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2009 Legal Division

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Supplement to the 2009 Legal Division Handbook

Little Down But Definitely Not Out:
Vehicular Search Incident to Arrest after *Gant*

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I. Introduction

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

The Fourth Amendment is a shield against all unreasonable searches and seizures by the government, but not against all warrantless searches and seizures. One instance of a reasonable warrantless search that has been recognized by the Supreme Court is a search incident to a valid arrest (SIA) as defined over 40 years ago in the Supreme Court's decision in *Chimel v. California*, 395 U.S. 752 (1969). Last year, in *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 1714 (2009), a divided court wrestled with how to impose clarity and discipline on the law pertaining to when a SIA may include a vehicle's passenger compartment recently occupied by the arrestee. This paper will summarize that decision and the legal precedent upon which it was based, and will provide this writer's assessment of the *Gant* decision's effect on vehicular searches incident to the arrest of a recent occupant.

II. Pre-*Gant* Case Law

A. *Chimel v. California*

In *Chimel v. California*, 395 U.S. 752 (1969), officers with an arrest warrant searched Chimel's entire residence along with a garage and another outbuilding, and compelled Chimel's wife to assist them in that search. *Chimel*, 395 U.S. at 754. The Court found the search to be unlawful and held that "absent some grave emergency," the Fourth Amendment requirement of reasonableness mandates that "the police must, whenever practical, obtain advance judicial approval of searches through the warrant procedure." *Id.* at 761.

Nevertheless, the Court acknowledged the need for officer safety and the preservation of evidence. To serve those needs, the Court found that, following a lawful arrest, an officer may reasonably search the arrestee without a warrant in order to locate and remove any weapons that the arrestee could use in order to resist arrest or escape. Further, the Court held that the arresting officer may search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. In short, the Court concluded that the scope of a reasonable SIA includes the arrestee's person and the area "within his immediate control," but not closed or concealed areas in the room of arrest or rooms other than that in which an arrest occurs. *Id.* at 762-63.

B. *New York v. Belton*

Against the foregoing backdrop, the Supreme Court, in 1981, addressed the question of the permissible scope of a SIA when the arrestee, at the time of or immediately before arrest, was an operator or passenger in a vehicle. *New York v. Belton*, 453 U.S. 454 (1981). In that case, the police officer lawfully stopped a car with four occupants because the driver was speeding. As he approached the vehicle after the stop, the officer smelled the odor of marijuana and saw an envelope on the floor of the car on which was printed a symbol for marijuana. He ordered the occupants out of the car, retrieved and opened the envelope, and found that it contained marijuana. Inside the pocket of the defendant's jacket, which was also in the car, the officer found cocaine. *Id.* at 456.

The Court upheld the search of Belton's jacket, concluding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460. In doing so, the Court found that it is reasonable to conclude that articles inside the passenger compartment of an arrestee's automobile are within "the area into which an arrestee might reach in order to grab a weapon or [evidence]." *Id.*

C. *Thornton v. United States*

Left unanswered in *Belton* was the question of the lawfulness of the SIA of a vehicle when the person arrested had already vacated the car. In *Thornton v. United States*, 541 U.S. 615 (2004), a police officer attempted to conduct a traffic stop of Thornton, though initially Thornton did not respond. After Thornton voluntarily stopped and exited his vehicle, the officer initiated contact with him. At the time, Thornton consented to being frisked and during that frisk, the officer found illegal drugs on Thornton's person. The officer placed Thornton under arrest, handcuffed him, and placed him in the back seat of the officer's car. After doing so, the officer returned to Thornton's car and searched it, finding a firearm under the driver's seat. *Id.* at 618.

In his motion to suppress the firearm, Thornton argued that the officer's search of his car was unconstitutional because it occurred when he was no longer an occupant of that car. *Id.* at 618-19. The Court upheld the search, however, finding that the concerns of officer safety and evidence destruction are the same regardless of whether the suspect is inside or outside of the car, if he is still in control of it. *Id.* at 620-21.[1]

III. *Arizona v. Gant*

Shortly after arresting two individuals at a residence for providing false information and for possession of drug paraphernalia, police officers in Tucson, Arizona, recognized Rodney Gant as he arrived in his car. Aware that Gant's driver license had been suspended, one officer approached Gant as he parked in the driveway of the residence, got out of his car, and shut the door behind him. At a point about 10 to 12 feet from Gant's car, the officer arrested Gant for driving on a suspended license, handcuffed him, and placed him in the backseat of a police

[1] Justice Scalia declined to join the *Thornton* majority's opinion though he concurred with its decision. He wrote, with some prescience given the Court's later decision in *Gant*, that the majority had "stretched *Belton* beyond [its]breaking point" and opined that it should be limited to cases in which the arresting officer has "…[reason] to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 625-29 (Scalia, J., concurring).

vehicle. A search of Gant's car incident to that arrest revealed a gun and a bag of cocaine in the pocket of a jacket on the backseat. *Arizona v. Gant,* 129 S.Ct. at 1714.

