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§ 1983: Fourth Amendment Update

Search & Seizure Case Law

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Searches Incident To Drunk Driving Arrest

***Birchfield v. North Dakota*, 136 S. Ct. 2160 (June 23, 2016)**

- Warrantless breath tests incident to arrests for drunk driving are permissible.
- Warrantless blood tests incident to arrests for drunk driving are impermissible.
- States may not criminalize a driver's refusal to submit to a blood test.

Danny Birchfield drove off a highway and into a ditch in North Dakota. A state trooper suspected Mr. Birchfield was under the influence of alcohol. Birchfield took and failed field sobriety tests and then consented to an onsite breath test of his blood-alcohol content, which he also failed. The trooper arrested Birchfield for drunk driving and asked Birchfield to take a blood test. Birchfield refused to consent to a blood test. North Dakota had a law making it a misdemeanor to refuse to consent to a blood test incident to an arrest for drunk driving. Birchfield was charged with violating that law. Birchfield moved to dismiss the charge, asserting that it violated his Fourth Amendment right against unreasonable searches. The trial court denied Birchfield's motion to dismiss, and the Supreme Court of North Dakota affirmed, finding that Birchfield had impliedly consented to such warrantless searches because he had elected to use North Dakota's highways.

The Supreme Court held that under the Fourth Amendment, states may lawfully imply drivers' consent to warrantless breath tests incident to arrests for drunk driving but may not imply such consent to warrantless blood tests. The exigent circumstances exception to the warrant requirement applies on a case-by-case basis, and the "natural dissipation of alcohol from the bloodstream does not *always* constitute an exigency justifying the warrantless taking of a blood sample." The authority to conduct a warrantless search incident to arrest applies categorically, but whether it authorizes the tests depends upon "the degree to which they intrude upon an individual's privacy and … the degree to which they are needed for the promotion of legitimate governmental interests." "Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving."

The Supreme Court also held that while states may lawfully impose civil penalties and evidentiary consequences on motorists who refuse to comply with blood tests, they may not impose criminal penalties on the refusal to submit to such a test. "[R]easonableness is always the touchstone of Fourth Amendment analysis," and "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."

Curtilage/Open Fields Searches

Cox v. Cache County, No. 14-4123, 2016 WL 6471705 (10th Cir. Nov. 2, 2016)

- It is not clearly established that "opening a movable beehive located in an open field for the purpose of identifying and warning the owner of possibly harmful pesticide spraying, amounts to an unreasonable search under the Fourth Amendment."

Darren Cox, a Utah bee keeper, brought suit against Martin James, a county bee inspector, alleging that James violated Cox's Fourth Amendment rights by inspecting Cox's bee hives without a warrant or consent. James had been moving some of his own hives after he was told that a nearby farmer would be spraying pesticide that would potentially be harmful to bees. He noticed other hives in a nearby field and approached them in order to determine who owned them so he could warn to owner about the pesticide spraying. The owner of the field did not object to James examining the hives to determine ownership. After spending approximately two to three minutes looking at the hives, the bees began acting aggressively, so James left without moving anything. It turned out that the bees and hives belonged to Cox, who then sued Inspector James under 42 U.S.C. § 1983 for allegedly inspecting Cox's hive without a warrant. The district court granted summary judgment in favor of James on qualified immunity grounds, and Cox appealed.

The Tenth Circuit affirmed the district court's decision to grant James qualified immunity. The court expressly addressed only the second inquiry of the qualified immunity analysis—namely, whether the right allegedly violated was clearly established. It concluded that it was not clearly established that James's brief inspection of the movable bee hives in an open field for the purpose of identifying and warning the owner of pesticide spraying violated Cox's Fourth Amendment rights.

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Davis v. City of Milwaukee, 642 Fed. Appx. 627 (7th Cir. May 17, 2016)

- It is not clearly established that a code enforcement officer's inspection of the exterior of a vacant, foreclosed home from walkways connected to public sidewalks is an illegal search from the home's curtilage.

