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

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CASE SUMMARIES

SUPREME COURT

Skilling v. U.S., 2010 U.S. LEXIS 5259, June 24, 2010

18 U.S.C. § 1346 defines “Scheme or Artifice to Defraud” as applied to *18 U.S.C. § 1341* (mail fraud) and *18 U.S.C. § 1343* (wire fraud), as “a scheme or artifice to deprive another of the intangible right of honest services.”

The Court held that the prohibition against schemes that deprived others of the intangible right of honest services are limited to schemes involving bribery or kickbacks, and as applied to these types of schemes, *§1346* was not unconstitutionally vague.

Here, the government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health for his own profit. Since the government never alleged that he solicited or accepted payments from anyone in exchange for making these misrepresentations, he did not violate *§ 1346*.

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

Black v. U.S., 2010 U.S. LEXIS 5253, June 24, 2010

The Court held in *Skilling v. United States* (see above) that *§ 1346* criminalizes only schemes to defraud that involve bribes or kickbacks. The scheme to defraud alleged in this case did not involve bribes or kickbacks, therefore the “honest-services” jury instructions in this case was incorrect.

The Court declined to rule on whether or not any prejudice from Black’s mail-fraud counts required the reversal of his obstruction-of-justice conviction.

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

Weyhrauch v. U.S., 2010 U.S. LEXIS 5254, June 24, 2010

In a third case involving “honest services mail fraud” the Court vacated the judgment of the lower court and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Skilling v. United States* (see above).

City of Ontario v. Quon, 2010 U.S. LEXIS 4972, June 17, 2010

The City of Ontario Police Department reviewed transcripts of text messages Sergeant Quon sent on his department issued alphanumeric pager. The department “allegedly” disciplined Quon for sending non-department related text messages in violation of department rules. Quon sued the department claiming that his *Fourth Amendment* rights were violated when the department reviewed the transcripts of his pager messages.

The Court declined to resolve the issue of whether or not Quon had a reasonable expectation of privacy in the text messages. The Court, instead, assumed that Quon had a reasonable expectation of privacy in the text messages, and that the department’s review of the text message transcripts constituted a search under the *Fourth Amendment*.

The Court then applied the test for reasonableness for work-place searches established in *O’Connor v. Ortega*, 480 U.S. 709 (1987). The Court held that the department’s review of Quon’s text message transcripts was a justified work-place search.

The search was justified at its inception because there were reasonable grounds to believe that it was conducted for non-investigatory work related purposes. The Chief ordered the search to determine if the text message character limit on the City’s contract with the service provider was sufficient to meet the City’s needs. The City had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, and that the City was not paying for extensive personal communications.

The scope of the search was reasonable because it was an efficient and expedient way to determine whether Quon’s overages were a result of work-related messaging or personal use. Although Quon had gone over his monthly allotment a number of times, the department only reviewed the transcripts of his text messages for two months. This was not excessively intrusive.

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

CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. Gonzalez, 2010 U.S. App. LEXIS 12914, June 23, 2010

The court held, that in regard to a consent search of an apartment that was being used as a “drug-drop”, the test was not whether LaFrance actually lived in the apartment, but whether she had sufficient authority to consent to its search. In this case the officer could have reasonably believed that LaFrance had the authority to consent to the search of the apartment.

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

U.S. v. Jackson, 2010 U.S. App. LEXIS 12582, June 18, 2010

Although the defendant's admissions at the apartment were inadmissible based on a *Miranda* violation, his will was not overborne in such a way as to render his confession the product of coercion, so the guns were not suppressible as the fruits of a coercive interrogation.

Once at the police station the officer gave the defendant clear *Miranda* warnings. There was no indication that the officer sought to use the defendant's prior admission as a lever to overcome an inclination that he might have had to remain silent. There was no deliberate two-step strategy here.

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

U.S. v. Crooker, 2010 U.S. App. LEXIS 12580, June 18, 2010

Under *18 U.S.C. § 921 (a)(24)* a firearm silencer or firearm muffler is defined as "any device for silencing, muffling, or diminishing the report of a portable firearm, . . ." The court held that the statute by its terms speaks of a device "for" silencing or muffling and requires something more than a potential for adaptation as a silencer, and that the defendant must have knowledge of it.

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

2nd CIRCUIT

Torraco v. Port Authority of New York and New Jersey, 2010 U.S. App. LEXIS 13379, June 30, 2010

The court consolidated three cases in which individuals, on separate occasions, attempted to transport unloaded firearms in checked baggage through various New York airports. They followed TSA regulations and relied upon *18 U.S.C. § 926A*, a statute which allows individuals to transport firearms from one state in which they are legal, through another state in which they are illegal, to a third state in which they are legal, provided that several conditions are met, without incurring criminal liability under local gun laws.

