2006 - 2009
SUPREME COURT and CIRCUIT COURTS OF APPEALS CASE BRIEFS
BY SUBJECT

(Click on subject to go to those cases)
Final update February 23, 2010.

Cases are arranged with Supreme Court decisions first followed by Courts of Appeals decisions in chronological order. Miscellaneous Criminal Statutes are arranged in numerical order.

Fourth Amendment

Search

U.S. v. Bucci, 582 F.3d 108 (1st Cir.), September 11, 2009

Law enforcement authorities installed a video camera on a utility pole across the street from Bucci's home and conducted surveillance of the front of his house for eight months. The camera was placed in a fixed location that enabled agents to monitor activity on the driveway and afforded agents a view of the garage door and inside the garage when the door was open. The video camera had no remote capabilities that allowed agents to either change the view or magnification of the camera without being physically at the scene. There are no fences, gates or shrubbery located in front of Bucci's residence that obstruct the view of the driveway or the garage from the street. Both were plainly visible.

An individual does not have an expectation of privacy in items or places he exposes to the public. Therefore, the use of the video surveillance did not violate the Fourth Amendment.

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

U.S. v. Jefferson, 566 F.3d 928 (9th Cir.), May 26, 2009

An addressee has both a possessory and a privacy interest in a mailed package. The postal inspector's visual inspection of the package did not implicate the Fourth Amendment because what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. The possessory interest in a mailed package is solely in the package's "timely" delivery.

Looking at this issue for the first time, the Court decides:

An addressee has no Fourth Amendment possessory interest in a package that has a guaranteed delivery time until such delivery time has passed. Before the guaranteed delivery time, law enforcement may detain such a package for inspection purposes without any Fourth Amendment curtailment. Once the guaranteed delivery time passes, however, law enforcement must have a "reasonable and articulable suspicion" that the package contains contraband or evidence of illegal activity for further detainment.

The 1st Circuit agrees (cite omitted)**.**

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

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U.S. v. Franklin, 547 F.3d 726 (7th Cir.), October 27, 2008

The odor of burning marijuana provides an officer with probable cause to search the passenger compartment and containers within the passenger compartment. A police dog's alerting to the presence of narcotics provides additional probable cause to search other parts of the vehicle for narcotics.

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

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U.S. v. Seljan, 547 F.3d 993 (9th Cir.), October 23, 2008

On rehearing of a previous panel decision, the full court decides:

The search of the FedEx package and reading of a personal letter by customs officials occurred at the functional equivalent of the border, did not involve the destruction of property, was not conducted in a particularly offensive manner, and was not a highly intrusive search of the person. Therefore, it did not require any articulable level of suspicion. There was intrusion into defendant's privacy, but the degree of intrusion must be viewed in perspective. The defendant voluntarily gave the package containing the letter to FedEx for delivery to someone in the Philippines, with knowledge that it would have to cross the border and clear customs. The reasonable expectation of privacy for that package was necessarily tempered.

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

U.S. v. Askew, 529 F.3d 1119 (D.C. Cir.), June 20, 2008

The full Court vacated and now reverses the decision by a panel in *U. S. v. Askew*, 482 F.3d 532 (D.C. Cir. 2007).

Unzipping a jacket to expose a sweatshirt underneath is a "search." A reasonable suspicion of criminal activity cannot justify a search that does not have a weapon as its "immediate object." There is no search-for-evidence counterpart to the Terry weapons search, permissible on only a reasonable suspicion that such evidence would be found. When there are no reasonable grounds for believing that it would establish or negate appellant's identification as the robber, unzipping a jacket to expose a sweatshirt during a show-up is precisely the sort of evidentiary search that is impermissible in the context of a Terry stop. (The Court expressly stated that it was not ruling that reasonable grounds for believing that it would establish or negate appellant's identification as the robber would make the search reasonable under the Fourth Amendment.) **The police may not maneuver a suspect's outer clothing – such as unzipping a suspect's outer jacket to facilitate a witness's identification at a show-up during a Terry stop.**

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

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U.S. v. Forbes, 528 F.3d 1273 (10th Cir.), June 17, 2008

Even assuming that a Customs and Border Protection agent first searched the interior of the trailer without consent or probable cause, no incriminating evidence was found during that search. The subsequent canine alert provided an independent source of suspicion to search the interior of the tractor, where the marijuana was discovered.

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

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Mora v. City of Gaithersburg, 519 F.3d 216 (4th Cir.), March 04, 2008

Editor's Note: Mora called a healthcare hotline and told the operator that he was suicidal, had weapons in his apartment, and could understand shooting people at work. He ended the call by saying, "I might as well die at work." Police immediately responded, seized Mora in the parking lot, transported him for psychiatric evaluation, searched his apartment, and seized 41 firearms and 5,000 rounds of ammunition.

The officers who seized Mora and his weapons were engaged in a preventive action aimed at incapacitating an individual they had reason to believe intended a crime. Protecting the physical security of its people is the first job of any government, and the threat of mass murder implicates that interest in the most compelling way. Police, then, must be entitled to take effective preventive action when evidence surfaces of an individual who intends slaughter.

To be objectively reasonable in preventative action situations, balancing the government interest against the intrusion, includes consideration of three important factors: (1) the likelihood or probability that a crime will come to pass; (2) how quickly the threatened crime might take place; and (3) the gravity of the potential crime. As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action. The proper application of a balancing test in preventive action cases respects the room for judgment that law enforcement must enjoy in any emergency where lives are on the line.

The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope.

The authority to defuse the threat Mora presented included the authority to take the weapons that made him so threatening.

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

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U.S. v. Mowatt, 513 F.3d 395 (4th Cir.), January 25, 2008

Even when officers never physically enter the room, a search under the Fourth Amendment occurs when officers gain *visual* access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority. Although officers have every right to knock on the door to try to talk to the occupant about a complaint, without a warrant, they cannot *require* him to open it.

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

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U.S. v. Barnes, 506 F.3d 58 (1st Cir.), October 29, 2007

The reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context. An initial strip search for contraband and weapons is clearly justified given an arrest for a drug trafficking crime. However, a visual body cavity search involves a greater intrusion into personal privacy. Accordingly, a more particularized suspicion that contraband is concealed is required prior to conducting a visual body cavity search.

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

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U.S. v. Wilson, 506 F.3d 488 (6th Cir.), October 29, 2007

The so-called "automatic companion" rule whereby any companion of an arrestee would be subject to a cursory pat-down reasonably necessary to give assurance that they are

unarmed is rejected. The Terry requirement of reasonable suspicion under the circumstances has not been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates. Although the government can rely on the fact that the defendant's traveling companion was found to be carrying a weapon as *part* of the basis for establishing reasonable suspicion with regard to the defendant, the government must point to additional specific and articulable facts in order to satisfy Terry.

There is nothing about being seated in a car which is itself suspicious. The fact that a person is seated in a vehicle does not create a different Terry frisk test, but instead is simply a relevant consideration under the totality of the circumstances.

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

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U.S. v. Yamba, 506 F.3d 251 (3rd Cir.), October 22, 2007

Assuming that an officer is authorized to conduct a Terry search at all, he is authorized to assure himself that a suspect has no weapons. He is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon.

A Terry search cannot purposely be used to discover contraband, but it is permissible to confiscate contraband if it is spontaneously discovered during a properly executed Terry search. The proper question, therefore, is not the immediacy and certainty with which an officer knows an object to be contraband or the amount of manipulation required to acquire that knowledge, but rather what the officer believes the object is by the time he concludes that it is not a weapon. Moreover, when determining whether the scope of a particular Terry search was proper, the areas of focus should be whether the officer had probable cause to believe an object was contraband *before* he knew it not to be a weapon and whether he acquired that knowledge in a manner consistent with a routine frisk.

The 2nd and 9th Circuits agree (cites omitted).

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

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Taylor v. Michigan Dep't of Natural Resources, 502 F.3d 452 (6th Cir.), September 14, 2007

A search under the Fourth Amendment is a government intrusion into a reasonable expectation of privacy. A "reasonable expectation of privacy" exists when (1) the individual has manifested a subjective expectation of privacy in the object of the challenged search and (2) society is willing to recognize that expectation as reasonable. The second prong generally addresses two considerations. The first focuses on what a person had an expectation of privacy *in*, for example, a home, office, phone booth or airplane. The second

consideration examines what the person wanted to protect his privacy *from*, for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes. The purpose and degree of the government's intrusion is relevant to the second consideration.

A conservation officer's daylight, five minute, suspicionless "property (security) check" of a temporarily unoccupied residence, consisting of calling out to determine if anyone was home, checking the doors and windows to ensure they were locked, peering briefly into the interior through the open curtains of a window, and leaving his business card in the front door is not a Fourth Amendment search.

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

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U.S. v. Nascimento, 491 F.3d 25 (1st Cir.), July 02, 2007

When police arrest a partially clothed individual charged with a crime of violence in his home, the need to dress him may constitute an exigency justifying the officers in entering another room in order to obtain needed clothing. When the police neither manipulate nor use the situation as a pretext to carry out an otherwise impermissible search, the conduct of the police in deciding to dress the suspect is reasonable. Common sense and practical considerations must guide judgments about the reasonableness of searches and seizures. A cabinet eight to ten feet away from an unrestrained suspect can be said to be within the suspect's immediate control and subject to search incident to arrest.

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

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U.S. v. Bravo, 489 F.3d 1 (1st Cir.), May 29, 2007

The Maritime Drug Law Enforcement Act (MDLEA) allows the United States to enforce drug laws outside of the United States, and more specifically, exercise jurisdiction over stateless vessels. A "vessel without nationality" includes a vessel aboard which the master or person in charge makes a claim of registry and the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

The Fourth Amendment prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial. A violation of the Amendment is "fully accomplished" at the time of an unreasonable government intrusion. For purposes of this case, therefore, if there was a violation of the Fourth Amendment, it occurred solely in international waters, where the search and seizure took place. However, the Fourth Amendment does not apply to activities of the United States against aliens in international waters.

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

U.S. v. Orman, 486 F.3d 1170 (9th Cir.), May 22, 2007

A brief investigatory detention, a Terry stop, while constituting a seizure, is not a violation of the Fourth Amendment provided that the police officer has reasonable suspicion that criminal activity may be afoot. In the course of a lawful investigatory stop, a police officer also may lawfully pat down the detained individual for weapons, a Terry frisk, provided that the officer has reasonable suspicion that the person may be armed and presently dangerous. However, a Terry frisk is not confined to just those situations in which a Terry stop has occurred. A Terry stop and a Terry frisk are two independent actions, each requiring separate justifications. Terry frisks are authorized in consensual encounters so long as there is reasonable suspicion that the person is armed and presently dangerous.

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

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U.S. v. Ferrer-Montoya, 483 F.3d 565 (8th Cir.), April 19, 2007

The scope of a search is generally defined by its expressed object. An officer may reasonably interpret a suspect's unqualified consent to search a vehicle for drugs to include consent to search containers within that car which might bear drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive manner. A trained dog's failure to alert may reduce the likelihood that a particular vehicle contains narcotics, but it has no bearing upon what a typical reasonable person would have understood by the exchange between the officer and the suspect in the initial grant of consent to a search.

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

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U.S. v. Varner, 481 F.3d 569 (8th Cir.), April 04, 2007

Ordinarily, the arrest of a person outside of a residence does not justify a warrantless entry into the residence itself. One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. Even absent an affirmative indication that the arrestee might have a weapon available or might attempt to escape, the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee's elbow at all times. Additionally, it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested.

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

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U.S. v. Garcia, 474 F.3d 994 (7th Cir.), February 02, 2007

Looking at this issue for the first time, the Court decides:

Placing a GPS (global positioning system) "memory tracking unit" underneath the rear bumper of a car found in a public place is not a Fourth Amendment "seizure" because the device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, and did not alter the car's appearance.

Using the device to track the car in public is not a Fourth Amendment "search" requiring probable cause and a warrant.

The courts of appeals have divided over the question.

The 5th and 9th Circuits agree, although the 5th Circuit approved of but did not expressly require a showing of reasonable suspicion. (cites omitted).

The 1st, 6th, and 10th Circuits call tracking a "search." The 1st and 6th Circuits require probable cause but no warrant. (cites omitted).

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

Click **HERE** for an article on GPS tracking by Senior Legal Instructor Keith Hodges (written prior to this decision).

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Cassidy v. Chertoff, 471 F.3d 67 (2nd Cir.), November 29, 2006

It is a "governmental search" for purposes of the Fourth Amendment when employees of a private transportation company search the carry-on baggage of randomly selected passengers and inspect randomly selected vehicles, including their trunks, pursuant to the company's security policy implemented in order to satisfy the requirements imposed by the Maritime Transportation Security Act of 2002 and its implementing regulations.

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

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U.S. v. Ziegler, 456 F.3d 1138 (9th Cir.), August 08, 2006

Social norms suggest that employees are not entitled to privacy in the use of workplace computers, which belong to their employers and pose significant dangers in terms of diminished productivity and even employer liability. Thus, in the ordinary case, a workplace computer simply does not provide the setting for those intimate activities that

the Fourth Amendment is intended to shelter from government interference or surveillance.

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

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U.S. v. Taylor, 458 F.3d 1201 (11th Cir.), July 28, 2006

The "Knock and Talk" exception to the Fourth Amendment's probable cause and warrant requirement allows entry upon private land to knock on a citizen's door for legitimate police purposes unconnected with a search of the premises. Absent express orders from the person in possession, an officer may walk up the steps and knock on the front door of any man's castle, with the honest intent of asking questions of the occupant just as any private citizen may. Also, an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence.

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

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REP

U.S. v. Crowder, 588 F.3d 929 (7th Cir.), December 07, 2009

Defendant did not have a reasonable expectation of privacy in the car after he turned it over to the shipper. Although individuals do not surrender their expectations of privacy in closed containers when they send them by mail or common carrier, the car in this case can hardly be considered a closed container. The doors were left unlocked, the driver of the car carrier was given the keys, and defendant knew that the driver would enter the car and drive it. No one could have a reasonable expectation of privacy in the contents of a vehicle under those circumstances. Although there is no evidence that defendant directly authorized the driver to search the vehicle, in light of the circumstances described above it is clear that the driver was authorized to act in direct contravention to defendant's privacy interest.

Hiding the drugs in a secret compartment in the car clearly shows defendant's subjective desire that the drugs not be discovered. But defendant must also show that his expectation of privacy was objectively reasonable - the simple act of hiding something will not necessarily trigger Fourth Amendment protections.

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

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U.S. v. Johnson, 584 F.3d 995 (10th Cir.), October 27, 2009

Looking at this issue for the first time, the court decides:

The warrantless search of the storage unit did not violate defendant's Fourth Amendment rights because he had "forfeited" any privacy rights he might have had in the storage unit by directing his girlfriend to enter into the rental agreement using another person's name and stolen identification.

While some courts have found an expectation of privacy when an individual uses an alias or a pseudonym, because of the potential harm to innocent third parties, there is a fundamental difference between merely using an alias and using another's identity.

What matters is not whether defendant might have some legitimate property interest in the storage unit but whether defendant's interest is one that the Fourth Amendment is intended to protect. "We will not be a party to the fraud by legitimizing Johnson's interest in the storage unit. Therefore, whatever subjective privacy expectations Johnson had in the storage unit were not expectations that 'society is prepared to recognize . . . as objectively reasonable.'"

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

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U.S. v. Bucci, 582 F.3d 108 (1st Cir.), September 11, 2009

Law enforcement authorities installed a video camera on a utility pole across the street from Bucci's home and conducted surveillance of the front of his house for eight months. The camera was placed in a fixed location that enabled agents to monitor activity on the driveway and afforded agents a view of the garage door and inside the garage when the door was open. The video camera had no remote capabilities that allowed agents to either change the view or magnification of the camera without being physically at the scene. There are no fences, gates or shrubbery located in front of Bucci's residence that obstruct the view of the driveway or the garage from the street. Both were plainly visible.

An individual does not have an expectation of privacy in items or places he exposes to the public. Therefore, the use of the video surveillance did not violate the Fourth Amendment.

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

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U.S. v. Monghur, 576 F.3d 1008 (9th Cir.), August 11, 2009

When made to a law enforcement officer, an unequivocal, contemporaneous, and voluntary disclosure that a package or container contains contraband waives any reasonable

expectation of privacy in the contents. The Constitution does not require the formality of a warrant in such circumstances.

The 7th circuit agrees (cite omitted)**.**

During a jail house telephone call, cognizant that jail personnel might be listening, Monghur attempted to disguise the subject matter by using ambiguous, generic language to describe the handgun and its whereabouts: "the thing" was in a closet, "in the green." It is relevant that Monghur never explicitly identified the contraband at issue. Nor did Monghur specifically identify the container itself. Monghur never made a voluntary disclosure directly to law enforcement. There was no "direct and explicit" waiver of an expectation of privacy in a container hidden elsewhere. The warrantless search of the container violated the Fourth Amendment.

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

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U.S. v. Washington, 573 F.3d 279 (6th Cir.), July 22, 2009

The landlord's mere authority to evict a person cannot of itself deprive that person of an objectively reasonable expectation of privacy. A landlord's unexercised authority over a lodging with overdue rent alone does not divest any occupant of a reasonable expectation of privacy. A tenant's violation of a lease cannot alone deprive him and his guests of a legitimate expectation of privacy. An occupant is not a trespasser if the landlord does not treat him as such.

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

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U.S. v. Jefferson, 566 F.3d 928 (9th Cir.), May 26, 2009

An addressee has both a possessory and a privacy interest in a mailed package.

The postal inspector's visual inspection of the package did not implicate the Fourth Amendment because what a person knowingly exposes to the public is not a subject of Fourth Amendment protection.

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

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U.S. v. Ward, 561 F.3d 414 (5th Cir.), February 26, 2009

An escapee has no right of privacy in his motel room (or his home) entitling him to the protection of the Fourth Amendment against unreasonable searches.

Recognizing a privacy right in the motel room of an escapee who legally belongs in a cell would offer judicial encouragement to the act of escape. Rewarding successful escapees by restoring previously ceded rights would embolden the escape plots that prison administrators already must work vigilantly to deter. The loss of significant rights is an incident of imprisonment; the deprivation of privacy is a component of society's punishment. A prisoner cannot by escape rewrite his sentence such that his punishment no longer includes a loss of Fourth Amendment protected privacy. Allowing an escapee to invoke the privacy right would be inconsistent with protecting society from a demonstrably dangerous person who is fleeing from law enforcement outside of the structured environment that the criminal justice system determined was necessary for him. In this game of hide and seek the sheriff need not count to ten.

The 2nd and 8th Circuits agree (cites omitted).

However, in recapturing escaped prisoners, law enforcement may well encounter the hurdles of the Fourth Amendment rights of third parties.

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

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Editor's Note: This opinion was amended by adding discussion and holdings. See also the report of this case in the July issue of *The Informer* (7Informer09) and the "Search Warrant" section of this Digest.

U.S. v. SDI Future Health, Inc., 553 F.3d 1246 (9th Cir.), January 27, 2009

Looking at this issue for the first time, the Court decides:

A corporate defendant has standing with respect to searches of corporate premises and seizure of corporate records. An employee of a corporation, whether worker or manager, does not, simply by virtue of his status as such, acquire Fourth Amendment standing with respect to company premises. Similarly, to be merely a shareholder of a corporation, without more, is also not enough.

Except in the case of a small, family-run business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and the materials seized. The strength of such personal connection is determined with reference to the following factors: (1) whether the item seized is personal property or otherwise kept in a private place separate from other work-related material; (2) whether the defendant had custody or immediate control of the item when officers seized it; and (3) whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without his authorization. Absent such a personal connection or exclusive use, a defendant cannot establish standing for Fourth Amendment purposes to challenge the search of a workplace beyond his internal office.

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

U.S. v. Molsbarger, 551 F.3d 809 (8th Cir.), January 06, 2009

Justifiable eviction terminates a hotel occupant's reasonable expectation of privacy in the room. When the police arrived and the manager confirmed that he wanted the occupants evicted, the police justifiably entered the room to assist the manager in expelling the individuals in an orderly fashion. Any right defendant had to be free of government intrusion into the room ended when the hotel manager, properly exercising his authority, decided to evict the unruly guests and asked the police to help him do so.

The 2nd and 8th Circuits agree (cites omitted).

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

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U.S. v. Hayes, 551 F.3d 138 (2nd Cir.), December 24, 2008

There is no legitimate expectation of privacy in the front yard of a home clearly within plain view of the public road and adjoining properties insofar as the presence of the scent of narcotics in the air is capable of being sniffed by a police narcotics dog.

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

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U.S. v. Harris, 526 F.3d 1334 (11th Cir.), May 08, 2008

Passengers in a taxicab can have a reasonable expectation of privacy in the passenger compartment. The cab driver has the authority to consent to a search of the passenger compartment.

Editor's Note: The Court did not define the "passenger compartment" in which the taxicab passenger could have a reasonable expectation of privacy. The Court suggests in dicta based on the Supreme Court's decision in Georgia v. Randolph that a refusal by the passenger who is present would prevail over consent by the driver.

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

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U.S. v. Banks, 514 F.3d 769 (8th Cir.), January 09, 2008

Ordinarily, a warrant is necessary before police may open a closed container because by concealing the contents from plain view, the possessor creates a reasonable expectation of privacy. However, like objects that sit out in the open, the contents of some containers are treated similarly to objects in plain view. Some containers (for example a gun case) by their very nature cannot support a reasonable expectation of privacy because their contents

can be inferred from their outward appearance. This exception is limited to those rare containers that are designed for a single purpose. Because the distinctive configuration of such containers proclaims their contents, the contents cannot fairly be said to have been removed from a searching officer's view. Because a gun, possessed by a felon, is always evidence of a crime, no warrant is necessary to search a bag whose size and shape suggests it contains a gun.

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

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U.S. v. Brown, 510 F.3d 57 (1st Cir.), December 07, 2007

A part of the driveway that is freely exposed to public view does not fall within the curtilage. This is true even where that part of the driveway is somewhat removed from a public road or street, and its viewing by passersby is only occasional. In order for a part of a driveway to be considered within the home's curtilage, public viewing of it must be, at most, very infrequent. The remoteness of the relevant part of the driveway and steps taken by the resident to discourage public entry or observation can support a finding that it falls within the curtilage.

The part of the driveway not visible from the public street, due in part to the 400-foot length of the driveway and vegetation between it and the street, was not curtilage since there were no erected barriers, no posted signs, and no other action taken to prevent or discourage public entry. Although there were also no signs directing visitors to the motor-repair business located in the garage, patrons were allowed onto the property to drop off and pick up motors.

The 7th and 8th Circuits agree (cites omitted).

The 6th Circuit agrees, using a somewhat different rationale (cite omitted).

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

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U.S. v. Amaral-Estrada, 509 F.3d 820 (7th Cir.), December 05, 2007

A driver who borrows a car with the owner's permission may acquire standing to challenge the search of the vehicle only if he can establish that he has a legitimate expectation of privacy in it or in the area searched.

A person who possesses a car for the purposes of transporting contraband; who expects while using the car that others will enter the vehicle and take and/or leave items therein; who, when asked by federal agents, denies any knowledge of the car and states that he does not care about the bag in the back seat of the car because it was not his bag and not his car, has no legitimate expectation of privacy in the car or the bag inside the car.

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

Taylor v. Michigan Dep't of Natural Resources, 502 F.3d 452 (6th Cir.), September 14, 2007

A search under the Fourth Amendment is a government intrusion into a reasonable expectation of privacy. A "reasonable expectation of privacy" exists when (1) the individual has manifested a subjective expectation of privacy in the object of the challenged search and (2) society is willing to recognize that expectation as reasonable. The second prong generally addresses two considerations. The first focuses on what a person had an expectation of privacy *in*, for example, a home, office, phone booth or airplane. The second consideration examines what the person wanted to protect his privacy *from*, for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes. The purpose and degree of the government's intrusion is relevant to the second consideration.

A conservation officer's daylight, five minute, suspicionless "property (security) check" of a temporarily unoccupied residence, consisting of calling out to determine if anyone was home, checking the doors and windows to ensure they were locked, peering briefly into the interior through the open curtains of a window, and leaving his business card in the front door is not a Fourth Amendment search.

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

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U.S. v. Brathwaite, 458 F.3d 376 (5th Cir.), July 31, 2006

Looking at this issue for the first time, the Court decides:

When a person invites a confidential informant into his home, he forfeits his privacy interest in those activities that are exposed to the informant. Video recording what transpires in the informant's presence inside the home does not violate the Fourth Amendment or Title III.

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

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U.S. v. Ziegler, 456 F.3d 1138 (9th Cir.), August 08, 2006

Social norms suggest that employees are not entitled to privacy in the use of workplace computers, which belong to their employers and pose significant dangers in terms of diminished productivity and even employer liability. Thus, in the ordinary case, a workplace computer simply does not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance.

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

U.S. v. Thomas, 447 F.3d 1191 (9th Cir.), May 18, 2006

The driver of a rental car, who is not listed on the rental agreement but who has the permission of the authorized renter to drive the car, has standing to challenge a search of the vehicle.

The 8th Circuit agrees (cites omitted).

The 4th, 5th, and 10th Circuits hold that a driver not listed on the rental agreement lacks standing to object to a search regardless of consent from an authorized driver (cites omitted).

The 6th Circuit, noting a broad presumption against granting unauthorized drivers standing to challenge a search, determines whether the defendant had REP based upon all the surrounding circumstances. The court lists five factors (cite omitted).

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

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U.S. v. Dillard, 438 F.3d 675 (6th Cir.), February 27, 2006

Tenants of apartments and duplexes have a reasonable expectation of privacy in *locked* common areas. Because a duplex is more akin to a single-family home than a large apartment building, tenants may also have a reasonable expectation of privacy in unlocked areas such as a basement.

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

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Screen Doors

U.S. v. Walker, 474 F.3d 1249 (10th Cir.), January 31, 2007

Opening the storm door to knock on the inner door, even though the inner door was partially open, is not a Fourth Amendment intrusion because such action does not violate an occupant's reasonable expectation of privacy.

When the Deputy knocked on the inner door, again announcing that he was from the Sheriff's office, defendant responded, "Yeah, and I got a goddamn gun." This threatening remark justified the officers in taking prompt action to protect themselves. Although retreat was an alternative, it was also reasonable for them to take control of the situation by entering to disarm Mr. Walker, who could otherwise continue to pose a danger to the officers and others.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and

conducted to protect the safety of police officers or others. Absent an arrest warrant or even probable cause to make an arrest, a protective sweep is not authorized.

Editor's Note: The court remanded the case to the district court to determine whether the "sweep" was lawful under the emergency exigency. If so, the evidence found during the "sweep" that justified the eventual arrest was seized under the "plain view doctrine" and would therefore be admissible.

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

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U.S. v. Arellano-Ochoa, 461 F.3d 1142 (9th Cir.), August 31, 2006

Opening a screen door to knock when the inner door is closed is not a Fourth Amendment intrusion. When the inner door is closed, people understand that visitors will need to open the screen door, and have no expectation to the contrary.

Opening a closed screen door when the inner door is open is a Fourth Amendment intrusion. Where the solid door is open so that the screen door is all that protects the privacy of the residents, opening the screen door infringes upon a reasonable and legitimate expectation of privacy.

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

******

U.S. v. Morris, 436 F.3d 1045 (8th Cir.), January 31, 2006

Opening the locked screen door, although it gave access only to the small space between the screen door and the inner door, was a search for purposes of the Fourth Amendment.

To go ahead and enter, police must have reasonable suspicion that further compliance with the knock-and-announce requirement would inhibit the effective investigation of the crime.

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

******

Search Warrants

Los Angeles County v. Rettele, 127 S. Ct. 1989, May 21, 2007 **(Supreme Court)**

Officers who are searching a house where they believe a suspect might be armed possess authority to secure the premises before deciding whether to continue with the search. It is reasonable for officers to take action to secure the premises and to ensure their own safety and the efficiency of the search. The risk of harm to both the police and the occupants is

minimized if the officers routinely exercise unquestioned command of the situation.

Unknown to the officers, the suspects had moved from and sold the house three months earlier. The occupants were completely innocent of wrongdoing. Clearly, the officers made an error in the case. However, "[t]he Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty." Under such standards, mistakes are inevitable. This does not mean that all mistakes are unreasonable. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, the Fourth Amendment is not violated.

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

******

U.S. v. Grubbs, 126 S. Ct. 1494, March 21, 2006 **(Supreme Court)**

"Anticipatory search warrants" are constitutionally permissible so long as there is probable cause at the time the warrant is served.

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

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Bowling v. Rector, 584 F.3d 956 (10th Cir.), October 26, 2009

To be valid under the Fourth Amendment, the search warrant must meet three requirements: (1) it must have been issued by a neutral, disinterested magistrate; (2) those seeking the warrant must have demonstrated to the magistrate their probable cause to believe that the evidence sought would aid in a particular apprehension or conviction for a particular offense; and (3) the warrant must particularly describe the things to be seized, as well as the place to be searched.

These requirements are satisfied where officers obtain a warrant, grounded in probable cause and phrased with sufficient particularity, from a magistrate of the relevant jurisdiction authorizing them to search a particular location, even if those officers are acting outside their jurisdiction as defined by state law.

The 8th Circuit agrees (cite omitted)**.**

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

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U.S. v. Fagan, 577 F.3d 10 (1st Cir.), August 13, 2009

The Warrant Clause of the Fourth Amendment has been interpreted to permit searches not only of the premises specified in a warrant but also of structures "appurtenant" to those premises. Whether a searching officer reasonably could conclude that a specific

structure is appurtenant to the premises specified in a particular search warrant necessarily demands close attention to the facts incident to the search in question. Factors include the proximity of the structure to the described premises; the location's layout and the context-specific relationship between the structure and the premises specified in the warrant; and extrinsic evidence, including evidence discovered during admittedly valid portions of the search, suggesting that the structure is appurtenant to the premises specified in the warrant.

In the case at hand, the third-floor closet was located on the third-floor landing, no more than eight feet from the front door of the apartment; the landing itself was small and led to the apartment; the spatial relationship between the closet and the apartment was intimate; the other residential units in the building were physically removed from both the third floor and the third-floor landing; and the key found in the defendant's bedroom opened the padlock that secured the closet. Thus, evidence found in the flat quite literally opened the door to the closet. That combination of factors was sufficient to permit an objectively reasonable officer to conclude that the storage closet was appurtenant to the apartment and to search the closet under the purview of the warrant.

What counts is whether the searching officer has an objectively reasonable basis for believing that a particular structure is appurtenant to the premises specified in the search warrant. If he does, he may search that structure under the purview of the warrant; he need not halt his search to scrutinize lease arrangements, interrogate landlords, or interview other occupants of the building.

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

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Editor's Note: This is an amended opinion adding the discussion and holdings below. See also the report of this case in the February issue of *The Informer* (2Informer09) and the "REP" section of this Digest.

U.S. v. SDI Future Health, Inc., 568 F.3d 684 (9th Cir.), June 01, 2009

In determining whether a warrant is overbroad and lacking particularity, the court must answer the threshold question of whether the warrant incorporates the affidavit. If it was incorporated, then the affidavit and the warrant are evaluated as a whole, allowing the affidavit to "cure" any deficiencies in the naked warrant. An affidavit is part of a warrant only if (1) the warrant expressly incorporates the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search. The goal of the "cure by affidavit" rule is to consider those affidavits that limit the discretion of the officers executing the warrant.

A warrant expressly incorporates an affidavit when it uses "suitable words of reference." There are no required magic words of incorporation. Suitable words of reference are used where the warrant explicitly states: "*Upon the sworn complaint made before me* there is probable cause to believe that the [given] crime[ ] . . . has been committed." There were suitable words in the instant warrant that pointed to the affidavit explicitly noting "the

supporting affidavit(s)" as the "grounds for application for issuance of the search warrant."

Even though the affidavit was not physically attached to the warrant (it had been sealed by the court), by making the affidavit available, the search team ensured that it accompanied the warrant to satisfy the requirements of incorporation. Nothing more is necessary for the affidavit to ensure that the discretion of the officers executing the warrant is limited.

A warrant must not only give clear instructions to a search team, it must also give legal, that is, not overbroad, instructions. Under the Fourth Amendment, this means that there must be probable cause to seize the particular things named in the warrant. The search and seizure of large quantities of material is justified if the material is within the scope of the probable cause underlying the warrant.

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

******

Guzman v. City of Chicago, 565 F.3d 393 (7th Cir.), May 13, 2009

Officers served a warrant to search what was described as a single-family residence. Although the officers thought the building looked like a single-family house, they should have known pretty quickly that their belief was mistaken. Learning that the front of the building housed a real estate office, that they could not get to the rest of the house from that office, that they had to go outside to access the second-floor apartment, and that there was a separate door for the first-floor apartment should have informed them that this was not a single-family residence. So informed, they should have called off the search.

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

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U.S. v. Otero, 563 F.3d 1127 (10th Cir.), April 28, 2009

The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the Fourth Amendment particularity requirement that much more important. A warrant authorizing a search of "any and all information and/or data" stored on a computer is the sort of wide-ranging search that fails to satisfy the particularity requirement. Warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material.

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

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U.S. v. Kattaria, 553 F.3d 1171 (8th Cir.), January 30, 2009

This opinion vacates and reverses the opinion at 503 F.3d 703, October 05, 2007, and briefed below.

The Court declined to address the issue of whether a warrant to use a thermal imaging device to detect excess heat emanating from a home may be issued on reasonable suspicion. The Court affirmed the District Court's denial of the motion to suppress and the panel's earlier ruling affirming that decision by determining that the facts used to support the thermal imaging warrant amounted to traditional probable cause.

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

******

U.S. v. Paull, 551 F.3d 516 (6th Cir.), January 09, 2009

A search warrant affidavit must allege facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. The expiration of probable cause is determined by the circumstances of each case and depends on the inherent nature of the crime. Because the crime is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography. The affidavit contained evidence that defendant had visited or subscribed to multiple websites containing child pornography over a two-year period and an expert description of the barter economy in child pornography. This made it likely that defendant was involved in an exchange of images and, therefore, likely to have a large cache of such images in order to facilitate that participation. Such information supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.

The 2nd, 5th, and 9th Circuits agree (cites omitted)**.**

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

******

U.S. v. Williams, 548 F.3d 311 (4th Cir.), December 03, 2008

Warrants to search a suspect's residence are valid when based on (1) evidence of the suspect's involvement in drug trafficking combined with (2) the reasonable suspicion (whether explicitly articulated by the applying officer or implicitly arrived at by the magistrate judge) that drug traffickers store drug-related evidence in their homes.

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

******

U.S. v. Jennings, 544 F.3d 815 (7th Cir.), September 15, 2008

Officers executing a search warrant have categorical authority to detain any occupant of the subject premises during the search. Muehler v. Mena, 544 U.S. 93, 98 (2005); Michigan v. Summers, 452 U.S. 692 (1981). This authority exists in part because the probable cause underlying a warrant to search a premises gives police reason to suspect that its occupants are involved in criminal activity, and also because the officers have a legitimate interest in minimizing the risk of violence that may erupt when an occupant realizes that a search is underway.

The rule of Summers also permits police to detain people who approach a premises where a search is in progress. Jennings' intrusion into the apartment parking lot within the security perimeter of officers preparing to serve a search warrant permitted his detention. The crack cocaine was in plain view in his vehicle and is therefore admissible evidence.

The 3rd and 6th Circuits agree (cites omitted).

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

******

U.S. v. Mikos, 539 F.3d 706 (7th Cir.), August 25, 2008

A "sneak and peek" warrant, pursuant to 18 U.S.C. §3103a permits inspection but not seizure. Lack of seizure explains the "peek" part of the name; the "sneak" part comes from the fact that agents need not notify the owner until later. Such warrants are designed to permit an investigation without tipping off the suspect. Even assuming that the removal of a large cache of firearms and ammunition from a storage unit and spreading them on the ground just outside to inventory and photograph is a "seizure" unauthorized by the warrant, use of the exclusionary rule would be unwarranted. First, it did not cause Mikos any distinct injury; second, a seizure was inevitable once the agents saw the arsenal. A premature seizure does not lead to exclusion of evidence when an immediately requested warrant, authorizing everything that occurred, was certain to issue.

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

******

U.S. v. Giberson, 527 F.3d 882 (9th Cir.), May 30, 2008

Even when the search warrant does not specifically authorize it, the search of a computer does not exceed the scope of the warrant when there is ample evidence that the documents authorized in the warrant could be found on the computer.

Computers are able to store massive quantities of intangible, digitally stored information, distinguishing them from ordinary storage containers. But neither the quantity of information, nor the form in which it is stored, is legally relevant in the Fourth

Amendment context. There is no reason why officers should be permitted to search a room full of filing cabinets or even a person's library for documents listed in a warrant but should not be able to search a computer.

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

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U.S. v. Morales-Aldahondo, 524 F.3d 115 (1st Cir.), April 24, 2008

When evaluating a claim that information in a search warrant affidavit was stale, the timeliness of information is not measured simply by counting the number of days that have elapsed. Instead, the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information is considered.

Three year old information is not stale when supported by the testimony of an agent, based on his experience and training, that people who download child pornography value their collections to such an extent that they keep the images for a period of time, usually years and that a person who uses a computer to access child pornography is likely to use his computer both to augment and to store the collected images. History teaches that collectors prefer not to dispose of their dross, typically retaining obscene materials for years.

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

******

U.S. v. Tejada, 524 F.3d 809 (7th Cir.), April 10, 2008

When a warrant would *certainly*, and not merely probably, have been issued had it been applied for, evidence seized without a warrant is admissible under the inevitable discovery doctrine.

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

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U.S. v. Rogers, 521 F.3d 5 (1st Cir.), March 25, 2008

The term "photos" certainly includes "developed print photographs." Given the current state of technology, the term "photos" also reasonably includes images captured on videotapes or by a digital camera. It is reasonable to believe that a videotape could contain "photos." Search of a videotape for "photos" is within the scope authorized by the warrant.

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

U.S. v. LaFortune, 520 F.3d 50 (1st Cir.), March 18, 2008

The best practice is for an applicant seeking a warrant based on images of alleged child pornography to append the images or provide a sufficiently specific description of the images to enable the magistrate judge to determine independently whether they probably depict real children.

Neither expert testimony nor "informed lay opinion" is required to support a judge's search warrant probable cause determination that the alleged child pornography involves real children rather than virtual children.

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

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U.S. v. Cazares-Olivas, 515 F.3d 726 (7th Cir.), January 29, 2008

Failure by the agent, Assistant U.S. Attorney, and Magistrate Judge to follow the procedures for obtaining a telephonic search warrant as set out in FRCrP 41 means that the warrantless search, even though verbally approved by the judge, violated the Fourth Amendment. (This was the only time within the last 15 years, if not longer, that a telephonic warrant had been requested in the Western District of Wisconsin).

The exclusionary rule is used for only a subset of constitutional errors. Permitting people to get away with crime is too high a price to pay for errors that either do not play any causal role in the seizure (the inevitable-discovery situation) or stem from negligence rather than disdain for constitutional requirements (the good faith reliance situation). Had the magistrate judge written out and signed a warrant after hanging up the phone, everything would have proceeded exactly as it did. The agents would have conducted the same search and found the same evidence (the inevitable-discovery situation).

Violations of federal rules alone do not justify the exclusion of evidence that has been seized on the basis of probable cause, and with advance judicial approval.

The 10th Circuit agrees (cite omitted).

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

******

U.S. v. Mousli, 511 F.3d 7 (1th Cir.), December 13, 2007

The Fourth Amendment warrant particularity requirement obligates the police to specify the precise unit of a multi-unit dwelling that is the subject of the search. The general rule is that a warrant that authorizes the search of an undisclosed multi-unit dwelling is invalid. There are exceptions to this rule.

The police can validly search a multi-unit dwelling even if the search warrant was only for a single-unit dwelling, provided the police reasonably believed that the dwelling contained

only one unit. Search warrants and affidavits should be considered in a common sense manner, and hyper technical readings should be avoided.

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

******

U.S. v. Kattaria, 503 F.3d 703 (8th Cir.), October 05, 2007

See Vacation and Reversal Above

Looking at this issue for the first time, the Court decides:

The same Fourth Amendment reasonable suspicion standard that applies to Terry investigative stops applies to the issuance of a purely investigative warrant to conduct a limited thermal imaging search from well outside the home. The traditional requirement of probable cause is relaxed by the well-established Fourth Amendment principle that the police may reasonably make a brief and minimally intrusive investigative stop if they have reasonable suspicion that criminal activity may be afoot. Factors justifying application of this standard, rather than probable cause, are "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives." The "practical alternatives" factor provides good reason to shift the analysis when the issue is the quantum of evidence required to obtain a warrant *solely for the purpose of conducting investigative thermal imaging*. Thermal imaging information provides important corroboration that criminal activity is likely being conducted in a home *before the homeowner is subjected to a full physical search.* If the same probable cause is required to obtain both kinds of warrants, law enforcement will have little incentive to incur the expense of a minimally intrusive thermal imaging search before conducting a highly intrusive physical search.

The 9th Circuit disagrees and requires probable cause for a thermal imaging warrant (cite omitted)**.**

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

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U.S. v. Williams, 477 F.3d 554 (8th Cir.), February 13, 2007

An affidavit is not robbed of its probative effect by its failure to mention that the informant

"was a paid informant who avoided prosecution by virtue of her testimony…." In fact, a properly developed pay-based incentive system with appropriate consequences for invalid information may even bolster reliability. Omitting the details and existence of the bargaining agreement between the informant and the government is not misleading.

Probable cause is not defeated by a failure to inform the magistrate judge of an

informant's criminal history if the informant's information is at least partly corroborated or reliability is established through some other means such as a track record.

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

******

U.S. v. Wiley, 475 F.3d 908 (7th Cir.), February 06, 2007

When an affidavit is based on informant tips, the probable cause inquiry is based on the totality of the circumstances. *See* Illinois v. Gates, 462 U.S. 213 (1983). These four factors are particularly relevant as a part of this inquiry: (1) the extent to which the police have corroborated the informant's statements; (2) the degree to which the informant has acquired knowledge of the events through firsthand observation; (3) the amount of detail provided; and (4) the interval between the date of the events and police officer's application for the search warrant.

Probable cause does not require direct evidence linking a crime to a particular place. Issuing judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense. In the case of drug dealers, evidence is often found at their residences. However, there is no categorical rule that would, in every case, uphold a finding of probable cause to search a particular location simply because a suspected drug trafficker resides there.

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

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U.S. v. Brakeman, 475 F.3d 1206 (10th Cir.), February 06, 2007

An officer's personal knowledge cannot be the *sole* means of determining what property is to be searched but it can supplement a technically inaccurate description in a search warrant to cure any ambiguity and satisfy the Fourth Amendment's particularity requirement.

