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Hunting for People of Color

By David and Johanna Zapp

Utah v. Strieff, 136 S.Ct. 27 (2015), did not overrule Terry v. Ohio (stop and frisk). But it sure made it harder for defendants to succeed on motions to suppress evidence in circumstances that started out unlawfully.

That is because the Court held that an officer's discovery of an outstanding arrest warrant constitutes an intervening act that generally will break the taint of the original unlawful stop.

However, the Court ALSO said that whether the officer acted in good faith in conducting the original stop is an important factor in determining whether the evidence should be suppressed. It specifically noted

that officers who deliberately conduct sweeps, or stop a person without any individualized suspicion at all, hoping to find people with warrants would not be acting in good faith. Also, officers who engage in an ongoing "practice" of unlawful Terry stops would not be acting in good faith.

The Court suggested that, had the officer been *unable* to articulate a specific, legitimate law enforcement reason for the stop, or had he not been *close* to having reasonable suspicion, the case might have come out differently.

The potential for abuse is obvious. An officer could stop a person without any individualized suspicion, find a warrant, and later claim that he or she DID have some individualized suspicion. It also does not provide much incentive for officers to refrain from stopping people that approach, but do not reach, the individualized suspicion required by Terry. And I don't have to tell you whom they will be stopping.

Everything You Wanted to Know About Challenging Foreign Based Wiretap Evidence

By David and Johanna Zapp

1. "When conducted in this country (U.S.), federal wiretaps are gov-

erned by federal wiretap law, but not outside the United States." Maturo, 982 F.2d at 60.

2. The Fourth Amendment's exclusionary rule, suppressing evidence seized in violation of the Fourth Amendment's (right to be free from unreasonable searches), generally does not apply to evidence obtained by searches abroad conducted by foreign officials.

3. There is no duty imposed upon American law enforcement officials to review the legality, under foreign law, of applications for surveillance authority.

4. "Information furnished to American officials by foreign police need not be excluded simply because the procedures followed in securing the evidence did not fully comply with our nation's (U.S.) constitutional requirements." United States v. Cotroni.

5. Even when "the persons arrested and from whom the evidence is seized are American citizens." Stowe v. Devoy.

6. Two exceptions: 1) where the conduct of foreign officials in acquiring the evidence is so extreme that it "shocks the conscience" and 2) where foreign law enforcement officials are acting like "agents" or working exclusively for U.S. law enforcement. Maturo, 958 F2d.

7. "*Circumstances that will shock the conscience are limited to conduct that not only violates U.S. notions of due process (fairness), but also violates fundamental international norms of decency.*" United States v. Vilar, 2007WL 1075041. Illegal wiretapping would hardly be called a shock to the "conscience." Putting a

gun to a child's head would.

8. "Within the second category, where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials, putting them on U.S. payrolls might certainly make them agents.

9. But just formalized collaboration between an American law enforcement agency and a foreign counterpart does not, standing alone, give rise to an "agency" relationship.

10. Demand for documents in support of foreign wiretaps to be able to determine whether or not wiretaps were legal in the foreign country do not have to be supplied.

12. A prosecutor is required to produce at the time of trial "verbatim statements or reports made by a government witness or prospective government witness" but only after the witness has testified, and limited to making a good-faith effort to obtain them.

13. That is why receiving monies or equipment may be significant to establish "joint venture." We have all suspected that foreign agents do U.S. bidding. The challenge is to prove it. And it is difficult. Judges do not look favorably on such an allegation because countries including the U.S. are supposed to be encouraging mutual cooperation, and do not want to challenge and undermine this mutual cooperation.

U.S. to Phase Out Use of Private Prisons for Federal Inmates

By *The New York Times*

WASHINGTON — The Obama administration said on Thursday that it would begin to phase out the use of private for-profit prisons to house federal inmates. In announcing the policy shift, the Justice Department cited a critical recent report by the department's independent inspector general about safety and security problems in private prisons.

The Bureau of Prisons were ordered not to renew contracts to use private prisons as existing ones expire, or to at least "substantially reduce" the number of beds. A pending contract solicitation will be scaled down from 10,800 prisoner slots to a maximum of 3,600. Also, the bureau recently declined to renew a contract for a private prison that had provided beds for up to 1,200 federal inmates.

The Justice Department's inspector general, issued a report. It found that private prisons were more violent and problematic than public prisons

In 2013, Eric H. Holder Jr., the attorney general at the time, announced a policy of not listing specific quantities of drugs in indictments, to avoid bringing mandatory minimum sentencing laws into play. That and other changes made in 2013 had helped reduce the federal inmate population, making it possible to start phasing out the use of private prisons.

"This is the first step in the process of reducing — and ultimately ending — our use of privately operated prisons, to ensure that all federal inmates are ultimately housed at bureau facilities."

Watch Out for the E-Mails (Corrlinks)!

By *Benjamin Weiser, The New York Times (edited), AUG. 26, 2016,*

When Defendant pleaded guilty, he apologized in court. But this week federal prosecutors revealed that they had also been reading his emails. And they say the emails, sent from jail portray him as unrepentant. The government memo included copies of some of the emails. They were sent on a Bureau of Prisons email system that inmates may use after they consent to having their messages monitored.

In his e-mails the government said the defendant seemed to be fixated on gaining notoriety and becoming rich, and "has learned absolutely nothing from this case." Defendant, in his letter to the judge said that he felt the "upmost regret." His lawyer echoed this sentiment and asked that the defendant, who is being detained at a federal facility in Brooklyn, be sentenced to 8 months rather than the 27 to 33 months federal guideline range.

Defendant is to be sentenced next month.

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