



Expert Testimony

Cross Examination



Expert Testimony

Courts regularly note that although deviations from NFPA 921 or other standards may not disqualify an expert witness, these are appropriate grounds for cross-examination.



Expert Testimony

"Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

Daubert 509 U.S. at 569.



Expert Testimony

State Farm Fire & Cas. Co. v. Electrolux

"...challenges to his qualifications beyond this threshold level of knowledge and experience are properly the subject of cross-examination."

Allstate Ins. Co. v. Gonyo, 2009 U.S. Dist. LEXIS 36597 (N.D.N.Y Apr. 29, 2009)

the expert "applied NFPA 921, a reliable and acceptable methodology, albeit not completely. His testimony is the product of reliable principles and methods. Hence [the expert] will be permitted to offer his opinion as to the cause and origin of the cabin's fire, subject, of course, to cross examination.

Schlesinger v. United States, 898 F. Supp. 2d 489, 504 (E.D.N.Y. 2012)

Ultimately, when determining whether a proffered expert's testimony is reliable, the court "must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions."



Expert Testimony

Pekarek v. Sunbeam Prods.

“The mere fact he did not cite or use NFPA 921 as his guide does not necessarily mean he failed to use a reliable method....”

“Defendant also argues that [expert’s] conclusions are based upon mere feelings or subjective opinions, rather than hard facts and data....”

“Defendant is correct in asserting that [expert] could have done a better job of noting and documenting the location of certain items in the room...[b]ut such deficiencies, while grounds for cross-examination, are not sufficient to preclude a jury from hearing and considering his opinion testimony”

672 F. Supp. 2d 1161(D. Kan. 2008)



United States v. Thomas

Individuals criticized the State Fire Marshal's conclusions, including two ATF agents who expressed their opinions in a pair of internal memoranda. These individuals uniformly criticized the methodologies employed by the state investigators and either questioned or disagreed with the conclusion that the fire was arson.

Thomas now claims that the fact that the ATF agents disagreed should have been revealed pursuant to *Brady* and *Giglio*.

396 F. Supp. 3d 813, 819 (N.D. Ind. 2019)



United States v. Thomas

Thomas presents no authority (and the Court has found none) suggesting, even by analogy, that *Brady* requires the government to disclose documents from its past, closed cases whenever those files indicate a mere disagreement among experts and/or investigators who are serving as witnesses in a current prosecution. In fact, caselaw suggests otherwise.



