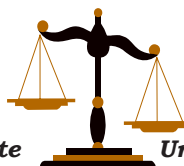




CJI Legal Briefs



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AMERICANS WITH DISABILITIES ACT: Disabled Prisoners

United States v. Georgia, No. 04-1203, 1/10/06

Tony Goodman is a paraplegic inmate in the Georgia prison system who, at all relevant times, was housed at the Georgia State Prison in Reidsville. After filing numerous administrative grievances in the state prison system, Goodman filed a pro se complaint in the United States District Court for the Southern District of Georgia challenging the conditions of his confinement. He named as defendants the State of Georgia and the Georgia Department of Corrections (state defendants) and several individual prison officials.

Goodman's pro se complaint and subsequent filings in the District Court included many allegations, both grave and trivial, regarding the conditions of his confinement in the Reidsville prison. Among his more serious allegations, he claimed that he was confined for 23-to-24 hours per day in a 12-by-3-foot cell in which he could not turn his wheelchair around. He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied. On multiple occasions, he asserted, he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own, and, on several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in

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cleaning up the waste. He also claimed that he had been denied physical therapy and medical treatment, and denied access to virtually all prison programs and services on account of his disability.

The Federal District Court dismissed the §1983 claims because Goodman's allegations were vague, and granted respondents summary judgment on the Title II money damages claims because they were barred by state sovereign immunity.

The United States intervened on appeal. The Eleventh Circuit affirmed the District Court's judgment as to the Title II claims, but reversed the §1983 ruling, finding that Goodman had alleged facts sufficient to support a limited number of Eighth Amendment claims against state agents and should be permitted to amend his complaint.

The U.S. Supreme Court granted certiorari and held that Title II of the *Americans With Disabilities Act* (ADA) creates a private cause of action for damages against states for actual violations of disabled prisoners' Fourteenth Amendment rights. The Court also held that Title II of the ADA validly abrogates (or abolishes) state sovereign immunity in these actions.

CHILD PORNOGRAPHY:

Probable Cause

United States v. Gourde,
CA9, No. 03-30262, 3/9/06

In August 2001, an undercover FBI agent discovered a website called "Lolita-gurls.com." The first page of the site

contained images of nude and partially-dressed girls, some prepubescent. As part of his investigation, the undercover agent joined the website and was a member from August to December 2001. The membership fee was \$19.95 per month, deducted automatically from the member's credit card. Lancelot Security handled credit card processing and access control for Lolitagurls.com. Members received unlimited access to the website and were "allowed...to download images directly from the website." Browsing the entire website, whose "primary feature was the images section," the undercover agent captured "hundreds of images" that "included adult pornography, child pornography, and child erotica." These images included the lascivious display of the breasts and genitalia of girls under the age of eighteen.

The FBI eventually identified the owner and operator of Lolitagurls.com and, in January 2002, executed a search warrant. Among the seized items was his computer, which contained child pornography images that had been posted to the Lolitagurls.com website. The owner "admitted...that 'Lolitagurls.com' was a child pornography website he operated as a source of income."

In response to a follow-up subpoena, Lancelot Security provided the FBI with information on Lolitagurls.com's subscribers. Lancelot's records listed Micah Gourde as a member and provided his home address, date of birth, email address, and the fact that he had been a subscriber from November 2001 until January 2002. Gourde never cancelled his membership—the FBI shut down the site at the end of January, while he was still a member.

In May 2002, the FBI requested a warrant to search the residence of Gourde for the purpose of seizing computer equipment and other materials containing evidence that he “probably caused the uploading, downloading and transmission of child pornography over the Internet” in violation of 18 U.S.C. §§ 2252 and 2252A, which criminalize the possession, receipt and transmission of child pornography.

The affidavit contained extensive background information on computers and the characteristics of child pornography collectors. One section set out legal and computer terms relevant to understanding how downloading and possessing child pornography would violate 18 U.S.C. § 2252. Citing FBI computer experts, the affidavit explained that if a computer had ever received or downloaded illegal images, the images would remain on the computer for an extended period. That is, even if the user sent the images to “recycle” and then deleted the files in the recycling bin, the files were not actually erased but were kept in the computer’s “slack space” until randomly overwritten, making even deleted files retrievable by computer forensic experts. Any evidence of a violation of 18 U.S.C. § 2252 would almost certainly remain on a computer long after the file had been viewed or downloaded and even after it had been deleted.

The affidavit also described the use of computers for child pornography activities. Based on his experience and that of other FBI experts, Moriguchi wrote that “[p]aid subscription websites are a forum through which persons with similar interests can view and download images in relative privacy.” He described how collectors and distributors of child pornography use the free email and

online storage services of Internet portals such as Yahoo! and Hotmail, among others, to operate anonymously because these websites require little identifying information. Communications through these portals result in both the intentional and unintentional storage of digital information, and a “user’s Internet activities generally leave traces or ‘footprints’ in the web cache...” Drawing on the expertise of the FBI Behavioral Analysis Unit, the affidavit listed certain “traits and characteristics...generally found to exist and be true in...individuals who collect child pornography.” According to the affidavit, the majority of collectors are sexually attracted to children, “collect sexually explicit materials” including digital images for their own sexual gratification, also collect child erotica (images that are not themselves child pornography but still fuel their sexual fantasies involving children), “rarely, if ever, dispose of their sexually explicit materials,” and “seek out like-minded individuals, either in person or on the Internet.”

The affidavit concluded by identifying facts about Gourde that made it fairly probable that he was a child pornography collector and maintained a collection of child pornography and related evidence: (1) he “took steps to affirmatively join” the website; (2) the website “advertised pictures of young girls;” (3) the website offered images of young girls engaged in sexually explicit conduct; (4) he remained a member for over two months, although he could have cancelled at any time; (5) he had access to hundreds of images, including historical postings to the website; and (6) any time he visited the website, he had to have seen images of “naked prepubescent females with a caption that described them as twelve to seventeen-year-old girls.”

On the strength of this affidavit, the magistrate judge issued a warrant to search Gourde's residence and computers. The FBI searched Gourde's house and seized his computer, which contained over 100 images of child pornography and erotica.

Gourde filed a motion to suppress the images found on his computer. At the suppression hearing, the district court heard testimony from two FBI agents, including the author of the affidavit. The district court restricted its ruling to "the face of the affidavit," and denied Gourde's motion to suppress. The district court determined that the recitations in the affidavit supported a fair probability that evidence of a crime would be found on Gourde's computer. The judge applied a "common sense approach" to conclude that evidence of a subscription to even a "mixed" site—one that offered both legal adult pornography and illegal child pornography—provided the necessary "fair probability" to "look further."

Upon appeal, the United States Court of Appeals for the Ninth Circuit further discussed the issue of probable cause in the context of whether child pornography would be found on a computer. A majority agreed that a search warrant affidavit which set forth information that Gourde was a paying member of a Web site that provided photographs of underage girls engaged in sexually explicit conduct established probable cause that his home computer would contain images of child pornography.

**CIVIL LIABILITY: Jail Suicide;
Video Surveillance of Detainee's Cell;
Failure by Supervisor to Monitor**

Short v. Smoot, CA4, No. 05-1284, 2/2/06

Thomas Lee Short was arrested on January 8, 2004, and jailed for assault and battery of his wife, in violation of a September 2003 protective order that prohibited Mr. Short from having any contact with her, from committing acts of family abuse, and from drinking alcoholic beverages. After his release on January 11, 2004, Short went to the Blue Ridge Motel in Front Royal, Virginia, and began drinking heavily. Around 9:30 p.m., Short called his wife, Mary Short, and told her that he was planning to kill himself. Mrs. Short, concerned that her husband would carry out his threat, called the Warren County Sheriff's Office to request that they check the local bridges. That office advised her to call the Front Royal Town Police, which she did. Soon after calling his wife, Mr. Short also called his daughter, Linda Good, to tell her that he "wanted to die," and to ask if she could come pick him up. When she arrived at the motel, Good found her father so drunk that she decided it would be better to let him sleep and return the next morning. Mr. Short called his wife again at 4:30 a.m. and repeated his threat to kill himself. He also called his daughter, who told him she would pick him up at noon the next day.

Before she returned to the hotel, Good spoke with Mrs. Short, and they decided to have Mr. Short arrested again for violating the September 2003 protective order, believing that this course of action would keep him from harming himself. Mrs. Short went to the

Magistrate's Office to file a criminal complaint and the Magistrate issued a warrant for Mr. Short's arrest. The Magistrate then contacted the Front Royal Town Police and told the officer that Mr. Short was "basically a drunk," that he was intoxicated, and that he had called his wife threatening to kill himself.

The officer, Sergeant Clint Keller, went to the Short residence, arrested Mr. Short, and transported him to the Warren County Jail. Sergeant Keller took Mr. Short before the Magistrate, who issued an order remanding Mr. Short to custody until he could appear in the Warren County General District Court the next day. Sergeant Keller then turned Mr. Short over to the deputies on duty at the jail. Defendants Smoot, Beatty, Oakes, and Lewis were in the jail's monitor room, where Sergeant Keller advised them that Mr. Short had been arrested for violation of a protective order, that he was drunk, and that he had been calling his wife threatening to kill himself.

The Warren County Jail Policy and Procedures manual addressed proper treatment of potentially suicidal inmates. The manual required custodial officers to remove all potential tools such as sheets, blankets, and shoelaces, to conduct inmate checks at random intervals (at least twice per hour) and to make reports of any unusual occurrences. The defendant deputies also received training in the treatment of potentially suicidal inmates. If the deputies were aware that the inmate was suicidal, they were instructed to remove his clothing, place him in a suicide "smock," call mental health services, and conduct checks at fifteen-minute intervals.

When an intoxicated inmate was brought to the jail, deputies would attempt to process him.

If the inmate was unable to give a medical history, then the typical practice was to place the intoxicated inmate in the jail's sick cell, separate from the general population, to sober up, and also to remove all items that could be used for "self-destructive purposes."

Despite Sergeant Keller's statement that Short had threatened to kill himself, the deputies never removed Short's clothing and shoelaces or called for a mental health evaluation. Sergeant Smoot took him from the booking area to the bathroom and then to the sick cell, where he removed Short's belt. Several hours later, Smoot heard banging coming from the sick room. He asked Short if he was all right, and Short responded that he was fine. He did not apprise the other deputies of the disturbance, nor did he make a report of an unusual occurrence. Deputy Lewis checked on Short twice, at approximately 5:30 and 6:30 p.m. Both times Short was lying in bed with a sheet over him and appeared to be asleep. Deputy Oakes also checked on Short around 5:00 p.m. and observed that he was asleep.

Sergeant Smoot and Deputies Lewis, Oakes, and Beatty's shifts ended at 7:00 p.m. and defendant Deputies Ferguson, Kensy, and Seal arrived. No one in the departing shift informed the incoming deputies that Short had threatened to kill himself; the incoming deputies were only aware that an intoxicated detainee had been brought in and placed in the sick room.

The Warren County Jail used surveillance cameras to monitor inmate activity. There were a number of twelve inch television screens that displayed images from these cameras in the jail's monitor room. During the evening shift, Deputy Ferguson, the officer-in-charge, was

in the monitor room from approximately 7:00 to 8:30 p.m. and was responsible for observing monitors as well as answering the telephone and admitting any visitors. He acknowledged that he was aware that an inmate was in the sick cell on the evening of January 12, 2004, and that he observed the monitor showing activity in the sick cell. He left the monitor room for a short time at approximately 8:24 p.m. to respond to an inmate waving a towel at the camera. Deputy Seal was not working in the monitor room. He made rounds of the cells at approximately 7:15 p.m., and again between 8:00 and 8:30 p.m. Seal did not check on the sick cell where Short was housed, believing that it was unoccupied. Deputy Kensity was in the jail records room filing from 7:00 to 8:30 p.m. He passed through the monitor room for a few minutes, but was not present at the jail between 8:35 and 9:00.

