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The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Center's Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals 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 http://www.fletc.gov/training/programs/legal-division/the-informer .

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In This Issue

Case Summaries

Circuit Courts of Appeals

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CASE SUMMARIES

Circuit Courts of Appeals

1st Circuit

United States v. Rabbia, 699 F.3d 85 (1st Cir. N.H. 2012)

Police officers patrolling a high crime neighborhood heard three men discussing what they suspected was the beginning of a drug deal. Shortly afterward, one of the men, Bryan Bleau, got into a car driven by Anthony Rabbia and left. Rabbia and Bleau returned a few minutes later and Bleau rejoined the other two men after he removed a bag from the trunk of the Rabbia's car. The officers approached Bleau and the other two men with their guns drawn, detained them in handcuffs and frisked them. One of the officers then approached Rabbia, ordered him out of the car at gunpoint, handcuffed and frisked him. The officer told Rabbia that he was not under arrest and that he would remove the handcuffs once back-up officers arrived. Although none of the men were armed, the officers found a gun inside the bag. After back-up officers arrived, an officer removed Rabbia's handcuffs and asked him what he had been doing. Rabbia eventually told the officer that he had sold Bleau the gun in the bag. The officer asked Rabbia to describe the gun, which Rabbia was able to do. The officers arrested Rabbia after they discovered that he had a prior felony conviction.

Rabbia argued that the initial *Terry* stop was unlawful because it was not based on reasonable suspicion that he was involved in criminal activity. The court disagreed, holding that the officers had reasonable suspicion to believe that Rabbia, Bleau and the other two men were involved in a drug deal. First, the officers overheard a conversation that centered on money. Next, Rabbia and Bleau drove away, returned a short time later, and Bleau had retrieved a bag from the trunk of Rabbia's car. Finally, this activity occurred in an area known for drug activity. In addition, it did not matter that Rabbia was involved in an illegal gun sale and not a drug deal. The officers had facts that allowed them to reasonably believe that Rabbia was involved in criminal activity even though the nature of the criminal activity turned out to be different from what they originally thought.

Rabbia also claimed that the statements he gave to the officers at the scene should have been suppressed because he had not been given *Miranda* warnings. Rabbia argued that the officer's display of his gun, use of handcuffs and frisk transformed the *Terry* stop into a custodial arrest. Again, the court disagreed, holding that the officer's initial encounter with Rabbia was a *Terry* stop and not an arrest. First, it was reasonable for the officers to approach the men with guns drawn based on their suspicions that the men were engaged in a drug transaction. Because Rabbia was seated in his car, the lower half of his body was not visible to the approaching officer and he could have easily been concealing a weapon. Additionally, the approaching officer was effectively alone when he confronted Rabbia because the other officers were busy detaining Bleau and the other two men thirty to forty feet away. Second, it was also reasonable for the officers to handcuff and frisk the men because drug dealing is often associated with access to weapons. Finally, while the display of guns and use of handcuffs are often associated with custodial arrests, in this case both were appropriate to effect the *Terry* stop and allow the officers

to conduct their brief investigation. In addition, Rabbia was only handcuffed for about five minutes, and the officers did not question him until after the handcuffs had been removed.

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

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United States v. Cameron, 699 F.3d 621 (1st Cir. Me. 2012)

Yahoo!, Inc. received an anonymous report that child pornography images were contained in a particular Yahoo! Photo account. Yahoo! personnel searched the account and discovered images they believed to be child pornography. As part of its internal process after discovering child pornography, Yahoo! created a child pornography (CP) Report and sent a copy to the National Center for Missing and Exploited Children (NCMEC). Based on the Yahoo! CP Report, the NCMEC created and sent a CyberTipline Report to the Maine State Police. The Maine State Police eventually obtained a warrant to search Cameron's residence and seize his computers. At trial, the government introduced evidence from Yahoo! through the testimony of an employee who had knowledge about Yahoo!'s data retention and legal procedures. The employee testified that Yahoo! recorded user log-on, IP address, and other user account information in the regular course of business. The employee also testified that Yahoo! automatically stored each CP Report as part of its ordinary business practice.

Cameron argued that Yahoo!'s search for child pornography in his account violated the *Fourth Amendment* because Yahoo! had acted as an agent of the government. The court disagreed. The *Fourth Amendment* does not apply to searches and seizures, even unreasonable ones, conducted by private individuals who are not acting as agents of the government. Here, there was no evidence that the government had any role in initiating or participating in the initial search. Yahoo! began searching Cameron's accounts after it received an anonymous tip concerning child pornography in one of the Yahoo! Photo albums registered to him. The Yahoo! employees conducted their search pursuant to Yahoo!'s own internal policy and there was no evidence that the government compelled Yahoo! to maintain such a policy. Even though Yahoo! had a duty under federal law to report child pornography to the NCMEC, the court noted that the statute did not impose any obligation to search for child pornography; it only required Yahoo! to report any child pornography it discovered.

