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Case Laws

Michigan v. Clifford, 46 U.S. 287, 104 S. Ct.641 (1984)

Michigan v Tyler, 436 U.S. 499, 98 S. Ct. 1942 (1978)

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McLaughlin v. Commonwealth of Virginia, No.1187-14-1. (November 17, 2015)

Goodwin v. Commonwealth of Virginia, No.0190-14-3, (February 03, 2015)

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Terry Frisks and the Totality of the Circumstances

By Brian Batterton

Many officers are of the belief that if they have the legal right to detain a suspect, they can automatically frisk that suspect "for officer safety." However, in 1968, the United States Supreme Court held that an officer may conduct a limited search (frisk) of a suspect for weapons when the officer reasonably believes that the suspect, who is detained pursuant to a lawful investigatory detention, is armed and dangerous.[i] Specifically, the court, in *Terry* held

> Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, ...he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[ii]

Thus, there are two requirements in order to frisk a suspect. First, the suspect must be lawfully detained during an investigative detention. This means that the detention must be based upon reasonable suspicion that criminal activity is afoot. Reasonable suspicion is simply specific, articulable facts combined with the rational inferences from these facts, and taken in light of an officer's training and experience, that leads an officer to believe criminal activity is occurring or has just occurred.[iii]

Second, the officer must have a reasonable belief that the suspect is armed and dangerous. This reasonable belief can come from a variety of factors. For example, the type of crime that an officer is investigating may be inherently dangerous, such as the possible armed robbery in *Terry*. Therefore, it would follow that, if an officer had reasonable suspicion that a particular suspect is involved in a crime that involved a weapon (i.e.: armed robbery, murder, assault with a deadly weapon, etc...), the officer would be entitled to frisk that suspect. Additionally, many courts have held that weapons are tools of the drug trade; therefore, if an officer has reasonable

suspicion that a suspect is dealing drugs, the officer likewise can reasonably infer that the suspect may be armed and dangerous.[iv] Additionally, officers, in order to lawfully conduct a frisk, may rely on information from citizens, the type of area the suspect is in (i.e.: high crime, known for weapons), bulges in clothing, and behavioral indicators that a suspect may be armed. Everything should be considered and documented because the determination of reasonable suspicion is very fact specific and dependant upon the totality of the circumstances. Therefore, officers should document every fact that he or she is aware of, even seemingly innocent facts at the time, in order to provide a full picture of the totality of the circumstances that the officer relied upon in order to justify a frisk.

Now, assuming that an officer has a suspect lawfully detained, and also has a reasonable belief that a suspect is armed and dangerous, the officer may conduct "a limited search of the outer clothing of [the suspect] in an attempt to discover weapons..."[v] This "limited search" is characterized by some courts as a two part process: (1) the officer is entitled to pat down the exterior of the clothing of a suspect and (2) if the officer feels an object could be a weapon he may intrude into the clothing and seize the object.[vi]

On February 14, 2008, the Third Circuit Court of Appeals decided a case that illustrates the totality of the circumstance analysis that the courts will use to analyze whether a frisk was lawful. The *United States v. Headen* began when an ATF Agent with 15 years of experience and a Philadelphia Police Detective with 10 years of experience were working together in a violent crime unit in the southwest and west area of Philadelphia.[vii] They received a tip from an informant who had provided accurate information in the past, that Allen Headen and Dorian Thompson were planning a retaliatory shooting of a rival gang member. The informant said that Headen and Thompson were in a blue mini-van and were armed. A few hours later, the informant called back and directed the agents to a particular location where the van was located.

The agents found the van and it was unoccupied. They noted the registration was expired and the registered owner was named Rodney Smith. The agents called the informant, and he confirmed that Headen and Thompson were acquainted with Smith. He also told the agents that they should wait and the men would be returning to the van.

The agents contacted additional units and waited. When Headen and Thompson returned, Thompson got into the drivers seat and Headen the passenger seat. As Thompson drove off, the agents attempted to stop the suspects based on the information provided and because of the registration violation, and a broken tail light. Thompson tried to flee, but the agents were able to force him to stop. Thompson was removed from the van and frisked; he was not carrying a gun, but he was wearing body armor. Headen door was opened and an agent frisked his waistband area. He felt a hard, L-shaped object in his waistband. Based on the feel of the object and the informant's information, the object, which turned out to be a handgun, was seized. Headen was removed from the car and checked Headen's pockets, locating another loaded handgun.

Headen argued that the stop and frisk of his person was not based on valid reasonable, articulable suspicion and the frisk was unlawful. First, it should be noted that that the agents had an objective reason, particularly the expired registration and equipment violation to stop the car. Therefore, even if the stop was pretext for the investigation of another crime, the stop would still be objectively reasonable.[viii]

However, even in light of the above traffic law violations, the Third Circuit Court of Appeals held that the agents, based on the information provided by the informant, and their personal observations, had reasonable suspicion to both stop and frisk Headen and Thompson.

The court reasoned that the agents were part of the area Violent Crime Impact team and both had extensive and special knowledge of the high crime nature of that area. They also had knowledge of Headen and Thompson. The court also considered that the informant had provided accurate information in the past and information that he provided in this case had been corroborated by the agents observations. Particularly, Headen and Thompson did return to the blue mini-van that the informant advised they would be in. The informant also corroborated that the van was registered to Rodney Smith, and that Headen and Thompson were acquaintances of Smith. Lastly, Thompson, the van's driver, took evasive actions when approached by the agents. The court reasoned that these facts all justified the stop of Headen and Thompson. Further, these facts in addition to the officer's knowledge that this is an area known for guns and violent crime, and the additional information from the informant that Headen was armed, in light of all of the other factors and corroboration of the informant, was sufficient to justify a frisk of Headen and Thompson.

In conclusion, the determination of whether reasonable suspicion exists to justify and stop and a frisk of a suspect is not rigid concept. According to the U.S. Supreme Court, reasonable suspicion is based upon "the totality of the circumstances – the whole picture."[ix] Therefore, reasonable suspicion is based on a variety of factors such as specialized knowledge of the officers, investigative inferences, personal observations of suspicious behavior, and information from other sources.[x] In light of the variety of factors the courts will consider in a determination of reasonable suspicion, officer should be thorough and detailed in documenting every detail of the incident in their report.

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[i] *Terry v. Ohio*, 392 U.S. 1, 27 (1968)
[ii] *Id.* at 30
[iii] *Id.* at 21
[iv] *United States v. Trullo*, 809 F.2d 108 (1st Cir.), cert. denied, 482 U.S. 916 (1987); *Hayes v. State*, 202 Ga. App. 204 (1993)
[v] *Terry*, 392 U.S. at 30
[vi] *Thomas v. State*, 231 Ga. App. 173 (1998)
[vii] No. 06-3965, 2008 U.S. App. LEXIS 3252 (3rd Cir. 2008)(unpublished)
[viii] *Whren v. United States*, 517 U.S. 806 (1996)
[ix] *United States v. Sokolow*, 490 U.S. 1, 8 (1989)
[x] *Headen*, No. 06-3965 at 6

United States Supreme Court
Maryland v. Shatzer

Miranda Based Custody Following an Invocation of Rights - *Expires After 14 Days* -

March 2010

Article Source: http://www.llrmi.com/articles/legal_update/us_miranda_custody_2010.shtml
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 Under *Miranda v. Arizona*[i], a person subject to a custodial interrogation has several options. The person can waive their rights and talk to the police, they can invoke their right to silence or they can invoke their right to counsel. The most stringent right that a person can assert is their right to counsel. The invocation of the right to counsel has been addressed by the United States Supreme Court in the *Edwards/Roberson/Minnick* line of cases.

In *Edwards v. Arizona*[ii], officers arrested Edwards and read him his rights under Miranda. He waived his rights. After a while, Edwards said he wanted an attorney. The police ceased questioning. The next day, officers went to the jail re-read Edwards his rights under Miranda, and began questioning him again. Edwards confessed. The issue before the court was whether officers can reinitiate contact with a person who has previously invoked his right to counsel. The Supreme Court held that police could not reinitiate contact with Edwards because he invoked his right to counsel. The purpose of this rule was to prevent the police from "wearing down" an in custody suspect by repeated interview attempts. Thus, **an in custody suspect who states that they wish to communicate with police through an attorney may not be re-approached by the police for an interview.** If the police reinitiate contact with the suspect, the court will presume any statements made are involuntary. The only way to re-interview this person is with their attorney present or if the suspect initiates contact with the police.

