Department of Homeland Security
Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

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The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List; have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting http://www.fletc.gov/training/programs/legal-division/the-informer.

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Free FLETC Informer Webinar Series Schedule March / April 2014

(See the top of page 6 for instructions on how to participate in a webinar)

1. **Cops, Canines, Curtilage – Using Police Dogs After *Florida v. Jardines***

   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   This webinar discusses the 2013 United States Supreme Court case, *Florida v. Jardines*.

   Date and Time:

   Wednesday April 16, 2014: 1:30 pm EDT

   To join this meeting: **https://share.dhs.gov/lgd1219**

2. **Curtilage in a Post-*Jones* Era**

   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   This webinar explores the *Fourth Amendment* concept of curtilage from its inception in *U.S. v Dunn*, to its application after *U.S. v. Jones*.

   Dates and Times:

   Thursday April 17, 2014: 2:30 pm EDT

   Tuesday April 22, 2014: 9:30 am EDT

   To join this meeting on either date listed above: **https://share.dhs.gov/bab0401**

3. ***Kalkines* and *Garrity* Overview**

   1-hour webinar presented by John Besselman, FLETC Legal Division

   John Besselman will look at these two important cases and how they affect the government's ability to obtain statements from its employees that may be suspected of criminal activity.

   Date and Time:

   Monday March 24, 2014, 2014: 8:30 am EST

   To join this meeting: **https://share.dhs.gov/garrity/**

4. **HIPAA and the Law Enforcement Officer**

1-hour webinar presented by Charlie Kels of the Office of the General Counsel - Office of Health Affairs

This webinar will provide a general overview of HIPAA legislation, including a look at the definitions under Privacy Rule, who and what is covered under this rule, and provides examples of specific exemptions and the impact on law enforcement operations. Mr. Kels will be available for a Q&A session at the conclusion of the webinar.

Date and Time:

Tuesday April 1, 2014: 2:30pm EDT

To join this meeting: **https://share.dhs.gov/hipaa/**

5. **Law Enforcement Legal Refresher Training (2-hours)**

2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

This is a two-hour block of instruction focuses on *Fourth* and *Fifth Amendment* law and is designed to meet the training requirements for state and federal law enforcement officers who have mandated two-hour legal refresher training requirements.

Dates and Times:

Thursday April 3, 2014: 2:30pm EDT

Friday April 18, 2014: 9:00am EDT

Thursday April 24, 2014: 9:30am EDT

To join this meeting on any of the dates listed above: **https://share.dhs.gov/lgd0312**

6. **The Rules of Search Warrant Execution**

1-hour webinar presented by John Besselman, FLETC Legal Division

This course looks at the rules that govern the proper execution of a search warrant, including the who, how, what, when and where of service. Items discussed will include who can issue and serve a search warrant, the use of force to execute the warrant, and how to properly and lawfully close out the warrant process.

Date and Time:

Monday April 21, 2014: 9:30am EDT

To join this meeting: **https://share.dhs.gov/swexecution/**

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1. Click on the appropriate link above to access the Homeland Security Information Network (HSIN).
2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account click on the button next to "Enter as a Guest."
4. Enter your name and click the "Enter" button.
5. You will now be in the meeting room and will be able to participate in the webinar.
6. Even though meeting rooms may be accessed before a webinar, there may be times when a meeting room is closed while an instructor is setting up the room.
7. Meeting rooms will be open and fully accessible at least one-hour before a scheduled webinar.
8. Training certificates will be provided at the conclusion of each webinar.

If there are any specific legal topics that you would like to see offered in future FLETC Informer webinars, please let us know! Address any inquiries to lgdwebinar@fletc.dhs.gov

Public Safety and Patient Privacy: A Law Enforcement Officer's Guide to HIPAA

Charles G. Kels, DHS Office of the General Counsel – Office of Health Affairs*

***This article is intended for informational purposes and does not constitute legal advice. Program offices should consult with Component legal counsel if they have specific legal questions.**

Investigating crimes requires access to evidence, whereas the practice of medicine involves holding patients' information in confidence. Inevitably, the need for law enforcement officers to obtain information will run up against the duty of confidentiality borne by healthcare providers.

This issue predates the Health Insurance Portability and Accountability Act (HIPAA) of 1996, but the HIPAA Privacy Rule published by the Department of Health and Human Services (HHS) provided a national blueprint for hospitals and healthcare personnel to follow in disclosing information to law enforcement. By understanding the Privacy Rule and developing amicable relationships with the local medical community, law enforcement officers can successfully navigate the wickets of medical privacy and gain more timely access to the information they need to accomplish their mission.

THE WHO AND WHAT OF HIPAA

The HIPAA Privacy Rule governs three types of groups, known as "covered entities": these include health plans, healthcare clearinghouses, and healthcare providers who conduct certain transactions electronically (typically associated with billing), along with their contracted "business associates." For practical purposes, this means that most healthcare practitioners—whether in a hospital, clinic, or office setting—will be subject to the strictures of the Privacy Rule.

Law enforcement agencies are generally not covered entities bound by HIPAA, although federal agencies must comply with the Privacy Act of 1974 in safeguarding information under their control. Law enforcement officers are exposed to HIPAA primarily through the need to interact with, and request information from, covered entities in the course of investigations and official inquiries.

