2010
SUPREME COURT and CIRCUIT COURTS OF APPEALS CASE SUMMARIES
BY SUBJECT

(As reported in 2 Informer 10 through 1 Informer 11, covering January – December 2010)
(Click on the subject in the Table of Contents to go to those cases)

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

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First Amendment

U.S. v. Marcavage, 609 F.3d 264 (3d Cir.)

Title 36 C.F.R. § 1.4 (a) defines a "permit" as a "*written* authorization to engage in uses or activities that are otherwise prohibited, restricted, or regulated." Since the permit issued to the defendant by the NPS Ranger was verbal, and not in writing, it was not valid, therefore; the defendant's conviction under *36 C.F.R. § 1.6(g)(2)* for violating a term or condition of a permit was vacated.

Ordering the defendant to move his demonstration, then citing him for interfering with agency function in violation of *36 C.F.R. § 2.32* when he refused to comply, violated the defendant's *First Amendment* right to free speech. The court held that the Rangers' actions were impermissibly motivated by the content of the defendant's speech.

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

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American Atheists, Inc. v. Duncan, 616 F.3d 1145 (10th Cir.)

The Utah Highway Patrol Association, with the permission of Utah state authorities, erected a number of twelve-foot high crosses on public land to memorialize fallen Utah Highway Patrol troopers.

The court held that these memorials have the impermissible effect of conveying to the reasonable observer the message that the State prefers or otherwise endorses a certain religion, and therefore, they violate the *Establishment Clause of the United States Constitution.*

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

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Boardley v. U.S. Department of the Interior, 615 F.3d 508 (D.C. Cir.)

The court held that the licensing scheme requiring individuals and small groups to obtain permits before engaging in expressive activities within designated "free speech areas" (and other public forums within national parks) is overbroad and therefore, violates the *First Amendment*.

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

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Second Amendment

U.S. v. Marzzarella, 614 F.3d 85 (3d Cir.)

The court held that Marzzarella's conviction under *18 U.S.C. § 922(k)* for possession of a handgun with an obliterated serial number did not violate his *Second Amendment* right to keep and bear arms.

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

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U.S. v. Skoien, 614 F.3d 638 (7th Cir.)

The defendant's conviction under *18 U.S.C. §922(g)(9)* for possession of a hunting shotgun, after he was convicted of a misdemeanor crime of domestic violence, does not violate his *Second Amendment* right to keep and bear arms as explained in *District of Columbia v. Heller* (cite omitted).

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

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Fourth Amendment

Governmental Action / Private Searches

U.S. v. Day, 591 F.3d 679 (4th Cir.)

The *Fourth Amendment* does not provide protection against searches by private individuals acting in a private capacity. Similarly, the sole concern of the *Fifth Amen*dment, on which *Miranda* was based, is governmental coercion. The defendant bears the burden of proving that a private individual acted as a government agent.

There are two primary factors to be considered: (1) whether the government knew of and acquiesced in the private individual's challenged conduct; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation.

With regard to the first factor, there must be some evidence of government participation in or affirmative encouragement of the private search. Passive acceptance by the government is not enough. Virginia's extensive armed security guard regulatory scheme simply empowers security guards to make an arrest. This mere governmental authorization for an arrest, in the absence of more active participation or encouragement, is insufficient to implicate the *Fourth* and *Fifth Amendments*.

With regard to the second factor, even if the sole or paramount intent of the security officers had been to assist law enforcement (in deterring crime), such an intent would not transform a private action into a public action absent a sufficient showing of government knowledge and acquiescence under the first factor of the agency test.

Under the "public function" test typically utilized for assessing a private party's susceptibility to a civil rights suit under *42 U.S.C. § 1983*, private security guards endowed by law with plenary police powers such that they are *de facto* police officers, may qualify as state actors. Security guards who are authorized to arrest only for offenses committed in their presence do not have plenary police powers and are not *de facto* police officers**.**

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

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U.S. v. Richardson, 607 F.3d 357 (4th Cir.)

The key factors bearing upon the question of whether a search by a private person constitutes a Government search are: (1) whether the Government knew of and acquiesced in the private search; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation.

There was nothing in the record to suggest that, in fact, law enforcement agents were involved in the search or investigation of Richardson's email transmissions until after AOL reported its discoveries to the National Center for Missing and Exploited Children (NCMEC). Additionally, the statutory provision pursuant to which AOL reported Richardson's activities did not effectively convert AOL into an agent of the Government for *Fourth Amendment* purposes.

In the context of child pornography cases, courts have largely concluded that a delay, even a substantial delay, between distribution and the issuance of a search warrant does not render the underlying information stale. This consensus rests on the widespread view among the courts, in accord with Agent White's affidavit, that "collectors and distributors of child pornography value their sexually explicit materials highly, 'rarely if ever' dispose of such material, and store it 'for long periods' in a secure place, typically in their homes."

The court concluded that a delay of four months did not preclude a finding of probable cause based on staleness in light of the other information supplied by Agent White, including the previous instance in which Richardson used an AOL account to send such images and Agent White's sworn statement that child pornographers "rarely, if ever, dispose of their sexually explicit materials," and that "even if a computer file is deleted from a hard drive or other computer media, a computer expert is still likely to retrieve . . . such files through scientific examination of the computer."

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

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Reasonable Expectation of Privacy

Reedy v. Evanson, 615 F.3d 197 (3d Cir.)

The court held that Reedy maintained a reasonable expectation of privacy in her blood after it was drawn from her body. Reedy's consent to give a blood sample and have it tested as part of the sexual assault protocol kit did not extend to consenting to have the blood sample tested for drugs. The court held that an objectively reasonable person would not believe that the two consent forms she signed to have her blood tested for evidence of sexual assault would extend to having a law enforcement officer order medical personnel to search her blood for evidence of drug use for the purpose of incriminating her.

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

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U.S. v. Christie, 624 F.3d 558 (3d Cir.)

The court held that Christie had no reasonable expectation of privacy in his IP address; therefore, he could not establish a *Fourth Amendment* violation.

The court noted that subscriber information provided to an internet provider is not protected by the *Fourth Amendment's* privacy expectation because it is information that is voluntarily given to a third party. Similarly, no reasonable expectation of privacy exists in an IP address, because that information is also conveyed to and from third parties, including internet service providers.

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

*****

U.S. v. Bynum, 604 F.3d 161 (4th Cir.)

Even if Bynum could show that he had a subjective expectation of privacy in his subscriber information, such an expectation would not be objectively reasonable. Indeed, every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the *Fourth Amendment's* privacy expectation.

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

*****

U.S. v. Domenech, 623 F.3d 325 (6th Cir.)

Officers went to a motel to investigate suspicious activity in Room 22. Two officers knocked on the door while another officer went behind the motel and stationed himself behind the closed, frosted bathroom window. When the officers knocked on the front door, the officer outside the bathroom window saw the light turn on and observed a figure enter the room and lean over. The frosted window prevented the officer from seeing any fixtures or the person in the bathroom. Suspecting that the person in the bathroom was about to flush away evidence, the officer opened the window and confronted the defendant. Upon hearing the commotion in the bathroom, the other two officers burst into to the room from outside. The officers found the defendant, his brother, two women, drugs, guns and counterfeit currency. The officers discovered the defendant had paid for Room 22 for his brother, and Room 31 for himself, but that he had someone else rent them and fill out the registration cards.

The court held that the defendant had a reasonable expectation of privacy as a social guest in his brother's room because he demonstrated a meaningful relationship to the room by: (1) paying for the room; (2) having personal belongings in the room; and (3) possessing a key to the room in his pocket. Because the officer could not see through the frosted window, he lacked probable cause to believe the defendant would destroy evidence of a drug crime. Without probable cause, the officers could not rely on exigent circumstances to justify the warrantless search of the room.

The court further explained that the use of the room for illegal activity did not defeat the occupants' expectation of privacy, nor did the fact that another person rented the room, and provided false information on the registration card. Because the defendant exercised control over

Room 22 with permission of the motel, the lawful possession of the room created an expectation of privacy.

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

*****

U.S. v. Warshak, 631 F.3d 266 (6th Cir.)

The court held that a subscriber has a reasonable expectation of privacy in the contents of emails that are stored with, sent, or received through a commercial ISP. The government may not compel a commercial ISP to turn over the contents of a subscriber's email without first obtaining a warrant based on probable cause. Since the agents did not obtain a warrant, they violated the *Fourth Amendment* when they obtained the contents of Warshak's emails. Additionally, the court held that the Stored Communications Act is unconstitutional to the extent that it allows the government to obtain such emails without a warrant.

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

*****

U.S. v. Carlisle, 614 F.3d 750 (7th Cir.)

Carlisle challenged the warrantless search of a backpack. The court held that Carlisle exhibited no subjective expectation of privacy in the backpack since he disclaimed ownership and knowledge of its contents. Therefore, he did not have a reasonable expectation of privacy in the backpack sufficient to allow him to challenge the search.

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

*****

U.S. v. Hernandez-Mendoza, 600 F.3d 971 (8th Cir.)

The Trooper had legitimate security reasons for recording the sights and sounds within his vehicle. The defendants had no reasonable expectation of privacy in a marked patrol car, which is owned and operated by the state for the express purpose of ferreting out crime.

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

*****

U.S. v. Marquez, 605 F.3d 604 (8th Cir.)

To establish a *Fourth Amendment* violation, a defendant must show that he had a reasonable expectation of privacy in the area searched. A defendant lacks standing to contest the search of a place to which he has an insufficiently close connection. Acosta-Marquez neither owned nor drove the Ford and was only an occasional passenger therein. He therefore lacked standing to contest the installation and use of the GPS device.

Even if Acosta-Marquez had standing, we would find no error. A person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from

one locale to another. When electronic monitoring does not invade upon a legitimate expectation of privacy, no search has occurred. When police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time.

In this case, there was nothing random or arbitrary about the installation and use of the device. The installation was non-invasive and occurred when the vehicle was parked in public. The police reasonably suspected that the vehicle was involved in interstate transport of drugs. The vehicle was not tracked while in private structures or on private lands.

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

*****

U.S. v. Swift, 623 F.3d 618 (8th Cir.)

The court held that Swift had no reasonable expectation of privacy while being detained in the interrogation room at the police station, and that he acknowledged the likelihood that the officers were monitoring him and his co-defendant.

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

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U.S. v. Pineda-Moreno, 591 F.3d 1212 (9th Cir.)

Agents installed mobile tracking devices on the underside of defendant's Jeep on seven different occasions. Each device was about the size of a bar of soap and had a magnet affixed to its side, allowing it to be attached to the underside of a car. On five of these occasions, the vehicle was located in a public place. On the other two occasions, between 4:00 and 5:00 a.m., agents attached the device while the Jeep was parked in defendant's driveway a few feet away from his trailer. The driveway leading up to the trailer was open, and there was no fence, gate, or "No Trespassing" sign.

The undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy.

Even assuming the Jeep was on the curtilage, it was parked in his driveway, which is only a semiprivate area. In order to establish a reasonable expectation of privacy in his driveway, defendant must detail the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it. Because defendant did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home. The time of day agents entered the driveway is immaterial.

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

*****

U.S. v. Borowy, 595 F.3d 1045 (9th Cir.)

Defendant purchased and installed a version of the file sharing software LimeWire that allows the user to prevent others from downloading or viewing the names of files on his computer. He attempted, but failed, to engage this feature. Even though his purchase and attempt show a subjective expectation of privacy, his files were still entirely exposed to public view. Anyone with access to LimeWire could download and view his files without hindrance. Defendant's subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access. The agent's access to defendant's files through LimeWire and the use of a keyword search to locate these files did not violate the Fourth Amendment.

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

*****

Searches

Delia v. City of Rialto, 621 F.3d 1069 (9th Cir.)

The city suspected that Delia was abusing his off-work status by engaging in a home improvement project. Surveillance revealed that Delia had purchased several rolls of fiberglass building insulation. Although Delia had been issued an off-duty work order, the doctor had not placed any activity restrictions on him.

During an internal investigation Delia refused to consent to a warrantless search of his home for the insulation. He also refused to go into his home and bring out the rolls of insulation for his supervisors' inspection when asked. Finally, Delia was ordered to go into his home and bring out the insulation for inspection, having been told that his failure to do so could result in his termination.

The court held that ordering Delia to go into his home and bring out the rolls of insulation for inspection was a warrantless compelled search that violated the *Fourth Amendment*. However his supervisors were entitled to qualified immunity since Delia had not demonstrated that they violated a clearly established right, such that the defendants would have known that their actions were unlawful.

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

*****

Curtilage / Searching Trash Containers

U.S. v. Simms, 626 F.3d 966 (7th Cir.)

An officer searched the defendant' wheeled garbage container and discovered evidence that was used to obtain a warrant to search his residence. At the time of the search, the garbage container was in the defendant's yard, behind a six-foot high solid fence, with a "No Trespassing" sign affixed to the gate. Although the gate was open when the officer entered and searched the garbage container, the accumulation of snow that morning prevented it from being closed.

Homeowners usually wheeled the garbage containers to the curb for collection; however, a city ordinance created "winter-rules", whereby, homeowners were required to leave the garbage containers on their property, so they would not hinder snow removal. The city informed homeowners that the sanitation workers would wheel the garbage containers from their property to the garbage trucks in the street, and required the homeowners to provide a clear path to all containers.

The court held that the officer's search of the garbage container was lawful since it was authorized by the appearance of consent to collect the garbage from a fenced yard under the "winter rules" with the gate open. Even if the container was on the curtilage, when the gate was open the garbage collectors could assume that the defendant wanted his garbage container emptied, and what the garbage collectors reasonably believed they could do, the officer could do as well.

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

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Seizures

Burg v. Gosselin, 591 F.3d 95 (2d Cir.)

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

The issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restrictions, does not constitute a *Fourth Amendment* seizure. This summons does no more than require appearance in court on a single occasion, and operates to effectuate due process.

The 1st, 3rd, 6th, 7th, 8th, 9th, 10th, and 11th circuits agree (cites omitted).

Editor's Note: In a previous 2nd Circuit case (cite omitted), a defendant accused of offenses that included two felonies was released post-arraignment, but was ordered not to leave the State of New York pending resolution of the charges against him, thereby restricting his constitutional right to travel outside of the state. He was obligated to appear in court in connection with those charges whenever his attendance was required, culminating in some eight appearances during the year in which his criminal proceeding was pending. The Court ruled that these restrictions imposed on the defendant constituted a "seizure" within the meaning of the *Fourth Amendment*.

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

*****

U.S. v. Allen, 618 F.3d 404 (3d Cir.)

The court held that Allen's detention did not violate the *Fourth Amendment*. The police executed a search warrant for evidence at a bar, located in a high crime area, where patrons were known to carry firearms, and where several firearms related crimes had recently been committed.

The officers detained Allen, who worked as a security guard at the bar. Allen voluntarily told the officers that he was in possession of a firearm. The officers then discovered that Allen was a convicted felon.

The officers were justified in taking reasonable action to secure the premises and to ensure their own safety and the efficacy of the search. The detention was just long enough for the police to ensure their safety and collect the evidence they sought.

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

*****

Portis v. City of Chicago, 613 F.3d 702 (7th Cir.)

The district court held that if it took police officers more than two hours to process and release individuals arrested for fine only offenses, then that detention was unreasonable and violated the *4th Amendment*.

The court rejected this bright-line rule, holding that "reasonableness" was the proper standard to apply since detainees' circumstances differ from each other. While an individual detainee may be able to show that he was detained for an unreasonable amount of time, he must do so without the benefit of a two-hour cap.

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

*****

U.S. v. Cha, 597 F.3d 995 (9th Cir.)

There are four factors used for determining the reasonableness of a seizure of a residence pending issuance of a search warrant: (1) whether there was probable cause to believe that the residence contained evidence of a crime or contraband; (2)whether there was good reason to fear that, unless restrained, the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether the police make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and (4) whether the police imposed the restraint for a limited period of time — in other words, was the time period no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.

Because the police refused to allow defendant into his home even with an escort to obtain his diabetes medicine and because there was a 26.5 hour delay between seizing the home and obtaining the warrant, the seizure violated the *Fourth Amendment*. The test asks only how long was reasonably *necessary* for police, acting with diligence, to obtain the warrant. Even absent evidence of bad faith, the delay was too long.

The evidence was not the "product" of the unconstitutional action because the unconstitutional seizure was not the "but for" cause of the discovery of the evidence. The evidence was seized pursuant to a search warrant issued on probable cause. Even so, the evidence is suppressed as a direct result of the unconstitutional seizure of the home pending the warrant.

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

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***U.S. v. Struckman*,** 603 F.3d 731 (9th Cir.)

The police officers' warrantless seizure of Struckman within his backyard and their entry into the yard to perfect his arrest violated the *Fourth Amendment*. Police officers must either obtain a warrant or consent to enter before arresting a person inside a home or its curtilage *or* make a reasonable attempt to ascertain that he is actually a trespasser before making the arrest. That easily could have been done here by asking Struckman to identify himself, a step one would ordinarily expect from the police where trespass is suspected.

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

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***U.S. v. Redlightning*,** 624 F.3d 1090 (9th Cir.)

The defendant argued that his confession resulted from his unlawful seizure by FBI agents, and that the agents did not promptly present him for arraignment after his arrest.

The court concluded that the encounter at the defendant's home did not amount to a seizure. The defendant voluntarily agreed to join the FBI agents at their office. The agents did not handcuff him and they did not brandish their firearms. One agent did not have handcuffs, which indicated the absence of intent to arrest. The minimal pat-down search to which the defendant was subjected before he got in the FBI car was routine before entering an FBI vehicle. The defendant's response to the agent's question about medication indicated that he believed he would be returning home later that evening.

Once at the FBI office, the court concluded that in the time leading up to the defendant's confession, a reasonable person in the defendant's shoes would have thought he could get up and leave, and decline to take part in further police questioning. The defendant's initial confession was not the result of an unlawful seizure.

After the defendant confessed at 12:22 p.m. on October 2, he was effectively under arrest. If the agents had stopped questioning him then, they may have been able to reach Seattle in time for the 2:30 p.m. arraignment. Because the agents were entitled to at least a six-hour safe harbor to continue questioning the defendant, they were under no obligation to stop questioning the defendant the moment he confessed, nor would it have been reasonable for them to do so.

The next reasonably available time to arraign the defendant was at 2:30 p.m. on October 3. While driving the defendant to his arraignment, the agents spoke to the AUSA who requested that they re-interview the defendant. The agents drove to a nearby FBI office and obtained a second confession from the defendant. The agents then resumed their trip and delivered the defendant to the district court well before the 2:30 p.m. arraignment. The court held that the defendant's second confession was admissible. Although the second confession occurred after the six-hour safe harbor after the defendant's arrest, it was made before the October 3 arraignment, and did not delay it.

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

*****

U.S. v. Prince, 593 F.2d 1178 (10th Cir.)

Even if it were a mistake of law for ATF agents to conclude that "AK-47 flats" i.e., pieces of flat metal containing holes and laser perforations, are "receivers" and therefore "firearms," such a mistake of law carries no legal consequence if it furnishes the basis for a consensual encounter, as opposed to a detention or arrest.

It is well established that consensual encounters between police officers and individuals implicate no *Fourth Amendment* interests. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual and request consent to search property belonging to the individual that is otherwise protected by the *Fourth Amendment*. The agents' purported mistake of law neither independently resulted in a *Fourth Amendment* violation nor otherwise "tainted" the entire investigation.

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

Editor's Note: The Court declined to decide whether the flats at issue are "receivers" and therefore "firearms."

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Armijo v. Peterson, 601 F.3d 1065 (10th Cir.)

Absent exigent circumstances and probable cause, or a warrant, officers may not enter a home and seize an individual for routine investigatory purposes, no matter whether the seizure is an investigatory stop or an arrest. In that sense, *Terry* stops have no place in the home. However, just as exigent circumstances permit a warrantless home entry, emergencies may justify a warrantless seizure in the home.

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

*****

U.S. v. Salazar, 609 F.3d 1059 (10th Cir.)

The state trooper's activation of his flashing lights constituted a show of authority, however; the defendant was not seized until he submitted to this show of authority by obeying the trooper's command to get out of the truck. At that point, based on the totality of the circumstances, the trooper had reasonable suspicion to detain the defendant.

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

*****

Brooks v. Gaenzle, 614 F.3d 1213 (10th Cir.)

Use of deadly force alone does not constitute a seizure. Clear restraint of freedom of movement must occur. The court held that Deputy Gaenzle's gunshot may have intentionally struck Brooks, but it clearly did not terminate his movement or otherwise cause the government to have physical control over him, therefore, he was not seized under the *Fourth Amendment*. Brooks

was able continue to climb over the fence and elude police for three days. Supreme Court cases determining what constitutes a seizure do not support Brooks' contention that use of deadly force against him by itself is enough to constitute a "seizure."

The 6th, 7th, and 9th circuits agree.

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

*****

Detaining Packages

U.S. v. Lozano, 623 F.3d 1055 (9th Cir.)

Postal workers may detain a package to conduct an investigation, if based on the totality of the circumstances, they have a reasonable and articulable suspicion that it contains contraband or evidence of illegal activity. Once the package is detained, the length of that detention must be reasonable.

The court held that the Postal Inspector had reasonable suspicion to detain the package. The postmaster told him that the defendant had asked him whether mail could be searched for drugs. Additionally, the package listed a fictitious sender and addressee, and had an incomplete return address. The package was shipped with a delivery confirmation, had a handwritten label and was heavily taped.

The court further held that the length of time between the initial seizure and the development of probable cause was reasonable. This court has previously upheld as reasonable a five-day delay arising because of the difficulty of travel for canines in Alaska. Here, the delay was less than one day, and was caused by the difficulty of canine travel in Alaska.

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

*****

Voluntary Contacts

U.S. v. Lewis, 606 F.3d 193 (4th Cir.)

The police may approach an individual on a public street and ask questions without implicating the *Fourth Amendment's* protections. The officers were thus entitled to approach Lewis, who was sitting in his parked car, late at night. As they approached the vehicle, one of the officers related to Officer Mills that there was an open beer bottle in the vehicle. Mills then approached the driver-side window and asked Lewis for identification. When Lewis rolled down his window to comply, Mills smelled the odor of marijuana emanating from the vehicle. At that point, the officers possessed probable cause to search the vehicle, and they were entitled to order Lewis out of the vehicle while their search was accomplished.

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

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U.S. v. Perdoma, 621 F.3d 745 (8th Cir.)

A plainclothes officer approached Perdoma at a bus station and identified himself as a police officer. The officer told Perdoma that he was not under arrest and asked him if he would answer a few questions. During their brief conversation the officer smelled the odor of marijuana emanating from Perdoma. The officer asked Perdoma for identification, who reached for his wallet, then turned and ran from the officer. After a brief chase, another officer on duty at the bus station arrested Perdoma. The officers searched a bag that Perdoma had been carrying and discovered one pound of methamphetamine.

The court held that the officer's initial encounter with Perdoma was consensual noting that nothing about this initial encounter would have caused a reasonable person in Perdoma's situation to believe that he was not free to disregard the officer's questions and walk away. Once the officer detected the odor of marijuana emanating from Perdoma he had probable cause to arrest him for marijuana possession.

The court further held that the search of Perdoma's bag was a valid search incident to his arrest. Perdoma argued that after he was restrained, and the bag was taken from him, it was "beyond his reach," and therefore could not be searched incident to his arrest. The court stated that although an officer may have exclusive control of a seized item, it does not mean that it has been removed from the arrestee's area of immediate control. In this case the search of the bag occurred in close proximity to where Perdoma was restrained, and he had already run from an officer once. Under these circumstances the bag was within "the area into which the arrestee might reach in order to grab a weapon or evidentiary items."

Since the search of a bag in a bus terminal did not involve "circumstances unique to the vehicle context," the Supreme Court's holding in *Gant* that the police may search an arrestee's vehicle for "evidence relevant to the crime of arrest" does not apply to the search of Perdoma's bag.

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

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U.S. v. Villa-Gonzalez, 623 F.3d 526 (8th Cir.)

Three officers, suspecting that the defendant was a drug dealer, went to his home and conducted a knock-and-talk. After receiving the defendant's state identification card, the narcotics officer called an ICE immigration officer and requested an immigration check. The ICE officer asked to speak to the defendant over the telephone. The narcotics officer handed his cell phone to the defendant and told him talk to the ICE officer. The defendant told the ICE officer that he had entered the United States on a visitor's visa. After he was unable to confirm this through a records check, the immigration officer told the narcotics officer to arrest the defendant as a suspected illegal alien. The police arrested two other individuals who admitted, over the phone to the ICE officer, that they were in the United States illegally. After his arrest, the defendant admitted to the ICE officer that he had entered the United States using fraudulent documents, and that the documents were in his home. The government obtained a search warrant for the fraudulent documents, and during the search of the defendant's home found methamphetamine, scales, handguns and $32,000 in currency.

The court held that the initial encounter between the narcotics officers and the defendant was consensual. However, the consensual encounter became a *Fourth Amendment* seizure after the officer told the defendant he believed he was a drug dealer, and because there was no evidence that the officer returned the defendant's identification before the defendant spoke to the ICE officer over the telephone. A reasonable person in the defendant's circumstances would not have felt free to terminate the police encounter and walk away. Since the officers had seized the defendant without reasonable suspicion that he was involved in criminal activity, it was an illegal seizure.

The court held that the physical evidence discovered during the search of the defendant's home was properly suppressed as "fruit of the poisonous tree." When the defendant spoke to the ICE officer over the phone, about the details of his immigration to the United States, he was illegally seized. The phone conversation supplied the only basis to arrest the defendant, and the arrest led directly to the defendant's subsequent admission that he had entered the United States illegally using fraudulent documents. The warrant to search the defendant's home for the fraudulent documents was supported by the defendant's admissions to the ICE officer.

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

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Terry Stops / Reasonable Suspicion

U.S. v. Brown, 621 F.3d 48 (1st Cir.)

Two Boston Police Department officers received information from their supervisor that he had seen the front-seat passenger of a black Ford Taurus smoking a marijuana blunt. A short time later, the officers spotted the Taurus and followed it. When the Taurus stopped at a red light, the officers got out of their unmarked vehicle and approached the driver and passenger sides, displaying their badges. As the officers approached, they smelled the strong odor of burnt marijuana, and when the driver rolled down the window, the odor became stronger. One officer opened the passenger side door, removed the defendant from the vehicle, and took a burning marijuana cigarette from his hand. Additional marijuana and crack cocaine was located on the defendant.

The court held that the supervisor's observations regarding the front-seat passenger that he communicated to the other officers established reasonable suspicion for the stop. Because the officers were acting with reasonable suspicion, even if their initial approach to the Taurus constituted a "seizure" for purposes of the *Fourth Amendment*, it was constitutionally permissible.

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

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U.S. v. Mohamed, 630 F.3d 1 (1st Cir.)

While on patrol, two officers heard gunshots and saw someone running down the street. One officer thought the suspect was wearing a t-shirt, and the other officer thought the suspect was wearing a hooded top. After a brief chase, witnesses pointed out the suspect's hiding place to the

officers. With their guns drawn, the officers removed Mohamed from underneath the back deck of a house. He was wearing a hooded sweatshirt, sweating profusely and he was out of breath. An officer handcuffed Mohamed, frisked him, and found a pistol in his pants pocket.

The court held the officers had reasonable suspicion to believe Mohamed was the fleeing suspect, and that they had conducted a valid *Terry* stop. Although one officer believed the fleeing suspect was wearing a t-shirt and shorts, and another officer saw that the suspect was wearing a hooded top, other factors supported Mohamed's detention. Witnesses pointed the officers to Mohamed's hiding place. When the officers discovered Mohamed, he was peeking out from under a deck behind a house, and he was panting and sweaty, which was consistent with someone who had just run away from the police.

The court held that the officer's display of firearms and use of handcuffs and did not transform the *Terry* stop into a de facto arrest without probable cause. The officers heard gunshots, saw someone running away, and witnesses pointed them to Mohamed's hiding place. Since it was likely that the shooter or someone involved in the shooting was armed, it was reasonable for the officers to approach Mohamed with their guns drawn. Although handcuffs are usually associated with an arrest, the use of handcuffs during a *Terry* stop does not convert the stop into an arrest as long as the officers reasonably believed the handcuffs were necessary to protect themselves or others. The officers' decision to handcuff Mohamed before conducting their frisk was justified since they reasonably believed that he was the shooter or somehow involved in the shooting, which meant it was likely he was armed.

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

*****

U.S. v. Ramos, 629 F.3d 60 (1st Cir.)

When the officer opened the door of the parked van, the occupants were seized under the *Fourth Amendment*. The court held that the officers had reasonable suspicion to justify the seizure because: (1) the van was parked in the farthest corner of the bus and rail station parking lot, (2) individuals usually parked their cars and immediately boarded the bus or subway, here the occupants remained in the van for at least twenty minutes after the police observed them, (3) transit rail stations were considered likely targets for terrorist attacks after the recent Madrid bombings, (4) the van had tinted windows and a paper Texas license plate over the regular plate, (5) larger vehicles could hold more explosives than smaller vehicles, (6) the occupants appeared to be of Middle Eastern descent.

The court held there was nothing that prohibited the officers from considering that at least two of the van's occupants appeared to be Middle Eastern. Groups claiming to be affiliated with Middle Eastern terrorist groups had made specific threats to the United States weeks earlier, and metropolitan transit services were considered terrorist targets. The officers did not base their reasonable suspicion solely on Ramos' appearance. Under the totality of the circumstances, the officers had reasonable suspicion criminal activity was afoot.

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

*****

U.S. v. Hernandez-Mendez, 626 F.3d 203 (4th Cir.)

Officers conducted surveillance on a school the day after a gang-related stabbing. They were trying to prevent retaliation against gang members who attended the school. Just before the end of the school day, the officers saw the defendant and six other individuals standing across the street from the school having a discussion. When the officers approached, the group split up. One individual ran away while the other six walked away. The officers detained and frisked everyone for weapons.

The court held that the officer's observations, knowledge, and experience in responding to gang-related incidents in the area provided reasonable suspicion to detain the defendant. The officer could reasonably believe the group, that included the defendant, was planning to retaliate against rival gang members leaving the school.

Additionally, the facts that justified the defendant's detention, and those that emerged after she was detained, provided reasonable suspicion to justify a frisk. Based on the clothes she was wearing, it was reasonable for the officer to frisk the defendant's purse as well as her person. When the officer touched the purse, he felt an object that he recognized to be a firearm, which then justified looking inside the purse and seizing the weapon.

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

*****

U.S. v. Gomez, 623 F.3d 265 (5th Cir.)

The factors that must be considered in deciding whether a tip provides reasonable suspicion to support a traffic stop include: (1) the credibility and reliability of the informant; (2) the specificity of the information contained in the tip or report; (3) the extent to which the information in the tip or report can be verified by officers in the field; and (4) whether the tip or report concerns active or recent activity.

The court held that the call to 911 readily satisfied three of the four factors. The caller provided and extraordinary amount of detail regarding the suspect brandishing a pistol, to include: the color of the weapon, the location of the crime, details about the suspect's race, age and weight, the make, model, and license plate number of the suspect's vehicle, and the race and gender of the other passengers in the vehicle. Officers were subsequently able to verify a number of these claims, to include: all of the vehicle information, the race and gender of the other passengers, and to an extent, the location, as the car was stopped heading away from the scene of the crime a few minutes after the 911 call.

As to the remaining factor, the caller gave his name, phone number and address to the 911 operator. Although the address and phone number led to a pay phone, the court held that the officers reasonably believed that they were acting on a credible and reliable tip from a verifiable source. The court noted that even if the caller were to be considered an "anonymous tipster" the officers still had reasonable suspicion to support the traffic stop based on the strength of the other three factors.

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

*****

U.S. v. Rains, 615 F.3d 589 (6th Cir.)

An employee at a veterinary clinic reported to the police that a woman had just purchased three bottles of highly concentrated iodine, a precursor ingredient for methamphetamine. The same woman had purchased eleven bottles of the same iodine in the past nine months. Based on previous conversations with staff at the veterinary clinic, the police were aware that this clinic typically sold only three to six bottles of this particular iodine per year. Previous tips from the clinic had already resulted in the police shutting down a different methamphetamine manufacturing operation.

An officer conducted a traffic stop on the vehicle. During the stop the officer noticed a syringe and arrested the occupants for possession of drug paraphernalia. A further search, conducted incident to the arrest, yielded the three bottles of iodine purchased from the clinic, plastic tubing, two drug pipes, and receipts for muriatic acid and hydrogen peroxide, which are also used in the manufacture of methamphetamine.

The court held that the purchase of the three bottles of iodine, when viewed within the "totality of the circumstances," including the ongoing and previously reliable communication between the veterinary clinic and the police, provided reasonable suspicion sufficient to justify the stop of the defendant's vehicle.

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

*****

U.S. v. Johnson, 620 F.3d 685 (6th Cir.)

The court reversed the defendant's conviction holding that the officers did not have reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime when they stopped him; therefore any evidence seized as a result of the stop should have been excluded.

Officers responded to a 4:00 a.m. 911 calls stating that "some people" connected with a blue Cadillac were "walking around" outside the caller's apartment. The officers saw the defendant carrying a bag and walking at a normal pace from a grassy area next to the caller's residence toward a white car on the street next to the residence. The officers ordered the defendant to stop but he did not respond, instead, he kept walking away from them. The defendant walked up to the white car, opened the passenger side door, threw the bag inside and stood outside the car. The defendant only complied with commands to raise his hands after the officers drew their weapons. The officers patted the defendant down, found a loaded gun and arrested him. After further searching the defendant the officers found crack cocaine and prescription pills.

Although the defendant was in a "high drug-trafficking area" and it was 4:00 a.m., the officer testified that he observed no conduct from the defendant consistent with drug activity. The court found that the 911 call was too vague and lacked any indicia of reliability. The caller only stated that people were walking around her home, not that she observed any incriminating behavior or that she suspected them of any criminal conduct in particular. The court further found that when

the officers first observed the defendant he was walking toward the white car and he did not change his course or otherwise react suspiciously to their presence.

Even though the officers stopped an individual who turned out to be engaged in criminal conduct, the totality of the circumstances did not provide a "particularized and objective basis for suspecting the defendant of criminal activity." The *Fourth Amendment* does not allow a detention based on an officer's "gut-feeling" that a suspect is up to no good.

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

*****

U.S. v. Howard, 621 F.3d 433 (6th Cir.)

The court held that even though the defendant's arrest was premature, the officers had reasonable suspicion to detain him. There was, at most, a ten minute wait for the officer to retrieve the drug-dog. The dog alerted on Howard's vehicle a few minutes after arriving. The length of this detention was reasonable.

The drug-dog's alert established probable cause to search Howard's vehicle. Because the search of the vehicle was supported by probable cause, independent of Howard's unlawful arrest, the cash inside the vehicle was properly seized.

The search warrant obtained by the police described Howard's property with sufficient particularity. Minor technical inaccuracies in the description will not render a search warrant unconstitutional. While the warrant described Howard's property as a single parcel, the property was actually made up of two parcels with two separate street addresses. The mobile home searched by the police was technically on the second parcel, which was inaccurate, but it was described with reasonable accuracy in the search warrant.

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

*****

U.S. v. Gross, 624 F.3d 309 (6th Cir.)

During a *Terry* stop, the officer discovered that the defendant had an outstanding warrant and arrested him. The officer patted down the defendant but did not conduct a search incident to arrest. At the jail, officers searched the defendant and passed him through a metal detector. The metal detector went off, but despite repeated efforts to locate the metal object, and repeated passes through the machine, the officers were unable to locate the source of the problem. When the officers brought the defendant into the holding area, he immediately asked to use the restroom. A short time later, an officer discovered a .380 caliber firearm near the toilet the defendant has used.

