

2007
SUPREME COURT and CIRCUIT COURTS OF
APPEAL CASE BRIEFS
BY SUBJECT

(Click on subject to go to those cases)
(last updated March 10, 2008)

Cases are arranged with Supreme Court decisions first followed by Courts of Appeals decisions in chronological order. Miscellaneous Criminal Statutes are arranged in numerical order.

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Fourth Amendment

Search

U.S. v. Garcia, 474 F.3d 994 (7th Cir.), February 2, 2007

Looking at this issue for the first time, the Court decides:

Placing a GPS (global positioning system) “memory tracking unit” underneath the rear bumper of a car found in a public place is not a Fourth Amendment “seizure” because the device did not affect the car’s driving qualities, did not draw power from the car’s engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, and did not alter the car’s appearance.

Using the device to track the car in public is not a Fourth Amendment “search” requiring probable cause and a warrant.

The courts of appeals have divided over the question.

The 5th and 9th circuits agree, although the 5th circuit approved of but did not expressly require a showing of reasonable suspicion. (cites omitted).

The 1st, 6th, and 10th circuits call tracking a “search.” The 1st and 6th circuits require probable cause but no warrant. (cites omitted).

Click [HERE](#) for the court’s opinion.

Click [HERE](#) for an article on GPS tracking by Senior Legal Instructor Keith Hodges (written prior to this decision).

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U.S. v. Varner, 481 F.3d 569 (8th Cir.), April 04, 2007

Ordinarily, the arrest of a person outside of a residence does not justify a warrantless entry into the residence itself. One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. Even absent an affirmative indication that the arrestee might have a weapon available or might attempt to escape, the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee’s elbow at all times. Additionally, it is not “unreasonable” under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer’s need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested.

Click [HERE](#) for the court’s opinion.

U.S. v. Ferrer-Montoya, 483 F.3d 565 (8th Cir.), April 19, 2007

The scope of a search is generally defined by its expressed object. An officer may reasonably interpret a suspect's unqualified consent to search a vehicle for drugs to include consent to search containers within that car which might bear drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive manner. A trained dog's failure to alert may reduce the likelihood that a particular vehicle contains narcotics, but it has no bearing upon what a typical reasonable person would have understood by the exchange between the officer and the suspect in the initial grant of consent to a search.

Click [HERE](#) for the court's opinion.

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U.S. v. Orman, 486 F.3d 1170 (9th Cir.), May 22, 2007

A brief investigatory detention, a *Terry* stop, while constituting a seizure, is not a violation of the Fourth Amendment provided that the police officer has reasonable suspicion that criminal activity may be afoot. In the course of a lawful investigatory stop, a police officer also may lawfully pat down the detained individual for weapons, a *Terry* frisk, provided that the officer has reasonable suspicion that the person may be armed and presently dangerous. However, a *Terry* frisk is not confined to just those situations in which a *Terry* stop has occurred. A *Terry* stop and a *Terry* frisk are two independent actions, each requiring separate justifications. *Terry* frisks are authorized in consensual encounters so long as there is reasonable suspicion that the person is armed and presently dangerous.

Click [HERE](#) for the court's opinion.

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U.S. v. Bravo, 489 F.3d 1 (1st Cir.), May 29, 2007

The Maritime Drug Law Enforcement Act (MDLEA) allows the United States to enforce drug laws outside of the United States, and more specifically, exercise jurisdiction over stateless vessels. A "vessel without nationality" includes a vessel aboard which the master or person in charge makes a claim of registry and the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

The Fourth Amendment prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial. A violation of the Amendment is "fully accomplished" at the time of an unreasonable government intrusion. For purposes of this case, therefore, if there was a violation of the Fourth Amendment, it occurred solely in international waters, where the search and seizure

took place. However, the Fourth Amendment does not apply to activities of the United States against aliens in international waters.

Click [HERE](#) for the court's opinion.

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U.S. v. Nascimento, 491 F.3d 25 (1st Cir.), July 02, 2007

When police arrest a partially clothed individual charged with a crime of violence in his home, the need to dress him may constitute an exigency justifying the officers in entering another room in order to obtain needed clothing. When the police neither manipulate nor use the situation as a pretext to carry out an otherwise impermissible search, the conduct of the police in deciding to dress the suspect is reasonable. Common sense and practical considerations must guide judgments about the reasonableness of searches and seizures. A cabinet eight to ten feet away from an unrestrained suspect can be said to be within the suspect's immediate control and subject to search incident to arrest.

Click [HERE](#) for the court's opinion.

* * * *

Taylor v. Michigan Dep't of Natural Resources, 502 F.3d 452 (6th Cir.), September 14, 2007

A search under the Fourth Amendment is a government intrusion into a reasonable expectation of privacy. A "reasonable expectation of privacy" exists when (1) the individual has manifested a subjective expectation of privacy in the object of the challenged search and (2) society is willing to recognize that expectation as reasonable. The second prong generally addresses two considerations. The first focuses on what a person had an expectation of privacy *in*, for example, a home, office, phone booth or airplane. The second consideration examines what the person wanted to protect his privacy *from*, for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes. The purpose and degree of the government's intrusion is relevant to the second consideration.

A conservation officer's daylight, five minute, suspicionless "property (security) check" of a temporarily unoccupied residence, consisting of calling out to determine if anyone was home, checking the doors and windows to ensure they were locked, peering briefly into the interior through the open curtains of a window, and leaving his business card in the front door is not a Fourth Amendment search.

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Barnes, 506 F.3d 58 (1st Cir.), October 29, 2007

The reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context. An initial strip search for contraband and weapons is clearly justified given an arrest for a drug trafficking crime. However, a visual body cavity search involves a greater intrusion into personal privacy. Accordingly, a more particularized suspicion that contraband is concealed is required prior to conducting a visual body cavity search.

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Yamba, 506 F.3d 251 (3rd Cir.), October 22, 2007

Assuming that an officer is authorized to conduct a *Terry* search at all, he is authorized to assure himself that a suspect has no weapons. He is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon.

A *Terry* search cannot purposely be used to discover contraband, but it is permissible to confiscate contraband if it is spontaneously discovered during a properly executed *Terry* search. The proper question, therefore, is not the immediacy and certainty with which an officer knows an object to be contraband or the amount of manipulation required to acquire that knowledge, but rather what the officer believes the object is by the time he concludes that it is not a weapon. Moreover, when determining whether the scope of a particular *Terry* search was proper, the areas of focus should be whether the officer had probable cause to believe an object was contraband *before* he knew it not to be a weapon and whether he acquired that knowledge in a manner consistent with a routine frisk.

The 2nd and 9th Circuits agree (cites omitted).

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Wilson, 506 F.3d 488 (6th Cir.), October 29, 2007

The so-called "automatic companion" rule whereby any companion of an arrestee would be subject to a cursory pat-down reasonably necessary to give assurance that they are unarmed is rejected. The *Terry* requirement of reasonable suspicion under the circumstances has not been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates. Although the government can rely on the fact that the defendant's traveling

companion was found to be carrying a weapon as *part* of the basis for establishing reasonable suspicion with regard to the defendant, the government must point to additional specific and articulable facts in order to satisfy *Terry*.

There is nothing about being seated in a car which is itself suspicious. The fact that a person is seated in a vehicle does not create a different *Terry* frisk test, but instead is simply a relevant consideration under the totality of the circumstances.

Click [HERE](#) for the court's opinion.

* * * *

Frisk

U.S. v. Orman, 486 F.3d 1170 (9th Cir.), May 22, 2007

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Click [HERE](#) for the court's opinion.

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Click [HERE](#) for the court's opinion.

* * * *

REP

Taylor v. Michigan Dep't of Natural Resources, 502 F.3d 452 (6th Cir.), September 14, 2007

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Click [HERE](#) for the court's opinion.

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U.S. v. Brown, 510 F.3d 57, December 07, 2007

A part of the driveway that is freely exposed to public view does not fall within the curtilage. This is true even where that part of the driveway is somewhat removed from a public road or street, and its viewing by passersby is only occasional. In order for a part of a driveway to be considered within the home's curtilage, public viewing of it must be, at most, very infrequent. The remoteness of the relevant part of the driveway and steps taken by the resident to discourage public entry or observation can support a finding that it falls within the curtilage.

The part of the driveway not visible from the public street, due in part to the 400-foot length of the driveway and vegetation between it and the street, was not curtilage since there were no erected barriers, no posted signs, and no other action taken to prevent or discourage public entry. Although there were also no signs directing visitors to the motor-repair business located in the garage, patrons were allowed onto the property to drop off and pick up motors.

The 7th and 8th circuits agree (cites omitted).

The 6th circuit agrees, using a somewhat different rationale (cite omitted).

Click [HERE](#) for the court's opinion.

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U.S. v. Amaral-Estrada, 509 F.3d 820, December 5, 2007

A driver who borrows a car with the owner's permission may acquire standing to challenge the search of the vehicle only if he can establish that he has a legitimate expectation of privacy in it or in the area searched.

A person who possesses a car for the purposes of transporting contraband; who expects while using the car that others will enter the vehicle and take and/or leave items therein; who, when asked by federal agents, denies any knowledge of the car and states that he does not care about the bag in the back seat of the car because it

was not his bag and not his car, has no legitimate expectation of privacy in the car or the bag inside the car.

Click [HERE](#) for the court's opinion.

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Screen Doors

U.S. v. Walker, 474 F.3d 1249 (10th Cir.), January 31, 2007

Opening the storm door to knock on the inner door, even though the inner door was partially open, is not a Fourth Amendment intrusion because such action does not violate an occupant's reasonable expectation of privacy.

When the Deputy knocked on the inner door, again announcing that he was from the Sheriff's office, defendant responded, "Yeah, and I got a goddamn gun." This threatening remark justified the officers in taking prompt action to protect themselves. Although retreat was an alternative, it was also reasonable for them to take control of the situation by entering to disarm Mr. Walker, who could otherwise continue to pose a danger to the officers and others.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. Absent an arrest warrant or even probable cause to make an arrest, a protective sweep is not authorized.

Editor's Note: The court remanded the case to the district court to determine whether the "sweep" was lawful under the emergency exigency. If so, the evidence found during the "sweep" that justified the eventual arrest was seized under the "plain view doctrine" and would therefore be admissible.

Click [HERE](#) for the court's opinion.

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Search Warrants

Los Angeles County v. Rettele, 127 S. Ct. 1989, May 21, 2007 ([Supreme Court](#))

Officers who are searching a house where they believe a suspect might be armed possess authority to secure the premises before deciding whether to continue with the search. It is reasonable for officers to take action to secure the premises and to ensure their own safety and the efficiency of the search. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Unknown to the officers, the suspects had moved from and sold the house three months earlier. The occupants were completely innocent of wrongdoing. Clearly,

the officers made an error in the case. However, “[t]he Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty.” Under such standards, mistakes are inevitable. This does not mean that all mistakes are unreasonable. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, the Fourth Amendment is not violated.

Click [HERE](#) for the Court’s opinion.

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U.S. v. Hector, 474 F.3d 1150 (9th Cir.), January 25, 2007

Overruling its prior decisions, the court decides:

The purpose (under F.R.Cr.P. 41(d)) of handing the occupant the warrant, like that of the “knock and announce” rule, is to head off breaches of the peace by dispelling any suspicion that the search is illegitimate.

Failure to serve a copy of the warrant, even if a violation of the Fourth Amendment, does not trigger the exclusionary rule. Given that a valid search warrant entitles the officers to retrieve evidence in the residence, resort to the massive remedy of suppressing evidence of guilt is unjustified.

Click [HERE](#) for the court’s opinion.

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U.S. v. Brakeman, 475 F.3d 1206 (10th Cir.), February 6, 2007

An officer’s personal knowledge cannot be the *sole* means of determining what property is to be searched but it can supplement a technically inaccurate description in a search warrant to cure any ambiguity and satisfy the Fourth Amendment’s particularity requirement.

Click [HERE](#) for the court’s opinion.

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U.S. v. Wiley, 475 F.3d 908 (7th Cir.), February 6, 2007

When an affidavit is based on informant tips, the probable cause inquiry is based on the totality of the circumstances. *See Illinois v. Gates*, 462 U.S. 213 (1983). These four factors are particularly relevant as a part of this inquiry: (1) the extent to which the police have corroborated the informant’s statements; (2) the degree to which the informant has acquired knowledge of the events through firsthand

observation; (3) the amount of detail provided; and (4) the interval between the date of the events and police officer's application for the search warrant.

Probable cause does not require direct evidence linking a crime to a particular place. Issuing judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense. In the case of drug dealers, evidence is often found at their residences. However, there is no categorical rule that would, in every case, uphold a finding of probable cause to search a particular location simply because a suspected drug trafficker resides there.

Click [HERE](#) for the court's opinion.

