SEARCH AND SEIZURE

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17TH ANNUAL SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE
July 28-29, 2005
San Antonio

CHAPTER 12

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Sheriff **1/1997-12/2004**
Travis County Sheriff's Office Austin, Texas

Sheriff of Travis County, Texas. Assumed office as the first female Sheriff in Travis County history on January 1, 1997. Served as the Chief Law Enforcement Officer and Chief Corrections Officer of Travis County, Texas. Sheriff Frasier headed an agency of over 1350 employees with a 2004 budget of over $90 million. The Travis County Sheriff's Office is a full service Sheriff's Office which patrols over 700 square miles and operates a jail system of over 2400 inmates.

Instructor **1/1997-12/2004**
St. Edward's University Austin, Texas

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Associate. Attorney whose primary practice was general litigation with an emphasis in litigation involving Sheriff's Offices.

Law Clerk **9/1984-12/1984**
U.S. District Court Tallahassee, Florida

Intern. Interned as Law Clerk for U.S. District Judge Maurice Paul.

Legislative Analyst **8/1983-7/1984**
Florida Senate Committee on Criminal Justice Tallahassee, Florida

Intern. Interned as Legislative Analyst for Senate Committee on Criminal Justice. Drafted and analyzed legislation in the area of criminal justice.

Captain **10/1975-8/1982**
Travis County Sheriff's Office Austin, Texas

Progressed through the ranks from Deputy Sheriff and Corrections Officer to Captain with five years of service as Captain. Main duties included managed of jail system and coordination with Commissioner's Court.

Instructor **9/1980-5/1982**
Austin Community College Austin, Texas

Adjunct Instructor. Adjunct Instructor in criminal justice on a part-time basis. Classes taught included Introduction to Criminal Justice and Corrections.

Corrections Officer **5/1974-5/1975**
Texas Department of Corrections Huntsville, Texas

Corrections Officer for the Texas Department of Corrections. Duties included maintenance of security and supervision of inmates in a maximum security prison.

EDUCATION

Juris Doctor **1984**
Florida State University College of Law Tallahassee, Florida

Graduated with high honors. Member of Law Review and Order of the Coif. Served as Research Editor of Law Review.

Bachelor of Science **1974**
Sam Houston State University Huntsville, Texas

Bachelor of Science in Criminology & Corrections. Graduated with honors. 30 hours towards Masters Degree in Criminal Justice.

High School Graduate **1971**
Highlands High School San Antonio, Texas

AWARDS

- Correctional Officer of the Year, 1981, National Jail Association
- Administrator of the Year, 1997, Combined Law Enforcement Association of Texas
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- Administrator of the Year, 1998, Combined Law Enforcement Association of Texas
- Breaking the Glass Ceiling Award, 1999, National Center on Women in Policing
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PROFESSIONAL ACCOMPLISHMENTS

- Major County Sheriffs' Association (President, 2004; Vice-President 2002-2003; Treasurer (1998-2001)
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- SafePlace Foundation, Board of Trustees
- Big Brothers/Big Sisters of Central Texas, Board Member
- Children's Advocacy Center of Central Texas, Advisory Board Member (1997-2004)
- National Center for Women and Policing, Board Member
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TABLE OF CONTENTS

I. INTRODUCTION 1

II. VIOLATION OF FOURTH AMENDMENT IS ACTIONABLE AS UNDER SECTION 1983 AGAINST STATE ACTORS 1

III. VIOLATION OF FOURTH AMENDMENT RIGHTS IS ACTIONABLE FOR DAMAGES AGAINST FEDERAL ACTORS 1

IV. *HECK* OF A ROADBLOCK FOR THOSE CONVICTED (OR STILL HAVE PENDING CHARGES) IN INCIDENT UNDERLYING CAUSE OF ACTION 1

V. WHAT EXACTLY IS AN UNLAWFUL SEARCH AND/OR SEIZURE? 2
- A. Preference for Obtaining Warrant 2
- B. Exceptions to Warrant Requirement 3
- C. A Man's (and Woman's) Home is His (and Her) Castle 4

VI. WHEN IS CONTACT BY AN OFFICER A SEIZURE? 5
- A. Approaching a Person in a Public Place 5
- B. Detention is the Key 5
- C. Like a Speech at a Conference, Brevity is the Issue 5