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

******

U.S. v. Hector, 474 F.3d 1150 (9th Cir.), January 25, 2007

Overruling its prior decisions, the court decides:

The purpose (under F.R.Cr.P. 41(d)) of handing the occupant the warrant, like that of the "knock and announce" rule, is to head off breaches of the peace by dispelling any suspicion that the search is illegitimate.

Failure to serve a copy of the warrant, even if a violation of the Fourth Amendment, does not trigger the exclusionary rule. Given that a valid search warrant entitles the officers to retrieve evidence in the residence, resort to the massive remedy of suppressing evidence of guilt is unjustified.

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

******

U.S. v. Jones, 471 F.3d 868 (8th Cir.), December 20, 2006

Federal Rule of Criminal Procedure 41 (and 18 U.S.C. § 3109) applies when a warrant is sought by a federal law enforcement officer or when the search is "federal in character." Searches may be "federal in character" if there is significant federal involvement in the search. Federal involvement is determined by considering factors such as the existence of an extensive joint state-federal investigation involving the defendant, a joint state-federal application for or execution of the search warrant, and whether federal agents used state officers and more flexible state procedures as a means of avoiding the strictures of Rule 41. Federal Special Agents, as well as Deputy U.S. Marshals, permanently detailed to the Career Criminal Unit of the Kansas City, Missouri Police Department ("KCPD"), acting at all times under the command and supervision of the KCPD, were participating as "state officers" in the execution of a state search warrant. There was no expectation of federal prosecution. Therefore, Rule 41, requiring application for a search warrant to a Federal Magistrate Judge, did not apply.

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

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U.S. v. Pope, 467 F.3d 912 (5th Cir.), October 17, 2006

This opinion vacates and reverses the opinion at, 452 F.3d 338, June 6, 2006, and briefed below.

In the earlier decision, the court refused to apply the "good faith" exception, holding that an officer's subjective motive to search does matter, and that when applying for a search warrant, the stated purpose of the warrant must match the officer's actual motivation for the search. The court now holds that even though the facts in the affidavit supporting the warrant were stale, good faith reliance on the issued warrant makes the evidence admissible.

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

******

U.S. v. Hurwitz, 459 F.3d 463 (4th Cir.), August 22, 2006

A supporting affidavit or document may be read together with (and considered part of) a search warrant that otherwise lacks sufficient particularity. It is sufficient either for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself.

The 6th Circuit agrees (cite omitted)**.**

The 1st, 3rd, 8th, 9th, 10th, and D.C. Circuits require that the warrant both reference the document and that the document accompany the warrant (cites omitted)**.**

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

******

U.S. v. Pope, 452 F.3d 338 (5th Cir.), June 06, 2006

See Reversal and Vacation Above

An officer's subjective motive to search does matter. When applying for a search warrant, the stated purpose of the warrant must match the officer's actual motivation for the search.

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

See also **Brigham City v. Stuart**, 126 S. Ct. 1943 (2006) ***Brigham City* at QR-7-3**

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U.S. v. Rizzi, 434 F.3d 669 (4th Cir.), January 09, 2006

Search warrants for controlled substances are governed exclusively by 21 U.S.C. § 879, and may be executed at any time of day or night without any showing or finding by the judge that a nighttime execution is necessary.

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

******

Armstrong v. City of Melvindale, 432 F.3d 695 (6th Cir. 2006)

The Fourth Amendment requires probable cause to believe that *fruits, instrumentalities, or evidence of a crime* will be found at the place to be searched. Search warrants for items that lack any criminal link are unconstitutional.

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

******

Knock and Announce

Hudson v. Michigan, 126 S. Ct. 2159, June 15, 2006 **(Supreme Court)**

Violation of the Fourth Amendment "knock and announce" rule, without more, will not result in suppression of evidence at trial.

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

******

U.S. v. Carvajal, 502 F.3d 54 (2nd Cir.), September 05, 2007

In Hudson v. Michigan, 126 S. Ct. 2159 (2006), the Supreme Court held that although a police officer's failure to abide by the knock-and-announce rule may violate an individual's right to be free from unreasonable searches under the Fourth Amendment, the exclusionary rule does not apply to evidence discovered in the ensuing search with a warrant. Hudson involved state law enforcement officers whose actions were governed solely by the Fourth Amendment and not by 18 U.S.C. § 3109. Because the Fourth Amendment knock-and-announce principle and § 3109 share the same common law roots, overlap in scope, and protect the same interests, the results in terms of the exclusionary rule's application are necessarily similar.

A technical violation by federal officers of the knock-and-announce rule under either the Fourth Amendment or § 3109 cannot form the basis for suppression of evidence.

The facts underlying an alleged violation of § 3109 may form the basis for attacking the propriety of the search as a violation of the Fourth Amendment outside of just the knock and announce context. If such is the case, a cause of action for damages may lie against the federal officer under Bivens.

The 5th and D.C. Circuits agree (cites omitted)**.**

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

******

U.S. v. Pelletier, 469 F.3d 194 (1st Cir.), November 28, 2006

The Supreme Court's decision in Hudson v. Michigan, 126 S. Ct. 2159 (2006) that a violation of the "knock and announce" rule in the course of executing a search warrant does not automatically trigger the Exclusionary Rule applies as well in the context of an arrest warrant.

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

******

Consent

Georgia v. Randolph, 126 S. Ct. 1515, March 22, 2006 **(Supreme Court)**

A warrantless search of a shared dwelling pursuant to consent granted by one tenant over the express refusal by a physically present co-tenant is unreasonable under the Fourth Amendment. Anything found during the search will be suppressed as to the person refusing to grant consent to search.

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

******

U.S. v. McMullin, 576 F.3d 810 (8th Cir.), August 17, 2009

Consent to enter to search for a fugitive does not authorize re-entry after the fugitive is found and taken into custody outside the house, even though there was no withdrawal of the original consent. The Marshals had already completed their task of arresting the fugitive in the backyard. There was no necessity or legal basis for them to re-enter the house.

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

******

U.S. v. Purcell, 526 F.3d 953 (6th Cir.), May 29, 2008

The discovery of men's clothing in a bag that a female claimed to own erases for future bags the apparent authority that justified the officers' warrantless search of the first bag, thereby making a subsequent search illegal. The discovery of men's clothing eviscerated any apparent authority, but the officers could have reestablished apparent authority by asking the supposed bag owner to verify her control over the other bags to be searched.

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

******

Eidson v. Owens, 515 F.3d 1139 (10th Cir.), February 13, 2008

A suspect's consent to search may be tainted by a threat of detention that essentially amounts to an arrest if consent is refused. A threat to hold the suspects—apparently at the end of their driveway—for as long as three days while a warrant was obtained suggests a detention amounting to arrest. However, such coercion is minimal when, based on a confession and other information, probable cause for arrest exists.

The 9th Circuit agrees (cite omitted).

Tricking or deceiving a suspect into granting consent can be improperly coercive. Telling

the suspects that if they insisted on a search warrant, "the judge would go harder on you in court and you would be considered uncooperative," is coercive, as it indicates that there are punitive ramifications to the exercise of the constitutional right to refuse.

The 3rd and 6th Circuits agree (cites omitted).

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

******

U.S. v. McKerrell, 491 F.3d 1221 (10th Cir.), July 05, 2007

Barricading oneself in one's home to avoid arrest on a warrant is not the functional equivalent of an express refusal of consent to search the home. Evidence that the police removed the potentially objecting tenant from the scene to avoid his or her objection may render a subsequent consent search unconstitutional. The bare fact of the arrest and transport to the police station does not support a conclusion that police removed the arrestee to mute a potential objection to a search. A co-tenant's consent to search a shared residence is valid as against the absent, nonconsenting tenant.

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

******

U.S. v. Andrus, 483 F.3d 711 (10th Cir.), April 25, 2007

The location of the computer within the house and other indicia of household members' access to the computer are important in assessing a third party's apparent authority to consent to the search of a home computer. Third party apparent authority to consent has generally been upheld when the computer is located in a common area of the home that is accessible to other family members under circumstances indicating the other family members were not excluded from using the computer.

Another critical issue is whether law enforcement knows or should reasonably suspect because of surrounding circumstances that the computer is password protected.

If the circumstances reasonably indicate mutual use of or control over the computer, officers are under no obligation to ask clarifying questions about password protection even if the burden would be minimal. Officers are not obligated to ask questions unless the circumstances are ambiguous.

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

******

U.S. v. Ferrer-Montoya, 483 F.3d 565 (8th Cir.), April 19, 2007

The scope of a search is generally defined by its expressed object. An officer may reasonably interpret a suspect's unqualified consent to search a vehicle for drugs to include consent to search containers within that car which might bear drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive manner. A trained dog's failure to alert may reduce the likelihood that a particular vehicle contains narcotics, but it has no bearing upon what a typical reasonable person would have understood by the exchange between the officer and the suspect in the initial grant of consent to a search.

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

******

U.S. v. Renken, 474 F.3d 984 (7th Cir.), January 31, 2007

Consent to search can be voluntary even when given while a defendant is in custody without having received Miranda warnings. Custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Under United States v. Patane, 124 S. Ct. 2620, 2629 (2004), the failure to give Miranda warnings does not require the exclusion of real evidence collected after a defendant gives a voluntary consent to search. Instead, the "totality of the circumstances" analysis applies.

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

******

U.S. v. Herrera-Gonzalez, 474 F.3d 1105 (8th Cir.), January 26, 2007

A traffic stop is reasonable under the Fourth Amendment if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred. Even if the officer was mistaken in concluding that a traffic violation occurred, the stop does not violate the Fourth Amendment if the mistake was an "objectively reasonable" one.

Even if a traffic stop is determined to be invalid, subsequent voluntary consent to a search may purge the taint of the illegal stop if it was given in circumstances that render it an

independent, lawful cause of the officer's discovery. To determine whether sufficient attenuation between the unlawful stop and the consent exists, consider the following factors: (1) the amount of time between the illegal stop and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

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

******

U.S. v. Guerrero, 472 F.3d 784 (10th Cir.), January 02, 2007

If officers merely examine an individual's driver's license, a detention has not taken place. When officers retain a driver's license in the course of questioning, that individual, as a general rule, will not reasonably feel free to terminate the encounter. Handing back defendants' papers, thanking them for their time, and beginning to walk away are generally sufficient to terminate the detention. Returning a driver's documentation may not end the detention if there is evidence of a coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled.

A defendant's consent must be clear, but it need not be verbal. Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer. Non-verbal consent may validly follow a verbal refusal.

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

******

Third Party Consent

Georgia v. Randolph, 126 S. Ct. 1515, March 22, 2006 **(Supreme Court)**

A warrantless search of a shared dwelling pursuant to consent granted by one tenant over the express refusal by a physically present co-tenant is unreasonable under the Fourth Amendment. Anything found during the search will be suppressed as to the person refusing to grant consent to search.

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

******

U.S. v. Brewer, 588 F.3d 1165 (8th Cir.), December 17, 2009

A warrantless entry and search by law enforcement officers does not violate the Fourth Amendment if the officers have obtained the consent of a third party who possesses common authority over the premises. However, a physically present co-occupant's stated refusal to permit entry renders the warrantless search unreasonable and invalid as to him. In the absence of such a refusal, a third party's consent to search is valid so long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.

The officers were tasked with serving the valid ex parte order. Defendant was removed pursuant to a valid ex parte order of protection and in furtherance of these concerns, not for the sake of avoiding a possible objection to the search.

***See* Georgia v. Randolph, 547 U.S. 103 (2006).**

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

******

U.S. v. Lopez, 547 F.3d 397 (2nd Cir.), November 13, 2008

The voluntary consent of a co-tenant is valid absent the affirmative objection by the defendant who is present. Law enforcement has no duty to ask the defendant whether he consents to the search, no matter how easy or convenient it might be to do so. Rather, the onus is on the defendant to object to the search.

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

******

U.S. v. Henderson, 536 F.3d 776 (7th Cir.), August 06, 2008

Georgia v. Randolph, 547 U.S. 103 (2006), left the bulk of third-party consent law in place. Its holding applies only when the defendant is both present and objects to the search of his home. Although defendant was initially at home and objected to the presence of the police when they arrived, his objection lost its force when he was *validly arrested* and taken to jail for domestic battery. At that point the co-tenant was free to consent to a search notwithstanding defendant's prior objection. Randolph does not permanently disable a co-tenant's shared authority to consent to an evidentiary search of the home. The co-tenant's subsequent consent, freely given when defendant was no longer present and objecting, rendered the warrantless search of their home reasonable and valid as to him.

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

******

U.S. v. Groves, 530 F.3d 506 (7th Cir.), June 27, 2008

Even though appellant had repeatedly refused consent to search his home a few weeks earlier, consent from a co-occupant obtained after the appellant had left for work was lawful because the appellant was not physically present and objecting and because the police had no active role in procuring his absence.

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

******

U.S. v. Hudspeth, 518 F.3d 954 (8th Cir.), March 11, 2008

This opinion vacates and reverses the opinion at 459 F.3d 922, August 25, 2006, and briefed below.

The Supreme Court decided in Georgia v. Randolph, 547 U.S. 103 (2006), that "a warrantless search of a shared dwelling for evidence over the *express refusal of consent by a physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." (emphasis added). That rule is limited to those situations in which the refusing party is present at the scene. A prior refusal of a cotenant who is not present does not trump the consent of a cotenant at the scene. Police do not have to tell the consenting party that the other cotenant has refused.

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

******

U.S. v. Murphy, 516 F.3d 1117 (9th Cir.), February 20, 2008

Consent to search given by a co-tenant is ineffective (as to the objector) when one tenant has already refused consent, even if the objecting tenant is not physically present at the scene because he has been arrested and taken away. If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Once a co-tenant has registered his objection, his refusal to grant consent remains effective (as to him) barring some objective manifestation that he has changed his position and no longer objects.

When an objection has been made by either tenant prior to the officers' entry, the search is not valid as to the objector and no evidence seized may be used against him.

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

******

Moore v. Andreno, 505 F.3d 203 (2nd Cir.), October 22, 2007

A third party has authority to consent to a search of a home when that person(1) has access to the area searched and (2) has either (a) common authority over the area, (b) a substantial interest in the area, or (c) permission to gain access to the area. A third party who has been told not to enter a room, who has been prevented from entry by padlocks, who has gained entry only by cutting the locks with bolt cutters, and who has made these facts known to the officers, has neither actual nor apparent authority to grant consent. Such entry violates the Fourth Amendment.

Because the court has never adequately defined the meaning of "access" or how "substantial" an interest must be over an area to vest a third party with authority to consent, the law governing the authority of a third party to consent to the search of an area

under the predominant control of another is unsettled. Therefore, the officers are entitled to qualified immunity.

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

******

U.S. v. Wilburn, 473 F.3d 742 (7th Cir.), January 11, 2007

Police may not remove a potentially objecting tenant in order to avoid a refusal when obtaining valid consent to search the apartment from a co-tenant. Absent other, additional evidence, legitimately arresting the defendant and placing him in the patrol vehicle is not purposefully removing him to avoid a refusal.

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

******

U.S. v. DiModica, 468 F.3d 495 (7th Cir.), November 16, 2006

U.S. v. Parker, 469 F.3d 1074 (7th Cir.), December 01, 2006

Police are not required to ask for consent to search from all tenants who are present. Search pursuant to the valid consent of one tenant is reasonable when a co-tenant is present, but is not asked, and does not object. Police may not remove a co-tenant from the house for the sake of avoiding a possible objection to the subsequent search.

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

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

******

U.S. v. Hudspeth, 459 F.3d 922 (8th Cir.), August 25, 2006

See Vacation and Reversal Above

The consent of one who possesses common authority over the premises or effects is valid against the absent person who does not expressly refuse consent. The consent of one does not overcome the express refusal by another who is physically present. The consent of one also does not overcome the express refusal by another who is not physically present. When one co-occupant expressly denies consent to search, police must get a warrant.

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

******

Consent Once Removed

Pearson v. Callahan, 129 S. Ct. 808, January 21, 2009 **(Supreme Court)**

It was highly anticipated that the Court would rule on the issue of "consent once removed." However, the Court made no ruling on "consent once removed."

The "consent once removed" doctrine applies when an *undercover officer* enters a house by invitation, establishes probable cause to arrest or search and then immediately summons other officers for assistance. The theory is that once someone consents to the government (undercover officer) coming in, then entry by the backup officers is no greater intrusion and is covered by the initial consent – in for a penny, in for a pound. Four circuits – the 6th, 7th, 9th, and 10th – have adopted the doctrine. The 6th and 7th Circuits have extended the doctrine to apply to situations in which *an informant,* not an undercover officer, is invited in. The 9th and 10th Circuits limit it to undercover officers.

Instead of ruling on "consent once removed," the Court found that the officers were entitled to qualified immunity based on the law of the four circuits. The focus of the Court's opinion deals with how lower courts should analyze cases to determine qualified immunity. Basically, courts are no longer required to first find that a Constitutional violation has occurred before considering whether the law was clearly established.

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

******

Callahan v. Millard County, 494 F.3d 891 (10th Cir.), July 16, 2007

The "consent-once-removed" doctrine applies when an *undercover officer* enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. There is no constitutional distinction between an entry or search by an individual police officer and an entry or search by several police officers.

The 6th, 7th, and 9th Circuits agree (cites omitted)**.**

The "consent-once-removed" doctrine does not apply when an informant is invited into a house who then in turn invites the police. In this context, the person with authority to consent never consented to the entry of police into the house.

The 6th and 7th Circuits disagree and have broadened the doctrine to grant informants the same capabilities as undercover officers (cites omitted)**.**

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

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Computers and Electronic Devices

Editor's Note: The Ninth Circuit recently (November 4, 2009) entered an order asking the parties in this case to brief the question of whether the case should be reheard by the full en banc court (comprised of *all* active judges as opposed to the 11 ordinarily selected randomly for standard en banc review).

U.S. v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir.), August 26, 2009

When the government wishes to obtain a warrant to examine a computer hard drive or electronic storage medium in searching for certain incriminating files, or when a search for evidence could result in the seizure of a computer, magistrate judges must be vigilant in observing the guidance we have set out throughout our opinion, which can be summed up as follows:

1. **Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.**

2. **Segregation and redaction must be either done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.**

3. **Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.**

4. **The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.**

5. **The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.**

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

******

U.S. v. Stults, 575 F.3d 834 (8th Cir.), August 14, 2009

There is no reasonable expectation of privacy in files on a personal computer where peer-to-peer software such as LimeWire is installed and used to make files accessible to others for file sharing. Although as a general matter an individual has an objectively reasonable expectation of privacy in his personal computer, this expectation cannot survive a decision to install and use file-sharing software, thereby opening his computer to anyone else, including law enforcement, with the same freely available program.

The 9th and 10th circuits agree (cites omitted)**.**

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

******

U.S. v. Payton, 573 F.3d 859 (9th Cir.), July 21, 2009

Computers are capable of storing immense amounts of information and often contain a great deal of private information. Searches of computers therefore often involve a degree of intrusiveness much greater in quantity, if not different in kind, from searches of other containers. Such considerations commonly support the need specifically to authorize the search of computers in a search warrant.

The drug search warrant did not authorize the search for or search of computers, but did explicitly authorize a search to find and seize, among other things, "sales ledgers showing narcotics transactions such as pay/owe sheets," and "financial records of the person(s) in control of the premises." These provisions did not authorize the officers to look for such records on defendant's computer.

Where there is no evidence that the documents in the warrant could be found on the computer, a search of the computer not expressly authorized by a warrant is not a reasonable search.

Editor's Note: See United States v. Giberson, 527 F.3d 882 (9th Cir. 2008), under this heading.

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

******

U.S. v. Otero, 563 F.3d 1127 (10th Cir.), April 28, 2009

The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the Fourth Amendment particularity requirement that much more important. A warrant authorizing a search of "any and all information and/or data" stored on a computer is the sort of wide-ranging search that fails to satisfy the particularity requirement. Warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material.

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

******

U.S. v. Mitchell, 565 F.3d 1347 (11th Cir.), April 22, 2009

A seizure of a computer based on probable cause is unconstitutional if the police act with unreasonable delay in securing a warrant.

Computers are relied upon heavily for personal and business use. Individuals may store personal letters, e-mails, financial information, passwords, family photos, and countless other items of a personal nature in electronic form on their computer hard drives. Thus, the detention of the hard drive for over three weeks (21 days) before a warrant was sought constitutes a significant interference with possessory interest. The purpose of securing a search warrant soon after a suspect is dispossessed of a closed container reasonably believed to contain contraband is to ensure its prompt return should the search reveal no such incriminating evidence, for in that event the government would be obligated to return the container (unless it had some other evidentiary value). This consideration applies with even greater force to the hard drive of a computer, which is the digital equivalent of its owner's home, capable of holding a universe of private information.

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

******

U.S. v. Murphy, 552 F.3d 405 (4th Cir.), January 15, 2009

Deciding this issue for the first time in a published opinion, the Court holds:

Because of the "manifest need . . . to preserve evidence," officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest. Officers need not first ascertain the cell phone's storage capacity. Such would be an unworkable and unreasonable rule. It is unlikely that police officers would have any way of knowing whether the text messages and other information stored on a cell phone will be preserved or be automatically deleted simply by looking at the cell phone. Rather, it is very likely that in the time it takes for officers to ascertain a cell phone's particular storage capacity, the information stored therein could be permanently lost.

The 5th and 7th Circuits agree (cites omitted).

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

******

U.S. v. Paull, 551 F.3d 516 (6th Cir.), January 09, 2009

A search warrant affidavit must allege facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. The expiration of probable cause is determined by the circumstances of each case and depends on the inherent nature of the crime. Because the crime is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography. The affidavit contained evidence

that defendant had visited or subscribed to multiple websites containing child pornography over a two-year period and an expert description of the barter economy in child pornography. This made it likely that defendant was involved in an exchange of images and, therefore, likely to have a large cache of such images in order to facilitate that participation. Such information supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.

The 2nd, 5th, and 9th Circuits agree (cites omitted)**.**

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

******

U.S. v. Giberson, 527 F.3d 882 (9th Cir.), May 30, 2008

Even when the search warrant does not specifically authorize it, the search of a computer does not exceed the scope of the warrant when there is ample evidence that the documents authorized in the warrant could be found on the computer.

Computers are able to store massive quantities of intangible, digitally stored information, distinguishing them from ordinary storage containers. But neither the quantity of information, nor the form in which it is stored, is legally relevant in the Fourth Amendment context. There is no reason why officers should be permitted to search a room full of filing cabinets or even a person's library for documents listed in a warrant but should not be able to search a computer.

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

******

U.S. v. Morales-Aldahondo, 524 F.3d 115 (1st Cir.), April 24, 2008

When evaluating a claim that information in a search warrant affidavit was stale, the timeliness of information is not measured simply by counting the number of days that have elapsed. Instead, the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information is considered.

Three year old information is not stale when supported by the testimony of an agent, based on his experience and training, that people who download child pornography value their collections to such an extent that they keep the images for a period of time, usually years and that a person who uses a computer to access child pornography is likely to use his computer both to augment and to store the collected images. History teaches that collectors prefer not to dispose of their dross, typically retaining obscene materials for years.

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

******

U.S. v. Arnold, 523 F.3d 941 (9th Cir.), April 21, 2008

Reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.

The United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity. Generally, searches made at the border are reasonable simply by virtue of the fact that they occur at the border. Searches of closed containers and their contents can be conducted at the border without particularized suspicion. The search of his laptop and its electronic contents is logically no different from the suspicionless border searches of travelers' luggage that the Supreme Court and this court have allowed.

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

******

U.S. v. LaFortune, 520 F.3d 50 (1st Cir.), March 18, 2008

The best practice is for an applicant seeking a warrant based on images of alleged child pornography to append the images or provide a sufficiently specific description of the images to enable the magistrate judge to determine independently whether they probably depict real children.

Neither expert testimony nor "informed lay opinion" is required to support a judge's search warrant probable cause determination that the alleged child pornography involves real children rather than virtual children.

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

******

U.S. v. Andrus, 483 F.3d 711 (10th Cir.), April 25, 2007

The location of the computer within the house and other indicia of household members' access to the computer are important in assessing a third party's apparent authority to consent to the search of a home computer. Third party apparent authority to consent has generally been upheld when the computer is located in a common area of the home that is accessible to other family members under circumstances indicating the other family members were not excluded from using the computer.

Another critical issue is whether law enforcement knows or should reasonably suspect because of surrounding circumstances that the computer is password protected.

If the circumstances reasonably indicate mutual use of or control over the computer, officers are under no obligation to ask clarifying questions about password protection even

if the burden would be minimal. Officers are not obligated to ask questions unless the circumstances are ambiguous.

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

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U.S. v. Garcia, 474 F.3d 994 (7th Cir.), February 02, 2007

Looking at this issue for the first time, the Court decides:

Placing a GPS (global positioning system) "memory tracking unit" underneath the rear bumper of a car found in a public place is not a Fourth Amendment "seizure" because the device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, and did not alter the car's appearance.

Using the device to track the car in public is not a Fourth Amendment "search" requiring probable cause and a warrant.

The courts of appeals have divided over the question.
The 5th and 9th Circuits agree, although the 5th Circuit approved of but did not expressly require a showing of reasonable suspicion. (cites omitted).

The 1st, 6th, and 10th Circuits call tracking a "search." The 1st and 6th Circuits require probable cause but no warrant. (cites omitted).

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

Click **HERE** for an article on GPS tracking by Senior Legal Instructor Keith Hodges (written prior to this decision).

******

U.S. v. Ziegler, 456 F.3d 1138 (9th Cir.), August 08, 2006

Social norms suggest that employees are not entitled to privacy in the use of workplace computers, which belong to their employers and pose significant dangers in terms of diminished productivity and even employer liability. Thus, in the ordinary case, a workplace computer simply does not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance.

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

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Exigency

Michigan v. Fisher, 130 S. Ct. 546, December 7, 2009 **(Supreme Court)**

Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. The police officers here were responding to a report of a disturbance. When they arrived on the scene they encountered a tumultuous situation in the house--and they also found signs of a recent injury, perhaps from a car accident, outside. The officers could see violent behavior inside. The officers saw defendant screaming and throwing things. It is objectively reasonable to believe that defendant's projectiles might have a human target (perhaps a spouse or a child), or that defendant would hurt himself in the course of his rage. The officer's entry was reasonable under the Fourth Amendment. See Brigham City v. Stuart, 547 U. S. 398 (2006).

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

******

Brigham City v. Stuart, 126 S. Ct. 1943, May 22, 2006 **(Supreme Court)**

An officer's ulterior, subjective motive for entering a residence is immaterial if the officer has an objectively reasonable basis to believe that someone inside is seriously injured or imminently threatened with such an injury.

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

******

U.S. v. Washington, 573 F.3d 279 (6th Cir.), July 22, 2009

An ongoing criminal trespass, on its own, does not constitute an exigency that overrides the warrant requirement. The critical issue is whether there is a "true immediacy" that absolves an officer from the need to apply for a warrant and receive approval from an impartial magistrate. When people may have the capacity to harm others, but are not engaged in an inherently dangerous activity, officers cannot lawfully dispense with the warrant requirement. An ongoing nuisance that results in non-physical harm to others may constitute an exigency. However, the mere possibility of physical harm does not. Here the underlying offense under Ohio law was criminal trespass—a fourth-degree misdemeanor punishable by a maximum sentence of thirty days' imprisonment. The government's interest in investigating a fourth-degree misdemeanor is relatively minor.

The community caretaker exception does not provide the government with refuge from the warrant requirement except when delay is reasonably likely to result in injury or ongoing harm to the community at large.

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

Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir.), March 11, 2009

This opinion vacates and reverses the opinion at 475 F.3d 1049, January 16, 2007, and briefed below.

During an armed standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody.

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

******

Mora v. City of Gaithersburg, 519 F.3d 216 (4th Cir.), March 04, 2008

Editor's Note: Mora called a healthcare hotline and told the operator that he was suicidal, had weapons in his apartment, and could understand shooting people at work. He ended the call by saying, "I might as well die at work." Police immediately responded, seized Mora in the parking lot, transported him for psychiatric evaluation, searched his apartment, and seized 41 firearms and 5,000 rounds of ammunition.

The officers who seized Mora and his weapons were engaged in a preventive action aimed at incapacitating an individual they had reason to believe intended a crime. Protecting the physical security of its people is the first job of any government, and the threat of mass murder implicates that interest in the most compelling way. Police, then, must be entitled to take effective preventive action when evidence surfaces of an individual who intends slaughter.

To be objectively reasonable in preventative action situations, balancing the government interest against the intrusion, includes consideration of three important factors: (1) the likelihood or probability that a crime will come to pass; (2) how quickly the threatened crime might take place; and (3) the gravity of the potential crime. As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action. The proper application of a balancing test in preventive action cases respects the room for judgment that law enforcement must enjoy in any emergency where lives are on the line.

The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope.

The authority to defuse the threat Mora presented included the authority to take the weapons that made him so threatening.

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

******

U.S. v. Mata, 517 F.3d 279 (5th Cir.), February 11, 2008

Lawful arrest is not an indispensable element of a protective sweep. The government need not prove the sweep was incident to a lawful arrest.

Exigent circumstances do not include the likely consequences of the government's own actions or inactions. The moment to determine whether exigent circumstances exist is before the defendant is aware of the officers' presence.

Editor's note: There is a split of circuits on both issues. Refer to the Subject Matter Case Digest on "Protective Sweeps" and "Exigent Circumstances."

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

******

U.S. v. Mowatt, 513 F.3d 395 (4th Cir.), January 25, 2008

Having first detected the odor of marijuana, the officers needed only to seek a warrant before confronting the apartment's occupants. By not doing so, they set up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crimes. Having created the "exigency" themselves for no apparent reason, the officers cannot rely on it to dispense with the warrant requirement.

The 3rd, 5th, 7th, 8th, and 11th Circuits agree (cites omitted).

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

******

Bingue v. Prunchak, 512 F.3d 1169 (9th Cir.), January 15, 2008

Looking at this issue for the first time, the Court decides:

Regarding the emergency exigency that allows a warrantless search, the court overrules its prior decision (cite omitted) and adopts a two pronged test that asks whether: (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need. In accordance with Brigham City v. Stuart, 126 S. Ct. 1943 (2006), the subjective motive of the officer is irrelevant.

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

******

U.S. v. Collins, 510 F.3d 697 (7th Cir.), December 14, 2007

If police have probable cause to believe that evidence is being destroyed within a house (an emergency situation), then they can enter immediately without a warrant and without knocking. If they do not have such probable cause, they have to get a warrant.

There is a sense in which any time police knock and announce their presence and the occupants respond in a suspicious manner (such as running feet), the police can be regarded as the "manufacturers" of the emergency that they then use to justify their warrantless barging in and searching the house and arresting the occupants. However, that would not justify suppression of the evidence found in the search. The conduct of the police would be a "but for" cause (that is, a necessary condition) of the emergency, but it would not be culpable. They would be doing nothing wrong because there is no legal requirement of obtaining a warrant to knock on someone's door. For that matter there is nothing to forbid the police to lug the battering ram with them in open view, anticipating the worst. But the risk they take in proceeding in such a fashion is that the emergency will not materialize— that the occupant of the house will calmly open the door and ask to see their warrant—that there will be no sounds or sights signifying that evidence is about to be destroyed. The further risk is that no one will answer the knock and the government will be unable to prove that the police knew the house was occupied.

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

******

U.S. v. Ellis, 499 F.3d 686 (7th Cir.), August 27, 2007

During a "knock and talk" investigation of drug activity, the perception of movement within the house by police, without more, does not create exigent circumstances. To support an exigent circumstance allowing entry without a warrant, police must differentiate the perceived movement from the reasonable type of movement that would be found in any home where there was a knock on the door.

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

******

U.S. v. Gomez-Moreno, 479 F.3d 350 (5th Cir.), February 12, 2007

Exigent circumstances may not consist of the likely consequences of the government's own actions or inactions. In determining whether officers create an exigency, this Court focuses on the "reasonableness of the officers' investigative tactics leading up to the warrantless entry."

A "knock and talk" strategy is reasonable where the officers who approached the house are not convinced that criminal activity is taking place or have any reason to believe the occupants are armed.

Creating a show of force and demanding entry into a home without a warrant, goes beyond the reasonable "knock and talk" strategy of investigation and unreasonably creates the exigency.

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

******

U.S. v. Walker, 474 F.3d 1249 (10th Cir.), January 31, 2007

Opening the storm door to knock on the inner door, even though the inner door was partially open, is not a Fourth Amendment intrusion because such action does not violate an occupant's reasonable expectation of privacy.

When the Deputy knocked on the inner door, again announcing that he was from the Sheriff's office, defendant responded, "Yeah, and I got a goddamn gun." This threatening remark justified the officers in taking prompt action to protect themselves. Although retreat was an alternative, it was also reasonable for them to take control of the situation by entering to disarm Mr. Walker, who could otherwise continue to pose a danger to the officers and others.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. Absent an arrest warrant or even probable cause to make an arrest, a protective sweep is not authorized.

Editor's Note: The court remanded the case to the district court to determine whether the "sweep" was lawful under the emergency exigency. If so, the evidence found during the "sweep" that justified the eventual arrest was seized under the "plain view doctrine" and would therefore be admissible.

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

******

Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir.), January 16, 2007

See Vacation and Reversal Above

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry*.

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

******

U.S. v. Newman, 472 F.3d 233 (5th Cir.), December 05, 2006

Officers may not impermissibly create exigent circumstances by revealing their presence in order to alert suspects who would, in response, destroy evidence or put the police in danger. Whether the exigent circumstances are impermissibly manufactured is determined by "the reasonableness and propriety of the investigative tactics that generated the exigency." The "knock and talk" approach has been recognized as legitimate, and the officers did not manufacture an exigency by employing this legitimate investigative tactic.

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

******

U.S. v. Elder, 466 F.3d 1090 (7th Cir.), November 01, 2006

Many 911 calls are brief, and anonymous, precisely because the speaker is at risk and must conceal the call. These persons are more rather than less in need of assistance. The fact that drug dealers often use guns and knives to protect their operations creates a possibility that violence has been done, or that someone is still there and lying in wait. Therefore, following an anonymous call about methamphetamine, entry into the outbuilding was reasonable, and a warrant was not necessary. The officers acted sensibly in attempting to assure the caller's safety.

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

******

U.S. v. Samboy, 433 F.3d 154 (1st Cir.), December 29, 2005

There is no legal rule requiring police to seek a warrant as soon as probable cause likely exists. An exigency may exist even when police might have foreseen the circumstances. An exigency may be negated when the government unreasonably and deliberately delays or avoids obtaining a warrant.

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

******

Inspections

Mills v. Dist. of Columbia, 571 F.3d 1304 (D.C. Cir.), July 10, 2009

D.C. established a Neighborhood Safety Zone (NSZ) program authorizing the police to set up checkpoints at the perimeters of the zone and stop all those attempting to enter by vehicle. When motorists were stopped at the checkpoint, officers were required to identify themselves and inquire whether the motorists had "legitimate reasons" for entering the NSZ area. Legitimate reasons for entry fell within one of six defined categories: the motorist was (1) a resident of the NSZ; (2) employed or on a commercial delivery in the NSZ; (3) attending school or taking a child to school or day-care in the NSZ; (4) related to a resident of the NSZ; (5) elderly, disabled or seeking medical attention; and/or (6) attempting to attend a verified organized civic, community, or religious event in the NSZ. If the motorist provided the officer with a legitimate reason for entry, the officer was authorized to request additional information sufficient to verify the motorist's stated reason for entry into the NSZ area. Officers denied entry to those motorists who did not have a legitimate reason for entry, who could not substantiate their reason for entry, or who refused to provide a legitimate The stated primary purpose of the NSZ was not to make arrests or to detect evidence of ordinary criminal wrongdoing, but to increase protection from violent criminal acts, and promote the safety and security of persons within the NSZ by discouraging–and thereby deterring–persons in motor vehicles from entering the NSZ intending to commit acts of violence.

Without question, a seizure occurs when a vehicle is stopped at a police checkpoint. When the primary purpose of a checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment. *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000). Because the purpose of the NSZ checkpoint program is not immediately distinguishable from the general interest in crime control, appellants' the seizures are unconstitutional.

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

*****

U.S. v. Seljan, 547 F.3d 993 (9th Cir.), October 23, 2008

On rehearing of a previous panel decision, the full court decides:

The search of the FedEx package and reading of a personal letter by customs officials occurred at the functional equivalent of the border, did not involve the destruction of property, was not conducted in a particularly offensive manner, and was not a highly intrusive search of the person. Therefore, it did not require any articulable level of suspicion.

There was intrusion into defendant's privacy, but the degree of intrusion must be viewed in perspective. The defendant voluntarily gave the package containing the letter to FedEx for delivery to someone in the Philippines, with knowledge that it would have to cross the

border and clear customs. The reasonable expectation of privacy for that package was necessarily tempered.

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

******

U.S. v. Arnold, 523 F.3d 941 (9th Cir.), April 21, 2008

Reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.

The United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity. Generally, searches made at the border are reasonable simply by virtue of the fact that they occur at the border. Searches of closed containers and their contents can be conducted at the border without particularized suspicion. The search of his laptop and its electronic contents is logically no different from the suspicionless border searches of travelers' luggage that the Supreme Court and this court have allowed.

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

******

Trinity Marine Prods., Inc. v. Chao, 512 F.3d 198 (5th Cir.), December 26, 2007

Looking at this issue for the first time, the Court decides:

When the target of an administrative (regulatory inspection) warrant forbids entry, the standard method of enforcement is a contempt proceeding. However, there is no constitutional right to a pre-execution contempt hearing, and administrative warrants, like criminal warrants, can be executed by means of reasonable force.

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

******

Bruce v. Beary, 498 F.3d 1232 (11th Cir.), September 06, 2007

Administrative searches are an exception to the Fourth Amendment's warrant requirement and do not violate the Constitution simply because of the existence of specific suspicion of criminal wrongdoing. But, they are not an exception to the Fourth Amendment's requirement for reasonableness. The scope and execution of an administrative inspection must be reasonable in order to be constitutional. To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it.

Absent evidence of any reason to believe that the inspection would be met with resistance

or defiance, an administrative search is unreasonable when a group of approximately twenty officers armed with Glock 21 sidearms, some carrying Bennelli automatic shotguns, some dressed in SWAT uniforms - ballistic vests imprinted with SWAT in big letters, camouflage pants, and black boots - arrive in unmarked trucks and SUVs, surround the entire premises, block all exits, enter with guns drawn, order the employees to line up along the fence, pat down and search the employees, search pockets and purses, and detain employees for ten hours.

If an administrative search is unlawful from its inception or in its execution, then nothing discovered in the ensuing search can be used to support the required probable cause to arrest or to seize property.

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

******

U.S. v. Aukai, 497 F.3d 955 (9th Cir.), August 10, 2007

The constitutionality of an airport screening search does not depend on either ongoing consent or irrevocable implied consent. Allowing a potential passenger to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by "electing not to fly" on the cusp of detection until a vulnerable portal is found. This rule would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks. Where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, 49 U.S.C. § 44901, all that is required is the passenger's election to attempt entry into the secured area of an airport.

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

******

U.S. v. Abbouchi, 494 F.3d 825 (9th Cir.), July 13, 2007

Border searches of persons and property entering and exiting the United States are reasonable simply by virtue of the fact that they occur at the border. These searches may take place at the physical border or its "functional equivalent." "Extended border searches" are typically separated by a greater distance and time from the actual border than searches at the functional equivalent of the border. Extended border searches necessarily entail a greater level of intrusion on legitimate expectations of privacy than an ordinary border search because of their delayed nature. The government must justify them with reasonable suspicion that the search may uncover contraband or evidence of criminal activity.

When a UPS sorting hub represents the last practicable opportunity for Customs officers to inspect international packages before UPS places them into sealed containers for

departure from the United States, the search takes place at the functional equivalent of the border, even if the airplanes briefly stop at another hub or airport to refuel or redistribute cargo before departing our country. Such searches require no level of articulable suspicion to be reasonable.

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

******

MacWade v. Kelly, 460 F.3d 260 (2nd Cir.), August 11, 2006

New York City's program of random, suspicionless subway baggage searches is reasonable, and therefore constitutional, because (1) preventing a terrorist attack on the subway is a "special need"; (2) that need is weighty; (3) the program is a reasonably effective deterrent; and (4) even though the searches intrude on a full privacy interest, they do so to a minimal degree.

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

******

Inventories

U.S. v. Matthews, 591 F.3d 230 (4th Cir.), December 31, 2009

A police department's policy on inventory searches does not have to specifically use the phrase "closed containers" to permit the search and seizure of such items. (The 2nd and 7th circuits in published opinions and the 5th and 6th circuits in unpublished opinions agree (cites omitted)).

Like the policies discussed in 2nd and 7th circuit cases, the Department's policy, though not explicitly using the phrase "closed containers," sufficiently regulates the opening of such containers to provide standardized criteria to justify the deputy's search of defendant's bags. That policy requires, in relevant part, for "[a] complete inventory [to] be taken on all impounded or confiscated vehicles including the interior, glove compartment and trunk." Only by opening all closed containers could a police officer effectively comply with this requirement for a "complete inventory." In addition, that the policy expressly permits examination of glove boxes, which are closed containers, strongly suggests that a "complete inventory" requires the opening of closed containers.

Policies of opening all containers or of opening no containers are unquestionably permissible. It is equally permissible to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.

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

U.S. v. Lopez, 547 F.3d 364 (2nd Cir.), November 10, 2008

A separate itemization of each object found, regardless of its value, is not required for an inventory search to be reasonable under the Fourth Amendment. Such an obligation would interfere severely with the enforcement of the criminal laws by requiring irrational, unjustified suppression of evidence of crime where officers, conducting a *bona fide* search of an impounded vehicle, found evidence of serious crime but, in making their inventory, failed to distinguish between the maps of Connecticut and New York, or failed to list separately the soiled baby blanket or a pack of gum.

When officers, following standardized inventory procedures, seize, impound, and search a car in circumstances that suggest a probability of discovering criminal evidence, the officers will inevitably be motivated in part by criminal investigative objectives. Such motivation, however, cannot reasonably disqualify an inventory search that is performed under standardized procedures for legitimate custodial purposes.

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

******

Frisk

U.S. v. Goodwin-Bey, 584 F.3d 1117 (8th Cir.), October 28, 2009

After officers received a report of an earlier incident involving occupants of a car displaying a weapon, they stopped a car of the same make, model and color. Officers arrested a passenger on an existing warrant, frisked the other three occupants, and then searched the passenger compartment. After getting the key from the driver, they found a handgun in the locked glove box.

The earlier incident report, along with the number of the vehicle's unsecured occupants, sufficiently implicated officer safety concerns to justify a search of the passenger compartment incident to arrest.