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U.S. v. Williams, 477 F.3d 554 (8th Cir.), February 13, 2007

An affidavit is not robbed of its probative effect by its failure to mention that the informant "was a paid informant who avoided prosecution by virtue of her testimony...." In fact, a properly developed pay-based incentive system with appropriate consequences for invalid information may even bolster reliability. Omitting the details and existence of the bargaining agreement between the informant and the government is not misleading.

Probable cause is not defeated by a failure to inform the magistrate judge of an informant's criminal history if the informant's information is at least partly corroborated or reliability is established through some other means such as a track record.

Click [HERE](#) for the court's opinion.

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U.S. v. Kattaria, 503 F.3d 703 (8th Cir.), October 05, 2007

Looking at this issue for the first time, the Court decides:

The same Fourth Amendment reasonable suspicion standard that applies to *Terry* investigative stops applies to the issuance of a purely investigative warrant to conduct a limited thermal imaging search from well outside the home. The traditional requirement of probable cause is relaxed by the well-established Fourth Amendment principle that the police may reasonably make a brief and minimally intrusive investigative stop if they have reasonable suspicion that criminal activity may be afoot. Factors justifying application of this standard, rather than probable cause, are "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives." The "practical alternatives" factor provides good reason to shift the analysis when the issue is the

quantum of evidence required to obtain a warrant *solely for the purpose of conducting investigative thermal imaging*. Thermal imaging information provides important corroboration that criminal activity is likely being conducted in a home *before the homeowner is subjected to a full physical search*. If the same probable cause is required to obtain both kinds of warrants, law enforcement will have little incentive to incur the expense of a minimally intrusive thermal imaging search before conducting a highly intrusive physical search.

The 9th Circuit disagrees and requires probable cause for a thermal imaging warrant (cite omitted).

Click [HERE](#) for the court's opinion.

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U.S. v. Mousli, 511 F.3d 7, December 13, 2007

The Fourth Amendment warrant particularity requirement obligates the police to specify the precise unit of a multi-unit dwelling that is the subject of the search. The general rule is that a warrant that authorizes the search of an undisclosed multi-unit dwelling is invalid. There are exceptions to this rule.

The police can validly search a multi-unit dwelling even if the search warrant was only for a single-unit dwelling, provided the police reasonably believed that the dwelling contained only one unit. Search warrants and affidavits should be considered in a common sense manner, and hyper technical readings should be avoided.

Click [HERE](#) for the court's opinion.

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Knock and Announce

U.S. v. Carvajal, 502 F.3d 54 (2nd Cir.), September 05, 2007

In *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), the Supreme Court held that although a police officer's failure to abide by the knock-and-announce rule may violate an individual's right to be free from unreasonable searches under the Fourth Amendment, the exclusionary rule does not apply to evidence discovered in the ensuing search with a warrant. *Hudson* involved state law enforcement officers whose actions were governed solely by the Fourth Amendment and not by 18 U.S.C. § 3109. Because the Fourth Amendment knock-and-announce principle and § 3109 share the same common law roots, overlap in scope, and protect the same interests, the results in terms of the exclusionary rule's application are necessarily similar.

A technical violation by federal officers of the knock-and-announce rule under either the Fourth Amendment or § 3109 cannot form the basis for suppression of evidence.

The facts underlying an alleged violation of § 3109 may form the basis for attacking the propriety of the search as a violation of the Fourth Amendment outside of just the knock and announce context. If such is the case, a cause of action for damages may lie against the federal officer under *Bivens*.

The 5th and D.C. Circuits agree (cites omitted).

Click [HERE](#) for the court's opinion.

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Seizure

Scott v. Harris, 127 S. Ct. 1769, April 30, 2007 ([Supreme Court](#))

A claim of excessive force in the course of making a seizure of a person is properly analyzed under the Fourth Amendment's objective reasonableness standard of *Graham v. Connor*, 490 U. S. 386 (1989).

Tennessee v. Garner, 471 U. S. 1 (1985), did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's reasonableness test to the use of a particular type of force in a particular situation.

Whatever *Garner* said about the factors that might have justified shooting the suspect in that case, such preconditions have scant applicability to this case, which has vastly different facts.

Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable. In determining the reasonableness of a seizure, 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.

In judging whether Scott's actions were reasonable, consider the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the public that Harris posed. It is appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability.

A police officer's attempt to terminate a dangerous high speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

Click [HERE](#) for the court's opinion.

Brendlin v. California, 127 S. Ct. 2400, June 18, 2007 ([Supreme Court](#))

When police stop a vehicle, the driver and passengers are effectively seized, giving the passenger a right to challenge the legality of the stop and the admissibility of evidence discovered as “fruit of the poisonous tree.” No passenger in such a situation would feel free to leave, even after the vehicle came to a full stop. For safety reasons alone, officers would be unlikely to allow the passenger just to walk away even if the offense was a mere traffic violation.

Click [HERE](#) for the Court’s opinion.

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U.S. v. Guerrero, 472 F.3d 784 (10th Cir.), January 2, 2007

If officers merely examine an individual’s driver’s license, a detention has not taken place. When officers retain a driver’s license in the course of questioning, that individual, as a general rule, will not reasonably feel free to terminate the encounter. Handing back defendants’ papers, thanking them for their time, and beginning to walk away are generally sufficient to terminate the detention. Returning a driver’s documentation may not end the detention if there is evidence of a coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled.

A defendant’s consent must be clear, but it need not be verbal. Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer. Non-verbal consent may validly follow a verbal refusal.

Click [HERE](#) for the court’s opinion.

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U.S. v. Crapser, 472 F.3d 1141 (9th Cir.), January 10, 2007

Looking at this issue for the first time, the Court decides:

When a suspect voluntarily opens the door of his residence in response to a non-coercive “knock and talk” request, the police may temporarily seize the suspect outside the home (or at the threshold) provided that they have reasonable suspicion of criminal activity. However, *Terry* does not apply *inside* a home.

Click [HERE](#) for the court’s opinion.

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Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir.), January 16, 2007

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry*.

Click [HERE](#) for the court's opinion.

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U.S. v. Garcia, 474 F.3d 994 (7th Cir.), February 2, 2007

Looking at this issue for the first time, the Court decides:

Placing a GPS (global positioning system) “memory tracking unit” underneath the rear bumper of a car found in a public place is not a Fourth Amendment “seizure” because the device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, and did not alter the car's appearance.

Using the device to track the car in public is not a Fourth Amendment “search” requiring probable cause and a warrant.

The courts of appeals have divided over the question.

The 5th and 9th circuits agree, although the 5th circuit approved of but did not expressly require a showing of reasonable suspicion. (cites omitted).

The 1st, 6th, and 10th circuits call tracking a “search.” The 1st and 6th circuits require probable cause but no warrant. (cites omitted).

Click [HERE](#) for the court's opinion.

Click [HERE](#) for an article on GPS tracking by FLETC LGD Senior Instructor Keith Hodges(written prior to this decision).

U.S. v. Varner, 481 F.3d 569 (8th Cir.), April 04, 2007

Ordinarily, the arrest of a person outside of a residence does not justify a warrantless entry into the residence itself. One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. Even absent an affirmative indication that the arrestee might have a weapon available or might attempt to escape, the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee’s elbow at all times. Additionally, it is not “unreasonable” under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer’s need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested.

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Click [HERE](#) for the court’s opinion.

* * * *

U.S. v. Campbell, 486 F.3d 949 (6th Cir.), May 24, 2007

The Supreme Court has noted that “interrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.” Regarding the statement, “I would *like* to see your ID,” the use of the word “like,” as opposed to “need” or “want,” suggests that a reasonable person would feel free to decline this request and leave the scene. Moreover, this court has previously held that the use of less permissive language by police officers than the phrase “I’d like to see some ID” does not constitute a seizure. A person walking down the street is not detained when an officer driving in a marked police

car yells, “Hey, buddy, come here.” Such a statement is a request rather than an order.

Click [HERE](#) for the court’s opinion.

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U.S. v. Virden, 488 F.3d 1317, June 12, 2007

The factors used to determine whether a *Terry* stop has matured into an arrest are also useful in evaluating whether a seizure of property required probable cause. The non-exclusive factors are: [1] the law enforcement purposes served by the detention, [2] the diligence with which the police pursue the investigation, [3] the scope and intrusiveness of the detention, and [4] the duration of the detention. Moving a vehicle to a new location for the purposes of investigation constitutes a seizure for which probable cause was required.

Click [HERE](#) for the court’s opinion.

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U.S. v. Proctor, 489 F.3d 1348 (D.C. Cir.), June 19, 2007

Vehicle impoundment conducted without a search warrant is *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions. One exception is the “community caretaking” exception. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

If a standard impoundment procedure exists, a police officer’s failure to adhere to it is unreasonable and violates the Fourth Amendment. The Fourth Amendment requires that an inventory search be reasonable and, if a standard procedure for conducting an inventory search is in effect, it must be followed. If the seizure of the car was unconstitutional, the materials later recovered during the inventory search are excluded.

The Supreme Court has only suggested that a reasonable, standard police procedure must govern the decision to impound. The 7th and 8th Circuits have held that the decision to impound must be made pursuant to a standard procedure. The 1st Circuit does not require that an impoundment be governed by standard police procedure.

Click [HERE](#) for the court’s opinion.

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U.S. v. Teleguz, (no cite found), July 24, 2007

When a driver heeds a police order to stop only to drive away as the police approach the vehicle, the driver has not been seized within the meaning of the Fourth Amendment. A “seizure” requires submission to police authority. The driver’s initial fleeting stop does not amount to such submission.

Click [HERE](#) for the court’s opinion.

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U.S. v. Grigg, 498 F.3d 1070 (9th Cir.), August 22, 2007

Looking at this issue for the first time, the Court decides:

There is no *per se* rule that police may not conduct a *Terry* stop to investigate a person in connection with a past, completed misdemeanor simply because it was a misdemeanor. The reasonableness of a *Terry* stop regarding a completed misdemeanor depends upon the nature of the misdemeanor offense, with particular attention to the potential for ongoing or repeated danger (*e.g.*, drunken and/or reckless driving), and any risk of escalation (*e.g.*, disorderly conduct, assault, domestic violence). A *Terry* stop based on a completed misdemeanor is unreasonable when, within the totality of the circumstances, there is no public safety risk, and when alternative means to identify the suspect or achieve the investigative purpose of the stop are possible.

The 6th Circuit, the only other circuit to have ruled on this issue, prohibits *Terry* stops based upon completed misdemeanors (cite omitted).

Click [HERE](#) for the court’s opinion.

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U.S. v. Oscar-Torres, 507 F.3d 224, November 08, 2007

Looking at this issue for the first time, the Court decides:

In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court’s held that

The “body” or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.

That holding does not establish a broad rule that evidence of a defendant’s identity (in this case, fingerprints) can never be suppressed. It simply means that illegal police activity does not affect the jurisdiction of the trial court or otherwise serve as

a basis for dismissing the prosecution. *Lopez-Mendoza* does not prohibit suppression of identity-related *evidence in criminal proceedings*.

The 8th and 10th Circuits agree (cites omitted).

The 3rd, 5th, and 6th Circuits disagree (cites omitted).

The 9th Circuit has reached inconsistent results (cites omitted).

Identity evidence such as fingerprints and records are not automatically suppressible simply because they would not have been obtained *but for* illegal police activity. Rather, this evidence is suppressible only if obtained by “*exploitation*” of the initial police illegality. Police may not forcibly transport an individual to a police station and detain him to obtain his fingerprints for “investigative” purposes without probable cause. When police officers use an illegal arrest as an investigatory device in a criminal case “for the purpose of obtaining fingerprints without a warrant or probable cause,” then the fingerprints are inadmissible under the exclusionary rule as “fruit of the illegal detention.” But when fingerprints are “administratively taken . . . for the purpose of simply ascertaining . . . the identity” or immigration status of the person arrested, they are “sufficiently unrelated to the unlawful arrest that they are not suppressible.” Fingerprints obtained for *administrative* purposes, and intended for use in an *administrative* process — like deportation — may escape suppression. An alien’s fingerprints taken as part of routine booking procedures but intended to provide evidence for a criminal prosecution are still *motivated* by an investigative, rather than an administrative, purpose. Such fingerprints are, accordingly, subject to exclusion.

The 8th, 9th, and 10th Circuits agree (cites omitted).

Click [HERE](#) for the court’s opinion.

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Use of Force

Scott v. Harris, 127 S. Ct. 1769, April 30, 2007 ([Supreme Court](#))

A claim of excessive force in the course of making a seizure of a person is properly analyzed under the Fourth Amendment’s objective reasonableness standard of *Graham v. Connor*, 490 U. S. 386 (1989).

Tennessee v. Garner, 471 U. S. 1 (1985), did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute “deadly force.” *Garner* was simply an application of the Fourth Amendment’s reasonableness test to the use of a particular type of force in a particular situation.

