2011
SUPREME COURT and CIRCUIT COURTS OF APPEALS CASE SUMMARIES
BY SUBJECT

(As reported in 2Informer11 through 1Informer12, covering January – December 2011)

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

Costello v. City of Burlington, 632 F.3d 41 (2d Cir. 2011)

Costello was street preaching at the top of his voice at an outdoor pedestrian mall and a storeowner called the police claiming that he was causing a disturbance. The responding officer issued Costello a written warning pursuant to a noise control ordinance that prohibits "any person to make or cause to be made any loud or unreasonable noise." Costello sued, claiming the noise control ordinance violated his *First Amendment* right to free speech.

Initially the court noted that it is undisputed that Burlington's noise control ordinance is content neutral in that it does not attempt to limit the content or substance of the speech in question.
The court held that the officer's enforcement of the noise control ordinance as to Costello did not burden substantially more speech than necessary to achieve Burlington's goal of preventing excessive noise. Costello's raised voice was heard more than three hundred and fifty feet away, dominated the area and was not drowned out by any competing ambient noise. Additionally, Costello's noise impinged on the use of the neighborhood by others with equal claim such as residents in adjacent apartments, storeowners, and their customers, all of whom may have wanted to work, think, shop or dine in a quiet environment.

Finally, the officer clearly told Costello that he was not requiring him to be completely silent, only that he must lower his voice. This provided Costello an adequate alternative channel to continue preaching in the area.

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

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U.S. v. Hotaling, 634 F.3d 725 (2d Cir. 2011)

The defendant created child pornography images by taking the heads of minor females that he "cut" from their original non-pornographic photographs and superimposing them over the heads of images of nude and partially nude adult females engaged in sexually explicit conduct.

The court held that "morphed" child pornography that utilizes the face of a child and the body of an adult is not protected expressive speech under the *First Amendment*, therefore the defendant's indictment under *18 U.S.C. § 2256(8)(C)* was constitutional.

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

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Howards v. McLaughlin, 634 F.3d 1131 (10th Cir. 2011)

Howards sued four Secret Service agents claiming that they unlawfully arrested him in violation of his *First* and *Fourth* Amendment rights.

As to the *First Amendment* claim, the court held that two agents were not entitled to qualified immunity. The court concluded that Howards had presented enough evidence to allow a jury to find that the agents arrested him in retaliation for comments he made about the Vice President.

The *First Amendment* prohibits government officials from subjecting individuals to retaliatory actions, to include arresting them, for speaking out. Howards provided facts that suggested two agents might have been substantially motivated by his speech when they arrested him. One agent overheard Howards say into his cell phone, "I'm going to ask him how many kids he's killed today." The agent admitted that the comment disturbed him and that it was not healthy nor quite right for someone to make such a comment about the Vice President. When the second agent found out about Howards's comment, he became visibly angry and admitted that he considered the cell phone conversation when he decided to arrest Howards.

The court held that the remaining two agents were entitled to qualified immunity for the *First Amendment* claim because Howards offered no evidence that they participated in the decision to arrest him. These agents had no contact with Howards until after his arrest.

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

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Second Amendment

See 18 U.S.C. Section 922

Fourth Amendment

Governmental Action / Private Searches

Doe v. Luzerne County, 660 F.3d 169 (3d Cir. 2011)

Two officers went to a house to serve an arrest warrant. The house was in disarray and after the officers left, they discovered that their bodies were covered with fleas. The officers went to a local hospital to be decontaminated. While at the hospital, Doe's supervisor videotaped her, without her consent while she was undressed in the decontamination area. The supervisor claimed that he was making a training video, however no training video was ever produced. Afterward, the supervisor saved several still photographs and a video clip of Doe's decontamination in a public computer that could be viewed by anyone with access to the county network.

In deciding the issue for the first time, the court followed the Second, Sixth and Ninth Circuits, holding that Doe had a constitutionally protected privacy interest in her partially clothed body. Specifically the court held that under the *Fourteenth Amendment*, Doe had a reasonable expectation of privacy while she was in the decontamination area, particularly while in the presence of members of the opposite sex.

The court, however, held that the defendant did not unlawfully search or seize video images of Doe in violation of the *Fourth Amendment*. Because the supervisor filmed Doe for personal reasons and not in furtherance of any governmental investigation, his actions did not trigger the *Fourth Amendment*.

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

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U.S. v. Oliver, 630 F.3d 397 (5th Cir. 2011)

Oliver argued that federal agents illegally searched the contents of a cardboard box given to them by his girlfriend. Oliver left an unsecured cardboard box in the dining room of her apartment. When agents interviewed the girlfriend, she gave them the box, but did not tell them she had already examined its contents. The court held that the girlfriend's search of the box destroyed Oliver's reasonable expectation of privacy in it, and rendered the subsequent warrantless police search permissible under the *Fourth Amendment*. The court stated the girlfriend's search made the agents' warrantless search permissible, not whether the agents knew about it or not.

Editor's note: The court cautioned that his holding was limited to the unique facts of this case and was not intended to expand significantly the scope of the private search doctrine.

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

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Reasonable Expectation of Privacy

U.S. v. Battle, 637 F.3d 44 (1st Cir. 2011)

Battle dated Fonseca for one month and occasionally stayed overnight at her apartment. After Battle confronted Fonseca's ex-boyfriend with a gun, she told Battle to leave the apartment and not to come back. A few days later the ex-boyfriend found a gun belonging to Battle that was left behind in the apartment. The next day while Fonseca was at work, the ex-boyfriend, who had unlimited access, allowed the police to enter the apartment. The officers found Battle inside the apartment and retrieved a gun from under the couch where he was sitting. After obtaining a search warrant that referenced the gun, officers found another gun, ammunition and cocaine.

The court held that Battle did not have a reasonable expectation of privacy in Fonseca's apartment; therefore, he did not have standing to object to the officers' warrantless entry into the apartment or to the seizure of the gun from under the couch.

Although Battle may have exhibited a subjective expectation of privacy in Fonseca's apartment, that expectation was objectively unreasonable because he did not have permission to be present there. An overnight guest may have a reasonable expectation of privacy in a home, but that expectation of privacy is lost when he does not have permission to be present anymore. Battle enjoyed certain privileges while he dated Fonseca, but she revoked those privileges when she ordered Battle out of her home twelve days before the officers entered and searched it.

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

*****

U.S. v. Werra, 638 F.3d 326 (1st Cir. 2011)

Officers had an arrest warrant for Daley. A confidential informant told them that she had recently seen Daley at a nearby house where she thought Daley was "staying". The officers went to the house and spoke to Cicerano. Cicerano, who lived in the house with several others,

including Werra, told the police they could not enter without a warrant. The officers pushed past him into the entry foyer and told him to bring everyone in the house down to the foyer. The officers testified that Cicerano had invited them into the house, but the court credited Cicerano's contrary account of their entry. When Werra came into the foyer, the officers frisked him and found a gun in his front pants pocket. The officers arrested him for being a felon in possession of a firearm. The police eventually found Daley in the house and arrested her.

The government compared the living arrangements of the various individuals in the house to individuals who live in a multi-unit apartment building. The government argued that Werra could not challenge the officers' entry into, or continued presence in the house because he lacked a reasonable expectation of privacy in a common area such as the foyer.

The court held that Werra had a subjective expectation of privacy in the foyer of the house. Werra established that he believed the entire house, not just the third floor, served as his home.

The court held that Werra's expectation of privacy was objectively reasonable. A resident of a single-family structure, who shares living arrangements, as the tenants in this house did, could reasonably expect his right to privacy to begin at the front door; therefore, he could challenge the officers' forcible, warrantless entry into the house.

In order to enter the house lawfully to execute the arrest warrant for Daley, the officers had to establish they had a reasonable belief that she lived there and that she was home at the time. The court held that the information provided by the confidential informant was not sufficient to support a reasonable belief that Daley lived at the house. Even if it were sufficient, the court held that the officers had no reason to believe that Daley would be home when they entered. The officers had no information about Daley's schedule or routine that would enable them to know when she was home and when she was away.

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

*****

U.S. v. Kennedy, 638 F.3d 159 (3d Cir. 2011)

In deciding the issue for the first time, the court held that the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there are extraordinary circumstances that suggest an expectation of privacy. No extraordinary circumstances existed here; therefore, Kennedy did not have *Fourth Amendment* standing to challenge the search of the rental car.

The 4th, 5th, 6th and 10th circuits agree. The 8th and 9th circuits disagree.

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

*****

U.S. v. Correa, 653 F.3d 187 (3d Cir. 2011)

Officers went to an apartment building to search for an escaped fugitive. The exterior door to the building was locked and a sign posted outside stated that anyone not accompanied by a resident would be prosecuted for trespassing. An officer climbed through a partially opened window and

unlocked the door from the inside, allowing the other officers to enter the building. The officers eventually arrested Correa in a common-use stairwell and recovered a firearm from his pocket. Correa argued that the officers violated his *Fourth Amendment* rights by unlawfully entering the common areas of the locked, multi-unit apartment building and seizing him.

The court had previously held that residents of a multi-unit apartment building lack an objectively reasonable expectation of privacy in the common areas of the building where the exterior door is unlocked. The court extended this holding by ruling that residents lack an objectively reasonable expectation of privacy in the common areas of multi-unit apartment buildings with locked exterior doors. The *Fourth Amendment* focuses on legitimate expectations of privacy and not on concepts of property-law trespass. Correa lacked a reasonable expectation of privacy in the building's common areas because he did not have control over these areas.

As a result, Correa did not have *Fourth Amendment* standing to challenge the search because he lacked an objectively reasonable expectation of privacy in the common-use stairwell of the apartment building.

The 2nd, 7th, 8th, 9th and 11th Circuits agree.

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

*****

Doe v. Luzerne County, 660 F.3d 169 (3d Cir. 2011)

Two officers went to a house to serve an arrest warrant. The house was in disarray and after the officers left, they discovered that their bodies were covered with fleas. The officers went to a local hospital to be decontaminated. While at the hospital, Doe's supervisor videotaped her, without her consent while she was undressed in the decontamination area. The supervisor claimed that he was making a training video, however no training video was ever produced. Afterward, the supervisor saved several still photographs and a video clip of Doe's decontamination in a public computer that could be viewed by anyone with access to the county network.

In deciding the issue for the first time, the court followed the Second, Sixth and Ninth Circuits, holding that Doe had a constitutionally protected privacy interest in her partially clothed body. Specifically the court held that under the *Fourteenth Amendment*, Doe had a reasonable expectation of privacy while she was in the decontamination area, particularly while in the presence of members of the opposite sex.

The court, however, held that the defendant did not unlawfully search or seize video images of Doe in violation of the *Fourth Amendment*. Because the supervisor filmed Doe for personal reasons and not in furtherance of any governmental investigation, his actions did not trigger the *Fourth Amendment*.

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

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U.S. v. Smith, 648 F.3d 654 (8th Cir. 2011)

The court held that the warrantless search of Smith's car was lawful. Smith abandoned the car when he left the door open, with the keys in the ignition, the motor running, in a public area, then ran from the officers. In doing so, he gave up any reasonable expectation of privacy he might have had in the car and its contents.

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

*****

Coffin v. Brandau, 642 F.3d 999 (11th Cir. 2011)

Cynthia Coffin tried to shut her open garage door to prevent two officers from entering and serving a court order on her husband. As the garage door was closing, one of the officers stepped into the threshold, breaking the electronic-eye safety beam, causing the door to retreat to its open position. The officers, who did not possess either a search warrant or an arrest warrant, entered the open garage and arrested her for obstruction of justice.

The court held that entering the garage as Ms. Coffin tried to close the door was a violation of the *Fourth Amendment*. However, the court found that at the time it was not clearly established that entering the open garage in the face of Ms. Coffin's attempts to exercise her *Fourth Amendment* privacy rights would violate the *Fourth Amendment* therefore; the officers were entitled to qualified immunity.

The officers reasonably believed that Ms. Coffin was resisting service of legal process, a misdemeanor occurring in their presence, which would allow them to make an immediate arrest. The officers were faced with a split-second decision about whether or not to enter the garage. There was no binding case law that informed the officers that they were violating the *Fourth Amendment*, and the non-binding cases that existed indicated that entry into an attached open garage might not be a *Fourth Amendment* violation.

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

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U.S. v. Basher, 629 F.3d 1161 (9th Cir. 2011)

Campers on National Forest Service land heard illegal gunfire coming from an adjacent undeveloped camping site. They also saw a campfire at the same site although there was a burn ban in effect. Two of the campers were off duty police officers, who went to the undeveloped campsite the next day to investigate.

Finally, the court held that the warrantless entry by the officers into the campsite was not a violation of the *Fourth Amendment*. While Basher had a reasonable expectation of privacy inside his tent, the court found that he had no expectation of privacy in the campsite, and that the area outside of the tent was not curtilage. The campsite was not well defined and it was open to the public and exposed.

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

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Curtilage

U.S. v. Brooks, 645 F.3d 971 (8th Cir. 2011)

The court held that the officers lawfully seized the discarded firearm under the plain-view doctrine. When Brooks saw the officers, he threw a bag containing a long object into a crawl space and ran down a staircase into the apartment building. The officers retrieved the bag, which contained a shotgun.

First, the officers lawfully arrived at the place where they saw Brooks discard the bag. Neither the staircase nor any part of the backyard could be considered curtilage of the apartment building. The staircase led to the basement of the multi-family dwelling, in which there was a common area shared by all tenants. There is no expectation of privacy in the common areas of an apartment building. Additionally, the gates to the backyard were open and unlocked, the backyard and staircase were visible from public areas and there we no "no trespassing" signs on the property. Because the staircase was not within the curtilage of the residence, the officers did not violate the *Fourth Amendment* in arriving at the place from which the bag containing the shotgun could be seen.

The incriminating nature of the gun was immediately apparent to the officers because Brooks's behavior corroborated a previously reliable confidential informant's information that Brooks was selling guns from his basement apartment.

Finally, the officer had a lawful right of access to the object because the bag containing the shotgun was on the ground in front of the officer who retrieved it.

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

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U.S. v. Wells, 648 F.3d 671 (8th Cir. 2011)

Officers received a tip from a confidential informant that Wells was manufacturing methamphetamine in an outbuilding located behind his house. Officers went to Wells's house at 4:00 a.m. to conduct a knock-and-talk interview. Instead of walking down the short paved driveway that lead from the street to the front door of the house, an officer walked down an unpaved driveway next to the house to check an open door on a shed that was in the back yard. After finding nothing in the shed, the officers stood on the unpaved driveway near the corner of the house where they were able to see the outbuilding mentioned by the confidential informant. The officers saw that lights were on and when they walked up to the door, they could detect movement inside. The officers knocked and when Wells opened the door, they smelled the odor of burnt marijuana. The officers conducted a protective sweep and found marijuana in plain view. A subsequent search warrant executed on the outbuilding uncovered evidence of methamphetamine manufacturing.

The court held that the portion of Wells's unpaved driveway extending past the rear of his home and into the backyard was part of the home's curtilage, and as such, Wells had a reasonable expectation of privacy there.

The court further held that the officers' entry onto the curtilage was not reasonable. Generally, no *Fourth Amendment* search occurs when police officers, who enter private property, restrict their movements to those areas generally made accessible to visitors, such as driveways and walkways. In those cases, police officers enter onto curtilage with the implied consent of the homeowner.

In this case, there was no implied consent because the officers did not attempt to make contact with Wells at the front door first. Other cases have found officers' entries into backyards to contact homeowners reasonable after the officers attempted to contact the homeowners at the front door first, and were unsuccessful. Here, at 4:00 a.m., the officers did not attempt to reach Wells by knocking on the front door of his house. The court refused to extend the knock-and-talk rule to situations in which the police choose not to knock at the front door, and without reason to believe the homeowner will be found there, proceed directly to the back yard.

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

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Searches

O'Neill v. Louisville / Jefferson County Metro Government, 662 F.3d 723 (6th Cir. 2011)

The O'Neills bred their adult bulldogs to each other and advertised the puppies for sale in a local newspaper. Two potential buyers went to their home to look at the puppies. After looking at the puppies, the potential buyers, who were actually undercover Louisville Metro Animal Services (LMAS) officers, stepped outside to discuss whether they wanted to purchase a puppy. A few minutes later several uniformed LMAS officers knocked on the door, entered the O'Neills' home without a warrant or consent, and confiscated the two adult dogs and the dogs' litter of seven puppies. The LMAS officers said that they were seizing the dogs because the O'Neills did not have a breeder's license. The LMAS neutered and spayed the two adult dogs, implanted microchips in all nine dogs, and then required the O'Neills to pay over one thousand dollars to retrieve them. No criminal charges were ever filed against the O'Neills. The O'Neills sued, claiming that their *Fourth Amendment* rights were violated by the warrantless search of their home and the seizure of their nine dogs. The district court dismissed the suit, concluding that the O'Neills were operating an unlicensed kennel in violation of the city's animal-control ordinance. The Court of Appeals disagreed and reinstated the majority of the O'Neills' claims.

First, the court found that the animal-control ordinance applied to full time commercial kennels but not to a private residence where two family pets are bred for a single litter of puppies, as was the case here.

As to the the O'Neills' *Fourth Amendment* claims, the court held that the initial entry by the undercover LMAS officers was lawful. The O'Neills opened a portion of their home to the public when they invited those who responded to their newspaper advertisement to come and look at the puppies. When the undercover officers initially entered the home, they did not intrude any more than any other person who responded to the advertisement. As such, the court concluded that no *Fourth Amendment* search occurred regarding the officers' initial entry.

However, the court found that the O'Neills sufficiently pleaded a *Fourth Amendment* violation based on the uniformed LMAS officers' second warrantless entry into their home. The officers claimed that their entry was lawful under the consent-once-removed doctrine. This doctrine allows government agents to enter a suspect's premises to arrest him without a warrant if the undercover agents: enter at the express invitation of someone with authority to consent; while inside the premises they establish the existence of probable cause to effect an arrest or search; and immediately summon help from the other officers. The court disagreed, holding that the consent-once-removed doctrine did not apply in this situation. After the undercover officers left the house, the back-up officers did not rush in to effect an arrest. Instead, they knocked on the O'Neills' door to request proof of a breeder's license, discussed the need for such a license with them and entered only after the O'Neills specifically objected to their coming into the house. The LMAS officers never intended to arrest the O'Neills; therefore, the consent-once-removed doctrine could not support the LMAS officers' second entry into their home.

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

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Strip Searches (Jail)

Byrd v. Maricopa County Sheriff's Department, 629 F.3d 1135 (9th Cir. 2011)

The court held that the cross-gender strip search performed on Byrd at the detention facility violated his *Fourth Amendment* right to be free from unreasonable searches. The court held that the justification for conducting the strip search and the location where it occurred was reasonable. However, the manner in which the female cadet performed the strip search was not. The court noted that courts throughout the country have universally frowned upon cross-gender strip-searches, in the absence of an emergency or exigent circumstances. In this case, it was undisputed that no emergency existed. During the search, the female cadet twice moved Byrd's penis and scrotum aside and separated the cheeks of his buttocks to search inside his anus. While the dissent characterized the search as a pat-down, the court disagreed, stating that if the search were a true pat-down, it would probably have been reasonable.

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

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Parolees

U.S. v. Baker, 658 F.3d 1050 (9th Cir. 2011)

Baker was convicted of misdemeanor possession of methamphetamine and sentenced to three years' probation. A condition of his probation required him to submit to suspicionless searches of his person, property, residence, vehicle and personal effects at any time of day or night by a probation officer or any federal, state or local law enforcement officer.

A suspicionless search of a parolee does not violate the *Fourth Amendment*. Because there is no constitutional difference between parole and probation for purposes of the *Fourth Amendment*, the court held that this condition of Baker's probation did not violate the *Fourth Amendment*.

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

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X-Ray Search

Spencer v. Roche, 659 F.3d 142 (1st Cir. 2011)

Officers arrested Spencer for a driving a motor vehicle without a license. Shortly after his arrest, a confidential informant told one of the officers that he had seen Spencer insert a package of crack cocaine into his anal cavity just before the arrest. After Spencer refused to allow the officers to search his body for the crack cocaine, they obtained a search warrant. The officers took Spencer to a hospital where a doctor performed a digital search with negative results. The doctor then ordered an x-ray of Spencer's abdominal area. The x-ray failed to show any foreign objects in Spencer's body. No drug related charges were ever filed against Spencer. Spencer sued the officers, arguing on appeal that the x-ray of his abdominal area was an unreasonable intrusion on his privacy, in violation of the *Fourth Amendment*.

