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

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GPS Tracking in a Post-*Maynard* World

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INTRODUCTION

A State Trooper conducts a traffic stop for excessive speed out on the Interstate. With the Trooper is a drug-detection dog that immediately alerts on the trunk of the driver's car. After receiving a call from the Trooper, Agent Houston and several other Federal Drug Task Force agents drive to the scene. Opening the trunk of the car, they find no apparent cocaine; however, the drug dog continues to alert on the trunk.

The driver of the car is Marcus Jeter. Jeter has one prior conviction, in federal court five years ago, for possession with intent to distribute cocaine. He successfully completed his prison sentence and a period of supervised release. Agent Houston checks and finds that Jeter has no outstanding wants or warrants. A check of the vehicle's VIN and plate number confirms that Jeter is the registered owner. Agent Houston also verifies that Jeter's driver's license is valid and notes the address reflected on the license.

While Jeter is being questioned by Agent Houston, other Task Force agents surreptitiously place a small self-powered GPS tracking device on the underside of his car in order to track its location in real time. Agent Houston releases Jeter who drives away.

The surveillance team, using only the GPS tracking system, tracks the vehicle to Jeter's address. Over the next three weeks, the Task Force continues to monitor the movements of Jeter's car. That information confirms that Jeter has traveled to commercial and residential addresses known to be owned or controlled by persons involved in cocaine trafficking, including a warehouse owned by another cocaine distributor recently arrested by Agent Houston but now cooperating with the Task Force. Just minutes later, however, the signal from the GPS on Jeter's car is lost.

The next morning, Agent Houston's CI calls to say that Jeter is just leaving his warehouse with two kilos of cocaine in a briefcase containing a hidden A-GPS[1] that Houston previously had provided him. The Task Force's GPS system tracks the device in the briefcase to Jeter's address. Visual surveillance agents see Jeter drive his car into his garage and the door closes. The GPS signals that the briefcase has now moved into the interior of Jeter's house.

Based on these facts, the Task Force agents decide to seek AUSA approval of a search warrant for Jeter's house. After reviewing the draft affidavit setting forth the foregoing information, the AUSA looks up and says, "Houston, we have a problem."

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[1] A-GPS, or Assisted GPS, uses not only radio signals from satellites, but also a cell phone data network. Such a network facilitates quicker acquisition of GPS data and also allows capture of position coordinates even where satellite signals may be unavailable or too weak to allow the GPS device to generate accurate location data. See generally, *Assisted GPS: A Low-Infrastructure Approach,"* GPS World, March 1, 2002; *Assisted GPS,* http://en.wikipedia.org/wiki/Assisted_GPS.

DISCUSSION

Nearly a half century ago, the United States Supreme Court, in a landmark Fourth Amendment decision, held that -

> …the *Fourth Amendment* protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of *Fourth Amendment* protection. *See Lewis v. United States, 385 U.S. 206, 210*; *United States v. Lee, 274 U.S. 559, 563*. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *See Rios v. United States, 364 U.S. 253*; *Ex parte Jackson, 96 U.S. 727, 733*.

Katz v. United States, 389 U.S. 347, 351. Thus, a bookie who enters a phone booth, closes the door, and makes a phone call signals to the world, in effect, that he expects privacy during the call. Further, that expectation is a reasonable one that society, through its courts, is willing to protect from government intrusion. *See id.* at 359.

Barely a generation later, the Supreme Court held that "[a] person travelling [sic] in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281 (1983). In *Knotts*, a defendant purchased a drum of chloroform, into which officers had previously installed a beeper, and then placed it in his car. The officers followed the car, using a combination of visual surveillance and a monitor in their vehicle that received the signals emitted by the beeper. After the drum was transferred to the vehicle of another defendant and that second defendant made evasive maneuvers, police lost visual and electronic contact with the car. Later, after reacquiring the signals from the beeper, the officers noted that the beeper was stationary and, from aerial surveillance, realized that it was located in the vicinity of a cabin. Relying on the location information acquired by the beeper and additional visual surveillance of the cabin, police obtained a warrant to search the cabin. That search revealed the presence of an illicit drug laboratory. 460 U.S. at 278-79.