Five days later, while the defendant was still in custody, officers obtained a search warrant to take oral swabs from him. A DNA analysis revealed that genetic material taken from the firearm and its ammunition matched the defendant's DNA.

Two months later, while he was still in custody, the defendant contacted an ATF agent he knew, and arranged a meeting. The defendant waived his *Miranda* rights and admitted to bringing the firearm into the restroom.

The court held that when the officer parked his marked police car directly behind the car in which the defendant was sitting, thereby blocking it in the parking space, he had seized the defendant under *Terry v Ohio.* Since the officer was unable to articulate reasonable suspicion for the *Terry* stop, his actions constituted and unlawful seizure of the defendant.

Generally, evidence discovered as the result of an illegal stop is tainted as fruit of the poisonous tree and must be suppressed. Evidence may only be admitted where there is sufficient attenuation, separate and apart from the discovery of an outstanding arrest warrant for the defendant, to dissipate the taint.

As to the firearm, the court held there were no intervening circumstances that purged the taint of the illegal stop, and that the firearm must be suppressed as fruit of the poisonous tree. Without the illegal stop, the officer would not have learned of the outstanding arrest warrant; he would not have arrested the defendant, and the firearm would not have been discovered in the restroom a short time later.

However, the court held that the DNA swabs and the defendant's confession were admissible because intervening circumstances had sufficiently attenuated them from the unlawful arrest, to the degree that any taint had dissipated. The police obtained the DNA evidence several days after arrest, pursuant to a search warrant. The defendant's confession occurred after he voluntarily gave information to the ATF agent, two months after his arrest, and after he had waived his *Miranda* rights.

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

*****

U.S. v. Johnson, 627 F.3d 578 (6th Cir.)

An undercover officer saw Johnson engage in a hand-to-hand transaction where he exchanged cash for several pieces of a small off-white substance. Johnson got into a car that drove away. The undercover officer relayed this information to his dispatcher, and during a traffic stop conducted by a different officer, Johnson got out of the car and ran. The officer tased Johnson, and as he fell to the ground, the officer saw a gun in his waistband. The officer arrested Johnson for unlawful possession of a firearm, and searched the front passenger area of the vehicle where Johnson had been sitting. The officer recovered crack and powder cocaine from the pocket of a sweatshirt.

The court held that the undercover officer had reasonable suspicion to justify a *Terry* stop on Johnson. The officer who initiated the traffic stop had reasonable suspicion as well, since reasonable suspicion may be based upon information provided by other officers.

Citing *Gant*, the court held that even though the officer had arrested and secured Johnson outside of the car, the search of the passenger area where he had been sitting was justified. An officer may search a vehicle incident to arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. Since the officer arrested Johnson for unlawful

possession of a firearm, he could have reasonably believed that ammunition or additional firearms were in the car or in containers in the car, especially in the passenger area where Johnson had been sitting.

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

*****

U.S. v. Carlisle, 614 F.3d 750 (7th Cir.)

The court held that when an individual flees from an area where a narcotics sweep is taking place it gives rise to reasonable suspicion to justify a *Terry* stop. Here it was reasonable for the officers to stop Carlisle and detain him to ask questions to determine why he was leaving the house with a backpack during a drug sweep. While handcuffing is not a normal part of a *Terry* stop, it does not automatically turn a *Terry* stop into an unlawful arrest, and the officers' actions in detaining Carlisle did not violate his *Fourth Amendment* rights.

Carlisle challenged the warrantless search of the backpack. The court held that Carlisle exhibited no subjective expectation of privacy in the backpack since he disclaimed ownership and knowledge of its contents. Therefore, he did not have a reasonable expectation of privacy in the backpack sufficient to allow him to challenge the search.

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

*****

U.S. v. Manes, 603 F.3d 451 (8th Cir.)

The *Fourth Amendment* is not violated when a law enforcement officer briefly detains an individual to investigate circumstances which gave rise to a reasonable suspicion that criminal activity was underway. A confidential informant's tip may support a reasonable suspicion if it has sufficient indicia of reliability, such as the informant's track record as a reliable source or independent corroboration of the tip. When an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. The reasonableness of such an inference is bolstered if the tip is corroborated not only by matching an identity or description, but also by accurately describing a suspect's future behavior.

Based on the informant's track record and corroboration of significant aspects of the tip, the officers reasonably inferred that the two white males traveling in the maroon truck were attempting to engage in an illicit drug transaction.

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

*****

U.S. v. Horton, 611 F.3d 936 (8th Cir.)

The court held that the officers had reasonable articulable suspicion to stop, then frisk Horton, and that they did not exceed the permissible scope of the stop.

Before initiating the stop the officers had received information from the cab driver regarding Horton's odd behavior and the possibility that he was carrying a knife. Horton matched the physical description, and the officers witnessed Horton flight upon seeing them.

The officers' detention of Horton was reasonable. During the initial stop the officers discovered that Horton was traveling under a different name than he originally gave them, he gave the officers multiple dates of birth, and told inconsistent stories as to why he was in town. Traveling under an assumed name and failing to provide identification are factors that, when taken in combination with other circumstances, can provide the necessary suspicion to expand the investigation.

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

*****

U.S. v. Alston, 626 F.3d 397 (8th Cir.)

Officers arrested Oteri for a parole violation near a hotel. The officers found drugs on him, and Oteri admitted to being involved in drugs, with a person he knew as "DA", in room 416. Based on prior experience, the officers believed that "DA" was the defendant. Officers also discovered that another person involved in a prior drug investigation was renting room 416.

Alston was on parole and a condition of his parole prohibited him from associating with persons engaged in criminal activity. When the officers saw Alston come out of the hotel they detained him. The officers searched room 416 and found cocaine, which Alston admitted belonged to him.

The court held that the police had reasonable suspicion to conduct a *Terry* stop on Alston for violating a condition of his parole. Based on Oteri's statements, and seeing Alston leave the hotel minutes later, the officers had reasonable suspicion to believe Alston was associating with active drug dealers in violation of his parole.

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

*****

U.S. v. Williams, 619 F.3d 1269 (11th Cir.)

Based on the totality of the circumstances the officer had reasonable suspicion to believe that the occupants of the car had been involved in criminal activity, therefore he was justified in stopping the car in which the defendant was riding. When the officer saw a lone vehicle hurriedly pulling out of a high-crime housing project in the middle of the night within seconds of a gunshot, it was reasonable of him to suspect that the cars' occupants might have committed a crime.

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

*****

***Terry* Frisks**

U.S. v. Gatlin, 2010 U.S. App. LEXIS 14506 (3d Cir. July 15, 2010)

When a reliable tip is received that a person is carrying a concealed firearm, and that conduct is presumed to be a crime, an investigatory stop is within the bounds of *Terry*. Because the officers believed the defendant had a firearm they were permitted by *Terry* to conduct a limited search for weapons. (In Delaware it is presumed that persons carrying concealed handguns are violating the law. While it is possible to have a concealed handgun license, the burden is upon defendant to establish that he had a license to carry the concealed weapon).

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

*****

U.S. v. Hernandez-Mendez, 626 F.3d 203 (4th Cir.)

The court held that the officer's observations, knowledge, and experience in responding to gang-related incidents in the area provided reasonable suspicion to detain the defendant. The officer could reasonably believe the group, that included the defendant, was planning to retaliate against rival gang members leaving the school.

Additionally, the facts that justified the defendant's detention, and those that emerged after she was detained, provided reasonable suspicion to justify a frisk. Based on the clothes she was wearing, it was reasonable for the officer to frisk the defendant's purse as well as her person. When the officer touched the purse, he felt an object that he recognized to be a firearm, which then justified looking inside the purse and seizing the weapon.

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

*****

U.S. v. Robinson, 615 F.3d 804 (7th Cir.)

Since the officer was not satisfied with his initial effort to pat-down Robinson, he was entitled to return to finish the job within the bounds outlined in *Terry*. Just because he indicated after the fact that his initial impression was that the hard object he felt for an instant was not a weapon, objectively speaking, a hard object might be harmful, so the officer was entitled to assure himself that his first impression was correct.

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

*****

U.S. v. Muhammad, 604 F.3d 1022 (8th Cir.)

Under *Terry*, a law enforcement officer may conduct a warrantless pat-down search for the protection of himself or others nearby in order to discover weapons if he has a reasonable, articulable suspicion that the person may be armed and presently dangerous. An officer may, however, seize other evidence discovered during a pat-down search for weapons as long as the search stays within the bounds marked by *Terry*. Muhammad contends that because Agent

McCrary knew that the object in Muhammad's back pocket was not a weapon or an object concealing a weapon, Agent McCrary could not lawfully remove the wallet from Muhammad's pocket. The record does not support this assertion. Agent McCrary testified that during a pat-down search it is often difficult to tell whether an object is a weapon or might conceal a weapon merely by touching the object. He stated that officers must generally "pull the suspicious object out and actually inspect it" to determine whether the object presents a safety concern. He further testified that he was not certain what the hard four-inch long and three-inch wide object in Muhammad's pocket was, but he said that the item "felt like an object that could conceal a weapon." This pat-down search stayed within the bounds of *Terry*, and the *Fourth Amendment* permitted Agent McCrary to remove the object from Muhammad's pocket.

We must next decide whether Agent McCrary lawfully seized the cash protruding from the wallet. The plain-view exception allows officers to seize contraband or other evidence of a crime in limited situations. Under the plain-view exception, officers may seize an object without a warrant if they are lawfully in a position from which they view the object, the incriminating character of the object is immediately apparent, and the officers have a lawful right of access to the object.

We conclude that Agent McCrary lawfully removed the wallet from Muhammad's pocket and Muhammad does not dispute that the cash was visible without opening the wallet; therefore the first and third requirements of the plain-view exception are met.

While cash is not inherently incriminating, under these circumstances, Agent McCrary had probable cause to believe that the cash protruding from the wallet was evidence of the robbery. The plain-view exception permitted Agent McCrary to seize the cash, which then allowed him to confirm that five of the $20 bills were bait bills taken during the robbery.

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

*****

U.S. v. Jones, 606 F.3d 964 (8th Cir.)

The court held that the officer lacked the requisite reasonable suspicion that the defendant was carrying a concealed firearm in his hoodie pocket, as opposed to some other object, or no object at all. The critical question is whether the officer had a "particularized and objective basis" for his suspicion.

The court commented:

> We find it remarkable that nowhere in the district court record did the government identify what criminal activity the officer suspected. Rather, the government leaped to the officer safety rationale for a protective frisk for weapons, ignoring the mandate in *Terry* that there must be reasonable suspicion of on-going criminal activity justifying a *stop* before a coercive *frisk* may be constitutionally employed.
>
> Being stopped and frisked on the street is a substantial invasion of an individual's interest to be free from arbitrary interference by

> police, and the police have "less invasive options" for "identifying the perpetrators of crime. Most obviously, the officer could have initiated a consensual encounter, for which no articulable suspicion is required, and which may both crystallize previously unconfirmed suspicions of criminal activity and give rise to legitimate concerns for officer safety.

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

*****

U.S. v. Salamasina, 615 F.3d 925 (8th Cir.)

Federal agents obtained an arrest warrant for Salamasina for a variety of drug offenses. Officers conducted surveillance on Salamasina's house and arrested him as he pulled into his driveway in his vehicle. Salamasina's fiancée, Lata, and their two minor children were also in the vehicle. The officers took Salamasina into custody and moved him away from his vehicle. An officer directed Lata leave the garage door open, after she stated that she was going to close it, and allowed her to re-enter the vehicle from the passenger side to tend to the children who were in the back seat. During this time Salamasina shouted to Lata to not let the officers into the house and, over orders from the officers not to communicate with one another, Salamasina and Lata shouted to one another in a foreign language that the officers did not understand.

An officer conducted a warrantless search of the vehicle looking for weapons. As the result of the search the officer found a dietary supplement that is commonly used as a cutting agent for cocaine as well as acetone, which is used in conjunction with the cutting agent. Based on these findings and on other information from the investigation the officers obtained a search warrant for Salamasina's house. The search yielded cocaine, drug paraphernalia, ammunition and cash.

The court stated that even if *Gant's* search incident to arrest exception did not apply, the search of the vehicle would have been warranted under *Michigan v. Long* which held that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

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

*****

U.S. v. Crippen, 627 F.3d 1056 (8th Cir.)

During a traffic stop, the officer saw the curved top of a white coffee filter sticking out of Crippen's coat pocket. Based on his training and experience the officer knew coffee filters were often used in manufacturing methamphetamine, and he remembered Crippen from a previous drug arrest. After conducting a pat-down search for weapons, the officer seized the coffee filter. Crippen, who had been a passenger, then admitted that there were drugs in the vehicle.

Crippen argued that the pat-down, which resulted in the seizure of the coffee filter, was illegal because the officer was not motivated by a fear that he was armed and dangerous. The court held that a suspicion on the part of police that a person is involved in a drug transaction supports a reasonable belief that the person may be armed and dangerous because weapons and violence are frequently associated with drug transactions. The court found that because the officer remembered Crippen from a previous drug arrest, and knew coffee filters were used as part of the methamphetamine manufacturing process, he suspected Crippen was involved in a drug transaction. Therefore, the officer had reasonable suspicion Crippen was armed and dangerous, and the pat-down search and seizure of the coffee filter was valid.

The court held that Crippen did not have standing to challenge the search of the vehicle. As a mere passenger in a vehicle, Crippen had no legitimate expectation of privacy under the seats where the officer found the drugs, therefore, Crippen could not challenge the search of the vehicle. Although a passenger is seized for *Fourth Amendment* purposes during a traffic stop, and may challenge the legality of the stop, Crippen challenged the search of the vehicle, and not the legality of the traffic stop.

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

*****

U.S. v. Burkett, 612 F.3d 1103 (9th Cir.)

The court held that the record developed during the suppression hearing amply supported a conclusion that the "stop and frisk" in this case was reasonable. In the totality of the circumstances, the highly experienced State Trooper had good reason to suspect that Burkett was armed and dangerous, and that a pat-down search was necessary to ensure the officer's safety.

Objectively viewed, Burkett's furtive movements during the time the driver was refusing to comply with the order to stop her vehicle, his evasive and deceptive responses when asked what he was doing at that time, the peculiar way he opened the door with his left hand, and the way he kept his right hand near and reached for his right coat pocket when he got out of the vehicle, would justify an experienced law enforcement officer's belief that Burkett was armed and dangerous.

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

*****

U.S. v. Bailey, 622 F.3d 1 (D.C. Cir.)

An undercover officer agreed to purchase cocaine from Webb, a drug dealer from whom he had purchased cocaine in the past. While he was waiting for a phone call, telling him to enter the alley where the sale would occur, the officer saw Bailey and Webb speaking in front of Webb's restaurant. After a few minutes, Bailey went and waited by his truck, and Webb went into his restaurant. Webb later came out of the restaurant, and he and Bailey walked into the alley. A short time later, a car driven by Webb's supplier entered the alley. Bailey walked out of the alley, got into his truck and drove it back into the alley, stopping next to the car driven by Webb's supplier. Two minutes later Webb called the officer and told him to come into the alley. When the officer drove into the alley, the supplier's car was there but Bailey's truck was not. No

police officer witnessed Bailey's actions in the alley. A uniformed police officer performed a traffic stop on Bailey's truck and seized one kilogram of cocaine in plain sight on the passenger seat.

The court held that there was reasonable suspicion to stop Bailey, concluding that evidence clearly supported articulable suspicion to believe that he was involved in the same type of activity that the undercover officer was involved in, considering the consistency of what was taking place.

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

*****

Traffic Stops / Detaining Vehicles / Occupants

U.S. v. Fernandez, 600 F.3d 56 (1st Cir.)

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

When police lawfully stop a vehicle, so long as the request does not measurably extend the duration of the stop, police do not need an independent justification to ask a passenger for identification.

The 4th, 9th, and 10th circuits agree (cites omitted).

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

*****

U.S. v. Harrison, 606 F.3d 42 (2d Cir.)

Officer Krywalski's questions to Harrison, a passenger in the vehicle, which lasted five to six minutes, did not measurably extend the duration of the lawful traffic stop, so as to render it unconstitutional.

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

*****

U.S. v. Sed, 601 F.3d 224 (3d Cir.)

Arrest of defendant in Ohio by Pennsylvania police officers was not unreasonable under the Fourth Amendment. The stop of defendant's car just before it entered Pennsylvania from Ohio was nothing more than an honest mistake and a *de minimis* one at that. See *Virginia v. Moore*, 128 S. Ct. 1598 (2008)

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

*****

U.S. v. Mason, 628 F.3d 123 (4th Cir.)

The court held that the officer had reasonable suspicion of drug activity when he finished processing the warning ticket for the window tint violation, which justified extending the traffic stop, because: (1) when the officer activated his blue lights to pull Mason over, Mason did not promptly pull over, (2) when Mason rolled down his window the officer smelled the strong odor of air fresheners, beyond what he had normally experienced from their ordinary use, (3) the officer saw a single key on Mason's key ring, combined with the fact he was coming from Atlanta on a known drug route, (4) Mason was sweating and seemed unusually nervous when talking to the officer, (5) Mason and his passenger gave conflicting stories about the purpose of their travel and (6) a newspaper on the backseat was labeled Radisson Hotel, yet Mason told the officer that he had stayed at a relative's house.

The court noted an officer may ask the driver and passenger questions unrelated to the purpose of the original traffic stop, without reasonable suspicion, as long as the questioning occurs within the time frame reasonably necessary to conduct the stop.
The court also held that the drug dog alerted to the drugs on the outside of the car before jumping into the vehicle on its own, through an open window, without any command from the officers. The drug dog's positive indication by entry into the car provided probable cause to justify the warrantless search of the car.

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

*****

U.S. v. Hampton, 628 F.3d 654 (4th Cir.)

The court held that the officer lawfully ordered Hampton to exit the vehicle during the traffic stop. When conducting lawful traffic stops, officers may order any passenger to exit the vehicle. Officers may do so as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk.

After Hampton exited the vehicle and shoved the officer in the chest in an effort to flee, the officers had probable cause to arrest him for simple assault and conduct a search of his person incident to that arrest.

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

*****

U.S. v. Pack, 612 F.3d 341 (5th Cir.)

A detention during a valid traffic stop does not violate the *Fourth Amendment* where it exceeds the amount of time needed to investigate the traffic infraction that initially caused the stop as long as:

The facts that emerge during the officer's investigation of the original offense create reasonable suspicion that additional criminal activity warranting additional present investigation is afoot,
The length of the entire detention is reasonable in light of the suspicious facts, and
The scope of the additional investigation is reasonable in light of the suspicious facts.

In this case, following a valid traffic stop for speeding, reasonable suspicion arose after the driver and passenger gave conflicting stories as to their travel history, the passenger appeared to be extremely nervous, and the pair was travelling on a drug trafficking corridor.

The court held that the officer's suspicion was entitled to significant weight because he had been a law enforcement officer for seventeen years, the length of the entire detention was reasonable in light of the suspicious acts observed, and the scope of the investigation conducted during the detention was reasonable. (The officer requested a canine unit, which responded, and the dog alerted to the trunk of the vehicle. A search of the trunk revealed 17.91 pounds of marijuana and a pistol).

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

*****

U.S. v. Everett, 601 F.3d 484 (6th Cir.)

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

There is no categorical ban on suspicionless, unrelated questioning that may minimally prolong a traffic stop.

The 1st, 2nd, 9th, 8th, and 10th circuits (cites omitted).

The proper inquiry is whether the totality of the circumstances surrounding the stop indicates that the duration of *the stop as a whole* – including any prolongation due to suspicionless, unrelated questioning – was reasonable. The overarching consideration is the officer's diligence in ascertaining whether the suspected traffic violation occurred, and, if necessary, issuing a ticket. The *subject* (that is to say, some questions are "farther afield" than others) and the quantity of the suspicionless, unrelated questions are part of the "totality of the circumstances" of the stop. Some amount of questioning relevant only to ferreting out unrelated criminal conduct is permissible. A lack of diligence may be shown when questions unrelated to the traffic violation constituted the bulk of the interaction between the trooper and the motorist.

Because the safety of the officer is a legitimate and weighty interest, the officers conducting a traffic stop may inquire about dangerous weapons.

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

*****

U.S. v Hughes, 606 F.3d 311 (6th Cir.)

For a traffic stop to be permissible under the *Fourth Amendment*, a police officer must know or reasonably believe that the driver of the car is doing something that represents a violation of law at the time of the stop. An officer may not use after-the-fact rationalizations to justify a traffic stop where, at the time of the stop, the officer was not aware that a defendant's actions were illegal.

The Sixth Circuit has developed two separate tests to determine the constitutional validity of vehicle stops. An officer must have probable cause to make a stop for a civil infraction, and

reasonable suspicion of an ongoing crime to make a stop for a criminal violation. In this case, the government raises only either civil infractions or misdemeanors that were clearly ***completed*** by the time the officer actually stopped Hughes. In order for the stop to have been proper the officer needed to have probable cause rather than reasonable suspicion that Hughes had violated a traffic ordinance at the time of the stop.

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

*****

U.S. v. Rains, 615 F.3d 589 (6th Cir.)

An employee at a veterinary clinic reported to the police that a woman had just purchased three bottles of highly concentrated iodine, a precursor ingredient for methamphetamine. The same woman had purchased eleven bottles of the same iodine in the past nine months. Based on previous conversations with staff at the veterinary clinic, the police were aware that this clinic typically sold only three to six bottles of this particular iodine per year. Previous tips from the clinic had already resulted in the police shutting down a different methamphetamine manufacturing operation.

An officer conducted a traffic stop on the vehicle. During the stop the officer noticed a syringe and arrested the occupants for possession of drug paraphernalia. A further search, conducted incident to the arrest, yielded the three bottles of iodine purchased from the clinic, plastic tubing, two drug pipes, and receipts for muriatic acid and hydrogen peroxide, which are also used in the manufacture of methamphetamine.

The court held that the purchase of the three bottles of iodine, when viewed within the "totality of the circumstances," including the ongoing and previously reliable communication between the veterinary clinic and the police, provided reasonable suspicion sufficient to justify the stop of the defendant's vehicle.

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

*****

Carmichael v. Village of Palatine, 605 F.3d 451 (7th Cir.)

The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the officer at the time he acts. The record before us requires us to conclude that the district court erred in finding that probable cause supported the stop.

The doctrine of qualified immunity shields from liability public officials who perform discretionary duties and it thus protects police officers "who act in ways they reasonably believe to be lawful." The defense provides "ample room for mistaken judgments" and protects all but the "plainly incompetent or those who knowingly violate the law."

The record before us contains no evidence that Officer Sharkey had any factual basis for stopping the plaintiffs at gun point. He admits that the reasons that he initially gave for stopping

the car, absence of a front license plate and tinted windows, were not known to him at the time that he affected the stop. The record shows, moreover, that the reason that he later gave for the stop, the absence of tail and brake lights, was not true. As the state court determined during the earlier criminal proceeding against the plaintiffs, there is simply no basis in the record upon which a determination of probable cause can be sustained. Certainly, any reasonable police officer, acting at the time Officer Sharkey acted, would have known this elementary principle of the law of arrest. Officer Sharkey is not entitled to qualified immunity with respect to the stop.

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

*****

U.S. v. Shafer, 608 F.3d 1056 (8th Cir.)

Based on the totality of the circumstances, the court held that the officer's expanded scope of the traffic stop was supported by a reasonable suspicion of criminal activity, and that the delay was not excessive under the circumstances. The officer recognized the odor of marijuana in the car; the suspects gave different accounts of their travels, avoided eye contact, and appeared nervous. This reasonable suspicion of criminal activity permitted the officer to briefly question Shafer and to wave down the canine unit.

When Shafer was later arrested, the court held that he voluntarily consented to the search of his residence, for the limited purpose of obtaining a briefcase containing his financial documents, and that he voluntarily consented to the search and seizure of that briefcase.

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

*****

U.S. v. Garcia, 613 F.3d 749 (8th Cir.)

The court held that at the conclusion of a lawful traffic stop, the post-stop the encounter between Garcia and the officer was consensual. After receiving the warning ticket, Garcia's behavior indicated that he felt free to leave. He asked the officer about the location of a pharmacy, and he voluntarily answered some questions posed by the officer.

During this consensual encounter the court held that Garcia voluntarily gave the officer consent to search his trailer which yielded packages of marijuana.

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

*****

U.S. v. Harris, 617 F.3d 977 (8th Cir.)

Police suspected that Harris was involved in drug distribution. Officers saw Harris leave his house with a duffel bag and drive away in a black truck. An officer stopped Harris because the truck had a tinted license plate cover, in violation of a local ordinance. During the traffic stop Harris refused to consent to a search of the truck but a drug dog arrived and alerted on the truck. A search of the truck yielded three pounds of marijuana.

The court held that the initial traffic stop was valid based on a violation of the local ordinance and the fact that the officer testified that the license plate was not plainly visible, stating, "that even a minor traffic violation provides probable cause for a traffic stop".

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

*****

U.S. v. Brewer, 624 F.3d 900 (8th Cir.)

Brewer sold a confidential informant crack cocaine. After the sale, Brewer drove his van away from the scene. Having learned ahead of time that Brewer's driver's license was suspended, an officer who monitored the sale requested that a patrol officer in a marked police car stop Brewer. A patrol officer stopped Brewer and arrested him for driving with a suspended license. The officer recovered the eight hundred dollars in pre-recorded cash used in the undercover buy during his search incident to arrest.

Brewer argued that the patrol officer did not have probable cause to stop and arrest him. The court held that if an officer determines that a person is driving on a suspended license, then the officer has probable cause to arrest. The court concluded that the patrol officer had probable cause to arrest Brewer after he received information from the narcotics officer that Brewer was driving and that it had been determined that his license was suspended.

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

*****

Canine Sniffs

U.S. v. Pierce, 622 F.3d 209 (3d Cir.)

During the course of a traffic stop an officer requested that a K-9 officer perform an examination of the defendant's car. A trained narcotics dog, K-9 Cole, alerted to the exterior, passenger side of the defendant's car. As the handler walked Cole around the car, he entered the car through the open driver's door and alerted on the passenger seat and the glove box. The officers conducted a warrantless search of the car and when they opened the glove box they found approximately one kilogram of cocaine and twenty thousand dollars in cash.

The Supreme Court has held that an exterior canine sniff of a car during a lawful traffic stop does not constitute a "search" under the *Fourth Amendment*. It is well established that, looking at the totality of the circumstances, a dog's positive alert while sniffing the exterior of the car provides an officer with the probable cause necessary to search the car without a warrant. Cole's positive alert to the outside of the car provided officers with probable cause to conduct a warrantless search of the interior of the car.

Additionally, the court held that Cole's entry into the car and interior sniffs did not constitute a "search." In decisions that have held that an interior sniff was unconstitutional, the courts have concluded that the officer "facilitated or encouraged" the dog's entry into the car. In this case Cole jumped through an open door, left open by the defendant when he got out of his car, and in doing so acted instinctively and without facilitation by his handler.

Whether one reasons that Cole's entry into the car, and interior sniffs did not constitute a search, or that Cole's positive alert, when he was outside the car gave the officers probable cause to search the car, the result is the same; the officers conducted a constitutional search.

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

*****

U.S. v. Howard, 621 F.3d 433 (6th Cir.)

The drug-dog's alert established probable cause to search Howard's vehicle. Because the search of the vehicle was supported by probable cause, independent of Howard's unlawful arrest, the cash inside the vehicle was properly seized.

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

*****

Probable Cause

U.S. v. Brooks, 594 F.3d 488 (6th Cir.)

Probable cause to search a location is not dependent upon whether the officers already have probable cause or legal justification to make an arrest. The question is whether the information known by the affiant and conveyed to the magistrate makes it fairly probable that there will be additional contraband or evidence of a crime in the place to be searched.

Probable cause to search for more marijuana exists where there is evidence of marijuana use immediately prior to the officers' arrival (the strong odor of marijuana smoke). The magistrate is not required to assume that the defendant has just smoked his last bit of marijuana immediately before the officers arrived. Instead, it is fairly probable under these facts that where there is smoke, there may be more there to smoke.

The same logic does not necessarily apply to the seeds in the ashtray as, standing alone and without the corroboration of the smell of marijuana smoke, it is impossible to know how long the seeds had been in the ashtray. Accordingly, the mere presence of marijuana seeds in an ashtray would likely be insufficient to establish probable cause to search the residence due to the uncertainty of how long ago the seeds got there.

"Even then, however, we [the Court] take note of the story told in Jim Stafford's down-home tribute to *Cannabis sativa*:

> All good things gotta come to an end,
> And it's the same with the wildwood weeds.
> One day this feller from Washington came by,
> And he spied 'em and turned white as a sheet.
> Well, they dug and they burned,
> And they burned and they dug,
> And they killed all our cute little weeds.
> Then they drove away,

We just smiled and waved,
Sittin' there on that sack of seeds!

JIM STAFFORD,WILDWOOD WEED (MGM 1974).

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

*****

U.S. v. Hinojosa, 606 F.3d 875 (6th Cir.)

Even without using the information gained by their visit to the defendant's house, the agents had developed probable cause to support the search warrant affidavit. Prior to entering the residence, the officers had established that: (1) videos and images involving child pornography were transferred to undercover agents from a specific IP address; (2) the IP address was registered to Defendant at a Lansing, Michigan, address; and (3) Defendant resided at the Lansing, Michigan, address. This evidence would have established the required "fair probability" that evidence of criminal activity would be found inside Defendant's residence, and it would have justified the issuance of a search warrant.

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

*****

U.S. v. Pappas, 592 F.3d 799 (7th Cir.)

An officer can reasonably believe that the number of email messages containing child pornography (11 over two months in this case) sent to defendant, and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, is sufficient to establish probable cause for the crime of knowing possession of child pornography.

A warrant application that includes boilerplate language concerning the practices of collectors of child pornography must lay a foundation which shows that the person subject to the search is a member of the class. However, there is no magic "profile" of child pornography "collectors" that must be attested to in a search warrant affidavit. In fact, the moniker "collector" merely recognizes that experts in the field have found that because child pornography is difficult to come by, those receiving the material often keep the images for years. There is nothing especially unique about individuals who are "collectors" of child pornography; rather, it is the nature of child pornography, i.e., its illegality and the difficulty procuring it, that causes recipients to become "collectors." Where evidence indicates that an individual has uploaded or possessed multiple pieces of child pornography, there is enough of a connection to the "collector" profile to justify including the child pornography collector boilerplate in a search warrant affidavit.

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

*****

U.S. v. Thomas, 605 F.3d 300 (7th Cir.)

Probable cause exists "when there is a 'fair probability' . . . that contraband or evidence of a crime will be found in a particular place. A magistrate need only find "reasonable grounds for belief" that evidence will be found in order to justify the issuance of a search warrant. When an affidavit relies on hearsay information from a confidential informant, the judicial officer (and reviewing court) must consider the veracity, reliability, and basis of knowledge for that information as part of the totality-of-the-circumstances review. Independent corroboration of the tip by police is not required when the court is provided with assurances that the informant is reliable. If the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required.

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

*****

U.S. v. Booker, 612 F.3d 596 (7th Cir.)

When the defendant showed up in a vehicle matching the description provided by the confidential source, at the time he and the confidential source had agreed upon, agents had sufficient evidence to conclude that there was a fair probability the suspect was in possession of the large quantity of crack cocaine that he was supposed to sell. Therefore, the defendant's arrest and search of his truck were valid.

The court further held that the information provided by the confidential source to the agents was credible. The totality of the information available to the DEA fully supported the inference that the defendant was a drug dealer because a prior buyer (the confidential source) identified the defendant as such, the defendant's background matched this occupation, and the defendant agreed to sell drugs to the confidential source in a recorded telephone call.

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

*****

U.S. v. Aljabari, 626 F.3d 940 (7th Cir.)

The court held that the search warrant affidavit contained sufficient information to show a fair probability that evidence would be found in the defendant's apartment. The defendant had asked three people to burn down the Smoke Shop, and he was in regular contact with the individual who was believed to have set the fire. When probable cause exists to believe an individual has committed a crime involving physical evidence, a magistrate judge will generally be justified in finding probable cause to search that individual's home, absent information to the contrary.

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

*****

U.S. v. Parish, 606 F.3d 480 (8th Cir.)

Since the police had probable cause to arrest Parish on the drug charges, his arrest was lawful. Because the only purpose of the arranged meeting was for Parish to distribute drugs, the police

had probable cause to believe that evidence relevant to the drug crime would be found in the vehicle.

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

*****

U.S. v. Mashek, 606 F.3d 922 (8th Cir.)

Mashek argued that the affidavit on which the search warrant was based contained false statements that were material to the determination of probable cause, and that these statements rendered the affidavit insufficient to support a finding of probable cause.

The lower court's determination that the affidavit established probable cause for the issuance of the warrant was well supported by the record. The officer's observation coupled with the recording established probable cause to search Mashek's residence even if the voice on the tape was not Mashek's. Nothing suggested that the officer intentionally falsified or recklessly completed the affidavit.

The affidavit narrative explained the cooperating individual's involvement in prior drug deals with Mashek, thus informing the magistrate of her drug activity. Moreover, the cooperating individual's information was partially corroborated, indicating its reliability. This court has held that 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 (cite omitted).

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

*****

U.S. v. Webster, 625 F.3d 439 (8th Cir.)

The court held that the information supplied by the informant was sufficiently reliable to establish a finding of probable cause and support the warrantless arrest of the defendant. The informant had a history of supplying reliable information since he had successfully purchased controlled substances from the defendant on two prior occasions, within the last month. Additionally, the defendant arrived at the pre-determined place and time for the controlled buy, and the informant provided the agreed upon visual sign to the police that the defendant was in possession of crack cocaine.

After arresting the defendant, the officers conducted a warrantless search of his vehicle and found crack cocaine. The court declined to apply *Gant* to determine if the warrantless search of the vehicle was valid incident to the defendant's arrest. Instead, the court held that under the automobile exception, the officers had probable cause to search the defendant's vehicle. The defendant arrived at the time and place set for a controlled drug buy, and he spoke with an informant in the vehicle before the informant gave a visual signal to the officers indicating that the defendant possessed drugs. Combined with the fact that the officers found drugs on the defendant's person when they arrested him, there was a reasonable basis for the officers to believe to a fair probability that there were drugs in the defendant's vehicle. The search was justified under the automobile exception regardless of the applicability of the search incident to arrest exception.

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

*****

U.S. v. Freeman, 625 F.3d 1049 (8th Cir.)

Officers obtained a search warrant for the defendant's residence based on information provided by a confidential informant. The confidential informant later denied that he had provided the officers any information about the defendant. At an evidentiary hearing, the confidential informant testified that he had provided the officers information, but had later lied about it because his mother and the defendant had pressured him to help the defendant's case.

The court noted that the critical issue was not the confidential informant' credibility, but whether the officer reasonably believed the information, provided by the confidential informant, that he included in the search warrant affidavit. The court held that the officer included no intentional or reckless false statements in the search warrant affidavit, therefore the defendant's motion to suppress was properly denied.

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

*****

U.S. v. Thurman, 625 F.3d 1053 (8th Cir.)

The court held that the search warrant application gave the issuing magistrate a substantial basis to conclude that evidence of firearms offenses would be found in the two-story frame house.

The warrant application included Thurman's statement to the officer that he had additional pistols in the two-story frame house, that he referred to as "his house," and the officer confirmed that Thurman was a convicted felon. Thurman's status as a felon and his admission that he possessed pistols in his house provided ample justification for issuance of the warrant.

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

*****

U.S. v. Palos-Marquez, 591 F.3d 1272 (9th Cir.)