The court has reviewed the videotape taken from the surveillance camera that recorded Short's activity in the sick room. Between 7:00 and 7:30 p.m., Short removed the laces from his shoes, tied them together, and climbed from his bed to the bars of his cell. He tied the shoelaces to the bars and tested their strength. He then tied the laces around his neck. Short repeated this process a number of times, alternating between climbing on the bars and sitting on his bed for several minutes at a time. At approximately 7:36 p.m., Short again climbed from his bed to the bars of his cell, placed the noose around his neck, and hung himself. It was not until approximately 9:00 p.m., when Deputy Seal escorted a new detainee to the sick room, that the deputies discovered Short's body.

Mrs. Short subsequently brought this action against Deputies Smoot, Beatty, Oakes, Lewis,

and Ferguson along with Sheriff McEathron and Deputies Kensity and Seal pursuant to 42 U.S.C.A. § 1983 contending that the officers violated her husband's rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment by exhibiting deliberate indifference to the substantial risk that he would commit suicide. After the district court dismissed Sheriff McEathron from the action, all remaining defendants moved for summary judgment. The district court denied the motion as to Deputies Smoot, Beatty, Oakes, and Lewis (the first-shift officers), concluding that the forecasted evidence permitted the reasonable inference that the conduct of the first shift officers constituted deliberate indifference because the officers all were aware of the risk that Short would commit suicide yet failed to follow jail procedure or even take the simple precaution of warning the next shift that Short was at risk. The court also denied the motion as to Deputy Ferguson, concluding that the forecasted evidence supported the inference that he exhibited deliberate indifference because he actually witnessed Short's suicide in progress, understood what was happening, and yet made no attempt to intervene.

It is first argued that the district court erred in denying summary judgment to the first-shift officers. The Fourth Circuit Court of Appeals agreed, stating as follows:

..."Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines.' *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Thus, government officials performing discretionary functions are

entitled to qualified immunity from liability for civil damages to the extent that ‘their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

“The right in question here, defined at the appropriate level of specificity, is the right of a detainee, whose jailers know that he is suicidal, to have his jailers take precautions against his suicide beyond merely placing him in a cell under video surveillance. We hold that *Brown v. Harris*, 240 F.3d 383 (4th Cir. 2001), demonstrates that no such right derives from the Eighth Amendment.

“The appropriate framework for evaluating constitutional claims arising from a prison official’s deliberate indifference to ‘a substantial risk of serious harm to an inmate’ is set out in *Farmer v. Brennan*, 511 U.S. 825 (1994). First, a constitutional violation can occur only when the deprivation alleged is objectively, sufficiently serious. A substantial risk of suicide is sufficient to satisfy this condition. Second, the prison official must have a sufficiently culpable state of mind. The subjective component of an Eighth Amendment claim challenging the conditions of confinement is satisfied by a showing of deliberate indifference by prison officials. Deliberate indifference entails something more than mere negligence but is satisfied by something less

“...Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. It requires that a prison official actually know of and disregard an objectively serious condition, medical need, or risk of harm.

“Importantly, a prison official who actually knows of a substantial risk to inmate health or safety may be found free

from liability if he responded reasonably to the risk, even if the harm ultimately was not averted. *Farmer* holds that ‘prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.’

“*Brown v. Harris*, 240 F.3d 383 (4th Cir. 2001) demonstrates that the first-shift officers’ response to Short’s risk of suicide was objectively reasonable and therefore sufficient to prevent liability under the Eighth Amendment. In *Brown* we held that, as a matter of law, placement of a detainee in a cell under video surveillance constituted an objectively reasonable response to the risk that Brown would kill himself. We further concluded that the reasonableness of the response was not affected by the fact that there were additional precautions, such as placing Brown in a paper gown or having him examined by a medical professional, that could also have been taken.

“Here, the first-shift officers’ response to the risk that Short would kill himself was the same

as the response in *Brown*: they placed the detainee in a cell under video surveillance. Thus, under *Brown*, this response was sufficient under the Cruel and Unusual Punishments Clause regardless of whether additional precautions might also have been advisable.

“The critical point is that despite the actual failure of the officers’ measures to prevent the detainees’ suicides, and despite possible inattentiveness of the officers whose duty it was at the time of the suicides to watch the monitors, in both *Brown* and the present case the officers placed their detainees in video-monitored cells, knowing that someone would be responsible for watching the monitors.

“The evidence supports the reasonable inference that Ferguson observed Short removing the laces from his shoes and, over a period of twenty to thirty minutes, climbing on the bars of his cell, tying his shoelaces to the bar, placing a noose around his neck, and testing the weight of the rope. On this basis, the district court concluded that the record permitted a reasonable inference that Ferguson knew Short was attempting to commit suicide. The court ruled that failure to make any effort to stop the ongoing suicide attempt, under such circumstances, would constitute deliberate indifference.”

The Fourth Circuit Court of Appeals reversed the denial of summary judgment to Deputies Smoot, Beatty, Oakes, and Lewis but affirmed the denial of summary judgment with regard to Deputy Ferguson, the officer in charge, who was in the monitor room and responsible for monitoring the surveillance cameras.

DWI ENFORCEMENT:

Vehicle Stop Based on Citizen’s Tip

Kellems v. State, (Indiana Supreme Court),
No. 62S05-0501-CR, 2/16/06

Editors Note: Courts across the United States have taken varying positions on whether a citizen’s tip about drunk driving will support a stop of the suspected vehicle. Law enforcement officers, if possible, should always verify the erratic driving of the suspect vehicle prior to making the stop. As the following case indicates, this is not always possible.

On March 20, 2002, the Tell City Police Department received a telephone call from a woman identifying herself as Dodie McDonald. McDonald reported seeing a man she identified as Luke Kellems driving from Troy to Tell City. According to her report, Kellems was driving without a license or insurance, intoxicated, and with children in the vehicle. Additionally, McDonald provided the police with a description of Kellems’ vehicle, a white pickup truck, and his license plate number.

Tell City Police Sergeant Lynn Wooldridge responded to the dispatch of McDonald’s tip. After spotting Kellems in a white pickup truck, he followed it to confirm whether the license plate number matched that given to dispatch by McDonald. Having matched the plates, Sergeant Wooldridge pulled Kellems’s vehicle over without observing any traffic violation.

Upon pulling Kellems over, Sergeant McDonald approached the truck with Kellems

sitting in the driver's seat and his wife and child in the passenger seats. Sergeant Wooldridge requested Kellems's driver's license and received an identification card instead. The identification card was checked through the Bureau of Motor Vehicles and indicated that Kellems had a suspended driver's license and was a habitual traffic offender. A portable breathalyzer test was administered to Kellems, which came up negative. Kellems was then arrested and charged with operating a vehicle while a habitual traffic offender.

At issue in this appeal is whether the tip provided to the Tell City Police Department by Dodie McDonald was sufficient to provide police with reasonable suspicion to perform an investigatory stop of Kellems' vehicle.

The Indiana Supreme Court found the tip provided by Dodie McDonald was sufficient to provide the Tell City Police with reasonable suspicion to conduct an investigatory stop of Kellems's car. McDonald identified herself to police when she made her call. She gave her date of birth to the police dispatcher. Tell City Police Sergeant Wooldridge knew McDonald, where she lived, and with whom she lived. Under these circumstances, had McDonald given the police a knowingly false report, she was sufficiently identified to be held criminally responsible for false reporting.

Additionally, McDonald offered the police sufficient information to allow them to corroborate her assertions independently. She provided the police with a vehicle description, license plate number, the name of the driver, and the direction in which the driver was heading, along with her claims that Kellems drove while intoxicated and without a license or insurance. She also related the fact that there

were children in the vehicle. Sergeant Wooldridge, before pulling Kellems over to conduct an investigatory stop, first identified and then confirmed that the license plate of the white pickup truck he spotted matched the plate given by McDonald.

Thus, under the totality of the circumstances, the Court concluded that there was reasonable suspicion to support an investigatory stop where the informant identified herself and provided the police with the level of specific information noted above, which was then subsequently verified by police.

The Indiana Supreme Court also found her tip sufficiently satisfied the requirements for classifying her a concerned or cooperative citizen. The record in this case does not suggest that McDonald had any intention other than her desire to assist police in their law enforcement duties. There is also no suggestion in the record that there were incriminating circumstances that would call McDonald's motives in reporting into question.

The Indiana Supreme Court, cognizant of law enforcement's need to respond immediately to criminal reports of this nature in the interest of public safety, concluded that McDonald acted as a concerned or cooperative citizen in making her report of criminal activity to the police. Therefore, her tip was sufficient to support an investigative stop under either the theories of identified informant or concerned or cooperative citizen.

EVIDENCE:

DNA Database “Cold Hit” Search

United States v. Jenkins,
DC, No. 05-CO-333, 12/15/05

On June 4, 1999, officers of the Metropolitan Police Department (MPD) discovered the body of Dennis Dolinger in the basement of his home in Washington, D.C. Mr. Dolinger had been stabbed several times in the head. Based on the condition of the crime scene, MPD concluded that Mr. Dolinger’s assailant had also been injured during the fatal assault.

Blood stains were found on clothing and other surfaces in the basement; traces of blood were found leading from the basement to the first and then the second floor of the house, and then outside to the front walkway and sidewalk; and bloody clothing was found in a room on the second floor. MPD also concluded that among other things, a diamond ring, a gold chain, and a wallet containing various credit cards were missing from Mr. Dolinger’s house.

Less than twenty-four hours after Mr. Dolinger’s murder, a man identified as Stephen Watson made several purchases using the victim’s credit card. Further investigation revealed that Watson was in possession of other items taken from Mr. Dolinger’s home. Pursuant to a warrant, Watson was arrested for felony murder while armed.

In continuing the investigation, MPD sent evidence samples from the crime scene to the Federal Bureau of Investigation (FBI) for forensic analysis. The FBI also obtained blood samples from Watson, Dolinger, and other

individuals (known samples). The FBI DNA laboratory tested the various blood samples at thirteen loci, also known as the “thirteen CODIS loci.” Based on this analysis, the FBI created a DNA profile for the samples. Although many of the samples collected at the crime scene matched Mr. Dolinger’s DNA profile, none of the collected samples matched the profiles of Watson or the known individuals. The FBI DNA laboratory also concluded that a single person, whose identity was unknown at the time, was the sole contributor of the blood in numerous evidence samples.

Seeking further assistance, on November 16, 1999, the government contacted the Virginia Department of Criminal Justice Services (DCJS) requesting that DCJS run the profile of the unknown person through Virginia’s DNA database of 101,905 previously profiled offenders. Using only eight of the thirteen loci profiled by the FBI, the DCJS reported that the evidence sample was consistent with the eight-loci profile of Robert P. Garrett, a known alias of appellee Raymond Anthony Jenkins.

At that point, the MPD investigation focused solely on Mr. Jenkins. A search warrant was obtained for Mr. Jenkins’ blood, which was acquired on November 23, 1999. Using the same tools and method of analysis used on the previous evidence samples, the FBI created a thirteen loci profile for Mr. Jenkins’ blood. Mr. Jenkins’ thirteen loci profile matched the thirteen loci profile from the evidence samples obtained from the crime scene.

In March 2001, Mr. Jenkins filed a motion in limine to exclude the government’s DNA evidence against him. Of the various attacks on the government’s expected use of DNA

evidence, the only one of consequence in this appeal was Mr. Jenkins' argument that the FBI's method of presenting the rarity statistic alone to express the significance of a DNA match of a crime scene sample with a suspect identified through a database search (a so-called "cold hit") is not generally accepted in the scientific community and is inadmissible under *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

The District of Columbia Court of Appeals held that modern methods of evaluation of a DNA match through a database search enjoy general acceptance in the scientific community and are admissible through expert testimony.