The Privacy Rule sets requirements for the use and disclosure of "protected health information" (PHI), which is information held by a covered entity that relates to the health of (or healthcare received by) an individual, and can be used to identify that individual. It excludes health information contained in employment records or education records; the latter are protected by a separate statute called the Family Educational Rights and Privacy Act (FERPA).

For the most part, when law enforcement agencies seek medical records or health information about an individual, medical professionals must comply with the HIPAA Privacy Rule in determining whether and how much to disclose.

THE GENERAL RULE

The Privacy Rule delineates the specific purposes for which covered entities may use or disclose PHI. Disclosure is *required* in only two circumstances: to the individuals themselves (or their personal representatives) upon request and to HHS for purposes of HIPAA compliance. Otherwise, HIPAA *permits* disclosure for other standard purposes, such as the treatment, payment, and healthcare operations of covered entities that have a relationship with the patient.

Covered entities may also release information to law enforcement pursuant to a patient's signed HIPAA authorization. When dealing with a cooperative individual, best practice usually dictates asking that person to grant an authorization rather than relying on another Privacy Rule provision to gain access to records. It is important to note that a HIPAA authorization must be written in specific terms to be valid. Most medical facilities use a standard form to ensure HIPAA compliance, and it generally behooves the requesting officer to use that facility's pre-approved authorization form to minimize procedural hurdles.

PUBLIC INTEREST AND BENEFIT ACTIVITIES

Of course, seeking authorization from suspects and uncooperative witnesses will often be unrealistic or counterproductive. In this case, the Privacy Rule enables covered entities to disclose PHI for 12 "national priority purposes" that benefit the public interest. Among these recognized activities is a specific provision for "law enforcement purposes."

This section permits disclosure to law enforcement officials under specified circumstances, including: (1) reporting information when required to so by other laws, such as gunshots, stab wounds, or other violent injuries; (2) answering a request (with limited data only) for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person; (3) responding to an inquiry about a victim or suspected victim of a crime if that individual agrees or is incapacitated; (4) advising authorities about an individual's death if there is a suspicion that it resulted from criminal conduct; (5) reporting evidence of a potential crime that occurred on the covered entity's premises; and (6) alerting authorities to criminal activity associated with an off-site medical emergency.

Several of the other public interest and benefit activities described in the Privacy Rule may also permit covered entities to report PHI to law enforcement. For example, healthcare providers can disclose information to avert a serious threat to health and safety to someone who is "reasonably able" to counter the threat; they may further alert law enforcement officials when necessary to identify or apprehend an escapee or violent criminal. As long as certain conditions are met, covered entities can also notify appropriate government authorities about victims of abuse, neglect, or domestic violence.

Moreover, the Privacy Rule permits disclosure of PHI without an individual's authorization for certain "specialized government functions" of particular relevance to the federal law enforcement community. Among these functions are the provision of protective services to the President and other authorized persons; the conduct of lawful intelligence, counter-intelligence, and other national security activities directed by the National Security Act and implementing authority; and the custody of an inmate or detainee by correctional institutions or law enforcement officials.

LAW ENFORCEMENT PROCESS

The law enforcement provision of the Privacy Rule explicitly allows covered entities to share information in compliance with a court order or court-ordered warrant, a subpoena or summons issued by a judicial officer, a grand jury subpoena, or an administrative request. The administrative request—when used judiciously and properly—can be one of the most useful tools for law enforcement in eliciting necessary data from healthcare providers.

In drafting such a request, law enforcement officers must ensure that it complies with the Privacy Rule's requirements. Specifically, the request must demonstrate, and ideally should state in writing, that (1) the information sought is relevant and material to a legitimate law enforcement inquiry; (2) the inquiry is specific and limited in scope to the extent reasonably practicable in light of

the purpose for which the information is sought; and (3) de-identified information could not reasonably be used.

It bears reemphasizing that HIPAA permits, but does not require, the covered entity to comply with such a request, even when properly drafted. Thus, it is beneficial for investigators to frame the request narrowly and to have a good inkling ahead of time what sort of records they are looking for. Although hospitals are entitled to rely upon the representations of the law enforcement official as to what information is needed, the appearance of a "fishing expedition" can be off-putting to medical staff and result in additional roadblocks. Consultation with agency counsel in drafting the law enforcement request can help alleviate some of these issues in advance.

ACCOUNTING DISCLOSURES

Patients have a right under HIPAA to receive an accounting of most disclosures of their PHI made by a covered entity without their authorization over the previous 6 years. As a result, hospitals must record and maintain certain details about disclosures made for law enforcement purposes, including the date, the recipient of the PHI, a brief description of the records, and a brief statement of the basis for release.

Notably, if a requesting law enforcement official provides a written statement that sharing these details with the individual "would be reasonably likely to impede the agency's activities," the covered entity must temporarily suspend that individual's right to receive an accounting for the time period specified. Law enforcement can utilize this tool to prevent an investigation from being compromised.

MINIMUM NECESSARY

Unless required by law or authorized by the patient, disclosures of PHI to law enforcement must be limited to the "minimum necessary" to accomplish the intended purpose. The onus falls on the covered entity to uphold the minimum necessary standard in reviewing and responding to requests for disclosure. This obligation underscores the importance of tailoring law enforcement requests carefully and only asking for the entire medical record when truly necessary.

