RECENT CASES

CRIMINAL LAW — FOURTH AMENDMENT — NINTH CIRCUIT UPHOLDS CAR SEIZURE THROUGH STAGED ACCIDENT AND THEFT. — *United States v. Alverez-Tejeda*, 491 F.3d 1013 (9th Cir. 2007).

Constitutional and statutory law have riddled the Fourth Amendment's search and seizure protections with significant exceptions. Last June, in *United States v. Alverez-Tejeda*,[1] the Ninth Circuit held that an elaborate ruse to seize a car transporting drugs was not unreasonable, thereby correctly denying the defendant's request for suppression of the subsequently discovered contraband. However, the court appeared to apply an ex post reasonableness analysis to the method of the seizure, thus unnecessarily obscuring limits on appropriate police behavior. The court could instead have denied suppression by applying the Supreme Court's holding in *Hudson v. Michigan*[2] without ruling on the underlying Fourth Amendment question, as another Ninth Circuit panel did.

On December 18, 2004,[3] Ascension Alverez-Tejeda, driving with his girlfriend, stopped short when the car in front of him stalled after a stoplight turned green; the truck behind him tapped his rear bumper.[4] Two police officers arrived on the scene and arrested the truck driver for drunk driving.[5] After determining that the accident had not caused any damage to the car he was driving, Alverez-Tejeda wanted to leave the scene but was ordered not to do so.[6] At the officers' direction, Alverez-Tejeda pulled the car into a nearby parking lot, left the keys inside, and both he and his girlfriend got into the police cruiser for processing.[7] While the couple was occupied, the car was stolen from the lot.[8] The police took off in pursuit, but soon returned, telling Alverez-Tejeda that the thief had gotten away.[9]

Drug Enforcement Administration (DEA) agents staged the entire series of events; everyone involved, other than the couple, was either

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[1] 491 F.3d 1013 (9th Cir. 2007).

[2] 126 S. Ct. 2159 (2006).

[3] United States v. Alverez-Tejeda, No. CR-05-126-RHW-11, at 3 (E.D. Wash. Apr. 20, 2006) (order granting defendant's motion to suppress).

[4] *Alverez-Tejeda*, 491 F.3d at 1015.

[5] *Id.*

[6] Brief of Appellee at 8, *Alverez-Tejeda*, 491 F.3d 1013 (9th Cir. 2007) (No. 06-30289), 2006 WL 3294980.

[7] *Alverez-Tejeda*, 491 F.3d at 1015; *see also Alverez-Tejeda*, No. CR-05-126-RHW-11, at 3.

[8] *Alverez-Tejeda*, 491 F.3d at 1015.

[9] *Id.*

an agent or a collaborating police officer.[10] The DEA had been investigating a drug conspiracy, using telephone call intercepts and direct surveillance, and had deduced that illegal drugs were being transported in a car belonging to one of the conspiracy's leaders.[11] Alverez-Tejeda became a suspect in the DEA investigation a few days prior to the seizure, when agents intercepted telephone calls between Jose Luis Carrillo-Mendez (the car owner, whose phone was tapped) and the defendant concerning transportation of cocaine and methamphetamine.[12] The agents staged the "accident/theft/chase" to seize the drugs without alerting the conspirators to the investigation.[13] Pursuant to a warrant obtained after the seizure, agents discovered cocaine and methamphetamine in the car; Alverez-Tejeda was indicted on drug charges.[14]

The parties agreed that the DEA had probable cause to justify seizing the car — out of which agents had previously purchased drugs on two occasions[15] — without a warrant.[16] In its brief, the government argued that the DEA agents had probable cause to arrest Alverez-Tejeda at the scene and would have done so if it had become necessary in order to execute the car seizure.[17] The district court agreed that arrest was an available course of action,[18] but it concluded that, under the "totality of the circumstances[, including] the use of force . . . , the phony high speed chase, . . . and the other events involved," the car seizure was "unreasonable."[19] The judge held that the seizure was unconstitutional and suppressed the drug evidence.[20]

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[10] *Id.* at 1015–16.

[11] *Id.* at 1015.

[12] Brief for Appellant at 5, 38, *Alverez-Tejeda*, 491 F.3d 1013 (9th Cir. 2007) (No. 06-30289), 2006 WL 2981776; Brief of Appellee, *supra* note 6, at 6.

[13] *Alverez-Tejeda*, 491 F.3d at 1015–16. The agents originally devised two plans: a plan to steal the car when Alverez-Tejeda stopped for gas, and the plan executed. United States v. Alverez-Tejeda, No. CR-05-126-RHW-11, at 5–6 (E.D. Wash. Apr. 20, 2006). Although the district court did not identify a reason why the executed plan was chosen, the government pointed to "safety concerns." Brief for Appellant, *supra* note 12, at 40 n.30.