All three individuals were interviewed and delayed from traveling and two were arrested for possession of a firearm without a New York firearms license.

The court held that a violation of *18 U.S.C. § 926A* is not enforceable through *42 U.S.C. § 1983*, the appellants right to travel was not infringed, and their right to be free from false arrest was not violated.

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

Amore v. Novarro, 2010 U.S. App. LEXIS 12736, June 22, 2010

Novarro was entitled to qualified immunity for arresting Amore for a violation of a state statute that was published as part of the New York Penal Law at the time of the arrest, but that had been held unconstitutional by the New York Court of Appeals eighteen years prior to the arrest. It was objectively reasonable for Novarro to fail to realize that the statute he was attempting to enforce had been held to be unconstitutional since it was still "on-the-books."

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

U.S. v. Heras, 2010 U.S. App. LEXIS 12490, June 18, 2010

The court held that a jury could reasonably infer the defendant's intent to distribute from evidence indicating that he knew of Correa's planned distribution of the contraband, and that with that knowledge; he agreed to facilitate the crime.

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

In re the City of New York, 2010 U.S. App. LEXIS 11784, June 9, 2010

During pretrial discovery proceedings, plaintiffs brought a motion to compel the City to produce roughly 1800 pages of confidential reports (field reports) created by undercover NYPD officers who were investigating potential security threats in the months before the RNC. The City opposed the motion to compel by asserting, among other things, that the documents were protected from disclosure by the law enforcement privilege.

The court held that the law enforcement privilege applied to the documents at issue, stating, "the Field Reports, even in their redacted form, contain detailed information about the undercover operations of the NYPD." "This information clearly relates to "law enforcement techniques and procedures."" "Moreover, providing information about the nature of the NYPD's undercover operations will only hinder the NYPD's ability to conduct future undercover investigations." Additionally, even the redacted documents contain some information that could disclose the identity of an NYPD undercover officer. Pulling any individual "thread" of an undercover operation may unravel the entire "fabric" that could lead to identifying an undercover officer. This could present a risk to the safety and effectiveness of that officer and would likely provide

additional information about how the NYPD infiltrates organizations, thereby impeding future investigations.

Although the Court concluded that the law enforcement privilege applied to the field reports, the privilege is qualified, not absolute. The court adopted a balancing test used by the District of Columbia Circuit in which the public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information. In this case the court held that the plaintiffs' need for the field reports was not "compelling" and therefore the plaintiffs had not overcome the strong presumption against disclosure.

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

3rd CIRCUIT

U.S. v. Marcavage, 2010 U.S. App. LEXIS 12271, June 16, 2010

Title 36 C.F.R. § 1.4 (a) defines a "permit" as a "written authorization to engage in uses or activities that are otherwise prohibited, restricted, or regulated." Since the permit issued to the defendant by the NPS Ranger was verbal, and not in writing, it was not valid, therefore; the defendant's conviction under *36 C.F.R. § 1.6(g)(2)* for violating a term or condition of a permit was vacated.

Ordering the defendant to move his demonstration, then citing him for interfering with agency function in violation of *36 C.F.R. § 2.32* when he refused to comply, violated the defendant's *First Amendment* right to free speech. The court held that the Rangers' actions were impermissibly motivated by the content of the defendant's speech.

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

U.S. v. Liburd, 2010 U.S. App. LEXIS 11780, June 9, 2010

The prosecutor's use of the "Cheese Statement" at trial was misconduct because it violated his promises not to introduce evidence of anything the defendant said at the airport. The prosecutor's pre-trial promise not to rely on "any statement" the defendant made required him to do exactly that. Instead, he invoked the Cheese Statement three times: once in his opening statement and then twice more in his examination of Officer Grouby. This was plainly improper.

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

4th CIRCUIT

U.S. v. Jackson, 2010 U.S. App. LEXIS 13017, June 24, 2010

The defendant's false statements on his timesheets, which were transmitted to, and ultimately paid by the National Security Agency, were matters within the jurisdiction of the executive branch under *18 U.S.C. § 1001*.

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

U.S. v. Rendon, 2010 U.S. App. LEXIS 12435, June 17, 2010

Rendon's MP3 player was inspected pursuant to a valid military inspection. There was no evidence to indicate that anyone had a particularized suspicion of Rendon when he was first inspected, nor was there any evidence that he was treated any differently from any other soldier entering the unit. The search of his personal property was conducted pursuant to a regularly scheduled intake protocol for new members of the unit, and the search stayed within the parameters authorized by the commanding officer in the DSCB Handbook and defined in Military Rule of Evidence 313. Even though a purpose of the search was the detection of contraband, it appropriately related to the good order and discipline of the unit. Therefore any contraband discovered during the course of that inspection could be seized and turned over to civilian authorities.

