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The Federal Law Enforcement -Informer-

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer)*. The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court and Circuit Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting the Legal Division web page at: http://www.fletc.gov/legal.

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An annual review of the law enforcement and criminal law cases to be decided by the Court in the October 2010 term.

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Article:

Law Enforcement Officers Safety Act Improvements Act of 2010

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Click Here

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Case Summaries

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Supreme Court
Law Enforcement Cases
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Testimonial and Non-Testimonial Statements

Bullcoming v. New Mexico
Decision Below: **226 P.3d 1 (N.M. 2010)**

Does the Confrontation Clause permit the prosecution to introduce testimonial statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements?

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Michigan v. Bryant
Decision Below: **768 N.W.2d 65 (Mich. 2009)**

Are preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting non-testimonial because they are "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"? (When the emergency includes not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual.)

*****

Temporary Seizure of a Child to Investigate Abuse

Alford v. Greene
Decision Below: **588 F.3d 1011 (9th Cir. 2009)**

Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview of a child at a public school whom they reasonably suspect is being sexually abused by her father?

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Exigent Circumstances

Kentucky v. King
Decision Below: **302 S.W.3d 649 (Ky. 2010)**

When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry, and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist? Does the hot pursuit exception to the warrant requirement apply only if the government can prove that the suspect was aware he was being pursued?

*****

The Good Faith Exception to the Exclusionary Rule

Davis v. United States
Decision Below: **598 F.3d 1259 (11th Cir. 2010)**

Does the good-faith exception to the exclusionary rule apply to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional?

(Editor's Note: Below is the case summary that was originally published in **4 Informer 10**)

U.S. v. Davis, 2010 U.S. App. LEXIS 5131, March 11, 2010

In an incident that predated the Supreme Court decision of *Arizona v. Gant*, Davis, a passenger in a car stopped for a traffic offense, was arrested after giving the officer a false name. During a search of the car incident to the arrest, the officer seized a gun from the pocket of Davis' jacket left on the seat. The search violated the Fourth Amendment pursuant to the *Gant* decision because neither Davis nor the driver had access to the car and because it was not reasonable to believe that evidence of the crime of arrest was in the car.

However, the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on well-settled precedent, even if that precedent is subsequently overturned. The gun is admissible evidence.

The 10th Circuit agrees (cite omitted).

The 9th Circuit disagrees (cite omitted).

Before *Gant*, the 5th Circuit refused to apply the exclusionary rule when police had relied in good faith on prior circuit precedent (cite omitted).

Before *Gant*, the 7th Circuit expressed skepticism about applying the rule's good-faith exception when police had relied solely on case law in conducting a search (cite omitted).

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Law Enforcement Officers Safety Act Improvements Act of 2010

(Nationwide Concealed Firearms Carry for LEOs and Retired LEOs)

On October 12, 2010, President Obama signed the above Act, and it became effective immediately. The 2010 Act contains several changes to the original LEOSA of interest to both active duty and retired law enforcement officers.

First, the Act specifically adds and clarifies that the definition of a law enforcement officer for the purposes of the Act includes active duty and qualified retired Amtrak police officers, Federal Reserve police officers and law enforcement or police officers of the executive branch of the Federal Government. Active and retired Law Enforcement officers of state and local governments continue to be covered by the Act.

The Act also now allows active duty law enforcement officers and qualified retired law enforcement officers to possess and carry any ammunition that is not expressly prohibited by Federal law or subject to the provisions of the National Firearms Act. Possession and carry of any machinegun, firearm silencer or destructive device is still prohibited.

Some of the new provisions expressly address concerns voiced by retired law enforcement officers. The original Act required an aggregate of 15 years or more of law enforcement employment in order to be covered by the Act. That has now been changed to an aggregate of 10 years or more of regular law enforcement employment. The retiree can qualify with his firearm based on his old agency's standards, the standards of the state in which he resides or, if that state has not established such standards, either a law enforcement agency's standards within the state in which the retiree resides or the standards used by a certified firearms instructor who is qualified to conduct firearms qualification tests for active duty law enforcement officers in that state. The qualification must be the same as that for active duty law enforcement officers and the firearm used in the qualification still must be of the same type the individual intends to carry.

