

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 <http://www.fletc.gov/training/programs/legal-division/the-informer>.

This edition of *The Informer* may be cited as "3 INFORMER 12".
(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

Law Enforcement Case Granted Certiorari by the United States Supreme Court

[Click Here](#)

Case Summaries

United States Supreme Court

[Click Here](#)

Circuit Courts of Appeals

[Click Here](#)

[1st Circuit](#) [2nd Circuit](#) [3rd Circuit](#) [4th Circuit](#)

[5th Circuit](#) [6th Circuit](#) [7th Circuit](#) [8th Circuit](#)

[9th Circuit](#) [10th Circuit](#) [11th Circuit](#) [D.C. Circuit](#)

Law Enforcement Case Granted Certiorari by the United States Supreme Court for the October 2012 Term

Dog Sniff

Florida v. Jardines

Decision Below: [73 So. 3d 34 \(Fla. 2011\)](#)

The police received an anonymous tip identifying Jardines' house as a place used to grow marijuana. After conducting surveillance on the house for fifteen minutes, two police officers and approached the front door with Franky, a drug-detection dog. After Franky alerted to the odor of narcotics, the officers drafted an affidavit and applied for a search warrant, which was issued. Officers searched Jardines' house and found live marijuana plants and equipment used to grow those plants.

The Florida Supreme Court held that the "sniff-test" conducted by Franky was a substantial government intrusion into Jardines' house and constituted a *Fourth Amendment* search.

The issue before the Supreme Court is whether a dog sniff, at the front door of a suspected grow house, by a trained narcotics detection dog, is a search under the *Fourth Amendment*, requiring probable cause.

CASE SUMMARIES

United States Supreme Court

Howes v. Fields, 2012 U.S. LEXIS 1077, February 21, 2012

While serving a jail sentence, a corrections officer escorted Fields to a conference room where two police officers questioned him about an unrelated crime. At the beginning of the interview, the officers told Fields that he could leave whenever he wanted. Fields eventually confessed to the crime. The officers never advised Fields of his *Miranda* warnings or told him that he did not have to speak with him.

The Sixth Circuit Court of Appeals held that any time an inmate is taken from the general prison population and questioned about a crime that occurred outside the prison, he is always in-custody for *Miranda* purposes.

The Supreme Court disagreed. The court held that serving a term of imprisonment, by itself, is not enough to constitute *Miranda* custody. When a prisoner is questioned, the determination of *Miranda* custody should focus on all of the circumstances surrounding the interrogation, to include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.

In this case, the court held that Fields was not in-custody for *Miranda* purposes. Although the interview lasted between five and seven hours and continued well past the time Fields went to

bed, the officers told Fields several times that he could leave and go back to his cell whenever he wanted. Additionally, the interview was conducted in comfortable conference room, the officers did not physically restrain or threaten Fields and they offered him food and water. All of these facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.

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

Messerschmidt v. Millender, 2012 U.S. LEXIS 1687, February 22, 2012

Officers obtained a warrant to search Augusta Millender's home after Jerry Ray Bowen threatened to kill his girlfriend and then fired a sawed-off shotgun at her when she fled from him. The officers confirmed that Bowen had been arrested and convicted for numerous violent and firearms related offense, that he was a member of two gangs and that he was staying at Millender's home. The warrant authorized the officers to search for all firearms and ammunition as well as evidence of gang membership.

The Ninth Circuit Court of Appeals refused to grant the officers qualified immunity. While the officers had probable cause to search for a sawed-off shotgun, the court held that they did not have probable cause to search for the broad class of firearms, ammunition and gang related material that was listed in the warrant. As a result, the court held that the warrant was so invalid on its face that no officer could have reasonably relied on it.

The Supreme Court reversed the Ninth Circuit, holding that the officers were entitled to qualified immunity. Given Bowen's possession of one illegal gun, his gang membership and willingness to use the gun to kill someone, it was reasonable for the officers to conclude that Bowen owned other guns. An officer could also reasonably believe that seizure of firearms was necessary to prevent further assaults on Bowen's girlfriend. California law allowed the officers to seize items, such as firearms, that Bowen could potentially use to harm another person, and the officers referenced this statute in their search warrant application.