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

U.S. v. Garcia-Ochoa, 2010 U.S. App. LEXIS 11938, June 11, 2010

Materiality is an essential element of the offenses under both *18 U.S.C. § 1001* and *18 U.S.C. § 1546(a)*. The test of materiality is whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action. The defendant's admitted misrepresentations of his immigration status on I-9 Forms were capable of influencing agency action and were, therefore, material.

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

U.S. v. Richardson, 2010 U.S. App. LEXIS 11928, June 11, 2010

The key factors bearing upon the question of whether a search by a private person constitutes a Government search are: (1) whether the Government knew of and acquiesced in the private search; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation.

There was nothing in the record to suggest that, in fact, law enforcement agents were involved in the search or investigation of Richardson's email transmissions until after AOL reported its discoveries to the National Center for Missing and Exploited Children (NCMEC). Additionally, the statutory provision pursuant to which AOL reported Richardson's activities did not effectively convert AOL into an agent of the Government for *Fourth Amendment* purposes.

In the context of child pornography cases, courts have largely concluded that a delay, even a substantial delay, between distribution and the issuance of a search warrant does not render the underlying information stale. This consensus rests on the widespread view among the courts, in accord with Agent White's affidavit, that "collectors and distributors of child pornography value their sexually explicit materials highly, 'rarely if ever' dispose of such material, and store it 'for long periods' in a secure place, typically in their homes."

The court concluded that a delay of four months did not preclude a finding of probable cause based on staleness in light of the other information supplied by Agent White, including the previous instance in which Richardson used an AOL account to send such images and Agent White's sworn statement that child pornographers "rarely, if ever, dispose of their sexually explicit materials," and that "even if a computer file is deleted from a hard drive or other computer media, a computer expert is still likely to retrieve . . . such files through scientific examination of the computer."

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

U.S. v. White, 2010 U.S. App. LEXIS 11026, June 1, 2010

Title 18 U.S.C. § 922(g)(9) makes it a felony under federal law to possess a firearm after having been convicted of a "misdemeanor crime of domestic violence," which § 921(a)(33)(A) defines as "a misdemeanor under Federal, State, or Tribal law" that has, *as an element*, the use or attempted use of *physical force*,"

The issue before the court was whether the "use of physical force," as that term is used in § 921(a)(33)(A)(ii), is an element of the criminal offense of assault and battery under Virginia law. "Physical force" is not defined in § 921 or any other relevant federal statute.

The court concluded that the phrase "physical force" in § 921(a)(33)(A)(ii) meant force, greater than a mere offensive touching, that is capable of causing physical pain or injury to the victim. Accordingly, a conviction for assault and battery in Virginia does not require "physical force" as an element of the crime. As a consequence, a Virginia conviction for assault and battery under *VA CODE ANN. § 18.2-57.2*, in and of itself, does not meet the definition of a § 922(g)(9) "misdemeanor crime of domestic violence."

The 7th, 9th and 10th circuits agree (cites omitted).

The 1st, 8th and 11th circuits disagree (cites omitted).

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

6th CIRCUIT

Aldini v. Johnson, 2010 U.S. App. LEXIS 13207, June 29, 2010

The Supreme Court has deliberately left undecided the question of whether the *Fourth Amendment* continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pre-trial detention begins. The circuits have been divided with courts choosing between the *Fourth Amendment* (objective reasonableness standard) and *Fourteenth Amendment* (shock-the-conscience standard) to protect those arrested without a warrant between the time of arrest and arraignment.

In this case the court held that the *Fourth Amendment* applies until an individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing or until the arrestee leaves the joint or sole custody of the arresting officer or officers.

The 2nd, 6th, 8th, 9th and 10th circuits agree (cites omitted).

The 4th and 7th circuits disagree (cites omitted).

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

U.S. v. Hinojosa, 2010 U.S. App. LEXIS 11782, June 9, 2010

The defendant's wife consented to the agents' initial and continued entry into the residence. There was no challenge as to her authority or ability to provide valid consent, and the interaction between the officers and the defendant's wife was devoid of coercion or intimidation, indicating that the consent was voluntarily given. Any observations the agents made after having been granted consent to enter the house was made in plain view from their lawful positions; therefore no improper search occurred and this information was properly included in the search warrant affidavit.