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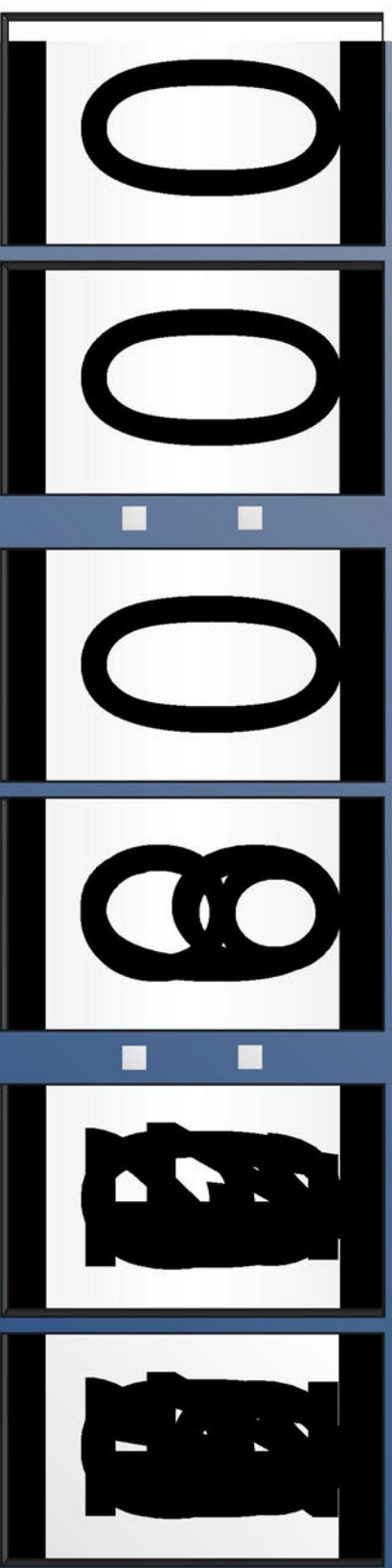
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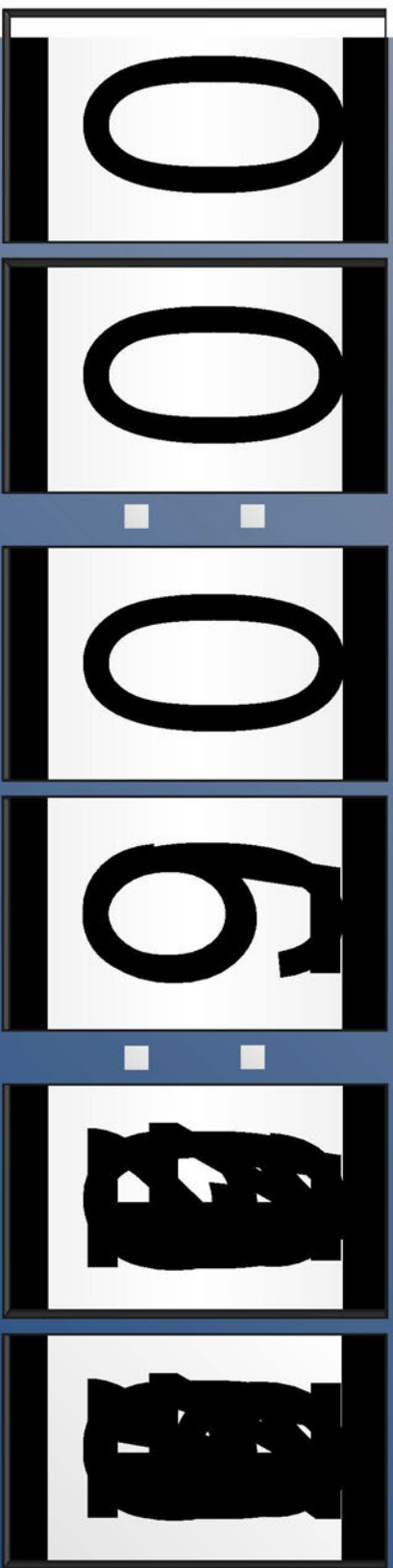
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