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

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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 .

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In This Issue

Law Enforcement Case Granted Certiorari by the United States Supreme Court

Click Here

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Case Summaries

United States Supreme Court

Click Here

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Circuit Courts of Appeals

Click Here

1st Circuit 2nd Circuit 4th Circuit

5th Circuit 6th Circuit 7th Circuit

8th Circuit 9th Circuit 10th Circuit

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

Fourth Amendment / Detaining An Individual During the Exection of a Search Warrant

Bailey v. United States
Docket: 11-770

Issue: Under *Michigan v. Summers,* are police officers allowed detain an individual incident to the execution of a search warrant, when the individual has left the immediate vicinity of the premises before the warrant is executed?

Decision Below: *United States v. Bailey,* 652 F.3d 197 (2d Cir. 2011)
See: 8 Informer 11 for case brief.

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CASE SUMMARIES

United States Supreme Court

Reichle v. Howards, 2012 U.S. Lexis 4132, June 4, 2012

Howards brought suit against United States Secret Service Agents, claiming that he was arrested and searched without probable cause, in violation of the *Fourth Amendment*. Howards also claimed that he was arrested in retaliation for criticizing the Vice-President, in violation of the *First Amendment*.

The Tenth Circuit Court of Appeals held that the agents were entitled to qualified immunity for Howards' *Fourth Amendment* claim because they had probable cause to arrest him for making a materially false statement to a federal official in violation of *18 U.S.C. § 1001*. However, the Court of Appeals denied the agents qualified immunity on Howards' *First Amendment* claim.

The Supreme Court concluded that when the agents arrested Howards, it was not clearly established that an arrest supported by probable cause could give rise to a *First Amendment* violation. As a result, the agents were entitled to qualified immunity for allegedly violating Howards' First *Amendment* rights when they had probable cause to arrest him for committing a federal crime.

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

Click **HERE** for the case brief from the 10th Circuit Court of Appeals opinion.

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Circuit Courts of Appeals

1st Circuit

Marrero-Rodriguez v. Municipality of San Juan, 2012 U.S. App. LEXIS 9273, May 7, 2012

Officer Lozada died after he was shot in the back by another police officer during a training exercise. Lozada's wife brought suit under *42 U.S.C. § 1983*, claiming that the use of a loaded firearm in a training exercise violated her husband's rights under the *Fourteenth Amendment*.

The court reversed the district court, which had dismissed this portion of her lawsuit. The officer who shot Lozada was the highest-ranking supervisor present. He did not ensure that his firearm was unloaded before entering the training facility and he did not go through the required checkpoint, in violation of several training protocols. While watching the training, the supervisor said that it was not proper to merely subdue and control a suspect. Rather, he illustrated what he considered "proper" training by taking out his firearm, placing it in Lozada's back, while he was lying face-down on the ground, and discharging it. The court held that from these facts, a number of inferences may be drawn in favor of the plaintiff's *Fourteenth Amendment* claim that the officer's conduct was more than mere negligence, but rather rose to the conscience-shocking level.

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

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U.S. v. Valdivia, 2012 U.S. App. LEXIS 9876, May 16, 2012

Valdivia was part of a drug trafficking network based in Aruba that smuggled heroin into Puerto Rico. As part of their investigation, Aruban authorities obtained approval from an Aruban court to wiretap several telephones. The wiretaps captured several incriminating conversations between Valdivia and his co-conspirators. At trial, Valdivia argued the Aruban wiretaps violated his *Fourth Amendment* rights and that evidence discovered through them should have been suppressed.

The *Fourth Amendment's* exclusionary rule does not apply to foreign searches and seizures unless the conduct of the foreign police shocks the judicial conscience or the American law enforcement officers participated in the foreign search or the foreign officers acted as agents for the American officers.

Valdivia claimed that the American officers were working with the Aruban officers when the wiretap evidence was obtained. The court disagreed. First, Aruban authorities had already initiated their investigation into the drug trafficking network prior to the arrival of any American officers. Second, the wiretap was neither requested nor in any way organized or managed by the American officers. Third, the wiretap orders were sought from and approved exclusively by Aruban courts. Finally, only Aruban officers actively participated in the implementation of the wiretaps and the recording of conversations. American officers were not permitted to enter the recording room nor listen to the recorded conversations while the investigation was ongoing. It was only after the investigation had concluded that an American officer, through official channels, requested an authorized copy of the recordings for purposes of prosecution in an

American court. While American officers were present in Aruba during periods of the wiretap investigation, they were not active participants in the operation, they did not carry guns or badges, they did not retain the authority to make arrests and they often worked on other unrelated cases.