The in-person nature of a tip, even from an unidentified informant, gives it substantial indicia of reliability for two reasons. First, an in-person informant risks losing anonymity and being held accountable for a false tip. Second, when a tip is made in-person, an officer can observe the informant's demeanor and determine whether the informant seems credible enough to justify immediate police action without further questioning.

In the context of border patrol stops, relevant facts for reasonable suspicion include: (1) characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic and time of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver, including obvious attempts to evade officers; (6) appearance or behavior of passengers; (7) model and appearance of the vehicle; and, (8) officer experience.

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

*****

U.S. v. Henderson, 595 F.3d 1198 (9th Cir.)

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court never-the-less ruled the evidence admissible through the good faith exception to the exclusionary rule.

*****

The Exclusionary Rule

U.S. v. Rosa, 626 F.3d 56 (2d Cir.)

Although the warrant was defective, the court concluded that the officers acted reasonably and that the exclusionary rule would serve little deterrent purpose in this case. The failure to particularly describe the type of evidence sought was an inadvertent error. As both the affiant and the officer in charge of executing the search warrant, the lead investigator was intimately familiar with the limits of the search. There was no evidence that the officers searched for, or seized, any items that were unrelated to the crimes for which probable cause had been shown, or that the lead investigator misled the judge regarding the facts of the case or the intended scope of the search. Therefore, the court affirmed the district court's denial of Rosa's motion to suppress.

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

*****

U.S. v. Pappas, 592 F.3d 799 (7th Cir.)

Obtaining a warrant is prima facie evidence of good faith on the part of the officer. Consulting with the prosecutor prior to applying for a search warrant provides additional significant evidence of that officer's objective good faith.

An officer can reasonably believe that the number of email messages containing child pornography (11 over two months in this case) sent to defendant, and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, is sufficient to establish probable cause for the crime of knowing possession of child pornography.

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

*****

U.S. v. Villa-Gonzalez, 623 F.3d 526 (8th Cir.)

The court held that the physical evidence discovered during the search of the defendant's home was properly suppressed as "fruit of the poisonous tree." When the defendant spoke to the ICE officer over the phone, about the details of his immigration to the United States, he was illegally seized. The phone conversation supplied the only basis to arrest the defendant, and the arrest led directly to the defendant's subsequent admission that he had entered the United States illegally using fraudulent documents. The warrant to search the defendant's home for the fraudulent documents was supported by the defendant's admissions to the ICE officer.

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

*****

Exceptions to the Exclusionary Rule

No Standing to Object

U.S. v. Marquez, 605 F.3d 604 (8th Cir.)

A defendant lacks standing to contest the search of a place to which he has an insufficiently close connection. Acosta-Marquez neither owned nor drove the Ford and was only an occasional passenger therein. He therefore lacked standing to contest the installation and use of the GPS device.

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

*****

U.S. v. Crippen, 627 F.3d 1056 (8th Cir.)

The court held that Crippen did not have standing to challenge the search of the vehicle. As a mere passenger in a vehicle, Crippen had no legitimate expectation of privacy under the seats where the officer found the drugs, therefore, Crippen could not challenge the search of the vehicle. Although a passenger is seized for *Fourth Amendment* purposes during a traffic stop, and may challenge the legality of the stop, Crippen challenged the search of the vehicle, and not the legality of the traffic stop.

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

*****

Good Faith

U.S. v. Allen, 625 F.3d 830 (5th Cir.)

The court held that the search warrant did not describe with sufficient particularity the items to be seized, and the attachment detailing the items to be seized was not incorporated by reference into the warrant. However, the court concluded that evidence seized during the execution of the search warrant was admissible under the good-faith exception. The language used in the warrant was flawed, in that it did not reference the exhibit containing the affidavit and list of items to be

seized. However, a reasonable officer could have easily concluded that the warrant was valid since the magistrate judge signed not only the warrant, but also the affidavit, to which the list of items to be seized was attached. The magistrate judge's signature on the affidavit reduced the concern that he did not agree to the scope of the search as defined in it. This protected the defendant by preventing the officers from conducting a general search. The mistake was not that the documentation was insufficient to support issuance of the warrant, but that the attachment and affidavit were not properly incorporated into the warrant by reference.

The court further held that the information relied upon by the officers to establish probable cause was not stale. The court found, in cases involving child pornography, it was reasonable for the magistrate to conclude that the pornographic images were still on the defendant's computer eighteen months after he transferred them.

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

*****

U.S. v. Warshak, 631 F.3d 266 (6th Cir.)

Although the government's search of Warshak's emails violated the *Fourth Amendment*, the agents relied in good faith on the Stored Communications Act to obtain them; therefore, they were not subject to the exclusionary rule. In the future, however, unless an exception applies, a reasonable officer my no longer assume that the Constitution permits warrantless searches of private emails.

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

*****

U.S. v. Henderson, 595 F.3d 1198 (9th Cir.)

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court nevertheless ruled the evidence admissible through the good faith exception to the exclusionary rule.

*****

Intervening Circumstances

U.S. v. Gross, 624 F.3d 309 (6th Cir.)

Generally, evidence discovered as the result of an illegal stop is tainted as fruit of the poisonous tree and must be suppressed. Evidence may only be admitted where there is sufficient

attenuation, separate and apart from the discovery of an outstanding arrest warrant for the defendant, to dissipate the taint.

As to the firearm, the court held there were no intervening circumstances that purged the taint of the illegal stop, and that the firearm must be suppressed as fruit of the poisonous tree. Without the illegal stop, the officer would not have learned of the outstanding arrest warrant; he would not have arrested the defendant, and the firearm would not have been discovered in the restroom a short time later.

However, the court held that the DNA swabs and the defendant's confession were admissible because intervening circumstances had sufficiently attenuated them from the unlawful arrest, to the degree that any taint had dissipated. The police obtained the DNA evidence several days after arrest, pursuant to a search warrant. The defendant's confession occurred after he voluntarily gave information to the ATF agent, two months after his arrest, and after he had waived his *Miranda* rights.

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

*****

Search Warrants

U.S. v. Rosa, 626 F.3d 56 (2d Cir.)

Police suspected that Rosa had sexually abused two boys, and shown them files on his computer that contained images of other children that he had sexually abused. A judge issued a search warrant that authorized, in part, the search and seizure of various electronic digital storage media "which would tend to identify criminal conduct."

The court held that the search warrant was defective because it failed to link the items to be searched and seized to the suspected criminal activity. The warrant directed officers to seize and search certain electronic devices, but provided them with no guidance as to the type of evidence sought, such as, digital files and images relating to child pornography. Even though the search warrant application and affidavit mentioned child pornography, these documents were not incorporated by reference into the search warrant. The court stated that since *Groh v. Ramirez*, it was no longer able to rely on unincorporated, unattached supporting documents to cure an otherwise defective search warrant.

Although the warrant was defective, the court concluded that the officers acted reasonably and that the exclusionary rule would serve little deterrent purpose in this case. The failure to particularly describe the type of evidence sought was an inadvertent error. As both the affiant and the officer in charge of executing the search warrant, the lead investigator was intimately familiar with the limits of the search. There was no evidence that the officers searched for, or seized, any items that were unrelated to the crimes for which probable cause had been shown, or that the lead investigator misled the judge regarding the facts of the case or the intended scope of the search. Therefore, the court affirmed the district court's denial of Rosa's motion to suppress.

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

*****

U.S. v. Williams, 592 F.3d 511 (4th Cir.)

The sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents.

The search warrant authorized a search of defendant's computers and digital media for evidence relating to the designated Virginia crimes of making threats and computer harassment. To conduct that search, the warrant impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization. To be effective, such a search could not be limited to reviewing only the files' designation or labeling, because the designation or labeling of files on a computer can easily be manipulated to hide their substance. Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality.

Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.

The warrant also authorized the police to search for things like disks and "thumbnail drives," which, the evidence showed, could be as small as a dime, and which could very easily have been stored in the lockbox where the machine gun and silencer were found. A thorough search of the lockbox would therefore have required the detective to move the gun and silencer, even if only within the confines of the lockbox. And before moving the gun, the detective was entitled to pick it up and determine whether it was loaded, for his own safety. Because it was during the course of a legitimate safety inspection that the incriminating character of the machine gun and silencer became "immediately apparent," the warrantless seizure of them was justified by the plain-view exception**.**

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

*****

U.S. v. Claridy, 601 F.3d 276 (4th Cir.)

Deciding this issue for the first time, the court holds:

When federal and state agencies cooperate and form a joint law-enforcement effort, investigating violations of both federal and state law, an application for a search warrant cannot categorically be deemed a "proceeding" governed by the Federal Rules of Criminal Procedure, based simply on the role that federal law-enforcement officers played in the investigation.

Nothing in the Federal Rules of Criminal Procedure suggests that a joint task force cannot use either federal or state investigatory tools governed, respectively, by federal or state law. Search warrants obtained during a joint federal-state investigation may be authorized by Federal Rule 41(b) or by state law and may serve to uncover violations of federal law as well as state law.

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

*****

U.S. v. Lazar, 604 F.3d 230 (6th Cir.)

The first paragraph of Attachment B to the search warrant gave sufficient direction when it referred to "the below listed patients" and "the following patients." Any patient list presented to the issuing Magistrate Judge thus was effectively incorporated into the search warrants. If the record otherwise shows that the government seized patient files according to the list, if any, presented to the issuing Magistrate Judge, a lack of formal incorporation by reference into the warrants does not justify a finding of facial insufficiency. Incorporation" of one thing into another need not be by express reference. Phrases such as 'incorporated by reference' are not talismanic, without which we do not consider additional necessary documents that effectuate the parties' agreement.

The Supreme Court's decision in *Groh v. Ramirez, 540 U.S. 551, 12, (2004)* controls, and requires suppression of all patient records seized beyond the scope of any patient list presented to the issuing Magistrate Judge.

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

******

U.S. v. Howard, 621 F.3d 433 (6th Cir.)

The search warrant obtained by the police described Howard's property with sufficient particularity. Minor technical inaccuracies in the description will not render a search warrant unconstitutional. While the warrant described Howard's property as a single parcel, the property was actually made up of two parcels with two separate street addresses. The mobile home searched by the police was technically on the second parcel, which was inaccurate, but it was described with reasonable accuracy in the search warrant.

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

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U.S. v. Mann, 592 F.3d 779 (7th Cir.)

Unlike a physical object that can be immediately identified as responsive to the warrant or not, computer files may be manipulated to hide their true contents. Images can be hidden in all manner of files, even word processing documents and spreadsheets. Criminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer.

The search warrant authorized a search for "images of women in locker rooms and other private places." Given the nature of the search and the fact that images of women in locker rooms could be virtually anywhere on the computers, using software known as "forensic tool kit" ("FTK") to catalogue the images on the computer into a viewable format did not, without more, exceed the scope of the warrant.

But, the "FTK" software also employed a filter known as "KFF (Known File Filter) Alert." The "KFF Alert" flags those files identifiable from a library of known files previously submitted by

law enforcement—most of which are images of child pornography. The "KFF Alert" flagged four files. Once those files had been flagged, the detective knew (or should have known) that files in a data base of known child pornography images would be outside the scope of the warrant. The detective exceeded the scope of the warrant by opening the four flagged "KFF Alert" files.

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

Editor's Note: The Court rejected the rule set out by the 9th Circuit in U.S. v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009), that directs magistrate judges to insist that the government waive reliance on the plain view doctrine. Instead, the court counsels officers and others involved in searches of digital media to exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described.

(On November 4, 2009, the 9th Circuit entered an order asking the parties in U.S. v. Comprehensive Drug Testing, Inc. 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).)

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U.S. v. Pappas, 592 F.3d 799 (7th Cir.)

Obtaining a warrant is prima facie evidence of good faith on the part of the officer. Consulting with the prosecutor prior to applying for a search warrant provides additional significant evidence of that officer's objective good faith.

An officer can reasonably believe that the number of email messages containing child pornography (11 over two months in this case) sent to defendant, and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, is sufficient to establish probable cause for the crime of knowing possession of child pornography.

A warrant application that includes boilerplate language concerning the practices of collectors of child pornography must lay a foundation which shows that the person subject to the search is a member of the class. However, there is no magic "profile" of child pornography "collectors" that must be attested to in a search warrant affidavit. In fact, the moniker "collector" merely recognizes that experts in the field have found that because child pornography is difficult to come by, those receiving the material often keep the images for years. There is nothing especially unique about individuals who are "collectors" of child pornography; rather, it is the nature of child pornography, i.e., its illegality and the difficulty procuring it, that causes recipients to become "collectors." Where evidence indicates that an individual has uploaded or possessed multiple pieces of child pornography, there is enough of a connection to the "collector" profile to justify including the child pornography collector boilerplate in a search warrant affidavit.

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

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U.S. v Thomas, 605 F.3d 300 (7th Cir.)

Probable cause exists "when there is a 'fair probability' . . . that contraband or evidence of a crime will be found in a particular place. A magistrate need only find "reasonable grounds for belief" that evidence will be found in order to justify the issuance of a search warrant. When an affidavit relies on hearsay information from a confidential informant, the judicial officer (and reviewing court) must consider the veracity, reliability, and basis of knowledge for that information as part of the totality-of-the-circumstances review. Independent corroboration of the tip by police is not required when the court is provided with assurances that the informant is reliable. If the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required.

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

*****

U.S. v. Estey, 595 F.3d 836 (8th Cir.)

Because child pornographers commonly retain pornography for a lengthy period of time, evidence developed within several months (5 months in this case) of an application for a search warrant for a child pornography collection and related evidence is not stale.

The 4th and 9th circuits agree (cites omitted).

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

*****

U.S. v. Colbert, 605 F.3d 573 (8th Cir.)

Although the search warrant affidavit in this case may not be a model of detailed police work, it sets forth a number of specific facts and explains the investigation that took place therefore the argument that the affidavit was too conclusory to establish probable cause fails.

There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography. Child pornography is in many cases simply an electronic record of child molestation. Accordingly, we conclude that Colbert's attempt to entice a child was a factor that the judicial officer reasonably could have considered in determining whether Colbert likely possessed child pornography, all the more so in light of the evidence that Colbert heightened the allure of his attempted inveiglement by telling the child that he had movies she would like to watch. That information established a direct link to Colbert's apartment and raised a fair question as to the nature of the materials to which he had referred.

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

*****

U.S. v. Finley, 612 F.3d 998 (8th Cir.)

The court held that, although there was a false statement made in the search warrant affidavit prepared by the ICE agent, there was no proof that it was a knowingly or recklessly made false statement; therefore, Finley's motion to suppress was properly denied.

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

*****

U.S. v. Henderson, 595 F.3d 1198 (9th Cir.)

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court never-the-less ruled the evidence admissible through the good faith exception to the exclusionary rule.

*****

U.S. v. Cha, 597 F.3d 995 (9th Cir.)

There are four factors used for determining the reasonableness of a seizure of a residence pending issuance of a search warrant: (1) whether there was probable cause to believe that the residence contained evidence of a crime or contraband; (2)whether there was good reason to fear that, unless restrained, the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether the police make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and (4) whether the police imposed the restraint for a limited period of time — in other words, was the time period no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.
Because the police refused to allow defendant into his home even with an escort to obtain his diabetes medicine and because there was a 26.5 hour delay between seizing the home and obtaining the warrant, the seizure violated the Fourth Amendment. The test asks only how long was reasonably *necessary* for police, acting with diligence, to obtain the warrant. Even absent evidence of bad faith, the delay was too long.

The evidence was not the "product" of the unconstitutional action because the unconstitutional seizure was not the "but for" cause of the discovery of the evidence. The evidence was seized pursuant to a search warrant issued on probable cause. Even so, the evidence is suppressed as a direct result of the unconstitutional seizure of the home pending the warrant.

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

*****

U.S. v. Campbell, 603 F.3d 1218 (10th Cir.)

A search warrant subsequently determined to lack probable cause demands suppression of the resulting evidence in at least four situations: (1) when the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his reckless disregard of the truth; (2) when the 'issuing magistrate wholly abandons her judicial role; (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and, (4) when a warrant is so facially deficient that the executing officer could not reasonably believe it was valid.

Recently, the Supreme Court in *United States v. Herring, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009),* appears to have described another situation in which Leon would not apply--when the warrant's flaw results from recurring or systemic police negligence.

The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. When police error is the result of negligence, "rather than systemic error or reckless disregard of constitutional requirements," the exclusionary rule does not serve its purpose and, therefore, does not apply.

In this case: (1) probable cause existed to support the warrant, (2) the officers involved in the preparation of the affidavit supporting the warrant did not deliberately mislead or act with reckless indifference to the truth, and, otherwise, (3) law enforcement relied in objective good faith upon the warrant

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

*****

Stale Information

U.S. v. Richardson, 607 F.3d 357 (4th Cir.)

In the context of child pornography cases, courts have largely concluded that a delay, even a substantial delay, between distribution and the issuance of a search warrant does not render the underlying information stale. This consensus rests on the widespread view among the courts, in accord with Agent White's affidavit, that "collectors and distributors of child pornography value their sexually explicit materials highly, 'rarely if ever' dispose of such material, and store it 'for long periods' in a secure place, typically in their homes."

The court concluded that a delay of four months did not preclude a finding of probable cause based on staleness in light of the other information supplied by Agent White, including the previous instance in which Richardson used an AOL account to send such images and Agent White's sworn statement that child pornographers "rarely, if ever, dispose of their sexually explicit materials," and that "even if a computer file is deleted from a hard drive or other computer media, a computer expert is still likely to retrieve . . . such files through scientific examination of the computer."

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

*****

U.S. v. Allen, 625 F.3d 830 (5th Cir.)

The court held that the information relied upon by the officers to establish probable cause was not stale. The court found, in cases involving child pornography, it was reasonable for the magistrate to conclude that the pornographic images were still on the defendant's computer eighteen months after he transferred them.

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

*****

U.S. v. Estey, 595 F.3d 836 (8th Cir.)

Because child pornographers commonly retain pornography for a lengthy period of time, evidence developed within several months (5 months in this case) of an application for a search warrant for a child pornography collection and related evidence is not stale.

The 4th and 9th circuits agree (cites omitted)**.**

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

*****

U.S. v. Tenerelli, 614 F.3d 764 (8th Cir.)

Police obtained a search warrant for Tenerelli's residence which they executed six days later. The court held that the ongoing nature of methamphetamine distribution supported the continued existence of probable cause, and that it was reasonable for the officers to conclude that Tenerelli was likely to possess methamphetamine at his residence when the search warrant was executed; therefore the probable cause supporting the search was not stale.

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

*****

Automobile Exception (mobile conveyance exception)

U.S. v. Navas, 597 F.3d 492 (2d Cir.)

After getting consent to enter a warehouse, agents conducted a warrantless search of the unhitched trailer part of a tractor/trailer rig. The cab was not in the warehouse.

The Supreme Court has relied on two rationales to explain the reasonableness of a warrantless search pursuant to the automobile exception: vehicles' inherent mobility and citizens' reduced expectations of privacy in their contents.

A vehicle's inherent mobility — not the probability that it might actually be set in motion — is the foundation of the mobility rationale. When the Supreme Court introduced the mobility rationale in *Carroll v. U.S.*, 267 U.S. 132 (1925), it referenced "wagon[s]," which, like trailers, require an additional source of propulsion before they can be set in motion. At least for purposes of the Fourth Amendment, a trailer unhitched from a cab is no less inherently mobile than a wagon without a horse. The trailer remained inherently mobile as a result of its own wheels and

the fact that it could have been connected to *any* cab and driven away. The fact that the trailer was detached from a cab with its legs dropped, did not eliminate its inherent mobility. Even where there is little practical likelihood that the vehicle will be driven away, the automobile exception applies when that possibility exists because of the vehicle's inherent mobility.

The very function of the automobile exception is to ensure that law enforcement officials need not expend resources to secure a readily mobile automobile during the period of time required to obtain a search warrant.

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

*****

U.S. v. Lewis, 606 F.3d 193 (4th Cir.)

The police may approach an individual on a public street and ask questions without implicating the *Fourth Amendment's* protections. The officers were thus entitled to approach Lewis, who was sitting in his parked car, late at night. As they approached the vehicle, one of the officers related to Officer Mills that there was an open beer bottle in the vehicle. Mills then approached the driver-side window and asked Lewis for identification. When Lewis rolled down his window to comply, Mills smelled the odor of marijuana emanating from the vehicle. At that point, the officers possessed probable cause to search the vehicle, and they were entitled to order Lewis out of the vehicle while their search was accomplished.

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

*****

U.S. v. Banuelos-Romero, 597 F.3d 763 (5th Cir.)

Law enforcement may conduct a warrantless search of an automobile if (1) the officer conducting the search had probable cause to believe that the vehicle in question contained property that the government may properly seize; and (2) exigent circumstances justified the search. (Cites to prior 5th Circuit cases omitted.)

Merely fitting a drug courier profile will not suffice to raise probable cause. Evidence of a non-standard hidden compartment supports probable cause.

In a vehicle stop on a highway, the fact of the automobile's potential mobility supplies the requisite exigency.

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

*****

U.S. v. Cruz-Rea, 626 F.3d 929 (7th Cir.)

A confidential informant admitted his own participation in a drug distribution ring, and told police that the defendant was going to use a Ford Focus to transport a shipment of cocaine from Utah to Indianapolis within the next two days. Additionally, he said that the defendant had previously shipped cocaine in gift-wrapped packages. While conducting surveillance on the

defendant, officers saw her loading gift-wrapped packages into a Ford Focus. An officer followed the defendant and conducted a traffic stop after he noticed that her vehicle did not have a license plate light. After receiving conflicting stories from the defendant and her passenger as to where they were going, the officer searched the Ford Focus and found cocaine in the gift-wrapped packages.

The court held that the confidential informant's admission that he was part of a drug ring, the corroboration of the information he provided, and the defendant's and passenger's conflicting stories, provided the officer probable cause to conduct a warrantless search of the defendant's vehicle under the automobile exception to the warrant requirement.

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

*****

U.S. v. Webster, 625 F.3d 439 (8th Cir.)

The court held that the information supplied by the informant was sufficiently reliable to establish a finding of probable cause and support the warrantless arrest of the defendant. The informant had a history of supplying reliable information since he had successfully purchased controlled substances from the defendant on two prior occasions, within the last month. Additionally, the defendant arrived at the pre-determined place and time for the controlled buy, and the informant provided the agreed upon visual sign to the police that the defendant was in possession of crack cocaine.

After arresting the defendant, the officers conducted a warrantless search of his vehicle and found crack cocaine. The court declined to apply *Gant* to determine if the warrantless search of the vehicle was valid incident to the defendant's arrest. Instead, the court held that under the automobile exception, the officers had probable cause to search the defendant's vehicle. The defendant arrived at the time and place set for a controlled drug buy, and he spoke with an informant in the vehicle before the informant gave a visual signal to the officers indicating that the defendant possessed drugs. Combined with the fact that the officers found drugs on the defendant's person when they arrested him, there was a reasonable basis for the officers to believe to a fair probability that there were drugs in the defendant's vehicle. The search was justified under the automobile exception regardless of the applicability of the search incident to arrest exception.

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

*****

U.S. v. Aguilera, 625 F.3d 482 (8th Cir.)

The court held that the officer had probable cause to search the defendant's vehicle, for methamphetamine, under the automobile exception to the warrant requirement. Prior to the search, the officer knew that the co-defendant distributed methamphetamine, and that a blue GMC Yukon was seen near his residence during an earlier controlled purchase there. The recorded telephone call between the co-defendant and the confidential informant revealed to the police that the co-defendant was on his way to the confidential informant's residence to deliver methamphetamine. Once the officer saw a blue GMC Yukon with the defendant driving and the

co-defendant as a passenger, he had probable cause to believe that the vehicle contained the methamphetamine that was scheduled for delivery. Since there was probable cause to search the vehicle, the court declined to rule on whether the search of the vehicle was a valid search incident to arrest. The officer initially stopped the vehicle for a license plate violation and arrested the defendant for driving without a valid license.

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

*****

U.S. v. Mayo, 627 F.3d 709 (8th Cir.)

The officers' warrantless search of the vehicle was valid under the automobile exception to the warrant requirement of the *Fourth Amendment*. The court held that the officers had probable cause to believe the minivan contained drugs based on the defendants' nervous behavior, their inconsistent stories, the driver's criminal history, and the plain-view discovery of two bindles with markings consistent with drug packaging.

The court also found that the driver gave the officers consent to search the vehicle, and that it was objectively reasonable for the officers to search any part of the minivan where drugs might be stored, including behind the door panels. When a person gives his consent to search a vehicle, officers may search containers within the vehicle that may contain drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive way. Here, a reasonable person would have understood the officer's request to search the vehicle for drugs covered the entire minivan, including behind the door's interior panels. The officers opened the panels in a minimally intrusive manner and the driver did not object to the search or attempt to withdraw his consent to search.

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

*****

U.S. v. Johnson, 630 F.3d 970 (10th Cir.)

The odor of marijuana, by itself, is sufficient to establish probable cause to support the warrantless search of an automobile. Because the district court specifically found the trooper to be credible, when he testified that there was a strong odor of burnt marijuana emanating from the defendant's car when he approached to question the passengers, is was proper to conclude that he had probable cause to conduct a warrantless search of the car.

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

*****

Collective Knowledge Doctrine

U.S. v. Williams, 627 F.3d 247 (7th Cir.)

The court held that the facts known by the DEA task force supported a warrantless search of the vehicle, in which Williams was a passenger, and that this information could be imputed to the patrol officer who conducted the traffic stop, under the collective knowledge doctrine.

The collective knowledge doctrine allows an officer to stop, search, or arrest a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of facts that amount to the necessary level of suspicion to permit the stop, search, or arrest. This court has applied the collective knowledge doctrine where, as the case is here, DEA agents asked local law enforcement officers to stop a specifically identified vehicle, and the local officers had no knowledge of the facts underlying the DEA's probable cause.

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

*****

Border Searches

U.S. v. Villasenor, 608 F.3d 467 (9th Cir.)

An extended border search is "any search away from the border where entry is not apparent," but where the dual requirements of reasonable certainty of a recent border crossing and reasonable suspicion of criminal activity are satisfied.

The search of Villasenor's car was reasonable under the *Fourth Amendment* as an extended border search. Because Villasenor did not contest that the cocaine was in his car at the time he crossed the border, the court focused its discussion on the second prong of the extended border search analysis.

Viewed together, the smuggler's tip and Villasenor's unusual behavior after crossing the border were enough to provide the officer with reasonable suspicion that a search of Villasenor's car would uncover evidence that he was involved in criminal activity.

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

*****

U.S. v. Alfaro-Moncada, 607 F.3d 720 (11th Cir.)

The suspicionless search of the defendant's cabin on a foreign cargo ship, while it was docked at the Antillean Marine on the Miami River, was not a violation of the *Fourth Amendment*. The CBP Agricultural Enforcement Team had statutory authority under *19 U.S.C. § 1581 (a)* to search the defendant's cabin.

Given the dangers we face, the paramount national interest in conducting border searches to protect this nation and its people makes it unreasonable to require any level of suspicion to search any part of a foreign cargo vessel coming into this country. Crew members' cabins are no exception because, like any other part of a vessel, they can be used to smuggle in weapons of mass destruction, illegal devices, or other contraband, such as child pornography, as was the case here.

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

*****

Computers and Electronic Devices

U.S. v. Vosburgh, 602 F.3d 512 (3d Cir.)

Deciding this issue for the first time, the court holds:

IP addresses are fairly "unique" identifiers. Evidence that the user of a computer employing a particular IP address possessed or transmitted child pornography can support a search warrant for the physical premises linked to that IP address.

Although there undoubtedly exists the possibility of mischief and mistake, the IP address provides a substantial basis to conclude that evidence of criminal activity would be found at the defendant's home, even if it did not *conclusively* link the pornography to the residence.

Although it is technically possible that the offending emails "originate outside of the residence to which the IP address was assigned, it remains *likely* that the source of the transmissions is inside that residence.

In those cases where officers know or ought to know, for whatever reason, that an IP address does not accurately represent the identity of a user or the source of a transmission, the value of that IP address for probable cause purposes may be greatly diminished, if not reduced to zero. The 5th, 6th, 8th, 9th, and 10th circuits agree (cites omitted).

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

*****

In The Matter Of The Application Of The United States Of America For An Order Directing A Provider Of Electronic Communication Service To Disclose Records To The Government, 620 F.3d 304 (3d Cir.)

The government applied for a court order pursuant to a provision of the *Stored Communications Act, 18 U.S.C. § 2703(d)*, to compel a cell phone provider to produce a customer's "historical cell tower data," also known as cell site location information or "CSLI." The Magistrate Judge (MJ) denied the application, holding that, "CSLI that allows the government to follow where a subscriber was over a period of time is "information from a tracking device," deriving from an electronic communications service," and therefore cannot be obtained through a *§ 2703(d)* order." In holding that the CSLI was information from a "tracking device" the MJ required the government to establish probable cause to obtain a warrant as outlined in *Rule 41b* (*Fed. R. Crim. P.*).

The court held that CSLI from cell phone calls can be obtained under a *§ 2703(d)* order and that such an order did not require the traditional probable cause determination. Instead, as stated in *§ 2703(d)* the government must establish "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." The court concluded that this standard is a lesser one than probable cause.

The court additionally held that although *§ 2703(d)* allows for CSLI from cell phones to be obtained by a court order, the statute "as presently written gives the MJ the option to require a

warrant showing probable cause." The court stated that this option should be used sparingly because Congress included the option of a *§ 2703(d)* order. In the present case the court found that on remand, if the MJ should conclude that a warrant is required rather than a *§ 2703(d)* order, it is imperative that she make fact findings and give a full explanation that balances the government's need for the information with the privacy interests of cell phone users.

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

*****

U.S. v. Christie, 624 F.3d 558 (3rd Cir.)

The court held that Christie had no reasonable expectation of privacy in his IP address; therefore, he could not establish a *Fourth Amendment* violation.

The court noted that subscriber information provided to an internet provider is not protected by the *Fourth Amendment's* privacy expectation because it is information that is voluntarily given to a third party. Similarly, no reasonable expectation of privacy exists in an IP address, because that information is also conveyed to and from third parties, including internet service providers.

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

*****

U.S. v. Williams, 592 F.3d 511 (4th Cir.)

The sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents.

The search warrant authorized a search of defendant's computers and digital media for evidence relating to the designated Virginia crimes of making threats and computer harassment. To conduct that search, the warrant impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization. To be effective, such a search could not be limited to reviewing only the files' designation or labeling, because the designation or labeling of files on a computer can easily be manipulated to hide their substance. Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality.

Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.

The warrant also authorized the police to search for things like disks and "thumbnail drives," which, the evidence showed, could be as small as a dime, and which could very easily have been stored in the lockbox where the machine gun and silencer were found. A thorough search of the lockbox would therefore have required the detective to move the gun and silencer, even if only within the confines of the lockbox. And before moving the gun, the detective was entitled to pick it up and determine whether it was loaded, for his own safety. Because it was during the course of a legitimate safety inspection that the incriminating character of the machine gun and silencer

became “immediately apparent,” the warrantless seizure of them was justified by the plain-view exception.

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

*****

U.S. v. Bynum, 604 F.3d 161 (4th Cir.)

The defendant raised two *Fourth Amendment* challenges to the district court's refusal to suppress evidence seized during the search of the Bynum home, including the computer that uploaded and stored the child pornography at issue here.

The 'touchstone' of *Fourth Amendment* analysis is whether the individual has a reasonable expectation of privacy in the area searched. In order to demonstrate a legitimate expectation of privacy, Bynum must have a subjective expectation of privacy, and that subjective expectation must be reasonable.

In this case, Bynum can point to no evidence that he had a subjective expectation of privacy in his internet and phone "subscriber information"--*i.e.*, his name, email address, telephone number, and physical address--which the Government obtained through the administrative subpoenas. Bynum voluntarily conveyed all this information to his internet and phone companies. In so doing, Bynum assumed the risk that those companies would reveal that information to the police. Moreover, Bynum deliberately chose a screen name derived from his first name, *compare* "markie_zkidluv6" *with* "Marques," and voluntarily posted his photo, location, sex, and age on his Yahoo profile page.

Even if Bynum could show that he had a subjective expectation of privacy in his subscriber information, such an expectation would not be objectively reasonable. Indeed, every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the *Fourth Amendment's* privacy expectation.

Additionally, Bynum presented no reason as to why minor date discrepancies, or the delay between the administrative subpoenas and the request for the warrant undermine the magistrate judge’s reasonable conclusion the home of Bynum’s mother contained evidence of a crime.

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

*****

U.S. v. Warshak, 631 F.3d 266 (6th Cir.)

Federal agents obtained a subpoena under the Stored Communications Act, *18 U.S.C. § 2703(b)* that compelled Warshak’s internet service provider (ISP) to turn over emails it had saved the previous year. Subsequently, the government served the ISP with a court order under *§ 2703(d)* that required the ISP to turn over any additional emails in Warshak’s account. In all, the government compelled the ISP to reveal the contents of approximately 27,000 emails from Warshak’s account.

The court held that a subscriber has a reasonable expectation of privacy in the contents of emails that are stored with, sent, or received through a commercial ISP. The government may not compel a commercial ISP to turn over the contents of a subscriber's email without first obtaining a warrant based on probable cause. Since the agents did not obtain a warrant, they violated the *Fourth Amendment* when they obtained the contents of Warshak's emails. Additionally, the court held that the Stored Communications Act is unconstitutional to the extent that it allows the government to obtain such emails without a warrant.

Although the government's search of Warshak's emails violated the *Fourth Amendment*, the agents relied in good faith on the Stored Communications Act to obtain them; therefore, they were not subject to the exclusionary rule. In the future, however, unless an exception applies, a reasonable officer my no longer assume that the Constitution permits warrantless searches of private emails.

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

*****

U.S. v. Mann, 592 F.3d 779 (7th Cir.)

Unlike a physical object that can be immediately identified as responsive to the warrant or not, computer files may be manipulated to hide their true contents. Images can be hidden in all manner of files, even word processing documents and spreadsheets. Criminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer.

The search warrant authorized a search for "images of women in locker rooms and other private places." Given the nature of the search and the fact that images of women in locker rooms could be virtually anywhere on the computers, using software known as "forensic tool kit" ("FTK") to catalogue the images on the computer into a viewable format did not, without more, exceed the scope of the warrant.

But, the "FTK" software also employed a filter known as "KFF (Known File Filter) Alert." The "KFF Alert" flags those files identifiable from a library of known files previously submitted by law enforcement—most of which are images of child pornography. The "KFF Alert" flagged four files. Once those files had been flagged, the detective knew (or should have known) that files in a data base of known child pornography images would be outside the scope of the warrant. The detective exceeded the scope of the warrant by opening the four flagged "KFF Alert" files.

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

Editor's Note: The Court rejected the rule set out by the 9th Circuit in U.S. v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009), that directs magistrate judges to insist that the government waive reliance on the plain view doctrine. Instead, the court counsels officers and others involved in searches of digital media to exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described.

(On November 4, 2009, the 9th Circuit entered an order asking the parties in U.S. v. Comprehensive Drug Testing, Inc. 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. Szymuszkiewicz, 622 F.3d 701 (7th Cir.)

The defendant was convicted under the *Wiretap Act (18 U.S.C. § 2511(1)(a)* for intentionally intercepting electronic communications sent to his supervisor. He obtained access to his supervisor's computer and set up a "rule" that forwarded all of the emails she received to his computer.

The court held that although the defendant did not learn anything worthwhile, the intentional interception of the emails was enough to support his conviction. The government did not have to establish that he obtained valuable information.