The Court concluded that monitoring the beeper was analogous to following the vehicle on public streets and highways. Thus, the Court held the defendant "voluntarily conveyed to anyone who wanted to look" both his movements and the nature of the stops he made and the use of a device to track those public movements does not implicate the Fourth Amendment. *Id.* at 284-85. Unanswered in the *Knotts* decision was the question of whether monitoring the beeper after the chloroform drum had entered the cabin would have violated the Fourth Amendment.

The Court provided the answer to that question just a year after *Knotts* in the case of *United States v. Karo*, 468 U.S. 705 (1984). In *Karo*, Drug Enforcement Administration (DEA) agents arranged for an informant to place a beeper into a 50 gallon can of ether (a precursor chemical in the production of cocaine). The agents saw the defendant take delivery of the can of ether and then, using both visual surveillance and by tracking the beeper, followed the defendant first to his house and then to a storage facility. The agents continued to use the beeper to locate the can as it moved within the private storage facility. Finally, the agents tracked the can containing the

beeper to another defendant's home where the beeper signal confirmed that it remained inside that home. *Id.* at 708-10.

The *Karo* court reasoned that the use of the beeper, though less intrusive than a physical search, nevertheless revealed information about the inside of a home that the DEA agents could not have known without entering the residence. Therefore, the use of the beeper to obtain that information was a search that required a warrant. Id. at 715-29.

Viewed together, *Katz, Knotts,* and *Karo* gave clear direction to investigators. Simply put, the installation of a beeper or tracking device on the exterior of a car that does not require a power source from the interior of the vehicle does not implicate the Fourth Amendment. Similarly, the Fourth Amendment does not require a warrant for law enforcement to use such devices to monitor the location of the target vehicle while it is located in a public place. Where, however, the target vehicle moves from a public place into a private place, the information sent by the transmitter to the tracking is subject to the Fourth Amendment's warrant requirement. Thus, unless that information is acquired with a warrant, it will be subject to suppression.

Though just over a quarter century has lapsed since the *Knotts* and *Karo* decisions, the technology now available to law enforcement to track criminal suspects has progressed light years beyond the passive beeping devices used in the 1980's. The tool of choice presently is GPS, an acronym for "Global Positioning System."[2] Though GPS unquestionably provides law enforcement with much more precise information than the old beepers, it is essentially the same type of information: the location of a transmitting device and thereby the location of the vehicle or other host item containing that device.

Several federal circuit courts of appeals and district courts (though not the U.S. Supreme Court) have addressed the issue of the constitutionality of the warrantless installation of a GPS device installed by government agents on the exterior of a vehicle and the tracking of those vehicles in public places. Almost without exception, these courts, relying on the Supreme Court decision in *Knotts,* have upheld such actions by police. *See, e.g., United States v. Cuevas-Perez,* 2011U.S. App. LEXIS 8675, (7th Cir., April 28, 2011); *United States v. Marquez,* 605 F.3d 604, 610 (8th Cir. 2010); *United States v. Pineda-Moreno,* 591 F.3d 1212 (9th Cir. 2010); *United States v. Garcia,* 474 F.3d 994 (7th Cir. 2007); *United States v. McIver,* 186 F.3d 1119 (9th Cir. 1999); *United States v. Burton,* 698 F. Supp. 2d 1303 (N.D. Fla. 2010); *United States v. Moran, 349 F. Supp. 2d 425 (N.D.N.Y. 2005).* Law enforcement could therefore be said to be justified in assuming that the issues were settled: no warrant is required to install a GPS device while the vehicle is in a non-private location;[3] nor is a warrant required to use such a device to track a vehicle while it is in public locations.

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[2] Begun several years ago by the U.S. military, by 2008 GPS was based on a network of some 31 satellites in orbit approximately 12,600 miles above the earth. Each satellite is more or less geo-stationary, making two complete orbits each sidereal day, and repeating the same ground track each day. The satellites continuously send radio signals transmitting their locations; receivers on earth triangulate their own three-dimensional position using information from at least four of the satellites. *See* http://www.gps.gov/systems/gps/space/. Fixes, when recorded, become a track, or chronological record, of travel of the vehicle or item to which the GPS device is attached.

