

THE FEDERAL LAW ENFORCEMENT – INFORMER –

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW
ENFORCEMENT OFFICERS AND AGENTS

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This edition of *The Informer* may be cited as “5 INFORMER 12”.
(The first number is the month and the last number is the year.)

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In This Issue

Case Summaries

Circuit Courts of Appeals

[Click Here](#)

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

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

[8th Circuit](#) [D.C. Circuit](#)

CASE SUMMARIES

Circuit Courts of Appeals

2nd Circuit

Terranova v. State of New York, 2012 U.S. App. LEXIS 7587, April 16, 2012

State troopers stopped traffic on a highway to apprehend several speeding motorcyclists who were driving towards their location. One of the motorcyclists collided with a stopped car causing two other motorcyclists to crash. Terranova, who was driving one of the motorcycles, died at the scene. Terranova's family sued the troopers claiming they had used excessive force to unlawfully seize him. At trial, the jury found the troopers were not liable for Terranova's death. The family appealed, claiming that *Tennessee v. Garner* established the constitutional standard for the use of deadly force and that by failing to instruct the jury on the *Garner* factors, the district court did not accurately explain the law to the jury.

The court disagreed. Claims that the police used excessive force are judged under the *Fourth Amendment's* objective reasonableness standard. However, following *Garner*, some courts held that the Supreme Court established a special rule concerning deadly force, which could require a separate jury instruction in any case in which police conduct created a substantial risk of death or serious bodily injury. More recently in *Scott v. Harris*, the Supreme Court rejected the view that *Garner* created a special rule that applies when officers use deadly force, stating that "*Garner* was simply an application of the *Fourth Amendment's* reasonableness test . . . to the use of a particular type of force in a particular situation."

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

3rd Circuit

U.S. v. Whiteford, 2012 U.S. App. LEXIS 7468, April 13, 2012

Whiteford and Wheeler were United States Army reserve officers who were convicted of conspiracy for participating in a bid-rigging scheme that involved directing millions of dollars in contracts to several different companies owned by another co-conspirator.

Wheeler claimed that incriminating statements he made to the agents after his arrest and weapons recovered from his house should have been suppressed.

When the agents approached Wheeler, he told them he had spoken to an attorney and that the attorney directed him to cooperate unless he "got stumped." The court held that this comment did not amount to a request for counsel under *Miranda*.

Next, the court held that Wheeler had voluntarily waived his *Miranda* rights. The agents did not intimidate or coerce Wheeler and he voluntarily signed an Advice of Rights form. Although Wheeler argued that the agents' failure to inform him of the specific charges against him

amounted to psychological pressure, he could not point to anything to show that his will was overcome. Further, there is no requirement that a person must know of the charges against him before he can waive his *Miranda* rights.

Finally, there was no evidence that Wheeler's statements to the agents or his consent to search his house were involuntary. Wheeler told the agents that the weapons were in his bedroom and he offered to show them exactly where he had put them. He signed a consent to search form and helped the agents gain entry into the house. Wheeler participated in a one and a half hour discussion with the agents, answering their questions and retrieving documents at their request. During this time, there were no threats, raised voices nor did Wheeler tell the agents that he wished to stop answering questions.

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

U.S. v. Johnson, 2012 U.S. App. LEXIS 7908, April 19, 2012

An undercover police officer and a confidential informant purchased a bag of cocaine from Johnson. A few days later, the informant arranged another purchase of cocaine from Johnson. As Johnson approached the informant's car, officers arrested him, recovering cocaine and a handgun.

Johnson argued that the district court abused its discretion by denying his motion to compel the government to disclose the identity of the confidential informant. Disclosure is required where the informant's identity or the contents of his communication are relevant and helpful to the defense of an accused. The burden to demonstrate the need for disclosure rests on the defendant.

Here, Johnson failed to meet this burden. The mere speculation that an eyewitness may have some evidence helpful to defendant's case is not sufficient to compel disclosure of his identity. Even though the confidential informant was an eyewitness to the two drug transactions, Johnson's suggestion that his testimony would support a mistaken-identity defense was speculative at best. The officer, who was present at both buys, positively identified Johnson, as did the officers who observed Johnson approach the informant's car when he was arrested.