Charged with possession of drugs and drug paraphernalia, Gant argued that the warrantless search of his vehicle was not justified under *Belton* because (1) he posed no threat to the officers after he was handcuffed and in the patrol car and (2) because he was arrested for a traffic offense for which no evidence could be found in his vehicle. *Id.* at 1715. The Arizona Supreme Court concluded that a warrantless search of a vehicle after its owner is arrested, handcuffed and secured in the back of a police car and the scene is otherwise secure, is unconstitutional. *Id.* at 1716.

The United States Supreme Court agreed, finding that vehicle SIAs after the arrest of a recent occupant of that vehicle must be based on "the safety and evidentiary justifications underlying Chimel's reaching distance rule." *Id.* at 1714. Along the lines of Justice Scalia's concurring opinion in *Thornton*, the Court majority wrote that earlier readings of its decision in *Belton* were "unnecessarily broad, resulting in the conclusion that the search of a vehicle incident to arrest was a police entitlement rather than as a narrow exception to the warrant requirement applicable only when the facts actually demonstrate officer safety or evidence destruction issues as contemplated in *Chimel*." *Id.* at 1718. Thus, the Court concluded, such searches are only permissible when (1) the arrestee retains actual access to the interior of the vehicle, or (2) the arresting officer has "reason to believe" that evidence of the crime for which he made the arrest exists in the car. *Id.* at 1723-24.[2]

IV. SIA of Vehicles after *Gant*

Clear from the holding in *Gant* is that the teachings of *Chimel* remain good law. That is, following a valid arrest, the arresting officer may conduct a warrantless search of the space within an arrestee's "immediate control" and "the area from which he might gain possession of a weapon or destructible evidence." *Id.* at 1718 (quoting *Chimel*, 395 U.S. at 763) (emphasis added). The Court in *Gant* made abundantly clear that the vehicle search in that case failed to meet that standard because it happened after Gant was handcuffed and secured in the back of a patrol car. Accordingly, law enforcement's longstanding presumption of "immediate control" of the interior of a vehicle merely because of proximity to the arrestee is no more.

Unlike in *Thornton*, the officers in *Gant* lacked any basis for concluding that Gant possessed evidence of a crime on his person at the time of his initial arrest, something that even under *Gant* could provide a basis for extending the SIA to a vehicle from which the arrestee had just exited. Because the Court in *Gant* expressly rejected any notion that it was overruling *Thornton*, *id.* at 1722, it would therefore seem reasonable to conclude that the actual change effected by *Gant* to law enforcement officer's post-arrest search authority may be viewed as similarly narrow.

Thus, if an arresting officer finds evidence of a crime on the person of an arrestee who recently occupied a vehicle, the SIA may reasonably be extended to the passenger compartment of that vehicle. It should also follow that if an arresting officer has no vehicle for securing an arrestee in

[2] The Supreme Court has not specifically defined "reasonable to believe" as that term was used in *Gant.* Some courts have equated *Gant*'s "reasonable to believe" standard with **probable cause**. *See, e.g., United States v. Grote,* 629 F. Supp. 2d 1201, 1203 (E.D. Wash. 2009). Other courts have found that *Gant*'s reasonable belief standard is less than probable cause. *See, e.g., United States v. Vinton,* 2010 U.S.App. LEXIS 2450 (2010).

a case involving drugs or another serious felony, the officer may reasonably conclude that, even if the defendant is handcuffed, his vehicle remains within his immediate control and a place where he could gain possession of a weapon or destructible evidence. Similarly, if the officer is alone but dealing with multiple arrestees who recently occupied a vehicle, it may be reasonably argued that the officer may conduct a quick search of the vehicle for weapons and destructible evidence to ensure his safety before moving the arrestees away from the vehicle.