The requirement that a retiree or separated employee have a non-forfeitable right to benefits under the retirement plan of his former agency has been eliminated. The requirements that the retiree or separated employee carry photo identification from the agency from which he or she retired or separated and proof of firearms qualification within the last twelve months remains in the new Act.

For the actual language of the changes in the 2010 Act, click **HERE.**

Editors Note: See **(7 Informer 09)** for an analysis of the orignal Law Enforcement Officers Safety Act of 2004.

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CASE SUMMARIES

Circuit Courts of Appeals

1st Circuit

U.S. v. Brown, 2010 U.S. App. LEXIS 20852, October 8, 2010

Two Boston Police Department officers received information from their supervisor that he had seen the front-seat passenger of a black Ford Taurus smoking a marijuana blunt. A short time later, the officers spotted the Taurus and followed it. When the Taurus stopped at a red light, the officers got out of their unmarked vehicle and approached the driver and passenger sides, displaying their badges. As the officers approached, they smelled the strong odor of burnt marijuana, and when the driver rolled down the window, the odor became stronger. One officer opened the passenger side door, removed the defendant from the vehicle, and took a burning marijuana cigarette from his hand. Additional marijuana and crack cocaine was located on the defendant.

The court held that the supervisor's observations regarding the front-seat passenger that he communicated to the other officers established reasonable suspicion for the stop. Because the officers were acting with reasonable suspicion, even if their initial approach to the Taurus constituted a "seizure" for purposes of the *Fourth Amendment*, it was constitutionally permissible.

Click **HERE** for the court's opinion.

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Statchen v. Palmer, 2010 U.S. App. LEXIS 21345, October 15, 2010

The court held that the officers' use of force was reasonable; therefore, they were entitled to qualified immunity. Statchen fought with officers as they tried to take him into custody for public intoxication. Statchen, who is 5'10" tall, weighing 250 pounds, bragged to the officers on the ride to the station that it took two of them to restrain him. At the station, when the officers tried to handcuff Statchen for the ride to the jail, he fought them again. Statchen, who suffered two fractured ribs, eventually pled no contest to two counts of resisting arrest.

The court found that the officers gave a consistent description of the melee in which they tried to seize a heavy and intoxicated man, who refused to submit, and who, after falling to the ground, continued to grab and struggle with them. The officers admitted to using considerable force, but only to the extent needed to handcuff Statchen. The officers shouted at him to stop resisting throughout the encounter, and they ceased to use force when he finally agreed to stop fighting.

The court noted that Statchen's deposition gave a much hazier description of the events, "which was hardly surprising, given his intoxication." While he was vivid in describing knees and

punches thrown at him in the struggle, nothing in his account suggested that the officers used more force than was necessary to subdue a large and uncooperative man, and place him into handcuffs.

Click **HERE** for the court's opinion.

*****

Raiche v. Pietroski, 2010 U.S. App. LEXIS 21977, October 25, 2010

A jury awarded Raiche damages for injuries he sustained after Pietroski forcibly removed him from his motorcycle during a traffic stop. The court held that the jury was free to conclude, as it did, that Pietroski had probable cause to arrest Raiche, but the manner in which he effected that arrest was unreasonable.

After applying the *Graham* factors, the court held that Raiche's minor infractions of failing to wear a helmet while driving a motorcycle, and failing to stop when signaled by police, did not justify Pietroski's violent act of physically removing Raiche from his parked motorcycle and slamming him into the pavement. Additionally, while Raiche remained on his motorcycle, behind a parked car, he never displayed any weapons or made any verbal threats, and Pietroski did not charge him with resisting arrest. An objectively reasonable police officer would have known that the force used to make the arrest was excessive; therefore, Pietroski was not entitled to qualified immunity.