The Court also held that it was permissible for the officers to search for gang-related materials. A reasonable officer could view Bowen's attack on his girlfriend as motivated by a concern that she might disclose his gang activities to the police and not solely as a domestic dispute. As a result, it would be reasonable for an officer to believe that evidence of Bowen's gang affiliation would be helpful in prosecuting him for the attack on his girlfriend.

Additionally, the officers sought and obtained approval of the warrant application from a superior officer and a deputy district attorney before submitting it to the magistrate. This provided further support for the conclusion that the officers could reasonably have believed that the scope of the warrant was supported by probable cause.

Click [HERE](#) for the case brief for the 9th Circuit Court of Appeals opinion as reported in 9 Informer 10.

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

Circuit Courts of Appeals

1st Circuit

U.S. v. Kearney, 2012 U.S. App. LEXIS 4146, February 29, 2012

Kearney sent child pornography images and videos to an undercover police officer over the internet through Yahoo messenger in May 2008. Investigators also connected the Yahoo messenger screen name to a MySpace account. The investigators established that those accounts belonged to Kearney and that he accessed them on May 21 and 22, 2008 from a particular IP address. Based on this information, investigators executed a search warrant at Kearney's house.

The court held that the officers had established probable cause in their search warrant application. Although Kearney's IP address was "dynamic", it was undisputed that his Yahoo and MySpace accounts were the conduits for the child pornography he transmitted to the undercover officer. Kearney's Yahoo account was accessed from that same IP address 288 times from April to May 21, 2008. Kearney's own expert witness testified that internet service providers sometimes keep dynamic IP addresses for months or even years. It was reasonable to infer that whoever accessed these accounts on May 21 and 22, 2008, was also the user of these accounts earlier that month and in June 2008, when they were used to engage in communications with the undercover officer.

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

2nd Circuit

U.S. v. Moore, 2012 U.S. App. LEXIS 3507, February 22, 2012

A state judge issued an arrest warrant for Moore on charges that arose from a carjacking and attempted armed robbery in which shots were fired. While fleeing from an officer, Moore tossed a gun away. The officer lost Moore and could not find the gun. Another officer arrested Moore the next day. At the jail, Moore saw an officer that he knew from a previous case and agreed to show him where he had thrown the gun, in an attempt to get help with his current charges. This officer was not involved in Moore's carjacking case. After the officer retrieved the gun, the investigators from the carjacking case interviewed Moore. After being advised of his *Miranda* rights, Moore made several incriminating statements. Moore was eventually charged in federal court for being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g).

The district court held that Moore's first statements were obtained in violation of *Miranda* but that his post-*Miranda* warning statements were admissible.

Moore argued that his post-*Miranda* statements should have been suppressed. He claimed that the officers had engaged in a deliberate two-step interrogation process designed to deprive him of his *Miranda* rights.

The court disagreed. First, the initial questioning was brief and it focused on the location of the missing gun because of the potential threat to the public. Second, the post-*Miranda* questioning was focused on the carjacking and attempted robbery and was conducted by different officers.

The investigators from the carjacking case were not present when the officer initially questioned Moore about the location of the gun and that officer was not present when the investigators questioned Moore about the carjacking case. Third, ninety minutes elapsed between the two interviews. This was enough time for Moore to have reasonably believed the second interview was not a continuation of the first one.

Moore also argued that the second interview violated his *Sixth Amendment* right to counsel. The court disagreed, holding that Moore's confession did not violate the *Sixth Amendment* because his right to counsel had not yet attached, for either his state or federal offenses, at the time of the second interview.

Moore's *Sixth Amendment* right to counsel attached for the state charges at his arraignment. Here, the officers interviewed him before that time and there was no indication that they intentionally delayed the arraignment in order to interview him.

