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ANALYSIS

Are Fourth Amendment rights sufficiently protected when CPS and DV cases are held virtually?

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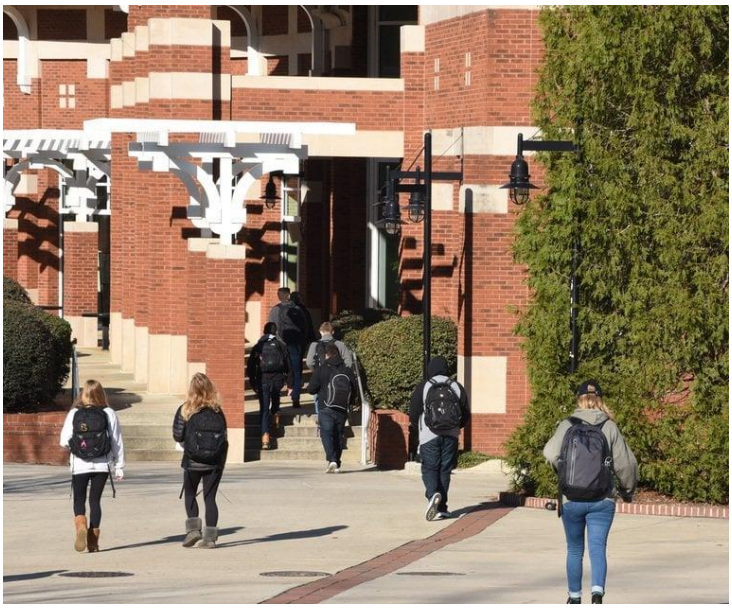

Many court hearings are now virtual. This means that some or all of the litigants and witnesses participate by video. Are virtual hearings compromising the Fourth Amendment rights of domestic violence victims/survivors and children involved with Child Protective Services?

The Fourth Amendment protects people from unreasonable searches and seizures. This includes searches and seizures of peoples' homes, businesses, private property and their bodies. Absent probable cause, the government is faced with a firm "Do not enter" stop sign. In a recent Ohio case that received considerable media attention, Cleveland State University learned this lesson. A U.S. district court ruled that the university was not permitted to virtually scan a student's room prior to that student taking an online test. The judge held that the student's "… subjective expectation of privacy at issue is one that society views as reasonable and that lies at the core of the Fourth Amendment's protections against governmental intrusion."

The charge of every state's Child Protective Services agency is to protect children from abuse and neglect, often by assisting families to stay together or reunite. To fulfill this proactive and preventive mission, while still respecting the Fourth Amendment, has become challenging. In the legal realm specifically—during the COVID pandemic and in its aftermath—video hearings are ubiquitous. Often, magistrates, associate judges and judges request that a party or a witness use their cell phone or laptop computer to allow the jurist to "scan the room" to assure that there are no others present who could coerce or impact the witness' testimony. Why ask to scan the room? Often there are situations, particularly when there are allegations of domestic violence, where the alleged perpetrator goes to the victim's home, and by the perpetrator's looming presence, threatens to inflict further harm on the victim if the victim does not claim to have a faulty memory, or to recant their prior allegations. Does a judge's well-intentioned request to "use your cellphone to show me the room" or "use your cellphone to prove to me

no one else is there at the house" suddenly mean that thousands of proceedings may be subject to appeal based on the foregoing Ohio case?

A cursory review of some major Fourth Amendment and privacy landmark cases may be enlightening. In *Katz v. United States*, the U.S. Supreme Court noted that:

… the Fourth Amendment protects people, not places. What a person knowingly exposes to the *public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States*, 385 U.S. 206, 210; *United States v. Lee*, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios v. United States,* 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727, 733.

In his dissenting opinion in *Griswold v. Connecticut*, Justice Hugo Black opined that a home invasion can resonate far more than a public confrontation:

The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth … And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home. See *Griswold v. Connecticut*, 381 U.S. 479, 509 (dissenting opinion of Justice Black).