The court held that the x-ray search of Spencer's abdominal area was reasonable under the *Fourth Amendment*. First, the court noted that an x-ray is routine medical procedure that is quick, painless and generally regarded as safe. Second, the x-ray was carried out by trained professionals in a hospital setting. Third, the evidence sought in the x-ray was needed to corroborate the officers' suspicions that Spencer had violated the state drug laws. Fourth, the search warrant, which Spencer never challenged, established the existence of probable cause to believe Spencer had drugs concealed inside his body. Finally, there was no less intrusive way in which the police could have verified their suspicions.

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

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Seizures

U.S. v. Griffin, 652 F.3d 793 (7th Cir. 2011)

The court held that Griffin was not "seized" for *Fourth Amendment* purposes when he discarded the crack cocaine in the parking lot during the low-speed police vehicle chase, therefore, the drug evidence was properly admitted at trial.

Submission to a show of authority is a necessary element of a *Fourth Amendment* seizure, and while a suspect is still fleeing, as Griffin was when he discarded the drugs, he is not seized. A seizure by a show of authority does not occur unless and until the suspect submits.

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

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Detaining Packages

U.S. v. Huerta, 655 F.3d 806 (8th Cir. 2011)

While conducting a routine inspection of mail packages, a United States Postal Inspector noticed a suspicious package. The Inspector first noticed the package because its seams were taped, it had a handwritten label, and it was mailed from California. Upon further examination the Inspector noticed that it had been mailed from a post office with a different zip code than the return address, it was addressed to an individual at a hotel, it consisted of two boxes that had been taped together to form one box and one of the numbers in the return address had been scratched out. Without moving the package, the Inspector searched an electronic database and discovered that the return address on the package was valid but the name of the return addressee was not associated with that address. The Inspector called the sender's telephone number, as listed on the package, but the number was no longer in service. The Inspector then removed the package from the mail cart, seizing it under the *Fourth Amendment*, and took it to another building so a canine could sniff it for drugs. The canine did not alert on the package so the Inspector decided to conduct a controlled delivery to the addressee at a local hotel.

Once at the hotel, the defendant initially admitted that he was expecting a package, but refused to consent to a search of it and later denied knowing anything about it. The Inspector obtained a search warrant for the package, which contained methamphetamine.

The sole issue on appeal was whether the Postal Inspector had reasonable suspicion to seize the package when he removed it from the mail cart and took it to the other building. The *Fourth Amendment's* protection against unreasonable searches and seizures extends to packages placed in the mail. A law enforcement officer may seize a package for investigative purposes if he believes the package contains contraband.

The court held that the Inspector had reasonable suspicion to seize the package. Through his more than seven years of experience of investigating mail containing narcotics, he learned that people sending contraband through the mail often use fictitious names, addresses and telephone numbers to avoid detection by law enforcement. When taken together, all of the suspicious factors articulated by the Inspector supported a reasonable suspicion that the package contained contraband.

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

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Voluntary Contacts / Consensual Encounters

Jones v. Clark, 630 F.3d 677 (7th Cir. 2011)

Officer Clark approached Jones, who is African-American, after receiving a report that a "person of color" was taking pictures of houses in an almost entirely white neighborhood. Jones was a meter reader for Commonwealth Edison (ComEd), and she used binoculars so she could take readings from a distance when she could not gain access to a yard. Clark approached Jones, who

was dressed in a hat, shirt, pants, and a reflective vest, all emblazoned with a ComEd logo. Jones told Clark that she was meter reader and gave him two ComEd identification cards that contained her full name and photograph. Jones showed the binoculars to Clark and explained to him why she used them. When Jones turned to walk away, the officer asked her for her date of birth. Jones, after accusing Clark of harassing her, took a few steps away from him and took out her cell phone to call her supervisor. Clark called for back up. Officer Kaminski arrived and after a brief exchange with Jones arrested her for obstructing a peace officer.

When Clark first approached Jones, it was a consensual encounter, and he was entitled to ask her what she was doing. However, once Clark asked Jones for her date of birth, he conceded that she was not free to leave. At this point, the court found that the officers could not point to a single fact that led them to believe that Jones was engaged in criminal activity. Jones was dressed in a ComEd uniform, she told Clark that she was reading meters, she provided two forms of company identification, she explained her use of binoculars, and a resident confirmed that she had read the meter at his house.

The court held that the officers did not have reasonable suspicion to detain Jones, nor did they have probable cause to arrest her. The officers argued that they had probable cause to arrest Jones for obstructing a peace officer and disorderly conduct; however, the court stated that the only disorderly conduct in this case came from the officers. As a result, the court held that the officers were not entitled to qualified immunity from Jones's false arrest claim.

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

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U.S. v. Correa, 641 F.3d 961 (8th Cir. 2011)

Officers boarded the bus on which Correa was traveling when it made a scheduled stop. They wanted to talk to passengers that had purchased their tickets in cash, within a day of departure, from drug source cities. Correa was one of these individuals.

One officer knelt in the bus driver's seat facing the back of the bus while another officer stood slightly behind Correa's seat, not blocking the aisle. The officer asked Correa if he could search his jacket, which was on the seat next to him. Correa said yes, and handed the jacket to the officer. Inside the jacket, the officer found two duct-taped wet wipe containers that felt heavy. Suspecting that the containers contained illegal drugs, the officer handcuffed Correa and escorted him into the bus terminal. After finding illegal drugs in the containers, the officer *Mirandized* Correa who waived his rights and made incriminating statements.

The court concluded that the initial conversation on the bus between the officer and Correa was not a detention subject to *Fourth Amendment* protection. There was no application of force, no intimidating movement, no brandishing of weapons. The officer did not threaten Correa and he did not block the aisle during their conversation. A reasonable person in Correa's position would have felt free to end the conversation with the officer.

The court held that Correa voluntarily consented to the search of his jacket. There was no evidence that he was of less than average intelligence and education. Additionally, he was sober during the conversation, which was brief.

Finally, the court held that the officer did not exceed the scope of the *Terry* stop when he handcuffed and removed Correa from the bus after discovering the containers that he believed contained illegal drugs. It was reasonable for the officer to handcuff Correa as a precaution in light of the dangerous nature of the suspected crime.

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

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U.S. v. Rush, 651 F.3d 871 (8th Cir. 2011)

An officer followed the car in which Rush and two others were riding because they fit the description of the suspects in a recent bank robbery. After the car pulled into a parking lot, one passenger got out and walked into a building. The officer parked his cruiser behind the suspect vehicle, without blocking it in, got out and approached Rush, who had gotten out of the car. While the officer was asking Rush about what they were doing there, the passenger came out of the building. The officer saw a thick roll of cash on top of the passenger's shoe. The money, from the bank robbery, had fallen down the passenger's pants leg to the top of his shoe. The officer arrested the passenger and detained Rush in the back of a police car. The driver fled on foot but was quickly arrested.

The court held that the officer's initial contact with Rush was a consensual encounter. The officer did not use his lights or siren to stop Rush's car nor did he block its exit from the parking lot when it stopped. The officer did not use any physical force, issue any orders or make any show of authority when he approached Rush and asked him his purpose for being in the parking lot. The officer did not have to give Rush the opportunity to avoid him before asking questions.

The court further held that the officer had reasonable suspicion to detain Rush after he saw the large roll of currency on the top of the passenger's shoe. Possession of a large amount of currency shortly after a bank robbery may be sufficient to support a brief investigatory detention. Here, a bank in the area had been robbed within the hour and the three individuals met the general description of the robbers. The passenger had a large amount of currency on his shoe and the driver fled upon seeing the officers recover the money and arrest him.

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

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Terry Stops / Reasonable Suspicion

U.S. v. Dancy, 640 F.3d 455 (1st Cir. 2011)

The court held that the officers had reasonable suspicion to stop Dancy and investigate his involvement in a recent shooting. Dancy fit the description of the shooter and the clothes he was wearing. The officers found Dancy in a bar one block from where the shooting occurred, a few minutes after the shooting. Finally, Dancy tried to move away from the officers after he saw them enter the bar.

The court also held that the officers were justified in frisking Dancy when he put his hand in his pocket in a way, which suggested to an experienced officer that he was putting his hand on a gun, as the officers approached him.

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

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U.S. v. Chaney, 647 F.3d 401 (1st Cir. 2011)

The officers' entry into the motel room with guns drawn and their handcuffing of Chaney was reasonable. Neither the use of handcuffs nor the drawing of weapons automatically transforms a valid *Terry* stop into a de facto arrest. The circumstances of the raid gave rise to a reasonable concern for officer safety that justified the use of handcuffs and drawn handguns. The unexpected presence of Chaney, in a darkened motel room with two suspected drug dealers who ignored repeated orders to drop to the ground, justified the officers' use of handcuffs during the investigative detention.

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

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U.S. v. Pontoo, 666 F.3d 20 (1st Cir. 2011)

Two officers went to a home after Gary Austin called police dispatch and reported that he had killed a woman there. Earlier that evening, the first officer had responded to the same home to deal with a domestic dispute between Austin and his girlfriend. As they approached in separate vehicles, the first officer radioed that he saw a subject walking near the home. The second officer thought the first officer said that he saw "the suspect" walking near the home. The second officer saw "the suspect," who was the only man in the vicinity, who also fit Austin's general description. Believing that the man was Austin, the officer drew his gun, ordered him to the ground, handcuffed him, and performed a *Terry* frisk. The officer found a handgun in the man's waistband. The man turned out to be the defendant, Gregory Pontoo, who had no connection to Austin or his girlfriend. Pontoo was charged with possession of a concealed weapon and possession of a firearm by a convicted felon. The officers later discovered that Austin had not killed his girlfriend, that at the time they were arresting Pontoo, other officers were arresting Austin and that Austin had a history of making false reports to the police.

First, the court found that the second officer had reasonable suspicion to believe that Austin had killed his girlfriend. The officer knew there had been trouble earlier at the girlfriend's home involving Austin, and that Austin had called dispatch claiming that he had killed her.

Next, the court found that it was objectively reasonable for the second officer to mistake Pontoo for Austin. Pontoo fit Austin's general description and he was the only man in the vicinity of the girlfriend's home at 3:30 a.m. Additionally, it was reasonable, under the stress of the situation, for the second officer to believe the first officer had said that he saw "the suspect" instead of "the subject."

The court also held that scope of *Terry* stop on Pontoo was reasonable. When an officer stops a person who is suspected of having just committed a murder, it is reasonable for the officer to conclude that he is armed and dangerous. Here, it was reasonable for the officer to draw his gun

on Pontoo, order him to the ground, handcuff him and conduct a frisk for weapons. These actions did not transform the *Terry* stop into a de facto arrest. Only a few seconds elapsed between the stop and the discovery of the gun. By that time, reasonable suspicion to stop Pontoo for a possible murder had turned into probable cause to arrest him for possession of a concealed weapon.

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

*****

U.S. v. Whitfield, 634 F.3d 741 (3d Cir. 2010)

While on patrol with other officers, in an area known for drug sales, Officer Redd saw Whitfield and another person surreptitiously exchange something, then walk away from each other when they saw his police car. Officer Redd did not tell the other officers that he saw the hand-to-hand exchange, but told them to check-out the two men on the corner. Officer Rivera approached Whitfield, who put his hand in his pocket and refused to remove it when ordered. Officer Rivera grabbed Whitfield who admitted that he had gun.

Whitfield argued that the court could only analyze the facts Officer Rivera knew to determine if there was reasonable suspicion to seize him. Applying the collective knowledge doctrine to a *Terry* stop for the first time, the court held that the collective knowledge of all the officers involved, including Officer Redd, provided reasonable suspicion to believe Whitfield was involved in criminal activity. The court stated that it made sense to apply the collective knowledge doctrine to fast-paced, dynamic situations, where the officers work together as a unified and tight-knit team, noting that it would be impractical to expect an officer in such a situation to communicate to the other officers every fact that could be pertinent in a subsequent reasonable suspicion analysis.

The 1st and 7th Circuits agree.

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

*****

***U.S. v. Glover*,** 662 F.3d 694 (4th Cir. 2011)

Two officers saw Glover standing by the side of a gas station at 4:40 a.m. He appeared to be surreptitiously watching the attendant who was in the parking lot bent down checking the levels of the fuel tanks. Both officers knew that armed robberies and assaults had occurred in the neighborhood, and that this particular gas station had been robbed within the last year. The officers pulled around the building and back into the otherwise deserted parking lot. During that time, Glover approached the clerk, who was unaware of his presence, and was standing over him. The officers approached Glover. One of the officers frisked Glover, retrieved a handgun from his pants pocket and arrested him.

Glover argued that the stop-and-frisk violated the *Fourth Amendment* because the officers lacked reasonable suspicion of criminal activity. The court disagreed. The officers had first-hand knowledge of the high degree of crime in the area and that the gas station had been robbed in the past. Coupled with the time of day and the lack of other people in the area, Glover's behavior

indicated that he planned to rob or assault the clerk. The court noted that the Supreme Court, in *Terry v. Ohio*, upheld a stop-and-frisk on less threatening behavior. The court commented that the stop-and-frisk here could only be viewed as good police work.

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

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U.S. v. Mays, 2011 FED App. 0166P (6th Cir. 2011)

Officers received an anonymous tip that a black male was selling drugs in front of an apartment complex. The officers drove to the apartment complex in unmarked police vehicles, and as they pulled up in front of the complex, Mays, a black male, walked down a stairway towards them. Believing that he was approaching them to sell drugs, the officers got out of the vehicle. Mays immediately turned away from the officers, put his hands in his pockets, and appeared to be deciding whether to run away. After initially refusing to remove his hands from his pockets, Mays reached into his waistband. The officers detained Mays, conducted a *Terry* frisk, and removed a loaded handgun from his waistband.

The court held that the officers were justified in conducting a *Terry* stop and then *Terry* frisk on Mays because: (1) the detention and search occurred at a location where officers had been recently informed that a black male was selling drugs, (2) Mays initially approached the officers in a calm way, but his demeanor changed dramatically once he realized they were police, (3) Mays acted nervously, like a "deer in the headlights", (4) Mays turned away from the officers as if to leave, and (5) he frantically dug his hands into his pockets and would not remove them.

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

*****

U.S. v. Beauchamp, 659 F.3d 560 (6th Cir. 2011)

Officers were patrolling an area near a housing project at 2:30 a.m. because they had received complaints about illegal drug activity taking place there. An officer approached Beauchamp, who was standing with another individual. Beauchamp walked away without making eye contact with the officer. The officer radioed another officer and told him to stop the "suspicious subject." The officer saw Beauchamp two blocks away, ordered him to stop, and then told him to walk around the fence toward him. Beauchamp complied. The officer began to frisk Beauchamp for weapons. During the frisk, he asked Beauchamp if he could search him more thoroughly and Beauchamp consented. The officer found a plastic baggie containing crack cocaine down the back of his pants.

The court held that the officer did not have reasonable suspicion to detain Beauchamp; therefore, the stop was an illegal seizure that violated the *Fourth Amendment*. A person is seized when an officer restrains his freedom of movement by force or show of authority. In this case, the officer seized Beauchamp once he ordered him to stop and walk around the fence and Beauchamp complied.

In order to detain Beauchamp, the officer needed to have reasonable suspicion that he was engaged in criminal activity. The court held that the totality of the circumstances did not provide

the officer with that reasonable suspicion. Although the officer saw Beauchamp in an area where there had been complaints of drug activity, he did not see him engage in any behavior consistent with buying or selling drugs. The officer saw Beauchamp interact with another person then walk away. Walking away from an officer, by itself, does not create reasonable suspicion.

The court further held that Beauchamp's consent to search was not obtained voluntarily. Beauchamp consented to the search while the officer was still conducting his frisk, and after another officer had arrived. The court stated that a person is not in a position to say no to a police officer whose hands are still on his body while another officer is standing a few feet away. The officer's search of Beauchamp was unreasonable under the *Fourth Amendment*.

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

*****

U.S. v. Correa, 641 F.3d 961 (8th Cir. 2011)

The court held that the officer did not exceed the scope of the *Terry* stop when he handcuffed and removed Correa from the bus after discovering the containers that he believed contained illegal drugs. It was reasonable for the officer to handcuff Correa as a precaution in light of the dangerous nature of the suspected crime.

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

*****

U.S. v. Smith, 645 F.3d 998 (8th Cir. 2011)

The court held that the officer had an objectively reasonable concern for her safety that justified handcuffing Smith and placing him in a squad car while awaiting the arrival of the drug- sniffing dog. Additionally, the officer was justified in searching the section of the passenger compartment where a recent occupant of the vehicle said a gun would be found.

The initial contact between the officer and Smith was a consensual encounter where Smith cooperated and voluntarily answered non-accusatory questions. During this encounter, the officer acquired reasonable suspicion when a known but unproven informant, a recent passenger in the vehicle, stated that there were drugs and a gun in Smith's car. This was partially corroborated after Smith admitted to being on parole for a drug offense.

After the officer acquired reasonable suspicion, she asked Smith for consent to search his person, which he granted, and for his car, which he refused. After the officer told Smith that she was going to request a drug-sniffing dog, he became agitated to the extent that the officer thought he might start a fight with her. At this point, the officer was justified in handcuffing and placing Smith in the squad car for the duration of the *Terry* stop in order to ensure officer safety and to maintain the status quo.

After securing Smith, the officer was permitted to conduct a protective sweep of the vehicle's passenger compartment to search for weapons that the suspect or other occupants might later access. It was during this search that the officer located a loaded pistol in the vehicle.

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

*****

U.S. v. Maldonado, 646 F.3d 1061 (8th Cir. 2011)

During a *Terry* stop of a vehicle, the officer asked Maldonado for his cell phone number, which was instrumental in establishing at trial that he had talked to a co-conspirator over the phone 279 times. Maldonado argued that by asking for his phone number, the officer exceeded the permissible scope of the investigative detention.

The court held that the request for Maldonado's phone number was within the scope of the investigative detention. The task force members had observed the involvement of the two occupants of the vehicle in two drug transactions earlier that day. The transactions had been arranged by phone, so the officers conducting the stop could reasonably conclude that learning the phone numbers of the occupants of the vehicle might establish or negate their involvement with the crime.

Additionally, the statements that Maldonado gave to the officers during the investigative detention were not obtained in violation of *Miranda*. The officers asked Maldonado for his name and phone number in the context of a brief investigative stop. Generally, the temporary and relatively non-threatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody. Because Maldonado never was subjected to a formal arrest or a restraint on his freedom of movement of the degree associated with a formal arrest, he was not in custody for *Miranda* purposes when he gave the officers his phone number.

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

*****

U.S. v. Smith, 648 F.3d 654 (8th Cir. 2011)

Officers suspected that Smith was involved in a bank robbery and posted a be-on-the lookout notice for Smith and his car. Officers from another police department saw Smith driving his car and conducted a *Terry* stop based on that notice. Once stopped, Smith ran from the car and the officers apprehended him in an adjacent neighborhood. Officers searched Smith's car without a warrant and located evidence from the bank robbery.

The court held that the officers had reasonable suspicion to conduct a *Terry* stop on Smith based on the notice from the other police department. Police officers may rely upon notice from another police department that a person or vehicle is wanted in connection with the investigation of a felony when making a *Terry* stop, even if the notice lacks the specific articulable facts supporting the reasonable suspicion. Reliance on such a notice justifies a stop to check identification, to pose questions to the person or to detain the person briefly while attempting to obtain further information.

The court also held that the warrantless search of Smith's car was lawful. Smith abandoned the car when he left the door open, with the keys in the ignition, the motor running, in a public area, then ran from the officers. In doing so, he gave up any reasonable expectation of privacy he might have had in the car and its contents.

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

*****

U.S. v. Rush, 651 F.3d 871 (8th Cir. 2011)

The court held that the officer had reasonable suspicion to detain Rush after he saw the large roll of currency on the top of the passenger's shoe. Possession of a large amount of currency shortly after a bank robbery may be sufficient to support a brief investigatory detention. Here, a bank in the area had been robbed within the hour and the three individuals met the general description of the robbers. The passenger had a large amount of currency on his shoe and the driver fled upon seeing the officers recover the money and arrest him.