A Milwaukee residential code-enforcement inspector inspected the exterior of a vacant home numerous times over a 14-month period, finding various code violations. He did not have a warrant. The owner brought a Fourth Amendment action under § 1983, arguing that a reasonable inspector would have known that walking around the lot to inspect the outside of a house was an unlawful invasion of protected curtilage.

The district court disagreed, and the Seventh Circuit affirmed. True, it said, "curtilage" is afforded Fourth Amendment protection, because it is "the space that surrounds a home" which the home's residents "may reasonably expect to 'be treated as the home itself,'" and harbors "the intimate activity associated with the sanctity of a [person's] home and the privacies of life." While the front porch of a home is part of its curtilage, and the backyard may also be curtilage in certain circumstances, "open fields" are not, being "unoccupied or undeveloped" areas that "do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance." "A warrantless search of a home's interior conducted from its curtilage, such as a dog-sniff from the front porch, violates the Fourth Amendment. But a warrantless entry onto an unoccupied, accessible open field yard to conduct an outside search, even in the face of a 'No Trespassing' sign, does not."

The court declined to "decide whether the areas from which [the inspector] inspected the house's exterior were part of its curtilage." Instead, the court held that the inspector was entitled to qualified immunity because the owner failed to identify a case preceding the search clearly establishing that "the ungated grounds surrounding an *unoccupied* house as curtilage that a government inspector could not enter for purposes of visual inspection." (emphasis in original)

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King v. Handorf, 821 F.3d 650 (5th Cir. May 6, 2016)

- A tax assessor's inspection of a property from its curtilage is not an unlawful search under the Fourth Amendment where the property owner consented to a tax appraisal.

Louisiana landowners protested an increase in their property taxes. The Tax Commission sent two inspectors to the couple's properties for the purpose of conducting an appraisal. The owners knew appraisers would be coming, and one of the owners offered to accompany the appraisers on a tour of the property while they were there. The appraisers declined the tour, and the owner "placed no limits on their access." The appraisers never entered the plaintiffs' home but did peer into the house through a window and may have opened a door to the pool house. The owner ultimately ordered the appraisers to leave and filed suit under § 1983 for a violation of their Fourth Amendment rights.

The district court denied qualified immunity to the tax appraisers, and the Fifth Circuit reversed. "The court noted that there is no guidance within the circuit regarding the actions a tax appraiser may take in an assessment. However, cases from other circuits support that the assessor's actions did not constitute a search under the Fourth Amendment. There was no clear violation of the [plaintiffs'] rights and thus the assessor was entitled to qualified immunity." Searches, 32 Fed. Prac. & Proc. Supplemental Service § 8146.

Lingo v. City of Salem, 832 F.3d 953 (9th Cir. June 27, 2016)

- Evidence officers discovered during an illegal search from a home's curtilage can supply probable cause to arrest and can be relied upon to defend the officers from claims under § 1983 for false arrest. While the illegally obtained evidence may be suppressed in a criminal prosecution pursuant to the exclusionary rule, it can be admitted in a § 1983 false arrest action in defense of the officers.

In June 2010 Lia Lingo and her neighbor had a dispute, prompting the neighbor to call law enforcement. Though the Salem, Oregon police did not believe anything criminal took place, they offered to speak to Lingo about the dispute. They saw Lingo's rear outside light was on and, instead of using the front door, walked around back and knocked on that door. A guest answered and retrieved Lingo to speak with the officers. The officers thought they smelled marijuana, which Lingo denied, saying she was burning incense. They asked to check the house repeatedly, each time Lingo denied the request. When Lingo's child came out, the officers arrested her for endangering a child, after which they searched the house and found marijuana and a prescription drug. Lingo moved to suppress all the evidence obtained as a result of the officers' alleged unconstitutional entrance into her carport, a motion granted by the lower court that led to the dismissal of all criminal charges.