EVIDENCE:

Retention of Videotapes

Mayweather v. State, CACR05-300, 3/8/06

Officer Denis Hutchins of the Little Rock Police Department (LRPD) stopped Melvin Mayweather, who was driving an older model, gold BMW during the early morning hours of December 24, 2002, after receiving reports that suspects in a rape investigation were driving a similar vehicle. Although it was determined that Mayweather was in no way involved in the rape, a subsequent search of his vehicle produced marijuana and cocaine.

During a pretrial hearing on Mayweather's motion to suppress, Officer Hutchins testified that he noticed a strong odor of marijuana after approaching Mayweather's vehicle and requesting his license and registration. He also noticed an unopened box of ammunition in the back floorboard of the vehicle. He asked

Mayweather to exit the vehicle, patted him down, asked him to sit in the patrol car, and searched the vehicle. Officer Hutchins found several rock-like substances in a toboggan on the front seat, a marijuana-filled cigar in the ashtray, and a marijuana bud in the console. Hutchins admitted that other officers were present during the search, but he could not remember exactly when they arrived. He noted that he may have been driving a patrol car outfitted with a videotape machine that night.

Officer James Jenkins also testified at the hearing and stated that he arrived on the scene as Officer Hutchins was approaching the BMW after having placed Mayweather in the patrol car. Jenkins stated that he was the first officer after Hutchins to respond. He stated that he never went inside the car and that he observed Hutchins find the cocaine inside the car. He testified that he thought the patrol car he was driving that night was equipped with a videotape recorder; however, any videotape that may have recorded the events was destroyed pursuant to the LRPD's policy of discarding those tapes after thirty days.

In the Arkansas Court of Appeals, Mayweather contended that the State breached its duty under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Arizona v. Youngblood*, 88 U.S. 51 (1988) to preserve potentially exculpatory evidence. However, the U.S. Supreme Court concluded in *Youngblood* that the State's failure to preserve potentially useful evidence does not constitute a denial of due process of law unless the defendant can show bad faith on the part of the police.

The Arkansas Court of Appeals found as follows: "In the present case, Mayweather has

failed to provide any proof that the State acted in bad faith in destroying the videotape. It was the uniform policy of the LRPD to erase all tapes after thirty days, except those determined to be useful to the department or requested by a defendant. Mayweather argues that the policy itself is the best evidence of bad faith.

“While the policy could be more precise in its language, no evidence has been presented that it required exculpatory evidence to be destroyed. Additionally, Mayweather has produced no proof that the videotape itself would have been potentially exculpatory even if it had been preserved. In fact, the main basis for probable cause provided by Officer Hutchins was that he smelled marijuana. It is doubtful that the videotape could have assisted the trial court in determining whether the odor was present. Without a showing of bad faith on the failure to preserve the tape, Mayweather’s conviction must be affirmed.”

FEDERAL CONTROLLED
SUBSTANCES ACT

This term, the United States Supreme Court has decided two cases dealing with the Federal Controlled Substances Act (CSA) but these decisions have no substantial impact on drug enforcement at the federal, state, or local level.

In *Gonzales v. Oregon*, No. 04-623, 1/17/06, the issue was whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors from prescribing regulated drugs to use in physician-assisted suicide, notwithstanding that this would be done in connection with the Oregon Death With

Dignity Act upon the request of a terminally ill patient. The United States Supreme Court concluded that the requirements of the CSA does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct.

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, No. 04-1084, 2/21/06, a religious sect with origins in the Amazon Rainforest receives communion by drinking a sacramental tea, brewed from plants unique to that region, containing a hallucinogen regulated under the Controlled Substances Act by the Federal Government. The Government conceded that this practice is a sincere expression of religion, but sought to prohibit the small American branch from engaging in the practice on the ground that the CSA bars all use of the hallucinogen. An injunction was granted by the District Court against the Government to block enforcement of the CSA against this sect. The United States Court of Appeals affirmed the district courts order. The United States Supreme Court, relying on the Religious Freedom Restoration Act of 1993, also affirmed the injunction against the Government.

INTERROGATION:
**Confronting Suspect with Evidence;
Delayed Warnings**

United States v. Gonzalez-Lauzan,
CA11, No. 04-12536, 1/30/06

Editor’s Note: *Missouri v. Seibert*, 542 U.S. 600 (2004); *CJI Legal Briefs, Fall 2004, page 8*, involved a police protocol for custodial interrogation that called

for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. The interrogating officer followed the confession with *Miranda* warnings and then led the suspect to cover the same ground a second time. The United States Supreme Court in *Missouri v. Seibert* held that such midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement. The Court held that a statement repeated after a warning in such circumstances does not meet constitutional requirements and is inadmissible.

The case detailed below involves well trained officers with an obvious understanding of *Missouri v. Seibert*. Any officer considering a *Gonzalez-Lauzan* interview approach should carefully review the full text of this case, carefully note the steps taken by the interrogating officers, and discuss the proposed interrogation at length with their appropriate legal advisor.

On September 18, 2002, Hialeah, Florida Police Officer Albert Nabut, Hialeah Police Detective Ralph Nazario and Special Agent Jackie Elbaum of the Bureau of Alcohol, Tobacco, and Firearms took Gonzalez-Lauzan out of the Federal Detention Center to an interview room in the courthouse. Once in the interview room, the three officers spent between two-and-a-half and three hours talking to Gonzalez-Lauzan. The three officers made a decision not to administer *Miranda* warnings to Gonzalez-Lauzan at the beginning

of this meeting. Instead, the officers decided that they would simply describe to Gonzalez-Lauzan the evidence the government had accumulated against him with respect to his involvement in Alexander Texidor's murder, an informant who turned on Gonzalez-Lauzan's father. The officers hoped that the strength of this evidence would persuade Gonzalez-Lauzan to talk about his participation in the killing of Texidor.

The officers planned to give Gonzalez-Lauzan *Miranda* warnings only if it became apparent that Gonzalez-Lauzan would be willing to make a custodial statement. The officers began the session by explaining to Gonzalez-Lauzan that they were working on a murder investigation, that they believed Gonzalez-Lauzan was involved in the murder, and that they knew Gonzalez-Lauzan had been represented by counsel previously. Gonzalez-Lauzan responded, "I know my rights." Before proceeding further, the officers instructed Gonzalez-Lauzan, "We are not asking you any questions. We don't want you to say anything. We just have something to say to you and we ask that you listen to it so that you can understand where we are coming from."

After this introductory admonition, the officers described the evidence they had accumulated against Gonzalez-Lauzan in detail. They told Gonzalez-Lauzan that his father had been arrested in relation to Texidor's death. The officers explained that they had done extensive surveillance of Gonzalez-Lauzan and his family, had analyzed phone records and had obtained the cooperation of one of Gonzalez-Lauzan's co-conspirators, all leading them to believe that Gonzalez-Lauzan had orchestrated the murder of Texidor.

At several points during this description, the officers instructed Gonzalez-Lauzan just to listen and told him that the officers did not have any questions. Gonzalez-Lauzan mostly listened to the evidence, occasionally saying things like, "I'm no mastermind," "I'm not the kingpin," or "I'm not the person." At times, the officers would allow a few minutes of silence to see if there was any response from Gonzalez-Lauzan.

Approximately two-and-a-half hours into the meeting, Gonzalez-Lauzan stated suddenly, "Okay, you got me." Gonzalez-Lauzan was then immediately read his Miranda rights. Gonzalez-Lauzan signed a form indicating that he understood his Miranda rights and agreed to waive them and speak to law enforcement.

At the onset of the postwarning interrogation, Gonzalez-Lauzan indicated that he would prefer not to answer any questions about his father. In response to Gonzalez-Lauzan's request, the officers agreed and did not ask him any questions about his father. During the interrogation, Gonzalez-Lauzan made multiple incriminating statements. Gonzalez-Lauzan admitted that he instructed the co-conspirators to teach Texidor a lesson, that he had provided the murder weapon and silencer to co-defendant James Wiggins, and that he had been present when Wiggins shot and killed Texidor. In his motion to suppress, Gonzalez-Lauzan argued that the district court should suppress his statements made both before and after he signed the waiver of his *Miranda* rights. Gonzalez-Lauzan argued that at the time of the interview he was represented by an attorney, Raben, and that Gonzalez-Lauzan had invoked his right to counsel. Gonzalez-Lauzan also contended that he was interrogated in violation of his Fifth Amendment rights under

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

A jury trial was held between January 20, 2004, and January 29, 2004. On January 29, 2004, the jury returned a verdict finding Gonzalez-Lauzan guilty of seven charges, including the intentional killing of Texidor, in violation of 18 U.S.C. §1512(a)(1)(A). On May 17, 2004, Gonzalez-Lauzan was sentenced to life imprisonment. In his direct appeal, Gonzalez-Lauzan now challenges the district court's ruling on his motion to suppress on both Fifth and Sixth Amendment grounds. The United States Court of Appeals found as follows:

"For purposes of our analysis, we assume, but do not decide, that the initial interaction between Gonzalez-Lauzan and the police constituted an interrogation and that *Miranda* warnings were applicable at the outset of the meeting. Given that the police did not ask Gonzalez-Lauzan any questions and three times instructed him explicitly just to listen, it is not clear that the first portion of the officers' interview of Gonzalez-Lauzan constitutes an 'interrogation.' However, on appeal, the government does not challenge the magistrate judge's ruling that the first segment was the 'functional equivalent' of an interrogation or that the District Court was correct to exclude Gonzalez-Lauzan's prewarning statement, 'Okay, you got me.'

"Rather, the government argues that *Seibert* is wholly inapplicable because the officers did not ask Gonzalez-Lauzan any questions in the first segment and did not deliberately use an interrogation technique designed to undermine the effectiveness of the *Miranda* warnings by obtaining unwarned incriminating statements and then using them in the warned

segment to undermine the effectiveness of the *Miranda* warnings. Instead, the officers withheld the warnings only in an attempt to gain credibility and establish rapport with Gonzalez-Lauzan and always intended to give warnings before asking him any questions.

“The government stresses that the officers’ intent not to engage in any prewarning questioning is evidenced by (1) the investigator’s introductory admonition, (2) the officers’ repeating three times that they were not going to ask questions and he should just listen, and (3) the officers’ reading of the *Miranda* warnings immediately upon Gonzalez-Lauzan stating, “Okay, you got me” and without first pursuing any questioning or obtaining any detail. The government argues that the magistrate judge correctly found that Gonzalez-Lauzan understood and waived his *Miranda* rights knowingly, freely, and voluntarily.

“In reply, Gonzalez-Lauzan emphasizes that *Seibert*’s focus is not on whether questions were actually asked but on whether there was a two-step interrogation in which the police deliberately withheld *Miranda* warnings during the first segment. Gonzalez-Lauzan stresses that *Seibert* is triggered when a two-step interrogation is involved and *Miranda* warnings are applicable at the outset but the police make a deliberate decision to withhold those warnings. Gonzalez-Lauzan points out that on appeal the government does not dispute that the first phase was an interrogation, that *Miranda* applied, and that the police intentionally delayed *Miranda* warnings. According to Gonzalez-Lauzan, *Seibert* controls, the police’s two-step technique undermined his *Miranda* warnings, and his postwarning statements are inadmissible.

“First, the two-step interrogation in this case, albeit continuous, is materially different from that in *Seibert*. *Seibert* involved a two-step technique adapted to obscure the *Miranda* warnings by not giving them until after the defendant had confessed, and then using the defendant’s own incriminating statements to pressure him to repeat them in the warned segment of the interrogation. In sharp contrast with *Seibert*, the officers asked no questions of Gonzalez-Lauzan at all during the first segment, nor did Gonzalez-Lauzan offer any detailed information concerning his involvement in Texidor’s murder until after he had waived his *Miranda* rights. Moreover, during the first segment, the officers at several points told Gonzalez-Lauzan just to listen and that they did not have any questions for him. Indeed, the magistrate judge expressly found that there were no threats or coercion by the police and Gonzalez-Lauzan understood his *Miranda* rights. There was no hostility, and all parties were respectful of each other. Accordingly, we conclude that the *Miranda* warnings did function effectively in Gonzalez-Lauzan’s circumstances and that Gonzalez-Lauzan has shown no error in the magistrate judge’s finding that he knowingly and voluntarily waived his *Miranda* rights.