STATE LAW

The Privacy Rule does not preempt state law that is "more stringent" in restricting release of PHI. As such, HIPAA provides "a federal floor of privacy protections," but not a ceiling. States can and sometimes do provide more wide-ranging safeguards for medical information considered especially sensitive, such as HIV/AIDS and mental health. Law enforcement officers encountering difficulties in this area may wish to consult with their local agency counsel regarding applicable state laws.

Ultimately, the best strategy for law enforcement is often to build trust and cultivate productive relationships with local hospital staff. A key part of this endeavor is to demonstrate sensitivity to the covered entity's legal and ethical obligations by avoiding the habit of requesting the entire medical record, except where specifically justified. Once mistrust and misconceptions are cleared away, HIPAA can provide an effective framework for balancing the important policies of public safety and patient privacy.

CASE SUMMARIES

United States Supreme Court

Fernandez v. California, 2014 U.S. LEXIS 1636 (U.S. Feb. 25, 2014)

Police officers investigating an assault and robbery saw Fernandez run into an apartment building. Once inside the building, the officers heard screams coming from one of the apartments. The officers knocked on the apartment door and Roxanne Rojas opened it. Rojas had a bump on her nose, fresh blood on her shirt and appeared to be crying. Rojas told the officers she had been in a fight. When the officers asked her if anyone else was in the apartment, Rojas told them that she and her four-year old son were the only individuals present. When the officers asked Rojas to step outside so they could conduct a protective sweep of the apartment, Fernandez stepped forward and told the officers not to enter. The officers arrested Fernandez for assaulting Rojas. In addition, the victim from the assault and robbery investigation identified Fernandez as his attacker. The officers transported Fernandez to the police station for booking. One-hour later, an investigator returned to the apartment and Rojas gave the investigator oral and written consent to search the apartment. The investigator seized weapons, gang paraphernalia and clothing worn by the robbery suspect.

The state charged Fernandez with robbery, domestic violence and firearms related charges. At trial, Fernandez filed a motion to suppress the evidence seized from the apartment, arguing Rojas' consent to search was not valid. The trial court and the California Court of Appeal both held Rojas' consent to search the apartment was valid, even though Fernandez had refused consent to search before he was arrested and taken to jail.

In *Georgia v. Randolph*, the United States Supreme Court held police officers may not conduct a warrantless search of a home over the express refusal of consent by a physically present resident, even if another resident consents to the search. Even though he was not present and objecting when Rojas gave the investigator consent to search the apartment, Fernandez argued his previously stated objection to the search of the apartment was still valid after he had been taken into custody.

The court disagreed. First, the court noted police officers cannot remove a person who might validly refuse consent to search in order to avoid that person's objection. When police officers remove a person who might validly object to a search, the court will to determine if the person's removal was objectively reasonable under the circumstances. In this case, Fernandez's removal was objectively reasonable. The court held an occupant, such as Fernandez, who is absent due to a lawful detention or arrest is in the same position as a person who is not present for any other reason.

Second, the court reiterated that a person's objection to a consent search is only valid when the person is present and objecting. If a person is present, objects to the search, but is then lawfully removed from the scene, a person with common authority, such as Rojas in this case, can give the officers valid consent to search. A person's objection does not remain in place after his lawful arrest.

Click **HERE** for the court's opinion.

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United States v. Apel, 2014 U.S. LEXIS 1643 (U.S. Feb. 26, 2014)

Two public highways run through a portion of Vandenberg Air Force Base, California. Adjacent to one of the highways is an area designated for peaceful protests. The base commander enacted several restrictions to control the protest area and issued an advisory stating that anyone who failed to adhere to the protest area policies could be barred from the base. Apel was convicted of three counts of trespassing on the base in violation of *18 U.S.C. § 1382* because he entered the designated protest area after he had been barred from the base for trespassing and vandalism.

The Ninth Circuit Court of Appeals reversed Apel's conviction. The Ninth Circuit held that *§1382* did not apply because the statute required the government to prove it has the exclusive control over the area on which the trespass allegedly occurred. Because the protest area was located on a portion of highway subject to an easement granted to the State of California, which later relinquished it to the County of Santa Barbara, the Ninth Circuit concluded the federal government lacked exclusive control over the area on which Apel's trespasses occurred. Consequently, the Ninth Circuit held Apel could not be convicted under *18 U.S.C. § 1382* for reentering a military installation after being ordered not to do so by the commanding officer.

The Supreme Court disagreed. In a unanimous decision, the court held nothing in *§ 1382* suggested the statute does not apply to a military base just because the federal government had conveyed a limited right to travel through a portion of the base or to assemble in a particular area. The common feature of the places described in *§ 1382* is not that they are used exclusively by the military, but that they have defined boundaries and are subject to the command authority of a military officer.

The Supreme Court further held the decision to secure a portion of the military base with fences did not change the boundaries of the base or reduce the authority of the base commander over the unfenced areas where the protest area was located.

Click **HERE** for the court's opinion.

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Rosemond v. United States, 2014 U.S. LEXIS 1787 (U.S. Mar. 5, 2014)

Title 18 U.S.C. § 924(c) prohibits "using or carrying" a firearm "during and in relation to any crime of violence or drug trafficking crime." To convict a defendant for aiding or abetting someone who commits a violation *§ 924(c)*, the Supreme Court held the government must prove the defendant actively participated in the underlying drug trafficking or violent crime and had advance knowledge that the other person would use or carry a gun during the commission of that crime. In this case, the court concluded the district court's jury instructions were erroneous because they allowed the jury to convict Rosemond without proof that Rosemond knew in advance that one of his co-defendants would be armed.