Cameron also argued that the admission of evidence, through the testimony of the Yahoo! employee, violated his *Confrontation Clause* rights. The court held that the log-on, IP address and user account information was properly admitted under Federal Rule of Evidence 803(6) as non-testimonial business records. This information was collected by Yahoo! to serve business functions that were completely unrelated to any trial or law enforcement purpose. Because the primary purpose of collecting this data was not to assist a subsequent criminal prosecution, the court held that its admission did not violate the *Confrontation Clause.*

However, the court concluded that there was strong evidence that the CP Reports, while created in the ordinary course of business, were testimonial because they were prepared with the primary purpose of establishing or proving past events potentially relevant to a later criminal prosecution. As a result, the court held that the admission of the CP Reports violated the *Confrontation Clause* because Cameron did not have the opportunity to cross-examine the Yahoo! employees who prepared them, but only an employee who had knowledge of Yahoo!'s data retention and legal procedures.

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

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United States v. Murdock, 699 F.3d 665 (1st Cir. Me. 2012)

A police officer stopped Murdock as he was walking up to his residence after the officer learned that Murdock, a convicted felon, might have received some firearms in the mail. Murdock initially ignored the officer's request to stop, but complied after the officer unholstered his firearm, but did not point it at him. The officer reholstered his weapon, frisked Murdock and told him that he was looking for weapons. Four other officers arrived and eventually found a red overnight bag containing two handguns and ammunition in the trunk of a car in the garage. After the officer told Murdock that he had found "the blue bag with your weapons in it," Murdock replied that the bag was red. The officer then agreed that the bag was red. During the forty-five minute to one-hour search, Murdock remained in the small front yard, spoke to his wife, used his cell phone, sat in a chair and drank a beverage. He was not handcuffed, restrained or told that he could not leave.

Murdock argued that his statement concerning the color of the bag should have been suppressed because he was in custody and had not been given his *Miranda* rights.

The court disagreed. While Murdock remained on the lawn, he was only in the presence of one or two police officers. Murdock was not handcuffed, he was able to sit down, use his cell phone and drink a beverage. Although the officer drew his firearm, he only did it after Murdock initially refused to stop and he reholstered it once Murdock did stop. The officer's conversation with Murdock about the red bag was brief and non-confrontational. As result, Murdock was not in custody for *Miranda* purposes; therefore, the officer's failure to provide them to Murdock was not a constitutional violation.

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

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2nd Circuit

United States v. Siddiqui, 2012 U.S. App. LEXIS 22728 (2d Cir. N.Y. Nov. 5, 2012)

Siddiqui claimed that the trial court improperly admitted incriminating, un-*Mirandized* statements that she gave to federal agents while she was hospitalized. The trial court held that the statements were made voluntarily; therefore, the government could use them in its rebuttal case after Siddiqui testified.

The court agreed. In its case in chief, the government may not introduce statements taken from the defendant in violation of *Miranda*. However, the government may introduce un-*Mirandized* statements to impeach the defendant's testimony, as long as they were made voluntarily because a defendant is under an obligation to testify truthfully.

Here, while the agents did not *Mirandize* Siddiqui, she was kept in soft restraints while in the hospital and the agents' conduct was not overbearing or abusive. The agents attempted to meet her basic needs and never denied her access to the restroom, food, water or medical attention. The agents talked with Siddiqui when she wanted to talk and sat quietly in her room when she did not want to talk. In addition, Siddiqui is highly educated, having earned undergraduate and graduate

degrees. Most importantly, Siddiqui was lucid and able to engage the agents in coherent conversation despite suffering pain associated with her injury.

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

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United States v. Moreno, 2012 U.S. App. LEXIS 23949 (2d Cir. N.Y. Nov. 20, 2012)

Drug Enforcement Administration (DEA) agents in New York received information from a DEA agent in Colombia that over a kilogram of heroin was to be transferred from Moreno to another person later that day in New York. The agent in Colombia provided the name of the hotel and the room number where the deal was supposed to occur. While conducting surveillance on the hotel, the agents in New York saw a woman matching Moreno's description repeatedly walk in and out of the hotel room and survey the parking lot. The agents had a housekeeper knock on the door to Moreno's room. Moreno opened the door, but when she saw two DEA agents behind the housekeeper, she tried to slam the door shut. One of the agents blocked this attempt, entered the room and handcuffed Moreno while the other agent conducted a protective sweep. Moreno gave the agents oral and written consent to search the room and her luggage. The agents found a kilogram of heroin inside her suitcase.