“Second, and more importantly...it is clear that the *Miranda* warnings as administered in Gonzalez-Lauzan’s case would meaningfully apprise a reasonable suspect of his right or choice to remain silent and were thus effective in this case. With respect to the *Seibert* plurality’s multifactor test, the first factor to consider is whether the prewarning questions and answers were complete and detailed. Because Gonzalez-Lauzan was asked no questions and gave no answers before he received the *Miranda* warnings, the first factor

strongly suggests that the warnings were effective.

“The second factor concerns the degree to which the defendant’s prewarning and postwarning statements overlapped. Given that Gonzalez-Lauzan made only a single brief incriminating statement in the prewarning stage of the interview, the complete interrogation of Gonzalez-Lauzan that followed the warnings bore little resemblance to his prewarning statement. *Seibert* stressed that after the police finished the unwarned phase of the interrogation, ‘there was little, if anything, of incriminating potential left unsaid.’ In contrast, the only statement Gonzalez-Lauzan made during the unwarned interrogation was, ‘Okay, you got me.’ All the detailed incriminating statements Gonzalez-Lauzan made after he had waived his *Miranda* rights. While this case involves a two-step interrogation, the technique employed by the officers during the first phase is wholly different from that used in *Seibert*. As such, the second factor mentioned by the plurality also demonstrates strongly that Gonzalez-Lauzan’s postwarning statements were properly admitted.

“The third and fourth considerations mentioned by the *Seibert* plurality focus on the timing and setting of the two rounds of questioning. Although these factors clearly favor Gonzalez-Lauzan, they carry little weight in light of the fact that Gonzalez-Lauzan was asked no questions and gave no answers in the first phase of the interview.

“As to the fifth factor, the continuity of the two rounds of questioning, *Seibert* focused on whether it would have been unnatural at the

second stage to repeat what had been said during the first stage. In this case, because Gonzalez-Lauzan said very little in the first stage, there was virtually nothing for him to repeat during the second round of interrogation. Thus, it remained objectively reasonable for him to refuse to make incriminating statements during the second phase. Indeed, during the second phase, Gonzalez-Lauzan refused to answer the officers’ questions about his father, demonstrating that Gonzalez-Lauzan understood that he retained a choice whether to answer or not.

“Accordingly, even under the *Seibert* plurality’s multifactor test, the prewarning interaction did not render the *Miranda* warnings ineffective to a reasonable suspect, and Gonzalez-Lauzan’s waiver of his *Miranda* rights was voluntary and constitutionally valid...

“In summary, during their presentation of evidence to Gonzalez-Lauzan, the officers repeatedly informed Gonzalez-Lauzan that he should just listen and that they were not asking him any questions. Because the officers had yet to ask Gonzalez-Lauzan a single question, the *Miranda* warnings they provided—advising Gonzalez-Lauzan that he need not answer questions—were not inconsistent with the first phase of the interview where they told him just to listen. Nothing in the record suggests that Gonzalez-Lauzan’s waiver of his rights was uninformed, coerced or involuntary. We conclude that the midstream *Miranda* warnings offered by the officers did not fail to offer Gonzalez-Lauzan or a reasonable suspect a genuine choice whether to follow up on his earlier admission.”

INTERROGATION:

Promise of Leniency That Goes Too Far

United States v. Lopez,
CA10, No. 04-1223, 2/21/06

On May 18, 2003, at approximately 4:30 a.m., Dalton Box was shot to death as he left a party at Valentina Wing's home in Towaoc, Colorado, on the Ute Mountain Ute Indian Reservation in southwestern Colorado. Two eyewitnesses identified thirty-three year old Leland Lopez as the shooter. One of these eyewitnesses told police that Lopez knocked Box to the ground with the first shot and then walked over to the fallen Box and shot him several more times before kicking him in the head.

Police arrested Lopez at approximately 12:30 p.m. that same day and took him to the Towaoc police station. There, at approximately 1:30 p.m., Bureau of Indian Affairs (BIA) Agent James Hopper and Federal Bureau of Investigation (FBI) Agent John Wallace gave Lopez his *Miranda* warnings. Lopez agreed to talk to the agents, and they interviewed him for approximately an hour. During this interview, Lopez denied shooting Box and told the agents that he had been at his mother's home asleep when the shooting occurred. Lopez agreed to a gunshot residue test, which was conducted at this time. During this first interview, Lopez asked to talk to his mother. Although the agents said he could talk to her, Lopez was never permitted to do so.

After talking to several other witnesses, Agents Hopper and Wallace again interviewed Lopez at 9:00 p.m. that same day. By this time, Lopez had slept and appeared more rested than he

had during the first interview earlier in the day. He was, however, in pain from a beating that he had received two days earlier, on May 16, when he was not in custody, a beating which apparently precipitated the shooting. Although officers had offered Lopez food during the day, Lopez could not eat solid food because his jaw had been broken during the May 16 beating.

At the start of this second interview, the agents again gave Lopez his *Miranda* warnings, after which Lopez again agreed to talk to the agents. Initially, Lopez reiterated that he had been home asleep at 4:00 a.m. that morning, when the killing occurred. Lopez, however, suggested two of his friends, Mondo McCook and Corey Morris, might have shot Box.

The agents then insinuated that the gun residue test they had conducted on Lopez earlier in the day had produced positive results, even though the agents had not actually yet received any test results. Further, the agents told Lopez that they had up to six witnesses who had identified him as the shooter, when in fact they had just two eyewitnesses. Finally, the agents misrepresented to Lopez that they had found his footprints at the crime scene; they had, in fact, found footprints, but had not identified whose they were.

In addition to these misrepresentations, Agent Hopper told Lopez that Hopper would prove Lopez's mother was a liar if she tried to corroborate Lopez's alibi of being asleep at her house at the time of the killing. Lopez interpreted this to mean that if his mother testified on his behalf, the Government "would make her a liar on the stand."

Agent Hopper also took two pieces of paper and wrote the words "mistake" and "murder"

on them and asked Lopez whether his killing Box was an accident or intentional murder. Agent Hopper then asked Lopez to make a choice. The agent took two more pieces of paper and wrote the numbers six and sixty on them. Lopez testified that Agent Hopper told him "if you cooperate, you know,...you could be looking at six years. And if you don't cooperate and give us answers, you could be looking at 60 years."

Agent Hopper also told Lopez about a murder case in which the suspects had cooperated and gotten less time than the suspects who had not cooperated. According to the agent, the suspects in that other case were "treated leniently" because the crime had been a mistake.

At 10:18 p.m., over an hour into the second interview, a crying Lopez told the agents that he had shot Box by mistake. Lopez testified at the suppression hearing that he admitted to shooting Box in order to avoid spending sixty years in jail, as well as to prevent his mother from being prosecuted. For the next two hours, Lopez gave the agents the details of his shooting Box. The agents testified that, while Lopez was telling them about the killing, he was crying and would "go in and out of sobbing." This second interview lasted almost four hours, ending at approximately 12:45 a.m. on May 19.

Agent Hopper and an officer from the Cortez, Colorado police department again interviewed Lopez at approximately noon on May 19, before taking Lopez to court for his initial appearance. This third interview lasted only thirty minutes. In between the second and third interviews, Lopez had slept and had breakfast. At the start of the third interview,

Agent Hopper again gave Lopez his *Miranda* warnings, after which Lopez agreed to talk with the officers. A crying Lopez again confessed, reiterating the story he had told the agents the night before. At the end of this interview, Lopez asked Agent Hopper if the agent would give Lopez a hug, and Agent Hopper obliged this request.

A grand jury indicted Lopez, charging him with malice aforethought murder occurring within Indian country, in violation of 18 U.S.C. §§ 2, 1111, 1153. Lopez moved to suppress the statements he had made in each of the three interviews he had with the federal agents on May 18 and 19. After an evidentiary hearing, the district court denied the motion to suppress Lopez's statements from the first interview, but granted the motion to suppress his confessions given during the second and third interviews. The Government appeals the district court's decision to suppress Lopez's confessions. The Tenth District Court of Appeals found as follows:

"...the most troublesome detail about the interrogation is Agent Hopper's use of the pieces of paper marked with the terms 'murder,' 'mistake,' '60,' and '6.' Under Supreme Court and Tenth Circuit precedent, a promise of leniency is relevant to determining whether a confession was involuntary and, depending on the totality of the circumstances, may render a confession coerced. *Clanton v. Cooper*, 129 F.3d 1147, 1159 (10th Cir. 1997). And while the Tenth Circuit Court of Appeals has held that the fact that an officer promises to make a defendant's cooperation known to prosecutors will not produce a coerced confession, that is not what occurred in this case. Rather, as the district court found, this is not a vague and non-committal promise. This

is also not a promise to make defendant's cooperation known to the United States Attorney or the Judge, which courts condone. As found by the district court, Agent Hopper used the terms 'mistake,' 'murder,' '6,' and '60,' in order to promise Lopez that he would spend fifty-four fewer years in prison if he would confess to killing Box by mistake. Thereafter, Agent Hopper reinforced this promise of leniency by telling Lopez about other suspects who had received lenient sentences after confessing to killing by mistake. Accordingly, the promise of leniency presented in this case is not a type of 'limited assurance' which we have held to be a permissible interrogation tactic. See *United States v. Lewis*, 24 F.3d 79, 82 (10th Cir. 1994). Rather, the nature of this promise is of the sort that may indeed critically impair a defendant's capacity for self-determination."

The Court concluded that the "totality of the circumstances" surrounding the interrogation and, in particular, the federal agents' promising Lopez that he would spend six rather than 60 years in prison if he admitted to killing Box by mistake and the Agents' misrepresenting the strength of the evidence they had against Lopez, resulted in Lopez's confession being coerced and, thus, involuntary.

PRISONS AND JAILS:

White Supremacist Literature

Borzzych v. Frank, CA7, No. 05-3907, 3/2/06

In *Borzzych v. Frank*, the Seventh Circuit Court of Appeals held that state prison officials did not violate the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, by refusing to allow an inmate to

possess certain books associated with the white supremacist religion known as Odinism.

RIGHT TO COUNSEL:

Separate Sovereigns Doctrine

United States v. Alvarado,
CA4, No. 04-4969, 3/13/06

In *United States v. Alvarado*, the United States Court of Appeals for the Fourth Circuit applied the separate sovereign theory in a case dealing with the Sixth Amendment Right to Counsel. It is noted that the Federal Courts of Appeals are divided on this issue.

The Commonwealth of Virginia charged a defendant with state drug crimes, provided him with counsel, but subsequently dismissed the charges against him. After filing a federal criminal complaint, federal investigators gave Alvarado appropriate *Miranda* warnings and then questioned him outside the presence of his state-appointed lawyer about his involvement in federal drug crimes. Alvarado contends that the incriminating statements he made during this interrogation should have been suppressed at his federal trial, because they were taken in violation of his Sixth Amendment right to counsel.

The Fourth Circuit Court of Appeals stated that the Sixth Amendment right to counsel attaches only to the specific offense with which a defendant is formally charged. See *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001). The Court held that federal and state crimes are necessarily separate offenses for the purposes of the Sixth Amendment, because they originate from autonomous sovereigns that each have the authority to define and prosecute

criminal conduct. The Court further held that the filing of a federal criminal complaint does not trigger the Sixth Amendment right. Since defendant's right to counsel had yet to attach to his federal offenses when he was interrogated, his remarks were properly admitted and his conviction was affirmed.