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

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Valentin v. Mueller, 2012 U.S. App. LEXIS 9877, May 16, 2012

While FBI agents executed a search warrant at an apartment, in connection with a terrorism investigation, more than a dozen reporters and protesters arrived to report on their activities. After the crowd became unruly, agents deployed pepper spray and then forcefully removed several individuals from the apartment complex.

The court held that the agents were entitled to qualified immunity, stating that the agents' actions were reasonable in light of the situation they faced. The agents were executing a warrant related to a terrorism investigation involving an organization known for violence and one that had been involved in a recent shoot-out with FBI agents. People in the crowd were yelling at the agents and the agents heard several people in the crowd discussing the use of violence against them. When the large group of people suddenly intruded into the complex, a reasonable agent could have believed that his security was seriously threatened. Given the perceived non-compliance by the crowd inside the complex, the previous verbal threats, the presence of FBI personnel, civilians, and evidence within the vicinity, and the serious concerns about maintaining control of the area, the agents reasonably could have concluded that the level of force that they used was appropriate.

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

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U.S. v. Jenkins, 2012 U.S. App. LEXIS 10431, May 23, 2012

The court held that the traffic stop that led to the officer finding the illegal firearm in Jenkins' car was supported by reasonable suspicion. When the officer saw a large blue disc behind the windshield of Jenkins's car, it was reasonable for him to suspect that Jenkins was in violation of Maine's law against civilian blue lights and conduct a traffic stop to get a better look at Jenkins' car.

Even though the officer eventually discovered that Jenkins did not have an illegal blue light in his car, by the time the officer made contact with Jenkins, he had established reasonable suspicion that Jenkins may be involved in other criminal activity. Jenkins did not immediately pull over after being signaled to do so by the officer and he reached in front of and behind the passenger seat as if he were hiding something. Jenkins gave the officer an implausible explanation for his furtive movements and he was not able to provide the officer with a valid driver's license. The officer had ample grounds for suspecting that Jenkins was trying to hide evidence of something unlawful such as illegal drugs or other contraband.

The court further held that the warrant obtained to search Jenkins' car was supported by probable cause. Additionally, the officers were not required to establish probable cause to search the car

for a specific type of contraband. It was sufficient that the warrant authorized the officers to search Jenkins's car for any illegal drug and weapons that may have been inside it.

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

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2nd Circuit

U.S. v. Williams, 2012 U.S. App. LEXIS 9988, May 17, 2012

Officers executed a search warrant on an apartment where they expected to find three men and ten firearms; however, they only found two men and four firearms. When an officer asked Williams, who was detained in handcuffs, who owned the four firearms, and he responded that he did. Williams refused to answer when the officer asked him about the other firearms and the missing individual. After the completion of their search, officers arrested Williams and took him to an interview room at the police station. After an officer advised Williams of his *Miranda* rights, he waived them and made several incriminating statements.

The court held that Williams' incriminating statements at the police station were admissible because the officer did not engage in a deliberate two-step interrogation. There was no evidence to suggest that the officer asked Williams about the ownership of the firearms, the location of the missing firearms or the third individual, in a way calculated to undermine the *Miranda* warnings given later at the police station.

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

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4th Circuit

U.S. v. Laudermilt, 2012 U.S. App. LEXIS 9072, May 3, 2012

Laudermilt's girlfriend called 911 and reported that Laudermilt was threatening her and her family with a gun at his house. Officers responded and met with the girlfriend outside the house where she told them that Laudermilt was inside with a gun. Officers apprehended Laudermilt when he came out of the house, but he was unarmed. As four officers entered the house to conduct a protective sweep, Laudermilt told them that the only person inside was his fourteen-year-old autistic brother. The officers located the brother and after they asked him if he knew where the gun was, he pointed to a rifle on a gun rack. The officers seized the rifle and completed their sweep within five minutes.

The district court suppressed the rifle concluding that the officers' justification for the protective sweep had ended by the time they seized the rifle because, by that time, all of the occupants in the house had already been secured.