Whatever *Garner* said about the factors that might have justified shooting the suspect in that case, such preconditions have scant applicability to this case, which has vastly different facts.

Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

In determining the reasonableness of a seizure, 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.

In judging whether Scott's actions were reasonable, consider the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the public that Harris posed. It is appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability.

A police officer's attempt to terminate a dangerous high speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

Click [HERE](#) for the court's opinion.

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Livermore v. Lubelan, 476 F.3d 397 (6th Cir.), February 7, 2007

In the excessive force context, it is not enough that a plaintiff establishes that the defendant's use of force was excessive under the Fourth Amendment. To defeat qualified immunity, the plaintiff must show that the defendant had notice that the manner in which the force was used had been previously proscribed.

The ultimate inquiry is "whether the totality of the circumstances justifies a particular sort of seizure." Three factors (not an exhaustive list) are considered in determining the reasonableness of force used: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the police officers or others; and (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight.

Even when the particular seizure is reasonable, liability exists if the defendant police officers acted recklessly in creating the circumstances which required the use of deadly force.

Click [HERE](#) for the court's opinion.

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Velazquez v. City of Hialeah, 484 F.3d 1340 (11th Cir.), April 20, 2007

An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for failing to intervene though he administered no blow. It is not necessary that the victim be able to identify which of the officers used excessive force. Where the law prohibits both the beating and the failure to intervene, the testimony of the victim that he was beaten after being handcuffed and that two officers were present supports the inference that one or more of the officers present beat him and that if one did not beat him, then he failed to intervene in the beating.

Click [HERE](#) for the court's opinion.

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Traffic Stops

Brendlin v. California, 127 S. Ct. 2400, June 18, 2007 ([Supreme Court](#))

When police stop a vehicle, the driver and passengers are effectively seized, giving the passenger a right to challenge the legality of the stop and the admissibility of evidence discovered as "fruit of the poisonous tree." No passenger in such a situation would feel free to leave, even after the vehicle came to a full stop. For safety reasons alone, officers would be unlikely to allow the passenger just to walk away even if the offense was a mere traffic violation.

Click [HERE](#) for the Court's opinion.

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U.S. v. Guerrero, 472 F.3d 784 (10th Cir.), January 2, 2007

If officers merely examine an individual's driver's license, a detention has not taken place. When officers retain a driver's license in the course of questioning, that individual, as a general rule, will not reasonably feel free to terminate the encounter. Handing back defendants' papers, thanking them for their time, and beginning to walk away are generally sufficient to terminate the detention. Returning a driver's documentation may not end the detention if there is evidence of a coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled.

A defendant's consent must be clear, but it need not be verbal. Consent may instead be granted through gestures or other indications of acquiescence, so long as they are

sufficiently comprehensible to a reasonable officer. Non-verbal consent may validly follow a verbal refusal.

Click [HERE](#) for the court's opinion.

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U.S. v. Herrera-Gonzalez, 474 F.3d 1105 (8th Cir.), January 26, 2007

A traffic stop is reasonable under the Fourth Amendment if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred. Even if the officer was mistaken in concluding that a traffic violation occurred, the stop does not violate the Fourth Amendment if the mistake was an “objectively reasonable” one.

Even if a traffic stop is determined to be invalid, subsequent voluntary consent to a search may purge the taint of the illegal stop if it was given in circumstances that render it an independent, lawful cause of the officer's discovery. To determine whether sufficient attenuation between the unlawful stop and the consent exists, consider the following factors: (1) the amount of time between the illegal stop and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

Click [HERE](#) for the court's opinion.

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*****The Court has vacated and withdrawn the October 30, 2006, decision in the *U.S. v. Mendez* case originally summarized in 11 Informer 06.*****

In that decision, the Court had ruled essentially that during a traffic stop, police needed particularized, reasonable suspicion to expand questioning beyond the scope of the traffic stop. A police officer may only “ask questions that are reasonably related in scope to the justification for his initiation of contact” and may expand the scope of questioning beyond the initial purpose of the stop only if he “articulate[s] suspicious factors that are particularized and objective.

U.S. v. Mendez, 476 F.3d 1077 (9th Cir.), February 23, 2007

The Court now holds that based on the U.S. Supreme Court's holding in *Muehler v. Mena*, 544 U.S. 93 (2005), because the officers' questioning did not prolong the stop, the expanded questioning did not have to be supported by separate reasonable suspicion for purposes of the Fourth Amendment.

Click [HERE](#) for the court's opinion.

US v. Meredith, 480 F.3d 366 (5th Cir.), February 26, 2007

After ordering an occupant to exit a vehicle and hearing that he claims to be physically unable to do so, an officer may open the occupant's door and conduct a minimally necessary visual inspection of the person of that occupant. Further, if this inspection reveals articulable facts constituting reasonable suspicion that the occupant is armed and dangerous, he may be patted down to the same extent as he could have been if he had complied with the order to exit the vehicle. Officers need no suspicion to order the occupants to step out of the car. Likewise, officers need no suspicion to open the door and perform a brief visual check of the disabled occupant.

Click [HERE](#) for the court's opinion.

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Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir.), March 7, 2007

Title II of the Americans with Disabilities Act and the Department of Justice implementing regulations do not require police to wait for an oral interpreter before taking field sobriety tests on a profoundly deaf subject. Such is not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity.

Click [HERE](#) for the court's opinion.

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U.S. v. Proctor, 489 F.3d 1348 (D.C. Cir.), June 19, 2007

Vehicle impoundment conducted without a search warrant is *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions. One exception is the "community caretaking" exception. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

If a standard impoundment procedure exists, a police officer's failure to adhere to it is unreasonable and violates the Fourth Amendment. The Fourth Amendment requires that an inventory search be reasonable and, if a standard procedure for conducting an inventory search is in effect, it must be followed. If the seizure of the car was unconstitutional, the materials later recovered during the inventory search are excluded.

The Supreme Court has only suggested that a reasonable, standard police procedure must govern the decision to impound. The 7th and 8th Circuits have held that the decision to impound must be made pursuant to a standard procedure. The

1st Circuit does not require that an impoundment be governed by standard police procedure.

Click [HERE](#) for the court's opinion.

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U.S. v. Soriano-Jarquin, 492 F.3d 495 (4th Cir.), July 11, 2007

A simple request for identification from passengers falls within the purview of a lawful traffic stop and does not constitute a separate Fourth Amendment event. Just as the officer may ask for the identification of the driver of a lawfully stopped vehicle, so he may request identification of the passengers also lawfully stopped. No separate showing is required. Officers performing a lawful stop are authorized to take such steps as are reasonably necessary to protect their personal safety thereafter. When an officer legitimately stops a vehicle, the identity of the persons in whose company the officer suddenly finds himself may be pertinent to the officer's well-being.

The 8th and 11th Circuits agree (cites omitted).

Click [HERE](#) for the court's opinion.

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U.S. v. Teleguz, (no cite found), July 24, 2007

When a driver heeds a police order to stop only to drive away as the police approach the vehicle, the driver has not been seized within the meaning of the Fourth Amendment. A "seizure" requires submission to police authority. The driver's initial fleeting stop does not amount to such submission.

Click [HERE](#) for the court's opinion.

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U.S. v. Booker, 496 F.3d 717 (D.C. Cir.), August 10, 2007

Traffic stops premised on mistakes of fact are constitutional so long as the mistake is objectively reasonable. Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional. Even when the articulated basis for the stop is a mistake of law, the stop is lawful if an objectively valid basis for the stop nonetheless exists. The officer's "subjective reason for making the arrest" need not be the criminal offense as to which the known facts provide probable cause.

Click [HERE](#) for the court's opinion.

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Arrest Warrants

U.S. v. Diaz, 491 F.3d 1074 (9th Cir.), June 22, 2007

An arrest warrant gives government agents limited authority to enter a suspect's home to arrest him if they have "reason to believe" he is inside. The phrase "reason to believe" is interchangeable with and conceptually identical to the phrases "reasonable belief" and "reasonable grounds for believing." Use the same standard of reasonableness inherent in probable cause to decide whether there is reason to believe a suspect is at a particular place. Probable cause means a "fair probability" based on the totality of circumstances. A common-sense analysis of the "totality of the circumstances" is therefore crucial in deciding whether an officer has a reason to believe a suspect is home.

Reasonable belief can exist even when police have no specific evidence that the suspect is present at that particular time. Direct evidence is not necessary. People draw "reasonable" conclusions all the time without direct evidence. Likewise, a probable cause determination can be supported entirely by circumstantial evidence. If juries can find someone guilty beyond a reasonable doubt without direct evidence, and magistrates can issue search warrants without direct evidence, police surely can reasonably believe someone is home without direct evidence.

Click [HERE](#) for the court's opinion.

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Protective Sweeps

Los Angeles County v. Rettele, 127 S. Ct. 1989, May 21, 2007 ([Supreme Court](#))

Officers who are searching a house where they believe a suspect might be armed possess authority to secure the premises before deciding whether to continue with the search. It is reasonable for officers to take action to secure the premises and to ensure their own safety and the efficiency of the search. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Unknown to the officers, the suspects had moved from and sold the house three months earlier. The occupants were completely innocent of wrongdoing. Clearly, the officers made an error in the case. However, "[t]he Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty." Under such standards, mistakes are inevitable. This does not mean that all mistakes are unreasonable. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, the Fourth Amendment is not violated.

Click [HERE](#) for the Court's opinion.

U.S. v. Stover, 474 F.3d 904 (6th Cir.), January 30, 2007

Officers with an arrest warrant and reason to believe that the suspect is inside the house may enter and search anywhere that the suspect might reasonably be found. Once a suspect is found, the arrest warrant does not justify a more intrusive search of the premises. Generally, the government may not search an individual’s home without the individual’s consent or a search warrant. A limited exception to this general rule authorizes officers making arrests in the home to conduct a “protective sweep”—a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of the police officers and others. The fact that police identified a car registered to a local criminal who did not live at defendant’s address is sufficient to justify a quick and limited protective sweep. Even though defendant lived in a duplex, the criminal who owned the car in defendant’s driveway was as likely to be visiting defendant as he was to be visiting defendant’s neighbor. This probability is sufficient to justify a protective sweep.

Click [HERE](#) for the court’s opinion.

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U.S. v. Walker, 474 F.3d 1249 (10th Cir.), January 31, 2007

Opening the storm door to knock on the inner door, even though the inner door was partially open, is not a Fourth Amendment intrusion because such action does not violate an occupant’s reasonable expectation of privacy.

When the Deputy knocked on the inner door, again announcing that he was from the Sheriff’s office, defendant responded, “Yeah, and I got a goddamn gun.” This threatening remark justified the officers in taking prompt action to protect themselves. Although retreat was an alternative, it was also reasonable for them to take control of the situation by entering to disarm Mr. Walker, who could otherwise continue to pose a danger to the officers and others.

A “protective sweep” is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. Absent an arrest warrant or even probable cause to make an arrest, a protective sweep is not authorized.

Editor’s Note: The court remanded the case to the district court to determine whether the “sweep” was lawful under the emergency exigency. If so, the evidence found during the “sweep” that justified the eventual arrest was seized under the “plain view doctrine” and would therefore be admissible.

Click [HERE](#) for the court’s opinion.

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U.S. v. Varner, 481 F.3d 569 (8th Cir.), April 04, 2007

Ordinarily, the arrest of a person outside of a residence does not justify a warrantless entry into the residence itself. One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. Even absent an affirmative indication that the arrestee might have a weapon available or might attempt to escape, the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee’s elbow at all times. Additionally, it is not “unreasonable” under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer’s need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested.

Click [HERE](#) for the court’s opinion.

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U.S. v. Nascimento, 491 F.3d 25 (1st Cir.), July 02, 2007

When police arrest a partially clothed individual charged with a crime of violence in his home, the need to dress him may constitute an exigency justifying the officers in entering another room in order to obtain needed clothing. When the police neither manipulate nor use the situation as a pretext to carry out an otherwise impermissible search, the conduct of the police in deciding to dress the suspect is reasonable. Common sense and practical considerations must guide judgments about the reasonableness of searches and seizures. A cabinet eight to ten feet away from an unrestrained suspect can be said to be within the suspect’s immediate control and subject to search incident to arrest.

Click [HERE](#) for the court’s opinion.

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SIA

U.S. v. Finley, 477 F.3d 250 (5th Cir.), January 26, 2007

The permissible scope of a search incident to lawful arrest includes looking for and seizing evidence of the arrestee’s crime on his person to preserve it for trial, and this extends to containers found on the arrestee’s person. Specifically, searching the cell phone logs and both the out-going and in-coming text messages was lawfully done as part of a search incident to arrest.

Click [HERE](#) for the court’s opinion.

