

Warrantless Entry and Exigent Circumstances

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The United States Supreme Court recently reversed and remanded a Fourth Amendment case, *Michigan v. Fisher*, 2009 WL 4544992, 558 U.S. ____ (Dec. 07, 2009) (per curiam). The crux of the ruling was exigent circumstances; more specifically, the need to assist persons who are seriously injured "or threatened with such injury." Police investigating a disturbance call were directed to a residence where a man was "going crazy" and found a chaotic scene: a wrecked truck, damaged fenceposts, broken windows, and fresh bloodstains. Officers looking in the windows saw Fisher inside, screaming and throwing things, with a bloodied hand. They identified themselves and asked him whether he needed medical help. Fisher refused to answer the door or to let the officers in, telling them, instead, to go get a search warrant. Nonetheless, one officer, Goolsby, cautiously pushed the front door partially open, only to find Fisher pointing a rifle at him. Fisher was charged under state law with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The trial court concluded that Goolsby violated the Fourth Amendment when he entered the residence, and granted Fisher's motion to suppress the evidence (Goolsby's statement that Fisher pointed a gun at him). On appeal, the Michigan Court of Appeals affirmed. The scope of the exception was limited to the emergency that justified it, and did not give police a blanket right to enter a person's home without a warrant, ostensibly to provide aid, whenever the officers had a basis for supposing that a person had been injured. Here, the police had not called an ambulance, nor was there any suggestion that they ever suspected that someone else in the house may have been injured.

The Supreme Court, finding that "the decision of the Michigan Court of Appeals is … contrary to our Fourth Amendment case law, particularly *Brigham City v. Stuart*, 547 U.S. 398 (2006)," reversed. Although warrantless searches and seizures were presumptively unreasonable, the presumption could be overcome if law enforcement officers had "an objectively reasonable basis" for believing that emergency aid was needed to assist or protect an occupant. This "emergency aid exception" did "not depend on the officers' subjective intent or the seriousness of any crime they [were] investigating when the emergency [arose]." Applying *Brigham City* to this case, the Court noted that the officers found a tumultuous scene with "signs of a recent injury, perhaps from a car accident, outside," and a violent, screaming man inside. It was "objectively reasonable" for the officers "to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage."

Dealing with the arguments of the courts below—that the circumstances did not suggest a serious or life-threatening injury, and that Fisher, while angry, was coherent and in his wits—the Supreme Court held that the Michigan Court of Appeals erred in replacing the necessary "objective inquiry into appearances with its hindsight determination that there was in fact no emergency." At the time, the officers had no way of knowing whether Fisher was threatening or had hurt anyone else inside the home, and it would be foolish to impose an "actual harm" threshold before officers could intervene. "It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit non-fatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else."

In a second decision, the Court declined to decide the merits of a due process/property forfeiture case, in which IMLA had participated as an *amicus*, on the ground that the case was now moot. In *Alvarez v. Smith*, – S.Ct. — , 2009 WL 4573274 (U.S. Dec. 08, 2009), the issue was how long local law enforcement officers could retain custody of personal property, without a judicial or administrative review of the lawfulness of the continued detention. In *Alvarez*, City of Chicago police officers had seized the plaintiffs' cash and vehicles as part of an investigation into drug offences. Pursuant to the Illinois Drug Asset Forfeiture Procedure Act (DAFPA), such warrantless seizures of personal property were permitted provided that officers had probable cause to believe the property was involved in a drug crime, and was, accordingly, subject to forfeiture. Under DAFPA, for property worth less than $20,000, the State had up to 187 days after the seizure in which to bring judicial forfeiture proceedings.

Three of the six plaintiffs in *Alvarez* were never charged with a crime. The plaintiffs brought a Section 1983 action against the City, the County State's Attorney, and others, claiming that, because almost five months could elapse between the seizure and the time forfeiture proceedings were filed, federal due process required that they be given a prompt, post-seizure, probable cause hearing, even though DAFPA did not require any such hearing. The Seventh Circuit ruled in favor of the plaintiffs, overruling its own precedent and finding that "the procedures set out in DAFPA show insufficient concern for the due

