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

April 2012

The Federal Law Enforcement -Informer-

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 Division of the Federal Law Enforcement Training Center 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 .

This edition of *The Informer* may be cited as "4 INFORMER 12".
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Thanks and best wishes to Dean Hawkins

A Hero Is...

Someone we admire. Someone we look up to. Someone solid, genuine and real. An ordinary person who does, perhaps not flashy or spectacular things, but extraordinary things.

A Hero picks us up when we are down. Believes in us before we believe in ourselves. Inspires us to expand and embrace what is possible.

True heroism is remarkably sober, very undramatic. It is not the urge to surpass all others at whatever cost, but the urge to serve others at whatever cost.

To use a rather weathered phrase, a man of honor, by instinct, by inevitability, without thought of it, and certainly without saying it. The best man in his world and a good enough man for any world.

Someone who never gives himself credit for anything. *Owning* his acts is good enough…its own reward in the real-time order of events.

QUIET HERO

the world knows not of sacrifice
that is hidden with a smile
stories set in days of old
let us listen for a while

I hope one day to be the same
and show all the passers-by
the smile that shines upon my face
and have them question why

and I will tell them of a man
who showed me all the little things
that most people just don't see

a man who was just a face
to those who didn't know
but to me and many others
he was always a quiet hero

(My thanks and apologies to Raymond Chandler, Arthur Ashe, and poet Eric Seth Fonua for my adoption of and liberties with their words.)

All of us know quiet heroes. I count mine on one hand. Dean Hawkins, legal instructor at FLETC Artesia, is among them.

Dean retired from federal service with 27 years as a GS-1811 federal criminal investigator, including 20 years as a Special Agent with the Internal Revenue Service, Criminal Investigation Division, three years as a Special Agent with the Resolution Trust Corporation, Office of

Inspector General, and four years as a legal instructor with the Legal Division at FLETC Glynco. He has spent the last eight years teaching law at FLETC Artesia. After 35+ years of dedication to law enforcement and law enforcement training, Dean is finally calling it quits to be closer to and spend more time with his family.

From the very beginning of the twelve years that I have known and worked with him, Dean stood out to me as someone I should emulate, a consummate professional with his head and his heart always in the right place. Many others share this clear and constant impression of him. The positive personal and professional impact he has had on countless colleagues and young officer and agent trainees is immeasurable. Dean set the bar high by example. It's a standard that I hope to someday achieve.

Dean, on behalf of so many, including me, who have known, admired, and respected you over the years, thank you for your service to our country. We wish you many more years of well-deserved happiness, health, and enjoyment.

Bob Cauthen
Assistant Legal Division Chief

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

Dog Sniff

Florida v. Harris
Decision Below: 71 So. 3d 756 (Fla. 2011)

The Florida Supreme Court held that when a drug-detection dog alerts, the fact that the dog has been trained and certified, by itself, is not enough to establish probable cause to search the interior of the vehicle and the person. The issue before the Court is whether this holding conflicts with established United States Supreme Court precedent.

The Florida Supreme Court held that the State, which bears the burden of establishing probable cause, must present all records and evidence that are necessary to allow the trial court to evaluate the reliability of the dog. The fact that the dog has been properly trained and certified is a starting point in this analysis. Because there is no uniform standard for training and certification of drug-detection dogs, the State must explain the training and certification so that the trial court can evaluate how well the dog is trained and whether the dog falsely alerts in training, and if so, the percentage of false alerts. The State should also keep and present records of the dog's performance in the field regarding verified alerts and false alerts. Finally, the State must present evidence of the experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.

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CASE SUMMARIES

United States Supreme Court

Rehberg v. Paulk, 2012 U.S. LEXIS 2711, April 2, 2012

Paulk, the chief investigator for the district attorney's office, was the sole "complaining witness" at three different grand jury proceedings that resulted in three separate indictments being returned against Rehberg. After all of the indictments were dismissed, Rehberg brought suit under *42 U.S.C. § 1983* claiming that Paulk presented false testimony to the grand jury.

The Eleventh Circuit Court of Appeals dismissed Rehberg's suit, holding that Paulk had absolute immunity from a *§ 1983* claim, based on his grand jury testimony. The Supreme Court affirmed, holding that a witness in a grand jury proceeding is entitled to the same absolute immunity from suit under *§ 1983* as a witness who testifies at trial.

