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## ***LAW ENFORCEMENT OFFICER TRAINING CASES OF THE MONTH***

**By Don Hays**

Month of March – 2019

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## LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

Month of March - 2019

**United States v. Marco Proano, 912 F.3d 431, January 7, 2019**

Proano, a police Officer, discharged his service weapon into a suspect car and he was charged with violating the civil rights of the occupants of the car.

**FACTS:** Two Officers stopped a car. The car had just sped out of an alley. The driver fled on foot, leaving one passenger in the front seat and four or five in the backseat. One Officer pursued the driver; the second stayed with the car. Before fleeing, the driver did not, apparently, put the car in park, and it rolled toward the second Officer and his squad car. The car wedged itself between the second Officer's squad car and another car parked on the street.

A suspect who had been sitting in the front passenger seat of the car too tried to escape as the car rolled forward, but his legs got stuck between the second Officer's squad car and the suspect car. The passenger tried to break free, and the second Officer assured him that when backup arrived the Officer would assist him. The second Officer then shouted commands to the other passengers— "stay still," "quit moving"—but they did not obey.

One backseat passenger, a thirteen-year-old boy, also attempted to flee, but stopped while hanging out of an open backseat window, with his head above the roof. The second Officer called for backup. Moments later, Proano and his partner arrived in their squad car.

Proano exited his car, with his weapon in one hand, cocked, and aimed at the suspect car. Seconds later, yet another passenger, who had been in the back seat of the suspect car, reached over the center console and pressed his hand on the gas pedal. The car, still wedged, revved but did not move. The passenger then put the car in reverse and pressed the pedal again. The suspect car jolted free and began to reverse. No one was in its path.

As the car retreated, three things happened: a metal BB gun fell to the ground from the suspect car, the suspect who had been wedged between the cars freed himself, and Proano began shooting at the suspect car. The second Officer quickly apprehended the wedged suspect. Proano's partner picked up the BB gun and handed it to the second Officer, saying "Gun. Here's the gun. Here's the gun."

Proano continued to shoot at the suspect car as it stopped, pivoted, and slowly rolled forward into a light pole. Ten of Proano's sixteen bullets entered the Toyota. One bullet hit one passenger's shoulder, while others grazed his face. Two bullets hit another passenger in his leg and foot. No other officer fired his weapon.

Thereafter, a grand jury returned a two-count indictment against Proano for willfully depriving the two passengers who were shot of their constitutional rights—namely, their Fourth Amendment right to be free from unreasonable force—in violation of 18 U.S.C. § 242.

Initially, Proano complained that pursuant to department policy, he had undergone an interrogation by Officers from within his Agency (IAD). Those Officers then spoke with Federal Officers (the FBI), and then the Federal authorities indicted him for civil rights violations.

Proano filed a motion to dismiss the indictment and argued that the FBI agents' meeting with the Agency Investigator led to the disclosure of statements protected by Garrity v. New Jersey, 385 U.S. 493, (1967). (The Fifth Amendment assures defendants that they will not be compelled to testify against themselves. Garrity expounded upon that general right in a particular context, that of public-official investigations.

Garrity held that when a public official must choose between cooperating in an internal investigation or losing his job, the statements he makes during the investigation are compelled, and, as such, they cannot later be used against the official in a criminal trial.) The district court held a hearing, in which Prieto and the FBI agents testified. The district court then denied Proano's motion on two independent grounds.

First, it found no evidence of "seepage or taint" of Proano's Garrity-protected statements in the prosecution.

Second, the district court found "legitimate independent sources" for any information the government could have gleaned from Proano's Garrity-protected statements, assuming the government had seen them.

The case proceeded to trial. A jury convicted Proano on both counts and this appeal followed.

**ISSUE:** Was Officer Proano properly convicted in this case?

**FINDINGS:** Proano first claimed that the government violated his rights under Garrity. The Court of Appeals rejected this argument.