VII. CONSENT TO SEARCH 5

VIII. HAVING A WARRANT IS NOT A CURE ALL 5
- A. Reliance on Magistrate 5
- B. Misrepresentations 5
- C. Search of Others on the Premises 5

IX. HOW ALL OF THIS PLAYS OUT IN REAL LIFE 6
- A. The *Groh* Decision 6
- B. The Williams v. Kaufman County Decision 6
- C. The Bennett v. City of Eastpointe Decision 7

X. CONCLUSION 8

SEARCH AND SEIZURE

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I. INTRODUCTION

When a suspect is arrested for alleged criminal activity, the last thing on most suspects' minds is bringing a civil suit against the officer executing the warrant and/or making the arrest. However, once the charges have been dismissed or the person has been found not guilty, the mindset often changes. The person will often feel as if being "vindicated" in the criminal courts is not enough. They want their own "pound of flesh"…out of the officer's hide and pocketbook.

Another common situation for civil suits based on violation of the Fourth Amendment (and usually accompanied by the Fourteenth Amendment) is when officers make mistakes…they search the wrong house, they arrest the wrong person. While the officers may have been well intending, the experience is often extremely frightful for the person on the other end of the battering ram.

The other common situation is where the individual who has dealings with the officer feels as if the officer did not have a basis for stopping, detaining, and/or searching him/her. Or, if the officer is able to articulate a reason, they question whether the stated reason was the officer's real motives for having made contact with the individual.

II. VIOLATION OF FOURTH AMENDMENT IS ACTIONABLE AS UNDER SECTION 1983 AGAINST STATE ACTORS

Given today's propensity for 5-4 verdicts being issued from the United States Supreme Court, it is hard to remember back to the time when the Court reached decisions on an 8-1 or unanimous vote. However, it was such an occasion when the Court voted 8-1 in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961), that the "under color of state law" language of the Civil Rights Act of 1871 allowed for a civil action against officers who had clearly violated the constitutional rights of an individual. The Court's reasoning was that while the officers may not have been acting appropriately under the law of the state from whom they gained their power, they were acting pursuant to that power nonetheless.

In *Monroe*, thirteen police officers of the City of Chicago has broken into the plaintiffs' (an African-American family consisting of the parents and six children) home in the early morning. The officers made the family stand nude in the living room while they "ransacked" every room while emptying drawers and ripping mattress covers. The father was then taken to the police station and detained for ten hours while he was interrogated about a murder. While there was a magistrate available, he was not taken before the magistrate or permitted to telephone his family or attorney. He was subsequently released without charges.

The Court found that a cause of action was stated under the Fourteenth Amendment for violation of due process for failure to adhere to the requirements of the Fourth Amendment. The fact that the officers' actions had clearly violated the statutes and Constitution of the State of Illinois did not take out their actions out from under the umbrella of "color of state law".

III. VIOLATION OF FOURTH AMENDMENT RIGHTS IS ACTIONABLE FOR DAMAGES AGAINST FEDERAL ACTORS

Okay, so it wasn't an 8-1 decision, it was 5-4 vote. Ten years after the *Monroe* decision, the Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, held that federal agents acting under color of their authority who violate the Fourth Amendment can be held accountable in a cause of action for damages based on their unconstitutional conduct.

In *Bivens*, the agents had entered the plaintiff's apartment and arrested him for narcotics violations. They then handcuffed him, threatened to arrest his entire family, and searched the apartment from top to bottom. Afterwards, they took the plaintiff to the federal courthouse where they interrogated him, booked him, and subjected him to a visual strip search. The Court held that the plaintiff could bring an action for damages based on a violation of the Fourth Amendment prohibition against unreasonable searches and seizures.

IV. *HECK* OF A ROADBLOCK FOR THOSE CONVICTED (OR STILL HAVE PENDING CHARGES) IN INCIDENT UNDERLYING CAUSE OF ACTION

Now, I know that some of you are recalling the other lessons you have learned and wondering whether a person who either has been convicted or has outstanding charges pending could bring a civil suit for the arrest and/or search which led to their prosecution. You will recall that the Supreme Court held in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed. 2d 383 (1994), that a Section 1983 action that would call into question the lawfulness of a plaintiff's conviction was not cognizable. Such a cause of action, therefore,

does not accrue until and unless the plaintiff can prove that his/her conviction or sentence has been reversed on direct appeal. Thus, when a plaintiff files a Section 1983 action, the court must determine whether "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* At 487 (footnote omitted).