The court found that the agents' initial interrogation of the defendant did not present a custodial environment; therefore *Miranda* warnings were not required prior to questioning. (The interrogation occurred in the defendant's home, it was of short duration, consisting of only a few brief questions and there was nothing to suggest that the agents acted in a hostile or coercive manner, no weapons were drawn nor were any threats made). As a result, the defendant's pre-*Miranda* statements were properly included in the agents' search warrant affidavit.

Even without using the information gained by their visit to the defendant's house, the agents had developed probable cause to support the search warrant affidavit. Prior to entering the residence, the officers had established that: (1) videos and images involving child pornography were

transferred to undercover agents from a specific IP address; (2) the IP address was registered to Defendant at a Lansing, Michigan, address; and (3) Defendant resided at the Lansing, Michigan, address. This evidence would have established the required "fair probability" that evidence of criminal activity would be found inside Defendant's residence, and it would have justified the issuance of a search warrant.

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

Miller v. Sanilac County, 2010 U.S. App. LEXIS 11469, June 4, 2010

The court reversed the grant of summary judgment to the Deputy Wagester with respect to the federal claims of malicious prosecution, unlawful arrest, and excessive force (for allegedly slamming Miller against the vehicle and kicking his legs), and for the state claims of false arrest/imprisonment, malicious prosecution and assault and battery.

The fact that Miller's blood alcohol was found to be 0.00% casted doubt on the officer's claims that Miller smelled of alcohol and failed the field sobriety tests. In light of the conflict in the evidence, the jury could have concluded that the officer was lying. Because the officer was aware of the icy road conditions--which could certainly have caused Miller to inadvertently drive through the stop sign--there was a genuine issue of fact as to whether the officer had probable cause to arrest Miller for reckless driving. Finally, the officer wrote Miller a criminal ticket for minor in possession of alcohol. The court was unable to find any discussion or explanation in the record from the briefs, depositions, the police report, or the District Court opinion as to the basis for this charge. The court found that there was no probable cause to arrest Miller for this offense.

The court held that a jury could reasonably find that slamming an arrestee into a vehicle constituted excessive force when the offense was non-violent, the arrestee posed no immediate safety threat, and the arrestee had not attempted to escape and was not actively resisting.

As to municipal liability, the inadequacy of police training only serves as a basis for § 1983 liability "where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact." To establish deliberate indifference, the plaintiff must show prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury. Miller was not able to show that a policy or custom was the moving force behind the alleged violations, or that there was deliberate indifference based on prior instances of unconstitutional conduct.

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

7th CIRCUIT

U.S. v. White, 2010 U.S. App. LEXIS 13166, June 28, 2010

The indictment for a violation of *18 U.S.C. § 373* (solicitation to commit a crime of violence) was legally sufficient, as the government laid out the elements of the crime and the statutory violation, along with some factual allegations for support.

It is up to the jury to determine if the defendant's intent for posting information about the juror on his web site constituted solicitation under *§ 373*, and is therefore, not protected by the *First Amendment*.

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

U.S. v. Hall, 2010 U.S. App. LEXIS 12424, June 17, 2010

As part of an undercover investigation targeting individuals involved in armed home invasions, a confidential informant introduced Hall to an undercover agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives. The purpose of this introduction was for the agent to present Hall an opportunity to commit an armed robbery.

The court held that there was no evidence that Hall was not predisposed to join in the proposed robbery plan, therefore; the trial court properly refused to give a jury instruction on entrapment.

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

U.S. v. Lewis, 2010 U.S. App. LEXIS 12080, June 14, 2010

Lewis voluntarily consented to the detectives' entry into the apartment and the bedroom, therefore; the seizure of the sawed-off shotgun was lawful. The officers had reasonable suspicion that Lewis was engaged in criminal activity so their limited detention of him at the kitchen table was justified.

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

8th CIRCUIT

McCabe v. Parker, 2010 U.S. App. LEXIS 13327, June 30, 2010

The court held that there was arguable probable cause to arrest the protesters for violating *18 U.S.C. 3056(d)*, which prohibits a person from resisting a federal law enforcement agent who is

performing protective services for the President; therefore the agent was entitled to qualified immunity. Based on the totality of the circumstances it was objectively reasonable for the agent to believe that he had probable cause to arrest the protesters although it was later determined that there was no lawful basis for the trespass charges.

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

U.S. v. Shafer, 2010 U.S. App. LEXIS 12976, June 24, 2010

Based on the totality of the circumstances, the court held that the officer's expanded scope of the traffic stop was supported by a reasonable suspicion of criminal activity, and that the delay was not excessive under the circumstances. The officer recognized the odor of marijuana in the car; the suspects gave different accounts of their travels, avoided eye contact, and appeared nervous. This reasonable suspicion of criminal activity permitted the officer to briefly question Shafer and to wave down the canine unit.