The Supreme Court extended the *Edwards* rule in *Arizona v. Roberson.*[iii] Roberson was arrested at the scene of a burglary. He was given his *Miranda* warnings and he said that he wanted an attorney. Three days later, while still in custody, and without a lawyer, a different officer contacted Roberson at the jail to interview him about a different crime. This officer was unaware of Roberson's prior invocation of his right to counsel. The officer provided Roberson his *Miranda* warnings and he agreed to speak. He then made incriminating statements about the new crime. The issue before the court

was whether *Edwards* rule would prevent a different officer from approaching an in-custody suspect about a different crime after a suspect had previously invoked his right to counsel. The Court held that **the invocation of the *Fifth Amendment* right to counsel by a suspect that is custody prevents any officer from approaching the defendant about any crime unless the suspect has a lawyer present.**

In *Minnick v. Mississippi*[iv], Minnick was wanted for murder in Mississippi and he was arrested in California. The day after his arrest, two FBI agents went to the jail to interview him. They advised him of his rights under *Miranda*, which he waived. He initially spoke to the agents but later told them to come back after he had a lawyer. The agents properly stopped their interview. Three days later, after Minnick had consulted with a lawyer, a deputy arrived to interview him. Jail personnel summoned Minnick and told him that he "had to talk to the sheriff. They also told him that he could not refuse. Minnick spoke to the deputy without his lawyer present but refused to sign a *Miranda* waiver of rights form. He made incriminating statements. The issue before the Supreme Court was whether the police could re-initiate contact with a suspect who invoked his right to counsel and had an opportunity to consult with counsel, even though counsel was not present for the new interview. The Supreme Court held that "**when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.**"[v]

The United States Supreme Court provided further interpretation of the *Edwards* rule on February 24, 2010 in ***Maryland v. Shatzer.***[vi] The facts of *Shatzer*, taken from the case are as follows:

> In August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department referred to the department allegations that respondent Michael Shatzer, Sr., had sexually abused his 3-year-old son. At that time, Shatzer was incarcerated at the Maryland Correctional Institution-Hagerstown, serving a sentence for an unrelated child-sexual-abuse offense. Detective Shane Blankenship was assigned to the investigation and interviewed Shatzer at the correctional institution on August 7, 2003. Before asking any questions, Blankenship reviewed Shatzer's *Miranda* rights with him, and obtained a written waiver of those rights. When Blankenship explained that he was there to question Shatzer about sexually abusing his son, Shatzer expressed confusion -- he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated. Blankenship clarified the purpose of his visit, and Shatzer declined to speak without an attorney. Accordingly, Blankenship ended the interview, and Shatzer was released back into the general prison population. Shortly thereafter, Blankenship closed the investigation.
>
> Two years and six months later, the same social worker referred more specific allegations to the department about the same incident involving Shatzer. Detective Paul Hoover, from the same division, was assigned to the investigation. He and the social worker interviewed the victim, then eight years old, who described the incident in more

detail. With this new information in hand, on March 2, 2006, they went to the Roxbury Correctional Institute, to which Shatzer had since been transferred, and interviewed Shatzer in a maintenance room outfitted with a desk and three chairs. Hoover explained that he wanted to ask Shatzer about the alleged incident involving Shatzer's son. Shatzer was surprised because he thought that the investigation had been closed, but Hoover explained they had opened a new file. Hoover then read Shatzer his *Miranda* rights and obtained a written waiver on a standard department form.

Hoover interrogated Shatzer about the incident for approximately 30 minutes. Shatzer denied ordering his son to perform fellatio on him, but admitted to masturbating in front of his son from a distance of less than three feet. Before the interview ended, Shatzer agreed to Hoover's request that he submit to a polygraph examination. At no point during the interrogation did Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one.

Five days later, on March 7, 2006, Hoover and another detective met with Shatzer at the correctional facility to administer the polygraph examination. After reading Shatzer his *Miranda* rights and obtaining a written waiver, the other detective administered the test and concluded that Shatzer had failed. When the detectives then questioned Shatzer, he became upset, started to cry, and incriminated himself by saying, "'I didn't force him. I didn't force him.'" After making this inculpatory statement, Shatzer requested an attorney, and Hoover promptly ended the interrogation.

The State's Attorney for Washington County charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance.[vii]

Shatzer filed a motion to suppress his 2006 statements arguing that his interview violated the Edwards rule because he had invoked his right to counsel. The trial court denied the motion to suppress because it found that, for *Miranda* purposes, there had been a break in custody. The statements were admitted at trial and Shatzer was convicted. The Maryland Court of Appeals later reversed the trial court holding that the statements were not admissible because the passage of time does not end the protection afforded by Edwards.

Additionally, they held that custody in general population at a prison does not constitute a break in custody. The state then appealed to the United States Supreme Court, who granted certiorari.

The two issues before the Supreme Court were as follows:

1. Whether a break in custody allows the police to initiate contact with an in-custody suspect who has previously invoked his right to counsel and thereby ends the presumption of involuntariness established in Edwards v. Arizona?

2. Whether Shatzer's release back into the general prison population constituted a break in custody for the purposes of Miranda?

Issue One: *Does a break in custody allows the police to initiate contact with an in-custody suspect who has previously invoked his right to counsel and thereby ends the presumption of involuntariness established in Edwards v. Arizona?*

In its analysis, the Court noted first that the *Fifth Amendment* provides that "no person...shall be compelled in any criminal case to be a witness against himself."[viii] The Court then noted that, taking into consideration the *Fifth Amendment*, they adopted a series of prophylactic measures in *Miranda v. Arizona*. These measures were intended to protect a person's *Fifth Amendment* rights when he is in custody, and thus exposed to the pressures of a police dominated environment. This police dominated environment, the Court reasoned, is likely to undermine an individual's will to resist and make a statement where he otherwise would not.

Thus, *Miranda* provided a safeguard to suspects who were in custody and being interviewed by the police. However, the Court held that, when a suspect has previously invokes his right to counsel, an additional safeguard was needed, hence the *Edwards* rule. In *Edwards*, the Supreme Court held

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.[ix][Internal quotations omitted]

The rationale for the *Edwards* rule is that, after a person has invoked their right to counsel, any subsequent contact by the police may produce "inherently compelling pressures" which will make a waiver of rights be deemed involuntary.

The Court then explained that the *Edwards* rule is not a constitutional mandate but rather a "judicially prescribed prophylaxis."[x] Therefore, since the Court made the rule, the court can amend, or clarify the rule. Additionally, they noted that numerous lower courts have held that a break in custody ends the *Edwards* protection.[xi] After weighing the costs and benefits of the *Edwards* rule, the Court stated that extending the rule to protect Shatzer, as did the Maryland Court of Appeals, is not justified.[xii]

The Court reasoned

> The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested

> counsel is re-interrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.[xiii]

Thus, the Court decided that, if there is a sufficient break in custody, simply re-advising a suspect of his *Miranda* warnings will sufficiently protect that suspect's rights.

The Court then set out to decide what qualified as a sufficient break in custody. The Court remarked that it would be impractical for them to not state a specific time frame for the break in custody because law enforcement officers would face uncertainty and courts would have to decide the issue on a case by case basis.[xiv] The Court then chose 14 days as the time frame for a sufficient break in custody and reasoned

> It seems to us that period is 14 days. That provides plenty of time for the suspect to get re-acclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.
>
> The 14-day limitation meets Shatzer's concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for re-interrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its coercive effect, there will be nothing to gain by such gamesmanship -- nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his *Miranda* rights.[xv]

Therefore, the Court established a new rule regarding a suspect's invocation of his right to counsel: **If an in-custody suspect, in response to *Miranda* warnings, invokes his right to counsel, law enforcement may re-initiate contact with the suspect if the suspect experiences a break in police custody of at least 14 days. *Miranda* warnings should be re-advised.**

Issue Two: *Does Shatzer's release back into the general prison population constitute a break in custody for the purposes of Miranda?*

The standard for determining "custody" for the purposes of *Miranda* has been whether "there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."[xvi] The court noted that all forms of incarceration meet the standard for custody for *Miranda* purposes.[xvii] However, Shatzer's case brings an interesting set of facts. Shatzer was not kept in custody while the police were gathering evidence directly associated with the case that resulted in his custody. To the contrary, after Shatzer's first interview attempt in 2003, he was not contacted again about the child abuse of his son until 2006. The Court stated:

> Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.
>
> Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine -- they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.
>
> Their detention, moreover, is relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing. And even where the possibility of parole exists, the former interrogator has no apparent power to decrease the time served. This is in stark contrast to the circumstances faced by the defendants in *Edwards*, *Roberson*, and *Minnick*, whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.[xviii]

The Court then stated that **this case "illustrates the vast difference between *Miranda* custody and incarceration pursuant to conviction."[xix] Therefore, incarceration pursuant to conviction may constitute a break in custody for the purposes of *Miranda*.**

In conclusion, the Court held

> Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his March 2006 statements. Accordingly, we reverse the judgment of the Court of Appeals of Maryland, and remand the case for further proceedings not inconsistent with this opinion.

The Bottom Line

- The *Edwards* rule, as well as the holdings of *Roberson* and *Minnick* must still be followed. In each of those cases, the suspect was still in *Miranda* custody.
- Where a suspect who has asserted his right to counsel (*Fifth Amendment*) in response to *Miranda* warnings has experienced a break in custody of at least 14 days, police can re-initiate contact with the suspect and re-warn the suspect of his rights under *Miranda*.

- Incarceration pursuant to conviction may constitute a break in custody for the purposes of *Miranda*.

- This case does not change a suspect's right to counsel under the *Sixth Amendment*, which attaches after a suspect has been formally charged. The Sixth Amendment right to counsel is "offense specific" and not "custody specific." As such, a person retains this right regarding the specific charge(s) regardless of whether he is in custody or not.

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[i] 384 U.S. 436 (1966)
[ii] 451 U.S. 477 (1981)
[iii] 486 U.S. 675 (1988)
[iv] 498 U.S. 146 (1990)
[v] *Id.*
[vi] 559 U.S. ____ (2010), No. 08-680, 2010 U.S. LEXIS 1899
[vii] *Shatzer*, No. 08-680 at 4-7
[viii] *Id.* at 8 (quoting *U.S. Const., Amdt. 5*)
[ix] *Id.* at 10-11(quoting *Edwards*, 451 U.S., at 484-485

[x] *Id.* at 12
[xi] *Id.* (citing *People* v. *Storm*, 28 Cal. 4th 1007, 1023-1024, 124 Cal. Rptr. 2d 110, 52 P.3d 52, and n. 6, 28 Cal. 4th 1007, 124 Cal. Rptr. 2d 110, 52 P. 3d 52, 61-62, and n. 6 (2002) (collecting state and federal cases), but we have previously addressed the issue only in dicta, see *McNeil*, *supra*, at 177, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (*Edwards* applies "assuming there has been no break in custody").