The court found that even if Moore's *Sixth Amendment* right to counsel had attached for the state charges, at the time of his second interview, it had not attached for the federal firearms charge. The *Sixth Amendment* right to counsel is offense specific. At the time of the second interview, the federal firearms charge had not yet been initiated against Moore, therefore, his *Sixth Amendment* right to counsel had not attached.

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

3rd Circuit

Marcavage v. National Park Service, 2012 U.S. App. LEXIS 1937, February 2, 2012

The court held that the NPS Rangers were entitled to qualified immunity from Marcavage's claim that they arrested him in violation of the *First and Fourth Amendments* and the *Equal Protection Clause of the Fourteenth Amendment*.

Although this court ultimately held otherwise, the fact that two judges in the court below found no *First Amendment* violation by the Rangers indicates that Marcavage's constitutional right to demonstrate on the sidewalk was not clearly established. At the time, it was reasonable for the Rangers to believe that they could lawfully escort Marcavage off the sidewalk and issue him a citation. They should not be denied qualified immunity simply because this belief turned out to be mistaken.

Regarding Marcavage's arrest, the court found that the government presented sufficient evidence for the Magistrate Judge to have reasonably found Marcavage committed the charged offense. The fact that Marcavage's conviction was eventually reversed is of no consequence. A criminal conviction requires proof of guilt beyond a reasonable doubt, a much higher standard than that required for a finding of probable cause to arrest.

Finally, the court held that Marcavage was not similarly situated to the tourists, the horse and carriage operators and the breast-cancer-walk participants who were also on the sidewalk. Unlike the others, Marcavage was escorted from the sidewalk because he was leading a demonstration without a permit, creating excessive noise and potentially interfering with traffic flow.

Click [HERE](#) for the court's opinion. See [7 Informer 10](#) for the brief for the criminal case.

U.S. v. Lewis, 2012 U.S. App. LEXIS 3495, February 22, 2012

The court held that the illegal window tint on the defendant's car could not provide a legal justification for the traffic stop because the officers only noticed it after the stop. Officers can only rely on facts known to them at the time of a stop to support their justification for the stop.

The court further held that the tip that led to the officer stopping the defendant's car was insufficient to justify the stop. The officer received a tip that individuals in a white Toyota Camry with "181" in the license plate had firearms in their possession. This information alone does not allow an officer to reasonably believe that possession of the firearms was illegal or that they were being used in a criminal manner. Without any information about the criminality of the firearms, there mere possession of them could not provide the officer with reasonable suspicion to stop the vehicle.

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

4th Circuit

U.S. v. Ortiz, 2012 U.S. App. LEXIS 3896, February 27, 2012

The Maryland State Police received a tip from the New Jersey State Police that a white Mitsubishi automobile, which was believed to be connected with large volumes of drugs and money was driving southbound into Maryland. Trooper Decker spotted the car and performed a traffic stop after he determined it traveling thirteen miles-per-hour over the speed limit. As he approached the car, Trooper Decker smelled a strong scent of air freshener coming from the car, which he knew was used as a masking agent to conceal the odor of illegal drugs. While speaking with the defendant, Trooper Decker saw several cans of air freshener in the car. The defendant also appeared very nervous and was unable to explain his destination to him. While Trooper Decker was writing a traffic ticket, Trooper Gussoni arrived on the scene and asked the defendant for permission to search his car, which he granted. Before the search began, however, the Trooper Decker handed the traffic ticket to the defendant and asked him if he could search the car for any signs that the vehicle had been tampered with or was stolen. The defendant again gave his consent. Two minutes into the search, the Trooper Gussoni lifted up the back seat and found a hidden compartment that contained six kilograms of cocaine.

The court held that the district court improperly suppressed the evidence discovered by Trooper Gussoni during the warrantless search of the defendant's car.

The information provided by the New Jersey State Police along with the information developed by the Maryland State Police, after they stopped the defendant, established probable cause to believe that contraband was in the vehicle. As a result, the officers lawfully searched the defendant's car under the automobile exception to the warrant requirement.