[14] *Alverez-Tejeda*, 491 F.3d at 1016.

[15] *Alverez-Tejeda*, No. CR-05-126-RHW-11, at 5.

[16] *Alverez-Tejeda*, 491 F.3d at 1016. It was undisputed that federal forfeiture statutes allow for such warrantless police action. *Id.* (quoting United States v. Johnson, 572 F.2d 227, 234 (9th Cir. 1978)); *see also Johnson*, 572 F.2d at 228 & n.1 (applying federal forfeiture statutes allowing for the seizure of a vehicle that is being used or *had been used* to transport contraband, including controlled substances like the drugs found in the defendant's car). Thus, the car driven by Alverez-Tejeda was subject to seizure for forfeiture without a warrant regardless of whether the car contained illegal drugs at the time of the seizure.

[17] Brief for Appellant, *supra* note 12, at 17, 27.

[18] *Alverez-Tejeda*, No. CR-05-126-RHW-11, at 24.

[19] *Id.* at 20.

[20] *Alverez-Tejeda*, 491 F.3d at 1016. Alverez-Tejeda also requested suppression on the ground that he was "illegally seized"; the judge agreed that he was but decided that, given the ruling on the car seizure, no remedy was needed. *Alverez-Tejeda*, No. CR-05-126-RHW-11, at 25.

The Ninth Circuit reversed and remanded, concluding that the seizure method was constitutional.[21] Judge Kozinski,[22] writing for the court, explained that "[a]n otherwise lawful seizure can violate the Fourth Amendment if it is executed in an unreasonable manner."[23] In assessing reasonableness, courts must weigh the governmental interest against the intrusion into the defendant's Fourth Amendment rights.[24] The court stated that the interest in preventing the drugs from reaching their destination was "a patently important goal."[25] Additionally, the DEA had the "vital objective" of "protect[ing] the anonymity of the ongoing investigation."[26] In support of this interest, the court pointed to statutory recognition of the importance of "[p]rotecting the secrecy of an ongoing investigation . . . in the administrative seizure process"[27] and Supreme Court precedent emphasizing the need for "undercover police activity."[28]

On the other side of the balance, the court concluded that the "intrusion into Alverez-Tejeda's Fourth Amendment interests was relatively mild."[29] Although "a serious risk of bodily injury or escalation of violence" resulting from use of excessive force might have outweighed the government's interest in secrecy, the force actually used in bumping the defendant's car was "minimal."[30] The court also stated that the use of deception by self-identified government officials to search places or seize evidence that they otherwise had "no legal authority to reach" would require closer judicial scrutiny; however, that concern was not implicated in this instance because the agents could have legally seized the car absent the ruse.[31] The court further concluded that the "fright" the defendant suffered "from being the victim of a crime"[32] and the delay in notifying him of the seizure of his personal property, "including a camera, checkbook and clothing" left in

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[21] *Alverez-Tejeda*, 491 F.3d at 1018.

[22] Judge Tallman joined Judge Kozinski's opinion. Judge Kozinski is now the Chief Judge of the Ninth Circuit, but he attained this status after writing this opinion, and thus is referred to as "Judge Kozinski" throughout this comment.

[23] *Alverez-Tejeda*, 491 F.3d at 1016 (citing United States v. Jacobsen, 466 U.S. 109, 124 (1984)).

[24] *Id.* (citing *Jacobsen*, 466 U.S. at 125); *see also* United States v. Place, 462 U.S. 696, 703 (1983) ("We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.").

[25] *Alverez-Tejeda*, 491 F.3d at 1016.

[26] *Id.*

[27] *Id.*

[28] *Id.* (quoting Lewis v. United States, 385 U.S. 206, 208–09 (1966)) (internal quotation mark omitted).

[29] *Id.* at 1017.

[30] *Id.*

[31] *Id.*

[32] *Id.*

the car,[33] were reasonable in light of the government's interest in maintaining the secrecy of the investigation.[34]

Finally, the court rejected the defendant's claims that his girlfriend was searched "in an overly invasive manner" by the agents and that the "mock pursuit" was "potentially dangerous."[35] Although circuit precedent hinted that an "'outrageous' or 'shocking' . . . intrusion on third parties' rights *could* be unconstitutional," that "high standard" was deemed not to have been satisfied here.[36] The court was unwilling even to affirm its prior dictum on third-party rights, since it would not have been applicable on these facts.[37]

Judge Fisher concurred, noting that although the ruse did not transgress constitutional limits, it "had the potential to spin out of control and exceed reasonable bounds."[38] Although he agreed that reversal was appropriate on the record, he did "not thereby mean to endorse this police action as a model for future creative seizures."[39]

The court reached the correct conclusion in this case: under Supreme Court and Ninth Circuit precedent, seizure of the vehicle was likely reasonable and, regardless, suppression of the drug evidence was inappropriate. However, the court appeared to use the wrong reasoning, creating an unclear and problematic precedent. Specifically, the court's evaluation of the reasonableness of the force used to seize the car seemed to imply that the *outcome* of the seizure — an injury-free operation — was important to the determination that no constitutional violation had occurred. But the court should have made clear that the proper evaluation was an ex ante analysis of the ruse itself, without referencing its results. If the *Alverez-Tejeda* court wanted to avoid suppression of the evidence, it could instead have applied the extension of *Hudson* made by another Ninth Circuit panel to deny exclusion.