The court held that exigent circumstances justified the agents' warrantless entry into the hotel room. First, the agents had probable cause to believe that Moreno was a drug courier. The agent in Colombia provided the agents in New York with detailed information concerning the description of the courier and the location of the drug deal, which they corroborated during their surveillance. In addition, the agents saw Moreno going in and out of the hotel room to check the parking lot as if she was expecting someone to arrive. This behavior added to the agents' belief that Moreno was about to engage in a drug transaction. Second, Moreno's reaction to seeing the agents at her door and her attempt to slam the door in their faces created an urgent need for the agents to enter the room to ensure that evidence was not destroyed. The agents' warrantless entry into Moreno's hotel room was reasonable under the *Fourth Amendment*.

The court further held that Moreno voluntarily consented to the search of her luggage. Although Moreno was in custody and had been subjected to a display of force, this did not automatically mean that any subsequent consent she gave was involuntary, as sufficient time had elapsed between the agents' initial entry into Moreno's room and her consent to search. The court found that Moreno was calm when the agents asked for consent to search and that they did not use any intimidating or coercive language or gestures in seeking her consent. Moreno immediately provided oral consent and then signed a written consent-to-search form, which affirmed that she had not been threatened or forced in any way to give consent. Finally, Moreno stated that she understood the form and she signed it without hesitation.

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

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3rd Circuit

United States v. Pavulak, 2012 U.S. App. LEXIS 24036 (3d Cir. Del. Nov. 21, 2012)

Police officers obtained a warrant to search Pavulak's computers for child pornography. Pavulak claimed that the affidavit submitted in support of the search warrant applications did not establish probable cause to search his computers because it lacked details about what the alleged images of child pornography depicted.

When evaluating a search warrant application for child pornography, the magistrate must be able to evaluate whether the contents of the alleged images meet the legal definition of child pornography. To do this the magistrate can personally view the images, the search warrant affidavit can provided a sufficiently detailed description of the images or the search warrant application can provide some other facts that tie the images' contents to child pornography.

In this case, the search warrant applications alleged that Pavulak was "dealing in child pornography" in violation of Delaware State Law. To support this claim, the affidavit relied on three pieces of information. First, that Pavulak had two prior convictions for child molestation. Second, the affidavits stated that two witnesses had seen Pavulak viewing "child pornography" of females between twelve and eighteen years old. However, the affidavit did not provide any details about what the images depicted. Third, the officers were able to corroborate Pavulak's ownership of the Yahoo! email account and his presence at the office where the computers were located.

The court held that this information did not establish probable cause to believe that the images seen by the witnesses contained child pornography. The label "child pornography," without more, did not present any facts from which the magistrate could determine with a fair degree of probability that what was depicted in the images met the statutory definition of child pornography. For example, the affidavit did not describe whether the minors depicted in the images were nude or clothed or whether they were engaged in any "prohibited sexual act" as defined by Delaware Law. Presented with the label "child pornography," the most the magistrate could infer was that the officer who drafted the affidavit concluded the images contained child pornography.

Although the warrants did not establish probable cause, the court held that the evidence should not be suppressed. It was reasonable for the officers to rely on the warrant, even though the supporting affidavit did not contain details about the content of the images, as the state of the law in the Third Circuit at the time was not clear on this issue. As a result, the officers relied on the warrant in good faith.

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

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James v. City of Wilkes-Barre, 2012 U.S. App. LEXIS 24592 (3d Cir. Pa. Nov. 29, 2012)

Cheryl James' fifteen-year-old daughter, Nicole, sent a text message to a friend stating that she planned to commit suicide. The friend called 911 and police officers were dispatched to James' house. When questioned by her parents, Nicole told them that she had changed her mind. However, one of the officers told the parents that Nicole still had to go to the hospital for an evaluation. The parents eventually consented but refused to accompany Nicole to the hospital.

After an officer insisted, Cheryl James agreed to ride to the hospital in the ambulance with her daughter. James later sued the officer for false arrest and false imprisonment for insisting that she accompany Nicole to the hospital in the ambulance.

The court held that the officer was entitled to qualified immunity because James was not seized in violation of the *Fourth Amendment*; therefore, no constitutional violation occurred.

James' allegations were insufficient to establish a show of authority that rose to the level of a *Fourth Amendment* seizure. The officer's insistence that James accompany her daughter to the hospital would not cause a reasonable person to feel powerless to decline the officer's request.