[3] See note 4, *infra.*

The validity of the latter of those assumptions was recently called into question, however, in the case of *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, __U.S.__ 2011 U.S. LEXIS 4956 (U.S., June 27, 2011).[4] In *Maynard*, the government, acting without a warrant, placed a GPS tracking device on Antoine Jones' car and tracked the car in public places around the clock for four weeks. Lawrence Maynard and Antoine Jones were the targets of a drug task force investigation resulting in their indictment in October 2005 for drug trafficking. Both moved to suppress evidence obtained by the government through, among other techniques, the use of a GPS tracking device placed on Jones' car without a warrant.

The D.C. Circuit found that the 24/7 warrantless tracking of Jones's vehicle's movements for 28 days gave a complete picture of his movements and was thus unreasonable. The Court's opinion stated that, "[a] single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly churchgoer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups -- and not just one such fact about a person, but all such facts." Thus, the Court concluded, the tracking in this case constituted "wholesale" or "mass" electronic surveillance rising to the level of a search and requiring a showing of probable cause and court approval in the form of a warrant. 615 F.3d at 565-66.

In its analysis, the D.C. Circuit seized on language in the *Knotts* decision in which the Supreme Court had reserved the question of whether a warrant would be required in a case involving extended electronic surveillance by the police. "If such dragnet-type law enforcement practice should eventually occur," the *Knotts* court wrote, "there will be time enough then to determine whether different constitutional principles may be applicable." *Id*. at 556 (citing *Knotts*, 460 U.S. at 283-84).

The *Maynard* court decided that time had arrived. It concluded that at some unspecified point in time, but in less than 30 days, constant warrantless GPS tracking in public places of the target of a criminal investigation triggers the protection of the Fourth Amendment. Restated in the language of *Katz*, the necessary underpinning of such a conclusion is that a criminal target whose initial subjective expectation of privacy of his public acts, one that society would not deem objectively reasonable, over time, and without more, becomes a 'justifiable,' 'reasonable,' and ''legitimate expectation of privacy' subject to the protections of the Fourth Amendment. *See Katz*, 460 U.S. 280-81.

In rejecting the government's argument that this case fell squarely within the purview of the *Knotts* decision, Judge Ginsburg wrote in *Maynard* that "*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[.]" 615 F.3d at 557. Thus, while a defendant may have no REP in a single discrete journey by car via public thoroughfares, at some point, with continuous travel over time, that defendant acquires REP as to what otherwise are public acts. When that happens, the *Maynard* court says, government "intrusion by tracking," even from a

[4] In addition to the constitutionality of extended warrantless GPS tracking, the Court has agreed to consider, and has directed the government and appellee Jones to brief, the issue of whether the warrantless installation of a GPS tracking device complies with the Fourth Amendment.

public vantage point, must be court-approved or done with proper consent. *See* 615 F.3d at 563-65.[5]

One core problem with the *Maynard* decision is that it equates improbability with illegality. The mere fact that Maynard and Jones did not expect their public behavior to be monitored, or, stated another way, that they believed it improbable that such monitoring by the police would occur, should not make that monitoring constitutionally infirm. One may expect that the trash that he places at the curb for collection will not be examined by the government, and, in the overall scheme of things, that is not likely to happen to most people. The fact that it could happen to everybody should not convert such examination into a Fourth Amendment event. What the Supreme Court has set as its talisman for deciding when a Fourth Amendment event occurs is whether the nature of the information revealed is private and thus worthy of constitutional protection. Orin S. Kerr, Four Models of Fourth Amendment Protection, *60 Stan. L. Rev. 503, 512 (2007).* As stated above, technology aside, *Knotts* finds tracking of a subject in public places to be unworthy of constitutional protection; *Maynard* says that it may start out that way but at some unspecified point along the path that protection leaps out of the woods, hands outstretched like that of a traffic officer, asking for a warrant before the tracking may proceed.

The *Maynard* decision is seemingly at odds not only with the U.S. Supreme Court's decision in *Knotts,* but also with prior decisions by at least two federal circuit courts of appeal. In *United States v. Pineda-Moreno,* 591 F.3d 1212 (9th Cir. 2010), the Court held that there was no intrusion into the defendant's REP by officers who attached a GPS device to a car parked in a publicly accessible location and monitored the movement of that car in public places. The Seventh Circuit, in *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), similarly held that there was no search when a self-powered GPS device was surreptitiously placed on the outside of the target vehicle.