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

*****

U.S. v. Blackmon, 662 F.3d 981 (8th Cir. 2011)

Officers responded to an apartment complex after it was reported that Blackmon was there in violation of a protection order and that he appeared to be under the influence of drugs. Blackmon ignored the officers' commands to get on the ground and then raised his fists towards them as if he was ready to fight. An officer deployed his Taser on Blackmon while other officers tackled and handcuffed him. The officers confirmed that the protection order was valid and arrested Blackmon for violating it. A search incident to arrest revealed a bottle containing PCP and over $1,700 in United States currency. Officers took Blackmon to jail where he was recognized being the same person in a surveillance photo who had robbed a bank earlier that day.

As an initial matter, the court held that the officers had reasonable suspicion to stop and detain Blackmon. Once they arrived at the apartment complex, the officers saw Blackmon, who fit the description of the person they were sent to investigate. Additionally, Blackmon's confused and unresponsive state was consistent with PCP use and provided the officers with justification to detain him and conduct their investigation.

The court then held that the officers had probable cause to arrest Blackmon after he refused their commands to get on the ground and instead raised his fists towards them. At that point, the officers had probable cause to arrest Blackmon for resisting arrest under Missouri law. Because the officers had probable cause to arrest Blackmon, their subsequent search of his person that uncovered the PCP and currency did not violate the *Fourth Amendment*.

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

*****

U.S. v. Basher, 629 F.3d 1161 (9th Cir. 2011)

Campers on National Forest Service land heard illegal gunfire coming from an adjacent undeveloped camping site. They also saw a campfire at the same site although there was a burn ban in effect. Two of the campers were off duty police officers, who went to the undeveloped campsite the next day to investigate.

Inside a vehicle at the campsite, officers saw a half-empty box of shotgun shells in plain view, and a smoldering campfire. The officers approached a tent and announced their presence. Basher and his son came out of the tent and when asked if he had a gun, Basher told the officers that there was a gun in the tent. The officer asked if Basher's son could retrieve the gun and Basher nodded his head in agreement then motioned for his son to get the gun. Basher's son retrieved a sawed-off shotgun from the tent. The officers arrested Basher.

The court held that the officers' interaction with Basher was a valid *Terry* encounter. The officers had reasonable suspicion to believe that criminal activity had taken place at Basher's campsite based on their first-hand observations from the day before and from witness statements. The officers were justified in asking about the presence of a gun since they were investigating a gun crime.

The court held that the officers were not required to *Mirandize* Basher before asking him about the presence of a gun since Basher was not in custody for *Miranda* purposes. He had not been formally arrested and there was no restraint on his freedom of movement to the degree associated with a formal arrest. The officers did not display their weapons, there was no use of physical force and no threatening language was used. Even if Basher had been in custody when the officers asked about the presence of a gun, the court held that the public safety exception to *Miranda* would have applied. An officer's questioning of a suspect without a *Miranda* warning is proper if the questioning is related to an objectively reasonable need to protect the officer or the public from any immediate danger associated with a weapon. Basher had not been searched or handcuffed, and the officers had reliable information that there was a gun at the campsite.

The court held that there was no *Fourth Amendment* violation concerning the retrieval of the weapon. The officer asked Basher for consent and he voluntarily nodded his head in agreement.

Finally, the court held that the warrantless entry by the officers into the campsite was not a violation of the *Fourth Amendment*. While Basher had a reasonable expectation of privacy inside his tent, the court found that he had no expectation of privacy in the campsite, and that the area outside of the tent was not curtilage. The campsite was not well defined and it was open to the public and exposed.

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

*****

U.S. v. Burleson, 657 F.3d 1040 (10th Cir. 2011)

Shortly before midnight, while patrolling a residential neighborhood, an officer saw three men come out of an alley and begin walking down the middle of the street. One of the men was carrying a pit bull without a leash. The officer stopped the men to inform them that they were not allowed to walk down the middle of the street and to ask them why they were carrying the dog. The officer was aware of previous dog thefts that had occurred in the city and of other property crimes that had occurred in that neighborhood.. The men told the officer that they did not have leash for the dog, which satisfied the officer. The officer then asked the men for their names and requested a warrants check from dispatch. Dispatch notified the officer that Burleson had an outstanding arrest warrant. While he was being handcuffed, Burleson told the officer that he had two handguns and some ammunition in his waistband and pockets.

The district court suppressed the handguns and ammunition. The court concluded that the officer exceeded the permissible scope of the *Terry* stop after he told the men that they could not walk down the middle of the street and then satisfied his suspicions about the dog. The court found that the men did not do anything further to raise additional suspicion of criminal activity, therefore the officer had no lawful basis for continuing the detention to run a warrants check. Additionally, the court held that the warrants check was inappropriate because the cooperative nature of the men did not give the officer any objective reasons to be concerned for his safety.

The court of appeals disagreed. First, the court held that an officer may perform a warrants check on a pedestrian during the course of a lawful *Terry* stop. In this case, the *Terry* stop had not ended by the time the officer asked the men for their names and requested the warrants check. Although the officer had told the men is was illegal to walk down the middle of the street, he still had the option to issue a citation or a verbal warning, depending on what transpired during the rest of the stop, to include the results of the warrants check.

Regarding the second basis for the stop, an investigation into whether the dog had been stolen, it was reasonable for the officer to obtain the men's names and confirm their identifies in case the dog was later reported stolen. The officer testified that he asked the men for their identities for this purpose.

Second, the court held that officers are permitted to conduct a warrants check during a *Terry* stop regardless of whether they have officer-safety concerns. The court stated that while officer-safety concerns are often cited as a reason for requesting a warrants check during a *Terry* stop, it is not the only reason. Allowing warrants checks during *Terry* stops also promotes the strong government interest of solving crimes and bringing offenders to justice. Here, the officer was entitled to determine whether any of the men were evading justice and as it turned out, Burleson was.

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

*****

Koch v. City of Del City, 660 F.3d 1228 (10th Cir. 2011)

It was not clearly established whether the officer's conduct violated Koch's *Fifth Amendment* rights, where her refusal to answer the officer's questions formed the probable cause for her arrest, but she was never prosecuted on that charge. While a *Fifth Amendment* right to remain silent may be triggered during a *Terry* stop, the court has limited that right to pre-arrest custodial interrogations where incriminating questions were asked. Here, Koch did not claim that her pre-arrest encounter with the officer constituted a custodial interrogation. As a result, the court similarly found that there was no clearly established right under the *Fifth Amendment* to refuse to answer questions during a *Terry* stop.

The court emphasized that its holding was specific to the facts of this case and that a reasonable officer could have believed that Koch had information regarding Lance's whereabouts and that she was required to convey this information to him or be subject to arrest for obstruction.

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

*****

Terry Frisks-Person/Vehicle

U.S. v. McGregor, 650 F.3d 813 (1st Cir. 2011)

The court held that the officers had reasonable suspicion to justify a *Terry* frisk of the defendant and his vehicle for weapons. The defendant and the three passengers had just driven away from a hospital where two fellow gang members had been brought after being shot. All four had prior criminal histories, and the defendant had a conviction for a firearms offense. The defendant exceeded the speed limit, ran a red light, and all four occupants appeared to be nervous when the officers approached them. It was reasonable to believe that the four men were out to seek revenge against a rival gang, and therefore were armed.

During his frisk of the passenger compartment of the vehicle, the officer noticed an alarm magnet on the dashboard below the car stereo. Based on his training and experience, he knew that this object could be used as a switch to activate a door on a hidden compartment in the vehicle. The officer lifted the lid to the center console, removed several CDs, and pried open a small panel that provided access to the emergency-brake cables, which had been glued shut. The officer found a handgun and crack cocaine in this area. Later at the police garage, another officer figured out how to use the magnet to trigger the system that allowed access to the hidden compartment.

When conducting a vehicle frisk, an officer must confine his search for weapons to accessible areas of the vehicle. The court held that the hidden compartment was an accessible area of the vehicle and could be searched by the officer. The hidden compartment could be opened in a matter of seconds; therefore, anything concealed inside it was readily accessible to those in the passenger compartment.

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

*****

U.S. v. Pontoo, 666 F.3d 20 (1st Cir. 2011)

The court held that scope of *Terry* stop on Pontoo was reasonable. When an officer stops a person who is suspected of having just committed a murder, it is reasonable for the officer to conclude that he is armed and dangerous. Here, it was reasonable for the officer to draw his gun on Pontoo, order him to the ground, handcuff him and conduct a frisk for weapons. These actions did not transform the *Terry* stop into a de facto arrest. Only a few seconds elapsed between the stop and the discovery of the gun. By that time, reasonable suspicion to stop Pontoo for a possible murder had turned into probable cause to arrest him for possession of a concealed weapon.

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

*****

U.S. v. Massenburg, 654 F3d 480 (4th Cir. 2011)

The court held that the officer lacked reasonable suspicion to conduct a lawful non-consensual frisk of the defendant. The poor match between the vague anonymous tip and the individuals encountered by the officers substantially undermined reliance on the tip for reasonable particularized suspicion of Massenburg. The fact that the area was a high-crime, high-drug area also added nothing to support particularized suspicion as to Massenburg. Finally, the court emphasized that Massenburg's refusal to consent to a search could not by itself justify a non-consensual search. The court reiterated that it had warned the government, in a recent case, against presenting whatever facts are present, no matter how innocent, as indicia of suspicious activity. The court noted that it was deeply troubled by the way in which the government attempted to spin mundane acts into a web of deception, especially when the mundane acts emerge from a refusal to consent to a voluntary search.

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

*****

U.S. v. Powell, 666 F.3d 180 (4th Cir. 2011)

An officer conducted a traffic stop on a vehicle for having a burned-out headlight. Powell was a back-seat passenger. After it was determined that the driver had a suspended license, another officer asked Powell and a second passenger if either of them possessed a valid driver's license. The officer was trying to determine if someone could drive the vehicle away after the completion of the traffic stop. Powell gave the officer his driver's license, which came back suspended, along with caution data that he had "priors" for armed robbery. The officer did not know whether Powell's "priors" were arrests, convictions, or whether they were charges that had been dismissed, or if he had been found not guilty. Additionally, the officer did not know if the "priors" were recent or years old. At the time, the officer received this caution data, neither Powell nor the other occupants of the vehicle had appeared suspicious or presented any threat or problem to the officers. Based solely on the caution data, the officer ordered Powell out of the car and conducted a pat-down. During the pat-down, Powell attempted to run away from the officers. Powell was captured and placed in handcuffs. An officer removed a backpack from the back seat of the car, near where Powell had been sitting. The officer found a handgun in the back pack and arrested Powell. An officer searched Powell incident to arrest and found crack cocaine on him.

The court held that the officer did not have reasonable suspicion that Powell was armed and dangerous, therefore, the pat-down was not permitted under the *Fourth Amendment* and all evidence seized during the traffic stop should have been suppressed.

The officer's sole basis for frisking Powell was the caution data that indicated Powell had "priors" for armed robbery. The court agreed with the government, which had conceded at oral argument, that such caution data, by itself, did not justify a reasonable suspicion that Powell was armed and dangerous the night of the traffic stop. While caution data can be relevant in establishing reasonable suspicion, in most cases a prior criminal record is not, by itself, sufficient to create reasonable suspicion. The caution data here was especially unpersuasive because it lacked any specifics concerning Powell's "priors" for armed robbery.

Additionally, before the pat-down, Powell and the other occupants of the vehicle were completely cooperative and friendly with the officers. They did not engage in any threatening or evasive conduct and they did not display any of the typical signs usually associated with illegal or dangerous activity. The court found it significant that during the traffic stop, prior to receiving the caution data, an officer told Powell that he was free to leave if he wanted to. This indicated to the court that the officers did not consider Powell armed and dangerous.

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

*****

U.S. v. Edwards, 666 F.3d 877 (4th Cir. 2011)

Officers saw Edwards at 11:30 p.m. on a public street and arrested him on an outstanding arrest for domestic violence that alleged he had threatened his girlfriend with a firearm. An officer handcuffed Edwards behind his back and conducted a pat-down search for weapons but did not find any. When the transport van arrived, the officer decided to search Edwards a second time. The officer unfastened Edwards' belt and pulled his pants and underwear six or seven inches away from his body. Three other officers were present and one of them directed a flashlight beam inside the front and back of Edwards' underwear. While they were looking inside Edwards' underwear, the officers saw that there was a plastic sandwich baggie tied in a knot around Edwards' penis. After this discovery, one officer held Edwards' pants and underwear open while another officer put on gloves, took a knife and cut the sandwich bag off Edwards' penis, retrieving it after it dropped down into his underwear. The sandwich baggie contained forty-three smaller Ziploc baggies, which contained a total of almost three grams of cocaine base.

First, the court first held that the search conducted inside Edwards' underwear constituted a strip search. A suspect does not have to be fully undressed for a search to be considered a strip search. Here, pulling Edwards' underwear away from his body and exposing his pelvic area to the officers qualified as a strip search.

Next, the court found the officers did not meet the reasonableness standard that has been applied in cases involving strip searches. Specifically, the court held that the search was unreasonable because the officer removed the drugs from Edwards' body in an unnecessarily dangerous manner. The court stated that the use of a knife in cutting the sandwich baggie off Edwards' penis posed a significant and unnecessary risk of injury to Edwards. The court listed several alternatives that were available to the officers for removing the baggie, which would not have compromised their safety or Edwards's safety to include: untying the baggie, removing it by hand, tearing the baggie, or requesting that blunt scissors be brought to the scene to remove the baggie. Additionally, the fact that Edwards was not injured was irrelevant to the reasonableness analysis.

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

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U.S. v. Mays, 2011 FED App. 0166P (6th Cir. 2011)

See case brief above under *Terry* Stops / Reasonable Suspicion or **click here.**

*****

U.S. v. Richardson, 657 F.3d 521 (7th Cir. 2011)

During a pat-down, an officer felt a small hard lump in the suspect's pants pocket. The officer removed the object that turned out to be a packet containing crack cocaine.

The court held that the officer lawfully removed the crack cocaine from the defendant's pocket even though when he first felt it, he was unsure what the object was. Even if Richardson had argued that the officer could not have reasonably believed the object was a weapon, this circuit has held that an officer who feels a small hard object during a pat-down may have reasonable suspicion to believe the object is a weapon.

Click **HERE** for the court's opinion.
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U.S. v. Smith, 645 F.3d 998 (8th Cir. 2011)

See case brief above under *Terry* Stops / Reasonable Suspicion or **Click Here** .

*****

U.S. v. Rochin, 662 F.3d 1272 (10th Cir. 2011)

During a valid traffic stop an officer developed reasonable suspicion to conduct a *Terry* frisk of Rochin. The officer felt a long hard bulge in each of Rochin's front pants pockets. The officer asked Rochin what the objects were and Rochin told him that he did not know. The officer removed the objects, which turned out to be glass pipes containing drugs. The officer arrested Rochin and found an illegal firearm during the inventory search of his vehicle.

Rochin argued that the officer violated the *Fourth Amendment* when he removed the items from his pockets without knowing what they were. The court disagreed stating that a reasonable officer could have concluded that the long hard objects in Rochin's pants pockets could have been used to assault the officer. Even though drug pipes are not typically used as weapons, the scope of a *Terry* frisk is not limited to traditional weapons. During a *Terry* frisk, an officer may remove objects such as guns and knives as well as other objects that he reasonably thinks could be used as weapons to assault him. Here, the two long, hard objects in Rochin's pockets easily qualified as such.

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

*****

Traffic Stops / Detaining Vehicles / Occupants

U.S. v. Digiovanni, 650 F.3d 498 (4th Cir. 2011)

The court held that the officer failed to diligently pursue the purpose of the traffic stop for following another vehicle to closely, and instead embarked on a sustained course of investigation into the presence of drugs in the car. The officer did not have reasonable suspicion to turn this traffic stop into a drug investigation; consequently, the length of Digiovanni's detention was unreasonable.

After the stop, the officer asked Digiovanni for his driver's license and registration, and then asked him to step out of the car. The officer then asked Digiovanni numerous questions concerning his travel history, and travel plans, only a few of which related to the justification for the stop. After this questioning, the officer continued to investigate the presence of drugs in the car instead of either completing the warning ticket or beginning the driver's license check. Ten minutes into the stop the officer radioed for back-up and five minutes after that finally issued a Digiovanni a warning ticket and returned his driver's license.

Additionally, the court held that Digiovanni's written consent to search the vehicle was obtained involuntarily. Although the officer returned his driver's license and told Digiovanni that he was free to go, he immediately returned to the subject of drugs, implying falsely that Digiovanni was bound by his earlier consent to search.

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

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U.S. v. Guijon-Ortiz, 660 F.3d 757 (4th Cir. 2011)

An officer conducted a traffic stop for driving under the influence (DUI) on the vehicle in which the defendant was a back-seat passenger. The officer received valid Georgia identification cards from the driver and front-seat passenger. The defendant, who appeared to be very nervous, gave the officer a Lawful Permanent Resident (LPR) Card that contained his photograph and the name Daniel Gaitan. The officer ran the names through the National Crime Information Center (NCIC) database and learned that there were no outstanding warrants for the three individuals. Instead of immediately returning the identification cards, the officer called the local office of the Bureau of Immigration and Customs Enforcement (ICE) to check into the validity of the LPR card. The ICE agent told the officer that the alien registration number (A-Number) did not match the name on the LPR card. The ICE agent asked to speak to the defendant, and over the phone, the defendant admitted to the ICE agent that he was in the United States illegally, but maintained that his name was Daniel Gaitan. The officer concluded that the driver had not been drinking and allowed him to leave but he arrested the defendant and took him to the ICE office were his fingerprints were taken. The fingerprint check revealed the defendant's name was Saul Guijon-Ortiz and that he had been previously deported from the United States. The government indicted the defendant for illegal reentry into the United States.

The defendant argued that as soon as the officer learned there were no outstanding warrants on the three individuals, the justification for the traffic stop ended and the officer was required to return the identification cards and send the driver and passengers on their way.

The court disagreed. Even though the officer's call to the ICE agent was unrelated to the justification for the DUI stop, and extended its duration, the totality of the circumstances demonstrated that the officer diligently pursued his investigation for DUI and did not completely abandon it to investigate the defendant.

First, calling ICE to check into the validity of the LPR Card is analogous in many ways to how an officer routinely runs a driver's license and registration to check their validity. Second, the time it took to call ICE was very brief, lasting only a few minutes. Third, at the time he ran the warrant search and called ICE, the officer had not yet assured himself that the driver had not been drinking. Finally, the officer's call to ICE was a single, brief detour from an otherwise diligent investigation into whether the driver was impaired. The court did not rule on whether the officer had reasonable suspicion to believe illegal activity was afoot at the time he called ICE.

While siding with the government in this case, the court made it a point to remind officers that possessing probable cause that a driver has committed a traffic infraction does not give them free rein to keep the vehicle and its passengers on the side of the road indefinitely. Officers may investigate matters unrelated to the justification for a traffic stop, but those investigations must be limited in both scope and duration and their reasonableness is evaluated under the totality of the circumstances.

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

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U.S. v. Soto, 649 F.3d 406 (5th Cir. 2011)

The court held that the conduct witnessed by the Border Patrol agents was sufficient to create reasonable suspicion of illegal activity to justify the traffic stop. Upon seeing the agents, Delacruz, a passenger in the vehicle, exhibited a look of shock and immediately ducked down and slumped back, out of the agents' sight. The only plausible explanation for this behavior is that Delacruz was attempting to hide from the agents. Adding to the agents' suspicion, when they pulled up alongside Soto's vehicle, Delacruz's darkly tinted rear window, which was halfway down when the agents first saw it, had been completely rolled up. Finally, the agents made their observations sixty miles from the border on a route known for illegal alien trafficking.

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

*****

U.S. v. Macias, 658 F.3d 509 (5th Cir. 2011)

An officer conducted a traffic stop on Macias for failing to wear a seatbelt. During the stop, the officer searched the vehicle and arrested Macias after he discovered an illegal firearm.