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

4th Circuit

U.S. v. Shrader, 2012 U.S. App. LEXIS 6734, April 4, 2012

Federal agents arrested Shrader at the home he shared with his aunt. Shrader was alone when the agents arrived and he refused to give consent to search the house for firearms that he admitted were inside. While several agents took Shrader to jail, other agents waited for his aunt to return home. Two hours later, she arrived and consented to a search of the house. The agents seized several illegal firearms.

Shrader argued that his aunt's consent to the search of their shared home was invalid because he had previously refused to consent to the search.

The court disagreed. In *Georgia v. Randolph*, the Supreme Court made it clear that to invalidate a co-tenant's consent to search, the defendant must be both "present and objecting." While the police may not try to exploit this rule by removing the potentially objecting person for the sake of avoiding a possible objection, there was no evidence that the agents did so in this case. They went to Shrader's house for the express purpose of executing a valid arrest warrant and his removal from the premises cannot be considered a pretext for later seeking consent from his aunt.

With this holding, the court joined the Seventh and Eighth Circuits, which have followed the clearly established rule outlined in *Randolph* that requires that the defendant be physically present to dispute his co-tenant's consent. The court declined to adopt the more expansive view articulated by the Ninth Circuit in *U.S. v. Murphy*, which permits a defendant's refusal to consent to remain in effect indefinitely, "barring some indefinite manifestation that he has changed his position and no longer objects."

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

U.S. v. McBride, 2012 U.S. App. LEXIS 8108, April 23, 2012

Officers saw McBride engaging in what they believed to be a drug transaction in the parking lot of a nightclub. The officers detained McBride's car for fifty-five minutes until a canine narcotics unit from a neighboring police department arrived. During that time, the officers allowed McBride to leave the scene. After McBride left, the narcotics canine arrived and alerted on his car. Using this information and other details from the investigation, the officers obtained a warrant to search McBride's car where they found an illegal firearm and crack cocaine.

The court held that the officers had reasonable suspicion to detain McBride's car. First, the officers observed unexplained traffic at an unusual hour at a location having a history of drug activity. Second, the officers saw McBride, who they knew from a prior drug investigation, engaged in what appeared to be a drug transaction with another individual who was found shortly thereafter in possession of over \$9,000. Finally, McBride was found in the company of other men at the club who were known to have been involved in the drug trade. These factors, taken together, were sufficient to establish reasonable, articulable suspicion for the officers' detention of McBride's car on the ground that it may have contained illegal drugs.

The court further held that the fifty-five minute period between the beginning of the detention and the arrival of the canine narcotics unit was reasonable. Shortly after the officers decided to detain McBride's car, they requested the assistance of the nearest canine narcotics unit. In the context of a fifty-five minute detention, the fact that the officers did not have a canine narcotics unit in their own department does not count against them. Once the officers detained McBride's car they were diligent in conducting their investigation.

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

Merchant v. Bauer, 2012 U.S. App. LEXIS 8469, April 26, 2012

Officer Bauer arrested Merchant for impersonation of a police officer. At the time, Merchant was employed as Deputy Director for a county Department of Corrections in Maryland. The

court held that Bauer was not entitled to qualified immunity. Under the circumstances, no reasonable person would have believed that Merchant violated the Impersonation Statute; therefore, Bauer lacked probable cause to arrest her.

Merchant accurately told Bauer that she was a Deputy Director in the Department of Corrections and that she worked in public safety. Even though Merchant referred to her county-issued vehicle as a “police car,” she did so by using air-quotes, which suggested that the term “police car” was not actually accurate for the situation. Merchant also carried a lawfully issued badge that she did not display to Bauer during their encounter.

After the encounter, Bauer confirmed that Merchant was employed by the Department of Corrections and that some of its non-law enforcement officers carried badges. This information served to corroborate Merchant’s representations to Bauer rather than support a claim that she had violated the Impersonation Statute. A prudent person in Bauer’s position would not conclude that Merchant’s badge, which he was never shown nor asked to see, was evidence that Merchant was impersonating a law enforcement officer.