When Shafer was later arrested, the court held that he voluntarily consented to the search of his residence, for the limited purpose of obtaining a briefcase containing his financial documents, and that he voluntarily consented to the search and seizure of that briefcase.

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

U.S. v. Nguyen, 2010 U.S. App. LEXIS 12061, June 14, 2010

The court held that the defendant had knowingly and voluntarily waived his Miranda rights even though a full day elapsed between the time the agents read him his full rights and the time he was questioned.

The 3rd, 5th and 9th circuits agree (cites omitted).

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

U.S. v. Greer, 2010 U.S. App. LEXIS 11948, June 11, 2010

Greer claimed that the police officers violated the *Fourth Amendment* when they entered first the porch, and then his house, on the date of his arrest, and as a result the court should have suppressed the firearm and other evidence seized from the house.

When Greer opened the door to the porch and stepped back, he impliedly invited the officers to enter, therefore; the officers' entry onto the porch was lawful.

The government does not contend that Greer consented to the officers moving from the porch to the house, that exigent circumstances justified the second entry, or that the fugitive for whom the officers had an arrest warrant resided in the house. Without consent or exigency, or an arrest warrant for a resident, the police generally must have a search warrant to enter a home. In this situation the officers' entry into Greer's home was unlawful.

However, once the officers entered the home, Greer's consent to search was obtained voluntarily, although voluntary consent alone is not sufficient to avoid suppression based on the unlawful entry. The government also must establish that the consent was an independent act of Greer's free will that purged the taint of the *Fourth Amendment* violation.

To determine whether Greer's consent was sufficient to purge the primary taint of the entry, the court considers the giving of *Miranda* warnings where applicable, "the temporal proximity" of the entry and the consent, "the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct."

An examination of those factors suggests that Greer's voluntary consent was an independent act of free will sufficient to purge the taint that arose from the unlawful entry to arrest the fugitive. The purpose of the unlawful entry was not to investigate Greer. The officers spotted a fugitive in the residence, and their intrusion was aimed at apprehending her. The entry was not especially flagrant; the door to the residence was open, and the officers used no force to gain access. The officers smelled marijuana before going into the house, so the unlawful entry did not prompt the request to search.

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

U.S. v. Jones, 2010 U.S. App. LEXIS 11599, June 8, 2010

The court held that the officer lacked the requisite reasonable suspicion that the defendant was carrying a concealed firearm in his hoodie pocket, as opposed to some other object, or no object at all. The critical question is whether the officer had a "particularized and objective basis" for his suspicion.

The court commented:

We find it remarkable that nowhere in the district court record did the government identify what criminal activity the officer suspected. Rather, the government leaped to the officer safety rationale for a protective frisk for weapons, ignoring the mandate in *Terry* that there must be reasonable suspicion of on-going criminal activity justifying a *stop* before a coercive *frisk* may be constitutionally employed.

Being stopped and frisked on the street is a substantial invasion of an individual's interest to be free from arbitrary interference by police, and the police have "less invasive options" for "identifying the perpetrators of crime. Most obviously, the officer could have initiated a consensual encounter, for

which no articulable suspicion is required, and which may both crystallize previously unconfirmed suspicions of criminal activity and give rise to legitimate concerns for officer safety.

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

U.S. v. Mashek, 2010 U.S. App. LEXIS 11359, June 4, 2010

Mashek argued that the affidavit on which the search warrant was based contained false statements that were material to the determination of probable cause, and that these statements rendered the affidavit insufficient to support a finding of probable cause.

The lower court's determination that the affidavit established probable cause for the issuance of the warrant was well supported by the record. The officer's observation coupled with the recording established probable cause to search Mashek's residence even if the voice on the tape was not Mashek's. Nothing suggested that the officer intentionally falsified or recklessly completed the affidavit.

The affidavit narrative explained the cooperating individual's involvement in prior drug deals with Mashek, thus informing the magistrate of her drug activity. Moreover, the cooperating individual's information was partially corroborated, indicating its reliability. This court has held that 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 (cite omitted).

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

U.S. v. Bryant, 2010 U.S. App. LEXIS 11363, June 4, 2010

To establish mail fraud, the government must prove: (1) a scheme to defraud by means of material false representations or promises, (2) intent to defraud, (3) reasonable foreseeability that the mail would be used, and (4) [that] the mail was used in furtherance of some essential step in the scheme.