The court held that the search of the vehicle violated the *Fourth Amendment* because the officer unreasonably extended the duration of the stop by asking Macias and his passenger questions that were unrelated to the reason for the stop. The officer asked Macias if he was employed, what kind of work he did, and if he owned his own business. The officer asked the passenger about her mother, who was the registered owner of the vehicle, and how long she and Macias had been in a relationship, how many children she had, and why had her mother not accompanied them on their trip. These questions were not related to the seatbelt violation or to the purpose or itinerary of Macias's trip and they unreasonably prolonged the duration of the stop.

The court also held that after the stop, the officer did not develop reasonable suspicion that Macias was involved in criminal activity that would have allowed him to prolong the duration of the stop. The officer stated that Macias appeared to be unusually nervous for someone pulled over for a seatbelt violation. The court noted that extreme nervousness, by itself, is not sufficient to support reasonable suspicion.

Finally, the court held that Macias's consent to search the vehicle was not valid. The court found that Macias's consent to search resulted from his illegal detention; therefore, it was obtained involuntarily and not an independent act of freewill.

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

*****

U.S. v. Zamora, 661 F.3d 200 (5th Cir. 2011)

Officers suspected that Zamora was part of a drug trafficking conspiracy that smuggled drugs from Mexico into the United States by car. Officers conducted surveillance on Zamora's residence after receiving a tip from a confidential informant that drugs might be located on the premises. Officers determined that the tip was reliable because the confidential informant had previously provided reliable information and they were able to corroborate certain aspects of the tip. Officers saw Zamora leave his residence in a car, followed him and then pulled him over for a traffic violation and as part of their drug investigation. During the stop, officers called in a drug-sniffing dog, which alerted on Zamora's car. However, a search of the car revealed no drugs. After the search, officers continued to question Zamora for approximately thirteen minutes. Zamora eventually signed a form consenting to a search of his residence. Officers searched the residence and discovered drugs.

Zamora argued that the contraband officers found at the residence should not have been admitted into evidence because it was discovered as the result of an unlawful traffic stop. The court disagreed, stating that the officers had two justifications for their initial stop. First, Zamora's car had an expired license plate on the back and no license plate on the front. Traffic violations like these give the police reasonable suspicion to stop a vehicle. Second, reasonable suspicion of drug trafficking arose from the informant's tip and the officers' corroboration of some of that information during their surveillance of Zamora's residence.

Next, the court determined that the officers' actions, after they stopped Zamora, were reasonably related to the reasons for the traffic stop.

First, the officers questioned Zamora about the license plate violations and performed a computer check on the vehicle. Once that was completed, the traffic violation no longer provided a sufficient reason to detain Zamora. However, the reasonable suspicion for the drug related offense remained which justified the officers' decision to call for the drug-sniffing dog. Once the drug-sniffing dog alerted on the vehicle, the officers had probable cause to search it for drugs. Even though the officers found no drugs in the vehicle, the thirteen-minute detention of Zamora, from the time the vehicle search ended until he signed the consent-to-search form for his residence, was reasonably related to the purpose of the original stop. Because the officers' conduct was reasonable, they did not violate Zamora's *Fourth Amendment* rights and the evidence discovered at his residence was not the fruit of an unlawful stop.

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

*****

U.S. v. Tinnie, 629 F.3d 749 (7th Cir. 2011)

Officers patrolling a high crime, gang, drug and gun activity area stopped the vehicle in which Tinnie was a passenger, at 11:30 p.m. on Friday night, because the multiple air fresheners hanging from the rearview constituted an "obstructive view." During the traffic stop, the officer ordered Tinnie out of the car, frisked him and discovered a handgun concealed on his person.

During traffic stops, officers may frisk the driver and any passenger upon reasonable suspicion that they may be armed and dangerous. The court held the totality of the circumstances justified frisking Tinnie. The officer was part of a unit that patrolled high crime areas and was familiar with the risk of gun possession in that area. Tinnie acted suspiciously by moving around nervously as the officers approached the car. After telling the officer that he did have an identification card, Tinnie told the officer, without checking his pockets, that he did not have an identification card. Tinnie told the officer that he was twenty-eight years old, but that did not match with the date of birth he had provided. When the officer asked Tinnie, twice, if he had any weapons on him, he remained silent, but when the officer asked him if he had any drugs on him, Tinnie immediately told him no.

The officer testified that when he asked Tinnie to step out of the car, he had already decided to frisk him. However an officer's subjective intent is irrelevant, and given all of the facts known to the officer, a reasonable officer would have believed the frisk was justified.

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

*****

U.S. v. Snow, 656 F.3d 498 (7th Cir. 2011)

An officer stopped Snow because he matched the description of a burglary suspect. The officer frisked Snow and recovered an unlawful firearm. Apart from his status as a burglary suspect, there was nothing to indicate that Snow was armed.

The court concluded that the officer had reasonable suspicion to detain Snow to investigate his involvement in the burglary. Because burglary is the type of offense that likely involves a weapon, the court held that the officer's decision to order Snow out of his vehicle to conduct a

protective frisk was reasonable, despite the absence of additional facts suggesting that Snow might be armed. The fact that Snow was calm and initially cooperated with the officer did not lessen the possibility that he might pose a danger to the officer or others.

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

*****

U.S. v. Randolph, 628 F.3d 1022 (8th Cir. 2011)

A plain-clothes officer saw Randolph driving a car. The officer knew Randolph from a previous drug investigation and recognized the car as belonging to another person involved in illegal drug activity. The officer followed Randolph and saw him pull over to the curb without using his turn signal. The officer called for a uniformed patrol officer to stop Randolph for this traffic violation.

The patrol officer arrived as Randolph got out of the car and began to walk away. The patrol officer stopped Randolph and brought him back to the car. Randolph denied owning the car, and denied that he had just gotten out of it. The patrol officer ran a criminal history check on Randolph as another officer looked through the passenger's side window. The officer saw a handgun lying on the driver's side floorboard. After the patrol officer confirmed that Randolph was a convicted felon, he arrested him and the other officer retrieved the handgun from the car.

The court held that the initial traffic violation for failure to use a turn signal provided probable cause to justify the stop, even if the officer was suspicious of other crimes.

After the officer saw the handgun, and the patrol officer confirmed that Randolph was a felon, they arrested him. Having seen the handgun on the floor of the car, the officer had probable cause to believe the car contained evidence of the crime for which Randolph was arrested; therefore, under *Gant* he was allowed to retrieve the handgun as part of the search incident to arrest.

The court held that even if the search of the car were unconstitutional, Randolph had no standing to challenge the search. Since Randolph repeatedly disavowed any ownership interest in the car and failed to show that he had a legitimate expectation of privacy in the car, he is precluded from claiming that the search and seizure of the handgun from the car violated his rights.

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

*****

U.S. v. Hambrick, 630 F.3d 742 (8th Cir. 2011)

An informant, who had provided accurate information three times in the past, told police that Hambrick was in town to sell crack cocaine. He claimed that Hambrick would be driving a dark colored car, with Illinois license plates, and a missing gas-tank door, and that he would be going to a specific area of town. The informant told police that in the past he had seen Hambrick remove crack cocaine from his buttocks and distribute it to others.

An officer saw Hambrick driving a vehicle that matched the description given by the informant in the area of town where the informant claimed he would be. The officer confirmed that

Hambrick had a suspended driver's license and conducted a traffic stop. After arresting Hambrick for driving under suspension, officers searched his car and found marijuana residue and a digital scale covered in cocaine residue. Officers strip searched Hambrick at the jail and recovered crack cocaine from between his buttocks.

The court held that the officer lawfully stopped Hambrick because he was driving with a suspended driver's license. The search of Hambrick's vehicle was not a valid search incident to arrest under *Gant* since Hambrick was handcuffed in the back of a patrol car; therefore, he had no access to his vehicle while it was being searched. In addition, since Hambrick was arrested for driving under suspension, there was no reason to believe that his vehicle contained evidence of that offense. However, the officers had probable cause to search Hambrick's vehicle under the automobile exception to the warrant requirement. The informant had provided reliable information in the past; he supplied detailed information about Hambrick's vehicle and he correctly predicted where Hambrick would be driving.

The court held that officers recovered the drugs from Hambrick as part of a valid search incident to arrest. The strip search in this case was reasonable since it took place in an interrogation room at the police department, it was based on highly reliable information, and the officers allowed Hambrick to remove the drugs on his own, without touching him.

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

*****

U.S. v. Claude X, 648 F.3d 599 (8th Cir. 2011)

Officers stopped the defendant's vehicle to arrest his passenger on an outstanding warrant. While an officer was processing the arrestee, another officer walked a drug-sniffing dog around the vehicle. The dog alerted on the vehicle. Officers searched the trunk and found drugs.

The court held that the initial stop was lawful and that the officers were still in the process of arresting the passenger when the dog sniff occurred. Because the officers did not prolong the stop beyond the time reasonably required to complete the arrest of the passenger, the search of the trunk was lawful.

The court noted that a dog's alert during a canine search of a vehicle provides probable cause that drugs are present in the vehicle, justifying a warrantless search of the vehicle under the automobile exception to the *Fourth Amendment*.

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

*****

U.S. v. Bowman, 660 F.3d 338 (8th Cir. 2011)

An officer stopped Bowman for speeding and a window tint violation. The officer noticed that Bowman smelled like air freshener, which the officer knew was often used to mask the odor of drugs. He also noticed that Bowman's breathing was fast-paced and his carotid artery was pulsing rapidly. The officer spoke briefly to the passenger in the car, who gave the officer a conflicting story as to where he and Bowman were going and how long they would be gone.

Approximately fourteen minutes after the stop the officer issued Bowman a warning ticket. After issuing the ticket, the officer asked Bowman if he had time to answer a couple of quick questions, to which Bowman replied, yes. Bowman refused to allow the officer to search his car, but consented to a free air search of the car by Jake, a drug-sniffing dog. Jake alerted to the presence of drugs in the car. The officers eventually transported the car to a garage where they found cocaine in a compartment behind the rear seat.

The court held that the duration of the traffic stop, approximately fourteen minutes, was reasonable. During this time, the officer completed tasks related to the reason for the traffic stop. He did not ask Bowman any questions about possible criminal activity until after the stop was completed. The officer's questions after the stop resulted from his suspicions developed during the stop.

The court further held that the interaction between Bowman and the officer after the tickets were issued was a consensual encounter. Bowman agreed to talk to the officer after receiving the tickets while refusing to allow the officer to search his car. He then agreed to allow the drug-sniffing dog to search the car. This behavior clearly indicated that Bowman realized he was not required to comply with the officer's requests. The court noted that even if Bowman had been seized during this time, the officer had reasonable suspicion to detain him based on his observations during the stop.

Finally, the court held that the alert by the drug-sniffing dog created probable cause for the officers to search Bowman's car. Jake's handler testified at length about Jake's training and significant experience in the field. There was no basis to conclude that Jake was unreliable. A positive alert from a reliable drug-sniffing dog gives an officer probable cause to believe there are drugs present.

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

*****

U.S. v. Polly, 630 F.3d 991 (10th Cir. 2011)

Officers involved in a narcotics surveillance operation conducted a traffic stop on Polly after they saw him commit two minor traffic offenses. Even if the officers were primarily interested in furthering their drug investigation, the court held that the traffic stop was valid because the officers saw Polly commit two traffic violations.

Polly consented to a search of his person and officers recovered crack cocaine. The court held the officers obtained Polly's consent voluntarily because the officers did not have their weapons drawn, they used a conversational tone when speaking to him, Polly was in a public place, and there were only two officers present.

After arresting Polly, officers drove his vehicle to the police station where they searched it and discovered crack cocaine, and other drug paraphernalia. The court held that the search of the vehicle was justified by the automobile exception to the warrant requirement. Officers had previously purchased drugs from Polly as part of a controlled buy, Polly appeared to be fleeing after he saw the officers during their surveillance, which resulted in his two traffic violations, and the officers had just found crack cocaine on him after he got out of this vehicle.

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

*****

U.S. v. Trestyn, 646 F.3d 732 (10th Cir. 2011)

Believing that Trestyn had an improperly displayed registration number on the license plate of his vehicle, an officer conducted a traffic stop. Once the officer approached the vehicle, on foot from the rear, he reasonably could have observed the registration number and realized that Trestyn was not in violation of the law. The court held that the officer's subsequent detention of the vehicle and its occupants to question them about their travel plans and to request their drivers' licenses exceeded the scope of the stop's underlying justification. At this point, the officer no longer had an objectively reasonable articulable suspicion that a traffic violation had occurred or was still occurring. The officer should have explained to Trestyn the reason for the initial stop and then allowed them to continue on their way.

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

*****

U.S. v. Kitchell, 653 F.3d 1206 (10th Cir. 2011)

The court held that the officer was justified in conducting the traffic stop because failing to use a turn signal when entering the toll plaza on the turnpike constituted a violation of Oklahoma law.

Additionally, the duration of the stop was reasonable under the circumstances. The officer finished writing the warning ticket and informed the driver he was free to go shortly after performing other permissible aspects of the stop to include obtaining information from all of the occupants in the car, performing criminal-history checks, and confirming that none of the occupants had outstanding warrants.

The court also held that the officer did not violate the *Fourth Amendment* by detaining the occupant after he gave the driver his license back and gave him a copy of the warning ticket. By this time, the occupants of the car had given the officer different versions of their travel plans, they appeared to be very nervous and they were in a rental car. Taken together, the officer had reasonable suspicion to prolong the stop to investigate criminal activity.

Finally, the court found that the drug-detection dog, Meco, was reliable, and that his alert on the vehicle established probable cause to search it for drugs. While the officers did not recover drugs from the car, Meco alerted to a backpack found in the trunk that contained over forty thousand dollars in currency, and five illegal handguns. Laboratory testing later confirmed that the backpack and currency contained trace amounts of illegal drugs. The defendant claimed that contamination of currency with trace amounts of illegal drugs is so widespread that any drug-dog alert of an occupied vehicle would impermissibly allow a general search of that vehicle.

The court declined to find that the contamination of currency theory undermined the reliability of canine sniffs in general, while specifically noting in this case, that Meco was trained to distinguish the scent of narcotics from the scents of other items, including currency.

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

*****

U.S. v. Chavez, 660 F.3d 1215 (10th Cir. 2011)

A Wal-Mart employee called police to report a disturbance in the parking lot involving an intoxicated person who was driving a white Cadillac. An officer responded and saw a white Cadillac with the same license plate number as reported by the caller. The officer conducted a traffic stop and almost immediately determined that the driver, Chavez, was intoxicated. Before he arrested Chavez, the officer received consent to search the Cadillac's passenger compartment. After finding no contraband, the officer asked for consent to search the trunk. Chavez refused to consent. The officer then placed him under arrest for driving while intoxicated (DWI). Approximately fifty minutes had elapsed since the officer first encountered Chavez.

First, the court found that the tip provided by the Wal-Mart employee was reliable. The employee identified himself to the officer at the scene and provided detailed information that the officer was able to corroborate. These circumstances provided the officer with reasonable suspicion to conduct an investigatory stop.

Second, the court held that the officer did not impermissibly expand the scope of the initial stop. The officer had probable cause to arrest Chavez for DWI within nine minutes of initiating the stop. While the officer may have suspected that Chavez was involved in more than DWI, he was under no Constitutional duty to stop his investigation and arrest him for that offense the moment he had minimal evidence to establish probable cause.

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

*****

U.S. v. Hunter, 663 F.3d 1136 (10th Cir. 2011)

An officer performed a traffic stop on a car for following another vehicle too closely, a violation of a state statute. Hunter was the passenger and Isaacson, his girlfriend, was the driver. The car was a rental vehicle and it was rented in Hunter's name. The officer issued Isaacson a warning ticket, returned their identifications and told them to have a safe trip. After taking a few steps, the officer turned back and asked the pair if he could ask them a few questions. Hunter responded "yes." After Hunter denied having anything illegal in the car, the officer then asked for consent to search. Hunter said nothing; however, Isaacson took the keys out of the ignition, reached across Hunter, and gave them to the officer through the passenger window. Hunter said and did nothing to stop her.

The officer searched the trunk and then opened the rear driver's side door, immediately smelling the odor of marijuana. He searched a suitcase that was on the backseat and discovered a bundle of marijuana. The officer arrested Hunter and Isaacson. After the car was impounded, officers found additional marijuana, cocaine and an illegal weapon in the car.

The court held that he initial stop was valid. The court found that the officer's use of the two-second rule to determine that Hunter's car was following the other vehicle at a one-second

interval, together with ten to fifteen seconds of observation, provided an objective justification to believe a traffic violation had occurred.

The court also held that the length of the initial stop was reasonable. The detention was brief and did not exceed what was necessary to accomplish the purpose of the stop. In fact, the officer grew impatient with the length of time it was taking to run the background checks on Hunter and Isaacson, so he returned their identification documents to them before he received all of that information.

The court noted that at this point, the traffic stop was over and that the discovery of the contraband occurred during a consensual encounter. The officer had returned the documents to the Isaacson and Hunter, told them to have a nice day, and walked away from the car. At this point, Hunter and Isaacson had the opportunity to leave.

Finally, the court held that Isaacson gave valid consent to search which led to the discovery of the contraband in the car. There is no legal authority that prohibits a person, who is not on the rental contract, from giving valid consent to search a rented car. A third party may have actual or apparent authority to consent to a search if he has mutual use of the property by virtue of joint access or some control over the property. Here, under either theory, the court held that Isaacson had the authority to consent to the search because she exercised control over the car by driving it.

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

*****

Collective Knowledge Doctrine

U.S. v. Robinson, 664 F.3d 701 (8th Cir. 2011)

A detective in an unmarked police car received an anonymous tip that three or four black males were in a maroon Cadillac that possibly contained firearms and stolen property. While on the way to investigate, the detective saw three black males in a maroon Cadillac stopped in an alley. The detective followed the Cadillac in his unmarked police car, and when the Cadillac committed a traffic violation, he called dispatch to have a marked police car "stop" the Cadillac. An officer in a marked police car conducted a traffic stop and arrested the driver for having a suspended driver's license. During the pre-impoundment inventory search the officer found a gun in the glove compartment. The officer then frisked, Robinson, who was one of the passengers, after he kept putting his hands in his pockets after being told to keep his hands out of his pockets. As the officer began his frisk, a handgun fell from Robinson's pants. The officer arrested Robinson.

While the uniformed officer may not have known every detail as to why he was stopping the Cadillac, the court held that he became part of the detective's "team," therefore, the collective knowledge doctrine applied. When multiple officers are involved in an investigation, probable cause may be based on their collective knowledge. Probable cause does not need to be based solely on the information known only by the arresting officer, as long as there is some degree of communication between the officers. Here, the detective had probable cause to stop the Cadillac for a traffic violation. When he told to his dispatcher to have an officer in a marked police car

"stop" the Cadillac, the uniformed officer was allowed to rely on the detective's probable cause to conduct a valid traffic stop. In addition, the detective was present when the uniformed officer made the stop, reinforcing the conclusion that the uniformed officer was not acting on his own, but rather as part of a team.

The court further held that the uniformed officer had reasonable suspicion to frisk Robinson. Robinson's baggy clothes, nervous demeanor, and refusal to keep his hands out of his pockets, along with the discovery of a firearm in the glove compartment provided the officer justification to frisk him.

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

*****

U.S. v. Wilkinson, 633 F.3d 938 (10th Cir. 2011)

Under the collective knowledge doctrine, an officer may lawfully detain a suspect when he is requested to do so by another officer, even if the requesting officer does not provide any details concerning the grounds for the stop. The collective knowledge doctrine applies to traffic stops for misdemeanors as well as stops for felonies.

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

*****

Canine Sniffs

U.S. v. Davis, 636 F.3d 1281 (10th Cir. 2011)

The court held that the officers had reasonable suspicion to detain Davis at the conclusion of the traffic stop in order to conduct a canine sniff. The officers' reasonable suspicion of illegal activity was based on the inconsistent travel plans provided by Davis and the driver, their abnormal nervousness, and Davis's prior history of drug trafficking.

The court also held that Davis voluntarily consented to a search of the vehicle. Initially Davis refused to consent to a search of the vehicle. After the officer requested a canine unit, Davis asked the officer how long it would take for the canine unit to arrive compared with the time it would take the officers to search the vehicle if he consented. After the officer told Davis it would take thirty minutes for the canine unit to arrive, but he could search the vehicle in five to ten minutes, Davis consented. The officer inquired to confirm that Davis was consenting to a search of the vehicle, and David confirmed his consent. The officer obtained Davis's consent voluntarily and not through coercion or force.