The earlier incident report also provided a reasonable suspicion that there was a weapon in the vehicle that the unsecured occupants could immediately access. Even if the search incident to arrest exception did not apply, these same concerns for officer safety would justify a Terry frisk of the passenger compartment.

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

******

U.S. v. Bennett, 555 F.3d 962 (11th Cir.), January 21, 2009

After ordering the boys out of bed onto the floor and cuffing their hands behind their backs, agents decided to return the boys to the bed to question them. To secure the area

before the move, one agent shook the sheets and pillows and then lifted the mattress. He uncovered a rifle between the mattress and box spring, about a foot from the edge of the bed. Officers cannot move detained people purely to bring an area they wish to search into that person's grab area. Because the agent had a reasonable belief that the boys could be dangerous and his reason for moving them to the bed was legitimate and not a pretext, his sweep of the boys' grab areas was properly limited. The under-mattress search was lawful. Law enforcement should not be required to endanger themselves by blindly sticking their hands into unknown and unseen spaces.

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

******

U.S. v. Oliver, 550 F.3d 734 (8th Cir.), December 23, 2008

During a traffic stop, when the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation, passengers may be frisked during a traffic stop based upon reasonable suspicion they may be armed and dangerous See Knowles v. Iowa, 525 U.S. 113 (1998). No reasonable suspicion of criminal activity unrelated to the traffic stop is required to justify the pat-down search.

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

Editor's Note: The Supreme Court confirmed the circuit court's decision in the case of Arizona v. Johnson, 129 S. Ct. 781, January 26, 2009.

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U.S. v. Askew, 529 F.3d 1119 (D.C. Cir.), June 20, 2008

The full Court vacated and now reverses the decision by a panel in *U. S. v. Askew*, 482 F.3d 532 (D.C. Cir. 2007).

Unzipping a jacket to expose a sweatshirt underneath is a "search." A reasonable suspicion of criminal activity cannot justify a search that does not have a weapon as its "immediate object." There is no search-for-evidence counterpart to the Terry weapons search, permissible on only a reasonable suspicion that such evidence would be found. When there are no reasonable grounds for believing that it would establish or negate appellant's identification as the robber, unzipping a jacket to expose a sweatshirt during a show-up is precisely the sort of evidentiary search that is impermissible in the context of a Terry stop. (The Court expressly stated that it was not ruling that reasonable grounds for believing that it would establish or negate appellant's identification as the robber would make the search reasonable under the Fourth Amendment.) **The police may not maneuver a suspect's outer clothing – such as unzipping a suspect's outer jacket to facilitate a witness's identification at a show-up during a Terry stop.**

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

U.S. v. Wilson, 506 F.3d 488 (6th Cir.), October 29, 2007

The so-called "automatic companion" rule whereby any companion of an arrestee would be subject to a cursory pat-down reasonably necessary to give assurance that they are unarmed is rejected. The Terry requirement of reasonable suspicion under the circumstances has not been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates. Although the government can rely on the fact that the defendant's traveling companion was found to be carrying a weapon as part of the basis for establishing reasonable suspicion with regard to the defendant, the government must point to additional specific and articulable facts in order to satisfy Terry. There is nothing about being seated in a car which is itself suspicious. The fact that a person is seated in a vehicle does not create a different Terry frisk test, but instead is simply a relevant consideration under the totality of the circumstances.

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

******

U.S. v. Yamba, 506 F.3d 251 (3rd Cir.), October 22, 2007

Assuming that an officer is authorized to conduct a Terry search at all, he is authorized to assure himself that a suspect has no weapons. He is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon.

A Terry search cannot purposely be used to discover contraband, but it is permissible to confiscate contraband if it is spontaneously discovered during a properly executed Terry search. The proper question, therefore, is not the immediacy and certainty with which an officer knows an object to be contraband or the amount of manipulation required to acquire that knowledge, but rather what the officer believes the object is by the time he concludes that it is not a weapon. Moreover, when determining whether the scope of a particular Terry search was proper, the areas of focus should be whether the officer had probable cause to believe an object was contraband *before* he knew it not to be a weapon and whether he acquired that knowledge in a manner consistent with a routine frisk.

The 2nd and 9th Circuits agree (cites omitted).

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

******

U.S. v. Orman, 486 F.3d 1170 (9th Cir.), May 22, 2007

A brief investigatory detention, a Terry stop, while constituting a seizure, is not a violation of the Fourth Amendment provided that the police officer has reasonable suspicion that criminal activity may be afoot. In the course of a lawful investigatory stop, a police officer also may lawfully pat down the detained individual for weapons, a Terry frisk, provided that the officer has reasonable suspicion that the person may be armed and presently

dangerous. However, a Terry frisk is not confined to just those situations in which a Terry stop has occurred. A Terry stop and a Terry frisk are two independent actions, each requiring separate justifications. Terry frisks are authorized in consensual encounters so long as there is reasonable suspicion that the person is armed and presently dangerous.

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

******

SIA

Arizona v. Gant, 129 S. Ct. 1710, April 21, 2009 **(Supreme Court)**

There is no automatic search of the passenger compartment of a vehicle incident to the arrest of an occupant. Officers may conduct the SIA under either of two circumstances:

1) **the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or**
2) **it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.**

Editor's Note: Please see the article by Senior Instructor Jenna Solari in the May 2009 issue of *The Informer* - 5 Informer 09 and on the website **HERE.**

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

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U.S. v. Barnum, 564 F.3d 964 (8th Cir.), April 28, 2009

After a consent search of his person revealed a crack pipe and $305 in cash, the officer placed defendant under arrest. As a result, the officer could have properly searched defendant's rental vehicle, without his consent, for further evidence relevant to the drug offense for which defendant had been arrested. *See* Arizona v. Gant, 129 S. Ct. 1710, April 21, 2009, authorizing a search of the passenger compartment of a vehicle incident to arrest of an occupant when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

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

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U.S. v. Murphy, 552 F.3d 405 (4th Cir.), January 15, 2009

Deciding this issue for the first time in a published opinion, the Court holds:

Because of the "manifest need . . . to preserve evidence," officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest.

Officers need not first ascertain the cell phone's storage capacity. Such would be an unworkable and unreasonable rule. It is unlikely that police officers would have any way of knowing whether the text messages and other information stored on a cell phone will be preserved or be automatically deleted simply by looking at the cell phone. Rather, it is very likely that in the time it takes for officers to ascertain a cell phone's particular storage capacity, the information stored therein could be permanently lost.

The 5th and 7th Circuits agree (cites omitted).

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

******

U.S. v. Caseres, 533 F.3d 1064 (9th Cir.), July 21, 2008

A person who had parked the car, gotten out and was quickly walking away, who was in a yard two houses away from the car when first approached by the police, who then ran from police and was 1½ blocks away from the car when seized and arrested was not a "recent occupant" of the car authorizing a search of the car incident to the arrest. He was handcuffed and taken into custody a full 1½ blocks away from his car. Several armed police officers were present. Under the circumstances, there was no danger that he could have used any weapons in the car or could have destroyed any evidence inside the car, unless he "possessed of the skill of Houdini and the strength of Hercules." He is not being rewarded for fleeing from police by having the evidence recovered from his car deemed inadmissible as a result because he was already a substantial distance from his car when he fled.

Editor's Note: See Arizona v. Gant, 129 S. Ct. 1710, April 21, 2009 briefed above.

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

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U.S. v. Nichols, 512 F.3d 789 (6th Cir.), January 15, 2008

Looking at this issue for the first time, the Court decides:

Search-incident-to-arrest authority extends to the locked glove box in the passenger compartment of a vehicle.

The 7th, 8th, and 11th Circuits, the only others that have considered this specific issue, agree (cites omitted).

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

******

U.S. v. Nascimento, 491 F.3d 25 (1st Cir.), July 02, 2007

When police arrest a partially clothed individual charged with a crime of violence in his home, the need to dress him may constitute an exigency justifying the officers in entering another room in order to obtain needed clothing. When the police neither manipulate nor use the situation as a pretext to carry out an otherwise impermissible search, the conduct of the police in deciding to dress the suspect is reasonable. Common sense and practical considerations must guide judgments about the reasonableness of searches and seizures. A cabinet eight to ten feet away from an unrestrained suspect can be said to be within the suspect's immediate control and subject to search incident to arrest.

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

******

U.S. v. Powell, 483 F.3d 836 (D.C. Cir.), April 17, 2007

This opinion vacates and reverses the opinion at 451 F.3d 862, June 23, 2006 and briefed below.

Based on the U.S. Supreme Court's holding in Rawlings v. Kentucky, 448 U.S. 98 (1980), police may conduct a search incident to arrest of a suspect whom they have probable cause to arrest if the formal arrest follows quickly on the heels of the challenged search. In Rawlings the Supreme Court was quite clear in stating that, assuming such proximity in time, it is not particularly important that the search preceded the arrest rather than vice versa.

The lawfulness of a search incident to arrest that precedes formal arrest does not require that the subject be in custodial arrest at the time of the search.

Probable cause to arrest is by itself insufficient to support this exception to the warrant requirement. Rather, it is the fact of the arrest that makes all the difference.

The 1st, 2nd, 4th, 5th, 6th, 8th, and 11th Circuits agree. (cites omitted).

The 7th Circuit disagrees. (cite omitted)

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

******

U.S. v. Varner, 481 F.3d 569 (8th Cir.), April 04, 2007

Ordinarily, the arrest of a person outside of a residence does not justify a warrantless entry into the residence itself. One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. Even absent an affirmative indication that the arrestee might have a weapon available or might attempt to escape, the arresting officer

has authority to maintain custody over the arrestee and to remain literally at the arrestee's elbow at all times. Additionally, it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested.

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

******

U.S. v. Walker, 474 F.3d 1249 (10th Cir.), January 31, 2007

Opening the storm door to knock on the inner door, even though the inner door was partially open, is not a Fourth Amendment intrusion because such action does not violate an occupant's reasonable expectation of privacy.

When the Deputy knocked on the inner door, again announcing that he was from the Sheriff's office, defendant responded, "Yeah, and I got a goddamn gun." This threatening remark justified the officers in taking prompt action to protect themselves. Although retreat was an alternative, it was also reasonable for them to take control of the situation by entering to disarm Mr. Walker, who could otherwise continue to pose a danger to the officers and others.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. Absent an arrest warrant or even probable cause to make an arrest, a protective sweep is not authorized.

Editor's Note: The court remanded the case to the district court to determine whether the "sweep" was lawful under the emergency exigency. If so, the evidence found during the "sweep" that justified the eventual arrest was seized under the "plain view doctrine" and would therefore be admissible.

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

******

U.S. v. Stover, 474 F.3d 904 (6th Cir.), January 30, 2007

Officers with an arrest warrant and reason to believe that the suspect is inside the house may enter and search anywhere that the suspect might reasonably be found. Once a suspect is found, the arrest warrant does not justify a more intrusive search of the premises. Generally, the government may not search an individual's home without the individual's consent or a search warrant. A limited exception to this general rule authorizes officers making arrests in the home to conduct a "protective sweep"–a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of the police officers and others. The fact that police identified a car registered to a local

criminal who did not live at defendant's address is sufficient to justify a quick and limited protective sweep. Even though defendant lived in a duplex, the criminal who owned the car in defendant's driveway was as likely to be visiting defendant as he was to be visiting defendant's neighbor. This probability is sufficient to justify a protective sweep.

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

******

U.S. v. Allen, 469 F.3d 11 (1st Cir.), November 17, 2006

Where the vehicle contains no trunk, the entire inside of the vehicle constitutes the passenger compartment and may be lawfully searched incident to the arrest of an occupant. This bright-line rule extends to SUVs.

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

******

U.S. v. Powell, 451 F.3d 862 (D.C. Cir.), June 23, 2006

See Vacation and Reversal Above

A search of the passenger compartment of a car incident to a lawful arrest must occur *after* the arrest has taken place and not before.

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

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Vehicles

Arizona v. Gant, 129 S. Ct. 1710, April 21, 2009 **(Supreme Court)**

There is no automatic search of the passenger compartment of a vehicle incident to the arrest of an occupant. Officers may conduct the SIA under either of two circumstances:

1) **the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or**

2) **it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.**

Editor's Note: Please see the article by Senior Instructor Jenna Solari in the May 2009 issue of *The Informer* - 5 Informer 09 and on the website **HERE**.

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

U.S. v. Davis, 590 F.3d 847 (10th Cir.), December 18, 2009

Police arrested the driver of a car on an outstanding warrant for failure to appear. The defendant, a passenger in the car, was arrested for public intoxication. Police found a gun during a search of the car incident to the arrests. The defendant's arrest was illegal and a search of the car incident to the arrest of both him and the driver violated the Fourth Amendment pursuant to Arizona v. Gant, 129 S. Ct. 1710 (2009). The arrests and search occurred before the Gant decision.

The good-faith exception to the exclusionary rule applies when an officer acts in reasonable reliance upon settled case law that is later made unconstitutional by the Supreme Court. The evidence is admissible.

***See* U.S. v. McCane, 573 F.3d 1037 (10th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3221 (U.S. Oct. 1, 2009) (No. 09-402). 8 INFORMER 09**

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

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U.S. v. Rumley, 588 F.3d 202 (4th Cir.), December 07, 2009

During a traffic stop, after learning that defendant had two prior convictions for driving with a suspended license, the deputy arrested defendant, handcuffed him, and placed him in the backseat of the deputy's patrol car. The deputy then returned to the passenger side of defendant's truck and requested that the front seat passenger step out of the truck. When the passenger moved his right leg to step out, the deputy noticed and seized a silver pistol lying on the floorboard in front of the passenger-side seat.

The deputy lawfully seized defendant's pistol when it came into plain view *before* any search of defendant's vehicle, and so Arizona v. Gant (search of a vehicle incident to arrest of an occupant) does not apply to the facts.

In Maryland v. Wilson, 519 U.S. 408, 414-15 (1997), the Supreme Court held that an officer conducting a lawful traffic stop may, as a safety measure, order any passenger to exit the vehicle as a matter of course. Nothing in Gant undermines the bright-line rule established in Wilson.

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

******

U.S. v. Ruckes, 586 F.3d 713 (9th Cir.), November 09, 2009

Search of the passenger compartment of defendant's car incident to his arrest for driving on a suspended license was unlawful under Arizona v. Gant. However, the gun and drugs are admissible under the inevitable discovery exception to the exclusionary rule. Evidence

is admissible if the prosecution can establish by a preponderance of the evidence that the items ultimately or inevitably would have been discovered by lawful means. The evidence would have been discovered during an inventory after the car was lawfully impounded.

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

******

U.S. v. Goodwin-Bey, 584 F.3d 1117 (8th Cir.), October 28, 2009

After officers received a report of an earlier incident involving occupants of a car displaying a weapon, they stopped a car of the same make, model and color. Officers arrested a passenger on an existing warrant, frisked the other three occupants, and then searched the passenger compartment. After getting the key from the driver, they found a handgun in the locked glove box.

The earlier incident report, along with the number of the vehicle's unsecured occupants, sufficiently implicated officer safety concerns to justify a search of the passenger compartment incident to arrest.

The earlier incident report also provided a reasonable suspicion that there was a weapon in the vehicle that the unsecured occupants could immediately access. Even if the search incident to arrest exception did not apply, these same concerns for officer safety would justify a Terry frisk of the passenger compartment.

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

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U.S. v. Gonzalez, 578 F.3d 1130 (9th Cir.), August 24, 2009

The Supreme Court decision of Arizona v. Gant, 129 S. Ct. 1710 (2009), applies to all cases pending at the time of the decision. Therefore, the search of the car incident to the arrest of an occupant violated the Fourth Amendment. The good faith exception to the Exclusionary Rule does not apply.

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

*****

U.S. v. McCane, 573 F.3d 1037 (10th Cir.), July 28, 2009

The good-faith exception to the exclusionary rule applies to a search of a vehicle incident to the arrest of an occupant justified at the time under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by the Supreme Court decision Arizona v. Gant, 129 S. Ct. 1710 (2009).

First, the exclusionary rule seeks to deter objectively unreasonable police conduct, i.e., conduct which an officer knows or should know violates the Fourth Amendment. Second, the purpose of the exclusionary rule is to deter misconduct by law enforcement officers. A police officer who undertakes a search in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision, has not engaged in misconduct

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

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U.S. v. Davis, 569 F.3d 813 (8th Cir.), July 02, 2009

Police may validly search an automobile incident to an "arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest." Arizona v. Gant, 129 S. Ct. 1710 (2009).

At the time of the search, the officer had already discovered marijuana in defendant's pocket and placed him in custody. The odor of marijuana was wafting from the car. Empty beer bottles lay strewn in the back seat. Three passengers, all of whom had been drinking, were not in secure custody and outnumbered the two officers at the scene. Although defendant had been detained, three unsecured and intoxicated passengers were standing around a vehicle redolent of recently smoked marijuana. Each of these facts comports with Gant's within-reach requirement and its two underlying rationales as articulated in Chimel. These facts are textbook examples of "[t]he safety and evidentiary justifications underlying Chimel's reaching-distance rule."

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

******

U.S. v. Hrasky, 567 F.3d 367 (8th Cir.), June 10, 2009

Defendant was arrested for driving on a suspended license (3rd offense), handcuffed and placed in the back of a patrol car. Because defendant was not within reaching distance of his vehicle's passenger compartment at the time of the search and because there was no reason to think that the vehicle contained evidence of the offense of arrest, the search of defendant's vehicle violated the Fourth Amendment as interpreted in Arizona v. Gant, 129 S. Ct. 1710 (Apr. 21, 2009). The two handguns that formed the basis of his conviction for felon in possession are inadmissible. Defendant's conviction is vacated.

Click **HERE** for the court's opinion. See also U.S. v. Hrasky, 453 F.3d 1099 (8th Cir. 2006).

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U.S. v. Lopez, 567 F.3d 755 (6th Cir.), June 01, 2009

Defendant was not within reaching distance of his vehicle's passenger compartment at the time of the search, but was instead handcuffed in the back seat of the patrol car by then. There was no reason to think that the vehicle contained evidence of the offense of arrest, since that offense was reckless driving. The search of defendant's vehicle, therefore, violated the Fourth Amendment as interpreted in Arizona v. Gant, 129 S. Ct. 1710 (Apr. 21, 2009). The 73 grams of crack cocaine, a set of digital scales, and a Glock .40 caliber handgun loaded with ten rounds of ammunition which formed the basis of his conviction for possession with the intent to distribute and for carrying a firearm in relation to a drug trafficking crime are inadmissible. Defendant's conviction is vacated.

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

******

U.S. v. Barnum, 564 F.3d 964 (8th Cir.), April 28, 2009

After a consent search of his person revealed a crack pipe and $305 in cash, the officer placed defendant under arrest. As a result, the officer could have properly searched defendant's rental vehicle, without his consent, for further evidence relevant to the drug offense for which defendant had been arrested. *See* Arizona v. Gant, 129 S. Ct. 1710, April 21, 2009, authorizing a search of the passenger compartment of a vehicle incident to arrest of an occupant when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

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

******

U.S. v. Caseres, 533 F.3d 1064 (9th Cir.), July 21, 2008

A person who had parked the car, gotten out and was quickly walking away, who was in a yard two houses away from the car when first approached by the police, who then ran from police and was 1½ blocks away from the car when seized and arrested was not a "recent occupant" of the car authorizing a search of the car incident to the arrest. He was handcuffed and taken into custody a full 1½ blocks away from his car. Several armed police officers were present. Under the circumstances, there was no danger that he could have used any weapons in the car or could have destroyed any evidence inside the car, unless he "possessed of the skill of Houdini and the strength of Hercules." He is not being rewarded for fleeing from police by having the evidence recovered from his car deemed inadmissible as a result because he was already a substantial distance from his car when he fled.

Editor's Note: See Arizona v. Gant, 129 S. Ct. 1710, April 21, 2009 briefed above.

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

U.S. v. Nichols, 512 F.3d 789 (6th Cir.), January 15, 2008

Looking at this issue for the first time, the Court decides:

Search-incident-to-arrest authority extends to the locked glove box in the passenger compartment of a vehicle.

The 7th, 8th, and 11th Circuits, the only others that have considered this specific issue, agree (cites omitted).

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

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U.S. v. Powell, 483 F.3d 836 (D.C. Cir.), April 17, 2007

This opinion vacates and reverses the opinion at 451 F.3d 862, June 23, 2006 and briefed below.

Based on the U.S. Supreme Court's holding in Rawlings v. Kentucky, 448 U.S. 98 (1980), police may conduct a search incident to arrest of a suspect whom they have probable cause to arrest if the formal arrest follows quickly on the heels of the challenged search. In Rawlings the Supreme Court was quite clear in stating that, assuming such proximity in time, it is not particularly important that the search preceded the arrest rather than vice versa.

The lawfulness of a search incident to arrest that precedes formal arrest does not require that the subject be in custodial arrest at the time of the search.

Probable cause to arrest is by itself insufficient to support this exception to the warrant requirement. Rather, it is the fact of the arrest that makes all the difference.

The 1st, 2nd, 4th, 5th, 6th, 8th, and 11th Circuits agree. (cites omitted).

The 7th Circuit disagrees. (cite omitted)

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

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U.S. v. Allen, 469 F.3d 11 (1st Cir.), November 17, 2006

Where the vehicle contains no trunk, the entire inside of the vehicle constitutes the passenger compartment and may be lawfully searched incident to the arrest of an occupant. This bright-line rule extends to SUVs.

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

U.S. v. Powell, 451 F.3d 862 (D.C. Cir.), June 23, 2006

See Vacation and Reversal Above

A search of the passenger compartment of a car incident to a lawful arrest must occur *after* the arrest has taken place and not before.

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

******

Plain View

U.S. v. Rumley, 588 F.3d 202 (4th Cir.), December 07, 2009

During a traffic stop, after learning that defendant had two prior convictions for driving with a suspended license, the deputy arrested defendant, handcuffed him, and placed him in the backseat of the deputy's patrol car. The deputy then returned to the passenger side of defendant's truck and requested that the front seat passenger step out of the truck. When the passenger moved his right leg to step out, the deputy noticed and seized a silver pistol lying on the floorboard in front of the passenger-side seat.

The deputy lawfully seized defendant's pistol when it came into plain view *before* any search of defendant's vehicle, and so Arizona v. Gant (search of a vehicle incident to arrest of an occupant) does not apply to the facts.

In Maryland v. Wilson, 519 U.S. 408, 414-15 (1997), the Supreme Court held that an officer conducting a lawful traffic stop may, as a safety measure, order any passenger to exit the vehicle as a matter of course. Nothing in Gant undermines the bright-line rule established in Wilson.

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

******

U.S. v. Cruz-Mendez, 467 F.3d 1260 (10th Cir.), November 06, 2006

It is important to distinguish "plain view" to justify the *seizure* of an object, from an officer's mere observation of an item left in plain view (sometimes called "open view") which generally involves no Fourth Amendment search. For a mere observation to be valid, the only requirement is that the officer be lawfully in a position from which he can view the object. (Parenthesis added).

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

******

Seizure

Arizona v. Johnson, 129 S. Ct. 781, January 26, 2009 **(Supreme Court)**

In a traffic stop setting, the first Terry condition - a lawful investigatory stop - is met whenever police lawfully detain an automobile and its occupants for a traffic violation. Police need not, in addition, have cause to believe any occupant of the vehicle is involved in criminal activity. All that is necessary to justify a frisk of the driver or a passenger during a traffic stop is reasonable suspicion that the person subjected to the frisk is armed and dangerous.

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

Editor's Note: On a closely related issue, one federal circuit has held that a Terry stop and a Terry frisk are "two independent actions, each requiring separate justifications." U.S. v. Orman, 486 F.3d 1170, (9th Cir. 2007) and U.S. v. Salinas, 246 Fed. Appx. 480 (9th Cir. 2007). In both cases the Ninth Circuit held that an officer may conduct a frisk during a voluntary/consensual encounter if he has a reasonable suspicion that the subject is presently armed and dangerous. The Supreme Court declined to hear the appeal of both cases.

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Virginia v. Moore, 128 S. Ct. 1598, April 23, 2008 **(Supreme Court)**

Warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Fourth Amendment. States are free to restrict such arrests however they desire. Such state restrictions do not alter the Fourth Amendment's protections. If states choose to impose higher standards for arrests or searches, those protections must be enforced by recourse to state law.

Officers may perform searches incident to constitutionally permissible arrests to ensure their safety and safeguard evidence. This rule covers any "lawful arrest," meaning any arrest based upon probable cause even if it violates a state statute.

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

******

Brendlin v. California, 127 S. Ct. 2400, June 18, 2007 **(Supreme Court)**

When police stop a vehicle, the driver and passengers are effectively seized, giving the passenger a right to challenge the legality of the stop and the admissibility of evidence discovered as "fruit of the poisonous tree." No passenger in such a situation would feel free to leave, even after the vehicle came to a full stop. For safety reasons alone, officers would be unlikely to allow the passenger just to walk away even if the offense was a mere traffic violation.

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

Scott v. Harris, 127 S. Ct. 1769, April 30, 2007 **(Supreme Court)**

A claim of excessive force in the course of making a seizure of a person is properly analyzed under the Fourth Amendment's objective reasonableness standard of Graham v. Connor, 490 U. S. 386 (1989).

Tennessee v. Garner, 471 U. S. 1 (1985), did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." Garner was simply an application of the Fourth Amendment's reasonableness test to the use of a particular type of force in a particular situation.

Whatever Garner said about the factors that might have justified shooting the suspect in that case, such preconditions have scant applicability to this case, which has vastly different facts.

Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable. In determining the reasonableness of a seizure, balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

In judging whether Scott's actions were reasonable, consider the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the public that Harris posed. It is appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability.

A police officer's attempt to terminate a dangerous high speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

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

******

Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, June 28, 2006 **(Supreme Court)**

After the state arrest of a foreign national, failure to give "consular notification" rights as required by the Vienna Conventions on Consular Relations (VCCR) does not trigger the exclusionary rule to suppress statements made to state law enforcement officers by the foreign national. However, failure to provide the notification can be a factor in determining the voluntariness of a confession.

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

******

U.S. v. Troy, 583 F.3d 20 (1st Cir.), September 25, 2009

Looking at this issue for the first time, the court decides:

Defendant's claim that the officer's decision to stop him from exiting the inspection building was an unconstitutional seizure in derogation of the Fourth Amendment is beside the point, for the inquiry into whether the officer was engaged in the performance of her official duties does not turn on the precise limits of her authority, but rather on the proper characterization of her conduct as official or personal.

The 2nd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and D.C. Circuits agree (cites omitted).

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

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Manzanares v. Higdon, 575 F.3d 1135 (10th Cir.), August 10, 2009

Even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within a home, police may not enter without a warrant absent exigent circumstances. Payton v. New York, 445 U.S. 573 (1980). Police may enter a home without a warrant on valid consent. Consent may be withdrawn, and if it is, police violate the Fourth Amendment by remaining in the home. Labeling an encounter in the home as either an investigatory stop or an arrest is meaningless because Payton's probable cause requirement applies to all such seizures in the home. Based upon facts known at the time, probable cause of a crime did not exist.

Witness detentions are confined to the type of brief stops that interfere only minimally with liberty. Neither the Supreme Court nor this court has countenanced such a detention in a home. Because the detention here occurred inside a home, it was unquestionably unconstitutional unless supported by probable cause.

A "protection-of-investigation" rationale requires probable cause to believe that the person is about to commit the crime of obstruction. Based upon facts known at the time, probable cause of the crime of obstruction did not exist.

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

******

Bressi v. Ford, 575 F.3d 891 (9th Cir.), August 04, 2009

A roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going

beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non- Indians.

Once they departed from, or went beyond, the inquiry to establish that Bressi was not an Indian, the officers were acting under color of state law. Tribal officers who are authorized to enforce state as well as tribal law, and proceed to exercise both powers in the operation of a roadblock, will be held to constitutional standards in establishing roadblocks. If a tribe wishes to avoid such constitutional restraints, its officers operating roadblocks will have to confine themselves, upon stopping non-Indians, to questioning to determine non-Indian status and to detention only for obvious violations of state law.

The mere presence of federal agents at the roadblock does not convert the tribal officers into federal actors.

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

******

U.S. v. Fraire, 575 F.3d 929 (9th Cir.), August 04, 2009

A momentary checkpoint stop of all vehicles at the entrance of a national park, aimed at preventing illegal hunting— which is minimally intrusive, justified by a legitimate concern for the preservation of park wildlife and the prevention of irreparable harm, directly related to the operation of the park, and confined to the park gate where visitors would expect to briefly stop — is reasonable under the Fourth Amendment.

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

******

Mills v. Dist. of Columbia, 571 F.3d 1304 (D.C. Cir.), July 10, 2009

D.C. established a Neighborhood Safety Zone (NSZ) program authorizing the police to set up checkpoints at the perimeters of the zone and stop all those attempting to enter by vehicle. When motorists were stopped at the checkpoint, officers were required to identify themselves and inquire whether the motorists had "legitimate reasons" for entering the NSZ area. Legitimate reasons for entry fell within one of six defined categories: the motorist was (1) a resident of the NSZ; (2) employed or on a commercial delivery in the NSZ; (3) attending school or taking a child to school or day-care in the NSZ; (4) related to a resident of the NSZ; (5) elderly, disabled or seeking medical attention; and/or (6) attempting to attend a verified organized civic, community, or religious event in the NSZ. If the motorist provided the officer with a legitimate reason for entry, the officer was authorized to request additional information sufficient to verify the motorist's stated reason for entry into the NSZ area. Officers denied entry to those motorists who did not have a legitimate reason for entry, who could not substantiate their reason for entry, or who refused to provide a legitimate The stated primary purpose of the NSZ was not to make arrests or to detect evidence of ordinary criminal wrongdoing, but to increase

protection from violent criminal acts, and promote the safety and security of persons within the NSZ by discouraging–and thereby deterring–persons in motor vehicles from entering the NSZ intending to commit acts of violence.

Without question, a seizure occurs when a vehicle is stopped at a police checkpoint. When the primary purpose of a checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment. *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000). Because the purpose of the NSZ checkpoint program is not immediately distinguishable from the general interest in crime control, appellants' the seizures are unconstitutional.

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

******

U.S. v. Alvarez-Manzo, 570 F.3d 1070 (8th Cir.), July 06, 2009

Law enforcement's detention of property entrusted to a third-party common carrier constitutes a Fourth Amendment seizure only when the detention does any of the following: (1) delays a passenger's travel or significantly impact[s] the passenger's freedom of movement, (2) delays the checked luggage's timely delivery, or (3) deprives the carrier of its custody of the checked luggage. With respect to the third factor, a "seizure" occurs when the government's actions go beyond the scope of the passenger's reasonable expectations for how the passenger's luggage might be handled when in the carrier's custody.

Removing checked luggage from the lower luggage compartment to a room inside the terminal *at the carrier's request* does not deprive the carrier of its custody of the checked luggage. The third factor does not turn on *where* law enforcement takes the bag, but *at whose direction* law enforcement acts when doing so. When law enforcement takes a bag into the passenger section of the bus terminal on its own accord and *not* at the direction of the carrier, the carrier is deprived of its custody of the checked luggage. Thus, law enforcement "seized" the defendant's bag within the meaning of the Fourth Amendment.

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

******

U.S. v. Jefferson, 566 F.3d 928 (9th Cir.), May 26, 2009

An addressee has both a possessory and a privacy interest in a mailed package.

The possessory interest in a mailed package is solely in the package's "timely" delivery.

Looking at this issue for the first time, the Court decides:

An addressee has no Fourth Amendment possessory interest in a package that has a

guaranteed delivery time until such delivery time has passed. Before the guaranteed delivery time, law enforcement may detain such a package for inspection purposes without any Fourth Amendment curtailment. Once the guaranteed delivery time passes, however, law enforcement must have a "reasonable and articulable suspicion" that the package contains contraband or evidence of illegal activity for further detainment.

The 1st Circuit agrees (cite omitted)**.**

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

******

U.S. v. Mitchell, 565 F.3d 1347 (11th Cir.), April 22, 2009

A seizure of a computer based on probable cause is unconstitutional if the police act with unreasonable delay in securing a warrant.

Computers are relied upon heavily for personal and business use. Individuals may store personal letters, e-mails, financial information, passwords, family photos, and countless other items of a personal nature in electronic form on their computer hard drives. Thus, the detention of the hard drive for over three weeks (21 days) before a warrant was sought constitutes a significant interference with possessory interest. The purpose of securing a search warrant soon after a suspect is dispossessed of a closed container reasonably believed to contain contraband is to ensure its prompt return should the search reveal no such incriminating evidence, for in that event the government would be obligated to return the container (unless it had some other evidentiary value). This consideration applies with even greater force to the hard drive of a computer, which is the digital equivalent of its owner's home, capable of holding a universe of private information.

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

******

U.S. v. Jones, 562 F.3d 768 (6th Cir.), April 16, 2009

Brendlin v. California, 551 U.S. 249 (2007) makes it clear that, generally, when a police officer pulls over a vehicle during a traffic stop, the officer seizes everyone in the vehicle, not just the driver. Yet, the Brendlin Court also observed, "there is no seizure without actual submission."

Even though an occupant in a vehicle stopped by the police is generally deemed seized by virtue of the stopping of the vehicle, he is not thereby seized if he does not submit to the show of authority. When police vehicles hemmed in the already parked car, the driver and other passenger in the Nissan were, "seized" by virtue of their passive acquiescence – remaining in the car. But, by opening the car door and jumping out as though he wanted to run, defendant did not submit. He was not "seized" until he stopped at the command of

the officer. Observations made by the officer after defendant got out but before he submitted may be used to justify the seizure.

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

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Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir.), March 11, 2009

This opinion vacates and reverses the opinion at 475 F.3d 1049, January 16, 2007, and briefed below.

During an armed standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody.

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

******

U.S. v. Al Nasser, 555 F.3d 722 (9th Cir.), February 04, 2009

A driver who stops is not "seized" under the Fourth Amendment just because he thinks that the police want him to stop, even when such belief is objectively reasonable. To constitute a "seizure," it is necessary that law enforcement conduct cause the stop and that the conduct is "intentionally applied." But, not every stop that is caused by intentional law enforcement conduct is a "seizure." A driver stopped in traffic by officers at the scene of an accident or by officers pulling over another car is not "seized" even though the conduct of the police is intentional. A person is seized when he is meant to be stopped by a particular law enforcement action and is so stopped.

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

******

U.S. v. Turner, 553 F.3d 1337 (10th Cir.), January 26, 2009

An arrest by state officers for a violation of federal law need not be authorized by state or federal law. Even if state law prohibits state police from arresting for a federal offense, that fact alone does not render the arrest a violation of the Fourth Amendment. See Virginia v. Moore, 128 S. Ct. 1598 (2008).

When state officers have probable cause to believe a person has committed a crime in their presence, the Fourth Amendment permits a warrantless arrest – and a search incident to

that arrest – regardless of whether the crime qualifies as an arrestable offense under applicable state law.

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

Editor's Note: See also United States v. Gonzales, 535 F.3d 1174 (10th Cir. 2008) - police officers' traffic stop of the defendant, outside of their jurisdiction and in violation of Colorado law, did not violate the Fourth Amendment.

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U.S. v. Jennings, 544 F.3d 815 (7th Cir.), September 15, 2008

Officers executing a search warrant have categorical authority to detain any occupant of the subject premises during the search. Muehler v. Mena, 544 U.S. 93, 98 (2005); Michigan v. Summers, 452 U.S. 692 (1981). This authority exists in part because the probable cause underlying a warrant to search a premises gives police reason to suspect that its occupants are involved in criminal activity, and also because the officers have a legitimate interest in minimizing the risk of violence that may erupt when an occupant realizes that a search is underway.

The rule of Summers also permits police to detain people who approach a premises where a search is in progress. Jennings' intrusion into the apartment parking lot within the security perimeter of officers preparing to serve a search warrant permitted his detention.

The crack cocaine was in plain view in his vehicle and is therefore admissible evidence.

The 3rd and 6th Circuits agree (cites omitted).

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

******

U.S. v. Hicks, 531 F.3d 555 (7th Cir.), July 09, 2008

Anonymous tips about an ongoing emergency are treated differently that those regarding general criminality. Because of the special reliability inherent in reports of ongoing emergencies, such 911 calls are subject to less testing in court than other out-of-court statements. When an officer relies on an emergency report in making a stop, a lower level of corroboration is required.

The 2nd, 3rd, 4th, 7th, 9th, 10th, and 11th Circuits agree (cites omitted)**.**

No circuits disagree.

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

U.S. v. Peralez, 526 F.3d 1115 (8th Cir.), May 14, 2008

The Fourth Amendment is violated when the extent and duration of the trooper's focus on non-routine questions prolongs a traffic stop beyond the time reasonably required to complete its purpose. However, suppression of evidence is the appropriate remedy only if the constitutional violation was "at least a but-for cause of obtaining the evidence."

Because the drug dog was available at the outset of the stop, and because at the outset of the stop the trooper indicated to both the driver and passenger that he intended to run the dog around the exterior of the van, regardless of the responses to the trooper's expanded inquiries, the dog sniff was not "the consequence of a constitutional violation." The positive indication during the dog sniff provided probable cause to search the van, resulting in the discovery of the evidence.

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

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U.S. v. Reeves, 524 F.3d 1161 (10th Cir.), May 07, 2008

Opening the door was not voluntary when, between 2:30 and 3:00 in the morning, three officers pounded on the door and window continuously for at least twenty minutes while yelling and loudly identifying themselves as police officers. A reasonable person faced with those circumstances would not feel free to ignore the officers' implicit command to open the door.

If an individual's decision to open the door to his home to the police is not made voluntarily, the individual is seized inside his home. Absent a warrant or exigent circumstance, the seizure violates the Fourth Amendment, and evidence seized inside is inadmissible as fruit of the poisonous tree.

The 6th, 7th, and 8th Circuits agree (cites omitted).

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

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U.S. v. Blair, 524 F.3d 740 (6th Cir.), May 02, 2008

An officer must have probable cause to make a stop for a civil traffic infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation.

Presence in a high-crime area at 10:30 p.m. does not by itself justify a Terry stop. That a given locale is well known for criminal activity will not by itself justify a Terry stop, although it may be taken into account with other factors. A late hour can contribute to reasonable suspicion; however, 10:30 p.m. is not late enough to arouse suspicion of criminal activity.

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

U.S. v. Smith, 522 F.3d 305 (3rd Cir.), April 09, 2008

Looking at this issue for the first time, the court decides:

The constitutionality of a vehicle impoundment is judged by directly applying the Fourth Amendment reasonableness standard. The Fourth Amendment does not require that there be a standardized policy in place for impoundment under the "community caretaking function."

The 1st Circuit agrees (cite omitted).

The D.C. Circuit disagrees (cite omitted).

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

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Floyd v. City of Detroit, 518 F.3d 398 (6th Cir.), March 06, 2008

The Fourth Amendment prohibits a police officer's use of deadly force to "seize" an unarmed, non-dangerous suspect. Shooting at but missing a suspect is a show of authority that amounts to a "seizure" under the Fourth Amendment when it actually has the intended effect of contributing to the suspect's immediate restraint.

Not all mistakes—even honest ones—are objectively reasonable. Honest but objectively unreasonable use of force mistakes violate the Fourth Amendment.

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

******

Mora v. City of Gaithersburg, 519 F.3d 216 (4th Cir.), March 04, 2008

Editor's Note: Mora called a healthcare hotline and told the operator that he was suicidal, had weapons in his apartment, and could understand shooting people at work. He ended the call by saying, "I might as well die at work." Police immediately responded, seized Mora in the parking lot, transported him for psychiatric evaluation, searched his apartment, and seized 41 firearms and 5,000 rounds of ammunition.

The officers who seized Mora and his weapons were engaged in a preventive action aimed at incapacitating an individual they had reason to believe intended a crime. Protecting the physical security of its people is the first job of any government, and the threat of mass murder implicates that interest in the most compelling way. Police, then, must be entitled to take effective preventive action when evidence surfaces of an individual who intends slaughter.

To be objectively reasonable in preventative action situations, balancing the government interest against the intrusion, includes consideration of three important factors: (1) the

likelihood or probability that a crime will come to pass; (2) how quickly the threatened crime might take place; and (3) the gravity of the potential crime. As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action. The proper application of a balancing test in preventive action cases respects the room for judgment that law enforcement must enjoy in any emergency where lives are on the line.

The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope.

The authority to defuse the threat Mora presented included the authority to take the weapons that made him so threatening.

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

******

U.S. v. Hughes, 517 F.3d 1013 (8th Cir.), February 25, 2008

There is no *per se* rule prohibiting Terry stops to investigate a completed misdemeanor. To determine whether such a Terry stop is constitutional, balance the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. Under this test, the nature of the misdemeanor and potential threats to citizens' safety are important factors.

Of the three other circuit courts that have addressed this issue –

The 9th and 10th Circuits agree (cites omitted).

The 6th Circuit disagrees, adopting a *per se* rule prohibiting such stops (cite omitted)**.**

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

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Moore v. Indehar, 514 F.3d 756 (8th Cir.), February 01, 2008

Not every police officer act that results in a restraint on liberty necessarily constitutes a seizure. The restraint must be effectuated "through means intentionally applied." Bystanders and hostages are not seized for Fourth Amendment purposes when struck by an errant bullet in a shootout. To establish a Fourth Amendment claim, a bystander must show that the officer intended to seize him through the means of firing his weapon at him.

The 1st, 2nd, 4th, 6th, and 10th Circuits agree (cites omitted).

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

Pennington v. Metro. Gov't of Nashville & Davidson County, 511 F.3d 647 (6th Cir.), January 10, 2008

Looking at this issue for the first time, the Court decides:

A breathalyzer test administered to an off-duty police officer does not amount to an unconstitutional seizure.

A person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. A person is not seized simply because he believes that he will lose his job. The Fourth Amendment does not protect against the threat of job loss.

Police officers: (1) may reasonably believe, based upon their workplace obligations to comply with department's guidelines and regulations, that their *employment relationship* will be severed if they refuse or disobey an order, direction, or request to accompany detectives to the department's headquarters; but (2) lack any reasonable basis to feel that they will be *restricted by force or a show of lawful authority in their freedom of movement or their ability to terminate the encounter.*

The 7th Circuit agrees (cite omitted).

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

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U.S. v. Tyler, 512 F.3d 405 (7th Cir.), January 10, 2008

A reasonable person in defendant's circumstances would not have believed he was free to leave. Although the encounter took place on a public street and the officers did not draw their weapons or (at least initially) lay hands on Tyler, they told him he was violating the law, took and retained his identification from him while they ran a warrant check, and told him he could not leave until the warrant check was completed. Defendant was seized.

When officers only generally identify themselves as investigators and immediately return the identification and travel documents, the initial consensual encounter does not ripen into a seizure.