Additionally, under the *Wiretap Act* any acquisition of information using a "device" is an interception, to include obtaining access to an email inbox's contents by automated forwarding. The supervisor's computer, the off-site servers and the defendant's computer constituted "devices" under the *Wiretap Act*.

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

*****

U.S. v. Koch, 625 F.3d 470 (8th Cir.)

Officers seized the defendant's computer and flash drive pursuant to a search warrant issued during an investigation into an illegal gambling operation. At the conclusion of the investigation, an officer obtained a disposal of property order for the computer and flash drive. Officers had never examined the computer or flash drive, and the officer planned to return them to the defendant if they did not contain evidence of the gambling operation. When he opened the flash drive, an officer discovered images of child pornography. The officer had the flash drive open for no more than two minutes and examined four photographs before he closed it. He then reopened the drive to show other agents the last image he had viewed. The flash drive was open for a total of up to five minutes before the officer removed it from the computer. Officers obtained a new search warrant for the computer and flash drive, and found over one hundred separate images of child pornography on both devices.

The court held that the officers were acting in good faith when they opened the flash drive and unexpectedly discovered the child pornography. The officer was not relying on the original warrant when he found the child pornography; rather he was in the process of following a court order regarding the disposal of the items seized under the original warrant. The officer did not prolong his viewing, but closed the flash drive within a few minutes of discovering the child pornography, and obtained a new search warrant.

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

*****

U.S. v. Borowy, 595 F.3d 1045 (9th Cir.)

Defendant purchased and installed a version of the file sharing software LimeWire that allows the user to prevent others from downloading or viewing the names of files on his computer. He attempted, but failed, to engage this feature. Even though his purchase and attempt show a subjective expectation of privacy, his files were still entirely exposed to public view. Anyone with access to LimeWire could download and view his files without hindrance. Defendant's subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access. The agent's access to defendant's files through LimeWire and the use of a keyword search to locate these files did not violate the Fourth Amendment.

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

*****

U.S. v. Henderson, 595 F.3d 1198 (10th Cir.)

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court never-the-less ruled the evidence admissible through the good faith exception to the exclusionary rule.

*****

GPS Tracking Devices

U.S. v. Marquez, 605 F.3d 604 (8th Cir.)

Even if Acosta-Marquez had standing, we would find no error. A person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another. When electronic monitoring does not invade upon a legitimate expectation of privacy, no search has occurred. When police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time.

In this case, there was nothing random or arbitrary about the installation and use of the device. The installation was non-invasive and occurred when the vehicle was parked in public. The police reasonably suspected that the vehicle was involved in interstate transport of drugs. The vehicle was not tracked while in private structures or on private lands.

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

*****

U.S. v. Pineda-Moreno, 591 F.3d 1212 (9th Cir.)

Agents installed mobile tracking devices on the underside of defendant's Jeep on seven different occasions. Each device was about the size of a bar of soap and had a magnet affixed to its side, allowing it to be attached to the underside of a car. On five of these occasions, the vehicle was located in a public place. On the other two occasions, between 4:00 and 5:00 a.m., agents attached the device while the Jeep was parked in defendant's driveway a few feet away from his trailer. The driveway leading up to the trailer was open, and there was no fence, gate, or "No Trespassing" sign.

The undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy.

Even assuming the Jeep was on the curtilage, it was parked in his driveway, which is only a semiprivate area. In order to establish a reasonable expectation of privacy in his driveway, defendant must detail the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it. Because defendant did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home. The time of day agents entered the driveway is immaterial.

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

*****

U.S. v. Maynard, 615 F.3d 544 (D.C. Circuit)

The police installed a GPS device on Jones's jeep, without a warrant, and tracked its movements twenty four hours a day for four weeks. The court held that monitoring Jones's movements on public roads for such a period of time constituted a Fourth Amendment search. The court rejected the government's argument that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." U.S. v. Knotts, 460 U.S. 276 (1983). The court held that Knotts did not control, stating,

"The Court explicitly distinguished between the limited information discovered by use of the beeper -- movements during a discrete journey -- and more comprehensive or sustained monitoring of the sort at issue in this case. In short, Knotts held only that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it."

"Two considerations persuade us the information the police discovered in this case -- the totality of Jones's movements over the course of a month -- was not exposed to the public: First, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed

constructively even though each individual movement is exposed, because that whole reveals more -- sometimes a great deal more -- than does the sum of its parts."

"Application of the test in Katz to the facts of this case can lead to only one conclusion: Society recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have -- short perhaps of his spouse. The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in Knotts."

The 7th, 8th, and 9th circuits have held that held that the use of a GPS tracking device to monitor an individual's movements in his vehicle over a prolonged period of time is not a search.

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

*****

Consent Searches

Reedy v. Evanson, 615 F.3d 197 (3d Cir.)

The court held that Reedy maintained a reasonable expectation of privacy in her blood after it was drawn from her body. Reedy's consent to give a blood sample and have it tested as part of the sexual assault protocol kit did not extend to consenting to have the blood sample tested for drugs. The court held that an objectively reasonable person would not believe that the two consent forms she signed to have her blood tested for evidence of sexual assault would extend to having a law enforcement officer order medical personnel to search her blood for evidence of drug use for the purpose of incriminating her.

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

*****

U.S. v. Garcia, 604 F.3d 186 (5th Cir.)

When an officer asks for consent to search a vehicle and does not express the object of the search, the searched party, who knows the contents of the vehicle, has the responsibility explicitly to limit the scope of the search. Otherwise, an affirmative response to a general request is evidence of general consent to search.

When officers request permission to search a vehicle after asking whether it was carrying "anything illegal," it is natural to conclude that they might look for hidden compartments or containers.

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

*****

U.S. v. Montgomery, 621 F.3d 568 (6th Cir.)

The court held that the defendant's consent to search his home was voluntary, even though he had been administered morphine at the hospital. There is no *per se* rule that medication or intoxication defeats a person's capacity to consent to a search. It is just another factor to be taken into consideration when assessing the totality of the circumstances.

In this case the nurse testified that after administering the morphine to Montgomery that he remained alert and oriented before, during and after police questioning, and that the morphine did not affect his ability to answer questions.

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

*****

U.S. v. Lewis, 608 F.3d 996 (7th Cir.)

Lewis voluntarily consented to the detectives' entry into the apartment and the bedroom, therefore; the seizure of the sawed-off shotgun was lawful. The officers had reasonable suspicion that Lewis was engaged in criminal activity so their limited detention of him at the kitchen table was justified.

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

*****

U.S. v. Pineda-Buenaventura, 622 F.3d 761 (7th Cir.)

DEA agents obtained a search warrant for the defendant's downstairs apartment, Unit A. A different group of agents executed the search warrant, and not realizing that the upstairs apartment, Unit B, was a separate apartment, entered it. The agents saw the defendant and two other men sleeping in Unit B. The agents arrested the defendant and transported him to the police station while the two other men were taken outside. After a preliminary sweep, but before any contraband was found, the agents realized that Unit B was a separate unit, and not included in the search warrant. The agents obtained oral and written consent to search Unit B from the two men, who told them that they lived there. The agents searched Unit B and found one kilogram of cocaine under the defendant's bed.

The court held that the co-tenants' consent to search were valid. Forty five minutes elapsed between the time they were taken out of the apartment to when they gave they gave their oral consents. They were permitted to get dressed and they were not handcuffed. The agents told both men that they did not have to give the agents permission to search the apartment.

The court further held that the agents' illegal entry into Unit B did not taint the co-tenants' consent. Once the agents realized that entry into Unit B was a mistake, they withdrew and obtained valid consent to search.

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

*****

U.S. v. Greer, 607 F.3d 559 (8th Cir.)

Greer claimed that the police officers violated the *Fourth Amendment* when they entered first the porch, and then his house, on the date of his arrest, and as a result the court should have suppressed the firearm and other evidence seized from the house.

When Greer opened the door to the porch and stepped back, he impliedly invited the officers to enter, therefore; the officers' entry onto the porch was lawful.

The government does not contend that Greer consented to the officers moving from the porch to the house, that exigent circumstances justified the second entry, or that the fugitive for whom the officers had an arrest warrant resided in the house. Without consent or exigency, or an arrest warrant for a resident, the police generally must have a search warrant to enter a home. In this situation the officers' entry into Greer's home was unlawful.

However, once the officers entered the home, Greer's consent to search was obtained voluntarily, although voluntary consent alone is not sufficient to avoid suppression based on the unlawful entry. The government also must establish that the consent was an independent act of Greer's free will that purged the taint of the *Fourth Amendment* violation.

To determine whether Greer's consent was sufficient to purge the primary taint of the entry, the court considers the giving of *Miranda* warnings where applicable, "the temporal proximity" of the entry and the consent, "the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct."

An examination of those factors suggests that Greer's voluntary consent was an independent act of free will sufficient to purge the taint that arose from the unlawful entry to arrest the fugitive. The purpose of the unlawful entry was not to investigate Greer. The officers spotted a fugitive in the residence, and their intrusion was aimed at apprehending her. The entry was not especially flagrant; the door to the residence was open, and the officers used no force to gain access. The officers smelled marijuana before going into the house, so the unlawful entry did not prompt the request to search.

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

******

U.S. v. Shafer, 608 F.3d 1056 (8th Cir.)

Based on the totality of the circumstances, the court held that the officer's expanded scope of the traffic stop was supported by a reasonable suspicion of criminal activity, and that the delay was not excessive under the circumstances. The officer recognized the odor of marijuana in the car; the suspects gave different accounts of their travels, avoided eye contact, and appeared nervous. This reasonable suspicion of criminal activity permitted the officer to briefly question Shafer and to wave down the canine unit.

When Shafer was later arrested, the court held that he voluntarily consented to the search of his residence, for the limited purpose of obtaining a briefcase containing his financial documents, and that he voluntarily consented to the search and seizure of that briefcase.

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

*****

U.S. v. Golinveaux, 611 F.3d 956 (8th Cir.)

The court held that Golinveaux's consent to the search of her car was voluntary. She was fifty years old, had thirteen years of education, did not suffer from any mental disability and there was no evidence that she was under the influence of drugs at the time she consented to the search.

At most, Golinveaux was in police custody for thirty-eight minutes before she gave consent to search, and was subject to the possible physical intimidation and the officer's "dangerous chemical" speech for less than twenty three minutes. The court did not believe that, in such a short time, an experienced criminal, such as Golinveaux, particularly given her history of assaulting law enforcement officers, was so overcome by police authority as to make her consent involuntary.

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

*****

U.S. v. Dinwiddie, 618 F.3d 821 (8th Cir.)

Police made a controlled delivery of marijuana to Dinwiddie at his residence. Immediately after the delivery police saw Dinwiddie outside the residence, holding what appeared to be a packing slip from the delivery. Police approached him, asking him if he possessed any weapons or drugs. Dinwiddie said no and consented to a search of his person and vehicle. During the search, police recovered from Dinwiddie's pants pocket a packing slip from one of the packages in the shipment that had just been delivered.

The scope of consent for a search is limited to what a reasonable person would have understood by the exchange between the investigating officer and the person to be searched. The scope of consent does not automatically exclude items about which the defendant was not questioned.

Dinwiddie was observed exiting a house to which a controlled delivery of drugs had just been made. He was observed carrying what appeared to be a packing slip from the just completed drug delivery. Police officers approached him and asked him if he would consent to a search of his person. He agreed. In this context, a reasonable person would have understood his consent to include his pants pocket; therefore, the scope of the search did not exceed the consent that was given. The police were not limited to searching for objects about which he was just questioned, weapons and drugs.

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

*****

U.S. v. Mayo, 627 F.3d 709 (8th Cir.)

The officers' warrantless search of the vehicle was valid under the automobile exception to the warrant requirement of the *Fourth Amendment*. The court held that the officers had probable cause to believe the minivan contained drugs based on the defendants' nervous behavior, their

inconsistent stories, the driver's criminal history, and the plain-view discovery of two bindles with markings consistent with drug packaging.

The court also found that the driver gave the officers consent to search the vehicle, and that it was objectively reasonable for the officers to search any part of the minivan where drugs might be stored, including behind the door panels. When a person gives his consent to search a vehicle, officers may search containers within the vehicle that may contain drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive way. Here, a reasonable person would have understood the officer's request to search the vehicle for drugs covered the entire minivan, including behind the door's interior panels. The officers opened the panels in a minimally intrusive manner and the driver did not object to the search or attempt to withdraw his consent to search.

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

*****

Third Party Consent

U.S. v. Gonzalez, 609 F.3d 13 (1st Cir.)

The court held, that in regard to a consent search of an apartment that was being used as a "drug-drop", the test was not whether LaFrance actually lived in the apartment, but whether she had sufficient authority to consent to its search. In this case the officer could have reasonably believed that LaFrance had the authority to consent to the search of the apartment.

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

*****

U.S. v. King, 604 F.3d 125 (3rd Cir.)

The *Georgia v. Randolph*, 126 S. Ct. 1515 (2006), holding that the consent of one party with authority is trumped by the refusal of another present party with authority is limited to searches and seizures of the home.

The consent by one party to the seizure of a computer shared equally without password protection is valid even when the other party is present and refuses consent.

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

*****

U.S. v. Hinojosa, 606 F.3d 875 (6th Cir.)

The defendant's wife consented to the agents' initial and continued entry into the residence. There was no challenge as to her authority or ability to provide valid consent, and the interaction between the officers and the defendant's wife was devoid of coercion or intimidation, indicating that the consent was voluntarily given. Any observations the agents made after having been granted consent to enter the house was made in plain view from their lawful positions; therefore

no improper search occurred and this information was properly included in the search warrant affidavit.

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

*****

U.S. v. King, 627 F.3d 641 (7th Cir.)

Officers went to the defendant's restaurant where they received consent to search the premises from the cook, who was the only employee present. The officers discovered a kilogram of "sham" cocaine that a confidential informant had given the defendant the day before.

The court held that the officers' entry into the restaurant was legal even though the restaurant was not open-for-business, at the time. The door was unlocked, and the employee did not object to the officers' presence when they made contact with him.

The court held that the employee had apparent authority to consent to a search of the premises. He had keys to the restaurant, the code to deactivate the burglar alarm and he opened the restaurant by himself. It was reasonable for the officers to believe that he had full authority over the premises, including the authority to grant access to others.

Finally, the court held that the employee voluntarily consented to the search. The employee never told the agents to stop their search or to leave. The encounter with the officers was polite, and there was no evidence of coercion.

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

*****

U.S. v. Amratriel, 622 F.3d 914 (8th Cir.)

Police responded to a 911 call about a domestic disturbance at the defendant's house. The defendant's wife told police that she and her husband had a fight that escalated when he began chasing her around the house with a sword. The officers disarmed the defendant and placed him in their patrol car. Concerned about weapons in the house, the defendant's wife gave the police written permission to search the house. The officers found a large, locked gun safe in the garage. The defendant's wife told the officers her husband had the keys. The officers retrieved the keys from the defendant, who was still outside in the officers' patrol car. Inside the safe the officers found seventeen firearms and a hand grenade. The defendant argued that the officers' reliance on his wife's apparent authority over the gun safe was unreasonable.

The court disagreed. When the officers received consent to search the officers knew: (1) the safe was in a common area, the garage; (2) the defendant's wife knew where the keys were and how to unlock the safe, as she unlocked it herself; (3) she never indicated that she had no access to the safe or that it was for her husband's exclusive use; (4) as the officers removed the weapons, the defendant's wife identified one handgun as hers. The court noted that possession of the key to the safe, alone, was not the sole factor in determining whether the defendant's wife had authority to consent to the search. Additionally, the defendant's failure to object when police took the keys from him was further evidence that the officers acted reasonably. Finally,

when officers obtain valid third-party consent, they are not also required to seek consent from a defendant, even if he is detained nearby.

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

*****

U.S. v. Sanchez, 608 F.3d 685 (10th Cir.)

The defendant's fifteen year old daughter had actual authority to consent to a search of the home by the officers since she had unrestricted access to the common living areas, such as the garage, where the officers found more than 100 kilograms of marijuana. The court further held that the daughter's consent was given voluntarily; noting that her age was not a bar to valid consent, but only one factor within the totality of the circumstances to be considered.

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

*****

Exigent Circumstances

Emergency Scene

U.S. v. Taylor, 624 F.3d 626 (4th Cir.)

A cab driver found a four-year-old girl wandering alone along a busy street and called the police. The girl told the responding officer that she lived across the street. When they got to her house, the officer saw through the exterior door, that the interior door was open. The officer opened the exterior door and called out, but received no response. He entered the house, with the girl, and found the defendant in the bedroom. On a cabinet next to the bed, the officer saw a clear plastic bag containing .22-caliber ammunition. After the officer learned that the defendant had given him false name, he conducted a protective sweep, and found a handgun under the mattress. The officer arrested the defendant after further investigation revealed that he was a convicted felon.

The court held that exigent circumstances permitted the officer to enter the defendant's house without a warrant. Although a warrant was not required, the officer's entry into the home had to be reasonable. The court concluded that a four-year-old girl wandering alone, along a busy street, constituted an emergency that made the officer's entry into the house to locate a parent reasonable.

The court then noted that once inside the house, the scope of the ensuing search had to be reasonable. In this case, the officer made no effort to search any areas that could not contain an adult that could care for the child. Once the officer encountered the defendant, it was reasonable to try to identify him before leaving the child with him. After seeing the bag of ammunition and learning that the defendant had given him a false name, the officer was justified in conducting a protective sweep. The officer limited the scope of his protective sweep to the area within which the defendant might gain possession of a weapon.

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

*****

Johnson v. City of Memphis, 617 F.3d 864 (6th Cir.)

The court held that the combination of a 911 hang-call (when a caller dials 911 and hangs up before speaking to the operator), an unanswered return call, and an open door with no response from inside the residence was sufficient to satisfy the exigency requirement and justify the officers' entry into the residence under the emergency aid exception. The court declined to adopt a *per se* rule for all 911 hang calls, instead limiting its holding to the specific facts of this case.

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

*****

Armijo v. Peterson, 601 F.3d 1065 (10th Cir.)

In response to a bomb threat at a local high school, police made a warrantless entry into a home, conducted a protective sweep, and temporarily seized the lone occupant.

The emergency exigency authorizing a warrantless entry exists when (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable.

In such an emergency, officers do not need probable cause. Reasonable belief does not require absolute certainty, and the standard is more lenient than probable cause.

The emergency exigency exception not only justifies warrantless entries into a house to aid *a potential victim in the house*, but also justifies warrantless entries into a house to stop *a person or property inside the house* from immediately harming *people not in or near the house.*

A protective sweep of a residence to ensure officer safety is not only authorized incident to an arrest, but may also be conducted under the exigent-circumstances doctrine *if* reasonable grounds exist to search to protect the safety of someone besides the officers.

Absent exigent circumstances and probable cause, or a warrant, officers may not enter a home and seize an individual for routine investigatory purposes, no matter whether the seizure is an investigatory stop or an arrest. In that sense, *Terry* stops have no place in the home. However, just as exigent circumstances permit a warrantless home entry, emergencies may justify a warrantless seizure in the home.

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

*****

Inspections

Giragosian v. Bettencourt, 614 F.3d 25 (1st Cir.)

Giragosian owned a gun shop. While Giragosian was training a customer to use a handgun, the customer committed suicide by intentionally shooting himself in the head. Along with their own investigation, the local police department contacted the ATF to request that ATF conduct an

inspection of the gun shop. After observing several violations of federal firearms regulations the ATF inspector had Giragosian surrender his federal firearms license and seized ten custom gun frames lacking serial numbers from the gun shop.

Giragosian sued the ATF inspector under *Bivens*, claiming that the inspection and the ATF's seizure of his federal license and gun frames constituted an unlawful warrantless seizure in violation of the *Fourth Amendment*.

The court held that the ATF inspector did not violate Giragosian's *Fourth Amendment* rights by conducting a warrantless search, but rather the search constituted a lawful exercise of the government's power to inspect the inventory and records of licensed firearms dealers. Pursuant to *18 U.S.C. § 923(g)(1)(B)(ii)*, the government may conduct compliance inspections of gun shop premises without either a warrant or reasonable cause, as long as it does not do so more than once in any twelve-month period. The Supreme Court has explicitly upheld the constitutionality of this provision under the *Fourth Amendment*, holding that the "urgent federal interest" in regulating firearms traffic outweighs any threat to gun dealers' privacy. The ATF inspector's 2007 compliance inspection of Giragosian's gun shop was the first in twelve months, therefore it met all of the requirements of *§ 923(g)(1)(B)(ii)*.

Giragosian also argued that the ATF inspector's did not qualify as a lawful compliance inspection because he acted on a local police department's request. The court held that § *923* does not prohibit an ATF officer from conducting an inspection at the request of local law enforcement, nor is there any reason to think that Congress intended to prevent ATF officers from carrying out compliance inspections when they have a particular reason to be concerned that violations might exist.

Because no constitutional violation occurred with respect to the warrantless search, the ATF inspector was entitled to qualified immunity.

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

*****

Military Inspections

U.S. v. Rendon, 607 F.3d 982 (4th Cir.)

Rendon's MP3 player was inspected pursuant to a valid military inspection. There was no evidence to indicate that anyone had a particularized suspicion of Rendon when he was first inspected, nor was there any evidence that he was treated any differently from any other soldier entering the unit. The search of his personal property was conducted pursuant to a regularly scheduled intake protocol for new members of the unit, and the search stayed within the parameters authorized by the commanding officer in the DSCB Handbook and defined in Military Rule of Evidence 313. Even though a purpose of the search was the detection of contraband, it appropriately related to the good order and discipline of the unit. Therefore any contraband discovered during the course of that inspection could be seized and turned over to civilian authorities.

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

*****

Inventory Searches

U.S. v. Mundy, 621 F.3d 283 (3d Cir.)

Philadelphia Highway Patrol officers stopped Mundy for a traffic violation and discovered that he was driving an unregistered vehicle in violation of Pennsylvania law. The officers impounded the vehicle and conducted inventory search of the vehicle pursuant to the department's "Live Stop Policy." During the inventory search, officers opened the locked trunk with key provided by Mundy, and discovered a grey plastic bag that contained a closed shoebox. The officer removed the shoebox and opened it, finding a brown paper bag and two clear plastic zip-lock bags filled with a substance that appeared to be cocaine. The officer opened the paper bag and found four more clear plastic zip-lock bags also containing a substance that appeared to be cocaine.

Mundy argued that the officer exceeded his authority when he searched the closed containers located in the trunk of the vehicle because the PPD Live Stop Policy did not specifically mention the opening of closed containers.

The court disagreed, holding that "standardized criteria or routine may adequately regulate the opening of closed containers discovered during inventory searches without using the words "closed containers" or other equivalent terms." The PPD Live Stop Policy sufficiently regulated the scope of the search by directing the officer to search all accessible areas of the vehicle, including the trunk, provided it was not forced open, to determine if it contained any personal property or effects. A search of unlocked containers that may hold such property or effects falls within the PPD Live Stop Policy's general directive and does not violate the *Fourth Amendment*.

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

*****

U.S. v. Maddox, 614 F.3d 1046 (9th Cir.)

An officer stopped Maddox after he observed him driving recklessly. Maddox got out of his vehicle and began yelling at the officer who instructed him to get back in his vehicle. Maddox complied. The officer noticed that the vehicle's tags were expired and the temporary registration sticker in the window was an invalid photocopy. A computer check revealed that Maddox's drivers license was suspended. When Maddox ignored the officer's request to step outside the vehicle the officer took away Maddox's key chain and cell phone, tossing them on the front seat of Maddox's vehicle. The officer arrested Maddox, handcuffed him and placed him in his patrol car. At this point Maddox posed no threat to officer safety and there was no danger of evidence destruction.

The officer went back to Maddox's vehicle, reached inside, and retrieved the key chain and cell phone. Hanging on the key-chain was a metal vial with a screw top. The officer removed the top and the contents of the vial which he believed to be methamphetamine. The officer went into the interior of the vehicle and removed a closed computer case which he opened, and discovered a handgun and more of a substance which he believed to be methamphetamine.

The court upheld the suppression of all items seized from Maddox's vehicle.

The government argued that the office's seizure of the laptop bag was the result of a valid inventory search. The court disagreed, holding that the officer's impoundment of Maddox's vehicle violated Washington Law, and, therefore, did not qualify as a valid inventory search in accordance with the *Fourth Amendment*.

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

*****

U.S. v. Cartwright, 630 F.3d 610 (7th Cir.)

After a traffic stop, the officer arrested Cartwright for failing to produce a driver's license and giving a false name. The officer found a gun in the backseat of the vehicle during the search incident to arrest. Although the incident occurred before the Supreme Court's decision in *Gant*, Cartwright argued on appeal that the court should apply *Gant* and suppress the gun.

Declining to suppress the gun under *Gant*, the court held that the officer would have inevitably discovered the gun pursuant to the valid inventory search of the car. The court found that the agency's inventory policy was sufficiently standardized and that the officer followed the policy.

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

*****

Plain View

U.S. v. Williams, 592 F.3d 511 (4th Cir.)

The sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents.

The search warrant authorized a search of defendant's computers and digital media for evidence relating to the designated Virginia crimes of making threats and computer harassment. To conduct that search, the warrant impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization. To be effective, such a search could not be limited to reviewing only the files' designation or labeling, because the designation or labeling of files on a computer can easily be manipulated to hide their substance. Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality.

Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.

The warrant also authorized the police to search for things like disks and "thumbnail drives," which, the evidence showed, could be as small as a dime, and which could very easily have been stored in the lockbox where the machine gun and silencer were found. A thorough search of the lockbox would therefore have required the detective to move the gun and silencer, even if only

within the confines of the lockbox. And before moving the gun, the detective was entitled to pick it up and determine whether it was loaded, for his own safety. Because it was during the course of a legitimate safety inspection that the incriminating character of the machine gun and silencer became "immediately apparent," the warrantless seizure of them was justified by the plain-view exception.

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

*****

U.S. v Muhammad, 604 F.3d 1022 (8th Cir.)

We must decide whether Agent McCrary lawfully seized the cash protruding from the wallet. The plain-view exception allows officers to seize contraband or other evidence of a crime in limited situations. Under the plain-view exception, officers may seize an object without a warrant if they are lawfully in a position from which they view the object, the incriminating character of the object is immediately apparent, and the officers have a lawful right of access to the object.

We conclude that Agent McCrary lawfully removed the wallet from Muhammad's pocket and Muhammad does not dispute that the cash was visible without opening the wallet; therefore the first and third requirements of the plain-view exception are met. While cash is not inherently incriminating, under these circumstances, Agent McCrary had probable cause to believe that the cash protruding from the wallet was evidence of the robbery.
The plain-view exception permitted Agent McCrary to seize the cash, which then allowed him to confirm that five of the $20 bills were bait bills taken during the robbery.

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

*****

Protective Sweeps

U.S. v. Roberts, 612 F.3d 306 (5th Cir.)

The officers acted well within their authority when they stepped into the defendant's apartment to place him under arrest, and then when they conducted a protective sweep of the apartment. Not only did they need to maintain control over the defendant and others present in the apartment, but other building residents had provided information that indicated that there were weapons in the apartment.

During the protective sweep of the apartment the officers seized a handgun and shotgun. Although the incriminating nature of the weapons was not immediately apparent, the court held that the officers were justified in temporarily seizing the weapons for the safety of themselves and the apartment's occupants.

The officers were entitled to maintain control over the weapons while they completed their investigation of the individuals inside the apartment. During that investigation the officers discovered that the defendant was an unlawful user of a controlled substance and that another

occupant of the apartment was a convicted felon. At this time the illegality of the firearms became apparent and their permanent seizure was warranted.

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

*****

Armijo v. Peterson, 601 F.3d 1065 (10th Cir.)

A protective sweep of a residence to ensure officer safety is not only authorized incident to an arrest, but may also be conducted under the exigent-circumstances doctrine *if* reasonable grounds exist to search to protect the safety of someone besides the officers.

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

*****

Searches Incident to Arrest (SIA)

U.S. v. McGhee, 627 F.3d 454 (1st Cir.)

During a lawful search, officers found marijuana in McGhee's shoes and arrested him. The officers had McGhee remove his shirt and shorts, but McGhee resisted when the officers tried to remove his underwear to complete their search incident to arrest. After a struggle, officers pulled down McGhee's underwear and found a bag containing crack cocaine protruding from between his buttocks.

The court noted that searches incident to arrest that go beyond a pat-down, and the removal of outer garments, such as shoes and socks, require more justification because of their intrusiveness. The court held that the officers were justified in conducting a strip-search. The officers had reason to believe that McGhee might be hiding drugs somewhere on his person, and not just in his pockets. They had found marijuana in his shoes, and McGhee's physical resistance when the officers tried to remove his underwear was a reasonable signal that he was concealing drugs in it or on his body.

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

*****

U.S. v. Shakir, 616 F.3d 315 (3d Cir.)

Police arrested Shakir on a warrant for armed robbery as he attempted to check into his hotel. During the arrest Shakir dropped a gym bag he was carrying. An officer searched the gym bag incident to arrest and discovered cash in the bag that was later identified as having been stolen during a different armed robbery than the one for which Shakir was arrested.

Shakir argued that the search of the gym bag violated the *Fourth Amendment* because he was already handcuffed at the time the officer searched his bag and, therefore, he had no access to any weapon or destructible evidence that might have been in the bag.

The court held that a search is permissible incident to a suspect's arrest when, under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched. In this case there remained a sufficient possibility that Shakir could access a weapon in his bag to justify its search. Although he was handcuffed and guarded by two policemen, Shakir's bag was literally at his feet, so it was accessible if he had dropped to the floor. Although it would have been more difficult for Shakir to open the bag and retrieve a weapon while handcuffed, the court did not regard this possibility as remote enough to render unconstitutional the search incident to arrest. This was especially true since Shakir was subject to an arrest warrant for armed bank robbery, and that he was arrested in a public area near some twenty innocent bystanders, as well as at least one suspected confederate who was guarded only by unarmed hotel security officers. Under these circumstances, the police were entitled to search Shakir's bag incident to arresting him.

Although the court upheld the validity of the search of the gym bag incident to Shakir's arrest, it applied the rule outlined in *Arizona v. Gant* (cite omitted), stating that it did not read *Gant* so narrowly so as to limit it only to searches incident to arrest involving vehicles. The court noted that many courts of appeals perceived *Belton* to establish a relaxed rule for searches incident to arrest in all contexts.

"Because *Gant* foreclosed such a relaxed reading of *Belton*, there is no plausible reason why it should be held to do so only with respect to automobile searches, rather than in any situation where the item searched is removed from the suspect's control between the time of the arrest and the time of the search. Although this Court has never explicitly adopted a "time of the arrest" rule like that adopted in the aforementioned cases, we do read *Gant* as refocusing our attention on a suspect's ability (or inability) to access weapons or destroy evidence at the time a search incident to arrest is conducted."

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

*****

U.S. v. Pineda-Areola, 372 Fed. Appx. 661(7th Cir.)

Defendant was arrested at the scene of a drug transaction, and his cell phone was seized. When, using another phone, officers dialed the phone number of the person through whom the drug transaction was arranged, defendant's phone vibrated.

Dialing a phone number causing defendant's phone to vibrate is not a "search." Even if dialing a phone were considered a search, the officers were entitled to search defendant and the phone incident to his lawful arrest.

Editor's Note: This is an unpublished opinion granting a request by defendant's counsel to withdraw from representing defendant on appeal. Counsel asserted, and the court agreed, that there were no non-frivolous grounds on which to appeal.

*****

U.S. v. Perdoma, 621 F.3d 745 (8th Cir.)

A plainclothes officer approached Perdoma at a bus station and identified himself as a police officer. The officer told Perdoma that he was not under arrest and asked him if he would answer a few questions. During their brief conversation the officer smelled the odor of marijuana emanating from Perdoma. The officer asked Perdoma for identification, who reached for his wallet, then turned and ran from the officer. After a brief chase, another officer on duty at the bus station arrested Perdoma. The officers searched a bag that Perdoma had been carrying and discovered one pound of methamphetamine.

The court held that the officer's initial encounter with Perdoma was consensual noting that nothing about this initial encounter would have caused a reasonable person in Perdoma's situation to believe that he was not free to disregard the officer's questions and walk away. Once the officer detected the odor of marijuana emanating from Perdoma he had probable cause to arrest him for marijuana possession.

The court further held that the search of Perdoma's bag was a valid search incident to his arrest. Perdoma argued that after he was restrained, and the bag was taken from him, it was "beyond his reach," and therefore could not be searched incident to his arrest. The court stated that although an officer may have exclusive control of a seized item, it does not mean that it has been removed from the arrestee's area of immediate control. In this case the search of the bag occurred in close proximity to where Perdoma was restrained, and he had already run from an officer once. Under these circumstances the bag was within "the area into which the arrestee might reach in order to grab a weapon or evidentiary items."

Since the search of a bag in a bus terminal did not involve "circumstances unique to the vehicle context," the Supreme Court's holding in *Gant* that the police may search an arrestee's vehicle for "evidence relevant to the crime of arrest" does not apply to the search of Perdoma's bag.

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

*****

Searches Incident to Arrest (vehicles)

U.S. v. Johnson, 627 F.3d 578 (6th Cir.)

Citing *Gant*, the court held that even though the officer had arrested and secured Johnson outside of the car, the search of the passenger area where he had been sitting was justified. An officer may search a vehicle incident to arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. Since the officer arrested Johnson for unlawful possession of a firearm, he could have reasonably believed that ammunition or additional firearms were in the car or in containers in the car, especially in the passenger area where Johnson had been sitting.

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

*****

U.S. v. Salamasina, 615 F.3d 925 (8th Cir.)

Federal agents obtained an arrest warrant for Salamasina for a variety of drug offenses. Officers conducted surveillance on Salamasina's house and arrested him as he pulled into his driveway in his vehicle. Salamasina's fiancée, Lata, and their two minor children were also in the vehicle. The officers took Salamasina into custody and moved him away from his vehicle. An officer directed Lata leave the garage door open, after she stated that she was going to close it, and allowed her to re-enter the vehicle from the passenger side to tend to the children who were in the back seat. During this time Salamasina shouted to Lata to not let the officers into the house and, over orders from the officers not to communicate with one another, Salamasina and Lata shouted to one another in a foreign language that the officers did not understand.

An officer conducted a warrantless search of the vehicle looking for weapons. As the result of the search the officer found a dietary supplement that is commonly used as a cutting agent for cocaine as well as acetone, which is used in conjunction with the cutting agent. Based on these findings and on other information from the investigation the officers obtained a search warrant for Salamasina's house. The search yielded cocaine, drug paraphernalia, ammunition and cash.

Salamasina claimed that the warrantless search of his vehicle violated the *Fourth Amendment*. He argued that under to the Supreme Court's recent ruling in *Arizona v. Gant, 129 S. Ct. 1710, (2009)*, the warrantless search of his vehicle was invalid because he was immediately restrained and removed from the vehicle, and officers, finding Lata to not be a threat, gave her permission to repeatedly access the vehicle to tend to her children.

The court rejected Salamasina's argument stating,

> Even assuming that Salamasina had been secured by the arresting officers, Lata was not secured. Rather, Lata repeatedly entered and exited the vehicle to tend to her children, she spoke to Salamasina in a foreign language despite officers' directions to not communicate with Salamasina, and she attempted to close the garage door after officers instructed her to keep the door open. An objective officer considering these facts, in conjunction with the fact that officers had just executed an arrest warrant on Lata's fiancé on drug charges, would be warranted in conducting a search of the vehicle incident to Salamasina's arrest under *Gant's* officer-safety consideration.

The court further stated that even if *Gant's* search incident to arrest exception did not apply, the search of the vehicle would have been warranted under *Michigan v. Long* which held that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

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

*****

U.S. v. Maddox, 614 F.3d 1046 (9th Cir.)