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

*****

U.S. v. Kitchell, 653 F.3d 1206 (10th Cir. 2011)

The court found that the drug-detection dog, Meco, was reliable, and that his alert on the vehicle established probable cause to search it for drugs. While the officers did not recover drugs from the car, Meco alerted to a backpack found in the trunk that contained over forty thousand dollars in currency, and five illegal handguns. Laboratory testing later confirmed that the backpack and currency contained trace amounts of illegal drugs. The defendant claimed that contamination of currency with trace amounts of illegal drugs is so widespread that any drug-dog alert of an occupied vehicle would impermissibly allow a general search of that vehicle.

The court declined to find that the contamination of currency theory undermined the reliability of canine sniffs in general, while specifically noting in this case, that Meco was trained to distinguish the scent of narcotics from the scents of other items, including currency.

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

*****

Probable Cause

U.S. v. Trinh, 665 F.3d 1 (1st Cir. 2011)

The court held that the search warrant affidavit, while largely dependent on information provided by a confidential informant, established probable cause to search the defendant's premises.

First, the agent who drafted the affidavit deemed the confidential informant to be a trustworthy source because he had provided credible and reliable information in the past that led to the seizure of illegal drugs. Inclusion of the confidential informant's history of providing information to law enforcement indicated some assurance of reliability, as opposed to an anonymous tipster.

Second, much of the confidential informant's information indicated that he had first-hand knowledge as to the defendant's marijuana cultivation operation.

Third, the agents corroborated a great deal of the confidential informant's information through surveillance of the defendant's movements as well as intercepted telephone conversations.

Finally, the agent stated his particular knowledge and experience in the area of marijuana cultivation operations in the affidavit.

The court also held that a one to two month gap between information included in the search warrant affidavit regarding criminal activity and the issuance of the search warrant did not render the warrant stale. Here the facts in the affidavit pointed to a large-scale marijuana cultivation operation that targeted items, which were likely to be of use to the operation for a considerable amount of time.

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

*****

U.S. v. Clark, 638 F.3d 89 (2d Cir. 2011)

The court held that the totality of the circumstances permitted the issuing judge to find it probable that Clark was dealing drugs from somewhere within the multi-occupancy dwelling. However, it did not provide a substantial basis to conclude that Clark controlled the various residential units in that multi-occupancy dwelling to the extent that there was probable cause to believe evidence of his criminal conduct could be found throughout the building. Search warrants for multi-occupancy dwellings must establish probable cause for each unit to satisfy the particularity requirement of the *Fourth Amendment* to protect against overbroad searches.

The court ruled that the good faith exception to the exclusionary rule applied, and as a result, Clark's motion to suppress the evidence seized from the invalid search should have been denied. The issuing judge did not abandon his neutral and detached judicial role in mistakenly finding probable cause to support the warrant, the warrant was not invalid on its face and the warrant affidavit was not completely bare bones. The warrant affidavit stated that the premises to be searched was a multi-family dwelling, provided sufficient details to permit the issuing judge to find probable cause to believe that Clark was dealing drugs from somewhere in the dwelling, and stated facts that tried to establish Clark's control over the entire dwelling.

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

*****

U.S. v. Miknevich, 638 F.3d 178 (3d Cir. 2011)

The court held that probable cause existed to search the Miknevich's computer for child pornography solely based on a sexually explicit file name and its related electronic identification, or SHA1 value, which the court equated to a digital fingerprint.

Although probable cause was established in this case based on the highly descriptive file name and SHA1 value, the court commented, "it remains better practice for an applicant seeking a warrant based on images of alleged child pornography to append the images or to provide a description of the images sufficient to enable the magistrate to determine independently whether probable cause exists."

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

*****

U.S. v. Blauvelt, 638 F.3d 281 (4th Cir. 2011)

The court held that there was ample evidence in the search warrant application for the magistrate to find probable cause that Blauvelt's home and computer contained child pornography.

The investigating officers corroborated the ex-girlfriend's information by viewing the images of child pornography Blauvelt sent as well as the inbox for his email account to which she still had access. Officers viewed Blauvelt's email inbox and saw that the digital picture files had been sent from the same cell phone account that the ex-girlfriend identified as belonging to Blauvelt.

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

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U.S. v. Norris, 640 F.3d 295 (7th Cir. 2011)

The court held that the information provided in the search warrant affidavit established probable cause to search the defendant's house and person for drugs. The affidavit was based on information provided by two confidential informants who had worked with the police in the past and had proven to be reliable. Additionally, the officer corroborated information provided by the informants by conducting surveillance on the defendant's home. The affidavit, taken as a whole, established the informants' reliability and contained sufficient timely and detailed information to constitute probable cause that the defendant was engaged in an ongoing drug trafficking operation making it likely that he had cocaine in his home and on his person.

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

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U.S. v. Montieth, 662 F.3d 660 (4th Cir. 2011)

Officers obtained a warrant to search Montieth's home for marijuana, firearms and evidence of drug trafficking. The officers knew that Montieth lived with his wife and two young children. In an effort to minimize the trauma to Montieth's family as well as the safety risks of the search, the officers planned to detain Montieth away from his home and obtain his cooperation in executing the warrant.

While conducting surveillance, officers saw Montieth leave his home in his car. Officers pulled him over eight-tenths of a mile down the street. The officers handcuffed Montieth and placed him in the back of a police car. After an officer told him about the warrant, Montieth admitted to having marijuana in his home. When they arrived at Montieth's home, the officers allowed his wife and children to leave while they searched. The officers brought Montieth inside and advised him of his *Miranda* rights. Montieth waived his rights, made several incriminating statements, and identified locations in his home where the officers found marijuana and firearms.

First, the court determined that the search warrant was supported by probable cause. The officers conducted a trash pull at Montieth's home after receiving information that he possessed a large quantity of marijuana. Within the trash, officers found extensive evidence of marijuana trafficking to include several burnt marijuana cigarettes and marijuana residue.

The court held that Montieth's detention qualified as a valid *Terry* stop. In this case, the warrant specified the Montieth's person, as well as his home was subject to search for evidence of drug trafficking. Once the officers pulled Montieth over and smelled the odor of marijuana in his car, they were further justified in detaining him in the police car.

In response to an argument made by Montieth, the court went on to state that the officers acted reasonably when they decided to detain Montieth a short distance from his home prior to executing the search warrant. The court refused to find that every detention incident to the execution of a search warrant must take place inside the home itself. Instead, the court considered whether the officers detained Montieth "as soon as practicable" after observing him leave his residence. In this case, the court determined that they had. However, the court was

careful to state that not every detention that occurs away from a home to be searched will automatically be considered reasonable.

The court also held that Montieth's statements to the officers before he was *Mirandized* were admissible. Montieth's incriminating statements to the officers, while in the back of the police car, were spontaneously made and not elicited as the result of any questions or routine statements made by the officers.

Finally, the court found the officers' failure to leave a copy of the search warrant at Montieth's home was not a constitutional violation. The officers mistakenly believed that they had left a copy of the warrant in the home when they left. The officers were only required to have a valid warrant before conducting their search, which they clearly did.

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

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U.S. v. Johnson, 655 F.3d 594 (7th Cir. 2011)

The court held that information provided by a confidential informant was sufficiently reliable to establish probable cause to search the defendant's home. The informant told the government that he had purchased cocaine from the defendant at his house four times in the previous week. The informant was known to the government and had provided reliable information in the past. Additionally, the informant made a controlled purchase of cocaine from the defendant at his house a few hours before the warrant was issued.

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

*****

Aleman v. Village of Peoria, 662 F.3d 897 (7th Cir. 2011)

Aleman operated a day care center in his home. One morning Danielle Schrik dropped off her eleven-month-old son at Aleman's house. On the two previous days, the child had been lethargic and feverish. On this day, shortly after being dropped off he collapsed. Aleman picked the child up and gently shook him to elicit a response and after there was none, called 911. The child died four days later.

Aleman voluntarily went to the police station to be interviewed. After waiting forty-five minutes, without being interviewed, Aleman asked if he could leave. An officer told him, no, because he was under arrest. Five hours later, two officers entered the interrogation room and claimed that they had spoken to several people about what had happened to the child. The officers told Aleman that they had spoken to three doctors who all agreed that Aleman's shaking of the child must have caused the injuries since the child was sluggish but responsive when he arrived at Aleman's house that morning. This account of what the doctors had said was a lie. Aleman responded by telling the officers that if that was what the doctors had said, then he must have caused the injuries because he had shaken the child. However, he continued to express disbelief that his gentle shaking could have caused the child's injuries.

The officers arrested Aleman for aggravated battery on a child. Aleman made bail and was released from custody. Four days later the child died. Following the child's autopsy, the officers re-arrested Aleman and charged him with murder. As the investigation progressed however, the case against Aleman quickly fell-apart. Over a year later, all charges against him were dismissed. Aleman sued several officers for violating his constitutional rights.

The court held that Aleman's initial arrest for aggravated battery on a child was supported by probable cause. Officers had interviewed doctors who had told them, misleadingly, as they all later admitted, that the injuries to the child were "fresh." The doctors stated that "fresh" meant that the injuries had occurred within a week, while the officers interpreted "fresh" to mean that the injuries had occurred that day. It was natural for the officers to suspect Aleman, since he was the last person to have had custody of the child and he admitted to shaking him.

The court held that Aleman's second arrest for murder, however, was not supported by probable cause. At the child's autopsy, the pathologist stated that it was highly unlikely that his injuries had been caused by Aleman since the symptoms the child had displayed in the days before were consistent with a pre-existing brain injury. Later that day, an officer went back and told the pathologist that the child had been behaving normally when he arrived at Aleman's house. This was a lie and caused the pathologist to change her opinion and tell the prosecutor that the child's injuries had occurred while in Aleman's care. The investigation revealed that the officer lied to the pathologist to focus attention on Aleman and away from Danielle Schrick, the child's mother, to whom, it was suspected, the officer had become attracted. Without the officer's lie to the pathologist and his efforts to obstruct the investigation into Schrick, there would have been no basis for charging Aleman with any crime. The court refused to grant the officer qualified immunity because it was unreasonable for him to believe that Aleman had killed the child.

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

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U.S. v. Darr, 661 F.3d 375 (8th Cir. 2011)

Officers suspected that David Darr, Sr. had sexually assaulted several children. Officers obtained a warrant to search the home he shared with his adult son, David Darr, Jr., for two bathroom brushes and a container of Vicks Vapor rub. These items were allegedly used in connection with the sexual assaults. While searching Darr, Jr.'s bedroom, an officer opened a VHS cassette holder and found children's underwear and computer printouts of child pornography. At this point, the officers stopped their search and applied for a second warrant.

The second warrant authorized the seizure of specific digital images found in Darr's bedroom, the underwear found in the VHS cassette holder and Polaroid photographs found underneath Darr, Sr.'s bed. After the search resumed, officers opened a cooler in Darr, Jr.'s bedroom and found VHS videotapes, a green tin and a camera memory card. Inside the tin, an officer found images of child pornography. The officers obtained a third search warrant, for the videotapes and camera memory card, which revealed images of Darr, Jr. engaged in sex acts with a minor.

The court held that the first warrant was supported by probable cause and that the information upon which it relied was not stale, even though the last allegation of sexual assault had occurred seven months prior. Considering the nature of the crimes, the ongoing related activity of Darr,

Sr. and the nature of the property sought, the information set forth in the warrant was not so stale as to preclude a finding of probable cause. Darr, Sr. had allegedly used the items sought in the search warrant on more than one occasion during incidents that occurred more than two years apart. Additionally, Darr, Sr. had tried to arrange to have several children spend time at his home within the last month. The fact that Darr, Sr. recently had sought additional contact with children at his home supported the inference that evidence used in such encounters would still be present.

The court also held that the officers did not exceed the scope of the first warrant by searching Darr, Jr.'s bedroom and the VHS cassette holder. As a result, the evidence found within it was lawfully seized under the plain view exception to the warrant requirement. Because the search warrant authorized the search of the entire premises for the items listed, officers did not exceed its scope by searching Darr, Jr.'s bedroom, even though the warrant was issued based upon information concerning the criminal activities of Darr, Sr.

The court declined to decide whether the second search warrant authorized the search of the cooler and green tin found in Darr, Jr.'s bedroom. Instead, the court held that the officers had lawfully searched these areas under the first search warrant because the cooler and tin could have contained the items specified in the first warrant. The officers lawfully seized the images of child pornography discovered in the tin under the plain view exception to the warrant requirement.

Finally, the court held that the officers established probable cause to search the VHS videotapes and camera memory card for images of child pornography based on the previously discovered images of child pornography.

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

*****

U.S. v. Blackmon, 662 F.3d 981 (8th Cir. 2011)

Officers responded to an apartment complex after it was reported that Blackmon was there in violation of a protection order and that he appeared to be under the influence of drugs. Blackmon ignored the officers' commands to get on the ground and then raised his fists towards them as if he was ready to fight. An officer deployed his Taser on Blackmon while other officers tackled and handcuffed him. The officers confirmed that the protection order was valid and arrested Blackmon for violating it. A search incident to arrest revealed a bottle containing PCP and over $1,700 in United States currency. Officers took Blackmon to jail where he was recognized being the same person in a surveillance photo who had robbed a bank earlier that day.

As an initial matter, the court held that the officers had reasonable suspicion to stop and detain Blackmon. Once they arrived at the apartment complex, the officers saw Blackmon, who fit the description of the person they were sent to investigate. Additionally, Blackmon's confused and unresponsive state was consistent with PCP use and provided the officers with justification to detain him and conduct their investigation.

The court then held that the officers had probable cause to arrest Blackmon after he refused their commands to get on the ground and instead raised his fists towards them. At that point, the officers had probable cause to arrest Blackmon for resisting arrest under Missouri law. Because

the officers had probable cause to arrest Blackmon, their subsequent search of his person that uncovered the PCP and currency did not violate the *Fourth Amendment*.

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

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Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. 2011)

The court held that the search warrant issued to search Dougherty's home computer lacked probable cause because: (1) no evidence of possession or attempt to possess child pornography was submitted to the magistrate, (2) no evidence was submitted to the magistrate regarding computer use by the suspect, and (3) the only evidence linking the suspect's attempted child molestation to possession of child pornography was the experience of the requesting officer, without any further explanation. However, the officers were entitled to qualified immunity. The law in the circuit had not been clearly established regarding whether allegations of sexual molestation at a place of work provide probable cause to search a residence for child pornography in the absence of an explanation tying together the two crimes.

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

*****

U.S. v. Baker, 658 F.3d 1050 (9th Cir. 2011)

Baker was convicted of misdemeanor possession of methamphetamine and sentenced to three years' probation. A condition of his probation required him to submit to suspicionless searches of his person, property, residence, vehicle and personal effects at any time of day or night by a probation officer or any federal, state or local law enforcement officer.

A suspicionless search of a parolee does not violate the *Fourth Amendment*. Because there is no constitutional difference between parole and probation for purposes of the *Fourth Amendment*, the court held that this condition of Baker's probation did not violate the *Fourth Amendment*.

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

*****

U.S. v. Krupa, 658 F.3d 1174 (9th Cir. 2011)

A woman contacted the military police after her ten-year-old daughter and five-year-old son, who were living on base with her ex-husband, had not arrived at the train station as previously arranged. Military police went to the home and discovered that the father, a service member, was out of the country. Krupa, a civilian, told police that he was taking care of the children while their father was away. The home was in disarray and police were concerned when they saw thirteen computer towers and two laptops in the home. Krupa gave the officers consent to seize the computers.

The next day, during the forensic examination of one of the computers, the investigator found an image he suspected to be child pornography along with a sexually suggestive website label. However, before the investigator could finish searching all of the computers he was hospitalized.

The next day Krupa revoked his consent to search the computers. The investigator obtained a search authorization from the Military Magistrate and found twenty-two images of child pornography. A subsequent search warrant obtained by the FBI uncovered additional child pornography images and movies.

The court held that Military Magistrate could have reasonably concluded that there was probable cause to issue the search authorization. The investigators assertion that he had found an "image of suspected contraband," implicitly referring to child pornography, in computers seized from a home for which there had been a report of child neglect, and where there was no custodial parent present, created a fair probability that contraband or evidence would be found in the computers.

Editors Note: This opinion replaced the opinion issued on February 7, 2011 as reported in the March 2011 issue of The Informer.

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

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Arrest

U.S. v. McCauley, 659 F.3d 645 (7th Cir. 2011)

Neeley reported that he had been assaulted by two men. An officer saw injuries consistent with an assault, and after receiving a detailed description of the men, went to the apartment where the assault occurred. The officer knocked on the door and the defendant, a man who fit the description of one of the assailants, opened the door. He quickly shut the door when the officer told him why he was there. The officer knocked on the door again and this time different man, who fit the description of the other assailant, opened the door. He also closed the door on the officer when the officer told him why he was there. A few minutes later, the defendant came out of the apartment and began to walk away from the officer. The officer handcuffed him and walked him toward his patrol car. Before he placed the defendant inside the patrol car, the officer patted him down and a plastic bag containing crack cocaine fell out of his pants leg.

The court held that the officer had probable cause to arrest the defendant. The officer received specific information about two individuals who had participated in a specific crime a few hours earlier, along with the location where it occurred and a description of the perpetrators. When the officer returned to the scene of the crime and encountered two individuals who matched the description provided by Neeley, it was reasonable for him to conclude that the defendant was one of the assailants.

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

*****

Entering the Suspect's Home to Make an Arrest

U.S. v. Hill, 649 F.3d 258 (4th Cir. 2011)

The court held that the officers did not have sufficient reasons upon which to base their belief that Hill was present in the home; therefore, their entry into the home to execute the arrest warrant for him was unlawful. As a result, the drugs and paraphernalia the officers found during their protective sweep were inadmissible.
The officers testified that they did not expect to find Hill at the home when they arrived there. Although the officers heard voices coming from inside the home to support their belief that Hill was present, the court stated that to have reason to believe that a defendant is in a home, officers cannot solely rely on unidentified noises coming from within the home.

The court additionally held that the officers' entry into the home was not justified by exigent circumstances. The court stated that slight damage to the doorframe, which the officers had seen on a previous visit, and unidentified noises coming from within the home was not sufficient to suggest that there was an emergency taking place inside the home.

While the initial entry into the home was unlawful, the court held that subsequent consent to search the home provided by the defendant's girlfriend was valid. However, the court remanded the issue as to whether the taint from the initial illegal search, which uncovered the additional evidence against Hill, was dissipated by the consent given by the girlfriend for the second search.

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

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U.S. v. Werra, 640 F.3d 638 (5th Cir. 2011)

In order to enter the house lawfully to execute the arrest warrant for Daley, the officers had to establish they had a reasonable belief that she lived there and that she was home at the time. The court held that the information provided by the confidential informant was not sufficient to support a reasonable belief that Daley lived at the house. Even if it were sufficient, the court held that the officers had no reason to believe that Daley would be home when they entered. The officers had no information about Daley's schedule or routine that would enable them to know when she was home and when she was away.

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

*****

Wiretaps

U.S. v. Melendez-Santiago, 644 F.3d 54 (1st Cir. 2011)

The court held that the government provided sufficient explanation as to why traditional investigative procedures were inadequate in the affidavits submitted in support of two Title III wiretap applications.

The affidavits described the limited success of efforts to conduct physical surveillance on the leader of the conspiracy. Such surveillance was difficult because of the narrow streets of the neighborhood and the vigilant counter-surveillance conducted by the suspects. The use of undercover officers or confidential informants was not feasible because the suspects were wary of individuals who were not members of the local criminal subculture. At the time of the wiretap application, one confidential source had been missing for five months and was presumed dead, and another had been threatened with death and was no longer trusted by the suspects. Pen registers and trap and trace records were already being used but they only provided limited information about the cell phones being used.

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

*****

U.S. v. Gaines, 639 F.3d 423 (8th Cir. 2011)

The *Fourth Amendment* requires that a wiretap application under *18 U.S.C. § 2518 (Title III)*, and subsequent wiretap orders, identify only the telephone line to be tapped and the particular conversations to be seized.

The court found that the agent's affidavit and the district court's wiretap order complied with the particularity requirement of the *Fourth Amendment* because they both identified the particular telephone to be tapped and the particular conversations, those concerning drug trafficking, to be seized.