The court also held that the defendant voluntarily consented to the search of his car, first when he gave permission to search the car for drugs and again when he gave consent to search the car to

determine whether it was stolen. Once voluntary consent is given, it remains valid until it is withdrawn by the defendant. Here, the defendant gave his consent to search the car for drugs, never withdrew that consent and the search that took place was conducted within the scope of that consent. Lifting up the back seat, which revealed the hidden compartment in which the cocaine was hidden, was within the scope of this consent.

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

U.S. v. Holmes, 2012 U.S. App. LEXIS 4104, February 29, 2012

Holmes was charged with sexually abusing his stepdaughter while he was on active duty with the United States Air Force. Holmes claimed that his oral and written statements to special agents with the Air Force Office of Special Investigations (OSI) should have been suppressed because his interrogation was conducted under circumstances that caused him to involuntarily confess.

To support his argument, Holmes focused on his lengthy return trip from Qatar immediately preceding the interview and the OSI agents' failure to allow him more than twelve hours' re-acclimation prior to the interrogation. He also pointed to the OSI agent's statements that his career might be salvaged if he admitted to the acts and that if he confessed his stepdaughter would be spared the trauma of testifying.

The court disagreed, holding that there was no evidence in the record that the OSI agents coerced Holmes into making any statements or otherwise overreached in order to cause him to confess.

Before the interview, the agent asked Holmes if he was tired or too sleepy to conduct the interview at that time. Holmes said that he "felt fine" and at no time after the interview began did he ask for it to end, claim that he was tired or otherwise indicate that he was unwilling to proceed.

Even though the agent told Holmes that he had known individuals charged with crimes to maintain their careers, there was no evidence to indicate that the agent made any direct or implied promises regarding Holmes' career that induced him to provide any statements.

Finally, the agent's statement to Holmes that his confession would spare his stepdaughter the trauma of testifying was an acceptable truthful statement that reflected on how Holmes' decision on whether or not to cooperate could affect his stepdaughter. Statements by law enforcement officers that are merely uncomfortable or create a predicament for a defendant are not automatically coercive.

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

5th Circuit

U.S. v. Gray, 2012 U.S. App. LEXIS 1874, February 1, 2012

Officers had probable cause to believe that Gray was concealing crack cocaine in his rectum. After conducting two strip searches, in which Gray was not fully cooperative, an officer told Gray that he could either undergo a third strip search, be placed in a cell with a waterless toilet or

he could consent to a rectal x-ray examination. After Gray refused to consent to any of these options, officers obtained a search warrant in which Gray was forced to submit to a proctoscopic examination under sedation. A doctor eventually recovered over nine grams of crack cocaine from within Gray.

The court held that the search was unreasonable because it was demeaning and intrusive to Gray's personal privacy and bodily integrity and that there were less invasive ways to recover the evidence, such as a cathartic or an enema.

However, court held the evidence should not be suppressed because the police acted on good-faith reliance on a valid search warrant. In doing so, the court encouraged magistrates, where feasible, to hold a hearing to allow for more careful consideration of the competing interests at stake in medical procedure search cases.

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

U.S. v. Cantu-Ramirez, 2012 U.S. App. LEXIS 2382, February 6, 2012

In this multiple co-defendant case, Lauro Grimaldo argued that the district court should have suppressed his confession because federal agents delayed in presenting him to a magistrate judge for more than two hours for the purpose of interviewing him and obtaining a confession.

The court disagreed after applying the Supreme Court's guidance from *Corley v. United States*.

First, because Grimaldo's presentment was delayed for less than six hours, his confession was admissible as long as it was obtained voluntarily.

Second, based on the totality of the circumstances, the court found that nothing about the interview indicated that his confession was involuntary. The interview lasted only ninety minutes, the agents wore casual clothing, Grimaldo was not handcuffed and the agents offered him food and drink and allowed him to make several phone calls. The agents advised Grimaldo of his *Miranda* rights and took care to ensure that he understood and voluntarily waived them. The agents obtained Grimaldo's confession voluntarily and it was properly admitted against him.