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

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U.S. v. Oscar-Torres, 507 F.3d 224 (4th Cir.), November 08, 2007

Looking at this issue for the first time, the Court decides:

In INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), the Supreme Court's held that

> The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.

That holding does not establish a broad rule that evidence of a defendant's identity (in this case, fingerprints) can never be suppressed. It simply means that illegal police activity does not affect the jurisdiction of the trial court or otherwise serve as a basis for dismissing the prosecution. Lopez-Mendoza does not prohibit suppression of identity-related *evidence* in *criminal proceedings*.

The 8th and 10th Circuits agree (cites omitted)**.**

The 3rd, 5th, and 6th Circuits disagree (cites omitted)**.**

The 9th Circuit has reached inconsistent results (cites omitted)**.**

Identity evidence such as fingerprints and records are not automatically suppressible simply because they would not have been obtained *but for* illegal police activity. Rather, this evidence is suppressible only if obtained by "*exploitation*" of the initial police illegality. Police may not forcibly transport an individual to a police station and detain him to obtain his fingerprints for "investigative" purposes without probable cause. When police officers use an illegal arrest as an investigatory device in a criminal case "for the purpose of obtaining fingerprints without a warrant or probable cause," then the fingerprints are inadmissible under the exclusionary rule as "fruit of the illegal detention." But when fingerprints are "administratively taken . . . for the purpose of simply ascertaining . . . the identity" or immigration status of the person arrested, they are "sufficiently unrelated to the unlawful arrest that they are not suppressible." Fingerprints obtained for *administrative* purposes, and intended for use in an *administrative* process — like deportation — may escape suppression. An alien's fingerprints taken as part of routine booking procedures but intended to provide evidence for a criminal prosecution are still *motivated* by an investigative, rather than an administrative, purpose. Such fingerprints are, accordingly, subject to exclusion.

The 8th, 9th, and 10th Circuits agree (cites omitted)**.**

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

******

U.S. v. Grigg, 498 F.3d 1070 (9th Cir.), August 22, 2007

Looking at this issue for the first time, the Court decides:

There is no per se rule that police may not conduct a Terry stop to investigate a person in connection with a past, completed misdemeanor simply because it was a misdemeanor. The reasonableness of a Terry stop regarding a completed misdemeanor depends upon the nature of the misdemeanor offense, with particular attention to the potential for ongoing or

repeated danger (e.g., drunken and/or reckless driving), and any risk of escalation (e.g., disorderly conduct, assault, domestic violence). A Terry stop based on a completed misdemeanor is unreasonable when, within the totality of the circumstances, there is no public safety risk, and when alternative means to identify the suspect or achieve the investigative purpose of the stop are possible.

The 6th Circuit, the only other circuit to have ruled on this issue, prohibits Terry stops based upon completed misdemeanors (cite omitted).

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

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U.S. v. Teleguz, 492 F.3d 80 (1st Cir.), July 24, 2007

When a driver heeds a police order to stop only to drive away as the police approach the vehicle, the driver has not been seized within the meaning of the Fourth Amendment. A "seizure" requires submission to police authority. The driver's initial fleeting stop does not amount to such submission.

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

******

U.S. v. Proctor, 489 F.3d 1348 (D.C. Cir.), June 19, 2007

Vehicle impoundment conducted without a search warrant is *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions. One exception is the "community caretaking" exception. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

If a standard impoundment procedure exists, a police officer's failure to adhere to it is unreasonable and violates the Fourth Amendment. The Fourth Amendment requires that an inventory search be reasonable and, if a standard procedure for conducting an inventory search is in effect, it must be followed. If the seizure of the car was unconstitutional, the materials later recovered during the inventory search are excluded.

The Supreme Court has only suggested that a reasonable, standard police procedure must govern the decision to impound.

The 7th and 8th Circuits have held that the decision to impound must be made pursuant to a standard procedure.

The 1st Circuit does not require that an impoundment be governed by standard police procedure.

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

U.S. v. Virden, 488 F.3d 1317 (11th Cir.), June 12, 2007

The factors used to determine whether a Terry stop has matured into an arrest are also useful in evaluating whether a seizure of property required probable cause. The non-exclusive factors are: [1] the law enforcement purposes served by the detention, [2] the diligence with which the police pursue the investigation, [3] the scope and intrusiveness of the detention, and [4] the duration of the detention. Moving a vehicle to a new location for the purposes of investigation constitutes a seizure for which probable cause was required.

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

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U.S. v. Campbell, 486 F.3d 949 (6th Cir.), May 24, 2007

The Supreme Court has noted that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." Regarding the statement, "I would *like* to see your ID," the use of the word "like," as opposed to "need" or "want," suggests that a reasonable person would feel free to decline this request and leave the scene. Moreover, this court has previously held that the use of less permissive language by police officers than the phrase "I'd like to see some ID" does not constitute a seizure. A person walking down the street is not detained when an officer driving in a marked police car yells, "Hey, buddy, come here." Such a statement is a request rather than an order.

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

******

U.S. v. Orman, 486 F.3d 1170 (9th Cir.), May 22, 2007

A brief investigatory detention, a Terry stop, while constituting a seizure, is not a violation of the Fourth Amendment provided that the police officer has reasonable suspicion that criminal activity may be afoot. In the course of a lawful investigatory stop, a police officer also may lawfully pat down the detained individual for weapons, a Terry frisk, provided that the officer has reasonable suspicion that the person may be armed and presently dangerous. However, a Terry frisk is not confined to just those situations in which a Terry stop has occurred. A Terry stop and a Terry frisk are two independent actions, each requiring separate justifications. Terry frisks are authorized in consensual encounters so long as there is reasonable suspicion that the person is armed and presently dangerous.

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

******

U.S. v. Varner, 481 F.3d 569 (8th Cir.), April 04, 2007

Ordinarily, the arrest of a person outside of a residence does not justify a warrantless entry into the residence itself. One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. Even absent an affirmative indication that the arrestee might have a weapon available or might attempt to escape, the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee's elbow at all times. Additionally, it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested.

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

******

U.S. v. Garcia, 474 F.3d 994 (7th Cir.), February 02, 2007

Looking at this issue for the first time, the Court decides:

Placing a GPS (global positioning system) "memory tracking unit" underneath the rear bumper of a car found in a public place is not a Fourth Amendment "seizure" because the device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, and did not alter the car's appearance.

Using the device to track the car in public is not a Fourth Amendment "search" requiring probable cause and a warrant.

The courts of appeals have divided over the question.

The 5th and 9th Circuits agree, although the 5th Circuit approved of but did not expressly require a showing of reasonable suspicion. (cites omitted).

The 1st, 6th, and 10th Circuits call tracking a "search." The 1st and 6th Circuits require probable cause but no warrant. (cites omitted).

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

Click **HERE** for an article on GPS tracking by FLETC LGD Senior Instructor Keith Hodges(written prior to this decision).

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Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir.), January 16, 2007

See Vacation and Reversal Above

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry*.

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

******

U.S. v. Crapser, 472 F.3d 1141 (9th Cir.), January 10, 2007

Looking at this issue for the first time, the Court decides:

When a suspect voluntarily opens the door of his residence in response to a non-coercive "knock and talk" request, the police may temporarily seize the suspect outside the home (or at the threshold) provided that they have reasonable suspicion of criminal activity. However, Terry does not apply *inside* a home.

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

******

U.S. v. Guerrero, 472 F.3d 784 (10th Cir.), January 02, 2007

If officers merely examine an individual's driver's license, a detention has not taken place. When officers retain a driver's license in the course of questioning, that individual, as a general rule, will not reasonably feel free to terminate the encounter. Handing back defendants' papers, thanking them for their time, and beginning to walk away are generally sufficient to terminate the detention. Returning a driver's documentation may not end the detention if there is evidence of a coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled.

A defendant's consent must be clear, but it need not be verbal. Consent may instead be

granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer. Non-verbal consent may validly follow a verbal refusal.

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

******

U.S. v. Zacher, 465 F.3d 336 (8th Cir.), October 11, 2006

A seizure of a package sent through FedEx occurs only when law enforcement "meaningfully interferes" with an individual's possessory interests in the property. A meaningful interference occurs only if the detention delays the timely delivery of the package.

No change of custody occurs just because the carrier gives the package to police at the carrier's place of business. The sender's reasonable expectations of how the carrier will handle the package define the scope of the carrier's custody. A reasonable person could expect FedEx to handle his or her package the same way.

(See ***U.S. v. VaLerie,*** 424 F.3d 694 (8th Cir. 2005))

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

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Traffic Stops

Arizona v. Johnson, 129 S. Ct. 781, January 26, 2009 **(Supreme Court)**

In a traffic stop setting, the first Terry condition - a lawful investigatory stop - is met whenever police lawfully detain an automobile and its occupants for a traffic violation. Police need not, in addition, have cause to believe any occupant of the vehicle is involved in criminal activity. All that is necessary to justify a frisk of the driver or a passenger during a traffic stop is reasonable suspicion that the person subjected to the frisk is armed and dangerous.

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

Editor's Note: On a closely related issue, one federal circuit has held that a Terry stop and a Terry frisk are "two independent actions, each requiring separate justifications." U.S. v. Orman, 486 F.3d 1170, (9th Cir. 2007) and U.S. v. Salinas, 246 Fed. Appx. 480 (9th Cir. 2007). In both cases the Ninth Circuit held that an officer may conduct a frisk during a voluntary/consensual encounter if he has a reasonable suspicion that the subject is presently armed and dangerous. The Supreme Court declined to hear the appeal of both cases.

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Brendlin v. California, 127 S. Ct. 2400, June 18, 2007 **(Supreme Court)**

When police stop a vehicle, the driver and passengers are effectively seized, giving the passenger a right to challenge the legality of the stop and the admissibility of evidence discovered as "fruit of the poisonous tree." No passenger in such a situation would feel free to leave, even after the vehicle came to a full stop. For safety reasons alone, officers would be unlikely to allow the passenger just to walk away even if the offense was a mere traffic violation.

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

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U.S. v. Rumley, 588 F.3d 202 (4th Cir.), December 07, 2009

During a traffic stop, after learning that defendant had two prior convictions for driving with a suspended license, the deputy arrested defendant, handcuffed him, and placed him in the backseat of the deputy's patrol car. The deputy then returned to the passenger side of defendant's truck and requested that the front seat passenger step out of the truck. When the passenger moved his right leg to step out, the deputy noticed and seized a silver pistol lying on the floorboard in front of the passenger-side seat.

The deputy lawfully seized defendant's pistol when it came into plain view *before* any search of defendant's vehicle, and so Arizona v. Gant (search of a vehicle incident to arrest of an occupant) does not apply to the facts.

In Maryland v. Wilson, 519 U.S. 408, 414-15 (1997), the Supreme Court held that an officer conducting a lawful traffic stop may, as a safety measure, order any passenger to exit the vehicle as a matter of course. Nothing in Gant undermines the bright-line rule established in Wilson.

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

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U.S. v. Goodwin-Bey, 584 F.3d 1117 (8th Cir.), October 28, 2009

After officers received a report of an earlier incident involving occupants of a car displaying a weapon, they stopped a car of the same make, model and color. Officers arrested a passenger on an existing warrant, frisked the other three occupants, and then searched the passenger compartment. After getting the key from the driver, they found a handgun in the locked glove box.

The earlier incident report, along with the number of the vehicle's unsecured occupants, sufficiently implicated officer safety concerns to justify a search of the passenger compartment incident to arrest.

The earlier incident report also provided a reasonable suspicion that there was a weapon in the vehicle that the unsecured occupants could immediately access. Even if the search

incident to arrest exception did not apply, these same concerns for officer safety would justify a Terry frisk of the passenger compartment.

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

******

U.S. v. Rangel-Portillo, 586 F.3d 376 (5th Cir.), October 27, 2009

To temporarily detain a vehicle for investigatory purposes, a Border Patrol agent on roving patrol must be aware of 'specific articulable facts' together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants." "Factors (no single factor is dispositive) that may be considered include: (1) the characteristics of the area in which the vehicle is encountered; (2) the arresting agent's previous experience with criminal activity; (3) the area's proximity to the border; (4) the usual traffic patterns on the road; (5) information about recent illegal trafficking in aliens or narcotics in the area; (6) the appearance of the vehicle; (7) the driver's behavior; and, (8) the passengers' number, appearance and behavior."

Proximity of the stop to the border (in this case a mere 500 yards) is afforded great weight, but this factor alone does not constitute reasonable suspicion to stop.

Factual conditions, such as wearing seatbelts, sitting rigidly, refraining from talking to one another, and having no shopping bags when leaving Wal-Mart (even when consistent with alien smuggling), do not provide reasonable suspicion if those conditions also occur even more frequently in the law-abiding public.

Whether a driver looks at an officer or fails to look at an officer, taken alone or in combination with other factors, should be accorded little weight.

Reasonable suspicion cannot result from the simple fact that two cars are traveling on a roadway or exiting a parking lot, one in front of the other, unless there are other "connecting factors" to establish that their simultaneous travel could rationally be considered suspicious.

In cases that present no evidence of erratic driving, no features on the defendant's vehicle that would make it a likely mode of transportation for illegal aliens, and no tips by informants, this Court has been quite reluctant to conclude a stop was based on reasonable suspicion.

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

******

U.S. v. Jones, 562 F.3d 768 (6th Cir.), April 16, 2009

Brendlin v. California, 551 U.S. 249 (2007) makes it clear that, generally, when a police officer pulls over a vehicle during a traffic stop, the officer seizes everyone in the vehicle, not just the driver. Yet, the Brendlin Court also observed, "there is no seizure without actual submission."

Even though an occupant in a vehicle stopped by the police is generally deemed seized by virtue of the stopping of the vehicle, he is not thereby seized if he does not submit to the show of authority. When police vehicles hemmed in the already parked car, the driver and other passenger in the Nissan were, "seized" by virtue of their passive acquiescence – remaining in the car. But, by opening the car door and jumping out as though he wanted to run, defendant did not submit. He was not "seized" until he stopped at the command of the officer. Observations made by the officer after defendant got out but before he submitted may be used to justify the seizure.

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

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U.S. v. Al Nasser, 555 F.3d 722 (9th Cir.), February 04, 2009

A driver who stops is not "seized" under the Fourth Amendment just because he thinks that the police want him to stop, even when such belief is objectively reasonable. To constitute a "seizure," it is necessary that law enforcement conduct cause the stop and that the conduct is "intentionally applied." But, not every stop that is caused by intentional law enforcement conduct is a "seizure." A driver stopped in traffic by officers at the scene of an accident or by officers pulling over another car is not "seized" even though the conduct of the police is intentional. A person is seized when he is meant to be stopped by a particular law enforcement action and is so stopped.

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

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U.S. v. Stewart, 551 F.3d 187 (2nd Cir.), January 08, 2009

A traffic stop based on a reasonable suspicion of a traffic violation is lawful under the Fourth Amendment. Probable cause of a traffic violation is not required.

The 3rd, 5th, 8th, 9th, and D.C. Circuits agree (cites omitted)**.**

The 6th Circuit disagrees (cite omitted)**.**

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

******

U.S. v. Oliver, 550 F.3d 734 (8th Cir.), December 23, 2008

During a traffic stop, when the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation, passengers may be frisked during a traffic stop based upon reasonable suspicion they may be armed and dangerous See Knowles v. Iowa, 525 U.S. 113 (1998). No reasonable suspicion of criminal activity unrelated to the traffic stop is required to justify the pat-down search.

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

Editor's Note: The Supreme Court confirmed the circuit court's decision in the case of Arizona v. Johnson, 129 S. Ct. 781, January 26, 2009.

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U.S. v. Blair, 524 F.3d 740 (6th Cir.), May 02, 2008

An officer must have probable cause to make a stop for a civil traffic infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation.

Presence in a high-crime area at 10:30 p.m. does not by itself justify a Terry stop. That a given locale is well known for criminal activity will not by itself justify a Terry stop, although it may be taken into account with other factors. A late hour can contribute to reasonable suspicion; however, 10:30 p.m. is not late enough to arouse suspicion of criminal activity.

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

******

U.S. v. Booker, 496 F.3d 717 (D.C. Cir.), August 10, 2007

Traffic stops premised on mistakes of fact are constitutional so long as the mistake is objectively reasonable. Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional. Even when the articulated basis for the stop is a mistake of law, the stop is lawful if an objectively valid basis for the stop nonetheless exists. The officer's "subjective reason for making the arrest" need not be the criminal offense as to which the known facts provide probable cause.

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

******

U.S. v. Teleguz, 492 F.3d 80 (1st Cir.), July 24, 2007

When a driver heeds a police order to stop only to drive away as the police approach the vehicle, the driver has not been seized within the meaning of the Fourth Amendment. A

"seizure" requires submission to police authority. The driver's initial fleeting stop does not amount to such submission.

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

******

U.S. v. Soriano-Jarquin, 492 F.3d 495 (4th Cir.), July 11, 2007

A simple request for identification from passengers falls within the purview of a lawful traffic stop and does not constitute a separate Fourth Amendment event. Just as the officer may ask for the identification of the driver of a lawfully stopped vehicle, so he may request identification of the passengers also lawfully stopped. No separate showing is required. Officers performing a lawful stop are authorized to take such steps as are reasonably necessary to protect their personal safety thereafter. When an officer legitimately stops a vehicle, the identity of the persons in whose company the officer suddenly finds himself may be pertinent to the officer's well-being.

The 8th and 11th Circuits agree (cites omitted)**.**

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

******

U.S. v. Proctor, 489 F.3d 1348 (D.C. Cir.), June 19, 2007

Vehicle impoundment conducted without a search warrant is *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions. One exception is the "community caretaking" exception. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

If a standard impoundment procedure exists, a police officer's failure to adhere to it is unreasonable and violates the Fourth Amendment. The Fourth Amendment requires that an inventory search be reasonable and, if a standard procedure for conducting an inventory search is in effect, it must be followed. If the seizure of the car was unconstitutional, the materials later recovered during the inventory search are excluded.

The Supreme Court has only suggested that a reasonable, standard police procedure must govern the decision to impound. The 7th and 8th Circuits have held that the decision to impound must be made pursuant to a standard procedure. The 1st Circuit does not require that an impoundment be governed by standard police procedure.

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

******

Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir.), March 07, 2007

Title II of the Americans with Disabilities Act and the Department of Justice implementing regulations do not require police to wait for an oral interpreter before taking field sobriety tests on a profoundly deaf subject. Such is not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity.

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

******

US v. Meredith, 480 F.3d 366 (5th Cir.), February 26, 2007

After ordering an occupant to exit a vehicle and hearing that he claims to be physically unable to do so, an officer may open the occupant's door and conduct a minimally necessary visual inspection of the person of that occupant. Further, if this inspection reveals articulable facts constituting reasonable suspicion that the occupant is armed and dangerous, he may be patted down to the same extent as he could have been if he had complied with the order to exit the vehicle. Officers need no suspicion to order the occupants to step out of the car. Likewise, officers need no suspicion to open the door and perform a brief visual check of the disabled occupant.

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

******

U.S. v. Mendez, 476 F.3d 1077 (9th Cir.), February 23, 2007

This opinion vacates and reverses the opinion at 467 F.3d 1162, October 30, 2006 and briefed below.

Based on the U.S. Supreme Court's holding in Muehler v. Mena, 544 U.S. 93 (2005), the 9th Circuit now holds that because the officers' questioning did not prolong the stop, the expanded questioning did not have to be supported by separate reasonable suspicion for purposes of the Fourth Amendment.

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

******

U.S. v. Herrera-Gonzalez, 474 F.3d 1105 (8th Cir.), January 26, 2007

A traffic stop is reasonable under the Fourth Amendment if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred. Even if the officer was mistaken in concluding that a traffic violation occurred,

the stop does not violate the Fourth Amendment if the mistake was an "objectively reasonable" one.

Even if a traffic stop is determined to be invalid, subsequent voluntary consent to a search may purge the taint of the illegal stop if it was given in circumstances that render it an independent, lawful cause of the officer's discovery. To determine whether sufficient attenuation between the unlawful stop and the consent exists, consider the following factors: (1) the amount of time between the illegal stop and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

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

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U.S. v. Guerrero, 472 F.3d 784 (10th Cir.), January 02, 2007

If officers merely examine an individual's driver's license, a detention has not taken place. When officers retain a driver's license in the course of questioning, that individual, as a general rule, will not reasonably feel free to terminate the encounter. Handing back defendants' papers, thanking them for their time, and beginning to walk away are generally sufficient to terminate the detention. Returning a driver's documentation may not end the detention if there is evidence of a coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled. A defendant's consent must be clear, but it need not be verbal. Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer. Non-verbal consent may validly follow a verbal refusal.

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

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U.S. v. Mendez, 467 F.3d 1162 (9th Cir.), October 30, 2006

See Vacation and Reversal Above

Past gang membership and a felony conviction do not give rise to the requisite type of particularized, reasonable suspicion necessary to expand questioning beyond the scope of the traffic stop.

During a traffic stop, police needed particularized, reasonable suspicion to expand questioning beyond the scope of the traffic stop. A police officer may only "ask questions that are reasonably related in scope to the justification for his initiation of contact" and may expand the scope of questioning beyond the initial purpose of the stop only if he "articulate[s] suspicious factors that are particularized and objective.

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

U.S. v. Zacher, 465 F.3d 336 (8th Cir.), October 11, 2006

A seizure of a package sent through FedEx occurs only when law enforcement "meaningfully interferes" with an individual's possessory interests in the property. A meaningful interference occurs only if the detention delays the timely delivery of the package. No change of custody occurs just because the carrier gives the package to police at the carrier's place of business. The sender's reasonable expectations of how the carrier will handle the package define the scope of the carrier's custody. A reasonable person could expect FedEx to handle his or her package the same way. (See U.S. v. VaLerie, 424 F.3d 694 (8th Cir. 2005))

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

******

U.S. v. Delfin-Colina, 464 F.3d 392 (3rd Cir.), September 22, 2006

Looking at this issue for the first time, the Court decides:

The Terry reasonable suspicion standard applies to routine traffic stops despite language in Whren v. U.S., 517 U.S. 806 (1996), that suggests that the decision to stop an automobile is reasonable only where the police have probable cause to believe that a traffic violation has occurred. A traffic stop will be deemed a reasonable "seizure" when an objective review of the facts shows that an officer possessed specific, articulable facts that an individual was violating a traffic law at the time of the stop.

The 2nd, 6th, 8th, 9th, 10th, and 11th Circuits agree (cites omitted).

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

******

U.S. v. Washington, 455 F.3d 824 (8th Cir.), August 01, 2006

To justify a traffic stop, police must objectively have a reasonable basis for believing that the driver has breached a traffic law. If an officer makes a stop based on a mistake of law, the mistake of law must be "objectively reasonable." The officer's subjective good faith belief about the content of the law is irrelevant. Officers have an obligation to understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable.

See **U.S. v. McDonald, 7th Circuit** (above)**.**

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

******

U.S. v. Mosley, 454 F.3d 249 (3rd Cir.), July 21, 2006

Looking at this issue for the first time, the Court decides:

A traffic stop is a seizure of everyone in the stopped vehicle. Thus passengers in an illegally stopped vehicle have "standing" to object to the stop, and may seek to suppress the evidentiary fruits of that illegal seizure under the "fruit of the poisonous tree doctrine." When a vehicle is illegally stopped, no evidence found during the stop may be used against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged (attenuation, independent source, inevitable discovery).

The 1st, 5th, 7th, 8th, 9th, and 11th Circuits agree (cites omitted)**.**

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

******

U.S. v. McDonald, 453 F.3d 958 (7th Cir.), July17, 2006

Looking at this issue for the first time, the Court decides:

An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law. Unlike a mistake of fact, a mistake of law, no matter how reasonable or understandable, cannot provide the objectively reasonable grounds for providing reasonable suspicion or probable cause. The good faith exception will also not apply.

The 5th, 9th, 10th, and 11th Circuits agree (cites omitted).

The 8th Circuit disagrees (See **U.S. v. Washington** above).

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

******

Arrest Warrants

Manzanares v. Higdon, 575 F.3d 1135 (10th Cir.), August 10, 2009

Even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within a home, police may not enter without a warrant absent exigent circumstances. Payton v. New York, 445 U.S. 573 (1980). Police may enter a home without a warrant on valid consent. Consent may be withdrawn, and if it is, police violate the Fourth Amendment by remaining in the home. Labeling an encounter in the home as either an investigatory stop or an arrest is meaningless because Payton's probable cause requirement applies to all such seizures in the home. Based upon facts known at the time, probable cause of a crime did not exist.

Witness detentions are confined to the type of brief stops that interfere only minimally with liberty. Neither the Supreme Court nor this court has countenanced such a detention in a home. Because the detention here occurred inside a home, it was unquestionably unconstitutional unless supported by probable cause.

A "protection-of-investigation" rationale requires probable cause to believe that the person is about to commit the crime of obstruction. Based upon facts known at the time, probable cause of the crime of obstruction did not exist.

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

******

U.S. v. Jackson, 576 F.3d 465 (7th Cir.), August 06, 2009

In Payton v. New York, 445 U.S. 573 (1980), the Supreme Court held that an arrest warrant "carries with it the limited authority to enter a dwelling when there is *reason to believe* the suspect is within." Nearly every court of appeals to consider the issue has held that law enforcement officers do not need a search warrant in addition to an arrest warrant to enter a third party's residence in order to effect an arrest (3rd, 6th, 8th, and 9th circuits - cites omitted; the 1st circuit held that a search warrant is required but strongly suggested that the arrestee's presence in a third party's residence is an exigency – cite omitted.). Although the third party's Fourth Amendment rights are violated and evidence against the third party might not be admissible, the arrest is still valid.

Three circuits (2nd, 10th, and D.C. circuits – cites omitted) have explicitly concluded that "reasonable belief" requires a lesser degree of knowledge than probable cause. Four other circuits (5th, 6th, 9th, and 11th – cites omitted) have disagreed, holding that "reasonable belief" amounts to the same thing as "probable cause." Although the court "might be inclined to adopt the view of the narrow majority of our sister circuits that 'reasonable belief' is synonymous with probable cause," it declined to decide whether the standard is probable cause or something lower. The court concluded that there was probable cause to believe the target was present which would meet the lower standard as well.

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

******

Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir.), March 11, 2009

This opinion vacates and reverses the opinion at 475 F.3d 1049, January 16, 2007, and briefed below.

During an armed standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical

custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody.

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

******

U.S. v. Hardin, 539 F.3d 404 (6th Cir.), August 25, 2008

In Payton v. New York, 445 U.S. 573 (1980), the Supreme Court held that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within."(emphasis added). Is *reason to believe* the same as probable cause or is it a lesser standard?

If you think the Sixth Circuit had already answered that question, you are wrong. The language addressing this question in its two prior cases, United States v. Jones, 641 F.2d 425 (6th Cir. 1981), and United States v. Pruitt, 458 F.3d 477 (6th Cir. 2006), was dicta and not controlling. The Court, when faced with the same question in this case, still does not decide the issue. Rather, the Court holds that regardless of which threshold is required, the government failed to support either. Prior to the entry, there were no facts to suggest that Hardin was present.

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

******

U.S. v. Diaz, 491 F.3d 1074 (9th Cir.), June 22, 2007

An arrest warrant gives government agents limited authority to enter a suspect's home to arrest him if they have "reason to believe" he is inside. The phrase "reason to believe" is interchangeable with and conceptually identical to the phrases "reasonable belief" and "reasonable grounds for believing." Use the same standard of reasonableness inherent in probable cause to decide whether there is reason to believe a suspect is at a particular place. Probable cause means a "fair probability" based on the totality of circumstances. A common-sense analysis of the "totality of the circumstances" is therefore crucial in deciding whether an officer has a reason to believe a suspect is home.

Reasonable belief can exist even when police have no specific evidence that the suspect is present at that particular time. Direct evidence is not necessary. People draw

"reasonable" conclusions all the time without direct evidence. Likewise, a probable cause determination can be supported entirely by circumstantial evidence. If juries can find someone guilty beyond a reasonable doubt without direct evidence, and magistrates can issue search warrants without direct evidence, police surely can reasonably believe someone is home without direct evidence.

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

Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir.), January 16, 2007

See Vacation and Reversal Above

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry*.

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

******

U.S. v. Barrera, 464 F.3d 496 (5th Cir.) September 05, 2006

An arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is "reason to believe" the suspect is within. "Reasonable belief" embodies the same standards of reasonableness as probable cause but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances. Like "reasonable suspicion" or "probable cause," "reasonable belief" is not a finely-tuned standard. The terms are commonsense, non-technical concepts that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. "Reasonable belief" can only be ascertained through a weighing of the facts.

See U.S. v. Pruitt, 6th Circuit (below).

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

******

U.S. v. Pruitt, 458 F.3d 477 (6th Cir.), August 11 2006

An arrest warrant is sufficient to enter a residence if the officers, by looking at common sense factors and evaluating the totality of the circumstances, establish a "reasonable belief" that the subject of the arrest warrant is within the residence at that time. The

"reasonable belief" standard is less than probable cause.

The 9th Circuit disagrees (cites omitted).

See U.S. v. Barrera, 5th Circuit (above).

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

******

Protective Sweeps

Los Angeles County v. Rettele, 127 S. Ct. 1989, May 21, 2007 **(Supreme Court)**

Officers who are searching a house where they believe a suspect might be armed possess authority to secure the premises before deciding whether to continue with the search. It is reasonable for officers to take action to secure the premises and to ensure their own safety and the efficiency of the search. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Unknown to the officers, the suspects had moved from and sold the house three months earlier. The occupants were completely innocent of wrongdoing. Clearly, the officers made an error in the case. However, "[t]he Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty." Under such standards, mistakes are inevitable. This does not mean that all mistakes are unreasonable. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, the Fourth Amendment is not violated.

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

******

Manzanares v. Higdon, 575 F.3d 1135 (10th Cir.), August 10, 2009

Even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within a home, police may not enter without a warrant absent exigent circumstances. Payton v. New York, 445 U.S. 573 (1980). Police may enter a home without a warrant on valid consent. Consent may be withdrawn, and if it is, police violate the Fourth Amendment by remaining in the home. Labeling an encounter in the home as either an investigatory stop or an arrest is meaningless because Payton's probable cause requirement applies to all such seizures in the home. Based upon facts known at the time, probable cause of a crime did not exist.

Witness detentions are confined to the type of brief stops that interfere only minimally with liberty. Neither the Supreme Court nor this court has countenanced such a detention in a home. Because the detention here occurred inside a home, it was unquestionably unconstitutional unless supported by probable cause.

A "protection-of-investigation" rationale requires probable cause to believe that the person is about to commit the crime of obstruction. Based upon facts known at the time, probable cause of the crime of obstruction did not exist.

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

******

U.S. v. Jennings, 544 F.3d 815 (7th Cir.), September 15, 2008

Officers executing a search warrant have categorical authority to detain any occupant of the subject premises during the search. Muehler v. Mena, 544 U.S. 93, 98 (2005); Michigan v. Summers, 452 U.S. 692 (1981). This authority exists in part because the probable cause underlying a warrant to search a premises gives police reason to suspect that its occupants are involved in criminal activity, and also because the officers have a legitimate interest in minimizing the risk of violence that may erupt when an occupant realizes that a search is underway.

The rule of Summers also permits police to detain people who approach a premises where a search is in progress. Jennings' intrusion into the apartment parking lot within the security perimeter of officers preparing to serve a search warrant permitted his detention. The crack cocaine was in plain view in his vehicle and is therefore admissible evidence.

The 3rd and 6th Circuits agree (cites omitted).

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

******

U.S. v. Mata, 517 F.3d 279 (5th Cir.), February 11, 2008

Lawful arrest is not an indispensable element of a protective sweep. The government need not prove the sweep was incident to a lawful arrest.

Exigent circumstances do not include the likely consequences of the government's own actions or inactions. The moment to determine whether exigent circumstances exist is before the defendant is aware of the officers' presence.

There is a split of circuits on both issues. Refer also to the Subject Matter Case Digest on "Exigent Circumstances."

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

******

U.S. v. Nascimento, 491 F.3d 25 (1st Cir.), July 02, 2007

When police arrest a partially clothed individual charged with a crime of violence in his home, the need to dress him may constitute an exigency justifying the officers in entering another room in order to obtain needed clothing. When the police neither manipulate nor use the situation as a pretext to carry out an otherwise impermissible search, the conduct of the police in deciding to dress the suspect is reasonable. Common sense and practical considerations must guide judgments about the reasonableness of searches and seizures. A cabinet eight to ten feet away from an unrestrained suspect can be said to be within the suspect's immediate control and subject to search incident to arrest.

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

******

U.S. v. Varner, 481 F.3d 569 (8th Cir.), April 04, 2007

Ordinarily, the arrest of a person outside of a residence does not justify a warrantless entry into the residence itself. One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. Even absent an affirmative indication that the arrestee might have a weapon available or might attempt to escape, the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee's elbow at all times. Additionally, it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested.

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

******

U.S. v. Walker, 474 F.3d 1249 (10th Cir.), January 31, 2007

Opening the storm door to knock on the inner door, even though the inner door was partially open, is not a Fourth Amendment intrusion because such action does not violate an occupant's reasonable expectation of privacy.

When the Deputy knocked on the inner door, again announcing that he was from the Sheriff's office, defendant responded, "Yeah, and I got a goddamn gun." This threatening remark justified the officers in taking prompt action to protect themselves. Although retreat was an alternative, it was also reasonable for them to take control of the situation by entering to disarm Mr. Walker, who could otherwise continue to pose a danger to the officers and others.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. Absent an arrest warrant or

even probable cause to make an arrest, a protective sweep is not authorized.

Editor's Note: The court remanded the case to the district court to determine whether the "sweep" was lawful under the emergency exigency. If so, the evidence found during the "sweep" that justified the eventual arrest was seized under the "plain view doctrine" and would therefore be admissible.

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

******

U.S. v. Stover, 474 F.3d 904 (6th Cir.), January 30, 2007

Officers with an arrest warrant and reason to believe that the suspect is inside the house may enter and search anywhere that the suspect might reasonably be found. Once a suspect is found, the arrest warrant does not justify a more intrusive search of the

premises. Generally, the government may not search an individual's home without the individual's consent or a search warrant. A limited exception to this general rule authorizes officers making arrests in the home to conduct a "protective sweep"–a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of the police officers and others. The fact that police identified a car registered to a local criminal who did not live at defendant's address is sufficient to justify a quick and limited protective sweep. Even though defendant lived in a duplex, the criminal who owned the car in defendant's driveway was as likely to be visiting defendant as he was to be visiting defendant's neighbor. This probability is sufficient to justify a protective sweep.

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

******

U.S. v. Davis, 471 F.3d 938 (8th Cir.), December 28, 2006

Protective sweeps are not allowed in all cases, regardless of departmental policies to conduct a sweep of a house during *every* home arrest as a matter of course. Each protective sweep must be justified by articulable facts on an individualized basis.

Click **HERE** for the court's opinion.
U.S. v. Jones, 471 F.3d 868 (8th Cir.), December 20, 2006

During the execution of a premises search warrant, officers may conduct a protective sweep of a vehicle not on the curtilage but parked on an adjacent public street if articulable facts support a reasonable belief that it harbors someone who may pose a danger to them.

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

******

U.S. v. Maldonado, 472 F.3d 388 (5th Cir.), December 12, 2006

There is no general "security check" exception to the warrant requirement. However, depending on the circumstances, a "protective sweep" may be conducted to protect the safety of police officers or others. There must be articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. The protective sweep doctrine may apply even if the arrest occurs outside the home and even when the agents have no certain knowledge that other individuals are in the home. However, lack of information alone cannot provide an articulable basis upon which to justify a protective sweep.

Fear for officer safety may be reasonable during drug arrests, even in the absence of any particularized knowledge of the presence of weapons. In drug dealing it is not uncommon for traffickers to carry weapons.

To determine reasonableness, look to the totality of the circumstances and for both direct and circumstantial evidence. The brief time available to conduct surveillance, the exposure of the agents in the open area, the opening and closing of the door during the arrest, and the reasonable expectation that weapons are present during drug transactions are sufficient circumstantial evidence to support a finding that the agents' fear was reasonable.

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

******

U.S. v. Torres-Castro, 470 F.3d 992 (10th Cir.), December 12, 2006

"Protective sweeps" are only permitted incident to an arrest. (The court has twice refused to authorize protective sweeps absent arrest (cites omitted)**).**

The 8th Circuit and one panel of the 9th Circuit agree. (cites omitted)**.**

A majority of circuits have extended the protective sweep doctrine to cases where officers possess a reasonable suspicion that their safety is at risk, even in the absence of an arrest. See, e.g., 1st, 2nd, 5th Circuits, and another panel of the 9th Circuit (cites omitted).

Protective sweeps, wherever they occur, may precede an arrest, and still be "incident to that arrest," so long as the arrest follows quickly thereafter. The time at which an officer forms the intent to arrest is not determinative. To be "incident to an arrest," there must have been a legitimate basis for the arrest that existed before the sweep. The legitimate basis for an arrest is purely an objective standard and can be for any crime, not merely that for which the defendant is ultimately charged after the protective sweep.

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

******

Knock and Talk

U.S. v. Gomez-Moreno, 479 F.3d 350 (5th Cir.), February 12, 2007

Exigent circumstances may not consist of the likely consequences of the government's own actions or inactions. In determining whether officers create an exigency, this Court focuses on the "reasonableness of the officers' investigative tactics leading up to the warrantless entry."

A "knock and talk" strategy is reasonable where the officers who approached the house are not convinced that criminal activity is taking place or have any reason to believe the occupants are armed.

Creating a show of force and demanding entry into a home without a warrant, goes beyond the reasonable "knock and talk" strategy of investigation and unreasonably creates the exigency.

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

******

U.S. v. Crapser, 472 F.3d 1141 (9th Cir.), January 10, 2007

Looking at this issue for the first time, the Court decides:

When a suspect voluntarily opens the door of his residence in response to a non-coercive "knock and talk" request, the police may temporarily seize the suspect outside the home (or at the threshold) provided that they have reasonable suspicion of criminal activity. However, Terry does not apply *inside* a home.

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

******

U.S. v. Taylor, 458 F.3d 1201 (11th Cir.), July 28, 2006

The "Knock and Talk" exception to the Fourth Amendment's probable cause and warrant requirement allows entry upon private land to knock on a citizen's door for legitimate police purposes unconnected with a search of the premises. Absent express orders from the person in possession, an officer may walk up the steps and knock on the front door of any man's castle, with the honest intent of asking questions of the occupant just as any private citizen may. Also, an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence.

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

******

RS / PC

U.S. v. Rangel-Portillo, 586 F.3d 376 (5th Cir.), October 27, 2009

To temporarily detain a vehicle for investigatory purposes, a Border Patrol agent on roving patrol must be aware of 'specific articulable facts' together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants." "Factors (no single factor is dispositive) that may be considered include: (1) the characteristics of the area in which the vehicle is encountered; (2) the arresting agent's previous experience with criminal activity; (3) the area's proximity to the border; (4) the usual traffic patterns on the road; (5) information about recent illegal trafficking in aliens or narcotics in the area; (6) the appearance of the vehicle; (7) the driver's behavior; and, (8) the passengers' number, appearance and behavior."

Proximity of the stop to the border (in this case a mere 500 yards) is afforded great weight, but this factor alone does not constitute reasonable suspicion to stop.

Factual conditions, such as wearing seatbelts, sitting rigidly, refraining from talking to one another, and having no shopping bags when leaving Wal-Mart (even when consistent with alien smuggling), do not provide reasonable suspicion if those conditions also occur even more frequently in the law-abiding public.

Whether a driver looks at an officer or fails to look at an officer, taken alone or in combination with other factors, should be accorded little weight.

Reasonable suspicion cannot result from the simple fact that two cars are traveling on a roadway or exiting a parking lot, one in front of the other, unless there are other "connecting factors" to establish that their simultaneous travel could rationally be considered suspicious.

In cases that present no evidence of erratic driving, no features on the defendant's vehicle that would make it a likely mode of transportation for illegal aliens, and no tips by informants, this Court has been quite reluctant to conclude a stop was based on reasonable suspicion.

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

******

U.S. v. Simmons, 560 F.3d 98 (2nd Cir.), March 17, 2009

An anonymous tip concerning an ongoing emergency "is entitled to a higher degree of reliability and requires a lesser showing of corroboration than a tip that alleges general criminality."

The 4th, 7th, 9th, 10th, and 11th Circuits agree (cites omitted).

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

******

U.S. v. Kattaria, 553 F.3d 1171 (8th Cir.), January 30, 2009

This opinion vacates and reverses the opinion at 503 F.3d 703, October 05, 2007, and briefed below.

The Court declined to address the issue of whether a warrant to use a thermal imaging device to detect excess heat emanating from a home may be issued on reasonable suspicion. The Court affirmed the District Court's denial of the motion to suppress and the panel's earlier ruling affirming that decision by determining that the facts used to support the thermal imaging warrant amounted to traditional probable cause.

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

******

U.S. v. Franklin, 547 F.3d 726 (7th Cir.), October 27, 2008

The odor of burning marijuana provides an officer with probable cause to search the passenger compartment and containers within the passenger compartment. A police dog's alerting to the presence of narcotics provides additional probable cause to search other parts of the vehicle for narcotics.

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

******

U.S. v. Chavez, 534 F.3d 1338 (10th Cir.), July 29, 2008

Under the "collective knowledge" doctrine, absent any traffic violation, a police officer may rely on the instructions of another law enforcement agency or officer to initiate a traffic stop and then conduct a search pursuant to the automobile exception.

"Horizontal" collective knowledge

When individual law enforcement officers have pieces of the probable cause puzzle, but no single officer possesses information sufficient for probable cause, the officers can communicate the information they possess individually and, thereby, pool their collective knowledge to meet the probable cause threshold.

Looking at this issue for the first time, the court decides:

"Vertical" collective knowledge

In stopping and searching a car, a police officer may rely on the instructions of another law

enforcement officer or agency with knowledge of the probable cause facts even if that officer himself is not privy to all the facts.

The 3rd, 5th, 7th, 8th, and 9th Circuits agree (cites omitted)**.**

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

******

U.S. v. Hicks, 531 F.3d 555 (7th Cir.), July 09, 2008

Anonymous tips about an ongoing emergency are treated differently that those regarding general criminality. Because of the special reliability inherent in reports of ongoing emergencies, such 911 calls are subject to less testing in court than other out-of-court statements. When an officer relies on an emergency report in making a stop, a lower level of corroboration is required.

The 2nd, 3rd, 4th, 7th, 9th, 10th, and 11th Circuits agree (cites omitted)**.**

No circuits disagree.

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

******

U.S. v. Askew, 529 F.3d 1119 (D.C. Cir.), June 20, 2008

The full Court vacated and now reverses the decision by a panel in *U. S. v. Askew*, 482 F.3d 532 (D.C. Cir. 2007).