Click **HERE** for the court's opinion.

*****

2nd Circuit

Tracy v. Freshwater, 2010 U.S. App. LEXIS 21238, October 14, 2010

The court held that the officer did not use unreasonable force by striking Tracy with his flashlight several times, by jumping on Tracy as Tracy tried to flee, or by forcibly moving Tracy from the ground to the police car, despite the fact that Tracy had told the officer that he was in pain and could not move.

However, the court held that the officer was not entitled to summary judgment on Tracy's claim that the officer used pepper spray on him after he was placed in handcuffs. Compelled to credit Tracy's version of the events, the court concluded that a reasonable juror could find that the use of pepper spray deployed inches from the face of a handcuffed suspect, who was not actively resisting, constituted an unreasonable use of force.

Click **HERE** for the court's opinion.

*****

U.S. v. Rosa, 2010 U.S. App. LEXIS 22099, October 27, 2010

Police suspected that Rosa had sexually abused two boys, and shown them files on his computer that contained images of other children that he had sexually abused. A judge issued a search warrant that authorized, in part, the search and seizure of various electronic digital storage media "which would tend to identify criminal conduct."

The court held that the search warrant was defective because it failed to link the items to be searched and seized to the suspected criminal activity. The warrant directed officers to seize and search certain electronic devices, but provided them with no guidance as to the type of evidence sought, such as, digital files and images relating to child pornography. Even though the search warrant application and affidavit mentioned child pornography, these documents were not incorporated by reference into the search warrant. The court stated that since *Groh v. Ramirez*, it was no longer able to rely on unincorporated, unattached supporting documents to cure an otherwise defective search warrant.

Although the warrant was defective, the court concluded that the officers acted reasonably and that the exclusionary rule would serve little deterrent purpose in this case. The failure to particularly describe the type of evidence sought was an inadvertent error. As both the affiant and the officer in charge of executing the search warrant, the lead investigator was intimately familiar with the limits of the search. There was no evidence that the officers searched for, or seized, any items that were unrelated to the crimes for which probable cause had been shown, or that the lead investigator misled the judge regarding the facts of the case or the intended scope of the search. Therefore, the court affirmed the district court's denial of Rosa's motion to suppress.

Click **HERE** for the court's opinion.

*****

3rd Circuit

Kelly v. Borough of Carlisle, 2010 U.S. App. LEXIS 20430, October 4, 2010

Kelly filed a civil rights action claiming that his *First* and *Fourth Amendment* rights were violated when he was arrested for videotaping a police officer during a traffic stop. The officer, after noticing that Kelly, a passenger in the vehicle, was videotaping him, contacted an Assistant District Attorney (ADA) to confirm that Kelly was in violation of the *Pennsylvania Wiretap Act*. After the ADA concluded that Kelly violated the *Wiretap Act*, based on the facts described by the officer, the officer arrested him. Several weeks later, the District Attorney dropped the charges against Kelly, but issued a memorandum stating that the officer had probable cause to arrest Kelly.

The court held that the right to videotape police officers during traffic stops was not clearly established, therefore, the officer was not on notice that seizing a camera, or arresting an individual for videotaping him during a traffic stop, would violate the *First Amendment*. As a result, the officer was entitled to qualified immunity on Kelly's *First Amendment* claim.

The court remanded Kelly's *Fourth Amendment* claim to the district court for additional fact finding after concluding that the district court did not evaluate the objective reasonableness of the officer's decision to rely on the ADA's advice, and did not properly evaluate the state of Pennsylvania law at the time of the traffic stop.

Click **HERE** for the court's opinion.

*****

U.S. v. Christie, 2010 U.S. App. LEXIS 19285, September 15, 2010

The court held that Christie had no reasonable expectation of privacy in his IP address; therefore, he could not establish a *Fourth Amendment* violation.