The court disagreed with the district court's ruling that the officers' justification for the protective sweep ended after the officers discovered Laudermilt's brother.

When the officers began their sweep, there was conflicting information about how many occupants might be inside the house. The officers were not required to accept Laudermilt's word that the only person in the house was his brother. Under these circumstances, the court held that

the protective sweep was not complete the moment the officers located Laudermilt's brother and that the officers were entitled to sweep the entire house.

Alternatively, the court noted that even if the sweep should have ended after Laudermilt's brother was secured, the seizure of the rifle would have been lawful. Laudermilt's brother was a fourteen-year-old special needs child and it was reasonable for the officers to remain with him in the house until his mother arrived home. It was also reasonable for the officers to ask him about the location of any firearms to ensure the home was safe.

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

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U.S. v. Jones, 2012 U.S. App. LEXIS 9513, May 10, 2012

Two police officers in a marked patrol car followed Jones' car from a public road onto a private driveway in an apartment complex. When Jones pulled his car into a parking space, the officer parked the cruiser so Jones' car was blocked from leaving the driveway. The officers had not witnessed any traffic violations and the only suspicious activity they observed was the car, with out-of-state tags, being in a high-crime neighborhood. The officers testified that this caused them to believe that the occupants of the car, four African-American men, were involved in drug trafficking. After Jones got out of his car, the officers approached him and asked him to lift his shirt, which he did. The officers then asked him to consent to a pat-down search, which he did. The officers eventually arrested Jones for driving with a revoked license and discovered a handgun in his pants during a subsequent pat-down.

The court held that the when the officers made contact with Jones, it was not a consensual encounter, but rather a *Fourth Amendment* seizure that was not supported by reasonable suspicion or probable cause. The officers, in a marked patrol car, without having observed a traffic violation, blocked Jones' car from leaving the driveway. When they approached Jones, they did not ask if they could speak to him, instead they immediately asked him to lift his shirt and then asked him to consent to a pat-down. Under these circumstances, a reasonable person would not have felt free to walk away and ignore the officers' requests. As a result, the firearm that the officers discovered should have been suppressed.

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

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5th Circuit

U.S. v. McKinnon, 2012 U.S. App. LEXIS 7806, May 8, 2012

An officer stopped the car McKinnon was driving because it had an expired registration sticker. The officer arrested McKinnon after he could not produce a valid driver's license. Based on the Houston Police Department's (HPD) towing policy, the officer ordered the car to be towed. During the inventory search, the officer found a handgun under the driver's seat.

The Supreme Court has recognized that the police may seize vehicles without a warrant in furtherance of their community caretaking function. This usually occurs when officers impound damaged or disabled vehicles or vehicles that violate parking ordinances or impede the flow of

traffic. As long as an officer's decision to impound a vehicle for community caretaking purposes is reasonable, it will not violate the *Fourth Amendment*.

Here, the court held that the officer's decision to have the car towed was reasonable under the *Fourth Amendment*. It was undisputed that the neighborhood in which the stop occurred had experienced a series of burglaries. Although these were house burglaries, there was nothing to suggest that the vehicle would not have been stolen or vandalized if left parked and locked at the scene. By impounding the car, the officer ensured that it was not left on a public street where it could have become a nuisance or where it could have been stolen or damaged.

In addition, while one of the passengers possessed a valid driver's license, the car's registration sticker was expired, so it could not have been lawfully driven away from the scene.

Finally, the HPD tow policy provides for the towing of vehicles when the owner is not able to designate a tow operator to remove the vehicle and no other authorized person is present. The registered owner of the vehicle was not present to designate a tow operator and there was nothing to suggest that she had authorized either of the two passengers, who were present, to operate her car.

The court further held that HPD's inventory search policy was constitutional. By its clear terms, the policy is consistent with preserving the property of the vehicle's owner while ensuring that the police protect themselves against claims or disputes over lost or stolen property and protecting the police from danger.

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

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6th Circuit

Clemente v. Vaslo, 2012 U.S. App. LEXIS 9746, May 15, 2012

Clemente and six other plaintiffs were city employees who were terminated after the City determined that they had tampered with their water meters. The plaintiffs claimed that their *Fourth Amendment* rights were violated when city officials, to include a police officer, came to their homes to inspect their water meters.