A misrepresentation is material if it is capable of influencing the intended victim. Bryant mailed reimbursement forms to John Hancock Life Insurance Company, all of which alleged, that he had paid Jesse White, a certified Nurse's Assistant, to care for his ailing mother. In reality White never provided services to Ms. Bryant during these times. It is irrelevant that Bryant cared for his mother himself before she moved in with her other son, because Bryant was not a licensed nurse, certified nurse's aide, nor any other type of qualified home care provider specifically listed in John Hancock's policy. John Hancock, influenced by Bryant's false claims of care, relied on Bryant's misrepresentations to send him reimbursement checks for care John Hancock believed was being provided, although John Hancock was only obligated to reimburse the actual charges Ms. Bryant incurred for care provided by qualifying providers. These misrepresentations by Bryant influenced John Hancock, and were therefore material.

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

9th CIRCUIT

Bryan v. MacPherson, 2010 U.S. App. LEXIS 12511, June 18, 2010

The court held that Officer MacPherson's use of the taser was unconstitutionally excessive, stating that "a reasonable officer in these circumstances would have known that it was unreasonable to deploy intermediate force". However, as of July 24, 2005 there was no Supreme Court, or 9th Circuit Court of Appeals decision addressing whether the use of a taser, in dart mode, constituted an intermediate level of force. The court concluded that a reasonable officer in MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the taser use, in the circumstances he confronted, in July 2005 and held that MacPherson was entitled to qualified immunity.

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

U.S. v. Villasenor, 2010 U.S. App. LEXIS 11833, June 10, 2010

An extended border search is "any search away from the border where entry is not apparent," but where the dual requirements of reasonable certainty of a recent border crossing and reasonable suspicion of criminal activity are satisfied.

The search of Villasenor's car was reasonable under the *Fourth Amendment* as an extended border search. Because Villasenor did not contest that the cocaine was in his car at the time he crossed the border, the court focused its discussion on the second prong of the extended border search analysis.

Viewed together, the smuggler's tip and Villasenor's unusual behavior after crossing the border were enough to provide the officer with reasonable suspicion that a search of Villasenor's car would uncover evidence that he was involved in criminal activity.

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

Mickey v. Ayers, 2010 U.S. App. LEXIS 11495, June 7, 2010

A suspect who invokes the right to counsel may not be interrogated unless he initiates the conversation. Mickey told the officer at the time of his arrest that he did not want to speak without first consulting a friend, who was an attorney. *Miranda* and *Edwards*, however, only apply to interrogations, which consist of "any words or actions on the part of the police (other

than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Casual conversation is generally not the type of behavior that police should know is reasonably likely to elicit an incriminating response. Here, on the airplane the police asked no questions and only responded to Mickey's desire for small talk. They engaged in casual conversation of the type generally not subject to *Edwards*. Since Mickey was not interrogated and, in any event, initiated the discussion on the airplane, his *Miranda* and *Edwards* rights were not violated on the flight.

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

10th CIRCUIT

U.S. v. Salazar, 2010 U.S. App. LEXIS 12609, June 21, 2010

The state trooper's activation of his flashing lights constituted a show of authority, however; the defendant was not seized until he submitted to this show of authority by obeying the trooper's command to get out of the truck. At that point, based on the totality of the circumstances, the trooper had reasonable suspicion to detain the defendant.

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

U.S. v. Sanchez, 2010 U.S. App. LEXIS 12166, June 15, 2010

The defendant's fifteen year old daughter had actual authority to consent to a search of the home by the officers since she had unrestricted access to the common living areas, such as the garage, where the officers found more than 100 kilograms of marijuana. The court further held that the daughter's consent was given voluntarily; noting that her age was not a bar to valid consent, but only one factor within the totality of the circumstances to be considered.

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

Thomas v. Durastanti, 2010 U.S. App. LEXIS 11458, June 4, 2010

The use of deadly force is not unlawful if a reasonable officer would have had probable cause to believe that there was a threat of serious physical harm to himself or others. Thus, if threatened by weapon (which may include a vehicle attempting to run over an officer), an officer may use deadly force.

The court concluded that Agent Durastanti's actions were objectively reasonable. Agent

Durastanti saw the trooper's marked patrol car behind the Lincoln, its emergency lights, and Mr. Jones' apparent compliance with the trooper's directive that Mr. Jones get back into the Lincoln. A reasonable officer could conclude that the Lincoln's occupants had notice of police presence. Yet, the driver decided to pull away from the stop and drive toward Agent Durastanti placing him in harm's way. Agent Durastanti had mere seconds to react, and his actions in firing the first couple of shots were reasonable, even if mistaken. An officer may be found to have acted reasonably even if he has a mistaken belief as to the facts establishing the existence of exigent circumstances.

Even if Agent Durastanti reasonably believed that it was necessary to use deadly force, the court had to still determine whether he recklessly or deliberately brought about the need to use such force.