The *Katz* case involved the government employing a listening device to spy on Katz—who was accused of engaging in activities as a bookie—

while Katz was in a public phone booth. In *Katz,* the U.S. Supreme Court held that:

The government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

Where and in what circumstances does an individual have a reasonable expectation of privacy? The Supreme Court extended its inquiry in *Katz*, to determine if the search was finely tailored to the circumstances, concluding that:

The government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this court has never sustained a search upon the sole ground that officers reasonably

expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.

In *Katz*, the Supreme Court takes issue with the government's position that it used the least intrusive means of search available in regard to using wiretapping devices on a public telephone booth, without obtaining advance authorization by a magistrate, holding that:

The government agents here ignored 'the procedure of antecedent justification … that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

In another case involving a student who argued that her Fourth Amendment rights were violated, *New Jersey v. T.L.O.*, the Supreme Court grappled with whether or not a school assistant principal's search of a 14-year-old student's purse was an unreasonable search and seizure. A teacher found the student smoking in a school bathroom. Smoking in the lavatory violated school rules. The teacher brought the student to the assistant principal's office. The assistant principal questioned the New Jersey student, who denied smoking and claimed she did not smoke. The principal asked to see the student's purse, and then opened and searched the purse, where the assistant principal found not only cigarettes, but cigarette rolling papers (often employed to smoke marijuana). This emboldened the assistant principal to dig deeper into the minor's purse, where the assistant principal located some marijuana, "empty plastic bags, a substantial quantity of money in $1 bills, an index card containing

a list of those students who owed the student money, and two letters that implicated the student in marijuana dealing." The student was tried in a New Jersey juvenile court. The trial court admitted the evidence discovered in the student's purse, holding that the school official's search had been appropriate, as the assistant principal had a reasonable suspicion that a crime had been or might be committed. The student was found to be a delinquent, and sentenced to one year probation. The Appellate Division affirmed the trial court. On appeal to New Jersey Supreme Court, the Supreme Court "reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in the purse, holding that the search of the purse was not reasonable (463 A2d 934)." On certiorari, the U.S. Supreme Court reversed the Supreme Court of New Jersey. The U.S. Supreme Court held:

- that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials;
- that school officials need not obtain a warrant before searching a student who is under their authority;
- that school officials need not strictly adhere to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law, and that the legality of their search of a student should depend simply on the reasonableness, under all the circumstances, of the search; and
- that the search in this case was not unreasonable under the Fourth Amendment. The U.S. Supreme Court notes the need for a balancing of the student's reasonable expectation of a right to privacy versus the school's legitimate goal of maintaining an environment of learning. The Supreme Court concludes in *New Jersey v. T.L.O.* that

… school officials need not obtain a warrant before searching a student who is under their authority. Moreover, school officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. And such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction. pp. 337-343.

The U.S. Supreme Court has since clarified that state operated schools are not to be "enclaves of totalitarianism." In *Tinker v. Des Moines Independent Community School District*, which involved the constitutionality of school officials suspending students who wore black armbands to school in protest of the Vietnam War, the U.S. Supreme Court described the situation as involving school officials who had banned certain conduct, and thereafter, to punish five students out of a student population of 18,000 for engaging in that conduct. The U.S. Supreme Court noted in *Tinker* that:

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of

armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In a 2022 opinion, the U.S. Supreme Court held in United States v. Jones, a GPS tracking device had been attached to a motor vehicle registered to the defendant's wife, and that device was used to track the accused for 28 days. The defendant was suspected of drug trafficking. The U.S. Supreme Court decisions seem to stand for the proposition that individuals, rather than places, can assert a right to privacy. What does the Fourth Amendment protect? "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Therefore, in *United States v. Jones*, the U.S. Supreme Court notes that it

… has to date not deviated from the understanding that mere visual observation does not constitute a search. S*ee Kyllo v. United States,* 533 U.S. 27 (2001). We accordingly held in *Knotts* that 'a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.' 460 U.S., at 281, 103 S. Ct. 1081, 75 L. Ed. 2d 55. Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a four-week period 'would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,' post, at ___, 181 L. Ed. 2d, at 933, our cases suggest that such visual observation is constitutionally permissible.