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

U.S. v. Hernandez, 2012 U.S. App. LEXIS 2809, February 8, 2012

Federal agents received an anonymous tip that Hernandez was harboring illegal aliens in her trailer. The agents conducted a knock-and-talk in which they banged on the doors and windows, with their weapons drawn, while demanding entry and then attempted a forced entry by breaking the glass on the door. When Hernandez answered the door, she admitted that an illegal alien was inside her trailer. Agents entered the trailer and arrested Hernandez and two illegal aliens. The court held that the agents' conduct during their knock-and-talk violated the *Fourth Amendment*. Since a *Fourth Amendment* violation had occurred by the time Hernandez came to the door, the agents could not rely on her admission as probable cause to either enter the trailer or arrest her.

Next, the court held that the incriminating statements Hernandez made to the agents, after her arrest at their office, were also inadmissible. They occurred only a few hours after an egregious *Fourth Amendment* violation and no intervening events occurred to break the connection between her arrest and her statements.

Finally, the court held that the statements obtained from the two illegal aliens were inadmissible against Hernandez. The government offered nothing more than pure speculation that their statements would have been inevitably obtained but even if they had, their statements were not sufficiently separated from the *Fourth Amendment* violation to make them admissible.

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

Elizondo v. Green, 2012 U.S. App. LEXIS 2917, February 13, 2012

The court held that Officer Green's use of force was reasonable and that he was entitled to qualified immunity. The subject ignored repeated instructions to put down the knife he was holding and he seemed intent on provoking Green. When Green discharged his firearm, the subject was hostile, armed with a knife and in close proximity to him and moving closer. Considering the totality of the circumstances, it was reasonable for Green to conclude that the subject posed a threat of serious harm.

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

6th Circuit

U.S. v. Evers, 2012 U.S. App. LEXIS 2641, February 10, 2012

Evers argued that the search warrant authorizing the seizure of his computers, camera and other electronic media did not authorize a search of the computer's hard drive; therefore, the police exceeded the scope of the warrant when they searched the contents of the computer without obtaining a second search warrant.

The court disagreed, holding that a warrant authorizing the seizure of a defendant's home computer equipment and digital media for a subsequent off-site electronic search is reasonable as long as the probable cause showing in the warrant application and affidavit demonstrate a significant chance of locating evidence. In addition, a second warrant to search a properly seized computer is not necessary where the evidence obtained in the search did not exceed the probable cause articulated in the original warrant.

In this case, Evers did not contest that the affidavit and warrant established probable cause to believe that there would be child pornography on his digital camera, computer and accessories.

Evers also argued that the search warrant failed to describe with particularity the computer files to be searched or to require the use of a search protocol to avoid a general search of his computer.

The *Fourth Amendment's* particularity requirement in the context of computer searches are unique because images on a computer may be anywhere on a computer and manipulated in ways

to hide their true content. A computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable cause.

Here, the court held that the search was reasonable. The warrant was as specific as the circumstances and the nature of the crime under investigation allowed and confined the search to evidence of child pornography on the computer, camera and electronic media described by the victim.

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

7th Circuit

U.S. v. Clark, 2012 U.S. App. LEXIS 2813, February 13, 2012

The police obtained a warrant to search Clark's computer for evidence of child pornography. Clark argued that his alleged sexual assault on his niece did not support probable cause that he possessed child pornography.

The court noted that boilerplate language in a warrant about the tendencies of child pornography collectors supports probable cause for a search when the affidavit also includes facts that suggest the target of the search has the characteristics of a prototypical child pornography collector.

While the investigator did not provide an example of Clark's downloading child pornography, he did not need to do so in order to establish Clark's sexual interest in children and connect him to the "collector" profile. First, the investigator's affidavit extensively described Clark's sexual assault on his four-year old niece and detailed his sexual advances on a nine-year old boy and another six-year old girl. Second, the investigator described how Clark watched pornography on his computer in presence of the six-year old girl, while asking her to take her clothes off.