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

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Florence v. Board of Chosen Freeholders of the County of Burlington,
2012 U.S. LEXIS 2712, April 2, 2012

Police arrested Florence on an outstanding warrant. After being briefly incarcerated in two different jails, the charges against him were dismissed. Florence filed suit under *42 U.S.C. § 1983* claiming that individuals arrested for minor offenses could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the jail intake process. Florence argued that jail officials could conduct this kind of search only if they had reason to suspect a particular inmate of concealing a weapon, drugs or other contraband. The Supreme Court disagreed with Florence and affirmed the Third Circuit Court of Appeals, holding that the search procedures at the two jails struck a reasonable balance between inmate privacy and the needs of the institutions.

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

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Circuit Courts of Appeals

1st Circuit

U.S. v. Hart, 2012 U.S. App. LEXIS 5565, March 16, 2012

The court held that the officers had reasonable suspicion to stop Hart. When Hart first saw the officers, he appeared to be startled, and he quickly walked away from them in the other direction. Hart was hunched over while he walked and he kept his hand in his waistband. Once he got to the car, Hart tried to shield his movements from the officers, but one of them saw him pull an

object from his waistband and place it beside his seat. Hart's behavior indicated that the object he was carrying was unlawful and provided the officers reasonable suspicion to detain him.

The officers ordered Hart to get out of car because they recognized that he was a member of a local gang, he appeared nervous, he would not make eye contact with them, and he placed his hands on the dashboard without being asked. Once Hart got out of the car, the officers discovered the handgun in plain view. Based on their observations, the court concluded that the officers acted reasonably throughout the encounter.

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

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4th Circuit

Lefemine v. Wideman, 2012 U.S. App. LEXIS 4490, March 5, 2012

Police officers told members of an anti-abortion organization to remove large graphic signs, depicting aborted fetuses that they were using as part of a roadside demonstration. Neither party challenged the district court's holding that the officers' actions were impermissible content-based restriction on the demonstrators' *First Amendment* rights. The court, however, agreed with the district court and held that the officers were entitled to qualified immunity.

In November 2005, the case law from this circuit and from the Supreme Court was ambiguous concerning whether requiring demonstrators to remove such signs would violate their *First Amendment* rights. Therefore, it was not objectively unreasonable for the officers to believe they could allow the demonstrators to continue to remain on the sidewalk, but order them to remove the graphic signs to protect the public from potential traffic hazards based on the signs' proximity to the road and to prevent children from seeing the images.

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

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U.S. v. Henry, 2012 U.S. App. LEXIS 4860, March 8, 2012

The court held that the affidavit provided a sufficient basis to establish probable cause for the issuance of the thermal-imaging search warrant. In the affidavit, the officer included information provided by two unidentified sources and a cooperating informant. If considered separately, this information may not have established probable cause. However, when considered collectively, the information demonstrated that three individuals with no connection to each other provided consistent statements regarding the Henrys' marijuana grow operation. In addition, many details provided by these three sources were corroborated by the officer's independent investigation.

Finally, while the officer failed to provide information to assist the magistrate judge in determining whether the Henrys' power usage was excessive for a property of that size, he did determine that the residence was heated by gas, rather than electric power. This information allowed the magistrate judge to consider the Henrys' electric power usage information in that relevant context.

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

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Seremeth v. Board of County Commissioners, 2012 U.S. App. LEXIS 5105, March 12, 2012

Officers were dispatched to Seremeth's house in response to a domestic disturbance call. The dispatcher told the officers that the entire family was deaf. A few of the officers already knew this because they had responded to similar calls at Seremeth's house in the past. When the officers arrived, they handcuffed Seremeth's wrists behind his back. The officers requested a sign–language interpreter through a company that had a contract with the county. However, the contract provided that the interpreter had one hour to arrive at their location. In the meantime, Seremeth's father, attempted to interpret for Seremeth and the officers. Additionally, an officer, who was studying sign language arrived, however, her efforts to communicate with Seremeth failed because of her lack of fluency. An hour and fifteen minutes after their arrival, the officers released Seremeth after concluding that no crime had occurred. Seremeth sued the officers under the Americans with Disabilities Act (ADA) and the Rehabilitation Act claiming that the officers had not reasonably accommodated him during their investigation.

The court first ruled that the ADA applies to law enforcement officers when they are conducting criminal investigations. The court then ruled that the officers were entitled to qualified immunity because their conduct toward Seremeth was reasonable under the circumstances. It was reasonable for the officers to attempt to accommodate Seremeth's disability by calling the contract interpreter as well as the officer, who was studying sign language, to assist in communication and by attempting to use Seremeth's father as an interpreter. Due to the exigencies inherent in responding to a domestic violence situation, the court stated that no further accommodations were required than the ones made by the officers. The officers were not required to wait until the contract interpreter arrived in order to perform their duties and attempt to question Seremeth.