The court held that the city officials were entitled to qualified immunity because they did not coerce the plaintiffs to provide them access to the water meters by threatening them with dismissal. Rather, to gain access to the water meters, the city officials acted pursuant to a sliding scale. First, they asked permission to enter the plaintiffs' homes to inspect the water meters. If denied access, they informed the plaintiffs that a city ordinance gave them the right to inspect the meter. If they were still denied access, a direct order was given by the plaintiffs' supervisor to show them the meter. Where a plaintiff continued to refuse access, the city officials respected his *Fourth Amendment* rights and left. The city officials acted on a gradient, applying more pressure at each step to obtain consent and they never forced the plaintiffs to choose between letting them into their homes or losing their jobs.

The court further held that the plaintiffs were terminated for cause and not in retaliation for asserting their *Fourth Amendment* rights.

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

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U.S. v. Stepp, 2012 U.S. App. LEXIS 9883, May 17, 2012

The court ruled that during the initial traffic stop for license plate and brake light violations, the officer established independent reasonable suspicion to believe that Stepp and the driver were involved in drug trafficking. Stepp and the driver both had prior criminal histories concerning illegal drugs. They each gave the officer a vague explanation of their travel plans and both men appeared nervous. The officer lawfully expanded the scope of the traffic stop to question Stepp and the driver about matters unrelated to reason for the initial stop and to allow for the dog sniff.

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

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7th Circuit

American Civil Liberties Union of Illinois v. Alvarez, 2012 U.S. App. LEXIS 9303, May 8, 2012

The court ordered the district court to enter a preliminary injunction prohibiting the State's Attorney from applying the Illinois eavesdropping statute against the American Civil Liberties Union (ACLU) and its employees or agents who openly audio record the audible communications of law enforcement officers, or others, when the officers are engaged in their official duties in public places.

The court noted that Illinois has criminalized the non-consensual recording of most oral communications, including recordings of public officials doing the public's business in public, regardless of whether the recording is open or surreptitious. The court further commented that the Illinois eavesdropping statute restricts far more speech than necessary to protect legitimate privacy interests and as applied in this case it likely violates the *First Amendment's* free-speech and free-press guarantees.

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

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U.S. v. Johnson, 2012 U.S. App. LEXIS 10468, May 24, 2012

Police officers obtained a search warrant for Johnson's apartment. While conducting surveillance on the apartment, officers saw Johnson get in his car and drive away. An officer performed a traffic stop and detained Johnson because of the pending execution of the search warrant. The officer requested Johnson's driver's license and registration, had him get out of his car and while conducting a pat-down for weapons he asked Johnson, "Do you have anything on you you shouldn't have?" Johnson replied that he had marijuana in his shoe, which the officer recovered after placing him in handcuffs.

The court held that Johnson would have believed that he was being pulled over for a routine traffic stop. Individuals subject to routine traffic stops are not considered to be in-custody for *Miranda* purposes. In addition, even though Johnson made the incriminating statement while the

officer was frisking him, the court held that individuals, who are subject to a frisk, are not automatically in-custody for *Miranda* purposes. In this case, no weapons were drawn, Johnson was not told he was under arrest, he was not handcuffed, the encounter occurred on a public roadway and there was no other display of force or physical restraint. Based on the totality of the circumstances, the court held that prior to Johnson's incriminating statement, a reasonable person in his position would have felt free to leave, and as a result, he was not in custody for *Miranda* purposes.

After Johnson was transported back to his apartment, an officer read a copy of the search warrant to him. Johnson told the officer that anything they found in the apartment belonged to him and not his girlfriend. Although Johnson was in custody at the time, the court held that his statement was spontaneous and unsolicited and not the result of express questioning; therefore, there was no *Miranda* violation. The court further held that the officer's reading of the search warrant to Johnson was not designed to elicit an incriminating response from him; therefore, it was not the functional equivalent of questioning. By reading the warrant aloud, the officer informed Johnson of the items officers had probable cause to search for in his apartment, which advised him of potentially incriminating evidence that could be used against him. There was nothing to indicate that reading the search warrant aloud would prompt Johnson to voluntarily confess to owing everything in the apartment in order to protect his girlfriend. This holding is consistent with decisions from the 1st, 4th and 9th circuits.