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

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4th Circuit

United States v. Vaughan, 2012 U.S. App. LEXIS 24591 (4th Cir. Va. Nov. 29, 2012)

Vaughan and Scott were pulled over by a police officer for speeding. Based on Scott's nervousness, the presence of four cellular phones, to include two prepaid cell phones, and conflicting explanations for their travels, the officer called in a drug-detection dog. The dog arrived thirteen minutes after the initiation of the traffic stop and alerted on the trunk of the car two to three minutes later. Officers searched the trunk and found cocaine.

The court held that the officer had reasonable suspicion to believe that Vaughan and Scott were involved in criminal activity six minutes into the stop when Scott volunteered information concerning their travels that conflicted with Vaughan's information. By this time, the officer had already observed Scott's nervousness and had seen two prepaid cell phones that the officer knew were used by people involved with drugs. As a result, the officer was justified in briefly extending the stop and waiting for the drug-detection dog to arrive.

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

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6th Circuit

Campbell v. City of Springboro, 2012 U.S. App. LEXIS 24548 (6th Cir. Ohio 2012)

Spike, a police dog in the Springboro Police Department's canine unit, attacked Samuel Campbell and Chelsie Gemperline in two separate incidents. Both sued Officer Clarke, Spike's handler, the Chief of Police and the City of Springboro alleging excessive force, failure to supervise, failure to train as well as state-law claims for assault and battery.

First, the court held that a reasonable jury could find that Officer Clarke unreasonably deployed Spike against Campbell and Gemperline; therefore, the district court properly denied him qualified immunity.

According to Campbell, when Officer Clarke found him, he was lying face down with his arms at his sides and he never resisted arrest. In addition, there was ample evidence to suggest that the deployment of Spike in the search for Campbell was unreasonable because by Officer Clarke's

own admission, he had failed to adequately maintain Spike's training. Officer Clark knew that Spike had issues with excessive biting and the failure to keep Spike on the accepted training regimen may have played a role in his aggressive behavior.

In Gemperline's case, Officer Clark arrested her for underage drinking and placed her in the back of his patrol car. Gemperline slipped the handcuffs, lowered the window in the patrol car and escaped. She fled down the street and hid in a children's plastic playhouse a short distance away. When told that Gemperline had escaped, Officer Clarke was heard to say, "This bitch, I've had it" and "She's gonna get a nice rude awakening here in a second or two." Officer Clarke used Spike to track Gemperline who leapt headfirst through the window of the playhouse and bit Gemperline. As soon as Gemperline screamed, Officer Clarke grabbed Spike by the collar so he would release her.

While Gemperline may have committed a felony by escaping from police custody, the court found that the crime was not violent and that she had not harmed anyone. Officer Clarke initially arrested Gemperline for a minor crime. She was neither fleeing nor posing a threat to anyone when Spike bit her. A jury could find that Officer Clarke's use of Spike to apprehend Gemperline was objectively unreasonable. In addition, there was evidence to suggest that the reason Officer Clarke grabbed Spike by the collar to get him off Gemperline may have been that Spike did not always respond to Clarke's verbal commands as consistently as he should have. This suggested a link between Gemperline's injury and Spike's inadequate training.

Second, the court agreed that the district court properly denied the Chief of Police qualified immunity. The Chief allowed Spike in the field even after his training lapsed and he never required appropriate supervision of the canine unit, letting it run itself. He failed to establish and publish an official K-9 unit policy and he seemed oblivious to the increasing frequency of dog-bite incidents involving Spike. The Chief also ignored Officer Clarke's complaints regarding his need to keep Spike up-to-date on his training. A jury could reasonably conclude that the Chief's apparent indifference to maintaining a properly functioning K-9 unit led to the injuries suffered by Campbell and Gemperline.

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

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7th Circuit

United States v. Schmidt, 2012 U.S. App. LEXIS 22744 (7th Cir. Wis. Nov. 6, 2012)

Police officers responded to a report of multiple gunshots that were heard at an intersection near Schmidt's residence. During the investigation, officers learned that one person had been shot in the leg and already taken to the hospital. While canvassing the area two hours later, an officer approached a two-duplex unit from an alley. The officer saw bullet holes in a car parked in the alley as well as bullet holes in Duplex A. The officer also saw several spent shell casings on the ground near Duplex A and one spent shell casing within the backyard. Without a warrant, the officer entered the common backyard shared by Duplexes A and B through an open chain-link gate, and panned the area with his flashlight. In the corner of the yard, the officer saw the scope and breech of a firearm. The officer moved a plastic lid that was covering the stock of the firearm, pushed some tall grass aside, and discovered that the firearm was a .308 caliber rifle, which he seized. The rifle belonged to Schmidt, a convicted felon, who lived in Duplex B.