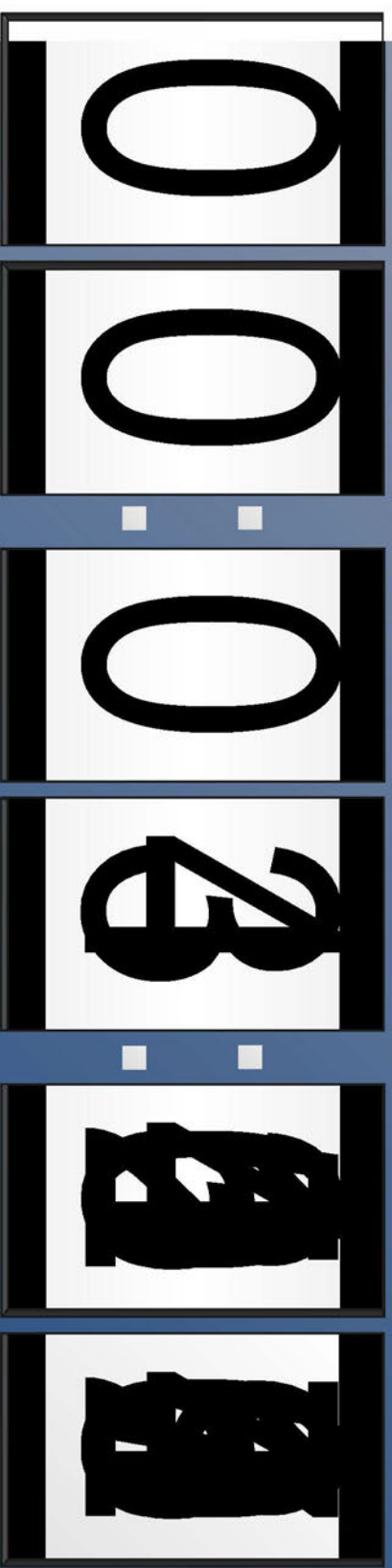
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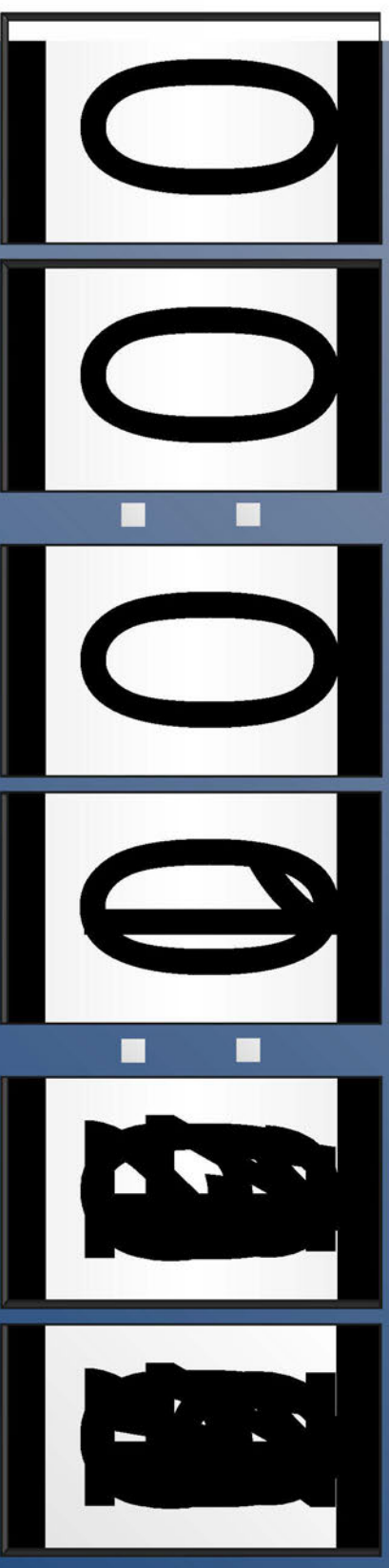
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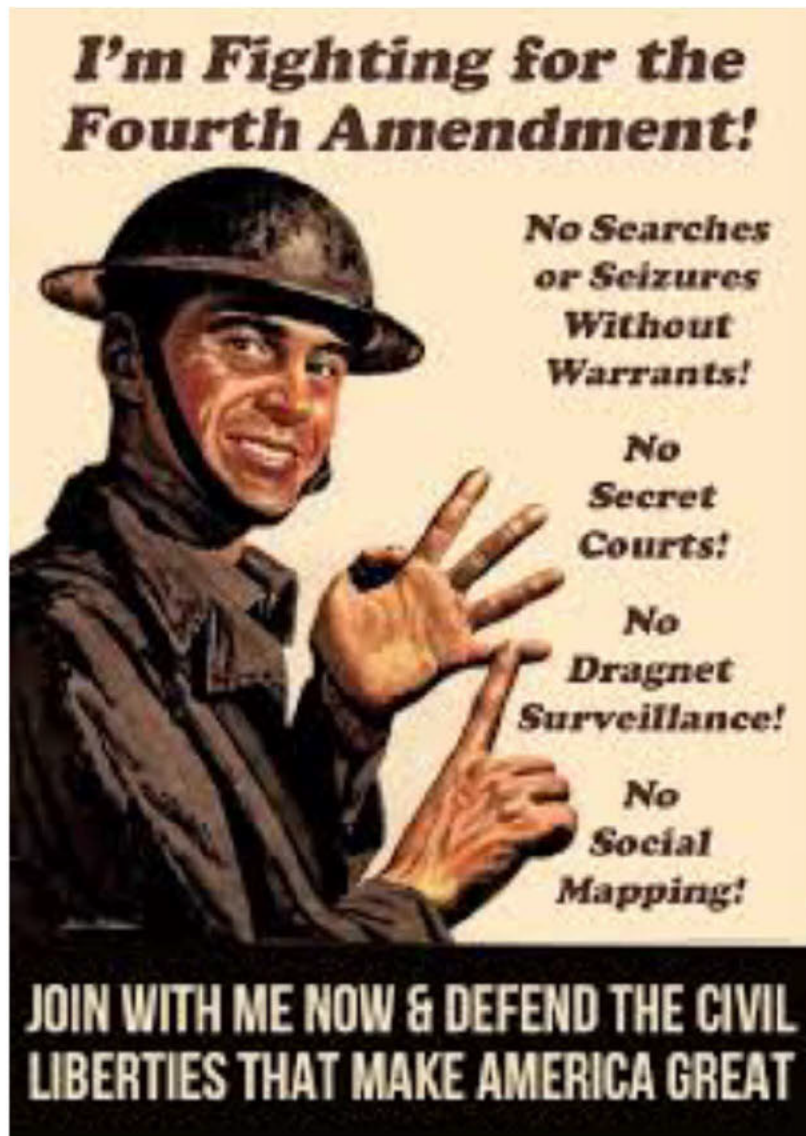


