Department of Homeland Security
Federal Law Enforcement Training Center
Legal Training Division

September 2010

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.

This edition of *The Informer* may be cited as "9 INFORMER 10".
(The first number is the month and the last number is the year.)

Join The Informer E-mail Subscription List

It's easy! Click HERE to subscribe, change your e-mail address, or unsubscribe.

THIS IS A SECURE SERVICE. No one but the FLETC Legal Division will have access to your address, and you will receive mailings from no one except the FLETC Legal Division.

In This Issue

Case Summaries

Circuit Courts of Appeals

Click Here

CASE SUMMARIES

Circuit Courts of Appeals

Third Circuit

Reedy v. Evanson, 2010 U.S. App. LEXIS 15776, August 2, 2010

While working as a cashier at a convenience store Reedy was robbed at gunpoint and sexually assaulted. She reported the crime immediately, subjected herself to a physical examination, voluntarily gave a blood sample and provided several detailed and consistent statements to law enforcement officers and hospital staff. Detective Evanson believed that Reedy had fabricated the incident to cover up her own theft of cash from the convenience store. He accused her of lying about the incident and directed hospital staff to perform drug testing on the blood samples taken from Reedy as part of the sexual assault kit protocol.

Three months later Evanson became the lead investigator on another sexual assault case that was substantially similar to the attack on Reedy, and that Evanson knew was suspected to be the work of a serial rapist.

Three months later Evanson filed a criminal complaint against Reedy charging her with falsely reporting a crime, theft and receipt of stolen property. Reedy spent five days in jail. The charges against her were eventually dropped after the serial rapist was captured and confessed to assaulting Reedy, and committing the theft at the convenience store as well as the other sexual assault case being investigated by Evanson.

Although the lower court concluded that Evanson's arrest affidavit contained recklessly made false statements and omissions, the court held that it was improper to find that probable cause existed to arrest Reedy. The court further held that Evanson was not entitled to qualified immunity, stating that "viewing the evidence from Reedy's perspective, no reasonably competent officer would have concluded that a warrant should issue when it did for her arrest for making a false report of rape, for theft and for receiving stolen property."

The court also held that Reedy maintained a reasonable expectation of privacy in her blood after it was drawn from her body. Reedy's consent to give a blood sample and have it tested as part of the sexual assault protocol kit did not extend to consenting to have the blood sample tested for drugs. The court held that an objectively reasonable person would not believe that the two consent forms she signed to have her blood tested for evidence of sexual assault would extend to having a law enforcement officer order medical personnel to search her blood for evidence of drug use for the purpose of incriminating her.

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

*****

U.S. v. Shakir, 2010 U.S. App. LEXIS 16492, August 10, 2010

Police arrested Shakir on a warrant for armed robbery as he attempted to check into his hotel. During the arrest Shakir dropped a gym bag he was carrying. An officer searched the gym bag incident to arrest and discovered cash in the bag that was later identified as having been stolen during a different armed robbery than the one for which Shakir was arrested.

Shakir argued that the search of the gym bag violated the *Fourth Amendment* because he was already handcuffed at the time the officer searched his bag and, therefore, he had no access to any weapon or destructible evidence that might have been in the bag.

The court held that a search is permissible incident to a suspect's arrest when, under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched. In this case there remained a sufficient possibility that Shakir could access a weapon in his bag to justify its search. Although he was handcuffed and guarded by two policemen, Shakir's bag was literally at his feet, so it was accessible if he had dropped to the floor. Although it would have been more difficult for Shakir to open the bag and retrieve a weapon while handcuffed, the court did not regard this possibility as remote enough to render unconstitutional the search incident to arrest. This was especially true since Shakir was subject to an arrest warrant for armed bank robbery, and that he was arrested in a public area near some twenty innocent bystanders, as well as at least one suspected confederate who was guarded only by unarmed hotel security officers. Under these circumstances, the police were entitled to search Shakir's bag incident to arresting him.

Although the court upheld the validity of the search of the gym bag incident to Shakir's arrest, it applied the rule outlined in *Arizona v. Gant* (cite omitted), stating that it did not read *Gant* so narrowly so as to limit it only to searches incident to arrest involving vehicles. The court noted that many courts of appeals perceived *Belton* to establish a relaxed rule for searches incident to arrest in all contexts.

> "Because *Gant* foreclosed such a relaxed reading of *Belton*, there is no plausible reason why it should be held to do so only with respect to automobile searches, rather than in any situation where the item searched is removed from the suspect's control between the time of the arrest and the time of the search. Although this Court has never explicitly adopted a "time of the arrest" rule like that adopted in the aforementioned cases, we do read *Gant* as refocusing our attention on a suspect's ability (or inability) to access weapons or destroy evidence at the time a search incident to arrest is conducted."

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

*****

U.S. v. Allen, 2010 U.S. App. LEXIS 17141, August 17, 2010

The court held that Allen's detention did not violate the *Fourth Amendment*. The police executed a search warrant for evidence at a bar, located in a high crime area, where patrons were known to carry firearms, and where several firearms related crimes had recently been committed. The officers detained Allen, who worked as a security guard at the bar. Allen voluntarily told the officers that he was in possession of a firearm. The officers then discovered that Allen was a convicted felon.

The officers were justified in taking reasonable action to secure the premises and to ensure their own safety and the efficacy of the search. The detention was just long enough for the police to ensure their safety and collect the evidence they sought.