The court further held that at the time of Merchant’s arrest, it was clearly established that police officers were not allowed to arrest individuals for impersonating a police officer without probable cause.

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

5th Circuit

Jones v. Lowndes County, Mississippi, 2012 U.S. App. LEXIS 7805, April 18, 2012

Jones and Nance sued the county, the Sheriff and Bryan, a deputy sheriff, claiming that their rights were violated when they were detained for more than 48 hours without a probable cause hearing or an initial appearance.

Bryan arrested Jones and Nance at 5:33 p.m. on a Saturday afternoon. Because there was no judge on duty over the weekend, Bryan attempted to schedule an appearance before a judge on Monday afternoon around 2:30 p.m., when he returned to work his normal shift. However, the chief judge had left for the day and there was no other judge available. Jones and Nance appeared before a judge on Tuesday morning and the judge determined that their arrests were supported by probable cause.

The court held that the district court properly dismissed the suit against the county and the Sheriff because Jones and Nance failed to show that they were liable for any alleged violation of their *Fourth Amendment* rights. The Sheriff’s Department’s policy was for arrestees to have a probable cause hearing “within 48 hours but no later than 72 hours and as soon as reasonably possible and without unnecessary delay.” This policy is consistent with the guidance provided by the United States Supreme Court, which stated that while a 48-hour timeline is a useful benchmark, probable cause hearings that occur more than 48 hours after arrest are not always unreasonable. Here, the delay was caused by unavailability of the judges, which neither the county nor the Sheriff could control.

The court also held Bryan was entitled to qualified immunity. He had no way of knowing that the county judges would close their courtrooms early that Monday afternoon or that their doing so was potentially unlawful. Under these circumstances, the court concluded that a reasonable officer would not have known he was required to make alternative arrangements, such as coming in early on Monday before his normal shift or preparing a written report to allow another officer to attend the probable cause hearing in his place.

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

6th Circuit

U.S. v. Carney, 2012 U.S. App. LEXIS 7114, April 10, 2012

The court affirmed Carney's conviction, holding that the search warrant was supported by probable cause because the affidavit contained enough facts to indicate a fair probability that evidence of a crime would be found in the car Carney had driven and in his apartment.

First, while Carney pointed to some alleged misstatements and omissions in the search warrant affidavit, the court held that he failed to show that the officer made any of those statements and omissions knowingly and intentionally or with reckless disregard for the truth.

Second, the affidavit described two separate transactions involving different denominations of counterfeit money that occurred in the same area and within seven days of each other. On both occasions, the person who passed the counterfeit money drove away in a white SUV that was later seen parked in front of Carney's apartment and registered to a person who lived at that address. Additionally, a witness picked Carney out of a photo lineup as the individual who had passed counterfeit money at one of the stores. Finally, officers confirmed that Carney lived in the apartment and when they knocked on the door, Carney answered it. Based on the totality of the circumstances, the search warrant affidavit established a fair probability that evidence of counterfeiting would be found in the apartment and car.

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

7th Circuit

U.S. v. Burgard, 2012 U.S. App. LEXIS 6555, April 2, 2012

A police officer seized Burgard's cell phone, without a warrant, after he established probable cause to believe it contained images of child pornography. The officer wrote his report and forwarded it to an investigator who was assigned to work with a cyber-crimes task force. The investigator obtained a warrant to search the cell phone six days later and discovered images of child pornography. Burgard argued that the images from his cell phone should have been suppressed because it was unreasonable for the officer to wait six days to obtain the search warrant.

After seizing an item, police must obtain a search warrant within a reasonable amount of time to comply with the *Fourth Amendment*. Even though the investigator may have been able to work

more quickly, his delay was not because he completely abandoned his work on the case or failed to realize the importance of obtaining a warrant in a timely manner. Rather, the investigator wanted to ensure that he had all the information he needed from the seizing officer and he wanted to consult with the federal prosecutor, while also attending to his other law enforcement duties. As a result, the court held that the six-day delay in obtaining the search warrant for Burgard's cell phone was reasonable under the *Fourth Amendment*.