Click **HERE** for the court's opinion.

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Circuit Courts of Appeals

1st Circuit

United States v. Silva, 2014 U.S. App. LEXIS 2201 (1st Cir. N.H. Feb. 5, 2014)

Pelletier went to the police department and gave an officer $150 in counterfeit currency Pelletier said he received from Silva. Pelletier told the officer Silva possessed more counterfeit currency as well as counterfeit driver's licenses. Pelletier told the officers Silva was living out of a silver Cadillac, and provided the vehicle's location. The officer did not know Pelletier had contacted the police on numerous occasions in the past to report alleged incidents that were never substantiated.

Two other police officers were dispatched to the location provided by Pelletier. When the officers arrived, they saw a silver Cadillac, full of personal belongings, and a man sitting in the driver's seat. When the man refused to produce his driver's license, one of the officers threatened to arrest him. The man then provided a driver's license that identified him as Anthony Silva. A record check revealed Silva had an outstanding arrest warrant for an unpaid motor vehicle fine. The officers arrested Silva and searched him incident to arrest. The officers found a fake driver's license with Silva's photograph on it and counterfeit currency.

Later that day, Pelletier contacted the police and told an officer that Silva had called him from jail and said there was $3,000 worth of counterfeit currency in the trunk of the Cadillac. Because Silva's arrest involved counterfeiting, the local police passed the case to the United States Secret Service. A local police officer shared the information collected on Silva with a Secret Service agent, but it was not clear if the officer told the agent about Pelletier's history of making false reports. The agent applied for a warrant to search the Cadillac, which included Pelletier's accusations against Silva, but contained no information about Pelletier's prior history. The agents searched the Cadillac and seized $3,000 in counterfeit currency.

At trial, Silva moved to suppress the evidence discovered during his arrest and from the subsequent search of his car.

First, the court held the officers had reasonable suspicion to approach Silva and demand his driver's license based on the information provided by Pelletier. Even though the officers had no knowledge of Pelletier's prior history, which may have caused them to question the reliability of his information, Pelletier provided counterfeit currency allegedly obtained from Silva and he accurately described Silva's car and its location. Silva's refusal to provide his driver's license combined with Pelletier's claim that Silva was producing counterfeit identification, gave the officers justification to run a record check on Silva's license.

Second, the court held when the officers discovered the counterfeit currency on Silva's person, they had probable cause to seize the Cadillac and search it without a warrant. The Secret Service agent's decision to obtain a warrant to search the Cadillac did not diminish the fact that probable cause existed. The court stated, "The practice of awaiting a magistrate's warrant prior to conducting a search, even where officers feel confident in their own assessment of probable cause, is one that should be commended, not punished with exclusion."

Finally, the court held the agent's failure to include facts about Pelletier's history of false reporting was neither intentional nor reckless. In addition, even if the agent had included information

concerning Pelletier's history, this information would not have affected the magistrate's finding of probable cause.

Click **HERE** for the court's opinion.

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3rd Circuit

United States v. Golson, 2014 U.S. App. LEXIS 2537 (3d Cir. Pa. Feb. 11, 2014)

A postal inspector seized a package sent from "M. Tubbs" at an address in Phoenix, Arizona, to "Derek Brown" at an address in Mechanicsburg, Pennsylvania. The inspector determined the package was suspicious because the return address was fictitious and non-deliverable. The inspector sent the package to a postal inspector in Pennsylvania who determined "Derek Brown" was not a person known to receive mail at the Pennsylvania address. A drug detection dog alerted to the presence of narcotics in the package, and the postal inspector obtained a warrant to search the package four days later. When the inspector opened the package, he discovered approximately twenty pounds of marijuana.

The postal inspector contacted state police officers and planned a controlled delivery of the package. A state police officer replaced the twenty pounds of marijuana with a small amount of marijuana and other material to represent the original weight of the package. The state officer also placed equipment inside the package to track it and to alert the officers when the package was opened. The state officer obtained an anticipatory search warrant from a state court judge, which authorized the officers to search the residence once the package was delivered and the officers received a signal it had been opened.

After the package was delivered and the officers were alerted the package had been opened, they entered Golson's house and conducted a search. The officers recovered a variety of illegal drugs, weapons and ammunition. At his federal trial on drug and firearms charges, Golson argued the anticipatory search warrant issued by the state court judge violated *Federal Rule of Criminal Procedure 41(b).*

The court disagreed, holding the anticipatory search warrant was not subject to *Rule 41(b).* In federal prosecutions, *Rule 41(b)* grants the authority to issue search warrants to federal judges and judges of state courts of record. In the Third Circuit, *Rule 41(b)* also applies to warrants made at the request of a non-federal law enforcement officer, if the federal court reviewing the warrant deems the search to be "federal" in character. In this case, it was clear the issuing state court judge was not a judge in a state court of record. However, the court found the search of Golson's residence was not "federal" but rather, "state" in character. First, a state police officer applied for the warrant and alleged a violation of state law. Second, while federal agents may have assisted in obtaining the warrant, state police officers supervised its execution and the evidence seized from Golson's residence was placed state police custody.

