



Supreme Court Cases 2007-2008 Term

By the FBI ACADEMY LEGAL INSTRUCTION UNIT

In the most recent term, the U.S. Supreme Court decided several cases of interest to law enforcement. One case addressed the applicability of the exclusionary rule to the seizure of evidence during a search incident to a constitutionally sound arrest but one which violated a state statute. Another case addressed the timing of the attachment of the Sixth Amendment right to counsel. Also of interest to the law enforcement community is the Supreme Court's decision interpreting the Second Amendment. This article includes a synopsis of these cases in

addition to a summary of cases of interest to law enforcement that the Supreme Court has agreed to consider next term.



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DECIDED CASES

Virginia v. Moore, 128 S. Ct. 1598 (2008)

This case considered whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law and, given the status of the arrest in light of state law, whether evidence seized incident to that arrest should be suppressed. Two police officers stopped a vehicle driven by David Moore, who they believed was driving with a suspended license. After determining that Moore's license was,

in fact, suspended, the officers arrested Moore for the misdemeanor offense. The officers searched Moore incident to his arrest and discovered 16 grams of cocaine and cash on his person. Moore was convicted of possessing cocaine with intent to distribute. He appealed his conviction, arguing that because under the Virginia statute he should have received a summons as opposed to being placed into custody, the search conducted by the officers incident to his arrest was unlawful and the evidence should have been suppressed. The state court disagreed with Moore, and he was convicted.¹ However, on appeal, the Virginia Supreme Court agreed with Moore and concluded that the search violated the Fourth Amendment.² The U.S. Supreme Court agreed to hear the case.³

The U.S. Supreme Court unanimously overturned the Virginia Supreme Court, holding that as the officers had probable cause to arrest Moore, the search incident to arrest also was lawful.⁴ The Supreme Court viewed the state statute calling for the issuance of citations for minor offenses as opposed to a full-blown arrest as a function of state law. The Court reiterated that an arrest, even for a minor crime, is reasonable within the meaning of the Fourth Amendment when the officer has probable cause to

believe a crime has been committed in the officer's presence. The Supreme Court stated,

We reaffirm against a novel challenge what we have signaled for more than half a century. When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.⁵

The fact that the state of Virginia opted to exclude the offense at issue from the category of arrestable offenses within the Virginia criminal code did not render the officers' actions unreasonable under the Fourth Amendment. As stated by the Supreme Court, "The arrest rules that the officers violated were those of state law alone, and as we have just concluded, it is not the province of the Fourth Amendment to enforce state law."⁶

Rothgery v. Gillespie County, Texas, 128 S. Ct. 2578 (2008)

In *Rothgery*, the Supreme Court reaffirmed what it previously held and what an "overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns of the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."⁷

Officers arrested Rothgery without a warrant, charging him with being a felon in possession of a firearm. In fact, Rothgery never had been a felon. However, when making the arrest, the arresting officer had relied on an erroneous record indicating that Rothgery was a convicted felon. Promptly after the arrest and pursuant to state law, the officers brought Rothgery before a magistrate judge. The judge reviewed the arresting officer's probable cause statement and determined that probable cause existed for the warrantless arrest. The magistrate then informed Rothgery of the charges against him, and Rothgery requested the appointment of counsel. The magistrate informed Rothgery that the appointment of counsel would delay his bail determination and, therefore, his release from jail. Rothgery then waived his



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right to counsel, bail was set, and Rothgery was released. Prosecutors were not aware of Rothgery's arrest nor were they present during the appearance before the magistrate.

Thereafter, Rothgery made several unsuccessful requests for court-appointed counsel. Six months after his arrest and initial appearance, Rothgery was indicted for possession of a firearm by a felon and rearrested with an increase in bail, which he was unable to post. Rothgery remained in jail for 3 weeks, during which time he was finally appointed an attorney. The attorney was able to confirm that Rothgery was not a convicted felon, and the charges were dismissed.

Rothgery then brought suit under Title 42, U.S. Code, section 1983, alleging his civil rights were violated when he was denied his Sixth Amendment right to counsel following his initial appearance. The Fifth Circuit Court of Appeals affirmed the lower court's decision to dismiss the suit, stating that the Sixth Amendment right to counsel did not attach at the initial appearance because the prosecutors were not aware of or involved in either the arrest or the appearance before the judge.⁸

The U.S. Supreme Court vacated the judgment of the lower federal court and remanded the case for further proceedings.⁹

The Court, referring to previous rulings, stated, "The right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which the defendant is told of the formal accusations against him and restrictions are imposed on his liberty."¹⁰ More specifically, the Court expressly stated that attachment of the Sixth Amendment right to counsel does not hinge on whether a prosecutor is aware of or involved in the initial proceeding.



