CONTENTS

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ARTICLES

REVIEW QUESTIONS PERTAINING TO THIS MONTH’S ISSUE .......................................................... Page 103
KILLING SUICIDAL (AND OTHER MENTALLY ILL) PEOPLE – AND BEYOND -- HOW WILL THE 7TH CIRCUIT RULE? .................................................. Page 104
WILL OFFICERS GET SUCCESSFULLY SUED FOR HANDCUFFING DURING TERRY STOPS? ........ Page 109
GRANTING CONSENT TO POLICE TO SEARCH PORNOGRAPHIC DVD’S, ETC. .................. Page 111
EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT ....................................................... Page 112
NO WARRANT NEEDED TO OBTAIN DNA FROM ARRESTEES .................................................. Page 113
FLIGHT FROM A CAR THAT HAS BEEN UNCONSTITUTIONALLY STOPPED BY POLICE ........... Page 114
ALWAYS TAKE A (LEGAL) STATEMENT FROM A SUSPECT .................................................. Page 115
QUESTIONS PERTAINING TO THIS ISSUE ................................................................................. Page 117

Please note: The Bulletin welcomes comments and suggestions. The Bulletin is designed to convey general information and should not be construed as providing legal advice. Readers are urged to consult the in-house counsel at their law enforcement agency or government corporation counsel when seeking legal advice. The Bulletin would like to hear from you! Please send your comments and questions to jeff@officerslawbulletin.com.

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REVIEW QUESTIONS PERTAINING TO THIS MONTH’S ISSUE

We have had many comments – compliments and concerns – regarding past issues of the Bulletin and most recently pertaining to the questions on our current mid-year exam.

Apparently, some officers felt that the questions were too difficult for a variety of reasons. I have countered that the answers are all available in previous month’s issues and I noted the issues in the answer explanations which are also available.

I have decided to include a few questions at the end of each month’s issue to get everyone thinking about what they just read or perhaps to entice you to go back and read something you may have missed or didn’t fully comprehend.

The questions are at the end of this issue.
KILLING SUICIDAL (AND OTHER MENTALLY ILL) PEOPLE – AND BEYOND -- HOW WILL THE 7TH CIRCUIT RULE?

There are so many “fuzzy” areas of the law. Officers hate them (as they want clarity in everything they do, and I don’t blame them for that).

I love them – the “fuzzy” areas -- and I like to try to make fuzzy areas clear for officers – and for me.

But sometimes that is virtually impossible.

It is particularly difficult when it comes to circumstances where officers must respond quickly, and especially so when officers feel compelled to use deadly force. That’s why officers are normally given the benefit of the doubt when they make “reasonable” mistakes when exercising their police powers.

Everybody knows that when people call officers out to “control” suicidal / mentally ill people, they are not calling 911 so that they can watch officers kill their loved ones. Usually, I think, they simply want help “controlling” the person.

On the other hand, officers do not respond to suicide calls with the notion that they are going to kill the “victim” – and then get “Monday-morning quarterbacked” by: their departments, plaintiff’s attorneys, judges and juries – and everybody else.

In summary, I would suggest that people who call for help have no idea that their loved one is about to die. And most officers have no intent of killing anybody.

That’s what makes these cases so tricky for officers.

In that context I read an interesting article by Tim Miller, Senior Legal Instructor at FLETC. He is asking the question -- when can deadly force be used against a suicidal mentally ill person?

The title of his article is “The Circuit Split in Using Deadly Force to Control Suicidal People.” (It might seem strange to use the term "control" when talking about killing someone, but I’ll let that pass for now.)

First, he discusses a common sort of case where a sister calls out the police because her 17-year old brother, Ruddy, is holding a knife against his stomach.

This was not the first time Ruddy had attempted suicide, but it would be his last.

An officer arrived and when he saw that Ruddy had a knife, the officer drew his pistol and repeatedly told Ruddy to drop the knife.

Ruddy told the officer to shoot him. The officer told Ruddy that he did not want to shoot him (Ruddy), but that he would (shoot him) if Ruddy came any closer. Ruddy apparently moved closer. So the officer shot Ruddy three times and killed him.
The 5th Circuit Court of Appeals (right below the United States Supreme Court) ruled that the shooting was justified and awarded summary judgment to the officer.

