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Confrontation Clause Developments and Their Impact on Effective Investigation and Prosecution: One Step Forward After Two Steps Back?

Part 3 of 3

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In part two, (see 1 Informer 12), we discussed *Michigan v. Bryant.* In that case, the Supreme Court identified characteristics of an out-of-court statement made by a declarant[1] that can result in a trial judge finding that it was not taken to preserve testimony. That finding means the statement can be admitted through the in-court testimony of a witness.

Drawing upon *Bryant*, we also pointed out some practical steps that investigators can take to:

1. Ensure declarants can be found for trial;

2. Corroborate a declarant's statement so that other evidence is available to prove the contents of her statement if her statement is not admitted; and

3. Record and highlight for prosecutors those aspects of how the declarant's statement was taken as well as the statement's actual contents to support the prosecutor's argument that the statement is nontestimonial and, hence, admissible.

This month we look at a parallel series of cases that followed from *Crawford.* The latest was decided by the Supreme Court on June 18, 2012. In these cases, the Confrontation Clause has been used by defense counsel to block admitting forensic crime-lab results unless the technician who ran the tests appears and testifies in the trial.

However, before turning to the crime-lab cases, one further point about the cases we have already discussed needs to be made. When the declarant has talked to someone besides the police or other government officials, her statement will seldom be deemed testimonial and, hence, inadmissible. Following-up on the standard question, "Who else have you talked to about this?" may produce an in-court witness with testimony, which survives a Confrontation Clause objection. Unfortunately, there is a catch. The catch is that it will be more difficult for prosecutors to overcome a hearsay objection. Now let's look at the crime-lab cases.

Crime Labs and Confrontation: *Melendez-Diaz v. Massachusetts*.[2] Caught selling 4 bags of cocaine to a K-Mart employee in the parking lot, Luis Melendez-Diaz was arrested and taken to the station in a squad car along with his partner and customer. Alerted by the odd movements of their backseat passengers, the police found 19 more bags of cocaine unsuccessfully hidden in the screen between the front and back seats of the squad car. All 23 bags went to the crime lab. The crime lab sent back three "certificates of analysis." According to the certificates, all 23 bags

[1] The "declarant" is the person who made a statement out-of-court which the prosecutor is trying to present through the testimony of the "witness," who does so by testifying what they heard the witness say.
[2] 557 U.S. 305, 129 S.Ct. 2527 (2009).

contained cocaine. Although defense counsel objected that *Crawford v. Washington* barred admission of the certificates, they were admitted. Luis was convicted.[3]

The Supreme Court Appeal of Melendez-Diaz. Luis's appeal reached the Supreme Court, closely watched by drug prosecutors throughout the United States. After all, proving content and weight of controlled substances solely through lab certificates was routine practice in both federal and military courts as well as in the great majority of state courts.

Were the certificates testimonial and, hence, inadmissible unless the technician either appeared at trial or were both unavailable for trial and previously available for cross-examination? The Supreme Court split 5-4 and issued its opinion at the end of its term in June 2009. Justice Scalia, writing for the majority, began by noting, "The *sole purpose* of the [certificates] was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance."[4] From there, the holding was predictable:

> This case involves little more than the application of our holding in *Crawford* v. *Washington* [citation omitted]. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.[5]

Absent defense agreement or stipulation, the government could no longer merely introduce written lab results in criminal cases. The technician who ran the test and prepared the report had to testify and face cross-examination.

The Supreme Court Follows *Melendez-Diaz*. In 2010 and 2011, the Supreme Court made the same point in two more cases, *Briscoe v. Virginia*[6] and *Bullcoming v. New Mexico.*[7]

***Briscoe v. Virginia*.**[8] In a terse two-sentence opinion, the Supreme Court rejected a Virginia statutory scheme, which like many other jurisdictions, had been crafted to balance confrontation concerns and efficiency. Under the scheme, written lab certificates were filed with the court and provided to defense before trial. If defense counsel objected to using the written lab certificate, the prosecutor was required to produce the technician at trial so that she could be cross-examined.[9] The Court apparently found, however, that this did not go far enough to protect the defendant's 6th Amendment right of confrontation and mandated adherence to *Melendez-Diaz*.

***Bullcoming v. New Mexico*.**[10] Like so many Supreme Court cases, *Bullcoming* begins with the most ordinary of facts. Donald Bullcoming rear-ended a pickup truck in New Mexico in August 2005. He left on foot, was promptly caught, failed field sobriety tests, refused a breathalyzer, and provided a blood sample at a hospital after a warrant was obtained. The sample was sent to the crime lab, and a technician named Caylor determined that the blood alcohol content was .21 gm/100ml[11].

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[3] 129 S.Ct. at 2530-2531.
[4] 129 S.Ct. at 2532.
[5] 129 S.Ct. at 2542.
[6] 130 S. Ct. 1316 (2010).
[7] 131 S. Ct. 2705 (2011).
[8] 130 S. Ct. 1316 (2010). As reported in Virginia proceedings after remand, the certificate established that the case involved more than an ounce of cocaine. *Cypress v. Commonwealth*, 280 Va. 305 (Va. 2010).
[9] *Va. Code Ann.* §§ 19.2-187, 19.2-187.1
[10] 131 S. Ct. 2705 (2011).
[11] 131 S. Ct. at 2710.

The case went to jury trial in November 2005 (after the Supreme Court's decision in *Crawford* but before its decision in *Melendez-Diaz*). The prosecution announced that instead of calling Caylor, they would use the testimony of another crime-lab technician named Razatos. The reason was that Caylor was on "unpaid leave" for undisclosed reasons. Despite defense counsel objection based on the Confrontation Clause, Razatos was able to testify.[12] Bullcoming, despite his testimony[13], was convicted of aggravated drunk driving. His appeal reached the New Mexico Supreme Court after *Melendez-Diaz*, but that court, despite finding that Caylor's report was testimonial, deemed it admissible through Razatos. Two reasons were offered. First, Caylor had been "a mere scrivener who simply transcribed the results generated by a gas chromatograph machine."[14] Moreover, because Razatos was familiar with the BAC testing equipment and protocol, he could be cross-examined on those points.[15]