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District of Columbia v. Heller, **128 S. Ct. 2783 (2008)**

In 1975, the District of Columbia passed the Firearms Control Regulation Act. This statute generally prohibited the possession of handguns within Washington, D.C. According to the act, the registration of a handgun was prohibited, and it was a crime to carry an unregistered handgun within the

District of Columbia.¹¹ In addition, the District of Columbia law required residents to keep any lawfully owned firearms unloaded and disassembled or secured by a trigger-lock device.¹²

Dick Heller was a special police officer authorized to carry a handgun while on duty within the District of Columbia. Heller also was a resident of the District of Columbia. Heller attempted to register a personally-owned handgun that he sought to keep at this home. Heller's request for a handgun permit was denied by District officials. After his request was denied, Heller filed suit in the U.S. District Court for the District of Columbia.¹³

In district court, Heller claimed that the District laws barring the registration and possession of handguns within a person's home violated the Second Amendment. Heller claimed that the Second Amendment protected an individual right to bear arms. The district court ruled against Heller, stating that it "reject[ed] that there is an individual right to bear arms separate and apart from service in the Militia."¹⁴ Because Heller did not claim that he was a member of any militia, the court ruled that Heller had no claim under the Second Amendment and dismissed the suit.¹⁵ Heller appealed to the Court of Appeals

for the District of Columbia Circuit.

The court of appeals ruled in favor of Heller.¹⁶ The court held that an individual right to bear arms was protected by the Second Amendment and the District's ban on handguns and the requirement that firearms within the home be maintained in a nonfunctional manner violated the Second Amendment.¹⁷ The District of Columbia appealed this decision to the Supreme Court. The Supreme Court agreed to decide whether certain provisions of the District's law "violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes."¹⁸ This case marked the first occasion since 1939 in which the Supreme

Court addressed the Second Amendment, and it presented the Supreme Court with the first opportunity to address the full import of the Second Amendment since it was ratified in 1791.

The plain meaning of the text of the Second Amendment was at the heart of the Supreme Court's analysis. The Second Amendment to the U.S. Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

In analyzing the text of the Second Amendment, the Supreme Court noted that its language is divided between a prefatory clause and an operative clause. According to the

Court, the prefatory clause does not limit the operative clause, it only "announces a purpose."¹⁹ The Court noted that the portion of the operative clause that proclaims "the right of the people" appears three times within the Bill of Rights.²⁰ According to the Court, in each instance where the phrase occurs, it "unambiguously refer[s] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body."²¹

The Court then addressed the phrase "keep and bear Arms." The Court explored the plain meaning of the words within this phrase and concluded that "the most natural reading of 'keep Arms' in the Second Amendment is to have weapons."²² By considering its plain meaning, the Court concluded that the Second Amendment secures an individual's right to possess a weapon without having to demonstrate that it is necessary to preserve the force of a militia.

The prefatory clause to the Second Amendment reads, "A well regulated Militia, being necessary to the security of a free state...." The Court considered this clause in light of the operative clause to determine whether the two fit together to create an individual right to bear arms. According to the Court, the two clauses are clearly



linked and consistent with one another when the purpose of the Second Amendment, as set out in the prefatory clause, is understood. According to the Court, the framers of the Constitution and the Bill of Rights believed that a militia was necessary to the preservation of a free state. Second, it was believed that securing an individual right to bear arms was necessary to preserving the force of a militia. As stated by the Court,

[H]istory showed that the way tyrants had eliminated a militia...was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents.²³

The Second Amendment thus preserved the militia through its guarantee of the individual right to bear arms. According to the Court, the Second Amendment could be rephrased to read, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."²⁴

Once the Court established that the Second Amendment protected an individual right to bear arms, the Court ruled that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home

operable for the purpose of immediate self-defense."²⁵

The Supreme Court did caution that its decision did not create an unlimited right on the part of individuals to possess guns. According to the Court:

Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.²⁶

In addition to restrictions, such as those described above, the Supreme Court also commented that limitations may be placed on the types of weapons that an individual may possess. According to the Court, "[the] Second Amendment does not protect those weapons not typically possessed by law abiding citizens for lawful purposes, such as short barreled shotguns."²⁷ Weapons that are considered "dangerous and unusual" may also be prohibited.²⁸

The Court recognized the toll that violence extracts on society and the purpose behind many laws that restrict the possession of firearms. While expressing sensitivity to these concerns, the Court noted that

"the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."²⁹

CASES FOR NEXT TERM

The Supreme Court has agreed to hear a number of cases of interest to the law enforcement community next term. These include the four cases presented here.