Finally, the court held that Johnson's confession at the police station, after he had been read his *Miranda* warnings, was not tainted by the officer's conduct in obtaining either of his prior incriminating statements. Johnson claimed that the officer intentionally failed to provide him *Miranda* warnings, hoping to get a confession, which he could get Johnson to repeat after being provided with *Miranda* warnings at the police station. While noting that the Supreme Court has rejected this question-first-warn-later tactic, the court reiterated that at no time prior to his interrogation at the police station was Johnson subject to a custodial interrogation where he was required to be provided *Miranda* warnings.

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

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8th Circuit

U.S. v. Seidel, 2012 U.S. App. LEXIS 8807, May 1, 2012

The court held that there was sufficient evidence to establish probable cause for the issuance of a search warrant for Seidel's house and garage. First, members of the Narcotics Task Force conducted a trash pull at Seidel's home. Second, officers discovered in the trash nine spiral-bound notebook pieces of paper that had ledgers on them. Based on his training and experience, an officer testified that those pieces of paper were pay-owe sheets used to keep track of drug sales. Third, the officers recovered improperly disposed syringes in the trash, which is indicative of illegal drug use. Finally, the an officer recovered a metal paper clip with marijuana residue on it from the trash and testified that paper clips are commonly used to clean out marijuana pipes. This evidence suggested that criminal drug activity was occurring at Seidel's house and was sufficient for a finding of probable cause.

The court further held that the officer's sworn, oral testimony, recorded by the judge was sufficient to support the issuance of the search warrant. Seidel did not cite any state or federal law providing that the officer had to provide a written affidavit in lieu of recorded, sworn oral testimony.

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

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Shekleton v. Eichenberger, 2012 U.S. App. LEXIS 9041, May 3, 2012

The court held that Officer Eichenberger was not entitled to qualified immunity for deploying his taser against Shekleton.

The court stated that a reasonable officer would not have believed that an argument had occurred between Shekleton and Rausch, when he saw them talking to each other on the sidewalk, outside the bar, as he drove past. By the time Eichenberger returned to the scene, Rausch had gone inside the bar and Shekleton was leaving the area. Shekleton told Eichenberger repeatedly that he had not been arguing with Rausch. Shekleton then complied with Eichenberger's orders to step away from the street, did not behave aggressively towards him and he did not direct obscenities toward Eichenberger or yell at him. When Eichenberger told Shekleton to place his arms behind his back, Shekleton told him that he could not physically do so. Shekleton's disability was well known in the community and Eichenberger testified that he was aware of it. Although Eichenberger and Shekleton fell apart from each other when Eichenberger tried to handcuff him, Shekleton did not resist and did not intentionally cause the two to break apart. Under these facts, Shekleton was an unarmed suspected misdemeanant, who did not resist, did not threaten the officer did not attempt to run from him and did not behave aggressively towards him. A reasonable officer would not have deployed is taser against Shekleton under these circumstances.

The court then held that general constitutional principles against excessive use of force were clearly established at the time of the incident between Eichenberger and Shekleton sufficient to put a reasonable officer on notice that tasering Shekleton under these circumstances was excessive force in violation of the clearly established law.

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

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Burke v. Sullivan, 2012 U.S. App. LEXIS 9042, May 3, 2012

The court held that the officers were entitled to qualified immunity for entering Burke's house without a warrant and detaining her for less than two minutes.

Based on the facts known to the officers at the time, it was reasonable for them to believe their warrantless entry into Burke's home was lawful under either the emergency aid exception or the community caretaker exception.

Burke's son, Jay, had become highly intoxicated and he refused to leave a neighbor's party. He would not cooperate with Burke when she tried to take him home, was verbally abusive toward her and he forcefully pushed her against a wall. Jay was then involved in a fight with one of the other party guests, seriously biting him. Jay finally left the party and went to Burke's house

across the street just before the officers arrived. There was no response when the officers attempted to contact Burke by knocking on her door, shouting, shining a flashlight inside and telephoning the residence. The officers reasonably believed that Burke was now in the home alone with a violent suspect. When viewed together, these facts could lead a reasonable police officer to conclude there was either a threat of violence or an emergency requiring attention and that it was reasonable to believe that a warrantless entry into Burke's home was lawful.

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

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U.S. v. Boe, 2012 U.S. App. LEXIS 9227, May 7, 2012

Boe claimed that his post-arrest statements to a Secret Service agent should have been suppressed because his *Miranda* rights waiver was not voluntary, knowing and intelligent. Specifically, Boe argued that he was not fully aware of the nature of his rights and the consequence of his decision to give up those rights. Boe made an unrecorded oral statement to the agent but he refused to provide a written statement. Boe claimed that this refusal established that he believed the legal consequences of a written statement differed from those of an oral statement.