On the other hand, after *Gant*, absent some similar basis for finding the potential for access to the vehicle, officer safety will not justify a SIA of the vehicle. In that case, the officer wishing to make a lawful search of the vehicle's interior must be prepared to articulate an objective reason to believe that the car is a repository of evidence of the crime that is the basis of the arrest.

V. Conclusion

Gant need not be viewed as a significant impediment to effective post-arrest searches of vehicles. If an arresting officer is able to articulate reasonable facts that demonstrate a realistic likelihood that the arrestee (or another acting to assist the arrestee by gaining access to a weapon or destructible evidence) retains access to the vehicle, a SIA of that vehicle would pass the test of *Gant*. If the officer is able to articulate a reason to believe that the vehicle contains evidence of the crime for which he has just made an arrest, *Gant* would allow an ensuing search of the passenger compartment of the vehicle. Absent such articulable facts, the likelihood that a SIA of the vehicle would be lawful is small.

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Additional Supreme Court Law Enforcement Cases To Be Decided in the October 2010 Term

Miranda

J.D.B. v. North Carolina
Decision Below: 686 S.E.2d 135 (N.C. 2009)

Whether a court may consider a juvenile's age, in a *Miranda* custody analysis, when evaluating the totality of the circumstances, to determine if a reasonable person in the juvenile's position would have felt he or she was not free to terminate police questioning and leave.

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The Exclusionary Rule

Tolentino v. New York
Decision Below: 926 N.E. 2d 1212 (N.Y. 2010)

Whether pre-existing identity-related governmental documents, such as motor vehicle records, obtained by the police as a result of a *Fouth Amendment* violation, are subject to the exclusionary rule.

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CASE SUMMARIES

Circuit Courts of Appeals

2nd Circuit

U.S. v. Capers, 2010 U.S. App. LEXIS 24516, December 1, 2010

Investigators arrested Capers, a postal employee, for theft of money from Express Mail envelopes. The investigator interrogated Capers without *Miranda* warnings. Afterward, other investigators transported Capers to another location. Ninety minutes later, the original investigator *Mirandized* Capers and interviewed him again.

To determine the admissibility of a defendant's statements, the court must determine: (1) whether the officers used a deliberate, two-step strategy, based upon violating *Miranda* during an interview, and if so, (2) whether specific curative steps were taken to ensure the confession was voluntary.

The 3rd, 5th, 8th, 9th and 11th circuits agree.

The court held that the pre-*Miranda* interrogation, followed ninety minutes later by a second, post-*Miranda* interrogation, amounted to a deliberate two-step interrogation technique designed to undermine the defendant's *Miranda* rights. The same investigator conducted both interrogations under similar circumstances, and discussed the same subject matter, without taking any steps to cure the violation. The only legitimate reason to delay the reading of a *Miranda* warning, until after custodial interrogation has begun, is to protect the safety of the arresting officers or the public, neither of which was an issue here.

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

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3rd Circuit

Ray v. Township of Warren, 2010 U.S. App. LEXIS 24043, November 23, 2010

The court held that the officers were entitled to qualified immunity for entering the Ray's house, without a warrant, to search for his daughter. Deciding this issue for the first time, the court ruled that the community caretaking doctrine could not be used to justify a warrantless search of a home. In the context of a home search, the community caretaking doctrine does not override the warrant requirement, or one of its well-recognized exceptions.

(The 7th, 9th and 10th Circuits agree)

The court did not determine whether there were exigent circumstances that would have allowed the officers to enter Ray's home without a warrant. However, it was objectively reasonable for the officers to be concerned for the young child, and to believe that their entry was allowed, based on the state of the law at the time.

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

*****

4th Circuit

U.S. v. Taylor, 2010 U.S. App. LEXIS 22921, November 4, 2010

A cab driver found a four-year-old girl wandering alone along a busy street and called the police. The girl told the responding officer that she lived across the street. When they got to her house, the officer saw through the exterior door, that the interior door was open. The officer opened the exterior door and called out, but received no response. He entered the house, with the girl, and found the defendant in the bedroom. On a cabinet next to the bed, the officer saw a clear plastic bag containing .22-caliber ammunition. After the officer learned that the defendant had given him false name, he conducted a protective sweep, and found a handgun under the mattress. The officer arrested the defendant after further investigation revealed that he was a convicted felon.