The court noted that subscriber information provided to an internet provider is not protected by the *Fourth Amendment's* privacy expectation because it is information that is voluntarily given to a third party. Similarly, no reasonable expectation of privacy exists in an IP address, because that information is also conveyed to and from third parties, including internet service providers.

Click **HERE** for the court's opinion.

*****

5th Circuit

U.S. v. Gomez, 2010 U.S. App. LEXIS 21382, October 7, 2010

The factors that must be considered in deciding whether a tip provides reasonable suspicion to support a traffic stop include: (1) the credibility and reliability of the informant; (2) the specificity of the information contained in the tip or report; (3) the extent to which the information in the tip or report can be verified by officers in the field; and (4) whether the tip or report concerns active or recent activity.

The court held that the call to 911 readily satisfied three of the four factors. The caller provided and extraordinary amount of detail regarding the suspect brandishing a pistol, to include: the color of the weapon, the location of the crime, details about the suspect's race, age and weight, the make, model, and license plate number of the suspect's vehicle, and the race and gender of the other passengers in the vehicle. Officers were subsequently able to verify a number of these claims, to include: all of the vehicle information, the race and gender of the other passengers, and to an extent, the location, as the car was stopped heading away from the scene of the crime a few minutes after the 911 call.

As to the remaining factor, the caller gave his name, phone number and address to the 911 operator. Although the address and phone number led to a pay phone, the court held that the officers reasonably believed that they were acting on a credible and reliable tip from a verifiable source. The court noted that even if the caller were to be considered an "anonymous tipster" the

officers still had reasonable suspicion to support the traffic stop based on the strength of the other three factors.

Click **HERE** for the court's opinion.

*****

6th Circuit

Ayers v. Hudson, 2010 U.S. App. LEXIS 20487, October 5, 2010

Ayers was arrested and indicted for murder. The court held that Ayers's *Sixth Amendment* right to counsel was violated when the trial court allowed a jailhouse informant to testify regarding incriminating statements made by Ayers in response to the informant's questioning. The court found that the state intentionally created a situation likely to induce Ayers to make incriminating statements without the assistance of counsel, when it returned the informant to Ayers's jail pod, and he deliberately elicited information from Ayers regarding the murder weapon and the amount of money taken from the victim.

Click **HERE** for the court's opinion.

*****

U.S. v. Domenech, 2010 U.S. App. LEXIS 20698, October 7, 2010

Officers went to a motel to investigate suspicious activity in Room 22. Two officers knocked on the door while another officer went behind the motel and stationed himself behind the closed, frosted bathroom window. When the officers knocked on the front door, the officer outside the bathroom window saw the light turn on and observed a figure enter the room and lean over. The frosted window prevented the officer from seeing any fixtures or the person in the bathroom. Suspecting that the person in the bathroom was about to flush away evidence, the officer opened the window and confronted the defendant. Upon hearing the commotion in the bathroom, the other two officers burst into to the room from outside. The officers found the defendant, his brother, two women, drugs, guns and counterfeit currency. The officers discovered the defendant had paid for Room 22 for his brother, and Room 31 for himself, but that he had someone else rent them and fill out the registration cards.

The court held that the defendant had a reasonable expectation of privacy as a social guest in his brother's room because he demonstrated a meaningful relationship to the room by: (1) paying for the room; (2) having personal belongings in the room; and (3) possessing a key to the room in his pocket. Because the officer could not see through the frosted window, he lacked probable cause to believe the defendant would destroy evidence of a drug crime. Without probable cause, the officers could not rely on exigent circumstances to justify the warrantless search of the room.

The court further explained that the use of the room for illegal activity did not defeat the occupants' expectation of privacy, nor did the fact that another person rented the room, and provided false information on the registration card. Because the defendant exercised control over

Room 22 with permission of the motel, the lawful possession of the room created an expectation of privacy.

Click **HERE** for the court's opinion.