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

U.S. v. Ambrose, 2012 U.S. App. LEXIS 3014, February 16, 2012

The court held that Ambrose, a law enforcement officer, was not in custody for *Miranda* purposes when he made incriminating statements during two sets of interviews; therefore, they were admissible against him at trial. At the beginning of the first interview, Ambrose was told that he was not under arrest. The interviewers were unarmed, dressed in business attire, the tone of the conversation was business-like and Ambrose was not physically prevented from leaving the conference room. Even though Ambrose had his weapon, cell phone and keys taken from him when he entered the building, these security measures are not indicative of "custody" because they were uniformly applied to all who entered the building. Security requirements of the police station are not enough to transform a non-custodial voluntary interview into a custodial one.

After the first interview, Ambrose was allowed to speak one-on-one with three different individuals in the conference room concerning his situation. Ambrose was not in custody at this time because he was given free access to these individuals, there were no investigators present, no

one eavesdropped on the conversations and there were no restrictions placed on the content or the duration of the conversations.

Finally, Ambrose argued that his statements were not voluntary because he was forced to either incriminate himself or be faced with losing his job. The court held that there was no evidence that anyone threatened Ambrose with the loss of his job if he failed to cooperate. The initial interviewer told Ambrose several times that any decision regarding Ambrose's job was beyond his control. The other person who urged Ambrose to cooperate was one of the people that Ambrose specifically asked to meet. Ambrose cannot complain that he followed the advice of the person that he sought out.

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

U.S. v. Flores-Lopez, 2012 U.S. App. LEXIS 4078, February 29, 2012

Officers arrested the defendant, searched him and seized a cell phone from his person. An officer searched the cell phone to determine its telephone number, which the government later used to subpoena three months of call history from the service provider. At trial, the government introduced the call history into evidence.

The defendant argued that the search of his cell phone was unreasonable because it was not conducted pursuant to a warrant. The court disagreed and held that the warrantless search of the defendant's cell phone was reasonable under the *Fourth Amendment*. Any invasion of the defendant's privacy was slight because the officer only sought to determine the cell phone's number. The court declined to address the issue of whether a more intrusive search of the cell phone's contents would have been reasonable.

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

8th Circuit

U.S. v. Williams, 2012 U.S. App. LEXIS 3950, February 28, 2012

A police officer went to the defendant's house and retrieved three bags of trash that had been left at the curb for pick-up by a trash company. After finding cocaine residue within that trash, officers obtained a search warrant for the defendant's house.

The court stated that it is well settled that there is no reasonable expectation of privacy in trash left at the curb in an area accessible to the public for pick-up by a trash company.

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

9th Circuit

U.S. v. Bolivar, 2012 U.S. App. LEXIS 4096, February 29, 2012

Philine Black was on probation. As a condition of her probation, she had consented to a search of her property by probation and police officers. Pursuant to a warrant, officers arrested Black and searched the apartment she shared with Bolivar. In a bedroom closet, officers found a backpack that contained a sawed-off shotgun. Black claimed that the weapon belonged to Bolivar.

The government charged Bolivar with possession of an unlawful sawed-off shotgun. Bolivar did not dispute that officers had reasonable suspicion to believe that Black exercised control over the backpack. Instead, he argued that the officers needed probable cause to believe that the backpack belonged to Black before they could lawfully open it as part of the probation search.

The court disagreed, holding that once police officers properly enter a residence pursuant to a probation search, they need only a reasonable suspicion to conclude that the probationer owns, controls, or possesses a particular item within the probationer's residence in order to search the item. Here, the backpack was found hanging in the middle of a closet, indicating that it could have been placed there by Black or that it might be jointly controlled by Black and Bolivar.