The Supreme Court found these two reasons unpersuasive. Technicians do more than write down a machine's results. For each test, they prepare the sample, calibrate the machine, and perform other tasks, all of which contain the potential for error. Those errors could not be discovered and exploited by cross-examining another expert who had not tested Bullcoming's blood. Adopting an earlier defense argument, the Court analogized the situation to traffic officers using a radar gun. Even if the officer who testifies in court is trained and certified on the device, he is no substitute for the officer who calibrated the device and pointed it at the speeder's car.[16]

In addition, perhaps critically, this case carried the additional defense counsel bonus of the credibility cloud that his unpaid leave status cast over Caylor. "With Caylor on the stand, Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor's removal from his work station." Substituting Razatos for Caylor (the Court called this using "surrogate testimony") allowed the prosecution to make this cloud go away.[17]

There was one bright spot for prosecutors. The Court leapfrogged its apparent earlier rejection in *Briscoe* of the Virginia statutory scheme. That scheme (which the Court called "notice-and-demand procedures") required prosecutors to notify defense counsel before if they planned to use only the written lab report and then gave defense counsel the right to demand that the expert appear and testify in court. The Court returned to *Melendez-Diaz* to observe that such schemes "permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report."[18]

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[12] 131 S. Ct. at 2711-2712.

[13] "Defendant testified that he had not been drinking for about ten hours that day. He said that he was driving because the others in the vehicle had been drinking and were drunk…. Defendant further testified that he left the scene after the other driver told him that the police had been called because he was afraid that he was going to be arrested. Defendant knew he had an outstanding warrant because he had violated his probation in Oklahoma by leaving that state. He walked to a creek where he met other men who were drinking vodka, and he testified that he drank with them for about thirty minutes and that they drank about a pint and a half gallon. He was picked up by the police when he returned to the road. He was intoxicated when he was given field sobriety tests back at the scene of the accident." *State v. Bullcoming*, 144 N.M. 546, 548-549 (N.M.Ct.App. 2008).

[14] *State v. Bullcoming*, 226 P.3d 1, 4 (N.M. 2010).

[15] 226 P.3d at 9.

[16] 131 S.Ct. at 2713-2714.

[17] 131 S.Ct. at 2715.

[18] *Quoting and citing Melendez-Diaz*, at 129 S.Ct. 2527, 2540-41.

Putting Together *Melendez-Diaz, Briscoe,* and *Bullcoming*. All three cases turn on the same trial issue. The analyst at the end of the chain of custody of the specimen− let's call that analyst the capstone witness− never came to court. No matter what the prosecution tried to use instead− a certificate the analyst produced (*Melendez-Diaz* - cocaine), statutory notice-and-demand procedures (*Briscoe* - cocaine) or another lab analyst familiar with the general drill (*Bullcoming* - blood alcohol content) − convictions were reversed. Read together, these cases send an unmistakable message to prosecutors: Produce the capstone witness for cross-examination at trial.

The Latest Crime-Lab Case: *Williams v. Illinois*.[19] The three cases already discussed reversed relatively minor convictions for drunk driving and street-level drug dealing. Those cases all involved a single sample and the failure to produce the capstone witness for trial. Decided June 18, *Williams* was different. The crimes were far more serious; instead of a single sample, the capstone witness testified about how she matched two samples; and the defense attack centered on the prosecutor's failure to produce one of the analysts who developed one of the samples. In *Williams*, the Supreme Court strained to sustain a conviction for kidnapping, repeated rape and robbery in the face of the logic laid down in its three earlier cases. It was one thing to reverse the convictions of a drunk driver and two petty drug dealers. It was another to free a rapist who had been sentenced to "two concurrent terms of natural life imprisonment for the [rape] counts; a consecutive term of 60 years' imprisonment for the aggravated kidnaping count; and a concurrent term of 15 years' imprisonment for the aggravated robbery count."[20]

***Williams v. Illinois*: The Facts.** A young woman was kidnapped, raped and robbed by a stranger as she walked home from work in Chicago in February 2000. A hospital promptly took a vaginal swab from the victim, which ultimately reached a contract laboratory [Cellmark]. Cellmark found semen in the specimen, developed a DNA profile from it, and returned a report to an Illinois state DNA analyst [Lambatos]. Lambatos ran a search of the state's database and got a hit on Williams' DNA profile drawn from a known sample taken following Williams' arrest for another crime in August 2000. The victim picked him out of a lineup.

***Williams v. Illinois*: The Trial.** The trial was conducted before a judge without a jury. The prosecutor used the witness who had developed the known sample taken from Williams following his arrest in August. Lambatos then testified extensively about how she had matched the known sample from Williams to the sample developed by Cellmark from the victim's vaginal swab. Not only was there a match− Lambatos testified, "That the probability of the profile's appearing in the general population was" between 1 in 8.7 quadrillion and 1 in 390 quadrillion[21] depending on the race of the individual. What was missing? The Cellmark analyst who developed the DNA profile from the victim's vaginal swab did not testify, denying defense counsel the chance to cross-examine him. Instead, Lambatos provided the Cellmark information as the basis for her expert opinion that there was a match. The trial judge, noting that the absence of the Cellmark witness went to the weight or persuasiveness of Lambatos's testimony concerning Cellmark's development of the DNA profile rather than to its admissibility, convicted Williams on all counts.

[19] 2012 U.S. LEXIS 4658 (U.S. June 18, 2012).
[20] *People v. Williams*, 385 Ill. App. 3d 359, 360 (Ill. App. Ct. 1st Dist. 2008).
[21] There are about 7 billion people on earth. One quadrillion is a million times greater than one billion.

***Williams v. Illinois*: The Supreme Court Appeal.** The court split 5 – 4 on the result. Justice Alito wrote the plurality opinion, giving the reasoning for four of the justices [Chief Justice Roberts and Justices Kennedy, Breyer and Alito] who supported the conviction. Justice Thomas supported the conviction for his own reasons. Justice Kagan wrote the dissenting opinion for the four justices [Justices Scalia, Ginsburg, Sotomayor, and Kagan] who would have reversed the conviction.

So if the conviction stands, what's not to like? In a nutshell, both the plurality's and Justice Thomas's reasons for excusing the lack of opportunity for defense counsel to cross-examine the Cellmark analyst are not compelling, and the reasons depend largely on facts specific to the *Williams* case. Few prosecutors will read *Williams* as providing a way to finesse an absent expert witness. Most will be unwilling to proceed unless all witnesses are available to testify.