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*****The Court has vacated and reversed the June 23, 2006, decision in the *U.S. v. Powell* case originally summarized in QR-7-4.*****

In that decision, the Court had ruled that the police may not conduct a warrantless search of the passenger compartment of a car incident to arrest before informing an occupant of the car that he was under arrest (formal arrest) or restraining his movement in a manner that would lead a reasonable person in his position to believe he was under arrest (custodial arrest).

U.S. v. Powell, 483 F.3d 836 (D.C. Cir.), April 17, 2007

The Court now holds that based on the U.S. Supreme Court's holding in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), police may conduct a search incident to arrest of a suspect whom they have probable cause to arrest if the formal arrest follows quickly on the heels of the challenged search. In *Rawlings* the Supreme Court was quite clear in stating that, assuming such proximity in time, it is not particularly important that the search preceded the arrest rather than vice versa.

The lawfulness of a search incident to arrest that precedes formal arrest does not require that the subject be in custodial arrest at the time of the search.

Probable cause to arrest is by itself insufficient to support this exception to the warrant requirement. Rather, it is the fact of the arrest that makes all the difference.

The 1st, 2nd, 4th, 5th, 6th, 8th, and 11th Circuits agree. (cites omitted).

The 7th Circuit disagrees. (cite omitted)

Click [HERE](#) for the court's opinion.

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Campbell v. Miller, 486 F.3d 949 (7th Cir.), August 28, 2007

To be reasonable as part of a search incident to arrest, strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons. The manner of the search, including the place in which it is conducted, must also be reasonable. Absent the most compelling circumstances, such as those that pose potentially serious risks to the arresting officer or others in the vicinity, it is unreasonable to conduct a strip search in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search.

Click [HERE](#) for the court's opinion.

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U.S. v. Grooms, 506 F.3d 1088, November 06, 2007

A search incident to arrest need not be conducted immediately upon the heels of the arrest, but sometimes may be conducted well after the arrest, so long as it occurs during a continuous sequence of events (search of a car one hour after the arrest (cite omitted)).

A person's classification as a "recent occupant" of a car may depend on his spatial and temporal relationship to the car at the time of arrest and search; however, it does not turn on whether he was inside or outside the car at the moment the officer first initiated contact. *Grooms* was arrested near the car he had exited some time before. Searching the car eight minutes after the arrest is sufficiently contemporaneous to be incident to the arrest. Eight minutes is not a long period of time, and some of the delay can be attributed to *Grooms*' attempts to offer explanations for his prior criminal conviction, for his return to the pub, and for his possession of the two gun cases subsequently seized.

Click [HERE](#) for the court's opinion.

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Knock and Talk

U.S. v. Crapser, 472 F.3d 1141 (9th Cir.), January 10, 2007

Looking at this issue for the first time, the Court decides:

When a suspect voluntarily opens the door of his residence in response to a non-coercive "knock and talk" request, the police may temporarily seize the suspect outside the home (or at the threshold) provided that they have reasonable suspicion of criminal activity. However, *Terry* does not apply *inside* a home.

Click [HERE](#) for the court's opinion.

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U.S. v. Gomez-Moreno, 479 F.3d 350 (5th Cir.), February 12, 2007

Exigent circumstances may not consist of the likely consequences of the government's own actions or inactions. In determining whether officers create an exigency, this Court focuses on the "reasonableness of the officers' investigative tactics leading up to the warrantless entry."

A "knock and talk" strategy is reasonable where the officers who approached the house are not convinced that criminal activity is taking place or have any reason to believe the occupants are armed.

Creating a show of force and demanding entry into a home without a warrant, goes beyond the reasonable “knock and talk” strategy of investigation and unreasonably creates the exigency.

Click [HERE](#) for the court’s opinion.

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RS / PC

U.S. v. Ramirez, 473 F.3d 1026 (9th Cir.), January 16, 2007

The “collective knowledge doctrine” applies so that when an officer (or team of officers), with direct personal knowledge of *all* the facts necessary to give rise to reasonable suspicion or probable cause, directs or requests that another officer, not previously involved in the investigation, conduct a stop, search, or arrest, that other officer may do so without violating the Fourth Amendment. When one officer directs another to take some action, there is necessarily a “communication” between those officers, and they are necessarily functioning as a team. The “collective knowledge doctrine” includes no requirement regarding the *content* of the communication that one officer must make to another.

The 3rd, 5th, and 7th Circuits agree. (cites omitted).

Click [HERE](#) for the court’s opinion.

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U.S. v. Wiley, 475 F.3d 908 (7th Cir.), February 6, 2007

When an affidavit is based on informant tips, the probable cause inquiry is based on the totality of the circumstances. *See Illinois v. Gates*, 462 U.S. 213 (1983). These four factors are particularly relevant as a part of this inquiry: (1) the extent to which the police have corroborated the informant’s statements; (2) the degree to which the informant has acquired knowledge of the events through firsthand observation; (3) the amount of detail provided; and (4) the interval between the date of the events and police officer’s application for the search warrant.

Probable cause does not require direct evidence linking a crime to a particular place. Issuing judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense. In the case of drug dealers, evidence is often found at their residences. However, there is no categorical rule that would, in every case, uphold a finding of probable cause to search a particular location simply because a suspected drug trafficker resides there.

Click [HERE](#) for the court’s opinion.

U.S. v. Williams, 477 F.3d 554 (8th Cir.), February 13, 2007

An affidavit is not robbed of its probative effect by its failure to mention that the informant “was a paid informant who avoided prosecution by virtue of her testimony....” In fact, a properly developed pay-based incentive system with appropriate consequences for invalid information may even bolster reliability. Omitting the details and existence of the bargaining agreement between the informant and the government is not misleading.

Probable cause is not defeated by a failure to inform the magistrate judge of an informant’s criminal history if the informant’s information is at least partly corroborated or reliability is established through some other means such as a track record.

Click [HERE](#) for the court’s opinion.

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U.S. v. Laville, 480 F.3d 187 (3rd Cir.), March 16, 2007

State or local law does not dictate the reasonableness of an arrest for purposes of a Fourth Amendment probable cause analysis. A violation of state or local law is not a *per se* violation of the Fourth Amendment. Rather, notwithstanding the validity of the arrest under state or local law, probable cause exists when the totality of the circumstances within an officer’s knowledge is sufficient to warrant a person of reasonable caution to conclude that the person being arrested has committed or is committing an offense.

The validity of an arrest under state law must never be confused or conflated with the Fourth Amendment concept of reasonableness. The validity of an arrest under state law is at most a factor that a court may consider in assessing the broader question of probable cause.

Click [HERE](#) for the court’s opinion.

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U.S. v. Ellis, 499 F.3d 686 (7th Cir.), August 27, 2007

Under the “collective knowledge doctrine,” the knowledge of one police officer is imputed to other officers when they are in communication regarding a suspect. This doctrine permits arresting officers to rely on the knowledge of other officers, but not necessarily the conclusions, such as whether probable cause exists. An officer need not be personally aware of all of the specific facts supporting probable case, so long as an officer who is aware of such facts relays them to the other officer.

During a “knock and talk” investigation of drug activity, the perception of movement within the house by police, without more, does not create exigent circumstances. To support an exigent circumstance allowing entry without a warrant, police must differentiate the perceived movement from the reasonable type of movement that would be found in any home where there was a knock on the door.

Click [HERE](#) for the court’s opinion.

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U.S. v. Barnes, 506 F.3d 58, October 29, 2007

Reasonable suspicion or even probable cause can be established by the “collective knowledge” or “pooled knowledge” principle. Specifically, reasonable suspicion can be imputed to the officer conducting a search if he acts in accordance with the direction of another officer who has reasonable suspicion.

Click [HERE](#) for the court’s opinion.

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U.S. v. Kattaria, 503 F.3d 703 (8th Cir.), October 05, 2007

Looking at this issue for the first time, the Court decides:

The same Fourth Amendment reasonable suspicion standard that applies to *Terry* investigative stops applies to the issuance of a purely investigative warrant to conduct a limited thermal imaging search from well outside the home. The traditional requirement of probable cause is relaxed by the well-established Fourth Amendment principle that the police may reasonably make a brief and minimally intrusive investigative stop if they have reasonable suspicion that criminal activity may be afoot. Factors justifying application of this standard, rather than probable cause, are “the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives.” The “practical alternatives” factor provides good reason to shift the analysis when the issue is the quantum of evidence required to obtain a warrant *solely for the purpose of conducting investigative thermal imaging*. Thermal imaging information provides important corroboration that criminal activity is likely being conducted in a home *before the homeowner is subjected to a full physical search*. If the same probable cause is required to obtain both kinds of warrants, law enforcement will have little incentive to incur the expense of a minimally intrusive thermal imaging search before conducting a highly intrusive physical search.

The 9th Circuit disagrees and requires probable cause for a thermal imaging warrant (cite omitted).

Click [HERE](#) for the court’s opinion.

Exigency

Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir.), January 16, 2007

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry*.

Click [HERE](#) for the court's opinion.

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U.S. v. Walker, 474 F.3d 1249 (10th Cir.), January 31, 2007

Opening the storm door to knock on the inner door, even though the inner door was partially open, is not a Fourth Amendment intrusion because such action does not violate an occupant's reasonable expectation of privacy.

When the Deputy knocked on the inner door, again announcing that he was from the Sheriff's office, defendant responded, "Yeah, and I got a goddamn gun." This threatening remark justified the officers in taking prompt action to protect themselves. Although retreat was an alternative, it was also reasonable for them to take control of the situation by entering to disarm Mr. Walker, who could otherwise continue to pose a danger to the officers and others.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. Absent an arrest warrant or even probable cause to make an arrest, a protective sweep is not authorized.

Editor's Note: The court remanded the case to the district court to determine whether the "sweep" was lawful under the emergency exigency. If so, the evidence found during the "sweep" that justified the eventual arrest was seized under the "plain view doctrine" and would therefore be admissible.

Click [HERE](#) for the court's opinion.

U.S. v. Gomez-Moreno, 479 F.3d 350 (5th Cir.), February 12, 2007

Exigent circumstances may not consist of the likely consequences of the government’s own actions or inactions. In determining whether officers create an exigency, this Court focuses on the “reasonableness of the officers’ investigative tactics leading up to the warrantless entry.”

A “knock and talk” strategy is reasonable where the officers who approached the house are not convinced that criminal activity is taking place or have any reason to believe the occupants are armed.

Creating a show of force and demanding entry into a home without a warrant, goes beyond the reasonable “knock and talk” strategy of investigation and unreasonably creates the exigency.

Click [HERE](#) for the court’s opinion.

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U.S. v. Ellis, 499 F.3d 686 (7th Cir.), August 27, 2007

During a “knock and talk” investigation of drug activity, the perception of movement within the house by police, without more, does not create exigent circumstances. To support an exigent circumstance allowing entry without a warrant, police must differentiate the perceived movement from the reasonable type of movement that would be found in any home where there was a knock on the door.

Click [HERE](#) for the court’s opinion.

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U.S. v. Collins, 510 F.3d 697, December 14, 2007

If police have probable cause to believe that evidence is being destroyed within a house (an emergency situation), then they can enter immediately without a warrant and without knocking. If they do not have such probable cause, they have to get a warrant.

There is a sense in which any time police knock and announce their presence and the occupants respond in a suspicious manner (such as running feet), the police can be regarded as the “manufacturers” of the emergency that they then use to justify their warrantless barging in and searching the house and arresting the occupants. However, that would not justify suppression of the evidence found in the search. The conduct of the police would be a “but for” cause (that is, a necessary condition) of the emergency, but it would not be culpable. They would be doing nothing wrong because there is no legal requirement of obtaining a warrant to knock on someone’s

door. For that matter there is nothing to forbid the police to lug the battering ram with them in open view, anticipating the worst. But the risk they take in proceeding in such a fashion is that the emergency will not materialize— that the occupant of the house will calmly open the door and ask to see their warrant—that there will be no sounds or sights signifying that evidence is about to be destroyed. The further risk is that no one will answer the knock and the government will be unable to prove that the police knew the house was occupied.

Click [HERE](#) for the court’s opinion.

* * * *

Consent

U.S. v. Guerrero, 472 F.3d 784 (10th Cir.), January 2, 2007

If officers merely examine an individual’s driver’s license, a detention has not taken place. When officers retain a driver’s license in the course of questioning, that individual, as a general rule, will not reasonably feel free to terminate the encounter. Handing back defendants’ papers, thanking them for their time, and beginning to walk away are generally sufficient to terminate the detention. Returning a driver’s documentation may not end the detention if there is evidence of a coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled.

A defendant’s consent must be clear, but it need not be verbal. Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer. Non-verbal consent may validly follow a verbal refusal.

Click [HERE](#) for the court’s opinion.