The court further held the state police office established probable cause to support the issuance of an anticipatory search warrant.

Finally, the court held the four day warrantless seizure of the package by the postal inspectors was reasonable because the delay was due to the investigation, scheduled leave and the weekend, when postal operations cease or slow down considerably.

Click **HERE** for the court's opinion.

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United States v. Cortez-Dutrieville, 2014 U.S. App. LEXIS 3596 (3d Cir. Pa. Feb. 26, 2014)

Federal agents intercepted a UPS package containing heroin. The handwritten mailing address on the package was different from the address indicated on the electronic manifest. The agents repackaged the heroin in a new box, which listed the electronic address instead of the original handwritten address. The electronic address was for a residence where Portia Newell, the mother of Dutrieville's child, lived. The agents also placed a beeper in the package that would indicate when the package was opened, and obtained an anticipatory search warrant for the residence once the package was taken inside the home.

An undercover agent delivered the package to Dutrieville. Two minutes later, the beeper activated and agents entered the home. The agents arrested Dutrieville then searched the house and found the heroin, the empty package, the beeper and other drug paraphernalia in Dutrieville's overnight bag. Dutrieville told the agents he had been staying at the home with Newell's consent for three days. The agents also learned Dutrieville was the subject of an order of protection that provided Dutrieville had "no right or privilege to enter or be present on" Newell's premises and Newell's consent could not override this provision of the order.

Dutrieville argued the evidence found in Newell's house should have been suppressed because the anticipatory search warrant was not supported by probable cause.

The district court held Dutrieville did not have standing under the *Fourth Amendment* to challenge the validity of the search warrant because he was subject to an order of protection that barred him from Newell's home.

The Third Circuit Court of Appeals agreed. Generally, a person's status as an overnight guest is enough to show he has a reasonable expectation of privacy in another person's home. However, Dutrieville was not like most overnight guests because the protection order prohibited him from entering the home and having any contact with Newell and Newell's consent could not override the terms of the order. Consequently, Dutrieville's presence in Newell's home was "wrongful" and any expectation of privacy he may have had was not one that society is prepared to recognize as reasonable.

Because Dutrieville's presence in Newell's home was unlawful, the court further held he could not reasonably expect privacy in a bag that he brought with him during his visit. The court reasoned, a person who is prohibited from entering a particular place cannot reasonably expect to use that place to store his personal effects.

Click **HERE** for the court's opinion.

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7th Circuit

United States v. Johnson, 2014 U.S. App. LEXIS 2303 (7th Cir. Ill. Feb. 6, 2014)

A jury convicted Johnson of robbing three banks. The majority of the testimony against Johnson came from Prince, who told the jury that he and Johnson had planned and committed the robberies together. To corroborate Prince's story, Williams testified that Prince asked her to give him a ride one day. Williams stated when she picked up Prince, he was accompanied by a stranger. Williams said she drove Prince and the stranger to a grocery store where the men robbed the branch bank it contained. Williams had not met the stranger before and did not know his name; however, Williams picked Johnson's photograph out of a "six-pack" photo array.

Johnson argued the trial court should have suppressed Williams' identification of him.

The court disagreed. When conducting a photographic line-up, the Seventh Circuit has suggested the police should present the photographs to the witness sequentially rather than part of an array. However, while this might be the best approach, the court recognized the due process clause of the *Fifth Amendment* only prohibits the use of an identification procedure that is unnecessarily suggestive. In this case, all six photographs fit Williams' description, a bald black male with a small amount of facial hair. In addition, all six men were in the same clothing and photographed against the same background. As a result, the court concluded the photo array presented to Williams was not unnecessarily suggestive because nothing about the array made Johnson's photograph stand out from the others.

Click **HERE** for the court's opinion.

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Carter v. City of Milwaukee, 2014 U.S. App. LEXIS 3048 (7th Cir. Wis. Feb. 19, 2014)

In an effort to lose weight, Officer Carter had been taking Colonix, a non-prescription supplement to clean his colon, for about two weeks. Carter consumed some Colonix prior to entering an apartment with other officers to execute a search warrant. During the execution of the search warrant, a resident accused the officers of taking approximately $1,750 of his cash. As a result, a supervisor told the officers, including Carter, they were not free to leave until representatives from the police department's Professional Performance Division (PPD) arrived. Thirty to forty-five minutes later, Carter claimed he was feeling the effects of the supplement. Carter asked a supervisor if he could leave the scene to use the restroom at the police station, as he did not want to use the bathroom in the residence because of its very dirty condition. The supervisor put his hand up with his palm straight out and told Carter, "You can't leave until I search you." The supervisor directed Carter to remove his jacket, outer vest carrier and duty belt, which held Carter's firearm. The supervisor patted down Carter and then searched Carter's jacket, wallet, police memo book and duty belt. The supervisor also had Carter remove his boots and searched them. After the supervisor did not find any of the alleged missing money, Carter was allowed to go back to the police station.

Carter sued the supervisor and the police department. Carter claimed he was seized in violation of the *Fourth Amendment* when the supervisor held his hand out and told Carter he had to be searched if he wished to leave the apartment.