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

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Ignacio v. United States, 2012 U.S. App. LEXIS 5105, March 12, 2012

A Pentagon police officer allegedly assaulted Ignacio, a contract security officer assigned to the Pentagon, while they were stationed at a security checkpoint for Pentagon employees. Ignacio sued the United States for assault under the Federal Tort Claims Act (FTCA). While both sides agreed that the Pentagon police officer qualified under the FTCA as an "investigative or law enforcement officer," the district court held that because the officer was not engaged in investigative or law enforcement activity when he allegedly assaulted Ignacio, the United States retained sovereign immunity from his lawsuit.

The court of appeals disagreed, holding that the FTCA waives the government's sovereign immunity whenever an "investigative or law enforcement officer" commits one of the specified intentional torts, including assault, regardless of whether the officer is engaged in investigative or law enforcement activity at the time.

The court declined to address whether the alleged assault occurred within the scope of the officer's employment because neither side raised the issue.

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

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5th Circuit

Waganfeald v. Gusman, 2012 U.S. App. LEXIS 5139, March 12, 2012

New Orleans police officers arrested Waganfeald and his friend for public intoxication approximately forty-eight hours before Hurricane Katrina struck the city. After being evacuated to several different locations, the two men were released from custody approximately five weeks later. Under Louisiana law, a person who is arrested and in custody is entitled to a determination of probable cause within forty-eight hours of arrest. The statute states that if this does not occur, the arrested person shall be released on his own recognizance. The men sued several law enforcement officers, claiming that their detention for this five-week period, without the benefit of a probable cause determination within forty-eight hours of their arrests, was unlawful.

The court disagreed. If a probable cause determination is not made within forty-eight hours of arrest, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstances. The court held that Hurricane Katrina was a bona-fide emergency within the meaning of the emergency exception to the forty-eight hour rule. As a result, the officers did not falsely imprison the men by holding them without a probable cause determination rather than releasing them into Hurricane Katrina.

The court also held that the officers did not act unreasonably by refusing to allow the men to use their cell phones to make calls after it was discovered that the landline telephones were not working. When the men were booked into the detention facility, jail personnel confiscated their cell phones. There was no established case law that would have put the officers on notice that they had to allow pre-trial detainees the use cell phones when the landline telephone service was disrupted. To the contrary, the court has ruled that prisoners have no right to unlimited telephone access and have afforded prison officials a great deal of deference in implementing policies that are needed to preserve order and discipline and to maintain institutional security.

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

*****

U.S. v. Cooke, 2012 U.S. App. LEXIS 5269, March 13, 2012

While Cooke was in jail, federal agents approached him and asked for consent to search his house. He refused. A week later, while Cooke was still in jail, federal agents went to Cooke's house to conduct a knock-and-talk interview. Cooke's house was a windowless structure that had two large sliding exterior barn doors. Behind the barn doors was a large area with a dirt floor and a paved sidewalk path that led to a stoop and another set of doors. Behind these interior doors were the living quarters where Cooke, his wife and his mother lived. When the agents approached the house, they noticed that one of the exterior barn doors was damaged, allowing them access to walk directly up to the interior doors. Believing that knocking on the barn door would be futile, the agents walked through the open barn door and knocked on the interior set of doors. Cooke's mother answered the door and granted the agents consent to enter the house. Once inside the house, the agents saw a shotgun shell and gun safe in plain view. Based on these observations, the agents obtained a search warrant and found illegal firearms, ammunition and a bulletproof vest in Cooke's house.

Cooke argued that the agents unlawfully entered the curtilage of his house when they crossed the threshold of the barn door without a warrant or consent.

The court held that the area inside the barn doors, but outside the interior doors was not part of the curtilage, so the agents did not violate Cooke's *Fourth Amendment* rights by entering the area without consent or a warrant in order to knock on the interior doors.

First, the area had a dirt floor and a paved sidewalk that led to the interior doors. Second, the contents of the area included non-operating washing machines and dryers, ladders, a grill and other items indicating that the space was used for storage. Finally, the barn door was open wide enough such that the items stored there were exposed to the elements, the public could see into the area from the street, and anyone would reasonably think that they would have to enter and knock on the interior doors when visiting.

Cooke also argued that under *Georgia v. Randolph* the warrantless search was invalid because his mother's consent to the agents' entry into the house was trumped by his previous refusal to consent. The court disagreed, stating that *Randolph* only applied to co-tenants who were physically present and immediately objected to the other co-tenant's consent. Here, Cooke was not a present and objecting co-tenant, but rather was miles away from his home and in jail when he objected to the search.

The Seventh and Eighth Circuits agree and allow searches under similar circumstances; however, the Ninth Circuit does not.