An officer stopped Maddox after he observed him driving recklessly. Maddox got out of his vehicle and began yelling at the officer who instructed him to get back in his vehicle. Maddox complied. The officer noticed that the vehicle's tags were expired and the temporary registration sticker in the window was an invalid photocopy. A computer check revealed that Maddox's drivers license was suspended. When Maddox ignored the officer's request to step outside the vehicle the officer took away Maddox's key chain and cell phone, tossing them on the front seat of Maddox's vehicle. The officer arrested Maddox, handcuffed him and placed him in his patrol car. At this point Maddox posed no threat to officer safety and there was no danger of evidence destruction.

The officer went back to Maddox's vehicle, reached inside, and retrieved the key chain and cell phone. Hanging on the key-chain was a metal vial with a screw top. The officer removed the top and the contents of the vial which he believed to be methamphetamine. The officer went into the interior of the vehicle and removed a closed computer case which he opened, and discovered a handgun and more of a substance which he believed to be methamphetamine.

The court upheld the suppression of all items seized from Maddox's vehicle. The government argued that the search of Maddox's key chain was proper as a lawful search incident to arrest.

In the Ninth Circuit, the determination of the validity of a search incident to arrest is a two-fold inquiry: (1) was the searched item "within the arrestee's immediate control when he was arrested;" (2) did "events occurring after the arrest but before the search make the search unreasonable?"

The court held that the search of the key-chain vial was not a valid search incident to arrest. While the key chain was within Maddox's immediate control while he was arrested, subsequent events, namely the officer's handcuffing of Maddox and placing Maddox in the back of the patrol car, rendered the search unreasonable. The court stated that "mere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the delay".

The government argued that the office's seizure of the laptop bag was the result of a valid inventory search. The court disagreed, holding that the officer's impoundment of Maddox's vehicle violated Washington Law, and, therefore, did not qualify as a valid inventory search in accordance with the *Fourth Amendment*.

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

*****

U.S. v. Davis, 598 F.3d 1259 (11th Cir.)

In an incident that predated the Supreme Court decision of *Arizona v. Gant*, Davis, a passenger in a car stopped for a traffic offense, was arrested after giving the officer a false name. During a search of the car incident to the arrest, the officer seized a gun from the pocket of Davis' jacket left on the seat. The search violated the Fourth Amendment pursuant to the *Gant* decision

because neither Davis nor the driver had access to the car and because it was not reasonable to believe that evidence of the crime of arrest was in the car.

However, the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on well settled precedent, even if that precedent is subsequently overturned. The gun is admissible evidence.

The 10th Circuit agrees (cite omitted). The 9th Circuit disagrees (cite omitted).

Before *Gant*, the 5th Circuit refused to apply the exclusionary rule when police had relied in good faith on prior circuit precedent (cite omitted).

Before *Gant*, the 7th Circuit expressed skepticism about applying the rule's good-faith exception when police had relied solely on case law in conducting a search (cite omitted).

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

*****

U.S. v. Vinton, 594 F.3d 14 (D.C. Cir.)

After lawfully stopping defendant for a traffic violation, the Park Police Officer saw a fishing knife with a five-and-a-half-inch sheath in plain view on the backseat. During a frisk of the passenger compartment, the officer found a "butterfly knife" under the passenger side floor mat.

Defendant was arrested for "possession of a prohibited weapon" (PPW), D.C. Code § 22-4514(b). However, because the offense of PPW requires proof of intent to use the weapon *unlawfully* against another, the officer lacked probable cause to arrest for PPW. The arrest was still valid because there was probable cause to believe defendant committed the offense of "carrying a dangerous weapon" (CDW), D.C. Code § 22-4504(a), which does not require proof of intent to use the weapon for an unlawful purpose." A "deadly or dangerous weapon" is anything that is *likely* to produce death or great bodily injury by the use made of it. Even though it may be used as a tool in certain trades or hobbies or may be carried for utilitarian reasons, the surrounding circumstances indicate that defendant's purpose for carrying the butterfly knife was its use as a weapon.

The search of a locked briefcase in the passenger compartment incident to the arrest was lawful under *Arizona v. Gant* because it was reasonable to believe that the briefcase contained evidence relevant to the crime of arrest. The "reasonable to believe" standard probably is akin to the "reasonable suspicion" standard required to justify a *Terry* search. Accordingly, the officer's assessment of the likelihood that there will be relevant evidence inside the car must be based on more than "a mere hunch," but "falls considerably short of needing to satisfy a preponderance of the evidence standard."

The defendant was caught with a type of contraband sufficiently small to be hidden throughout a car and frequently possessed in multiple quantities. Indeed, this fact was well-known to the officer, who testified that "generally if one weapon is there . . . there's the chance that other weapons could be there." Having found two objects, mace and earplugs, that suggested at least a possible association with weapons, along with two other objects, a sheathed knife and a butterfly knife, that were clearly capable of being used as weapons, the officer had an objectively

reasonable basis for believing that additional weapons might be inside the briefcase inside the car.

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

*****

Qualified Immunity / Civil Liability / Municipal Liability

Use of Force Situations (Detention / Arrest)

Statchen v. Palmer, 623 F.3d 15 (1st Cir.)

The court held that the officers' use of force was reasonable; therefore, they were entitled to qualified immunity. Statchen fought with officers as they tried to take him into custody for public intoxication. Statchen, who is 5'10" tall, weighing 250 pounds, bragged to the officers on the ride to the station that it took two of them to restrain him. At the station, when the officers tried to handcuff Statchen for the ride to the jail, he fought them again. Statchen, who suffered two fractured ribs, eventually pled no contest to two counts of resisting arrest.
The court found that the officers gave a consistent description of the melee in which they tried to seize a heavy and intoxicated man, who refused to submit, and who, after falling to the ground, continued to grab and struggle with them. The officers admitted to using considerable force, but only to the extent needed to handcuff Statchen. The officers shouted at him to stop resisting throughout the encounter, and they ceased to use force when he finally agreed to stop fighting.

The court noted that Statchen's deposition gave a much hazier description of the events, "which was hardly surprising, given his intoxication." While he was vivid in describing knees and punches thrown at him in the struggle, nothing in his account suggested that the officers used more force than was necessary to subdue a large and uncooperative man, and place him into handcuffs.

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

*****

Raiche v. Pietroski, 623 F.3d 30 (1st Cir.)

A jury awarded Raiche damages for injuries he sustained after Pietroski forcibly removed him from his motorcycle during a traffic stop. The court held that the jury was free to conclude, as it did, that Pietroski had probable cause to arrest Raiche, but the manner in which he effected that arrest was unreasonable.

After applying the *Graham* factors, the court held that Raiche's minor infractions of failing to wear a helmet while driving a motorcycle, and failing to stop when signaled by police, did not justify Pietroski's violent act of physically removing Raiche from his parked motorcycle and slamming him into the pavement. Additionally, while Raiche remained on his motorcycle, behind a parked car, he never displayed any weapons or made any verbal threats, and Pietroski did not charge him with resisting arrest. An objectively reasonable police officer would have

known that the force used to make the arrest was excessive; therefore, Pietroski was not entitled to qualified immunity.

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

*****

Amore v. Novarro, 610 F.3d 155 (2d Cir.)

Novarro was entitled to qualified immunity for arresting Amore for a violation of a state statute that was published as part of the New York Penal Law at the time of the arrest, but that had been held unconstitutional by the New York Court of Appeals eighteen years prior to the arrest. It was objectively reasonable for Novarro to fail to realize that the statute he was attempting to enforce had been held to be unconstitutional since it was still "on-the-books."

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

*****

Tracy v. Freshwater, 623 F.3d 90 (2d Cir.)

The court held that the officer did not use unreasonable force by striking Tracy with his flashlight several times, by jumping on Tracy as Tracy tried to flee, or by forcibly moving Tracy from the ground to the police car, despite the fact that Tracy had told the officer that he was in pain and could not move.

However, the court held that the officer was not entitled to summary judgment on Tracy's claim that the officer used pepper spray on him after he was placed in handcuffs. Compelled to credit Tracy's version of the events, the court concluded that a reasonable juror could find that the use of pepper spray deployed inches from the face of a handcuffed suspect, who was not actively resisting, constituted an unreasonable use of force.

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

*****

Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir.)

Kelly filed a civil rights action claiming that his *First* and *Fourth Amendment* rights were violated when he was arrested for videotaping a police officer during a traffic stop. The officer, after noticing that Kelly, a passenger in the vehicle, was videotaping him, contacted an Assistant District Attorney (ADA) to confirm that Kelly was in violation of the *Pennsylvania Wiretap Act*. After the ADA concluded that Kelly violated the *Wiretap Act*, based on the facts described by the officer, the officer arrested him. Several weeks later, the District Attorney dropped the charges against Kelly, but issued a memorandum stating that the officer had probable cause to arrest Kelly.

The court held that the right to videotape police officers during traffic stops was not clearly established, therefore, the officer was not on notice that seizing a camera, or arresting an individual for videotaping him during a traffic stop, would violate the *First Amendment*. As a result, the officer was entitled to qualified immunity on Kelly's *First Amendment* claim.

The court remanded Kelly's *Fourth Amendment* claim to the district court for additional fact finding after concluding that the district court did not evaluate the objective reasonableness of the officer's decision to rely on the ADA's advice, and did not properly evaluate the state of Pennsylvania law at the time of the traffic stop.

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

*****

Henry v. Purnell, 619 F.3d 323 (4th Cir.)

Purnell attempted to execute a warrant for Henry's arrest. Henry fled on foot and Purnell gave chase. Purnell mistakenly drew his firearm, instead of his taser, and shot Henry in the elbow. Although not ruling on whether Purnell's mistaken use of his firearm was objectively reasonable, the court held that Purnell was not on notice that is conduct was clearly unlawful, therefore he was entitled to qualified immunity on Henry's *§ 1983* claim.

The court, however, reversed the lower court's grant of summary judgment on Henry's state-law claim and remanded the case to the district court.

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

*****

Valle v. City of Houston, 613 F.3d 536 (5th Cir.)

Police officers responded to Valle's home in response to a 911 call. Valle's son, who suffered from depression and anxiety, had become upset and locked himself in his room, refusing to allow anyone to enter. While a member of the crisis intervention team (CIT) negotiated with the son, the Special Weapons and Tactical/Hostage Negotiation Team (SWAT) forcefully entered the house. A police officer shot and killed Valle's son during the ensuing confrontation.

The court held that although the decision by the SWAT Captain to order entry into the home was arguably the "moving force" behind the constitutional violations (the warrantless entry into the home and the lethal seizure of the son) that resulted in the son's death, because his decision was not a decision by a final policy maker of the city, the city could not be held liable.

The court also held that the Valles failed to establish that a city policymaker acted with deliberate indifference, and that the inadequate CIT training was a moving force in bringing about the constitutional violation.

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

*****

Miller v. Sanilac County, 606 F.3d 240 (6th Cir.)

The court reversed the grant of summary judgment to the Deputy Wagester with respect to the federal claims of malicious prosecution, unlawful arrest, and excessive force (for allegedly slamming Miller against the vehicle and kicking his legs), and for the state claims of false arrest/imprisonment, malicious prosecution and assault and battery.

The fact that Miller's blood alcohol was found to be 0.00% casted doubt on the officer's claims that Miller smelled of alcohol and failed the field sobriety tests. In light of the conflict in the evidence, the jury could have concluded that the officer was lying. Because the officer was aware of the icy road conditions--which could certainly have caused Miller to inadvertently drive through the stop sign--there was a genuine issue of fact as to whether the officer had probable cause to arrest Miller for reckless driving. Finally, the officer wrote Miller a criminal ticket for minor in possession of alcohol. The court was unable to find any discussion or explanation in the record from the briefs, depositions, the police report, or the District Court opinion as to the basis for this charge. The court found that there was no probable cause to arrest Miller for this offense.

The court held that a jury could reasonably find that slamming an arrestee into a vehicle constituted excessive force when the offense was non-violent, the arrestee posed no immediate safety threat, and the arrestee had not attempted to escape and was not actively resisting.

As to municipal liability, the inadequacy of police training only serves as a basis for *§ 1983* liability "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." To establish deliberate indifference, the plaintiff must show prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury. Miller was not able to show that a policy or custom was the moving force behind the alleged violations, or that there was deliberate indifference based on prior instances of unconstitutional conduct.

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

*****

Aldini v. Johnson, 609 F.3d 858 (6th Cir.)

The Supreme Court has deliberately left undecided the question of whether the *Fourth Amendment* continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pre-trial detention begins. The circuits have been divided with courts choosing between the *Fourth Amendment* (objective reasonableness standard) and *Fourteenth Amendment* (shock-the-conscience standard) to protect those arrested without a warrant between the time of arrest and arraignment.

In this case the court held that the *Fourth Amendment* applies until an individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing or until the arrestee leaves the joint or sole custody of the arresting officer or officers.

The 2nd, 6th, 8th, 9th and 10th circuits agree (cites omitted).
The 4th and 7th circuits disagree (cites omitted).

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

*****

McKenna v. Honsowetz, 617 F.3d 432 (6th Cir.)

Officers responded to McKenna's home in response to a call to 911 that stated he was having a medical seizure. During their encounter with McKenna the officers repeatedly tried to get him to put on his pants, and tried to force him to rise, in the face of his request that they stop. Completely unprovoked by any aggressive or dangerous behavior, they then rolled him over, pinned him on his stomach with their knees, and handcuffed his arms behind his back and his ankles. After McKenna had been taken away to the hospital, the officers searched a dresser drawer in his bedroom and the medicine cabinet in the bathroom. In the process, they knocked down everything on top of the dresser and threw out his children's baby-teeth collection. One of the officers also ran a check on McKenna's license plate.

This view of the facts supported the finding that the officers primarily acted in a law-enforcement capacity and not in an emergency-medical response capacity. Their actions violated McKenna's right to be free from unreasonable searches and seizures and the denial of qualified immunity was proper.

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

*****

Carmichael v. Village of Palatine, 605 F.3d 451 (7th Cir.)

The record before us contains no evidence that Officer Sharkey had any factual basis for stopping the plaintiffs at gun point. He admits that the reasons that he initially gave for stopping the car, absence of a front license plate and tinted windows, were not known to him at the time that he affected the stop. The record shows, moreover, that the reason that he later gave for the stop, the absence of tail and brake lights, was not true. As the state court determined during the earlier criminal proceeding against the plaintiffs, there is simply no basis in the record upon which a determination of probable cause can be sustained. Certainly, any reasonable police officer, acting at the time Officer Sharkey acted, would have known this elementary principle of the law of arrest. Officer Sharkey is not entitled to qualified immunity with respect to the stop.

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

*****

McAllister v. Price, 615 F.3d 877 (7th Cir.)

McAllister suffered a diabetic episode while driving his automobile and crashed into two other automobiles. He claimed that the responding officer violated his *Fourth Amendment* rights by using excessive force to remove him from his car.

The court held that is was proper to deny Price qualified immunity since the evidence showed that Price ignored obvious signs of McAllister's medical condition, pulled him out of the car and took him to the ground with such force that McAllister's hip was broken and his lung bruised from the force of Price's knee in his back. Price did not do so because such force was necessary but because he was "angry" with McAllister.

The court further held that the right at issue was clearly established. The state of the law would not suggest to a reasonable officer that he may slam an unresponsive, convulsing driver into the ground with force sufficient to break the driver's hip and place his knee on the driver's back with enough force to bruise his lung.

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

*****

Forrest v. Prine, 620 F.3d 739 (7th Cir.)

Forrest posed an immediate threat to officer safety and order within the jail therefore, the use of a taser constituted permissible use of force. Officer Prine was aware that Forrest had attacked an officer earlier that night. Forrest appeared to be intoxicated, and he was pacing in the cell, clenching his fists and yelling obscenities. Before employing the taser, Officer Prine warned Forrest several times that his noncompliance would result in tasing. His conduct created a situation where the officers were faced with aggression, disruption and a physical threat.

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

*****

Cyrus v. Town of Mukwonago, 624 F.3d 856 (7th Cir.)

The court concluded that the officer was not entitled to summary judgment since there was conflicting evidence about how much force the officer used against the suspect. The officer testified that he deployed the Taser five or six times, and the medical examiner noted that the marks on the decedent's back were consistent with five or six Taser shocks. However, the Taser's internal computer registered twelve trigger pulls during the relevant time period. Although a jury might conclude that the additional six trigger pulls were not, in fact, deployments that emitted an electrical charge to the decedent's body, the Taser's internal computer record created enough of a factual discrepancy on the degree of force used by the officer to preclude summary judgment.

Additionally, summary judgment was inappropriate because a jury could conclude that the officer's use of force was excessive in light of the other *Graham* factors. At most, the decedent had committed a misdemeanor offense, he was not exhibiting violent behavior, and there was no evidence that suggested he violently resisted the officer's attempts to handcuff him. A jury might reasonably conclude that even if the initial Taser deployment was justified that the circumstances of the encounter reduced the need for force as the situation progressed. Force is reasonable only when exercised in proportion to the threat posed.

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

*****

Sallenger v. City of Springfield, 630 F.3d 499 (7th Cir.)

The court held that the officers began CPR and called paramedics as soon as they realized Sallenger was not breathing and this satisfied the *Fourth Amendment's* reasonableness standard. The officers endured a violent struggle to subdue and restrain Sallenger, a very large man who

was actively psychotic, and they responded appropriately once they realized he was not breathing.

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

*****

McCabe v. Parker, 608 F.3d 1068 (8th Cir.)

The court held that there was arguable probable cause to arrest the protesters for violating *18 U.S.C. 3056(d),* which prohibits a person from resisting a federal law enforcement agent who is performing protective services for the President; therefore the agent was entitled to qualified immunity. Based on the totality of the circumstances it was objectively reasonable for the agent to believe that he had probable cause to arrest the protesters although it was later determined that there was no lawful basis for the trespass charges.

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

******

Lee v. Andersen, 616 F.3d 803 (8th Cir.)

The court held that the evidence supported the jury's verdict that Andersen did not use excessive force against Fong Lee. The jury was instructed that the force is excessive if "it was not reasonably necessary to protect Andersen or others from apparent death or great bodily harm." Andersen testified that Fong Lee made threatening movements in the moments leading up to the shooting. He testified that Lee turned his body, with gun still in hand, towards Andersen in such a way that Andersen believed his life was in danger and Fong Lee was going to shoot him. The video from the surveillance camera corroborated Andersen's testimony that Fong Lee turned towards Andersen near the end of the foot pursuit. Andersen presented sufficient evidence to allow a jury to find that lethal force was reasonably necessary to protect him or others from apparent death or great bodily harm.

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

*****

Shannon v. Koehler, 616 F.3d 855 (8th Cir.)

Officer Koehler responded to a call for a disturbance between two females at a bar. Koehler got to the bar and was greeted by a female who claimed one of the females inside the bar had been "touched or grabbed" by a male in the bar. The bar owner, Timothy Shannon, walked up to Koehler and using profanity stated that he did not need the police and ordered Koehler out of the bar. Koehler claimed that Shannon poked him in the chest twice during this time, which prompted him to take Shannon to the ground where he eventually handcuffed him. Shannon claimed that as a result he suffered a partially collapsed lung, multiple fractured ribs, and a laceration to the head and various contusions. Shannon denied poking Koehler in the chest.

The court held that nothing in the record, including the surveillance videos, contradicted Shannon's version of the facts, and after considering the facts and circumstances, that no reasonable officer on the scene would have felt the need to use any force against Shannon, much

less enough force to cause the injuries of which he complained. Although Shannon greeted Officer Koehler in a disrespectful, even churlish manner, that alone did not make Officer Koehler's use of force acceptable under the law.

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

*****

Fisher v. Wal-Mart Stores, 619 F.3d 811 (8th Cir.)

Police arrested Fisher for attempting to cash fraudulent money orders at Wal-Mart. The case was dismissed after the Wal-Mart employee who initially notified police did not appear in court to testify.

In a subsequent lawsuit, Fisher claimed that the police violated her *Fourth Amendment* rights against unreasonable seizures by falsely arresting her. The court held that Fisher could not establish a *Fourth Amendment* violation because the police had probable cause to arrest her. The court noted that the Wal-Mart employees confidently identified Fisher as the person who attempted to cash the fraudulent money orders, and that the officers viewed the Wal-Mart employees as reliable based on previous experiences with them.

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

*****

Dodd v. Jones, 623 F.3d 563 (8th Cir.)

Dodd was ejected from his pick-up truck after he drove it into a ditch, in the early morning hours, in an apparent alcohol-related accident. The responding officers found Dodd lying in the roadway. Fearing that Dodd might have suffered a spinal injury, the officers did not move him. While waiting for an ambulance, a pick-up truck driven by McSwain approached the accident scene. The officers waved their flashlights in an attempt to get McSwain to stop. McSwain, whose blood-alcohol content later tested at 0.164, did not stop, and he ran over Dodd. The officers drew their weapons and ordered McSwain to stop, but he ignored their commands, shifted into reverse, and ran over Dodd a second time. Officers finally got McSwain to stop and they arrested him.

Dodd survived and sued the officers for violating his rights under *Due Process* clause by failing to protect him from McSwain. He claimed the officers should have parked their vehicles, or set road flares north of the accident scene, the direction from which McSwain had driven.

The court noted that the *Due Process* clause generally does not provide a cause of action against state officials for harm caused by private actors. However, when a state official takes a person into custody and holds him against his will, the Constitution imposes upon the state official a duty to assume some responsibility for his safety and well-being.

In this case, the court doubted that the evidence supported a finding that the officers took Dodd into custody and held him against his will, to the degree necessary to trigger any duty under the *Due Process* clause. When the officers found Dodd he was incapacitated and lying in the roadway. There was no showing that Dodd could have removed himself from the roadway, or

that a passerby would have moved him out of the path later taken by McSwain, if the officers had not arrived. The absence of a clearly established constitutional duty for the officers to act to protect Dodd under these circumstances was sufficient ground to grant the officers qualified immunity.

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

*****

Elliot-Park v. Manglona, 592 F.3d 1003 (9th Cir.)

While an officer's discretion in deciding whom to arrest is certainly broad, it cannot be exercised in a racially discriminatory fashion. There is no right to state protection against madmen or criminals, but there is a constitutional right (equal protection) to have police services administered in a nondiscriminatory manner—a right that is violated when a state actor denies such protection to disfavored persons. A complete withdrawal of police protective services based on race or ethnicity violates equal protection. Diminished police services also don't satisfy the government's obligation to provide services on a non-discriminatory basis. The government may not racially discriminate in the administration of *any* of its services.

The right to non-discriminatory administration of protective services is clearly established. The very purpose of *42 U.S.C § 1983* was to provide a federal right of action against states that refused to enforce their laws when the victim was black.

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

*****

Espinosa v. City & County of San Francisco, 598 F.3d 528 (9th Cir.)

Pointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force. The pointing of a gun at someone may constitute excessive force, even if it does not cause physical injury.

Where a police officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force. If an officer intentionally or recklessly violates a suspect's constitutional rights, then the violation may be a provocation creating a situation in which force was necessary and such force would have been legal but for the initial violation.

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

*****

Brooks v. Seattle, 599 F.3d 1018 (9th Cir.)

The use of the Taser in drive-stun mode is painful, certainly, but also temporary and localized, without incapacitating muscle contractions or significant lasting injury. This amount of force is more on par with pain compliance techniques, which this court has found involve a "less significant" intrusion upon an individual's personal security than most claims of force, even when they cause pain and injury. This quantum of force is less than the intermediate.

The Officers were attempting to take Brooks into custody for refusing to sign the Citation to Appear. Her behavior also gave the officers probable cause to arrest her for obstructing a police officer in the exercise of his official duties. Although obstructing an officer is a more serious offense than the traffic violations, it is nonetheless not a serious crime.

It would also be incorrect to say Brooks posed *no* threat to officers. While she might have been *less* of a threat because her force so far had been directed solely at immobilizing herself, a suspect who repeatedly refuses to comply with instructions or leave her car escalates the risk involved for officers unable to predict what type of noncompliance might come next. That Brooks remained in her car, resisting even the pain compliance hold the officers first attempted, also reveals that she was not under their control.

There is little question that Brooks resisted arrest: the district court noted she "does not deny that she used force to resist the [O]fficers' efforts," she grasped the steering wheel and wedged herself between the seat and steering wheel, and she refused to get out of the car when asked. Her conduct is classified as "active resistance."

The officers gave multiple warnings that a Taser would be used and explained its effects. Even though the Taser was used three times in this case, which constitutes a greater application of force than a single tasing, in light of the totality of the circumstances, this does not push the use of force into the realm of excessive.

This case presents a less-than intermediate use of force, prefaced by warnings and other attempts to obtain compliance, against a suspect accused of a minor crime, but actively resisting arrest, out of police control, and posing some slight threat to officers. The officers' behavior did not amount to a constitutional violation.

Editor's Note: The Court did not hold that the use of a Taser in drive-stun mode can never amount to excessive force, but solely that such use was not excessive based upon Brooks's conduct.

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

*****

Bryan v. MacPherson, 608 F.3d 614 (9th Cir.)

The court held that Officer MacPherson's use of the taser was unconstitutionally excessive, stating that "a reasonable officer in these circumstances would have known that it was unreasonable to deploy intermediate force". However, as of July 24, 2005 there was no Supreme Court, or 9th Circuit Court of Appeals decision addressing whether the use of a taser, in dart mode, constituted an intermediate level of force. The court concluded that a reasonable officer in MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the taser use, in the circumstances he confronted, in July 2005 and held that MacPherson was entitled to qualified immunity.

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

*****

Luchtel v. Hageman, 623 F.3d 975 (9th Cir.)

The court held that the officers' use of force in arresting Luchtel was reasonable; therefore, they were entitled to qualified immunity. When the officers responded to Luchtel's house, her husband told them that she was running around the neighborhood, out of control on drugs, and that she had gone to a neighbor's house. When the officers went to the neighbor's house, Luchtel attempted to hide behind the neighbor for protection. As the officers tried to grab Luchtel, she put her arms around the neighbor and they both fell to the floor. In the ensuing struggle, Luchtel tried to hit, scratch, bite and kick the officers. Although police officers need not use the least intrusive means available to them, the officers here did. They did not deploy a taser, use batons, or pepper sprays, nor did they punch or kick Luchtel, despite her violent, aggressive and unpredictable behavior. It was reasonable and necessary for the officers confronted with these circumstances to use the amount of force that they did to subdue Luchtel, and prevent injury to her, the neighbor and themselves.

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

*****

Smith v. Almada, 623 F.3d 1078 (9th Cir.) (opinion withdrawn and substituted at 2011 U.S. App. LEXIS 5692, March 21, 2011)

The court held that Almada was entitled to qualified immunity on Smith's claim of false arrest and malicious prosecution. Smith argued that the magistrate would not have issued the warrant for his arrest if Almada's warrant application had not included false representations. The court ruled that even if the false information had been omitted from the warrant application, there were sufficient facts left to establish probable cause to arrest Smith for arson.

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

*****

Thomas v. Durastanti, 607 F.3d 655 (10th Cir.)

The use of deadly force is not unlawful if a reasonable officer would have had probable cause to believe that there was a threat of serious physical harm to himself or others. Thus, if threatened by weapon (which may include a vehicle attempting to run over an officer), an officer may use deadly force.

The court concluded that Agent Durastanti's actions were objectively reasonable. Agent Durastanti saw the trooper's marked patrol car behind the Lincoln, its emergency lights, and Mr. Jones' apparent compliance with the trooper's directive that Mr. Jones get back into the Lincoln. A reasonable officer could conclude that the Lincoln's occupants had notice of police presence. Yet, the driver decided to pull away from the stop and drive toward Agent Durastanti placing him in harm's way. Agent Durastanti had mere seconds to react, and his actions in firing the first couple of shots were reasonable, even if mistaken. An officer may be found to have acted reasonably even if he has a mistaken belief as to the facts establishing the existence of exigent circumstances.

Even if Agent Durastanti reasonably believed that it was necessary to use deadly force, the court had to still determine whether he recklessly or deliberately brought about the need to use such force.

The parties agreed that Agent Durastanti did not identify himself as a police officer. Agent Durastanti's failure to identify himself and his partner as agents could still be viewed as reasonable given the trooper's marked patrol car behind the Lincoln, its emergency lights, and Mr. Jones' apparent compliance with the trooper's directive that Mr. Jones get back into the Lincoln. Under these circumstances, it cannot be considered reckless for a plainclothes officer to not identify himself as police.

That left the issue as to whether Agent Durastanti's decision to draw his weapon was reckless. There are no hard-and-fast rules regarding the reasonableness of force used during investigatory stops, and prior cases have eschewed establishing any bright-line standards for permissible conduct.

The agents had observed the occupants driving an apparently stolen vehicle in a reckless manner and away from a high crime area, as though they were fleeing a crime; something more than a traffic violation was suspected. Additionally, Agent Durastanti saw the occupants leaving after being stopped by a uniformed state trooper in a marked patrol car with emergency lights, and after the occupants' apparent initial compliance with the trooper's commands. A reasonable officer based upon the totality of the circumstances certainly could believe that officer safety required the display of and access to weapons.

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

*****

Brooks v. Gaenzle, 614 F.3d 1213 (10th Cir.)

Use of deadly force alone does not constitute a seizure. Clear restraint of freedom of movement must occur. The court held that Deputy Gaenzle's gunshot may have intentionally struck Brooks, but it clearly did not terminate his movement or otherwise cause the government to have physical control over him, therefore, he was not seized under the *Fourth Amendment*. Brooks was able continue to climb over the fence and elude police for three days. Supreme Court cases determining what constitutes a seizure do not support Brooks' contention that use of deadly force against him by itself is enough to constitute a "seizure."

The 6th, 7th, and 9th circuits agree.

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

*****

Lundstrom v. Romero, 616 F.3d 1108 (10th Cir.)

Albuquerque Police Department officers responded to Joseph Lundstrom's home after a neighbor called 911 and reported that she heard a woman at the residence screaming at, and striking a child. Lundstrom answered the door and told the officer that there were no children in the home. At some point, Jane Hibner, who was also in the home, came to the door because she

heard Lundstrom raising his voice. As Hibner stepped outside, Lundstrom shut the door. The officer called for back-up stating that a disorderly subject had "barricaded" himself inside the house. Officers responded and Hibner was handcuffed, frisked and directed to sit on the curb.

Officers are authorized to handcuff individuals during the course of investigative detentions if doing so is reasonably necessary to protect their personal safety or maintain the status quo. However, the use of handcuffs is greater than a de minimus intrusion and the government is required to demonstrate that the facts available to the officer would warrant a man of reasonable caution in the belief that the use of handcuffs was appropriate.

The court held that handcuffing Hibner was not a reasonable response to the circumstances presented to the officers. At the time of this encounter Hibner had cooperated with the officers; the officers had not yet uncovered any evidence of a child; Lundstrom had denied a child was at the house; Lundstrom was unarmed and speaking with the 911 operator; and none of the officers had yet interviewed Hibner about a child in the home. Even granting the officers some latitude in undertaking their community caretaking role, the actions they took in the course of detaining Hibner were not reasonably related in scope to the investigation. Rather than undertake the most rudimentary investigation, asking Hibner what happened, the officers handcuffed her and led her to the curb. At that time, the officers had yet to confirm any fact relating to the neighbor's report with Lundstrom or Hibner, nor did they have a reason to suspect foul play.

Lundstrom eventually came out of the house and was handcuffed and frisked by the officers. The officers searched the home but no child was discovered. Sometime prior to the search of the home, a dispatcher, in an attempt to confirm the neighbor's story learned that there was a possibility that the officers were at the wrong residence.

The court held that while the circumstances the officers confronted initially supported a brief investigatory detention, objectively reasonable officers would not have prolonged the detention and searched the home on the facts before them. Therefore, the officers were not entitled to qualified immunity.

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

*****

Cavanaugh v. Woods Cross City, 625 F.3d 661 (10th Cir.)

The court held that the officer was not entitled to qualified immunity since his actions were objectively unreasonable and violated the *Fourth Amendment*. It was also clearly established that an officer could not use his Taser on a non-violent misdemeanant, who did not pose a threat, and was not resisting or evading arrest, without first giving a warning.

The court found that the officer's use of force was not supported by any of the *Graham* factors.

The officer went to the Cavanaugh residence to help locate Ms. Cavanaugh, but later learned that she had assaulted her husband. It was a class B misdemeanor (non-injurious assault) and the court considered it a minor crime.

When the officer encountered Ms. Cavanaugh, she did not pose an immediate threat to the officer or anyone else at the scene. Just before the officer tasered Ms. Cavanaugh, she and the

officer passed within a few feet of each other as she walked toward the front door of her residence. She did not act aggressively toward the officer or threaten him. Her hands were clearly visible, she held no knife or other weapon, and the officer followed her at a distance of six feet.

When the officer deployed his taser Ms. Cavanaugh was neither actively resisting nor fleeing arrest. The officer gave her no verbal commands and she had little reason to believe that the officers were responding to a crime.

The court found that, although the officer had been told that Ms. Cavanaugh had left the house with a knife, and that she had been drinking and taking pain medication, his use of the taser was unreasonable based on all of the other specific facts that were known to him.

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

*****

Penley v. Eslinger, 605 F.3d 843 (11th Cir.)

Christopher Penley, a fifteen-year-old middle school student brought a pistol to school. He briefly held one classmate hostage who escaped before the police officers arrived. Penley eventually took refuge in a bathroom, and on three occasions walked laterally past the open bathroom door, aiming his gun at the police officers. On Penley's third pass Lieutenant Weippert fired a single shot from his scoped semi-automatic rifle, striking Penley in the head. Police entered the bathroom and discovered that Penley's gun was a plastic air pistol modified to look like a real gun. Penley died two days later.

The Penleys' claim that, when he shot their son, Lieutenant Weippert used excessive force, in violation of Mr. Penley's *Fourth Amendment* right to be free from unreasonable seizure.

To satisfy the objective reasonableness standard imposed by the *Fourth Amendment*, Lieutenant Weippert must establish that the countervailing government interest was great. Analysis of this balancing test is governed by (1) the severity of the crime at issue; (2) whether Mr. Penley posed an immediate threat to the officers or others; and (3) whether he actively resisted arrest. In this case, the reasonableness analysis turns on the second of these factors: presence of an imminent threat.

Both the first and third factors weigh in Lieutenant Weippert's favor. Bringing a firearm to school, threatening the lives of others, and refusing to comply with officers' commands to drop the weapon are undoubtedly serious crimes. As the Penleys themselves concede, they "have never taken the position that because the gun turned out to be a toy, the situation was any less serious." The third factor favors a finding of reasonableness as well. While the Penleys argue that Mr. Penley did not attempt to run from the bathroom, they do not contest that their son refused to comply with repeated commands to drop his weapon. Non-compliance of this sort supports the conclusion that use of deadly force was reasonable.

Though a closer call, the second factor also supports Lieutenant Weippert's argument that he acted reasonably. Mr. Penley demonstrated his dangerous proclivities by bringing to school what reasonable officers would believe was a real gun. He refused to drop the weapon when repeatedly commanded to do so. Most importantly, he pointed his weapon several times at

Lieutenant Weippert and Deputy Maiorano. We have held that a suspect posed a grave danger under less perilous circumstances than those confronted by Lieutenant Weippert.

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

*****

Brown v. City of Huntsville, 608 F.3d 724 (11th Cir.)

To receive qualified immunity, an officer need not have actual probable cause, but only "arguable" probable cause. Arguable probable cause exists where "reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest Plaintiff."