Both opinions commented on the results of the officers' conduct, suggesting the results' importance. The majority opinion concluded that the use of force was "just enough . . . to pull off the 'drunk driver' ruse, without causing physical injury to the suspects,"[40] whereas Judge Fisher explicitly acknowledged that the scheme had the "potential to spin out of control[,] . . . [although] on the record . . . the agents' ruse stayed within bounds."[41] Judge Kozinski said that the outcome of the

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[33] *Id.* at 1018.

[34] *Id.* at 1017–18.

[35] *Id.* at 1018.

[36] *Id.* (emphasis added) (quoting United States v. Offices Known As 50 State Distrib. Co., 708 F.2d 1371, 1376 (9th Cir. 1983)).

[37] *Id.*

[38] *Id.* (Fisher, J., concurring).

[39] *Id.*

[40] *Id.* at 1017 (majority opinion).

[41] *Id.* at 1018 (Fisher, J., concurring).

suppression motion might have been different if the agents had "simulated a car heist by running Alverez-Tejeda off of the road or staged a carjacking by holding him up at gunpoint,"[42] but it is not immediately clear from the opinion's internal logic why those situations are more unreasonable than the instant events. One could easily imagine the staged car accident injuring those involved or the manufactured police chase endangering a third-party motorist, pedestrian, or good Samaritan bystander attempting to intervene to stop the fleeing "thief." Regardless of the standard the panel intended to apply, the judges' comments, especially Judge Fisher's, seem to imply that *had* injury resulted, the case might have turned out differently. Such decisions can be subconsciously influenced by "outcome bias," the tendency to judge more harshly something that led to a bad outcome and to judge less harshly something that led to a good outcome.[43]

The constitutional protections afforded under the Fourth Amendment ought not to depend on fortuities of accidents. The Supreme Court has said that reasonableness in the use of force ought to be evaluated "from the perspective of a reasonable officer on the scene," suggesting that judges should not evaluate police tactics ex post.[44] An outcome-influenced approach to constitutionally permissible police methods fails to create usable guidelines for law enforcement behavior — as Judge Fisher was quick to note.[45] On the one hand, police officers might be discouraged from taking necessary and reasonable steps out of fear that an unanticipated accident will result in suppression. On the other hand, officers might be inclined to take unreasonable actions in the hope that no injury will result, thereby escaping suppression. In *Alverez-Tejeda*, it is possible that an objective evaluation of the force used would result in the same determination, but the court ought to have made clear that it conducted an ex ante analysis.

The panel's emphasis on the lack of injury may have been influenced by the desire to avoid suppression; as commentators note, the potential exclusion of otherwise probative evidence of a crime may influence whether judges find that there was a Fourth Amendment vio-

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[42] *Id.* at 1017 (majority opinion).

[43] *E.g.*, Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 319 (discussing the effect of "outcome information" on "evaluations of decision quality," i.e. "outcome bias," and on "the judged probability of an outcome," i.e. "hindsight bias" (emphasis omitted)).

[44] Graham v. Connor, 490 U.S. 386, 396 (1989) (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)). Although the Court made this statement while discussing cases of innocent officer mistakes — such as the inadvertent arrest of the wrong person or the accidental search of the wrong premises, *see id.* — the same logic that says that an unlucky, injurious outcome does not automatically create a Fourth Amendment violation suggests that a lucky, noninjurious outcome ought not to preclude a violation.

[45] *See Alverez-Tejeda*, 491 F.3d at 1018 (Fisher, J., concurring).

lation in the first place.[46] But such doctrinal sleight of hand was arguably not necessary to achieve the desired outcome. The Ninth Circuit's extension of a recent Supreme Court precedent suggests that even were the court to have found a Fourth Amendment violation, application of the exclusionary rule would not have been the appropriate remedy. In *Hudson v. Michigan*,[47] the Supreme Court held that when "the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence,"[48] the causal disconnect between the violation and the seizure of evidence rendered the exclusionary rule "inapplicable."[49] In an opinion originally issued only eleven days after the one in *Alverez-Tejeda*, another Ninth Circuit panel extended *Hudson* beyond the knock-and-announce context. In *United States v. Ankeny*,[50] the police executed an arrest warrant at a suspect's home by battering down the door, shattering windows with rubber bullets, and throwing "flash-bang" devices into the house (injuring the arrestee and setting furnishings on fire), but the court refused to suppress the evidence found after entry.[51] The *Ankeny* court stated that it did not need to assess the reasonableness of this method; it was irrelevant to suppression due to lack of a "causal nexus" between the alleged violation and the evidence discovery.[52]