“The U.S. Supreme Court held that anticipatory warrants are no different in principle from ordinary warrants: They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed.”

into the residence...At that time, and not before, this search warrant will be executed by me and other United States Postal inspectors, with appropriate assistance from other law enforcement officers in accordance with this warrant's command.”

The Magistrate Judge issued the warrant as requested. Two days later, an undercover postal inspector deli-

vered the package. Grubbs' wife signed for it and took the unopened package inside. The inspectors detained Grubbs as he left his home a few minutes later, then entered the house and commenced the search. Grubbs consented to interrogation by the postal inspectors and admitted ordering the videotape. He was placed under arrest, and various items were seized, including the videotape.

The United States Supreme Court held that anticipatory warrants are no different in principle from ordinary warrants: They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed. Where the anticipatory warrant places a condition upon its execution, the first of these determinations goes not merely to what will probably be found *if* the condition is met, but also to the likelihood that the condition *will* be met, and thus that a proper object of seizure will be on the described premises. Here, the occurrence of the triggering condition—

SEARCH AND SEIZURE:
Anticipatory Search Warrants

United States v. Grubbs,
No. 04-1414, 3/21/06

In this case, the United States Supreme Court dealt with the issue of anticipatory search warrants. Jeffrey Grubbs purchased a videotape containing child pornography from a website operated by an undercover postal inspector. Officers from the Postal Inspection Service arranged a controlled delivery of a package containing the videotape to Grubbs' residence. A postal inspector submitted a search warrant application to a Magistrate Judge for the Eastern District of California, accompanied by an affidavit describing the proposed operation in detail. The affidavit stated:

“Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken

successful delivery of the videotape—would plainly establish probable cause for the search, and the affidavit established probable cause to believe the triggering condition would be satisfied.

The warrant at issue did not violate the Fourth Amendment's particularity requirement. The Amendment specifies only two matters that the warrant must particularly describe: the place to be searched and the persons or things to be seized.

SEARCH AND SEIZURE:

**Consent Search;
Consent by One Tenant Not Valid
Over Objection of Another Tenant**

Georgia v. Randolph, No. 04-1067, 3/22/06

Scott Randolph's estranged wife gave police permission to search their marital residence for items of drug use after Randolph, who was also present, had unequivocally refused to give consent. As a result, Randolph was indicted for possession of cocaine, and the trial court denied his motion to suppress the evidence as products of a warrantless search unauthorized by consent. The Georgia Court of Appeals reversed. In affirming, the State Supreme Court held that consent given by one occupant is not valid in the face of the refusal of another physically present occupant, and distinguished *United States v. Matlock*, 415 U. S. 164, which recognized the permissibility of an entry made with the consent of one co-occupant in the other's absence.

Upon review, the United States Supreme Court stated that the Fourth Amendment recognizes a valid warrantless entry and search

of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. *Illinois v. Rodriguez*, 497 U. S. 177 (1990); *United States v. Matlock*, 415 U. S. 164 (1974). The question in this case is whether such a seizure of evidence by law enforcement officers is lawful with the permission of one occupant when the other occupant is present at the scene and expressly refuses to consent. The United States Supreme Court held that, in the circumstances here, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

The United States Supreme Court also discussed other issues which could arise in consent cases. The Court again stated that the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom that authority is shared.

When explaining the concept of common authority, the Court stated that when someone comes to the door of a domestic dwelling with a baby at her hip, she shows that she belongs there, which is enough to tell a law enforcement officer that if she occupies the place along with others, she probably lives there subject to the assumption tenants usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. Shared tenancy is understood to include an assumption of risk, on which police officers are entitled to rely.

The Court also stated that it is also easy to imagine different facts on which, if known, no common authority could sensibly be suspected. A person on the scene who identifies himself, say, as a landlord or a hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant. A tenant in the ordinary course does not take rented premises subject to any formal or informal agreement that the landlord may let visitors into the dwelling, and a hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into his room. In these circumstances, neither state law property rights, nor common contractual arrangements, nor any other source points to a common understanding of authority to admit third parties generally without the consent of a person occupying the premises. And when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted, but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom.

The Court also discussed the issue of a tenant who shares property with another tenant who is engaged in criminal activity. The co-tenant acting on his own initiative may be able to deliver evidence to the police, and can tell the police what he knows, for use before a magistrate in getting a warrant. The reliance on a co-tenant's information instead of

disputed consent accords with the law's general partiality toward police action taken under a warrant as against searches and seizures without one.

The Court also stated that this case has no bearing on the capacity of the police to protect domestic violence victims. No question has been raised about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists. The question whether the police might lawfully enter over objection to provide any protection that might be reasonable is easily answered yes. The undoubted right of the police to enter in order to protect a victim, however, has nothing to do with the question in this case, whether a search with the consent of one co-tenant is good against another, standing at the door and expressly refusing consent.

The Court also discussed the situation where a co-tenant is not present but might object to the search. Does law enforcement have a duty to seek this person out and obtain consent? The Court stated so long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. It would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if police were required to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received.

The Court stated that the rule of this case is that a physically present inhabitant's express refusal of consent to a police search is final, regardless of the consent of a fellow present occupant.

SEARCH AND SEIZURE;
 CONSENT SEARCH:
**Consent Obtained by Officers
 Outside Their District**
United States v. Sawyer,
 CA10, No. 05-5002, 3/20/06

On August 17, 2000, Detectives Michael Todd Brown and Jack Cross of the Lawrence, Kansas Police Department decided to pursue an investigation into a stolen motorcycle ring by traveling to Bartlesville, Oklahoma to interview Paul Michael Sawyer. In preparation for their trip, the Kansas officers attempted to telephone Sergeant Jay Hastings of the Bartlesville Police Department on August 17 and August 18, 2000. The Kansas officers were unable to speak with Hastings, but left a message for him on August 18.

Upon their arrival in Bartlesville, the Kansas officers stopped first at the Bartlesville Police Department hoping to find a police officer to accompany them. No Bartlesville officers were available. Sawyer was interviewed by the Kansas officers at his place of employment and provided them with a written statement.

After Sawyer finished the statement, Detective Brown asked whether Sawyer would take him and Detective Cross to Sawyer's motorcycle shop, and Sawyer agreed. The Kansas officers followed Sawyer, who was driving his own vehicle, to the shop.

Upon their arrival, Sawyer unlocked the door and allowed the Kansas officers to enter. Once inside, the Kansas officers requested that Sawyer consent to a search of the premises by completing and signing an official Lawrence, Kansas Police Department consent form. The Kansas officers explained that they wanted to formalize Sawyer's consent to search so that they could have it for their records. Sawyer signed the form.

The Kansas officers began to search the motorcycle shop, and when they were concluding their search, the officers contacted the Bartlesville Police Department to request that a Bartlesville officer bring a camera to the shop. Three Bartlesville officers arrived on the scene, took photographs, and at the request of the Kansas officers, seized six engines. The Kansas officers took Sawyer's records from his office and subsequently proceeded to Sawyer's residence where they obtained additional records from his wife.

At some point between August 19 and August 23, 2000, the Kansas officers notified the Bartlesville police officers of the results of their examination of the serial numbers on the engines that they had seized from Sawyer's shop.

The following day, the Bartlesville officers obtained a search warrant from an Oklahoma state court judge authorizing a second search of Sawyer's shop, using the information obtained by the Kansas officers from the first search as the basis for their warrant application. The warrant resulted in the seizure of seventeen motorcycle engines.

On October 10, 2003, the Government indicted Sawyer in the Northern District of

Oklahoma, charging him with conspiracy to possess stolen property, which had traveled in interstate commerce, in violation of 18 U.S.C. Section 371, and possession of motorcycle engines with altered or obliterated vehicle identification numbers, with the intent to sell such engines, in violation of 18 U.S.C. Section 2321. On November 14, 2003, Sawyer filed a motion to suppress, arguing that the district court should suppress all evidence obtained from both searches of his motorcycle shop on the ground that the Kansas officers lacked authority to conduct an investigation in Oklahoma and that his consent to search therefore was invalid.

The district court held that although the consent obtained from the Kansas officers was voluntary under the Fourth Amendment, that consent nonetheless was invalid and constitutionally infirm because the Kansas officers did not, as a threshold matter, have authority under Oklahoma law to request Sawyer's consent.

Upon review, the Tenth Circuit Court of Appeals noted that while the Kansas officers were acting outside their jurisdiction, it is the voluntariness of the individual's consent that determines the lawfulness of the search. The search in this case relies upon Sawyer's consent, and the federal consent test does not depend upon state-law authorization. The decision of the district court to suppress the evidence was reversed and the case was remanded for further proceedings against Sawyer.

SEARCH AND SEIZURE:
**Emergency Search;
Emergency Created by Officer's Knock**

United States v. Coles,
CA3, No. 04-2134, 2/9/06

On June 7, 2002, Terrance Coles checked into room 511 at the Hawthorne Suites Hotel, 1100 Vine Street in Philadelphia. Coles initially checked into the hotel for the weekend, but subsequently arranged to stay for an additional 10 nights. After Coles had been there for about a week, the hotel manager, David Bradley, sought unsuccessfully to locate Coles to discuss payment arrangements. On June 14, 2002, Bradley let himself into Coles' room to see if the room was still occupied. Once inside the room, he observed a plastic bag and small vials containing a white substance. Suspecting that he had seen illegal drugs in the room, Bradley called Federal Bureau of Investigation (FBI) Special Agent John Warrington and described what he had seen.

Later that afternoon, when Agent Warrington and local narcotics officers met with Bradley at the hotel, Bradley repeated the information that he had provided earlier to the FBI on the telephone. Bradley then unlocked room 511 for the officers. The officers entered the room and observed a plastic bag and small vials containing a white substance, as well as an empty holster. After a few minutes, the officers left the room, without touching anything. The government concedes that this entry was illegal and does not rely on anything seen on this visit in establishing probable cause for the subsequent warrantless entry and search.

Bradley next provided the officers with access to room 514, located directly across the hall from room 511, where the officers established surveillance by using the peephole in the door. At some point, Sgt. Jonathan Josey, the supervising officer, sent Officer Barry Wilson to check additional records on Terrance Coles and perhaps to secure a search and seizure warrant. As Officer Wilson approached the elevator to leave the fifth floor, he noticed two men exiting the elevator, at least one of whom carried a black nylon backpack. After Officer Wilson watched the two men enter room 511, he returned to room 514 to inform the officers positioned there that two men had just entered room 511. There is no indication that either of the two men, later identified as Coles and co-defendant Jonathan Jackson, were aware of the police surveillance, either then or at any time thereafter.

Despite having the room under covert surveillance, the officers decided to enter room 511. Sergeant Josey, Officer Wilson and two other officers, all dressed in plain clothes with identification badges hanging around their necks, positioned themselves in two parallel columns outside the entrance to room 511. Sergeant Josey knocked on the door, attempting to gain access by a subterfuge. He first announced "room service" in an attempt to get the two men to open the door. A man replied that he had not ordered anything and refused to open the door. Sergeant Josey knocked a second time, this time announcing that he was from maintenance to fix a reported leak. A voice again responded, saying there was no leak and again refused to open the door. Sergeant Josey knocked a third time, more forcefully, identifying himself as a police officer and telling the occupants, "Open the door, this is the police."

At this critical juncture, the officers heard the sounds of rustling and running footsteps. Sergeant Josey attempted to open the door using an electronic passkey provided by Bradley, but the officers could not enter because there was a bar latch over the door. After partially opening the door with the passkey, the officers heard the sound of a toilet flushing and the sounds of more running.

Coles eventually opened the door for the officers. Upon entering the room, the police discovered, among other things, several containers of cocaine base "crack," multiple bags containing cocaine, 25 vials of "crack" cocaine, approximately \$2,000 in cash, and a firearm inside of Coles' open carrying bag. Coles and Jackson were then arrested.