Unzipping a jacket to expose a sweatshirt underneath is a "search." A reasonable suspicion of criminal activity cannot justify a search that does not have a weapon as its "immediate object." There is no search-for-evidence counterpart to the Terry weapons search, permissible on only a reasonable suspicion that such evidence would be found. When there are no reasonable grounds for believing that it would establish or negate appellant's identification as the robber, unzipping a jacket to expose a sweatshirt during a show-up is precisely the sort of evidentiary search that is impermissible in the context of a Terry stop. (The Court expressly stated that it was not ruling that reasonable grounds for believing that it would establish or negate appellant's identification as the robber would make the search reasonable under the Fourth Amendment.) **The police may not maneuver a suspect's outer clothing – such as unzipping a suspect's outer jacket to facilitate a witness's identification at a show-up during a Terry stop.**

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

******

U.S. v. Forbes, 528 F.3d 1273 (10th Cir.), June 17, 2008

Even assuming that a Customs and Border Protection agent first searched the interior of the trailer without consent or probable cause, no incriminating evidence was found during that search. The subsequent canine alert provided an independent source of suspicion to search the interior of the tractor, where the marijuana was discovered.

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

******

U.S. v. Peralez, 526 F.3d 1115 (8th Cir.), May 14, 2008

The Fourth Amendment is violated when the extent and duration of the trooper's focus on non-routine questions prolongs a traffic stop beyond the time reasonably required to complete its purpose. However, suppression of evidence is the appropriate remedy only if the constitutional violation was "at least a but-for cause of obtaining the evidence."

Because the drug dog was available at the outset of the stop, and because at the outset of the stop the trooper indicated to both the driver and passenger that he intended to run the dog around the exterior of the van, regardless of the responses to the trooper's expanded inquiries, the dog sniff was not "the consequence of a constitutional violation." The positive indication during the dog sniff provided probable cause to search the van, resulting in the discovery of the evidence.

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

******

U.S. v. Blair, 524 F.3d 740 (6th Cir.), May 02, 2008

An officer must have probable cause to make a stop for a civil traffic infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation.

Presence in a high-crime area at 10:30 p.m. does not by itself justify a Terry stop. That a given locale is well known for criminal activity will not by itself justify a Terry stop, although it may be taken into account with other factors. A late hour can contribute to reasonable suspicion; however, 10:30 p.m. is not late enough to arouse suspicion of criminal activity.

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

******

U.S. v. Morales-Aldahondo, 524 F.3d 115 (1st Cir.), April 24, 2008

When evaluating a claim that information in a search warrant affidavit was stale, the timeliness of information is not measured simply by counting the number of days that have

elapsed. Instead, the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information is considered.

Three year old information is not stale when supported by the testimony of an agent, based on his experience and training, that people who download child pornography value their collections to such an extent that they keep the images for a period of time, usually years and that a person who uses a computer to access child pornography is likely to use his computer both to augment and to store the collected images. History teaches that collectors prefer not to dispose of their dross, typically retaining obscene materials for years.

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

******

U.S. v. LaFortune, 520 F.3d 50 (1st Cir.), March 18, 2008

The best practice is for an applicant seeking a warrant based on images of alleged child pornography to append the images or provide a sufficiently specific description of the images to enable the magistrate judge to determine independently whether they probably depict real children.

Neither expert testimony nor "informed lay opinion" is required to support a judge's search warrant probable cause determination that the alleged child pornography involves real children rather than virtual children.

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

******

U.S. v. Hughes, 517 F.3d 1013 (8th Cir.), February 25, 2008

There is no *per se* rule prohibiting Terry stops to investigate a completed misdemeanor. To determine whether such a Terry stop is constitutional, balance the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. Under this test, the nature of the misdemeanor and potential threats to citizens' safety are important factors.

Of the three other Circuit Courts that have addressed this issue –

The 9th and 10th Circuits agree (cites omitted).

The 6th Circuit disagrees, adopting a *per se* rule prohibiting such stops (cite omitted)**.**

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

******

U.S. v. Tyler, 512 F.3d 405 (7th Cir.), January 10, 2008

An investigative detention cannot be justified by a mistaken belief that the law prohibits carrying open alcoholic beverages in public (a mistake of law as opposed to a mistake of fact).

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

******

U.S. v. Reaves, 512 F.3d 123 (4th Cir.), January 08, 2008

To protect against mischief and harassment by an unknown, unaccountable informant, an anonymous tip must be suitably corroborated and must be reliable in its assertion of illegal conduct.

Although a caller's running account of the suspect's movement is of considerable assistance to the police in locating and stopping him and may contribute to the presence of reasonable suspicion, it may not, by itself, serve to validate the underlying tip.

When an unidentified tipster provides enough information to allow the police to readily trace her identity, thereby subjecting herself to potential scrutiny and responsibility for the allegations, a reasonable officer may conclude that the tipster is credible.

An anonymous tipster's unconfirmed, blow-by-blow assertion of the basis of her knowledge is not sufficient by itself to make the tip reliable. Some corroboration is required because a fraudulent tipster can fabricate her basis of knowledge.

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

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U.S. v. Barnes, 506 F.3d 58 (1st Cir.), October 29, 2007

Reasonable suspicion or even probable cause can be established by the "collective knowledge" or "pooled knowledge" principle. Specifically, reasonable suspicion can be imputed to the officer conducting a search if he acts in accordance with the direction of another officer who has reasonable suspicion.

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

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U.S. v. Kattaria, 503 F.3d 703 (8th Cir.), October 05, 2007

See Vacation and Reversal Above

Looking at this issue for the first time, the Court decides:

The same Fourth Amendment reasonable suspicion standard that applies to Terry investigative stops applies to the issuance of a purely investigative warrant to conduct a limited thermal imaging search from well outside the home. The traditional requirement of probable cause is relaxed by the well-established Fourth Amendment principle that the police may reasonably make a brief and minimally intrusive investigative stop if they have reasonable suspicion that criminal activity may be afoot. Factors justifying application of this standard, rather than probable cause, are "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives." The "practical alternatives" factor provides good reason to shift the analysis when the issue is the quantum of evidence required to obtain a warrant *solely for the purpose of conducting investigative thermal imaging*. Thermal imaging information provides important corroboration that criminal activity is likely being conducted in a home *before the homeowner is subjected to a full physical search.* If the same probable cause is required to obtain both kinds of warrants, law enforcement will have little incentive to incur the expense of a minimally intrusive thermal imaging search before conducting a highly intrusive physical search.

The 9th Circuit disagrees and requires probable cause for a thermal imaging warrant (cite omitted)**.**

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

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U.S. v. Ellis, 499 F.3d 686 (7th Cir.), August 27, 2007

Under the "collective knowledge doctrine," the knowledge of one police officer is imputed to other officers *when they are in communication regarding a suspect*. This doctrine permits arresting officers to rely on the knowledge of other officers, but not necessarily the conclusions, such as whether probable cause exists. An officer need not be personally aware of all of the specific facts supporting probable case, so long as an officer who is aware of such facts relays them to the other officer.

During a "knock and talk" investigation of drug activity, the perception of movement within the house by police, without more, does not create exigent circumstances. To support an exigent circumstance allowing entry without a warrant, police must differentiate the perceived movement from the reasonable type of movement that would be found in any home where there was a knock on the door.

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

U.S. v. Laville, 480 F.3d 187 (3rd Cir.), March 16, 2007

State or local law does not dictate the reasonableness of an arrest for purposes of a Fourth Amendment probable cause analysis. A violation of state or local law is not a *per se* violation of the Fourth Amendment. Rather, notwithstanding the validity of the arrest under state or local law, probable cause exists when the totality of the circumstances within an officer's knowledge is sufficient to warrant a person of reasonable caution to conclude that the person being arrested has committed or is committing an offense.

The validity of an arrest under state law must never be confused or conflated with the Fourth Amendment concept of reasonableness. The validity of an arrest under state law is at most a factor that a court may consider in assessing the broader question of probable cause.

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

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U.S. v. Williams, 477 F.3d 554 (8th Cir.), February 13, 2007

An affidavit is not robbed of its probative effect by its failure to mention that the informant "was a paid informant who avoided prosecution by virtue of her testimony…." In fact, a properly developed pay-based incentive system with appropriate consequences for invalid information may even bolster reliability. Omitting the details and existence of the bargaining agreement between the informant and the government is not misleading.

Probable cause is not defeated by a failure to inform the magistrate judge of an informant's criminal history if the informant's information is at least partly corroborated or reliability is established through some other means such as a track record.

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

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U.S. v. Wiley, 475 F.3d 908 (7th Cir.), February 06, 2007

When an affidavit is based on informant tips, the probable cause inquiry is based on the totality of the circumstances. *See* Illinois v. Gates, 462 U.S. 213 (1983). These four factors are particularly relevant as a part of this inquiry: (1) the extent to which the police have corroborated the informant's statements; (2) the degree to which the informant has acquired knowledge of the events through firsthand observation; (3) the amount of detail provided; and (4) the interval between the date of the events and police officer's application for the search warrant.

Probable cause does not require direct evidence linking a crime to a particular place. Issuing judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense. In the case of drug

dealers, evidence is often found at their residences. However, there is no categorical rule that would, in every case, uphold a finding of probable cause to search a particular location simply because a suspected drug trafficker resides there.

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

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U.S. v. Ramirez, 473 F.3d 1026 (9th Cir.), January 16, 2007

The "collective knowledge doctrine" applies so that when an officer (or team of officers), with direct personal knowledge of *all* the facts necessary to give rise to reasonable suspicion or probable cause, directs or requests that another officer, not previously involved in the investigation, conduct a stop, search, or arrest, that other officer may do so without violating the Fourth Amendment. When one officer directs another to take some action, there is necessarily a "communication" between those officers, and they are necessarily functioning as a team. The "collective knowledge doctrine" includes no requirement regarding the *content* of the communication that one officer must make to another.

The 3rd, 5th, and 7th Circuits agree. (cites omitted).

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

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U.S. v. Goodwin, 449 F.3d 766 (7th Cir.), May 24, 2006

Fitting a drug courier profile based on a last minute cash purchase of a train ticket, combined with a response to questioning that appears to be a fabrication, amounts to reasonable suspicion.

More than reasonable suspicion may be required when the stop is more oppressive than a typical Terry stop.

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

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U.S. v. Gourde, 440 F.3d 1065 (9th Cir.), March 09, 2006 (en banc)

Paid membership in a child pornography download site can establish probable cause that there are child pornography images, or evidence of the same, on the suspect's computer.

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

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Mistake of Law

U.S. v. Washington, 455 F.3d 824 (8th Cir.), August 01, 2006

To justify a traffic stop, police must objectively have a reasonable basis for believing that the driver has breached a traffic law. If an officer makes a stop based on a mistake of law, the mistake of law must be "objectively reasonable." The officer's subjective good faith belief about the content of the law is irrelevant. Officers have an obligation to understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable.

See **U.S. v. McDonald, 7th Circuit** (below).

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

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U.S. v. McDonald, 453 F.3d 958 (7th Cir.), July 17, 2006

Looking at this issue for the first time, the Court decides:

An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law. Unlike a mistake of fact, a mistake of law, no matter how reasonable or understandable, cannot provide the objectively reasonable grounds for providing reasonable suspicion or probable cause. The good faith exception will also not apply.

The 5th, 9th, 10th, and 11th Circuits agree (cites omitted).

The 8th Circuit disagrees (See U.S. v. Washington above).

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

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Exclusionary Rule

Kansas v. Ventris, 129 S. Ct. 1841, April 29, 2009 **(Supreme Court)**

Statements taken in violation of the Sixth Amendment right to counsel are inadmissible in the government's case in chief. However, once the defendant testifies inconsistently, denying the prosecution the traditional truth-testing devices of the adversary process is a high price to pay for vindicating the right to counsel at the prior stage. Therefore, statements suppressed because of a Sixth Amendment violation may be used to impeach the defendant's testimony.

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

Herring v. United States, 129 S. Ct. 695, January 14, 2009 **(Supreme Court)**

Based upon erroneous information provided by another law enforcement agency about the existence of an active arrest warrant, defendant was arrested and searched. Evidence was seized. There was, in fact, no active arrest warrant, making the arrest and the search incident to it unlawful.

The exclusionary rule does not apply when police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. The pertinent analysis is objective, not an inquiry into the arresting officers' subjective awareness.

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

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U.S. v. Quinney, 583 F.3d 891 (6th Cir.), October 01, 2009

Under the inevitable-discovery doctrine, if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale of the exclusionary rule has so little basis that the evidence should be received. See Nix v. Williams, 467 U.S. 431, 444 (1984). However, the inevitable-discovery doctrine does not permit police, who have probable cause to believe a home contains contraband, to enter a home illegally, conduct a warrantless search and escape the exclusionary rule on the ground that the police *could* have obtained a warrant yet chose not to do so.

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

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U.S. v. Farias-Gonzalez, 556 F.3d 1181 (11th Cir.), February 03, 2009

The Supreme Court case of INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), addressed a jurisdictional challenge in a civil deportation case, not an evidentiary challenge in a criminal case. Any language in that decision suggesting that identity-related evidence is never suppressible is mere dictum and does not control admissibility in a criminal case.

The 4th, 8th, and 10th Circuits agree (cites omitted).

The 3rd, 5th, and 6th Circuits disagree (cites omitted).

There are seemingly contradictory rulings in the 9th Circuit (cites omitted).

The exclusionary rule is applicable only where its deterrence benefits outweigh its substantial social costs. See Herring v. United States, 129 S. Ct. 695 (2009) and Hudson v. Michigan, 547 U.S. 586 (2006). Because the social costs of excluding it outweigh the minimal deterrence benefits, identity related evidence obtained in violation of the Fourth Amendment is admissible in a criminal prosecution when offered solely to prove the identity of the defendant.

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

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Luz Lopez-Rodriguez v. Mukasey, 536 F.3d 1012 (9th Cir.), August 08, 2008

In INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), the Supreme Court held that the Fourth Amendment exclusionary rule does not generally apply in deportation proceedings, where the sole issues are identity and alienage. However, the Court expressly left open the possibility that the exclusionary rule might still apply in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."

Even in administrative proceedings, administrative tribunals are still required to exclude evidence that was obtained by deliberate violations of the Fourth Amendment or by conduct a reasonable officer should know is in violation of the Constitution. A Fourth Amendment violation is "egregious" if evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should have known is in violation of the Constitution. A reasonable officer knows that entry into a home without a warrant, exigent circumstance, or consent is a clear violation of the Fourth Amendment. The Court's "confidence in this result is further underscored by our cognizance of the extensive training INS agents receive in Fourth Amendment law."

The government may not show consent to enter from the defendant's failure to object to the entry. There is no inferred consent in the absence of a request by the officers or ongoing, affirmative cooperation by the suspect.

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

******

U.S. v. Peralez, 526 F.3d 1115 (8th Cir.), May 14, 2008

The Fourth Amendment is violated when the extent and duration of the trooper's focus on non-routine questions prolongs a traffic stop beyond the time reasonably required to complete its purpose. However, suppression of evidence is the appropriate remedy only if the constitutional violation was "at least a but-for cause of obtaining the evidence."

Because the drug dog was available at the outset of the stop, and because at the outset of the stop the trooper indicated to both the driver and passenger that he intended to run the

dog around the exterior of the van, regardless of the responses to the trooper's expanded inquiries, the dog sniff was not "the consequence of a constitutional violation." The positive indication during the dog sniff provided probable cause to search the van, resulting in the discovery of the evidence.

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

******

U.S. v. Tejada, 524 F.3d 809 (7th Cir.), April 10, 2008

When a warrant would *certainly*, and not merely probably, have been issued had it been applied for, evidence seized without a warrant is admissible under the inevitable discovery doctrine.

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

******

U.S. v. Cazares-Olivas, 515 F.3d 726 (7th Cir.), January 29, 2008

Failure by the agent, Assistant U.S. Attorney, and Magistrate Judge to follow the procedures for obtaining a telephonic search warrant as set out in FRCrP 41 means that the warrantless search, even though verbally approved by the judge, violated the Fourth Amendment. (This was the only time within the last 15 years, if not longer, that a telephonic warrant had been requested in the Western District of Wisconsin).

The exclusionary rule is used for only a subset of constitutional errors. Permitting people to get away with crime is too high a price to pay for errors that either do not play any causal role in the seizure (the inevitable-discovery situation) or stem from negligence rather than disdain for constitutional requirements (the good faith reliance situation). Had the magistrate judge written out and signed a warrant after hanging up the phone, everything would have proceeded exactly as it did. The agents would have conducted the same search and found the same evidence (the inevitable-discovery situation).

Violations of federal rules alone do not justify the exclusion of evidence that has been seized on the basis of probable cause, and with advance judicial approval.

The 10th Circuit agrees (cite omitted).

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

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U.S. v. Mowatt, 513 F.3d 395 (4th Cir.), January 25, 2008

The good faith exception to the exclusionary rule does not apply when the warrant is based on information obtained in an illegal, warrantless search because the constitutional error

was made by the officer, not by the magistrate.

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

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Use of Force

Scott v. Harris, 127 S. Ct. 1769, April 30, 2007 **(Supreme Court)**

A claim of excessive force in the course of making a seizure of a person is properly analyzed under the Fourth Amendment's objective reasonableness standard of Graham v. Connor, 490 U. S. 386 (1989).

Tennessee v. Garner, 471 U. S. 1 (1985), did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." Garner was simply an application of the Fourth Amendment's reasonableness test to the use of a particular type of force in a particular situation.

Whatever Garner said about the factors that might have justified shooting the suspect in that case, such preconditions have scant applicability to this case, which has vastly different facts.

Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

In determining the reasonableness of a seizure, balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

In judging whether Scott's actions were reasonable, consider the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the public that Harris posed. It is appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability.

A police officer's attempt to terminate a dangerous high speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

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

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Bryan v. McPherson, 590 F.3d 767 (9th Cir.), December 28, 2009

Tasers and stun guns fall into the category of non-lethal force. (Like any generally non-lethal force, the taser is capable of being employed in a manner to cause the victim's death.)

Non-lethal, however, is not synonymous with non-excessive; all force - lethal and non-lethal - must be justified by the need for the specific level of force employed. Nor is "non-lethal" a monolithic category of force. A blast of pepper spray and blows from a baton are not necessarily constitutionally equivalent levels of force simply because both are classified as non-lethal. Because of the physiological effects, the high levels of pain, and foreseeable risk of physical injury, the X26 and similar devices are a greater intrusion than other non-lethal methods of force. Tasers like the X26 constitute an intermediate or medium, though not insignificant, quantum of force that must be justified by a strong government interest that *compels* the employment of such force.

Under Graham v. Connor, the government's interest in the use of force is evaluated by examining three core factors, the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. These factors, however, are not exclusive. The totality of the circumstances are examined and whatever specific factors may be appropriate in a particular case, whether or not listed in Graham, are considered.

Traffic violations generally will not support the use of a significant level of force. While the commission of a misdemeanor offense is not to be taken lightly, it militates against finding the force used to effect an arrest reasonable where the suspect was also nonviolent and posed no threat to the safety of the officers or others. (The 10th and 11th circuits agree (cites omitted)). **The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense.**

The objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public.

Police officers normally provide warnings where feasible, even when the force is less than deadly. The failure to give such a warning is a factor to consider.

Although police officers need not employ the "least intrusive" degree of force possible, police are required to *consider* what other tactics if any were available' to effect the arrest.

Viewing the facts in the light most favorable to Bryan, the totality of the circumstances here did not justify the deployment of the Taser X26. A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury.

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

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Vance v. Wade, 546 F.3d 774 (6th Cir.), November 17, 2008

For an excessive-force-in-handcuffing claim, a plaintiff must show

(1) that officers handcuffed the plaintiff excessively and unnecessarily tightly, and

(2) that officers ignored the plaintiff's pleas that the handcuffs were too tight.

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

******

Torres v. City of Madera, 524 F.3d 1053 (9th Cir.), May 05, 2008

Five factors are relevant in determining whether an officer's mistake in using the Glock rather than the Taser was objectively unreasonable: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.

This determination of reasonableness must allow for the fact that police officers are often forced to make split second judgments.

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

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Floyd v. City of Detroit, 518 F.3d 398 (6th Cir.), March 06, 2008

The Fourth Amendment prohibits a police officer's use of deadly force to "seize" an unarmed, non-dangerous suspect. Shooting at but missing a suspect is a show of authority that amounts to a "seizure" under the Fourth Amendment when it actually has the intended effect of contributing to the suspect's immediate restraint.

Not all mistakes—even honest ones—are objectively reasonable. Honest but objectively unreasonable use of force mistakes violate the Fourth Amendment.

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

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Velazquez v. City of Hialeah, 484 F.3d 1340 (11th Cir.), April 20, 2007

An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for failing to intervene though he administered no blow. It is not necessary that the victim be able to identify which of the officers used excessive force. Where the law prohibits both the beating and the

failure to intervene, the testimony of the victim that he was beaten after being handcuffed and that two officers were present supports the inference that one or more of the officers present beat him and that if one did not beat him, then he failed to intervene in the beating.

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

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Livermore v. Lubelan, 476 F.3d 397 (6th Cir.), February 07, 2007

In the excessive force context, it is not enough that a plaintiff establishes that the defendant's use of force was excessive under the Fourth Amendment. To defeat qualified immunity, the plaintiff must show that the defendant had notice that the manner in which the force was used had been previously proscribed.

The ultimate inquiry is "whether the totality of the circumstances justifies a particular sort of seizure." Three factors (not an exhaustive list) are considered in determining the reasonableness of force used: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the police officers or others; and (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight.

Even when the particular seizure is reasonable, liability exists if the defendant police officers acted recklessly in creating the circumstances which required the use of deadly force.

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

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Defenses

Entrapment

U.S. v. Morris, 549 F.3d 548 (7th Cir.), December 05, 2008

Stings are schemes for getting a person who is predisposed to criminal activity to commit a crime at a time or place in which he can be immediately apprehended. They are an essential tool of law enforcement against crimes that have no complaining victim. Private sting operations may become even more common now that there are organizations like "Perverted Justice," which trains adult volunteers to pose as children in chat rooms and unmask sexual predators, and TV shows like Dateline NBC's "To Catch a Predator" which popularizes sexual-predation stings. Just as there is no defense of private entrapment, so there is no exclusionary rule applicable to evidence obtained improperly by private persons.

A private stinger can find himself accused of committing a crime in his attempt to catch others. The "private sting operation" defense requires the defendant's reasonable belief

that he committed the charged conduct while acting as an agent for law enforcement authority.

Entrapment refers to the use of inducements that cause a normally law-abiding person to commit a crime, and is a defense when the entrapment is conducted by law enforcement officers or their agents. There is no defense of private entrapment. Individuals tempted, induced or set up by anyone besides a state agent cannot raise an entrapment defense to criminal charges.

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

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U.S. v. Carriles, 541 F.3d 344 (5th Cir.), August 14, 2008

The government did not set a "perjury trap" for defendant – that is a pretextual civil proceeding designed to elicit evidence for a criminal prosecution. Carriles was the instigator of the civil proceeding when he applied for naturalization. His lies on the application and then in the interview about the circumstances of his entry into the country can be prosecuted as false statements.

Because Carriles approached the government to initiate the civil proceedings, it is "highly incongruous, to say the least, for these proceedings to be characterized as a sham engineered by the government." For the defendant to show outrageous government conduct sufficient to support dismissal of an indictment, there must be "government over-involvement combined with a passive role by the [himself]."

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

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U.S. v. White, 519 F.3d 342 (7th Cir.), March 05, 2008

Sentencing entrapment occurs in situations when a defendant who lacks a predisposition to engage *in more serious crimes* nevertheless does so as a result of unrelenting government persistence. In this case the government insisted on a certain amount of a certain drug in order to trigger a mandatory minimum sentence under the 21 U.S.C. § 841(b)(1)(A)(iii) - 20 years with a prior felony drug conviction. To overcome this sentencing entrapment argument, the government need not explain or defend its motives, but must show only that the defendant was in fact predisposed to violate the law without extraordinary inducements.

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

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U.S. v. Haddad, 462 F.3d 783 (7th Cir.), September 14, 2006

For the defense of entrapment, a defendant must present sufficient evidence upon which a rational jury could infer that the government induced the crime and that the defendant lacked predisposition to engage in the crime. Only then does the burden of defeating the entrapment defense shift to the government.

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

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Necessity

U.S. v. Ridner, 512 F.3d 846 (6th Cir.), January 17, 2008

A defendant charged with being a felon-in-possession of a firearm may assert the necessity defense. This defense is limited to rare situations and should be construed very narrowly.

The defendant must produce evidence of the following five requirements:

(1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;

(2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

(3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm;

(4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm; . . . and

(5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

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

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Self Incrimination

Corley v. U.S., 129 S. Ct. 1558, April 06, 2009 **(Supreme Court)**

Editor's Note: This case pertains to federal prosecutions. See 18 U.S.C. §3501(c), and see McNabb *v.* United States, 318 U. S. 332 (1943) and Mallory *v.* United States, 354 U. S. 449 (1957), under which an arrested person's confession is inadmissible if given after an

unreasonable delay in bringing him before a judge.

Statements given before the initial appearance but within six hours of the arrest are admissible so long as they are otherwise voluntary and in compliance with Miranda.

If, in order to obtain a statement, the initial appearance is delayed to beyond six hours after arrest, such statements given more than six hours after arrest but before the appearance can be suppressed even if voluntary and in compliance with Miranda.

Statements given before the initial appearance but more than six hours after arrest may be admissible if the delay was not for the purpose of obtaining the statement, and the delay was otherwise reasonable and necessary.

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

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U.S. v. Villalpando, 588 F.3d 1124 (7th Cir.), December 16, 2009

While a false promise of leniency may render a statement involuntary, police tactics short of the false promise are usually permissible. Trickery, deceit, even impersonation do not render a confession inadmissible . . . unless government agents make threats or promises. A confession induced by a promise to bring cooperation by the defendant to the attention of prosecutors does not render a confession involuntary.

A false promise is treated differently than other somewhat deceptive police tactics (such as cajoling and duplicity) because a false promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable. Police conduct that influences a rational person who is innocent to view a false confession as more beneficial than being honest is necessarily coercive, because of the way it realigns a suspect's incentives during interrogation.

The explicit promises offered by the detective were that she would try to persuade the probation officer not to revoke defendant's probation, and she would not arrest him that night if he cooperated with the investigation against the unnamed target (presumably defendant's supplier). She offered, for instance "to go to bat" for defendant and indicated that she would "sit down" with the DEA, the police, and his probation officer to "work this out." She indicated that "we don't have to charge you." None of these, standing alone or in the context of the interview, represented a solid offer of leniency in return solely for his admission to cocaine possession. It is far different to offer to intercede on someone's behalf than to promise that such an intercession will be effective.

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

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U.S. v. Liera, 585 F.3d 1237 (9th Cir.), November 04, 2009

4:15 a.m. – defendant arrested
9:18 a.m. – defendant first interrogated
10:45 a.m. – two material witnesses interrogated
1:30 p.m. – discovery of a malfunction of video recording equipment used during defendant's first interrogation (did not record any audio)
2:57 p.m. – the government conducted a second interrogation of defendant
3:00 p.m. – Magistrate Court in session
10:48 a.m. the next day – defendant presented to court (over thirty hours after his arrest)

Instead of presenting defendant to a magistrate as quickly as possible, the government delayed defendant's arraignment so that it could interrogate defendant a second time and obtain an audio recording of his statements. The delay was unreasonable and unnecessary. Therefore, defendant's recorded statement is inadmissible.

Administrative delays due to the unavailability of government personnel and judges required to complete the arraignment process are reasonable and necessary. (A twenty-four hour pre-arraignment delay was reasonable and necessary because the defendant needed to receive medical treatment; A thirty-one hour pre-arraignment delay was necessary because the defendant spoke only Spanish, and the first available Spanish-speaking FBI agent did not arrive until approximately 27 hours after defendant's arrest (cites omitted)**).**

Editor's Note: See Corley v. United States, 129 S. Ct. 1558 (April 6, 2009); McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957); Federal Rule of Criminal Procedure 5(a); and 18 U.S.C. § 3501(c).

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

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Stoot v. City of Everett, 582 F.3d 910 (9th Cir.), August 13, 2009

A coerced statement in violation of the Self-Incrimination Clause of the Fifth Amendment can form the basis of a 42 U.S.C § 1983 action when the statement is "used against the suspect in a criminal case."

A coerced statement has been "used" in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status.

The 2nd and 7th circuits agree (cites omitted)**.**

The 3rd, 4th, and 5th circuits disagree and require the allegedly coerced statements to have been admitted against the defendant *at trial* (cites omitted)**.**

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

U.S. v. Montgomery, 555 F.3d 623 (7th Cir.), February 13, 2009

There is no per se rule of suppression if investigators make any sort of promise at all to a suspect prior to a confession. A false promise of leniency may be sufficient to overcome a person's ability to make a rational decision about the courses open to him. An empty prosecutorial promise could prevent a suspect from making a rational choice by distorting the alternatives among which the person under interrogation is being asked to choose.

Telling the defendant that if he was sentenced to prison time on the federal charges he would not get ten years was, in fact, false because he qualified as an Armed Career Criminal and instead faced a mandatory minimum sentence of fifteen years. However, those proclamations were not tied to any confession or statement on defendant's part. The defendant was not promised that he would not receive a ten year sentence *if he confessed*. Although an illusive promise of leniency in exchange for a confession presents "a difficult case," the mere fact that the potential sentence in the federal system was misstated does not make the interrogation coercive, especially when the purported sentence was not linked to defendant's willingness to talk to the investigators.

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

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U.S. v. Boskic, 545 F.3d 69 (1st Cir.), October 22, 2008

The quasi-coercive nature of an official immigration interview in a federal building, whether the door is open or not, is a factor to be considered in deciding whether a confession was given voluntarily because it would be naive to ignore the perception -- indeed fear-- of all non-citizens in the United States that immigration authorities control their fate. The following factors also weigh against voluntariness: (1) the agents' decision not to inform Boskic of the nature of the offenses that they suspected he had committed, (2) the absence of counsel during the interview, and (3) Boskic's nervousness and hesitancy at the outset of the interview.

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

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U.S. v. Pando Franco, 503 F.3d 389 (5th Cir.), October 04, 2007

Evidence of post-arrest, post Miranda silence is admissible because of the knowing, intelligent, and voluntary waiver of Miranda rights. Silence in the face of questions about silence is not an exercise of the privilege against self-incrimination at that time. Answering questions about post-arrest, pre- and post-Miranda silence allows the entire conversation, including the implicit references to silence contained therein, to be used as substantive evidence of guilt. The admission of such evidence of silence at trial does not violate the Fifth Amendment privilege against self-incrimination.

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

U.S. v. Lafferty, 503 F.3d 293 (3rd Cir.), September 28, 2007

Putting a suspect in an interrogation room with an alleged confederate after the suspect had invoked her right to remain silent and after the confederate had promised to give a confession is inconsistent with "scrupulously honoring" the suspect's assertion of her right to remain silent. Such a joint interrogation would likely force the suspect to either react to the confederate's statements or suggest her assent to those statements by remaining silent while he incriminated her in a conspiracy. Waiver of her right to remain silent cannot be inferred merely because she was willing to go into the interrogation with her confederate.

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

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U.S. v. Jumper, 497 F.3d 699 (7th Cir.), August 13, 2007

Editor's Note: These issues were raised in the context of a videotaped interview played in its entirety to the jury.

The right to remain silent, in a custodial interrogation, attaches to a defendant's refusal to answer specific or selective questions.

The 1st, 4th, and 6th Circuits agree (cites omitted)**.**

In order for a defendant to have a right to remain silent as to a specific or selective question (and the corresponding right that the prosecution will not comment on this silence), the defendant must indicate in some manner that he is invoking that right. Silence itself may not be enough to invoke this right to silence.

At trial the government may not comment on the defendant's refusal to answer a specific question. Therefore, playing portions of the videotape that included the defendant's clear refusal to answer certain questions violated the defendant's right to remain silent.

An officer's opinion regarding the guilt or innocence of the defendant cannot be admitted because these comments affect the trial's fundamental fairness and invade the province of the jury. Although the question of truthfulness may go to the ultimate question of guilt or innocence, these issues are not the same. Telling the defendant that he had not been truthful earlier in the interview was not a direct comment on the defendant's guilt.

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

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U.S. v. Miller, 450 F.3d 270 (7th Cir.), June 07, 2006

A factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates is not coercion. An objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be

the sort of overbearing conduct that amounts to coercion.

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

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McConkie v. Nichols, 446 F.3d 258 (1st Cir.), May 15, 2006

Abuse of power violates the Fifth Amendment Due Process Clause when it is so extreme and egregious as to "shock the conscience." The conduct must be truly outrageous, uncivilized, and intolerable; it must be stunning, evidencing more than humdrum legal error. Telling someone that his statement would remain confidential and thereby knowingly misrepresenting the nature of his Fifth Amendment right against self-incrimination is not so egregious that it shocks the conscience.

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

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U.S. v. Kiam, 432 F.3d 524 (3rd Cir.), January 03, 2006

A person seeking entry into the United States does *not* have a right to remain silent regarding matters concerning admissibility. An alien at the border must convince a border inspector of his or her admissibility to the country by affirmative evidence. While an alien is unquestionably in "custody" until he is admitted to the country, persons seeking entry at the border may be questioned about admissibility without Miranda warnings.

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

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Miranda

U.S. v. Edwards, 581 F.3d 604 (7th Cir.), September 14, 2009

When there has been a lapse of time between warnings/waiver/questioning and a subsequent questioning, the practical question is not whether Miranda warnings given to a defendant became "stale," or, though the courts love the phrase, whether the "totality of the circumstances" indicates that the inculpatory statement was made knowingly. It is whether the defendant when he gave the statement did not realize he had a right to remain silent. The Miranda form told him he had that right, and the presumption should be that he would remember this even if some time (15-25 minutes) had elapsed between his receiving the warnings and undergoing the questioning that elicited the inculpatory statement. The presumption can be rebutted.

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

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U.S. v. Plugh, 576 F.3d 135 (2nd Cir.), July 31, 2009

Police may not question a suspect in custody who, when informed of his Miranda rights, expresses uncertainty with regard to asserting his Fifth Amendment rights while contemporaneously refusing to sign a waiver of rights form. Defendant invoked his Fifth Amendment rights by unequivocally refusing to sign the waiver form in response to a custodial agent's instruction to sign the waiver form if defendant agreed with it. Therefore, his custodial agents were required to refrain from further interrogation.

While defendant's statements, "I am not sure if I should be talking to you" and "I don't know if I need a lawyer," appear ambiguous, defendant's ultimate action – his refusal to sign – constituted an unequivocally negative answer to the question posed together by the waiver form and the agent, namely, whether he was willing to waive his rights.

The agents did not scrupulously honor defendant's rights when they repeatedly told him that any cooperation would be brought to the attention of the AUSA and by telling him that he was about to be taken to the Marshal's office. Even if defendant invoked his right to counsel and his right to remain silent equivocally or ambiguously, suppression is nonetheless required since the agents, at least as to the defendant's right to remain silent, failed to limit themselves to narrow questions only for the purpose of clarifying the ambiguity.

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

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Fleming v. Metrish, 556 F.3d 520 (6th Cir.), February 25, 2009

The admissibility of statements obtained after the person in custody has decided to remain silent depends on whether his right to cut off questioning was "scrupulously honored." Michigan v. Mosley, 423 U.S. 96 (1975).

Mosley permits the police to present new information to a suspect so that he is able to make informed and intelligent assessments of his interests. Three hours after the initial refusal to answer questions, the detective told the defendant that the police had discovered a weapon on the premises, permitting the defendant to reassess his situation. True, the alleged comments included a suggestion to "cooperate." But this suggestion was accompanied by a warning to the defendant "to be careful" about what he said, and a caution not to say anything about which he would be "sorry." No doubt a complete and fresh recitation of the Miranda warnings would have been preferable to these shorthand reminders. But in the context of this case, where there is no dispute that the defendant fully understood his Miranda rights, such cautionary language bolsters the view that those rights were scrupulously honored under Mosley.

The defendant was not subject to a measure of compulsion above and beyond that inherent in custody itself. Nor is this a case where the police carried on a lengthy harangue in the presence of the suspect. Lengthy harangues that are directed toward a suspect are more

likely to elicit an incriminating response. There is no evidence, moreover, indicating that the defendant was peculiarly susceptible to an appeal to his conscience. Instead, the detective's comments involved a brief conversation that including nothing more than a few off hand remarks that were not particularly evocative.

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

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U.S. v. Montgomery, 555 F.3d 623 (7th Cir.), February 13, 2009

After the defendant has invoked his right to silence, the constitutionality of a subsequent police interview depends not on its subject matter but rather on whether the police, in conducting the interview, sought to undermine the defendant's resolve to remain silent. Outlining the evidence against defendant before giving him renewed Miranda warnings, and discussing the same crime as in the first interview are missteps, but are insufficient to require suppression.

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

******

U.S. v. Panak, 552 F.3d 462 (6th Cir.), January 09, 2009

On the issue of "custody" for Miranda purposes, the question is not whether the interviewee knew of evidence that she may have committed a crime. And, the question is not whether the investigator knew of evidence inculpating the interviewee. The question is whether the investigator connected the two in front of the individual. An investigator's knowledge of an individual's guilt may bear upon the custody issue not simply because the officer possesses incriminating evidence but because he has conveyed it, by word or deed, to the individual being questioned, and thus has used the information to create a hostile, coercive, freedom-inhibiting atmosphere. That is why such knowledge is relevant only if (1) it was somehow manifested to the individual under interrogation and (2) it would have affected how a reasonable person in that position would perceive his or her freedom to leave.

The 11th Circuit agrees (cite omitted).

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

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U.S. v. DeJear, 552 F.3d 1196 (10th Cir.), January 09, 2009

Looking at this issue for the first time, the Court decides:

Under New York v. Quarles, 467 U.S. 649 (1984), an officer may question a suspect in

custody without first giving the Miranda warnings if the questions arise out of "an objectively reasonable need to protect the police or the public from any immediate danger associated with a weapon." As a generally applicable standard, a sufficient threat to officer safety exists under Quarles when an officer, at minimum, has a reason to believe (1) that the defendant might have (or recently has had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it.

The 6th Circuit agrees (cite omitted).

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

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Thompkins v. Berghuis, 547 F.3d 572 (6th Cir.), November 19, 2008

A heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. A valid waiver will not be presumed simply from the silence of the accused after warnings are given or from the fact that a confession was in fact eventually obtained. The courts must presume that a defendant did not waive his rights.

During a three hour interrogation, a suspect who "consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes," who is described as "so uncommunicative" and "not verbally communicative," who "largely …remained silent," and who "shared very limited verbal responses with us," consisting of "yeah," or a "no," or "I don't know", who only "sporadically" made eye contact or nodded his head, and who, after being advised under Miranda, orally confirmed understanding of those rights but refused to sign the printed form, has not affirmatively waived his right to remain silent.

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

******

U.S. v. Craighead, 539 F.3d 1073 (9th Cir.), August 21, 2008

Craighead was in "custody" for Miranda purposes in his own home for the twenty to thirty minute interview when eight law enforcement officers, representing three different agencies (five FBI agents, a detective from the Pima County Sheriff's Department, and two members from the OSI) went to Craighead's residence to serve a search warrant; all of these law enforcement officers were armed and some of them unholstered their firearms in Craighead's presence; all of the FBI agents were wearing flak jackets or "raid vests;" an agent, accompanied by a detective who wore a flak jacket and firearm, directed Craighead to a storage room at the back of his house, "where they could have a private conversation;" the door was shut "for privacy;" and the detective placed himself between Craighead and the door.

"Custody" existed in those circumstances despite the fact that Craighead was told he was

not under arrest; that any statement he might make would be voluntary; that he would not be arrested that day regardless of what information he provided; that he was free to leave; and despite the fact that no force, threats or promises were used to induce Craighead to speak.

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

******

U.S. v. Pacheco-Lopez, 531 F.3d 420 (6th Cir.), June 26, 2008

Miranda warnings are not required for "booking questions" such as the defendant's name, address, height, weight, eye color, date of birth and current address. But, during the service of a drug search warrant, asking where he was from, how he had arrived at the house, and when he had arrived are questions reasonably likely to elicit an incriminating response, thus mandating a Miranda warning. The location, the nature of the questioning and the failure to take notes or document the defendant's identity also support the conclusion that the booking exception is not applicable in this case. Application of the booking exception is most appropriate at the station, where administrative functions such as bookings normally take place. Extending the exception to the type of questioning here – which occurred in a private home during the investigatory stage of criminal proceedings – would undermine the protections that Miranda seeks to afford to criminal suspects. Where the booking exception does not apply, statements made before Miranda advice and waiver are "irrebuttably presumed involuntary" and must be suppressed.

Subsequent Miranda warnings are not effective unless the warnings place a suspect who has just been interrogated in a position to make an informed choice. A Miranda waiver is ineffective when the same officers conduct the interrogation in the same location without any break between the two sets of questions, and the post-Miranda question resulted from the knowledge gleaned during the initial questioning. There is no practical justification for accepting the formal warnings as compliance with Miranda, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

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

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Anderson v. Terhune, 516 F.3d 781 (9th Cir.), February 15, 2008

"I plead the Fifth" is an unambiguous, unequivocal invocation of the right to remain silent. From television shows like "Law & Order" to movies such as "Guys and Dolls," we are steeped in the culture that knows a person in custody has "the right to remain silent." Miranda is practically a household word. And surely, when a criminal defendant says, "I plead the Fifth," it doesn't take a trained linguist, a Ph.D, or a lawyer to know what he means. In popular parlance and even in legal literature, the term "Fifth Amendment" in the context of our time is commonly regarded as being synonymous with the privilege

against self-incrimination. Failure to scrupulously honor such an invocation makes the subsequent statements inadmissible.

Playing dumb and asking, "Plead the Fifth. What's that?" is not a legitimate clarifying question. This effort to keep the conversation going was almost comical and, at best, was mocking and provoking the defendant.

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

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U.S. v. Nichols, 512 F.3d 789 (6th Cir.), January 15, 2008

A suspect impliedly waives his Miranda rights by voluntarily speaking with an officer after affirming that he understands these rights. Such a waiver can be clearly inferred from the actions and words of the person interrogated. While it does not require much to invoke the right to silence, it does require something that indicates a desire not to be questioned. Repeated, false denials of identity are not refusals to answer all police questions.

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

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U.S. v. Upton, 512 F.3d 394 (7th Cir.), January 09, 2008

A Miranda waiver can be either express or implied. Waiver can never occur through "mere silence," but a person can act as though he has waived his rights without expressly saying so. Waiver may be inferred from the defendant's conduct, even when he has refused to sign a waiver form.