The court held that exigent circumstances permitted the officer to enter the defendant's house without a warrant. Although a warrant was not required, the officer's entry into the home had to be reasonable. The court concluded that a four-year-old girl wandering alone, along a busy street, constituted an emergency that made the officer's entry into the house to locate a parent reasonable.

The court then noted that once inside the house, the scope of the ensuing search had to be reasonable. In this case, the officer made no effort to search any areas that could not contain an adult that could care for the child. Once the officer encountered the defendant, it was reasonable to try to identify him before leaving the child with him. After seeing the bag of ammunition and learning that the defendant had given him a false name, the officer was justified in conducting a protective sweep. The officer limited the scope of his protective sweep to the area within which the defendant might gain possession of a weapon.

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

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U.S. v. Hargrove, 2010 U.S. App. LEXIS 23839, November 19, 2010

Officers executed a search warrant at the defendant's residence. An officer interviewed the defendant, and while they sat at the kitchen table, the defendant made several incriminating statements. The court held that the defendant was not in custody during the interview; therefore, he was not entitled to *Miranda* warnings, so his statements were admissible.

The totality of the circumstances supported the finding that a reasonable man in the defendant's position would have understood that he was not in custody. At the beginning of the interview, the officer told the defendant that he was not under arrest and that he was free to leave. The officers did not handcuff the defendant. After their initial entry, the officers did not draw their weapons in the kitchen, and the conversation was amicable and non-threatening in tone. The officers allowed the defendant to move around his house, as long as he did not interfere with the ongoing search, which he did on one occasion to attend to his cat. Between ten and fifteen officers participated in the execution of the search warrant, while only two officers were in the kitchen with the defendant during the interview. Even though the two officers were armed, they

did not draw their firearms during the interview, and they did not threaten the defendant. The mere presence of armed law enforcement officers during an interview is not sufficient to create a custodial situation.

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

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U.S. v. Hernandez-Mendez, 2010 U.S. App. LEXIS 24364, November 29, 2010

Officers conducted surveillance on a school the day after a gang-related stabbing. They were trying to prevent retaliation against gang members who attended the school. Just before the end of the school day, the officers saw the defendant and six other individuals standing across the street from the school having a discussion. When the officers approached, the group split up. One individual ran away while the other six walked away. The officers detained and frisked everyone for weapons.

The court held that the officer's observations, knowledge, and experience in responding to gang-related incidents in the area provided reasonable suspicion to detain the defendant. The officer could reasonably believe the group, that included the defendant, was planning to retaliate against rival gang members leaving the school.

Additionally, the facts that justified the defendant's detention, and those that emerged after she was detained, provided reasonable suspicion to justify a frisk. Based on the clothes she was wearing, it was reasonable for the officer to frisk the defendant's purse as well as her person. When the officer touched the purse, he felt an object that he recognized to be a firearm, which then justified looking inside the purse and seizing the weapon.

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

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5th Circuit

U.S. v. Allen, 2010 U.S. App. LEXIS 22920, November 4, 2010

The court held that the search warrant did not describe with sufficient particularity the items to be seized, and the attachment detailing the items to be seized was not incorporated by reference into the warrant. However, the court concluded that evidence seized during the execution of the search warrant was admissible under the good-faith exception. The language used in the warrant was flawed, in that it did not reference the exhibit containing the affidavit and list of items to be seized. However, a reasonable officer could have easily concluded that the warrant was valid since the magistrate judge signed not only the warrant, but also the affidavit, to which the list of items to be seized was attached. The magistrate judge's signature on the affidavit reduced the concern that he did not agree to the scope of the search as defined in it. This protected the defendant by preventing the officers from conducting a general search. The mistake was not that the documentation was insufficient to support issuance of the warrant, but that the attachment and affidavit were not properly incorporated into the warrant by reference.

The court further held that the information relied upon by the officers to establish probable cause was not stale. The court found, in cases involving child pornography, it was reasonable for the

magistrate to conclude that the pornographic images were still on the defendant's computer eighteen months after he transferred them.

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

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6th Circuit

Sykes v. Anderson, 2010 U.S. App. LEXIS 23204, November 9, 2010

After the plaintiffs' convictions for larceny and false report of a felony were overturned on appeal, they sued the officers for false imprisonment, malicious prosecution and denial of due process, based on the *Brady* violation. A jury awarded the plaintiffs compensatory and punitive damages against the two officers in their individual capacity.

The court held that the false arrest claim was proper because the officer submitted a warrant application that contained his deliberate material misrepresentations and omissions, and there was no probable cause to arrest without these misrepresentations and omissions.