[xii] *Id.* at 18
[xiii] *Id.* at 19-20
[xiv] Id. at 20
[xv] *Id.* at 21-22
[xvi] *Id.* at 24 (quoting *New York v. Quarles*, 467 U.S. 649 (1984)
[xvii] *Id.*
[xviii] *Id.* at 25-26
[xix] *Id.* at 28

MIRANDA WARNING NEEDED DURING "NON-CUSTODIAL" INTERVIEW?

United States v. Cavazos

February 2012

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It is well known that police must provide suspects with *Miranda* warnings for custodial questioning. Further, before questioning, the suspect must waive his *Fifth Amendment* rights after the warnings are given. However, sometimes, the specific circumstances of an interview or interrogation provide some ambiguity as to whether an interview is "custodial" or "non-custodial" for the purposes of *Miranda*. Recently, the Fifth Circuit Court of Appeals decided *United States v. Cavazos*[1] which offers police some guidance regarding whether or not an interview will be considered "non-custodial" when conducted in the suspect's residence. The facts of *Cavazos* are as follows:

> On September 1, 2010, between 5:30 a.m. and 6:00 a.m., Cavazos woke to banging on his door and the shining of flashlights through his window. U.S. Immigration and Custom Enforcement ("ICE") Agents, assisted by U.S. Marshals, Texas Department of Public Safety personnel, and Crane Sheriff's Department personnel, were executing a search warrant on Cavazos's home. The warrant was issued on the belief that Cavazos had been texting sexually explicit material to a minor female. After Cavazos's wife answered the door, approximately fourteen law enforcement personnel entered Cavazos's residence.
>
> Immediately upon entering, government agents ran into Cavazos's bedroom, identified him, and handcuffed him as he was stepping out of bed. Agents then let Cavazos put on pants before taking him to his kitchen. Cavazos's wife and children were taken to the living room. Cavazos remained handcuffed in the kitchen, away from his family, while the entry team cleared and secured the home. ICE Agents Le Andrew Mitchell and Eric

Tarango then uncuffed Cavazos and sat with him in the kitchen for approximately five minutes while other officers secured the home.

Once the house was secured, agent Tarango asked Cavazos if there was a private room in which they could speak. Cavazos suggested his son's bedroom. In the bedroom, Cavazos sat on the bed while the two agents sat in two chairs facing him. The agents asked Cavazos if he wanted the door open, but Cavazos said to keep the door closed. Agents Mitchell and Tarango informed Cavazos that this was a "non-custodial interview," that he was free to get something to eat or drink during it, and that he was free to use the bathroom. The agents then began questioning Cavazos without reading him his *Miranda* rights.

About five minutes into the initial interrogation, Cavazos asked to use the restroom. Agents then searched the restroom for sharp objects and inculpatory evidence. Once cleared, they allowed Cavazos to use the bathroom, but one agent remained outside the door, which was left slightly open so the agent could observe Cavazos. Once finished, Cavazos, followed by an agent, went to the kitchen to wash his hands, as the restroom's sink was broken. Cavazos then returned to his son's bedroom, and the interrogation resumed.

After Cavazos returned to the bedroom, officers interrupted the interrogation several times to obtain clothing to dress Cavazos's children. The officer would ask Cavazos for an article of clothing, which Cavazos would retrieve from the drawers and hand to the officer. Agents Mitchell and Tarango would then continue the questioning.

At some point during the interrogation, Cavazos asked to speak with his brother, who was his supervisor at work. The agents brought Cavazos a phone and allowed him to make the call, instructing Cavazos to hold the phone so that the agents could hear the conversation. Cavazos told his brother that he would be late for work.

Finally, the agents asked Cavazos if he had been "sexting" the victim. Cavazos allegedly admitted that he had, and also described communications with other minor females. After the interrogation was over, Cavazos agreed to write a statement for the agents in his kitchen. While Cavazos began writing the statement, an agent stood in the doorway and watched him.

Cavazos wrote his statement for approximately five minutes before agents Mitchell and Tarango interrupted him. At that point the agents formally arrested Cavazos and read him his *Miranda* rights. From beginning to end, the interrogation of Cavazos lasted for more than one hour, and the agents' conduct was always amiable and non-threatening. Subsequently, Cavazos was indicted for coercion and enticement of a child, and for transferring obscene material to a minor.[ii]

Cavazos filed a motion to suppress the statements that he made prior to receiving his *Miranda* warnings. The district court granted the motion to suppress and the government appealed.

The Fifth Circuit first summarized the law on this topic as follows:

> **"Miranda warnings must be administered prior to 'custodial interrogation.'"** United States v. Bengivenga, 845 F.2d 593, 595 (5th Cir. 1988) (quoting Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). **"A suspect is . . . 'in custody' for Miranda purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest."** Id. at 596. **"Two discrete inquires are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave."** J. D. B. v. North Carolina, 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310 (2011). **"The reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances."** Bengivenga, 845 F.2d at 596. [iii] [emphasis added]

Thus, the determination of whether a person is "in-custody" for *Miranda* purposes relies on the totality of the circumstance and does not consider the subjective (personal) views of the officer or the person being questioned.[iv]

The Fifth Circuit then looked at the relevant facts in this case. The incident began with Cavazos being awakened by officers banging at his door. His wife let the officers in and they handcuffed Cavazos while about fourteen officers searched his home. He was then un-handcuffed and told that his interview was "non-custodial." He was then separated from his family and questioned by law enforcement agents for about an hour in his home. During the questioning, he was then told that he was free to use the bathroom or get a snack but he was closely followed and monitored by officers as he did so. He was also told that he could telephone his brother but the agent made him hold his phone such that they could monitor his call.

The government argued several reasons that the court should hold that the questioning was "non-custodial" and no *Miranda* was required. First, they argued that the questioning took place in his home. The court stated that while this may often weigh in favor of an interview being non-custodial, in this case, officers made non-consensual entry into Cavazos home, handcuffed him, searched his home, and then closely monitored his movement inside his home. The court also considered case law from the First and Ninth Circuits that have held that in-home interviews under similar circumstances were held to be "custodial" for the purposes of *Miranda*.[v]

Second, the government argued that Cavazos was allowed to speak with his brother on the phone. However, the court noted that the conversation was monitored by the police which would indicate to a reasonable person that the police had sufficient control over a person to restrict their privacy. Third, the court considered the fact that the police immediately handcuffed Cavazos when they encountered him and searched his home. They found that this would indicate that the police had control or dominion over Cavazos in spite of the fact that the police later un-handcuffed him. Lastly, the government asserted that the fact that agents told Cavazos that the interview was "non-custodial" should negate the need for *Miranda*. To this, the court stated:

> Such statements, while clearly relevant to a Miranda analysis, are not a "talismanic factor." They must be analyzed for their effect on a reasonable person's perception, and weighed against opposing facts. Here, several facts act to weaken the agents' statement such that it does not tip the scales of the analysis. First, to a reasonable lay person, the statement that an interview is "non-custodial" is not the equivalent of an assurance that he could "terminate the interrogation and leave." Second, uttered in Cavazos's home, the statement would not have the same comforting effect as if the agents had offered to "leave at any time upon request." This is not to say that a statement by police to a defendant that an interrogation is "non-custodial" does not inform our decision as to the necessity of a Miranda warning when an interrogation is conducted inside the home. Instead, we recognize the "totality of circumstances" Miranda commands, and we note that statements made in different circumstances will have different meanings and differently affect the coercive element against which Miranda seeks to protect.[vi] [internal citations omitted]

The court then held that, while no single factor in this case is in itself determinative, based upon the totality of the circumstances, a reasonable person in Cavazos position would have believed that he or she was not at liberty to terminate the interview and leave. As such, the interview was custodial and Miranda was required.

The Fifth Circuit therefore affirmed the decision of the district court granting the motion to suppress.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

CITATIONS:

[i] No. 11-50094, 2012 U.S. App. LEXIS 1103 (5th Circuit Decided January 19, 2012)
[ii] Id. at 1-5
[iii] Id. at 6
[iv] Id. at 7
[v] Id. at 9 (See United States v. Craighead, 539 F.3d 1073, 1085 (9th Cir. 2008) (suppressing statements made during in-home interrogation where home was "a police-dominated atmosphere"); United States v. Mittel-Carey, 493 F.3d 36, 40 (1st Cir. 2007)

(finding in-home interrogation custodial where, inter alia, search conducted early in the morning by eight officers, and officers exercised physical control over defendant)

[vi] Id. at 11-12

PROTECTIVE SWEEPS OF RESIDENCES:

A REVIEW

Unites States v. Rebecca Jones & Kipling Jones

June 2012

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PROTECTIVE SWEEPS OF RESIDENCES: A REVIEW

By Brian S. Batterton, J.D.