For a plaintiff suing under a theory of violation of the Fourth Amendment, the difficulty arises when the alleged unlawful search and/or seizure is the basis of the criminal charges. If the plaintiff was searched first, it is highly likely that the search was the basis for the arrest. If the arrest occurred first, it is highly likely that the search was incidental to the arrest.

The key question to ask is whether a civil finding in favor of the plaintiff would necessarily challenge the legality of a conviction (or potential future conviction). If not, it may be brought. If it would be inconsistent, then the plaintiff cannot bring the action until, if and when, the criminal conviction has been dismissed or reversed.

What makes the reasoning of *Heck* interesting in a Fourth Amendment claim is footnote 7 of the opinion. (I know, aren't you thankful now for those law professors that insisted that you brief the footnotes and the dissents). In the footnote, the Court stated that a suit for damages attributable to an allegedly unreasonable search might still lie even if the challenged search resulted in a conviction because of doctrines such as independent source, inevitable discovery, and harmless error. The other common way that it might not impair the conviction is if it is a suit based on unnecessary force being used to effectuate the arrest. The arrest may still be valid because it was based on probable cause while the amount of force used is unconstitutional.

The reasoning behind footnote 7 comes into play in two ways in suits based on the Fourth Amendment under Section 1983. If suit is brought while the charges are still pending or a conviction is still standing, the defendant could challenge the suit as being a collateral attack on the criminal proceeding. The plaintiff should be prepared to argue that the unreasonableness of the search or seizure will not necessarily undermine the validity of the conviction.

The second way it comes into play is when the plaintiff waits until the criminal charges are dismissed or the conviction is overturned. In *Harvey v. Waldron*, 210 F.3d 1008 (9th Cir. 2000), the plaintiff brought suit based on an alleged unlawful search and seizure and subsequent disposal of antique gaming devices. The appellate court was faced with the issue as to when the cause of action had accrued for determination of when the statute of limitations had begun to run. In relation to the cause of action based on the initial search and seizure of the gaming devices, the Ninth Circuit declined to adopt the reasoning that a Fourth Amendment claim could go forward while charges were still pending. The Ninth Circuit ruled the cause of action for the initial search and seizure of the gaming devices did not accrue until the charges were dismissed. It is important to note that, in *Harvey*, the possession of the gaming machines was an essential element of the crime for which Harvey was charged.

Interestingly, the Ninth Circuit distinguished between the Fourth Amendment claim based on the initial search and seizure of the gaming machines and the Fourth Amendment claim based on the disposal of the gaming machines. The Ninth Circuit held that the bringing of the claim based on the disposal of the gaming machines would have been cognizable and not premature under the reasoning of *Heck* as it would not invalidate any future conviction. Thus, the statute of limitations had begun to run when Harvey knew, or should have known, of disposal of the gaming machines.

Therefore, a plaintiff who has a potential Fourth Amendment claim should not rely on the reasoning of *Heck* to assume that it is safe to wait until the disposal of the criminal charges to bring a civil suit. If the cause of action would not invalidate a criminal conviction, it may very well be that the statute of limitations will be running during the pendency of the criminal charges.

V. WHAT EXACTLY IS AN UNLAWFUL SEARCH AND/OR SEIZURE?

In order to prevail under a Fourth Amendment claim, the plaintiff will first have to prove that the actions of the officers violated the Fourth Amendment. While a cause of action against a city, county or state law enforcement officer will be based on a violation of the due process clause of the Fourteenth Amendment, in reality, it is based on a violation of the "reasonableness" component of the Fourth Amendment. If the plaintiff is able to establish a violation of the Fourth Amendment, one can expect the issue of qualified immunity to come into play. However, if the plaintiff cannot get past this first hurdle, the issue of the officers' good faith or objective reasonableness may never come into play.

A. Preference for Obtaining Warrant

The Supreme Court has made it clear time and time again that the preferred practice is for an officer to secure a warrant before searching and/or seizing (remember, an arrest is a seizure). While some members of the Court would say it is because of a warrant requirement in the language of the Fourth Amendment, most, if not all of the past and current members of the Court would agree that obtaining a

warrant brings into the play the "informed and deliberate judgment" of "a neutral and detached magistrate" as opposed to leaving the decision of whether probable cause exists in the hands of those "engaged in the often competitive enterprise of ferreting out crime." *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3505, 82 L.Ed.2d 677 (1984). Thus, warrantless searches are presumed to be unreasonable and the burden will be on the officer to show that some exception to the warrant requirement applies. Unless the failure to secure a warrant is excused under one of the exceptions, the search will be illegal. *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed. 2d 246 (1984).