The court held that liability against the officers for malicious prosecution was proper because they provided the prosecutor with investigatory material that contained knowing misstatements, and the prosecutor relied on many of these falsehoods in proceeding against the plaintiffs in their criminal trial.

The court held that liability against the officer for a due process claim, for a *Brady* violation, was proper because there was no evidence that the plaintiffs possessed any of the facts that would have enabled them to uncover the withheld evidence, which was favorable to them, and as a result, suffered prejudice.

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

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Ellison v. Balinski, 2010 U.S. App. LEXIS 23409, November 12, 2010

The court upheld the judgment against the officer in her individual capacity because her search warrant affidavit failed to establish a nexus between the material to be seized and the place to be searched. The affidavit did not state how the officer came to know that plaintiff's business was located at his residence, or why documentation of an allegedly fraudulent mortgage might be found there.

The court further held that the officer was properly denied qualified immunity. The evidence presented allowed the jury to reasonably determine that the warrant was so lacking in indicia of probable cause that the officer's belief in its existence was objectively unreasonable.

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

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7th Circuit

Cyrus v. Town of Mukwonago, 2010 U.S. App. LEXIS 23284, November 10, 2010

The court concluded that the officer was not entitled to summary judgment since there was conflicting evidence about how much force the officer used against the suspect. The officer testified that he deployed the Taser five or six times, and the medical examiner noted that the marks on the decedent's back were consistent with five or six Taser shocks. However, the Taser's internal computer registered twelve trigger pulls during the relevant time period. Although a jury might conclude that the additional six trigger pulls were not, in fact, deployments that emitted an electrical charge to the decedent's body, the Taser's internal computer record created enough of a factual discrepancy on the degree of force used by the officer to preclude summary judgment.

Additionally, summary judgment was inappropriate because a jury could conclude that the officer's use of force was excessive in light of the other *Graham* factors. At most, the decedent had committed a misdemeanor offense, he was not exhibiting violent behavior, and there was no evidence that suggested he violently resisted the officer's attempts to handcuff him. A jury might reasonably conclude that even if the initial Taser deployment was justified that the circumstances of the encounter reduced the need for force as the situation progressed. Force is reasonable only when exercised in proportion to the threat posed.

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

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U.S. v. Cruz-Rea, 2010 U.S. App. LEXIS 23632, November 17, 2010

A confidential informant admitted his own participation in a drug distribution ring, and told police that the defendant was going to use a Ford Focus to transport a shipment of cocaine from Utah to Indianapolis within the next two days. Additionally, he said that the defendant had previously shipped cocaine in gift-wrapped packages. While conducting surveillance on the defendant, officers saw her loading gift-wrapped packages into a Ford Focus. An officer followed the defendant and conducted a traffic stop after he noticed that her vehicle did not have a license plate light. After receiving conflicting stories from the defendant and her passenger as to where they were going, the officer searched the Ford Focus and found cocaine in the gift-wrapped packages.

The court held that the confidential informant's admission that he was part of a drug ring, the corroboration of the information he provided, and the defendant's and passenger's conflicting stories, provided the officer probable cause to conduct a warrantless search of the defendant's vehicle under the automobile exception to the warrant requirement.

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

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U.S. v. Aljabari, 2010 U.S. App. LEXIS 23633, November 17, 2010

The court held that the search warrant affidavit contained sufficient information to show a fair probability that evidence would be found in the defendant's apartment. The defendant had asked

three people to burn down the Smoke Shop, and he was in regular contact with the individual who was believed to have set the fire. When probable cause exists to believe an individual has committed a crime involving physical evidence, a magistrate judge will generally be justified in finding probable cause to search that individual's home, absent information to the contrary.

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

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U.S. v. Simms II, 2010 U.S. App. LEXIS 24031, November 23, 2010

An officer searched the defendant' wheeled garbage container and discovered evidence that was used to obtain a warrant to search his residence. At the time of the search, the garbage container was in the defendant's yard, behind a six-foot high solid fence, with a "No Trespassing" sign affixed to the gate. Although the gate was open when the officer entered and searched the garbage container, the accumulation of snow that morning prevented it from being closed.

Homeowners usually wheeled the garbage containers to the curb for collection; however, a city ordinance created "winter-rules", whereby, homeowners were required to leave the garbage containers on their property, so they would not hinder snow removal. The city informed homeowners that the sanitation workers would wheel the garbage containers from their property to the garbage trucks in the street, and required the homeowners to provide a clear path to all containers.