On January 13, 2012, the Fourth Circuit Court of Appeals decided *United States v. Rebecca Jones and Kipling Jones*[1], which serves as an excellent review of the law related to protective sweeps of residences. The facts of the Jones' case are as follows:

> On the evening of October 28, 2008, the Cherokee County, North Carolina Sheriff's Office received a call from Mike Monteith, a narcotics officer with the Polk County, Tennessee Sheriff's Office. Monteith advised that an officer from the Bradley County, Tennessee Sheriff's Office had notified him that an individual had been admitted to a hospital in Bradley County with serious burn injuries believed to have been sustained in a meth lab explosion. Monteith investigated the incident by visiting the burn victim's house and speaking with the victim's son, who advised that his father had been "at Kip and Becky's house" earlier that day. During Monteith's visit, the victim's son received a telephone call, which the caller ID indicated was from the Jones' home phone.
>
> Based on information relayed by Monteith, four officers of the Cherokee County Sheriff's Office were dispatched to the Jones residence in Murphy, North Carolina. When the officers arrived at the Jones residence around 1:00 on the morning of October 29, 2008, they observed seven motor vehicles on the property, including a "camper," a truck, and

an "SUV." As they approached, the officers did not observe any disturbances or signs of activity within the house, which was dark except for some light apparently emanating from a television set in the living room. In response to the officers' knock at the front door, the Joneses opened the door after a few moments and met the officers on the front porch. The officers explained that they were investigating a burn victim's injuries and a possible meth lab explosion. Kipling Jones informed the four officers that he did not know anything about a burn victim or a meth lab explosion and asked the officers to leave his property.

The officers started to comply but, as they were about to leave the driveway, Officer Sean Matthews recalled that Kipling Jones might be the subject of an outstanding arrest warrant. One of the officers then confirmed by radio that there was an arrest warrant for Mr. Jones and a corresponding request for extradition from the State of Georgia. The officers promptly returned to the Jones residence to arrest Mr. Jones. On this occasion, the officers found Mr. Jones in the open doorway of the residence, informed him of the outstanding warrant, and placed him under arrest. Although Mr. Jones protested that he had already been arrested on that warrant, he did not resist. During the arrest, Rebecca Jones raised her voice to question her husband's arrest, but did not either impede the arrest or otherwise cause difficulty for the officers.

As Officer Matthews was placing Kipling Jones in handcuffs, the other officers entered the house through the front door with their handguns drawn. Officer Dustin Smith promptly informed the Joneses that the officers were going to conduct a protective sweep of the residence, explaining that this was being done for the officers' safety. The officers asked the Joneses if there was anyone else in the house, and they replied that there was not. From his vantage point on the front porch, Officer Smith did not see any indication of illegal drug activity, and he did not hear or see any movement from within the house to indicate the presence of other persons. Smith was nevertheless suspicious that others might be in the house, based primarily on his prior dealings with the Joneses, whom he had investigated at various times since 2003 as part of his duties as a narcotics officer.

During the officers' protective sweep, the Joneses were in the living room of the house. From the front door, the officers walked through the living room and the adjoining kitchen, and quickly scanned the remaining rooms but did not find anyone else in the house. Although there was a closed door leading to the basement, Officer Smith did not open it because there was a cloth along the door's bottom, possibly used to retain heat, and Smith did not believe that anyone had been through the basement doorway. Smith and the other officers noticed a number of items in plain view during their sweep. Based on his training and experience in narcotics investigations, Officer Smith believed that several of these items constituted precursor materials for the manufacture of meth. Smith also detected a strong odor that he associated with meth production. In the living

room, Smith observed a pipe containing marijuana and a pill that had been crushed into powder, lying on an end table beside the couch where Rebecca Jones had been sitting.

Mrs. Jones was also then placed under arrest for possession of marijuana, and both Joneses were transported to the Cherokee County Sheriff's Office. An officer remained at the Jones residence to secure the house until the other officers could obtain a search warrant. That afternoon, Officer Smith applied for and obtained a search warrant from the Superior Court of Cherokee County. Smith's application for the warrant specifies that he and Officer Matt Kuhn had "conducted a safety search of the [Jones] residence for other persons" and detailed the items they had observed in plain view. Later that day, the North Carolina State Bureau of Investigation executed the search warrant, seizing, inter alia, a meth mixture and drug paraphernalia.[ii]

The Jones' were subsequently indicted for federal drug violations. They each filed a motion to suppress the evidence found during the protective sweep that formed the probable cause for the search warrant. The district court denied each motion to suppress. The Jones' plead guilty with the right to appeal. They each appealed the denial of the motion to suppress to the Fourth Circuit Court of Appeals.

The issue before the court was whether, upon arresting Kipling Jones, the police possessed reasonable suspicion that there were other persons in the Jones' residence who could pose a danger to officers, thereby justifying the protective sweep of the residence.

At the outset, the Fourth Circuit noted that in 1990, the United States Supreme Court decided *Maryland v. Buie*[iii] in which they held that a "protective sweep" was a constitutionally reasonable exception to the warrant requirement of the *Fourth Amendment*. In explaining its rationale, the Supreme Court stated:

> Unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf' [where] [a]n ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." [iv]

The Supreme Court, in *Buie*, then described two constitutionally permissible types of searches of a residence, "after and while making an arrest."[v] The Fourth Circuit described these two types of searches as follows:

> First, the authorities are entitled to search "incident to the arrest . . . as a precautionary matter and without probable cause or reasonable suspicion, . . . closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Buie*, 494 U.S. at 334. Second, the officers are entitled to perform a further "protective sweep," beyond the immediately adjoining areas, when they have "articulable facts which, taken together with the rational inferences from which those facts, would warrant a reasonably prudent officer in believing that the area to be

> swept harbors an individual posing a danger to those on the arrest scene." *Id.* Such a protective sweep is circumscribed, however, extending "only to a cursory inspection of those spaces where a person may be found," and lasting "no longer than it takes to complete the arrest and depart the premises." *Id.* at 335-36.[vi]

In the Jones' case, the government does not argue that the search was "incident to arrest." Rather, the government characterizes the search as a "protective sweep", which is the second type of search described above from *Buie*. Thus, the court had to examine the facts to determine if sufficient reasonable suspicion existed that other persons who posed a threat to the officers could have been be present in the Jones' home when Kipling Jones was arrested.

The Jones' assert that there was insufficient reasonable suspicion to justify the protective sweep. They argue that there was nothing amiss at their residence either time when the police were there. They also assert that there was no apparent activity at the residence that suggested other people were present. Further, they argue that they exhibited non-threatening behavior to the officers and there was no sign of a meth lab explosion as was the original reason they came to the residence.

Regarding the Jones' arguments above, the Fourth Circuit first noted that their compliance during arrest is not relevant to whether the police had sufficient reasonable suspicion to conduct a protective sweep. The court stated:

> The linchpin of the protective sweep analysis is not "the threat posed by the arrestee,[but] the safety threat posed by the house, or more properly by unseen third parties in the house." See Buie, 494 U.S. at 336.[vii]

The Fourth Circuit then examined several facts that support the officer's belief that a protective sweep was warranted. The court noted that (1) recent surveillance of Jones' residence revealed that known drug users were frequently visiting the house, (2) some of these drug users were known to be armed, (3) information was received by officers that stated a fugitive was staying at the Jones' residence, (4) there were seven vehicles parked at the residence, and (5) the Jones' claimed nobody else was present, despite the number of vehicles.[viii]

The court then noted that there was precedent from other federal circuits, particularly the Seventh, Tenth, and Eleventh Circuits, that support the proposition that the facts above provide sufficient reasonable suspicion for the police to believe that there were other persons present who could pose a threat to the officers.[ix]

The Fourth Circuit then held:

> It was not merely the number of vehicles present at the Jones residence that made the officers' suspicions reasonable; it was the presence of the seven vehicles coupled with Officer Smith's prior surveillance of known meth users patronizing the Jones residence. Faced with the possibility that there were other persons inside the house, there was ample reason to believe that such individuals could endanger the officers' safety, in that

> the Joneses were involved in the production and distribution of meth; at least one of their patrons was known to carry a firearm; and a fugitive was reportedly staying in the residence. Such articulable facts, "taken together with the rational inferences from those facts" made by law officers, and construed in the light most favorable to the government, are more than sufficient to justify the protective sweep in this case.[x] [internal citations omitted]

Therefore, the Fourth Circuit affirmed the denial of the motion to suppress and held the protective sweep was reasonable.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

CITATIONS:

[i] No. 10-4442, No. 10-4698, 2012 U.S. App. LEXIS 784 (4th Cir. Decided January 13, 2012)
[ii] Id. at 2-8
[iii] 494 U.S. 325 (1990)
[iv] Jones at 15 (quoting Buie, 494 U.S. at 334))
[v] Id. at 15
[vi] Id. at 15-16
[vii] Id. at 19
[viii] Id. at 20
[ix] Id. at 20-21 (citing United States v. Tapia, 610 F.3d 505, 511 (7th Cir. 2010) (upholding protective sweep where officers had reason to believe other individuals were inside home in that, inter alia, large vehicle capable of holding several persons was parked outside); United States v. Hauk, 412 F.3d 1179, 1192 (10th Cir. 2005) (upholding protective sweep where, inter alia, surveillance showed there was extra vehicle in driveway and unidentified driver apparently entered home); United States v. Tobin, 923 F.2d 1506, 1513 (11th Cir. 1991) (upholding protective sweep where officers had reasonable belief that someone would be hiding in house because three vehicles were on scene and defendant had lied about codefendant's presence).
[x] Id. at 21-22

FOURTH CIRCUIT FINDS NO EXIGENT CIRCUMSTANCES FROM GRENADE IN HOUSE

United States v. Yengel

May 2013

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Warrantless searches of private residences are presumptively unreasonable under the *Fourth Amendment*. However, the United States Supreme Court has established certain exceptions to the warrant requirement. On February 15, 2013, the Fourth Circuit Court of Appeals decided the *United States v. Yengel*, which serves as an excellent review of the exigent circumstance exception to the warrant requirement. The facts of *Yengel*, taken directly from the case, are as follows:

> In the late afternoon of December 31, 2011, Sergeant Brian Staton responded to a call regarding a domestic assault at the home of Joseph Robert Yengel, Jr. ("Yengel"). The 911 dispatcher informed Sergeant Staton that a domestic dispute had erupted between Yengel and his wife. Sergeant Staton also learned that Mrs. Yengel had vacated the residence, and Yengel was potentially armed and threatening to shoot law enforcement personnel.
>
> At around 4:00 p.m., Officer J.M. Slodysko was the first to arrive on the scene. The Yengels' two-story home featured a walk-up front porch and was located in a dense residential neighborhood, with very little space separating adjacent homes. Upon his arrival, Officer Slodysko observed that Yengel was "extremely upset." Officer Slodysko was, however, able to calm Yengel, and to persuade him to come out of the residence onto the front porch, unarmed. Shortly thereafter, when Sergeant Staton arrived on the scene, Yengel was seated on the top step of the front porch, "agitated and emotional,"

but unarmed. The officer's then further calmed Yengel, arrested him, and removed him from the scene.