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

*****

Fourth Circuit

U.S. v. Johnson, 2010 U.S. App. LEXIS 17087, August 16, 2010

The government recorded telephone conversations between the defendant and others in the course of its investigation. At trial the government played excerpts of various telephone calls for the jury, and then asked the agent on the witness stand to explain the meaning of certain words or phrases that were believed to be "drug code." The trial court permitted this testimony based on the agent's experience and training pursuant to *Federal Rule of Evidence 701* (lay opinion testimony).

The court held, that since the agent was not proffered as an expert witness, his testimony was only admissible as lay opinion testimony. However, since the agent's opinions regarding the meaning of the phrases in the telephone calls were based on his experience and training and not his own perception, they were improperly admitted as lay opinion.

Lay opinion testimony must be based on personal knowledge, and in order to build a foundation for lay testimony it must be based on the perception of the witness. Here the agent did not testify that he directly observed the surveillance or even listened to all of the relevant telephone calls in question. Much of his testimony should have been considered that of an expert, as he consistently supported his interpretations of the telephone calls by referencing his experience as a DEA agent, the post-wiretap interviews he conducted and statements made to him by co-defendants. None of this second-hand information qualified as foundational personal perception needed under *Rule 701*.

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

*****

Fifth Circuit

Valle v. City of Houston, 2010 U.S. App. LEXIS 15776, July 30, 2010

Police officers responded to Valle's home in response to a 911 call. Valle's son, who suffered from depression and anxiety, had become upset and locked himself in his room, refusing to allow anyone to enter. While a member of the crisis intervention team (CIT) negotiated with the son, the Special Weapons and Tactical/Hostage Negotiation Team (SWAT) forcefully entered the house. A police officer shot and killed Valle's son during the ensuing confrontation.

The court held that although the decision by the SWAT Captain to order entry into the home was arguably the "moving force" behind the constitutional violations (the warrantless entry into the home and the lethal seizure of the son) that resulted in the son's death, because his decision was not a decision by a final policy maker of the city, the city could not be held liable.

The court also held that the Valles failed to establish that a city policymaker acted with deliberate indifference, and that the inadequate CIT training was a moving force in bringing about the constitutional violation.

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

*****

Sixth Circuit

Elkins v. Summit County, 2010 U.S. App. LEXIS 16471, August 10, 2010

The court held that the officers were not entitled to qualified immunity in this *42 U.S.C. § 1983* suit. Their failure to disclose an exculpatory memorandum, which would have likely made a substantial difference to the outcome of the trial, deprived Elkins of a fair trial.

In the Sixth Circuit, the due process guarantees recognized in *Brady* also impose an analogous or derivative obligation on the police. An officer must disclose to the prosecutor evidence whose materially exculpatory value should have been "apparent" to him at the time of his investigation. Elkins had a constitutional right to have the favorable evidence disclosed to the prosecution and court.

Additionally, this right was clearly established so that a reasonable officer would understand that what he was doing violated that right.

Finally, the exculpatory nature of the memorandum would have been apparent to the detectives given the state of the case at the time. The exculpatory statement cast serious doubt on the six year old victim's identification of Elkins as the perpetrator of the sexual assaults and murder.

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

*****

McKenna v. Honsowetz, 2010 U.S. App. LEXIS 17114, August 17, 2010

Officers responded to McKenna's home in response to a call to 911 that stated he was having a medical seizure. During their encounter with McKenna the officers repeatedly tried to get him to put on his pants, and tried to force him to rise, in the face of his request that they stop. Completely unprovoked by any aggressive or dangerous behavior, they then rolled him over, pinned him on his stomach with their knees, and handcuffed his arms behind his back and his ankles. After McKenna had been taken away to the hospital, the officers searched a dresser drawer in his bedroom and the medicine cabinet in the bathroom. In the process, they knocked down everything on top of the dresser and threw out his children's baby-teeth collection. One of the officers also ran a check on McKenna's license plate.

This view of the facts supported the finding that the officers primarily acted in a law-enforcement capacity and not in an emergency-medical response capacity. Their actions violated McKenna's right to be free from unreasonable searches and seizures and the denial of qualified immunity was proper.

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

*****

U.S. v. Rains, 2010 U.S. App. LEXIS 17608, August 23, 2010

An employee at a veterinary clinic reported to the police that a woman had just purchased three bottles of highly concentrated iodine, a precursor ingredient for methamphetamine. The same woman had purchased eleven bottles of the same iodine in the past nine months. Based on previous conversations with staff at the veterinary clinic, the police were aware that this clinic typically sold only three to six bottles of this particular iodine per year. Previous tips from the clinic had already resulted in the police shutting down a different methamphetamine manufacturing operation.

An officer conducted a traffic stop on the vehicle. During the stop the officer noticed a syringe and arrested the occupants for possession of drug paraphernalia. A further search, conducted incident to the arrest, yielded the three bottles of iodine purchased from the clinic, plastic tubing, two drug pipes, and receipts for muriatic acid and hydrogen peroxide, which are also used in the manufacture of methamphetamine.

The court held that the purchase of the three bottles of iodine, when viewed within the "totality of the circumstances," including the ongoing and previously reliable communication between the veterinary clinic and the police, provided reasonable suspicion sufficient to justify the stop of the defendant's vehicle.

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

*****

Johnson v. City of Memphis, 2010 U.S. App. LEXIS 17658, August 24, 2010

The court held that the combination of a 911 hang-call (when a caller dials 911 and hangs up before speaking to the operator), an unanswered return call, and an open door with no response from inside the residence was sufficient to satisfy the exigency requirement and justify the officers' entry into the residence under the emergency aid exception. The court declined to adopt a *per se* rule for all 911 hang calls, instead limiting its holding to the specific facts of this case.

