

# Supreme Court 2023: What Cases are on the Docket with the Potential to Reshape Law Enforcement Landscape

## Description

The Supreme Court of the United States has a packed schedule in 2023, with several cases that could potentially impact law enforcement officers and departments across the country. In this article, we will provide an overview of both scheduled and petitioned cases to be on the lookout for.

First up on the Court's Docket is **Counterman v. Colorado**, which is set to be argued in front of the High Court on April 19, 2023.<sup>1</sup> This case centers around the issue of whether establishing a "true threat" unprotected by the First Amendment requires the government to prove that the speaker subjectively knew or intended the threatening nature of their statement, or if it is sufficient to demonstrate that an objective "reasonable person" would regard the statement as a threat of violence. This case has implications for law enforcement officers who may need to assess whether a statement made by a suspect constitutes a true threat.

Billy Counterman was found guilty of stalking after engaging in two years of continuous harassment of a Colorado-based musician through sending her aggressive messages on multiple Facebook accounts. The musician, C.W., perceived these messages as threats, which led her to cancel shows, withdraw from maintaining an online presence, and distance herself from the public and fans. Counterman was eventually arrested in May 2016.

The case has already made its way through the Colorado courts, with Counterman arguing that his conviction violated his Federal and Colorado Constitutional rights to freedom of speech. He contended that for a statement to be considered a "true threat," prosecutors needed to prove his intent to threaten or his intention to carry out an act of violence. The Colorado courts rejected his argument, holding that his statements were "true threats" unprotected by the First Amendment and the Colorado Constitution.

It is well established that the protections afforded by the First Amendment do not extend to statements that are deemed "true threats." Now, the Supreme Court will decide whether the "true threat" standard requires proof of subjective intent, or if an objective standard is sufficient. This decision will address the existing circuit split regarding the standard for "true threats." The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, as well as various state courts, have adopted the objective standard, which focuses on reasonable person interpretations of the speaker's words. In contrast, the Ninth and Tenth Circuits, along with a few state courts, require proof that the speaker intended the statement as a threat, following a subjective standard.

Law enforcement officers should pay close attention to the Court's decision in this case, as it will likely have a significant impact on how they assess whether a statement made by a suspect constitutes a true threat. This ruling may also influence the way in which cases involving online harassment and stalking are prosecuted in the future, potentially resolving the inconsistencies among jurisdictions.

Law enforcement officers and departments should also take note of four pending petitions awaiting approval for review by the Supreme Court.

The first case, **Pennington v. West Virginia**, questions whether, when police have an outstanding pickup order which the lower Court stated equates to an arrest warrant for a person, they can enter a home without probable cause that the person resides there and is present within.<sup>2</sup> This case will address the legal boundaries for law enforcement officers when conducting warrant-less searches and arrests.

The case comes from West Virginia and involves Tracy Pennington, a mother whose custody rights to her daughter, S.W., were stripped away. The daughter had been placed under the care of her paternal grandparents due to excessive absences from school. The daughter ran away from her grandparents's home and stopped attending school altogether. After months of searching, the police received an anonymous tip that S.W. was staying at Pennington's apartment. Acting on this tip, and without obtaining a search warrant, officers entered Pennington's apartment and found S.W. hiding.

Pennington was subsequently charged with felony child concealment and conspiracy. Although she accepted a plea deal, she later appealed, arguing that the officers's search of her home without a warrant or probable cause violated her Fourth Amendment rights. The West Virginia Supreme Court denied her appeal, holding that the "reason to believe" standard for warrantless entry requires a lower level of suspicion than probable cause. Applying that principle to the facts here, the court found that because the outstanding pickup order for S.W., equates to an officer possessing an arrest warrant, combined with the anonymous tip, acted as justification for the officers's warrantless entry into Pennington's apartment.

In February 2023, Pennington filed a petition for certiorari with the Supreme Court of the United States (No. 22-747). Specifically, her petition asks the High Court to clarify whether the "reason to believe" standard is comparable to the standard required for probable cause. If certiorari is granted by the Court, the outcome of this case could potentially impact law enforcement officers's practices regarding the Fourth Amendment for warrantless entries and searches.