*****

U.S. v. Gross, 2010 U.S. App. LEXIS 21478, October 19, 2010

During a *Terry* stop, the officer discovered that the defendant had an outstanding warrant and arrested him. The officer patted down the defendant but did not conduct a search incident to arrest. At the jail, officers searched the defendant and passed him through a metal detector. The metal detector went off, but despite repeated efforts to locate the metal object, and repeated passes through the machine, the officers were unable to locate the source of the problem. When the officers brought the defendant into the holding area, he immediately asked to use the restroom. A short time later, an officer discovered a .380 caliber firearm near the toilet the defendant has used.

Five days later, while the defendant was still in custody, officers obtained a search warrant to take oral swabs from him. A DNA analysis revealed that genetic material taken from the firearm and its ammunition matched the defendant's DNA.

Two months later, while he was still in custody, the defendant contacted an ATF agent he knew, and arranged a meeting. The defendant waived his *Miranda* rights and admitted to bringing the firearm into the restroom.

The court held that when the officer parked his marked police car directly behind the car in which the defendant was sitting, thereby blocking it in the parking space, he had seized the defendant under *Terry v Ohio.* Since the officer was unable to articulate reasonable suspicion for the *Terry* stop, his actions constituted and unlawful seizure of the defendant.

Generally, evidence discovered as the result of an illegal stop is tainted as fruit of the poisonous tree and must be suppressed. Evidence may only be admitted where there is sufficient attenuation, separate and apart from the discovery of an outstanding arrest warrant for the defendant, to dissipate the taint.

As to the firearm, the court held there were no intervening circumstances that purged the taint of the illegal stop, and that the firearm must be suppressed as fruit of the poisonous tree. Without the illegal stop, the officer would not have learned of the outstanding arrest warrant; he would not have arrested the defendant, and the firearm would not have been discovered in the restroom a short time later.

However, the court held that the DNA swabs and the defendant's confession were admissible because intervening circumstances had sufficiently attenuated them from the unlawful arrest, to the degree that any taint had dissipated. The police obtained the DNA evidence several days after arrest, pursuant to a search warrant. The defendant's confession occurred after he voluntarily gave information to the ATF agent, two months after his arrest, and after he had waived his *Miranda* rights.

Click **HERE** for the court's opinion.

7th Circuit

U.S. v. Shamah, 2010 U.S. App. LEXIS 20998, October 12, 2010

The defendant, a corrupt Chicago police officer, was convicted of conspiracy to violate the *Racketeer Influenced and Corrupt Organizations Act* (*RICO*). To be convicted under *RICO*, there must be "operation" of an "enterprise." The court held that given his discretion and authority as a police officer, and the way in which he chose to direct his powers, Shamah operated or managed the integral duties of the police department's daily affairs. The court rejected Shamah's argument that as a "lowly" police officer he could not direct the affairs of the Chicago Police Department, the charged enterprise.

Click **HERE** for the court's opinion.

*****

U.S. v. Adams, 2010 U.S. App. LEXIS 22894, October 25, 2010

Police arrested Adams shortly after he accepted keys from undercover ICE agents to a van that was loaded with 1400 pounds of marijuana. The court held that Adams constructively possessed the marijuana once he accepted the keys to the van, and he actually possessed it once he entered the van and attempted to start it. The fact that the officers had disconnected the battery cable, rendering the van inoperable, did nothing to diminish Adams' control over the van or its contents. It was not necessary for the agents to give Adams the opportunity to drive away to establish his possession of the marijuana.

Click **HERE** for the court's opinion.

*****

U.S. v. Williams, 2010 U.S. App. LEXIS 22787, October 25, 2010

The court held that the facts known by the DEA task force supported a warrantless search of the vehicle, in which Williams was a passenger, and that this information could be imputed to the patrol officer who conducted the traffic stop, under the collective knowledge doctrine.

The collective knowledge doctrine allows an officer to stop, search, or arrest a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of facts that amount to the necessary level of suspicion to permit the stop, search, or arrest. This court has applied the collective knowledge doctrine where, as the case is here, DEA agents asked local law enforcement officers to stop a specifically identified vehicle, and the local officers had no knowledge of the facts underlying the DEA's probable cause.