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U.S. v. Wilburn, 473 F.3d 742 (7th Cir.), January 11, 2007

Police may not remove a potentially objecting tenant in order to avoid a refusal when obtaining valid consent to search the apartment from a co-tenant. Absent other, additional evidence, legitimately arresting the defendant and placing him in the patrol vehicle is not purposefully removing him to avoid a refusal.

Click [HERE](#) for the court’s opinion.

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U.S. v. Renken, 474 F.3d 984 (7th Cir.), January 31, 2007

Consent to search can be voluntary even when given while a defendant is in custody without having received *Miranda* warnings. Custody alone has never been enough in itself to demonstrate a coerced confession or consent to search.

Under *United States v. Patane*, 124 S. Ct. 2620, 2629 (2004), the failure to give *Miranda* warnings does not require the exclusion of real evidence collected after a defendant gives a voluntary consent to search. Instead, the “totality of the circumstances” analysis applies.

Click [HERE](#) for the court’s opinion.

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U.S. v. Herrera-Gonzalez, 474 F.3d 1105 (8th Cir.), January 26, 2007

A traffic stop is reasonable under the Fourth Amendment if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred. Even if the officer was mistaken in concluding that a traffic violation occurred, the stop does not violate the Fourth Amendment if the mistake was an “objectively reasonable” one.

Even if a traffic stop is determined to be invalid, subsequent voluntary consent to a search may purge the taint of the illegal stop if it was given in circumstances that render it an independent, lawful cause of the officer’s discovery. To determine whether sufficient attenuation between the unlawful stop and the consent exists, consider the following factors: (1) the amount of time between the illegal stop and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

Click [HERE](#) for the court’s opinion.

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U.S. v. Ferrer-Montoya, 483 F.3d 565 (8th Cir.), April 19, 2007

The scope of a search is generally defined by its expressed object. An officer may reasonably interpret a suspect’s unqualified consent to search a vehicle for drugs to include consent to search containers within that car which might bear drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive manner. A trained dog’s failure to alert may reduce the likelihood that a particular vehicle contains narcotics, but it has no bearing upon what a typical reasonable person would have understood by the exchange between the officer and the suspect in the initial grant of consent to a search.

A suspect invokes his right to remain silent under *Miranda* by making a clear, consistent expression of a desire to remain silent. Indirect, ambiguous, and equivocal statements or assertions of an intent to exercise the right to remain silent are not enough. Being evasive and reluctant to talk is different from invoking one's right to remain silent.

Click [HERE](#) for the court's opinion.

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U.S. v. Andrus, 483 F.3d 711 (10th Cir.), April 25, 2007

The location of the computer within the house and other indicia of household members' access to the computer are important in assessing a third party's apparent authority to consent to the search of a home computer. Third party apparent authority to consent has generally been upheld when the computer is located in a common area of the home that is accessible to other family members under circumstances indicating the other family members were not excluded from using the computer.

Another critical issue is whether law enforcement knows or should reasonably suspect because of surrounding circumstances that the computer is password protected.

If the circumstances reasonably indicate mutual use of or control over the computer, officers are under no obligation to ask clarifying questions about password protection even if the burden would be minimal. Officers are not obligated to ask questions unless the circumstances are ambiguous.

Click [HERE](#) for the court's opinion.

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U.S. v. McKerrell, 491 F.3d 1221 (10th Cir.), July 05, 2007

Barricading oneself in one's home to avoid arrest on a warrant is not the functional equivalent of an express refusal of consent to search the home. Evidence that the police removed the potentially objecting tenant from the scene to avoid his or her objection may render a subsequent consent search unconstitutional. The bare fact of the arrest and transport to the police station does not support a conclusion that police removed the arrestee to mute a potential objection to a search. A co-tenant's consent to search a shared residence is valid as against the absent, nonconsenting tenant.

Click [HERE](#) for the court's opinion.

Callahan v. Millard County, 494 F.3d 891 (10th Cir.), July 16, 2007

The “consent-once-removed” doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. There is no constitutional distinction between an entry or search by an individual police officer and an entry or search by several police officers.

The 6th, 7th, and 9th Circuits agree (cites omitted).

The “consent-once-removed” doctrine does not apply when an informant is invited into a house who then in turn invites the police. In this context, the person with authority to consent never consented to the entry of police into the house.

The 6th and 7th Circuits disagree and have broadened the doctrine to grant informants the same capabilities as undercover officers (cites omitted).

Click [HERE](#) for the court’s opinion.

* * * *

Moore v. Andreno, 505 F.3d 203 (2nd Cir.), October 22, 2007

A third party has authority to consent to a search of a home when that person(1) has access to the area searched and (2) has either (a) common authority over the area, (b) a substantial interest in the area, or (c) permission to gain access to the area. A third party who has been told not to enter a room, who has been prevented from entry by padlocks, who has gained entry only by cutting the locks with bolt cutters, and who has made these facts known to the officers, has neither actual nor apparent authority to grant consent. Such entry violates the Fourth Amendment.

Because the court has never adequately defined the meaning of “access” or how “substantial” an interest must be over an area to vest a third party with authority to consent, the law governing the authority of a third party to consent to the search of an area under the predominant control of another is unsettled. Therefore, the officers are entitled to qualified immunity.

Click [HERE](#) for the court’s opinion.

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Inspections

U.S. v. Abbouchi, 494 F.3d 825 (9th Cir.), July 13, 2007

Border searches of persons and property entering and exiting the United States are reasonable simply by virtue of the fact that they occur at the border. These searches may take place at the physical border or its “functional equivalent.” “Extended

border searches” are typically separated by a greater distance and time from the actual border than searches at the functional equivalent of the border. Extended border searches necessarily entail a greater level of intrusion on legitimate expectations of privacy than an ordinary border search because of their delayed nature. The government must justify them with reasonable suspicion that the search may uncover contraband or evidence of criminal activity.

When a UPS sorting hub represents the last practicable opportunity for Customs officers to inspect international packages before UPS places them into sealed containers for departure from the United States, the search takes place at the functional equivalent of the border, even if the airplanes briefly stop at another hub or airport to refuel or redistribute cargo before departing our country. Such searches require no level of articulable suspicion to be reasonable.

Social security cards are “identification documents” within the meaning of 18 U.S.C. § 1028(a)(2).

The 4th Circuit agrees (cite omitted).

Click [HERE](#) for the court’s opinion.

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U.S. v. Aukai, 497 F.3d 955 (9th Cir.), August 10, 2007

The constitutionality of an airport screening search does not depend on either ongoing consent or irrevocable implied consent. Allowing a potential passenger to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by “electing not to fly” on the cusp of detection until a vulnerable portal is found. This rule would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks. Where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, 49 U.S.C. § 44901, all that is required is the passenger’s election to attempt entry into the secured area of an airport.

Click [HERE](#) for the court’s opinion.

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Bruce v. Beary, 498 F.3d 1232 (11th Cir.), September 06, 2007

Administrative searches are an exception to the Fourth Amendment’s warrant requirement and do not violate the Constitution simply because of the existence of specific suspicion of criminal wrongdoing. But, they are not an exception to the

Fourth Amendment's requirement for reasonableness. The scope and execution of an administrative inspection must be reasonable in order to be constitutional. To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it.

Absent evidence of any reason to believe that the inspection would be met with resistance or defiance, an administrative search is unreasonable when a group of approximately twenty officers armed with Glock 21 sidearms, some carrying Bennelli automatic shotguns, some dressed in SWAT uniforms - ballistic vests imprinted with SWAT in big letters, camouflage pants, and black boots - arrive in unmarked trucks and SUVs, surround the entire premises, block all exits, enter with guns drawn, order the employees to line up along the fence, pat down and search the employees, search pockets and purses, and detain employees for ten hours.

If an administrative search is unlawful from its inception or in its execution, then nothing discovered in the ensuing search can be used to support the required probable cause to arrest or to seize property.

Click [HERE](#) for the court's opinion.

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Trinity Marine Prods., Inc. v. Chao, 512 F.3d 198, December 26, 2007

Looking at this issue for the first time, the Court decides:

When the target of an administrative (regulatory inspection) warrant forbids entry, the standard method of enforcement is a contempt proceeding. However, there is no constitutional right to a pre-execution contempt hearing, and administrative warrants, like criminal warrants, can be executed by means of reasonable force.

Click [HERE](#) for the court's opinion.

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Self Incrimination

U.S. v. Jumper, 497 F.3d 699 (7th Cir.), August 13, 2007

EDITOR'S NOTE: These issues were raised in the context of a videotaped interview played in its entirety to the jury.

The right to remain silent, in a custodial interrogation, attaches to a defendant's refusal to answer specific or selective questions.

The 1st, 4th, and 6th Circuits agree (cites omitted).

In order for a defendant to have a right to remain silent as to a specific or selective question (and the corresponding right that the prosecution will not comment on this silence), the defendant must indicate in some manner that he is invoking that right. Silence itself may not be enough to invoke this right to silence.

At trial the government may not comment on the defendant's refusal to answer a specific question. Therefore, playing portions of the videotape that included the defendant's clear refusal to answer certain questions violated the defendant's right to remain silent.

An officer's opinion regarding the guilt or innocence of the defendant cannot be admitted because these comments affect the trial's fundamental fairness and invade the province of the jury. Although the question of truthfulness may go to the ultimate question of guilt or innocence, these issues are not the same. Telling the defendant that he had not been truthful earlier in the interview was not a direct comment on the defendant's guilt.

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Lafferty, 503 F.3d 293 (3rd Cir.), September 28, 2007

Putting a suspect in an interrogation room with an alleged confederate after the suspect had invoked her right to remain silent and after the confederate had promised to give a confession is inconsistent with "scrupulously honoring" the suspect's assertion of her right to remain silent. Such a joint interrogation would likely force the suspect to either react to the confederate's statements or suggest her assent to those statements by remaining silent while he incriminated her in a conspiracy. Waiver of her right to remain silent cannot be inferred merely because she was willing to go into the interrogation with her confederate.

Click [HERE](#) for the court's opinion.

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U.S. v. Pando Franco, 503 F.3d 389 (5th Cir.), October 04, 2007

Evidence of post-arrest, post *Miranda* silence is admissible because of the knowing, intelligent, and voluntary waiver of *Miranda* rights. Silence in the face of questions about silence is not an exercise of the privilege against self-incrimination at that time. Answering questions about post-arrest, pre- and post-*Miranda* silence allows the entire conversation, including the implicit references to silence contained therein, to be used as substantive evidence of guilt. The admission of such evidence of silence at trial does not violate the Fifth Amendment privilege against self-incrimination.

Click [HERE](#) for the court's opinion.

Miranda

U.S. v. Williams, 483 F.3d 425 (6th Cir.), January 9, 2007

The public safety exception to *Miranda* applies when officers have a reasonable belief based on articulable facts that they are in danger. An officer must, at minimum, have reason to believe (1) that the defendant might have, or recently has had, a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it.

There can be no other context-specific evidence that rebuts that reasonable belief. Indications that the officers may have acted pretextually might rebut the presumption that the public safety exception should apply.

Click [HERE](#) for the court's opinion.

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U.S. v. Kimbrough, 477 F.3d 144 (4th Cir.), February 16, 2007

Showing arrestee's mother evidence found in her home, allowing her, on her own initiative, to speak with her son while remaining in their presence is not the "functional equivalent of questioning." Absent evidence of an express or tacit agreement, discussion, or understanding between the police and the mother that she would ask questions or attempt to elicit incriminating information, *Miranda* warnings are not required.

Click [HERE](#) for the court's opinion.

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U.S. v. Ferrer-Montoya, 483 F.3d 565 (8th Cir.), April 19, 2007

The scope of a search is generally defined by its expressed object. An officer may reasonably interpret a suspect's unqualified consent to search a vehicle for drugs to include consent to search containers within that car which might bear drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive manner. A trained dog's failure to alert may reduce the likelihood that a particular vehicle contains narcotics, but it has no bearing upon what a typical reasonable person would have understood by the exchange between the officer and the suspect in the initial grant of consent to a search.

A suspect invokes his right to remain silent under *Miranda* by making a clear, consistent expression of a desire to remain silent. Indirect, ambiguous, and equivocal statements or assertions of an intent to exercise the right to remain silent

are not enough. Being evasive and reluctant to talk is different from invoking one's right to remain silent.

Click [HERE](#) for the court's opinion.

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Van Hook v. Anderson, 488 F.3d 411 (6th Cir.), May 24, 2007

When, following the arrest of a suspect, the police advise him of his *Miranda* rights and the suspect asks for a lawyer, all questioning must then stop (a) until a lawyer has been provided, or (b) unless the suspect "himself" initiates a discussion. Police are permitted to approach the suspect and inquire whether he now wants to talk when a third party tells police that the suspect is now willing to speak with them. Police are not precluded from acting on that information because it was not communicated to them directly by the suspect.