First, the Court held that federal investigators and prosecutors cannot misuse Garrity-protected statements if they are never exposed to the statements. The government, in this case, set up a filter team to receive and review the IAD materials. The filter team then redacted any protected statements before handing the materials over to the prosecution team.

The Court ruled that no evidence suggested that this process was flawed or that Garrity-protected statements slipped through.

The district court also found that, despite some ambiguous evidence, the FBI agents and the IAD investigator did not discuss Proano's statements during their meeting.

As a result, the district court found that there was no "seepage or taint" of Proano's Garrity-protected statements to the FBI agents or the prosecution team. The Court of Appeals agreed with this ruling.

Second, the Court held that even if the prosecution could have accessed Proano's protected statements, there is no constitutional violation if the government can establish "a legitimate source wholly independent of the compelled testimony" for the evidence.

Here, the district court specifically found that the dashcam video, other witness accounts, and police reports all provided independent bases from which the prosecution could have learned of the facts Proano described in his Garrity-protected statements.

Again, the Court of Appeals agreed with this finding. Therefore, the Court concluded that the district court was correct in finding that Proano's Fifth Amendment rights were not violated in this case.

Alternatively, Proano argued that the prosecution failed to produce sufficient evidence to convict him. He first maintained that there was insufficient evidence to prove that his actions were not objectively reasonable.

The Court responded by noting that reasonableness depends on the totality of the circumstances. This calls for a balanced inquiry into "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake."

According to the Court, it was required to view the events through the lens of the officer in the moment, not with 20/20 hindsight. The law allows for "the fact that police officers are often forced to make split-second judgments."

The Court then declared that deadly force is generally reasonable when a reasonable officer in the same circumstances would believe that the assailant's conduct put someone in the "immediate vicinity in imminent danger of death or serious bodily injury."

Based on the totality of the circumstances, Proano argued, it was reasonable for him to believe that the passengers were in mortal danger and to act accordingly. He emphasized the chaos of the scene: On passenger hanging out of the suspect car, another suspect stuck between the second Officer's squad car and the suspect car, the occupants' refusal to show their hands, and the car reversing.

The Court of Appeals rejected this argument. It ruled that the squad car's dashcam video provided ample grounds for the jury to conclude that there was no danger posed to anyone and, thus, no need for lethal force.

According to the Court, the video showed one passenger sitting up out of a window, not being dragged. The car reversed at a mild pace, and quickly slowed, redirected, and butted against a light pole. No bystander was near it. Yet Proano shot and continued to shoot even after the suspect car stopped its retreat.

Additionally, the BB gun's presence at the scene did not prove that the jury erred in its conclusions. The officers' first awareness of the gun was when it fell to the ground, and there was no evidence that any passenger threatened an officer with a weapon. Moreover, evidence suggested that the BB gun fell out at the same time the shooting started.

The Court concluded that that fact, combined with Proano's immediate show of force and his post-shooting reports, which did not identify the BB gun, could have reasonably led the jury to reject the idea that Proano fired in reaction to the weapon.

Proano also argued that the government's reliance on the dashcam video, particularly its slow-motion version, was (1) inconsistent with the totality analysis required under the Fourth Amendment and (2) distorted the in-the-moment experience Proano felt.

The Court ruled that the jury heard, and clearly rejected, these arguments. The jury saw at trial and had in deliberations the real-time dashcam video. The Court concluded that the jury may well have reviewed that video and found that no interpretation of the circumstances supported the notion that someone was in danger.

Further, the Court held that even if circumstances were sufficient to give rise to a lethal threat reasonably requiring deadly force, the jury still could have decided that Proano's reaction was unreasonable.

Proano argued that the number of rounds he fired—sixteen—was irrelevant, because officers reasonably shoot until the threat is eliminated. The Court ruled that this argument was correct in principle, but wrong in application.

The jury could have concluded (easily in the opinion of the Court) that Proano continued to apply lethal force even after the threat subsided. After the vehicle stopped reversing and began inching toward the light pole, Proano continued to fire several more shots into its side.