Schmidt claimed that the back yard was curtilage and that the officer violated the *Fourth Amendment* by entering it without a warrant. Even if the officer was lawfully in the backyard, Schmidt argued that the officer did not have the right seize the rifle.

Without deciding whether the backyard was curtilage, the court held that the officer's entry was justified by exigent circumstances. Although two hours had passed since the last gunshots had been heard, the officer saw bullet holes in a car adjacent to the backyard, bullet holes in Duplex A, spent shell casings on the ground and one spent shell casing in the yard. These circumstances made it reasonable for an officer to believe, at the time of the search, that people in the backyard area may have recently been shot and in need of immediate aid. Consequently, the officer's warrantless presence in the backyard was justified whether the backyard was curtilage or not.

The court further held that the seizure of the rifle was justified under the plain view doctrine. First, the officer was lawfully present in the backyard. Second, the rifle's scope and the breech were clearly visible to the officer, so he knew that the object was a firearm before he moved the plastic lid and grass to see the stock and caliber of the rifle. Finally, based on the report of recent gunshots, the bullet holes and the spent shell casings, the officer had probable cause to believe the rifle was linked to those gunshots.

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

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United States v. Pelletier, 2012 U.S. App. LEXIS 24016 (7th Cir. Ill. Nov. 21, 2012)

Pelletier applied for a job with the Federal Bureau of Investigation (FBI). As part of the application process, he went to the FBI office to undergo a personnel security interview and to take a polygraph examination. Pelletier failed the polygraph examination. When the polygraph examiner asked him how he thought he did, Pelletier told him that he had some trouble with some of the questions because of a set of files on his home computer that contained images of naked children. The polygraph examiner then invited an agent from the Cyber Crimes Unit to join them. The agent did not *Mirandize* Pelletier who admitted to downloading child pornography from the internet for a graduate school research project. The agent asked Pelletier for consent to search his computer but Pelletier refused. The agent left the room and directed other agents to go to Pelletier's home and secure it until a search warrant or consent could be obtained. The agent also contacted federal and state prosecutors about obtaining search warrants for Pelletier's home and computer. The agent returned to the interview room and told Pelletier if he did not consent to a search that he was going to apply for a search warrant. Pelletier signed a written consent to search form and was allowed to leave. As he left, Pelletier asked the agent if "this was going to slow down the application process." It did. The FBI found over six hundred images of child pornography on Pelletier's computer and instead of hiring him, arrested him.

Pelletier claimed that several of his incriminating statements should have been suppressed because he never received *Miranda* warnings. He argued that the job interview became a custodial interrogation by the time the agent from the Cyber Crimes Unit, who was wearing a badge and carrying his duty weapon entered the interview room.

The court did not agree. Pelletier came to the FBI office as a job applicant, not a suspect. A reasonable applicant for an FBI job would expect to go through lengthy interviews in an FBI office, encounter armed FBI agents and be subject to security measures limiting free movement

through the building. Pelletier never expressed any discomfort, asked to leave or asked for an attorney. The agents offered him snacks, sodas, and restroom breaks several times and Pelletier remained friendly and talkative throughout the day. Pelletier's statement to agents as he was leaving showed that he believed he was still in the running for an FBI job. Under these circumstances, a reasonable person would not have thought himself in custody; therefore, Pelletier was not entitled to *Miranda* warnings.

Pelletier also argued that he involuntarily consented to the search of his computer. Without deciding the issue of consent, the court held that the child pornography evidence was admissible under the inevitable discovery doctrine. First, Pelletier's admission that his computer contained child pornography established probable cause to apply for a warrant to search it. Second, the Cyber Crimes agent had contacted both federal and state prosecutors about obtaining a search warrant and he testified that he would have applied for one if Pelletier had refused consent.

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

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8th Circuit

United States v. Coleman, 2012 U.S. App. LEXIS 23055 (8th Cir. Neb. Nov. 8, 2012)

A police officer patrolling Interstate 80 saw the passenger-side tires on Coleman's motor home twice cross over the fog line onto the shoulder of the highway. The officer stopped Coleman for driving on the shoulder. The officer asked Coleman to sit with him in the front of his patrol car while he wrote a citation and checked Coleman's license status and criminal history. The officer asked Coleman about his criminal history and Coleman told the officer that he had never been arrested. Dispatch then responded and told the officer that Coleman had an extensive criminal history that included drug, robbery and weapons offenses. The officer asked Coleman about his drug use and Coleman admitted to having medical marijuana in the front part of the motor home. The officer searched the motor home and saw a bag that resembled a gun case under the bed. Inside the bag, the officer found a rifle and ammunition. He also found marijuana in the front part of the motor home. The officer confirmed that Coleman was a convicted felon and arrested him for unlawful possession of a firearm.