Another court has left open the question of whether, in a case of extended GPS surveillance in public places, the Fourth Amendment could require a warrant. In *United States v. Sparks,* __F.3d__, 2010 U.S. Dist. LEXIS 120257 (D.MA 2010), FBI agents had used a GPS tracking device to locate Sparks' vehicle in connection with a criminal investigation. They found the car empty but with the engine running. Fortuitously, as the agents were watching the car, two men wearing dark sweatshirts arrived in a red SUV, jumped out of that car, jumped into Sparks' car and drove away. One of them was carrying a dark colored bag. The agents then learned that just minutes before a nearby bank had been robbed by two individuals wearing dark sweatshirts who made their getaway in a red SUV. Using the previously-installed GPS, the agents reacquired visual contact with the getaway vehicle and were able to stop it and eventually arrest the two occupants. The agents later downloaded information from the GPS unit that provided circumstantial evidence of Sparks' involvement in the bank robbery and conspiracy.

Sparks filed a motion to suppress the GPS data. Citing *Maynard,* he argued that "...the longer the GPS was placed on the car, the more his privacy was invaded because it gave the government a wealth of information about his personal preferences." 2010 U.S. Dist. LEXIS 120257 at *21 (citing *Maynard,* 615 F.3d at 558, 562). The *Sparks* court did not reject the rationale of

[5] The *Maynard* court did not provide any guidance concerning the point in time at which the line is crossed between permissible warrantless tracking in public places and extended and impermissible tracking in public places. Criminal investigators should contact an Assistant U.S. Attorney in his or her district to determine that office's policies concerning any warrantless installation and/or tracking of GPS devices.

Maynard, i.e., that continuous and prolonged GPS tracking requires a warrant. Rather, the court approved the GPS tracking of Sparks because it lasted only 11 days and was used only to locate the vehicle in order to initiate visual surveillance. In this respect, the court reasoned, the use of the GPS device on Sparks' vehicle is more akin to the use of the beeper in *Knotts* than that of the GPS device in *Maynard*. [6]

Though leaving the door uncomfortably ajar on whether mere length of public surveillance may trigger Fourth Amendment protection, the *Sparks* Court did firmly suggest that such a decision should not be based solely on technology. Rather, the court suggested in essence that, the capabilities of technology notwithstanding, the issue of whether any technology in the hands of the government violates the Fourth Amendment remains the same:

> If technology allows the government to sidestep the warrant requirement by providing access into otherwise protected areas, or to protected information, it ought to be considered an unreasonable search. If, however, the technology merely provides a replacement for an activity that is not a search within the meaning of the *Fourth Amendment*, then the use of technology does not render the activity illegal.

2010 U.S. Dist. LEXIS 120257 at *25 (citing *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007)).

CONCLUSION

GPS does not allow government agents access to otherwise protected areas. It merely allows the agents to "see" from afar what they could also see via visual surveillance. Nevertheless, although the *Maynard* decision is binding only on officers acting in the District of Columbia, it raises the troubling issue of whether some courts are beginning to embrace the concept of "privacy creep" relating to activities that, while wholly conducted within the realm of public observation, with time and continuity acquire constitutional protection.[7]

So, where does all of this leave the Task Forces agents in the hypothetical posited at the outset of this writing? Their warrantless GPS tracking of Jeter lasted three weeks and, with the exception of the last few minutes of that time, occurred solely in public places. If the federal court in which Jeter is indicted follows the *Maynard* case, the temporal length of the warrantless tracking of Jeter would be a problem.

The next question, then, is, assuming the local court follows *Maynard*, is the entire surveillance subject to suppression? Or does it acquire unconstitutional characteristics at some arbitrary point in the middle of the GPS tracking? For that question, neither *Maynard* nor other court opinions offer a definitive answer. Hopefully, the Supreme Court will soon provide some guidance to law enforcement on that matter. In the meantime, protection from adverse

[6] The Eighth Circuit has also held that the tracking of a GPS device placed on a truck used by drug traffickers was not a search because the installation occurred in a public place and the tracking was done for a reasonable period of time. *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010).