Lingo then filed a § 1983 suit alleging the officers and city violated her First, Fourth, and Fourteenth Amendment rights by falsely arresting her without probable cause and for interfering with her right to familial association for taking her kids. The lower court agreed that the officers violated Lingo's Fourth Amendment right by entering the house curtilage but held the exclusionary rule does not apply in § 1983 cases. In other words, the officers' Fourth Amendment violation did not taint Lingo's arrest. It held the officers' smelling marijuana gave them probable cause to arrest her, that her children being removed temporarily was permissible, and that she failed to show municipal liability. It granted summary judgment to the defendants.

Lingo appealed only the ruling that her arrest was valid, arguing that since the officers should not have been at her back door, the evidence they gathered from that unconstitutional vantage point could not supply probable cause to arrest her. The Court began by noting the exclusionary rule is a prudential one, not a constitutional one, created by the judiciary to discourage constitutional violations by preventing illegally obtained evidence from being used in criminal prosecutions. It does not apply in all actions. For example, the Supreme Court has refused to apply the exclusionary rule in grand jury proceedings, civil tax proceedings, civil deportation proceedings, or parole revocation proceedings. Similarly, federal courts have refused to apply the rule in §1983 cases where the government invokes it to defend itself against civil liability, as the deterrent effect it was created to achieve is not served. The Ninth Circuit joined its sister circuits here, holding "nothing within the fruit-of-the-poisonous-tree doctrine suggests that an officer must ignore facts that would give him probable cause to arrest a person merely because those facts were procured through an unlawful search. Indeed, as a general matter, probable cause determinations depend on the

substance of the information known to the officer, not whether that information would be admissible in court." The Circuit affirmed the lower court.

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Mendez v. County of Los Angeles, 815 F.3d 1178 (9th Cir. Mar. 2, 2016)

- After police officers knock and announce at a residence, they must re-knock and announce at a shack located in the curtilage that they should know is being used as a separate residence, but the right was not clearly established at the time of the search.

In 2010, Los Angeles County Police responded to an officer's request for assistance after he believed he saw a wanted a parolee. Various officers were dispatched, including two that went to a house they were advised had people living in the backyard. The officers knocked and announced at the residence, but the owner refused entry because they didn't have a warrant. The officers then entered the curtilage of the house by opening a gate, opened the door to a shack in the backyard, and shot the two occupants who were inside. The occupants lived and sued the officers under § 1983 for violating their Fourth Amendment rights by, *inter alia*, searching the shack without a warrant and failing to knock-and-announce before opening the shack door.

The district court found, and the Circuit Court affirmed, that the officers violated the plaintiffs' clearly established Fourth Amendment rights by opening the door to the shack without a warrant. The shack was within the curtilage of the residence, and thus, a warrant was required to access the shack. Qualified immunity was properly denied to the officers on this claim.

The district court also denied the officers qualified immunity on plaintiffs' knock-and-announce claim, but the Ninth Circuit reversed, holding that it was not clearly established that the officers were required to knock-and-announce at the shack after knocking-and-announcing at the residence. But the Circuit Court clearly established going forward that officers must re-knock-and-announce before entering a shack located in the curtilage where the officers "should have been aware that the shack in the backyard was being used as a separate residence."

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United States v. Whitaker, 820 F.3d 849 (7th Cir. Apr. 12, 2016)

- Use of a drug-sniffing dog to search the hallway outside an apartment for the purpose of gathering incriminating forensic evidence constituted a search of the home under the Fourth Amendment and, thus, required a warrant.

A confidential informant told a sheriff's deputy that an individual was selling drugs from a certain apartment in Madison, Wisconsin. The property manager for the apartment building authorized the deputy to search the common areas of the building—including the locked hallway outside the apartment—with a narcotics-detecting dog. The dog alerted to the presence of drugs at the targeted apartment. After obtaining a search warrant, officers found cocaine, heroin and marijuana in the apartment and arrested the occupant. In the criminal prosecution of the occupant, the defendant moved to suppress the evidence seized during the search, arguing that he had an expectation of privacy in the apartment building's common hallway and, thus, the deputy's warrantless search of the hallway with the drug-sniffing dog violated his Fourth Amendment rights.