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

*****

U.S. v. Lanham, 2010 U.S. App. LEXIS 17660, August 24, 2010

The court held that there was sufficient evidence to support the defendant's convictions for committing civil rights abuses in violation of *18 U.S.C. §§ 241 and 242*. Lanham and Freeman worked as jailers at the Grant County, Kentucky, Detention Center. Along with their supervisor the defendants decided to "scare" an individual, who had been arrested for a traffic violation, by placing him in a general population jail cell. As a result the victim was beaten and sexually assaulted by other inmates.

The court found that the evidence established that Lanham and his supervisor mocked the victim about his slight appearance, and he was present when his supervisor said that the victim would make a "good girlfriend" for the other inmates. When the supervisor stated that they needed to teach the victim a lesson, Lanham quickly volunteered that he knew a prisoner in Cell 101. The evidence showed that Lanham talked to Inmate Wright, within earshot of other inmates, and explained that the guards would be bringing a new prisoner down and that they wanted the prisoners to "f-ck with" him. The evidence also showed that the inmates cheered at this news when Lanham was present, and that Lanham knew of that particular cell-block's reputation for violence. Lanham stated that the victim should have been in a detox cell, not in the general population, and he admitted that he had asked Inmate Wright to teach the victim a lesson.

Freeman was present when Lanham spoke to Inmate Wright, and nodded his head in agreement. He also failed to protect or assist the victim after learning of the plan.

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

*****

Daoud v. Davis, 2010 U.S. App. LEXIS 17737, August 25, 2010

The Supreme Court has never directly addressed under what circumstances a suspect's mental illness can impede his ability to knowingly and intelligently waive his *Miranda* rights. However, most courts have recognized that mental illness is a factor to consider in determining whether a waiver was knowing and intelligent.

In this case the experts all agreed that Daoud comprehended what was said to him and understood that the officers would use his statements against him. They also all appeared to

agree that he understood he did not have to speak and that he could have an attorney. Because a defendant does not have to understand every possible consequence of a waiver, and the evidence demonstrates that Daoud had an understanding of his rights, the Michigan Supreme Court's conclusion that his waiver was knowing and intelligent was not an unreasonable application of federal law.

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

*****

Seventh Circuit

U.S. v. Robinson, 2010 U.S. App. LEXIS 16481, August 10, 2010

Since the officer was not satisfied with his initial effort to pat-down Robinson, he was entitled to return to finish the job within the bounds outlined in *Terry*. Just because he indicated after the fact that his initial impression was that the hard object he felt for an instant was not a weapon, objectively speaking, a hard object might be harmful, so the officer was entitled to assure himself that his first impression was correct.

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

*****

U.S. v. Carlisle, 2010 U.S. App. LEXIS 17026, August 11, 2010

The court held that when an individual flees from an area where a narcotics sweep is taking place it gives rise to reasonable suspicion to justify a *Terry* stop. Here it was reasonable for the officers to stop Carlisle and detain him to ask questions to determine why he was leaving the house with a backpack during a drug sweep. While handcuffing is not a normal part of a *Terry* stop, it does not automatically turn a *Terry* stop into an unlawful arrest, and the officers' actions in detaining Carlisle did not violate his *Fourth Amendment* rights.

Carlisle challenged the warrantless search of the backpack. The court held that Carlisle exhibited no subjective expectation of privacy in the backpack since he disclaimed ownership and knowledge of its contents. Therefore, he did not have a reasonable expectation of privacy in the backpack sufficient to allow him to challenge the search.

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

*****

McAllister v. Price, 2010 U.S. App. LEXIS 16685, August 12, 2010

McAllister suffered a diabetic episode while driving his automobile and crashed into two other automobiles. He claimed that the responding officer violated his *Fourth Amendment* rights by using excessive force to remove him from his car.

The court held that is was proper to deny Price qualified immunity since the evidence showed that Price ignored obvious signs of McAllister's medical condition, pulled him out of the car and took him to the ground with such force that McAllister's hip was broken and his lung bruised from the force of Price's knee in his back. Price did not do so because such force was necessary but because he was "angry" with McAllister.

The court further held that the right at issue was clearly established. The state of the law would not suggest to a reasonable officer that he may slam an unresponsive, convulsing driver into the ground with force sufficient to break the driver's hip and place his knee on the driver's back with enough force to bruise his lung.

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

*****

U.S. v. LaFaive, 2010 U.S. App. LEXIS 17188, August 18, 2010

LaFaive assumed the identity of her deceased sister, opened checking accounts in her name using counterfeited checks, and withdrew nearly $65,000 before being apprehended.

The court held that *18 U.S.C. § 1028(a)(1)* criminalizes the misuse of another person's identity, whether that other person is living or deceased.

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

*****

Etherly v. Davis, 2010 U.S. App. LEXIS 17738, August 25, 2010

Relevant factors to consider in determining whether a confession by a juvenile is voluntary include: the juvenile's age, experience, education, background, intelligence, the length of the questioning, the presence of a parent or other friendly adult, the use of coercive or intimidating interrogation tactics, whether he had the capacity to understand the warnings given to him, the nature of his *Fifth Amendment* rights, and the consequences of waiving those rights.

The court held that Etherly's statements to police were made voluntarily noting that he was read his *Miranda* rights several times, he understood them, and he was questioned for a very limited period of time. The fact that the police urged Etherly to tell the truth, and told him that if he did, they would tell the judge that he had cooperated, did not constitute a promise of leniency nor did it constitute a threat or coercion.