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Pandemic

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3. For more information, see The Centers for Disease Control and Prevention (CDC), *CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season* (Oct. 21, 2009); OSHA, *Worker Guidance: Precautions For All Workers during the 2009-2010 Flu Season* (Nov. 05, 2009), and OSHA, *Guidance on Preparing Workplaces for an Influenza Pandemic*, OSHA 3327-02N 2007 (Feb. 01, 2007) at http://www.osha.gov/Publications/influenza_pandemic.html.
4. *CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season* (Oct. 21, 2009).
5. 29 C.F.R. § 541.602 (2004).
6. For additional information, see *Pay and Absence Concerns for Exempt Employees*, by the Boardman Law Firm.
7. CDC, *People at High Risk of Developing Flu-Related Complications* (Nov. 10, 2009).
8. *See, e.g.*, the Americans With Disabilities Act, 42 U.S.C.§ 12111(3) (West 2009).
9. For example, a major exception to many states' at-will employment doctrines is "discharge against public policy."
10. The CDC suggests, for example, that employers develop flexible leave policies to allow workers to stay home, and not require a doctor's note for workers who are ill with influenza-like illness to validate their illness or to return to work, since doctors' offices and medical facilities may be extremely busy and not be able to provide such documentation in a timely way. CDC Guidance, *supra* note 4.
11. Freeman v. Chertoff, 604 F. Supp.2d 726 (D. N.J. 2009).
12. Robinson v. Bodman, 333 Fed. Appx. 205 (9th Cir. 2009).
13. "[O]ver the course of the 477 hours that Robinson worked from home, the only work she produced was one half-page report." *Id.* at 208.
14. No. 2:2009cv00289 (E.D. Wis., filed Mar. 15, 2009). *See also*, Abdelkhaleq v. Precision Door of Akron, No. 5:07 CV 3585, 2009 WL 2762356 (N.D. Ohio Aug. 28, 2009) (employee on "pager duty" sued under FLSA claiming time spent on-call constituted time spent working). ML

Merger of Adjoining Parcels

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29 Cal.4th 990 (Cal. 2003) (holding that lots shown on an 1865 map but never individually deeded were not entitled to grandfather status, absent any law then authorizing divisions of land by map).
4. *See, e.g.*, San Diego, Calif. Code § 125.0760 (2000).
5. Cal. Gov't Code § 66451.10, *et seq.* (West 2009). For a thorough account of California's merger law, see *Merger and Local Governments* (1986), available from the California Governor's Office of Planning and Research.
6. *See* Stell v. Jay Hales Dev. Co., 11 Cal. App. 4th 1214 (Cal. Ct. App. 1992); *see also*, Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345 (Cal. 1995) (disapproving a ruling in *Stell* regarding enforceability of restrictive covenants).
7. 11 Cal. App. 4th at 1223-24.
8. Cal. Gov't Code § 66451.10, *et seq.* (West 2009).
9. Cal. Gov't Code §§ 66451.12 to 66451.17 (West 2009).
10. 11 Cal. App. 4th at 1224-25.
11. Cottone v. Zoning Hearing Bd. of Polk Twp., 954 A.2d 1271 (Pa. Commw. Ct. 2008).
12. *Id.* at 1276.
13. *Id.* at 1279.
14. *Id.*
15. 151 Cal. App.4th 827 (Cal. Ct. App. 2007).
16. *Id.* at 834. ML

Economic Incentives

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23. Rachel Weber, *Do Better Contracts Make Better Economic Development Incentives*, 68 J. Am. Plan. Ass'n 43 (2002).
24. Greg LeRoy, *Nine Concrete Ways to Curtail the Economic War Among the States, in Reining in the Competition for Capital*, Ann Markusen, ed. (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2007).
25. Scott J. Ziance, *Making Economic Development Incentives More Efficient*, 30 Urb. Law. 33 (1998).
26. Timothy J. Bartik, *Solving the Problems of Economic Development Incentives*, 36 Growth & Change 139, 143 (2005). ML

Supreme Court

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process right of the plaintiffs." By the time the case reached the oral argument stage before the Supreme Court, all of the underlying property disputes had been resolved, either because the property had been returned or because the plaintiff had relinquished a claim to the property. The Supreme Court, in an opinion authored by Justice Breyer, vacated and remanded on the basis that, in such circumstances, the case no longer presented an Article III "case or controversy." An actual controversy had to exist at all stages of review, not just when the complaint was filed, and the complaint before the Court sought only declaratory and injunctive relief, not damages (a damages claim was launched only after the Seventh Circuit issued its ruling). Because the "case more closely resemble[d] mootness through 'happenstance' [rather] than through 'settlement,'" the exception to vacating the judgment set out in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U. S. 18, 21 (1994), did not apply (namely, that, by virtue of a settlement, a party had "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari"). The Court concluded that "we should follow our ordinary practice, thereby 'clear[ing] the path for future re-litigation of the issues.'" The upshot? Local governments will need to wait for this future re-litigation to clarify how long law enforcement officers may retain seized property without providing for administrative review and without offending due process. ML

Ordinances

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District of Columbia voters adopted an initiated ordinance in 1998, which has not been adopted by Congress.
2. Joel Warner, *Medical marijuana has become a growth industry in Colorado*, Westword, Feb. 5, 2009.
3. Colorado Constitution, Article XVIII, §14(1)(a).
4. Littleton calls their sales tax license a business license, although a lawyer who

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