V. Commonwealth of Kentucky, WL 5877781 (2011).** Frisk of all group members allowable when crime being openly committed. Bad guy was with group of friends, some of whom were smoking weed. Bad guy was not seen smoking weed. A frisk of guys smoking weed found guns on two members of group. Cops then frisked bad guy and found gun on him (convicted felon). Bad guy argued frisk of him unconstitutional because there was no suspicion particular to him. Kentucky court disagreed. They held police had reasonable suspicion to detain entire group and seeing bulge in bad guy's pants led to valid frisk. Remember frisks of all persons present at crime scene not usually allowed but a detention may be justified where someone is hanging out with others who are openly violating the law.

**PROTECTIVE SWEEP**

**State V. Manuel, WL 6372855 (2011).** Protective sweep of area adjacent to arrest of bad guy can include lifting the mattress and looking under beds since officers testified they routinely do so to search for anyone who could potentially pose a damage to the officers.

**Belloitte v. Edwards, 629 Fed. 3d 415, 4th Cir. (2011).** Police suspected a bad guy of being involved in child porn because of photographs he had developed at a Wal Mart. They determined the bad guy and his wife had concealed carry permits and convinced a judge to give them a no-knock warrant to search the house for evidence of child pornography.

The Court ruled there was no exigent circumstances justifying a no-knock entry. They reasoned that a single photograph of alleged child pornography didn't show the bad guy was a danger to police executing the warrant and there was no evidence that the bad guy and his spouse had violent tendencies, and went on to say that the concealed weapon permit should have revealed to the police that the bad guy had passed background checks. While the officers prevailed at the lower Court, the Appellate Court ruled that the civil rights action filed against the officers for excessive force could continue.

**PROFILING**

**United States v. Ramos, Fed. 3d (2010), 1st Cir. (2010), WL 5129826.** The bad guy was parked in a van at the Massachusetts Bay Transit Authority Bus and Train Station. An employee of the Transit Authority noticed the van parked in a peculiar place and noticed that there were several men in the van who appeared to have a Middle Eastern complexion. A few days before bombs had been detonated in a Madrid, Spain train station killing nearly 200 people. The police were called and detained the van driver and its occupants. The van driver was smuggling illegal aliens. The van driver argued that there was no reasonable suspicion for his detention and that it was done solely based upon his skin color.

The Court disagreed. It held that the threat from persons likely to have a particular appearance such as being Middle Eastern was a reasonable factor for officers to consider. The Court noted the officers were following up on a situation on the heels of a major terrorist bombing that happened at a major transit hub. The Court warned that officers should never engage in racial profiling but also should not discount race or ethnicity. The Court ultimately held the officers effectively connected known criminal behavior, present threats and other suspicious factors including the description of the suspect they detained.

**INVENTORY SEARCH OF VEHICLES AND CONTENTS**

**U.S. v. Mundy, Fed. 3d (3rd Cir., 2010).** When impounding a vehicle it is critical that a department have a sufficiently detailed policy governing the inventory process and that the officers performing the inventory be trained in the policy and follow it precisely.

Mundy was stopped for a traffic violation and the officers realized the VIN & plate showed the car was not registered. They impounded the vehicle. The written inventory policy required that the officers conduct a vehicle inventory describing any damage to any equipment, personal property of value left in the vehicle, including the trunk area if accessible. The written policy stated no locked areas including the trunk should be forced open while conducting the inventory. The Philadelphia police officer followed the written policy, opened the trunk with a key, and found a plastic bag. Inside the bag was a shoebox containing two bags of coke. A subsequent search warrant based upon the coke found during the inventory led to the discovery of more coke. The bad guy challenged based upon the Fourth Amendment setting forth the argument that the Philadelphia Police Department Police Department policy, while allowing inventories of impounded cars, did not guide officers on how to deal with closed containers.

**South Dakota v. Opperman, 428 U.S. 364 (1976) and Colorado v. Bertine, 479 U.S. 367 (1987),** Both addressed the issue of when police may inventory the contents of closed containers found in vehicles lawfully taken into custody. In those cases the Courts held that inventory fulfills three government interests: (1) it protects the owner's property while it is in the custody of the police; (2) it insulates the police from claims of lost, stolen or vandalized property and (3) it guards the police from danger.

In this case the Court of Appeals held that inventory was guided by sufficiently detailed policy. The written policy giving the officers the right to search all accessible areas of the vehicle, including the trunk, provided that they could do so as long as they did not force open either the trunk or locked container. The cocaine was found in a plastic bag in the trunk, the warrant was obtained and the search was thereafter admissible.

All police agencies should ensure that their policies are tailored to both Federal and State Court decisions pertaining to inventory searches.

**CASUAL ENCOUNTER/RUNNER/SEARCH OF BAG**

**United States v. Perdoma, U.S. App. LEXIS 19066 (8th Cir., 2010).** Perdoma, the bad guy, was observed by a drug task force officer entering a bus station with only a small bag as luggage. The task force officer followed him, watched him produce his wallet and buy a ticket, and then approached the bad guy and asked to speak with him. The officer asked to see the bad guy's wallet and identification. (Note: many states would not allow a stop and id procedure) The bad guy smelled of marijuana. The task force officer noted that the bad guy was clearly nervous and sweating. The bad guy took off running and was chased down by the task force officer. He had a small amount of marijuana in his pocket. He was placed under arrest. The bag he was carrying was searched and revealed a pound of meth. The bad guy argued the search of the bag incident to his arrest was barred by Arizona v. Gant, 129 Sup. Ct. 1710 (2009). In Arizona v. Gant the Supreme Court held that police may search a vehicle incident to arrest of an occupant only in two circumstances: (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and (2) when it is reasonably believed that relevant evidence to the crime might be found in the vehicle. In Gant, the driver had been handcuffed and secured in a police car and the search incident to the arrest was not justified by safety rationale.

A large number of State Courts have emphasized the unique limiting factors in Gant. In this case, a search incident to the arrest happened near where Perdoma was apprehended and he had already run once. The officers didn't know how strong the bad guy was or whether he could fight them and gain access to a weapon that might be hidden in the bag. The Court in Perdoma stated that whether an officer has exclusive control of a seized item does not determine whether the item remains in the area for which the arrestee might gain possession of the weapon. The Court rejected the notion that an officer's exclusive control of an item necessarily removes the item from the arrestee's area of immediate control. Perdoma's argument that the search of the bag incident to the arrest is barred by Arizona v. Gant was rejected by the 8th Cir.

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