Coleman argued that the officer did not have probable cause to stop him and that the officer's questions concerning his drug use improperly exceeded the scope of a normal traffic stop.

The court commented that a traffic violation, no matter how minor, provides an officer with probable cause to stop the driver. At the time of the stop, a driver who briefly crossed onto the shoulder of the highway could be cited for a traffic violation. Therefore, the court held that the officer had probable cause to stop Coleman.

The court further held that the officer was justified in asking Coleman about drug use in order to eliminate drug use as a possible cause of Coleman's crossing onto the shoulder of the highway. Coleman's dishonesty regarding his criminal history increased the officer's suspicions and prompted him to ask clarifying questions. Regardless, any additional questioning was brief and the court has held that such short detentions do not violate the *Fourth Amendment*.

Coleman also claimed that the officer violated his *Fifth Amendment* rights by questioning him without first advising him of his *Miranda* rights. Although a driver is technically seized during a

traffic stop, *Miranda* warnings are not required when the driver is not subjected to the functional equivalent of a formal arrest. Here, Coleman was seated in the front seat of the officer's patrol car and he was not handcuffed. The officer's tone was conversational and the questions were limited in number and scope. Because the officer did not subject Coleman to restraints comparable to those of a formal arrest, he was not required to give *Miranda* warnings before questioning him.

Finally, Coleman argued that the search of his motor home violated the *Fourth Amendment* because it should have been treated like a residence. As such, he claimed that the officer should have limited his search to the front part of the motor home, the space within Coleman's immediate control, where he claimed the marijuana was located.

The court disagreed. Officers may search a vehicle without a warrant if they have probable cause to believe the vehicle contains contraband. This automobile exception applies equally to a motor home in transit on a public highway because it is being used as a vehicle. Once Coleman told the officer that there was marijuana in his motor home, the officer had probable cause to search it for drugs. This allowed the officer to search every part of the motor home where marijuana might have been concealed, including under the bed where the rifle was found. Even if the officer did not have probable cause to search the motor home beyond where Coleman told him the marijuana was located, the court found the officer was justified in performing a protective sweep to make sure no passengers were hiding in the motor home.

Finally, the court held that once the officer saw the bag under bed and it was readily identifiable as a gun case, the officer had probable cause to believe it contained contraband and he could lawfully seize it because he knew that Coleman's criminal history included felony offenses.

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

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United States v. Collins, 699 F.3d 1039 (8th Cir. Iowa 2012)

Police officers had an outstanding arrest warrant for Collins who was a convicted felon. After a reliable source told an officer that Collins was staying with someone at a residence in Des Moines, officers went to the house to arrest him. Outside the house, the officers met the man who owned the property. He said that Krista Stoekel rented the house and that Collins had been there recently. An officer spoke to Stoekel at the front door of the house but she denied knowing Collins. The officer then asked for consent to search the house, but Stoekel refused. She did allow the officer to enter the house so they could continue to talk, but she told the officer that he could go no further than the living room. Once in the living room, the officer cautioned Stoekel that he "did not want her to be in trouble" and he knew that she was lying to him about not knowing Collins. Stoekel finally admitted to knowing Collins and that, "he may have come home last night." Stoekel then gave the officers consent to search the upstairs bedroom where Collins stayed. The officers found Collins asleep in the bedroom and arrested him. The officers seized a firearm that was in an open bag next to the bed.

Collins argued that the firearm should have been suppressed because Stoekel's consent to search the bedroom had been obtained by coercion. The court disagreed. While Stoekel was induced to cooperate, there was no unreasonable coercion. When the officer confronted Stoekel about her lie, she became increasingly concerned about the legal consequences she might face. As a result, it

was reasonable for the officer to believe that she voluntarily changed her mind and consented to the search. While she may have been reluctant to grant consent, Stoekel still voluntarily gave it.

Even if the officers went upstairs to look for Collins without Stoekel's consent, the court concluded that they did not violate the *Fourth Amendment*. Police officers may enter a third person's home to execute an arrest warrant if they have a reasonable belief that the suspect resides there and have reason to believe that the suspect is present at the time the warrant is executed. The property owner told the officers that Collins had been there recently and then Stoekel told the officers that Collins "may have come home last night." This information gave the officers a reasonable belief that Collins was present in the house and gave them the authority to go to that part of the house to arrest him.