Although Etherly exhibited a lack of intellectual capacity, the court held that he understood that he was not required to talk to the police and that the prosecutor would act on any information provided by him.

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

*****

Forrest v. Prine, 2010 U.S. App. LEXIS 18151, August 31, 2010

Forrest posed an immediate threat to officer safety and order within the jail therefore, the use of a taser constituted permissible use of force. Officer Prine was aware that Forrest had attacked an officer earlier that night. Forrest appeared to be intoxicated, and he was pacing in the cell, clenching his fists and yelling obscenities. Before employing the taser, Officer Prine warned Forrest several times that his noncompliance would result in tasing. His conduct created a situation where the officers were faced with aggression, disruption and a physical threat.

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

*****

U.S. v. Slaight, 2010 U.S. App. LEXIS 18326, September 2, 2010

The court reversed the defendant's conviction holding that the statements he made to the federal law enforcement officers at the police station should have been suppressed. The court held that the defendant was in custody for *Miranda* purpose when he made the incriminating statements, without having been first advised of his *Miranda* rights.

When police create a situation in which a suspect reasonably does not believe that he is free to escape their clutches, he is in custody, and regardless of their intentions, entitled to the *Miranda* warnings.

In this case the police made a show of force by arriving at Slaight's house en masse. Although he had a criminal record none of his crimes involved violence or weapons, yet nine officers drove up to the house, broke in with a battering arm, strode in with pistols and assault rifles at the ready, and when they found him naked in his bed ordered him, in an "authoritative tone" to put his hands up. The presence of an overwhelming armed force in the small house could not have failed to intimidate the occupants. The police could have searched the house thoroughly and taken the computer and left, or they could have arrested Slaight since they had ample probable cause. Instead of leaving the house or arresting him they asked Slaight whether he would consent to a voluntary interview.

Two officers escorted Slaight from his house to the police station where they took him to a tiny windowless interview room where the door was closed throughout the interview. Although the officers told Slaight he was not in custody, and that he was free to leave, the court discredited this testimony.

The key facts were the show of force at Slaight's home, the protracted questioning of him in the claustrophobic setting of the police station's tiny interview room, and the more than likelihood that he would have been formally placed under arrest if he tried to leave because the government already had so much evidence against him. These facts were incontrovertible and established that the average person in Slaight's position would have thought himself in custody.

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

*****

Eighth Circuit

U.S. v. Tenerelli, 2010 U.S. App. LEXIS 15959, August 2, 2010

Police obtained a search warrant for Tenerelli's residence which they executed six days later. The court held that the ongoing nature of methamphetamine distribution supported the continued existence of probable cause, and that it was reasonable for the officers to conclude that Tenerelli was likely to possess methamphetamine at his residence when the search warrant was executed; therefore the probable cause supporting the search was not stale.

The court held that the officer's testimony regarding what he observed during the controlled buy was not hearsay since no statements made by the confidential informant (CI) were offered for their underlying truth. Instead, the officer testified about the fact that the CI asked the defendant to sell him drugs, a verbal act of which the officer had personal knowledge. Further, an out of court statement is not hearsay when offered to explain why an officer conducted an investigation in a certain way. It was not improper for the officer to testify about his observations that led to the issuance of the search warrant when no statement of the CI was ever offered to prove an underlying truth.

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

*****

U.S. v. Thomas, 2010 U.S. App. LEXIS 16113, August 4, 2010

The defendant argued that *18 U.S.C. § 922(g)(1)* requires the government to prove that he knew of his status as a felon. The court held however, in a prosecution under *§ 922(g)(1)*, the government need only prove defendant's status as a convicted felon, and knowing possession of the firearm. The 'knowingly' element of *section 922(g)* applies only to the defendant's underlying conduct, not to his knowledge of the illegality of his actions.

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

*****

U.S. v. Salamasina, 2010 U.S. App. LEXIS 16293, August 6, 2010

Federal agents obtained an arrest warrant for Salamasina for a variety of drug offenses. Officers conducted surveillance on Salamasina's house and arrested him as he pulled into his driveway in his vehicle. Salamasina's fiancée, Lata, and their two minor children were also in the vehicle. The officers took Salamasina into custody and moved him away from his vehicle. An officer directed Lata leave the garage door open, after she stated that she was going to close it, and allowed her to re-enter the vehicle from the passenger side to tend to the children who were in the back seat. During this time Salamasina shouted to Lata to not let the officers into the house and, over orders from the officers not to communicate with one another, Salamasina and Lata shouted to one another in a foreign language that the officers did not understand.

An officer conducted a warrantless search of the vehicle looking for weapons. As the result of the search the officer found a dietary supplement that is commonly used as a cutting agent for cocaine as well as acetone, which is used in conjunction with the cutting agent. Based on these findings and on other information from the investigation the officers obtained a search warrant for Salamasina's house. The search yielded cocaine, drug paraphernalia, ammunition and cash.

Salamasina claimed that the warrantless search of his vehicle violated the *Fourth Amendment*. He argued that under to the Supreme Court's recent ruling in *Arizona v. Gant, 129 S. Ct. 1710, (2009),* the warrantless search of his vehicle was invalid because he was immediately restrained and removed from the vehicle, and officers, finding Lata to not be a threat, gave her permission to repeatedly access the vehicle to tend to her children.

The court rejected Salamasina's argument stating,

> Even assuming that Salamasina had been secured by the arresting officers, Lata was not secured. Rather, Lata repeatedly entered and exited the vehicle to tend to her children, she spoke to Salamasina in a foreign language despite officers' directions to not communicate with Salamasina, and she attempted to close the garage door after officers instructed her to keep the door open. An objective officer considering these facts, in conjunction with the fact that officers had just executed an arrest warrant on Lata's fiancé on drug charges, would be warranted in conducting a search of the vehicle incident to Salamasina's arrest under *Gant's* officer-safety consideration.