Constitutional Law

4th Amendment



Constitutional Law



"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."



Constitutional Law

Michigan v. Clifford

Michigan v. Tyler

**These two cases, above all, guide the lawful search by
public sector fire investigators at a fire scene**



Constitutional Law

Michigan v. Tyler,

12:00 am Fire at furniture store

2:00 am Fire Chief arrives; determines arson is possible; contacts police detective

3:30 am Detective arrives on scene

4:00 am Everyone leaves

8:00 am Chief returns with Assistant Chief

Police returned 10, 13, 26 days afterward

436 U.S. 499 (1978)



Constitutional Law

Michigan v. Tyler,

“The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”



Constitutional Law

Michigan v. Tyler

“...we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze.”



Constitutional Law

Michigan v. Tyler

“Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches.”



Constitutional Law

Michigan v. Tyler

“...there is no diminution in a person’s reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman.”



Constitutional Law

Michigan v. Tyler

“...except in certain **carefully defined classes of cases**, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant.”



Constitutional Law

Michigan v. Tyler

carefully defined

classes of cases



Constitutional Law

Michigan v. Tyler

carefully defined

classes of cases



Constitutional Law

Michigan v. Tyler

carefully defined
classes of cases

Search Incident to Arrest
Protective Search
Terry stop
Border Searches
Automobile Exception
Plain View
Exigent Circumstances
Consent



Constitutional Law

Michigan v. Tyler

“...it would defy reason to suppose that fireman must secure a warrant or consent before entering a burning structure to put out the blaze. And once in the building for this purpose, firefighters may seize evidence of arson that is in plain view.”



Constitutional Law

Michigan v. Tyler,

12:00 am *Fire at furniture store*

2:00 am *Fire Chief arrives; determines arson is possible; contacts police detective*

3:30 am *Detective arrives on scene* OK OK

4:00 am *Everyone leaves* OK

8:00 am *Chief returns with Assistant Chief* OK

Police returned 10, 13, 26 days afterward

436 U.S. 499 (1978)



Constitutional Law

Michigan v. Tyler factors:

- The number of prior entries.
 - The scope of the search.
 - The time of day for the search.
 - The lapse of time since the fire.
 - The continued use of the building.
 - The owner's efforts to secure the building against intruders.
-



Constitutional Law

A note on consent...





Constitutional Law

Consent

Q: Who can give Consent?