The court disagreed, holding that Carter was not seized for *Fourth Amendment* purposes. The supervisor did not tell Carter he was the subject of a criminal investigation, nor was there any

indication that he was. In addition, the supervisor did not read Carter his rights and he did not threaten to arrest if Carter refused to be searched. Although Carter might have felt he had to agree to the search as a condition of being allowed to leave, the court ruled this did not mean the supervisor seized Carter under the *Fourth Amendment*. The court concluded a reasonable officer in Carter's position would not have feared arrest or detention if he declined a pat down or search.

Click **HERE** for the court's opinion.

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8th Circuit

United States v. Crisolis-Gonzalez, 2014 U.S. App. LEXIS 2451 (8th Cir. Mo. Feb. 10, 2014)

Federal agents received information that Gonzalez had entered the United States illegally, was involved in trafficking methamphetamine and had possibly purchased a firearm. Four agents went to an apartment where they believed Gonzalez was staying to conduct a knock and talk interview. Savedra opened the door and allowed the agents to enter the apartment. Inside the apartment, the agents saw a woman, and after initially hesitating, Savedra indicated there was someone else in the apartment. The agents drew their firearms and conducted a protective sweep. The agents discovered Gonzalez and another man in the apartment and handcuffed them. One of the agents asked the occupants their names and immigration status. Gonzalez admitted he was in the country illegally. The agent then asked Gonzalez for consent to search the apartment. Gonzalez asked the agent what he was looking for, and the agent replied he was looking for fraudulent documents, guns, large amounts of cash and drugs. Gonzalez told the agent he had a gun under his mattress. The agent asked Gonzalez a second time for consent to search the apartment. When Gonzalez asked what would happen if he refused, the agent told Gonzalez he would attempt to get a search warrant. Gonzalez and the woman then signed consent-to-search forms, while Savedra and the other man refused. The agents searched Gonzalez's bedroom and seized a gun, drugs, drug paraphernalia, and a fraudulent social security card. Afterward, the agent advised Gonzalez of his *Miranda* rights and Gonzalez waived those rights and made incriminating statements.

The government indicted Gonzalez on drug and immigration offenses. Gonzalez filed a motion to suppress all evidence and statements obtained during the search of the apartment.

First, the court held Savedra, who shared a bedroom in the apartment with his girlfriend, had actual authority to consent to the agents' initial entry into the apartment. The court also ruled the agents did not gain entry into the apartment by false pretenses. Savedra agreed to let the agents into the apartment without specifically asking the agents why they wanted to come in. The agents' general request to enter the apartment was consistent with their goal of locating Gonzalez.

Second, the court held the agents' protective sweep was reasonable. Protective sweeps are not limited to situations where police officers arrest a person in a dwelling. Here, the agents had reason to believe Gonzalez was involved in drug trafficking and might have purchased a gun. In addition, Savedra's initial hesitation when the agents inquired about the presence of others in the apartment gave the agents reason to believe there might be others in the apartment who posed a threat to them.

Third, the court held Gonzalez's pre-*Miranda* statement about the gun under his mattress was a volunteered, spontaneous admission. The agent's question about Gonzalez's immigration status did not cause Gonzalez to make the incriminating statement regarding the gun. Rather, Gonzalez

volunteered the location of the gun after the agent explained of what he would be looking for if allowed to search the apartment.

Fourth, the court held the agents obtained Gonzalez's consent to search his bedroom voluntarily. Gonzalez asked the agent what would happen if he refused to consent and Gonzalez read the consent-to-search form before he signed it. These actions indicated Gonzalez's intelligent consideration of his options. In addition, by the time the agent asked Gonzalez for consent to search, the agent had already removed Gonzalez from handcuffs and all of the agents had holstered their firearms.

Finally, the court held Gonzalez's post-*Miranda* statements were obtained after Gonzalez validly waived his *Miranda* rights.

Click **HERE** for the court's opinion.

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United States v. Holleman, 2014 U.S. App. LEXIS 3717 (8th Cir. Iowa Feb. 27, 2014)

A state trooper stopped Holleman for speeding and following too closely behind another vehicle. While questioning Holleman during the stop, the trooper became suspicious of Holleman's behavior. First, Holleman only opened the passenger-side window of his truck one inch when the trooper approached the truck. Second, Holleman refused to roll the window down any farther after the trooper asked him to do so. Finally, Holleman slid his license, registration and insurance card through the one-inch opening in the window. Seven minutes into the stop, the trooper walked his drug dog around Holleman's truck. The dog did not successfully sniff the truck, however, because it was distracted by the smell of a dead animal in a nearby ditch. The trooper issued Holleman a warning ticket and let him leave.

Still suspicious of Holleman, the trooper contacted another police officer who followed Holleman to a hotel. While Holleman's truck was parked in the hotel parking lot, the officer walked his drug dog, Henri, around the truck two times. Both times, Henri alerted to the presence of drugs in Holleman's truck. While waiting for other officers to obtain a warrant to search the truck, an officer spoke to Holleman in the parking lot. Holleman told the officer the two arc welders located in the back of the truck belonged to him. After the search warrant was obtained, officers searched Holleman's truck and found approximately 250 pounds of marijuana hidden inside two arc welders.

The government indicted Holleman for possession with intent to distribute marijuana. Holleman filed a motion to suppress the marijuana found in his truck and the statement he made to the officer in the hotel parking lot.

Holleman claimed the trooper unreasonably extended the duration of the initial stop to conduct the first drug dog sniff. Holleman argued that without this unreasonable extension, the second officer would never have been called in with Henri to conduct a sniff of his truck in the hotel parking lot.