B. Exceptions to Warrant Requirement

1. In Texas, there are both statutory exceptions to the warrant requirement and a number of exceptions developed through case law.

One of the most commonly employed exceptions to the warrant requirement is the provision allowing for the arrest of an individual who has committed an offense in the presence of a law enforcement officer. Article 14.01 of the Code of Criminal Procedure provides that the officer may arrest without a warrant a person that commits an offense within the presence of the officer. Another statutory exception is the provision of the Transportation Code which allowed for blood to be withdrawn from a driver involved in a fatal accident without a warrant. In essence, the legislature has recognized and codified the exigent circumstances of having to obtain the blood sample promptly.

2. Plain view:

Under the "plain view" doctrine, officers who are lawfully in a position to observe an item first hand may seize the item. The reasoning of the courts is that once the owner places the item in plain sight of others (especially law enforcement officers), the "owner's privacy interest in that item is lost." *Illinois v. Andreas*, 463 U.S. 765, 103 S.Ct. 3319, 77 L.Ed. 2d 1003 (1983).

One key to the applicability of the plain view doctrine is that the officer must be viewing the item from a location where the officer has the right to be in the first place. *U.S. v. Jackson*, 588 F.2d 1046 (5th Cir. 1979). For example, the Fifth Circuit struck down the application of the plain view doctrine when the officer had only observed the marijuana plants because he had driven onto the driveway of the residence with his headlights illuminated thus invading the person's privacy by going on to the curtilage of the property. *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974).

You would be hard pressed to find an officer who does not look to find contraband or evidence of a crime during just about every contact with another. However, the discovery of the item does not have to be inadvertent. *Horton v. California*, 496 U.S. 128, 110 S.Ct. 301, 110 L.Ed.2d. 112 (1990). But, it must be immediately apparent to the officer that what the officer is seeing is evidence of a crime or contraband. For example, it made not be immediately apparent that the guns seen are stolen, *Williams v. State*, 743 S.W.2d 642 (Tex.Crim.App. 1988) or that photographic negatives depict evidence of a crime, *Nicholas v. State*, 626 S.W.2d 169 (Tex.Crim.App. 1973).

However, the officer may use the knowledge and skill the officer has accumulated to make the determination as to whether the item is most likely contraband or evidence of a crime. For instance, experience which told the officer that small party balloon tied at one end probably contained narcotics justified seizure of the balloons under the plain view doctrine. *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed. 2d 502 (1983). The officer needs only "probable cause to associate the property with criminal activity." *Id.* at 460 U.S. 747.

Often the distinction will be made between whether the officer has the right to seize the item in plain view as opposed to whether the officer has the right to search the item. For example, officers may be entitled to seize opaque plastic wrapped packages which smelled strongly of marijuana, but they were required to obtain a warrant prior to opening and searching the packages. Once the officers have the items in their custody, the exigency of acting without a warrant is most likely dissipated.

3. Exigent Circumstances

Normally, exigent circumstances will be held to exist when the situation the officers find themselves in creates a risk of danger to the lives of officers or others or at risk that evidence will be destroyed. Additionally, officers who are in hot pursuit of a felony suspect are not required to stop pursuing the suspect just because the suspect enters a house. *Warden v. Hayden*, 387 U.S. 294 (1967).

However, officers cannot justify a warrantless search on the basis of exigent circumstances if they themselves create the exigent circumstances. Lack of preparation does not create an exigent circumstance. *U.S. v. Collazo*, 732 F.2d 1200 (4th Cir. 1984).

Additionally, a court may look at the amount of time officers had to at least attempt to secure a warrant. For example, where officer had an hour and a half to two hours to at least attempt to obtain a warrant by telephone and made no effort, the Ninth Circuit found that it undermined their claim of exigent circumstances. *U.S. v. Alvarez*, 810 F.2d 879 (9th Cir. 1987).