The Crime-Lab Cases: Lessons for Investigators. Two lessons emerge. First, positive crime-lab results are not one-shot-one-kill silver bullets. When capstone witnesses do not appear for trial, crime-lab results are inadmissible.

Second, given this reality, solid investigations producing an abundance of corroboration remain key. Corroboration works three ways when crime-lab witnesses are absent. One in a great while, the corroboration might be strong enough to support a verdict or confession even in the absence of the crime-lab result. Slightly more often, an abundance of corroboration that the defendant is in fact guilty may help persuade a judge to grant the prosecution a continuance to allow the substance to be re-tested by an analyst who will be available to testify. Finally, if the crime-lab result is admitted as in *Williams*, corroboration may help sustain a conviction on appeal. Corroboration in the form of the victim's identification of Williams in a pretrial line-up provided the Supreme Court a way to justify sustaining his conviction.

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CASE SUMMARIES

United States Supreme Court

Williams v. Illinois, 2012 U.S. Lexis 4658, June 18, 2012

A private laboratory developed a DNA profile of the perpetrator in a sexual assault from evidence sent to them by the Illinois State Police. The police matched the DNA profile from the private lab with a DNA profile belonging to Williams that was already in the state's DNA database. At trial, the prosecution did not call the technician from the private lab that developed the DNA profile of the perpetrator. Instead, the prosecution called a DNA analyst from the state lab, who testified as an expert witness. The analyst described Williams' DNA profile that was in the state's DNA database and how, in her opinion, it matched the DNA profile developed by the private lab. Williams claimed that his rights under the *Confrontation Clause* were violated because he did not have the opportunity to cross-examine the DNA analyst from the private lab.

While five justices agreed with the Supreme Court of Illinois, which held that, there was no *Confrontation Clause* violation in this case, only four justices agreed as to the reason. Writing

for the plurality, Justice Alito held that out-of-court statements, such as the private lab report, that are referenced by the expert witness solely for explaining the assumptions on which that witness' opinion rests, are not offered for their truth and therefore fall outside the scope of the *Confrontation Clause*. In addition, even if the private lab report had been admitted into evidence there would have been no *Confrontation Clause* violation. The report was produced before any suspect was identified and it was not sought for the purpose of obtaining evidence against Williams, who was not under suspicion at the time, but for the purpose of finding a rapist who was still at-large.

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

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Circuit Courts of Appeals

1st Circuit

U.S. v. Farlow, 2012 U.S. App. LEXIS 11121, June 1, 2012

While in an online chat room, Farlow sent explicit messages to an undercover police officer who was posing as a fourteen-year-old child. Farlow proposed meeting for sex and sent the undercover officer a non-pornographic image of a bodybuilder, claiming it was an image of himself. Officers executed a search warrant on Farlow's computer for evidence related his online chats with the undercover officer, to include the bodybuilder image. During this search, the officers discovered several images of child pornography. The officers sought and obtained a second search warrant specifically for child pornography and discovered over three thousand such images.

Farlow argued that the officers did not have probable cause to search for any electronic image other than the single bodybuilder image; therefore, all the evidence seized from his computer, from both warrants, should have been suppressed.

The court disagreed, holding that the affidavits in support of the first search warrant established a fair probability that Farlow's computer and other digital devices contained more evidence than just the bodybuilder image. Farlow could have saved transcripts or screenshots of his sexual solicitation chats with the undercover officer and he could have stored them on any form of digital media.

Farlow also argued that officers should have employed a limited search for the bodybuilder image by using the image's hash value. He claimed that the image's hash value would have led the officer's to that specific image and its precise location on the computer and as a result, they would not have discovered the images of child pornography.

Again, the court disagreed, holding that the search warrant did not need to be so narrowly drafted. The court noted that specific identifying information, such as hash values, could be mislabeled; a file's extension could be changed or it could be converted to a different file type. In addition, a limited hash value search would not have allowed the officers to search for any of the chat transcripts, for which they were clearly entitled to search.

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

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U.S. v. Grupee, 2012 U.S. App. LEXIS 1291, June 20, 2012

In May 2008, officers obtained a warrant to search the house Grupee shared with Roderiques for a cell phone that had been used to set up a drug deal with an informant in November 2007. The court held that is was reasonable for the officers to think that Roderiques still possessed the cell phone used to set up the November 2007 drug deal and that he lived at that particular address in May 2008. First, there was abundant evidence tying the cell phone to Roderiques. Second, the officers confirmed that the phone number used to arrange the drug transaction in November was still active, even though it did not prove conclusively that Roderiques was the one answering calls to that number. Third, Roderiques was in business and his customers presumably knew how to reach him through that cell phone number. Roderiques had to maintain some degree of continuity at the risk of losing buyers. Finally, officers had seen Roderiques come and go from the house on numerous occasions and he had used that address when he applied for his driving permit.

The court also held that the officers established probable cause to believe that the car parked in the driveway during the execution of the search warrant contained contraband. A drug detection dog alerted on the exterior of the car and the officers had already found illegal drugs and firearms in the house. This provided the magistrate judge with a substantial basis to find probable cause for the search of the car.

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

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4th Circuit

United States v. Sowards, 2012 U.S. App. LEXIS 13255, June 26, 2012

An officer stopped Sowards for speeding after visually estimating that his vehicle was traveling 75 mph in a 70 mph zone. The court commented that while the officer's patrol car was equipped with radar, he had intentionally positioned it at an angle that rendered an accurate radar reading impossible. A drug-detection dog alerted on the vehicle and during the subsequent search officers found five kilograms of cocaine.

The court stated that the reasonableness of an officer's visual estimate that a vehicle is speeding in slight excess of the legal speed limit may be supported by radar, pacing methods, or other indicia of reliability. Without these additional indicia of reliability, an officer's visual approximation that a vehicle is traveling in slight excess of the speed limit is a guess that is merely conclusory and lacks the necessary factual foundation to provide an officer with reasonably trustworthy information to initiate a traffic stop.

As a result, the court held that the officer lacked probable cause to initiate a traffic stop based exclusively on his visual estimate, that Sowards' vehicle was traveling 75 mph in a 70 mph zone.