The trial court denied the motion to suppress, and the Seventh Circuit reversed, relying on Supreme Court precedent. In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court held that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." The Seventh Circuit found that the dog search from the apartment hallway "comes within this rule's ambit." "At the time of this search, there was no recognized expectation of privacy in the common areas of a multi-unit apartment building. However, no appellate decision specifically authorizes the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant." Moreover, the Seventh Circuit stated that *Kyllo* "should have reasonably indicated by the time of this search that a warrantless dog sniff at an apartment door would ordinarily amount to an unreasonable search in violation of the Fourth Amendment."

Prison Inmate Searches

Harris v. Fischer, 818 F.3d 49 (2d Cir. Mar. 15, 2016)

- A visual body cavity search of a female inmate by male guard, absent an emergency and without justification, can violate a prisoner's limited right of bodily privacy.

Harris was a female inmate at New York's Bedford Hills Correctional Facility. She used cotton from her mattress to block the window to her cell. Four officers (three female and one male) entered her cell to remove the blockage, demanded to know if she had any more cotton on her body. Although Harris replied "no," the officers threw her to the ground, lifted her smock, and forced her to allow a male officer to visually inspect her genitalia for mattress cotton.

Harris filed suit alleging a violation of her Fourth Amendment right against unreasonable searches. The district court granted the officers' motion for summary judgment, and the Second Circuit reversed and remanded for further proceedings. Inmates retain a limited right of bodily privacy under the Fourth Amendment, and the reasonableness of the search of an inmate depends upon the type of search, who performs the search, the manner in which the search was conducted, the justification for initiating the search, and the place in which the search was conducted. The officers did not submit evidence contradicting Harris's version of the incident, and failed to submit evidence supporting a justification for the visual body cavity search.

Parkell v. Danberg, 833 F.3d 313 (3d Cir. Aug. 17, 2016)

- Thrice-daily visual body cavity searches of inmates housed in isolation unit violated Fourth Amendment right against unreasonable searches.

Parkell was an inmate in Smyrna, Delaware. Because of disciplinary misconduct, he was moved to an isolation unit known as "C-Building." All inmates in C-Building were locked in a stripped-down cell, given minimal clothing to wear, were not permitted to keep certain items in their cell, and left their cells only three times per week for five-minute showers. Other than a daily visit from nurses with medication, Parkell had no contact with any other human beings. Nonetheless, three times a day he was subjected to visual body cavity searches, where officers visually inspected his anus and genitals while he "was forced to squat naked and cough loudly." Parkell sued the prison's officials under the Fourth Amendment, asserting that the thrice-daily visual body cavity searches were unreasonable.

The district court granted summary judgment to the prison officials, and the Third Circuit reversed the judgment on the Fourth Amendment claim. The court found that inmates have a limited expectation of bodily privacy. The court further found that the prison's search policy enforced in C-Building "is not reasonably related to [the prison's] legitimate interests in detecting and deterring contraband, particularly given the significant intrusiveness of the thrice-daily visual body-

cavity searches." The prison officials were "unable to articulate a single plausible theory as to how inmates in isolation in C-Building would have thrice-daily opportunities to smuggle in contraband from outside their cells or use unsupervised time in their locked cells to transform a harmless object into something dangerous."

***Smart v. Intensive Supervision Program*, 651 Fed. Appx. 136 (3d Cir. June 6, 2016)**

- Jailer's direct observation of inmate in a prison drug program while providing a urine sample does not violate the Fourth Amendment.

Salahuddin F. Smart was convicted of a crime in New Jersey and subsequently entered the state's Intensive Supervision Program ("ISP"), under which participants must maintain employment, follow curfew rules and submit to regular searches for drugs and alcohol. The drug testing policy of the program includes direct observation when obtaining urine samples from participants. Smart objected to being observed by an ISP employee but was ordered to comply anyway. He sued under § 1983, naming the individual ISP employee as well as the director of the program, complaining his Fourth Amendment rights were violated. The district court granted summary judgment to the defendants, a decision from which Smart appealed.