Like the defendants in *Hudson* and *Ankeny*, Alverez-Tejeda challenged the constitutionality of the *manner* of the "otherwise lawful seizure" and sought to have the evidence suppressed.[53] Applying the reasoning of those cases to the *Alverez-Tejeda* facts, the court's decision on whether a constitutional violation occurred with regard to the manner of the seizure need not have been colored by a desire to avoid impeding the conviction of a clearly guilty defendant.[54] Following *Hudson*,

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[46] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 912 (1991) ("[T]he existence of suppressible evidence . . . tends to suggest that the defendant deserves punishment, not relief."); *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999) ("[R]emedial deterrence['s] defining feature is the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences." (emphasis omitted)); *id.* at 889–99 (discussing remedial deterrence).

[47] 126 S. Ct. 2159 (2006).

[48] *Id.* at 2164. In *Hudson*, the preliminary violation of the knock-and-announce rule was deemed irrelevant to the discovery of guns and drugs pursuant to the execution of a search warrant. *Id.*

[49] *Id.* at 2165.

[50] 490 F.3d 744 (9th Cir.), *amended and superseded*, 502 F.3d 829 (9th Cir. 2007), *reh'g and reh'g en banc denied*, *id.*

[51] *See Ankeny*, 502 F.3d at 833–35.

[52] *Id.* at 837.

[53] *Alverez-Tejeda*, 491 F.3d at 1016.

[54] *See, e.g.*, Richard M. Re, Comment, United States v. Ankeny*: Remedying the Fourth Amendment's Reasonable Manner Requirement*, 117 YALE L.J. 723, 730 (2008) (arguing that

as did the *Ankeny* panel, the *Alvarez-Tejeda* panel could have reversed the district court's suppression regardless of its conclusion on the question of constitutional violation.

This extension of *Hudson* would preclude the exclusionary remedy in many cases, which is not necessarily a desirable result. However, whether or not the *Ankeny* court was correct to extend *Hudson* in this way, if courts are influenced by the desire to admit evidence, a blanket denial of the exclusionary remedy might be preferable to a fact-specific evaluation that risks relaxing the Fourth Amendment restrictions on police tactics. By holding that the police action was not unreasonable, the *Alverez-Tejeda* majority, despite Judge Fisher's assurance to the contrary, effectively sanctioned this method of seizure. Applying *Hudson* to preclude the exclusionary remedy, as an alternative to creating a precedent of constitutional reasonableness for questionably reasonable police tactics, would not affect the availability of civil remedies.[55] Furthermore, an *Ankeny*-like *Hudson* application would leave open the possibility of the exclusionary remedy where the tactics constituted a but-for cause of the evidence discovery.[56]

The court thus unnecessarily muddied the analysis of the vehicle seizure, while also reducing the limits on police action. If constitutional limits are to have any teeth, the actions to which they apply must be evaluated without regard to possible alternative scenarios or end results. In this particular case, an ex ante evaluation was unlikely to create a different result, but that evaluation ought to be objective. If suppression is the (possibly unconscious) goal, then the courts — and defendants — might be better served by a *Hudson* application that does not obfuscate the reasonableness evaluation to the detriment of limits on police behavior.

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manner violations should be evaluated independently of the suppression remedy and any lack of scope violation).

[55] If the court had persisted in finding no constitutional violation even if the events had resulted in harm to either the defendant or his girlfriend, the officers involved would be shielded from civil liability. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) (describing the first prong of the two-pronged test: determining if "the facts alleged show the officer's conduct violated a constitutional right").

[56] *Cf.* Amar, *supra* note 46, at 785–99, 811–16 (criticizing reliance on the exclusionary rule and arguing for strengthened civil remedies). The court's opinion also gave short shrift to the issue of whether Alverez-Tejeda was unconstitutionally seized himself, despite briefing from both sides on the issue, *see* Brief of Appellee, *supra* note 6, at 15–17; Reply Brief for Appellant at 7–9, *Alverez-Tejeda*, 491 F.3d 1013 (9th Cir. 2007) (No. 06-30289), 2006 WL 3845596. Although this was likely a straightforward question in this case, given the probable cause to arrest Alverez-Tejeda, an unreasonable seizure of a person is also a Fourth Amendment violation, *see, e.g.*, Terry v. Ohio, 392 U.S. 1, 16–17 (1968). Such a violation could be a but-for cause of evidence discovery; the court's focus on the car seizure, while ignoring the person seizure, glossed over a potential area of constitutional violation and left open the possibility that future courts will not consider this question at all when it actually matters.