The court held that the officer's search of the garbage container was lawful since it was authorized by the appearance of consent to collect the garbage from a fenced yard under the "winter rules" with the gate open. Even if the container was on the curtilage, when the gate was open the garbage collectors could assume that the defendant wanted his garbage container emptied, and what the garbage collectors reasonably believed they could do, the officer could do as well.

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

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8th Circuit

U.S. v. Villa-Gonzalez, 2010 U.S. App. LEXIS 22668, November 1, 2010

Three officers, suspecting that the defendant was a drug dealer, went to his home and conducted a knock-and-talk. After receiving the defendant's state identification card, the narcotics officer called an ICE immigration officer and requested an immigration check. The ICE officer asked to speak to the defendant over the telephone. The narcotics officer handed his cell phone to the defendant and told him talk to the ICE officer. The defendant told the ICE officer that he had entered the United States on a visitor's visa. After he was unable to confirm this through a records check, the immigration officer told the narcotics officer to arrest the defendant as a suspected illegal alien. The police arrested two other individuals who admitted, over the phone to the ICE officer, that they were in the United States illegally. After his arrest, the defendant admitted to the ICE officer that he had entered the United States using fraudulent documents, and that the documents were in his home. The government obtained a search warrant for the

fraudulent documents, and during the search of the defendant's home found methamphetamine, scales, handguns and $32,000 in currency.

The court held that the initial encounter between the narcotics officers and the defendant was consensual. However, the consensual encounter became a *Fourth Amendment* seizure after the officer told the defendant he believed he was a drug dealer, and because there was no evidence that the officer returned the defendant's identification before the defendant spoke to the ICE officer over the telephone. A reasonable person in the defendant's circumstances would not have felt free to terminate the police encounter and walk away. Since the officers had seized the defendant without reasonable suspicion that he was involved in criminal activity, it was an illegal seizure.

The court held that the physical evidence discovered during the search of the defendant's home was properly suppressed as "fruit of the poisonous tree." When the defendant spoke to the ICE officer over the phone, about the details of his immigration to the United States, he was illegally seized. The phone conversation supplied the only basis to arrest the defendant, and the arrest led directly to the defendant's subsequent admission that he had entered the United States illegally using fraudulent documents. The warrant to search the defendant's home for the fraudulent documents was supported by the defendant's admissions to the ICE officer.

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

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U.S. v. Webster, 2010 U.S. App. LEXIS 23127, November 5, 2010

The court held that the information supplied by the informant was sufficiently reliable to establish a finding of probable cause and support the warrantless arrest of the defendant. The informant had a history of supplying reliable information since he had successfully purchased controlled substances from the defendant on two prior occasions, within the last month. Additionally, the defendant arrived at the pre-determined place and time for the controlled buy, and the informant provided the agreed upon visual sign to the police that the defendant was in possession of crack cocaine.

After arresting the defendant, the officers conducted a warrantless search of his vehicle and found crack cocaine. The court declined to apply *Gant* to determine if the warrantless search of the vehicle was valid incident to the defendant's arrest. Instead, the court held that under the automobile exception, the officers had probable cause to search the defendant's vehicle. The defendant arrived at the time and place set for a controlled drug buy, and he spoke with an informant in the vehicle before the informant gave a visual signal to the officers indicating that the defendant possessed drugs. Combined with the fact that the officers found drugs on the defendant's person when they arrested him, there was a reasonable basis for the officers to believe to a fair probability that there were drugs in the defendant's vehicle. The search was justified under the automobile exception regardless of the applicability of the search incident to arrest exception.

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

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U.S. v. Freeman, 2010 U.S. App. LEXIS 23413, November 12, 2010

Officers obtained a search warrant for the defendant's residence based on information provided by a confidential informant. The confidential informant later denied that he had provided the officers any information about the defendant. At an evidentiary hearing, the confidential informant testified that he had provided the officers information, but had later lied about it because his mother and the defendant had pressured him to help the defendant's case.

The court noted that the critical issue was not the confidential informant' credibility, but whether the officer reasonably believed the information, provided by the confidential informant, that he included in the search warrant affidavit. The court held that the officer included no intentional or reckless false statements in the search warrant affidavit, therefore the defendant's motion to suppress was properly denied.