The court further stated that even if *Gant's* search incident to arrest exception did not apply, the search of the vehicle would have been warranted under *Michigan v. Long* which held that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

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

*****

Lee v. Andersen, 2010 U.S. App. LEXIS 16702, August 12, 2010

The court held that the evidence supported the jury's verdict that Andersen did not use excessive force against Fong Lee. The jury was instructed that the force is excessive if "it was not reasonably necessary to protect Andersen or others from apparent death or great bodily harm." Andersen testified that Fong Lee made threatening movements in the moments leading up to the shooting. He testified that Lee turned his body, with gun still in hand, towards Andersen in such a way that Andersen believed his life was in danger and Fong Lee was going to shoot him. The video from the surveillance camera corroborated Andersen's testimony that Fong Lee turned towards Andersen near the end of the foot pursuit. Andersen presented sufficient evidence to allow a jury to find that lethal force was reasonably necessary to protect him or others from apparent death or great bodily harm.

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

*****

U.S. v. Harris, 2010 U.S. App. LEXIS 16423, August 9, 2010

Police suspected that Harris was involved in drug distribution. Officers saw Harris leave his house with a duffel bag and drive away in a black truck. An officer stopped Harris because the truck had a tinted license plate cover, in violation of a local ordinance. During the traffic stop Harris refused to consent to a search of the truck but a drug dog arrived and alerted on the truck. A search of the truck yielded three pounds of marijuana.

The court held that the initial traffic stop was valid based on a violation of the local ordinance and the fact that the officer testified that the license plate was not plainly visible, stating, "that even a minor traffic violation provides probable cause for a traffic stop".

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

*****

U.S. v. Sanchez, 2010 U.S. App. LEXIS 16474, August 10, 2010

The court held that Sanchez's will was not overborne by improper police conduct; therefore his incriminating statements were admissible against him. In considering the totality of the circumstances surrounding Sanchez's confession, the court found that while the location of the interrogation weighed in favor of finding the confession involuntary, the remaining factors, to include, the degree of police coercion, the length of the interrogation, and the defendant's maturity, education, physical condition and mental condition, weighed in favor of finding that Sanchez's confession was voluntary.

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

*****

Shannon v. Koehler, 2010 U.S. App. LEXIS 17123, August 17, 2010

Officer Koehler responded to a call for a disturbance between two females at a bar. Koehler got to the bar and was greeted by a female who claimed one of the females inside the bar had been "touched or grabbed" by a male in the bar. The bar owner, Timothy Shannon, walked up to Koehler and using profanity stated that he did not need the police and ordered Koehler out of the bar. Koehler claimed that Shannon poked him in the chest twice during this time, which prompted him to take Shannon to the ground where he eventually handcuffed him. Shannon claimed that as a result he suffered a partially collapsed lung, multiple fractured ribs, and a laceration to the head and various contusions. Shannon denied poking Koehler in the chest.

The court held that nothing in the record, including the surveillance videos, contradicted Shannon's version of the facts, and after considering the facts and circumstances, that no reasonable officer on the scene would have felt the need to use any force against Shannon, much

less enough force to cause the injuries of which he complained. Although Shannon greeted Officer Koehler in a disrespectful, even churlish manner, that alone did not make Officer Koehler's use of force acceptable under the law.

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

*****

U.S. v. Dinwiddie, 2010 U.S. App. LEXIS 17753, August 25, 2010

Police made a controlled delivery of marijuana to Dinwiddie at his residence. Immediately after the delivery police saw Dinwiddie outside the residence, holding what appeared to be a packing slip from the delivery. Police approached him, asking him if he possessed any weapons or drugs. Dinwiddie said no and consented to a search of his person and vehicle. During the search, police recovered from Dinwiddie's pants pocket a packing slip from one of the packages in the shipment that had just been delivered.

The scope of consent for a search is limited to what a reasonable person would have understood by the exchange between the investigating officer and the person to be searched. The scope of consent does not automatically exclude items about which the defendant was not questioned.

Dinwiddie was observed exiting a house to which a controlled delivery of drugs had just been made. He was observed carrying what appeared to be a packing slip from the just completed drug delivery. Police officers approached him and asked him if he would consent to a search of his person. He agreed. In this context, a reasonable person would have understood his consent to include his pants pocket; therefore, the scope of the search did not exceed the consent that was given. The police were not limited to searching for objects about which he was just questioned, weapons and drugs.

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

*****

U.S. v. Johnson, 2010 U.S. App. LEXIS 18105, August 30, 2010

A DEA Special Agent and local law enforcement officers went to Johnson's home to conduct a "knock and talk" interview. Johnson invited the officers into his home and consented to a search of the premises. Johnson made several incriminating statements before he terminated the interview. Johnson voluntarily went to the police station three days later to continue the interview, and he made more incriminating statements to the officers.

The court held that on both occasions Johnson was not in-custody for *Miranda* purposes; therefore he was not entitled to a *Miranda* warning. The court found that Johnson voluntarily spoke to the officers, who informed him that he was not under arrest, and that he did not have to talk to them, and at some point Johnson did just this by terminating the interview. Three days later Johnson voluntarily went to the police station on his own volition to speak with the officers again. During both interviews Johnson's freedom of movement was not restricted and he was not arrested at the conclusion of either interview. Considering the totality of the circumstances

the court found that a reasonable person in Johnson's position would not have considered his freedom of movement restricted to the degree of a formal arrest.