The court disagreed. By the time the trooper employed his drug dog, he was already suspicious of Holleman; therefore, the trooper's use of his drug dog did not unreasonably extend the duration of the initial traffic stop.

Next, the court held Henri's two positive alerts to the side of Holleman's truck established probable cause to believe the vehicle contained drugs. The government introduced sufficient evidence concerning Henri's initial and annual recertifications, as well as his field performance statistics to establish his reliability.

The court further held that even though the officers searched Holleman's truck pursuant to a search warrant, a warrantless search of Holleman's truck would have been justified under the automobile exception to the warrant requirement.

Finally, the court held Holleman's statements to the officer in the parking lot were admissible because Holleman was not in custody for *Miranda* purposes when he spoke to the officer. First, the officer never told Holleman he had to remain in the parking lot or told Holleman he was not free to leave. Second, Holleman was not restrained by the officer while the officer waited for the search warrant. Third, Holleman and the officer were in an open area, and the officer did not limit Holleman's freedom to use his cell phone. While it may have been clear to Holleman that his truck could not leave, the court held a reasonable person in Holleman's position would have felt that he was free to leave the parking lot.

Click **HERE** for the court's opinion.

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9th Circuit

Sheehan v. City & County of San Francisco, 2014 U.S. App. LEXIS 3321 (9th Cir. Cal. Feb. 21, 2014)

Teresa Sheehan, a woman who suffered from mental illness, lived in a group home that accommodated such persons. Sheehan's assigned social worker became concerned about her deteriorating condition because Sheehan was not taking her medications. When the social worker entered Sheehan's room, she told the social worker to get out. In addition, Sheehan told the social worker she had a knife and threatened to kill him. The social worker left Sheehan's room, cleared the building of other residents and called the police to help him transport Sheehan to a mental health facility for a 72-hour involuntary commitment for evaluation and treatment.

When Officers Reynolds and Holder arrived, the social worker told them he had cleared the building of other residents. The social worker also told the officers the only way for Sheehan to leave her room was by using the main door, as the window in Sheehan's room could not be used as a means of escape without a ladder. The officers then entered Sheehan's room, without a warrant, to confirm the social worker's assessment and to take Sheehan into custody. Sheehan grabbed a knife and threatened to kill the officers, stating she did not wish to be detained in a mental health facility. The officers went back into the hallway and closed the door to Sheehan's room. The officers called for back-up, but before any other officers arrived, the two officers drew their firearms and forced their way back into Sheehan's room. After Sheehan threatened the officers with a knife, the officers shot Sheehan five or six times. Sheehan survived and sued the officers, claiming the officers violated her *Fourth Amendment* rights by entering her room without a warrant and using excessive force.

The court held the officers were justified in entering Sheehan's room initially, under the emergency aid exception to the *Fourth Amendment's* warrant requirement. When the officers first entered Sheehan's room, they had an objectively reasonable basis to believe Sheehan was in need of emergency medical assistance based on the information provided by Sheehan's social worker.

Even though the officers might have been justified in entering Sheehan's room the second time without a warrant, the court concluded there were factual issues that had to be resolved by a jury and not the court. For example, Sheehan produced evidence suggesting the officers deviated from training they received from their department on how to deal with mentally ill subjects. Consequently,

the court held a jury could find that the officers acted unreasonably by forcing their way into Sheehan's room and provoking a near fatal confrontation.

After ruling that a reasonable jury could find a *Fourth Amendment* violation for the officer's second entry into Sheehan's rule, the court further held the officers were not entitled to qualified immunity. The court concluded prior case law would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and threatening others, when there was no objective need for immediate entry. The court emphasized that at trial, the facts may show Sheehan was not contained, that she presented a flight risk or threat to others. However, at this stage, the court stated those fact are in dispute.

Concerning the officers' use of deadly force, the court held, at the moment of the shooting, the officers' use of deadly force was reasonable because Sheehan posed an immediate threat of danger to the officers' safety. However, under Ninth Circuit case law, police officers may be liable for an otherwise lawful use of deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of a separate *Fourth Amendment* violation. In this case, Sheehan presented evidence from which a reasonable jury could find the officers acted recklessly in failing to take her mental illness into account and in forcing a deadly confrontation rather than attempting to de-escalate the situation.

Finally, the court held Officer Reynolds was entitled to qualified immunity on Sheehan's claim that Reynolds last shot constituted excessive force because Sheehan was already on the ground when Reynolds fired it. Even if Reynolds continued to fire after Sheehan reached the ground, Reynolds was entitled to qualified immunity because Reynolds was forced to make a split-second decision in response to an imminent threat. In addition, after Sheehan was on the ground she continued to hold the knife and threaten the officers.

Click **HERE** for the court's opinion.

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10th Circuit

United States v. Augustine, 2014 U.S. App. LEXIS 2976 (10th Cir. Kan. Feb. 19, 2014)

Police officers established probable cause to obtain a warrant to search Augustine's residence for evidence of methamphetamine distribution. After being advised of his *Miranda* rights, Augustine agreed to be interviewed by two police officers without an attorney. At the beginning of the interview, Augustine told the officers he was not under the influence of alcohol or drugs; however, Augustine admitted he took a variety of prescription medications. Throughout the interview, Augustine indicated a desire to take his prescription medications, but he never told the officers that he could not or would not continue the interview without his medication. During the interview, Augustine made several incriminating statements.