4. Frisk for Weapons

While an officer may frisk a person the officer has detained if the officer has a reasonable suspicion that the individual is armed and dangerous, that frisk must be based on individualized suspicion of that individual. *Ybarra v. Illinois,* 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), *Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

Additionally, the frisk is limited to a frisk for weapons. Once the officer determines the person does not possess a weapon, no further manipulation of an object felt during the frisk is permissible without a showing of probable cause. *Minnesota v. Dickerson,* 506 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

5. Search Incident to Arrest

Once an officer has arrested an individual, the officer may normally search arrestee. The reason normally put forth is officer safety since the officer will most likely be placing that person behind him/her in a patrol car. How far that search goes will determine its reasonableness. For instance, a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence would be unreasonable absent reasonable suspicion that the person is carrying or concealing a weapon or other contraband. *Masters v. Crouch,* 872 F.2d 1278 (6th Cir. 1980).

Additionally, the officer must actually place the person under custodial arrest in order to justify a search incident to arrest. *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). The fact that the person could have been arrested is not enough.

6. Search Incident to Access to Jail

A policy requiring that everyone wishing to visit an inmate first submit to a highly intensive strip search is unreasonable. *Blackburn v. Snow,* 771 F.2d 556 (1st Cir. 1985).

7. Automobiles

The so called "automobile exception" has been the law for the past 80 years since the Supreme Court held that an automobile could be searched without a warrant if the officers had probable cause to believe that it contained contraband or evidence of a crime. *Carroll v. U.S.,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925). If the probable cause relates to the vehicle itself, then officers may "conduct a probing search of compartments and containers within the vehicle" wherever they are found. *U.S. v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). However, the mere fact that a container is placed in an automobile, if the probable cause does not relate the vehicle, does not itself subject the container to search without a warrant.

If an individual is arrested in an automobile, and no probable cause exists as to the vehicle, the entire passenger area may still be searched as being within the "zone" of the arrestee's reach. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d. 685 (1979). That search may occur even after the arrestee has been removed from the vehicle and is unable to regain access to the interior. *U.S. v. White,* 871 F.2d 41 (6th Cir. 1989). But it is important to note that the Texas Court of Criminal Appeals has held that while such a search may not violate the Fourth Amendment to the United States Constitution, it would violate Section 9 of the Texas bill of Rights. *Morr v. State,* 631 S.W.2d 517 (Tex.Crim.App. 1982).

Even if the person is not arrested, officers may conduct a limited *Terry*-type frisk of the automobile compartment for weapons if the officer has reasonable belief, based on specific and articulable facts, which taken together with rational inferences from those facts, would warrant the officer believing the suspect is dangerous and may gain immediate control of the weapons. *Michigan v. Long,* 459 U.S. 1098, 103 S.Ct. 3469, 72 L.Ed.2d 945 (1983).

C. A Man's (and Woman's) Home is His (and Her) Castle

When the search involved is of a person's home, additional scrutiny will often be given to the actions of the officer. A person's home is accorded a heightened expectation of privacy. *U.S. v. Ross,* 486 U.S. 798 , 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). This increased protection afforded to the house includes "the area immediately surrounding the dwelling" known as the curtilage. *Wattenberg v. U.S.,* 388 F.2d 853 (9th Cir. 1968). In *Fixel v. Wainwright,* 492 F.2d 480 (5th Cir. 1974), the Fifth Circuit clearly stated that the "sacredness of a person's home" did not stop at the physical walls but included the yard, courtyard, and area closely related to the dwelling as well.

For example, officers may not enter a suspect's home to effectuate an arrest without an arrest warrant unless exigent circumstances make it impossible or impractical to obtain a warrant. *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1732, 63 L.Ed.2d 639 (1980). Officers cannot get around the requirement by circling the house, flooding it with a searchlight, and coercing the occupants to come out with a bullhorn. *U.S. v. Maez,* 872 F.2d 1158 (6th Cir. 1984).

Even if an arrest occurs inside one's home, it does not provide the officers with justification to search the entire residence for evidence. *U.S. v. Cueto,* 611 F.2d 1056 (5th Cir. 1980).

Additionally, a warrant for the arrest of a person will not authorize entry into another's home to effectuate the arrest without a warrant to search the third party's home or exigent circumstances. *Steagald v. U.S.,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981).