The court concluded that Brown's actions in playing loud music, stopping her car, and rolling her window down could have indicated to an objectively reasonable officer at the scene that Brown was making unreasonable noise with intent to create public annoyance, even if those circumstances were insufficient to prove an actual violation of *§ 13A-11-7*.

A law enforcement officer receives qualified immunity for use of force during an arrest if an objectively reasonable officer in the same situation could have believed the use of force was not excessive.

An objectively reasonable police officer would have known it was unlawful to use pepper spray and other force against an arrestee who was suspected only of a minor offense (playing music too loud), was not threatening the officer or the public, was not attempting to flee, and who had communicated her willingness to be arrested. Although the law permits some use of force in any arrest for even minor offenses, the law was clearly established in 2005 (cite omitted) that the officer's combined gratuitous use of pepper spray and other force against Brown in this minor offense context violated the Constitution.

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

*****

Jean-Baptiste v. Gutierrez, 627 F.3d 816 (11th Cir.)

Officer Gutierrez chased Jean-Baptiste, an armed burglary and robbery suspect, on foot, in residential area, after a high-speed car chase. Gutierrez went behind a house and encountered Jean-Baptiste, who was standing eight to ten feet away. Jean-Baptiste pointed a gun at Gutierrez, who fired his pistol, shooting fourteen continuous rounds at Jean-Baptiste. Eight rounds struck Jean-Baptiste in his legs, foot and testicles. Officer Gutierrez said that he fired his pistol continuously because Jean-Baptiste continued to point his gun at him, and only went down after he had fired his last round.

The court held that Officer Gutierrez was entitled to qualified immunity. Gutierrez confronted an armed suspect who had attempted to elude the police. Jean-Baptiste posed a threat of serious physical injury to Gutierrez and to the citizens in the immediate residential area. Gutierrez reasonably perceived the situation as an ambush that required the use of deadly force.

The court noted that a police officer is entitled to continue his use of force until a suspect is fully secured. The court held that Officer Gutierrez reasonably responded with deadly force, and he was not required to interrupt a volley of bullets until he knew that Jean-Baptiste had been disarmed.

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

*****

Non-Use of Force Situations (Search Warrant Application / Execution / Other)

Giragosian v. Bettencourt, 614 F.3d 25 (1st Cir.)

Giragosian owned a gun shop. While Giragosian was training a customer to use a handgun, the customer committed suicide by intentionally shooting himself in the head. Along with their own investigation, the local police department contacted the ATF to request that ATF conduct an inspection of the gun shop. After observing several violations of federal firearms regulations the ATF inspector had Giragosian surrender his federal firearms license and seized ten custom gun frames lacking serial numbers from the gun shop.

Giragosian sued the ATF inspector under *Bivens*, claiming that the inspection and the ATF's seizure of his federal license and gun frames constituted an unlawful warrantless seizure in violation of the *Fourth Amendment*.

The court held that the ATF inspector did not violate Giragosian's *Fourth Amendment* rights by conducting a warrantless search, but rather the search constituted a lawful exercise of the government's power to inspect the inventory and records of licensed firearms dealers. Pursuant to *18 U.S.C. § 923(g)(1)(B)(ii)*, the government may conduct compliance inspections of gun shop premises without either a warrant or reasonable cause, as long as it does not do so more than once in any twelve-month period. The Supreme Court has explicitly upheld the constitutionality of this provision under the *Fourth Amendment*, holding that the "urgent federal interest" in regulating firearms traffic outweighs any threat to gun dealers' privacy. The ATF inspector's 2007 compliance inspection of Giragosian's gun shop was the first in twelve months, therefore it met all of the requirements of *§ 923(g)(1)(B)(ii)*.

Giragosian also argued that the ATF inspector's did not qualify as a lawful compliance inspection because he acted on a local police department's request. The court held that § *923* does not prohibit an ATF officer from conducting an inspection at the request of local law enforcement, nor is there any reason to think that Congress intended to prevent ATF officers from carrying out compliance inspections when they have a particular reason to be concerned that violations might exist.

Because no constitutional violation occurred with respect to the warrantless search, the ATF inspector was entitled to qualified immunity.

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

*****

Reedy v. Evanson, 615 F.3d 197 (3d Cir.)

While working as a cashier at a convenience store Reedy was robbed at gunpoint and sexually assaulted. She reported the crime immediately, subjected herself to a physical examination, voluntarily gave a blood sample and provided several detailed and consistent statements to law enforcement officers and hospital staff. Detective Evanson believed that Reedy had fabricated the incident to cover up her own theft of cash from the convenience store. He accused her of lying about the incident and directed hospital staff to perform drug testing on the blood samples taken from Reedy as part of the sexual assault kit protocol.

Three months later Evanson became the lead investigator on another sexual assault case that was substantially similar to the attack on Reedy, and that Evanson knew was suspected to be the work of a serial rapist.

Three months later Evanson filed a criminal complaint against Reedy charging her with falsely reporting a crime, theft and receipt of stolen property. Reedy spent five days in jail. The charges against her were eventually dropped after the serial rapist was captured and confessed to assaulting Reedy, and committing the theft at the convenience store as well as the other sexual assault case being investigated by Evanson.

Although the lower court concluded that Evanson's arrest affidavit contained recklessly made false statements and omissions, the court held that it was improper to find that probable cause existed to arrest Reedy. The court further held that Evanson was not entitled to qualified immunity, stating that "viewing the evidence from Reedy's perspective, no reasonably competent officer would have concluded that a warrant should issue when it did for her arrest for making a false report of rape, for theft and for receiving stolen property."

The court also held that Reedy maintained a reasonable expectation of privacy in her blood after it was drawn from her body. Reedy's consent to give a blood sample and have it tested as part of the sexual assault protocol kit did not extend to consenting to have the blood sample tested for drugs. The court held that an objectively reasonable person would not believe that the two consent forms she signed to have her blood tested for evidence of sexual assault would extend to having a law enforcement officer order medical personnel to search her blood for evidence of drug use for the purpose of incriminating her.

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

*****

Ray v. Township of Warren, 626 F.3d 170 (3d Cir.)

The court held that the officers were entitled to qualified immunity for entering the Ray's house, without a warrant, to search for his daughter. Deciding this issue for the first time, the court ruled that the community caretaking doctrine could not be used to justify a warrantless search of a home. In the context of a home search, the community caretaking doctrine does not override the warrant requirement, or one of its well-recognized exceptions.

(The 7th, 9th and 10th Circuits agree)

The court did not determine whether there were exigent circumstances that would have allowed the officers to enter Ray's home without a warrant. However, it was objectively reasonable for the officers to be concerned for the young child, and to believe that their entry was allowed, based on the state of the law at the time.

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

*****

Elkins v. Summit County, 615 F.3d 671 (6th Cir.)

The court held that the officers were not entitled to qualified immunity in this *42 U.S.C. § 1983* suit. Their failure to disclose an exculpatory memorandum, which would have likely made a substantial difference to the outcome of the trial, deprived Elkins of a fair trial.

In the Sixth Circuit, the due process guarantees recognized in *Brady* also impose an analogous or derivative obligation on the police. An officer must disclose to the prosecutor evidence whose materially exculpatory value should have been "apparent" to him at the time of his investigation. Elkins had a constitutional right to have the favorable evidence disclosed to the prosecution and court.

Additionally, this right was clearly established so that a reasonable officer would understand that what he was doing violated that right.

Finally, the exculpatory nature of the memorandum would have been apparent to the detectives given the state of the case at the time. The exculpatory statement cast serious doubt on the six year old victim's identification of Elkins as the perpetrator of the sexual assaults and murder.

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

*****

Sykes v. Anderson, 625 F.3d 294 (6th Cir.)

After the plaintiffs' convictions for larceny and false report of a felony were overturned on appeal, they sued the officers for false imprisonment, malicious prosecution and denial of due process, based on the *Brady* violation. A jury awarded the plaintiffs compensatory and punitive damages against the two officers in their individual capacity.

The court held that the false arrest claim was proper because the officer submitted a warrant application that contained his deliberate material misrepresentations and omissions, and there was no probable cause to arrest without these misrepresentations and omissions.

The court held that liability against the officers for malicious prosecution was proper because they provided the prosecutor with investigatory material that contained knowing misstatements, and the prosecutor relied on many of these falsehoods in proceeding against the plaintiffs in their criminal trial.

The court held that liability against the officer for a due process claim, for a *Brady* violation, was proper because there was no evidence that the plaintiffs possessed any of the facts that would

have enabled them to uncover the withheld evidence, which was favorable to them, and as a result, suffered prejudice.

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

*****

Ellison v. Balinski, 625 F.3d 953 (6th Cir.)

The court upheld the judgment against the officer in her individual capacity because her search warrant affidavit failed to establish a nexus between the material to be seized and the place to be searched. The affidavit did not state how the officer came to know that plaintiff's business was located at his residence, or why documentation of an allegedly fraudulent mortgage might be found there.

The court further held that the officer was properly denied qualified immunity. The evidence presented allowed the jury to reasonably determine that the warrant was so lacking in indicia of probable cause that the officer's belief in its existence was objectively unreasonable.

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

*****

Millender v. County of Los Angeles, 620 F.3d 1016 (9th Cir.)

The court held that the search warrant was so facially invalid that no reasonable officer could have relied on it; therefore the officers were not entitled to qualified immunity.

There is no dispute that the deputies had probable cause to search for and seize the "black sawed off shotgun with a pistol grip" used in the crime, however, the warrant in this case authorized a search for essentially any device that could fire ammunition, any ammunition, and any firearm-related materials.

The affidavit did not set forth any evidence indicating that Bowen owned or used other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millenders' residence. Nothing in the warrant or the affidavit provided any basis for concluding there was probable cause to search for or seize the generic class of firearms and firearm-related materials listed in the search warrant.

While the deputies had probable cause to search for a single, identified weapon, whether assembled or disassembled, they had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant. Although this court has upheld warrants describing broad classes of items in certain cases, the rationales adopted in those cases were inapplicable here given the information the deputies possessed.

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

Delia v. City of Rialto, 621 F.3d 1069 (9th Cir.)

The city suspected that Delia was abusing his off-work status by engaging in a home improvement project. Surveillance revealed that Delia had purchased several rolls of fiberglass building insulation. Although Delia had been issued an off-duty work order, the doctor had not placed any activity restrictions on him.

During an internal investigation Delia refused to consent to a warrantless search of his home for the insulation. He also refused to go into his home and bring out the rolls of insulation for his supervisors' inspection when asked. Finally, Delia was ordered to go into his home and bring out the insulation for inspection, having been told that his failure to do so could result in his termination.

The court held that ordering Delia to go into his home and bring out the rolls of insulation for inspection was a warrantless compelled search that violated the *Fourth Amendment*. However his supervisors were entitled to qualified immunity since Delia had not demonstrated that they violated a clearly established right, such that the defendants would have known that their actions were unlawful.

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

*****

Mink v. Knox, 613 F.3d 995 (10th Cir.)

Mink, a college student, created a fictional character for the editorial column of his internet-based journal that was a parody of one of the professors at the college. The professor complained, and the police department initiated an investigation into a possible violation of Colorado's criminal libel statute.

Deputy District Attorney Knox reviewed and approved a search warrant and search warrant affidavit for Mink's home. The police searched Mink's house and seized his personal computer and other written materials referencing his online journal. The District Attorney subsequently determined that the statements contained in Mink's journal could not be prosecuted under the state's criminal libel statute. Mink brought an action against Knox under *42 U.S.C. § 1983*.
The court previously held that Knox was not entitled to absolute immunity since she "was not wearing the hat of an advocate," when she reviewed the affidavit in support of the warrant.

The court now held that Knox was not entitled to qualified immunity stating, "Because a reasonable person would not take the statements in the editorial column as statements of facts by or about Professor Peake, no reasonable prosecutor could believe it was probable that publishing such statements constituted a crime warranting search and seizure of Mr. Mink's property."

Additionally, the court held that the search warrant was overly broad since there was no reference to any particular crime. The warrant authorized the search and seizure of all computer and non-computer equipment and written material in Mink's house, without any mention of any particular crime to which they may be related, essentially authorizing a "general exploratory rummaging" through Mink's belongings for any unspecified "criminal offense."

The court held that at the time Knox reviewed the search warrant and affidavit it was clearly established that speech, such as parody and rhetorical hyperbole, which cannot reasonably be taken as stating actual fact, enjoyed the full protection of the *First Amendment* and therefore could not constitute the crime of criminal libel for purposes of a probable cause determination. It was also clearly established that warrants must contain probable cause that a specified crime has occurred and meet the particularity requirement of the *Fourth Amendment* in order to be constitutionally valid.

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

*****

Federal Tort Claims Act (FTCA)

Merlonghi v. U.S., 620 F.3d 50 (1st Cir.)

The court held that the federal agent was not acting within the scope of his employment when his vehicle collided with the plaintiff's motorcycle; therefore the plaintiff's lawsuit against the U.S. government under the *Federal Tort Claims Act (FTCA)* was properly dismissed.

Special Agent Porro, U.S. Department of Commerce, Office of Export Enforcement (OEE), was driving home from work in an unmarked government vehicle when he nearly collided with a motorcycle driven by the plaintiff's friend. The plaintiff drove his motorcycle alongside SA Porro's vehicle and the two men exchanged some unpleasant words. SA Porro drove away, but the plaintiff followed in his motorcycle yelling and screaming. The two men drove their vehicles back and forth towards each other, and at some point SA Porro took out his gun and displayed it to the plaintiff. After a few minutes of back and forth arguing with each other, SA Porro's vehicle swerved hard to the left striking the plaintiff's motorcycle. The plaintiff was thrown to the ground and suffered serious bodily injuries. SA Porro briefly stopped, straightened out some damage to his vehicle and sped away. After the collision SA Porro failed to contact his office or the police. He personally paid for the repairs to his vehicle even though government typically pays for the repair of damaged government vehicles. He later testified that he failed to report the accident to the OEE because, "It wasn't inside the scope of my employment."

Under Massachusetts law, to determine whether an employee's conduct is within the scope of his employment, the courts examine three factors: (1) Whether the conduct in question is of the kind the employee is hired to perform, (2) whether it occurs within authorized time and space limits, and (3) whether it is motivated, at least in part, by a purpose to serve the employer.

In determining that SA Porro was not within the scope of his employment the court held that, engaging in a car chase while driving home from work was not the type of conduct that OEE hired SA Porro to perform; the accident did not occur within "authorized time and space limits" because he was not at work, responding to an emergency, or driving to a work assignment, even if he was on call, and his actions were not motivated by a purpose to serve his employer.

In addition to the three-factor test, Massachusetts has a long-established "going and coming" rule, where travel to and from home to a place of employment is not considered to be within the scope of employment. The court did not decide whether or not a federal employee acts within the scope of his employment when he negligently causes an accident while simply commuting to

or from work in a government vehicle since the undisputed facts of this case established that SA Porro was not merely commuting.

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

*****

Workplace Searches

City of Ontario v. Quon, 130 S. Ct. 2619 (2010)

The City of Ontario Police Department reviewed transcripts of text messages Sergeant Quon sent on his department issued alphanumeric pager. The department "allegedly" disciplined Quon for sending non-department related text messages in violation of department rules. Quon sued the department claiming that his *Fourth Amendment* rights were violated when the department reviewed the transcripts of his pager messages.

The Court declined to resolve the issue of whether or not Quon had a reasonable expectation of privacy in the text messages. The Court, instead, assumed that Quon had a reasonable expectation of privacy in the text messages, and that the department's review of the text message transcripts constituted a search under the *Fourth Amendment*.

The Court then applied the test for reasonableness for work-place searches established in *O'Connor v. Ortega*, 480 U.S. 709 (1987). The Court held that the department's review of Quon's text message transcripts was a justified work-place search.

The search was justified at its inception because there were reasonable grounds to believe that it was conducted for non-investigatory work related purposes. The Chief ordered the search to determine if the text message character limit on the City's contract with the service provider was sufficient to meet the City's needs. The City had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, and that the City was not paying for extensive personal communications.

The scope of the search was reasonable because it was an efficient and expedient way to determine whether Quon's overages were a result of work-related messaging or personal use. Although Quon had gone over his monthly allotment a number of times, the department only reviewed the transcripts of his text messages for two months. This was not excessively intrusive.

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

*****

Fifth Amendment

Double Jeopardy

U.S. v. Faulds, 612 F.3d 566 (7th Cir.)

The defendant's conviction for distribution of child pornography and possession of child pornography did not violate the *Double Jeopardy Clause of the Constitution*. When the contraband is a tangible object, like illegal drugs, distributing the contraband necessarily means giving up possession by transferring it to another. Once it is distributed, the contraband is no longer possessed, and its possession prior to the distribution is implicit in the distribution itself.

The same is not true with respect to distribution of digital depictions of minors being sexually exploited. The transmission of such material over the internet is in effect the transmission of a copy, allowing the owner to retain the original on his own computer. The defendant continued to possess the digital images on his own computer after he distributed identical images to the federal agent. His continued possession of the images after distributing them constituted separate and distinct crimes.

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

*****

Due Process

Pre-Trial Identification (Line-Ups, Show-Ups, Photo Arrays)

Richardson v. Superintendent of Mid-Orange Correctional Facility, 621 F.3d 196 (2d Cir.)

The court held that the witness's identification of Richardson at the police station was not unduly suggestive because it was voluntary and spontaneous. Unplanned or accidental encounters between a witness and a criminal suspect are not impermissibly suggestive, particularly where there is no indication to the witness that the individual was arrested as a suspect in the witness's case. The 3rd, 4th, 5th, 6th and 8th circuits agree.

Additionally, the court found that the witness's identification of Richardson as the shooter was reliable because he had sufficient opportunity to view him during the crime, only an hour or two elapsed between the commission of the crime and the confrontation at the police station, and the witness demonstrated a high degree of certainty when he identified Richardson as the shooter. Although the witness's lack of focus on Richardson's face weighed against reliability, the court held that this factor was not especially powerful, given how quickly and confidently the witness identified Richardson at the initial unprompted station-house confrontation.

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

*****

Self Incrimination

Account Services Corp. v. U.S., 593 F.3d 155 (2d Cir.)

Under the long-established "collective entity rule," corporations do not have a *Fifth Amendment* privilege against self-incrimination. The custodian of corporate records, who acts as a representative of the corporation, cannot refuse to produce corporate records on *Fifth Amendment* grounds.

However, because the act of producing documents can be both incriminating and testimonial - such as when it confirms the documents' existence, possession, or authenticity - a subpoenaed individual may be able to resist production on *Fifth Amendment* grounds. Even though a corporation's custodian of records cannot resist a subpoena on *Fifth Amendment* grounds, should the custodian stand trial, the government cannot introduce evidence that the custodian himself produced the records since he acted in his representative and not personal capacity. The jury might permissibly infer that the custodian was the source of the documents based on his position at the corporation.

A one person corporation does not have a *Fifth Amendment* privilege against self-incrimination. The corporation must produce the subpoenaed records even when the corporation is "essentially a one-man operation." This is true even when, although the government cannot introduce evidence of the production, a jury could conclude that the "one-man" actually produced the incriminating records.

The 1st and 4th circuits agree (cites omitted).

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

*****

U.S. v. Day, 591 F.3d 679 (4th Cir.)

The *Fourth Amendment* does not provide protection against searches by private individuals acting in a private capacity. Similarly, the sole concern of the *Fifth Amendment*, on which *Miranda* was based, is governmental coercion. The defendant bears the burden of proving that a private individual acted as a government agent.

There are two primary factors to be considered: (1) whether the government knew of and acquiesced in the private individual's challenged conduct; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation.

With regard to the first factor, there must be some evidence of government participation in or affirmative encouragement of the private search. Passive acceptance by the government is not enough. Virginia's extensive armed security guard regulatory scheme simply empowers security guards to make an arrest. This mere governmental authorization for an arrest, in the absence of more active participation or encouragement, is insufficient to implicate the *Fourth* and *Fifth Amendments*.

With regard to the second factor, even if the sole or paramount intent of the security officers had been to assist law enforcement (in deterring crime), such an intent would not transform a private

action into a public action absent a sufficient showing of government knowledge and acquiescence under the first factor of the agency test.

Under the "public function" test typically utilized for assessing a private party's susceptibility to a civil rights suit under *42 U.S.C. § 1983*, private security guards endowed by law with plenary police powers such that they are *de facto* police officers, may qualify as state actors. Security guards who are authorized to arrest only for offenses committed in their presence do not have plenary police powers and are not *de facto* police officers.

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

*****

U.S. v. Allmon, 594 F.3d 981 (8th Cir.)

A witness who has previously testified may not assert a *Fifth Amendment* privilege and refuse to give precisely the same testimony in a subsequent hearing. Testifying consistently with his prior testimony would not expose the witness to any further jeopardy beyond that which existed by virtue of prior testimony.

A witness who has previously testified may not assert a *Fifth Amendment* privilege and refuse to testify in a subsequent hearing because fear of reprisals would cause him to commit perjury for which he could then be prosecuted. The *Fifth Amendment* confers no right upon a witness to avoid testifying simply because he refuses, for one reason or another, to do so truthfully.

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

*****

U.S. v. Estey, 595 F.3d 836 (8th Cir.)

Agents appropriately advised defendant of his rights prior to a noncustodial interview by telling him that he did not have to speak with them if he chose not to do so, that he had the right to refuse to answer all or any particular question, and that he was free to leave. The practice of agents providing such advice is a proper method to ensure that a noncustodial interview is not misinterpreted as a custodial interrogation and to avoid *Miranda* problems.

Because child pornographers commonly retain pornography for a lengthy period of time, evidence developed within several months (5 months in this case) of an application for a search warrant for a child pornography collection and related evidence is not stale.

The 4th and 9th circuits agree (cites omitted).

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

*****

U.S. v. Swift, 623 F.3d 618 (8th Cir.)

Officers, suspecting that Swift and Harlan were involved in a shooting, transported them to police headquarters and placed them in an interrogation room together. The room was equipped with video and audio monitoring equipment, and officers recorded the conversation between

them. Swift made incriminating statements that were introduced against him at trial, even though he told Harlan that he believed the officers were listening to their conversation.

The court held that the act of placing Swift in an interrogation room, with a recording device activated, was neither express questioning, nor the functional equivalent of express questioning. The officers may have hoped that Swift or Harlan would make incriminating statements when left alone, but officers do not "interrogate" a suspect by simply hoping that he will incriminate himself.

The court further held that Swift had no reasonable expectation of privacy while being detained in the interrogation room at the police station, and that he even acknowledged the likelihood that officers were monitoring him and Harlan.

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

*****

U.S. v. Bohn, 622 F.3d 1129 (9th Cir.)

The defendant's conviction for refusing to obey a lawful order, after he refused to tell the NPS Ranger his last name, did not violate his *Fifth Amendment* right to remain silent. Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances, and there were no unusual circumstances in this case.

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

*****

U.S. v. Redlightning, 624 F.3d 1090 (9th Cir.)

The defendant argued that his confession resulted from his unlawful seizure by FBI agents, and that the agents did not promptly present him for arraignment after his arrest.

After the defendant confessed at 12:22 p.m. on October 2, he was effectively under arrest. If the agents had stopped questioning him then, they may have been able to reach Seattle in time for the 2:30 p.m. arraignment. Because the agents were entitled to at least a six-hour safe harbor to continue questioning the defendant, they were under no obligation to stop questioning the defendant the moment he confessed, nor would it have been reasonable for them to do so.

The next reasonably available time to arraign the defendant was at 2:30 p.m. on October 3. While driving the defendant to his arraignment, the agents spoke to the AUSA who requested that they re-interview the defendant. The agents drove to a nearby FBI office and obtained a second confession from the defendant. The agents then resumed their trip and delivered the defendant to the district court well before the 2:30 p.m. arraignment. The court held that the defendant's second confession was admissible. Although the second confession occurred after the six-hour safe harbor after the defendant's arrest, it was made before the October 3 arraignment, and did not delay it.

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

*****

U.S. v. Garcia-Cordero, 610 F.3d 613 (11th Cir.)

Title 8 U.S.C. § 1324(a)(2)(B)(iii) imposes a duty on individuals transporting international passengers to "bring and present" those passengers to the appropriate immigration officers at a designated point of entry immediately upon arrival into the country.

In deciding this issue for the first time, the court held that as applied to a defendant who is smuggling aliens, the "bring and present" requirement does not violate the defendant's *Fifth Amendment* privilege against self-incrimination.

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

*****

Miranda

Florida v. Powell, 130 S. Ct. 1195 (2010)

Miranda warnings that failed to expressly state that the suspect had a right to have a lawyer present during the questioning, but advised that he had "the right to talk to a lawyer before answering any of our questions" and the right to exercise that right at "anytime you want during this interview," adequately conveyed his rights under *Miranda.*

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

*****

Maryland v. Shatzer, 130 S. Ct. 1213 (2010)

Lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*. Such incarceration is not necessarily "custody" for *Miranda* purposes. A subsequent waiver of *Miranda* rights by a suspect who has previously invoked right to counsel under *Miranda,* who remains in custody, and who is re-approached by law enforcement is presumed to be involuntary.

A break in *Miranda* custody of fourteen (14) days provides ample time for the suspect to get reacclimated to his normal life, to consult with friends and family and counsel, and shake off any residual coercive effects of prior custody. After a fourteen (14) day break in custody, law enforcement may re-approach the suspect who is now back in custody. A waiver of *Miranda* rights then obtained is not presumed involuntary.

If a suspect invokes counsel under *Miranda* while in custody and is then released, nothing prohibits law enforcement from approaching, asking questions, and obtaining a statement without the *Miranda* lawyer present from the suspect who remains out of custody.

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

Editor's Note: The majority and Justice Thomas raise the specter of a "catch and release" tactic where, after invoking counsel, a suspect is released and then re-arrested. Unless fourteen (14)

days elapse between release and re-arrest, the previous invocation remains effective. Although it does not expressly state so, Justice Thomas suggests that the majority opinion requires law enforcement to wait fourteen (14) days after release before re-approaching a suspect who remains out of custody after previously invoking counsel under *Miranda*.

*****

Berghuis v. Thompkins, 130 S. Ct. 2250 (2010)

Police arrested Thompkins and attempted to question him about his role in a shooting. After advising him of his rights under *Miranda* the officers began their interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police or that he wanted an attorney. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."

About 2 hours and 45 minutes into the interrogation, Detective Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. Thompkins moved to suppress the statements made during the interrogation arguing that he invoked his privilege to remain silent by not saying anything for a sufficient period of time; therefore the interrogation should have ceased before he made his inculpatory statements.

Reversing the Sixth Circuit Court of Appeals, (see 12 Informer 08) the Court held that the *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.

A suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompkins's right to remain silent before interrogating him.

The Court held that there was no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. In *Davis v. United States, 512 U.S. 452 (1994),* the Court held that when a suspect invokes the *Miranda* right to counsel he must do so "unambiguously". If an accused makes a

statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights. There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and . . . provide[s] guidance to officers" on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity.

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

*****

U.S. v. Ellison, 632 F.3d 727 (1st Cir.)

While being held at a county jail charged with attempting to set fire to the building where his ex-girlfriend lived, defendant indicated his willingness to give the police information about a pair of unsolved robberies elsewhere. The next day a second interview took place in the jail library. Defendant was brought there in restraints, but these were removed. Defendant was told that he was not under arrest for the robberies, did not have to answer any questions, and was free to end the interview at any time by pushing a button on the table to summon the guards. Defendant was not advised of other rights required by *Miranda*.

Custody under *Miranda* means a suspect is not free to go away; but, a suspect's lack of freedom to go away does not necessarily mean that questioning is custodial interrogation for purposes of *Miranda*. Never is this distinction more important than when the subject of interrogation is independently incarcerated. Even when he is given the option to end the interrogation as he chooses, he is not in the position of a suspect who is free to walk away and roam around where he pleases. Still, the restrictions on his freedom do not necessarily equate his condition during any interrogation with *Miranda* custody. In the usual circumstances of someone serving prison time following a conviction, so long as he is not threatened with harsher confinement than normal until he talks, he knows that the worst that can happen to him will be his return to prison routine, and that he will be back on the street (in most cases) whether he answers questions or refuses.

The 4th, 9th, and 11th circuits agree (cites omitted).

It is true that the condition of someone being held while awaiting trial, like defendant, is not exactly the same as the convict's position, since the suspect might reasonably perceive that the authorities have a degree of discretion over pretrial conditions, at least to the point of making recommendations to a court. But we see nothing in the facts of this case that would be likely to create the atmosphere of coercion subject to *Miranda* concern.

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

*****

U.S. v. Guzman, 603 F.3d 99 (1st Cir.)

The government indicted Guzman for two counts of arson in violation of *18 U.S.C. § 844 (i)* for fires that occurred on April 3 and June 9, 2003. After his arrest on June 9, Guzman was taken to the police station and read his *Miranda* rights. Guzman invoked his right to counsel and was not questioned further. Guzman was charged in state court for the June 9 arson and was released on bail from July 2003 until November 2003 when he was returned to state custody for violating conditions of his bail.

On November 12, 2003 two ATF agents traveled to the correctional facility to interview Guzman about the April 3 arson. Guzman agreed to meet with the agents and signed a form consenting to the interview. At the outset of the meeting, the agents advised Guzman of his *Miranda* rights, and Guzman signed the top half of a form acknowledging that he had been advised of his rights. The bottom half of the form, containing a waiver of *Miranda* rights, remained unsigned at this time. Guzman was also told by the agents several times that he could leave the meeting at any time.

The ATF agents told Guzman that they were there to speak about the April 3 fire. After listening to the agents for about an hour, Guzman responded, saying that the April 3 fire had been "bothering him." He gave his version of the events and admitted that he had helped Cruz commit the arson by providing fuel and acting as a lookout. After Guzman had told his story, the ATF agents asked Guzman to provide a written or recorded version of his statement. Guzman said that he would do so only with his lawyer present. The agents ceased questioning him but asked Guzman to sign the bottom half of the *Miranda* waiver form, indicating that he had waived his rights and agreed to talk with them. Guzman signed the waiver at approximately 1:15 p.m., but, at the agents' request, Guzman indicated on the form that he had waived his rights at 12:15 p.m., when he began telling his version of events to the officers.

On appeal Guzman argued that he was in the ATF agents' custody at the time that he gave the November 12 statement, and that, as a result, his June 9 invocation of his right to counsel barred the ATF agents from initiating further interrogation, even though he was released on bail for a period of about four months between the time of the first and second interrogations. Because of the very recent Supreme Court decision in *Shatzer*, Guzman's argument fails. Even assuming arguendo that the November 12 meeting between Guzman and the agents was a "custodial interrogation," *Shatzer* forecloses the claim.

In *Shatzer*, the Supreme Court established a bright-line rule that if a suspect who has invoked his right to have counsel present during a custodial interrogation is released from police custody for a period of fourteen days before being questioned again in custody, then the *Edwards* presumption of involuntariness will not apply.

In this case, Guzman was released on bail for about four months between the time that he originally invoked his right to counsel and the ATF agents' subsequent attempt to question him. This far exceeds the time period required by *Shatzer* and thus its break-in-custody exception to *Edwards* applies.

The court also found that Guzman voluntarily waived his *Miranda* rights when he spoke to the ATF agents about the April 3 fire.

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

*****

U.S. v. Jackson, 608 F.3d 100 (1st Cir.)

Although the defendant's admissions at the apartment were inadmissible based on a *Miranda* violation, his will was not overborne in such a way as to render his confession the product of coercion, so the guns were not suppressible as the fruits of a coercive interrogation.

Once at the police station the officer gave the defendant clear *Miranda* warnings. There was no indication that the officer sought to use the defendant's prior admission as a lever to overcome an inclination that he might have had to remain silent. There was no deliberate two-step strategy here.

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

*****

U.S. v. Capers, 627 F.3d 470 (2d Cir.)

Investigators arrested Capers, a postal employee, for theft of money from Express Mail envelopes. The investigator interrogated Capers without *Miranda* warnings. Afterward, other investigators transported Capers to another location. Ninety minutes later, the original investigator *Mirandized* Capers and interviewed him again.

To determine the admissibility of a defendant's statements, the court must determine: (1) whether the officers used a deliberate, two-step strategy, based upon violating *Miranda* during an interview, and if so, (2) whether specific curative steps were taken to ensure the confession was voluntary.

The 3rd, 5th, 8th, 9th and 11th circuits agree.

The court held that the pre-*Miranda* interrogation, followed ninety minutes later by a second, post-*Miranda* interrogation, amounted to a deliberate two-step interrogation technique designed to undermine the defendant's *Miranda* rights. The same investigator conducted both interrogations under similar circumstances, and discussed the same subject matter, without taking any steps to cure the violation. The only legitimate reason to delay the reading of a *Miranda* warning, until after custodial interrogation has begun, is to protect the safety of the arresting officers or the public, neither of which was an issue here.

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

*****

U.S. v. Hargrove, 625 F.3d 170 (4th Cir.)

Officers executed a search warrant at the defendant's residence. An officer interviewed the defendant, and while they sat at the kitchen table, the defendant made several incriminating statements. The court held that the defendant was not in custody during the interview; therefore, he was not entitled to *Miranda* warnings, so his statements were admissible.

The totality of the circumstances supported the finding that a reasonable man in the defendant's position would have understood that he was not in custody. At the beginning of the interview, the officer told the defendant that he was not under arrest and that he was free to leave. The officers did not handcuff the defendant. After their initial entry, the officers did not draw their weapons in the kitchen, and the conversation was amicable and non-threatening in tone. The officers allowed the defendant to move around his house, as long as he did not interfere with the ongoing search, which he did on one occasion to attend to his cat. Between ten and fifteen officers participated in the execution of the search warrant, while only two officers were in the kitchen with the defendant during the interview. Even though the two officers were armed, they did not draw their firearms during the interview, and they did not threaten the defendant. The mere presence of armed law enforcement officers during an interview is not sufficient to create a custodial situation.

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

*****

U.S. v. Hinojosa, 606 F.3d 875 (6th Cir.)

The court found that the agents' initial interrogation of the defendant did not present a custodial environment; therefore *Miranda* warnings were not required prior to questioning. (The interrogation occurred in the defendant's home, it was of short duration, consisting of only a few brief questions and there was nothing to suggest that the agents acted in a hostile or coercive manner, no weapons were drawn nor were any threats made). As a result, the defendant's pre-*Miranda* statements were properly included in the agents' search warrant affidavit.

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

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Treesh v. Bagley, 612 F.3d 424 (6th Cir.)

A totality-of-the-circumstances test is applied when considering whether a delay between reading the *Miranda* warnings and custodial interrogation requires the interrogating officers to re-advise the suspect of his *Miranda* rights. Under *Wyrick v. Fields*, 459 U.S. 42 (1982), the court held that additional warnings are only required if the circumstances seriously change between the initial warnings and the interrogation.

In this case approximately two hours passed between the suspect's arrest, when he was initially *Mirandized*, and his interrogation by another officer. The lower court's conclusion that the second officer was not required to fully re-advise the suspect of his *Miranda* rights was not an unreasonable application of *Fields*.

The 5th, 7th, 8th, and 11th circuits agree.

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

*****

Simpson v. Jackson, 615 F.3d 421 (6th Cir.)

Simpson sought habeas relief following his convictions on a variety of charges arising from a fatal arson. He argued that the trial court improperly admitted statements he made to the police on four separate occasions.

In regard to the June 16th statement, Simpson argued that the officers violated *Miranda* when they questioned him after he expressed his desire to remain silent. Although he initially indicated a desire to remain silent, after the officer commented, "well that's up to you whether you want to talk to us or not, we're not going to twist your arm or anything like that," Simpson immediately responded by asking the officer what he wanted to talk about. The officers were faced with an individual who had indicated that he did not want to talk, and yet continued to talk. The court held that the officer's comment was a non-coercive statement, and it was not unreasonable or impermissible for the officers to have circled back to the *Miranda* issue to clarify whether the Simpson wished to waive his rights before asking him any substantive questions.