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

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5th Circuit

Khan v. Normand, 2012 U.S. App. LEXIS 11202, May 31, 2012

Khan, who suffered from a mental illness, began running around inside a supermarket screaming that people outside were trying to kill him. A security guard and an off-duty police officer subdued and handcuffed Khan with his hands in front of his body. As the responding police officers escorted Khan out of the store, he began to resist them by thrashing his legs, attempting to bite them and reaching for one of the officer's gun belt. Outside the store, the officers re-handcuffed Khan's hands behind his back. After Khan continued to kick at the officers, they hobbled his legs and linked the leg irons and handcuffs with an additional set of handcuffs. Almost immediately, the officers noticed that Khan had stopped breathing. They removed the hand and leg restraints and administered CPR until an ambulance arrived. Khan began to breathe again but he died later that night at the hospital. Khan's parents sued the officers under *42 U.S.C. § 1983*, claiming that their use of a four-point restraint on their son constituted excessive force.

The court held that the officers were entitled to qualified immunity. First, court recognized that under limited circumstances, the use of a four-point restraint could constitute excessive force, but that its use did not constitute excessive force *per se*.

Next, the court held that in this case the officers' use of a four-point restraint did not violate any of Khan's clearly established rights. Khan was not left face down in the four-point restraint for an extended period. In addition, Khan remained under constant police supervision, which allowed the officers to remove the handcuffs and administer first aid quickly after he stopped breathing. The court commented that while this was a tragic incident, "police officers must often make split-second decisions and qualified immunity shields them from subsequent second-guessing unless their conduct was objectively unreasonable under clearly established law."

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

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6th Circuit

Nettles-Nickerson v. Free, 2012 U.S. App. LEXIS 11030, June 1, 2012

Officers arrested Nettles-Nickerson for operating a vehicle while intoxicated, after they found her intoxicated, sitting in the driver's seat of her running, but legally parked vehicle. The state trial court dismissed her case after it concluded that she was not "operating" her vehicle as defined under Michigan law. Nettles-Nickerson then sued the arresting officers, claiming that they detained her without reasonable suspicion and arrested her without probable cause.

The court held that the officers were entitled to qualified immunity because it would not have been clear to a reasonable police officer that detaining and arresting Nettles-Nickerson was unlawful. Here, a reasonable officer could have concluded that Nettles-Nickerson was in actual physical control of her vehicle. She had opened the driver's side door, gotten into the driver's seat, started the vehicle, turned the taillights on, pressed the brake pedal and she was sitting behind the wheel while the vehicle was running. In addition, no one else was in the vehicle and nothing impeded Nettles-Nickerson's ability to move the vehicle. A reasonable officer relying

on the plain language of the relevant statute could have concluded that Nettles-Nickerson was operating her vehicle while intoxicated.

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

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U.S. v. Collins, 2012 U.S. App. LEXIS 11828, June 12, 2012

An officer conducted a traffic stop on a vehicle in which Collins was a passenger. The driver consented to a search and the officer found a handgun under the front passenger seat. After the officer asked them to whom the gun belonged, both men said they "didn't know anything about it." The officer then told the Collins and the driver that he would have to take them both into custody and charge them with possession of the firearm. At that point, Collins said, "I'll take the charge." The officer arrested Collins and released the driver.

The court held that the driver voluntarily consented to the search of the vehicle. While the fact that the driver did not know that he could refuse consent to search can be considered in determining whether consent is voluntary, police do not have to inform an individual of his right to refuse to consent to a search. In addition, when requesting an individual's consent to search a vehicle, police are not required to inform the individual that others could object to the search. Nor are police required to obtain the consent of all the occupants of a vehicle in order to search it. In this case, the driver testified repeatedly that he consented to the search of the vehicle and that he never felt coerced or threatened into doing so by the officer.

Collins also argued that his statement that he would "take the charge" for the gun found in the vehicle was made before he was advised of his *Miranda* rights. He claimed that the officer's statement that he would take both men into custody and charge them with possession of the gun was a threat intended to elicit an incriminating response. The court disagreed, holding that the officer's statement that he would charge both men with possession of the gun was not a threat, but a factually accurate statement about the next step he would take as part of the arrest process. An accurate statement made by an officer to an individual in custody concerning the nature of the charges to be brought against the individual cannot reasonably be expected to elicit an incriminating response.

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

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Green v. Throckmorton, 2012 U.S. App. LEXIS 11930, June 13, 2012

Trooper Throckmorton conducted a traffic stop on Green for failing to dim her high beams in the face of oncoming traffic. After conducting a series of field sobriety tests, Throckmorton arrested Green for driving under the influence of drugs or alcohol. After Green's urine sample came back negative for the presence of drugs or alcohol, all charges against her were dropped. Green brought suit claiming that Throckmorton violated her *Fourth Amendment* rights by conducting the field sobriety tests without having reasonable suspicion that she was impaired and for arresting her without probable cause.

The court held that Throckmorton was not entitled to qualified immunity, stating that a reasonable jury could conclude that the trooper's in-car video supported Green's position that

Throckmorton did not have reasonable suspicion to administer the field sobriety tests to her. The video showed that Green responded directly to Throckmorton's questions, that her speech was not slurred and that she was completely lucid and rational throughout the traffic stop. In addition, Throckmorton did not smell or see alcohol or drugs on Green or in her vehicle. Further, the negative results on Green's urine test could cast doubt on Throckmorton's claim that her pupils were constricted at the time of the stop.

The court also held that Throckmorton was not entitled to qualified immunity on Green's unlawful arrest claim. Because reasonable jurors could interpret the video evidence differently, the district court incorrectly ruled as a matter of law that Throckmorton had probable cause to arrest Green.

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

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U.S. v. Jackson, 2012 U.S. App. LEXIS 12344, June 19, 2012

A police officer saw a vehicle that resembled one that had been driven by a suspect in a recent shooting. The officer performed a traffic stop after the driver turned into a driveway without using his turn signal. When the officer made contact with the driver, Jackson, he realized that neither Jackson nor the vehicle had any connection to the shooting. However, the officer saw that Jackson and his passenger were both holding open bottles of beer. The officer conducted a background check, which revealed that both men had suspended driver's licenses and that Jackson had an outstanding warrant for his arrest. The officer conducted an inventory search of the vehicle before he had it towed and found an illegal handgun hidden under the driver's seat, beneath a section of carpet that appeared to have been ripped up.