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

*****

The Exclusionary Rule

Exceptions to the Exclusionary Rule

Good Faith

U.S. v. Clark, 638 F.3d (2d Cir. 2011)

The court held that the totality of the circumstances permitted the issuing judge to find it probable that Clark was dealing drugs from somewhere within the multi-occupancy dwelling. However, it did not provide a substantial basis to conclude that Clark controlled the various residential units in that multi-occupancy dwelling to the extent that there was probable cause to believe evidence of his criminal conduct could be found throughout the building. Search warrants for multi-occupancy dwellings must establish probable cause for each unit to satisfy the particularity requirement of the *Fourth Amendment* to protect against overbroad searches.

The court ruled that the good faith exception to the exclusionary rule applied, and as a result, Clark's motion to suppress the evidence seized from the invalid search should have been denied. The issuing judge did not abandon his neutral and detached judicial role in mistakenly finding probable cause to support the warrant, the warrant was not invalid on its face and the warrant

affidavit was not completely bare bones. The warrant affidavit stated that the premises to be searched was a multi-family dwelling, provided sufficient details to permit the issuing judge to find probable cause to believe that Clark was dealing drugs from somewhere in the dwelling, and stated facts that tried to establish Clark's control over the entire dwelling.

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

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People of the Virgin Islands v. John, 654 F.3d 412 (3d Cir. 2011)

An officer applied for a warrant to search John's home for child pornography, relying on an affidavit that established only probable cause to believe that she would find evidence that he had sexually assaulted several children at the school where he taught. The officer did not allege any direct evidence that John possessed child pornography, nor allege the existence of any connection between the two crimes. The affidavit provided no reason to believe that a person who committed child sexual assault would be likely to possess child pornography. As a result, the court held that the lower court properly suppressed journals seized by the officers.

Additionally, the court held that good-faith exception to the exclusionary rule did not apply. The affidavit did not contain any assertion that John was in any way associated with child pornography. Although they had a search warrant, it was unreasonable for the officers to believe they had probable cause to search for child pornography.

The court commented that even police officers who lack legal training are expected to know of the requirement that the factual basis for a probable cause determination must be stated in the affidavit. An officer seeking a warrant must explain why she is justified in entering a person's home and searching through his belongings.

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

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U.S. v .Wellman, 663 F.3d 224 (4th Cir. 2011)

Officers in West Virginia received a spreadsheet from a Wyoming Criminal Investigation Task Force indicating that child pornography had been transmitted over a peer-to-peer file-sharing network. The pornographic files were not identified by name, type or description, but by hash value. Each entry on the spreadsheet contained a hash value for a digital file, the Internet Protocol (IP) address of the computer offering the file for download, the locality in which that computer operated, the time and date the file was observed and the officer from the Task Force who identified the file. One of the IP addresses was from West Virginia and was suspected of having hosted five different digital files of child pornography. A West Virginia officer identified Wellman as the person associated with the IP address.

The officer drafted a search warrant application for Wellman's home in which he stated that he did not have copies of the suspected child pornography images or any description of what the images depicted. However, the officer did include the information from the spreadsheet regarding the hash values and the IP address, as well as other background information he had gathered on Wellman.

As an initial matter, the court followed the ninth circuit and refused to require that a search warrant application involving child pornography must include an image of the alleged pornography. While the inclusion of such material would assist in the probable cause determination, the court declined to make it an absolute requirement. Instead, the court stated that it would review a search warrant application in its entirety to determine if the officer stated facts sufficient for a finding of probable cause.

Next, without deciding the issue, the court assumed that the search warrant was not supported by probable cause. However, the court concluded that the evidence seized from Wellman's home was not subject to suppression because the officers relied in good faith on the warrant.

The court concluded that the judge that issued the search warrant did not act as a "rubber stamp" or abandon his role as a neutral and detached decision maker. The officer who drafted the search warrant application explained the significance of the information from the spreadsheet and then performed additional research into Wellman's background to provide corroboration and to minimize the possibility of mistake or confusion. The officer thoroughly explained the technology involved in the case and how that technology was used to identify Wellman. This took place over a six-week period and was not the result of a hasty investigation.

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

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U.S. v. Flores, 640 F.3d 638 (5th Cir. 2011)

The court held that the good-faith exception to the exclusionary rule applied and that the defendant's motion to suppress was properly denied. Although an officer included mistaken information in the search warrant application, there was no evidence that he did so in bad faith or that the officers that executed the warrant were reckless or dishonest in their reliance on the warrant. Along with the mistaken information, the officer that drafted the warrant application also included accurate information that he obtained from his own research.

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

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U.S. v. Patten, 664 F.3d 247 (8th Cir. 2011)

Officers obtained a warrant to search Patten's home for evidence relating to accusations that he had sexually abused his fifteen-year old stepdaughter and taken sexually explicit photographs of her. Probable cause to support the warrant was established by information provided by the stepdaughter, but in the search warrant application, the officer did not refer to the stepdaughter by name or use her initials when referring to her as the source of his information. During the search, officers discovered a camera and memory cards described by the stepdaughter.

Patten argued that the search warrant was not supported by probable cause because the application contained no finding of reliability concerning the source of the information, it provided no indication of who the source was and it contained no statement as to the source's credibility.

The court declined to rule on whether or not the search warrant affidavit was sufficient to establish probable cause and instead held that the evidence was admissible against Patten under the good-faith exception. Disputed evidence will be admitted if it was objectively reasonable for the officer executing a search warrant to have relied in good faith on the judge's determination that there was probable cause to issue the warrant.

Here, it was reasonable for the officers to believe that the warrant contained probable cause to justify the search of Patten's home. First, an officer consulted with an assistant county attorney in drafting the application for the warrant. Second, an officer interviewed the stepdaughter in person and had an opportunity to assess her credibility. Finally, the stepdaughter had first-hand knowledge of the sexual abuse and photographs because she was the subject of the abuse.

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

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Independent Source Doctrine

U.S. v. Stabile, 633 F.3d 219 (3d Cir. 2011)

United States Secret Service agents and Sheriff's Department investigators, suspecting that Stabile had passed counterfeit checks, went to his house to question him. Debbie Deetz answered the door and gave the agents consent to search the house. Deetz showed the agents around the house and consented to the seizure of six computer hard drives and several DVDs bearing sexually suggestive labels that caused the agents to believe they contained child pornography. While the agents were conducting their search, Stabile arrived home and attempted to revoke Deetz's consent to the search the house. The agents left shortly thereafter; however, Stabile did not request that they return the hard drives or DVDs.

The USSS agents took Stabile's computer hard drives to their office and the deputies took the DVDs back to the sheriff's department. An immediate examination of the DVDs revealed that they did not contain child pornography, but this was not communicated to the USSS agents.

The USSS case agent did not apply for a warrant to search the hard drives for three months because shortly after their seizure he was assigned to a protective detail. Eventually the USSS agent obtained a state search warrant, which authorized a search of the hard drives for evidence of financial crimes and possession of child pornography. Before the search of the hard drives occurred, the USSS agent learned that the DVDs, which were the sole basis for their application to search for child pornography, did not contain child pornography. The forensic agent was told to conduct a forensic examination of the hard drives, but to confine his search for evidence of financial crimes and not child pornography.

During his search of one of the hard drives, the forensic agent discovered a folder entitled "Kazvid." The agent understood this folder to reference "Kaaza," a peer-to-peer file sharing program, which based on his experience could contain evidence of any type of crime. The agent highlighted the "Kazvid" folder, which allowed him to view a list of file names contained in the folder. The agent saw a list of file names with file extensions indicating video files and file names suggestive of child pornography. Although the agent believed that these files contained child pornography, and not evidence of financial crimes, he opened twelve different video files

from within the "Kazvid" folder. After confirming that these files contained child pornography, the agent contacted a prosecutor and stopped his search of the hard drive.

The USSS agent obtained a federal search warrant for child pornography for that particular hard drive only. The federal search warrant was based solely on the sexually suggestive names on the files in the "Kazvid" folder and not on the contents of the twelve files that the forensic agent had viewed. The search warrant affidavit did not mention that the forensic agent had opened any files in the "Kazvid" folder.

During the execution of the federal search warrant, a different forensic agent found numerous child pornography files on the hard drive he examined. However, by mistake, the federal search warrant authorized the search of one of the other hard drives seized by the agents and not the hard drive the original forensic agent had examined which contained the "Kazvid" folder.

Stabile filed a variety of motions seeking to suppress evidence discovered by the agents.

The court held that the investigators' warrantless search of the house did not violate the *Fourth Amendment* because Deetz voluntarily consented to the search. Deetz had authority to consent to a search of the house, because as a co-habitant, she used the property along with Stabile and exercised joint access and control over the house. Deetz's mistaken belief that she was married to Stabile did not change the analysis because an unmarried cohabitant has authority to consent to a search of shared premises.

The court found that Deetz had the authority to consent to the seizure of the six computer hard drives. The hard drives were not password protected and they were located in common areas of the home where she had access to them.

Stabile argued that even if Deetz voluntarily consented to the search and seizure of the hard drives, the seizure of six entire hard drives was unreasonable. He claimed that in addition to containing information potentially relating to financial crimes, the hard drives contained a great deal of unrelated personal information. The court held that the seizure of the six entire hard drives was reasonable. First, Deetz did not limit the scope of her consent to search them in any way. Second, a broad seizure was required because evidence of financial crimes could have been found in any location of the six hard drives, and this evidence very likely would have been disguised or concealed somewhere on the hard drive. Third, an on-site search of the hard drives would not be practical since computer searches are time consuming and require a trained forensic investigator and a controlled environment.

The court held the three-month delay in obtaining the state search warrant was reasonable under the circumstances since the lead case agent was assigned to a Secret Service Detail protecting the President and other officials shortly after seizing the hard drives. Additionally, Stabile did not request the return of the hard drives until eighteen months after their seizure, and Deetz had obtained a replacement computer for Stabile to use for his work the day after the hard drives were seized.

The court held that forensic agent's decision to open the "Kazvid" folder and view the file names during the execution of the state search warrant was objectively reasonable under the *Fourth Amendment* because criminals can easily alter file names and file extensions to conceal contraband. The forensic agent engaged in a focused search to ensure that he complied with the

state search warrant and followed procedures, such as imaging the hard drive, checking for corrupted files, and conducting a "hash value analysis" to ensure that he did not conduct a general search. The court noted it was irrelevant that the agent may have suspected that the "Kazvid" folder contained child pornography. The "Kazvid" folder required further investigation because it could have contained evidence of financial crimes.

Once the forensic agent lawfully opened the "Kazvid" folder, the court held that the file names were in plain view so that any screen print he made of them constituted a valid seizure. First, the forensic agent lawfully opened the "Kazvid" folder. Second, the incriminating nature of the evidence, the file names, was immediately apparent. Finally, the forensic agent had a lawful right to access the hard drive because the state search warrant authorized a search of it for evidence of financial crimes.

The court declined to decide whether the plain view doctrine applied to the examination of the contents of the individual video files because the independent source doctrine applied to their contents. Even assuming the original forensic agent illegally viewed the contents of the files, it did not taint the warrant application the USSS agent presented to the magistrate because it did not mention the contents of the "Kazvid" folder, but only the sexually suggestive names of the files within it, which the forensic agent lawfully viewed.

Finally, the court held that the inevitable discovery doctrine applied to the evidence discovered during the federal search warrant. Even though the agents made mistakes, proper execution of procedures would have uncovered evidence of child pornography. Additionally, the fact that the agents attempted to secure state and federal search warrants at every step of the search indicated that there would be little deterrence benefit gained by suppressing the evidence.

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

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U.S. v. Moody, 664 F.3d 164 (7th Cir. 2011)

Officers arrested Moody in 2007 for methamphetamine trafficking and searched his cell phone incident to arrest. One of the phone numbers was identified in the phone's memory with the letter "G." This information was documented but played no part in Moody's 2007 prosecution.

Officers arrested Moody and Gutierrez in 2009 for conspiracy to distribute methamphetamine following an investigation that utilized a confidential informant and a controlled purchase of methamphetamine that was captured on audio and video. After their arrests, an investigator subpoenaed Moody and Gutierrez's cell phone records. After reviewing these records, the investigator realized that the telephone number identified as "G" in Moody's phone from his 2007 arrest corresponded to Gutierrez's cell phone number. At trial, the government presented evidence from the subpoenaed cell phone records as well as testimony from the arresting officer, which indicated that prior to his arrest in 2007 Moody had received a recent call from "G."

Moody argued that the warrantless search of his cell phone incident to his 2007 arrest violated the *Fourth Amendment* and that it improperly led to subsequent evidence that the government used to show that he was involved in a large methamphetamine distribution conspiracy.

The court declined to rule on whether the officer's warrantless search of Moody's cell phone, incident to his arrest in 2007, was constitutional but instead, applied the independent source doctrine. The independent source doctrine allows the admission of evidence initially discovered during an unlawful search if the evidence was later discovered through a source untainted by the initial unlawful search. Here, there was no evidence that the search of Moody's cell phone in 2007 had any bearing on the investigator's decision to subpoena Moody and Gutierrez's cell phone records in 2009. The phone number identified as "G" in 2007 was ignored until later discovered in the subpoenaed cell phone records in 2009. In 2009, the investigators connected "G" to Moody's case, when, under heavy surveillance, Gutierrez met with Moody to deliver methamphetamine. Prior to that meeting, there was no indication that law enforcement was even aware of Gutierrez's existence. These facts were sufficient to establish the necessary basis to subpoena cell phone records and they were derived entirely independent of the search of Moody's cell phone in 2007.

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

*****

U.S. v. Craig, 630 F.3d 717 (8th Cir. 2011)

The court held that the marijuana and firearms initially discovered by the police during the illegal entry into Craig's home were admissible under the independent-source doctrine. The court found that the officers would have applied for a search warrant even if they had not seen those items in plain view while in the home. The court also found that even without this tainted information, there was probable cause to support the issuance of a search warrant for Craig's home.

The court held that Craig's voluntary statements to the Sheriff the next day were not subject to the exclusionary rule since the officers had probable cause to arrest him before they entered his home.

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

*****

Inevitable Discovery Doctrine

U.S. v. Hughes, 640 F.3d 428(1st Cir. 2011)

The court held that the defendant's interview was non-custodial; therefore, no *Miranda* warnings were required. The interview took place in the defendant's house after the officers went there to conduct a "knock and talk" interview. There were four officers present, but only two participated in the interview, and there was never any show of force toward the defendant. Only two officers carried visible weapons, which remained in their holsters for the entire visit. The officers did not make any physical contact with the defendant, and the atmosphere was non-confrontational and relaxed throughout the interview. The interview took place in the late morning and the defendant was appropriately dressed. The totality of the circumstances established that the defendant's freedom of movement was not restrained to such a degree that a reasonable person in his position would have thought that he was under arrest.

The court held that the defendant voluntarily made incriminating statements to the officers. The officers did not make any promises or threats to the defendant, the length of the interview was reasonable and the tone cordial. The defendant was mature, had taken some college courses and had a respectable employment history. After the defendant suffered a panic attack, the officers stopped their questioning and summoned medical assistance. They did not resume questioning the defendant until after an EMT advised them that the defendant's condition had stabilized.

Finally, the court declined to rule on whether or not the defendant voluntarily consented to a search of his computer. Instead, the court held that the inevitable discovery doctrine applied. The defendant's voluntary confession gave the officers probable cause to obtain a warrant to search the house and his computer. Additionally, the defendant voluntarily gave the officers videotapes containing child pornography prior to the discussion about a consent search. The discovery of the child pornography would have occurred regardless of the defendant's consent.

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

*****

U.S. v. Crespo-Rios, 645 F.3d 37 (1st Cir. 2011)

Officers obtained a search warrant that authorized them to seize the defendant's computer and search it for documents and records showing that he attempted to entice a minor to cross state lines to engage in sexual activity. In addition to finding that evidence, the forensic examination of the defendant's computer also revealed images and videos of child pornography.

The court held that the child pornography evidence was admissible against the defendant under the inevitable discovery doctrine. Although the search warrant did not mention child pornography, the officers had a valid search warrant that allowed them to search the defendant's computer for correspondence between the defendant and the undercover officer posing as a child. In conducting his search for records and documents, the forensic examiner was not limited to searching certain folders or types of files because digital files may be mislabeled or manipulated to disguise the true file types. The lawful search of the computer for correspondence between the defendant and the undercover officer would have inevitably led the forensic examiner to discover the child pornography.

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

*****

U.S. v. Stabile, 633 F.3d 219 (3d Cir. 2011)

The court held that the inevitable discovery doctrine applied to the evidence discovered during the federal search warrant. Even though the agents made mistakes, proper execution of procedures would have uncovered evidence of child pornography. Additionally, the fact that the agents attempted to secure state and federal search warrants at every step of the search indicated that there would be little deterrence benefit gained by suppressing the evidence.

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

*****

Intervening Circumstances

U.S. v. Faulkner, 636 F.3d 1009 (8th Cir. 2011)

The court found that the officer did not have probable cause or reasonable suspicion to stop Faulkner's car because there was no traffic violation, so the stop was improper. However, the arrest of Faulkner on the outstanding federal arrest warrant was an intervening circumstance that purged the taint of the unjustified stop; therefore, the drugs found in the vehicle and Faulkner's incriminating statements were admissible.

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

*****

No Standing to Object

U.S. v. Kennedy, 638 F.3d 159 (3d Cir. 2011)

In deciding the issue for the first time, the court held that the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there are extraordinary circumstances that suggest an expectation of privacy. No extraordinary circumstances existed here; therefore, Kennedy did not have *Fourth Amendment* standing to challenge the search of the rental car.

The 4th, 5th, 6th and 10th circuits agree. The 8th and 9th circuits disagree.

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

*****

U.S. v. Randolph, 628 F.3d 1022 (8th Cir. 2011)

The court held that even if the search of the car were unconstitutional, Randolph had no standing to challenge the search. Since Randolph repeatedly disavowed any ownership interest in the car and failed to show that he had a legitimate expectation of privacy in the car, he is precluded from claiming that the search and seizure of the handgun from the car violated his rights.

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

*****

U.S. v. Correa, 653 F.3d 187 (3d Cir. 2011)

The court held that Correa did not have *Fourth Amendment* standing to challenge the search because he lacked an objectively reasonable expectation of privacy in the common-use stairwell of the apartment building.

The 2nd, 7th, 8th, 9th and 11th Circuits agree.

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

*****

Search Warrants

Camreta v. Greene, 131 S. Ct. 2934 (2011)

(consolidated with *Alford v. Greene*)

A child protective services worker and a police officer interviewed a nine-year-old girl at school regarding allegations that her father was sexually abusing her. The girl's mother sued Camreta and Deputy Greene claiming that the interview violated her daughter's *Fourth Amendment* rights since it was conducted without either a warrant or the parents' consent.

The Ninth Circuit Court of Appeals held that the interview violated the girl's *Fourth Amendment* rights, but that Camreta and Deputy Greene were entitled to qualified immunity. Camreta and Greene appealed the portion of the court's holding that they violated the girl's *Fourth Amendment* rights by conducting their interview without a warrant or the parents' consent.
Although Camreta and Greene prevailed by having received qualified immunity, the Supreme Court held, as a matter of procedure, that they had the right to appeal the Ninth Circuit's ruling on the *Fourth Amendment* issue.

However, the Supreme Court declined to rule on whether or not the girl's *Fourth Amendment* rights were violated in this case, finding the matter moot. The court noted the interview occurred nine years ago, the girl was now living in another state and she was about to graduate from high school. There was no chance that she would be seized in a school in the Ninth Circuit and questioned about allegations of sexual abuse. As a result, the Supreme Court vacated the Ninth Circuit's holding as to this issue, and the *Fourth Amendment* question remains unanswered.

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

*****

U.S. v. Riesselman, 646 F.3d 1072 (8th Cir. 2011)

Officers drafted an affidavit and application for a search warrant for the defendant's residence. The items sought in the search warrant were indicated by reference to Attachment 1, which included a list of documents, drug paraphernalia, weapons and other items.