The government convicted Augustine on two counts of conspiracy to distribute methamphetamine.

Augustine argued the search warrant affidavit did not establish probable cause to search his residence and his ability to properly waive his *Miranda* rights was impaired because he was under the influence of controlled substances during his interview with the police officers.

Without deciding whether the search warrant application established probable cause, the court held the application established a minimal nexus between Augustine's residence and the drug-related

items being sought in the warrant. Consequently, the court concluded the good-faith exception to the exclusionary rule applied.

The court noted drug or alcohol use, by itself, is not enough to overcome evidence showing the defendant was sufficiently in touch with reality so he knew his rights and the consequences of waiving them. Here, the video recording of Augustine's interview and the testimonies of the interrogating officers did not establish that Augustine was so impaired that his waiver of his *Miranda* rights was invalid. In addition, even though Augustine may have been more comfortable with his medication, the absence of his medication did not cause Augustine to proceed with the interrogation involuntarily or in ignorance of the consequences of his actions or statements.

Click **HERE** for the court's opinion.

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District of Columbia Circuit

United States v. Brodie, 2014 U.S. App. LEXIS 2874 (D.C. Cir. Feb. 18, 2014)

Police officers obtained a warrant to search a townhouse belonging to a murder suspect who was in custody. While waiting for homicide detectives to arrive, two police officers parked down the street saw Brodie leave the townhouse and walk down the sidewalk towards them. Because Brodie had left the townhouse they planned to search, the officers decided to stop and identify him. The officer pulled the patrol car parallel to Brodie, who was now two townhouses further down the street, while the second officer got out of the car. The officer told Brodie to put his hands on a nearby parked car. Brodie complied. When the officer turned to speak to his partner, Brodie ran. As the officers chased him, Brodie discarded three firearms. Brodie dropped to the ground after one of the officers threatened to deploy his Taser against him. The officers found crack cocaine on Brodie's person.

The district court denied Brodie's motion to suppress the firearms and crack cocaine.

The Court of Appeals reversed. A person is seized under the *Fourth Amendment* when physical force is used to restrain movement or when a person submits to an officer's show of authority. In this case, the court determined Brodie was seized when he placed his hands on the parked car when told to do so by the police officer.

Next, the court held Brodie's seizure was not reasonable. The government did not argue the officers had reasonable suspicion or probable cause to justify Brodie's seizure. Instead, the government argued Brodie's seizure was reasonable under *Michigan v. Summers* because it was incident to the execution of the search warrant on the townhouse. However, the court stated *Summers* only applies to individuals who are present when and where the search is being conducted. Here, the officers were waiting for the homicide detectives to arrive and had not yet begun the execution of the search warrant on the townhouse when they seized Brodie. Because the officers did not encounter Brodie during the search, the court declined to determine if it was reasonable to detain Brodie down the street from the townhouse.

Finally, the court held suppression of the evidence was warranted because the officers only discovered the firearms and crack cocaine because of Brodie's unlawful seizure. There was no evidence to suggest Brodie would have discarded the firearms if the officers had stayed in their car to wait for the detectives to arrive as originally planned.

Click **HERE** for the court's opinion.

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Unites States Court of Appeals for the Armed Forces

United States v. Wicks, 2014 CAAF LEXIS 173 (C.A.A.F. Feb. 20, 2014)

Wicks was a military training instructor (MTI) whose duties included training new recruits. Wicks was involved in a personal relationship with Roberts, who was also an MTI. A few months later, after their relationship ended, Roberts took Wicks' cell phone without his permission. Roberts read various text messages on Wicks' cell phone that suggested Wicks had engaged in inappropriate conduct with some trainees. Eight months later, as part of a general inquiry from the command concerning MTI misconduct, a criminal investigator interviewed Roberts. Roberts told the investigator she had evidence that would prove Wicks engaged in inappropriate relationships with trainees, and provided verbal descriptions of the text messages she had seen on Wicks' cell phone. Approximately one week later, Roberts gave the investigator Wicks' cell phone. Instead of asking Roberts to show her the text messages Roberts had previously seen, the investigator allowed Roberts to leave and then the investigator reviewed some of the text messages on the cell phone. The next day, the investigator gave the cell phone to another police agency and requested a detailed analysis of the cell phone's contents. Wicks was eventually charged with four violations of the Uniform Code of Military Justice that were referred to trial by general court-martial. Wicks filed a motion to suppress evidence obtained from his cell phone and other evidence derived from the evidence obtained from his cell phone.

First, the United States Court of Appeals for the Armed Forces held the military judge correctly ruled Wicks had a reasonable expectation of privacy in his cell phone.

Second, the court held the military judge correctly ruled the criminal investigator exceeded the scope of the private search conducted by Roberts. Generally, the *Fourth Amendment* does not apply to searches and seizures conducted by private individuals. However, one of the exceptions to the private search doctrine pertains to the scope of any subsequent warrantless search by the government. The government may not exceed the scope of the search by the private individual, to include expanding the private search into a general search. Here, the trial judge was not able to determine whether the investigator limited her search of Wicks' cell phone to the information Roberts had previously discovered during her private search. The court commented that the investigator engaged in a general search of Wicks' cell phone because in reviewing the text messages she did not limit herself to what Roberts had already searched.

Click **HERE** for the court's opinion.

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