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

Phillips v. Community Insurance Corporation, 2012 U.S. App. LEXIS 8582, April 27, 2012

Phillips claimed that police officers used excessive force in arresting her when they shot her four times in the leg with an SL6 baton launcher after she disregarded their orders to come out of her car. The court agreed with Phillips and additionally held that the officers were not entitled to qualified immunity.

First, the officers who arrested Phillips testified that they believed she was driving a stolen car. Initially there was some confusion about the status of vehicle. However, at the time of Phillips' arrest, the officers had received information that called into question whether or not the car was stolen. The officers could not simply ignore subsequent information that a different car had been stolen when they considered the appropriate amount of force to use against Phillips. As a result, the officers' certainty that they were dealing with a car theft was objectively unreasonable based on the contrary information they had received.

Second, the force that the officers used to apprehend Phillips exceeded the level that was reasonable under the circumstances. Although the officers testified that they believed Phillips was drunk, she never exhibited any aggressive behavior toward the officers nor did she attempt to escape. The officers had Phillips' vehicle surrounded with seven squad cars and behind her vehicle was a steep drop-off. An officer told dispatch that the driver was "secured, not in handcuffs, but stabilized in the car." The scene was stabilized for fifteen minutes before the officers shot Phillips four times with rounds from the SL6. During this time, Phillips had given no indication that she intended to harm the officers or anyone else. While it may have been reasonable in hitting Phillips with the first SL6 round, multiple shots fired at her exceeded the level of force permissible to effect the arrest. It was unreasonable to shoot Phillips four times when she posed no immediate threat and offered no active resistance.

Finally, the court concluded that the officers were not entitled to qualified immunity. While it may have been lawful to shoot Phillips the first time, the officers should have known that it was unlawful to escalate force by shooting her three more times when she was unresponsive, presented no threat and made no attempt to flee or even avoid police fire. It was clearly established at the time of this incident that officers could not use such a significant level of force on a non-resisting or passively resisting individual.

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

8th Circuit

U.S. v. Cooke, 2012 U.S. App. LEXIS 7133, April 10, 2012

Undercover police officers, posing as pimps, placed an advertisement on the internet related to underage girls. Cooke replied to the ad and requested more information and pictures of the girls. The officers emailed Cooke a digitally morphed photograph of an underage girl and quoted prices for spending up to an hour with her. Cooke eventually exchanged fourteen emails and had five telephone conversations with the officers. Officers arrested Cooke shortly after he arrived at a house where he expected to meet one of the girls.

The district court refused to give an entrapment instruction to the jury and the court of appeals agreed that Cooke was not entitled to one. The court is not required to give an entrapment instruction if there is sufficient evidence that the defendant has a predisposition to engage in the crime with which he is charged.

Here, there was ample evidence that Cooke was predisposed to commit two crimes involving sex with minors. Cooke made the first contact with the officers. Throughout the telephone calls and emails, Cooke repeatedly sought assurances that he was not dealing with law enforcement. After learning that the “girls” were thirteen and fifteen years old, he still requested photographs of them and a meeting. Finally, Cooke drove to the undercover house and upon entering, took out his wallet, offered the undercover officer money and requested the use of a bedroom for privacy.

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

U.S. v. Sanchez, 2012 U.S. App. LEXIS 7369, April 10, 2012

Sanchez confronted a man at a gas station and made several threatening statements towards him and his family. The man’s wife was a cooperating witness in a federal criminal case against three of Sanchez’s children. The next day, Sanchez attended a hearing regarding the case and while she was sitting in the courtroom, a federal agent gestured for Sanchez to join her in the hallway. Once in the hallway, the agent led Sanchez to an office in the court’s basement that was normally used by the federal prosecutor. A second agent asked Sanchez to join him and a third agent in an adjoining interview room. After she complied, the agent told her that she was not under arrest and asked her if she would answer questions about the gas station incident. Sanchez agreed and neither agent issued *Miranda* warnings. Sanchez initially denied the incident, but after the agent raised his voice and called her a liar, she made some incriminating statements. The interview lasted ten to fifteen minutes and the agents did not arrest Sanchez when it ended.