VI. WHEN IS CONTACT BY AN OFFICER A SEIZURE?

A. Approaching a Person in a Public Place

An officer who merely approaches an individual in a public place has not "seized" the person within the meaning of the Fourth Amendment. Therefore, neither reasonable suspicion nor probable cause is required. "Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in any public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

B. Detention is the Key

Even a momentary detention of a person requires at least "reasonable suspicion". *Id.* at 460 U.S. at 498. An individual "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Id.* Seizure or detention occurs when the person believes he is not free to leave.

C. Like a Speech at a Conference, Brevity is the Issue

An investigatory stop must be brief. *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The length of the stop alone can be sufficient to rule it unreasonable in the absence of probable cause. *U.S. v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

To measure whether the stop was unreasonable in length, court will often look at whether the officers were diligently pursuing their investigation. *Id.* at 462 U.S. at 709. Whether they were diligently pursuing the investigation may well constitute a question of fact which might preclude summary judgment.

VII. CONSENT TO SEARCH

A consensual search is allowable under the Fourth Amendment. The key issue will be whether the search was indeed consensual. Officers do not have to tell the person that they have the right to refuse to consent to the search in order for it to be voluntary. *U.S. v. Drayton*, 122 S.Ct. 2005, 153 L.Ed.2d 242 (2002). However, the officers do bare the burden of establishing that the search was knowing, intelligent, and voluntary. The test is whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *INS v. Delgado*, 466 U.S. 210 (1984).

The extent of the search given by consent will also be scrutinized. Permission to "look" into the trunk of an automobile does not extend to consent to search packages and contents located in the trunk. *U.S. v. Gay*, 774 F.2d 368 (10th Cir. 1985). However, consenting in general for the officers to search for drugs allows the search to extend to close containers in the vehicle. *Florida v. Jimeno*, 500 U.S. 278, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

VIII. HAVING A WARRANT IS NOT A CURE ALL

An officer who relies in good faith on a warrant issued by a neutral and detached magistrate upon a finding of probable cause is presumptively entitled to qualified immunity defense in a suit against the officer in the officer's individual capacity. *Golino v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991). Law enforcement activity conducted pursuant to a warrant issued by a magistrate normally suffices to establish that an officer has acted in good faith and has acted as an objectively reasonable officer would have acted under the circumstances. *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

A. Reliance on Magistrate

While normally an officer may rely on a warrant issued by a magistrate, the reliance must be objectively reasonable. *Id.* The court's inquiry will normally be limited to determining whether a reasonably well-trained officer would have known that the warrant was illegal despite it having been issued by a magistrate. *Id.* at 468 U.S. 922. For example, a warrant that fails to describe the persons or things to be seized with particularity is illegal and the officers who relied upon it will not be entitled to qualified immunity. *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

B. Misrepresentations

If a search warrant affidavit contains erroneous statements, false statements, or misrepresentations, it may render the search warrant and the ensuing search invalid. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d. 667 (1978). The Fifth Circuit has held that omissions are essentially the same as misstatements. *U.S. v. Martin*, 615 F.2d 318 (5th Cir. 1980). If allegations of misrepresentations are true, a court would owe no deference to a magistrate's decision to issue a warrant because where the "officers procuring a warrant have deliberately misled the magistrate about relevant information, no magistrate will have made a prior probable cause determination" based on the correct version of the material facts. *Velardi v. Walsh*, 40 F.3d 569 (2d Cir. 1994).

C. Search of Others on the Premises

The fact that officers have a warrant to lawfully search a premises, does not, without more, given rise to probable cause to search anyone found on that premises. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct.

338, 62 L.Ed.2d 238 (1979). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simple pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person happens to be. The Fourth and Fourteenth Amendments protect the legitimate expectation of privacy of persons, not places." *Id.* at 444 U.S. at 91.

IX. HOW ALL OF THIS PLAYS OUT IN REAL LIFE

There are a great many nuances surrounding the law on search and seizure. Normally, it plays out in a criminal law context when the suspect is seeking to have the evidence suppressed. One of the realities is that the law continues to change; partly because the Congress and state legislatures change the procedural law and partly because the appellate courts continue to struggle with the harsh reality of excluding evidence based on a technicality.

When looking at the issue of whether it is clearly established constitutional rights, one rule of thumb might be to remember that if it isn't clear to you whether a particular search and/or seizure is unlawful, there is a strong likelihood that the officers involved could prevail under qualified immunity because of the argument that the law was not clearly established at the time.