The court disagreed. A defendant may have any number of reasons for refusing to provide a written statement, but that refusal does not establish that he misunderstood the consequences of waiving *Miranda* rights. To the contrary, in this case, the agent told Boe, "anything you say can be used against you in court," and Boe responded that he understood.

Boe also claimed that he was a Liberian national for whom English was not a primary language and that he was unfamiliar with the criminal justice system in the United States. The court noted, however, that Boe spoke English during the entire interview and that the agent had no problem understanding him. There was no evidence that Boe had a limited ability to read, speak or understand English. After the agent advised Boe of his *Miranda* rights, no further knowledge of the criminal justice system was required to demonstrate a valid waiver of those rights.

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

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Hemphill v. Hale, 2012 U.S. App. LEXIS 9483, May 10, 2012

Hemphill claimed that Officer Hale choked him and hit him with his fists in the ribs after he refused to sign a consent-to-search form for his apartment. Hale claimed that he was entitled to qualified immunity because Hemphill's injuries were minimal and that it was not clearly established at the time of the incident that an officer could be liable under the *Fourth Amendment* when the plaintiff suffered only de minimis injury.

The court disagreed. Officers do not have the right to use any degree of physical force or threatened force to coerce an individual to consent to a warrantless search of his home. Because no use of force to obtain Hemphill's consent to search would have been reasonable, the force Hale was alleged to have used – grabbing Hemphill by the neck, choking him, and hitting him two or three times while he was handcuffed – was objectively unreasonable. The law regarding

forced consent was clearly established at the time the incident to the extent that a person in Hale's position would have known that his actions were unreasonable.

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

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U.S. v. Mendoza, 2012 U.S. App. LEXIS 9673, May 14, 2012

Mendoza claimed that the officer unlawfully seized him after he conducted a traffic stop without probable cause. Mendoza claimed that the officer's in-court testimony concerning his alleged traffic violations was not credible because the officer's incident report stated that Mendoza made "random turns and stops," but did not describe any specific violations of the traffic code. The court noted that the trial judge found the officer's testimony that he observed "traffic violations," including "not signaling" and "driving in other lanes of traffic" to be credible. This testimony was consistent with the officer's report and believable, so the trial judge was entitled to accept it.

After the stop, the court held that it was reasonable to detain Mendoza for twenty to twenty-five minutes, while the officers waited for a translator to arrive, so they could determine if Mendoza was using a false identification. While waiting for the translator to arrive, the drug-sniffing dog alerted to the presence of drugs in Mendoza's car. The dog-sniff was lawful because it did not extend the scope or duration of the initial traffic stop. Consequently, the drug-dog's alert gave the officers probable cause to detain Mendoza further and to search his car.

Finally, at the conclusion of the traffic stop, the court held that Mendoza voluntarily consented to a search of his house when he escorted the officers back to it and let them inside. Even though Mendoza did not verbally consent to the search of his house and did not sign the consent-to-search form, his gestures and body language indicated his consent. Additionally, the officers did not use force, coercion, intimidation or deception to gain Mendoza's consent.

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

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9th Circuit

U.S. v. Cervantes, 2012 U.S. App. LEXIS 9843, May 16, 2012

The court held that the officer's conclusory statement that the box in Cervantes's car came from a "suspected narcotics stash house," and his observation that Cervantes "did not take a direct route to his location," were not sufficient to establish probable cause to conduct a warrantless search of Cervantes's car under the automobile exception to the *Fourth Amendment's* warrant requirement.

First, the officer failed to provide any facts as to why he or any other officer suspected that the house was a "narcotics stash house." Next, much of the driving behavior exhibited by Cervantes was consistent with innocent travel and the officer did not observe Cervantes employ any specific counter-surveillance techniques. Finally, had the officer had probable cause, there would have been no need for him to radio a marked patrol car and have other officers follow Cervantes in over to develop an independent reason to pull him over.