While still at the scene, Sergeant Staton then interviewed Mrs. Yengel and Yengel's mother, Karol Yengel. During the interviews, Sergeant Staton learned Yengel kept a large number of firearms and a "grenade" inside the house. Sergeant Staton also learned that Mrs. Yengel's young son was sleeping in one of the upstairs bedrooms. Upon learning of the possible existence of a "grenade," Sergeant Staton did not immediately call for the assistance of explosive experts, nor did he evacuate the area. Rather, Sergeant Staton asked Mrs. Yengel to show him where the alleged grenade was kept.

Mrs. Yengel directed Sergeant Staton into the upstairs master bedroom. There, she collected a variety of firearms which were strewn about the bedroom, placed the firearms on the bed, and requested that Sergeant Staton remove them. She said nothing further at that point about the existence or removal of the alleged grenade. Therefore, Sergeant Staton reiterated his request to locate the "grenade," and Mrs. Yengel directed him to a nearby guest bedroom located at the end of the upstairs hallway, directly next to the bedroom in which her young son was sleeping. Mrs. Yengel led Sergeant Staton to a closet inside the guest bedroom that was locked with a combination keypad and thumbprint scanner. Mrs. Yengel informed Sergeant Staton that she did not know the combination to the lock and did not have access to the closet, but told him the "grenade" was kept inside. She then gave Sergeant Staton permission to "kick the door open" and told him to "do whatever you need to do to get in there."

At this point, Sergeant Staton still did not notify explosive experts, did not evacuate the house or nearby homes, did not remove the sleeping child from the room located directly next to the room where the "grenade" was allegedly stored, and did not secure a search warrant. Instead, he simply pried open the closet with a screwdriver.

Once inside the closet, Sergeant Staton identified a variety of military equipment, including two gun safes, camouflage, and other weapons. Sergeant Staton also identified what he thought to be a military ammunition canister that he believed might contain the possible grenade.

After the warrantless entry into the closet, Sergeant Staton ordered an evacuation of the house, which at the time still included Mrs. Yengel's young son, as well as an evacuation of the surrounding residences. At approximately 6:25 p.m., he also notified the James City County Fire Marshal's office, and the Naval Weapons Station, requesting the assistance of its Explosive Ordnance Disposal ("EOD") team. At around 7:00 p.m., Investigator Kendall Driscoll of the James City County Fire Marshal's office arrived on the scene, and began gathering further information from Mrs. Yengel by telephone, as she had by then been removed from the scene. Mrs. Yengel informed

> Investigator Driscoll that she had seen her husband place a "grenade" — four inches by two inches, dark green in color, with a pin in the top — into the closet two years prior. Shortly thereafter, around 7:30 p.m., the EOD team arrived and searched the open closet. Once inside the closet, the EOD team found a backpack containing not a grenade, but a one pound container of smokeless shotgun powder and a partially assembled explosive device attached to a kitchen timer. Law enforcement had been on the scene approximately three and a half hours at this point.[ii]

Yengel was subsequently charged with various federal weapons and explosives violations. He filed a motion to suppress the evidence found during the warrantless search of his closet and the district court granted his motion. The government appealed the grant of the motion to suppress to the Fourth Circuit Court of Appeals arguing that the warrantless search of Yengel's closet was justified under the exigent circumstance exception to the warrant requirement.

The issue before the court in this case was:

> [W]hether it was reasonable for an officer to enter a locked closet without a search warrant after responding to an armed domestic dispute, arresting the suspect and removing him from the residence, and gaining information that indicated a grenade may have been present in the closet.[iii]

It should be noted that the government did not argue that the officers had the wife's consent to enter the closet; as such, this was not before the court in this case.

At the outset, the court examined relevant principals related to the exigent circumstances exception. The court stated:

> **The Supreme Court has recognized a variety of specific circumstances that may constitute an exigency sufficient to justify the warrantless entry and search of private property. These circumstances have included when officers must enter to fight an on-going fire, prevent the destruction of evidence, or continue in "hot pursuit" of a fleeing suspect.** *Brigham City, 547 U.S. at 403 (citing Michigan v. Tyler, 436 U.S. 499, 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978); Ker v. California, 374 U.S. 23, 40, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963) (plurality opinion); and United States v. Santana, 427 U.S. 38, 42, 43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976)).* **In addition to these well-established exigencies, the Supreme Court and this Circuit have held that more general "emergencies," if enveloped by a sufficient level of urgency, may also constitute an exigency and justify a warrantless entry and search.** See generally, *Brigham City, 547 U.S. at 403; United States v. Hill, 649 F.3d 258, 265 (4th Cir. 2011).*
>
> **Under this more general emergency-as-exigency approach, in order for a warrantless search to pass constitutional muster, "the person making entry must have had an objectively reasonable belief that an emergency existed that required**

> **immediate entry to render assistance or prevent harm to persons or property within."** *United States v. Moss, 963 F.2d 673, 678 (4th Cir. 1992).* **An objectively reasonable belief must be based on specific articulable facts and reasonable inferences that could have been drawn therefrom.** See *Mora v. City of Gaithersburg, 519 F.3d 216, 224 (4th Cir. 2008) (citing Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).*[iv] [emphasis added]

The court also noted five factors that are helpful in determining whether exigent circumstances exception is reasonable in a particular situation. The five factors are as follows:

> (1) The degree of urgency involved and the amount of time necessary to obtain a warrant;
>
> (2) The officers' reasonable belief that the contraband is about to be removed or destroyed;
>
> (3) The possibility of danger to police guarding the site;
>
> (4) Information indicating the possessors of the contraband are aware that the police are on their trail; and
>
> (5) The ready destructibility of the contraband.[v]

The court then examined the facts of Yengel's case in light of the above rules and factors. First, the court noted that the information possessed by the officers regarding the nature of the danger posed by the grenade was limited. In fact, they noted that the only information possessed by the officers at the time of the search indicated that the threat was stable rather than immediate. The court noted that Mrs. Yengel only told the police about a grenade and made no mention of any other explosives in the home. Further, she provided no information as to whether the grenade was believed to be "live" or inert. The court stated:

> **[E]ven the presence of explosive materials alone, while heightening the danger, would not automatically provide an exigent basis for a search.** See *United States v. Bonitz, 826 F.2d 954, 957 (10th Cir. 1987)* (concluding no exigency existed where officers found cans of gun powder because "[s]tanding undisturbed, cans of gun powder are inert"). **The presence of explosive materials must be tied to objective facts that sufficiently increase the likelihood, urgency, and magnitude of the threat to the level of an emergency.**[vi] [emphasis added]

Second, the court noted that the "immobile and inaccessible location of the grenade further diminished" the level of danger posed by the grenade.[vii] Particularly, the grenade was locked in a closet and the only person with access to the closet, Yengel, was in custody.

Lastly, no officers on the scene saw fit to evacuate the child who was asleep in close proximity to the closet that contained the grenade or nearby residents. The court placed great emphasis on implication of this fact. Specifically, the court stated:

> [T]he fact that no officers on the scene sought to evacuate the nearby residences, or, in particular, to evacuate Mrs. Yengel's young son who was sleeping in the room directly next to the alleged grenade provides stark evidence that a reasonable police officer would not — and did not — believe an emergency was on-going, such as would justify a warrantless entry.[viii]

As such, the court held that the police did not possess sufficient exigent circumstances in Yengel's case to justify the warrantless search of his closet. In closing, the court stated:

> While we recognize preventive action may well be justified in the face of an exigency, we conclude the factual circumstances of this case simply do not rise to that level. Inevitably, every police interaction with the public will carry with it an apprehension of the unknown; but not every interaction presents an emergency requiring preventive action. Rather, when uncertainty is tethered to objective facts that increase the likelihood, urgency, and magnitude of a threat, an emergency may be present and preventive action may be warranted. Where, as here, however, the objective facts decrease the likelihood, urgency, and magnitude of a threat, any uncertainty is like-wise tempered, and the exigency dissipates.