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

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Edmonds v. Oktibbeha County, Mississippi, 2012 U.S. App. LEXIS 6153, March 26, 2012

Kristi Fulgham shot and killed her husband shortly before taking her thirteen-year old brother, Tyler Edmonds, and two of her children on a trip. Fulgham told Edmonds that she had shot her husband and asked him to take the blame to protect her from the death penalty. Edmonds confessed to the murder but a few days later recanted his confession.

Edmonds and his mother sued the county under *42 U.S.C. § 1983,* claiming that police officers coerced the confession from Edmonds and separated him from his mother while he was confessing.

The court held that under the totality of the circumstances, Edmonds's confession was voluntarily given and its introduction at trial did not violate the *Fifth Amendment*. Although a thirteen-year old's separation from his mother, his desire to please adults, and his inexperience with the criminal justice system all weighed against a finding of voluntariness, Edmonds's express desire to help his sister decided the issue. There was no evidence that the officers' interrogation tactics would have produced a confession if it were not for Edmonds desire to help his sister. While Fulgham may have used her brother's love to get him to lie on her behalf, there was no evidence that the officers knew of her plan.

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

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6th Circuit

U.S. v. Jones, 2012 U.S. App. LEXIS 4700, March 7, 2012

A police officer saw two males who appeared to be engaging in a hand-to-hand transaction in an area known for extensive drug trafficking and violent crimes. The officer had seen more than two hundred hand-to-hand drug transactions in his nine-years as a police officer and he believed that the men were exchanging cash for drugs. When the officer got out of his car to investigate, the defendant ran away. The officer told the defendant to stop several times but he kept running. The officer gave chase and saw the defendant throw down several unidentifiable items and a brown paper bag. The officer eventually caught the defendant and handcuffed him. Another officer retraced the defendant's path and found a loaded firearm. The officer read the defendant his *Miranda* rights and he admitted to possessing the firearm.

The defendant argued that the officer detained him without reasonable suspicion and that the firearm and his confession should have been suppressed.

The court disagreed. Because the defendant did not comply with the officer's commands to stop, he was not seized until the officer physically restrained him by taking him down and handcuffing him. By the time this happened, the officer had already seen the defendant engage in a hand-to and transaction in an area known for drug activity, and then run away from the officer as he approached, throwing several items to the ground as he fled. These facts gave the officer reasonable suspicion to believe the defendant was engaged in criminal activity.

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

*****

U.S. v. Carr, 2012 U.S. App. LEXIS 5727, March 20, 2012

Officers saw Carr's Chevy Tahoe parked in an empty coin-operated car wash, which was located in an area known for drug activity. It was nighttime, and no one was washing the Tahoe. The officers parked their unmarked police vehicle, briefly activated their blue lights, then got out and approached the Tahoe. After seeing furtive movements and observing marijuana on the dashboard, the officers arrested Carr, searched the Tahoe and found a gun, crack cocaine and more marijuana.

First, the court held that the officers had parked their vehicle so they were not blocking the Tahoe and that Carr could have driven it either forward or backward out of the car wash bay. As a result, no *Fourth Amendment* seizure occurred, but only a consensual encounter. The encounter remained consensual after the officers briefly activated their blue lights. The officers were merely identifying themselves to the occupant of the Tahoe, and under the circumstances, this was reasonable.

Next, when the officers approached the Tahoe on foot and began to talk with Carr, the encounter remained consensual. The officer did not engage in any coercive behavior, display their weapons or physically touch Carr.

Finally, when the officers asked Carr to step out of the Tahoe, he was seized for *Fourth Amendment* purposes. This seizure was constitutional because Carr's actions coupled with the

officer's observation of marijuana in the Tahoe provided reasonable suspicion that Carr was engaging in illegal activity.

The court went on to state that even if the officers had seized Carr when they initially parked their vehicle near the Tahoe, that such a seizure would have been lawful. The car wash was a known meeting place for drug dealers, it was nighttime, there were no other vehicles around and the Tahoe was not being washed. Based on these facts, the officers had reasonable suspicion to approach the Tahoe and detain its occupants.

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

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U.S. v. McCraney, 2012 U.S. App. LEXIS 5818, March 21, 2012

An officer conducted a traffic stop on a vehicle after it failed to dim its headlights as it drove past him. The officer arrested the driver for driving with a suspended license and McCraney, the owner of the car, for unlawful entrustment of a motor vehicle. Before the two men were handcuffed, back-up officers searched the car and seized an unlawful firearm. Officers then handcuffed McCraney and the driver and placed them under arrest.