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

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Livers v. Schenck, 2012 U.S. App. LEXIS 23051 (8th Cir. Neb. Nov. 8, 2012)

Matthew Livers and Nicholas Sampson were arrested and jailed awaiting trial for the murders of Livers' aunt and uncle after Livers confessed to the murders and implicated Sampson as an accomplice. A few weeks after the crime, investigators traced a ring found at the crime scene to a truck stolen by two individuals from another state with no connection to the Livers, Sampson or the victims. DNA and other physical evidence connected the two individuals to the murders and they eventually confessed. The charges against Livers and Sampson were dismissed and both men sued various law enforcement officers, alleging violations of their constitutional rights.

The court held that the officers were not entitled to qualified immunity on Livers' claim that they coerced his confession from him, in violation of his *Fourteenth Amendment* right to due process. First, there was evidence that Livers was mentally retarded and the officers knew this when they interrogated him. Second, the officers interrogated Livers for approximately six and one half hours before his confessed. During this time, Livers denied knowledge of or involvement in the murders more than eighty times before he began to confess. Additionally, the officers obtained Livers' confession almost entirely by using leading questions that provided details about the murders. Third, the officers used threatening tones and language, ridiculed Livers' claims of innocence, promised to help him if he confessed and told him that he would be executed if he did not. Further, at the time of Livers' confession, it was clearly established that coercing a confession from a suspect violated the *Fourteenth Amendment*.

The court also held that the officers were not entitled to qualified immunity based upon Livers' and Sampson's claims that the officers manufactured false evidence, which caused them to be arrested without probable cause in violation of the *Fourteenth Amendment*. The court noted that Livers and Sampson presented evidence that would allow a jury to infer that an officer planted blood evidence in a car linked to them.

Finally, the court held that the officers were not entitled to qualified immunity with regard to Livers' and Sampson's claims that the officers conspired to violate their constitutional rights.

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

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9th Circuit

United States v. Wahchumwah, 2012 U.S. App. LEXIS 24296 (9th Cir. Wash. Nov. 27, 2012)

United States Fish and Wildlife Service (USFWS) agents began an investigation on Wahchumwah after receiving anonymous complaints that he was selling eagle parts. During a visit to Wahchumwah's home, an undercover agent wearing a concealed audio-video recording device purchased two eagle plumes from him.

Wahchumwah argued that the warrantless audio-video recordings of the sale of the eagle plumes inside his home violated the *Fourth Amendment*.

The court disagreed and following the Second, Third and Fifth circuits held that an undercover agent's warrantless use of a concealed audio-video device in a home into which he has been invited by a suspect does not violate the *Fourth Amendment*. As a result, the district court properly denied Wahchumwah's motion to suppress the evidence obtained by the use of the concealed audio-video device.

The court explained that a person's expectation of privacy does not extend to what a person knowingly exposes to the public, even in his own home. In addition, a person generally has no privacy interest in that which he voluntarily reveals to a government agent. A government agent may also make an audio recording of a suspect's statements and those audio recordings, made with the consent of the government agent, do not require a warrant.

When Wahchumwah invited the undercover agent into his home, he forfeited his expectation of privacy as to those areas that were knowingly exposed to the agent. Wahchumwah could not reasonably argue that the recording violated his legitimate privacy interests when it revealed no more than what was already visible to the agent.

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

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United States v. I.E.V., Juvenile 2012 U.S. App. LEXIS 24426 (9th Cir. Ariz. Nov. 28, 2012)

The defendant, a juvenile, was a passenger in a car driven by his brother when they entered a United States Border Patrol Checkpoint in Arizona, approximately one hundred miles from the Arizona - Mexico border. As the car entered the primary inspection area of the checkpoint, a police dog displayed alert behavior that indicated the presence of either drugs or concealed humans in the car. Because of this alert, the car was sent to secondary inspection where the defendant and his brother were asked to get out of the car. An officer frisked the driver, who appeared to be nervous but found nothing. A different officer frisked the defendant and asked him about an object he felt under the defendant's shirt. Without permission, the officer then lifted the defendant's shirt and found a brick-shaped object taped to the defendant's abdomen. The officers frisked the brother again and this time they found a similar brick-shaped object taped to his abdomen. Both bricks contained marijuana.

The district court concluded that the officers were justified in frisking the defendant and his brother for weapons based on the totality of the circumstances, to include, the proximity to the border, the canine alert to contraband, the nervous behavior exhibited by the defendant's brother, and the officer's experience that often individuals transporting contraband also carry firearms.