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

10th Circuit

U.S. v. McGee, 2012 U.S. App. LEXIS 3544, February 22, 2012

An officer saw the car in which McGee was a passenger illegally parked in front of a house known for drug trafficking. By the time the officer turned around to conduct a traffic stop, the driver had moved the car and legally parked it. When the officer approached the car, he smelled a strong odor of PCP. Inside the car, the officer saw a vanilla extract bottle that he knew was commonly used to store PCP. As a back-up officer removed the driver from the car to arrest him, the officer saw McGee kick a handgun underneath his seat. The officer arrested McGee and found crack cocaine on his person.

The court held that the officer was justified to conduct a traffic stop on the car, even though by the time the officer made contact with McGee, the driver had legally parked the car. A traffic stop is valid under the *Fourth Amendment* if based on an observed traffic violation that has occurred. Here, the officer was entitled to conduct a traffic stop in order to issue a citation for the parking violation that he had seen.

Once the officer made contact with the driver, he was justified in expanding the scope of the traffic stop to determine whether the occupants were engaged in illegal drug activity after he smelled PCP and saw the vanilla extract bottle. Once the officer saw McGee kick the handgun underneath the seat, he had probable cause to arrest him. Finally, the crack cocaine found on McGee's person was seized pursuant to a lawful search incident to arrest.

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

Romero v. Story, 2012 U.S. App. LEXIS 3680, February 23, 2012

Romero claimed that the officer unlawfully arrested him under a New Mexico statute that makes it a crime to intentionally flee or evade an officer when the person knows that the officer is attempting to detain or arrest him.

The court held that the officer was not entitled to qualified immunity. The statute applies only where law enforcement officers have reasonable suspicion to detain or probable cause to arrest a person prior to his flight. To be charged, a person must attempt to flee or evade knowing that the officer was attempting to detain or arrest him.

Here, the officer claimed that Romero's flight was the reason he arrested him. Because the officer did not have a reasonable suspicion to detain Romero, prior to his flight, he did not have probable cause to arrest him for flight or evasion. As a result, the officer violated Romero's right to be free from an unlawful arrest.

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

Morris v. Noe, 2012 U.S. App. LEXIS 3927, February 27, 2012

The court held that Officer Noe was not entitled to qualified immunity for unlawful arrest. When the other individual involved in the dispute came towards him, Morris raised his hands in a defensive position and backed away from him. A reasonable officer in Noe's position would not have believed he had probable cause to arrest Morris for assault. The fact that Noe noticed signs of Morris' intoxication after he had taken him down and handcuffed him is not relevant. Morris' behavior up to the point of arrest was not threatening, loud or disorderly and he had complied with all of the officer's orders. Noe had no reason to arrest Morris for any offense.

The court further held that Morris' right to be free from an unlawful arrest was clearly established at the time. A reasonable officer would know the offense of assault requires at least some attempt to use "force or violence" to cause harm to another. Here, Morris exhibited no signs of violence or intent to cause harm. Instead, Morris was calm and remained out of reach of the other individual and he backed up at the first sign the other individual wanted to escalate the encounter. Such non-violent conduct is not enough for any reasonable officer to believe Morris was committing an assault.

The court also held that Officer Noe was not entitled to qualified immunity on Morris's claim that he used excessive force when he arrested him. Applying the *Graham* factors, the court noted that the officer believed he had probable cause to arrest for assault and that a forceful takedown may be appropriate for effecting this kind of arrest in some circumstances. However, in this case, Morris posed little threat to the safety of the officers or the other individual. Additionally, Morris was neither resisting arrest nor attempting to flee. He was backing toward the officers, away from the other individual, when he was grabbed from behind and taken to the ground.

The court found that Morris' right to be free from the degree of force used by the officer was clearly established. A reasonable officer would know, based on his training, that the degree of

force used was not justified. Noe had reason to believe, at most, that Morris had committed a misdemeanor but that he did not pose a threat to the officers or others nor was he actively resisting arrest or trying to flee. Morris' right to be free from a forceful takedown was clearly established under *Graham*.