The government argued that warrantless search of the vehicle was either a valid search incident to arrest or a valid *Terry* frisk of the vehicle because the officers had reasonable suspicion to believe the occupants were dangerous and may have access to weapons.

First, the police are authorized to search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Neither side argued that it was reasonable to believe that the vehicle contained evidence of either driving with a suspended license or unlawful entrustment. However, the government argued that it would have been possible for either McCraney or the driver to gain access to the passenger compartment at the time of the search. The court disagreed. Although neither McCraney nor the driver were handcuffed, they were standing two or three feed behind the rear bumper of the vehicle, as instructed, with three officers standing around them. It was not improper for the district court to hold that McCraney and the driver were not within reaching distance of the passenger compartment at the time of the search.

Next, the court held that the original traffic violation for failing to dim headlights and the subsequent arrests for driving under suspension and negligent entrustment did not provide reasonable suspicion to believe that McCraney or the driver were dangerous or had access to weapons in the vehicle. Additionally, the arresting officer testified that if McCraney's license had not also been suspended, he would have let him drive the vehicle away from the scene. The court found that this was not consistent with an officer who had reasonable suspicion to support a *Terry* frisk of the vehicle.

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

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7th Circuit

U.S. v. Spears, 2012 U.S. App. LEXIS 4822, March 8, 2012

Officers obtained a warrant to search the defendant's house for evidence that he was growing marijuana there. The application and affidavit in support of the warrant included information from a confidential informant, information from the power company regarding electric usage at the house and criminal history information for the defendant. At a pre-trial hearing, there were inconsistencies between the information contained in the affidavit and the testimony of several law enforcement officers concerning the information from the power company and the defendant's criminal history.

The court held that even if the electricity and criminal history information were taken out of the affidavit, the remaining portions of the affidavit would have been sufficient for a finding of probable cause.

First, the informant provided detailed information about the marijuana-grow operation and stated that he had obtained the information firsthand. Second, the officers corroborated that the defendant lived at the house and during a trash-pull discovered evidence indicating that marijuana was being grown there. Finally, a short period of time elapsed between the informant's information, the corroboration of that information and the application for the search warrant.

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

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U.S. v. Conrad, 2012 U.S. App. LEXIS 5285, March 14, 2012

The court agreed with the district court which held that the agents' warrantless entry onto the back deck of the house violated Conrad's *Fourth Amendment* rights because he had a reasonable expectation of privacy in his father's house, including the curtilage. As a result, all evidence and statements obtained at that time were properly suppressed.

However, the court agreed with the district court, which held that the evidence and statements obtained two hours later from Conrad at his apartment were admissible because they were sufficiently attenuated from the original *Fourth Amendment* violation.

First, two hours elapsed between the curtilage violation and the evidence and statements obtained at Conrad's apartment. During this time, Conrad had the opportunity to reflect upon his situation and talk to his father.

Second, Conrad's repeated consents to search and his waiver of *Miranda* rights, which the agents were not required to give because Conrad was not in "custody," occurred two hours after the curtilage violation and at a different location. Conrad voluntarily agreed to go from the family home to his apartment and during this time, he was able to obtain advice from his father, which he chose to ignore by talking to the agents.

Finally, the agents' curtilage violation was not so flagrant that it warranted the exclusion of evidence obtained at Conrad's apartment. The agents' conduct at Conrad's apartment showed

that their earlier constitutional blunder reflected only a temporary lapse in judgment, which had been cured by the time they reached the apartment.

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

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U.S. v. Hampton, 2012 U.S. App. LEXIS 6222, March 27, 2012

Officers arrested Hampton. At the jail, Hampton signed a *Miranda* waiver and began to give a statement, but then invoked his right to counsel. The officers stopped the interview and asked a guard to take Hampton back to his cell. Hampton then changed his mind and asked to speak with the officers without counsel present. The officers read Hampton his *Miranda* warnings again and asked him if he wanted a lawyer. Hampton replied, "Yeah, I do, but you . . ." Upon hearing this, the officers reminded Hampton that they could not talk to him if he was asking for counsel. After a long pause, Hampton continued the conversation, telling the officers unambiguously that he wanted to continue without a lawyer. Hampton made incriminating statements to the officers that were admitted against him at trial.

Hampton argued that his statements should have been suppressed because the officers violated *Miranda* and *Edwards* by questioning him after he invoked is right to counsel. The court disagreed, holding that the officers did not violate the *Miranda/Edwards* rule. The officers honored Hampton's initial request for counsel and immediately stopped questioning him. Hampton then reinitiated the interview with the officers. After he was advised of his *Miranda* rights a second time, Hampton never made a clear and unambiguous request for counsel. The officers' effort to obtain clarification from Hampton was appropriate and consistent with good police practices recommended by the United States Supreme Court in *U.S. v. Davis* .