In assessing the voluntariness of a waiver, physical force is certainly a defining circumstance—and possibly a dispositive one. However, its incidental use can sometimes be excused where the other circumstances of the interview show a voluntary waiver. The relevant inquiry is the totality of the circumstances, looking to gaps in time between the use of force and the waiver, changed interrogators or location, defendant's background, experience and conduct, and renewed Miranda warnings.

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

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Saleh v. Fleming, 512 F.3d 548 (9th Cir.), January 03, 2008

Incarceration does not automatically render an interrogation custodial. The need for a Miranda warning to a person in custody for an unrelated matter will only be triggered by some restriction on his freedom of action in connection with the interrogation itself.

The 8th and 9th circuits agree (cites omitted).

Under the "cat out of the bag" theory set forth in United States v. Bayer, 331 U.S. 532 (1947), after an accused has once let the cat out of the bag by confessing, he is never thereafter free of the psychological and practical disadvantages of having confessed. In such a sense, a later confession always may be looked upon as fruit of the first. Under Oregon v. Elstad, 470 U.S. 298 (1985), the "cat out of the bag" theory does not apply where, subsequent to a technical Miranda violation, a confession is voluntarily made under circumstances not requiring a Miranda warning.

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

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U.S. v. Colonna, 511 F.3d 431 (4th Cir.), December 20, 2007

"Custody" for Miranda purposes is not avoided by simply stating to a suspect that he is "not under arrest." Custody is determined by looking to the totality of the circumstances to determine whether an individual's freedom of action is curtailed to a degree associated with formal arrest.

In a police dominated environment, when agents do everything short of actual, physical restraint to make any reasonable man believe that he was not free to leave, simply stating to a suspect that he is "not under arrest" is insufficient to preclude a finding of a custodial interrogation.

Although advising someone that he or she is not under arrest mitigates an interview's custodial nature, an explicit assertion that the person may end the encounter is stronger medicine.

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

******

U.S. v. Revels, 510 F.3d 1269 (10th Cir.), December 20, 2007

Lawful investigative detention under the Fourth Amendment can be "custody" for purposes of Miranda. Under the totality of the circumstances, would a reasonable person in the suspect's position understand her freedom of action has been restricted to a degree consistent with formal arrest. Several relevant factors inform the fact-specific analysis, including: (1) whether the circumstances demonstrated a police-dominated atmosphere; (2) whether the nature and length of the officers' questioning was accusatory or coercive; and (3) whether the police advise the suspect that she is free to refrain from answering questions, or to otherwise end the interview.

The officers' actions created the type of coercive environment that Miranda was designed to address. At 6:00 AM, seven police officers breached the front door with force, abruptly

roused defendant from her bedroom, handcuffed her, placed her prone on the hall floor, and made her sit under the supervision of officers while police executed the search warrant. Then, after the search was completed and before any questioning began, three male officers separated her from her boyfriend and two children, and escorted her to a rear bedroom for questioning. Once inside the room, the officers isolated her from the other occupants of the home, and closed the door behind her. For much of the interview, all three of the officers remained in the room with her, and she was confronted with the seized drugs in an accusatory manner. They never advised her that she was not under arrest, free to leave, or that she was otherwise at liberty to decline to answer questions.

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

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U.S. v. Jamison, 509 F.3d 623 (4th Cir.), December 04, 2007

The question of custody for Miranda purposes typically turns on whether "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." In some circumstances, however, the defendant may be prevented from terminating the interrogation because of factors independent of police restraint. The restrictions on freedom arising from police interrogation must be separated from those incident to the background circumstances.

Placing bags on the hands of a gunshot victim receiving treatment at a hospital emergency room is not tantamount to custody. A reasonable person without a detailed knowledge of police procedures might find it odd that his hands were bagged as soon as he arrived at the hospital for treatment for a gunshot wound. However, the likelihood of such curiosity does not lead to an inference that a reasonable person would consequently feel unable to refuse police questioning.

Miranda and its progeny do not equate police investigation of criminal acts with police coercion. This distinction is especially important when the victim or suspect initiates the encounter with the police. Having invoked the protective and investigatory powers of the police, a reasonable person would think it prudent, not surprising, when asked to recount a description of the shooting.

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

******

Hall v. Bates, 508 F.3d 854 (7th Cir.), November 15, 2007

When a suspect does not ask whether he is free to leave, there is a rebuttable inference that he does not want to terminate the questioning but instead wants to use the opportunity to deflect the suspicion of the police.

The Supreme Court has a rejected (cite omitted) **a Miranda-like rule requiring police whenever they question someone at a police station to advise him that he is not under arrest**

and is therefore free to leave at any time. All a person has to do in order to test the right of police to detain him is to ask them whether he is free to leave. Such an approach—placing on the suspect the burden of ascertaining whether he is in fact detained—is preferable to speculation by judges or juries on whether the circumstances of a particular interrogation were so intimidating that the average person being questioned would have thought himself under arrest even though he made no effort, as he could easily have done, to determine whether he was.

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

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U.S. v. Pando Franco, 503 F.3d 389 (5th Cir.), October 04, 2007

Evidence of post-arrest, post Miranda silence is admissible because of the knowing, intelligent, and voluntary waiver of Miranda rights. Silence in the face of questions about silence is not an exercise of the privilege against self-incrimination at that time. Answering questions about post-arrest, pre- and post-Miranda silence allows the entire conversation, including the implicit references to silence contained therein, to be used as substantive evidence of guilt. The admission of such evidence of silence at trial does not violate the Fifth Amendment privilege against self-incrimination.

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

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U.S. v. Lafferty, 503 F.3d 293 (3rd Cir.), September 28, 2007

Putting a suspect in an interrogation room with an alleged confederate after the suspect had invoked her right to remain silent and after the confederate had promised to give a confession is inconsistent with "scrupulously honoring" the suspect's assertion of her right to remain silent. Such a joint interrogation would likely force the suspect to either react to the confederate's statements or suggest her assent to those statements by remaining silent while he incriminated her in a conspiracy. Waiver of her right to remain silent cannot be inferred merely because she was willing to go into the interrogation with her confederate.

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

******

Garner v. Mitchell, 502 F.3d 394 (6th Cir.), September 11, 2007

Whether a waiver of Miranda rights is a knowing and intelligent depends upon the totality of the circumstances, including the suspect's age, experience, education, background, and intelligence, and the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. There is no categorical rule that a low IQ or other significant limitations in intellectual functioning make a suspect

with such characteristics unable to give a valid waiver of Miranda rights. The standard of proof is a preponderance of evidence.

Editor's Note: This case involved expert testimony on four standardized mental tests designed specifically to determine whether a waiver of Miranda rights is knowing and intelligent.

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

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U.S. v. Jumper, 497 F.3d 699 (7th Cir.), August 13, 2007

Editor's Note: These issues were raised in the context of a videotaped interview played in its entirety to the jury.

The right to remain silent, in a custodial interrogation, attaches to a defendant's refusal to answer specific or selective questions.

The 1st, 4th, and 6th Circuits agree (cites omitted)**.**

In order for a defendant to have a right to remain silent as to a specific or selective question (and the corresponding right that the prosecution will not comment on this silence), the defendant must indicate in some manner that he is invoking that right. Silence itself may not be enough to invoke this right to silence.

At trial the government may not comment on the defendant's refusal to answer a specific question. Therefore, playing portions of the videotape that included the defendant's clear refusal to answer certain questions violated the defendant's right to remain silent.

An officer's opinion regarding the guilt or innocence of the defendant cannot be admitted because these comments affect the trial's fundamental fairness and invade the province of the jury. Although the question of truthfulness may go to the ultimate question of guilt or innocence, these issues are not the same. Telling the defendant that he had not been truthful earlier in the interview was not a direct comment on the defendant's guilt.

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

******

Van Hook v. Anderson, 488 F.3d 411 (6th Cir.), May 24, 2007

When, following the arrest of a suspect, the police advise him of his Miranda rights and the suspect asks for a lawyer, all questioning must then stop (a) until a lawyer has been provided, or (b) unless the suspect "himself" initiates a discussion. Police are permitted to approach the suspect and inquire whether he now wants to talk when a third party tells police that the suspect is now willing to speak with them. Police are not precluded from

acting on that information because it was not communicated to them directly by the suspect.

The 8th, 9th, and 11th Circuits agree, as does the Georgia Supreme Court (cites omitted)**.**

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

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U.S. v. Ferrer-Montoya, 483 F.3d 565 (8th Cir.), April 19, 2007

The scope of a search is generally defined by its expressed object. An officer may reasonably interpret a suspect's unqualified consent to search a vehicle for drugs to include consent to search containers within that car which might bear drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive manner. A trained dog's failure to alert may reduce the likelihood that a particular vehicle contains narcotics, but it has no bearing upon what a typical reasonable person would have understood by the exchange between the officer and the suspect in the initial grant of consent to a search.

A suspect invokes his right to remain silent under Miranda by making a clear, consistent expression of a desire to remain silent. Indirect, ambiguous, and equivocal statements or assertions of an intent to exercise the right to remain silent are not enough. Being evasive and reluctant to talk is different from invoking one's right to remain silent.

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

******

U.S. v. Kimbrough, 477 F.3d 144 (4th Cir.), February 16, 2007

Showing arrestee's mother evidence found in her home, allowing her, on her own initiative, to speak with her son while remaining in their presence is not the "functional equivalent of questioning." Absent evidence of an express or tacit agreement, discussion, or understanding between the police and the mother that she would ask questions or attempt to elicit incriminating information, Miranda warnings are not required.

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

******

U.S. v. Williams, 483 F.3d 425 (6th Cir.), January 9, 2007

The public safety exception to Miranda applies when officers have a reasonable belief based on articulable facts that they are in danger. An officer must, at minimum, have reason to believe (1) that the defendant might have, or recently has had, a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it.

There can be no other context-specific evidence that rebuts that reasonable belief. Indications that the officers may have acted pretextually might rebut the presumption that the public safety exception should apply.

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

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U.S. v. Pettigrew, 468 F.3d 626 (10th Cir.), October 12, 2006

The admissibility of an unsolicited inculpatory statement, following a voluntary statement made in violation of Miranda, turns on whether the inculpatory statement was knowingly and voluntarily made. It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. In the absence of coercion or improper tactics, a broader rule would "undercut the twin rationales of Miranda's exclusionary rule - trustworthiness and deterrence."

The 7th and 9th Circuits agree. (cites omitted).

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

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U.S. v. Washington, 462 F.3d 1124 (9th Cir.), September 06, 2006

Questions about an arrested defendant's name, date of birth, address, and medical condition are routine booking questions even if the identification may help the prosecution of that person for a crime. The identification of oneself is not self-incriminating.

Questions about an arrested defendant's gang affiliation and gang moniker are routine booking questions where officers routinely obtain such information for other officers to ensure prisoner safety.

Agreeing to listen without an attorney present after receiving Miranda warnings allows agents to describe the evidence against the person. Moreover, even when a defendant has invoked his Miranda rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case.

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

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U.S. v. Arellano-Ochoa, 461 F.3d 1142 (9th Cir.), August 31, 2006

Asking a person their name and place of birth are questions "attendant to arrest and custody" and do not require Miranda warnings.

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

******

Due Process

Stoot v. City of Everett, 582 F.3d 910 (9th Cir.), August 13, 2009

A coerced statement in violation of the Self-Incrimination Clause of the Fifth Amendment can form the basis of a 42 U.S.C § 1983 action when the statement is "used against the suspect in a criminal case."

A coerced statement has been "used" in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status.

The 2nd and 7th circuits agree (cites omitted)**.**

The 3rd, 4th, and 5th circuits disagree and require the allegedly coerced statements to have been admitted against the defendant *at trial* (cites omitted)**.**

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

******

Brockinton v. City of Sherwood, 503 F.3d 667 (8th Cir.), October 04, 2007

To establish a violation of due process of law under the Fourteenth Amendment by conducting an inadequate investigation, the plaintiff must show that the failure to investigate was intentional or reckless, thereby shocking the conscience. Negligent failure to investigate does not violate due process. Qualified immunity protects officers from "mistaken judgments."

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

******

McConkie v. Nichols, 446 F.3d 258 (1st Cir.), May 15, 2006

Abuse of power violates the Fifth Amendment Due Process Clause when it is so extreme and egregious as to "shock the conscience." The conduct must be truly outrageous, uncivilized, and intolerable; it must be stunning, evidencing more than humdrum legal

error. Telling someone that his statement would remain confidential and thereby knowingly misrepresenting the nature of his Fifth Amendment right against self-incrimination is not so egregious that it shocks the conscience.

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

******

Show-ups

U.S. v. Martinez, 462 F.3d 903 (8th Cir.), September 11, 2006

A crime victim's identification of the defendant is admissible unless it is based upon a pretrial confrontation between the witness and the suspect that is both impermissibly suggestive *and* unreliable. An identification is unreliable if its circumstances create a very substantial likelihood of irreparable misidentification. Police need not limit themselves to station house line-ups when an opportunity for a quick, on-the-scene identification arises. Such identifications are essential to free innocent suspects and to inform the police if further investigation is necessary. Absent special elements of unfairness, prompt on-the-scene confrontations do not violate due process.

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

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6th Amendment Counsel

Montejo v. Louisiana, 129 S. Ct. 2079, May 26, 2009 **(Supreme Court)**

Once the adversary judicial process has begun, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. Interrogation by the state is such a stage. In the absence of a valid waiver, statements obtained after the Sixth Amendment right to counsel has attached are inadmissible.

Even though the Sixth Amendment right to counsel has attached, unless and until the defendant invokes the right in the specific context of being questioned, law enforcement may approach and obtain a waiver. Relinquishment of the right must be voluntary, knowing, and intelligent. Miranda advice and waiver is sufficient to waive Sixth Amendment counsel.

Once the Sixth Amendment right to counsel attaches and the defendant invokes in the specific context of being questioned, law enforcement may not approach and question defendant without the presence and/or consent of defendant's lawyer. After such an invocation, waivers obtained after approach by law enforcement are presumed involuntary.

Previous appointment of a Sixth Amendment lawyer does not, in and of itself, create the presumption that a subsequent waiver obtained after approach by law enforcement is involuntary. Even if it is reasonable to presume from a defendant's *request* for counsel that any subsequent waiver of the right was coerced, no such presumption can seriously be entertained when a lawyer was merely "secured" on the defendant's behalf, by the state itself, as a matter of course.

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

******

Kansas v. Ventris, 129 S. Ct. 1841, April 29, 2009 **(Supreme Court)**

Statements taken in violation of the Sixth Amendment right to counsel are inadmissible in the government's case in chief. However, once the defendant testifies inconsistently, denying the prosecution the traditional truth-testing devices of the adversary process is a high price to pay for vindicating the right to counsel at the prior stage. Therefore, statements suppressed because of a Sixth Amendment violation may be used to impeach the defendant's testimony.

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

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Rothgery v. Gillespie County, 128 S. Ct. 2578, June 23, 2008 **(Supreme Court)**

The Court reaffirms its long standing position which an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

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

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U.S. v. Boskic, 545 F.3d 69 (1st Cir.), October 22, 2008

The Supreme Court has never elaborated on what instruments beyond indictment and information would constitute a "formal charge" for purposes of the Sixth Amendment right to counsel. A federal complaint does not qualify as such, primarily because of its limited role as the precursor to an arrest warrant. The process of securing a federal criminal complaint does not involve the appearance of the defendant before a judicial officer. It is therefore unlike a preliminary hearing or arraignment. Nor does the process of securing a federal criminal complaint require, by statute or rule, the participation of a prosecutor. It is therefore unlike the procedures for securing an indictment or information, which require the participation of a prosecutor and, in that sense, manifest

the "commitment to prosecute."

The 2nd, 3rd, 4th, 6th, 8th, 9th, and 11th Circuits agree (cites omitted)**.**

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

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U.S. v. Burgest, 519 F.3d 1307 (11th Cir.), March 13, 2008

Looking at this issue for the first time, the court decides:

The Sixth Amendment right to counsel is offense specific. When the same conduct violates both state laws and federal laws, the offenses are distinct for purposes of the right to counsel. The invocation of a Sixth Amendment attorney for the state offenses does not bar federal agents from questioning the suspect about the federal offenses. Voluntary statements obtained by federal agents are admissible in the federal prosecution.

The 1st, 4th, and 5th Circuits agree (cites omitted)**.**

The 2nd and 8th Circuits disagree (cites omitted)**.**

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

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U.S. v. Coker, 433 F.3d 39 (6th Cir.), December 28, 2005

For Sixth Amendment right to counsel purposes, a federal charge is a different "offense" from a state charge, even when they both deal with the same underlying conduct and have essentially the same elements. Federal agents can interview and take a statement from the suspect without notification to and the presence of the attorney representing the suspect on the state charge.

The **2nd Circuit disagrees** – U.S. v. Mills, 412 F.3d 325 (2005).

The **5th Circuit agrees** – U.S. v. Avants, 278 F.3d 510 (2002).

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

******

Civil Liability

Pearson v. Callahan, 129 S. Ct. 808, January 21, 2009 **(Supreme Court)**

It was highly anticipated that the Court would rule on the issue of "consent once removed." However, the Court made no ruling on "consent once removed."

The "consent once removed" doctrine applies when an *undercover officer* enters a house by invitation, establishes probable cause to arrest or search and then immediately summons other officers for assistance. The theory is that once someone consents to the government (undercover officer) coming in, then entry by the backup officers is no greater intrusion and is covered by the initial consent – in for a penny, in for a pound. Four circuits – the 6th, 7th, 9th, and 10th – have adopted the doctrine. The 6th and 7th Circuits have extended the doctrine to apply to situations in which *an informant*, not an undercover officer, is invited in. The 9th and 10th Circuits limit it to undercover officers.

Instead of ruling on "consent once removed," the Court found that the officers were entitled to qualified immunity based on the law of the four circuits. The focus of the Court's opinion deals with how lower courts should analyze cases to determine qualified immunity. Basically, courts are no longer required to first find that a Constitutional violation has occurred before considering whether the law was clearly established.

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

******

Ali v. Federal Bureau of Prisons, 128 S. Ct. 831, January 22, 2008 **(Supreme Court)**

Under the Federal Tort Claims Act (FTCA), the United States waives sovereign immunity and can be liable for torts committed by federal employees acting in the scope of their employment. However, 28 U.S.C. § 2680 carves out exceptions to this waiver of immunity, specifically noting that the U.S. does not waive sovereign immunity for claims arising from detention of property by "any officer of customs or excise or *any other law enforcement officer*."

The Supreme Court holds that the phrase "any other law enforcement officer" in § 2680 is to be interpreted broadly. Accordingly, it prohibits claims against the United States for the unlawful detention of property by any law enforcement officer (emphasis added).

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

******

Scott v. Harris, 127 S. Ct. 1769, April 30, 2007 **(Supreme Court)**

A claim of excessive force in the course of making a seizure of a person is properly analyzed under the Fourth Amendment's objective reasonableness standard of Graham v.

Connor, 490 U. S. 386 (1989).

Tennessee v. Garner, 471 U. S. 1 (1985), did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." Garner was simply an application of the Fourth Amendment's reasonableness test to the use of a particular type of force in a particular situation.

Whatever Garner said about the factors that might have justified shooting the suspect in that case, such preconditions have scant applicability to this case, which has vastly different facts.

Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

In determining the reasonableness of a seizure, balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

In judging whether Scott's actions were reasonable, consider the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the public that Harris posed. It is appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability.

A police officer's attempt to terminate a dangerous high speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

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

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Stoot v. City of Everett, 582 F.3d 910 (9th Cir.), August 13, 2009

A coerced statement in violation of the Self-Incrimination Clause of the Fifth Amendment can form the basis of a 42 U.S.C § 1983 action when the statement is "used against the suspect in a criminal case."

A coerced statement has been "used" in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status.

The 2nd and 7th circuits agree (cites omitted)**.**

The 3rd, 4th, and 5th circuits disagree and require the allegedly coerced statements to have been admitted against the defendant *at trial* (cites omitted)**.**

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

Moldowan v. City of Warren, 570 F.3d 698 (6th Cir.), July 01, 2009

All witnesses — police officers as well as lay witness — are absolutely immune from civil liability based on their trial testimony in judicial proceedings. As with any witness, police officers enjoy absolute immunity for any testimony delivered at adversarial judicial proceedings. A witness is entitled to testimonial immunity no matter how egregious or perjurious that testimony was alleged to have been. That protection, however, does not extend to non-testimonial conduct, despite any connection these acts might have to later testimony. Although there is a well-established exception to the doctrine of absolute testimonial immunity "insofar as [an official] performed the function of a complaining witness," that exception does not extend to testimony delivered at trial.

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

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The Supreme Court reversed and remanded the decision below (as first summarized in 9 Informer 07), citing Pearson v. Callahan (see 2 Informer 09). This opinion vacates and reverses the opinion at 499 F.3d 1094, August 28, 2007, and briefed below.

Editor's Note: This case is a civil action under 42 U.S.C. § 1983 alleging an unlawful arrest in violation of the 4th Amendment.

Rodis v. San Francisco, 558 F.3d 964 (9th Cir.), March 09, 2009

The officers are entitled to qualified immunity because the arrest was not clearly established as unlawful. Every circuit (the 5th, 6th, 7th, 8th, and 11th circuits) which has considered the intent issue has found that such arrests were lawful even without some evidence of intent to defraud. It is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present. In such cases those officials should not be held personally liable. The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. Rodis's $ 100 bill looked odd, and it lacked many modern security features. Although the arrest was unfortunate, the officers' belief that the bill was fake was not plainly incompetent.

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

******

Waller v. City of Danville, VA, 556 F.3d 171 (4th Cir.), February 12, 2009

In the context of arrests, courts have recognized two types of claims under Title II of the Americans with Disabilities Act (ADA): (1) wrongful arrest, where police arrest a suspect based on his disability, not for any criminal activity; and (2) reasonable accommodation, where police properly arrest a suspect but fail to reasonably accommodate his disability during the investigation or arrest, causing him to suffer greater injury or indignity than

other arrestees (8th and 10th circuits, cites omitted)**.**

Reasonableness in law is generally assessed in light of the totality of the circumstances, and exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA. Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence. "Exigency" is not confined to split-second circumstances.

Plaintiff suggests several possible courses of action that she argues would have constituted "reasonable accommodation" under the ADA during the hostage standoff. Assuming for purposes of argument that a duty of reasonable accommodation existed, given the circumstances presented to the officers, it was unreasonable to expect the sorts of accommodations that plaintiff proposes. Any duty of reasonable accommodation that might have existed was satisfied by the officers in several ways. Plaintiff has not indicated what the officers reasonably might be expected to do that they in fact did not do.

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

******

Gandara v. Bennett, 528 F.3d 823 (11th Cir.), May 22, 2008

Looking at this issue for the first time, the court decides:

Article 36 of the Vienna Convention on Consular Relations provides that a foreigner who has been arrested and detained in this country must be advised of his rights regarding notification of representatives of his home country. Failure to comply with this international treaty cannot form the basis of a civil suit under 42 U.S.C. § 1983.

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

The 9th Circuit agrees. Cornejo v. County of San Diego, 504 F.3d 853 (2007)
(Click **10 Informer 07**).

The 7th Circuit disagrees. Jogi v. Voges, 480 F.3d 822 (2007). (Click **HERE**).

Editor's Note: The 2nd Circuit has also ruled that violation of the treaty cannot form the basis of a civil suit – Mora v. New York, 524 F.3d 183 (2008).

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Torres v. City of Madera, 524 F.3d 1053 (9th Cir.), May 05, 2008

Five factors are relevant in determining whether an officer's mistake in using the Glock rather than the Taser was objectively unreasonable: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have

alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training. This determination of reasonableness must allow for the fact that police officers are often forced to make split second judgments.

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

******

Mora v. People of the State of New York, 524 F.3d 183 (2nd Cir.), April 24, 2008

Failure to inform detained aliens of the prospect of consular notification as required by the Vienna Convention on Consular Relations will not support an individual civil action for damages under 42 U.S.C. § 1983 or the Alien Tort Statute.

The 9th Circuit agrees (cite omitted).

Editor's Note: The 11th Circuit – Gandara v. Bennett, 528 F.3d 823, May 22, 2008, agrees.

The 7th Circuit disagrees (cite omitted).
The 5th and 6th Circuits have ruled in criminal cases that the treaty does not create a judicially enforceable individual right (cites omitted).

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

******

Bingue v. Prunchak, 512 F.3d 1169 (9th Cir.), January 15, 2008

Looking at this issue for the first time, the Court decides:

Police officers involved in *all* high-speed chases are entitled to qualified immunity under 42 U.S.C. § 1983 unless the plaintiff can prove that the officer acted with a deliberate intent to harm. Only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience which is necessary for a due process violation under the Fourteenth Amendment.

The 8th Circuit agrees (cite omitted).

The 3rd, 6th, 9th and 10th Circuits disagree, holding that the intent to harm standard only applies to emergency and nearly instantaneous pursuits, and that a deliberate indifference standard applies when the circumstances are such that actual deliberation is practical (cites omitted).

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

Pennington v. Metro. Gov't of Nashville & Davidson County, 511 F.3d 647 (6th Cir.), January 10, 2008

Looking at this issue for the first time, the Court decides:

A breathalyzer test administered to an off-duty police officer does not amount to an unconstitutional seizure.

A person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. A person is not seized simply because he believes that he will lose his job. The Fourth Amendment does not protect against the threat of job loss.

Police officers: (1) may reasonably believe, based upon their workplace obligations to comply with department's guidelines and regulations, that their *employment relationship* will be severed if they refuse or disobey an order, direction, or request to accompany detectives to the department's headquarters; but (2) lack any reasonable basis to feel that they will be *restricted by force or a show of lawful authority in their freedom of movement or their ability to terminate the encounter*.

The 7th Circuit agrees (cite omitted).

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

******

Brockinton v. City of Sherwood, 503 F.3d 667 (8th Cir.), October 04, 2007

To establish a violation of due process of law under the Fourteenth Amendment by conducting an inadequate investigation, the plaintiff must show that the failure to investigate was intentional or reckless, thereby shocking the conscience. Negligent failure to investigate does not violate due process. Qualified immunity protects officers from "mistaken judgments."

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

******

Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir.), September 24, 2007

Article 36 of the Vienna Convention on Consular Relations does not create judicially enforceable rights that support a 42 U.S.C. § 1983 action. It confers legal rights and obligations on *States* in order to facilitate and promote consular functions including protecting the interests of detained nationals, and for that purpose detainees have the right (if they want) for the consular post to be notified of their situation. In this sense, detained foreign nationals benefit from Article 36's provisions. But the right to protect nationals belongs to *States* party to the Convention; no private right is unambiguously conferred on individual detainees such that they may pursue it through § 1983.

The 7th Circuit disagrees (Jogi v. Voges, 480 F.3d 822 (March 2007))**.**

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

******

Meals v. City of Memphis, 493 F.3d 720 (6th Cir.), July 11, 2007

A 42 U.S.C. § 1983 claim may be brought against a police officer under the Fourteenth Amendment for death or injury to innocent third parties where the injury results from a pursuit. To prevail on such a claim, a plaintiff must prove that the police officer's conduct "shocks the conscience." Only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation. High-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under § 1983. Violation of the City's police vehicle operation and pursuit policy can raise a question as to whether there was malice with intent to worsen legal plight. In the absence of evidence from which a jury could infer a purpose to cause harm unrelated to the legitimate object of the chase, the evidence does not satisfy the requisite element of arbitrary conduct shocking the conscience.

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

******

Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir.), March 07, 2007

Title II of the Americans with Disabilities Act and the Department of Justice implementing regulations do not require police to wait for an oral interpreter before taking field sobriety tests on a profoundly deaf subject. Such is not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity.

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

******

Firearms

Dean v. U.S., 129 S. Ct. 1849, April 29, 2009 **(Supreme Court)**

Under 18 U.S.C. §§924(c)(1)(A)(ii),(iii), an individual convicted for using or carrying a firearm during and in relation to any violent or drug trafficking crime, or possessing a firearm in furtherance of such a crime, receives a 10-year mandatory minimum sentence, in addition to the punishment for the underlying crime, if the firearm is discharged. The government is not required to prove that the defendant intended to discharge the firearm.

The 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident.

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

******

U.S. v. Hayes, 129 S. Ct. 1079, February 24, 2009 **(Supreme Court)**

Persons who have been earlier convicted of a "misdemeanor crime of domestic violence" as defined in 18 U.S.C. § 921(a)(33)(A) are banned from possessing firearms by 18 U.S.C. § 922(g)(9). If the statute on which the earlier conviction (the "predicate-offense") was based contained as a necessary element of proof the domestic relationship between the assailant and the victim, it qualifies as a "misdemeanor crime of domestic violence." The definition does not require that the predicate-offense statute include, as an element, the existence of the domestic relationship. If it does not, in the § 922(g)(9) prosecution the government can and must prove the domestic relationship.

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

******

D.C. v. Heller, 128 S. Ct. 2783, June 26, 2008 **(Supreme Court)**

The Second Amendment guarantees an individual right to keep and bear arms. The District's bans on possessing an operable handgun or other firearm in the home are unconstitutional. "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."

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

******

U.S. v. Ressam, 128 S. Ct. 1858, May 19, 2008 **(Supreme Court)**

Proof that there were explosives in defendant's car at the time he lied on a customs form (18 U.S.C. § 1001) while attempting to enter the United States is sufficient to convict for "carrying" explosives "during" the commission of a felony in violation of 18 U.S.C. § 844 (h)(4). The government does not have to prove that the explosives were carried "in relation to" the underlying felony. The government only has to prove that the explosives were carried while the felony was being committed.

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

******

Watson v. U.S., 128 S. Ct. 579, December 10, 2007 **(Supreme Court)**

It is better to receive than to give.

Title 18 § 924(c)(1)(A) sets a mandatory minimum sentence for a defendant who, "during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm." The statute leaves the term "uses" undefined.

In Smith *v.* U.S., 508 U. S. 223 (1993) the Supreme Court held that a criminal who trades his firearm for drugs "uses" it during and in relation to a drug trafficking offense within the meaning of §924(c)(1), thereby invoking the minimum mandatory sentence.

In this case, the Supreme Court holds that a person who trades his drugs for a gun does not "use" a firearm "during and in relation to ... [a] drug trafficking crime" within the meaning of §924(c)(1).

Click **HERE** for the Court's Opinion.

******

Logan v. U.S., 128 S. Ct. 475, December 04, 2007 **(Supreme Court)**

There is a mandatory 15 year sentence under the Armed Career Criminal Act of 1984 for those with at least three prior convictions for violent felonies. 18 U.S.C. §924(e)(1). A conviction *for which a person has had civil rights restored* does not count. 18 U.S.C. §921(a)(20). A violent felony conviction that did not result in any loss of civil rights does count. The ordinary meaning of the word "restored"--giving back something that has been taken away--does not include retention of something never lost.

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

******

U.S. v. Leon-Quinones, 588 F.3d 748 (1st Cir.), December 07, 2009

A conviction under 18 U.S.C. § 924(c) requires proof that the defendant used a real firearm when committing the predicate offense. A toy or replica will not do. Although § 924(c) requires proof that the gun is real, the government's proof need not reach a level of scientific certainty. Descriptive lay testimony can be sufficient to prove that the defendant used a real gun.

The direct evidence included three bank employees, each of whom observed the object carried by De León at close range, who called it either a "revolver," "pistol," or a "firearm." One employee further testified that the "pistol or revolver" was "nickel plated," a description which is consistent with the jury's finding that defendant carried a real gun. Moreover, none of the witnesses called the gun a "toy gun," or "replica gun" or otherwise described it in a way that would indicate that the gun was not real. There was

also circumstantial evidence indicating that defendant carried a real firearm. At trial, some of the employees stated that they were "afraid" that defendant might hurt someone with the gun. And, throughout the robbery, the employees at the bank reacted as if the gun was real, following defendant's various orders. From the totality of the evidence, including the reactions of the witnesses, the jury was entitled to infer that defendant carried a real firearm.

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

******

U.S. v. Vaughn, 585 F.3d 1024 (7th Cir.), November 03, 2009

Even though experts have repeatedly testified that guns are tools of the drug trade, in order to show that a firearm furthered a drug trafficking crime in violation of 18 U.S.C. § 924(c), the government must establish a specific nexus between the particular weapon and the particular drug crime at issue. It must present specific, non-theoretical evidence to tie that gun and the drug crime together.

In the usual § 924(c) case, weapons are used more as a stick, but there's no reason they couldn't be used as a carrot. Defendant offered the gun like Mary Kay might offer a pink Cadillac to a top selling cosmetics salesperson. In the same way that a sales commission plays a role in a business transaction, defendant used the rifle "to speed the payment and to assure full payment." The government thus tied the particular weapon to the particular transaction and demonstrated that defendant's possession of the rifle helped forward the sale of the six pounds of marijuana.

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

******

U.S. v. Burchard, 580 F.3d 341 (6th Cir.), September 02, 2009

Looking at this issue for the first time, the court decides:

The term "unlawful user of a controlled substance" contemplates the regular and repeated use of a controlled substance in a manner other than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance. The government need not show that defendant used a controlled substance at the precise time he possessed a firearm. It must, however, establish that he was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was possessed.

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

U.S. v. Johnson, 572 F.3d 449 (8th Cir.), July 10, 2009

To establish that a defendant is an "unlawful user" of marijuana while possessing a firearm, 18 U.S.C. § 922(g)(3) does not require proof of contemporaneous use of a controlled substance and possession of a firearm. The Government need only prove that the defendant was an "unlawful user" of marijuana at the time he possessed the firearm. Possession of a small amount of marijuana supports the inference that the possessor is a user of marijuana.

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

*****

U.S. v. Alderman, 565 F.3d 641 (9th Cir.), May 12, 2009

Looking at this issue for the first time, the Court decides:

Congress has the authority under the Commerce Clause of the United States Constitution to criminalize the possession by a felon of body armor that has been "sold or offered for sale in interstate commerce." Title 18 U.S.C. §§ 931 and 921(a)(35). Put another way, the sale of body armor in interstate commerce creates a sufficient nexus between possession of the body armor and commerce to allow for federal regulation under Congress's Commerce Clause authority.

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

******

U.S. v. Fincher, 538 F.3d 868 (8th Cir.), August 13, 2008

Membership in the Washington County Militia (WCM), a private militia unrelated to or sanctioned by the state government, is no defense to the charges of unregistered possession of machine guns and short-barrel shotguns. As an unorganized and unregulated militia, the WCM does not fall within the auspices of the Second Amendment.

Although, as established in D.C. v. Heller, 128 S. Ct. 2783 (2008), there is an individual right to possess firearms unrelated to membership in a militia, machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.

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

******

U.S. v. Baker, 508 F.3d 1321 (10th Cir.), December 06, 2007

Although recognizing the "necessity" defense to felon in possession of a

firearm/ammunition, the court refuses to recognize an "innocent possession" defense. The 1st, 4th, 7th, and 9th circuits agree (cites omitted).

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

******

Hall v. Bates, 508 F.3d 854 (7th Cir.), November 15, 2007

When a suspect does not ask whether he is free to leave, there is a rebuttable inference that he does not want to terminate the questioning but instead wants to use the opportunity to deflect the suspicion of the police.

The Supreme Court has a rejected (cite omitted) **a Miranda-like rule requiring police whenever they question someone at a police station to advise him that he is not under arrest and is therefore free to leave at any time. All a person has to do in order to test the right of police to detain him is to ask them whether he is free to leave. Such an approach—placing on the suspect the burden of ascertaining whether he is in fact detained—is preferable to speculation by judges or juries on whether the circumstances of a particular interrogation were so intimidating that the average person being questioned would have thought himself under arrest even though he made no effort, as he could easily have done, to determine whether he was.**

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

******

U.S. v. Introcaso, 506 F.3d 260 (3rd Cir.), October 25, 2007

Looking at this issue for the first time, the Court decides:

Title 26 U.S.C. § 5845(g) exempts "antique firearms" from registration. An "antique firearm" is defined in pertinent part as "any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade." Congress did not declare clearly an intent to impose a registration requirement on pre-1899 firearms for which ammunition specifically designed for it is no longer manufactured in the United States but in which any modern ammunition is usable. Therefore, the statute in ambiguous and will not support a conviction.

The only other circuits to address this issue, the 2nd Circuit (published) and the 7th Circuit (unpublished), disagree (cites omitted).

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

******

U.S. v. Ciszkowski, 492 F.3d 1264 (11th Cir.), July 20, 2007

For purposes of applying the 30 year mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(B)(ii), the government must prove that the firearm was equipped with a silencer but need not prove that the defendant knew the firearm was equipped with a silencer.

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

******

U.S. v. Presley, 487 F.3d 1346 (11th Cir.), May 31, 2007

The elements of a "necessity" defense to felon in possession of a firearm include "that the defendant had no reasonable legal alternative to violating the law."

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

******

U.S. v. Strong, 485 F.3d 985 (7th Cir.), May 14, 2007

When a defendant has been charged with felon in possession of a firearm, evidence of contemporaneous uncharged drug trafficking is admissible under the "inextricably intertwined" doctrine. Such evidence tends to prove "knowing possession" of the firearm. Drug trafficking supplies a motive for having a gun because weapons are tools of the trade of drug dealers.

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

******

U.S. v. Luke-Sanchez, 483 F.3d 703 (10th Cir.), April 17, 2007

See Watson v. U.S., 128 S. Ct. 579, December 10, 2007 above.

Bartering drugs for firearms constitutes "use" of the firearms "in furtherance of a drug trafficking crime" under 18 U.S.C. § 924(c)(1)(A).

The 1st, 3rd, 4th, 5th, 8th, and 9th Circuits agree. (cites omitted).

The 6th, 7th, 11th, and D.C. Circuits disagree. (cites omitted)

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

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U.S. v. Hayes, 482 F.3d 749 (4th Cir.), April 16, 2007

Title 18 U.S.C. §§ 922(g)(9) prohibits the possession of a firearm by one convicted of a "misdemeanor crime of domestic violence" (MCDV). The definition of a MCDV in 18 U.S.C.§ 921(a)(33)(A) requires that the predicate offense have as an element a domestic relationship between the offender and the victim. Even if the victim was the offender's spouse, a "simple assault" conviction does not qualify since it does not require, as an element, proof of a domestic relationship.

The 4th Circuit is alone in its holding.

All nine other circuits, the 1st, 2nd, 5th, 8th, 9th, 10th, 11th, D.C., and Federal, that have decided this issue disagree (cites omitted)**.**

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

******

U.S. v. Nieves-Castano, 480 F.3d 597 (1st Cir.), March 27, 2007

A machine gun is defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."

Mere possession of the weapon is insufficient to support conviction under 18 USC § 922(o). The government must also prove beyond a reasonable doubt that the defendant knew the weapon "had the characteristics that brought it within the statutory definition of a machinegun."

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

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Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir.), March 09, 2007

See D.C. v. Heller, 128 S. Ct. 2783, June 26, 2008 above.

The Second Amendment protects an individual right to keep and bear arms – "a right that existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad)." The D.C. code provisions are unconstitutional to the extent that they act to ban the possession and carrying of pistols in the home. "[T]he District may not flatly ban the keeping of a handgun in the home, [and] it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon which the right was premised--i.e, self-defense." The court specifically left open the question of whether the District could lawfully ban the possession and carrying in public or in automobiles.

Editor's Note: See also 18 U.S.C.A. 926A which provides:

> Notwithstanding any other provision of law…of a state…any person…shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation, the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle....

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

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U.S. v. Nobriga, 474 F.3d 561 (9th Cir.), December 29, 2006

18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by one previously convicted of a "misdemeanor crime of domestic violence," does not require that the misdemeanor statute charge a domestic relationship as an element. Section 922(g)(9) requires only that the misdemeanor have been committed against a person who is in one of the domestic relationships specified under 18 U.S.C. § 921(a)(33)(A)(ii).

All seven circuits that have addressed this issue, the 1st, 2nd, 5th, 8th, 11th, D.C, and Federal Circuits, agree. (cites omitted).

The phrase "physical force" in the definition at 18 U.S.C. § 921(a)(33)(A)(ii) means the intentional *violent use of force against the body of another individual.* Crimes that involve the reckless use of force cannot be considered "crimes of violence."

All three circuits that have addressed this issue, the 1st, 10th, and 11th Circuits, agree (cites omitted).

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

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U.S. v. Skinner, 2006 U.S. App. LEXIS 29607 (2nd Cir.), November 30, 2006 (unpublished opinion)

Violations of 18 U.S.C. §§ 242 and 241 are crimes of violence for purposes of 18 U.S.C. § 924(c).

Editor's Note: See also Leocal v. Ashcroft, 543 U.S. 1 (2004).

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

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U.S. v. Carter, 465 F.3d 658 (6th Cir.), October 17, 2006

It is not necessary to allege nor prove the existence of a "trigger mechanism" to meet the definition of "machine gun" in 26 U.S.C. § 5845(b). Section 5845(b) defines "machine gun" as

> …any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

The statute includes a total of four definitions of a "machinegun," *i.e.*, the initial definition in the first sentence followed in the second sentence by three independent, alternative definitions added by amendment to the statute in 1968.

The 3th, 4th, 7th, and Federal Circuits agree. (cites omitted).

The 10th Circuit disagrees. (cite omitted).

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

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U.S. v. Francis, 462 F.3d 810 (8th Cir.), September 08, 2006

Constructive possession of a firearm by an employee of a business that deals in firearms may be established by knowledge of the location of the weapons, close physical proximity, and unfettered access. Infrequent handling of the weapons is immaterial. Increased evidence of knowledge and control is necessary for a finding of constructive possession in an employee / employer context.

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

******

U.S. v. Stallings, 463 F.3d 1218 (11th Cir.), September 07, 2006

The Federal Sentencing Guidelines provide that, if a dangerous weapon (including a firearm) was possessed during a drug-trafficking offense, then a defendant's offense level should be increased by two levels, unless it is clearly improbable that the weapon was connected to the offense. The government must show that the firearm had some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. Although experience has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade, the mere fact that a drug offender possesses a firearm does not necessarily give rise to the firearms enhancement.

The government must show some nexus beyond mere possession between the firearms and the drug crime.

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

******

U.S. v. Johnson, 459 F.3d 990 (9th Cir.), August 29, 2006

Looking at this issue for the first time, the Court decides:

There is no "innocent possession" defense that would excuse a defendant for being a felon in possession of a firearm if he had obtained it innocently and his possession was transitory.

The 1st, 4th, 6th, 7th, and 11th Circuits agree (cites omitted).

The D.C. Circuit disagrees (cite omitted).

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

******

U.S. v. Cotto, 456 F.3d 25 (1st Cir.), August 02, 2006

See Watson v. U.S., 128 S. Ct. 579, December 10, 2007 above.