Therefore, the court affirmed the grant of the motion to suppress.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*

CITATIONS:

[i] No. 12-4317, 2013 U.S. App. LEXIS 3290 (4th Cir. 2013)
[ii] Id. at 3-6
[iii] Id. at 1-2
[iv] Id. at 9-10
[v] Id. at 10-11 (citing United States v. Turner, 650 F.2d 526 (4th Cir. 1981))
[vi] Id. at 13
[vii] Id. at 15
[viii] Id. at 16

A District Court grants, in part, and denies, in part, a Defendant's motion to suppress after concluding that some of the statements that he made to law enforcement officers were made in violation of his Constitutional rights while others were not

February 2018

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In United States v. Butler, 20147 WL 6089072 (W.D. Mo. Dec. 7, 2017), Defendant William H. Butler moved the United States District Court for the Western District of Missouri to suppress certain physical evidence and the statements that he made to law enforcement officers. Butler asserted that his statements to law enforcement officers were made and that the physical evidence was obtained in violation of his Fourth and Fifth Amendment rights. The District Judge referred Butler's motion to a United States Magistrate Judge who conducted an evidentiary hearing on Butler's motion to suppress. At the conclusion of the hearing, the Magistrate Judge made the following findings of fact, rendered the following conclusions of law, and recommended to the District Judge that he grant, in part, and deny, in part, Butler's motion to suppress.

On July 21, 2013, Sugar Creek Missouri Police Department Chief Herb Soule advised Sgt. Kirk Beeman that a complaint had been registered about suspected drug activity at a Sugar Creek apartment complex. After receiving the information, Sgt. Beeman and Patrol Officer Josko Wrabec–in separate marked police vehicles–conducted surveillance of the apartment complex beginning at approximately 4:00 p.m.

While conducting the surveillance, Sgt. Beeman observed a car with several occupants pull up to the complex and park in the back alley. The car's driver entered the complex and, then, left in his car after being in the apartment complex for less than a minute. Thereafter, Sgt. Beeman radioed Officer Wrabec and requested that he conduct a stop of the vehicle.

During the ensuing traffic stop, one of the car's occupants told the officers that they had gone to the apartment complex and purchased a small amount of marijuana. The occupant described the location of the apartment and said that he bought the marijuana from a black male named "Will." Based on the information, Sgt. Beeman and Officer Wrabec decided to conduct a "knock and talk" at the described apartment.

At approximately 7:34 p.m., Sgt. Beeman and Officer Wrabec (both in uniform) knocked on the door of Apartment 3 (the location described by the witness) of the apartment complex. Butler answered the door, stepped outside the apartment into the hallway, and shut the door behind him. Sgt. Beeman explained to Butler that there were some indications that illegal drugs were being sold out of his apartment. Butler responded: "Man, all I have is a little bit in my pipe, and it's just for personal use." Butler confirmed that he lived in the apartment with his girlfriend and that both of them were on the lease.

Subsequently, Sgt. Beeman showed Butler a consent-to-search form and requested Butler to consent to a search of the apartment. Sgt. Beeman read the consent-to-search form out loud and asked Butler to sign. In part, the form specifically provides that Butler was acknowledging that he had been informed of his "constitutional right not to have a search made of the premises and property."
Butler initially responded to Sgt. Beeman that he would go inside and retrieve the marijuana that he had, and if the officers would return in ten minutes, "it will be gone." Butler then reached for the doorknob to go inside.

However, Sgt. Beeman stopped Butler from going back into the apartment and asked Butler if there were weapons or other individuals in the apartment. Butler said that he was home alone and that he had some swords hanging inside the doorway and "maybe a BB gun."

Sgt. Beeman then told Butler that he could not go back into the apartment until he consented to a search or refused to consent to a search. Butler responded: "If I don't sign that form, you will just come back with a search warrant, and then [I will be] questioned, won't you?" Sergeant Beeman stated that was a possibility. Butler then said: "I don't sell to nobody. I smoke marijuana with friends sometimes. I have some weed inside, but it's for my personal stash. And I take a few Xanax." Thereafter, Butler signed the consent-to-search form and was told by Sgt. Beeman that he could revoke the consent at any point.

Before entering the apartment, Sgt. Beeman asked Butler if he was a convicted felon, and Butler indicated that he thought he had some "drug things and unlawful possession of a gun" in the past. When Butler and the officers entered the apartment, Butler attempted to take a seat in a cushioned chair. Sgt. Beeman–after placing Butler on a couch–searched the area around the chair and found 163 grams of marijuana (in containers on an adjacent end table) and a loaded, silver-colored handgun (in the cushions of the chair). As a result of the discovery of this contraband, Officer Wrabec handcuffed Butler. Butler never revoked the consent to search.

In his motion to suppress, Butler argued that Sgt. Beeman and Officer Wrabec violated both his Fourth and his Fifth Amendment rights during the encounter at his apartment on July 21, 2013. As a result, Butler moved the District Court to suppress the physical evidence obtained at his apartment and to suppress the statements that he made to the law enforcement officers.

The Magistrate Judge began his analysis of Butler's motion to suppress by noting that the initial "knock and talk" performed by the officers was valid because a mere knock and talk does not implicate the Fourth Amendment because no seizure occurs. United States v. McDaniel, 2017 WL 706630, * 4 (W.D. Mo. Feb. 22, 2017). Instead, a knock and talk is an investigatory technique in which law enforcement officers approach the door of a dwelling seeking voluntary conversation and consent to search. The Magistrate Judge noted, however, that an initial knock and talk could morph into something more that could raise constitutional concerns.

Here, the Magistrate Judge stated that it was undisputed that Butler was not apprised of his Miranda rights during the encounter with the officers. As such, the question became whether Butler was in custody and was being interrogated which would trigger his right to Constitutional protections. In answering this question, the Magistrate Judge divided Butler's encounter with the police into two parts: (1) before Sgt. Beeman stopped Butler from entering his apartment and (2) after Sgt. Beeman did so.

As for the first part, the Magistrate Judge found that, prior to Sgt. Beeman stopping Butler from entering his apartment, the encounter was consensual and non-custodial. The Magistrate Judge stated that the United States Court of Appeals for the Eight Circuit has identified six common indicia of in custody that, when applied, tend to confirm or refute whether an individual is in custody for Constitutional purposes: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was placed under arrest at the termination of the questioning.

In this case, the Magistrate Judge found that the indicia did not support a finding that Butler was in custody during his initial discussions with the officers. Thus, the Magistrate Judge recommended that the District Court deny Butler's motion to suppress the regarding his initial conversation with the officers.

After Sgt. Beeman stopped Butler from re-entering his apartment, however, the Magistrate Judge explained that the indicia of custody became stronger because a reasonable person would not believe that he was free to leave. As a result, the Magistrate Judge considered Butler's three statements made after he was not allowed to re-enter his apartment to see if suppression was proper.

First, the Magistrate Judge considered Butler's statement that he was home alone, had some swords hanging inside the doorway, and "maybe a BB gun." The Magistrate Judge determined that Sgt. Beeman's question (that elicited Butler's statement) was exempt from the Miranda requirement based upon public safety concerns. New York v. Quarles, 467 U.S. 649, 655 (1984)(holding that there is a public safety exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence). Accordingly, the Magistrate Judge found that Butler's statement need not be suppressed.

As for Butler's second statement ("I don't sell to nobody. I smoke marijuana with friends sometimes. I have some weed inside, but it's for my personal stash. And I take a few Xanax") that Butler made after Sergeant Beeman said that it was a "possibility" that a search warrant might be obtained if Butler refused to consent, the Magistrate Judge found that the statement need not be suppressed because it was not the product of interrogation. Instead, Butler's statements were voluntary and spontaneous. Rhode Island v. Innis, 446 U.S. 291, 299 (1980)(holding that "[a] voluntary statement made by a suspect, in response to interrogation, is not barred by the Fifth Amendment and is admissible with or without the giving of Miranda warnings.").

As for Butler's third statement about his criminal record, the Magistrate Judge found Butler provided that statement in direct response to Sgt. Beeman's question. Indeed, the response was the result of a custodial interrogation and, in the absence of any clear indication of Butler's waiver of his Miranda rights, the statement should be suppressed.

Finally, as for the physical evidence, the Magistrate Judge explained that the generally accepted validity of a knock and talk does not encompass searching someone's property because, without question, individuals possess a privacy interest in their property that is protected by the Fourth Amendment. As protection for the citizen from unwarranted government intrusion, the Fourth Amendment generally requires law enforcement to obtain a court-sanctioned search warrant based on probable cause before undertaking a search of private property.

In this case, the police did not have a warrant. However, the Magistrate Judge found that the officers reasonably believed that Butler consented to a search of his apartment. When Sgt. Beeman asked if he consented to a search and when Butler asked if Sgt. Beeman would obtain a search warrant if consent was refused, Sgt. Beeman responded that it was a possibility. Sgt. Beeman's response was not coercive or improper, and therefore, the results of the search need not be suppressed because Butler consented to the search, and he never revoked that proper consent.

Accordingly, after a de novo review, the District Court adopted in total the Magistrate Judge's Report and Recommendation and granted, in part, and denied, in part, Butler's motion to suppress as recommended by the Magistrate Judge.

The Eighth Circuit affirms the District Court's denial of a Defendant's motion to suppress after concluding that the Defendant's pre-arrest interview was not custodial and after finding that the Defendant did not clearly and unequivocally assert his Fifth Amendment right to counsel during the post-arrest interview

January 2018

Article Source : http://www.patc.com/weeklyarticles/2018_us_v_giboney_chapman.shtml

In United States v. Giboney, 863 F.3d 1022 (8th Cir. 2017), the United States Court of Appeals for the Eighth Circuit was asked to consider whether the District Court had erred in denying Defendant Craig Kendall Giboney's motion to suppress his pre- and post-arrest statements that he made to law enforcement officials. The relevant facts are as follows.