The court then held that the seizure and subsequent inventory search of Cervantes's car was not justified by the community caretaking exception to the *Fourth Amendment's* warrant requirement. Under the community caretaking exception, police officers may impound vehicles that jeopardize public safety and the efficient movement of traffic. Neither officer provided testimony that Cervantes's car was parked illegally, posed a safety hazard, nor was vulnerable to vandalism or theft. Although Cervantes's car was not located close to his home when the officers impounded it, there was no evidence that it would have been vulnerable to vandalism or theft if it were left in its residential location or that it posed a safety hazard. The court concluded that seizure and inventory search of Cervantes's car was a pretext for an investigatory search for evidence of narcotics trafficking.

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

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U.S. v. Perea-Rey, 2012 U.S. App. LEXIS 10941, May 31, 2012

Border Patrol agents watched a man, later identified as Pedro Garcia, climb over the Mexico-United States border fence and followed him as he took a taxi to Perea-Rey's home. An agent watched Garcia walk through the gated entrance into the yard and knock on the front door. Perea-Rey answered the door, spoke to Garcia and gestured towards the carport that was attached to the side of the house. The agent entered the property, walked along the front of the house, past the front door, and into the carport where he confronted Perea-Rey and Garcia. The agent told Perea-Rey and Garcia to remain where they were until other agents arrived. When the other agents arrived, they arrested Garcia and surrounded the house. After Perea-Rey refused consent to search the house, an agent knocked on the side door, identified himself as a border patrol agent, and commanded everyone to come out of the house. Six men came out of the house and were eventually arrested for being undocumented aliens. After learning that there was a seventh man inside, the agents searched the house and arrested him. Perea-Rey was charged with harboring undocumented aliens.

First, the court agreed with the district court, holding that the carport, which the agents occupied, was part of the curtilage of Perea-Rey's house, therefore, it is afforded the same *Fourth Amendment* protections as Perea-Rey's home. In addition, the ability to observe part of the curtilage does not authorize police officers to enter those areas without a warrant, consent or an exception, to conduct searches or seizures. Here, the agents could lawfully observe the curtilage from the sidewalk and could have use those observations to apply for a warrant.

Second, the court held that the district court incorrectly ruled that the agents did not violate Perea-Rey's *Fourth Amendment* rights when they entered the carport without a warrant. Citing *U.S. v. Jones*, the court noted "warrantless trespasses by the government into the home or its curtilage are *Fourth Amendment* searches" and that searches and seizures in the curtilage, without a warrant are presumed to be unreasonable.

The government argued that the agents were entitled to enter the curtilage to conduct a knock-and-talk interview with Perea-Rey. While the court agreed that police officers are allowed to approach a home to contact individuals inside, in this case, the evidence did not support the agent's position that he agents entered Perea-Rey's property to initiate a consensual encounter with him. The court concluded that it was not objectively reasonable, as part of a knock-and-talk, for the agent to bypass the front door, which he had seen Perea-Rey open in response to a

knock by Garcia, and intrude into an area of the curtilage where an uninvited visitor would not be expected to appear. By trespassing onto the curtilage and detaining Perea-Rey, the agent violated Perea-Rey's *Fourth Amendment* rights and the district court should have suppressed the evidence obtained as a result of the warrantless search.

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

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10th Circuit

U.S. v. Diaz, 2012 U.S. App. LEXIS 9337, May 8, 2012

Diaz was convicted of knowingly leaving the scene of a car accident where she hit and killed a pedestrian. The accident occurred on the Pojoaque Pueblo Indian reservation. She was charged with committing a crime in Indian Country under the General Crimes Act, *18 U.S.C. § 1152*. The federal government may prosecute an individual under *§ 1152*, if the accident occurred in Indian Country and the victim or perpetrator was non-Indian.

Diaz argued that the federal government lacked jurisdiction to prosecute her because the government failed to prove the victim was not an Indian, as required by *§ 1152*.

The court disagreed and held that the government had presented sufficient evidence to establish the victim's non-Indian status. First, the victim's father testified that during college he had researched his family genealogy, going back several hundred years, and that neither he nor his wife had any Native American or Indian background. Second, the victim's father also testified that his son was never enrolled in any tribe or pueblo and had not associated himself with any tribe or pueblo, other than his job at a casino. The court noted that while additional DNA evidence might have been helpful, its absence did not undercut the testimony of the victim's father going back generations. In addition, the court stated that the government did not have a duty, as Diaz argued, to bring forth tribal officials to disprove the victim was a member of their tribes.

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

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