The court held that a clear incorporation of Attachment 1, including a full list of items subject to seizure, and the presence of Attachment 1 with the search warrant at the search scene satisfied the *Fourth Amendment's* particularity requirement. Although a copy of Attachment 1 was not provided to Riesselman after the search concluded, this was of no consequence. A complete copy of the search warrant, including Attachment 1, was present at the time of the search, limiting the items the officers could seize and it was available for Riesselman to review.

The court also held there was no connection between the illegal search of Riesselman's person and the incriminating statements he subsequently made to the officers. The officers *Mirandized* Reisselman twice before they questioned him. After the officers found drugs in Riesselman's pockets, they moved him into the house to talk to him. There was no evidence to indicate that the illegal search was conducted in bad faith. While the officers had a search warrant for the house, it did not authorize a search of Riesselman's person. However, the focus of the officers'

questioning was not the drugs found on Riesselman, but other drug transactions and weapons in general. Riesselman's statements were obtained voluntarily under circumstances that demonstrated they were not a result of the illegal search.

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

*****

Anticipatory Search Warrant

U.S. v. Schwarte, 645 F.3d 1022 (8th Cir. 2011)

Schwarte argued that the anticipatory search warrant used to search his house was not valid because the triggering condition, the proper delivery of the package, never occurred. The court disagreed, holding that the anticipatory search warrant defined the triggering condition as the controlled delivery of the package containing the child pornography "to Steven Schwarte or any other occupant" at that address. When the undercover officer, posing as a mail carrier, handed the package to Schwarte's adult niece, and she accepted the package, delivery occurred and the triggering condition was satisfied.

Schwarte claimed that he did not knowingly receive the child pornography because he was asleep and completely unaware of the delivery of the package to his residence. Again the court disagreed, holding that that the crime of knowingly receiving child pornography does not require proof that the defendant be present and awake when the child pornography is delivered to his residence. It is sufficient that Schwarte knowingly set into motion the events, which resulted in his possession of the child pornography.

Here, Schwarte knowingly and repeatedly asked the undercover officer, posing as a minor, to send him various items of child pornography. He provided the undercover officer his address so she could mail those items to him. After his arrest, he told the officers that the items in package matched the items he requested from the undercover officer. The court found that Schwarte knew exactly what he ordered and affirmatively acted to have the materials delivered to his residence. Although he was asleep when the package arrived, Schwarte came into constructive possession of it once it was accepted by his niece.

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

*****

Detaining Occupants During Search Warrant Execution

U.S. v. Bailey, 652 F.3d 197 (2d Cir. 2011)

Officers had a search warrant for Bailey's apartment. While they were conducting surveillance prior to the execution of the search warrant, the officers saw Bailey come out of the apartment, get into a car and drive away. The officers followed Bailey's car for approximately one mile and conducted a traffic stop. The officers handcuffed Bailey, told him that he was being detained incident to the execution of the search warrant, and drove him back to the apartment. Bailey denied living in the apartment. After the officers found guns and drugs in the apartment, they arrested Bailey and found a key to the apartment in his pocket during the search incident to

arrest. Bailey argued that the key should be suppressed because the officers had detained him in violation of the *Fourth Amendment*.

In a case of first impression, the court held that the officers' authority under *Michigan v. Summers* to detain Bailey incident to a search of the apartment was not strictly confined to the physical premises of the apartment so long as the detention occurred as soon as practicable after Bailey left the apartment. The officers' decision to wait until Bailey had driven out of view of the apartment to detain him out of concern for their own safety and to prevent alerting others possible occupants was reasonable and prudent. His detention during the valid search of the apartment did not violate the *Fourth Amendment*.

The Fifth, Sixth and Seventh Circuits agree. The Eighth and Tenth Circuits have declined to extend *Summers* to allow officers to detain occupants, who have been seen leaving a residence subject to a search warrant, at a location away from that residence.

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

*****

U.S. v. Montieth, 662 F.3d 660 (4th Cir. 2011)

Officers obtained a warrant to search Montieth's home for marijuana, firearms and evidence of drug trafficking. The officers knew that Montieth lived with his wife and two young children. In an effort to minimize the trauma to Montieth's family as well as the safety risks of the search, the officers planned to detain Montieth away from his home and obtain his cooperation in executing the warrant.

While conducting surveillance, officers saw Montieth leave his home in his car. Officers pulled him over eight-tenths of a mile down the street. The officers handcuffed Montieth and placed him in the back of a police car. After an officer told him about the warrant, Montieth admitted to having marijuana in his home. When they arrived at Montieth's home, the officers allowed his wife and children to leave while they searched. The officers brought Montieth inside and advised him of his *Miranda* rights. Montieth waived his rights, made several incriminating statements, and identified locations in his home where the officers found marijuana and firearms.

In response to an argument made by Montieth, the court stated that the officers acted reasonably when they decided to detain Montieth a short distance from his home prior to executing the search warrant. The court refused to find that every detention incident to the execution of a search warrant must take place inside the home itself. Instead, the court considered whether the officers detained Montieth "as soon as practicable" after observing him leave his residence. In this case, the court determined that they had. However, the court was careful to state that not every detention that occurs away from a home to be searched will automatically be considered reasonable.

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

*****

Knock and Announce

U.S. v. Garcia-Hernandez, 659 F.3d 108 (1st Cir. 2011)

Officers obtained a search warrant for the defendant's house after they confirmed, through a confidential informant, that he possessed approximately thirty-five kilograms of cocaine. Officers drove an armored vehicle onto the defendant's front lawn, and then breached the front door with a battering ram. Other officers detonated noise-flash devices, causing windows in the residence to shatter. Eighteen officers participated in the operation. Officers ultimately found thirty kilograms of cocaine in the trunk of the defendant's car. The defendant argued that the cocaine should have been suppressed because the officers had violated the knock-and-announce rule by failing to alert the occupants before they forcibly entered the house.

The court, without ruling on whether the officers violated the knock-and-announce rule, held that even if the officers had, suppression of the evidence was not an available remedy. In Hudson v. Michigan, the Supreme Court held that the exclusionary rule is not applicable to knock-and-announce violations. The defendant argued that because of the officers' "Rambo-like" manner of entry, *Hudson* did not apply, and the evidence should have been suppressed. The court disagreed, holding that the rule in *Hudson* applies, even in situations where alleged violations of the knock-and-announce rule are accompanied by significant force.

The 7th and 9th Circuits agree.

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

*****

Bellotte v. Edwards, 629 F.3d 415 (4th Cir. 2011)

Officers suspected that Bellotte possessed child pornography. Detective Edwards obtained a search warrant and executed a late night, no-knock entry into his home. The warrant did not provide for a no-knock entry, but the officers later claimed that exigent circumstances justified this type of entry. The officers did not find any child pornography and no charges were ever filed against Bellotte or his wife.

As part of the *Fourth Amendment's* reasonableness requirement, police must knock and announce their presence before forcibly entering a residence. No knock entries may be reasonable if exigent circumstances exist. However, police must have a reasonable suspicion that knocking and announcing their presence under the particular circumstances would be dangerous, futile or would allow the destruction of evidence.

The court held that the officers' no-knock entry was not justified because they failed to offer any particularized basis to believe that someone in Bellotte's home would react violently to a knock and announce.

The suspicion that Bellotte possessed a single photograph, suspected to be child pornography, without more, did not automatically provide a particularized basis for believing there was danger

to the officers executing the warrant. Additionally, there was no indication that the Bellottes had any tendency to violence, and neither had a criminal record. The fact that the Bellottes each possessed a concealed carry weapons permit showed they were citizens in good standing who passed a background check. The court noted that a justifiable fear for officer safety must include more than a belief that a gun may be located within a home, but rather facts to indicate that someone inside the home might be willing to use it. The court also found that the officers involved had experience with no-knock warrants, and they could have sought one in this case. The court noted that after obtaining the warrant, the officers did not discover any new information that would have supported a no-knock entry.

The court held that the officers were not in entitled to qualified immunity stating, "A man of reasonable intelligence would not have believed that exigent circumstances existed in this situation."

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

*****

Particularity Requirement

U.S. v. Aguirre, 664 F.3d 606 (5th Cir. 2011)

Federal agents arrested Mendoza shortly after he drove away from his home and they recovered marijuana and cocaine from his car. The agents went back to Mendoza's home to conduct a knock and talk interview with the remaining occupants. After knocking on the door and announcing themselves, the agents received no verbal response but did see a person look through the window, then quickly retreat toward the back of the home. Fearing the destruction of drug evidence, the officers immediately entered the home without a warrant or consent. Once inside the home the agents saw marijuana and drug paraphernalia in plain sight. The agents secured the home and the occupants while they applied for a search warrant. After obtaining the search warrant, the agents searched Aguirre's cell phone that was lying in plain view on a bed, and discovered several incriminating text messages.

Aguirre argued that the search and seizure of her cell phone was improper because the warrant did not particularly describe it as one of the items to be seized. The court noted that while the *Fourth Amendment* requires that a warrant particularly describe the place to be searched and the person or thing to be seized, each item does not need to be precisely described in the warrant. The particularity requirement can be satisfied where a seized item is not specifically named in the warrant, but the functional equivalent of other items are adequately described. Here, the agents were authorized to search for items used to facilitate drug trafficking to include records, correspondence, address books and telephone directories. While this list did not include cell phones, the court held that cellular text messages, the directory and call logs of Aguirre's cell phone could be characterized as the functional equivalent of several items included in the search warrant such as: correspondence, address books and telephone directories. Aguirre's cell phone served as the equivalent of records and documentation of sales or other drug activities and as such, the agents lawfully searched it under the authority of the search warrant.

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

*****

Stale Information

U.S. v. Trinh, 665 F.3d 1 (1st Cir. 2011)

The court held that a one to two month gap between information included in the search warrant affidavit regarding criminal activity and the issuance of the search warrant did not render the warrant stale. Here the facts in the affidavit pointed to a large-scale marijuana cultivation operation that targeted items, which were likely to be of use to the operation for a considerable amount of time.

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

*****

Automobile Exception (mobile conveyance exception)

U.S. v. Polanco, 634 F.3d 39 (1st Cir. 2011)

An undercover officer bought heroin from Contreras at the food court at a mall. Contreras had arrived with Polanco, and after the sale, they left in Polanco's car. A week later the undercover officer arranged to meet Contreras to buy more heroin. Polanco and Contreras drove to the meeting location in Polanco's car again. Contreras called the undercover officer and told him "I have the stuff; you better come and get it." Officers arrived and arrested both men, but they did not find any heroin on them. The officers drove Polanco's car to their office, conducted a warrantless search of it, and found heroin in a hidden compartment. Based on this discovery the officers obtained a search warrant for Polanco's apartment where they found more heroin, drug paraphernalia, and some of the marked currency from the previous drug deal.

The court held that the officers' warrantless search of Polanco's car was lawful under the automobile exception to the warrant requirement. At the time of the search, the officers had probable cause to believe that Polanco's car contained evidence of a crime. Additionally, the court reiterated that as long as the officers had probable cause it did not matter that they moved the car and searched it at their office or that they had time to obtain a warrant before they conducted their search.

The court disagreed with Polanco's assertion that the United States Supreme Court's holding in *Arizona v. Gant* limited the automobile exception. *Gant* dealt exclusively with the search incident to arrest doctrine in the vehicle context. Nothing in *Gant* changed the automobile exception, and every circuit that has considered the issue has ruled this way.

The Fourth, Fifth, Seventh, Eighth, and D.C. circuits agree.

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

*****

U.S. v. Clark, 657 F.3d 578 (7th Cir. 2011)

Officers arrested McCormick for a drug offense and she agreed to provide them with information on Clark, who was her supplier. McCormick gave the officers Clark's first name, a physical description of him and the truck he drove, as well as the route he always took when delivering drugs to her house. Officers monitored several telephone calls between McCormick and Clark on the day Clark was supposed to arrive at her house with ten ounces of cocaine. Officers positioned along Clark's expected travel route confirmed his physical description and description of his truck previously provided by McCormick. When Clark pulled into McCormick's driveway, officers ordered him out of the truck, handcuffed him and placed him in the back of a police car. A drug-sniffing dog alerted to the presence of drugs in the truck and officers found ten ounces of cocaine inside a plastic bag hidden behind a dashboard panel.

The court held that the officers were entitled to search Clark's truck without a warrant under the automobile exception to the *Fourth Amendment*. The court found that McCormick was not an ordinary informant because she had bought large quantities of drugs directly from Clark on multiple occasions. Additionally, the officers corroborated the most significant details of her story. They listened in on her phone call to Clark and heard her place an order for ten ounces of cocaine to be delivered by Clark himself two days later. Two days later Clark appeared at McCormick's house, driving a truck she had previously described, having driven the route she said he would take. With this information, the officers had probable cause to believe that Clark had arrived at McCormick's house to deliver cocaine.

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

*****

U.S. v. Hambrick, 630 F.3d 742 (8th Cir. 2011)

An informant, who had provided accurate information three times in the past, told police that Hambrick was in town to sell crack cocaine. He claimed that Hambrick would be driving a dark colored car, with Illinois license plates, and a missing gas-tank door, and that he would be going to a specific area of town. The informant told police that in the past he had seen Hambrick remove crack cocaine from his buttocks and distribute it to others.

An officer saw Hambrick driving a vehicle that matched the description given by the informant in the area of town where the informant claimed he would be. The officer confirmed that Hambrick had a suspended driver's license and conducted a traffic stop. After arresting Hambrick for driving under suspension, officers searched his car and found marijuana residue and a digital scale covered in cocaine residue. Officers strip searched Hambrick at the jail and recovered crack cocaine from between his buttocks.

The court held that the officer lawfully stopped Hambrick because he was driving with a suspended driver's license. The search of Hambrick's vehicle was not a valid search incident to arrest under *Gant* since Hambrick was handcuffed in the back of a patrol car; therefore, he had no access to his vehicle while it was being searched. In addition, since Hambrick was arrested for driving under suspension, there was no reason to believe that his vehicle contained evidence of that offense. However, the officers had probable cause to search Hambrick's vehicle under the automobile exception to the warrant requirement. The informant had provided reliable

information in the past; he supplied detailed information about Hambrick's vehicle and he correctly predicted where Hambrick would be driving.

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

*****

U.S. v. Ewing, 638 F.3d 1226 (9th Cir. 2011)

An officer stopped a car for having an expired registration. While he was standing by the car, the officer saw folded United States currency partially hidden between the weather stripping on the passenger-side door and the window. The officer removed the bills and after examining them, determined that they were counterfeit since the serial numbers on some of the bills were identical.

The defendant argued that he had a reasonable expectation of privacy in the information concealed inside the folded bills and that the officer unlawfully removed, unfolded and examined the bills.

The court held that the removal of the bills and their examination by the officer was valid under the automobile exception to the warrant requirement. The officer identified several factors that reasonably caused him to suspect that the money was related to drug trafficking and that a search of the car would reveal evidence of a crime. Before removing the bills, the officer learned that one of the occupants was on parole. Additionally, this person was nervous and spoke loudly and rapidly which indicated that he was under the influence of a stimulant. Finally, the bills were located in a place that suggested an effort to conceal their presence and the officer knew that drug couriers used door compartments and similar hiding places to transport contraband and cash.

Although the bills were not drug proceeds, the totality of the circumstances justified the officer's belief that they were, and that there was a fair probability that a search of the car would yield evidence of a crime.

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

*****

U.S. v. Rodgers, 656 F.3d 1023 (9th Cir. 2011)

An officer conducted an investigatory stop, suspecting that Rodgers was driving a stolen vehicle. After determining that the vehicle was not stolen, the officer asked Rodgers, who was fifty-one years old, what his relationship was to his female passenger. The female passenger appeared to be twelve to fourteen years old, the area was known for juvenile prostitution and it was 3:30 a.m. Rodgers told the officer that the female passenger was just a friend who needed a ride. The passenger told the officer that she was nineteen years old, but that she did not have any identification on her. She gave the officer a date of birth that was consistent with her claim that she was nineteen years old. When the officer ran a check on her information, he learned that there was an outstanding arrest warrant for a person with the same name, and month and day of birth, but not the same year. The officer, unsure if the passenger was the same person on the warrant, decided to search the vehicle in an attempt to locate any identification for her. The

officer never found any identification however; he did find methamphetamine, drug paraphernalia, and an illegal firearm and arrested Rodgers. The passenger was arrested on the outstanding warrant.

The court held that the officers did not have probable cause to support a warrantless search of Rodgers's car under the automobile exception to the warrant requirement. The officer did not identify any fact or observation that caused him to believe that the female passenger had any identification and that it was inside Rodgers's car. The officer did not see the passenger trying to hide anything inside the car, she made no furtive movements, and there was no paper or objects appearing to be identification in plain view. Although officer never recovered any identification for the passenger, he still arrested her on the warrant when he was initially reluctant to do so. There was no indication that the officer searched the passenger herself, the most likely place to find identification, before they searched Rodgers's car.

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

*****

U.S. v. Polly, 630 F.3d 991 (10th Cir. 2011)

Officers involved in a narcotics surveillance operation conducted a traffic stop on Polly after they saw him commit two minor traffic offenses. Even if the officers were primarily interested in furthering their drug investigation, the court held that the traffic stop was valid because the officers saw Polly commit two traffic violations.

After arresting Polly, officers drove his vehicle to the police station where they searched it and discovered crack cocaine, and other drug paraphernalia. The court held that the search of the vehicle was justified by the automobile exception to the warrant requirement. Officers had previously purchased drugs from Polly as part of a controlled buy, Polly appeared to be fleeing after he saw the officers during their surveillance, which resulted in his two traffic violations, and the officers had just found crack cocaine on him after he got out of this vehicle.

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

*****

U.S. v. Medina-Gonzalez, 437 Fed. Appx. 714 (10th Cir. 2011) (unpublished)

The defendant's car broke down and officers had it towed to a garage at the defendant's request. At the garage, the officers ran a drug-sniffing dog around the car and he alerted to the presence of drugs. Officers conducted a warrantless search of the car and discovered illegal drugs hidden in the spare tire.

The court held that the automobile exception applies to temporarily immobile vehicles when the immobility is caused by mechanical problems. Additionally, the positive alert from the narcotics detection dog established probable cause to search the vehicle. Once probable cause was established, the officers were entitled to search the entire vehicle including the trunk and all containers that could contain contraband.

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

*****

U.S. v. Lanzon, 639 F.3d 1293 (11th Cir. 2011)

The court held that the officers had probable cause to search the defendant's vehicle under the automobile exception to the warrant requirement. The defendant participated in online chat-room conversations, with an undercover police officer, in which he expressed a desire to have sex with the undercover officer's fourteen-year-old "daughter". He agreed to meet the officer at a specific time and place and to bring condoms and peppermint candy for the daughter.

The defendant drove his vehicle to the designated meeting place at the agreed-upon time and approached the officers who were posing as father and daughter. After arresting the defendant, the officer searched him but found no condoms or peppermint candy on his person. The officer used the defendant's keys to enter and search his vehicle. Inside the vehicle, he found condoms and a mint-flavored lubricant. Based on the totality of the circumstances, there was a fair probability that evidence of a crime would be found in the defendant's vehicle.

Additionally, it was irrelevant that the officer characterized the search of the defendant's vehicle in his incident report as an inventory search. An officer's subjective reasons for a search do not control the legal justifications for his actions, as long as objective circumstances justify the search. Here, the officers had probable cause to search the defendant's vehicle in accordance with the automobile exception.

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

*****

Border Searches

U.S. v. Cotterman, 637 F.3d 1068 (9th Cir. 2011)

In deciding the issue for the first time, the court held that the seizure of a laptop computer that began at the border and ended two days later in a government forensic laboratory, one hundred seventy miles away, fell within the border search doctrine.

The Supreme Court has recognized that the government possesses inherent authority to seize property at the international border without reasonable suspicion, probable cause or a warrant, in order to prevent the introduction of contraband into the country. Despite its name, a border search need not take place at the actual international border. The border search doctrine applies to searches that occur hundreds or thousands of miles from the physical border.

Additionally, the court stated that the border search doctrine is not so rigid as to require the government to equip every entry point, no matter how desolate or infrequently traveled, with inspectors and sophisticated forensic equipment capable of searching whatever property an individual may wish to bring into the United States. As long as property has not been officially cleared for entry into the United States and remains in the control of the government, any further search is simply a continuation of the original border search.

While the initial seizure and preliminary search of Cotterman's computer was a valid border search, the court stated that the continued detention of the computer could have become unreasonable under the *Fourth Amendment* if the government retained it beyond the time reasonably required to conduct a complete forensic search.