Proano finally argued that there was insufficient evidence to prove that he willfully used unreasonable force. Again, however, the Court noted that the dashcam video provided grounds for the jury to conclude otherwise.

According to the Court, the "brazenness" of Proano's actions alone could have supported the jury's conclusion: despite the car not threatening anyone's safety, Proano fired sixteen shots at it, including several after the car began idling.

Additionally, the jury could have concluded that Proano disregarded his training by: using his gun, cocked, as an immediate show of force; discharging it into a group of people; shooting at something into which he did not have visibility; and never reassessing the situation until his magazine was empty.

The Court determined that the jury also could have disregarded Proano's justifications as inconsistent with the video evidence. Specifically, although Proano reported concern for a passenger, who he said was being "dragged" by the suspect car, the jury could have concluded that this was flatly not believable in light of the video, which showed the passenger propped up out of the window (and thus not "dragged").

In all, the Court concluded that there was sufficient evidence to convict Proano on both counts.

**CONCLUSION:** The Court of Appeals affirmed the Officers two convictions for willfully depriving two passengers of their constitutional rights—namely, their Fourth Amendment right to be free from unreasonable force—in violation of 18 U.S.C. § 242, and his sentence to six months imprisonment.

**QUIZ QUESTIONS FOR THE MONTH OF MARCH – 2019**

**United States v. Marco Proano, 912 F.3d 431, January 7, 2019**

1. In this case, Officer Proano was charged with Aggravated Battery for shooting, without justification, two suspects.
  - a. True.
  - b. False.
  
2. After the shooting incident in this case, Officer Proano spoke with Officers from his agency who were investigating the shooting. Could the statements Officer Proano made to the investigating Officers be legally used against him during this subsequent trial?
  - a. Yes.
  - b. No.
  
3. Here, Officer Proano discharged sixteen (16) rounds at and into the suspect car. He argued that the number of rounds he fired—sixteen—was irrelevant, because officers reasonably shoot until the threat is eliminated. Did the Court of Appeals generally agree with this argument?
  - a. Yes.
  - b. No.
  
4. During this incident, a metal BB gun was seen to fall from the suspect car. The Court of Appeals found that this discovery alone did not justify the conduct of Officer Proano.
  - a. True.
  - b. False.

## QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF MARCH – 2019

### United States v. Marco Proano, 912 F.3d 431, January 7, 2019

1. In this case, Officer Proano was charged with Aggravated Battery for shooting, without justification, two suspects.

**b. False.** The Officer was charged by indictment with: “willfully depriving the two passengers who were shot of their constitutional rights—namely, their Fourth Amendment right to be free from unreasonable force—in violation of 18 U.S.C. § 242.”

2. After the shooting incident in this case, Officer Proano spoke with Officers from his agency who were investigating the shooting. Could the statements Officer Proano made to the investigating Officers be legally used against him during this subsequent trial?

**b. No.** The Court held: “The Fifth Amendment assures defendants that they will not be compelled to testify against themselves. *Garrity* expounded upon that general right in a particular context, that of public-official investigations. *Garrity* held that when a public official must choose between cooperating in an internal investigation or losing his job, the statements he makes during the investigation are compelled, and, as such, they cannot later be used against the official in a criminal trial.”

3. Here, Officer Proano discharged sixteen (16) rounds at and into the suspect car. He argued that the number of rounds he fired—sixteen—was irrelevant, because officers reasonably shoot until the threat is eliminated. Did the Court of Appeals generally agree with this argument?

**a. Yes.** The Court said: “That is correct in principle, see *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 2020, 188 L.Ed.2d 1056 (2014).”

4. During this incident, a metal BB gun was seen to fall from the suspect car. The Court of Appeals found that this discovery alone did not justify the conduct of Officer Proano.

**a. True.** The Court held: “Nor does the BB gun’s presence at the scene show that the jury erred in its conclusions. The officers’ first awareness of the gun was when it fell to the ground, and there was no evidence that any passenger threatened an officer with a weapon. Kalicki’s testimony, moreover, suggested that the BB gun fell out at the same time the shooting started. That fact, combined with Proano’s immediate show of force and Proano’s post-shooting reports, which did not identify the BB gun, could have reasonably led the jury to reject the idea that Proano fired in reaction to the weapon.”

## LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

### Month of March - 2019 - ALTERNATIVE

#### United States v. Dimitris Terry, 2019 WL 625125, February 14, 2019

Terry was arrested for a drug offense. Officers search his apartment and interrogated him. Terry moved to suppress.

**FACTS:** Officers executed an arrest warrant for Dimitris Terry. The Officers didn't want others to know that Terry had been arrested because they hoped to secure his cooperation in the broader investigation; thus, they planned a quick and quiet arrest.

They waited for Terry to return home from taking his son to school one morning, arrested him when he got out of his car, and took him to the police station for questioning.

A few Officers remained behind. Two of them knocked on the door of Terry's apartment, and a woman answered, wearing a bathrobe and looking sleepy. The Officers identified themselves, explained that they had just arrested Terry, and asked to come inside. They didn't ask the woman who she was, how she was related to Terry, or whether she lived at the apartment.

Without hesitation, the woman let the Officers in, and they immediately presented her with a consent-to-search form. After she both read the form and had it read aloud to her, she signed it, and the search began.

Only then, after the search was underway, did the Officers ask the woman who she was. She identified herself as the mother of Terry's son. She explained that her son lived at Terry's apartment, but she did not.

Nevertheless, the Officers continued the search for roughly the next hour. They recovered letters addressed to Terry showing proof of residence, four cell phones, and a suspected drug ledger.

Meanwhile, two Officers conducted a post-arrest interview of Terry back at the station. Before asking any questions, the Officers read Terry his Miranda rights, which were also spelled out on an advice-of-rights form. The Officers signed the form, but Terry refused to do so. When asked if he understood his rights, Terry explained that "he was not going to sign the form or initial it; that, you know, this wasn't his first go-around with law enforcement ... but he was willing to talk." The Officers understood Terry's statement to mean that he had prior experience with law enforcement, understood his rights, and was knowingly and voluntarily waiving them by agreeing to talk with the agents. So, they wrote "Verbal Only" on the advice-of-rights form, indicating that Terry "gave verbal consent that he understood the form." Terry then answered the Officers' questions about the case and made incriminating statements about his role in a conspiracy to distribute heroin.

Terry was charged with possession, distribution, and conspiracy to possess and distribute heroin. He moved to suppress both the evidence recovered from the search and his post-arrest statements to the Officers.



First, Terry argued that the search was unlawful because the woman had neither actual nor apparent authority to consent to it—all the Officers knew at the time of consent was that she answered the door at Terry’s apartment wearing a bathrobe. Had the Officers simply inquired, Terry said, they would have discovered that the woman did not live at the apartment.

Second, Terry claimed that he had not understood that he was waiving his *Miranda* rights when he answered the Officers’ questions. Thus, he argued, the waiver was invalid and his post-arrest statements should be suppressed.

After an evidentiary hearing at which the agents and Terry testified, the district court denied both motions.

As to the first, the court determined that it was reasonable for the Officers to assume that the woman lived at the residence and had authority to consent to the search because (1) she was permitted to be home when Terry was not; (2) her son resided at the apartment; (3) the bathrobe “indicated she was more than a mere temporary guest”; and (4) she consented to the search without hesitation.

On the second motion, the court found Terry’s testimony that he did not know that his statements could be used against him “simply not credible” given his many encounters with law enforcement—he has been arrested at least seventeen times since he turned eighteen—as well as his level of education and success in business.

The court thought that this was strong evidence that Terry understood his rights. And because he understood his rights, the court concluded that Terry’s answers to the Officers’ questions provided “a clear and unequivocal waiver of his right to remain silent.”

After a bench trial, the district court found Terry guilty and sentenced him to 168 months’ imprisonment. Terry then brought this appeal.