The court held that Jackson's failure to use his turn signal provided the officer probable cause to justify the traffic stop. Regardless of whether the officer had reasonable suspicion to stop Jackson's vehicle because it resembled the vehicle one driven by a shooting suspect, the traffic stop was lawful because the officer saw Jackson violate state law by making a left turn without activating his turn signal.

Even though it turned out that Jackson was not the shooting suspect, the court found that once the officer made contact with him, there were three independent reasons to arrest him. First, he was in possession of an open container of an alcoholic beverage while operating a motor vehicle. Second, he was driving with a suspended license. Third, there was an active warrant for his arrest.

The court held that the officer followed his agency's policy when he had Jackson's vehicle towed. Neither Jackson nor the passenger could drive the vehicle to another location because of their suspended licenses and the vehicle was illegally parked in the driveway of a residence with no apparent connection to either man.

Finally, the court held that the inventory search that uncovered the illegal pistol was lawful. The officer only searched under the section of carpet that appeared to have already been disturbed. The officer was allowed to lift up the already loose flap of carpet based on a reasonable belief that if might be a place where items could be hidden.

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

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U.S. v. Earvin, 2012 U.S. App. LEXIS 12345, June 19, 2012

An officer performed a traffic stop on the vehicle that Earvin was driving. While a back-up officer explained the speeding ticket to Earvin, the first officer walked his drug-detection dog, Arrow, around the car. Arrow alerted to the presence of drugs. The officers searched the car and found ten false driver's licenses, bearing Earvin's and his two passengers' pictures, in a sealed envelope. The officers arrested Earvin and the two passengers and towed the vehicle to their station so they could continue to search the vehicle. At the station, the officers found nine more false driver's licenses in another envelope. The officers did not find any drugs in the vehicle.

The court held that the use of the drug-detection dog did not prolong the time necessary to complete the traffic stop. Less than five minutes elapsed between the original officer asking Earvin for identification and the back-up officer issuing the ticket. In addition, the original officer testified that the dog sniff did not delay issuing the citation.

The court also ruled that the evidence presented at the suppression hearing established that Arrow was properly trained and reliable. The officer explained the extensive training required to obtain Arrow's certification and that Arrow was 90% accurate when deployed to detect the odor of drugs. Arrow's past alerts, in which no drugs were found, did not indicate that he was unreliable because he is able to detect the odor of narcotics in places where narcotics were previously stored. The key question for reliability is not whether a dog is actually correct in the specific instance at hand, as no dog is perfect, but rather whether the dog is likely enough to be right so that a positive alert is sufficient to establish probable cause for the presence of a controlled substance. Arrow's 90% success rate allowed the officer to believe that there was a fair probability that Earvin's car contained drugs.

Once the officer had probable cause to believe that Earvin's vehicle contained drugs, he was allowed to search and any containers capable of hiding drugs. Because the envelope that contained the first set of false driver's licenses was capable of containing drugs, the officer was entitled to open it. Once the officer found the ten false driver's licenses, he had probable cause to arrest all three men for that offense.

Finally, the court ruled that officers could lawfully continue to search Earvin's vehicle without a warrant after towing it to the police station. The Supreme Court has ruled that if police officers have probable cause to search a vehicle that has been stopped on the road for contraband, then the officers may transport the vehicle to the police station and search the vehicle without a warrant. Here, the officers had probable cause to search Earvin's vehicle for more evidence of identify fraud, after discovering the ten false driver's licenses and they still had probable cause to search for drugs.

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

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U.S. v. Vreeland, 2012 U.S. App. LEXIS 13307, June 29, 2012

Vreeland met with his federal probation officer for his regular monthly meeting. The probation officer had concluded, based on his investigation, that Vreeland had violated his supervised release by committing a home invasion robbery. The probation officer told Vreeland that he was

a suspect in the home invasion and without advising his of his *Miranda* warnings, asked him specific questions about it. Vreeland denied any knowledge of the incident. The probation officer told Vreeland that it was a violation of federal law to make a false statement to a federal officer. Vreeland was convicted of making false oral and written statements concerning the home invasion to the probation officer.

Vreeland claimed that when the probation officer questioned him about the home invasion that he was forced to either incriminate himself or face sanctions or penalties for not cooperating with the probation officer. When faced with that choice, he argued that the *Fifth Amendment* is self-executing, and does not require a probationer to invoke it in order to have his admissions suppressed in an ensuing criminal prosecution.

First, the court noted that the general obligation to appear before a probation officer and answer questions truthfully does not automatically convert a probationer's otherwise voluntary statements into compelled ones. In addition, this court has held that the *Fifth Amendment* privilege against self-incrimination is not self-executing in the context of a meeting with a probation officer. Although further incarceration was possible under Vreeland's terms of supervised release if he failed to "answer truthfully all inquiries by the probation officer," it was clear that the probation officer did not threaten Vreeland with arrest or a supervised release violation if he refused to answer his questions. The *Fifth Amendment* allows an individual to remain silent but not to lie.

The court then held that Vreeland was not entitled to *Miranda* warnings because he was not in-custody. He met with his probation officer, just as he had done on numerous occasions, and he was allowed to leave after the meeting. The probation officer never told Vreeland that remaining silent or requesting an attorney would lead to revocation of his probation. Instead, the probation officer accurately told Vreeland that he could be subject to federal charges if he lied.

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

*****

7th Circuit

Tucker v. Williams, 2012 U.S. App. LEXIS 11262, June 5, 2012

A confidential informant told Officer Williams that Tucker was in possession of a stolen backhoe. On June 22, Williams met with Tucker who told him that he had purchased the backhoe for cash and then added, "If it's stolen, go ahead and take it then." Williams continued his investigation and discovered that the backhoe had been sold to a construction company and that it had been missing from their inventory for five years. On August 29, Williams seized the backhoe without a warrant. Tucker never contacted Williams to object to the seizure or initiate a state court proceeding to have the backhoe returned. Instead, Tucker sued under *42 U.S.C. § 1983*, claiming, among other things, that Williams violated his *Fourth Amendment* rights.

The court held that Williams was entitled to qualified immunity because Tucker gave him consent to seize the backhoe on June 22. A reasonable person in Williams' position would have understood Tucker's consent to seize the backhoe on June 22 to be indefinite and not limited to that day only. Tucker did nothing to indicate to Williams that he wished to withdraw his

consent; therefore, that consent was still valid and effective when Williams seized the backhoe on August 29.