The parties agreed that Agent Durastanti did not identify himself as a police officer. Agent Durastanti's failure to identify himself and his partner as agents could still be viewed as reasonable given the trooper's marked patrol car behind the Lincoln, its emergency lights, and Mr. Jones' apparent compliance with the trooper's directive that Mr. Jones get back into the Lincoln. Under these circumstances, it cannot be considered reckless for a plainclothes officer to not identify himself as police.

That left the issue as to whether Agent Durastanti's decision to draw his weapon was reckless. There are no hard-and-fast rules regarding the reasonableness of force used during investigatory stops, and prior cases have eschewed establishing any bright-line standards for permissible conduct.

The agents had observed the occupants driving an apparently stolen vehicle in a reckless manner and away from a high crime area, as though they were fleeing a crime; something more than a traffic violation was suspected. Additionally, Agent Durastanti saw the occupants leaving after being stopped by a uniformed state trooper in a marked patrol car with emergency lights, and after the occupants' apparent initial compliance with the trooper's commands. A reasonable officer based upon the totality of the circumstances certainly could believe that officer safety required the display of and access to weapons.

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

U.S. v. Smith, 2010 U.S. App. LEXIS 11257, June 3, 2010

In determining whether *Miranda* rights were voluntarily waived, the court considers: the suspect's age, intelligence, and education; whether the suspect was informed of his or her rights; the length and nature of the suspect's detention and interrogation; and the use or threat of physical force against the suspect. The same factors are assessed in determining whether a confession was voluntarily given.

The record demonstrates Smith's waiver of his rights was voluntary and based on those same considerations, we conclude that Smith's written confession also was made voluntarily.

Additionally, the presentment rule does not begin to operate, and the six-hour safe harbor period is not implicated, until a person is arrested for a federal offense. Where a person is under arrest on solely non-federal charges, neither the prompt-presentment rule nor the safe-harbor period are relevant even when the arresting officers believe the person also may have violated federal law or the person makes an inculpatory statement to federal agents.

The district court correctly ruled the presentment rule did not support suppressing Smith's confession. First, Smith was not arrested on a federal charge until March 27, 2007. The presentment rule did not become operative until that time and therefore it did not bear on Smith's March 25, 2007 arrest and confession.

Second, even if Smith had been arrested for a federal offense on March 25, rather than on a Navajo charge, the presentment rule would not warrant suppression of his written statement, because--at most--five hours and 10 minutes elapsed between Smith's arrest and confession.

Finally, hearsay evidence is generally not admissible, *see FED. R. EVID. 802*, but an exception is made for statements relating to a "startling event or condition," *see FED. R. EVID. 803(2)*. The so-called "excited-utterance" exception has three requirements: (1) a startling event; (2) the statement was made while the declarant was under the stress of the event's excitement; and (3) a nexus between the content of the statement and the event.

The district court properly admitted the victim's statement as an "excited utterance" since: (1) A startling event occurred – the sexual assault, (2) the victim was under the stress of the assault's excitement when she made the statement to her neighbor, "Help me, Help me, He raped me." This statement occurred at the first possible moment she had to disclose the assault to another person. (3) There was an obvious nexus between the content of the statement and the startling event, the victim's sexual assault.

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

11th CIRCUIT

U.S. v. Garcia-Cordero, 2010 U.S. App. LEXIS 13245, June 29, 2010

Title 8 U.S.C. § 1324(a)(2)(B)(iii) imposes a duty on individuals transporting international passengers to "bring and present" those passengers to the appropriate immigration officers at a designated point of entry immediately upon arrival into the country.

In deciding this issue for the first time, the court held that as applied to a defendant who is smuggling aliens, the "bring and present" requirement does not violate the defendant's *Fifth Amendment* privilege against self-incrimination.

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

Brown v. City of Huntsville, 2010 U.S. App. LEXIS 11480, June 7, 2010

To receive qualified immunity, an officer need not have actual probable cause, but only "arguable" probable cause. Arguable probable cause exists where "reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest Plaintiff."

The court concluded that Brown's actions in playing loud music, stopping her car, and rolling her window down could have indicated to an objectively reasonable officer at the scene that Brown was making unreasonable noise with intent to create public annoyance, even if those circumstances were insufficient to prove an actual violation of § 13A-11-7.

A law enforcement officer receives qualified immunity for use of force during an arrest if an objectively reasonable officer in the same situation could have believed the use of force was not excessive.