In regard to the June 20th statement, prior to a polygraph examination, the officer administering the polygraph *Mirandized* Simpson, who responded, "Oh, I can have an attorney present?" The officer told Simpson that he only needed a lawyer if he had lied, or intended to lie. The court held that someone in Simpson's position would think that if he requested an attorney that he would be admitting to lying, and that framing the issue in this way was "inherently coercive" and violated *Miranda*. The court noted that in doing so the officer crossed the line from stating the truth to distorting the truth and, arguably, to giving legal advice, and that officers run a high risk when they move into the realm of offering advice.

Simpson argued that both statements that he gave in April should have been suppressed. Simpson was in prison on unrelated charges when the officers questioned him without advising him of his *Miranda* rights. The lower court held that he was not in "custody" for *Miranda* purpose stating that simply being incarcerated did not, by itself, constitute "custody" for *Miranda* purposes.

However, the lower court cited a string of cases that relied on substantially different fact patterns where the incarcerated persons were questioned about something that happened in prison. The court held that *Mathis v United States*, 391 U.S. 1, (1968) controlled in this case. Here, as in *Mathis*, state agents unaffiliated with the prison isolated an inmate and questioned him about an unrelated incident without first giving *Miranda* warnings. Such action is improper and any resulting statement must be suppressed.

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

*****

Daoud v. Davis, 618 F.3d 525 (6th Cir.)

The Supreme Court has never directly addressed under what circumstances a suspect's mental illness can impede his ability to knowingly and intelligently waive his *Miranda* rights. However, most courts have recognized that mental illness is a factor to consider in determining whether a waiver was knowing and intelligent.

In this case the experts all agreed that Daoud comprehended what was said to him and understood that the officers would use his statements against him. They also all appeared to agree that he understood he did not have to speak and that he could have an attorney. Because a defendant does not have to understand every possible consequence of a waiver, and the evidence demonstrates that Daoud had an understanding of his rights, the Michigan Supreme Court's conclusion that his waiver was knowing and intelligent was not an unreasonable application of federal law.

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

*****

Hoffner v Bradshaw, 622 F.3d 487 (6th Cir.)

The court held that Hoffner's statements to the officers complied with *Miranda* and were properly admitted at trial. When the officers first interacted with Hoffner he was not in "custody" for *Miranda* purposes. Hoffner was at a friend's house when the police burst in to execute a search warrant. The officers asked him some general questions regarding the victim's disappearance and Hoffner made incriminating statements. The court recognized that general on-the-scene questioning, as to facts surrounding a crime or other general questioning of citizens in the fact-finding process, does not implicate *Miranda*.

Additionally, the court held that other incriminating statements made by Hoffner were entirely "volunteered" by him and not given in response to police questioning, and therefore were not admitted in violation of *Miranda.*

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

*****

Collins v. Gaetz, 612 F.3d 574 (7th Cir.)

Collins argued that the lower court improperly admitted his statement at trial because it failed to require the government to show that the police took "special care" in obtaining a voluntary waiver given his limited mental capacity.

The Supreme Court has said that when the police are aware of a suspect's mental defect but persist in questioning him, such dogged persistence can contribute to a finding that the waiver was involuntary, and that a suspect's mental capacity is a factor that a court must consider in deciding whether a waiver was voluntary.

However, the Court has never held that police can render a waiver of *Miranda* rights involuntary simply by failing to take "special care" that a suspect with a mental disability understands his rights. Even if there were such a "special care" requirement, Collins produced no evidence that the officers who questioned him were aware of his mental deficiency.

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

*****

Etherly v. Davis, 619 F.3d 654 (7th Cir.)

Relevant factors to consider in determining whether a confession by a juvenile is voluntary include: the juvenile's age, experience, education, background, intelligence, the length of the questioning, the presence of a parent or other friendly adult, the use of coercive or intimidating interrogation tactics, whether he had the capacity to understand the warnings given to him, the nature of his *Fifth Amendment* rights, and the consequences of waiving those rights.

The court held that Etherly's statements to police were made voluntarily noting that he was read his *Miranda* rights several times, he understood them, and he was questioned for a very limited period of time. The fact that the police urged Etherly to tell the truth, and told him that if he did, they would tell the judge that he had cooperated, did not constitute a promise of leniency nor did it constitute a threat or coercion.

Although Etherly exhibited a lack of intellectual capacity, the court held that he understood that he was not required to talk to the police and that the prosecutor would act on any information provided by him.

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

*****

U.S. v. Slaight, 620 F.3d 816 (7th Cir.)

The court reversed the defendant's conviction holding that the statements he made to the federal law enforcement officers at the police station should have been suppressed. The court held that the defendant was in custody for *Miranda* purpose when he made the incriminating statements, without having been first advised of his *Miranda* rights.

When police create a situation in which a suspect reasonably does not believe that he is free to escape their clutches, he is in custody, and regardless of their intentions, entitled to the *Miranda* warnings.

In this case the police made a show of force by arriving at Slaight's house en masse. Although he had a criminal record none of his crimes involved violence or weapons, yet nine officers drove up to the house, broke in with a battering arm, strode in with pistols and assault rifles at the ready, and when they found him naked in his bed ordered him, in an "authoritative tone" to put his hands up. The presence of an overwhelming armed force in the small house could not have failed to intimidate the occupants. The police could have searched the house thoroughly and taken the computer and left, or they could have arrested Slaight since they had ample probable cause. Instead of leaving the house or arresting him they asked Slaight whether he would consent to a voluntary interview.

Two officers escorted Slaight from his house to the police station where they took him to a tiny windowless interview room where the door was closed throughout the interview. Although the officers told Slaight he was not in custody, and that he was free to leave, the court discredited this testimony.

The key facts were the show of force at Slaight's home, the protracted questioning of him in the claustrophobic setting of the police station's tiny interview room, and the more than likelihood

that he would have been formally placed under arrest if he tried to leave because the government already had so much evidence against him. These facts were incontrovertible and established that the average person in Slaight's position would have thought himself in custody.

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

*****

U.S. v. Hernandez-Mendoza, 600 F.3d 971 (8th Cir.)

The Trooper's act of leaving the defendants alone in his vehicle, with a recording device activated, was not the functional equivalent of express questioning. The Trooper may have expected that the two men would talk to each other if left alone, but an expectation of voluntary statements does not amount to deliberate elicitation of an incriminating response. Officers do not interrogate a suspect simply by hoping that he will incriminate himself.

The Trooper had legitimate security reasons for recording the sights and sounds within his vehicle. The defendants had no reasonable expectation of privacy in a marked patrol car, which is owned and operated by the state for the express purpose of ferreting out crime.

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

*****

U.S. v. Nguyen, 608 F.3d 368 (8th Cir.)

The court held that the defendant had knowingly and voluntarily waived his *Miranda* rights even though a full day elapsed between the time the agents read him his full rights and the time he was questioned.

The 3rd, 5th and 9th circuits agree (cites omitted).

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

*****

U.S. v. Carlson, 613 F.3d 813 (8th Cir.)

The court held that Carlson's meeting with the officers was non-custodial and voluntary; therefore, his statements were properly admitted against him at trial.

The officers met with Carlson at a public restaurant and told him at the beginning of the meeting that he was not under arrest and that he was free to leave at any time. The officers did not restrain Carlson's freedom in a fashion similar to a formal arrest because they made sure that he sat on the outside of the booth in the restaurant.

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

*****

U.S. v. Sanchez, 614 F.3d 876 (8th Cir.)

The court held that Sanchez's will was not overborne by improper police conduct; therefore his incriminating statements were admissible against him. In considering the totality of the circumstances surrounding Sanchez's confession, the court found that while the location of the interrogation weighed in favor of finding the confession involuntary, the remaining factors, to include, the degree of police coercion, the length of the interrogation, and the defendant's maturity, education, physical condition and mental condition, weighed in favor of finding that Sanchez's confession was voluntary.

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

*****

U.S. v. Johnson, 619 F.3d 910 (8th Cir.)

A DEA Special Agent and local law enforcement officers went to Johnson's home to conduct a "knock and talk" interview. Johnson invited the officers into his home and consented to a search of the premises. Johnson made several incriminating statements before he terminated the interview. Johnson voluntarily went to the police station three days later to continue the interview, and he made more incriminating statements to the officers.

The court held that on both occasions Johnson was not in-custody for *Miranda* purposes; therefore he was not entitled to a *Miranda* warning. The court found that Johnson voluntarily spoke to the officers, who informed him that he was not under arrest, and that he did not have to talk to them, and at some point Johnson did just this by terminating the interview. Three days later Johnson voluntarily went to the police station on his own volition to speak with the officers again. During both interviews Johnson's freedom of movement was not restricted and he was not arrested at the conclusion of either interview. Considering the totality of the circumstances the court found that a reasonable person in Johnson's position would not have considered his freedom of movement restricted to the degree of a formal arrest.

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

*****

Mickey v. Ayers, 606 F.3d 1223 (9th Cir.)

A suspect who invokes the right to counsel may not be interrogated unless he initiates the conversation. Mickey told the officer at the time of his arrest that he did not want to speak without first consulting a friend, who was an attorney. *Miranda* and *Edwards*, however, only apply to interrogations, which consist of "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Casual conversation is generally not the type of behavior that police should know is reasonably likely to elicit an incriminating response. Here, on the airplane the police asked no questions and only responded to Mickey's desire for small talk. They engaged in casual conversation of the type generally not subject to *Edwards*. Since Mickey was not interrogated and, in any event,

initiated the discussion on the airplane, his *Miranda* and *Edwards* rights were not violated on the flight.

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

*****

Hurd v. Terhune, 619 F.3d 1080 (9th Cir.)

The state charged Hurd with murder after his wife was shot to death in their home. When the police arrived Hurd told them that the firearm had accidentally discharged. The police took Hurd into custody and *Mirandized* him. Hurd described the circumstances surrounding the shooting but when asked to demonstrate how the shooting took place he refused. Throughout Hurd's trial (during the opening statement, case-in-chief and closing argument) the prosecution referred to Hurd's refusal to reenact the shooting as affirmative evidence of his guilt.

The court held that the prosecutor's comments on Hurd's refusal to reenact the shooting, when asked by police, was a violation of his *Fifth Amendment* rights under *Miranda* and *Doyle v. Ohio,* 426 U.S. 610 (1976).

The Supreme Court has clearly established that, after receiving *Miranda* warnings, a suspect may invoke his right to silence at any time during questioning and that his silence cannot be used against him at trial, even for impeachment. *Miranda* does not apply only to specific subjects or crimes. It applies to every question investigators pose. The mere fact that a criminal defendant may have answered some questions does not deprive him of the right to refrain from answering any further questions. The right to silence is not an all or nothing proposition. A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial.

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

*****

Thompson v. Runnels, 621 F.3d 1007 (9th Cir.)

Police suspected that Thompson murdered his girlfriend. He agreed to go the police station for questioning. At some point Thompson's interrogation became "custodial" before he admitted any wrongdoing. The officers had not yet *Mirandized* Thompson, and they admitted to employing "sophisticated interrogation techniques to keep the interview going" and obtain incriminating statements. After Thompson gave his most detailed account of how he killed his girlfriend the officers *Mirandized* him. The officers then used Thompson's prior admissions to elicit further details and "hold him to his story."

The court held "the only reasonable inference from this interrogation sequence is that the officers deliberately withheld *Miranda* warnings until after obtaining a confession." The officers' deliberate withholding of *Miranda* warnings until after Thompson confessed rendered the subsequent warnings ineffective; therefore, Thompson's confession should have been suppressed.

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

*****

U.S. v. Cook, 599 F.3d 1208 (10th Cir.)

While defendant was incarcerated at a county detention center as a federal pretrial detainee in connection with a federal drug case, one of his cellmates was strangled to death in the cell.

Two months later, in March, sheriff's office investigators had defendant brought from his housing area to an interview room for questioning. Almost immediately after being brought to the interview room, defendant stated that he did not want to speak to the investigators and that he had a right to an attorney. Defendant went to the door and asked to be returned to his cell. The interview was terminated, and defendant was taken back to his cell.

Federal authorities promised to recommend leniency for an informant, himself facing a lengthy federal sentence, should he agree to approach defendant and question him about the murder. The FBI then became involved in the murder investigation, and the sheriff's office withdrew shortly thereafter. The FBI was not informed of defendant's March encounter with the sheriff's office investigators, or that he invoked his *Miranda* rights during that encounter.

In June, through the efforts of the FBI, the cooperating informant was wired and placed in a cell with defendant. The cooperating informant asked defendant about the murder, and defendant described the roles that each of the three inmates played in the killing.

Defendant was completely unaware that he was in the presence of a government agent. Because *Miranda* and its progeny were directed at the prevention of pressure and coercion in custodial interrogation settings, the fears motivating exclusion of confessions which are the product of such custodial interrogation settings are simply not present in this case.

Deception which takes advantage of a suspect's misplaced trust in a friend or fellow inmate does not implicate the right against self-incrimination or the Fifth Amendment right to counsel. A suspect in those circumstances speaks at his own peril. The concerns underlying *Miranda* are inapplicable in the undercover agent context, even when the suspect is incarcerated.

Under *Edwards v. Arizona*, 451 U.S. 477 (1981), after an accused clearly invokes his right to have counsel present during a custodial interrogation, officers must cease all questioning and may not reinitiate questioning on any matter until counsel is provided, unless the accused himself initiates further communications, exchanges, or conversations with the police. But in order to implicate *Miranda* and *Edwards,* there must be a custodial interrogation. *Edwards* depended on the existence of custodial interrogation. In this case, defendant was unaware that he was speaking to a government agent. As a result, his questioning lacked the police domination inherent in custodial interrogation. Thus, without custodial interrogation, *Edwards* does not apply. And because *Edwards* does not apply, it is irrelevant that defendant had previously invoked his right to counsel in March when questioned by the sheriff's office investigators.

Under *Michigan v. Mosley*, 423 U.S. 96 (1975) law enforcement must honor an individual's invocation of the right to remain silent in order to counteract the coercive pressures of the custodial setting. Defendant did not know he was speaking to a government agent, and therefore, he was not subject to the pressures of a custodial setting. Thus, *Mosley* does not apply.

Defendant spoke freely with the cooperating informant, was not coerced, and the circumstances surrounding their conversation were nothing akin to police interrogation. Such casual questioning by a fellow inmate does not equate to "police interrogation," even though the government coordinated the placement of the fellow inmate and encouraged him to question defendant.

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

Editor's Note: The Court noted that since it "concluded that Cook was not subject to custodial interrogation when he made the incriminating statements at issue,"…"the rule announced in [*Maryland v. Shatzer*, 130 S. Ct. 1213 (2010)] is likewise inapplicable."

*****

U.S. v. Smith, 606 F.3d 1270 (10th Cir.)

In determining whether *Miranda* rights were voluntarily waived, the court considers: the suspect's age, intelligence, and education; whether the suspect was informed of his or her rights; the length and nature of the suspect's detention and interrogation; and the use or threat of physical force against the suspect. The same factors are assessed in determining whether a confession was voluntarily given.

The record demonstrates Smith's waiver of his rights was voluntary and based on those same considerations, we conclude that Smith's written confession also was made voluntarily.

Additionally, the presentment rule does not begin to operate, and the six-hour safe harbor period is not implicated, until a person is arrested for a federal offense. Where a person is under arrest on solely non-federal charges, neither the prompt-presentment rule nor the safe-harbor period are relevant even when the arresting officers believe the person also may have violated federal law or the person makes an inculpatory statement to federal agents.

The district court correctly ruled the presentment rule did not support suppressing Smith's confession. First, Smith was not arrested on a federal charge until March 27, 2007. The presentment rule did not become operative until that time and therefore it did not bear on Smith's March 25, 2007 arrest and confession.

Second, even if Smith had been arrested for a federal offense on March 25, rather than on a Navajo charge, the presentment rule would not warrant suppression of his written statement, because--at most--five hours and 10 minutes elapsed between Smith's arrest and confession.

Finally, hearsay evidence is generally not admissible, *see FED. R. EVID. 802*, but an exception is made for statements relating to a "startling event or condition," *see FED. R. EVID. 803(2)*. The so-called "excited-utterance" exception has three requirements: (1) a startling event; (2) the statement was made while the declarant was under the stress of the event's excitement; and (3) a nexus between the content of the statement and the event.

The district court properly admitted the victim's statement as an "excited utterance" since: (1) A startling event occurred – the sexual assault, (2) the victim was under the stress of the assault's excitement when she made the statement to her neighbor, "Help me, Help me, He raped me." This statement occurred at the first possible moment she had to disclose the assault to another

person. (3) There was an obvious nexus between the content of the statement and the startling event, the victim's sexual assault.

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

*****

U.S. v. Lall, 607 F.3d 1277 (11th Cir.)

Before a suspect's un-counseled incriminating statements made during custodial interrogation may be admitted, the prosecution must show that the suspect made a voluntary, knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel.

First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Detective Gaudio gave Lall the *Miranda* warnings then shortly thereafter told him that he was not going to pursue any charges against him. This representation contradicted the *Miranda* warnings previously given. As a result of Gaudio's statements, Lall did not truly understand the nature of his right against self-incrimination or the consequences that would result from waiving it.

(**Editor's Note:** the court did not rule on whether Lall was "in custody" for *Miranda* purposes.)

Next, the court examined the totality of the circumstances to determine the voluntariness of Lall's confession. A significant aspect of that inquiry here involved the effect of deception in obtaining the confession. The court noted that the deception at issue here did not involve a misrepresentation of fact. Such misrepresentations are not enough to render a suspect's ensuing confession involuntary, nor does it undermine the waiver of the defendant's *Miranda* rights.

Police misrepresentations of law, on the other hand, are much more likely to render a suspect's confession involuntary. Det. Gaudio explicitly assured Lall that anything he said would not be used to prosecute him. Moreover, there is ample record evidence to support a finding that Gaudio's promise was deceptive. Under these circumstances, Gaudio's statements were sufficient to render Lall's confession involuntary and to undermine completely the prophylactic effect of the *Miranda* warnings Gaudio previously administered. As a result the physical evidence seized as a result of Lall's involuntary confession was also suppressed.

Additionally, other evidence seized does not fall within the "plain view" exception because the incriminating character of the evidence was not immediately apparent to Det. Gaudio.

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

*****

U.S. v. Farley, 607 F.3d 1294 (11th Cir.)

Farley argued that because Agent Paganucci "tricked" him by telling him that the FBI wanted to question him as part of a terrorism investigation, his waiver of *Miranda* rights was not knowing or voluntary and therefore his post-arrest statements should have been suppressed.

Cases interpreting *Miranda's* language show that trickery or deceit is only prohibited to the extent it deprives the suspect of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Knowledge of what the agents really suspected him of doing would no doubt have been useful, possibly even decisive, to Farley in calculating the wisdom of answering their questions. But their deception on that point was not "constitutionally significant," because the lack of that information did not prevent Farley from understanding the nature of his rights and the legal consequences of waiving them.

Generally, courts have held statements involuntary because of police trickery only when other aggravating circumstances were also present. Misleading a suspect about the existence or strength of evidence against him does not by itself make a statement involuntary. By contrast, statements have been held involuntary where the deception took the form of a coercive threat or where the deception goes directly to the nature of the suspect's rights and the consequences of waiving them.

Even if some police tricks may be "objectionable as a matter of ethics," they are not relevant to the constitutional validity of a waiver unless they interfere with the defendant's ability to understand the nature of his rights and the consequences of abandoning them. It does not matter if the agents deliberately lied to Farley about the subject of the investigation in order to trick him into signing a waiver they thought he might not otherwise have signed. Their subjective motives for the deception are not relevant. Because the issue is whether Farley's decision to waive his rights was knowing and voluntary under the totality of the circumstances, the only relevant state of mind is that of Farley himself. Looking at the totality of the circumstances, nothing indicates that Farley's waiver of his rights was anything less than knowing and voluntary.

Whatever impact Agent Paganucci's "terrorist" remark may have had on Farley's earlier decision to waive his *Miranda* rights, it could have had no effect on his consent to the search of his laptop computer. Farley knew perfectly well by the time that he gave his consent to the search that the agents did not suspect him of being a terrorist. He knew when he consented to the search that the agents were looking for child pornography on the laptop because they had specifically asked him whether he had used it to search for child pornography. Given all of the circumstances, Farley's consent to search was knowing and voluntary.

Finally, Farley argued that the warrantless search of his briefcase was not a proper inventory search because the agents should have sealed the briefcase in his presence rather than opening it to itemize its contents.

Inventory searches of an arrestee's personal property are a "well-defined exception" to the *Fourth Amendment's* warrant requirement. When police take custody of a bag, suitcase, box, or any similar container, they may open it in order to itemize its contents pursuant to standard inventory procedures. That is what the agents did in this case. When they opened Farley's briefcase and

suitcase they compiled an inventory, itemizing the complete contents of both bags on a standard "Receipt for Property" form.

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

*****

Hall v. Thomas, 611 F.3d 1259 (11th Cir.)

Hall sought habeas relief from his state court convictions for robbery and kidnapping arguing that his audio taped confession was involuntary, coerced and made without a knowing and intelligent waiver of his right to counsel. Hall was fifteen years and eleven months old at the time he confessed.

The totality of the circumstances here indicated that Hall's waiver of his *Miranda* rights and his subsequent confession were knowing, intelligent, and voluntary. The officers read Hall his state juvenile rights twice and his adult *Miranda* rights twice. Hall himself also read his state juvenile and adult *Miranda* rights. Thus, Hall was told twice, and read himself once, that he had a right to have a parent present during questioning if he wanted.

Hall confirmed on the audiotape that the officers had read him his state juvenile rights and adult *Miranda* rights twice and that he understood those rights. During his audiotaped confession, Hall also acknowledged that he had signed the forms waiving his *Miranda* rights. The transcript and audiotape of Hall's confession gave no indication whatsoever that Hall was confused or misunderstood the seriousness of the interrogation or the questions he was being asked.

The transcript and audiotape recording of his confession revealed no evidence that he was mistreated by the police, tricked, or coerced into waiving his rights or confessing. When asked during his audio taped confession whether he had been threatened, Hall stated that he had not been threatened. On the audiotape, Hall confessed to the crime in detail and gave no indication that he was fed facts by the officers, as he now claims, that he was frightened into confessing, as he now claims, or that he did not understand, as he now claims. The transcript of the confession confirms its voluntariness.

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

*****

Sixth Amendment

Confrontation Clause

U.S. v. Castro-Davis, 612 F.3d 53 (1st Cir.)

The government presented evidence that established a well orchestrated plot to carjack and kidnap the victim. The admission of one co-defendant's recorded statements from a telephone call to his mother did not violate the *Confrontation Clause of the Sixth Amendment*. Applying the analysis outlined in *Crawford v. Washington* (cite omitted) the court held that the statement was not made under circumstances that rendered it testimonial; therefore, it was admissible.

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

*****

Right to Counsel

Torres v. Dennehy, 615 F.3d 1 (1st Cir.)

The court affirmed the lower court's conclusion that the officers did not "deliberately elicit" information from Torres in violation of his 6^{th} *Amendment* right to counsel. While the officers served Torres with the indictment, he made spontaneous statements to them over their admonitions that he had the right to remain silent and the right to counsel. The officers further told Torres that they knew he had a lawyer, and that he should not say anything about the new charges.

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

*****

Ayers v. Hudson, 623 F.3d 301 (6th Cir.)

Ayers was arrested and indicted for murder. The court held that Ayers's *Sixth Amendment* right to counsel was violated when the trial court allowed a jailhouse informant to testify regarding incriminating statements made by Ayers in response to the informant's questioning. The court found that the state intentionally created a situation likely to induce Ayers to make incriminating statements without the assistance of counsel, when it returned the informant to Ayers's jail pod, and he deliberately elicited information from Ayers regarding the murder weapon and the amount of money taken from the victim.

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

*****

Federal Rule of Evidence (FRE)

FRE 701 (Lay Witness Testimony)

U.S. v. Roe, 606 F.3d 180 (4th Cir.)

Sergeant Russell's testimony was properly admitted as lay testimony, pursuant to *Fed. R. Evid. 701*. He was in charge of the unit that issues handgun carry permits as well as security guard and private detective certifications in Maryland. Based on his personal knowledge acquired in that capacity he was qualified to testify as to the requirements for getting such permits and certifications, and to state what possessing those permits allowed an individual to do.

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

*****

U.S. v. Johnson, 617 F.3d 286 (4th Cir.)

The government recorded telephone conversations between the defendant and others in the course of its investigation. At trial the government played excerpts of various telephone calls for the jury, and then asked the agent on the witness stand to explain the meaning of certain words or phrases that were believed to be "drug code." The trial court permitted this testimony based on the agent's experience and training pursuant to *Federal Rule of Evidence 701* (lay opinion testimony).

The court held, that since the agent was not proffered as an expert witness, his testimony was only admissible as lay opinion testimony. However, since the agent's opinions regarding the meaning of the phrases in the telephone calls were based on his experience and training and not his own perception, they were improperly admitted as lay opinion.

Lay opinion testimony must be based on personal knowledge, and in order to build a foundation for lay testimony it must be based on the perception of the witness. Here the agent did not testify that he directly observed the surveillance or even listened to all of the relevant telephone calls in question. Much of his testimony should have been considered that of an expert, as he consistently supported his interpretations of the telephone calls by referencing his experience as a DEA agent, the post-wiretap interviews he conducted and statements made to him by co-defendants. None of this second-hand information qualified as foundational personal perception needed under *Rule 701*.

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

*****

FRE 801 (Hearsay)

U.S. v. Buchanan, 604 F.3d 517 (8th Cir.)

The district court did not abuse its discretion in admitting the officers' testimony regarding the numeric inscription on the safe where the narcotics were found. The officers' testimony that the safe contained the inscription "2010" is not hearsay; instead, the inscription is similar to the marking of "Made in Spain" on the gun in *Thody*. (*U.S. v. Thody*, 978 F2d 625, 630 (10th Cir. 1992)). As the Tenth Circuit explained, such a marking is "technically not an assertion by a declarant" under *Rule 801*. Furthermore, the inscription was not offered "to prove the truth of the matter asserted"--that the safe was, in fact, a 2010 model. Instead, it was admitted to show that the number on the safe matched the number on Buchanan's key.

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

*****

U.S. v. Tenerelli, 614 F.3d 764 (8th Cir.)

The court held that the officer's testimony regarding what he observed during the controlled buy was not hearsay since no statements made by the confidential informant (CI) were offered for their underlying truth. Instead, the officer testified about the fact that the CI asked the defendant to sell him drugs, a verbal act of which the officer had personal knowledge. Further, an out of

court statement is not hearsay when offered to explain why an officer conducted an investigation in a certain way. It was not improper for the officer to testify about his observations that led to the issuance of the search warrant when no statement of the CI was ever offered to prove an underlying truth.

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

*****

FRE 803 (2) (Excited Utterance)

U.S. v. Smith, 606 F.3d 1270 (10th Cir.)

In determining whether *Miranda* rights were voluntarily waived, the court considers: the suspect's age, intelligence, and education; whether the suspect was informed of his or her rights; the length and nature of the suspect's detention and interrogation; and the use or threat of physical force against the suspect. The same factors are assessed in determining whether a confession was voluntarily given.

The record demonstrates Smith's waiver of his rights was voluntary and based on those same considerations, we conclude that Smith's written confession also was made voluntarily.

Additionally, the presentment rule does not begin to operate, and the six-hour safe harbor period is not implicated, until a person is arrested for a federal offense. Where a person is under arrest on solely non-federal charges, neither the prompt-presentment rule nor the safe-harbor period are relevant even when the arresting officers believe the person also may have violated federal law or the person makes an inculpatory statement to federal agents.

The district court correctly ruled the presentment rule did not support suppressing Smith's confession. First, Smith was not arrested on a federal charge until March 27, 2007. The presentment rule did not become operative until that time and therefore it did not bear on Smith's March 25, 2007 arrest and confession.

Second, even if Smith had been arrested for a federal offense on March 25, rather than on a Navajo charge, the presentment rule would not warrant suppression of his written statement, because--at most--five hours and 10 minutes elapsed between Smith's arrest and confession.

Finally, hearsay evidence is generally not admissible, *see FED. R. EVID. 802*, but an exception is made for statements relating to a "startling event or condition," *see FED. R. EVID. 803(2)*. The so-called "excited-utterance" exception has three requirements: (1) a startling event; (2) the statement was made while the declarant was under the stress of the event's excitement; and (3) a nexus between the content of the statement and the event.

The district court properly admitted the victim's statement as an "excited utterance" since: (1) A startling event occurred – the sexual assault, (2) the victim was under the stress of the assault's excitement when she made the statement to her neighbor, "Help me, Help me, He raped me." This statement occurred at the first possible moment she had to disclose the assault to another person. (3) There was an obvious nexus between the content of the statement and the startling event, the victim's sexual assault.

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

*****

FRE 1002 (Best Evidence Rule)

U.S. v. Buchanan, 604 F.3d 517 (8th Cir.)

Failure to seize the safe and introduce it into evidence did not implicate the *Best Evidence Rule* (*FRE 1002*), therefore the government witnesses could testify as to the inscription on the safe.

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

*****

Miscellaneous Criminal Law

Conspiracy and Parties

U.S. v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir.)

Under *18 U.S.C. § 2119(3)* when a carjacking victim is taken hostage, the commission of the carjacking continues at least while the carjacker maintains control over the victim and his car. When the criminal conduct extends over a period of time, a latecomer may be convicted of aiding and abetting even if she did not learn of the crime at its inception, but knowingly assisted at a later stage.

In this case the defendant lent significant aid to the principals while they held the victim hostage in the car for several hours after she became involved. The defendant was not "merely present" at the scene of the crime. Her aid was essential to the scheme, and she may therefore be held liable as an aider and abettor.

The 6th and 9th circuits agree.
The court additionally held that the defendant's conviction for conspiracy to commit carjacking was proper. Even though there was no evidence to show that she was involved at the initial planning phase, the evidence of her later involvement provided a sufficient basis to infer that she knew of the co-defendants' plan, shared their common purpose, and acted to further their plan.

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

*****

U.S. v. Torres, 604 F.3d 58 (2d Cir.)

The evidence at trial, viewed as a whole and taken in the light most favorable to the government, was insufficient to permit the jury to find beyond a reasonable doubt that Torres knew that the packages addressed to him contained narcotics, and hence was insufficient to establish that he had knowledge of the purposes of the conspiracy of which he was accused.

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

*****

U.S. v. Heras, 609 F.3d 101 (2d Cir.)

The court held that a jury could reasonably infer the defendant's intent to distribute from evidence indicating that he knew of Correa's planned distribution of the contraband, and that with that knowledge; he agreed to facilitate the crime.

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

*****

U.S. v. Sliwo, 620 F.3d 630 (6th Cir.)

The court held that the government failed to present sufficient evidence to establish that the defendant knew he was involved in a scheme to procure marijuana, stating:

> It is a step too far to find that the defendant knew that marijuana was in the van simply because he was involved in the run-up to the acquisition of the marijuana and served as a lookout when the drugs were actually loaded into the van, even though he was not present to see the marijuana being loaded. No evidence was presented that demonstrated the defendant's knowledge that the purpose of the scheme was the acquisition of marijuana. The government only showed that the defendant was involved in a scheme, and the evidence of his participating in transporting the empty van and serving as a lookout would not allow a rational jury to find beyond a reasonable doubt that the defendant conspired to possess with intent to distribute marijuana.

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

*****

U.S. v. Mateos, 623 F.3d 1350 (11th Cir.)

The court held that the evidence was sufficient to establish that the defendant knew that St. Jude was submitting fraudulent claims to Medicare. It was not necessary for Mateos to know "all the details" of how the fraud worked in order for her to be guilty of conspiracy. The presence of fraud at St. Jude was so obvious that knowledge of its character could fairly be attributed to her.

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

*****

Constructive Possession

U.S. v. Adams, 625 F.3d 371 (7th Cir.)

Police arrested Adams shortly after he accepted keys from undercover ICE agents to a van that was loaded with 1400 pounds of marijuana. The court held that Adams constructively possessed the marijuana once he accepted the keys to the van, and he actually possessed it once he entered the van and attempted to start it. The fact that the officers had disconnected the battery cable, rendering the van inoperable, did nothing to diminish Adams' control over the van or its contents. It was not necessary for the agents to give Adams the opportunity to drive away to establish his possession of the marijuana.

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

*****

Hidden Compartments

U.S. v. Gonzalez-Rodriguez, 621 F.3d 354 (5th Cir.)

Generally, a jury may infer that a defendant has knowledge of drugs in a vehicle when the defendant exercises control over the vehicle. However, when drugs are hidden in a secret compartment, guilty knowledge may not be inferred solely from the defendant's control of the vehicle because there is at least a fair assumption that a third party might have concealed the controlled substances in the vehicle with the intent to use the unwitting defendant as the carrier in a smuggling enterprise. In secret compartment cases, this circuit requires additional circumstantial evidence that is suspicious in nature and demonstrates guilty knowledge.

In this case there was sufficient suspicious circumstantial evidence to support the defendant's conviction. First, a packing house manager testified that it would have been almost impossible for the methamphetamine to be loaded into the defendant's trailer without detection at the warehouse where the load originated. Second, a witness testified that it would have been extremely difficult to unload the drugs from the trailer at the destination warehouse without detection. Third, there was a suspicious gap in time, from the time the defendant left the original warehouse, until the time he arrived at the Falfurrias immigration checkpoint where the Border Patrol Agents discovered the drugs. Fourth, the defendant had a key to the lock on the trailer and was able to open the trailer at the checkpoint. Finally, the 312.5 pound of methamphetamine that was seized was worth between ten and forty million dollars. A jury could reasonably infer that the defendant would not have been entrusted with such a large amount and high value of methamphetamine unless he knew he was part of the drug trafficking scheme.

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

*****

U.S. v. Aponte, 619 F.3d 799 (8th Cir.)

An officer stopped Aponte for a traffic violation. Aponte and a passenger had recently borrowed the vehicle, and were traveling to visit Aponte's cousin. After receiving consent to search, the officers searched the interior of the vehicle for over seven minutes without finding any

contraband. The officers asked Aponte to drive the vehicle to the sheriff's office so they could continue the search indoors, due to the cold weather. The officers examined a round cooler in the vehicle. The officers noticed that the cooler's weight "did not seem right," and then they noticed some non-factory glue seeping from the seam between the cooler exterior and the liner. After dismantling the cooler the officers found four baggies wrapped around the cooler's inner core containing approximately one kilogram of methamphetamine.

The court reversed Aponte's conviction holding that the evidence was insufficient for the jury to reasonably conclude that he knew of the drugs inside the lining of the cooler. Generally when a defendant denies knowledge of drugs found inside his vehicle, the court has held that the defendant's ownership and control over the vehicle are sufficient to infer possession of drugs therein, even if the drugs are concealed. However, if a defendant did not own the vehicle, especially where the defendant was in control of the vehicle for only a short period of time, then the court has required additional proof showing that the defendant was aware of drugs concealed in the vehicle.

In this case the drugs were well-hidden inside the cooler within the vehicle. When drugs are found in a hidden-compartment, an important consideration is whether the compartment was obvious to a member of the general public. No evidence suggested that Aponte inspected the cooler at a close enough distance to notice the irregularity with the small amount of off-color glue protruding from the cooler's liner. Three officers initially searched the vehicle for over seven minutes, and during that time they never turned their attention to the cooler, much less the problem with the cooler's lining.