In January 2015, FBI Special Agent Kevin Matthews was working undercover investigating the sexual exploitation of children on the website GigaTribe. GigaTribe is a peer-to-peer online forum for sharing videos, images, and music files. A GigaTribe user can create a private network which the user controls by inviting "friends" to join. Once a friend accepts an invitation to join the user's network, both users can browse and download files from each other's shared folders. Additionally, any GigaTribe user can create a "tribe" of users to share files with or to find other users that have similar interests.

On the morning of January 8, 2015, Agent Matthews was logged into GigaTribe from an undercover account with the username "Pedocchio." While posing as Pedocchio, Agent Matthews observed a tribe called "Boytoys" that described itself as a tribe "[a]ll about the boys, young vids, pics, BIBCAMs." "BIB" stands for "boys in bedroom" and "BIBCAM" typically indicates webcam videos of young boys. Among the 551 users in the Boytoys tribe was "Jizzlobber11." Agent Matthews, acting as Pedocchio, invited Jizzlobber11 and other members of Boytoys to join his private network. Jizzlobber11 accepted, thereby granting Pedocchio access to Jizzlobber11's shared files. Agent Matthews downloaded 73 files directly from Jizzlobber11. These files contained images and videos depicting minor children engaged in lascivious displays of their genitals or involved in sexual acts.

Agent Matthews was able to determine the IP address utilized by Jizzlobber11 and, after further investigation, traced the IP address to a residence in St. Charles, Missouri. Police obtained a search warrant for that residence, and on February 26, 2015, six officers arrived at the residence to execute the warrant. Several individuals occupied the house, including Giboney, who was found asleep on a couch in the basement. The officers woke Giboney and escorted him upstairs to join the other occupants in the garage. The officers then seized media equipment from the basement including a laptop (which was found on a table in front of the couch where Giboney was sleeping), two thumb drives, two cell phones, and one external hard drive.

While the other officers executed the search warrant, Detective Jacob Walk, an officer with the Missouri Internet Crimes Against Children Task Force, conducted an audio-recorded interview of Giboney in the living room of the residence. Detective Walk advised Giboney repeatedly during the interview that he was not under arrest and that he was free to leave. Giboney was not placed in handcuffs or otherwise physically restrained, and no weapon was drawn against him. Detective Walk was the only officer questioning Giboney during the

interview, although another officer interrupted at one point to ask Giboney for the username and password of the laptop in the basement. Giboney provided the information, allowing the officer to log into the laptop and view its content.

While Detective Walk interviewed Giboney, officers learned that the laptop's IP address matched the IP address captured during Agent Matthews's undercover activity on GigaTribe. Sergeant Bosley informed Detective Walk of the match, which suggested to Detective Walk that the basement laptop was the computer that had been sharing videos and images of child pornography on GigaTribe. Detective Walk decided to Mirandize Giboney at that time, but before he could do so, Giboney asked to use the restroom. After confirming with other officers that the restroom had been cleared, Detective Walk informed Giboney that (1) Detective Walk had to accompany Giboney to the restroom because a search warrant was being executed; (2) Giboney could not walk freely around the house; and (3) Detective Walk was not finished questioning Giboney; but (4) it was Giboney's decision whether to continue the interview.

After using the restroom, Giboney stated that he wanted to go outside to smoke a cigarette. Detective Walk accompanied Giboney to the garage where he confirmed that Giboney was still willing to talk to him. Detective Walk then advised Giboney that he had developed new information and wanted to read Giboney his rights before asking more questions. Giboney stated that, if he was going to be arrested, he would "take off," and Detective Walk would "have to come get [him]." Detective Walk replied, "I'm not saying I'm going to arrest you; I was just wanting to know . . . if you wanted to talk." Giboney then began walking down the street. Detective Walk and two other officers followed Giboney and took him into custody after informing Giboney that he was under arrest.

At the police station, Detective Walk conducted a video-recorded interview of Giboney. No lawyers were present. Detective Walk began by reading Giboney his Miranda rights from a form titled "Your Constitutional Rights." Giboney initialed each right after Detective Walk read the right to him out loud. Giboney also verbally acknowledged that he understood each right as it was read to him. When Detective Walk asked whether Giboney understood his right to talk to a lawyer before the interview and to have one present during the interview, Giboney jokingly asked "[s]o does it stop now if I want to get an attorney?" Detective Walk responded, "[I]f at any time you want to stop, man, just tell me and we'll stop."

Detective Walk then asked Giboney to read the section of the form titled "Waiver" out loud. Giboney complied but stated that he would not initial the waiver because the waiver stated: "I do not want a lawyer at this time." Seeking clarification, Detective Walk asked, "[A]re you saying that you don't want to talk to me without an attorney?" Giboney responded, "No, that's not what I'm saying. I'm saying I do want a lawyer and that's saying I do not want a lawyer.... And that's why I do not want to initial that because I do want an attorney if I'm going to be charged with this." Seeking further clarification, Detective Walk asked, "So you want an attorney with you during questioning here. Is that what you're saying? ... So are you saying that you want a lawyer at this time?" Giboney replied, "Oh, at this time. Alright.... Sorry." Giboney then initialed the waiver section of the form, and Detective Walk asked, "[W]ith this waiver in mind, do you want to talk to me?" Giboney replied, "I'll talk to you." The interview proceeded and, though he denied any wrongdoing at first, Giboney ultimately admitted that he had been viewing child pornography for fifteen years.

In March 2015, a federal grand jury returned a two-count indictment charging Giboney with receipt and possession of child pornography. A superseding indictment was later returned adding a charge of transportation of child pornography. Three days before the start of trial, Giboney pled guilty to the three charges in the superseding indictment but reserved his right to appeal. The District Court accepted the plea and sentenced Giboney to thirteen years in prison followed by a lifetime of supervised release.

On appeal, Giboney asserted three arguments in support of his contention that the District Court erred in denying his motion to suppress and erred in denying his pro se motion that the District Court should have dismissed the superseding indictment because the District Court lacked subject matter jurisdiction. As for his pro se jurisdictional argument, the Eighth Circuit found that the argument had "no merit." According to Giboney, the federal child pornography statutes were unconstitutionally applied in him because the child pornography at issue was transmitted over the internet and, thus, did not physically cross state lines. But, the Eighth Circuit explained that the Constitution's Commerce Clause confers regulatory authority over the channels and instrumentalities of interstate commerce, and "[t]he Internet is an instrumentality and channel of interstate commerce." United States v. Haylik, 710 F.3d 818, 824 (8th Cir. 2013). Accordingly, the Eighth Circuit held that the District Court correctly rejected Giboney's pro se jurisdictional argument.

Next, the Eighth Circuit rejected Giboney's argument that the District Court erred in denying his motion to suppress his pre-arrest statements. Giboney argued that his pre-arrest statements should be suppressed because Detective Walk extracted those statements without first advising Giboney of his Miranda rights.
The Eighth Circuit began its analysis by noting that the Fifth Amendment requires that Miranda warnings be given when a person is interrogated by law enforcement after being taken into custody. Because there was no question that Giboney was interrogated by Detective Walk at Giboney's residence, the only issue was whether the interrogation was custodial.

The ultimate question in determining whether a person is in "custody" for purposes of Miranda is whether there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest. This determination is not based on the interrogator's perspective; instead, the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Courts use six factors in determining whether a suspect is in custody: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was placed under arrest at the termination of the questioning."

Here, the Eighth Circuit opined that the facts weighed against a finding that Giboney was in custody when questioned by Detective Walk. Detective Walk repeated told Giboney that he was free to leave and that he was not under arrest, and Giboney confirmed his understanding of this communication. Moreover, the Eighth Circuit held that Giboney's freedom of movement was not restrained. And, Giboney voluntarily answered Detective Walk's questions. The Eighth Circuit concluded that the remaining factors also weighed in a determination that Giboney was not in custody, and therefore, the Eighth Circuit concluded that the District Court did not err in denying Giboney's motion to suppress based upon the fact that Detective Walk questioned him before giving Giboney his Miranda warnings prior to Giboney's arrest.

Finally, the Eighth Circuit rejected Giboney's argument that the District Court erred in denying his motion to suppress his post-arrest statements that he made at the police station. According to Giboney, the District Court should have suppressed those statements because the post-arrest interview continued after he invoked his Fifth Amendment right to counsel. The Eighth Circuit disagreed.

The Eighth Circuit began by noting that only a clear and unequivocal request for the assistance of counsel may serve to invoke a defendant's right. According to the Eighth Circuit, Giboney's statements were, at best, ambiguous as to whether he desired to have an attorney present for the interview. Therefore, the Eighth Circuit held that Giboney failed to sufficiently invoke his right to counsel, and Detective Walk was not required

to cease the questioning. Accordingly, the Eighth Circuit found that the District Court correctly denied Giboney's motion to suppress his post-arrest statements.

UNITED STATES SUPREME COURT

THE AUTOMOBILE EXCEPTION DOES NOT PERMIT THE WARRANTLESS ENTRY OF A HOME OR ITS CURTILAGE IN ORDER TO SEARCH A VEHICLE THEREIN

May 2018

Article Source: http://llrmi.com/articles/legal_update/2018_collins_v_virginia.shtml

In *Collins v. Virginia,*[1] the United States Supreme Court examined the sanctity of a home's curtilage, [an area adjacent to the home and to which activity of home life extends] when balanced against the long-standing motor vehicle exception to the warrant requirement.