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

*****

U.S. v. Ford, 2012 U.S. App. LEXIS 11382, June 6, 2012

Ford was convicted of armed bank robbery. Sixteen months after the robbery, a police officer presented the bank manager, who had confronted the robber, with a photo array of six headshots that included one of Ford. The manager picked Ford out of the photo array as the robber.

The court held that the photo array was unduly suggestive.

First, instead of showing the six photographs to the bank manager one by one, the police officer placed them on a table in front of him all at once, side by side in two rows. The array would have been less suggestive had the manager been shown the photos one by one.

Second, the officer asked the manager whether he recognized the robber. This might have caused the manager to pick the one who most resembled the robber even if the resemblance was not close, especially since so much time had elapsed since he had seen the robber. In addition, the robber had been wearing a mask during the robbery.

Third, even though the officer told the manager not to assume that a photo of the suspect would be among the photos shown to him, it is doubtful that this statement eliminated the risk created by the simultaneous array.

Fourth, because the robber was wearing a mask during the robbery, the men in the photos, including Ford, should have been shown wearing dust masks similar to the one the police found outside the bank.

Fifth, the other five men in the photo array did not look like the robber. Although they were all adult Caucasian males of approximately the same age, none was pale or had freckles. The only description that the manager had given the police was that the robber was very fair and had freckles and only Ford's photo matched that description. Because Ford's appearance was so unlike that of the other men in the photo array, and unlike them with respect to the only two features that the manager recalled of the masked robber, that the photo array suggested to the manager, which photo, he should pick as the one of the robber.

While it may have been improper for the trial court to allow the manager to testify about his previous identification of the defendant as the robber, the court held that any error was harmless and affirmed Ford's conviction. There was no doubt that the dust mask found outside the bank was the robber's and the DNA found on the dust mask matched Ford's DNA. In addition, the manager could have described the robber to the jury and they could have compared his description with the pictures of the robber taken by the bank's surveillance camera that were shown at the trial.

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

*****

U.S. v. Wysinger, 2012 U.S. App. LEXIS 12768, June 22, 2012

A DEA agent conducted a videotaped custodial interrogation of Wysinger that lasted approximately thirty-two minutes. The agent read Wysinger *Miranda* warnings from a card. Within the first nine minutes of the interrogation, Wysinger asked the agent twice if he thought he should have a lawyer before they started talking. The court held that these statements were not unequivocal requests for a lawyer and that the agent was not required to cease the interrogation at that point.

Next, the court ruled that Wysinger's subsequent statement to the agent, "I mean, but can I call one now ?" was an unequivocal request for counsel that no reasonable officer could interpret otherwise. At that point, the court stated the interrogation should have ceased. However, the officer continued to make statements and ask questions that a reasonable officer would know were likely to elicit an incriminating response. For example, the agent asked if there was "any dope money" in Wysinger's van and he challenged Wysinger's explanation for why he was in the East St. Louis area. As a result, the court held that all of Wysinger's statements to the agent after the first nine minutes should have been suppressed.

Alternatively, the court went on to hold that the entire video, to include the first nine minutes, should have been suppressed because Wysinger's statements were obtained as a result of inadequate and misleading *Miranda* warnings.

The agent told Wysinger that he had the "right to talk to a lawyer for advice before we ask you any questions or have one – have an attorney with you during questioning." Wysinger had a right to consult an attorney both before and during questioning and the agent's misstatement gave Wysinger the false choice of talking to a lawyer before questioning or having a lawyer with him during questioning. In addition, the agent used various tactics to confuse Wysinger as to when the actual "questioning" began and tried to divert Wysinger from exercising his *Miranda* rights. Under these circumstances, the agent's *Miranda* warnings were inadequate and misleading and the entire videotaped interrogation should have been held inadmissible.

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

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U.S. v. Bohman, 2012 U.S. App. LEXIS 13195, June 28, 2012

An officer conducted a traffic stop on a vehicle because it came out the driveway of a forty-acre tract of land where there was a suspected methamphetamine lab. The officer testified that he did not observe any traffic violations before the stop. In addition, the government did not argue that the officer was justified in stopping the vehicle because he had probable cause to believe the cabin on the property housed a methamphetamine lab.

The court held that the stop violate the *Fourth Amendment* because it was based on a mere hunch. Police officers are not allowed to detain an individual just because he emerges from a location where there may be criminal activity. Here, the officer did not observe any suspicious behavior and he only stopped the vehicle because it came out of the driveway of a suspected methamphetamine lab. A mere suspicion of illegal activity at a particular place is not enough to transfer that suspicion to anyone who leaves that property.

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

*****

8th Circuit

U.S. v. Philips, 2012 U.S. App. LEXIS 11207, June 4, 2012

Police officers suspected that Gregory Hollie was involved in a shooting. While conducting surveillance near Hollie's apartment, an officer saw a man that fit his description in the back seat of a car that drove past. Believing the man was Hollie, the officer conducted a *Terry* stop on the car. While approaching the car, the officer saw the man manipulating something on the right side of his body. The man gave the officer an identification card that listed him as Tony Phillips. The officer had Phillips get out of the car to get a better look at him to see if he matched the photo on the identification. When asked if he had any weapons in his possession, Phillips admitted that he had a pistol in his right front pocket. The officer determined that the man was Phillips and not Hollie, however it was illegal for him to possess the firearm because he was a convicted felon.

The court held that the officer's belief that Phillips was Hollie was objectively reasonable under the circumstances, although it was mistaken. The officer's initial observation of Phillips was brief and from a distance; Phillips closely matched Hollie's description and booking photo; and the officer saw Philips near the house where Hollie lived. The court further held that the officer was allowed to order Phillips out of the car so he could establish his identity.

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

*****

U.S. v. Robbins, 2012 U.S. App. LEXIS 13310, June 29, 2012

A police dispatcher received a 911 hang-up call. Two officers tried to locate the address associated with the telephone number to conduct a welfare check. The officers' GPS maps indicated the address was in an industrial area. The officers located a house near where they believed the hang-up call had originated. It was 10:00 pm and because there were so many lights on in the house, the officers believed that someone was home. The officers knocked on the front door but received no response. The officers walked around the house and returned to the front door where for the first time they smelled the odor of marijuana. A drug detection dog was called to the scene and it alerted on the front door of the house. The officers obtained a search warrant and discovered marijuana-grow operation in the house. The officers later discovered that the 911 hang up call had originated from a phone line at a construction trailer, on a job-site, near Robbins' house.