The second petition, **Fox v. Campbell**, raises several issues.<sup>3</sup> The case involves an incident in which law enforcement officers fired shots in self-defense but missed the intended target. The petition questions whether the Fourth Amendment standard established in *Graham v. Connor* for evaluating claims of excessive force applies, or if the Fourteenth Amendment standard established in *County of Sacramento v. Lewis* for evaluating whether officers's actions amount to a due process violation is the applicable standard.<sup>4</sup>

The case also considers whether the U.S. Court of Appeals for the 6th Circuit denial of qualified immunity and finding that the respondent was seized for Fourth Amendment purposes when the officer shot but missed the target, is inconsistent with Supreme Court precedents.

-If the High Court grants certiorari and concludes that the Fourth Amendment standard is applicable, the petitioner asks the Court to determine whether the Sixth Circuit's application of *Graham* was proper, and whether the Circuit erred in determining that the law is clearly established regarding the seizure and the excessive force claims.

The third petition, **Lombardo v. City of St. Louis, Missouri** comes to the Court following their 2021 ruling on the case. In 2021, the Supreme Court issued a ruling in the case *Lombardo v. City of St. Louis, Missouri*. This case has gained significant attention from the public and law enforcement community alike. *Lombardo* involves allegations of the use of excessive force by police officers in St. Louis, Missouri, and raises questions about the constitutionality of officers' actions. Specifically, the case concerns the death of Nicholas Gilbert, who, after resisting assistance during an attempt at self-harm in his prison cell, was subjected to a prone position restraint for fifteen minutes, ultimately resulting in his suffocation.

After the Supreme Court initially heard the case in 2021, they found for the Petitioners in part and remanded the case to the Eight Circuit for further fact-finding, as required by the "objectively unreasonable" test used to assess excessive force. However, upon reconsideration, the Court of Appeals ruled again in favor of the defendants and granted the officers qualified immunity.

The Eight Circuit's ruling prompted the Petitioners to seek review by the Supreme Court once more. The Petitioners challenge the holding reached by the Eight Circuit, contending that the decision contradicts established precedents set by other Circuit Courts that have deemed the use of comparable force as violative of a clearly established right and excessive in nature.

If the Supreme Court grants review in this case, they will have to determine whether law enforcement officers who applied pressure to the back of a handcuffed and shackled person until he died are entitled to qualified immunity as a matter of law, even if the individual struggled to breathe in the moments before death.

The potential review of this case holds significant importance for law enforcement and citizens within the Eight Circuit's jurisdiction, particularly in Ferguson and Minneapolis, where these cities have seen instances of excessive force by law enforcement.

The fourth petition awaiting a grant of review by the Court is **United States v. Moore-Bush**, a case that could potentially change the future of technology in law enforcement for Fourth Amendment purposes.

This case arises from a federal investigation when law enforcement agents conducted long-term surveillance of the Petitioner's residence, using a remote-controlled pole-camera. The surveillance efforts confirmed suspicions that Moore was using her residence as a place to foster and conduct a drug trafficking ring. In 2018, Moore was indicted for drug charges and money laundering, but the District Court hearing the case in 2019 granted Moore's motion to suppress the evidence based on Fourth Amendment grounds, because the surveillance constituted an unreasonable search. Eventually, the case reached the First Circuit Court of Appeals and was reviewed by the Court twice, ordering reversal of the District Court's findings both times.

Upon their decision to review the case, the Supreme Court will grapple with the issue of whether long-term police use of surveillance cameras targeted at someone's home and premises is considered a Fourth Amendment search.

This case could have profound repercussions for law enforcement's use of technology and citizens' privacy rights as related to Fourth Amendment protections.

Law enforcement officers and departments should keep a close eye on these cases, as they could have significant implications for how they conduct their operations and interact with the public. The rulings on these cases may provide further guidance on the legal standards that police officers must adhere to when performing their duties.

Â<sup>1</sup> People v. Counterman, 497 P.3d 1039 (Colo. App. 2021), cert. granted, Counterman v. Colorado, 143 S. Ct. 644 (2023), No. 22-138.

Â<sup>2</sup> State v. Pennington, LEXIS 694 (W. Va. 2022); Pennington v. West Virginia, petition for cert. pending, No. 22-747 (U.S. 2023).

Â<sup>3</sup> Campbell v. Cheatham County Sheriffâ??s Department, 47 F.4th 468 (6th Cir. 2022); Fox v. Campbell, petition for cert. pending, No. 22-848 (U.S. 2023).

â? Graham v. Connor, 490 U.S. 386 (1989); County of Sacramento v. Lewis, 523 U.S. 833 (1998).

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