A: Anyone with a privacy interest.



Constitutional Law

Who has a privacy interest?

Tenant

Roommate

Spouse

Landlord (Common Areas)

“Apparent Authority”



Constitutional Law

Fernandez v. CA

- Police remove suspect because they suspect he hit the woman
- Woman later gives consent to search the apartment and proof of robbery is found

Issue: Did suspect's refusal to grant consent bar the police from searching the apartment even when suspect was no longer present?



Constitutional Law

Fernandez v. CA

Georgia v. Randolph does not extend to this situation, and therefore police search does not violate the 4th Amendment where objecting occupant is absent when another occupant consents.

This includes an objecting occupant who is absent due to a lawful detention or arrest.



Constitutional Law

Michigan v. Clifford – Timeline

- 7:04am Fire extinguished; all fire officials and police leave premises*
- 12:00pm Workers boarding up house; pump out basement*
- 1:00pm Arson Investigators arrive on scene*
- 1:30pm Arson Investigators enter – locate source and find evidence of arson in basement...*

...but continue the search upstairs and find incriminating evidence



Constitutional Law

Michigan v. Clifford

“The constitutionality of warrantless and nonconsensual entries onto fire damaged premises...turns on several factors....”



Constitutional Law

Michigan v. Clifford

“...legitimate privacy interests in the fire damaged property...”

“...exigent circumstances justify the governmental intrusion regardless of any reasonable expectations of privacy.”

“...whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity”



Constitutional Law

Michigan v. Clifford

“Because the cause of the fire was then known, the search of the upper portions of the house...could only have been a search to gather further evidence of the crime of arson.”

“Such a search requires a criminal warrant.”



Constitutional Law

Michigan v. Clifford

“...we hold that a subsequent post-fire search must be conducted pursuant to a warrant, consent, or the identification of some new exigency.”



Constitutional Law

Michigan v. Clifford

To obtain an Administrative Warrant:

1. a fire of undetermined origin has occurred on the premises,
 2. that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and
 3. that the search will be executed at a reasonable and convenient time.
-



Constitutional Law

Applying Tyler and Clifford



Constitutional Law

Applying *Tyler* and *Clifford*

United States v. Buckmaster

Firefighters put out fire in second story bedroom

Investigators arrived shortly thereafter; knew that Buckmaster's neighbors often complained about fireworks and asked him whether there was a danger of an explosion

Buckmaster stated that the fireworks were not near fire

485 F.3d 873, 874-875 (6th Cir. Ohio 2007)



Constitutional Law

Applying *Tyler* and *Clifford*

United States v. Buckmaster

The investigators "could not start their investigation, however, until the water was cleared from the bed and bedroom, and thus they decided instead to check the residence for high carbon monoxide levels and for 'other possible dangers to the structure from the fire.'"

485 F.3d 873, 874-875 (6th Cir. Ohio 2007)



Constitutional Law

Applying *Tyler* and *Clifford*

United States v. Buckmaster

Upon search of the basement investigators found fireworks labeled 1.3 and 1.4

Buckmaster ultimately convicted on illegal possession of explosives

485 F.3d 873 (6th Cir. Ohio 2007)



Constitutional Law

Applying *Tyler* and *Clifford*

United States v. Buckmaster

Buckmaster argues that "the search of the remaining portions of the house, not for fire causation evidence, but for carbon monoxide levels, was per se unreasonable" without a warrant...

"This argument not only improperly narrows the government's justifications for its search, it also fails because it restricts *Tyler* and *Clifford* to the notion that fire officials may remain in a building for a reasonable time after the blaze has been put out, but *only* to investigate the cause of the blaze."



Constitutional Law

Applying *Tyler* and *Clifford*

United States v. Buckmaster

The fire on the waterbed led to the bed being punctured, which in turn led to potential electrical dangers throughout much of the house due to the seepage of excess water into the rooms below.

This exigency justified local fire officials' warrantless search of many of the rooms of the house -- including the furnace room in which the explosives were found in plain view -- to ensure that the water was cleaned up and no such damage had occurred.