Robbins argued that the officers violated his *Fourth Amendment* rights by walking onto his porch to knock on the front door and by then walking around the perimeter of his house. He claimed that this unlawful intrusion onto his curtilage provided the evidence that established probable cause for the search warrant.

The court noted that, "where a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the *Fourth Amendment*, provided that the intrusion upon one's privacy is limited." Here, the court found that the officers' acted in furtherance of a legitimate law enforcement objective and their intrusion upon Robbins' privacy was appropriately limited. After responding to a 911 call that they reasonably believed came from

the house, the officers entered the normal access route for any visitor to the house. Walking around the perimeter in search of an occupant was reasonable based on the belief that the 911 call originated from the house and the officers' observation of the many lights on in the house.

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

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9th Circuit

U.S v. Grant, 2012 U.S. App. LEXIS 11757, June 11, 2012

Officers obtained a warrant and searched Grant's home for a firearm that was used in a homicide that had occurred nine months earlier. The officers did not suspect Grant in the homicide, but believed that two of his sons, Davonte and James had some connection to it. The officers did not find the firearm from the homicide; however, they did find two other firearms and ammunition, which Grant unlawfully possessed because he was a convicted felon.

The court held that the search warrant affidavit did not establish probable cause that the firearm used in the homicide might be located in Grant's home. The affidavit referenced only one possible contact, a conversation, between Davonte and Grant after the homicide and before the search. In addition, nothing in the affidavit suggested that Davonte ever visited Grant's home after the homicide.

Regarding Grant's other son, the affidavit failed to provide any connection between James and the firearm used in the homicide. Without that link, an inference that James brought the firearm to Grant's home when he visited was unreasonable.

The court further held that the good-faith exception did not apply in this case because the officers' reliance on the warrant was unreasonable. The affidavit did not explain any plausible connection between Grant's home and the firearm used in the homicide.

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

*****

Avina v. U.S., 2012 U.S. App. LEXIS 11876, June 12, 2012

Thomas and Rosalie Avina sued the United States under the Federal Tort Claims Act (FTCA) for assault and battery and intentional infliction of emotional distress after agents from the Drug Enforcement Administration (DEA) executed a search warrant at their mobile home. Upon entering the home, the agents pointed guns at Thomas and Rosalie, handcuffed them and forcefully pushed Thomas to the floor. The agents handcuffed the Avina's fourteen-year-old daughter on the floor and then handcuffed their eleven-year-old daughter on the floor and pointed their guns at her head. The agents removed the handcuffs from the children approximately thirty minutes after they entered.

The court held that the district court properly granted summary judgment in favor of the United States as to Thomas and Rosalie because the agents' use of force against them was reasonable. The agents were executing a search warrant at the residence of a suspected drug trafficker. This presented a dangerous situation for the agents and the use of handcuffs on the adult members of

the family was reasonable to minimize the risk of harm to the officers and the Avinas. In addition, the agents did not act unreasonably when they forcefully pushed Thomas Avina to the floor. At the time of the push, Avina was refusing the agents' commands to get down on the ground. Because this refusal occurred during the initial entry, the agents had no way of knowing whether Avina was associated with the suspected drug trafficker, whom they thought lived there.

The court however, found that the district court improperly granted summary judgment to the United States concerning the agents' conduct toward the Avinas' minor daughters. The court held that a jury could find that when the agents pointed their guns at the eleven-year-old daughter's head, while she was handcuffed on the floor, that this conduct amounted to excessive force. Similarly, the court held that a jury could find that the agents' decision to force the two girls to lie face down on the floor, with their hands cuffed behind their backs, was unreasonable. Genuine issues of fact existed as to whether the actions of the agents were excessive in light of girls' ages and the limited threats they posed.

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

*****

10th Circuit

U.S. v. Whitley, 2012 U.S. App. LEXIS 8078, June 1, 2012

An officer conducted a traffic stop as the request of another officer to investigate whether Whitney was illegally in possession of a firearm. Whitley argued that in the absence of a traffic violation, the officer needed probable cause to stop him. The court disagreed. To conduct a lawful investigatory stop of a vehicle, the officer only needs reasonable suspicion that criminal activity is afoot, whether or not the vehicle stop involves a traffic violation.

The court further held that the officer was justified in stopping Whitley based on the collective knowledge doctrine. The collective knowledge doctrine allows an officer with probable cause or reasonable suspicion to instruct another officer to act, even without communicating all of the information necessary to justify the action. The officer who makes the stop does not need to have reasonable suspicion that criminal activity is afoot. Instead, the knowledge and reasonable suspicions of one officer can be imputed to another.

Here, Agent Powley received a tip that Whitley had a firearm and ammunition in his vehicle. Agent Powley conducted a records check and discovered that Whitley was a felon. A few days later, Agent Powley received a tip from the same source that Whitley had loaded a dead antelope into his truck on the first day of hunting season. This information was enough for a reasonable officer to believe that Whitley was a felon in possession of a firearm.

In addition, the officer who conducted the stop knew that Whitley was a convicted felon and he saw the antelope carcass in the back of Whitley's truck before he initiated the traffic stop. This officer's independent knowledge of these facts adds to and is part of the collective knowledge supporting the reasonable suspicion that Whitley was a felon in possession of a firearm.

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

*****

U.S. v. Neff, 2012 U.S. App. LEXIS 11327, June 5, 2012

The court held that a driver's decision to use a rural highway exit after passing drug checkpoint signs may be considered as one factor in an officer's reasonable suspicion determination, but it is not a sufficient basis, by itself, to justify a traffic stop. The court noted that an officer must identify additional suspicious circumstances or independently evasive behavior to justify stopping a vehicle that uses an exit after driving past ruse drug-checkpoint signs.

In this case, the trooper did not observe a traffic violation and the facts he gathered after Neff left the interstate highway contributed only marginally to reasonable suspicion. Neff was driving a vehicle registered to the adjoining county, took an exit onto a gravel road in a rural area, pulled into a driveway and stopped, looked "surprised" when he saw the trooper and then backed out of the driveway as if to turn around. The court found that these facts did not amount to an objective basis for suspecting criminal activity. Because the trooper did not have reasonable suspicion to justify the initial stop of Neff's vehicle, the district court should have suppressed the evidence seized by the trooper.

