

***United States v. Buckner*, 06-4399 (Jan. 11, 2007)**

Issue: Whether client's wife had apparent authority to consent to search of password-protected files on a computer located in the couple's home. (YES).

Police went to defendant's home to speak with defendant's wife, Michelle Buckner, because of online fraud complaints regarding someone using AOL and eBay accounts opened in the name of Michelle Buckner. Defendant's wife later contacted police and told them that she knew nothing about illegal eBay transactions, but that she had a home computer leased in her name. She told police to take what they needed and that she wanted to be as cooperative as possible.

Officers seized the home computer. It was turned on and running at the time. They shut down the computer and took its data storage components for forensic analysis.

At a suppression hearing, defendant testified that a password was required to use the computer, and he was the only person who knew the password. Nothing in the record indicated that law enforcement officers knew of the password protection when they seized or searched the computer.

The Court considered this a case of third-party consent. Because of the password protection, Michelle did not have actual authority to consent to a search of the password-protected files. However, the Court concluded that she had apparent authority, because officers did not have any indication from her or from any of the attendant circumstances that files were password-protected.

The Court specifically noted that it was not holding that officers could rely on apparent authority to search while simultaneously using technology to intentionally avoid discovery of password or encryption protection.

***United States v. Hernandez-Villanueva*, 06-4211 (Jan. 10, 2007)**

Issues: whether *Miranda*'s exclusionary rule applies at sentencing (NO); whether district court reasonably can vary from the Guidelines based on defendant's gang membership (YES).

Defendant pleaded guilty to unauthorized re-entry.

When he was arrested, he gave an un-Mirandized statement to law enforcement agents concerning the MS-13 gang and its activities and offered to be a confidential informant. At sentencing, the government argued for an upward variance based on the defendant's involvement in MS-13 and offered opinion testimony of a police sergeant that defendant was an active member of MS-13 at the time of his arrest.

After acknowledging that there was no evidence that the defendant had directly participated in violent activity, based on defendant's gang membership, the district court sentenced defendant to 18 months' imprisonment, which was 12 months higher than the high end of the Guidelines range.

Defendant objected on Miranda grounds to the admission of his post-arrest statements in sentencing. The Court of Appeals rejected this argument. A statement made in violation of Miranda is admissible at sentencing unless there is evidence that the statement was actually coerced or otherwise involuntary.

Defendant argued that the district court unreasonably varied upward based on gang membership. Court of Appeals found district court's variance sentence reasonable.

United States v. Hill, 06-4092 (Jan. 10, 2007)

Issue: whether road leading to gate of military base was "highway" under Virginia law (YES).

Defendant was charged under the Assimilative Crimes Act, 18 USC § 13, after he was stopped at the gate of a military base and was found to be driving with a suspended driver's license. Court concluded that stretch of road in question was highway because district court was not clearly erroneous in determining that it was open to public use.