The court disagreed. The court noted that the officers were justified in conducting a *Terry* stop because the canine alert provided them reasonable suspicion that criminal activity was afoot. However, the court held that the officer was not justified in frisking the defendant. The court stated that at the time of the frisk, the officer could not point to any suspicious behavior by the defendant, who was behaving in a non-threatening and compliant manner. Even if the frisk was justified, the court further held that the officer exceeded the scope of a *Terry* frisk because it was not obvious from the record whether the officer immediately identified the bundle on the defendant as contraband or a weapon.

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

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10th Circuit

United States v. Guardado, 2012 U.S. App. LEXIS 23493 (10th Cir. Utah Nov. 15, 2012)

A police officer was patrolling a specific part of town because of an ongoing "tagging" or graffiti feud between gangs. There had also been aggravated assaults, a weapons offense and other crimes in that vicinity. Around 1:00 a.m., the officer saw four men in an area where foot traffic was usually very light at that hour. The officer saw that two of the men were dressed in clothing specific to one of the local gangs and one of the other men had a backpack. From his experience, the officer knew that a majority of graffiti-related arrests involved suspects who carried their graffiti kits in backpacks. The officer pulled his patrol car twenty to thirty feet behind the men and got out so he could talk to them. As he was getting out of his car, the officer heard someone yell, "Cops." One of the men, later identified as Guardado, ran away. The officer chased and yelled for him to stop, but Guardado did not comply. During the chase, the officer saw that Guardado's hand was in front of his body, causing the officer to believe that Guardado was trying to conceal some type of evidence or retrieve a weapon. The officer eventually caught Guardado, tackled him, handcuffed and frisked him. The officer found a firearm located in the groin area of Guardado's pants. Guardado was arrested and charged with being a felon in possession of a firearm. Guardado argued that the officer did not have reasonable suspicion to justify the stop.

The court determined that Guardado was seized for *Fourth Amendment* purposes when the officer tackled him. By that time, the court held that the officer had developed reasonable suspicion to believe Guardado was involved in criminal activity. First, the officer stopped Guardado in a high crime area. Second, the stop occurred around 1:00 a.m. Third, several of the men, including Guardado, were wearing clothing associated with a local gang. Finally and most importantly, Guardado fled from the officer upon seeing him and he was grabbing his waistband in what appeared to be an effort to conceal evidence or retrieve a weapon. When viewed together, these factors established reasonable suspicion to believe criminal activity was afoot and supported the officer's seizure of Guardado.

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

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United States v. Conner, 2012 U.S. App. LEXIS 23492 (10th Cir. Colo. Nov. 15, 2012)

Around 11:00 p.m., a man called 911 to report that a light-skinned black male, wearing a fuzzy hunter hat, had exited a black SUV and placed a pistol in his waistband. The caller said that this had occurred after he heard someone yelling, "No, no." The caller gave the location of SUV and provided the 911 operator with his address and phone number. Two officers responded to the location, which was in one of the most dangerous areas of the city because of the frequent stabbings and shootings that occurred there. Specifically, the officers knew that there had been a shooting or stabbing in the same area two nights before. Upon arrival, the officers saw a black SUV in the exact location the caller had given. They also saw a black male, later identified as Connor, wearing a fuzzy hunting hat, just as the caller had described, walking down the sidewalk away from the SUV. When the officer positioned the patrol car to block Connor's path, Connor turned off the sidewalk and into an empty parking lot, in what the officers thought was an attempt to avoid them. One of the officers got out of the patrol car and stopped Conner at gunpoint. The officer frisked Connor and found a pistol concealed in his waistband. Connor was charged with being a felon in possession of a firearm.

Connor argued that his seizure violated the *Fourth Amendment* because the 911 call was not reliable. Connor also argued that even if the call was reliable, it did not establish reasonable suspicion of criminal activity.

The court disagreed, holding that the 911 call was sufficiently reliable. Although the caller did not disclose his name, he provided the 911 operator with his address and phone number, so he could be identified later if needed. The caller stated that he personally heard someone yell, "No, no," then saw a man place a pistol in his waistband and that these events had just occurred. The caller provided specific details regarding events, the suspect, and the location of the SUV. The caller provided enough personal information to suggest that he was a concerned citizen and not a malicious tipster. Finally, the officers corroborated several details provided by the caller such as the color and location of the SUV as well as the location and description of the suspect.

The court further held that the officers had reasonable suspicion to stop Connor. The stop occurred in a high crime area at night. While he did not run, Connor altered his route in what could be considered an evasive manner upon seeing the officers. Finally, Connor was in the area where the caller reported that he heard someone yell "No, no," and then saw a man put a pistol in his waistband. The officers had a reliable tip and a reasonable suspicion of criminal activity that justified stopping Connor.

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

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