Before you put this article away thinking the issue is now settled, let me warn you that the issue is far from resolved in the 7th Circuit.

Some courts, like the 5th Circuit, above, look at the question only to determine whether the "victim" represented a danger of serious bodily injury or death to the officer (sort of the Tennessee v Garner test).

Some other courts look at the “totality of circumstances” to determine whether the officer should be liable.

In the Ruddy case the plaintiff’s (the estate’s) attorney argued “Rather than call for back-up, consult with a critical incident team, contact suicide prevention personnel, consult with family, move away from the doorway, formulate a plan to calmly and safely remove the knife or deploy non-lethal force, the officer did what no reasonable officer should do with a mentally unstable, suicidal person...."

In some jurisdictions this argument would probably have won the day, and in those courts a jury would have been told by a host of “experts” that the officers engaged in poor “pre-seizure strategy” and that that was the proximate cause of Ruddy’s death – not the knife that Ruddy was holding in a threatening manner.

So this relatively new theory is a very dangerous one for officers -- and is a much much bigger issue than just dealing with mentally ill people.

Let me explain:

About 20 years ago the 9th Circuit decided a case which I viewed at the time as “deadly” for officers.

A guy refused to allow public health officials to investigate a sewage leak in his home. When the public health officials attempted to serve the administrative warrant, the guy said that he "was going to get his gun and use it."

So the SWAT team was called out. The SWAT team broke into the house; the man attempted to shoot at the SWAT team, but his gun misfired. The SWAT team then shot and killed the man.

The 9th Circuit implied that it was not a good idea to send the SWAT team in over this – especially without a search or arrest warrant -- and decided that summary judgment for the officers was therefore inappropriate.

I think this case, Alexander v City and County of San Francisco, 29 F3d 1355 (9th Cir 1994) started the move away from Tennessee v Garner when officers do something the court considers really dumb "pre-seizure." (I could be wrong that this was the first case – but it was the first case of its type I saw.)
So, this was the first case I saw where the court applied the totality test to an officer shooting. Now there are a number of circuits that at least look at the “totality of circumstances” to see if the shooting was justified. The author cites three or four circuits that now apply the “totality” test.

The 1st Circuit said, for example, “Once a seizure has occurred, the court should examine the action of the officer leading up to the seizure. This rule is most consistent with the Supreme Court’s mandate that we consider these cases in the totality of the circumstances. (citing Tennessee v Garner).” Young v City of Providence, 404 F3d 4, 22 (1st Cir 2005)

**Every seizure? !!!** Wow – that’s a pretty broad rule – and very scary for officers!

So what were the facts in the Young case? Officers responded to a dispatched call that females were fighting at a restaurant. This was a Code 2 call (Code 1 was emergency; Code 3 was routine.).

As officers approached, they saw a man with a gun. They ordered him to drop the gun. Apparently he did. They then saw another man, Young, with a gun. After yelling to Young to drop the gun, they shot him numerous times and killed him when he did not.

His estate sued the officers and the department.

Most officers would say at this point that the officers, in this highly tense situation, were justified in shooting and killing a man who did not immediately drop his gun. At least they should get qualified immunity – right?

Let me give you the “totality of circumstances” here to see if you change your mind:

1. The victim, Young, was an off-duty African-American police officer responding to the dispatch.
2. Young was required by his department to always be on duty.
3. The officers yelled drop the gun, but never announced that they were officers.
4. The department could not document training in this area.
5. Young held his gun like an officer (with two hands) and was immediately recognized by bystanders as an officer.

So although the officers appear to be justified in this situation in fearing that the “suspect” represented a threat of serious bodily injury or death as required by Garner, the totality of circumstances reflects another answer.

After knowing all (most of) the facts, who do you identify with – the shooters? Or the shootee?

Cases like Young are forcing courts to go beyond just the Garner test to determine whether officers used excessive force.
The 7th Circuit is one of those jurisdictions that has not yet made up its mind about this crucial test.