**ISSUE:** Should the district court have granted Terry’s motions to suppress?

**FINDINGS:** Concerning the search of Terry’s apartment, the Court of Appeals (the Court) noted that as a rule, the Fourth Amendment requires the government to get a warrant before searching someone’s property. But the warrant requirement is subject to several “carefully defined” exceptions.

The Court held that when a person allows a third party to exercise authority over his property, he “assume[s] the risk that the third party might permit access to others, including government agents.”

In this case, the Court noted that the People did not claim that the woman had actual authority to consent to the search of Terry’s apartment. The dispute was about whether she had apparent authority, which the Court held exists when “the facts available to the officer at the moment ... ‘warrant a man of reasonable caution in the belief’ that the consenting party had authority over the premises,” even if the person actually had no such authority.

According to the Court, an officer might reasonably believe that a third party has authority over certain property if the third party appears to have “joint access or control for most purposes.” To determine whether

the officers' belief was reasonable, the Court considered "what the officers knew *at the time they sought consent*, not facts that came to light after the search began." If the officers did not know enough to reasonably conclude that the third party had authority over the premises, they had "a duty to inquire further" before they could rely on her consent to the search.

In this case, when the search began, the Court noted that the Officers had four facts: Terry left the woman alone in the apartment for about forty-five minutes, the woman was wearing a bathrobe, she appeared sleepy, and she consented to the search without hesitation. They did not know who she was, what her relationship to Terry was, why she was in the apartment, how long she had been in the apartment, or whether she lived there.

At that point, the Court determined that the Officers did not know that the woman was the mother of Terry's child—so it was wrong for the district court to rely on that fact in evaluating Carson's apparent authority. The facts that the Officers had made it reasonable for them to conclude that the woman had spent the night at Terry's apartment.

The Court held that this *might* have been an indication that she lived with him, but there were multiple other possibilities. The Court noted that she could have been a one-time guest, a periodic guest, a friend or relative visiting for a couple of days—or she may have had some other relationship to Terry. And the existence of so many other equally plausible possibilities should have prompted the agents to "inquire further." But they did not.

Instead, the Court held that they thought that it was safe to assume that the woman had spent the night in the apartment, therefore lived in the apartment, therefore had joint access to or control over the apartment for most purposes, and therefore had the authority to consent to the search.

The Court declared that this kind of "inferential pileup" fell short of the reasonableness required by the Fourth Amendment. According to the Court, the woman's bathrobe alone did not "clothe" (so to speak) someone with apparent authority over a residence, even at 10:00 in the morning. Because the government failed to demonstrate that an exception to the warrant requirement applied in this case, the Court concluded that the evidence discovered as a result of the search should have been suppressed.

Next Terry argued that the statements he made to the Officers should be suppressed because he did not knowingly waive his Miranda rights by choosing to speak with the agents.

In response, the Court held that a defendant's "statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived *Miranda* rights' when making the statement."

Further, the Court ruled that a knowing waiver requires "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Terry argued that he never explicitly waived his right to remain silent and pointed to his refusal to sign the advice-of-rights form as evidence that he did not knowingly waive his Miranda rights.

The Court of Appeals rejected this argument and declared that in *Berghuis v. Thompkins*, 560 U.S. 370, (2010), the defendant refused to sign a form acknowledging his *Miranda* rights. He remained largely silent during questioning that lasted about three hours, but he ultimately confessed to the crime. The United States Supreme Court rejected his Fifth Amendment challenge.

It explained that a knowing waiver can be express or implied, and that “[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford,” Consistent with that principle, it concluded that the defendant knowingly waived his rights because (1) his understanding of English was sufficient evidence that he understood the rights that had been presented, and (2) the fact that he answered the detective’s questions was a sufficient “course of conduct indicating waiver.”

The Court of Appeals agreed with the district court that Terry’s education, sophistication, and familiarity with the criminal justice system provided sufficient evidence that he understood his rights when the Officers read them to him. And as in *Berghuis*, the Court held that Terry’s willingness to speak with the Officers was a “course of conduct indicating waiver,” notwithstanding his refusal to sign the advice-of-rights form.