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

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U.S. v. Koch, 2010 U.S. App. LEXIS 23629, November 17, 2010

Officers seized the defendant's computer and flash drive pursuant to a search warrant issued during an investigation into an illegal gambling operation. At the conclusion of the investigation, an officer obtained a disposal of property order for the computer and flash drive. Officers had never examined the computer or flash drive, and the officer planned to return them to the defendant if they did not contain evidence of the gambling operation. When he opened the flash drive, an officer discovered images of child pornography. The officer had the flash drive open for no more than two minutes and examined four photographs before he closed it. He then reopened the drive to show other agents the last image he had viewed. The flash drive was open for a total of up to five minutes before the officer removed it from the computer. Officers obtained a new search warrant for the computer and flash drive, and found over one hundred separate images of child pornography on both devices.

The court held that the officers were acting in good faith when they opened the flash drive and unexpectedly discovered the child pornography. The officer was not relying on the original warrant when he found the child pornography; rather he was in the process of following a court order regarding the disposal of the items seized under the original warrant. The officer did not prolong his viewing, but closed the flash drive within a few minutes of discovering the child pornography, and obtained a new search warrant.

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

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U.S. v. Aguilera, 2010 U.S. App. LEXIS 23626, November 17, 2010

The court held that the officer had probable cause to search the defendant's vehicle, for methamphetamine, under the automobile exception to the warrant requirement. Prior to the search, the officer knew that the co-defendant distributed methamphetamine, and that a blue GMC Yukon was seen near his residence during an earlier controlled purchase there. The recorded telephone call between the co-defendant and the confidential informant revealed to the police that the co-defendant was on his way to the confidential informant's residence to deliver

methamphetamine. Once the officer saw a blue GMC Yukon with the defendant driving and the co-defendant as a passenger, he had probable cause to believe that the vehicle contained the methamphetamine that was scheduled for delivery. Since there was probable cause to search the vehicle, the court declined to rule on whether the search of the vehicle was a valid search incident to arrest. The officer initially stopped the vehicle for a license plate violation and arrested the defendant for driving without a valid license.

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

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U.S. v. Thurman, 2010 U.S. App. LEXIS 23933, November 22, 2010

The court held that the search warrant application gave the issuing magistrate a substantial basis to conclude that evidence of firearms offenses would be found in the two-story frame house. The warrant application included Thurman's statement to the officer that he had additional pistols in the two-story frame house, that he referred to as "his house," and the officer confirmed that Thurman was a convicted felon. Thurman's status as a felon and his admission that he possessed pistols in his house provided ample justification for issuance of the warrant.

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

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10th Circuit

U.S. v. Johnson, 2010 U.S. App. LEXIS 22805, November 2, 2010

The odor of marijuana, by itself, is sufficient to establish probable cause to support the warrantless search of an automobile. Because the district court specifically found the trooper to be credible, when he testified that there was a strong odor of burnt marijuana emanating from the defendant's car when he approached to question the passengers, is was proper to conclude that he had probable cause to conduct a warrantless search of the car.

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

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Cavanaugh v. Woods Cross City, 2010 U.S. App. LEXIS 22907, November 3**,** 2010

The court held that the officer was not entitled to qualified immunity since his actions were objectively unreasonable and violated the *Fourth Amendment*. It was also clearly established that an officer could not use his Taser on a non-violent misdemeanant, who did not pose a threat, and was not resisting or evading arrest, without first giving a warning.

The court found that the officer's use of force was not supported by any of the *Graham* factors.

The officer went to the Cavanaugh residence to help locate Ms. Cavanaugh, but later learned that she had assaulted her husband. It was a class B misdemeanor (non-injurious assault) and the court considered it a minor crime.

When the officer encountered Ms. Cavanaugh, she did not pose an immediate threat to the officer or anyone else at the scene. Just before the officer tasered Ms. Cavanaugh, she and the

officer passed within a few feet of each other as she walked toward the front door of her residence. She did not act aggressively toward the officer or threaten him. Her hands were clearly visible, she held no knife or other weapon, and the officer followed her at a distance of six feet.

When the officer deployed his taser Ms. Cavanaugh was neither actively resisting nor fleeing arrest. The officer gave her no verbal commands and she had little reason to believe that the officers were responding to a crime.

The court found that, although the officer had been told that Ms. Cavanaugh had left the house with a knife, and that she had been drinking and taking pain medication, his use of the taser was unreasonable based on all of the other specific facts that were known to him.

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

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