The 8th, 9th, and 11th Circuits agree, as does the Georgia Supreme Court (cites omitted).

Click [HERE](#) for the court's opinion.

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U.S. v. Jumper, 497 F.3d 699 (7th Cir.), August 13, 2007

EDITOR'S NOTE: These issues were raised in the context of a videotaped interview played in its entirety to the jury.

The right to remain silent, in a custodial interrogation, attaches to a defendant's refusal to answer specific or selective questions.

The 1st, 4th, and 6th Circuits agree (cites omitted).

In order for a defendant to have a right to remain silent as to a specific or selective question (and the corresponding right that the prosecution will not comment on this silence), the defendant must indicate in some manner that he is invoking that right. Silence itself may not be enough to invoke this right to silence.

At trial the government may not comment on the defendant's refusal to answer a specific question. Therefore, playing portions of the videotape that included the defendant's clear refusal to answer certain questions violated the defendant's right to remain silent.

An officer's opinion regarding the guilt or innocence of the defendant cannot be admitted because these comments affect the trial's fundamental fairness and invade the province of the jury. Although the question of truthfulness may go to the

ultimate question of guilt or innocence, these issues are not the same. Telling the defendant that he had not been truthful earlier in the interview was not a direct comment on the defendant's guilt.

Click [HERE](#) for the court's opinion.

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Garner v. Mitchell, 502 F.3d 394 (6th Cir.), September 11, 2007

Whether a waiver of *Miranda* rights is a knowing and intelligent depends upon the totality of the circumstances, including the suspect's age, experience, education, background, and intelligence, and the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. There is no categorical rule that a low IQ or other significant limitations in intellectual functioning make a suspect with such characteristics unable to give a valid waiver of *Miranda* rights. The standard of proof is a preponderance of evidence.

(This case involved expert testimony on four standardized mental tests designed specifically to determine whether a waiver of *Miranda* rights is knowing and intelligent.)

Click [HERE](#) for the court's opinion.

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U.S. v. Lafferty, 503 F.3d 293 (3rd Cir.), September 28, 2007

Putting a suspect in an interrogation room with an alleged confederate after the suspect had invoked her right to remain silent and after the confederate had promised to give a confession is inconsistent with "scrupulously honoring" the suspect's assertion of her right to remain silent. Such a joint interrogation would likely force the suspect to either react to the confederate's statements or suggest her assent to those statements by remaining silent while he incriminated her in a conspiracy. Waiver of her right to remain silent cannot be inferred merely because she was willing to go into the interrogation with her confederate.

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Pando Franco, 503 F.3d 389 (5th Cir.), October 04, 2007

Evidence of post-arrest, post *Miranda* silence is admissible because of the knowing, intelligent, and voluntary waiver of *Miranda* rights. Silence in the face of questions about silence is not an exercise of the privilege against self-incrimination at that

time. Answering questions about post-arrest, pre- and post-*Miranda* silence allows the entire conversation, including the implicit references to silence contained therein, to be used as substantive evidence of guilt. The admission of such evidence of silence at trial does not violate the Fifth Amendment privilege against self-incrimination.

Click [HERE](#) for the court's opinion.

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U.S. v. Jamison, 509 F.3d 623, December 04, 2007

The question of custody for *Miranda* purposes typically turns on whether “a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.” In some circumstances, however, the defendant may be prevented from terminating the interrogation because of factors independent of police restraint. The restrictions on freedom arising from police interrogation must be separated from those incident to the background circumstances.

Placing bags on the hands of a gunshot victim receiving treatment at a hospital emergency room is not tantamount to custody. A reasonable person without a detailed knowledge of police procedures might find it odd that his hands were bagged as soon as he arrived at the hospital for treatment for a gunshot wound. However, the likelihood of such curiosity does not lead to an inference that a reasonable person would consequently feel unable to refuse police questioning.

Miranda and its progeny do not equate police investigation of criminal acts with police coercion. This distinction is especially important when the victim or suspect initiates the encounter with the police. Having invoked the protective and investigatory powers of the police, a reasonable person would think it prudent, not surprising, when asked to recount a description of the shooting.

Click [HERE](#) for the court's opinion.

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U.S. v. Colonna, 511 F.3d 431, December 20, 2007

“Custody” for *Miranda* purposes is not avoided by simply stating to a suspect that he is “not under arrest.” Custody is determined by looking to the totality of the circumstances to determine whether an individual’s freedom of action is curtailed to a degree associated with formal arrest.

In a police dominated environment, when agents do everything short of actual, physical restraint to make any reasonable man believe that he was not free to leave, simply stating to a suspect that he is “not under arrest” is insufficient to preclude a finding of a custodial interrogation.

Although advising someone that he or she is not under arrest mitigates an interview's custodial nature, an explicit assertion that the person may end the encounter is stronger medicine.

Click [HERE](#) for the court's opinion.

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U.S. v. Revels, 510 F.3d 1269, December 20, 2007

Lawful investigative detention under the Fourth Amendment can be “custody” for purposes of *Miranda*.

Under the totality of the circumstances, would a reasonable person in the suspect's position understand her freedom of action has been restricted to a degree consistent with formal arrest. Several relevant factors inform the fact-specific analysis, including: (1) whether the circumstances demonstrated a police-dominated atmosphere; (2) whether the nature and length of the officers' questioning was accusatory or coercive; and (3) whether the police advise the suspect that she is free to refrain from answering questions, or to otherwise end the interview.

The officers' actions created the type of coercive environment that *Miranda* was designed to address. At 6:00 AM, seven police officers breached the front door with force, abruptly roused defendant from her bedroom, handcuffed her, placed her prone on the hall floor, and made her sit under the supervision of officers while police executed the search warrant. Then, after the search was completed and before any questioning began, three male officers separated her from her boyfriend and two children, and escorted her to a rear bedroom for questioning. Once inside the room, the officers isolated her from the other occupants of the home, and closed the door behind her. For much of the interview, all three of the officers remained in the room with her, and she was confronted with the seized drugs in an accusatory manner. They never advised her that she was not under arrest, free to leave, or that she was otherwise at liberty to decline to answer questions.

Click [HERE](#) for the court's opinion.

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Hall v. Bates, 508 F.3d 854 (7th Cir.), November 15, 2007

When a suspect does not ask whether he is free to leave, there is a rebuttable inference that he does not want to terminate the questioning but instead wants to use the opportunity to deflect the suspicion of the police.

The Supreme Court has rejected (cite omitted) a *Miranda*-like rule requiring police whenever they question someone at a police station to advise him that he is not under arrest and is therefore free to leave at any time. All a person has to do in order to test the right of police to detain him is to ask them whether he is free to

leave. Such an approach—placing on the suspect the burden of ascertaining whether he is in fact detained—is preferable to speculation by judges or juries on whether the circumstances of a particular interrogation were so intimidating that the average person being questioned would have thought himself under arrest even though he made no effort, as he could easily have done, to determine whether he was.

Click [HERE](#) for the court’s opinion.

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Due Process

Brockinton v. City of Sherwood, 503 F.3d 667 (8th Cir.), October 04, 2007

To establish a violation of due process of law under the Fourteenth Amendment by conducting an inadequate investigation, the plaintiff must show that the failure to investigate was intentional or reckless, thereby shocking the conscience. Negligent failure to investigate does not violate due process. Qualified immunity protects officers from “mistaken judgments.”

Click [HERE](#) for the court’s opinion.

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Civil Liability

Scott v. Harris, 127 S. Ct. 1769, April 30, 2007 ([Supreme Court](#))

A claim of excessive force in the course of making a seizure of a person is properly analyzed under the Fourth Amendment’s objective reasonableness standard of *Graham v. Connor*, 490 U. S. 386 (1989).

Tennessee v. Garner, 471 U. S. 1 (1985), did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute “deadly force.” *Garner* was simply an application of the Fourth Amendment’s reasonableness test to the use of a particular type of force in a particular situation.

Whatever *Garner* said about the factors that might have justified shooting the suspect in that case, such preconditions have scant applicability to this case, which has vastly different facts.

Whether or not Scott’s actions constituted application of “deadly force,” all that matters is whether Scott’s actions were reasonable.

In determining the reasonableness of a seizure, 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.

In judging whether Scott's actions were reasonable, consider the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the public that Harris posed. It is appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability.

A police officer's attempt to terminate a dangerous high speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

Click [HERE](#) for the court's opinion.

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Meals v. City of Memphis, 493 F.3d 720 (6th Cir.), July 11, 2007

A 42 U.S.C. § 1983 claim may be brought against a police officer under the Fourteenth Amendment for death or injury to innocent third parties where the injury results from a pursuit. To prevail on such a claim, a plaintiff must prove that the police officer's conduct "shocks the conscience." Only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation. High-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under § 1983. Violation of the City's police vehicle operation and pursuit policy can raise a question as to whether there was malice with intent to worsen legal plight. In the absence of evidence from which a jury could infer a purpose to cause harm unrelated to the legitimate object of the chase, the evidence does not satisfy the requisite element of arbitrary conduct shocking the conscience.

Click [HERE](#) for the court's opinion.

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Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir.), September 24, 2007

Article 36 of the Vienna Convention on Consular Relations does not create judicially enforceable rights that support a 42 U.S.C. § 1983 action. It confers legal rights and obligations on *States* in order to facilitate and promote consular functions including protecting the interests of detained nationals, and for that purpose detainees have the right (if they want) for the consular post to be notified of their situation. In this sense, detained foreign nationals benefit from Article 36's provisions. But the right to protect nationals belongs to *States* party to the Convention; no private right is

unambiguously conferred on individual detainees such that they may pursue it through § 1983.

The 7th Circuit, the only other Circuit to squarely answer the question, disagrees (*Jogi v. Voges*, 480 F.3d 822 (March 2007)).

Click [HERE](#) for the court's opinion.

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Brockinton v. City of Sherwood, 503 F.3d 667 (8th Cir.), October 04, 2007

To establish a violation of due process of law under the Fourteenth Amendment by conducting an inadequate investigation, the plaintiff must show that the failure to investigate was intentional or reckless, thereby shocking the conscience. Negligent failure to investigate does not violate due process. Qualified immunity protects officers from “mistaken judgments.”

Click [HERE](#) for the court's opinion.

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Firearms

Logan v. U.S., 128 S. Ct. 475, December 4, 2007 ([Supreme Court](#))

There is a mandatory 15 year sentence under the Armed Career Criminal Act of 1984 for those with at least three prior convictions for violent felonies. 18 U.S.C. §924(e)(1). A conviction *for which a person has had civil rights restored* does not count. 18 U.S.C. §921(a)(20). A violent felony conviction that did not result in any loss of civil rights does count. The ordinary meaning of the word "restored"--giving back something that has been taken away--does not include retention of something never lost.

Click [HERE](#) for the court's opinion.

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Watson v. U.S., 128 S. Ct. 579, December 10, 2007 ([Supreme Court](#))

It is better to receive than to give.

Title 18 § 924(c)(1)(A) sets a mandatory minimum sentence for a defendant who, “during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm.” The statute leaves the term “uses” undefined.

In Smith v. U.S., 508 U. S. 223 (1993) the Supreme Court held that a criminal who trades his firearm for drugs “uses” it during and in relation to a drug trafficking offense within the meaning of §924(c)(1), thereby invoking the minimum mandatory sentence.

In this case, the Supreme Court holds that a person who trades his drugs for a gun does not “use” a firearm “during and in relation to ... [a] drug trafficking crime” within the meaning of §924(c)(1).

Click [HERE](#) for the Court’s Opinion.

*****The Supreme Court will decide the *Parker* issue (called *D.C. v. Heller* in the Supreme Court) in its October 2007 term.*****

Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir.), March 9, 2007

The Second Amendment protects an individual right to keep and bear arms – “a right that existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad).” The D.C. code provisions are unconstitutional to the extent that they act to ban the possession and carrying of pistols in the home. “[T]he District may not flatly ban the keeping of a handgun in the home, [and] it may not prevent it from being moved throughout one’s house. Such a restriction would negate the lawful use upon which the right was premised--i.e, self-defense.” The court specifically left open the question of whether the District could lawfully ban the possession and carrying in public or in automobiles.

(Editor’s Note - See also 18 U.S.C.A. 926A which provides:

Notwithstanding any other provision of law...of a state...any person...shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation, the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle...)

Click [HERE](#) for the court’s opinion.

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Hall v. Bates, 508 F.3d 854 (7th Cir.), November 15, 2007

When a suspect does not ask whether he is free to leave, there is a rebuttable inference that he does not want to terminate the questioning but instead wants to

use the opportunity to deflect the suspicion of the police.