So here's where the relatively infamous Asperger kid in Calumet City case comes in.

Officers go to the “victim’s” home for about the 10th time apparently to try to help parents control their (very large) 15-year old son, Stephon -- and get him to school.

Stephon is in the basement. When the officers go down there, they are apparently met by the boy, Stephon, with a knife. The officers say that the boy attacked them, and the officers then shot and killed him.

On its face, applying the Tennessee v Garner standard, this case is very close to the situation in Ruddy, above.

Right after the incident, the Calumet City Chief of Police went on television and said that when officers had previously encountered the boy, the boy had had a knife. The officers during that prior episode had used a Taser to disarm the boy. When the officers killed the boy in the present incident, neither officer had brought a Taser.

I’m sure that the Chief felt that his version of the story helped the officers – but if the 7th Circuit decides that the better theory in deciding the case is the “totality test” those officers – and Calumet City -- are screwed IMO – as that means that ten (10) experts are going to tell the jury the officers did this all wrong.

It appears that most people in Calumet City have already made up their mind based on news reports which test they would use. Here’s one: http://www.youtube.com/watch?v=u1mRv7AUlas

And, even worse, in the future, every officer can be sure that he / she is going to be second guessed until the second coming about his “pre-seizure” strategy when the officer uses any kind of force. If the 7th Circuit decides to apply the totality test to all excessive force cases, it is going to be a nightmare for officers, especially those where deadly force was necessary but could have been avoided if the officers would have modified slightly their pre-seizure strategy.

One big legal issue is that this may fall not under the rubric of the 4th Amendment, but may be characterized as a “due process” right that has been violated, which will be even more deadly for officers in court.

If all that happens, and Calumet City goes bankrupt, I’m going to scream even louder about my total disagreement with virtually every department’s policy that requires that officers respond to every citizen’s request for assistance.

For example, IMO, in the Asperger case, the parents sincerely believed, for some reason, that it is the police department’s job to get their child to school. I can’t imagine that anyone reading this believes that – if you do, please let me know.
Again, IMO, the parents should have been told by the police -- after about the 3rd incident where the child / kid would not go to school -- that they (the parents) need to get someone else to "babysit" their son. Barring that, officers must learn to enlist the aid of "experts" to help them in these situations.

Officers are getting in the middle of way too many situations that end in disaster. If Calumet City loses this case and "goes under," maybe things will change for the better for police.
WILL OFFICERS GET SUCCESSFULLY SUED FOR HANDCUFFING DURING TERRY STOPS?

One of the areas where I am the most uncomfortable is telling officers that they cannot normally handcuff during a traffic or a Terry stop.

I know that officers say they are handcuffing for their safety, but courts consider the word “safety” to be nothing but a conclusory term that means nothing without an explanation of the danger.

For example, courts have long held that handcuffing when the officer has reasonable suspicion to believe the suspect / detainee has committed a dangerous / violent crime is constitutional. See e.g. People v Walters, 627 NE2d 1280 (1994) (reasonable suspicion to believe the suspect was an armed robber).

Also, the court of appeals recently ruled that continued furtive movements (reaching down etc.) during a traffic stop in a high crime area after many warnings justified handcuffing. People v Daniel, ___NE2d___(2013).

However, the vast majority of traffic and Terry stops do not support handcuffing. See e.g. People v Surles, ___NE2d___(2012) where the court of appeals ruled that a passenger / gang member during a traffic stop cannot be handcuffed even in a high crime area.

So that brings me to getting sued for handcuffing during Terry stops.

An officer is told that a burglary suspect, Jose, is Hispanic, was wearing a red shirt and lived at a certain residence. The officer pulled up to the residence and saw a car pull away with a Hispanic driver wearing a red shirt. The officer stopped the driver and got him out of the car. The suspect was allegedly 5’2” and the driver was 6’1” tall. Worse, the driver’s name is Pedro Ramos. The officer then handcuffed Pedro. Officers brought a witness to the scene, and the witness positively identified Pedro as one of the perpetrators.

Ramos was incarcerated for 253 days at which time he was acquitted of the burglary offense.