Three recent cases (one out of the Supreme Court, one out of the Fifth Circuit, and one out of the Sixth Circuit) help to highlight how a suit based on a Fourth Amendment claim might play out in the real world.

A. The *Groh* Decision

In *Groh v. Ramirez,* 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), an agent of the United States Bureau of Alcohol, Tobacco and Firearms (ATF) had prepared and signed an application for a warrant to search a home in Montana. The application stated that the search was for specified weapons, explosives, and records and detailed why the agent felt the items were in the home. The agent also prepared the warrant and presented it to a magistrate for signature. The magistrate signed the warrant despite the fact that the warrant, in the portion calling for a description of the "person or property" merely described the house. The warrant did not incorporate by reference the itemized list in the application.

The agent led others to search the house, but no illegal weapons or explosives were found. The family then sued the federal officers under a *Bivens* cause of action. The District Court granted summary judgment as to all of the officers.

The Supreme Court found that the warrant was invalid and the search was clearly unreasonable because it failed to comply with the Fourth Amendment's unambiguous requirement that a warrant particularly describe the persons or things to be seized. The fact that the application contained a detailed list did not save the warrant from being invalid because it was not incorporated. The Court also declined to grant qualified immunity because it found that no reasonable officer would have believed that a warrant that plainly did not comply with the requirements of the Fourth Amendment was valid.

The majority opinion was written by Justice Stevens and joined in by Justices O'Connor, Souter, Ginsburg, and Breyer. Justice Kennedy, joined by Chief Justice Rehnquist, dissented because, while they agreed that the warrant was invalid, they felt the agent was entitled to qualified immunity because the agent had made a clerical error and the agent's mistaken belief that the warrant contained the proper language was reasonable.

Justice Thomas, joined by Justice Scalia, dissented expressing the view that, despite the defective warrant, the search was not unreasonable and, even if it was, the agent ought to be entitled to qualified immunity given the number of warrants officers prepare and execute each year. The reasoning of Justice Thomas began with the premise that no warrant is required by the Fourth Amendment.

B. The Williams v. Kaufman County Decision

In *Williams v. Kaufman County*, 352 F.3d 994 (2003), the Fifth Circuit considered a case in which the plaintiffs alleged the officers (including the Sheriff of the county) had unlawfully detained them and subject them to an illegal strip search. In April of 1995, the Sheriff of Kaufman County obtained a search warrant for a night club in Terrell, Texas. The affidavit identified five persons suspected of dealing crack cocaine and identified as suspects "all other person or persons whose names, identities, and descriptions are unknown to the affiant." The warrants, itself, only authorized the officers to enter the premises, search for the property described, and seize the property and to arrest each suspected person named in the affidavit.

The Sheriff led a group of approximately 40 law enforcement officer who entered the club and detained approximately 100 people for about three hours. Some of the individuals were outside of the club and brought back in by the officers. During that time the officers conducted a pat-down search, strip search, and warrants check on each individual they had detained. After the strip searches, the detainees were rehandcuffed and required to remain until the entire search of the club and all occupants had been completed.

The District Court had granted summary judgment in favor of the officers on the unlawful detention claim of those who were in the club, invasion of privacy

claims, and verbal harassment claims. The District Court had denied the officers' summary judgment on the illegal strip search claim, unlawful detention claim of those who were brought back into the club, and the policy claims against Kaufman County. A bench trial resulted in a verdict against the Sheriff for the illegal strip search claims and denied his defense of qualified immunity. The judge also found that the county was liable because the Sheriff was a policymaker for Kaufman County and that the policy he promulgated resulted in the unconstitutional action.

The Fifth Circuit upheld the finding that the strip search was illegal. In this case, the Sheriff was unable to offer a basis for a reasonable belief that the plaintiffs, in particular, were armed or engaged in criminal activity. Furthermore, before the strip search, the officers had already patted the plaintiffs down for weapons and found nothing upon which to base probable cause for a strip search.

As to the detention of the individuals for three hours while the search of the club and all of the other occupants was conducted, the Fifth Circuit found that the extended detention of the plaintiffs was unlawful. The basis for the finding relied heavily on the length of the detention of the individuals in a public establishment during which highly intrusive searches (the illegal strip searches) were conducted. The fact that the Sheriff had a valid warrant for the search of the club did not authorize containing to detain individuals who were not found to be harboring contraband or weapons during a frisk. This was especially so because they were subjected to a strip search, and, even after the results of the strip search were negative, they continued to detain them.