The Third Circuit affirmed the lower court, noting that state-compelled urine collection is a "search" within the meaning of the Fourth Amendment normally requiring a warrant, but that warrantless searches are constitutional where "special needs" are at issue. Specifically, the Supreme Court's "special needs" doctrine requires courts determine "reasonableness" by applying a three-part test "consider[ing]: (1) the nature of [the defendant's] privacy interest; (2) the extent to which the search intrudes on that interest; and (3) the nature of the governmental concern at issue and the efficacy of the means employed for meeting that concern." Here, the Court found Smart had a diminished privacy interest as a participant in ISP. It agreed that direct observation is "intrusive" but followed its longstanding principal that a search need not be the "least intrusive" search practicable, under the special needs doctrine, and found the government's interest in preventing ISP participants from cheating on drug and alcohol tests significant. It affirmed the reasonableness of direct observation in the case and affirmed the lower court.

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Seizure Based on Warrant

***Goad v. Town of Meeker*, 654 Fed. Appx. 916 (10th Cir. July 1, 2016)**

- In effecting an arrest, law enforcement is not limited to statements made within the four corners of a warrant application and may consider a totality of factors to determine if probable cause exists.

James Goad found a police car blocking the entryway to the pawn shop he operated in Meeker, Oklahoma (Town) with his brother and demanded that the vehicle be moved. When the officer declined, Goad filed a complaint against the officer, including the assertion that Goad owned the pawn shop in question. One year later, following additional conflict between Goad and law enforcement, the Town's Chief of Police (Chief) obtained a warrant for Goad's arrest based on false statements Goad made in the earlier complaint that he owned the pawn shop in question. Goad voluntarily turned himself in.

The charges were ultimately dropped, but Goad sued the Town and the Chief under a spectrum of counts including First Amendment retaliation and violation of his Fourth Amendment rights. The latter was based on Goad's contention that the arrest warrant should not have been issued because the Chief's warrant application lacked sufficient grounds.

The district court granted summary judgment to defendants, and the Tenth Circuit affirmed. The relevant question was not whether the four corners of the warrant application provided a sufficient factual basis for issuance of a warrant; the question was whether there was probable cause to support arresting Goad. Therefore, the court was permitted to consider additional information known to the Chief which contributed to the finding of probable cause. Apart from the statement in the warrant application that official records did not show Goad to be the pawn shop owner, the Chief had also obtained information that Goad was a convicted felon who had served time for receiving stolen property—a crime which would clearly disqualify Goad from ownership of a pawn shop. That additional information supported probable cause to arrest Goad.

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***Graves v. Mahoning County*, 821 F.3d 772 (6th Cir. May 12, 2016)**

- Where a warrantless arrest is permitted, an invalid or insufficient arrest warrant, in and of itself, fails to give rise to a Fourth Amendment claim for unlawful seizure. In such cases, to state a claim under the Fourth Amendment, plaintiffs must allege a lack of probable cause.

Shannon Graves and a group of other exotic dancers were arrested for a variety of charges related to drug distribution and prostitution. Claiming the police used invalid arrest warrants to arrest them, the dancers filed a § 1983 suit against the county and municipalities that employed the officers. The district

court dismissed the case, holding the dancers' complaint was fatally flawed because they failed to allege the officers lacked probable cause to arrest. The Sixth Circuit agreed, delving into the two operative clauses of the Fourth Amendment – the Warrant Clause and the Reasonableness Clause. The dancers' correctly asserted the governments' warrants failed to include any independent probable cause determination, as required by the Warrants Clause.

However, in order to state a valid § 1983 claim under the Fourth Amendment, the dancers had to show a violation of the Reasonableness Clause – e.g. that their seizure was unreasonable. The arrests at issue did not require warrants – though the officers did take the time to get warrants, albeit invalid ones, prior to the arrest – but, as with all seizures, the seizures were required to be reasonable. The dancers' failed to allege that the arrests were unreasonable under the Fourth Amendment and thus the Sixth Circuit affirmed. Simply put, nothing in the dancers' complaints (they were given leave to amend four times) ever alleged that the police lacked probable cause to believe a crime was committed, thus no viable Fourth Amendment violation was alleged.