Ramos filed a Section 1983 suit complaining that the officers violated his rights by handcuffing him during the Terry stop / detention.

The 7th Circuit here ruled that there was reasonable suspicion for the stop. However, the court stated that the one foot disparity in the height of the perpetrator and the suspect really had a serious impact in the consideration of whether the reasonable suspicion had dissipated by the time the handcuffs were put on Ramos.

The court held, however, that because the suspect had no valid license (only an ID) that the “arrest” was constitutional anyway.
Finally as a warning about handcuffing *Terry* suspects, the court stated:

"[A]lthough we have upheld the use of handcuffs to ensure officer safety in a *Terry* stop of brief duration, without automatically escalating the situation to an arrest, that does not mean that law enforcement has carte blanche to handcuff routinely. The proliferation of cases in this court in which *Terry* stops involve handcuffs and ever-increasing wait times in police vehicles is disturbing, and we would caution law enforcement officers that the acceptability of handcuffs in some cases does not signal that the restraint is not a significant consideration in determining the nature of the stop."

A word to the wise should suffice.
GRANTING CONSENT TO POLICE TO SEARCH PORNOGRAPHIC DVD’S, ETC.

Mona was married to Kevin Lyons. Mona’s daughter told Mona that Kevin had touched her inappropriately and Mona caught Kevin masturbating while watching what appeared to be a young girl on the computer screen.

Mona then told Kevin that he must leave.

She then obtained an order of protection.

The same day, Kevin came and got his computers.

Two days later Mona brought two boxes of floppy discs and DVD’s (collectively disks) -- belonging to Kevin that were in the cabinet -- to the police station. She told the police that she had never viewed any of the disks. Mona told the officer that she did not know what was on the disks but that she did not want them in her house.

When Kevin picked up his computers he did not pick up the boxes of disks.

The officer did not seek a warrant for the discs. He looked at them and discovered child pornography.

The Illinois Court of Appeals District 2, (somehow), came to the conclusion that Mona had authority to give the officers her consent to search the disks.

The court also decided that even though Mona never actually consented to the search of the disks, she consented implicitly by leaving them at the station and saying she didn’t want them back.

This is a very strange opinion and one I suspect will be reversed by the Illinois Supreme Court, if the Illinois Supreme Court will take it. IMO. Mona does not have “joint access” to the disks to give authority to consent, and I do not believe she ever did give (explicit) authority / consent for the police to search the disks.

I strongly suggest in this situation that you obtain a search warrant.
EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT

I have to laugh every time I read a court’s mantra that officers must get warrants except in very limited situations. “The Fourth Amendment proscribes all unreasonable searches (and seizures), and it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.” United States v Ross, 456 US 798 (1982).

Don’t believe it. The exceptions are neither few, nor are they well delineated. I can easily name over 20 exceptions to the warrant requirement – and there are at least 10 to search the passenger compartment of a car.

Can you name them?

Do you know how to apply – or even create -- those exceptions in the street?
NO WARRANT NEEDED TO OBTAIN DNA FROM ARRESTEES

Speaking of the many exceptions to the warrant requirement, the United States Supreme Court, in Maryland v King ruled that DNA samples may be taken without a search warrant.

King had been arrested for assault. During a routine booking, his DNA was taken by applying a cotton swab – a buccal swab – to the inside of his cheeks.

As a result of this procedure, his DNA was linked to a robbery-rape that occurred 6 years earlier.

The Maryland courts suppressed the evidence ruling the warrantless obtaining of DNA for a minor crime was an unconstitutional search under the Fourth Amendment.

The United States Supreme Court in a 5-4 decision stated that the minor intrusion was not a lot more intrusive than fingerprinting or photographing.

Therefore the search is constitutional.
FLIGHT FROM A CAR THAT HAS BEEN UNCONSTITUTIONALLY STOPPED BY POLICE

An “anonymous citizen” told officers at about 1:30 a.m. that there was a tan, four-door Lincoln that had four occupants and a “possible gun.”

Officers saw the car with four occupants soon after that and stopped it.