[7] Another question implicitly raised by the *Maynard* court's analysis, but not answered in its opinion, is the question of whether agents' extended warrantless observation of a target's activities in public places may at some point trigger the protections of the Fourth Amendment.

consequences following an incorrect guess about when that arbitrary point occurs will come from obtaining a tracking warrant.

Finally, the Task Force agents stumbled at the end of the surveillance of Jeter by continuing to track, without the authority of a warrant, the GPS device concealed in the briefcase that he obtained from the CI. *Knotts* teaches that the public tracking of Jeter while he traveled in public places does not require a warrant, even right up to the point that he enters concededly private space. *Maynard* tells us that warrantless public tracking is only constitutional for so long. *Karo* tells us, however, that, regardless, once the beeper or other tracking device crosses the threshold from public space into private space, the lack of a warrant for the use of such a device requires that all information acquired from within the private must be suppressed.

The criminal investigator should always consider obtaining court approval both for the installation and for the monitoring of a tracking device. If the initial installation or tracking is done in public places without a warrant, that does not preclude the possibility of obtaining a warrant for continued tracking in anticipation that the target may enter into a private place. Both before and during such tracking, the criminal investigator should remain in close contact with the AUSA assigned to the case in order to anticipate and deal with legal issues such as these, which could have a significant effect on the investigator's case.

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Law Enforcement Case Granted Certiorari by the United States Supreme Court for the October 2011 Term

GPS Tracking

United States v. Jones
Decision Below: 615 F.3d 544 (D.C. Cir. 2010)

Whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated the *Fourth Amendment*. The court also directed the parties to brief and argue the following issue: Whether the government violated Jones's *Fourth Amendment* rights by installing the GPS tracking device on his vehicle without a valid warrant or without his consent.

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CASE SUMMARIES

United States Supreme Court

J.D.B. v. North Carolina, 2011 U.S. LEXIS 4557, June 16, 2011

A police officer removed a thirteen-year-old student from his class, took him to a school conference room, and questioned him about a home break-in. The officer did not give the student *Miranda* warnings, the opportunity to call his legal guardian, nor tell him he was free to leave. The student eventually confessed.

The court held that when the police question a child, the child's age is relevant when determining whether he was in custody for *Miranda* purposes. The court noted that a child's age will not always be a determinative or even a significant factor in every case; however, it must be included in the analysis of *Miranda* custody.

The court remanded the case to the state court to determine if the student was in custody for *Miranda* purposes when the officer questioned him, this time taking into account all of the relevant circumstances of the interrogation including the student's age at the time.

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

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Davis v. United States, 2011 U.S. LEXIS 4560, June 16, 2011

During a vehicle stop, an officer arrested Davis for giving a false name. After securing Davis, the officer searched the vehicle incident to arrest, which under these circumstances was permitted under existing case law, and recovered a firearm. Davis was ultimately convicted of a firearms offense.

While Davis's appeal was pending, the Supreme Court decided *Arizona v. Gant*, which outlined a new rule governing automobile searches incident to arrests of recent occupants. The Eleventh Circuit held that under *Gant* the vehicle search at issue violated Davis's *Fourth Amendment* rights, but declined to suppress the firearm and affirmed Davis's conviction.

The Supreme Court agreed, holding that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. The exclusionary rule's sole purpose is to deter future *Fourth Amendment* violations, and the court has never applied the exclusionary rule to suppress evidence obtained as a result of non-culpable, innocent police conduct.

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

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Bullcoming v. New Mexico, 2011 U.S. LEXIS 4790, June 23, 2011

Bullcoming was arrested for driving while intoxicated. Principal evidence against him was a forensic laboratory report certifying that his blood-alcohol concentration was well above the

legal limit. At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the state called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample.

The court held that the *Confrontation Clause* does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification through the in-court testimony of a scientist who did not sign the certification, perform, or observe the test reported in the certification. The defendant had the right to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the defendant had an opportunity, pretrial, to cross-examine that particular scientist.