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

*****

U.S. v. Madden, 2012 U.S. App. LEXIS 12483, June 19, 2012

An officer saw Madden's car parked in the loading dock area of a grocery store. The engine was off and Madden was sitting in the driver's seat. The officer approached the car because cars did not usually park in that location and he thought it might have been a no-parking zone. The officer asked Madden what he was doing and requested his driver's license. Madden did not have his driver's license with him, a violation of state law. The officer detained Madden in the back of his patrol car while he ran his personal information through his computer. The computer check revealed that Madden had two outstanding misdemeanor traffic warrants. The officer arrested Madden on the warrants, searched his car incident to arrest and found an illegal firearm.

The court held that the initial encounter between the officer and Madden was consensual. The officer approached Madden's vehicle, asked him what he was doing and requested Madden's driver's license. There was nothing to suggest that the officer conveyed a message that compliance with his request was required; therefore, a reasonable person in Madden's position would feel free to decline the officer's request or otherwise terminate the encounter.

The consensual encounter became an investigative detention when the officer asked Madden to step out of his vehicle and directed him to sit in the back of his patrol car while he obtained Madden's personal information and ran it through his computer. By this time however, the officer had reasonable suspicion to believe that Madden may have been engaged in criminal activity. The officer found Madden in the driver's seat of his car and Madden admitted that he did not have his driver's license with him, a violation of state law. After discovering that Madden had two outstanding arrest warrants, the officer had probable cause to arrest him.

While the officer's search of Madden's car was not a valid search incident to arrest in light of *Arizona v. Gant*, decided in 2009, the search was objectively reasonable under the binding circuit precedent that existed in 2005 when it occurred.

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

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11th Circuit

U.S. v. Welch, 2012 U.S. App. LEXIS 12001, June 13, 2012

Officers went to Welch's apartment looking for a robbery suspect. Without a warrant or consent, the officers entered the apartment to conduct a protective sweep after another occupant opened the door. After Welch refused to consent to a complete search of the apartment, the officers told him that they were going to detain him on apartment's balcony while they sought a search warrant, which they told him "would take a while." Welch then orally consented and signed a written consent form. The officers found an illegal firearm that Welch later admitted was his.

The court held that Welch's consent to search was obtained voluntarily and not tainted by the unlawful protective sweep. The court stated that while the initial entry into Welch's apartment was unlawful, the officers did not enter for the purpose of gaining consent to search. Rather, the officers were looking for the robbery suspect. Once inside, the officers confronted Welch who voluntarily consented to the search. Even though Welch only consented after an officer commented that obtaining the search warrant "would take a while," this comment was not coercive. The court reasoned that Welch consented to the search because he knew he would have been detained on the balcony and that he could not have disposed the firearm while the officers were obtaining the warrant. Welch gambled that by giving the officers consent to search, they might want to get the search done quickly and fail to find the firearm.

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

*****

U.S. v. Woods, 2012 U.S. App. LEXIS 12295, June 18, 2012

On two occasions, federal agents interviewed Woods, a U.S. Navy service member, in connection with a child pornography investigation. Each time, before questioning him, an agent read aloud to Woods a form entitled "Military Suspect's Acknowledgment and Waiver of Rights." One of the rights informed Woods that he had the right to consult with a lawyer prior to questioning and that "this lawyer may be a civilian lawyer retained by me at no cost to the United States" or "a military lawyer appointed to act as my counsel, at no cost to me, or both." Woods waived these rights prior to each interview and made several incriminating statements.

Woods claimed that the waiver form, instead of simply stating that he had the right to have a lawyer present during questioning, drew a confusing distinction between a retained civilian lawyer and an appointed military lawyer.

The court held that the language of the waiver forms reasonably and adequately conveyed Woods' *Fifth Amendment* rights under *Miranda*. The warnings expressly informed Woods of his right to have a lawyer appointed at no cost to him, to consult with that lawyer before questioning and to have the lawyer present during questioning. These statements are consistent with *Miranda*, which protects a person's right to a lawyer. Although Woods was entitled to a lawyer before and during questioning, he was not entitled to a particular kind of lawyer, whether military or civilian. The waiver forms made it clear that before any questioning took place, Woods could retain his own lawyer or a military lawyer would be provided at no cost to him.

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

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District of Columbia Circuit

U.S. v. Glover, 2012 U.S. App. LEXIS 11268, June 5, 2012

In this multiple co-defendant drug trafficking case, while listening by wiretap to one Suggs' cell phone conversations, officers learned that an odor consistent with PCP was emanating from his house. Law enforcement and fire department personnel went to the exterior of Suggs' house and smelled an odor consistent with PCP first-hand. Before the officers obtained a search warrant, they entered Suggs' house and looked around to make sure that no evidence was destroyed and that there was no fire or hazardous materials risk. The officers seized no evidence at this time. Officers eventually obtained a search warrant and seized a large quantity of PCP. Without deciding the issue, the court held that even if the officers' initial entry was unlawful, the PCP evidence was validly seized. Prior to their entry, the officers detected the odor of PCP coming from Suggs' house and this created an independent source for the search warrant.

The court also held that the officers established probable cause and the necessity to extend the initial 30-day period set for the wiretap. The officers submitted affidavits explaining that traditional investigative methods were still inadequate to reveal the full nature and scope of the PCP-distribution conspiracy. The affidavits stated that Suggs was "extremely surveillance conscious" and that "the use of the cooperating witnesses alone would not have provided the type and quality of evidence necessary to prosecute Suggs." Given these explanations, the authorizing judge did not abuse her discretion in finding that the necessity requirement was met.

During the course of the wiretap, officers intercepted more than 4,000 phone calls to and from Suggs' cell phone. The officers stopped monitoring over 600 of them after they recognized that they were not relevant to the investigation, to comply with the statutory minimization requirement. Suggs claimed that the minimization efforts were not sufficient because too few calls were minimized. The court noted that the district court correctly concluded that a low number of minimized calls does not itself show that the minimization efforts were unreasonable. The minimization inquiry focuses on the content of the intercepted communications, not the number.

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

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