Click **HERE** for the court's opinion.

*****

8th Circuit

U.S. v. Amratriel, 2010 U.S. App. LEXIS 21166, October 14, 2010

Police responded to a 911 call about a domestic disturbance at the defendant's house. The defendant's wife told police that she and her husband had a fight that escalated when he began chasing her around the house with a sword. The officers disarmed the defendant and placed him in their patrol car. Concerned about weapons in the house, the defendant's wife gave the police written permission to search the house. The officers found a large, locked gun safe in the garage. The defendant's wife told the officers her husband had the keys. The officers retrieved the keys from the defendant, who was still outside in the officers' patrol car. Inside the safe the officers found seventeen firearms and a hand grenade. The defendant argued that the officers' reliance on his wife's apparent authority over the gun safe was unreasonable.

The court disagreed. When the officers received consent to search the officers knew: (1) the safe was in a common area, the garage; (2) the defendant's wife knew where the keys were and how to unlock the safe, as she unlocked it herself; (3) she never indicated that she had no access to the safe or that it was for her husband's exclusive use; (4) as the officers removed the weapons, the defendant's wife identified one handgun as hers. The court noted that possession of the key to the safe, alone, was not the sole factor in determining whether the defendant's wife had authority to consent to the search. Additionally, the defendant's failure to object when police took the keys from him was further evidence that the officers acted reasonably. Finally, when officers obtain valid third-party consent, they are not also required to seek consent from a defendant, even if he is detained nearby.

Click **HERE** for the court's opinion.

*****

Dodd v. Jones, 2010 U.S. App. LEXIS 21353, October 18, 2010

Dodd was ejected from his pick-up truck after he drove it into a ditch, in the early morning hours, in an apparent alcohol-related accident. The responding officers found Dodd lying in the roadway. Fearing that Dodd might have suffered a spinal injury, the officers did not move him. While waiting for an ambulance, a pick-up truck driven by McSwain approached the accident scene. The officers waved their flashlights in an attempt to get McSwain to stop. McSwain, whose blood-alcohol content later tested at 0.164, did not stop, and he ran over Dodd. The officers drew their weapons and ordered McSwain to stop, but he ignored their commands, shifted into reverse, and ran over Dodd a second time. Officers finally got McSwain to stop and they arrested him.

Dodd survived and sued the officers for violating his rights under *Due Process* clause by failing to protect him from McSwain. He claimed the officers should have parked their vehicles, or set road flares north of the accident scene, the direction from which McSwain had driven.

The court noted that the *Due Process* clause generally does not provide a cause of action against state officials for harm caused by private actors. However, when a state official takes a person

into custody and holds him against his will, the Constitution imposes upon the state official a duty to assume some responsibility for his safety and well-being.

In this case, the court doubted that the evidence supported a finding that the officers took Dodd into custody and held him against his will, to the degree necessary to trigger any duty under the *Due Process* clause. When the officers found Dodd he was incapacitated and lying in the roadway. There was no showing that Dodd could have removed himself from the roadway, or that a passerby would have moved him out of the path later taken by McSwain, if the officers had not arrived. The absence of a clearly established constitutional duty for the officers to act to protect Dodd under these circumstances was sufficient ground to grant the officers qualified immunity.

Click **HERE** for the court's opinion.

*****

U.S. v. Brewer, 2010 U.S. App. 21683, October 21, 2010

Brewer sold a confidential informant crack cocaine. After the sale, Brewer drove his van away from the scene. Having learned ahead of time that Brewer's driver's license was suspended, an officer who monitored the sale requested that a patrol officer in a marked police car stop Brewer. A patrol officer stopped Brewer and arrested him for driving with a suspended license. The officer recovered the eight hundred dollars in pre-recorded cash used in the undercover buy during his search incident to arrest.