Constitutional Law

Exigent Circumstances and Plain View



Constitutional Law

Exigent Circumstances and Plain View

U.S. v Infante

Firemen responded to a "fire call and rescue" at Infante's residence for a "propane explosion" that had severed Infante's finger and caused a deep laceration on his hand.

Found marijuana, pipe bombs in basement

701 F.3d 386 (1st Cir. Me. 2012)



Constitutional Law

Exigent Circumstances and Plain View

Witnessed Infante's significant injuries

Infante told them that a butane lighter had exploded inside his house

A blood trail was observed through a window.

Heard a hissing sound that was "probably, but not necessarily, the sound of running water."



Constitutional Law

Exigent Circumstances and Plain View

Based on these facts, the firefighters had a reasonable basis...to believe that there was an emergency and to associate the emergency with the inside of Infante's residence.

Infante's reports of an explosion involving volatile gas...coupled with his significant wounds ...caused the firefighters to reasonably perceive an emergency -- the



Constitutional Law

Under these circumstances, the danger of a secondary explosion is akin to that of a rekindling fire that the Supreme Court identified in *Tyler* as a continuing danger that justified fire officials' remaining in a building for a reasonable time after extinguishing a fire in order to promptly investigate its cause.



April 20



EEO/CES Training

Dallas, Texas

September 18, 2107



Agenda

- Interplay of Federal
law and State Marijuana
and Objective Design Features
- Interstate

United States v Fish

mere possession
constitute "use of a firearm"
guidelines 4B1.2.

36813

September 2017

U.S. v. Barker

- Relying on U.S. v. Barker, 1977, 541 F.2d 1006, 1011, the court held that Barker's conviction constitutes a crime under the law. This [conviction] does not involve the possession of explosives."

U.S. v. Barker

- lead
- However, the 9th Cir. ruled in *U.S. v. Barker* that the Guidelines in 2004 to deem § 922(a) firearms unlawful, thus overruling

2017, 855 F.3d 1135 (9th Cir. 2017)

Note the possible different outcome in 924(c)

- U.S. v. Hull, Admitted Imperial Wizard of the splinter group White Knights of the Ku Klux Klan. Charged with “teaching or demonstrating, and distributing information regarding, the making and use of a pipe bomb with the intent that the teaching or information be used for a ‘Federal crime of violence’ (‘unlawful possession of a pipe bomb’).”
- What was the crime of violence?
 - Unlawful Possession of a pipe bomb
- Mere unlawful possession is **not** a “Federal crime of violence.”

456 F.3d 133 (2006)

U.S. v. Ragland (June 26, 2017)

made

Justice may be a

Michigan] from implementing

to criminalize the use, distribution, possession, or
of medical marijuana."

- This

- 2017 U.S. Dist. LEXIS 97852, 2-3

U.S. v. Ragland

a prohibited
risk of injury to another
public safety officer performing duties

September 2017

U.S. v. Ragland

unregistered
substantial risk of injury
explosive device.

September 2017

U.S. v. Ragland

the court
finds that the
Counts Three and Four
[Michigan] from implementing [its] own
the use, distribution, possession,
marijuana."

Destructive Devices

“

Lundberg
450 (S.D. Cal. 1993)

all the first and most important
alm

Destructive Devices

- “
 - ✓ Rifle
 - Others
 - X Thermite Grenade Documentation (Homa case)
 - X Indirect heat-seeking

U.S. v. Salas (May 11, 2017)

would

When the wire is

fire whatever was contained

be projecting it in a specific direction.

mines were of a similar

considered camouflage.

U.S. v. Salas

Walter...
nonetheless be...
substantial likelihood of...
items would still constitute weapons...
...are the individual who would trip the mine. ...
...characteristics nonetheless render them destructive
...tively, they are designed for use as a

2017 U.S. Dist. LEX

U.S. v. Salas

theories of causation
characteristics as evidence
silencer case....

September 2017