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

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Fleming v. Livingston County, Illinois, 2012 U.S. App. LEXIS 6268, March 28, 2012

An officer arrested Fleming for breaking into a home and fondling two teenage girls. The state filed criminal charges against Fleming, but those charges were eventually dismissed. Fleming brought suit against the officer for false arrest under *42 U.S.C. § 1983*.

The court held that the officer was entitled to qualified immunity. An officer is entitled to qualified immunity for false arrest as long as he reasonably believed that he had probable cause to arrest a suspect. An officer is not required to show that he knew with certainty that the person he arrested committed the offense.

Here, the officer spotted Fleming, in the early morning hours, approximately seven minutes after being told of a possible break-in and assault, one-half block from the crime scene. Fleming was the only person in the area and he substantially matched the description of the intruder provided by one of the victims. A police officer could have reasonably, if mistakenly believed that he had probable cause to arrest Fleming. In addition, the officer took the added precaution of calling a state prosecutor and only arrested Fleming after the prosecutor agreed that he had probable cause to arrest Fleming.

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

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8th Circuit

Hulstein v. Drug Enforcement Administration, 2012 U.S. App. LEXIS 4289, March 2, 2012

Hulstein brought suit under the Freedom of Information Act (FOIA) against the Drug Enforcement Administration (DEA) seeking unredacted versions of three DEA reports.

The court agreed with the government and held that the "Details" section of the 1990 report was provided by a person who had an assurance of confidentiality, making it exempt from release under section 7d. The court stated that the DEA is not required to make a detailed explanation regarding the alleged confidentiality of each source. The courts have held that the violence and risk of retaliation in drug cases supports an implied grant of confidentiality for such sources, even after the passage of time and whether or not the allegation was acted upon by the agency.

The court also agreed with the government and held that the DEA did not have to disclose the names and signatures of the law enforcement officers listed in two reports from 2008. The court found that the withheld information could be used to identify a private individual and therefore triggered the privacy concerns under section 7c. The withheld information also revealed little about the DEA's conduct and nothing meaningful about the DEA's performance of its statutory duties. Unless there was an allegation of wrongdoing by the government in the investigation, which there was not, the privacy interests of the private citizens in the report outweighed any public interest in their disclosure to Hulstein.

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

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U.S. v. Robinson, 2012 U.S. App. LEXIS 4841, March 8, 2012

A security guard at a nightclub told an officer, who was providing security there, that Robinson had returned to the club with a gun shortly after an altercation that had led to his ejection, and that Robinson had just left in a white car. The officer saw the white car as it was leaving the club and performed a traffic stop. After conducting a frisk for weapons, the officer placed Robinson in the back of her patrol car and ran a computer check for outstanding warrants. The officer discovered that Robinson was a convicted felon and that there were several outstanding warrants for his arrest. The officer returned to the white car and seized a handgun that was sticking out from under the driver's seat

The court held that the officer had reasonable suspicion to detain Robinson. It was reasonable for the officer to believe the information provided by the security guard because they had worked directly with each other to provide security at the nightclub and it was unlikely that he would intentionally provide false information to her. In addition, the officer corroborated part of the information when she saw the white car described by the security guard leaving the club.

The court also held that the officer did not exceed the scope of the *Terry* stop by handcuffing Robinson and placing him in her patrol car. The officer had specific information that Robinson had possessed a firearm, just minutes earlier, and that he was potentially intoxicated or hostile. It was reasonable for the officer to secure Robinson to eliminate the possibility that he would gain control of the firearm and threaten her safety.

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

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U.S. v. Huether, 2012 U.S. App. LEXIS 4957, March 9, 2012

Huether argued that the district court should have suppressed incriminating statements he made to the officers because he had not been given *Miranda* warnings.

The court held that Huether was not in custody for *Miranda* purpose; therefore, he was not entitled to the warnings. First, an officer told Huether, at least twice, that he was not under arrest or in custody. Heuther did not ask to leave, refuse to answer questions, or request anything during the interview even though he had been told that he was not under arrest or in custody. Huether became more responsive to the officer's questions as the interview progressed and he cooperated with the officer in providing access to his laptop computer.

Second, when Huether signed the search warrant, he became aware of the number of officers present. As a result, he could not complain later that when the interviewing officer mentioned the other officers, that this was a verbal show of force that made the interview custodial.

Finally, Huether had prior experience in being interviewed by police officers. This indicated that he was no stranger in speaking with them and that he voluntarily chose to be cooperative.