An objectively reasonable police officer would have known it was unlawful to use pepper spray and other force against an arrestee who was suspected only of a minor offense (playing music too loud), was not threatening the officer or the public, was not attempting to flee, and who had communicated her willingness to be arrested. Although the law permits some use of force in any arrest for even minor offenses, the law was clearly established in 2005 (cite omitted) that the officer's combined gratuitous use of pepper spray and other force against Brown in this minor offense context violated the Constitution.

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

U.S. v. Farley, 2010 U.S. App. LEXIS 11125, June 2, 2010

Farley argued that because Agent Paganucci "tricked" him by telling him that the FBI wanted to question him as part of a terrorism investigation, his waiver of *Miranda* rights was not knowing or voluntary and therefore his post-arrest statements should have been suppressed.

Cases interpreting *Miranda's* language show that trickery or deceit is only prohibited to the extent it deprives the suspect of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Knowledge of what the agents really suspected him of doing would no doubt have been useful, possibly even decisive, to Farley in calculating the wisdom of answering their questions. But their deception on that point was not "constitutionally significant," because the lack of that information did not prevent Farley from understanding the nature of his rights and the legal consequences of waiving them.

Generally, courts have held statements involuntary because of police trickery only when other aggravating circumstances were also present. Misleading a suspect about the existence or strength of evidence against him does not by itself make a statement involuntary. By contrast, statements have been held involuntary where the deception took the form of a coercive threat or

where the deception goes directly to the nature of the suspect's rights and the consequences of waiving them.

Even if some police tricks may be "objectionable as a matter of ethics," they are not relevant to the constitutional validity of a waiver unless they interfere with the defendant's ability to understand the nature of his rights and the consequences of abandoning them. It does not matter if the agents deliberately lied to Farley about the subject of the investigation in order to trick him into signing a waiver they thought he might not otherwise have signed. Their subjective motives for the deception are not relevant. Because the issue is whether Farley's decision to waive his rights was knowing and voluntary under the totality of the circumstances, the only relevant state of mind is that of Farley himself. Looking at the totality of the circumstances, nothing indicates that Farley's waiver of his rights was anything less than knowing and voluntary.

Whatever impact Agent Paganucci's "terrorist" remark may have had on Farley's earlier decision to waive his *Miranda* rights, it could have had no effect on his consent to the search of his laptop computer. Farley knew perfectly well by the time that he gave his consent to the search that the agents did not suspect him of being a terrorist. He knew when he consented to the search that the agents were looking for child pornography on the laptop because they had specifically asked him whether he had used it to search for child pornography. Given all of the circumstances, Farley's consent to search was knowing and voluntary.

Finally, Farley argued that the warrantless search of his briefcase was not a proper inventory search because the agents should have sealed the briefcase in his presence rather than opening it to itemize its contents.

Inventory searches of an arrestee's personal property are a "well-defined exception" to the *Fourth Amendment's* warrant requirement. When police take custody of a bag, suitcase, box, or any similar container, they may open it in order to itemize its contents pursuant to standard inventory procedures. That is what the agents did in this case. When they opened Farley's briefcase and suitcase they compiled an inventory, itemizing the complete contents of both bags on a standard "Receipt for Property" form.

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

U.S. v. Lall, 2010 U.S. App. LEXIS 10938, May 28, 2010

Before a suspect's un-counseled incriminating statements made during custodial interrogation may be admitted, the prosecution must show that the suspect made a voluntary, knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel.

First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Detective Gaudio gave Lall the *Miranda* warnings then shortly thereafter told him that he was not going to pursue any charges against him. This representation contradicted the *Miranda* warnings previously given. As a result of Gaudio's statements, Lall did not truly understand the nature of his right against self-incrimination or the consequences that would result from waiving it.

(Editor's Note: the court did not rule on whether Lall was “in custody” for *Miranda* purposes.)

Next, the court examined the totality of the circumstances to determine the voluntariness of Lall's confession. A significant aspect of that inquiry here involved the effect of deception in obtaining the confession. The court noted that the deception at issue here did not involve a misrepresentation of fact. Such misrepresentations are not enough to render a suspect's ensuing confession involuntary, nor does it undermine the waiver of the defendant's *Miranda* rights.

Police misrepresentations of law, on the other hand, are much more likely to render a suspect's confession involuntary. Det. Gaudio explicitly assured Lall that anything he said would not be used to prosecute him. Moreover, there is ample record evidence to support a finding that Gaudio's promise was deceptive. Under these circumstances, Gaudio's statements were sufficient to render Lall's confession involuntary and to undermine completely the prophylactic effect of the *Miranda* warnings Gaudio previously administered. As a result the physical evidence seized as a result of Lall's involuntary confession was also suppressed.

Additionally, other evidence seized does not fall within the “plain view” exception because the incriminating character of the evidence was not immediately apparent to Det. Gaudio.

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