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

*****

U.S. v. Aponte, 2010 U.S. App. LEXIS 18243, September 1, 2010

An officer stopped Aponte for a traffic violation. Aponte and a passenger had recently borrowed the vehicle, and were traveling to visit Aponte's cousin. After receiving consent to search, the officers searched the interior of the vehicle for over seven minutes without finding any contraband. The officers asked Aponte to drive the vehicle to the sheriff's office so they could continue the search indoors, due to the cold weather. The officers examined a round cooler in the vehicle. The officers noticed that the cooler's weight "did not seem right," and then they noticed some non-factory glue seeping from the seam between the cooler exterior and the liner. After dismantling the cooler the officers found four baggies wrapped around the cooler's inner core containing approximately one kilogram of methamphetamine.

The court reversed Aponte's conviction holding that the evidence was insufficient for the jury to reasonably conclude that he knew of the drugs inside the lining of the cooler. Generally when a defendant denies knowledge of drugs found inside his vehicle, the court has held that the defendant's ownership and control over the vehicle are sufficient to infer possession of drugs therein, even if the drugs are concealed. However, if a defendant did not own the vehicle, especially where the defendant was in control of the vehicle for only a short period of time, then the court has required additional proof showing that the defendant was aware of drugs concealed in the vehicle.

In this case the drugs were well-hidden inside the cooler within the vehicle. When drugs are found in a hidden-compartment, an important consideration is whether the compartment was obvious to a member of the general public. No evidence suggested that Aponte inspected the cooler at a close enough distance to notice the irregularity with the small amount of off-color glue protruding from the cooler's liner. Three officers initially searched the vehicle for over seven minutes, and during that time they never turned their attention to the cooler, much less the problem with the cooler's lining.

Additionally, the court held that the common indicia of guilty consciences were not present in this case. The officers testified that Aponte answered their questions completely and without apparent nervousness. Aponte and his passenger both gave the officers consistent stories regarding the reason for their trip and their travel history. The officers verified that Aponte had borrowed the car from a friend for the trip.

Finally, there was no evidence linking Aponte to the drugs. No fingerprints were found on the methamphetamine packaging, and the fingerprints located on the liner of the cooler did not belong to Aponte or his passenger.

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

*****

Fisher v. Wal-Mart Stores, 2010 U.S. App. LEXIS 18239, September 1, 2010

Police arrested Fisher for attempting to cash fraudulent money orders at Wal-Mart. The case was dismissed after the Wal-Mart employee who initially notified police did not appear in court to testify.

In a subsequent lawsuit, Fisher claimed that the police violated her *Fourth Amendment* rights against unreasonable seizures by falsely arresting her. The court held that Fisher could not establish a *Fourth Amendment* violation because the police had probable cause to arrest her. The court noted that the Wal-Mart employees confidently identified Fisher as the person who attempted to cash the fraudulent money orders, and that the officers viewed the Wal-Mart employees as reliable based on previous experiences with them.

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

*****

Ninth Circuit

U.S. v. Monday, 2010 U.S. App. LEXIS 15979, August 4, 2010

The defendant, a U.S. Postal Service employee, was properly convicted of removing money from a mailed letter in violation of *18 U.S.C. § 1709*. The court held that the offense does not include an element of specific intent permanently to deprive the owner of the money of its property.

The 4th and 10th Circuits agree (to sustain a conviction under *§ 1709* for removing the contents of mail, the government is not required to prove a defendant possessed the specific intent to convert the contents to her own use).

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

*****

U.S. v. Maddox, 2010 U.S. App. LEXIS 16705, August 12, 2010

An officer stopped Maddox after he observed him driving recklessly. Maddox got out of his vehicle and began yelling at the officer who instructed him to get back in his vehicle. Maddox complied. The officer noticed that the vehicle's tags were expired and the temporary registration sticker in the window was an invalid photocopy. A computer check revealed that Maddox's drivers license was suspended. When Maddox ignored the officer's request to step outside the vehicle the officer took away Maddox's key chain and cell phone, tossing them on the front seat of Maddox's vehicle. The officer arrested Maddox, handcuffed him and placed him in his patrol car. At this point Maddox posed no threat to officer safety and there was no danger of evidence destruction.

The officer went back to Maddox's vehicle, reached inside, and retrieved the key chain and cell phone. Hanging on the key-chain was a metal vial with a screw top. The officer removed the top and the contents of the vial which he believed to be methamphetamine. The officer went into the interior of the vehicle and removed a closed computer case which he opened, and discovered a handgun and more of a substance which he believed to be methamphetamine.

The court upheld the suppression of all items seized from Maddox's vehicle. The government argued that the search of Maddox's key chain was proper as a lawful search incident to arrest.

In the Ninth Circuit, the determination of the validity of a search incident to arrest is a two-fold inquiry: (1) was the searched item "within the arrestee's immediate control when he was arrested;" (2) did "events occurring after the arrest but before the search make the search unreasonable?"

The court held that the search of the key-chain vial was not a valid search incident to arrest. While the key chain was within Maddox's immediate control while he was arrested, subsequent events, namely the officer's handcuffing of Maddox and placing Maddox in the back of the patrol car, rendered the search unreasonable. The court stated that "mere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the delay".

The government argued that the office's seizure of the laptop bag was the result of a valid inventory search. The court disagreed, holding that the officer's impoundment of Maddox's vehicle violated Washington Law, and, therefore, did not qualify as a valid inventory search in accordance with the *Fourth Amendment*.