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

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U.S. v. McManaman, 2012 U.S. App. LEXIS 5341, March 14, 2012

Federal agents arrested the defendant at his house on various gun and drug charges. The agents found marijuana and methamphetamine pipes in his pockets during their search incident to arrest. An agent then asked the defendant if there was anything else illegal inside the house and the defendant told them that there was a shotgun in the basement. While searching for the shotgun, the agents discovered boxes that contained child pornography magazines.

Prior to his trial on the gun and drug charges, the district court found that the agents violated the defendant's *Fifth* and *Sixth Amendment* rights, but concluded that these violations did not require the suppression of the shotgun because of the inevitable discovery doctrine. Specifically, the court ruled that the drug paraphernalia found in the defendant's pockets when he was arrested would have provided probable cause for a search warrant of the house that would have led to the discovery of the shotgun.

At his trial on the child pornography charges, the defendant argued that the evidence of child pornography would have been outside the scope of a properly obtained search warrant for guns and drugs. The court disagreed, holding that the child pornography evidence would have been discovered under the plain view doctrine if the police had obtained a warrant. The child pornography magazines were found in a box that would have been subject to search under a warrant for guns and drugs and the incriminating nature of the evidence was immediately apparent to the agents. Even if the pictures were folded up in the box, the agents could have lawfully unfolded them to see if they contained drugs because drugs are often contained within folded pieces of paper.

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

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U.S. v. Anderson, 2012 U.S. App. LEXIS 5506, March 16, 2012

Anderson gave the officers consent to search his motel room for firearms. An officer found five shotgun shells in a shell compartment on an orange hunting vest hanging in a closet. The government prosecuted Anderson for being a felon in possession of ammunition.

The court held that the search of hunting vest was within the scope of the consent given by Anderson. Firearms could be located in clothing hanging in a closet, especially in an orange hunting vest. In addition, the searching officer identified the ammunition without searching any areas that were too small to conceal a firearm.

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

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U.S. v. Aquino, 2012 U.S. App. LEXIS 5970, March 22, 2012

A police officer working with a drug interdiction unit at a bus station asked Aquino if he could conduct a *Terry* frisk, but Aquino declined, stating that he did not want the officer to touch him. After the officer saw an unnatural bulge on the inside of Aquino's right calf, he asked him to lift his pants above the bulge. Aquino refused so the officer placed him in handcuffs for "his safety." Without first conducting a pat down, the officer lifted Aquino's pant leg above the bulge and saw a duct-taped bundle strapped on Aquino's right leg. The officer removed the bundle along with two other packages that were found strapped to Aquino's body. All of the packages contained methamphetamine.

The court held that the officer violated the *Fourth Amendment* when he searched underneath Aquino's pant leg, without consent or probable cause, instead of performing a pat down to confirm whether the concealed bulge was a weapon.

The Eighth Circuit has previously ruled that when an officer merely observes a concealed bulge under a person's clothing, standing alone, this does not establish probable cause to believe that the person is trafficking drugs. Additionally, an actual search of a person's body is not authorized under *Terry* until after a pat down confirms the presence of a weapon or contraband. Here, there was no valid reason for the officer to immediately search underneath Aquino's clothing instead of first conducting a pat down to determine whether the concealed bulge was a weapon.

Because the officer exceeded the scope of a *Terry* frisk and Aquino was handcuffed at the time, the court found that Aquino was effectively under arrest at the time of the search and not simply being detained. As a result, the officer needed to have probable cause before he conducted the non-consensual search of Aquino, which the court ruled he did not have.

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

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U.S. v. Cowan, 2012 U.S. App. LEXIS 6051, March 23, 2012

Officers encountered Cowan at an apartment during the execution of a search warrant for drugs. The court held that it was lawful for the officers to detain, temporarily handcuff and frisk Cowan because they were executing a warrant at a place of suspected drug trafficking, where weapons may have been present, and the suspects outnumbered the officers.

The court held that when an officer felt keys in Cowan's front pocket, he was justified in reaching into the pocket and seizing the keys and the attached key fob. The officer immediately recognized the object as keys and the search warrant specifically authorized the seizure of keys as indicia of occupancy or ownership of the premises.

After seizing the keys from Cowan's pocket, the officer pressed the alarm button on the key fob until it set off an alarm on a car parked in front of the apartment building. Another officer brought a drug-dog to the scene to conduct a sniff around the car. After the dog alerted to the presence of drugs, officers searched the car and found crack cocaine.