After securing the room, the police obtained and executed search warrants in order to search the room further and to search Coles' rental car. The application for the search warrants made no mention of the first illegal entry into room 511. No additional evidence or contraband was discovered after the warrants had been secured.

Coles filed a pre-trial motion to suppress the evidence seized from his hotel room claiming the warrantless entry into the hotel room could not be justified under the exigent circumstances exception because the officers had created those circumstances in attempting to gain access to the room. Upon review, the Third Circuit Court of Appeals found as follows:

"...the Fourth Amendment to the Federal Constitution protects people in their homes from unreasonable searches and seizures by permitting only a neutral and detached

magistrate to review evidence and draw inferences to support the issuance of a search warrant. *Johnson v. United States*, 333 U.S. 10 (1948). This Fourth Amendment protection extends to guests staying in hotel rooms. *Stoner v. State of Cal.*, 376 U.S. 483, 490 (1964). ('No less than a tenant of a house...a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.')

"Warrantless searches and seizures inside someone's home (or in this case, a hotel room) are presumptively unreasonable unless the occupant's consent or probable cause *and* exigent circumstances exist to justify the intrusion. *Steagald v. United States*, 451 U.S. 204, 211 (1981); *Payton v. New York*, 445 U.S. 573, 586 (1980); see also *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) ('Probable cause to believe contraband is present is necessary to justify a warrantless search, but it alone is not sufficient...Mere probable cause does not provide the exigent circumstances necessary to justify a search without a warrant.')

Consent is not at issue in this case. This appeal thus requires us to reexamine the exigent circumstances exception to the warrant requirement. Examples of exigent circumstances include, but are not limited to, hot pursuit of a suspected felon, the possibility that evidence may be removed or destroyed, and danger to the lives of officers or others. *U.S. v. Richard*, 994 F.2d 244, 247-48 (5th Cir. 1993).

“Probable cause to believe contraband is present is necessary to justify a warrantless search, but it alone is not sufficient...Mere probable cause does not provide the exigent circumstances necessary to justify a search without a warrant.”

In these limited situations, the need for effective law enforcement trumps the right of privacy and the requirement of a search warrant, thereby excusing an otherwise unconstitutional intrusion. *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967). Exigent circumstances, however, do not meet Fourth Amendment standards if the government deliberately creates them.

United States v. Acosta, 965 F.2d 1248, 1254 (3d Cir. 1992).

"In *Johnson v. United States*, 333 U.S. 10 (1948), the Supreme Court considered the Fourth Amendment implications of a warrantless search on a very similar set of facts to those presented here. In *Johnson*, the police obtained information from an informant that persons were smoking opium in the Europe Hotel. When the officers went to the hotel to investigate, they immediately recognized the smell of opium, and then traced the odor to Room 1. The officers did not know who occupied the room, and so they knocked and announced themselves. After a slight delay, there was 'some shuffling or noise' in the room and then the defendant opened the door. The lead officer told the defendant, 'I want to talk to you a little bit,' and the defendant stepped back acquiescently and admitted the officers. The officers proceeded to search the room, uncovering incriminating evidence of drugs and smoking apparatus.

“The Supreme Court found that the search violated the Fourth Amendment. The government had offered no reason ‘for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate.’ The Court noted that the following factors were relevant to its determination: (1) no suspect had been fleeing or likely to take flight; (2) the search was of a hotel room [permanent premises], not of a movable vehicle; and (3) no evidence was threatened with removal or destruction. Finally, the Court observed that if the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

“In *Johnson*, the Supreme Court emphasized that at the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. In this case, too, the police possessed probable cause based on the initial observations of Bradley, the hotel manager. Based on this evidence, the police could have obtained a search warrant for Coles’ hotel room.

“This case is not a situation where the police reasonably attempted to utilize the ‘knock and talk’ investigative tactic. Having knowledge of criminal activity inside room 511, both from Bradley’s observations and from their own earlier observations, the police had no legitimate reason to utilize the ‘knock and talk’ procedure. Compare *United States Jones*, 239 F.3d at 716 (5th Cir. 2001). (‘Because the officers were not convinced that criminal activity was taking place and did not have any reason to believe that the occupants were armed, the

‘knock and talk’ procedure was a reasonable investigative tactic under the circumstances.’) In any case, in identifying themselves as hotel personnel providing ‘room service’ or ‘maintenance,’ the police resorted to subterfuge, clearly manifesting their intention to mislead the occupants into believing that they were not police officers. At the very least, the actions of the officers at this time demonstrated that the police had no intention of merely investigating matters further or perhaps obtaining consent to search.

“The officers decided to enter room 511 without a warrant. It was that decision to conduct a warrantless entry and search of the room, without any urgent need to do so, that impermissibly created the very exigency relied upon by the government in this case. Nor is this a case where Coles had detected the law enforcement surveillance, thereby creating an urgent need for the officers to bypass the warrant requirement. There is no indication in the record that Coles was aware of the surveillance prior to the officers’ decision to gain entry.

“We emphasize that the record reveals no urgency or need for the officers to take immediate action, prior to the officers’ decision to knock on Coles’ hotel room door and demand entry. It is, of course, true that once the officers knocked on the door and announced, “Open the door, this is the police,” they heard sounds indicating that evidence was being destroyed. But that exigency did not arise naturally or from reasonable police investigative tactics. Quite to the contrary, the officers, after their pretextual announcements had failed to gain entry to room 511, deliberately created the exigency by knocking on the door to room 511 and demanding entry.

“We therefore hold that the exigent circumstances exception to the warrant requirement does not justify the warrantless entry and search of Coles’ hotel room. As a result, the physical evidence that led to Coles’ conviction, which evidence was the product of an unlawful search and seizure, should have been suppressed.”

SEARCH AND SEIZURE:
**Emergency Search;
Response to Burglar Alarm**

Steinmetz v. State, No. CR05-455, 4/27/06

On May 11, 2004, Deputy Mark Swagerty of the Pulaski County Sheriff’s Office received a call from his dispatcher at 9:15 p.m. to respond to a burglary alarm which had been activated at a residence in Jacksonville. According to the audio tape of the dispatch call, Deputy Swagerty was advised that the residents of the home were en route and would arrive at the residence in a red Chevrolet Avalanche in approximately twenty minutes. Deputy Swagerty arrived at the residence at 9:27 p.m. and checked the perimeter of the house. Upon doing so, he found that the door in the garage area of the carport was open. At that point, he could not tell if anyone was in the home. He yelled through the open door and announced himself. He received no response and advised his dispatcher that he was going in to check the residence. In accordance with the policy of the Sheriff’s Office, he entered the home to check and make certain that no one was there committing a crime or in need of help. Deputy Swagerty testified that he thought anything could have been happening in the home, such as somebody inside needed help and was hurt

or that someone had burglarized the home and shot someone who could not respond.

Upon entering the back northwest bedroom of the home, Deputy Swagerty noticed narcotic paraphernalia laying on top of the dresser in plain view, including straws, smoking devices, and white powder residue. He further saw white powder bags in an open drawer underneath. After finding these items, Deputy Swagerty contacted his Narcotics Division. While in the bedroom and on the telephone, Mrs. Steinmetz arrived and, according to Deputy Swagerty, started freaking out. She called her husband and told him to hurry home because the police were in their bedroom. At that time, under the instruction of his supervisor, Deputy Swagerty placed Mrs. Steinmetz under arrest.

The Arkansas Supreme Court stated that there is no doubt in the instant case that probable cause and exigent circumstances existed. A security alarm had been activated at the Steinmetzes’ residence, which they had installed. Upon Deputy Swagerty’s arrival, he found a door to the house open. The Pulaski County Sheriff’s Office had a policy to secure the premises, and it was certainly reasonable for Deputy Swagerty to believe that a crime might be in progress and for him to begin to secure the premises, including entry into the residence. Whether the owner of the residence was en route is of no moment. Furthermore, the fact that Deputy Swagerty did not pull his weapon upon entering the house or wait for backup before doing so does not diminish the exigency of the situation. Because the warrantless entry was permissible, any subsequent seizure of evidence in plain view was also permissible.

 SEARCH AND SEIZURE:

Evidence of Lost Warrant

United States v. Pratt,
CA11, No. 04-15168, 2/8/06

In early November 2002, Detective Morgan Wysocki of the Leon County, Florida Sheriff's Department used a confidential informant for a controlled buy of powder cocaine from Dwight Pratt. Wysocki subsequently prepared an affidavit in support of an application for a search warrant. He then prepared a search warrant template containing descriptive language of the place, person, and items to be searched and seized. The template's language was electronically copied from the affidavit.

On December 19, 2002, Wysocki took the affidavit and two copies of the search warrant template to the chambers of Leon County Judge Donald Modesitt, who signed the affidavit and issued a search warrant. That same day, Wysocki and other members of the Leon County Sheriff's Department executed the search warrant at Pratt's residence. Wysocki read the warrant to Pratt. Wysocki seized a loaded semi-automatic pistol, 19 grams of powder cocaine, 60 grams of marijuana, Pratt's wallet containing his identification, and miscellaneous drug paraphernalia. He also completed an inventory of the items seized. Pratt was arrested and copies of the warrant and the inventory were left on the kitchen counter.

Pratt filed a motion to suppress, assuming based on the search warrant's absence from the record, that no judge had issued a warrant and that the police only used the affidavit as

authorization for the search. The Government countered that a warrant was indeed issued, but was lost after the search. At the hearing, the Government presented a magistrate and three law enforcement officers, including Wysocki, who testified that a warrant had been issued.

When a search warrant is lost after its execution and is missing at a suppression hearing, does the Fourth Amendment prohibit the use of other evidence to prove the warrant's existence and descriptive language? The Eleventh Circuit Court of Appeals held that the Fourth Amendment does not prohibit the use of other evidence to establish the existence and the contents of a lost search warrant. The Eleventh Circuit Court of Appeals affirmed the district court's denial of Pratt's motion to suppress and affirmed his sentence.

 SEARCH AND SEIZURE:

**Expectation of Privacy
in Common Hallway**

United States v. Dillard,
CA6, No. 04-4191, 2/27/06

The only Federal Court of Appeals Circuit which is believed to have recognized an expectation of privacy in the common areas of an apartment building is the Sixth Circuit Court of Appeals. In *United States v. Dillard*, this issue is raised again.

The Court noted that a duplex common hallway and stairway are used by people other than the tenants. There may have been fewer people regularly entering a duplex than in a multi-unit building, but, because the doors were unlocked, those people could still use the

hallway and stairway to gain access to an apartment. Thus, an individual does not have an objectively reasonable expectation of privacy in the unlocked and open common hallway and stairway of an apartment or duplex building.

The Sixth Circuit Court of Appeals distinguished this case from their decision in *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976) by stating that in the *Carriger* case, the building was locked. The Sixth Circuit Court of Appeals stated that *United States v. King*, 227 F.3d 732 (6th Cir. 2000), was different because in *King* the common area at issue was not a hallway and stairway but a basement. Unlike a basement, a duplex common hallway and stairway are used by people other than the tenants.

SEARCH AND SEIZURE:
Federal Airline Travel Regulations
Gilmore v. Gonzales,
 CA9, No. 04-15736, 1/26/06

In *Gilmore v. Gonzales*, John Gilmore, a California civil liberties advocate, filed suit claiming that the federal government's policy of requiring airline passengers to present identification or be subjected to a thorough search violated his due process, travel, and Fourth Amendment rights. The Ninth Circuit Court of Appeals disagreed and upheld the federal travel policy stating that it was not so vague as to violate due process, does not interfere with the fundamental right to travel, and does not amount to an unreasonable search and seizure under the Fourth Amendment.

In *United States v. Hartwell*, CA3, No. 04-3841, 1/31/06, the United States Court of Appeals for the Third Circuit held that suspicionless screening searches of travelers at airport security checkpoints are lawful under the administrative search doctrine.