As to qualified immunity, the Fifth Circuit found that the law was clearly established as to the constitutionality of the strip searches and denied the application of qualified immunity. As to the detention, the Fifth Circuit found that the law was not clearly established and allowed qualified immunity.

As Sheriffs in Texas are final policymakers for the county in the area of law enforcement, the Fifth Circuit held Kaufman County liable for the Sheriff's intentional conduct as it was the moving force behind the alleged injury.

In this case, the District Court had awarded each plaintiff $100 in nominal and $15000 in punitive damages against the Sheriff personally. The Fifth Circuit in upholding the damages relied upon not only the unconstitutional strip searches, but the fact that there was evidence about the questionable privacy during the strip searches and the use of racial slurs to find that the Sheriff had not acted in good faith.

C. The Bennett v. City of Eastpointe Decision

In *Bennett v. City of Eastpointe*, 410 F.3d 810 (6th Cir. 2005), the Sixth Circuit was faced with cases involving the Fourth and Fourteenth Amendment rights of young African-American bicycle riders. Although there were numerous plaintiffs (twenty-two at the district court level) and numerous officers involved in the different incidents, all of the cases involved the same basic set of facts. The young African-American bicycle riders were from Detroit and when they crossed over 8 Mile Road into the City of Eastpointe they were stopped by officers questioning their presence.

In some cases they were merely questioned and allowed to leave, in most they were frisked, in some they were handcuffed and placed in the back of a patrol car, and in one case their bicycles were taken and sold at auction. While on a couple of occasions the officers issued citations for things such as riding double on a bicycle, none of the plaintiffs were arrested.

What makes the case interesting reading is that it is case in which the Sixth Circuit goes behind the stated motive of the officers to examine what truly was the motivation for their actions. For instance, in one case the officers had stopped two individuals and questioned what they were doing. The young men told the officers that they were on their way to a friend's house to pick up another bicycle. The officers merely talked to the young men and the young men were allowed to leave. A short while later the officers received a call about two suspicious young black men riding bicycles towing a third bicycle. The officers located the young men (it was the same officers and the same young men), required them to dismount from their bicycles, conducted pat-down searches of them, ordered them to sit on the curb, and called in the serial numbers to see if the bicycles were stolen. Finding that they were not stolen, the young men were released.

The Sixth Circuit discussed the fact that the officers had no reasonable grounds for their purported "reasonable suspicion" as these young men were doing exactly what they had told the officers earlier that they were going to do. While they were violating the traffic code by towing the third bicycle, and the stop could be justified on that basis, the pat-down search was not justified as the officers had no basis for believing the young men were armed and dangerous.

One of the things that clearly bothered the Sixth Circuit was the racially charged atmosphere of these stops. In the majority of the cases the officers instructed and/or followed the young men until they returned to "their side" of 8 Mile Road. Additionally, in one case the young men were told that when they rode their bicycles on the City of Eastpointe side of 8 Mile Road that they needed to bring with them proof of ownership of their bicycles. One of the especially disturbing encounters involved the officers patting down, handcuffing and placing the young men in the back of a patrol car…all except for one of the young men…the only Caucasian young man among them.

The Sixth Circuit found that the officers were not entitled to summary judgment as there actions clearly violated the Fourth Amendment (usually the pat-down searches) and that they were not entitled to qualified immunity because the law was clearly established and reasonable officers should have known.

The Sixth Circuit did uphold the summary judgment given to the City of Eastpointe under the ruling of *Monell v. Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). While that is usually to be expected what was an unusual twist in this case was that the Police Chief admitted in a memorandum in an early suit that when he was a lieutenant he had instructed the officers on his shift to stop young black men who rode their bicycles into City of Eastpointe. The Sixth Circuit hinted that if the plaintiffs had produced evidence that those were still his instructions while Police Chief, then it might constitute official city policy.

X. CONCLUSION

The courts clearly do not expect officers to anticipate the future rulings of courts. Additionally, they appear willing to grant officers qualified immunity if there is any question as to the reasonableness of the officers' conduct. However, when officers violate clearly established constitutional principles, the courts, including the Supreme Court, do not appear to be reluctant to hold them civilly liable.