The court held that the officer's use of the key fob to identify Cowan's car was lawful because he did not have a reasonable expectation of privacy in the identity of his car. Additionally, in light of the United States Supreme Court's recent holding in *United States v. Jones*, the court had to consider whether the officer's use of the key fob constituted a search by "physically intruding on a constitutionally protected area to find something or obtain information." The court held that the officer did not trespass on the key fob itself because he had lawfully seized it. The court went on to state that even if the use of the key fob was a search, the court held that it would have been reasonable under the *Fourth Amendment's* automobile exception.

Finally, the court held that several statements obtained from Cowan were properly suppressed. Cowan was detained, handcuffed, patted down and then questioned by the officer who did not first advise him of his *Miranda* rights. The court found that Cowan was in-custody for *Miranda* purposes because a reasonable person in his position would not have felt free to end the questioning and leave and no one told Cowan that he was free to leave or refuse to answer questions.

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

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U.S. v. Clutter, 2012 U.S. App. LEXIS 6139, March 26, 2012

The court held that the officers' warrantless seizure of three computers from the house where Clutter lived was reasonable under the *Fourth Amendment*.

First, Clutter's father, who was in actual possession of the computers, consented to their seizure. The computers were located in areas of the home accessible to the father and the officers reasonably relied on the father's actual or apparent authority to consent to a temporary seizure of them.

Second, the officers had probable cause to believe that the computers contained evidence of child pornography offenses. Under the *Fourth Amendment*, officers are allowed to temporarily seize property, while they wait for a warrant to search its contents, if the exigencies of the

circumstances require it. It is reasonable to seize a computer without a warrant to ensure the hard drive is not tampered with while a search warrant is obtained.

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

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9th Circuit

U.S. v. King, 2012 U.S. App. LEXIS 5262, March 13, 2012

The court held that the information provided by the two informants was highly unreliable and did not provide the officers with reasonable suspicion that the defendant was involved in the homicide. The first informant had no track record of reliability and his/her basis of knowledge concerning the defendant's involvement in the crime was double hearsay. The second informant had no track record of reliability, lacked firsthand information concerning the defendant's involvement in the crime and did not meet with the officer face-to-face.

However, the court held that the officers did not need reasonable suspicion to search the defendant's room. The defendant was subject to suspicionless search as a condition of his probation, whether or not the officers believed he was involved in any criminal activity. Suspicionless search conditions for individuals on probation do not violate the *Fourth Amendment*.

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

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10th Circuit

U.S. v. Haymond, 2012 U.S. App. LEXIS 4652, March 6, 2012

Haymond claimed that the agent's affidavit submitted in support of the search warrant was insufficient to establish probable cause to search his home for evidence of child pornography. The court disagreed. The agent's affidavit described in detail his undercover Limewire investigation, including the fact that he observed a user, with an IP address linked to Haymond's residence, who had numerous files of child pornography available for other Limewire users to access, view and download. This information would cause a reasonable person to believe evidence of child pornography would be recovered from Haymond's residence.

Haymond also argued that the information in the affidavit was stale because the agent obtained the search warrant 107 days after he completed his Limewire investigation. The court disagreed, holding that in other cases it had rejected similar claims of staleness and that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes.

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

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11th Circuit

U.S. v. Lewis, 2012 U.S. App. LEXIS 6073, March 23, 2012

Officers approached four men who were standing near a car in a restaurant parking lot and engaged them in a consensual conversation. One of the officers asked the men if any of them were carrying guns. Evans said that he had a gun in his backpack, which was in the open trunk of the car, and another man, McRae, told the officer that he had a gun in his waistband. The officers immediately drew their weapons and ordered all four men to sit on the ground. Lewis, who was acting very nervously, eventually complied, but he refused to sit still. The officers searched the area near Lewis and found a handgun underneath a car. McRae was not charged because he had a valid concealed weapons permit, however, Lewis was charged with a firearms violation and subsequent testing found Lewis's DNA on the gun.

The court held that McCrae's admission to carrying a concealed weapon was sufficient to justify a *Terry* stop on him before the officers determined whether he possessed a valid concealed weapons permit. Although an individual may ultimately be engaged in conduct that is lawful, as turned out to be the case with McCrae, officers may detain the individual while they are making that determination.

The court also held that it was reasonable for the officers to detain Lewis, Evans and the fourth man, under *Terry*, after McRae told the officers that he had a gun in his waistband and Evans said that he had a gun in his backpack.

The officers faced substantial immediate danger when they discovered that McRae and Evans each had access to a firearm. The Supreme Court and the Eleventh Circuit have established that, for safety reasons, in some circumstances, officers may briefly detain individuals about whom they have no individualized reasonable suspicion of criminal activity in the course of conducting a valid *Terry* stop on other related individuals.

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

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