Finally, in *Wyman v. James*, the U.S. Supreme Court grappled with the constitutionality of a caseworker's home visit that violated an AFDC recipient's constitutional rights. The core issue: Did the beneficiary's refusal to allow the home visit justify termination of her government benefits through Aid to Families with Dependent Children? Assuming, arguendo, that a home visit constitutes a search, and if that search was not consented to, it would appear that such a search would be a violation of the AFDC beneficiary's right to privacy. Is a search warrant necessary for a state social worker to engage in a home study? In Wyman,

The district court majority held that a mother receiving AFDC relief may refuse, without forfeiting her right to that relief, the periodic home visit which the cited New York statutes and regulations prescribe as a condition for the continuance of assistance under the program. The beneficiary's thesis, and that of the district court majority, is that home visitation is a search and, when not consented to or when not supported by a warrant based on probable cause, violates the beneficiary's Fourth and Fourteenth Amendment rights. By contrast, the U.S. Supreme Court concluded that the home visit was not unreasonable, based on several factors, including:

- A dependent child is a worthy cause for a social worker's concern.
- The social worker is the agent of the state agency in fulfilling the public concern to assure the safety and wellbeing of the dependent child via a home visit.
- A social worker represents the public interest in assuring that state or Federal funds are being used for their stated purpose by the recipient.
- The Federal focus is on assistance and rehabilitation – progress is best monitored by assuring the child's well-being in the home.
- Home visits are at the core of welfare administration.
- The means employed by the social worker were procedurally correct. The social worker provided the mother with written notice on several occasions that her benefits would continue if the mother cooperated with

and accommodated a home visit, and further, that said benefits would otherwise be terminated.
- There was no unreasonable intrusion (nothing at bedtime, dinner hour, etc.).
- Not all information could be obtained at a neutral location. The home visit is an integral part of the social worker's ability to assess the safety of the child and the interaction between the parent and the child.
- The home visit was to be made by a trained social worker, not by a uniformed police officer whose appearance might be daunting to the child.
- While a home visit might discourage recipients of governmental benefits from perpetrating fraud, the home visit is not part of a criminal prosecution. By contrast, it is a civil visit, conducted with decorum.
- A home visit is preferable to the social worker being required to obtain a warrant for each home visit—in fact, the U.S. Supreme Court found the warrant argument out of place in the context of this case.

Having reviewed some precedents, let us return to the prospect of child protection cases tried via video. How many attorneys have been privy to a judge requesting a scan of the room, as occurred in the recent Ohio case? I (Elisa Reiter) did. In fact, it involved having a party to a CPS matter, seemingly hidden in the shadows of his apartment, arise about 30 minutes into a hearing. Still in the shadows, the respondent father stood. While the lighting was poor, it appeared that he then reached out to grab something. That something proved to be the man's trousers. The man attended the beginning of the hearing in boxer shorts and a tee-shirt with the words "wife-beater" on the front. He proceeded to dress on camera as the hearing continued.

Concerning virtual hearings, many unanswered questions remain:

- Do we really know what is going on "behind the scenes"?
- Are there perpetrators present at a witness' home during video hearings attempting to coerce victims into not testifying or testifying in a particular manner?
- Should the rules be different if a possible victim of domestic violence or child appears to be in imminent danger?

- How attentive are jurors? In one video jury trial, a juror wandered off to take a phone call during the trial. In a California case, a physician performed surgery during a trial.
- Will appeals flow as a result of the recent Ohio opinion, finding a breach of due process because the proctor demanded to scan the room where the student was taking an exam?

Consistency in how and when searches are required is an important factor in determining whether sufficient grounds exist to interfere with an individual's right to privacy in virtual hearing cases involving domestic violence and child protection.

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