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

*****

U.S. v. Dotson, 2010 U.S. App. LEXIS 17130, August 17, 2010

The court affirmed Dotson's conviction for furnishing liquor to minors, holding that *Wash. Rev. Code § 66.44.270* was properly assimilated into federal law under the Assimilative Crimes Act, *18 U.S.C. § 13(a)* (ACA). The ACA subjects persons on federal lands to federal prosecution in federal court for violations of criminal statutes of the state in which the federal lands are located. The ACA applies in this case because Congress has not passed any law that prohibits the conduct at issue, and the Washington statute is "prohibitory," meaning that the furnishing of alcohol to minors is flatly prohibited and criminally penalized.

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

*****

U.S. v. Alvarez, 2010 U.S. App. LEXIS 17135, August 17, 2010

The court reversed Alvarez's conviction for falsely claiming to have received the Congressional Medal of Honor, in violation of the Stolen Valor Act, *18 U.S.C. § 704(b), (c).* The court held

that the Act is unconstitutional because is not narrowly tailored to achieve a compelling government interest, stating that, "honoring and motivating our troops are doubtless important government interests, but we fail to see how the Act is necessary to achieving either aim."

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

*****

U.S. v. Havelock, 2010 U.S. App. LEXIS 17597, August 23, 2010

Title 18 U.S.C. § 876(c) makes it a felony to mail a communication "addressed to any other person and containing . . . any threat to injure the person of the addressee or of another."

The court held that the phrase "any other person" in *§ 876(c)* refers exclusively to natural persons. The court also held that the requirement of *§ 876(c)*, that the communication deposited in the mail be "addressed" to such person, means that the natural person addressee must be designated on the outside of the letter or package deposited in the mail. Because none of the six packets of which Havelock was convicted of mailing was addressed on its cover to any natural person, his convictions were reversed.

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

*****

Hurd v. Terhune, 2010 U.S. App. LEXIS 17600, August 23, 2010

The state charged Hurd with murder after his wife was shot to death in their home. When the police arrived Hurd told them that the firearm had accidentally discharged. The police took Hurd into custody and *Mirandized* him. Hurd described the circumstances surrounding the shooting but when asked to demonstrate how the shooting took place he refused. Throughout Hurd's trial (during the opening statement, case-in-chief and closing argument) the prosecution referred to Hurd's refusal to reenact the shooting as affirmative evidence of his guilt.

The court held that the prosecutor's comments on Hurd's refusal to reenact the shooting, when asked by police, was a violation of his *Fifth Amendment* rights under *Miranda* and *Doyle v. Ohio,* 426 U.S. 610 (1976).

The Supreme Court has clearly established that, after receiving *Miranda* warnings, a suspect may invoke his right to silence at any time during questioning and that his silence cannot be used against him at trial, even for impeachment. *Miranda* does not apply only to specific subjects or crimes. It applies to every question investigators pose. The mere fact that a criminal defendant may have answered some questions does not deprive him of the right to refrain from answering any further questions. The right to silence is not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial.

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

*****

Millender v. County of Los Angeles, 2010 U.S. App. LEXIS 17673, August 24, 2010

The court held that the search warrant was so facially invalid that no reasonable officer could have relied on it, therefore the officers were not entitled to qualified immunity.

There is no dispute that the deputies had probable cause to search for and seize the "black sawed off shotgun with a pistol grip" used in the crime, however, the warrant in this case authorized a search for essentially any device that could fire ammunition, any ammunition, and any firearm-related materials.

The affidavit did not set forth any evidence indicating that Bowen owned or used other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millenders' residence. Nothing in the warrant or the affidavit provided any basis for concluding there was probable cause to search for or seize the generic class of firearms and firearm-related materials listed in the search warrant.

While the deputies had probable cause to search for a single, identified weapon, whether assembled or disassembled, they had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant. Although this court has upheld warrants describing broad classes of items in certain cases, the rationales adopted in those cases were inapplicable here given the information the deputies possessed.

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

*****

U.S. v. Ali, 2010 U.S. App. LEXIS 17760, August 25, 2010

The defendant purchased Microsoft software at a discounted price, but contrary to the agreement with Microsoft, resold it to unauthorized users. The agreement provided that the defendant would be liable to Microsoft for the difference between the estimated retail price for the discounted software and the commercial version of the same product, in the event it was sold to an unauthorized user.

The court held that the defendant was properly convicted of mail and wire fraud in violation of *18 U.S.C. §§ 1341* and *1343* because a right of payment for the sale of software was "money or property" as defined in *18 U.S.C. §§ 1341* and *1343,* and that neither statute required a transfer directly to the defendant from the party deceived by the defendant.

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

*****

U.S. v. Millis, 2010 U.S. App. LEXIS 18339, September 2, 2010

The court reversed Millis' conviction under *50 C.F.R. § 27.94(a*), *(Disposal of Waste),* for placing full, gallon-sized plastic bottles of water on trails in the Buenos Aires National Wildlife Refuge to help alleviate exposure deaths among undocumented immigrants crossing into the United States.

The court held that the common meaning of the term "garbage" within the context of the regulation was sufficiently ambiguous, therefore the defendant's conviction was improper. The court noted that Millis likely could have been charged under a different regulatory section, such as abandonment of property or failure to obtain a special use permit.