Additionally, the court held that the common indicia of guilty consciences were not present in this case. The officers testified that Aponte answered their questions completely and without apparent nervousness. Aponte and his passenger both gave the officers consistent stories regarding the reason for their trip and their travel history. The officers verified that Aponte had borrowed the car from a friend for the trip.

Finally, there was no evidence linking Aponte to the drugs. No fingerprints were found on the methamphetamine packaging, and the fingerprints located on the liner of the cooler did not belong to Aponte or his passenger.

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

*****

Defenses

Necessity

U.S. v. Kilgore, 591 F.3d 890 (7th Cir.)

In the case of a felon in possession of a firearm, the justification (necessity) defense only applies to the individual who in the heat of a dangerous moment disarms someone else, thereby possessing a gun briefly in order to prevent injury to himself. It is available when the felon, not being engaged in criminal activity, does nothing more than grab a gun with which he or another

is being threatened (the other might be the possessor of the gun, threatening suicide). The defense is a rare one and is unavailable in a setting where no ongoing emergency exists or where legal alternatives to possession are available.

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

*****

Entrapment

U.S. v. Hall, 608 F.3d 340 (7th Cir.)

As part of an undercover investigation targeting individuals involved in armed home invasions, a confidential informant introduced Hall to an undercover agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives. The purpose of this introduction was for the agent to present Hall an opportunity to commit an armed robbery.

The court held that there was no evidence that Hall was not predisposed to join in the proposed robbery plan, therefore; the trial court properly refused to give a jury instruction on entrapment.

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

*****

U.S. v. Orr, 622 F.3d 864 (7th Cir.)

The court rejected Orr's argument that the district court should have made the entrapment defense available to him, but even if it had, that it would have been futile. A successful entrapment defense requires proof of two elements: (1) government inducement of the crime and (2) lack of a defendant's predisposition to engage in criminal conduct.

Spaden's (an undercover police officer's fictional persona used as part of an undercover sting operation to investigate internet crimes) Yahoo profile did not contain any sexual information, yet without provocation Orr initiated contact with Spaden, and his first comment to her was an inquiry about sexually abusing her daughters. He subsequently made several statements to Spaden that showed his continuing interest in abusing Spaden's daughters. When the government simply invites the defendant to participate in the crime and does not employ any pressure tactics or use any other type of coercion to induce the defendant, he is not entitled to an entrapment defense.

Further, all factors indicated that Orr was predisposed to commit the charged offenses, *18 U.S.C. § 2422(a)* and *(b)*, since he was the first one to suggest training Spaden's daughters, and he encouraged Spaden to acclimate the girls to sexual acts.

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

*****

U.S. v. Young, 613 F.3d 735 (8th Cir.)

Although the undercover officer posing as a fourteen-year old girl named "Emily" alluded to sex in some of the online chats, Young initially contacted Emily, and it was Young who initiated the majority of the sexual discussions, supporting the conclusion that he was not induced by the government.

Young was the one who brought up the topic of a sexual encounter at the Super 8 Motel, and who reserved a room. Although Emily pretended to be receptive of Young's sexual suggestions, and was portrayed as a sexually precocious teen-ager, the government did not "implant the criminal design" in Young's mind. The district court's refusal to instruct the jury on an entrapment defense was proper.

The court further held that even if Young had established that the government induced his criminal conduct, that he was predisposed to commit the crime. The evidence of Young's numerous other internet chats, during which he attempted to arrange meetings with minors for sexual encounters, clearly showed his predisposition to commit this crime.

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

*****

U.S. v. Vincent, 611 F.3d 1246 (10th Cir.)

A defendant is entitled to a jury instruction on entrapment only when the government conduct is such that a reasonable jury could find that it "creates a substantial risk that an un-disposed person or otherwise law-abiding citizen would commit the offense."

While Vincent may well have felt indebted to his friend, who unbeknownst to him was acting as a confidential informant, a reasonable jury could not conclude that his benevolence to Vincent and invocations of sympathy created a substantial risk that an otherwise law-abiding citizen would take up the methamphetamine trade.

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

*****

U.S. v. Sistrunk, 622 F.3d 1328 (11th Cir.)

The defendant, a convicted felon, became involved in a scheme to commit an armed robbery on a drug stash-house. The stash-house was supposed to hold twenty-five kilograms of cocaine, valued at approximately $500,000. However, the scheme was actually a police sting set up by a confidential informant and an undercover agent.

The court held that the evidence presented at trial was not sufficient to justify submitting an entrapment defense to the jury. The facts presented represented nothing more than evidence that the government presented the opportunity for the defendant to commit the crime.

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

*****

Evidence Preservation

U.S. v. Hood, 615 F.3d 1293 (10th Cir.)

Police seized Hood's backpack and found five plastic bags containing a total of 542 grams of methamphetamine. An officer combined the drugs from the five plastic bags into a separate bag and sent that bag to the crime lab for testing. The five plastic bags were later destroyed. The government later charged Hood with possession with intent to distribute fifty grams or more of actual methamphetamine.

Hood argued that the court should have dismissed the indictment against him because the government had destroyed potentially exculpatory evidence, contending that had the five plastic bags not been destroyed he would have been able to test the contents of each bag recovered from his backpack before it was comingled, and that he could have conducted fingerprint analysis on the bags.

Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Hood conceded that the destroyed evidence was only potentially exculpatory and that the officers did not act in bad faith in destroying the five plastic bags, therefore his challenge must fail.

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

*****

Law Enforcement Privilege

In re the City of New York, 607 F.3d 923 (2d Cir.)

During pretrial discovery proceedings, plaintiffs brought a motion to compel the City to produce roughly 1800 pages of confidential reports (field reports) created by undercover NYPD officers who were investigating potential security threats in the months before the RNC. The City opposed the motion to compel by asserting, among other things, that the documents were protected from disclosure by the law enforcement privilege.

The court held that the law enforcement privilege applied to the documents at issue, stating, "the Field Reports, even in their redacted form, contain detailed information about the undercover operations of the NYPD." "This information clearly relates to "law enforcement techniques and procedures."" "Moreover, providing information about the nature of the NYPD's undercover operations will only hinder the NYPD's ability to conduct future undercover investigations."

Additionally, even the redacted documents contain some information that could disclose the identity of an NYPD undercover officer. Pulling any individual "thread" of an undercover operation may unravel the entire "fabric" that could lead to identifying an undercover officer. This could present a risk to the safety and effectiveness of that officer and would likely provide additional information about how the NYPD infiltrates organizations, thereby impeding future investigations.

Although the Court concluded that the law enforcement privilege applied to the field reports, the privilege is qualified, not absolute. The court adopted a balancing test used by the District of Columbia Circuit in which the public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information. In this case the court held that the plaintiffs' need for the field reports was not "compelling" and therefore the plaintiffs had not overcome the strong presumption against disclosure.

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

*****

Mistake of Law

U.S. v. Prince, 593 F.2d 1178 (10th Cir.)

Even if it were a mistake of law for ATF agents to conclude that "AK-47 flats" i.e., pieces of flat metal containing holes and laser perforations, are "receivers" and therefore "firearms," such a mistake of law carries no legal consequence if it furnishes the basis for a consensual encounter, as opposed to a detention or arrest.

It is well established that consensual encounters between police officers and individuals implicate no *Fourth Amendment* interests. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual and request consent to search property belonging to the individual that is otherwise protected by the *Fourth Amendment*. The agents' purported mistake of law neither independently resulted in a *Fourth Amendment* violation nor otherwise "tainted" the entire investigation.

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

Editor's Note: The Court declined to decide whether the flats at issue are "receivers" and therefore "firearms."

*****

Proprietary Jurisdiction

U.S. v. Bohn, 622 F.3d 1129 (9th Cir.)

The court held that the federal government has the power under the *Property Clause* to enforce *36 C.F.R. § 4.2(b)* (failure to wear a helmet) on land over which it has only proprietary jurisdiction. Additionally, there was sufficient evidence that the defendant violated *36 C.F.R. § 2.32(a)(2)* (refusing to obey a lawful order), which applies on land administered by the National Park Service, over which the federal government has only proprietary jurisdiction. Finally, the defendant's conviction for refusing to obey a lawful order, after he refused to tell the NPS Ranger his last name, did not violate his *Fifth Amendment* right to remain silent. Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances, and there were no unusual circumstances in this case.

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

*****

Miscellaneous Criminal Statutes / CFR Provisions

18 U.S.C. § 13

U.S. v. Dotson, 615 F.3d 1162 (9th Cir.)

The court affirmed Dotson's conviction for furnishing liquor to minors, holding that *Wash. Rev. Code § 66.44.270* was properly assimilated into federal law under the Assimilative Crimes Act, *18 U.S.C. § 13(a)* (ACA). The ACA subjects persons on federal lands to federal prosecution in federal court for violations of criminal statutes of the state in which the federal lands are located. The ACA applies in this case because Congress has not passed any law that prohibits the conduct at issue, and the Washington statute is "prohibitory," meaning that the furnishing of alcohol to minors is flatly prohibited and criminally penalized.

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

*****

18 U.S.C. § 111

U.S. v. Williams, 602 F.3d 313 (5th Cir.)

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

Title 18 U.S.C. § 111(a)(1) provides that
(a) In general—Whoever—
(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [federal officer] while engaged in or on account of the performance of official duties;
. . . shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both,….

The statute contains two ambiguities. First, it distinguishes between misdemeanor and felony conduct by use of the undefined term "simple assault." Second, and central to this case, the statute appears to outlaw several forms of conduct directed against federal officers, only one of which is assault, but then distinguishes between misdemeanors and felonies by reference to the crime of assault.

Simple assault as an attempted or threatened battery:
Section 111(a)(1) prohibits more than assault, simple or otherwise. A misdemeanor conviction under *§ 111(a)(1)* does not require underlying assaultive conduct. The dual purpose of the statute is not simply to protect federal officers by punishing assault, but also to deter interference with federal law enforcement activities and ensure the integrity of federal operations by punishing obstruction and other forms of resistance.

The 6th Circuit agrees (cite omitted). The 9th and D.C. circuits disagree (cites omitted).

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

*****

18 U.S.C. §§ 241 / 242

U.S. v. Lanham, 617 F.3d 873 (6th Cir.)

The court held that there was sufficient evidence to support the defendant's convictions for committing civil rights abuses in violation of *18 U.S.C. §§ 241 and 242*. Lanham and Freeman worked as jailers at the Grant County, Kentucky, Detention Center. Along with their supervisor the defendants decided to "scare" an individual, who had been arrested for a traffic violation, by placing him in a general population jail cell. As a result the victim was beaten and sexually assaulted by other inmates.

The court found that the evidence established that Lanham and his supervisor mocked the victim about his slight appearance, and he was present when his supervisor said that the victim would make a "good girlfriend" for the other inmates. When the supervisor stated that they needed to teach the victim a lesson, Lanham quickly volunteered that he knew a prisoner in Cell 101. The evidence showed that Lanham talked to Inmate Wright, within earshot of other inmates, and explained that the guards would be bringing a new prisoner down and that they wanted the prisoners to "f-ck with" him. The evidence also showed that the inmates cheered at this news when Lanham was present, and that Lanham knew of that particular cell-block's reputation for violence. Lanham stated that the victim should have been in a detox cell, not in the general population, and he admitted that he had asked Inmate Wright to teach the victim a lesson.

Freeman was present when Lanham spoke to Inmate Wright, and nodded his head in agreement. He also failed to protect or assist the victim after learning of the plan.

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

*****

18 U.S.C. § 373

U.S. v. White, 610 F.3d 956 (7th Cir.)

The indictment for a violation of *18 U.S.C. § 373* (solicitation to commit a crime of violence) was legally sufficient, as the government laid out the elements of the crime and the statutory violation, along with some factual allegations for support.

It is up to the jury to determine if the defendant's intent for posting information about the juror on his web site constituted solicitation under *§ 373*, and is therefore, not protected by the *First Amendment*.

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

******

18 U.S.C. § 641

U.S. v. Reagan, 596 F.3d 251 (5th Cir.)

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

Title 18 U.S.C.§ 641 punishes "[w]hoever embezzles, steals, purloins or knowingly converts to his use . . . *any* record, voucher, money, or thing of value of the United States." (emphases added). Each individual transaction in which government money is received is a separate count, even if the transaction is part of an overarching scheme.

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

Editor's Note: No other circuits have addressed this specific issue.

*****

U.S. v. Dowl, 619 F.3d 494 (5th Cir.)

The court held that the government presented sufficient evidence to support a conviction under *18 U.S.C. § 641*. Dowl submitted fraudulent applications to obtain government funds and used those funds for her personal use instead of to rebuild after Hurricane Katrina. Her scheme deprived the government of the fund's economic value for aiding homeowners' rebuilding effort after Hurricane Katrina.

Additionally, the wire transfer from the Small Business Administration (SBA) was sufficient to support Dowl's conviction for wire fraud. The use of wire communications need not be an essential element of a scheme to defraud, but may instead be incident to an essential part of the scheme. Dowl's scheme was not complete until she approved the transfer of funds that were distributed to her and the SBA.

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

*****

18 U.S.C. § 704

U.S. v. Alvarez, 617 F.3d 1198 (9th Cir.)

The court reversed Alvarez's conviction for falsely claiming to have received the Congressional Medal of Honor, in violation of the Stolen Valor Act, *18 U.S.C. § 704(b), (c).* The court held that the Act is unconstitutional because is not narrowly tailored to achieve a compelling government interest, stating that, "honoring and motivating our troops are doubtless important government interests, but we fail to see how the Act is necessary to achieving either aim."

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

*****

18 U.S.C. § 876

U.S. v. Havelock, 619 F.3d 1091 (9th Cir.)

Title 18 U.S.C. § 876(c) makes it a felony to mail a communication "addressed to any other person and containing . . . any threat to injure the person of the addressee or of another."

The court held that the phrase "any other person" in *§ 876(c)* refers exclusively to natural persons. The court also held that the requirement of *§ 876(c),* that the communication deposited in the mail be "addressed" to such person, means that the natural person addressee must be designated on the outside of the letter or package deposited in the mail. Because none of the six packets of which Havelock was convicted of mailing was addressed on its cover to any natural person, his convictions were reversed.

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

*****

18 U.S.C. § 921

U.S. v. Crooker, 608 F.3d 94 (1st Cir.)

Under *18 U.S.C. § 921 (a)(24)* a firearm silencer or firearm muffler is defined as "any device for silencing, muffling, or diminishing the report of a portable firearm, . . ." The court held that the statute by its terms speaks of a device "for" silencing or muffling and requires something more than a potential for adaptation as a silencer, and that the defendant must have knowledge of it.

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

******

18 U.S.C. § 922

U.S. v. Marzzarella, 614 F.3d 85 (3d Cir.)

The court held that Marzzarella's conviction under *18 U.S.C. § 922(k)* for possession of a handgun with an obliterated serial number did not violate his *Second Amendment* right to keep and bear arms.

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

*****

U.S. v. White, 606 F.3d 144 (4th Cir.)

Title 18 U.S.C. § 922(g)(9) makes it a felony under federal law to possess a firearm after having been convicted of a "misdemeanor crime of domestic violence," which *§ 921(a)(33)(A)* defines as "a misdemeanor under Federal, State, or Tribal law" that has, *as an element,* the use or attempted use of *physical force*, ..."

The issue before the court was whether the "use of physical force," as that term is used in *§ 921(a)(33)(A)(ii)*, is an element of the criminal offense of assault and battery under Virginia law. "Physical force" is not defined in *§ 921* or any other relevant federal statute.

The court concluded that the phrase "physical force" in *§ 921(a)(33)(A)(ii)* meant force, greater than a mere offensive touching, that is capable of causing physical pain or injury to the victim. Accordingly, a conviction for assault and battery in Virginia does not require "physical force" as an element of the crime. As a consequence, a Virginia conviction for assault and battery under *VA CODE ANN. § 18.2-57.2*, in and of itself, does not meet the definition of a *§ 922(g)(9)* "misdemeanor crime of domestic violence."

The 7th, 9th and 10th circuits agree (cites omitted). The 1st , 8th and 11th circuits disagree (cites omitted).

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

******

U.S. v. Skoien, 614 F.3d 638 (7th Cir.)

The defendant's conviction under *18 U.S.C. §922(g)(9)* for possession of a hunting shotgun, after he was convicted of a misdemeanor crime of domestic violence, does not violate his *Second Amendment* right to keep and bear arms as explained in *District of Columbia v. Heller* (cite omitted).

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

*****

U.S. Cook, 603 F.3d 434 (8th Cir.)

To convict a defendant of being a felon in possession of ammunition, the government must prove beyond a reasonable doubt that (1) the defendant had previously been convicted of a crime punishable by a term of imprisonment exceeding one year, (2) the defendant knowingly possessed ammunition, and (3) the ammunition had traveled in or affected interstate commerce. The testimony that Cook was found in possession of the loaded revolver is sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Cook knowingly possessed the ammunition in the revolver.

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

*****

U.S. v. Thomas, 615 F.3d 895 (8th Cir.)

The defendant argued that *18 U.S.C. § 922(g)(1)* requires the government to prove that he knew of his status as a felon. The court held however, in a prosecution under *§ 922(g)(1)*, the government need only prove defendant's status as a convicted felon, and knowing possession of the firearm. The 'knowingly' element of *section 922(g)* applies only to the defendant's underlying conduct, not to his knowledge of the illegality of his actions.

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

*****

U.S. v. Seay, 620 F.3d 919 (8th Cir.)

The defendant was convicted of possessing a firearm while being an unlawful user of, or addicted to, a controlled substance in violation of *18 U.S.C. §§ 922(g)(3)* and *924(a)(2.)* He argued that *18 U.S.C. § 922(g)(3)* is unconstitutional following the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), claiming that the prohibition on firearm possession in *§ 922(g)(3)* violates his *Second Amendment* right to keep and bear arms.

The court noted that since *Heller*, many defendants have argued that *18 U.S.C. § 922(g)* or some subsection thereof, violates the *Second Amendment*, although none have succeeded. The court held that nothing in the defendant's argument "convinces us that we should depart company from *every* other court to examine *§ 922(g)(3)* following *Heller*. In passing *§ 922(g)(3)*, Congress expressed its intention to "keep firearms out of the possession of drug abusers, a dangerous class of individuals." "As such, we find that *§ 922(g)(3)* is the type of "longstanding prohibition on the possession of firearms" that *Heller* declared presumptively lawful."

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

*****

U.S. v. Nevils, 598 F.3d 1158 (9th Cir.)

The 9th Circuit, *en banc*, vacates and reverses the earlier panel decision dated November 20, 2008, and reported in 12 Informer 08, that held the government had failed to prove Nevils had *knowing possession* of the firearms. The conviction for felon in possession of firearms is now affirmed.

The evidence is sufficient to support a reasonable conclusion that Nevils knew he possessed firearms and ammunition. Nevils's actual possession of two loaded weapons, each lying on or against Nevils's body, would permit a reasonable juror to infer that Nevils knew of those weapons. Further, Nevils initially reached toward his lap when the officers first awakened him, raising the inference that he knew a loaded weapon was within reach. Nevils later cursed his cohorts who had left him in this compromising situation without warning him that the police were in the vicinity. Finally, and contrary to Nevils's representations, there was evidence tying Nevils to the particular apartment where he was found: Nevils had been arrested on narcotics and firearms charges in the same apartment just three weeks earlier. This evidence, construed in favor of the government, raises the reasonable inference that Nevils was stationed in Apartment 6 and armed with two loaded firearms in order to protect the drugs and cash in the apartment when he fell asleep on his watch.

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

******

U.S. v. DuBose, 598 F.3d 726 (11th Cir.)

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

Title 18 U.S.C. § 922(g)(8) prohibits possession of a firearm while subject to a protective order. Among other requirements, the protective order must either include a finding that such person represents a credible threat to the physical safety of such intimate partner or child *(§ 922(g)(8)(C)(i))* or by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury (*§ 922(g)(8)(C)(ii)*). Since the protective order issued against DuBose, a lawyer and judge, did not include a specific finding that he was a credible threat, it must satisfy *§ 922(g)(8)(C)(ii)*.

Section 922(g)(8) does not require that the precise language found in subsection *(C)(ii)* must be used in a protective order for it to qualify under the statute. This order "restrained and enjoined" DuBose "from intimidating, threatening, hurting, harassing, or in any way putting the plaintiff, [], her daughters and/or her attorney in fear of their lives, health, or safety." The definition of "hurt" as a verb includes "to inflict with physical pain." Thus, the order's language restraining DuBose from "hurting" his wife or her daughters, at the very least, satisfies subsection *(C)(ii)*'s requirement that the order explicitly prohibit the use, attempted use, or threatened use of "physical force" that would reasonably be expected to cause bodily injury.

The 1st and 4th circuits, the only other circuits to address this specific issue, agree (cites omitted).

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

*****

18 U.S.C. § 924

U.S. v. Gardner, 602 F.3d 97 (2d Cir.)

Deciding this issue for the first time, the court decides:

Although acquiring a firearm using drugs as payment does not constitute "using" the gun "during and in relation to a drug trafficking crime" (see *Watson v. United States*, 552 U.S. 74 (2007)), it does constitute "possessing" that firearm "in furtherance of a drug trafficking crime" in violation of *18 U.S.C. § 924(c)(1)(A)*.

The 1st, 3rd, 4th, 9th, and 10th circuits agree (cites omitted).

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

*****

U.S. v. Doody, 600 F.3d 752 (7th Cir.)

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

When a defendant receives a gun for drugs, he "possesses" the firearm in a way that "further[s], advance[s], or help[s] forward" the distribution of drugs in violation of *18 U.S.C. § 924(c)(1)(A)*.

The 1st, 5th, 6th, 9th, and 10th circuits agree (cites omitted).

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

*****

18 U.S.C. § 926A

Torraco v. Port Authority of New York and New Jersey, 615 F.3d 129 (2d Cir.)

The court consolidated three cases in which individuals, on separate occasions, attempted to transport unloaded firearms in checked baggage through various New York airports. They followed TSA regulations and relied upon *18 U.S.C. § 926A*, a statute which allows individuals to transport firearms from one state in which they are legal, through another state in which they are illegal, to a third state in which they are legal, provided that several conditions are met, without incurring criminal liability under local gun laws.

All three individuals were interviewed and delayed from traveling and two were arrested for possession of a firearm without a New York firearms license.

The court held that a violation of *18 U.S.C. § 926A* is not enforceable through *42 U.S.C. § 1983*, the appellants right to travel was not infringed, and their right to be free from false arrest was not violated.

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

*****

Revell v. Erickson, 598 F.3d 128 (3d Cir.)

The *Firearm Owners' Protection Act ("FOPA"), 18 U.S.C. § 926A*, allows gun owners licensed in one state to carry firearms through another state under certain circumstances. In essence, *§ 926A* allows a person to transport a firearm and ammunition from one state through a second state to a third state, without regard to the second state's gun laws, provided that the traveler is licensed to carry a firearm in both the state of origin and the state of destination and that the firearm is not readily accessible during the transportation. A person transporting a firearm across state lines must ensure that the firearm and any ammunition being transported is not readily accessible or directly accessible from the passenger compartment of the transporting vehicle. Only the most strained reading of the statute could lead to the conclusion that having the firearm and ammunition inaccessible while in a vehicle means that, during the owner's travels, they can be freely accessible for hours at a time as long as they are not in a vehicle.

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

*****

18 U.S.C. § 1001

U.S. v. Garcia-Ochoa, 607 F.3d 371 (4th Cir.)

Materiality is an essential element of the offenses under both *18 U.S.C. § 1001* and *18 U.S.C. § 1546(a)*. The test of materiality is whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action. The defendant's admitted misrepresentations of his immigration status on I-9 Forms were capable of influencing agency action and were, therefore, material.

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

******

US v. Boffil-Rivera, 607 F.3d 736 (11th Cir.)

To sustain a conviction for violation of *18 U.S.C. § 1001*, the government must prove (1) that a statement was made; (2) that it was false; (3) that it was material; (4) that it was made with specific intent; and (5) that it was within the jurisdiction of an agency of the United States.
There was sufficient evidence for a jury to conclude that the defendant's statement to the ICE agents was false, that the defendant intended to deceive the agents and that the statement was material because it was capable of influencing the agency's investigation.

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

*****

U.S. v. Jackson, 608 F.3d 193 (4th Cir.)

The defendant's false statements on his timesheets, which were transmitted to, and ultimately paid by the National Security Agency, were matters within the jurisdiction of the executive branch under *18 U.S.C. § 1001*.

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

*****

U.S v. Geisen, 612 F.3d 471 (6th Cir.)
U.S v. Siemaszko, 612 F.3d 450 (6th Cir.)

The court affirmed the defendants' convictions for concealing material facts and making false statements to the Nuclear Regulatory Commission (NRC) in violation of *18 U.S.C. §§ 1001* and *1002*.

The government presented sufficient evidence to allow a rational juror to find that the defendants knew that statements made to the NRC were false, and that they permitted those material statements to be sent to the NRC.

Click **HERE** for the court's opinion (*Geisen*).

Click **HERE** for the court's opinion (*Siemaszko*).

*****

U.S. v. Moore, 612 F.3d 698 (D.C. Cir.)

Moore was charged with a violation of *18 U.S.C. § 1001(a)(2)* after he signed a false name to a U.S. Postal service delivery form. Moore signed for a package containing powder cocaine that was part of a controlled delivery by U.S. Postal Inspectors.

The court held that a statement is material if it has a natural tendency to influence, or is capable of influencing, either a discrete decision or any other function of the agency to which it was addressed.

In this case, Moore's false statement was capable of affecting the Postal Service's general function of tracking packages and identifying the recipients of packages entrusted to it.

The 1st, 5th, 6th 7th and 11th circuits agree.

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

*****

18 U.S.C. § 1028

U.S. v. Abdelshafi, 592 F.3d 602 (4th Cir.)

To establish a violation of *§ 1028A(a)(1),* the Government must prove the defendant (1) knowingly transferred, possessed, or used, (2) without lawful authority, (3) a means of identification of another person, (4) during and in relation to a predicate felony offense.

Nothing in the plain language of the statute requires that the means of identification at issue must have been stolen. For sure, stealing and then using another person's identification would fall within the meaning of "without lawful authority." However, there are other ways someone could possess or use another person's identification, yet not have lawful authority to do so. Defendant may have come into lawful possession, initially, of Medicaid patients' identifying information and had lawful authority to use that information for proper billing purposes, but he did not have lawful authority to use Medicaid patients' identifying information to submit fraudulent billing claims.

The application of *§ 1028A(a)(1)* is not limited to cases in which an individual's identity has been misrepresented. Such an interpretation is not supported by the plain text of the statute.

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

*****

U.S. v. LaFaive, 618 F.3d 613 (7th Cir.)

LaFaive assumed the identity of her deceased sister, opened checking accounts in her name using counterfeited checks, and withdrew nearly $65,000 before being apprehended.

The court held that *18 U.S.C. § 1028(a)(1)* criminalizes the misuse of another person's identity, whether that other person is living or deceased.

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

*****

18 U.S.C. § 1028A

U.S. v. Maciel-Alcala, 598 F.3d 1239 (9th Cir.)

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

The word "person" as used in *18 U.S.C. § 1028A*, Aggravated Identity Theft, includes the living and the dead. The government does not have to prove the defendant used the identification of a person he knew at the time was alive.

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

*****

18 U.S.C. § 1030

U.S. v. John, 597 F.3d 263 (5th Cir.)

Title 18 U.S.C. § 1030(a)(2) makes it unlawful to…

(2) intentionally access[] a computer without authorization or exceed[s] authorized access, and thereby obtain[]--

(A) information contained in a financial record of a financial institution, or of a card issuer….

Under *18 U.S.C. § 1030(e)(6)*, the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter. . . ."

"Authorized access" or "authorization" may encompass limits placed on *the use* of information obtained by permitted access to a computer system and data available on that system when the user knows or reasonably should know that he or she is not authorized to access a computer and information obtainable from that access in furtherance of or to perpetrate a crime. To give but one example, an employer may "authorize" employees to utilize computers for any lawful purpose but not for unlawful purposes and only in furtherance of the employer's business. An employee would "exceed authorized access" if he or she used that access to obtain or steal information as part of a criminal scheme.

The 1st Circuit agrees (cite omitted).

The 9th Circuit disagrees, limiting "exceeds authorized access" to cases in which the defendant had authorized access to the computer but not to the specific information accessed (cite omitted).

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

*****

18 U.S.C. §§ 1341 / 1343

U.S. v. Bryant, 606 F.3d 91 (8th Cir.)

To establish mail fraud, the government must prove: (1) a scheme to defraud by means of material false representations or promises, (2) intent to defraud, (3) reasonable foreseeability that the mail would be used, and (4) [that] the mail was used in furtherance of some essential step in the scheme.

A misrepresentation is material if it is capable of influencing the intended victim. Bryant mailed reimbursement forms to John Hancock Life Insurance Company, all of which alleged, that he had paid Jesse White, a certified Nurse's Assistant, to care for his ailing mother. In reality White never provided services to Ms. Bryant during these times. It is irrelevant that Bryant cared for his mother himself before she moved in with her other son, because Bryant was not a licensed nurse, certified nurse's aide, nor any other type of qualified home care provider specifically listed in John Hancock's policy. John Hancock, influenced by Bryant's false claims of care, relied on Bryant's misrepresentations to send him reimbursement checks for care John Hancock believed was being provided, although John Hancock was only obligated to reimburse the actual charges Ms. Bryant incurred for care provided by qualifying providers. These misrepresentations by Bryant influenced John Hancock, and were therefore material.

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

*****

U.S. v. Ali, 620 F.3d 1062 (9th Cir.)

The defendant purchased Microsoft software at a discounted price, but contrary to the agreement with Microsoft, resold it to unauthorized users. The agreement provided that the defendant would be liable to Microsoft for the difference between the estimated retail price for the discounted software and the commercial version of the same product, in the event it was sold to an unauthorized user.

The court held that the defendant was properly convicted of mail and wire fraud in violation of *18 U.S.C. §§ 1341* and *1343* because a right of payment for the sale of software was "money or property" as defined in *18 U.S.C. §§ 1341* and *1343,* and that neither statute required a transfer directly to the defendant from the party deceived by the defendant.

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

*****

18 U.S.C. § 1346

Skilling v. U.S., 130 S. Ct. 2896 (2010)

18 U.S.C. § 1346 defines "Scheme or Artifice to Defraud" as applied to *18 U.S.C. § 1341* (mail fraud) and *18 U.S.C. § 1343* (wire fraud), as "a scheme or artifice to deprive another of the intangible right of honest services."

The Court held that the prohibition against schemes that deprived others of the intangible right of honest services are limited to schemes involving bribery or kickbacks, and as applied to these types of schemes, *§1346* was not unconstitutionally vague.

Here, the government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health for his own profit. Since the government never alleged that he solicited or accepted payments from anyone in exchange for making these misrepresentations, he did not violate *§ 1346*.

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

*****

Black v. U.S., 130 S. Ct. 2963 (2010)

The Court held in *Skilling v. United States* (see above) that *§ 1346* criminalizes only schemes to defraud that involve bribes or kickbacks. The scheme to defraud alleged in this case did not involve bribes or kickbacks, therefore the "honest-services" jury instructions in this case was incorrect.

The Court declined to rule on whether or not any prejudice from Black's mail-fraud counts required the reversal of his obstruction-of-justice conviction.

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

*****

Weyhrauch v. U.S., 130 S. Ct. 2971 (2010)

In a third case involving "honest services mail fraud" the Court vacated the judgment of the lower court and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Skilling v. United States* (see above).

*****

18 U.S.C. § 1709

U.S. v. Monday, 614 F.3d 983 (9th Cir.)

The defendant, a U.S. Postal Service employee, was properly convicted of removing money from a mailed letter in violation of *18 U.S.C. § 1709*. The court held that the offense does not include an element of specific intent permanently to deprive the owner of the money of its property.

The 4th and 10th Circuits agree (to sustain a conviction under *§ 1709* for removing the contents of mail, the government is not required to prove a defendant possessed the specific intent to convert the contents to her own use).

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

*****

18 U.S.C. § 1961

U.S. v. Shamah, 624 F.3d 449 (7th Cir.)

The defendant, a corrupt Chicago police officer, was convicted of conspiracy to violate the *Racketeer Influenced and Corrupt Organizations Act* (*RICO*). To be convicted under *RICO*, there must be "operation" of an "enterprise." The court held that given his discretion and authority as a police officer, and the way in which he chose to direct his powers, Shamah operated or managed the integral duties of the police department's daily affairs. The court rejected Shamah's argument that as a "lowly" police officer he could not direct the affairs of the Chicago Police Department, the charged enterprise.

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

*****

18 U.S.C. § 2119

U.S. v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir.)

Under *18 U.S.C. § 2119(3)* when a carjacking victim is taken hostage, the commission of the carjacking continues at least while the carjacker maintains control over the victim and his car. When the criminal conduct extends over a period of time, a latecomer may be convicted of aiding and abetting even if she did not learn of the crime at its inception, but knowingly assisted at a later stage.

In this case the defendant lent significant aid to the principals while they held the victim hostage in the car for several hours after she became involved. The defendant was not "merely present" at the scene of the crime. Her aid was essential to the scheme, and she may therefore be held liable as an aider and abettor.

The 6th and 9th circuits agree.

The court additionally held that the defendant's conviction for conspiracy to commit carjacking was proper. Even though there was no evidence to show that she was involved at the initial planning phase, the evidence of her later involvement provided a sufficient basis to infer that she knew of the co-defendants' plan, shared their common purpose, and acted to further their plan.

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

*****

18 U.S.C. § 2237

U.S. v. Santana-Perez, 619 F.3d 117 (1st Cir.)

The court affirmed the defendant's conviction for failing to obey a federal law enforcement officer's order to "heave-to" in violation of *18 U.S.C. § 2237(a)*. The court held that there was sufficient evidence to establish the defendant was aware of and understood the Coast Guard's orders to stop his boat.

The government presented testimony that the Coast Guard vessel activated its blue light, spot-light, blew its whistle and ordered the defendant to stop in English and Spanish over the loud hailer. After a twelve minute pursuit the defendant stopped only when he was warned that force would be used if he did not stop. Additionally, the defendant acknowledged in a post-arrest statement that he saw the "flashing lights" and admitted, "We were spotted by the Coast Guard and I tried to outrun them."

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

*****

36 C.F.R. § 1.4

U.S. v. Marcavage, 609 F.3d 264 (3d Cir.)

Title 36 C.F.R. § 1.4 (a) defines a "permit" as a "*written* authorization to engage in uses or activities that are otherwise prohibited, restricted, or regulated." Since the permit issued to the defendant by the NPS Ranger was verbal, and not in writing, it was not valid, therefore; the defendant's conviction under *36 C.F.R. § 1.6(g)(2)* for violating a term or condition of a permit was vacated.

Ordering the defendant to move his demonstration, then citing him for interfering with agency function in violation of *36 C.F.R. § 2.32* when he refused to comply, violated the defendant's *First Amendment* right to free speech. The court held that the Rangers' actions were impermissibly motivated by the content of the defendant's speech.

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

*****

50 C.F.R. § 27.94

U.S. v. Millis, 621 F.3d 914 (9th Cir.)

The court reversed Millis' conviction under *50 C.F.R. § 27.94(a*), *(Disposal of Waste),* for placing full, gallon-sized plastic bottles of water on trails in the Buenos Aires National Wildlife Refuge to help alleviate exposure deaths among undocumented immigrants crossing into the United States.

The court held that the common meaning of the term "garbage" within the context of the regulation was sufficiently ambiguous, therefore the defendant's conviction was improper. The

court noted that Millis likely could have been charged under a different regulatory section, such as abandonment of property or failure to obtain a special use permit.

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

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