SEARCH AND SEIZURE:
Good Faith Exception;
Affidavit Based on Information
Obtained in a Previous Illegal Search
United States v. McClain,
 CA6, No. 04-5887, 12/2/05

In *United States v. McClain*, the issue before the Sixth Circuit Court of Appeals was whether the good faith exception to the exclusionary rule could apply when the probable cause for the search warrant affidavit was based on information obtained in a previous illegal search.

The Hendersonville, Tennessee Police Department received a phone call from a concerned neighbor who reported seeing a light on in a house located at 123 Imperial Point, which had been vacant for several weeks. The police dispatcher contacted Officer Michael Germany and notified him of a possible "suspicious incident" at that address. Upon arriving near the scene a couple minutes later, Officer Germany confirmed that lights were on in a bedroom on the west side of the house and in the dining area in the center of the house. An inspection of the outside of the house found no open or unlocked windows, doors or gates, and no sign of forced entry or illegal activity. The front door was found slightly ajar and light was showing through the crack.

Concerned that the open door and the lights might be signs that a burglary was in progress or that juveniles had entered the house to vandalize or engage in underage drinking, Officer Michael German called for backup. When assistance arrived, Officer Germany suggested that they “clear” the house because the open door could indicate a crime in progress.

Officer Germany announced their presence loud enough so that anyone inside could hear him, and after waiting for “approximately two to five minutes” and receiving no response from inside the house, they entered with their guns drawn. Moving from room to room in order to clear it of any potential perpetrators, the officers found no furniture in the house except a television set on the living room floor. They found fast food wrappers on the kitchen counter and a piece of luggage and a child’s toy in one of the bedrooms in the house. After securing the upstairs rooms, the officers moved to the basement where they observed that the windows were covered with inward-facing reflective paper and that a large room contained a substantial amount of electrical wiring connected to a junction box and what appeared to be plant stimulators. The basement also contained a number of boxes marked as grow lights. While neither officer saw any marijuana in the house or observed any illegal activity, both concluded that a marijuana grow operation was being set up in the basement of the house. Following their search of the basement, the officers cleared the garage and, finding nothing, left the premises.

That same night, Officer Germany’s supervisor contacted Officer Brian Murphy of the Sumner County Drug Task Force concerning the search at 123 Imperial Point. Officer Murphy

determined that the home was owned by Kevin and Tina McClain. The next day, after receiving Officer Germany’s report on the search of the residence, Officer Murphy began investigating a possible marijuana grow operation at the home. He placed the property under off-and-on surveillance for several weeks and eventually determined that McClain, George Brandt and Jason Davis were engaged in setting up a marijuana grow operation at 123 Imperial Point and at several other residences.

On November 27, 2001, Officer Murphy obtained warrants to search the house at 123 Imperial Point and five other properties that he had linked to the defendants through his investigation and surveillance. The warrant affidavit explicitly relied in part on evidence obtained during the initial warrantless search of 123 Imperial Point conducted on October 12 and described the circumstances of that search. When law enforcement authorities executed the warrants on November 28, 2001, they recovered from 123 Imperial Point 348 marijuana plants and various types of plant growing equipment. The searches of the other five properties for which Officer Murphy had obtained warrants also uncovered numerous marijuana plants and plant-growing paraphernalia.

A federal grand jury returned a three-count indictment charging Kevin McClain, George Brandt III, and Jason Davis with conspiring to manufacture and to possess with intent to distribute more than 1,000 marijuana plants. McClain and the other defendants moved to suppress the evidence found during the searches. After an evidentiary hearing, the district court granted each defendant’s motion to suppress. The court found that the

warrantless entry and search of 123 Imperial Point violated the Fourth Amendment, necessitating the suppression of all evidence derivative of that warrantless search, and that the good faith exception to the exclusionary rule established in *United States v. Leon*, 468 U.S. 897 (1984), did not apply. The United States filed a timely notice of appeal. The Sixth Circuit Court of Appeals found as follows:

“...These officers were responding to a ‘suspicious incident’ call and, and there was no evidence that they acted in bad faith when, after finding the front door to McClain’s home slightly ajar, they went inside to ensure that no criminal activity was afoot. Sometimes the line between good police work and a constitutional violation is fine indeed. Here, however, the officers’ own testimony at the suppression hearing reveals that they had no objective basis for their concern that a burglary was being committed at McClain’s residence. Officers testified that there was no emergency necessitating their entry into the home. Officer Germany testified that upon inspecting the exterior of the house, he observed no movement in or around the home, no signs of forced entry or vandalism, and no suspicious noises or odors emanating from the house. Officer Williams similarly testified that upon his arrival he observed no signs of any criminal activity.

“Officer Williams even stated that the officers’ hunch that a burglary could be occurring inside the residence was mere ‘speculation.’ Speculation does not equate to probable cause. Indeed, mere speculation that a crime could be occurring, without more, simply does not suffice to overcome the presumption of unconstitutionality attached to a warrantless intrusion into the sanctity of the home.”

The question before the Sixth Circuit Court of Appeals was whether the good faith exception to the exclusionary rule can apply in a situation in which the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment. The Court found as follows:

“The Ninth and Eleventh Circuits have answered that question in the negative. *United States v. McGough*, 412 F.3d 1232, 1239-40 (11th Cir. 2005) (holding that the good faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search); *United States v. Wanless*, 882 F.2d 1459, 1466-67 (9th Cir. 1989) (same); *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987) (holding that a ‘magistrate’s consideration of the evidence does not sanitize the taint of the illegal warrantless search’). On the other hand, the Second and Eighth Circuits have held that, at least under some circumstances, the *Leon* good faith exception can still apply when the warrant affidavit relies on evidence obtained in violation of the Fourth Amendment.

“We conclude that this is one of those unique cases in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation. Evidence seized pursuant to a warrant, even if in fact obtained in violation of the Fourth Amendment, is not subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid. The facts surrounding these officers’ warrantless entry into the house at 123 Imperial Point were not sufficient to establish probable cause to believe a burglary was in progress, but we do not believe that the officers were objectively unreasonable in suspecting that criminal

activity was occurring inside McClain's home, and we find no evidence that the officers knew they were violating the Fourth Amendment by performing a protective sweep of the home.

"More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search. Officer Murphy's warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search. On the basis of that affidavit, the magistrate issued the search warrants. There was indeed nothing more that Officer Murphy could have or should have done under these circumstances to be sure his search would be legal.

"Because the officers who sought and executed the search warrants acted with good faith, and because the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers' belief in the validity of the search warrants objectively reasonable, the Court concluded that despite the initial Fourth Amendment violation, the *Leon* exception bars application of the exclusionary rule in this case. *See Leon*, 468 U.S. at 920 (explaining that the exclusion of evidence will not further the purposes of the exclusionary rule 'when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope')."

SEARCH AND SEIZURE:
**Good Faith Exception; Improper
Execution of a Search Warrant**

United States v. Angelos,
CA10, No. 04-4282, 1/9/06

In *United States v. Angelos*, FBI Agents executed a search warrant which called for a search of a vehicle and a search of a safe inside a residence. While executing the search warrant on the residence, the agents discovered and seized incriminating evidence throughout the residence.

The Tenth Circuit Court of Appeals stated that the facts of the case require a decision on whether the officers executing the warrant acted reasonably in exceeding the scope of the warrant which called only for a search of a safe by their seizing items throughout the house. The Court found as follows:

"Although the government makes reference to the good faith exception announced by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984), we conclude that exception is inapplicable here. In *Leon*, the Court held that evidence obtained pursuant to a constitutionally defective search warrant is admissible at trial if the officers executing the search warrant reasonably relied on the warrant and there is no evidence the officers misled the magistrate issuing the warrant.

"Notably, the Supreme Court in *Leon* made reference to officers properly executing a warrant and searching only those places and for those objects that it was reasonable to believe were covered by the warrant. In turn, we have held that the *Leon* good faith

exception will not save an improperly executed warrant. *United States v. Rowland*, 145 F.3d 1194, 1208 n.10 (10th Cir. 1998). Given the circumstances of the search of the Fort Union house, it is apparent that the problem lies in the execution, and not the constitutionality, of the search warrant.

"...There are only two possible explanations for why the officers in this case exceeded the scope of the search warrant: either they knew the limits of the warrant and decided to disregard them, or they never bothered to read the warrant itself. Either way, the officers are not entitled to rely on any type of good faith exception...Assuming the agents executing the warrant actually read it, they reasonably should have noticed its limited scope. By failing to do so, the officers cannot be said to have acted reasonably."

SEARCH AND SEIZURE:

Good Faith Exception; No Knock Warrant

United States v. Singleton,
CA4, No. 04-4108, 3/23/06

In 2001, a confidential informant told the Harford County police that two individuals known as "Eva" and "BK" were selling cocaine inside an apartment in Edgewood, Maryland. In August of that year, the informant made a controlled purchase of cocaine from "Eva" inside the Edgewood apartment. Later, police received a separate tip that two individuals known as "Eva Hall" and "BK" were selling cocaine in the area. Upon further investigation, the police discovered that one of the cars near the apartment was registered to a woman named Eva Mae Hall. The police also learned that "BK" was a

pseudonym for a man named Anthony Singleton. An examination of court records revealed that Singleton had a fairly extensive arrest record, including arrests in the mid-1980s for second-degree murder and criminal possession of a weapon. In September 2001, the confidential informant made a second controlled purchase of cocaine inside the Edgewood apartment, this time from Singleton.

On September 26, 2001, the police applied for a search warrant in the Circuit Court of Harford County, alleging probable cause to believe that the inhabitants of the Edgewood apartment were selling drugs. The application also sought authorization for a no-knock entry, averring that "any advance notice given to the occupants of the above residence would greatly diminish the chance of a safe and secure entry by law enforcement officers executing the issued search warrant." The court granted the search warrant and authorized a no-knock entry.

On October 3, 2001, the confidential informant made, or attempted to make (the record is unclear), his third and final controlled purchase of cocaine in the Edgewood apartment, again from Singleton. The express purpose of this controlled purchase was to verify that Singleton still resided there.

Under Maryland law, the police had fifteen days to execute the issued warrant. On the morning of October 9, 2001, within the time permitted, law enforcement officers entered the Edgewood apartment by forcibly breaking down the door without first knocking and announcing their presence. Inside, they found Singleton, Hall, and Hall's five-year-old son, whom the police had expected to be at school.

The police also found a locked safe in the apartment's bedroom that contained 42 grams of crack cocaine in the form of a crack "cookie" and over 50 plastic bags of crack; \$1,400 cash separated into 14 separate \$100 bundles; three plastic bags with marijuana; and a loaded Smith & Wesson 9 mm semi-automatic handgun. The police also recovered a Sprint telephone bill addressed to Singleton at the Edgewood apartment. After being read his Miranda rights, Singleton made several incriminating admissions to the police acknowledging his ownership and possession of the contraband.

A grand jury charged Singleton with one count of possession with intent to distribute five grams or more of crack, one count of possession of a firearm in furtherance of a drug-trafficking crime, and one count of possession of a firearm by a convicted felon.

Singleton moved to suppress the evidence seized from the Edgewood apartment, asserting that exigent circumstances did not justify the police's no-knock entry. He contends that exigent circumstances did not justify the search and that the good-faith exception articulated in *United States v. Leon*, 468 U.S. 897 (1984) cannot excuse this defect. Upon review, the Fourth Circuit Court of Appeals found as follows:

"In the application for a no-knock warrant, the police listed three reasons to suspect that knocking and announcing their presence at the Edgewood apartment would imperil them. First, they cited Singleton's criminal history, which included several arrests in the 1980s for firearms offenses, an arrest for second-degree murder in 1987, and then nothing until 2000, when Singleton was arrested for marijuana

possession and importation and for driving with a revoked license. Second, the application explained that the apartment was in 'a known open air drug market, having a history of shootings and weapons related violence.' Third, the application stated that the only way into the apartment was an open area in which the approaching police would be visible to the inhabitants of the Edgewood apartment. (The Court stated the application also relied on several generalizations about the inherent violence of drug dealers, such as their tendency to own weapons and to protect their property by force.)