Bartering drugs for firearms constitutes "use" of the firearms under 18 U.S.C. § 924(c)(1)(A).

The 3rd, 4th, 5th, 8th, and 9th Circuits agree. (cites omitted).

The 6th, 7th, 11th, and D.C. Circuits disagree. (cites omitted)

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

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U.S. v. Hull, 456 F.3d 133 (3rd Cir.), July 28, 2006

Looking at this issue for the first time, the Court decides:

Mere "possession" of a pipe bomb does not qualify as a "Federal crime of violence" under 18 U.S.C. § 842(p)(2)(A). Since § 842(p) does not define "Federal crime of violence," refer to 18 U.S.C. § 16 for its definition. Under § 16(a), "use" requires the "active employment" of force, and therefore a degree of intent higher than negligence. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Simply "possessing" a pipe bomb is not an "offense that naturally involves a person acting in

disregard of the risk that physical force might be used against another in committing the offense."

See also Leocal v. Ashcroft, 543 U.S. 1 (2004).

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

******

U.S. v. Al-Rekabi, 454 F.3d 1113 (10th Cir.), July 17, 2006

The bedrock of constructive possession - whether individual or joint, whether direct or through another person - is the *ability to control* the object. It has nothing to do with a *right to control.*

There is a "necessity defense" to firearms possession offenses. The necessity defense may excuse an otherwise unlawful act if the defendant shows that (1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant's action and the avoidance of harm.

Editor's note: This is distinguished from the "innocent possession" defense. See U.S. v. Johnson, 9th Circuit above.)

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

******

U.S. v. Rios, 449 F.3d 1009 (9th Cir.), June 02, 2006

To convict someone of possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)(1)(a)), the government must prove something more than that the drug dealer happened to have a gun in his house. Neither a weapon's fitness for crime, nor expert testimony that drug dealers habitually possess weapons to protect their assets and intimidate competitors, is sufficient to establish possession in furtherance of drug trafficking.

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

******

U.S. v. Lopez-Perera, 438 F.3d 932 (9th Cir.), February 21, 2006

An illegal alien who presents himself at a port of entry, and is found in possession of a firearm before he leaves the port, cannot be convicted of being an illegal alien in the United States in possession of a firearm.

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

Possession

U.S. v. Hooks, 551 F.3d 1205 (10th Cir.), January 09, 2009

When two or more people occupy the space where the firearm is found, proximity to the firearm alone is insufficient to establish knowledge of and access to that firearm. The government must demonstrate some connection or nexus between the defendant and the firearm which leads to at least a plausible inference that the defendant had knowledge of and access to the weapon or contraband. Evidence of knowledge and access may be proved by direct evidence, or inferred from circumstantial evidence, so long as the circumstantial evidence includes something other than mere proximity. A firearm does not need to be "readily accessible," *i.e.*, "visible and retrievable," to a defendant at the time of his arrest for the defendant to constructively possess it. Evidence of mere accessibility, without evidence of dominion and control, is insufficient to support a finding of constructive possession.

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

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U.S. v. Nevils, 548 F.3d 802 (9th Cir.), November 20, 2008

Simply finding a firearm resting on the stomach of and another resting against the leg of a sleeping (passed out) defendant does not establish either actual or constructive custody of the weapons. Possession—whether actual or constructive—requires a showing that the defendant had knowledge of the firearms and the ability and intention to control them. When the evidence establishes that the defendant was asleep or passed out, the fact that the firearms were physically touching him is not sufficient to show that he was conscious of their presence. That the weapons were touching defendant is a factor tending to make knowing possession more likely, but it is not enough without evidence that the defendant was aware of their presence.

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

******

U.S. v. Sanders, 520 F.3d 699 (7th Cir.), March 21, 2008

In order to convict under 26 U.S.C. § 5861(d) for possession of an unregistered, short-barrel shotgun as defined in 26 U.S.C. § 5845(a), the government must prove intentional possession of a shotgun that the defendant knows to be of an overall length of less than 26 inches or a barrel length of less than 18 inches. Such knowledge can be inferred from evidence that the defendant handled the shotgun if the appearance of the shotgun would have revealed those characteristics. A barrel length of only 11 and 7/16 inches, more than one-third shorter than the legal length, is a large enough difference that it would be obvious to someone who handled it that the barrel was not 18 inches long.

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

U.S. v. Ridner, 512 F.3d 846 (6th Cir.), January 17, 2008

A defendant charged with being a felon-in-possession of a firearm may assert the necessity defense. This defense is limited to rare situations and should be construed very narrowly.

The defendant must produce evidence of the following five requirements:

(1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;

(2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

(3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm;

(4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm; . . . and

(5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

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

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U.S. v. Piwowar, 492 F.3d 953 (8th Cir.), July 05, 2007

The holder of the key, be it to the dwelling, vehicle or motel room in question, has constructive possession of the contents therein. The government is not required to show knowing possession of the key. Mere proof of possession of the key is sufficient to prove the knowing possession of the contents.

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

******

U.S. v. Timlick, 481 F.3d 1080 (8th Cir.), April 10, 2007

To convict on a violation of 21 U.S.C. § 841(a)(1), the Government must prove knowing possession with the intent to distribute. Proof of constructive possession is sufficient to satisfy the element of knowing possession. To prove constructive possession, the government must show knowledge and ownership, dominion, or control over the contraband itself, or dominion over the vehicle in which the contraband is concealed. The holder of the key, be it to the dwelling, vehicle or motel room, has constructive possession of the contents therein.

All five other circuits, the 2nd, 3rd, 5th, 7th, and D.C., that have decided this issue agree (cites omitted)**.**

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

******

U.S. v. Lawrence, 471 F.3d 135 (D.C. Cir.), December 01, 2006

Constructive possession requires the ability to exercise knowing dominion and control over the items. It is reasonable to infer that a person exercises constructive possession over items found in his home. The defendant's possession of a key to a residence he does not own or rent supports a reasonable inference that he was not just a casual visitor.

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

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U.S. v. Francis, 462 F.3d 810 (8th Cir.), September 08, 2006

Constructive possession of a firearm by an employee of a business that deals in firearms may be established by knowledge of the location of the weapons, close physical proximity, and unfettered access. Infrequent handling of the weapons is immaterial. Increased evidence of knowledge and control is necessary for a finding of constructive possession in an employee / employer context.

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

******

U.S. v. Moye, 454 F.3d 390 (4th Cir.), July 24, 2006

"Constructive possession" means that the defendant exercised, or had the power to exercise, dominion and control over the item. The possession can be shared with others. Mere presence at the location where contraband is found is insufficient to establish possession. There must be some action, some word, or some conduct that links the individual to the items, shows some stake in them, some power over them. There must be something to prove that the individual was not merely an incidental bystander.

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

******

U.S. v. Al-Rekabi, 454 F.3d 1113 (10th Cir.), July 17, 2006

The bedrock of constructive possession - whether individual or joint, whether direct or through another person - is the *ability to control* the object. It has nothing to do with a *right to control.*

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

Drugs

Abuelhawa v. U.S., 129 S. Ct. 2102, May 26, 2009 **(Supreme Court)**

Title 21 U. S. C. §843(b) makes it a felony "to use any communication facility in committing or in causing or facilitating" certain felonies prohibited by the statute. Using a telephone to make a misdemeanor drug purchase does not "facilitate" felony drug distribution in violation of § 843(b). Where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the other's conduct. Where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the legislature's punishment calibration.

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

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Kimbrough v. U.S., 128 S. Ct. 558, December 10, 2007 **(Supreme Court)**

Under 21 U.S.C. § 841, the statute criminalizing the manufacture and distribution of crack cocaine, and the relevant Guidelines prescription, 18 U.S.C. Appx § 2D1.1, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine.

The Supreme Court holds that, under U.S. v. Booker, 543 U.S. 220 (2005), the cocaine Guidelines, like all other Guidelines, are advisory only. The crack/powder sentencing disparity is not mandatory. Although the Guidelines range must be included in the array of factors warranting consideration, the judge may determine that, in the particular case, a within-Guidelines sentence is "greater than necessary" to serve the objectives of sentencing. In making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses.

Click **HERE** for the Court's Opinion.

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U.S. v. Aguilar, 585 F.3d 652 (2nd Cir.), November 05, 2009

Under 18 U.S.C. § 848(e)(1)(A) it is a crime to commit murder while "engaging in an offense punishable under 21 U.S.C. § 841(b)(1)(A), drug distribution. The government does not have to prove that a drug related motive was the sole, primary, or most important reason for a killing as long as it was one purpose.

The "substantive connection" requirement implied in the "engaging in" element of § 848(e)(1)(A) can be satisfied by proof that at least one of the purposes of the killing was related to an ongoing drug conspiracy. It can also be satisfied by proof that the defendant used his position in or control over such a conspiracy to facilitate the murder, for instance

to induce confederates to participate in the murder by promising to forgive past drug debts and to supply drugs in the future.

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

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U.S. v. Vaughn, 585 F.3d 1024 (7th Cir.), November 03, 2009

Even though experts have repeatedly testified that guns are tools of the drug trade, in order to show that a firearm furthered a drug trafficking crime in violation of 18 U.S.C. § 924(c), the government must establish a specific nexus between the particular weapon and the particular drug crime at issue. It must present specific, non-theoretical evidence to tie that gun and the drug crime together.

In the usual § 924(c) case, weapons are used more as a stick, but there's no reason they couldn't be used as a carrot. Defendant offered the gun like Mary Kay might offer a pink Cadillac to a top selling cosmetics salesperson. In the same way that a sales commission plays a role in a business transaction, defendant used the rifle "to speed the payment and to assure full payment." The government thus tied the particular weapon to the particular transaction and demonstrated that defendant's possession of the rifle helped forward the sale of the six pounds of marijuana.

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

******

U.S. v. Romero-Padilla, 583 F.3d 126 (2nd Cir.), October 07, 2009

Looking at this issue for the first time, the court decides:

Title 21 U.S.C. § 959(a) makes it "unlawful for any person to manufacture or distribute a controlled substance . . . (1) intending that such substance or chemical will be unlawfully imported into the United States . . . *or* (2) *knowing* that such substance or chemical will be unlawfully imported into the United States. The government must prove beyond a reasonable doubt that the defendant actually knew or intended that a controlled substance he distributed or manufactured would be illegally imported into the United States. When the government does not prove the specific intent, it must prove actual (as opposed to constructive) knowledge that such substance or chemical will be unlawfully imported into the United States.

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

******

U.S. v. Burchard, 580 F.3d 341 (6th Cir.), September 02, 2009

Looking at this issue for the first time, the court decides:

The term "unlawful user of a controlled substance" contemplates the regular and repeated use of a controlled substance in a manner other than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance. The government need not show that defendant used a controlled substance at the precise time he possessed a firearm. It must, however, establish that he was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was possessed.

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

******

U.S. v. Johnson, 572 F.3d 449 (8th Cir.), July 10, 2009

To establish that a defendant is an "unlawful user" of marijuana while possessing a firearm, 18 U.S.C. § 922(g)(3) does not require proof of contemporaneous use of a controlled substance and possession of a firearm. The Government need only prove that the defendant was an "unlawful user" of marijuana at the time he possessed the firearm. Possession of a small amount of marijuana supports the inference that the possessor is a user of marijuana.

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

******

U.S. v. Franklin, 547 F.3d 726 (7th Cir.), October 27, 2008

The odor of burning marijuana provides an officer with probable cause to search the passenger compartment and containers within the passenger compartment. A police dog's alerting to the presence of narcotics provides additional probable cause to search other parts of the vehicle for narcotics.

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

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U.S. v. Luna, 547 F.3d 66 (2nd Cir.), October 16, 2008

A conspiracy conviction requires proof that two or more persons agreed to participate in a joint venture intended to commit an unlawful act. A transfer of drugs from a seller to a

buyer necessarily involves agreement, however brief, on the distribution of a controlled substance from the former to the latter. However, while the illegal sale of narcotics is a substantive crime requiring an agreement by two or more persons, the sale agreement itself cannot be the conspiracy to distribute, for it has no separate criminal object. Without more, the mere buyer-seller relationship is insufficient to establish a conspiracy. The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy. They have no agreement to advance any joint interest.

However, this rationale does not apply where, for example, there is advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use. Under such circumstances, the participants in the transaction may be presumed to know that they are part of a broader conspiracy. A defendant may be deemed to have agreed to join a conspiracy if there is something more, some indication that the defendant knew of and intended to further the illegal venture, that he somehow encouraged the illegal use of the goods or had a stake in such use.

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

******

U.S. v. Wilson, 503 F.3d 195 (2nd Cir.), September 24, 2007

Title 21 U.S.C. § 856(a)(2) makes it unlawful for a person with a premises to knowingly and intentionally allow its use for the purpose of manufacturing, storing or distributing drugs. The person who manages or controls the building and then rents to others need not have the express purpose in doing so that drug related activity take place. The phrase "for the purpose," as used in this provision, references the purpose and design not of the person with the premises, but rather of those who are permitted to engage in drug-related activities there.

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

******

U.S. v. Lopez-Vanegas, 493 F.3d 1305 (11th Cir.), July 26, 2007

Title 21 U.S.C. § 841(a)(1), in conjunction with §846, makes it unlawful for any person to conspire to possess with the intent to distribute a controlled substance, such as cocaine. Section 841(a)(1) does not apply to possession outside United States territory unless the possessor intends to distribute the contraband within the United States. There can be no violation of § 846 if the object of the conspiracy is not a violation of § 841. When the object of the conspiracy is to possess controlled substances outside the United States with the intent to distribute outside the United States, there is no violation of § 841(a)(1) or § 846.

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

U.S. v. Strong, 485 F.3d 985 (7th Cir.), May 14, 2007

When a defendant has been charged with felon in possession of a firearm, evidence of contemporaneous uncharged drug trafficking is admissible under the "inextricably intertwined" doctrine. Such evidence tends to prove "knowing possession" of the firearm. Drug trafficking supplies a motive for having a gun because weapons are tools of the trade of drug dealers.

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

******

U.S. v. Penaloza-Duarte, 473 F.3d 575 (5th Cir.), December 20, 2006

To convict for possession of methamphetamine with intent to distribute, the prosecution must prove that the defendant (1) knowingly (2) possessed methamphetamine (3) with the intent to distribute it.

To prove that a defendant "aided and abetted," the prosecution must also prove that the defendant associated with the criminal venture, purposefully participated in the criminal activity, and sought by his actions to make the venture succeed. "Association" means that the defendant shared in the principal's criminal intent (in this case, specific intent to distribute). "Participation" means that the defendant engaged in some affirmative conduct designed to aid the venture or to assist the perpetrator of the crime. Thus, a defendant must share in the intent to commit the offense as well as play an active role in its commission. It is not enough to show that the defendant engaged in otherwise innocent activities that just happened to further the criminal enterprise.

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

******

U.S. v. Rios, 449 F.3d 1009 (9th Cir.), June 02, 2006

To convict someone of possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)(1)(a)), the government must prove something more than that the drug dealer happened to have a gun in his house. Neither a weapon's fitness for crime, nor expert testimony that drug dealers habitually possess weapons to protect their assets and intimidate competitors, is sufficient to establish possession in furtherance of drug trafficking.

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

******

U.S. v. Alvarez, 451 F.3d 320 (5th Cir.), June 01, 2006

For purposes of 21 U.S.C. § 860(e)(1), Distribution of Controlled Substances Within 1000 Feet of a Playground, the government must prove that the controlled substance offense took place within 1000 feet of an outdoor facility intended for recreation that is open to the public and that includes three or more separate apparatus intended for the recreation of children.

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

******

U.S. v. Richardson, 439 F.3d 421 (8th Cir.), March 02, 2006

The Court overrules its prior decisions and now holds that convictions for being a felon in possession, and being a drug user in possession, based upon a single act of possession of a firearm, violate Double Jeopardy.

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

******

Possession

U.S. v. Fambro, 526 F.3d 836 (5th Cir.), May 02, 2008

A person is in constructive possession of contraband if he knowingly has ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located. Constructive possession need not be exclusive. It may be joint with others, and it may be proven with circumstantial evidence. When there is joint occupancy, control or dominion over the place in which contraband is found is not by itself sufficient to establish constructive possession. Constructive possession in such cases exists only when there is some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the contraband.

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

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U.S. v. Tran, 519 F.3d 98 (2nd Cir.), March 10, 2008

A defendant's sole occupancy of a vehicle cannot alone suffice to prove knowledge of contraband found hidden in the vehicle. Corroborating evidence, such as nervousness, a false statement, or suspicious circumstances, is necessary to prove this element. Even where drugs are hidden and therefore not immediately visible to the occupant or others, the possibility of discovery may cause an individual with knowledge of the drugs to respond with nervousness to a law enforcement officer's presence. "Nervousness" is one type of evidence that, when considered alongside the defendant's sole occupancy of a vehicle, can support an inference that the defendant knew about the drugs in the hidden compartment.

Nervousness alone is not enough. There must be facts which suggest that the defendant's nervousness or anxiety derives from an underlying consciousness of criminal behavior.

The 5th and 6th Circuits agree (cites omitted).

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

******

U.S. v. Piwowar, 492 F.3d 953 (8th Cir.), July 05, 2007

The holder of the key, be it to the dwelling, vehicle or motel room in question, has constructive possession of the contents therein. The government is not required to show knowing possession of the key. Mere proof of possession of the key is sufficient to prove the knowing possession of the contents.

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

******

U.S. v. Timlick, 481 F.3d 1080 (8th Cir.), April 10, 2007

To convict on a violation of 21 U.S.C. § 841(a)(1), the Government must prove knowing possession with the intent to distribute. Proof of constructive possession is sufficient to satisfy the element of knowing possession. To prove constructive possession, the government must show knowledge and ownership, dominion, or control over the contraband itself, or dominion over the vehicle in which the contraband is concealed. The holder of the key, be it to the dwelling, vehicle or motel room, has constructive possession of the contents therein.

All five other circuits, the 2nd, 3rd, 5th, 7th,th, and D.C., that have decided this issue agree. (cites omitted).

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

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U.S. v. Lawrence, 471 F.3d 135 (D.C. Cir.), December 01, 2006

Constructive possession requires the ability to exercise knowing dominion and control over the items. It is reasonable to infer that a person exercises constructive possession over items found in his home. The defendant's possession of a key to a residence he does not own or rent supports a reasonable inference that he was not just a casual visitor.

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

******

U.S. v. Francis, 462 F.3d 810 (8th Cir.), September 08, 2006

Constructive possession of a firearm by an employee of a business that deals in firearms may be established by knowledge of the location of the weapons, close physical proximity, and unfettered access. Infrequent handling of the weapons is immaterial. Increased evidence of knowledge and control is necessary for a finding of constructive possession in an employee / employer context.

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

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U.S. v. Moye, 454 F.3d 390 (4th Cir.), July 24, 2006

"Constructive possession" means that the defendant exercised, or had the power to exercise, dominion and control over the item. The possession can be shared with others. Mere presence at the location where contraband is found is insufficient to establish possession. There must be some action, some word, or some conduct that links the individual to the items, shows some stake in them, some power over them. There must be something to prove that the individual was not merely an incidental bystander.

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

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U.S. v. Al-Rekabi, 454 F.3d 1113 (10th Cir.), July 17, 2006

The bedrock of constructive possession - whether individual or joint, whether direct or through another person - is the *ability to control* the object. It has nothing to do with a *right to control.*

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

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Conspiracy and Parties

U.S. v. Colon, 549 F.3d 565 (7th Cir.), December 08, 2008

A sale, by definition, requires two parties; their combination for that limited purpose does not increase the likelihood that the sale will take place, so conspiracy liability would be inappropriate. "Regular" purchases on "standard" terms cannot transform a customer into a co-conspirator. Agreement – the crime of conspiracy – cannot be equated with repeated transactions.

A wholesale customer of a drug conspiracy – one who buys for resale rather than for his personal consumption – is not a coconspirator per se. Large quantities of controlled

substances, without more, cannot sustain a conspiracy conviction. The joint objective of distributing drugs is missing where the conspiracy is based simply on an agreement between a buyer and a seller for the sale of drugs.

An aider and abettor is conventionally defined as one who knowingly assists an illegal activity, wanting it to succeed. Even though the buyer of drugs assists an illegal activity, which he doubtless wants to be successful, it is not enough to establish aiding and abetting. Otherwise, every buyer from a drug conspiracy is an aider and abettor of a conspiracy and is therefore to be treated by the law exactly as a member of the conspiracy would be treated.

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

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U.S. v. Luna, 547 F.3d 66 (2nd Cir.), October 16, 2008

A conspiracy conviction requires proof that two or more persons agreed to participate in a joint venture intended to commit an unlawful act. A transfer of drugs from a seller to a buyer necessarily involves agreement, however brief, on the distribution of a controlled substance from the former to the latter. However, while the illegal sale of narcotics is a substantive crime requiring an agreement by two or more persons, the sale agreement itself cannot be the conspiracy to distribute, for it has no separate criminal object. Without more, the mere buyer-seller relationship is insufficient to establish a conspiracy. The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy. They have no agreement to advance any joint interest.

However, this rationale does not apply where, for example, there is advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use. Under such circumstances, the participants in the transaction may be presumed to know that they are part of a broader conspiracy. A defendant may be deemed to have agreed to join a conspiracy if there is something more, some indication that the defendant knew of and intended to further the illegal venture, that he somehow encouraged the illegal use of the goods or had a stake in such use.

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

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Miscellaneous Criminal Statutes

(In numerical order)

8 U.S.C. § 1324

U.S. v. Cuevas-Reyes, 572 F.3d 119 (3rd Cir.), July 10, 2009

To convict under 8 U.S.C. § 1324, "bringing in and harboring certain aliens" the government must show that defendant's actions…tended to substantially facilitate the alien *remaining* in the United States.

The goal of § 1324 is to prevent aliens from entering or remaining in the United States illegally by punishing those who shield or harbor them. Defendant's actions were undertaken for the purpose of *removing* the women from the United States rather than helping them remain here. Punishing defendant for helping illegal aliens *leave* the country is contrary to that goal.

Defendant failed to inform the women that they were required to pass inspection by Immigration and Customs Enforcement officials at the airport despite having been aware of their illegal status. Defendant's failure to follow procedures set by the federal government did not amount to concealing the illegal immigrants from detection while in the United States. To the extent defendant's instructions to meet him directly at the plane helped the departing women avoid detection by Immigration and Customs Enforcement, this too facilitated their removal from the country. They presumably would have been detained in the United States and remained even longer had they been apprehended.

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

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U.S. v. Ozcelik, 527 F.3d 88 (3rd Cir.), May 27, 2008

The terms "shielding," "harboring," and "concealing" under 8 U.S.C. § 1324 encompass conduct "tending to substantially facilitate an alien's remaining in the United States illegally" and to prevent government authorities from detecting the alien's unlawful presence. General advice to, in effect, keep a low profile and not do anything illegal do not tend to "substantially" facilitate the alien remaining in the country; rather, it simply states an obvious proposition that anyone would know or could easily ascertain from almost any source. Comments about changing addresses were irrelevant because the illegal alien had already taken the action on his own accord. Holding someone criminally responsible for passing along general information to an illegal alien would effectively write the word "substantially" out of the applicable test.

The 5th Circuit agrees (cite omitted)**.**

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

U.S. v. Lopez, 484 F.3d 1186 (9th Cir.), May 07, 2007

A driver who transports a group of illegal aliens from a drop-off point in the United States to another destination in this country commits only the offense of transporting aliens "within" the United States but is not guilty of aiding and abetting the crime of "bringing" the aliens "to" the United States. 8 U.S.C. § 1324.

Although all of the elements of the "bringing to" offense are satisfied once the aliens cross the border, the crime does not terminate until the initial transporter who brings the aliens to the United States ceases to transport them and drops off the aliens on the U.S. side of the border. One who transports undocumented aliens only within the United States and only after the initial transporter had dropped the aliens off inside the country is not guilty of aiding and abetting the initial transportation.

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

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18 U.S.C. § 7

U.S. v. Passaro, 577 F.3d 207 (4th Cir.), August 10, 2009

Title 18 U.S.C. § 7(9) explicitly extends special maritime and territorial jurisdiction to "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership . . . ."

Section 7(9) pertains only to fixed locations, rather than a mobile group of people conducting an operation. "The premises of . . . military . . . missions" refers to fixed physical locations, i.e., land and buildings, on which the United States has established a "military mission." Section 7(9) does not reach so broadly as to encompass any area that U.S. soldiers occupy, no matter how temporary or mobile their presence. Relevant factors include the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States. Asadabad, Afghanistan, Firebase is within §7(9) jurisdiction.

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

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18 U.S.C. § 111

U.S. v. Troy, 583 F.3d 20 (1st Cir.), September 25, 2009

Looking at this issue for the first time, the court decides:

Whether a federal officer is "engaged in . . . the performance of official duties" in 18 U.S.C. § 111(a) does not turn on whether the law being enforced is constitutional or applicable to the defendant, or whether the levy order being enforced was validly obtained; rather it turns on whether the federal officer is acting within the scope of what [he] is employed to do . . . or is engaging in a personal frolic of his own.

CBP officers are expected to determine whether people and conveyances entering the country are allowed to enter and are properly documented. The officers are also responsible for ensuring the security of the inspection building and the area around it, a duty that includes inquiring about the activities of people walking near the border.

Defendant's claim that the officer's decision to stop him from exiting the inspection building was an unconstitutional seizure in derogation of the Fourth Amendment is beside the point, for the inquiry into whether the officer was engaged in the performance of her official duties does not turn on the precise limits of her authority, but rather on the proper characterization of her conduct as official or personal.

The 2nd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and D.C. Circuits agree (cites omitted).

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

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U.S. v. Hertular, 562 F.3d 433 (2nd Cir.), April 06, 2009

For a threat to satisfy the force element of 18 U.S.C. § 111, there must be proof that the alleged threat would objectively inspire fear of pain, bodily harm, or death that is likely to be inflicted immediately. The government must prove that the defendant instilled (1) a reasonable apprehension of bodily harm (2) likely to be inflicted immediately. An implied threat to use force sometime in the indefinite future" is insufficient to support a § 111 conviction. Circumstances that certainly instill an objectively reasonable fear that homicidal threats are serious and real are not sufficient to establish that the agents were being threatened with immediate harm.

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

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U.S. v. Chapman, 528 F.3d 1215 (9th Cir.), June 23, 2008

Even though it appears to prohibit six different types of actions, only one of which is "assault," convictions under 18 U.S.C. § 111 require at least some form of assault. Title 18

U.S.C. § 111(a) allows misdemeanor convictions only in cases where the acts constitute simple assault. To constitute simple assault, an action must be "either a willful attempt to inflict injury upon the person of another, or a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." "Tensing up" in anticipation of arrest and disobeying orders to move and lie down, may have made the officers' job more difficult, but did not amount to a simple assault. Mere passive resistance is not sufficient for a conviction under § 111(a).

The 2nd, 3rd, 5th, 8th, and 10th Circuits agree (cites omitted).

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

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18 U.S.C. § 113

U.S. v. Pettigrew, 468 F.3d 626 (10th Cir.), October 12, 2006

18 U.S.C.S. § 113(a)(4), Assault by Wounding, is a general intent crime. Driving while voluntarily intoxicated supports an inference that the defendant intended the consequences of his actions.

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

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18 U.S.C. § 115

U.S. v. Evans, 581 F.3d 333 (6th Cir.), September 22, 2009

FPS officers reasonably exercised their investigative and protective authority pursuant to 40 U.S.C. § 1315 when they left federal property to surveil defendant's vehicle. Defendant's conduct, specifically, her tailgating of the FPS officers' marked police vehicle and her visible hand gestures, which simulated the firing of a gun, provided the FPS officers with probable cause to arrest her for a violation of 18 U.S.C. § 115, regardless of her presence on non-federal property.

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

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18 U.S.C. § 201

U.S. v. Valle, 538 F.3d 341 (5th Cir.), July 30, 2008

Title 18 U.S.C. § 201 does not require that the public official actually commit the violation

of his official duty. It only requires that he demand or agree to accept something of value in return for "being induced" to commit the violation. The statute clearly requires that the official's demand be "corrupt." The public official acts "corruptly" when he knows that the purpose behind the payment that he has received, or agreed to receive, is to induce or influence him in an official act, even if he has no intention of actually fulfilling his end of the bargain

The 2nd Circuit agrees (cite omitted).

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

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U.S. v. Ganim, 510 F.3d 134 (2nd Cir.), December 04, 2007

The specific intent element (quid pro quo / this for that) for bribery, extortion, and honest services mail fraud crimes may be satisfied by showing that a government official received a benefit in exchange for his promise to perform specific official acts *or to perform such acts as the opportunities arise.* It is sufficient if the defendant understood he was expected as a result of the payment to exercise particular kinds of influence on behalf of the payor as specific opportunities arose.

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

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U.S. v. Ihnatenko, 482 F.3d 1097 (9th Cir.), March 30, 2007

The gratuities statute, 18 USC § 201(c)(2), does not prohibit the government from providing immigration benefits, immunity from prosecution, leniency, cash benefits, or government-paid housing to a cooperating witness so long as the payment does not recompense any corruption of the truth of testimony.

Paid informants play a vital role in the government's infiltration and prosecution of major organized crime and drug syndicates. Such compensation is necessary to assure the safety of those who turn against their former compatriots in the underworld.

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

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18 U.S.C. § 241

U.S. v. Rehak, 589 F.3d 965 (8th Cir.), December 22, 2009

Defendant police officers were convicted under 18 U.S.C. § 241 of conspiring to violate the rights of Vincent Pelligatti, a fictitious person, by stealing his drug money.

Police officers who convert to private purposes funds lawfully seized from suspected criminals violate those criminals' civil rights.

Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing about that objective. Factual impossibility is not a defense to an inchoate offense such as conspiracy or attempt. The objective of defendants was to take the money of a drug trafficker, Vincent Pelligatti. Their goal, to keep his money as their own, violates the law. The fact that Pelligatti was fictitious was unknown to defendants. This circumstance prevented them from actually violating a person's due process rights. While it was factually impossible to violate his rights, defendants were charged and convicted of *conspiring* to violate his rights. The crime was committed upon their agreement to steal his money. That they were unsuccessful is irrelevant to their culpability for conspiring.

Even if defendants believed the money was forfeitable, agreeing to convert it to personal use, rather than following forfeiture procedures, is sufficient for conviction under § 241.

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

******

18 U.S.C. § 286 and 287

U.S. v. Saybolt, 577 F.3d 195 (3rd Cir.), August 18, 2009

Because the purpose of a 18 U.S.C. § 286 conspiracy must be to obtain payment of a claim, the conspirators must understand, at least implicitly, that the agreed-upon methods of accomplishing the fraud are capable of causing the payment of a claim. Accordingly, where the Government alleges that the conspirators agreed to make false statements and representations as part of the conspiracy to defraud, § 286 requires proof that the conspirators agreed that those statements or representations would have a material effect on the Government's decision to pay a false, fictitious, or fraudulent claim.

Section 286's language leaves open the possibility that other conspiracies to defraud may be actionable under the statute; it does not explicitly specify that the conspiracy must involve an agreement to make false statements or representations. Accordingly, we express no view on whether materiality is a required element of any alleged conspiracies that do not involve an agreement to make false statements or representations.

The 6th Circuit disagrees (cite omitted)**.**

Title 18 U.S.C. § 287, False, fictitious, or fraudulent claims, is clear and unambiguous. Because the terms "false," "fictitious," and "fraudulent" are connected with the disjunctive "or," the terms must be given separate meaning and thus, proof of materiality is not necessary to establish a violation of § 287.

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

18 U.S.C. § 472

Rodis v. City & County of San Francisco, 499 F.3d 1094 (9th Cir.), August 28, 2007

See reversal on qualified immunity grounds in Civil Liability section above.

To support a conviction for possession of counterfeit currency with intent to defraud under 18 U.S.C. § 472, the government must prove three elements: (1) possession of counterfeit money; (2) knowledge, at the time of possession, that the money is counterfeit; and (3) intent to defraud. The mere passing of a counterfeit bill is not a criminal offense. The defendant must not only possess or pass counterfeit money, but he must know the money is counterfeit *and* he must intend to use the money to defraud another. To act with the "intent to defraud" means to act willfully, and with the *specific intent* to deceive or cheat for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself. For specific intent crimes, evidence of intent is required to establish probable cause. Without at least some evidence regarding the knowledge or intent elements of this crime, probable cause is necessarily lacking.

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

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18 U.S.C. § 514

U.S. v. Morganfield, 501 F.3d 453 (5th Cir.), September 25, 2007

Title 18 U.S.C. § 514(a)(2) provides that "Whoever, with intent to defraud… passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States… any false or fictitious instrument…." Terms in § 514(a) are defined by reference to 18 U.S.C. § 513(c). Section 513(c)(3)(A) defines a "security" as including a check. Neither § 514 nor § 513(c) define what constitutes a "false or fictitious instrument, document, or other item."

"False or fictitious instrument" in § 514 refers to nonexistent instruments. Fictitious instruments are not counterfeits of *any existing negotiable instrument*. A check that is genuine on its face, even if it is worthless, is not, as a matter of law, a "false or fictitious instrument."

The 6th and 8th Circuits agree (cites omitted)**.**

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

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18 U.S.C. § 666

U.S. v. Abbey, 560 F.3d 513 (6th Cir.), April 03, 2009

For bribery under 18 U.S.C. § 666, it is enough if a defendant corruptly solicits anything of value with the intent to be influenced or rewarded in connection with some transaction involving property or services worth $5000 or more. The statute does not require the government to prove that defendant contemplated a specific act when he received the bribe; the text says nothing of a quid pro quo requirement to sustain a conviction, express or otherwise. While a *quid pro quo* of money for a specific . . . act is sufficient to violate the statute, it is not necessary.

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

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U.S. v. Zimmerman, 509 F.3d 920 (8th Cir.), December 17, 2007

Looking at this issue for the first time, the Court decides:

Title 18 U.S.C. § 666(a)(1)(B) prohibits the acceptance of gratuities intended to be a bonus for taking official action involving any thing of value of $5,000 or more. The $5000 value requirement in § 666(a)(1)(B) can be met if the amount of the gratuity itself is $5000 or more.

The 7th Circuit agrees (cite omitted).

Intangible benefits, such as development of a retail mall and the ability to more effectively market condominiums, can also satisfy the value requirement so long as the actual value of the intangible benefit meets the value threshold.

The 5th Circuit agrees (cite omitted).

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

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U.S. v. Vitillo, 490 F.3d 314 (3rd Cir.), June 25, 2007

An independent contractor with managerial responsibilities may be an "agent" under 18 U.S.C. § 666. Section 666 prohibits "an agent" of a local government agency that receives more than $10,000 in federal funds from stealing from that agency property valued at more than $5,000. The term "agent" is defined as "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." An "agent" does not have to necessarily controls federal funds. An individual can affect agency funds despite a lack of power to authorize their direct

disbursement. An "agent" is merely a person with authority to act on behalf of the organization receiving federal funds, and can include an "employee," "officer," "manager" or "representative" of that entity. Section 666(d)(1) does not by definition exclude an independent contractor who acts on behalf of a § 666(b) entity as a manager or representative of that entity.

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

******

U.S. v. De La Cruz, 469 F.3d 1064 (7th Cir.), November 29, 2006

When criminal intent is otherwise proven, after-the-fact ratification from those with authority is not a complete defense to prosecution for misapplication of public funds under 18 U.S.C. § 666(a)(1)(A).

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

******

18 U.S.C. § 844

U.S. v. Ressam, 474 F.3d 597 (9th Cir.), January 16, 2007

Looking at this issue for the first time, the Court decides:

18 U.S.C. § 844(h)(2) makes it a crime to carry an explosive "during the commission of any felony." The government must demonstrate that the explosives "facilitated or played a role in the crime" and, therefore, "aided the commission of the underlying felony in some way."

The 3rd and 5th Circuits disagree, saying that the government need only prove that explosives were carried during a felony offense. (cites omitted).

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

******

18 U.S.C. § 848

U.S. v. Aguilar, 585 F.3d 652 (2nd Cir.), November 05, 2009

Under 18 U.S.C. § 848(e)(1)(A) it is a crime to commit murder while "engaging in an offense punishable under 21 U.S.C. § 841(b)(1)(A), drug distribution. The government does not have to prove that a drug related motive was the sole, primary, or most important reason for a killing as long as it was one purpose.

The "substantive connection" requirement implied in the "engaging in" element of § 848(e)(1)(A) can be satisfied by proof that at least one of the purposes of the killing was

related to an ongoing drug conspiracy. It can also be satisfied by proof that the defendant used his position in or control over such a conspiracy to facilitate the murder, for instance to induce confederates to participate in the murder by promising to forgive past drug debts and to supply drugs in the future.

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

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18 U.S.C. § 924

Dean v. U.S., 129 S. Ct. 1849, April 29, 2009 **(Supreme Court)**

Under 18 U.S.C. §§924(c)(1)(A)(ii),(iii), an individual convicted for using or carrying a firearm during and in relation to any violent or drug trafficking crime, or possessing a firearm in furtherance of such a crime, receives a 10-year mandatory minimum sentence, in addition to the punishment for the underlying crime, if the firearm is discharged. The government is not required to prove that the defendant intended to discharge the firearm. The 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident.

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

******

U.S. v. Leon-Quinones, 588 F.3d 748 (1st Cir.), December 07, 2009

A conviction under 18 U.S.C. § 924(c) requires proof that the defendant used a real firearm when committing the predicate offense. A toy or replica will not do. Although § 924(c) requires proof that the gun is real, the government's proof need not reach a level of scientific certainty. Descriptive lay testimony can be sufficient to prove that the defendant used a real gun.

The direct evidence included three bank employees, each of whom observed the object carried by De León at close range, who called it either a "revolver," "pistol," or a "firearm." One employee further testified that the "pistol or revolver" was "nickel plated," a description which is consistent with the jury's finding that defendant carried a real gun. Moreover, none of the witnesses called the gun a "toy gun," or "replica gun" or otherwise described it in a way that would indicate that the gun was not real. There was also circumstantial evidence indicating that defendant carried a real firearm. At trial, some of the employees stated that they were "afraid" that defendant might hurt someone with the gun. And, throughout the robbery, the employees at the bank reacted as if the gun was real, following defendant's various orders. From the totality of the evidence, including the reactions of the witnesses, the jury was entitled to infer that defendant carried a real firearm.

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

U.S. v. Vaughn, 585 F.3d 1024 (7th Cir.), November 03, 2009

Even though experts have repeatedly testified that guns are tools of the drug trade, in order to show that a firearm furthered a drug trafficking crime in violation of 18 U.S.C. § 924(c), the government must establish a specific nexus between the particular weapon and the particular drug crime at issue. It must present specific, non-theoretical evidence to tie that gun and the drug crime together.

In the usual § 924(c) case, weapons are used more as a stick, but there's no reason they couldn't be used as a carrot. Defendant offered the gun like Mary Kay might offer a pink Cadillac to a top selling cosmetics salesperson. In the same way that a sales commission plays a role in a business transaction, defendant used the rifle "to speed the payment and to assure full payment." The government thus tied the particular weapon to the particular transaction and demonstrated that defendant's possession of the rifle helped forward the sale of the six pounds of marijuana.

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

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U.S. v. Spells, 537 F.3d 743 (7th Cir.), August 08, 2008

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1) mandates a 15 year prison term for felons in possession of a firearm who has three or more previous convictions for certain drug crimes or "violent felonies." Under § 924(e)(2)(B)(ii) a "violent felony" is defined as "burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another;*"(emphasis added).

In Begay v. United States, 128 S. Ct. 1581 (2008), the Court determined that "the provision's listed examples—burglary, arson, extortion, or crimes involving the use of explosives—illustrate the kinds of crimes that fall within the statute's scope." Thus, the residual clause in § 924(e)(2(b)(ii) covers only "crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." Those kinds of crimes make it "more likely that an offender, later possessing a gun, will use the gun deliberately to harm a victim.

Flight from the police in a vehicle poses a serious potential risk of physical injury to another. Because flight from the police is knowing and intentional, and therefore purposeful, those people would have a greater propensity to use a firearm in an effort to evade arrest. Therefore, the crime qualifies as a "violent felony" funder the ACCA.

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

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18 U.S.C. § 931

U.S. v. Alderman, 565 F.3d 641 (9th Cir.), May 12, 2009

Looking at this issue for the first time, the Court decides:

Congress has the authority under the Commerce Clause of the United States Constitution to criminalize the possession by a felon of body armor that has been "sold or offered for sale in interstate commerce." Title 18 U.S.C. §§ 931 and 921(a)(35). Put another way, the sale of body armor in interstate commerce creates a sufficient nexus between possession of the body armor and commerce to allow for federal regulation under Congress's Commerce Clause authority.

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

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18 U.S.C. § 1001

U.S. v. Horvath, 492 F.3d 1075 (9th Cir.), July 10, 2007

Any person who knowingly and willfully makes a materially false statement to the federal government is subject to criminal liability under 18 U.S.C. § 1001(a) except when the false statements are submitted to a judge by a party to a judicial proceeding. When, but only when, the probation officer is required by law to include such a statement in the PSR and to submit the PSR to the judge, the statement falls within the exception in § 1001(b).

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

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18 U.S.C. § 1014

U.S. v. Sandlin, 589 F.3d 749 (5th Cir.), December 01, 2009 (Revised December 22, 2009)

The elements of 18 U.S.C. § 1014, false statements on a loan application, are:

(1) the defendant knowingly and willfully made a false statement to the bank,
(2) the defendant knew that the statement was false when he made it,
(3) the defendant made the false statement for the purpose of influencing the bank to extend credit, and
(4) the bank to which the false statement was made was federally insured.

The false statement need not be material nor relied upon by the bank to violate § 1014. If a person makes a false statement that has the capacity to influence the bank then the specific intent necessary to violate § 1014 may be inferred and the offense is complete. Because the

relevant inquiry concerns defendant's intent, not the bank's, it does not matter that the bank might have made the loans even without considering what was on the application.

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

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18 U.S.C. § 1015

U.S. v. Youssef, 547 F.3d 1090 (9th Cir.), November 05, 2008

Looking at this issue for the first time, the Court decides:

Title 18 U.S.C. § 1015(a), making a false statement in an immigration document, does not require the false statement to be "material" as an element of the offense.

The 4th Circuit agrees (cite omitted).

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

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18 U.S.C. § 1028

U.S. v. Abbouchi, 494 F.3d 825 (9th Cir.), July 13, 2007

Social security cards are "identification documents" within the meaning of 18 U.S.C. § 1028(a)(2). The 4th Circuit agrees (cite omitted)**.**

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

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18 U.S.C. § 1028A

Flores-Figueroa v. U.S., 129 S. Ct. 1886, May 04, 2009 **(Supreme Court)**

Title 18 U. S. C. §1028A(a)(1), aggravated identity theft, imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes *if,* during (or in relation to) the commission of those other crimes, the offender "*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person.*" (emphasis added). To obtain a conviction under this statute, the government must prove that the defendant knew that the means of identification belonged to a real person.