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

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Circuit Courts of Appeals

1st Circuit

U.S. v. Crespo-Rios, 2011 U.S. App. LEXIS 11551, June 8, 2011

Officers obtained a search warrant that authorized them to seize the defendant's computer and search it for documents and records showing that he attempted to entice a minor to cross state lines to engage in sexual activity. In addition to finding that evidence, the forensic examination of the defendant's computer also revealed images and videos of child pornography.

The court held that the child pornography evidence was admissible against the defendant under the inevitable discovery doctrine. Although the search warrant did not mention child pornography, the officers had a valid search warrant that allowed them to search the defendant's computer for correspondence between the defendant and the undercover officer posing as a child. In conducting his search for records and documents, the forensic examiner was not limited to searching certain folders or types of files because digital files may be mislabeled or manipulated to disguise the true file types. The lawful search of the computer for correspondence between the defendant and the undercover officer would have inevitably led the forensic examiner to discover the child pornography.

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

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U.S. v. Melendez-Santiago, 2011 U.S. App. LEXIS 13305, June 30, 2011

The court held that the government provided sufficient explanation as to why traditional investigative procedures were inadequate in the affidavits submitted in support of two Title III wiretap applications.

The affidavits described the limited success of efforts to conduct physical surveillance on the leader of the conspiracy. Such surveillance was difficult because of the narrow streets of the neighborhood and the vigilant counter-surveillance conducted by the suspects. The use of

undercover officers or confidential informants was not feasible because the suspects were wary of individuals who were not members of the local criminal subculture. At the time of the wiretap application, one confidential source had been missing for five months and was presumed dead, and another had been threatened with death and was no longer trusted by the suspects. Pen registers and trap and trace records were already being used but they only provided limited information about the cell phones being used.

The court further held that the after being indicted and arrested, Melendez waived his *Fifth* and *Sixth Amendment* rights. Melendez initiated the first interview with the officers himself, after being advised twice of his *Miranda* rights. Later, after being advised of both his *Fifth* and *Sixth Amendment* rights by the magistrate judge at his initial appearance, he continued to cooperate with the officers without requesting counsel. Under all the circumstances, Melendez voluntarily and intelligently waived both his right to remain silent and his right to counsel when he made his statements to the officers.

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

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5th Circuit

U.S. v. Portillo-Munoz, 2011 U.S. App. LEXIS 11976, June 13, 2011

The defendant argued that his conviction for being an illegal alien in possession of a firearm, in violation of *18 U.S.C. § 922(g)(5)* violated the *Second Amendment*. The court held that "the people" referenced in the *Second Amendment* (. . . the right of the **people** to keep and bear Arms, shall not be infringed) does not include aliens illegally in the United States. The court noted that the Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens, and between lawful and illegal aliens, and as a result *18 U.S.C. § 922(g)(5)* is constitutional under the *Second Amendment*.

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

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6th Circuit

U.S. v. Little, 2011 U.S. App. LEXIS 13141, June 27, 2011

Little was suspected of taking nude photographs of a fourteen-year-old girl with his cell phone camera. An officer located Little at his mother's house, and while standing on the front porch asked him to come to the police station to discuss the matter. Little asked if he could put on a shirt first. The officer agreed and followed Little into the house without asking permission to enter. Once inside the house, Little gave the officer his cell phone, which contained the nude photographs of the fourteen-year-old girl.

The court held that the officer entered the house in violation of the *Fourth Amendment*. There were two ways that the officer could have lawfully entered the house: by obtaining a search warrant or by requesting and obtaining consent from Little. The court followed the Eleventh Circuit, which has held that consent cannot be inferred, by the simple act of disengaging from

conversation with an officer and walking into a house. Because of the unlawful entry, the evidence obtained from the cell phone should have been suppressed.

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

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U.S. v. Mays, 2011 U.S. App. LEXIS 13263, June 29, 2011

Officers received an anonymous tip that a black male was selling drugs in front of an apartment complex. The officers drove to the apartment complex in unmarked police vehicles, and as they pulled up in front of the complex, Mays, a black male, walked down a stairway towards them. Believing that he was approaching them to sell drugs, the officers got out of the vehicle. Mays immediately turned away from the officers, put his hands in his pockets, and appeared to be deciding whether to run away. After initially refusing to remove his hands from his pockets, Mays reached into his waistband. The officers detained Mays, conducted a *Terry* frisk, and removed a loaded handgun from his waistband.