While there were several factors that favored a finding of custody, the court ultimately held that Sanchez was not in custody during the interview; therefore, the agents were not required to provide her with *Miranda* warnings. Although the interview was police dominated, the agent told Sanchez that she was not under arrest. The agent did not employ strong-arm tactics or use deception during the interview. The agent’s raised voice and assertions to Sanchez that she was lying to him were not coercive interview methods. Finally, Sanchez was not arrested at the end of the interview. The court found that a reasonable person in Sanchez’s position would have felt free to end the interview.

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

U.S. v. Vega, 2012 U.S. App. LEXIS 7634, April 17, 2012

Vega argued that the affidavit in support of the search warrant for his house did not establish probable cause and that his statements were involuntary because the police officers did not read him his *Miranda* rights and they threatened to have his children taken away from him.

The court disagreed. First, from the affidavit, it can be reasonably inferred that Horvath, the drug dealer, obtained the methamphetamine that he sold to the cooperating witness from Vega. When the cooperating witness met Horvath, Horvath told him that he had to go get the methamphetamine. Horvath then left his house and walked across the street to Vega's house. When he returned to his house a few minutes later, Horvath handed the cooperating witness a small Ziploc bag containing methamphetamine.

Next, the court noted that the district court had ruled that the officers had read Vega his *Miranda* rights and that neither officer had used any threats against him to obtain a confession, contrary to Vega's argument. The court stated that witness credibility determinations made by the district court are virtually unreviewable on appeal. Consequently, the court concluded that Vega's incriminating statements to the officers were voluntary and that the district court properly refused to suppress them.

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

U.S. v. Lomeli, 2012 U.S. App. LEXIS 7791, April 18, 2012

The court affirmed the district court's suppression of evidence that the government obtained against Lomeli and a co-defendant as the result of a wiretap.

Wiretap applications may only be authorized by certain people specifically designated by the Attorney General who are listed in *18 U.S.C. § 2516(1)*. Additionally, under *18 U.S.C. § 2518(1)(a)* all wiretap applications must identify the law enforcement officers making the application and indicate the Department of Justice officer who authorized it.

In this case, the wiretap application approved by the federal judge stated that the documents that identified the authorizing officials were attached to the application. However, these documents were not attached.

The court held that the wiretap application was insufficient on its face because it did not comply with the *§ 2518(1)(a)* requirement. The court stated that the authorizing judge had no way of knowing the name of the actual, statutorily designated official that had authorized the application. Additionally, the government offered no evidence that the judge knew the identity of the appropriate authorizing official or if the necessary authority was obtained. It was not until the magistrate judge conducted the supplemental hearing that the government offered the supporting documents. The court found that these omissions were not merely technical defects, and that suppression of the wiretap evidence was warranted.

In a footnote, the court noted that in *U.S. v. Gray*, the Sixth Circuit refused to suppress wiretap evidence obtained by the government under similar circumstances.

The court also refused to admit the wiretap evidence under the good-faith exception. The court held that no wiretap applicant could, in good faith, rely upon a court order authorizing the wiretap, when the applicant failed to comply with the federal wiretap statute when obtaining the order.

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

U.S. v. Ramirez, 2012 U.S. App. LEXIS 8451, April 26, 2012

Officers arrested two men at a bus terminal for smuggling heroin in their shoes. Their investigation revealed that the two men were travelling with three other men who had already left the bus station, who also had heroin in their shoes. Over a two-hour period, the officers tracked the three men to a motel room and obtained a key card for the room from the desk clerk. The officers swiped the key card in an attempt to gain entry to the room but it did not work. The officers then knocked on the door and announced "housekeeping." One of the men, Hector Cruz, partially opened the door and then attempted to close it after he realized the officers were outside. The officers used a ram to force the door open and entered the room. Once inside, the officers saw two pairs of shoes that were similar to the shoes worn by the two men arrested at the bus station. After all of the men denied ownership of the shoes, the officers searched them and discovered heroin in each pair.