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

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U.S. v. Blixt, 548 F.3d 882 (9th Cir.), November 26, 2008

Looking at this issue for the first time, the court decides:

Forging another's signature on a check in furtherance of mail fraud constitutes the use of that person's name and thus qualifies as a "means of identification" under 18 U.S.C. § 1028A. Title 18 U.S.C. § 1028(d) provides that "in this section and section 1028A . . . (7) the term 'means of identification' means *any name* or number that may be used, *alone or in conjunction with any other information, to identify a specific individual,* including any — (A) *name*…." There is nothing in the language of the statute that suggests the use of another's name in the form of a signature is somehow excluded from the definition of "means of identification."

Editor's Note: The court could find no other decision of any circuit court addressing this issue.

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

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U.S. v. Godin, 534 F.3d 51 (1st Cir.), July 18, 2008

See Flores-Figueroa v. U.S., 129 S. Ct. 1886, May 4, 2009 above.

To obtain a conviction under 18 U.S.C. § 1028A(a)(1), the aggravated identity theft statute, the government must prove that the defendant knew that the means of identification transferred, possessed, or used during the commission of an enumerated felony belonged to another person.

The D.C. Circuit agrees (cite omitted)**.**

The 4th, 8th, and 11th Circuits disagree (cites omitted)**.**

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

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U.S. v. Miranda-Lopez, 532 F.3d 1034 (9th Cir.), July 17, 2008

The crime of aggravated identity theft, 18 U.S.C. § 1028A(a)(1), requires proof that the defendant knew that the means of identification belonged to another person. It is not enough to prove only that the defendant knew he was using a false document.

The D.C. Circuit agrees (cite omitted)**.**

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

******

U.S. v. Kowal, 527 F.3d 741 (8th Cir.), May 29, 2008

Title 18 U.S.C. § 1028A(a)(1), the aggravated identity theft statute, covers the theft of a *deceased* person's identity.

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

******

U.S. v. Mendoza-Gonzalez, 520 F.3d 912 (8th Cir.), March 28, 2008

To sustain a conviction for aggravated identify theft in violation of 18 U.S.C. § 1028A(a)(1), the identification used must belong to an actual person. The government does not have to prove that the defendant knew that the identification belonged to an actual person.

The 4th and 11th Circuits agree (cites omitted)**.**

The D.C. Circuit disagrees (cite omitted)**.**

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

******

U.S. v. Mitchell, 518 F.3d 230 (4th Cir.), March 06, 2008

To be convicted under 18 U.S.C. § 1028A(a)(1), aggravated identity theft, the government must prove that the defendant coupled his use of a name with a sufficient amount of correct, distinguishing information to identify a specific individual. Although there were two real individuals with the name used by defendant on the fake driver's license, the name alone was not sufficiently unique to identify a specific individual.

A government issued driver's license number is a unique identifier belonging to a real person and, as such, identifies a specific individual.

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

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U.S. v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir.), February 15, 2008

To obtain a conviction under section 18 U.S.C. §1028A(a)(1), the "aggravated identity theft" statute, the government must prove the defendant *knew* the means of identification he transferred, possessed, or used actually belonged to "another person." It is insufficient for the government just to show that the means of identification *happened* to belong to another person.

Every other circuit that has construed this language, the 4th, 8th, and 11th Circuits, disagrees (cites omitted).

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

******

U.S. v. Hurtado, 508 F.3d 603 (11th Cir.), November 21, 2007

Title 18 U.S.C. § 1028A, entitled "Aggravated Identity Theft," provides, in pertinent part:

> Whoever, during and in relation to any felony violation enumerated in §1028A(c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony….

Congress did not define "without lawful authority."

Although stealing and then using another person's identification would fall within the meaning of "without lawful authority," the government does not have to prove that the defendant "stole" the means of identification. Using another's name without permission or based on consent obtained in exchange for money and illegal drugs would also be "without lawful authority."

The 8th Circuit agrees (cite omitted).

The defendant did not need to be aware that the numbers he knowingly used had been actually assigned to an real person.

The 4th Circuit agrees (cite omitted).

There is no requirement that the person whose identity was wrongfully used suffered any financial harm.

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

******

18 U.S.C. § 1341 and 1343

U.S. v. Inzunza, 580 F.3d 894 (9th Cir.), September 01, 2009

The *quid pro quo* required for bribery is a payment made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. Similarly, when the government seeks to prove honest services fraud in the form of bribery, it must prove a *quid pro quo*. The *quid pro quo* must be clear and unambiguous, leaving no uncertainty about the terms of the bargain.

Private gain is not an "implied" or "necessary" element of honest services fraud. The intent to defraud does not depend on the intent to gain, but rather the intent to deprive.

The 10th Circuit agrees (cite omitted).

The 3rd Circuit agrees because requiring private gain would merely substitute one ambiguous standard for another (cite omitted).

The 5th Circuit agrees because it has adopted a state-law-violation requirement instead (cite omitted).

The 7th Circuit disagrees, requiring proof of private gain (cite omitted).

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

******

U.S. v. Weyhrauch, 548 F.3d 1237 (9th Cir.), November 26, 2008

Looking at this issue for the first time, the court decides:

Failure to disclose a conflict of interest, even when not required by state law, can be the basis of an honest services fraud conviction under 18 U.S.C. § 1341. The government is not required to prove that the fraud violated an independent state law.

The 1st, 4th, 7th, and 11th Circuits agree (cites omitted).

The 3rd and 5th Circuits disagree (cites omitted).

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

******

U.S. v. Black, 530 F.3d 596 (7th Cir.), June 25, 2008

In a mail and/or wire fraud case based upon a scheme to defraud an employer of honest services, the fact that the inducement was the anticipation of money from a third party and not the employer is no defense, even when that third party never receives a benefit.

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

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U.S. v. Ward, 486 F.3d 1212 (11th Cir.), May 16, 2007

A defendant may be convicted of mail fraud (18 U.S.C. § 1341) without personally committing each and every element of mail fraud, so long as the defendant knowingly and

willfully joined the criminal scheme, and a co-schemer used the mails for the purpose of executing the scheme.

It is not necessary that a defendant actually do any of the mailing so long as there is sufficient evidence to tie him to the fraudulent scheme which involves the use of the mails.

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

******

U.S. v. Ghilarducci, 480 F.3d 542 (7th Cir.), March 14, 2007

Materiality (i.e., a tendency to influence) is an essential element of a wire fraud prosecution – 18 U.S.C. §1343. Reliance is not an element of federal criminal statutes dealing with fraud. A representation may be material even though the hearer strongly suspects that it is false. Whether or not a victim in fact relied upon a defendant's false representations is irrelevant in criminal fraud cases.

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

******

U.S. v. Evans, 473 F.3d 1115 (11th Cir.), December 26, 2006

Under 18 U.S.C. § 1343A, wire fraud, an unsolicited fax from the victim to the defendant is "for the purpose of executing" the scheme if it is "incident to an essential part of the scheme." Transmissions after a scheme has "reached fruition" cannot have been "for the purpose of executing" the scheme. A scheme has "reached fruition" when it is "fully consummated." Transmissions after the money is obtained may nevertheless be "for the purpose of executing" the fraud if designed to conceal a fraud, by lulling a victim into inaction. As such, they constitute a continuation of the original scheme to defraud. The success of the lulling effort is immaterial.

A transmission from the victim who recognizes the likelihood of fraud and threatens to sound the alarm if not swiftly satisfied, may not be in furtherance of the scheme if its "only likely effect would be to further detection of the fraud."

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

******

U.S. v. Rosby, 454 F.3d 670 (7th Cir.), July 19, 2006

"Materiality" is an element of the mail-fraud offense under 18 U.S.C. § 1341. Neder v. U.S., 527 U.S. 1 (1999). Reliance is not an element nor is it an aspect of the "materiality" element in mail-fraud prosecutions.

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

18 U.S.C. § 1347

U.S. v. Dearing, 504 F.3d 897 (9th Cir.), September 25, 2007

Title 18 U.S.C. § 1347, provides that one commits health care fraud when he: knowingly and willfully executes, or attempts to execute, a scheme or artifice to defraud.

As a general matter, when used in the criminal context, a "willful" act is one undertaken with a "bad purpose." In other words, in order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. Willfulness may be inferred from circumstantial evidence of fraudulent intent. Intent can be inferred from efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits.

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

******

U.S. v. Jones, 471 F.3d 478 (3rd Cir.), December 28, 2006

Health care fraud in violation of 18 U.S.C. § 1347(2), requires misrepresentation by the defendant in connection with the delivery of, or payment for, health care benefits, items, or services.

An employee's theft of money already paid by patients is not "in connection with the delivery of or payment for health care benefits."

Fraud is different from theft. Theft is the taking of another's property by trespass with intent to deprive permanently the owner of the property. Fraud means to cheat or wrongfully deprive another of his property by deception or artifice. An employee's implicit promise not to steal from the employer cannot be the basis for a fraud.

Instead, see 18 U.S.C. § 669, theft or embezzlement in connection with healthcare.

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

******

18 U.S.C. § 1382

U.S. v. Madrigal-Valdez, 561 F.3d 370 (4th Cir.), April 01, 2009

Title 18 U.S.C. § 1382 provides in relevant part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; . . .

Shall be fined under this title or imprisoned not more than six months, or both.

To obtain a conviction under § 1382, the Government must prove that the defendant had notice that entry upon a military installation is prohibited.

The 1st, 9th, and 10th Circuits agree (cites omitted**).**

The sign, setting forth entrance requirements, cannot be placed in a location visible only if the person is already on the base. A person, who has previously entered the United States illegally does not violate 18 U.S.C. § 1382 or 8 U.S.C. § 1325(a) by subsequently entering a military installation *within the jurisdiction of the United States*.

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

******

18 U.S.C. § 1462

U.S. v. Whorley, 550 F.3d 326 (4th Cir.), December 18, 2008

Under 18 U.S.C. § 1462, it is a crime to "bring[s] into the United States . . . or knowingly use[s] any express company or other common carrier or interactive computer service… for carriage in interstate or foreign commerce — (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character;…."

Japanese anime-style cartoons of children engaged in explicit sexual conduct with adults qualify as "obscene" even though real children are not depicted.

Text e-mails describing sexually explicit conduct involving children, including incest and molestation by doctors qualify as "obscene" even though they do not include any obscene visual depictions and are not accompanied by attachments containing obscene material.

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

******

18 U.S.C. §§ 1512 and 1513

U.S. v. Draper, 553 F.3d 174 (2nd Cir.), January 20, 2009

To sustain a witness retaliation charge, 18 U.S.C. § 1513, the government must establish three elements: (1) the defendant engaged in conduct that caused or threatened a witness with bodily injury; (2) the defendant acted knowingly, with the specific intent to retaliate against the witness for information the witness divulged to law enforcement authorities about a federal offense; and (3) the officials to which the witness divulged information were federal agents. A witness's interactions with local authorities, which just happen to be

eventually reported to federal authorities, does not provide the requisite federal contacts under the statute.

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

******

U.S. v. Ramos, 537 F.3d 439 (5th Cir.), July 28, 2008

Failing to report the discharge of their weapons is not obstruction of an "official proceeding" in violation of 18 U.S.C. § 1512. Internal investigations into agency employee conduct are not "official proceedings" under § 1512. An "official proceeding" involves some formal convocation of the agency in which parties are directed to appear, instead of an informal investigation conducted by any member of the agency. "Official proceeding" is consistently used throughout § 1512 in a manner that contemplates a formal environment in which persons are called to appear or produce documents.

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

******

U.S. v. Black, 530 F.3d 596 (7th Cir.), June 25, 2008

Title 18 U.S.C. § 1512(c)(1), concealing or attempting to conceal documents "with the intent to impair the [documents'] integrity or availability for use in an official proceeding" does not require proof of materiality for the excellent reason that being able to deny the materiality of a document is the usual reason for concealing the document. All that need be proved is that the document was concealed in order to make it unavailable in an official proceeding.

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

******

U.S. v. Rand, 482 F.3d 943 (7th Cir.), April 06, 2007

Murdering an innocent man in order to fake the death of a defendant in a criminal case violates 18 U.S.C. § 1512(a)(1)(C), "Tampering with a witness, victim, or an informant." The statute makes it a crime to "kill[s] or attempt[s] to kill *another person*, with intent to—(C) prevent the communication by *any person* to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense (emphasis added)." The plain reading of the statute demonstrates that the murder victim does not have to be a witness or an informant. The statute makes it a federal crime to kill or attempt to kill "*another person*"—regardless of who that person is—in order to prevent the communication of information by "*any person*" to law enforcement or the court. The statute is not limited to killing another person in order to prevent *that* person from communicating information law enforcement or to the court.

The 11th Circuit agrees (cite omitted).

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

******

18 U. S. C. §1546

U.S. v. Krstic, 558 F.3d 1010 (9th Cir.), March 10, 2009

Title 18 U.S.C. § 1546(a) prohibits possession of a forged, counterfeited, altered, or falsely made immigration document. It also prohibits possession of an otherwise authentic immigration document that one knows has been procured by means of a false claim or statement.

This statute punishes "possession" of such a document, not the material falsehood that was used to obtain it. Unlike false statement crimes, possessory offenses have long been described as "continuing offenses" that are not complete upon receipt of the prohibited item. Rather, the statute of limitations does not begin to run until the possessor parts with the item.

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

******

18 U. S. C. §1951

U.S. v. Inzunza, 580 F.3d 894 (9th Cir.), September 01, 2009

The *quid pro quo* required for bribery is a payment made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. Similarly, when the government seeks to prove honest services fraud in the form of bribery, it must prove a *quid pro quo*. The *quid pro quo* must be clear and unambiguous, leaving no uncertainty about the terms of the bargain.

Private gain is not an "implied" or "necessary" element of honest services fraud. The intent to defraud does not depend on the intent to gain, but rather the intent to deprive.

The 10th Circuit agrees (cite omitted).

The 3rd Circuit agrees because requiring private gain would merely substitute one ambiguous standard for another (cite omitted).

The 5th Circuit agrees because it has adopted a state-law-violation requirement instead (cite omitted).

The 7th Circuit disagrees, requiring proof of private gain (cite omitted).

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

U.S. v. Abbey, 560 F.3d 513 (6th Cir.), April 03, 2009

For bribery under the Hobbs Act, 18 U.S.C. § 1951, the benefits received need not have some explicit, direct link with a promise to perform a particular, identifiable act when the illegal gift is given to the official. Instead, it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose. The public official need not even have any intention of *actually* exerting his influence on the payor's behalf because "fulfillment of the quid pro quo is not an element of the offense." The inquiry is whether the official extracted money through promises to improperly employ his public influence.

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

******

U.S. v. Ossai, 485 F.3d 25 (1st Cir.), April 24, 2007

The "interstate nexus" element of the Hobbs Act, 18 U.S.C. § 1951(a), is established by testimony that the stolen money would have been deposited into the business owner's bank account and used to run the business, which necessarily required the ordering of products manufactured outside of the state. The government need only adduce evidence of a realistic probability that the robbery had some slight or minimal impact on interstate commerce. The government need not prove that the precise funds stolen were certain to be used in future business purchases. It matters not that the actual effect of the robbery may be slight or even untraceable.

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

******

U.S. v. Boyd, 480 F.3d 1178 (9th Cir.), March 23, 2007

A conviction under the Hobbs Act - 18 USC § 1951(a) / robbery - requires sufficient evidence that: 1) the business was engaged in interstate commerce; and 2) the robbery obstructed, delayed, or affected interstate commerce. Only a de minimis effect on interstate commerce is needed to support the conviction.

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

******

U.S. v. Horne, 474 F.3d 1004 (7th Cir.), February 05, 2007

The Hobbs Act, 18 U.S.C. § 1951(a) makes robbery that "in any way or degree obstructs, delays, or affects commerce" a federal crime.

eBay, the online auction site, is an avenue of interstate commerce, like an interstate

highway or long-distance telephone service. The use of eBay to lure a victim is use of an interstate instrumentality for purposes of the Hobbs Act.

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

******

18 U. S. C. §1952

U.S. v. Inzunza, 580 F.3d 894 (9th Cir.), September 01, 2009

The *quid pro quo* required for bribery is a payment made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. Similarly, when the government seeks to prove honest services fraud in the form of bribery, it must prove a *quid pro quo*. The *quid pro quo* must be clear and unambiguous, leaving no uncertainty about the terms of the bargain.

Private gain is not an "implied" or "necessary" element of honest services fraud. The intent to defraud does not depend on the intent to gain, but rather the intent to deprive.

The 10th Circuit agrees (cite omitted).

The 3rd Circuit agrees because requiring private gain would merely substitute one ambiguous standard for another (cite omitted).

The 5th Circuit agrees because it has adopted a state-law-violation requirement instead (cite omitted).

The 7th Circuit disagrees, requiring proof of private gain (cite omitted).

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

******

U.S. v. Nader, 542 F.3d 713 (9th Cir.), September 05, 2008

Looking at this issue for the first time, the Court decides:

The Travel Act, 18 U.S.C. § 1952(a), provides that "[w]hoever . . . uses the mail or any facility in interstate or foreign commerce" with intent to carry on unlawful activity is guilty of a crime. Since telephones are instrumentalities of interstate commerce, even completely intrastate telephone calls involve the use of a facility "in" interstate commerce in violation of the Travel Act. As in 18 U.S.C. § 1958, the murder-for-hire statute, the Travel Act does not require actual interstate activity.

The 2nd, 5th, and 8th Circuits agree (cites omitted).

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

18 U. S. C. §1956

U.S. v. Santos, 128 S. Ct. 2020, June 02, 2008 **(Supreme Court)**

The federal money-laundering statute, 18 U. S. C. §1956, prohibits the use of the "proceeds" of criminal activities for various purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity. The word "proceeds" applies only to transactions involving criminal *profits*, not criminal receipts. In this illegal gambling operation, money paid as salary, commissions, and to winning gamblers were not "proceeds." Therefore, none of the transactions on which the money-laundering convictions were based involved lottery "profits."

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

******

Cuellar v. U.S., 128 S. Ct. 1994, June 02, 2008 **(Supreme Court)**

Evidence that money was concealed during transportation is not sufficient to sustain a conviction under 18 U. S. C. §1956, the federal money-laundering statute. The government must prove knowledge that taking the funds to Mexico was "designed," at least in part, to conceal or disguise their "nature," "location," "source," "ownership," or "control." Merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money. The Government's own expert testified that the transportation's purpose was to compensate the Mexican leaders of the operation. Thus, the evidence suggested that the transportation's secretive aspects were employed to *facilitate* it, but not necessarily that secrecy was its *purpose.*

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

******

U.S. v. Ness, 565 F.3d 73 (2nd Cir.), May 08, 2009

Defendant's avoidance of a paper trail, hiding of the drug proceeds in packages of jewelry, and use of code words show only that he concealed the proceeds in order to transport them. While such evidence may indicate that defendant was concealing the nature, location, or source of the narcotics proceeds, it does not prove that his purpose in transporting the proceeds was to conceal these attributes. It evidences not "why" he moved the money, but only "how" he moved it. Under Cuellar v. United States, 128 S. Ct. 1994 (2008), such evidence is not sufficient to prove transaction or transportation money laundering offenses. A conviction under 18 U.S.C. § 1956(a)(2)(B)(i) must be based on evidence that the defendant: (i) attempted to transport the funds across the United States border; (ii) knew that those funds "represent[ed] the proceeds of some form of unlawful activity;" and (iii) knew that such transportation was designed to "conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds.

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

U.S. v. Hodge, 558 F.3d 638 (7th Cir.), March 11, 2009

U.S. v. Lee, 558 F.3d 651 (7th Cir.), March 11, 2009

Editor's Note: These unrelated but very similar cases were decided by the court on the same day. See U.S. v. Santos, 128 S. Ct. 2020 (2008).

The federal money-laundering statute, 18 U. S. C. §1956, prohibits the use of the "proceeds" of criminal activities for various purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity. The word "proceeds" applies only to transactions involving criminal "profits," not criminal receipts. Both of these cases involved health spas as fronts for prostitution operations. Money laundering convictions in both were based upon evidence of rent, utilities, and advertising expenses. These costs are essential operating expenses which do not count as "proceeds" within the meaning of § 1956(a)(1). None of the transactions on which the money-laundering convictions were based involved prostitution "profits." Evidence of rent, utilities, and advertising expenses is insufficient to support the convictions.

Click **HERE** for the court's ***U.S. v. Hodge*** opinion.

Click **HERE** for the court's ***U.S. v. Lee*** opinion.

******

U.S. v. Ness, 466 F.3d 79 (2nd Cir.), October 10, 2006

"Transaction money laundering" and "transportation money laundering," in violation of 18 U.S.C. §§1956(a)(1)(B)(i) and 1956(a)(2)(B)(i), both proscribe conduct "designed in whole or in part . . . to *conceal or disguise* the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." (italics added)**. Highly complex and surreptitious processes through which the funds are transferred — involving coded language, the use of intermediaries, secretive handoffs, and cash transactions — suffice to permit the inference that the deliveries have been designed in a way that would conceal the source of the moneys.**

The 5th and 10th Circuits disagree, holding that the concealment element is satisfied only when the transaction or transportation at issue is designed to give unlawful proceeds the appearance of legitimate wealth. (cites omitted).

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

******

18 U.S.C. § 2252

U.S. v. Lewis, 554 F.3d 208 (1st Cir.), February 02, 2009

Title 18 U.S.C. § 2252(a)(2) requires that the government prove actual interstate transmission or shipment of the child pornography images. Proof of transmission of pornography over the Internet or over telephone lines satisfies the interstate commerce element of the offense. The government proved the images traveled interstate when it introduced evidence that defendant received images that were transmitted over the Internet.

The 3rd and 5th Circuits agree (cites omitted).

Editor's Note: This case was prosecuted under the child pornography statute as it was written at the time of the offenses. Congress recently amended the statutes to expand the jurisdictional coverage by replacing all instances of "in interstate" with "in or affecting interstate" commerce. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 103.

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

******

U.S. v. Paull, 551 F.3d 516 (6th Cir.), January 09, 2009

A search warrant affidavit must allege facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. The expiration of probable cause is determined by the circumstances of each case and depends on the inherent nature of the crime. Because the crime is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography. The affidavit contained evidence that defendant had visited or subscribed to multiple websites containing child pornography over a two-year period and an expert description of the barter economy in child pornography. This made it likely that defendant was involved in an exchange of images and, therefore, likely to have a large cache of such images in order to facilitate that participation. Such information supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.

The 2nd, 5th, and 9th Circuits agree (cites omitted)**.**

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

******

U.S. v. Schaefer, 501 F.3d 1197 (10th Cir.), September 05, 2007

Title 18 U.S.C. §§ 2252(a)(2) and (a)(4)(B), make unlawful the receipt and possession of child pornography images mailed, shipped or transported in interstate or foreign

commerce. The jurisdictional language unambiguously requires the movement of the images across state lines. Absent evidence of (1) the server locations of the websites searched; or (2) the server location of defendant's internet service provider, it is not enough to assume that an internet communication necessarily traveled across state lines. In many, if not most, situations the use of the internet will involve the movement of communications or materials between states. But this fact does not suspend the need for evidence of this interstate movement. The government is required to prove that any internet transmissions containing child pornography that moved to or from the defendant's computer crossed state lines. There is no "internet exception" to the statute's jurisdictional requirements.

The 1st, 3rd, and 5th Circuits disagree (cites omitted).

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

******

18 U.S.C. § 2252A

U.S. v. Shaffer, 472 F.3d 1219 (10th Cir.), January 03, 2007

Title 18 U.S.C. § 2252A(a)(2) makes it a crime to distribute child pornography. The statute fails to define the term "distribute." Placing child porn images in a "shared folder," freely allowing others access to the images through a peer-to-peer file sharing program, and openly inviting them to take or download the items is "distribution" under the statute. The statute does not require that a defendant actively transfer the images to others.

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

******

18 U.S.C. § 2421

U.S. v. Shim, 584 F.3d 394 (2nd Cir.), October 01, 2009

The Mann Act, 18 U.S.C. § 2421, punishes "[w]hoever knowingly transports any individual in interstate . . . commerce . . . with intent that such individual engage in prostitution . . . ." "Knowingly" qualifies "interstate commerce." Therefore, the government must prove beyond a reasonable doubt, as an essential element of the offense, that the defendant knew the women were transported in interstate commerce.

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

******

18 U.S.C. § 2422

U.S. v. Gagliardi, 506 F.3d 140 (2nd Cir.), October 22, 2007

Looking at this issue for the first time, the Court decides:

Title 18 § 2422(b), which imposes criminal liability on anyone who "knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, *or attempts to do so,*" does not require that the enticement victim be an actual "individual who has not attained the age of 18 years." The government must prove that the defendant had the intent and took a substantial step toward committing the crime, as required for attempt liability, even though it was factually impossible to commit the substantive offense.

The 3rd, 5th, 8th, 9th, 10th, and 11th Circuits agree (cites omitted)**.**

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

******

18 U.S.C. § 2423

U.S. v. Cox, 577 F.3d 833 (7th Cir.), August 18, 2009

Looking at this issue for the first time, the Court decides:

Title 18 U.S.C. § 2423(a), transportation of minors with the intent to engage in criminal sexual activity, does not require that the government prove that a defendant knew his victim was a minor.

The 2nd, 3rd, 4th, and 9th circuits agree (cites omitted)**.**

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

******

U.S. v. Jones, 471 F.3d 535 (4th Cir.), December 22, 2006

Although the victim's minor status is a fact which the prosecution must prove, defendant's knowledge of the victim's minority is not an element of the offense of 18 U.S.C. § 2423(a), transportation of minors for illegal sexual activity.

All four circuits that have addressed this issue, the 2nd, 3rd, 9th, and 10th Circuits, agree. (cites omitted).

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

18 U.S.C. § 2703

Warshak v. U.S., 490 F.3d 455 (6th Cir.), June 18, 2007

As 18 USC § 2703(d) specifically permits, officers obtained a court order to obtain a target's emails that had been in storage with the Internet Service provider for more than 180 days. The court order also excused, pursuant to 18 USC § 2705, having to give the target prior notice before seizing the emails. Though the statute required only a showing that the emails were "relevant and material to an ongoing criminal investigation," the 6th Circuit upheld a District Court injunction preventing agents from viewing the emails because there was no showing of probable cause or prior notice giving the target an opportunity to challenge the order.

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

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18 U.S.C. § 3501

Corley v. U.S., 129 S. Ct. 1558, April 06, 2009 **(Supreme Court)**

Editor's Note: This case pertains to federal prosecutions. See 18 U.S.C. §3501(c), and see McNabb *v.* United States, 318 U. S. 332 (1943) and Mallory *v.* United States, 354 U. S. 449 (1957), under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge.

Statements given before the initial appearance but within six hours of the arrest are admissible so long as they are otherwise voluntary and in compliance with Miranda.

If, in order to obtain a statement, the initial appearance is delayed to beyond six hours after arrest, such statements given more than six hours after arrest but before the appearance can be suppressed even if voluntary and in compliance with Miranda.

Statements given before the initial appearance but more than six hours after arrest may be admissible if the delay was not for the purpose of obtaining the statement, and the delay was otherwise reasonable and necessary.

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

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U.S. v. Liera, 585 F.3d 1237 (9th Cir.), November 04, 2009

4:15 a.m. – defendant arrested
9:18 a.m. – defendant first interrogated
10:45 a.m. – two material witnesses interrogated

1:30 p.m. – discovery of a malfunction of video recording equipment used during defendant's first interrogation (did not record any audio)
2:57 p.m. – the government conducted a second interrogation of defendant
3:00 p.m. – Magistrate Court in session
10:48 a.m. the next day – defendant presented to court (over thirty hours after his arrest)

Instead of presenting defendant to a magistrate as quickly as possible, the government delayed defendant's arraignment so that it could interrogate defendant a second time and obtain an audio recording of his statements. The delay was unreasonable and unnecessary. Therefore, defendant's recorded statement is inadmissible.

Administrative delays due to the unavailability of government personnel and judges required to complete the arraignment process are reasonable and necessary. (A twenty-four hour pre-arraignment delay was reasonable and necessary because the defendant needed to receive medical treatment; A thirty-one hour pre-arraignment delay was necessary because the defendant spoke only Spanish, and the first available Spanish-speaking FBI agent did not arrive until approximately 27 hours after defendant's arrest (cites omitted)**).**

Editor's Note: See Corley v. United States, 129 S. Ct. 1558 (April 6, 2009); McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957); Federal Rule of Criminal Procedure 5(a); and 18 U.S.C. § 3501(c).

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

******

18 U.S.C. § 3553

U.S. v. Fernandez, 526 F.3d 1247 (9th Cir.), May 27, 2008

Under 18 U.S.C. § 3553(f)(2), a defendant is entitled to relief from a mandatory minimum sentence if "the defendant did not . . . possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." The burden is on the defendant to prove that it was clearly improbable that he possessed a firearm in connection with the offense. The circumstances in which the firearms were found, coupled with the implausibility of the defendants' explanations may serve as grounds for concluding that firearms were possessed in connection with the offense of conviction. "Offense" means the offense of conviction *and all relevant conduct*. Any infraction is an offense, whether one is caught or not.

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

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21 U.S.C. § 841

U.S. v. Aguilar, 585 F.3d 652 (2nd Cir.), November 05, 2009

Under 18 U.S.C. § 848(e)(1)(A) it is a crime to commit murder while "engaging in an offense punishable under 21 U.S.C. § 841(b)(1)(A), drug distribution. The government does not have to prove that a drug related motive was the sole, primary, or most important reason for a killing as long as it was one purpose.

The "substantive connection" requirement implied in the "engaging in" element of § 848(e)(1)(A) can be satisfied by proof that at least one of the purposes of the killing was related to an ongoing drug conspiracy. It can also be satisfied by proof that the defendant used his position in or control over such a conspiracy to facilitate the murder, for instance to induce confederates to participate in the murder by promising to forgive past drug debts and to supply drugs in the future.

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

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21 U.S.C. § 843

Abuelhawa v. U.S., 129 S. Ct. 2102, May 26, 2009 **(Supreme Court)**

Title 21 U. S. C. §843(b) makes it a felony "to use any communication facility in committing or in causing or facilitating" certain felonies prohibited by the statute. Using a telephone to make a misdemeanor drug purchase does not "facilitate" felony drug distribution in violation of § 843(b). Where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the other's conduct. Where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the legislature's punishment calibration.

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

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21 U.S.C. § 846

U.S. v. Luna, 547 F.3d 66 (2nd Cir.), October 16, 2008

A conspiracy conviction requires proof that two or more persons agreed to participate in a joint venture intended to commit an unlawful act. A transfer of drugs from a seller to a buyer necessarily involves agreement, however brief, on the distribution of a controlled substance from the former to the latter. However, while the illegal sale of narcotics is a substantive crime requiring an agreement by two or more persons, the sale agreement itself cannot be the conspiracy to distribute, for it has no separate criminal object. Without

more, the mere buyer-seller relationship is insufficient to establish a conspiracy. The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy. They have no agreement to advance any joint interest.

However, this rationale does not apply where, for example, there is advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use. Under such circumstances, the participants in the transaction may be presumed to know that they are part of a broader conspiracy. A defendant may be deemed to have agreed to join a conspiracy if there is something more, some indication that the defendant knew of and intended to further the illegal venture, that he somehow encouraged the illegal use of the goods or had a stake in such use.

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

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21 U.S.C. § 959

U.S. v. Romero-Padilla, 583 F.3d 126 (2nd Cir.), October 07, 2009

Looking at this issue for the first time, the court decides:

Title 21 U.S.C. § 959(a) makes it "unlawful for any person to manufacture or distribute a controlled substance . . . (1) intending that such substance or chemical will be unlawfully imported into the United States . . . *or* (2) *knowing* that such substance or chemical will be unlawfully imported into the United States. The government must prove beyond a reasonable doubt that the defendant actually knew or intended that a controlled substance he distributed or manufactured would be illegally imported into the United States. When the government does not prove the specific intent, it must prove actual (as opposed to constructive) knowledge that such substance or chemical will be unlawfully imported into the United States.

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

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26 U.S.C. § 5845
26 U.S.C. § 5861

U.S. v. Sanders, 520 F.3d 699 (7th Cir.), March 21, 2008

In order to convict under 26 U.S.C. § 5861(d) for possession of an unregistered, short-barrel shotgun as defined in 26 U.S.C. § 5845(a), the government must prove intentional possession of a shotgun that the defendant knows to be of an overall length of less than 26 inches or a barrel length of less than 18 inches. Such knowledge can be inferred from

evidence that the defendant handled the shotgun if the appearance of the shotgun would have revealed those characteristics. A barrel length of only 11 and 7/16 inches, more than one-third shorter than the legal length, is a large enough difference that it would be obvious to someone who handled it that the barrel was not 18 inches long.

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

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31 U.S.C. § 3729

Stoner v. Santa Clara County Office of Education, 502 F.3d 1116 (9th Cir.), September 07, 2007

Under the False Claims Act ("FCA"), "[a]ny person" who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" is liable to the Government for a civil penalty, treble damages, and costs. 31 U.S.C. § 3729(a)(1). School districts in California, including county offices of education, are arms of the state, and therefore not "persons" subject to *qui tam* liability under the FCA.

State officials, sued for damages in their individual capacities, are "persons" within the meaning of 31 U.S.C. § 3729.

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

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36 C.F.R. § 7.96

U.S. v. Cindy Sheehan, 512 F.3d 621 (D.C. Cir.), January 11, 2008

36 C.F.R. § 7.96(g)(2), a National Park Service ("NPS") regulation, governs demonstrations in all park areas in the National Capital Region, including the White House sidewalk, and provides that demonstrations involving more than 25 people may be held only pursuant to a permit. In order to sustain a conviction the government must prove that the defendant "knowingly" violated the regulation.

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

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Title III

U.S. v. Garcia-Villalba, 585 F.3d 1223 (9th Cir.), November 02, 2009

For a wiretap order, a "cascading theory of necessity" is insufficient to establish that other investigative procedures have been and/or would be unsuccessful. A "cascading theory of necessity" is one in which with each wiretap order obtained and employed successfully during the investigation, the need for the next wiretap is more and more presumed and other investigative methods are more and more discounted as inconvenient or inefficient such that by the time of the application for another wiretap, the allegations of necessity become largely conclusory statements that improperly attempt to fold the showing of necessity to previous wiretaps into the current application. The government is not free to transfer a statutory showing of necessity from one application to another—even within the same investigation.

Although the government may not rely on the conclusion that a previous wiretap was necessary to justify the current application, historical facts from previous applications, particularly those within the same investigation, will almost always be relevant. So will previous investigatory tactics, so long as they bear on whether the government has adequately shown necessity within the current application. If these facts are incorporated into the latest affidavit, the issuing judge may examine them. Nothing prohibits an affidavit from employing such a technique, which is designed merely to save time, not to piggyback an earlier showing of necessity into a later affidavit. The key question will always be whether the wiretap application separately satisfies the necessity requirement.

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

******

U.S. v. Crabtree, 565 F.3d 887 (4th Cir.), May 19, 2009

Communications intercepted, recorded, and disclosed by private persons, with no involvement by government, in violation of 18 U.S.C. § 2511 (Title III), are inadmissible as evidence under § 2515. There is no "clean hands" exception under § 2515.

The 1st, 3rd, and 9th Circuits agree (cites omitted)**.**

The 6th Circuit disagrees (cite omitted)**.**

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

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U.S. v. Fernandez, 526 F.3d 1247 (9th Cir.), May 27, 2008

When the government reasonably and in good faith concludes that the target of its wiretap surveillance has adopted a new alias, it may continue to intercept such target's

conversations without violating the § 2518(5) minimization requirement.

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

******

U.S. v. Wilson, 484 F.3d 267 (4th Cir.), April 19, 2007

Title 18 U.S.C.A. § 2518(3) requires that the government to show the "necessity" of any wiretap application via a full and complete statement as to whether normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. This burden is not great, and the adequacy of such a showing is to be tested in a practical and commonsense fashion that does not hamper unduly the investigative powers of law enforcement agents. Although wiretaps are disfavored tools of law enforcement, the government need only present specific factual information sufficient to establish that it has encountered difficulties in penetrating the criminal enterprise or in gathering evidence such that wiretapping becomes reasonable.

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

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U.S. v. Rice, 478 F.3d 704 (6th Cir.), March 02, 2007

Title III requires that an application for a wiretap order contain full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. This is referred to as the "necessity requirement," the purpose of which is to ensure that a wiretap is not resorted to in situations where traditional investigative techniques would suffice and to protect against the impermissible use of a wiretap as the initial step in a criminal investigation. A purely conclusory affidavit unrelated to the instant case and not showing any factual relations to the circumstances at hand is inadequate compliance with the statute.

The "good faith" exception of United States v. Leon, 468 U.S. 897 (1984), does not apply to warrants improperly issued under Title III.

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

******

U.S. v. Luong, 2006 U.S. App. LEXIS 31952 (9th Cir.), December 26, 2006 (unpublished opinion)

Under 18 U.S.C. § 2518(3), a federal district judge, upon proper showing, may authorize "interception of . . . electronic communications within the territorial jurisdiction of the court in which the judge is sitting." The court in one district may authorize interception of

communications to and from a mobile phone when that phone and its area code are located outside of the issuing court's district but the government's listening post is located within it. The intercepted communications are first heard by the government within the issuing court's district. An "interception" occurs where the tapped phone is located *and* where law enforcement officers first overhear the call.

The 2nd, 5th, and 7th Circuits agree. (cites omitted)**.**

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

******

U.S. v. Brathwaite, 458 F.3d 376 (5th Cir.), July 31, 2006

Looking at this issue for the first time, the Court decides:

When a person invites a confidential informant into his home, he forfeits his privacy interest in those activities that are exposed to the informant. Video recording what transpires in the informant's presence inside the home does not violate the Fourth Amendment or Title III.

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

******

Shell v. U.S., 448 F.3d 951 (7th Cir.), May 23, 2006

It is permissible to plant a listening device on an unwitting person pursuant to a Title III intercept order without that person's consent.

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

******

Aliens / Immigration

***Osagiede v. U.S.*,** 543 F.3d 399 (7th Cir.), September 09, 2008

Article 36 of the Vienna Convention on Consular Relations imposes three separate obligations on a detaining authority (the government): (1) inform the consulate of a foreign national's arrest or detention without delay; (2) forward communications from a detained national to the consulate without delay, and (3) inform a detained foreign national of "his rights" under Article 36 without delay.

Although the government's failure to comply with the Convention's requirements will not alone support exclusion of evidence or statements otherwise lawfully obtained, dismissal of an indictment, or reversal of a conviction or sentence, defense counsel's failure to inform

her client of these rights can support a Sixth Amendment claim of ineffective assistance of counsel.

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

******

U.S. v. Ozcelik, 527 F.3d 88 (3rd Cir.), May 27, 2008**.**

The terms "shielding," "harboring," and "concealing" under 8 U.S.C. § 1324 encompass conduct "tending to substantially facilitate an alien's remaining in the United States illegally" and to prevent government authorities from detecting the alien's unlawful presence.

General advice to, in effect, keep a low profile and not do anything illegal do not tend to "substantially" facilitate the alien remaining in the country; rather, it simply states an obvious proposition that anyone would know or could easily ascertain from almost any source. Comments about changing addresses were irrelevant because the illegal alien had already taken the action on his own accord. Holding someone criminally responsible for passing along general information to an illegal alien would effectively write the word "substantially" out of the applicable test.

The 5th Circuit agrees (cite omitted)**.**

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

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Melendez v. Gonzales, 503 F.3d 1019 (9th Cir.), September 19, 2007

An alien may not avoid the immigration consequences of a drug conviction as a "first time offender" when, as the result of a previous arrest for drug possession, he was granted "pretrial diversion" under a state rehabilitation scheme that did not require him to plead guilty.

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

******

U.S. v. Lopez, 484 F.3d 1186 (9th Cir.), May 07, 2007

A driver who transports a group of illegal aliens from a drop-off point in the United States to another destination in this country commits only the offense of transporting aliens "within" the United States but is not guilty of aiding and abetting the crime of "bringing" the aliens "to" the United States - 8 U.S.C. § 1324.

Although all of the elements of the "bringing to" offense are satisfied once the aliens cross the border, the crime does not terminate until the initial transporter who brings the aliens

to the United States ceases to transport them and drops off the aliens on the U.S. side of the border. One who transports undocumented aliens only within the United States and only after the initial transporter had dropped the aliens off inside the country is not guilty of aiding and abetting the initial transportation.

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

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Sentencing

Kennedy v. La., 128 S. Ct. 2641, June 25, 2008 **(Supreme Court)**

A death sentence for one who rapes but does not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth Amendment prohibition against cruel and unusual punishment.

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

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U.S. v. Rodriquez, 128 S. Ct. 1783, May 19, 2008 **(Supreme Court)**

The Armed Career Criminal Act, 18 U.S.C. 924(e), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, *inter alia,* a state-law controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." A state drug-trafficking offense, for which state law authorized a ten-year sentence *because the defendant was a recidivist,* qualifies as a predicate offense under the Act, mandating the minimum 15 year sentence.

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

******

Baze v. Rees, 128 S. Ct. 1520, April 16, 2008 **(Supreme Court)**

To constitute cruel and unusual punishment, an execution method must present a "substantial" or "objectively intolerable" risk of serious harm. Because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain. Kentucky's continued use of the three-drug protocol does not pose an "objectively intolerable risk" of serious harm.

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

******

Burgess v. U.S., 128 S. Ct. 1572, April 16, 2008 **(Supreme Court)**

Title 21 U.S.C. § 841(b)(1)(A) of the Controlled Substances Act doubles the mandatory minimum sentence for certain federal drug crimes if the defendant was previously convicted of a "felony drug offense." "Felony drug offense" in that section is defined exclusively by 21 U.S.C. § 802(44). A state drug offense punishable by more than one year qualifies as a "felony drug offense" even if state law classifies the offense as a misdemeanor.

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

******

Begay v. U.S., 128 S. Ct. 1581, April 16, 2008 **(Supreme Court)**

Title 18 U. S. C. § 924(e)(1), the Armed Career Criminal Act, imposes a special mandatory 15-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior convictions for committing …"a violent felony." The Act defines "violent felony" as, inter alia, a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Even assuming that DUI involves conduct that "presents a serious potential risk of physical injury to another," it is not "a violent felony" because it is simply too unlike the example crimes to indicate that Congress intended that provision to cover it.

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