The Court outlined the facts in *Collins* as follows:

> Officer Matthew McCall of the Albemarle County Police Department in Virginia saw the driver of an orange and black motorcycle with an extended frame commit a traffic infraction. The driver eluded Officer McCall's attempt to stop the motorcycle. A few weeks later, Officer David Rhodes of the same department saw an orange and black motorcycle traveling well over the speed limit, but the driver got away from him, too. The officers compared notes and concluded that the two incidents involved the same motorcyclist. Upon further investigation, the officers learned that the motorcycle likely was stolen and in the possession of petitioner Ryan Collins. After discovering photographs on Collins' Facebook profile that featured an orange and black motorcycle parked at the top of the driveway of a house, Officer Rhodes tracked down the address of the house, drove there, and parked on the street. It was later established that Collins' girlfriend lived in the house and that Collins stayed there a few nights per week.[1]
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> From his parked position on the street, Officer Rhodes saw what appeared to be a motorcycle with an extended frame covered with a white tarp, parked at the same angle and in the same location on the driveway as in the Face-book photograph. Officer Rhodes, who did not have a warrant, exited his car and walked toward the house. He stopped to take a photograph of the covered motorcycle from the sidewalk, and then walked onto the residential property and up to the top of the driveway to where the motorcycle was parked. In order "to investigate further," Officer Rhodes pulled off the tarp,

[1] *Collins v. Virginia,* (slip opinion 16-1027 decided May 29, 2018).

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revealing a motorcycle that looked like the one from the speeding incident. He then ran a search of the license plate and vehicle identification numbers, which confirmed that the motorcycle was stolen. After gathering this information, Officer Rhodes took a photograph of the uncovered motorcycle, put the tarp back on, left the property, and returned to his car to wait for Collins.

Shortly thereafter, Collins returned home. Officer Rhodes walked up to the front door of the house and knocked. Collins answered, agreed to speak with Officer Rhodes, and admitted that the motorcycle was his and that he had bought it without title. Officer Rhodes then arrested Collins.

In its analysis the Court noted the long-standing protection of the home and its curtilage. In doing so, the Court pointed out that Curtilage, "the area immediately surrounding and associated with the home—[is considered] to be part of the home itself for Fourth Amendment purposes…The protection afforded the curtilage is essentially a protections of families and personal privacy in an area intimately linked to the home, both physically and psychologically where privacy expectations are most heightened."

The Court wrote: "When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct thus is presumptively unreasonable absent a warrant."

In determining that the area where the motorcycle had been located was curtilage the Court, using photographs of the property noted that a person going to the front door would walk partially up the driveway, but would turn off to enter the front porch before reaching an enclosed portion of the driveway where the motorcycle was located.

The Court determined that clearly the entry onto the curtilage in the area where the motorcycle was located was an invasion of Collins' Fourth Amendment interest, but then turned to the question of whether the Motor Vehicle exception would justify the invasion of Collins' Fourth Amendment interest. The Court held that the motor vehicle exception would not justify an entry onto the curtilage.

In reaching its decision, the Court noted that the scope of the motor vehicle exception has always been limited to the vehicle itself and containers within the vehicle. In this case, Virginia was asking for the motor vehicle exception to be extended to areas outside of the motor vehicle itself, specifically the curtilage of a home.

The Court remanded the case back to the Virginia courts for a determination as to whether Officer Rhodes' entry into the curtilage may have been reasonable under a different basis such as exigency.

Bottom Line:

The motor vehicle exception does not justify an entry into a home or its curtilage where the vehicle, for which the officer has probable cause, is parked within the home or its curtilage.

Agencies should consider conducting training on the concept of "curtilage" and the limitations on what will be considered curtilage. It should be made clear to officers that an entry into curtilage that is not justified by a warrant, consent, or some exception to the warrant requirement, other than the motor vehicle exception, may be considered a violation of the Fourth Amendment.

Note: The United States Supreme Court has previously held that there is an implied invitation to knock on someone's front door. (*Florida v. Jardines* 569 U.S. 1)

THE UNITED STATES SUPREME COURT DECIDES PRIVACY ISSUES RELATED TO CELLULAR PHONE RECORDS

June 2018

Article Source: http://llrmi.com/articles/legal_update/2018_carpenter_v_united_states.shtml

Law Enforcement Must Obtain a Search Warrant in Order to Access Cell Phone Records from Cellular Providers

In *Carpenter v. United States*,[1] the United States Supreme Court considered whether the Fourth Amendment was violated when investigators obtained a court order, rather than a warrant for cellular phone data that allowed investigators to place the defendant Carpenter in the vicinity of 4 robberies, after a co-conspirator confessed to the robberies and identified the involved subjects. At trial, the con-conspirators identified Carpenter as the leader of the pack.

The Court outlined the facts in *Carpenter* as follows:

> In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.
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> Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." *18 U. S. C. §2703(d)*. Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone at call origination and at call termination for incoming and outgoing calls"

[1] *Carpenter v. United States*, __S.Ct. __; 2018 U.S. LEXOS 3844; (No. 16-402 Decided June 22, 2018).

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during the four-month period when the string of robberies occurred. App. to Pet. for Cert. 60a, 72a. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. See *18 U. S. C. §§924(c), 1951(a)*. Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the *Fourth Amendment* because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. App. to Pet. for Cert. 38a-39a.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the . . . robbery was at the exact time of the robbery." App. 131 (closing argument). Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court cited some interesting background facts at the outset of their analysis to include that there are 396 million cell phone accounts in the United States though there are only 326 million people. The Court noted that cellular phones are constantly scanning the environment looking for the strongest signal, which generally comes from the closest cell site. Each time a cell phone connects to a cell site a time stamp record "known as cell-site location information" or CSLI is generated. The Court noted that these CSLI records are store by Cell Phone providers for five years.

The Court's analysis in this case focused on the privacy of all citizens from government. In doing so, the Court reviewed how privacy and 4th Amendment interests have been viewed over time.

Fourth Amendment privacy was originally tied to the concept of trespass. Early cases focused on whether government actors, such as law enforcement had trespassed onto private property or constitutionally protected area to conduct a search. Thus, the basic analysis was: did law enforcement trespass upon private property? If they did so, did they have a warrant or in the alternative, did some exception the warrant requirement apply.

In 1967, the *Katz*[2] case was decided. In *Katz*, there was no trespass to private property, but instead officers listened in to Katz's conversations in a public phone booth. The Court found that listening to Katz private conversation in public phone booth violated the Fourth Amendment holding that the Fourth Amendment protects people and not places. Under this second type of Fourth Amendment privacy, which for lack of an identified term can be referred to as person privacy, the analysis is first; did the person exhibit a subjective expectation of

[2] *Katz v. United States*, 389 U.S. 347 (1967).

privacy? If so, was that subjective expectation of privacy, one that society is willing to accept as a reasonable expectation of privacy.

It is clear from the facts of this case, that the Court would have to apply this second type of privacy analysis since there was no trespass onto private property in this case.

At the outset the Court noted that as technology has developed, it has become easier for government to pry into the private lives of citizens and thus the "Court has sought to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." The Court noted that the Fourth Amendment "seeks to secure the 'privacies of life' against 'arbitrary power… [and]… that a central aim of the Framers was 'to place obstacles in the way of too permeating police surveillance.'"

The Court noted that cell phone records did not neatly fit into prior decisions and actually fit somewhat with two distinct lines of cases. One line of cases involves the level of privacy a person has in their physical location and movements and the second line of cases involves things a person keeps to themselves versus things a person shares with others. The second type has generally fund that information that a person voluntarily turns over to someone else has no legitimate expectation of privacy.

In its analysis the Court indicated that the application of the Fourth Amendment to the records obtained in this case was a "new phenomenon." The Court rejected the application of the line of cases indicating that because these records are held by a third party, the cell phone provider, that there was no expectation of privacy.

Instead the Court focused on what private information could be gleaned from the constant and detailed location information received from these records. The Court noted that most people are never separated from their cell phone, even citing surveys of persons who indicate that they use their cell phone in the shower. The Court described that based on the records, government could determine a person's religious affiliation by the location of the church they visited, their political affiliations by the locations they frequented, as well as their familial and sexual associations.

The Court cited the relative ease with which government could obtain information from cell phone providers and the fact that unlike other forms of surveillance that are conducted in real time, with cell phone data, law enforcement can go back in time to start their surveillance of an individual. The Court noted, with cell phone data, law enforcement does not even have to know in advance that they want to follow someone or when. "Whoever the suspect turns out to be, he has effectively been tailed every moment of everyday for five years, and the police may-in the Government's view [which the Court rejects]—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape the tireless and absolute surveillance."

The Court also asserted that in fashioning a rule in this case, the majority is recognizing that technology is advancing such that a person's movements are becoming increasingly tracked and more accurate.

The Court concluded that when the government obtained Carpenter's CSLI records from the telephone carriers, "it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements."

The Court rejected the government's argument that the Fourth Amendment did not protect the cell phone records as third-party business records and that Carpenter, in owning a cell phone, had voluntarily shared the information.

The Court stated: "cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society."

The Court made clear:

> "Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." *Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292, 300 (1944)*.

The Court held that law enforcement must generally get a warrant supported by probable cause in order to obtain the type of records obtained in this case. It was made clear that acquiring Carpenter's records pursuant to a court order based on "reasonable belief" was insufficient to satisfy the probable cause requirement of a warrant.

Bottom Line:

When seeking cell phone records on an individual suspect, obtain a search warrant.