Thus, the Court held that the district court correctly concluded that Terry knowingly waived his right to remain silent and properly denied his motion to suppress.

**CONCLUSION:** The Court of Appeals declared that the evidence discovered in Terry’s apartment was the fruit of an unconstitutional search by the Officer. Therefore, the district court erred in not granting Terry’s motion to suppress. However, the district court properly denied Terry’s motion to suppress his post-arrest statements because he knowingly waived his right to remain silent.

**QUIZ QUESTIONS FOR THE MONTH OF MARCH – 2019 - ALTERNATIVE**

**United States v. Dimitris Terry, 2019 WL 625125, February 14, 2019**

1. The court in this case declared that as a general rule, the police must obtain a warrant before they can legally search a suspect's home.
  - a. True.
  - b. False.
  
2. The Officers in this case asked the woman they found inside Terry's apartment for consent to search. Can a third party legally grant consent for the police to search a suspect's property?
  - a. Yes.
  - b. No.
  
3. In this case, the district court determined that it was reasonable for the Officers to assume that the woman lived at the residence and had authority to consent to the search because (1) she was permitted to be home when Terry was not; (2) her son resided at the apartment; (3) the bathrobe "indicated she was more than a mere temporary guest"; and (4) she consented to the search without hesitation. Did the Court of Appeals agree with this finding?
  - a. Yes.
  - b. No.
  
4. Here Terry was advised of his Miranda rights and he refused to sign a waiver of those rights. The Court of Appeals declared that the Officers could not prove that Terry waived his Miranda rights because he refused to sign the waiver form.
  - a. True.
  - b. False.

**QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF MARCH – 2019 - ALTERNATIVE**

**United States v. Dimitris Terry, 2019 WL 625125, February 14, 2019**

1. The court in this case declared that as a general rule, the police must obtain a warrant before they can legally search a suspect's home.

**a. True.** The Court held: "As a rule, the Fourth Amendment requires the government to get a warrant before searching someone's property. U.S. Const. amend. IV; see also United States v. Basinski, 226 F.3d 829, 833 (7th Cir. 2000).

2. The Officers in this case asked the woman they found inside Terry's apartment for consent to search. Can a third party legally grant consent for the police to search a suspect's property?

**a. Yes.** The Court ruled: "But the warrant requirement is subject to several "carefully defined" exceptions. See Coolidge v. New Hampshire, 403 U.S. 443, (1971). One is consent from a person with actual or apparent authority to give it. Basinski, 226 F.3d at 833–34. When a person allows a third party to exercise authority over his property, he "assume[s] the risk that the third party might permit access to others, including government agents." Id. at 834 (citing United States v. Matlock, 415 U.S. 164, (1974)).

3. In this case, the district court determined that it was reasonable for the Officers to assume that the woman lived at the residence and had authority to consent to the search because (1) she was permitted to be home when Terry was not; (2) her son resided at the apartment; (3) the bathrobe "indicated she was more than a mere temporary guest"; and (4) she consented to the search without hesitation. Did the Court of Appeals agree with this finding?

**b. No.** The Court held: "It was not reasonable for officers to believe that the woman at the defendant's apartment had authority to consent to search, and thus officers' warrantless search of apartment pursuant to woman's consent violated the Fourth Amendment. **WHY:** The officers, having already arrested the defendant, knew that the woman had been alone in the apartment for about 45 minutes, the woman was wearing a bathrobe and appeared sleepy when she answered the door, and the officers did not inquire who woman was, what her relationship to defendant was, why she was in apartment, how long she had been in apartment, or whether she lived there."

4. Here Terry was advised of his Miranda rights and he refused to sign a waiver of those rights. The Court of Appeals declared that the Officers could not prove that Terry waived his Miranda rights because he refused to sign the waiver form.

**b. False.** The Court said: "And as in Berghuis, Terry's willingness to speak with the agents was a "course of conduct indicating waiver," notwithstanding his refusal to sign the advice-of-rights form.