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***State v. Johnson*, 170 P.3d 667 (2007), cert. granted, *Arizona v. Johnson*, 128 S. Ct. 2961 (2008)**

This case concerns the extent to which a law enforcement officer may engage in a limited search or "Terry frisk"

for weapons during a consensual encounter with a subject when the officer lacks suspicion of criminal activity but suspects the subject may possess a weapon.³⁰ In this case, officers from the Oro Valley Police Department in Arizona pulled over a vehicle based on an insurance-related suspension. The officers testified that they had no reason to suspect the occupants of the car were engaged in criminal activity at the time the stop was initiated.³¹ One officer engaged Lemon Johnson, a passenger in the backseat of the vehicle, in conversation hoping to elicit information about gang activity in the area after she observed indicia of possible gang membership on the part of Johnson. The officer asked Johnson to step out of the car to talk with her. Once out of the vehicle, the officer asked him to turn around, at which time, she conducted a limited search or “frisk” for weapons in light of her observations about possible gang affiliation. The officer testified that at the time of the search for a weapon, she did not suspect that Johnson was involved in criminal activity.³²

During the frisk, the officer discovered a handgun. A subsequent search revealed marijuana. Johnson was charged with possession of a weapon by a prohibited possessor and possession of marijuana. Johnson’s

motion to suppress the evidence was denied, and he was subsequently convicted.³³ On appeal, the Arizona Supreme Court overturned his conviction holding that the evidence derived from the search should be suppressed as it was the fruit of an unlawful search.³⁴ The Arizona Supreme Court stated, “When an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without a reasonable cause to believe ‘criminal activity may be afoot.’”³⁵ The Supreme Court granted certiorari to determine whether in the context of a motor vehicle stop for a minor offense, a limited search of a passenger for weapons may be conducted in the absence of suspicion of criminal conduct.

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***United States v. Herring*, 492 F.3d 1212 (11th Cir. 2007), cert granted, *Herring v. United States*, 128 S. Ct. 1221 (2008)**

The Supreme Court also agreed to decide whether the Fourth Amendment requires the suppression of evidence seized following a search that occurred incident to arrest when the arrest was based on erroneous information provided by another law enforcement agency. Before the Court is the question of whether the exclusionary rule should apply when police personnel are at fault when an arrest occurs that should not have occurred and contraband is discovered during the search incident to the arrest. In *Arizona v. Evans*,³⁶ the Supreme Court ruled that the purpose of the exclusionary rule is not served when court personnel are the source of the error but expressly declined to hold that the same result should occur when the error is attributable to police personnel.³⁷ In *Herring*, the Eleventh Circuit Court of Appeals concluded that the purpose of the exclusionary rule would not be furthered in the case at hand given there was no indication of any malicious or willful conduct on the part of the police, as the arrest was the result of negligent records handling by personnel within the agency.³⁸ Other federal courts, as well as state supreme courts,

are divided on this issue; some concluding that evidence seized as a result of police clerical error should be suppressed.³⁹

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***State v. Gant*, 162 P.3d 640 (2007), cert. granted, Arizona v. Gant, 128 S. Ct. 1443 (2008)**

This case places the parameters of a search of a vehicle following the arrest of a recent occupant of the vehicle before the Supreme Court. In this case, Gant was arrested moments after he stepped out of his vehicle. He was handcuffed and placed in the back of a patrol car. Officers then searched the passenger compartment of the vehicle and discovered a weapon and a plastic bag containing cocaine.⁴⁰ The Arizona Supreme Court distinguished this case from the

U.S. Supreme Court's ruling in *New York v. Belton*,⁴¹ concluding that the warrantless search of Gant's car was not lawful. The Arizona Supreme Court reasoned that as the arrestee was secured (handcuffed) and in the custody of law enforcement (in the back of the patrol car), the justifications for the search incident to arrest—the need to preserve evidence and maintain officer safety—did not exist.⁴² The Supreme Court agreed to hear this case to determine whether the Fourth Amendment requires officers to articulate facts and circumstances indicating a threat to their safety or the possibility of the destruction of evidence to justify a search of a vehicle incident to the arrest of the occupant or recent occupant of the vehicle.

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***Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007), cert. granted, *Pearson v. Callahan*, 128 S. Ct. 1702 (2008)**

In this case, the Supreme Court will address the lawfulness of a warrantless entry by police officers into a house following a drug deal participated in by an informant who was invited into the home by the subject and then signaled officers to enter the home once the drug deal was consummated. The case raises the question of whether consent to allow the informant into the home extends to police officers that the informant thereafter summons. In a civil lawsuit filed by the resident of the home against the police who made the entry, the Tenth Circuit Court of Appeals denied qualified immunity despite the fact that other federal circuits had recognized a “consent once removed” doctrine, permitting the informant to give consent to enter once he was inside the home.⁴³ Despite this other precedent, the Tenth Circuit concluded that the occupant's right to be free from this type of warrantless entry by law enforcement was clearly established. ♦

Endnotes

¹ *Moore v. Commonwealth of Virginia*, 146 S.E.2d 74, 45 Va.App. 146 (2005).