Brewer argued that the patrol officer did not have probable cause to stop and arrest him. The court held that if an officer determines that a person is driving on a suspended license, then the officer has probable cause to arrest. The court concluded that the patrol officer had probable cause to arrest Brewer after he received information from the narcotics officer that Brewer was driving and that it had been determined that his license was suspended.

Click **HERE** for the court's opinion.

*****

U.S. v. Swift, 2010 U.S. App. 21948, October 25, 2010

Officers, suspecting that Swift and Harlan were involved in a shooting, transported them to police headquarters and placed them in an interrogation room together. The room was equipped with video and audio monitoring equipment, and officers recorded the conversation between them. Swift made incriminating statements that were introduced against him at trial, even though he told Harlan that he believed the officers were listening to their conversation.

The court held that the act of placing Swift in an interrogation room, with a recording device activated, was neither express questioning, nor the functional equivalent of express questioning. The officers may have hoped that Swift or Harlan would make incriminating statements when left alone, but officers do not "interrogate" a suspect by simply hoping that he will incriminate himself.

The court further held that Swift had no reasonable expectation of privacy while being detained in the interrogation room at the police station, and that he even recognized the likelihood that officers were monitoring him and Harlan.

Click **HERE** for the court's opinion.

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9th Circuit

Luchtel v. Hageman, 2010 U.S. App. LEXIS 20736, October 7, 2010

The court held that the officers' use of force in arresting Luchtel was reasonable; therefore, they were entitled to qualified immunity. When the officers responded to Luchtel's house, her husband told them that she was running around the neighborhood, out of control on drugs, and that she had gone to a neighbor's house. When the officers went to the neighbor's house, Luchtel attempted to hide behind the neighbor for protection. As the officers tried to grab Luchtel, she put her arms around the neighbor and they both fell to the floor. In the ensuing struggle, Luchtel tried to hit, scratch, bite and kick the officers. Although police officers need not use the least intrusive means available to them, the officers here did. They did not deploy a taser, use batons, or pepper sprays, nor did they punch or kick Luchtel, despite her violent, aggressive and unpredictable behavior. It was reasonable and necessary for the officers confronted with these circumstances to use the amount of force that they did to subdue Luchtel, and prevent injury to her, the neighbor and themselves.

Click **HERE** for the court's opinion.

*****

U.S. v. Lozano, 2010 U.S. App. LEXIS 21440, October 18, 2010

Postal workers may detain a package to conduct an investigation, if based on the totality of the circumstances, they have a reasonable and articulable suspicion that it contains contraband or evidence of illegal activity. Once the package is detained, the length of that detention must be reasonable.

The court held that the Postal Inspector had reasonable suspicion to detain the package. The postmaster told him that the defendant had asked him whether mail could be searched for drugs. Additionally, the package listed a fictitious sender and addressee, and had an incomplete return address. The package was shipped with a delivery confirmation, had a handwritten label and was heavily taped.

The court further held that the length of time between the initial seizure and the development of probable cause was reasonable. This court has previously upheld as reasonable a five-day delay arising because of the difficulty of travel for canines in Alaska. Here, the delay was less than one day, and was caused by the difficulty of canine travel in Alaska.

Click **HERE** for the court's opinion.

Smith v. Almada, 2010 U.S. App. LEXIS 21496, October 19, 2010

The court held that Almada was entitled to qualified immunity on Smith's claim of false arrest and malicious prosecution. Smith argued that the magistrate would not have issued the warrant for his arrest if Almada's warrant application had not included false representations. The court ruled that even if the false information had been omitted from the warrant application, there were sufficient facts left to establish probable cause to arrest Smith for arson.

Click **HERE** for the court's opinion.