The Supreme Court has a rejected (cite omitted) a *Miranda*-like rule requiring police whenever they question someone at a police station to advise him that he is not under arrest and is therefore free to leave at any time. All a person has to do in order to test the right of police to detain him is to ask them whether he is free to leave. Such an approach—placing on the suspect the burden of ascertaining whether he is in fact detained—is preferable to speculation by judges or juries on whether the circumstances of a particular interrogation were so intimidating that the average person being questioned would have thought himself under arrest even though he made no effort, as he could easily have done, to determine whether he was.

Click [HERE](#) for the court’s opinion.

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U.S. v. Nieves-Castano, 480 F.3d 597 (1st Cir.), March 27, 2007

A machine gun is defined as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.”

Mere possession of the weapon is insufficient to support conviction under 18 USC § 922(o). The government must also prove beyond a reasonable doubt that the defendant knew the weapon “had the characteristics that brought it within the statutory definition of a machinegun.”

Click [HERE](#) for the court’s opinion.

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U.S. v. Hayes, 482 F.3d 749 (4th Cir.), April 16, 2007

Title 18 U.S.C. §§ 922(g)(9) prohibits the possession of a firearm by one convicted of a “misdemeanor crime of domestic violence” (MCDV). The definition of a MCDV in 18 U.S.C. § 921(a)(33)(A) requires that the predicate offense have as an element a domestic relationship between the offender and the victim. Even if the victim was the offender’s spouse, a “simple assault” conviction does not qualify since it does not require, as an element, proof of a domestic relationship.

The 4th Circuit is alone in its holding.

All nine other circuits, the 1st, 2nd, 5th, 8th, 9th, 10th, 11th, D.C., and Federal, that have decided this issue disagree. (cites omitted).

Click [HERE](#) for the court’s opinion.

U.S. v. Luke-Sanchez, 483 F.3d 703 (10th Cir.), April 17, 2007

Bartering drugs for firearms constitutes “use” of the firearms “in furtherance of a drug trafficking crime” under 18 U.S.C. § 924(c)(1)(A).

The 1st, 3rd, 4th, 5th, 8th, and 9th Circuits agree. (cites omitted).

The 6th, 7th, 11th, and D.C. Circuits disagree. (cites omitted)

**** See the Supreme Court decision of *Watson v. U.S.* above on this issue.****

Click [HERE](#) for the court’s opinion.

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U.S. v. Strong, 485 F.3d 985 (7th Cir.), May 14, 2007

When a defendant has been charged with felon in possession of a firearm, evidence of contemporaneous uncharged drug trafficking is admissible under the “inextricably intertwined” doctrine. Such evidence tends to prove “knowing possession” of the firearm. Drug trafficking supplies a motive for having a gun because weapons are tools of the trade of drug dealers.

Click [HERE](#) for the court’s opinion.

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U.S. v. Presley, 487 F.3d 1346 (11th Cir.), May 31, 2007

The elements of a “necessity” defense to felon in possession of a firearm include “that the defendant had no reasonable legal alternative to violating the law.”

Click [HERE](#) for the court’s opinion.

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U.S. v. Ciszkowski, 492 F.3d 1264 (11th Cir.), July 20, 2007

For purposes of applying the 30 year mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(B)(ii), the government must prove that the firearm was equipped with a silencer but need not prove that the defendant knew the firearm was equipped with a silencer.

Click [HERE](#) for the court’s opinion.

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U.S. v. Introcaso, 506 F.3d 260 (3rd Cir.), October 25, 2007

Looking at this issue for the first time, the Court decides:

Title 26 U.S.C. § 5845(g) exempts “antique firearms” from registration. An “antique firearm” is defined in pertinent part as “any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.” Congress did not declare clearly an intent to impose a registration requirement on pre-1899 firearms for which ammunition specifically designed for it is no longer manufactured in the United States but in which any modern ammunition is usable. Therefore, the statute is ambiguous and will not support a conviction.

The only other circuits to address this issue, the 2nd Circuit (published) and the 7th Circuit (unpublished), disagree (cites omitted).

Click [HERE](#) for the court’s opinion.

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U.S. v. Baker, 508 F.3d 1321, December 06, 2007

Although recognizing the “necessity” defense to felon in possession of a firearm/ammunition, the court refuses to recognize an “innocent possession” defense.

The 1st, 4th, 7th, and 9th circuits agree (cites omitted).

Click [HERE](#) for the court’s opinion.

* * * *

Possession

U.S. v. Timlick, 481 F.3d 1080 (8th Cir.), April 10, 2007

To convict on a violation of 21 U.S.C. § 841(a)(1), the Government must prove knowing possession with the intent to distribute. Proof of constructive possession is sufficient to satisfy the element of knowing possession. To prove constructive possession, the government must show knowledge and ownership, dominion, or control over the contraband itself, or dominion over the vehicle in which the contraband is concealed. The holder of the key, be it to the dwelling, vehicle or motel room, has constructive possession of the contents therein.

All five other circuits, the 2nd, 3rd, 5th, 7th, and D.C., that have decided this issue agree. (cites omitted).

Click [HERE](#) for the court’s opinion.

U.S. v. Piwowar, 492 F.3d 953 (8th Cir.), July 05, 2007

The holder of the key, be it to the dwelling, vehicle or motel room in question, has constructive possession of the contents therein. The government is not required to show knowing possession of the key. Mere proof of possession of the key is sufficient to prove the knowing possession of the contents.

Click [HERE](#) for the court's opinion.

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Drugs

Kimbrough v. U.S., 128 S. Ct. 558, December 10, 2007 ([Supreme Court](#))

Under 21 U.S.C. § 841, the statute criminalizing the manufacture and distribution of crack cocaine, and the relevant Guidelines prescription, 18 U.S.C. Appx § 2D1.1, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine.

The Supreme Court holds that, under *U.S. v. Booker*, 543 U.S. 220 (2005), the cocaine Guidelines, like all other Guidelines, are advisory only. The crack/powder sentencing disparity is not mandatory. Although the Guidelines range must be included in the array of factors warranting consideration, the judge may determine that, in the particular case, a within-Guidelines sentence is “greater than necessary” to serve the objectives of sentencing. In making that determination, the judge may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses.

Click [HERE](#) for the Court's Opinion.

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U.S. v. Strong, 485 F.3d 985 (7th Cir.), May 14, 2007

When a defendant has been charged with felon in possession of a firearm, evidence of contemporaneous uncharged drug trafficking is admissible under the “inextricably intertwined” doctrine. Such evidence tends to prove “knowing possession” of the firearm. Drug trafficking supplies a motive for having a gun because weapons are tools of the trade of drug dealers.

Click [HERE](#) for the court's opinion.

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U.S. v. Lopez-Vanegas, 493 F.3d 1305 (11th Cir.), July 26, 2007

Title 21 U.S.C. § 841(a)(1), in conjunction with §846, makes it unlawful for any person to conspire to possess with the intent to distribute a controlled substance, such as cocaine. Section 841(a)(1) does not apply to possession outside United States territory unless the possessor intends to distribute the contraband within the United States. There can be no violation of § 846 if the object of the conspiracy is not a violation of § 841. When the object of the conspiracy is to possess controlled substances outside the United States with the intent to distribute outside the United States, there is no violation of § 841(a)(1) or § 846.

Click [HERE](#) for the court's opinion.

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U.S. v. Wilson, 503 F.3d 195 (2nd Cir.), September 24, 2007

Title 21 U.S.C. § 856(a)(2) makes it unlawful for a person with a premises to knowingly and intentionally allow its use for the purpose of manufacturing, storing or distributing drugs. The person who manages or controls the building and then rents to others need not have the express purpose in doing so that drug related activity take place. The phrase “for the purpose,” as used in this provision, references the purpose and design not of the person with the premises, but rather of those who are permitted to engage in drug-related activities there.

Click [HERE](#) for the court's opinion.

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Possession

U.S. v. Timlick, 481 F.3d 1080 (8th Cir.), April 10, 2007

To convict on a violation of 21 U.S.C. § 841(a)(1), the Government must prove knowing possession with the intent to distribute. Proof of constructive possession is sufficient to satisfy the element of knowing possession. To prove constructive possession, the government must show knowledge and ownership, dominion, or control over the contraband itself, or dominion over the vehicle in which the contraband is concealed. The holder of the key, be it to the dwelling, vehicle or motel room, has constructive possession of the contents therein.

All five other circuits, the 2nd, 3rd, 5th, 7th, and D.C., that have decided this issue agree. (cites omitted).

Click [HERE](#) for the court's opinion.

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U.S. v. Piwovar, 492 F.3d 953 (8th Cir.), July 05, 2007

The holder of the key, be it to the dwelling, vehicle or motel room in question, has constructive possession of the contents therein. The government is not required to show knowing possession of the key. Mere proof of possession of the key is sufficient to prove the knowing possession of the contents.

Click [HERE](#) for the court's opinion.

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Miscellaneous Criminal Statutes (In numerical order)

U.S. v. Ihnatenko, 482 F.3d 1097 (9th Cir.), March 30, 2007

The gratuities statute, 18 USC § 201(c)(2), does not prohibit the government from providing immigration benefits, immunity from prosecution, leniency, cash benefits, or government-paid housing to a cooperating witness so long as the payment does not recompense any corruption of the truth of testimony.

Paid informants play a vital role in the government's infiltration and prosecution of major organized crime and drug syndicates. Such compensation is necessary to assure the safety of those who turn against their former compatriots in the underworld.

Click [HERE](#) for the court's opinion.

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U.S. v. Ganim, 510 F.3d 134, December 04, 2007

The specific intent element (*quid pro quo* / this for that) for bribery, extortion, and honest services mail fraud crimes may be satisfied by showing that a government official received a benefit in exchange for his promise to perform specific official acts *or to perform such acts as the opportunities arise*. It is sufficient if the defendant understood he was expected as a result of the payment to exercise particular kinds of influence on behalf of the payor as specific opportunities arose.

Click [HERE](#) for the court's opinion.

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U.S. v. Ressam, 474 F.3d 597 (9th Cir.), January 16, 2007

Looking at this issue for the first time, the Court decides:

18 U.S.C. § 844(h)(2) makes it a crime to carry an explosive “during the commission

of any felony.” The government must demonstrate that the explosives “facilitated or played a role in the crime” and, therefore, “aided the commission of the underlying felony in some way.”

The 3rd and 5th Circuits disagree, saying that the government need only prove that explosives were carried during a felony offense. (cites omitted).

Click [HERE](#) for the court’s opinion.

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Rodis v. City & County of San Francisco, 499 F.3d 1094 (9th Cir.), August 28, 2007

To support a conviction for possession of counterfeit currency with intent to defraud under 18 U.S.C. § 472, the government must prove three elements: (1) possession of counterfeit money; (2) knowledge, at the time of possession, that the money is counterfeit; and (3) intent to defraud. The mere passing of a counterfeit bill is not a criminal offense. The defendant must not only possess or pass counterfeit money, but he must know the money is counterfeit *and* he must intend to use the money to defraud another. To act with the “intent to defraud” means to act willfully, and with the *specific intent* to deceive or cheat for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself. For specific intent crimes, evidence of intent is required to establish probable cause. Without at least some evidence regarding the knowledge or intent elements of this crime, probable cause is necessarily lacking.

Click [HERE](#) for the court’s opinion.

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U.S. v. Morganfield, 501 F.3d 453 (5th Cir.), September 25, 2007

Title 18 U.S.C. § 514(a)(2) provides that “Whoever, with intent to defraud... passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States... any false or fictitious instrument....” Terms in § 514(a) are defined by reference to 18 U.S.C. § 513(c). Section 513(c)(3)(A) defines a “security” as including a check. Neither § 514 nor § 513(c) define what constitutes a “false or fictitious instrument, document, or other item.”

“False or fictitious instrument” in § 514 refers to nonexistent instruments. Fictitious instruments are not counterfeits of *any existing negotiable instrument*. A check that is genuine on its face, even if it is worthless, is not, as a matter of law, a “false or fictitious instrument.”

The 6th and 8th Circuits agree (cites omitted).

Click [HERE](#) for the court’s opinion.

U.S. v. Vitillo, 490 F.3d 314 (3rd Cir.), June 25, 2007

An independent contractor with managerial responsibilities may be an “agent” under 18 U.S.C. § 666. Section 666 prohibits “an agent” of a local government agency that receives more than \$10,000 in federal funds from stealing from that agency property valued at more than \$5,000. The term “agent” is defined as “a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.” An “agent” does not have to necessarily controls federal funds. An individual can affect agency funds despite a lack of power to authorize their direct disbursement. An “agent” is merely a person with authority to act on behalf of the organization receiving federal funds, and can include an “employee,” “officer,” “manager” or “representative” of that entity. Section 666(d)(1) does not by definition exclude an independent contractor who acts on behalf of a § 666(b) entity as a manager or representative of that entity.

Click [HERE](#) for the court’s opinion.