"It is not clear that these facts sufficiently establish a particularized basis to reasonably suspect that knocking and announcing would be met with violent resistance. *United States v. Grogins*, 163 F.3d 795, 798 (4th Cir. 1998). Of the three specific factors cited by the police, only the first—Singleton's criminal history—distinguishes this particular search from many others that police conduct on a daily basis. The other factors alone would be insufficient to justify a no-knock search—the Fourth Amendment countenances neither a blanket rule allowing no-knock searches for drug investigations, nor a marginally narrower rule allowing no-knock searches for drug investigations in dangerous neighborhoods.

"The addition of Singleton's criminal history does not decisively tip the balance toward forgoing the knock-and-announce requirement. Singleton may have had a rough past, but his history of violence ended (as far as the police knew) in 1987, with his conviction for second-degree murder. He then managed to avoid violating the law for fourteen years, until he again ran into trouble in 2000—but even then he was only convicted of driving with a

revoked license. Furthermore, the police had no contemporary evidence that Singleton owned a firearm even though the confidential informant had been in the Edgewood apartment several times. Given the lack of any contemporary evidence that Singleton might prove violent to police, it is unclear whether the police reasonably believed that knocking and announcing their presence would be dangerous.

“However, we need not resolve this question because the police reasonably relied in good faith upon a properly obtained search warrant that specifically authorized a no-knock search. More than twenty years ago, the Supreme Court held that ‘reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate...should be admissible in the prosecution’s case in chief,’ even if the warrant is ultimately found to be defective. *United States v. Leon*, 468 U.S. 897 (1984). The good-faith exception is perfectly suited for cases like this, when the judge’s decision was borderline. *United States v. Scroggins*, 361 F.3d 1075, 1084 (8th Cir. 2004).

“Although neither the Supreme Court nor this Court has previously held that the *Leon* good-faith exception applies to a no-knock warrant, we see no persuasive reason not to apply *Leon* to the warrant at issue here. Given that the Constitution allows no-knock warrants, [see *United States v. Banks*, 540 U.S. 31, 36 (2003)], we believe that applying the good-faith exception here is most consistent with the strong preference for warrants. *Leon*, 468 U.S. at 914. As the Supreme Court has explained, “the detached scrutiny of a neutral magistrate...is a more reliable safeguard against improper searches than the hurried

judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.” *United States v. Chadwick*, 433 U.S. 1, 9 (1977). When officers suspect ahead of time that knocking and announcing their presence would imperil them or risk the destruction of evidence, they minimize the risk of violating the Fourth Amendment if they obtain prior judicial approval for a no-knock entry.

“In addition, applying the exclusionary rule here despite reasonable reliance on a no-knock warrant would not help deter future police misconduct. When an officer in good faith seeks prior judicial approval for a no-knock warrant, he is already doing the most that he can—at least prior to the search—to ensure that the no-knock entry will comply with the Fourth Amendment. There is ‘nothing to deter’ in such situations. *Leon*, 468 U.S. at 921. Even if the no-knock warrant turns out to be unjustified, penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. Thus, the evidence produced by the no-knock search of the Edgewood apartment is admissible under *Leon*’s good faith exception.”



SEARCH AND SEIZURE:
**Good Faith Exception; Officer's
Alteration of Description on Warrant**

United States v. Tran,
CA6, No. 04-1801, 1/5/06

Hang Le-Thy Tran owned and operated two businesses, Mimi's Family Hair Care and Kimberly Beauty College, located in the suburbs of Grand Rapids, Michigan. On October 24, 2000, Mimi's Family Hair Care was damaged by a small fire in the rear room of the salon. The fire marshal concluded that the cause of the fire was arson, and all other causes were ruled out. The Michigan State Police Laboratory was unable to identify the flammable liquid used to ignite the fire, but there were acetone and several other flammable hair and nail care products in the salon. While investigating a second fire at Kimberly Beauty College, a detective with the Kentwood Police Department received a letter naming a suspect in the Mimi's Family Hair Care fire. The detective eventually located Hanh Ngo, a student at Kimberly Beauty College, who confessed to setting the fire at Mimi's Family Hair Care at Tran's behest.

On March 24, 2002, Kimberly Beauty College was destroyed by fire, and an adjacent business suffered fire and smoke damage. The basement of Kimberly Beauty College escaped significant damage even though the fire completely destroyed the rest of the structure. The cause of the fire was determined to be arson, ignited through the use of a flammable liquid in conjunction with cotton, acting as a wick from the flammable liquid to other areas of the business. Acetone, a flammable liquid commonly used in beauty salons, was found

in the basement of Kimberly Beauty College in unusually high quantities. The police were unable to identify the arsonist responsible for the fire that destroyed Kimberly Beauty College.

These offenses resulted in an indictment charging Tran with two counts of aiding and abetting another to commit arson. Count 1 of the indictment related to the fire at Mimi's Family Hair Care in Kentwood, Michigan, on October 24, 2000. Count 2 of the indictment arose out of the fire at Kimberly Beauty College in Wyoming, Michigan, on March 25, 2002. The case was tried by a jury on February 9, 2004, and following a five-day trial, the defendant was found guilty of both counts.

Thereafter, Tran filed a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, arguing that sufficient evidence was not presented by the government at trial to meet its burden of showing that Mimi's Family Hair Care and Kimberly Beauty College affected interstate commerce. The district court denied the motion. On June 9, 2004, Tran was sentenced to 72 months in prison on each count, to be served concurrently. Tran timely filed a notice of appeal.

Tran argues on appeal that the government failed to introduce sufficient evidence to support the verdict in this case. Tran moved to suppress the evidence seized in the search of Kimberly Beauty College because the street number of the address on the warrant and the accompanying affidavit had been altered. Tran also moved to suppress the evidence seized in the search of her mobile home on the grounds that the warrant failed to establish the required nexus between the mobile home and the

defendant and hence lacked probable cause. Upon review, the Sixth Circuit Court of Appeals found as follows:

“...The alteration of the warrant and affidavit by the executing officer was improper, but that the alteration did not eliminate probable cause or render the warrant invalid. It is clear that the incorrect address in the warrant and the affidavit does not itself invalidate the search warrant. The Fourth Amendment requires a warrant to particularly describe the place to be searched, and the persons or things to be seized. In determining whether the warrant describes with sufficient particularity the place to be searched, we consider: (1) whether the place to be searched is described with sufficient particularity as to enable the executing officers to locate and identify the premises with reasonable effort; and (2) whether there is reasonable probability that some other premises may be mistakenly searched.

“In the present case, the warrant and supporting affidavit specified that the place to be searched was ‘Kimberly Beauty College, 937 28th St. S.W., Wyoming, MI 49509.’ It is undisputed that two out of the three references in the warrant to the place to be searched were accurate. Kimberly Beauty College was, in fact, located on 28th Street S.W. in the 900 block. Thus, even though the street address was inaccurate, the executing officers could still locate and identify Kimberly Beauty College with reasonable effort.

“The executing officer who actually conducts a search should not himself or herself amend or alter the search warrant, but, instead, should submit the desired amendment or alteration to a judicial officer for approval.”

“The Court further considered whether Detective Struve’s alteration of the warrant to search Kimberly Beauty College invalidated the warrant. Since only a judicial officer may issue a warrant, it necessarily follows that only a judicial officer may alter, modify, or correct the warrant. The executing officer who actually

conducts a search should not himself or herself amend or alter the search warrant but, instead, should submit the desired amendment or alteration to a judicial officer for approval.”

It follows that the alteration in the instant case was an improper attempt to exercise the judicial function. However, the Court found no authority or reason to invalidate the entire warrant because of the officer’s mistake. There was no bad faith, deception, or prejudice as a result. The officer simply tried to correct a minor error and did not know that the document had now become a judicial matter. The alteration did not eliminate probable cause or eliminate compliance with the requirements of the Fourth Amendment.

SEARCH AND SEIZURE:
Probable Cause; Controlled Buys

United States v. Sidwell,
CA7, No. 05-2189, 3/10/06

In July 2004, Officer Bryan Hasse of the Beloit, Wisconsin, Police Department executed an affidavit in support of a search

warrant for Gerald L. Sidwell's apartment unit. The affidavit contained the following information:

1) The Beloit Police Department had received two tips that cocaine was being sold and used in Sidwell's apartment unit, 2) Sidwell had twice refused consent to search his apartment, 3) drug paraphernalia, such as baggie corners and knots, had been found near the entrance to Sidwell's apartment, and 4) within 72 hours of when the affidavit was prepared, a confidential informant had made a "controlled buy" of crack cocaine from Sidwell's apartment. Information previously provided by this confidential informant had proven accurate and, thus, the police believed his services to be reliable in this case as well.

The informant's "controlled buy" occurred as follows:

Before the informant entered Sidwell's apartment building, he was searched by Officer Hasse for contraband. He was then observed entering the building and exiting a few minutes later. At this time, the informant turned over to the police a substance which tested positive for the presence of cocaine. The informant's description of Sidwell's apartment unit matched Officer Hasse's information about the apartment.

On the basis of this information, a Circuit Court Commissioner for Rock County, Wisconsin, issued a search warrant. Officer Hasse executed this warrant at Sidwell's apartment and recovered 0.1 grams of marijuana, two finger scales, rolling papers, 17 morphine pills, three 20-gauge shotgun shells, two .357 magnum rounds of ammunition and a 20-gauge Mossberg shotgun.

On appeal, Sidwell contends that the affidavit submitted in support of the application for a search warrant failed to establish probable cause that contraband would be found in his apartment. The Seventh Circuit Court of Appeals found as follows:

"Probable cause exists when, considering all the circumstances, the affidavit sets forth sufficient facts to induce a reasonably prudent person to believe that a search will uncover contraband or evidence of a crime. *United States v. Olson*, 408 F.3d 366, 370 (7th Cir. 2005); *United States v. Peck*, 317 F.3d 754, 756 (7th Cir. 2003). The affidavit is to be interpreted in a practical, 'common-sense manner.' *United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

"We believe, as did the magistrate judge and the district court, that the existence of probable cause in this case turns primarily on the 'controlled buy' of cocaine that the confidential informant made from Sidwell's apartment. Generally, a controlled buy, when executed properly, is a reliable indicator as to the presence of illegal drug activity. The district court correctly determined that the controlled buy was adequate to support such a conclusion in this case: the confidential informant entered the building without contraband; exiting moments later, he produced cocaine, indicating the probable—if not likely—presence of illegal drug activity in the apartment.

"Sidwell, however, submits that the buy was not actually 'controlled' because the police were unable to see the confidential informant after he entered the apartment building. Therefore, he submits, the informant could

have purchased the cocaine from any person in any unit in that building. This scenario is theoretically possible. Nevertheless, it does not negate the existence of probable cause. See *United States v. Garcia*, 983 F.2d 1160, 1167 (1st Cir. 1993) (rejecting the defendant's contention that 'the informant, who made the controlled buy, might have stashed cocaine elsewhere in the building out of the sight of the detective' as 'straining credulity on a common-sense reading'). Probable cause requires only a probability or substantial chance that evidence may be found; it does not, by contrast, require absolute certainty. *Brack*, 188 F.3d at 755 (citing *Gates*, 462 U.S. at 243 n.13). Although we recognize that Officer Hasse's monitoring of the informant during the controlled buy may have been imperfect, we ultimately find persuasive the fact that the informant had completed numerous other controlled buys in the past and provided, on those occasions, accurate and reliable information.

"Furthermore, the informant provided a description of the interior of Sidwell's apartment that matched Officer Hasse's understanding of the apartment, thereby indicating that the informant did enter the unit. The controls in place at the buy in this case therefore were sufficient to establish probable cause that contraband would be found in Sidwell's apartment."

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