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

*****

Tenth Circuit

Brooks v. Gaenzle, 2010 U.S. App. LEXIS 16488, August 10, 2010

Use of deadly force alone does not constitute a seizure. Clear restraint of freedom of movement must occur. The court held that Deputy Gaenzle's gunshot may have intentionally struck Brooks, but it clearly did not terminate his movement or otherwise cause the government to have physical control over him, therefore, he was not seized under the *Fourth Amendment*. Brooks was able continue to climb over the fence and elude police for three days. Supreme Court cases determining what constitutes a seizure do not support Brooks' contention that use of deadly force against him by itself is enough to constitute a "seizure."

The 6th, 7th, and 9th circuits agree.

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

*****

Lundstrom v. Romero, 2010 U.S. App. LEXIS 17136, August 17, 2010

Albuquerque Police Department officers responded to Joseph Lundstrom's home after a neighbor called 911 and reported that she heard a woman at the residence screaming at, and striking a child. Lundstrom answered the door and told the officer that there were no children in the home. At some point, Jane Hibner, who was also in the home, came to the door because she heard Lundstrom raising his voice. As Hibner stepped outside, Lundstrom shut the door. The officer called for back-up stating that a disorderly subject had "barricaded" himself inside the house. Officers responded and Hibner was handcuffed, frisked and directed to sit on the curb.

Officers are authorized to handcuff individuals during the course of investigative detentions if doing so is reasonably necessary to protect their personal safety or maintain the status quo. However, the use of handcuffs is greater than a de minimus intrusion and the government is

required to demonstrate that the facts available to the officer would warrant a man of reasonable caution in the belief that the use of handcuffs was appropriate.

The court held that handcuffing Hibner was not a reasonable response to the circumstances presented to the officers. At the time of this encounter Hibner had cooperated with the officers; the officers had not yet uncovered any evidence of a child; Lundstrom had denied a child was at the house; Lundstrom was unarmed and speaking with the 911 operator; and none of the officers had yet interviewed Hibner about a child in the home. Even granting the officers some latitude in undertaking their community caretaking role, the actions they took in the course of detaining Hibner were not reasonably related in scope to the investigation. Rather than undertake the most rudimentary investigation, asking Hibner what happened, the officers handcuffed her and led her to the curb. At that time, the officers had yet to confirm any fact relating to the neighbor's report with Lundstrom or Hibner, nor did they have a reason to suspect foul play.

Lundstrom eventually came out of the house and was handcuffed and frisked by the officers. The officers searched the home but no child was discovered. Sometime prior to the search of the home, a dispatcher, in an attempt to confirm the neighbor's story learned that there was a possibility that the officers were at the wrong residence.

The court held that while the circumstances the officers confronted initially supported a brief investigatory detention, objectively reasonable officers would not have prolonged the detention and searched the home on the facts before them. Therefore, the officers were not entitled to qualified immunity.

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

*****

U.S. v. Hood, 2010 U.S. App. LEXIS 17154, August 17, 2010

Police seized Hood's backpack and found five plastic bags containing a total of 542 grams of methamphetamine. An officer combined the drugs from the five plastic bags into a separate bag and sent that bag to the crime lab for testing. The five plastic bags were later destroyed. The government later charged Hood with possession with intent to distribute fifty grams or more of actual methamphetamine.

Hood argued that the court should have dismissed the indictment against him because the government had destroyed potentially exculpatory evidence, contending that had the five plastic bags not been destroyed he would have been able to test the contents of each bag recovered from his backpack before it was comingled, and that he could have conducted fingerprint analysis on the bags.

Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Hood conceded that the destroyed evidence was only potentially exculpatory and that the officers did not act in bad faith in destroying the five plastic bags, therefore his challenge must fail.

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

*****

American Atheists, Inc. v. Duncan, 2010 U.S. App. LEXIS 17249, August 18, 2010

The Utah Highway Patrol Association, with the permission of Utah state authorities, erected a number of twelve-foot high crosses on public land to memorialize fallen Utah Highway Patrol troopers.

The court held that these memorials have the impermissible effect of conveying to the reasonable observer the message that the State prefers or otherwise endorses a certain religion, and therefore, they violate the *Establishment Clause of the United States Constitution.*

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

*****

District of Columbia Circuit

Boardley v. U.S. Department of the Interior, 2010 U.S. App. LEXIS 16302, August 6, 2010

The court held that the licensing scheme requiring individuals and small groups to obtain permits before engaging in expressive activities within designated "free speech areas" (and other public forums within national parks) is overbroad and therefore, violates the *First Amendment*.

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

*****

U.S. v. Maynard, 2010 U.S. App. LEXIS 16417, August 6, 2010

The police installed a GPS device on Jones's jeep, without a warrant, and tracked its movements twenty four hours a day for four weeks. The court held that monitoring Jones's movements on public roads for such a period of time constituted a *Fourth Amendment* search. The court rejected the government's argument that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *U.S. v. Knotts*, 460 U.S. 276 (1983). The court held that *Knotts* did not control, stating,

> "The Court explicitly distinguished between the limited information discovered by use of the beeper -- movements during a discrete journey -- and more comprehensive or sustained monitoring of the sort at issue in this case. In short, *Knotts* held only that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it."

> "Two considerations persuade us the information the police discovered in this case -- the totality of Jones's movements over the course of a month -- was not exposed to the public: First, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed *constructively* even though each individual movement is exposed, because that whole reveals more -- sometimes a great deal more -- than does the sum of its parts."
>
> "Application of the test in *Katz* to the facts of this case can lead to only one conclusion: Society recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have -- short perhaps of his spouse. The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts.*"

The 7th, 8th, and 9th circuits have held that held that the use of a GPS tracking device to monitor an individual's movements in his vehicle over a prolonged period of time is not a search.

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

*****