The officers handcuffed the driver.

When they got a passenger, Henderson, out of the car, he ran -- and as he did, he dropped a gun.

The Illinois Supreme Court ruled that although the stop was unconstitutional, the flight and the gun were not products of the stop. The flight interrupted “the causal connection between the two events” – the stop and the drop (of the gun).

Therefore California v Hodari, 499 US 621 (1991) became the guiding case. In that case officers chased a youth, Hodari, who ran when he saw police. During the chase, Hodari dropped cocaine. The officer then caught Hodari.

The Supreme Court in Hodari ruled that no seizure occurred during the chase. So even thought there was no reasonable suspicion when the officer chased Hodari, there was reasonable suspicion once Hodari abandoned the drugs.

Henderson put a new spin on Hodari by ruling that even after an unconstitutional traffic stop, a person who runs is probably not going to be seized technically until he’s caught.

Again, this ruling is a bit of a surprise as most courts rule that once a person is seized unconstitutionally – and then runs away, the evidence that is later obtained is the fruit of the poisonous tree.
ALWAYS TAKE A (LEGAL) STATEMENT FROM A SUSPECT

Back when I was a prosecutor, I used to insist that officers always get a statement from a suspect whether he / she is a traffic offender or a murderer.

My reasoning was that virtually everything out of a suspect's mouth must be an admission or lie, if he / she did the crime. And it is admissions and lies that cook the suspect in court – and provide the proof beyond a reasonable doubt.

One time I had a case where officers caught a guy driving a stolen car. The officers did not ask the suspect any questions as they thought (mistakenly) that if they ask him no questions, they don’t have worry about Miranda or any of the other legal niceties.

Later at trial, the defendant said he loaned a guy some money, and the guy had given him the car as collateral on the loan. It was shaky defense, but it was enough to create a reasonable doubt when a very young inexperienced prosecutor is trying the case.

I am absolutely certain that if I could have just asked him one question, I would have won. That question is – “If that is your defense, why didn’t you tell the police that when they stopped you and arrested you for stealing the car?”

The reason I couldn’t ask that is that it might make the jury infer that the suspect asserted his rights, and prosecutors are prohibited from doing that.

So it is really the officer(s) who asserted the suspects rights FOR HIM – by not warning him and asking him questions!

There are a number of cases that repeat this rule, but the recent case of People v Quinonez, 959 NE2d 713 (2011) is one of the most interesting, I think.

In Quinonez, an officer saw Quinonez drop a plastic bag of cocaine as the officer approached him.

At trial, Quinonez testified that it was the guy next to him who dropped the bag.

The prosecutor asked Quinonez that if that wer true, why didn’t Quinonez say that at the time of the arrest?

Quinonez was convicted, but the conviction was reversed by the Illinois Court of Appeals because a prosecutor may not cross-examine a suspect about his right to silence.

Now in Quinonez, if an officer had given Quinonez his rights and then asked him about the drugs, his statement and the cross examination question would have been permissible.

Make sense?
Now let me make this a little trickier with a case that just came down.

A suspect was driving a "stolen" car. Officers finally stopped the car and caught the driver, Miller. After catching and handcuffing Miller, the officer asked Miller why he ran. "Was it because the car was stolen?" Miller answered "yes."

So Miller was tried for aggravated possession of a stolen motor vehicle and sentenced to 19 years in prison.

The Illinois Court of Appeals ruled that the conviction must be reversed as Miller said he bought the car, and his statement that he stole it was obtained unconstitutionally because he was in custody, but had not been given his *Miranda* rights before being questioned.

*The problem with the court’s decision here is that when a suspect takes the stand he may be impeached with his prior statements even if they were obtained unconstitutionally.*

So, the moral of the story – always give Miranda after you arrest – and always ask questions about the crime.
QUESTIONS PERTAINING TO THIS ISSUE:

1. How can you be better prepared to deal with the mentally ill and avoid having to kill them?

2. What should you do if you feel that you MUST handcuff someone during a TERRY or traffic stop?

3. When should officers take a statement?

4. When must officers give Miranda warnings?

Answers available in next month’s issue.