² *Moore v. Commonwealth of Virginia*, 636 S.E.2d 395, 272 Va. 717 (2006).

³ *Commonwealth of Virginia v. Moore*, 128 S. Ct. 28, 168 L.Ed.2d 805 (2007).

⁴ *Commonwealth of Virginia v. Moore*, 128 S. Ct. 1598, 170 L.Ed.2d 559 (2008).

⁵ 128 S. Ct. at 1608.

⁶ *Id.*

⁷ *Rothgery v. Gillespie County, Texas*, 128 S. Ct. 2578, 2592 (2008).

⁸ *Rothgery v. Gillespie County, Texas*, 491 F.3d 293 (5th Cir. 2007), *aff'g* 413 F.Supp. 2d 806 (W.D.Tex. 2006).

⁹ *Rothgery v. Gillespie County, Texas*, 128 S. Ct. 2578 (2008), on remand, 537 F.3d 716 (5th Cir. 2008), vacating 413 F.Supp. 2d 806.

¹⁰ 128 S. Ct. at 2581.

¹¹ D.C. Code §7-2501.01.

¹² D.C. Code §7-2501.02.

¹³ *Parker, et al v. District of Columbia*, 311 F.Supp.2d 103 (D.C. 2003).

¹⁴ *Id.* at 109.

¹⁵ *Id.*

¹⁶ 478 F.3d 370 (D.C. Cir. 2007) (Heller was one of six plaintiffs who challenged the D.C. law. Because Heller was the only plaintiff who actually applied for a handgun permit, the other plaintiffs were eventually dismissed from the action by the time the case reached the Supreme Court).

¹⁷ *Id.*

¹⁸ 128 S. Ct. 645 (2007).

¹⁹ 128 S. Ct. 2783 (2008).

²⁰ *Id.* at 2790.

²¹ *Id.*

²² *Id.* at 2792.

²³ *Id.* at 2801.

²⁴ *Id.* at 2789.

²⁵ *Id.* at 2821-2822.

²⁶ *Id.* at 2816-2817.

²⁷ *Id.* at 2815-2816.

²⁸ *Id.* at 2836.

²⁹ *Id.* at 2822.

³⁰ See *Terry v. Ohio*, 392 U.S.1, 88 S. Ct. 1868 (1968) (the Supreme Court recognized that the Fourth Amendment permits officers to engage in an investigative or temporary detention based on reasonable suspicion that the individual detained is engaged in criminal activity and to conduct a limited search or “frisk” for weapons if the officer has a reasonable suspicion the individual possess a weapon).

³¹ *State v. Johnson*, 170 P.3d 667, 669-670 (2007), *cert. granted*, 128 S. Ct. 2961 (2008).

³² *Id.* at 670.

³³ *Id.* at 670-671.

³⁴ *Id.*

³⁵ *Id.* at 674, quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

³⁶ *Arizona v. Evans*, 514 U.S. 1 (1995).

³⁷ *Id.* at 15, fn 5.

³⁸ *United States v. Herring*, 492 F.3d 1212, 1217-1218 (11th Cir. 2007).

³⁹ See e.g., *United States v. Santa*, 180 F.3d 20 (2nd Cir. 1999) (principle in *Arizona v. Evans* applied when arrest was made pursuant to a warrant that had actually been recalled but, due to

clerical error, had not been removed from the system); *United States v. Southerland*, 486 F.3d 1355 (C.A.D.C. 1997) (officers relied on information within database that arrestee’s license had been suspended when in fact it was not. Court concluded that handgun found during search following arrest was admissible); *Hoay v. State*, 71 S.W.3d 573, 348 Ark. 80 (2002) (exclusionary rule to apply if the wrongful arrest was due to law enforcement personnel as opposed to court personnel); *White v. State*, 989 S.W.2d 108 (Texas 1999) (exclusionary rule applicable where law enforcement personnel failed to remove recalled warrant).

⁴⁰ 162 P.3d 640, 641 (2007).

⁴¹ 453 U.S. 454 (1981). The Arizona Supreme Court viewed Belton as addressing the specific issue of the permissible scope of a search of a vehicle incident to arrest and not the “threshold question whether the police may conduct a search incident to arrest at all once the scene is secure.” *Gant* at 642-643.

⁴² *Id.* at 643.

⁴³ See *Callahan v. Millard County*, 494 F.3d 891, 896 (10th Cir. 2007). For cases referring to “consent once removed” following entry by an undercover officer see *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000); *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996). For an extension of “consent once removed” to include informants, see *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986); *United States v. Yoon*, 398 F.3d 802 (6th Cir. 2005). In addition, the Supreme Court asked that the parties in this case brief whether the Court’s decision in *Saucier v. Katz*, 121 S. Ct. 2151 (2001) establishing a two-step qualified immunity determination, should be overturned.

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.