*****

U.S. v. Redlightning, 2010 U.S. App. LEXIS 21957, October 25, 2010

The defendant argued that his confession resulted from his unlawful seizure by FBI agents, and that the agents did not promptly present him for arraignment after his arrest.
The court concluded that the encounter at the defendant's home did not amount to a seizure. The defendant voluntarily agreed to join the FBI agents at their office. The agents did not handcuff him and they did not brandish their firearms. One agent did not have handcuffs, which indicated the absence of intent to arrest. The minimal pat-down search to which the defendant was subjected before he got in the FBI car was routine before entering an FBI vehicle. The defendant's response to the agent's question about medication indicated that he believed he would be returning home later that evening.

Once at the FBI office, the court concluded that in the time leading up to the defendant's confession, a reasonable person in the defendant's shoes would have thought he could get up and leave, and decline to take part in further police questioning. The defendant's initial confession was not the result of an unlawful seizure.

After the defendant confessed at 12:22 p.m. on October 2, he was effectively under arrest. If the agents had stopped questioning him then, they may have been able to reach Seattle in time for the 2:30 p.m. arraignment. Because the agents were entitled to at least a six-hour safe harbor to continue questioning the defendant, they were under no obligation to stop questioning the defendant the moment he confessed, nor would it have been reasonable for them to do so.

The next reasonably available time to arraign the defendant was at 2:30 p.m. on October 3. While driving the defendant to his arraignment, the agents spoke to the AUSA who requested that they re-interview the defendant. The agents drove to a nearby FBI office and obtained a second confession from the defendant. The agents then resumed their trip and delivered the defendant to the district court well before the 2:30 p.m. arraignment. The court held that the defendant's second confession was admissible. Although the second confession occurred after the six-hour safe harbor after the defendant's arrest, it was made before the October 3 arraignment, and did not delay it.

Click **HERE** for the court's opinion.

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11th Circuit

U.S. v. Sistrunk, 2010 U.S. App. LEXIS 20738, October 7, 2010

The defendant, a convicted felon, became involved in a scheme to commit an armed robbery on a drug stash-house. The stash-house was supposed to hold twenty-five kilograms of cocaine, valued at approximately $500,000. However, the scheme was actually a police sting set up by a confidential informant and an undercover agent.

The court held that the evidence presented at trial was not sufficient to justify submitting an entrapment defense to the jury. The facts presented represented nothing more than evidence that the government presented the opportunity for the defendant to commit the crime.

Click **HERE** for the court's opinion.

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U.S. v. Mateos, 2010 U.S. App. LEXIS 21497, October 19, 2010

The court held that the evidence was sufficient to establish that the defendant knew that St. Jude was submitting fraudulent claims to Medicare. It was not necessary for Mateos to know "all the details" of how the fraud worked in order for her to be guilty of conspiracy. The presence of fraud at St. Jude was so obvious that knowledge of its character could fairly be attributed to her.

Click **HERE** for the court's opinion.

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District of Columbia Circuit

U.S. v. Bailey, 2010 U.S. App. LEXIS 21983, October 26, 2010

An undercover officer agreed to purchase cocaine from Webb, a drug dealer from whom he had purchased cocaine in the past. While he was waiting for a phone call, telling him to enter the alley where the sale would occur, the officer saw Bailey and Webb speaking in front of Webb's restaurant. After a few minutes, Bailey went and waited by his truck, and Webb went into his restaurant. Webb later came out of the restaurant, and he and Bailey walked into the alley. A short time later, a car driven by Webb's supplier entered the alley. Bailey walked out of the alley, got into his truck and drove it back into the alley, stopping next to the car driven by Webb's supplier. Two minutes later Webb called the officer and told him to come into the alley. When the officer drove into the alley, the supplier's car was there but Bailey's truck was not. No police officer witnessed Bailey's actions in the alley. A uniformed police officer performed a traffic stop on Bailey's truck and seized one kilogram of cocaine in plain sight on the passenger seat.

The court held that there was reasonable suspicion to stop Bailey, concluding that evidence clearly supported articulable suspicion to believe that he was involved in the same type of activity that the undercover officer was involved in, considering the consistency of what was taking place.

Click **HERE** for the court's opinion.