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

11th Circuit

In RE: Grand Jury Subpoena Duces Tecum Dated March 25, 2011; U.S. v. Doe, 2012 U.S. App. LEXIS 3894, February 23, 2012

Law enforcement officers obtained a warrant to search two computers and five external hard drives that belonged to Doe. Forensic examiners analyzed the digital media, but were unable to access certain portions of the hard drives. Doe was served with a grand jury subpoena duces tecum that required him to appear before the grand jury and produce the unencrypted contents located on the computers and the five external hard drives. Doe told the government that when he appeared before the grand jury he would invoke his *Fifth Amendment* right against self-incrimination and refuse to comply with the subpoena. The government then requested and received from the court, an order that would grant Doe immunity and require him to respond to the subpoena. Doe refused to decrypt the hard drives, arguing that the government's use of the decrypted contents of the computers and hard drives would constitute derivative use of his immunized testimony that was not protected by the district court's grant of immunity. The district court disagreed and ordered Doe to be incarcerated for contempt of court.

The court of appeals reversed the district court and held that compelling Doe to decrypt and produce the contents of the hard drives would significantly implicate his *Fifth Amendment* privilege to be free from self-incrimination.

First, the decryption and production of the contents of the drives would be testimonial because it would require the use of the contents of Doe's mind and could not be fairly characterized a physical act that would be non-testimonial in nature. The decryption and production would be like compelling testimony from Doe about his knowledge of the existence and location of potentially incriminating files; of his possession, control and access to the encrypted portions of the drives; and of his capability to decrypt the files.

Second, there was nothing in the record to establish that the government even knew whether any files existed on the hard drives or where they were located on the drives. The government established that the combined storage space on the drives was capable of containing millions of files. However, the government did not show that the drives actually contained any files, nor did it show which of the millions of potential files the drives were capable of holding may prove useful. Further, the government could not establish that Doe was even capable of accessing the encrypted portions of the drives.

In two other cases where the government compelled suspects to produce unencrypted versions of computer hard drives, the government had knowledge of the existence of files on those drives. As a result, the court lawfully compelled the suspects to decrypt the drives and produce them.

Additionally, the court held that the district court's grant of immunity was not sufficient. Doe's immunity only covered his act of decrypting and producing the unencrypted hard drives. With this immunity, the government could still use the evidence on the hard drives, that Doe was compelled to decrypt and produce, against him at trial. The court held that in order to compel Doe to decrypt and produce the hard drives, he was also entitled to immunity for any criminal charges that may arise from evidence discovered on the drives. Because the immunity offered here was insufficient, Doe could not be compelled to decrypt and produce the drives.

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

District of Columbia Circuit

U.S. v. Washington, 2012 U.S. App. LEXIS 3691, February 24, 2012

Officers performed a traffic stop, at 3:00 a.m., on a car that was driving without its headlights on. The car did not immediately pull over, but after he did, the officers smelled a strong odor of alcohol coming from the vehicle and they saw a plastic cup in a cup holder as well as a puddle of liquid on the floorboard near the driver's seat. Washington, the only occupant of the car, handed the cup to one of the officers. The cup contained a small amount of red liquid that smelled like an alcoholic beverage. The officers arrested Washington for possession of an open container of alcohol in a vehicle. While searching the car for additional items of evidence related to that charge, the officers discovered an illegal firearm underneath the driver's seat. The government prosecuted Washington for unlawful possession of a firearm by a felon.

The court held that the officers had probable cause to arrest Washington for possession of an open container of alcohol in a vehicle. While there was only a small amount of liquid in the cup, the officers smelled the odor of an alcoholic beverage coming from the car and saw a puddle of liquid on the floor near the driver's seat. A reasonable officer could infer that the defendant had poured alcohol out of the cup and onto the floor of the car before he pulled over. Because the officers had probable cause to arrest Washington for the alcohol related offense, under *Arizona v. Gant*, they were entitled to search his car for evidence related to that arrest. It was reasonable for the officers to believe they might find another container of alcohol in the car, such as the source of the liquid in the cup and the puddle on the floor.

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