The government argued that when the officers were outside the motel room, exigent circumstances justified their warrantless entry because the officers believed, even before they swiped the key card, that the destruction of evidence was imminent.

The court disagreed and reversed the defendant's conviction, finding there were no exigent circumstances that allowed the officers to enter the motel room without a warrant or consent.

First, Cruz's attempt to shut the door in response to the officers' knock does not support the existence of an exigency. This occurred after the officers unsuccessfully attempted to unlawfully enter the room with the key card, which they admitted compromised their position outside the room. While officers have the right to merely knock on a door and seek entry, when the occupants choose not to respond or choose to open the door and then close it, the officers must bear the consequences of this method of investigation.

Second, there was no evidence that the three men knew that the officers were tracking them and the officers' knowledge that drugs were probably in the room does not automatically support the conclusion that their destruction was imminent.

Finally, prior to using the key card, the officers had no indication there was any activity at all in the room, let alone any activity that might lead them to believe that the occupants inside might imminently destroy evidence. The lack of any sounds coming from the room supported the inference that nothing was going on inside.

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

Molina-Gomes v. Welinski, 2012 U.S. App. LEXIS 8681, April 30, 2012

Police officers arranged for an undercover officer to make a payment to Molina-Campos for drugs he had supplied to an informant. As the officers moved in to arrest Molina-Campos, he attempted to drive away, dragging along the undercover officer and ramming an unmarked police car that blocked his path. Officer Welinski shot Molina-Campos with his service weapon and he died at the scene.

Molina-Gomes claimed that Officer Welinski violated Molina-Campos' *Fourth Amendment* rights by using excessive force in trying to arrest him. The court disagreed, holding that Officer Welinski was entitled to qualified immunity. The reckless driving by Molina-Campos in his attempt to escape was a danger to the arresting police officers and to any drivers on the roadway. When Molina-Campos sped backwards, he dragged the undercover officer along, knocking him to the ground. He then crashed into a police vehicle before driving around Officer Welinski's vehicle toward a public road. When Officer Welinski fired his weapon, he had probable cause to believe that Molina-Campos posed a threat of serious danger to the officers as well as to other motorists. Officer Welinski's use of force under these quickly evolving dangerous actions by Molina-Campos was objectively reasonable under the circumstances.

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

District of Columbia Circuit

Youngbey v. March, 2012 U.S. App. LEXIS 7630, April 17, 2012

Youngbey claimed that police officers violated his *Fourth Amendment* rights by planning and conducting a 4:00 a.m. search on a warrant that did not authorize a nighttime search and by breaking and entering into her home without first knocking and announcing their presence.

The court reversed the district court and held that the officers were entitled to qualified immunity because neither their no-knock entry into the home nor their nighttime search violated clearly established law.

The court held that the officers did not have to knock and announce before they entered Youngbey's house because of the exigent circumstances that existed at the time. It was not disputed that before their entry, the officers knew that the victim, Mallory, had died from multiple gunshot wounds and that Youngbey's son had confessed to killing him. Additionally, the warrant authorized the officers to search for the firearm used in the killing, believed to be an assault rifle, and the officers verified that Youngbey's son lived in the house.

Regarding the nighttime search, the warrant form authorized the officers "to search in the daytime / at any time of the day or night." The judge who issued the warrant did not cross out, circle or otherwise mark either "in the daytime" or "at any time of the day or night." The court held that there was no clearly established law under the *Fourth Amendment* that supported Youngbey's position that "no reasonable officer could have believed that the warrant authorized a nighttime search."

First, even though the timing of a search might affect its reasonableness, the *Fourth Amendment* does not specifically prohibit nighttime searches.

Second, there is no clearly established law under the *Fourth Amendment* prohibiting nighttime searches where the warrant is unmarked or silent as to the authorized time of execution.

Third, the language of the warrant here cannot be construed to authorize only a daytime search.

Finally, even if a District of Columbia law may have applied, which the court said it did not, its prohibition on nighttime searches was unclear.

The court concluded that there is no clearly established law under the *Fourth Amendment* that prohibits the nighttime execution of a warrant, where, as here, the warrant does not prohibit such a search.

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