The court held that the officers were justified in conducting a *Terry* stop and then *Terry* frisk on Mays because: (1) the detention and search occurred at a location where officers had been recently informed that a black male was selling drugs, (2) Mays initially approached the officers in a calm way, but his demeanor changed dramatically once he realized they were police, (3) Mays acted nervously, like a "deer in the headlights", (4) Mays turned away from the officers as if to leave, and (5) he frantically dug his hands into his pockets and would not remove them.

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

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8th Circuit

Chambers v St. Louis County, 2011 U.S. App. LEXIS 11392, June 13, 2011

The court held that an individual may prove an unreasonable seizure occurred, based on an excessive use of force, without having to show more than a *de minimis* injury.

Graham v. Conner requires that a particular use of force used to effect a seizure must be reasonable. This rule focuses on the reasonableness of the seizure and not on the degree of any injury that an individual may suffer. It is possible to prove an excessive use of force that only causes a minor injury.

In this case, the court held that Chambers presented sufficient evidence, if believed, to establish a violation of the *Fourth Amendment*. However, the officers were entitled to qualified immunity since it was not clearly established at the time that an officer could violate an individual's rights by applying force that caused only *de minimis* injury.

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

*****

U.S. v. Correa, 2011 U.S. App. LEXIS 11970, June 13, 2011

Officers boarded the bus on which Correa was traveling when it made a scheduled stop. They wanted to talk to passengers that had purchased their tickets in cash, within a day of departure, from drug source cities. Correa was one of these individuals.

One officer knelt in the bus driver's seat facing the back of the bus while another officer stood slightly behind Correa's seat, not blocking the aisle. The officer asked Correa if he could search his jacket, which was on the seat next to him. Correa said yes, and handed the jacket to the officer. Inside the jacket, the officer found two duct-taped wet wipe containers that felt heavy. Suspecting that the containers contained illegal drugs, the officer handcuffed Correa and escorted him into the bus terminal. After finding illegal drugs in the containers, the officer *Mirandized* Correa who waived his rights and made incriminating statements.

The court concluded that the initial conversation on the bus between the officer and Correa was not a detention subject to *Fourth Amendment* protection. There was no application of force, no intimidating movement, no brandishing of weapons. The officer did not threaten Correa and he did not block the aisle during their conversation. A reasonable person in Correa's position would have felt free to end the conversation with the officer.

The court held that Correa voluntarily consented to the search of his jacket. There was no evidence that he was of less than average intelligence and education. Additionally, he was sober during the conversation, which was brief.

Finally, the court held that the officer did not exceed the scope of the *Terry* stop when he handcuffed and removed Correa from the bus after discovering the containers that he believed contained illegal drugs. It was reasonable for the officer to handcuff Correa as a precaution in light of the dangerous nature of the suspected crime.

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

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11th Circuit

Coffin v. Brandau, 2011 U.S. App. LEXIS 11353, June 3, 2011

Cynthia Coffin tried to shut her open garage door to prevent two officers from entering and serving a court order on her husband. As the garage door was closing, one of the officers stepped into the threshold, breaking the electronic-eye safety beam, causing the door to retreat to its open position. The officers, who did not possess either a search warrant or an arrest warrant, entered the open garage and arrested her for obstruction of justice.

The court held that entering the garage as Ms. Coffin tried to close the door was a violation of the *Fourth Amendment*. However, the court found that at the time it was not clearly established that entering the open garage in the face of Ms. Coffin's attempts to exercise her *Fourth Amendment* privacy rights would violate the *Fourth Amendment* therefore; the officers were entitled to qualified immunity.

The officers reasonably believed that Ms. Coffin was resisting service of legal process, a misdemeanor occurring in their presence, which would allow them to make an immediate arrest.

The officers were faced with a split-second decision about whether or not to enter the garage. There was no binding case law that informed the officers that they were violating the *Fourth Amendment*, and the non-binding cases that existed indicated that entry into an attached open garage might not be a *Fourth Amendment* violation.

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

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