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Seizure of Pet Dogs

Brown v. Battle Creek Police Dep't, 844 F.3d 556 (6th Cir. Dec. 19, 2016)

- Shooting and killing a 97-pound and a 53-pound pit bulls that barked aggressively and lunged at police officers executing a search warrant and prevented the officers from entering and sweeping the area to be searched constituted lawful, reasonable seizures.

Officers obtained a search warrant for a residence based on information that a man with a history of gang, gun, drug and criminal activity was distributing drugs from it. When approaching the home, officers saw two dogs through the front window, standing on a couch, barking aggressively, and jumping at the window. After officers breached the door of the home, the larger dog lunged at an officer in the entryway. The officer shot it once, non-fatally. The injured dog descended into the basement with the other dog. Officers proceeded to the basement to sweep and clear it. The injured dog stood at the bottom of the staircase barking at the officers. An officer fatally shot the dog. The second dog stood in the middle of the cluttered basement, barking. An officer shot the second dog, non-fatally. The second dog ran to a corner and then purportedly moved out of the corner in the direction of an officer. The officer shot the second dog again. The second dog ran toward the furnace, bleeding profusely. An officer shot it a third time to "put her out of her misery."

The dog owner sued the officers under § 1983, alleging that the killing of the dogs constituted an unreasonable seizure under the Fourth Amendment. The district court granted summary judgment to the officers based on qualified immunity, and the Sixth Circuit affirmed. It was clearly established at the time of the incident that a pet is an "effect" protected by the Fourth Amendment and, thus, any seizure of a pet must be reasonable. While shooting the dogs were "severe intrusions given the emotional attachment between a dog and an owner, … insuring officer safety and preventing the destruction of evidence are particularly important governmental interests that the courts must strive to protect." Summary judgment for the officers was warranted in the case because "Plaintiffs provided no evidence rebutting the officers' testimony that the first dog lunged at the officers in the entryway, or testimony rebutting the fact that it prevented the officers from entering and sweeping the basement safely. Likewise, Plaintiffs failed to present evidence rebutting the fact that the second dog was barking aggressively at the officers in the basement and was preventing them from safely sweeping the basement."

Mayfield v. Bethards, 826 F.3d 1252 (10th Cir. June 20, 2016)

- It is clearly established that a warrantless shooting and killing of a pet dog that is not acting aggressively toward law enforcement is unreasonable and violates the Fourth Amendment.

In July 2014, two deputies from Halstead, Kansas entered Kent and Tonya Mayfield's unfenced yard without a warrant and shot at their two dogs. One dog ran behind the house, but the second was shot three times on the front porch.

The deputies dragged the dog's body off the property and, according to witnesses, tried to hide it amongst nearby trees to disguise where it had been shot. The Mayfields filed a § 1983 suit claiming the officers violated their Fourth Amendment rights, and the district court denied the deputies qualified immunity.

On appeal, the deputies argued the dogs were not "effects" under the Fourth Amendment. The Tenth Circuit disagreed, holding the Supreme Court has long-held that the word "effects" in the Fourth Amendment is equated with personal property and that Kansas state law, in turn, has long deemed dogs personal property. Thus, the Circuit found it clearly unlawful to seize a dog without a warrant or without circumstances amounting to an exception to the warrant clause. The deputies also argued it was reasonable to kill the dog because they believed the animal had killed livestock and thought Kansas law allowed anyone to kill a dog reported to have killed livestock. The Circuit looked to the record to address this argument and found it contained a letter from the Mayfield's to the sheriff noting that the offending dog in the livestock incident, which had occurred a year before the deputies killed their dog, had already been shot by the livestock owner. The Tenth Circuit thus affirmed the lower court ruling denying qualified immunity.

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