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U.S. v. Zimmerman, 509 F.3d 920, December 17, 2007

Looking at this issue for the first time, the Court decides:

Title 18 U.S.C. § 666(a)(1)(B) prohibits the acceptance of gratuities intended to be a bonus for taking official action involving any thing of value of \$5,000 or more.

The \$5000 value requirement in § 666(a)(1)(B) can be met if the amount of the gratuity itself is \$5000 or more.

The 7th Circuit agrees (cite omitted).

Intangible benefits, such as development of a retail mall and the ability to more effectively market condominiums, can also satisfy the value requirement so long as the actual value of the intangible benefit meets the value threshold.

The 5th Circuit agrees (cite omitted).

Click [HERE](#) for the court’s opinion.

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U.S. v. Horvath, 492 F.3d 1075 (9th Cir.), July 10, 2007

Any person who knowingly and willfully makes a materially false statement to the federal government is subject to criminal liability under 18 U.S.C. § 1001(a) except when the false statements are submitted to a judge by a party to a judicial proceeding. When, but only when, the probation officer is required by law to

include such a statement in the PSR and to submit the PSR to the judge, the statement falls within the exception in § 1001(b).

Click [HERE](#) for the court's opinion.

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U.S. v. Abbouchi, 494 F.3d 825 (9th Cir.), July 13, 2007

Social security cards are “identification documents” within the meaning of 18 U.S.C. § 1028(a)(2).

The 4th Circuit agrees (cite omitted).

Click [HERE](#) for the court's opinion.

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U.S. v. Hurtado, 508 F.3d 603, November 21, 2007

Title 18 U.S.C. § 1028A, entitled “Aggravated Identity Theft,” provides, in pertinent part:

Whoever, during and in relation to any felony violation enumerated in § 1028A(c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony....

Congress did not define “without lawful authority.”

Although stealing and then using another person's identification would fall within the meaning of “without lawful authority,” the government does not have to prove that the defendant “stole” the means of identification. Using another's name without permission or based on consent obtained in exchange for money and illegal drugs would also be “without lawful authority.”

The 8th Circuit agrees (cite omitted).

The defendant did not need to be aware that the numbers he knowingly used had been actually assigned to a real person.

The 4th Circuit agrees (cite omitted).

There is no requirement that the person whose identity was wrongfully used suffered any financial harm.

Click [HERE](#) for the court's opinion.

U.S. v. Ward, 486 F.3d 1212 (11th Cir.), May 16, 2007

A defendant may be convicted of mail fraud (18 U.S.C. § 1341) without personally committing each and every element of mail fraud, so long as the defendant knowingly and willfully joined the criminal scheme, and a co-schemer used the mails for the purpose of executing the scheme.

It is not necessary that a defendant actually do any of the mailing so long as there is sufficient evidence to tie him to the fraudulent scheme which involves the use of the mails.

Click [HERE](#) for the court's opinion.

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U.S. v. Ghilarducci, 480 F.3d 542 (7th Cir.), March 14, 2007

Materiality (i.e., a tendency to influence) is an essential element of a wire fraud prosecution – 18 U.S.C. §1343. Reliance is not an element of federal criminal statutes dealing with fraud. A representation may be material even though the hearer strongly suspects that it is false. Whether or not a victim in fact relied upon a defendant's false representations is irrelevant in criminal fraud cases.

Click [HERE](#) for the court's opinion.

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U.S. v. Dearing, 504 F.3d 897 (9th Cir.), September 25, 2007

18 U.S.C. § 1347, provides that one commits health care fraud when he: knowingly and willfully executes, or attempts to execute, a scheme or artifice to defraud.

As a general matter, when used in the criminal context, a “willful” act is one undertaken with a “bad purpose.” In other words, in order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. Willfulness may be inferred from circumstantial evidence of fraudulent intent. Intent can be inferred from efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits.

Click [HERE](#) for the court's opinion.

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U.S. v. Rand, 482 F.3d 943 (7th Cir.), April 06, 2007

Murdering an innocent man in order to fake the death of a defendant in a criminal case violates 18 U.S.C. § 1512(a)(1)(C), “Tampering with a witness, victim, or an

informant.” The statute makes it a crime to “kill[s] or attempt[s] to kill *another person*, with intent to— (C) prevent the communication by *any person* to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense (emphasis added).” The plain reading of the statute demonstrates that the murder victim does not have to be a witness or an informant. The statute makes it a federal crime to kill or attempt to kill “*another person*”—regardless of who that person is—in order to prevent the communication of information by “*any person*” to law enforcement or the court. The statute is not limited to killing another person in order to prevent *that person* from communicating information law enforcement or to the court.

The 11th Circuit agrees (cite omitted).

Click [HERE](#) for the court’s opinion.

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U.S. v. Horne, 474 F.3d 1004 (7th Cir.), February 5, 2007

The Hobbs Act, 18 U.S.C. § 1951(a) makes robbery that “in any way or degree obstructs, delays, or affects commerce” a federal crime.

eBay, the online auction site, is an avenue of interstate commerce, like an interstate highway or long-distance telephone service. The use of eBay to lure a victim is use of an interstate instrumentality for purposes of the Hobbs Act.

Click [HERE](#) for the court’s opinion.

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U.S. v. Boyd, 480 F.3d 1178 (9th Cir.), March 23, 2007

A conviction under the Hobbs Act - 18 USC § 1951(a) / robbery - requires sufficient evidence that: 1) the business was engaged in interstate commerce; and 2) the robbery obstructed, delayed, or affected interstate commerce. Only a de minimis effect on interstate commerce is needed to support the conviction.

Click [HERE](#) for the court’s opinion.

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U.S. v. Ossai, 485 F.3d 25 (1st Cir.), April 24, 2007

The “interstate nexus” element of the Hobbs Act, 18 U.S.C. § 1951(a), is established by testimony that the stolen money would have been deposited into the business owner’s bank account and used to run the business, which necessarily required the ordering of products manufactured outside of the state. The government need only

adduce evidence of a realistic probability that the robbery had some slight or minimal impact on interstate commerce. The government need not prove that the precise funds stolen were certain to be used in future business purchases. It matters not that the actual effect of the robbery may be slight or even untraceable.

Click [HERE](#) for the court's opinion.

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U.S. v. Shaffer, 472 F.3d 1219 (10th Cir.), January 3, 2007

18 U.S.C. § 2252A(a)(2) makes it a crime to distribute child pornography. The statute fails to define the term “distribute.” Placing child porn images in a “shared folder,” freely allowing others access to the images through a peer-to-peer file sharing program, and openly inviting them to take or download the items is “distribution” under the statute. The statute does not require that a defendant actively transfer the images to others.

Click [HERE](#) for the court's opinion.

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U.S. v. Schaefer, 501 F.3d 1197 (10th Cir.), September 05, 2007

18 U.S.C. §§ 2252(a)(2) and (a)(4)(B), make unlawful the receipt and possession of child pornography images mailed, shipped or transported in interstate or foreign commerce. The jurisdictional language unambiguously requires the movement of the images across state lines. Absent evidence of (1) the server locations of the websites searched; or (2) the server location of defendant's internet service provider, it is not enough to assume that an internet communication necessarily traveled across state lines. In many, if not most, situations the use of the internet will involve the movement of communications or materials between states. But this fact does not suspend the need for evidence of this interstate movement. The government is required to prove that any internet transmissions containing child pornography that moved to or from the defendant's computer crossed state lines. There is no “internet exception” to the statute's jurisdictional requirements.

The 1st, 3rd, and 5th circuits disagree (cites omitted).

Click [HERE](#) for the court's opinion.

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Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir.), March 7, 2007

Title II of the Americans with Disabilities Act and the Department of Justice implementing regulations do not require police to wait for an oral interpreter before

taking field sobriety tests on a profoundly deaf subject. Such is not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity.

Click [HERE](#) for the court's opinion.

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U.S. v. Gagliardi, 506 F.3d 140 (2nd Cir.), October 22, 2007

Looking at this issue for the first time, the Court decides:

Title 18 § 2422(b), which imposes criminal liability on anyone who “knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, *or attempts to do so*,” does not require that the enticement victim be an actual “individual who has not attained the age of 18 years.” The government must prove that the defendant had the intent and took a substantial step toward committing the crime, as required for attempt liability, even though it was factually impossible to commit the substantive offense.

The 3rd, 5th, 8th, 9th, 10th, and 11th Circuits agree (cites omitted).

Click [HERE](#) for the court's opinion.

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Warshak v. U.S., 490 F.3d 455 (6th Cir.), June 18, 2007

As 18 USC § 2703(d) specifically permits, officers obtained a court order to obtain a target's emails that had been in storage with the Internet Service provider for more than 180 days. The court order also excused, pursuant to 18 USC § 2705, having to give the target prior notice before seizing the emails. Though the statute required only a showing that the emails were “relevant and material to an ongoing criminal investigation,” the 6th Circuit upheld a District Court injunction preventing agents from viewing the emails because there was no showing of probable cause or prior notice giving the target an opportunity to challenge the order.

Click [HERE](#) for the court's opinion.

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Stoner v. Santa Clara County Office of Education, 502 F.3d 1116 (9th Cir.), September 07, 2007

Under the False Claims Act (“FCA”), “[a]ny person” who, among other things, “knowingly presents, or causes to be presented, to an officer or employee of the

United States Government . . . a false or fraudulent claim for payment or approval” is liable to the Government for a civil penalty, treble damages, and costs. 31 U.S.C. § 3729(a)(1). School districts in California, including county offices of education, are arms of the state, and therefore not “persons” subject to *qui tam* liability under the FCA.

State officials, sued for damages in their individual capacities, are “persons” within the meaning of 31 U.S.C. § 3729.

Click [HERE](#) for the court’s opinion.

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U.S. v. Lopez, 484 F.3d 1186 (9th Cir.), May 07, 2007

A driver who transports a group of illegal aliens from a drop-off point in the United States to another destination in this country commits only the offense of transporting aliens “within” the United States but is not guilty of aiding and abetting the crime of “bringing” the aliens “to” the United States. 8 U.S.C. § 1324.

Although all of the elements of the “bringing to” offense are satisfied once the aliens cross the border, the crime does not terminate until the initial transporter who brings the aliens to the United States ceases to transport them and drops off the aliens on the U.S. side of the border. One who transports undocumented aliens only within the United States and only after the initial transporter had dropped the aliens off inside the country is not guilty of aiding and abetting the initial transportation.

Click [HERE](#) for the court’s opinion.

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Title III

U.S. v. Rice, 478 F.3d 704 (6th Cir.), March 2, 2007

Title III requires that an application for a wiretap order contain full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. This is referred to as the “necessity requirement,” the purpose of which is to ensure that a wiretap is not resorted to in situations where traditional investigative techniques would suffice and to protect against the impermissible use of a wiretap as the initial step in a criminal investigation. A purely conclusory affidavit unrelated to the instant case and not showing any factual relations to the circumstances at hand is inadequate compliance with the statute.

The “good faith” exception of *United States v. Leon*, 468 U.S. 897 (1984), does not apply to warrants improperly issued under Title III.

Click [HERE](#) for the court’s opinion.

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U.S. v. Wilson, 484 F.3d 267 (4th Cir.), April 19, 2007

Title 18 U.S.C.A. § 2518(3) requires that the government to show the “necessity” of any wiretap application via a full and complete statement as to whether normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. This burden is not great, and the adequacy of such a showing is to be tested in a practical and commonsense fashion that does not hamper unduly the investigative powers of law enforcement agents. Although wiretaps are disfavored tools of law enforcement, the government need only present specific factual information sufficient to establish that it has encountered difficulties in penetrating the criminal enterprise or in gathering evidence such that wiretapping becomes reasonable.

Click [HERE](#) for the court’s opinion.

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Aliens / Immigration

U.S. v. Lopez, 484 F.3d 1186 (9th Cir.), May 07, 2007

A driver who transports a group of illegal aliens from a drop-off point in the United States to another destination in this country commits only the offense of transporting aliens “within” the United States but is not guilty of aiding and abetting the crime of “bringing” the aliens “to” the United States. 8 U.S.C. § 1324. Although all of the elements of the “bringing to” offense are satisfied once the aliens cross the border, the crime does not terminate until the initial transporter who brings the aliens to the United States ceases to transport them and drops off the aliens on the U.S. side of the border. One who transports undocumented aliens only within the United States and only after the initial transporter had dropped the aliens off inside the country is not guilty of aiding and abetting the initial transportation.

Click [HERE](#) for the court’s opinion.

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Melendez v. Gonzales, 503 F.3d 1019 (9th Cir.), September 19, 2007

An alien may not avoid the immigration consequences of a drug conviction as a “first time offender” when, as the result of a previous arrest for drug possession, he

was granted “pretrial diversion” under a state rehabilitation scheme that did not require him to plead guilty.

Click [HERE](#) for the court’s opinion.

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