In this case, the government detained Cotterman's computer for forty-eight hours. The court held that this was reasonable since the complexity of Cotterman's computer, specifically password-protected files, required the government to transport it to a forensic computer laboratory so an adequate search could be conducted.

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

*****

Reasonable Suspicion During a Routine Border Search

U.S. v. De Jesus-Viera, 655 F.3d 52 (1st Cir. 2011)

Without deciding whether the search was a routine border search, the court held that the U.S. Customs and Border Protection (CBP) officers had reasonable suspicion that the defendant was engaged in criminal activity. As a result, the officers were justified in drilling into the secret compartment in his vehicle that contained heroin and cocaine.

The court noted the escalating sequence of events in which each step taken by the CBP officers led reasonably to the next. The defendant was visibly nervous and avoided eye contact with each of the officers to whom he spoke. The defendant told the officers that he had recently purchased the vehicle, a recognized indicia the vehicle may have been used for drug trafficking. The defendant gave three different stories concerning his travel history when cross-interviewed by the CBP officers. The "buster" scan of the defendant's vehicle yielded abnormal readings, indicating dense objects underneath the floor of the vehicle. A search of the vehicle's interior found recent alterations or repairs contrary to the defendant's prior statement that he had made no recent repairs. An officer's view of the underside of the vehicle showed an abnormal bulge underneath the area where the alterations to the car were found. Finally, a drug-sniffing canine alerted to the presence of narcotics in the vehicle.

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

*****

Computers and Electronic Devices

U.S. v. Hotaling, 634 F.3d 725 (2d Cir. 2011)

The defendant created child pornography images by taking the heads of minor females that he "cut" from their original non-pornographic photographs and superimposing them over the heads of images of nude and partially nude adult females engaged in sexually explicit conduct.

The court held that "morphed" child pornography that utilizes the face of a child and the body of an adult is not protected expressive speech under the *First Amendment*, therefore the defendant's indictment under *18 U.S.C. § 2256(8)(C)* was constitutional.

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

*****

U.S. v. Stabile, 633 F.3d 219 (3d Cir. 2011)

United States Secret Service agents and Sheriff's Department investigators, suspecting that Stabile had passed counterfeit checks, went to his house to question him. Debbie Deetz answered the door and gave the agents consent to search the house. Deetz showed the agents around the house and consented to the seizure of six computer hard drives and several DVDs bearing sexually suggestive labels that caused the agents to believe they contained child pornography. While the agents were conducting their search, Stabile arrived home and attempted to revoke Deetz's consent to the search the house. The agents left shortly thereafter; however, Stabile did not request that they return the hard drives or DVDs.

The USSS agents took Stabile's computer hard drives to their office and the deputies took the DVDs back to the sheriff's department. An immediate examination of the DVDs revealed that they did not contain child pornography, but this was not communicated to the USSS agents.

The USSS case agent did not apply for a warrant to search the hard drives for three months because shortly after their seizure he was assigned to a protective detail. Eventually the USSS agent obtained a state search warrant, which authorized a search of the hard drives for evidence of financial crimes and possession of child pornography. Before the search of the hard drives occurred, the USSS agent learned that the DVDs, which were the sole basis for their application to search for child pornography, did not contain child pornography. The forensic agent was told to conduct a forensic examination of the hard drives, but to confine his search for evidence of financial crimes and not child pornography.

During his search of one of the hard drives, the forensic agent discovered a folder entitled "Kazvid." The agent understood this folder to reference "Kaaza," a peer-to-peer file sharing program, which based on his experience could contain evidence of any type of crime. The agent highlighted the "Kazvid" folder, which allowed him to view a list of file names contained in the folder. The agent saw a list of file names with file extensions indicating video files and file names suggestive of child pornography. Although the agent believed that these files contained child pornography, and not evidence of financial crimes, he opened twelve different video files from within the "Kazvid" folder. After confirming that these files contained child pornography, the agent contacted a prosecutor and stopped his search of the hard drive.

The USSS agent obtained a federal search warrant for child pornography for that particular hard drive only. The federal search warrant was based solely on the sexually suggestive names on the files in the "Kazvid" folder and not on the contents of the twelve files that the forensic agent had viewed. The search warrant affidavit did not mention that the forensic agent had opened any files in the "Kazvid" folder.

During the execution of the federal search warrant, a different forensic agent found numerous child pornography files on the hard drive he examined. However, by mistake, the federal search warrant authorized the search of one of the other hard drives seized by the agents and not the hard drive the original forensic agent had examined which contained the "Kazvid" folder.

Stabile filed a variety of motions seeking to suppress evidence discovered by the agents.

The court held that the investigators' warrantless search of the house did not violate the *Fourth Amendment* because Deetz voluntarily consented to the search. Deetz had authority to consent to a search of the house, because as a co-habitant, she used the property along with Stabile and exercised joint access and control over the house. Deetz's mistaken belief that she was married to Stabile did not change the analysis because an unmarried cohabitant has authority to consent to a search of shared premises.

The court found that Deetz had the authority to consent to the seizure of the six computer hard drives. The hard drives were not password protected and they were located in common areas of the home where she had access to them.

Stabile argued that even if Deetz voluntarily consented to the search and seizure of the hard drives, the seizure of six entire hard drives was unreasonable. He claimed that in addition to containing information potentially relating to financial crimes, the hard drives contained a great deal of unrelated personal information. The court held that the seizure of the six entire hard drives was reasonable. First, Deetz did not limit the scope of her consent to search them in any way. Second, a broad seizure was required because evidence of financial crimes could have been found in any location of the six hard drives, and this evidence very likely would have been disguised or concealed somewhere on the hard drive. Third, an on-site search of the hard drives would not be practical since computer searches are time consuming and require a trained forensic investigator and a controlled environment.

The court held the three-month delay in obtaining the state search warrant was reasonable under the circumstances since the lead case agent was assigned to a Secret Service Detail protecting the President and other officials shortly after seizing the hard drives. Additionally, Stabile did not request the return of the hard drives until eighteen months after their seizure, and Deetz had obtained a replacement computer for Stabile to use for his work the day after the hard drives were seized.

The court held that forensic agent's decision to open the "Kazvid" folder and view the file names during the execution of the state search warrant was objectively reasonable under the *Fourth Amendment* because criminals can easily alter file names and file extensions to conceal contraband. The forensic agent engaged in a focused search to ensure that he complied with the state search warrant and followed procedures, such as imaging the hard drive, checking for corrupted files, and conducting a "hash value analysis" to ensure that he did not conduct a general search. The court noted it was irrelevant that the agent may have suspected that the "Kazvid" folder contained child pornography. The "Kazvid" folder required further investigation because it could have contained evidence of financial crimes.

Once the forensic agent lawfully opened the "Kazvid" folder, the court held that the file names were in plain view so that any screen print he made of them constituted a valid seizure. First, the forensic agent lawfully opened the "Kazvid" folder. Second, the incriminating nature of the evidence, the file names, was immediately apparent. Finally, the forensic agent had a lawful right to access the hard drive because the state search warrant authorized a search of it for evidence of financial crimes.

The court declined to decide whether the plain view doctrine applied to the examination of the contents of the individual video files because the independent source doctrine applied to their contents. Even assuming the original forensic agent illegally viewed the contents of the files, it did not taint the warrant application the USSS agent presented to the magistrate because it did not mention the contents of the "Kazvid" folder, but only the sexually suggestive names of the files within it, which the forensic agent lawfully viewed.

Finally, the court held that the inevitable discovery doctrine applied to the evidence discovered during the federal search warrant. Even though the agents made mistakes, proper execution of procedures would have uncovered evidence of child pornography. Additionally, the fact that the agents attempted to secure state and federal search warrants at every step of the search indicated that there would be little deterrence benefit gained by suppressing the evidence.

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

*****

U.S. v. Miknevich, 638 F.3d 178 (3d Cir. 2011)

The court held that probable cause existed to search the Miknevich's computer for child pornography solely based on a sexually explicit file name and its related electronic identification, or SHA1 value, which the court equated to a digital fingerprint.

Although probable cause was established in this case based on the highly descriptive file name and SHA1 value, the court commented, "it remains better practice for an applicant seeking a warrant based on images of alleged child pornography to append the images or to provide a description of the images sufficient to enable the magistrate to determine independently whether probable cause exists."

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

*****

U.S. v. Blauvelt, 638 F.3d 281 (4th Cir. 2011)

The court held that there was ample evidence in the search warrant application for the magistrate to find probable cause that Blauvelt's home and computer contained child pornography.

The investigating officers corroborated the ex-girlfriend's information by viewing the images of child pornography Blauvelt sent as well as the inbox for his email account to which she still had access. Officers viewed Blauvelt's email inbox and saw that the digital picture files had been sent from the same cell phone account that the ex-girlfriend identified as belonging to Blauvelt.

Click HERE for the court's opinion.

*****

U.S. v. Curtis, 635 F.3d 704 (5th Cir. 2011)

In July 2007, officers obtained an arrest warrant for Curtis after he made a false statement on a credit application he submitted to a car dealership. When the officers arrested Curtis he was

driving his vehicle and talking on his cell phone. After he pulled over, Curtis placed the cell phone on the car's center console. An officer took the phone out of the car and began looking at the text messages on it. Later, while Curtis was being processed at the jail the officer resumed looking at the text messages on the cell phone.

The court held that the search of the cell phone was constitutional since it took place incident to a lawful arrest and it was within Curtis's reaching distance when the officers arrested him. The court followed *U.S. v. Finley, 477 F.3d 250 (5th Cir.)*, which held that the police could search the contents of an arrestee's cell phone incident to a valid arrest when it is recovered from the area within an arrestee's immediate control.

Curtis argued that the officer's search of the cell phone was unlawful in light of the Supreme Court's holding in *Gant*, decided in 2009, which held in part that the police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of arrest."

The court refused to apply the rule announced by *Gant* to a search incident to arrest that occurred before *Gant* was decided. Additionally, the court stated that even if it had ruled the search of the cell phone was unlawful, it would have refused to suppress the text messages under the good-faith exception to the exclusionary rule. The court noted that the good-faith exception applies to searches that were legal at the time they were conducted, but later determined to be unconstitutional by a subsequent change in the law.

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

*****

U.S. v. Lucas, 640 F.3d 168 (6th Cir. 2011)

The court held that the search of Lucas's computer fell within the scope of the consent to search the home for narcotics-related evidence. The officers had already found narcotics related evidence that justified their limited search for the same or similar drug-related records or photographs on the computer. Additionally, Lucas saw the officer searching his computer and he did not object, clarify the scope of his consent or withdraw his consent. There is no evidence that the officer exceeded the scope of Lucas's consent to search for evidence related to a narcotics violation. When the thumbnail images appeared on the screen, the officer enlarged just a few of them to be certain he was looking at child pornography. After he was convinced of the unlawful nature of the images, the officer immediately stopped his search so a search warrant could be obtained.

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

*****

U.S. v. Flyer, 633 F.3d 911 (9th Cir. 2011)

The court reversed Flyer's convictions for attempted transportation and shipping of child pornography, holding that *18 U.S.C. § 2252 (a)(1)* required actual transportation of child pornography across state lines. A defendant's mere connection to the Internet does not satisfy

the jurisdictional requirement where there is undisputed evidence that the files in question never crossed state lines.

The government conceded that the two files that the officer downloaded from the defendant's computer did not travel across state lines; therefore, the officer's intrastate download of files from Flyer's computer could not by itself provide sufficient evidence to convict Flyer of attempting to cause those files' interstate or foreign movement.

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

*****

U.S. v. Stanley, 653 F.3d 946 (9th Cir. 2011)

The court held that Stanley had no reasonable expectation of privacy in a computer he jointly owned and used with his girlfriend that was in her possession for two years while he was in prison. As a co-owner and common user, she had the authority to consent to a search of the computer and its non-password protected files. When Stanley gave her the computer, he assumed the risk that she would allow someone else to examine it.

Even if the girlfriend did not have the actual authority to consent to a search of the computer, it was reasonable for the officers to believe that she had the apparent authority to consent to its search.

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

*****

U.S. v. Krupa, 658 F.3d 1174 (9th Cir. 2011)

A woman contacted the military police after her ten-year-old daughter and five-year-old son, who were living on base with her ex-husband, had not arrived at the train station as previously arranged. Military police went to the home and discovered that the father, a service member, was out of the country. Krupa, a civilian, told police that he was taking care of the children while their father was away. The home was in disarray and police were concerned when they saw thirteen computer towers and two laptops in the home. Krupa gave the officers consent to seize the computers.

The next day, during the forensic examination of one of the computers, the investigator found an image he suspected to be child pornography along with a sexually suggestive website label. However, before the investigator could finish searching all of the computers he was hospitalized. The next day Krupa revoked his consent to search the computers. The investigator obtained a search authorization from the Military Magistrate and found twenty-two images of child pornography. A subsequent search warrant obtained by the FBI uncovered additional child pornography images and movies.

The court held that Military Magistrate could have reasonably concluded that there was probable cause to issue the search authorization. The investigators assertion that he had found an "image of suspected contraband," implicitly referring to child pornography, in computers seized from a

home for which there had been a report of child neglect, and where there was no custodial parent present, created a fair probability that contraband or evidence would be found in the computers.

Editors Note: This opinion replaced the opinion issued on February 7, 2011 as reported in the March 2011 issue of The Informer.

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

*****

GPS Tracking Devices

U.S. v. Cuevas-Perez, 640 F.3d 272 (7th Cir. 2011)

Officers suspected that the defendant was involved in a drug distribution operation. Without obtaining a warrant, an officer attached a GPS tracking device to the defendant's Jeep while it was parked in a public area. The GPS device sent the officer text message updates of its location every four minutes. The defendant went on a road trip and the officer monitored the defendant's location, until the batteries in the GPS device began to run low after approximately sixty hours. Other officers located Cuevas-Perez's vehicle, conducted a traffic stop and eventually found heroin hidden inside it.

The court held that GPS tracking is not a search under the *Fourth Amendment* and refused to suppress the contraband recovered by the officers. GPS surveillance utilizes technology to substitute for an activity, specifically, following a car on a public street, which is not a search under the *Fourth Amendment*.

The court did not explicitly reject the reasoning outlined by the District of Columbia Circuit in *U.S. v. Maynard, 615 F.3d 544 (D.C. Cir. 2010)* which held that continuous GPS tracking for twenty-eight consecutive days constituted a search. The court noted in this case that the GPS tracking covered a single trip, was not lengthy, and it did not risk exposing the intimate details of the defendant's life for a long period.

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

*****

U.S. v. Hernandez, 647 F.3d 216 (5th Cir. 2011)

The court held that Hernandez lacked standing to challenge the placement of the GPS device on his brother's truck. The truck was registered to the brother and Hernandez was not a regular driver. Even if Hernandez had standing, there was no *Fourth Amendment* violation because no search or seizure occurred. The officer attached the device to the trucks undercarriage with a magnet while it was parked on a public street. Additionally, the device did not affect the truck's driving qualities or draw power from the truck's engine or battery.

The court further held that the government's use of the hidden GPS device to track the truck's movements as it drove across the country was not a search within the meaning of the *Fourth Amendment*.

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

*****

Consent Searches

U.S. v. Reynolds, 646 F.3d 63 (1st Cir. 2011)

Officers went to Bradford's home after he complained that Reynolds had been staying with him, but failed to pay her share of the rent. Bradford told the officers that Reynolds possessed two firearms. The officers entered Reynolds's bedroom and asked her if she had any guns. Reynolds answered yes and pointed to the headboard of the bed behind her. The guns were not visible. One of the officers went to the headboard, opened a compartment within it, and removed two guns. After learning that Reynolds had been involuntarily committed to a mental hospital a month prior, the officers seized the guns and left. Reynolds was later charged with two firearms offenses.

The court held that Reynolds gave the officer implied consent to search the headboard after she gestured to the headboard when answering "yes" to whether she had any guns. This gesture demonstrated that Reynolds understood the officer intended not only to learn of the existence of the weapons, but also to find them.

Additionally the court held that Reynolds's consent was voluntary. The search was minimally coercive and that there was no evidence that Reynolds was affected by any underlying illness during the search. She was responsive, lucid and cooperative with the officers during the encounter.

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

*****

U.S. v. Chaney, 647 F.3d 401 (1st Cir. 2011)

While detained and handcuffed, Chaney consented to a search of his pants pocket for his identification. The officer placed his hand in Chaney's pocket and first removed a plastic bag containing crack cocaine. Then he reentered Chaney's pocket and removed a social security card.

Chaney argued that the expressed object of the consent search was the retrieval of his identification, and that the removal of the plastic bags fell outside the scope of his consent. The court disagreed, holding that it was objectively reasonable for the officer to believe that the scope of consent extended to the removal of the plastic bag from Chaney's pocket in the course of searching for his identification.

The court also held that Chaney's consent was obtained voluntarily although he was handcuffed when he provided it.

Finally, the officers' entry into the motel room with guns drawn and their handcuffing of Chaney was reasonable. Neither the use of handcuffs nor the drawing of weapons automatically transforms a valid *Terry* stop into a de facto arrest. The circumstances of the raid gave rise to a

reasonable concern for officer safety that justified the use of handcuffs and drawn handguns. The unexpected presence of Chaney, in a darkened motel room with two suspected drug dealers who ignored repeated orders to drop to the ground, justified the officers' use of handcuffs during the investigative detention.

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

*****

U.S. v. Lucas, 640 F.3d 168 (6th Cir. 2011)

Police received information from a reliable confidential informant that Lucas was growing marijuana inside his home. Two officers went to Lucas's home to conduct a knock and talk interview. Lucas invited the officers inside, where they immediately smelled the odor of burnt marijuana and saw a marijuana pipe on a shelf. One of the officers asked Lucas to sign a consent form to allow them to search the house for narcotics related evidence. After Lucas hesitated, the officer told him that he had probable cause to obtain a search warrant for the house and that he planned to apply for one. Lucas then signed the consent to search form.

The officers found marijuana plants in a closet and a digital camera on a stand near the closet. An officer reviewed the digital images on the camera because he knew that marijuana growers often took photographs of their plants as they were growing. After finding images of the marijuana plants on the digital camera, the officer noticed a laptop computer and a handwritten marijuana plant "grow-chart" on a desk. The officer searched the laptop for images of the marijuana plants and for any spreadsheet similar to the handwritten "grow-chart." Lucas did not object to the search of the computer or try to withdraw his consent to search. The officer searched a thumb-drive that was connected to the computer and found thumbnail images of child pornography. He viewed six or seven images to confirm that he had discovered child pornography, and then he stopped his search so they could obtain a search warrant for the computer.

The court first noted that the knock and talk procedure used by the police is a legitimate investigative technique aimed at obtaining a suspect's consent to search. The court held that after Lucas invited the officers into his home, their observations, coupled with the information provided by the reliable confidential informant, provided probable cause to search the home for narcotics-related evidence. The officer's warning that a search warrant would be sought if Lucas did not grant consent to search was a proper statement that did not taint the subsequent search.

The court found that Lucas's consent to search was not obtained by coercion. The officer clearly told Lucas that he could refuse to consent to the search and that he could ask the officers to stop the search at any time. His initial hesitation when first asked to give consent to search indicated that Lucas knew he had a right to refuse the search and that he contemplated exercising that right.

The court held that the search of Lucas's computer fell within the scope of the consent to search the home for narcotics-related evidence. The officers had already found narcotics related evidence that justified their limited search for the same or similar drug-related records or photographs on the computer. Additionally, Lucas saw the officer searching his computer and he did not object, clarify the scope of his consent or withdraw his consent. There is no evidence

that the officer exceeded the scope of Lucas's consent to search for evidence related to a narcotics violation. When the thumbnail images appeared on the screen, the officer enlarged just a few of them to be certain he was looking at child pornography. After he was convinced of the unlawful nature of the images, the officer immediately stopped his search so a search warrant could be obtained.

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

*****

U.S. v. Little, 2011 FED App. 0412N (6th Cir. 2011)

Little was suspected of taking nude photographs of a fourteen-year-old girl with his cell phone camera. An officer located Little at his mother's house, and while standing on the front porch asked him to come to the police station to discuss the matter. Little asked if he could put on a shirt first. The officer agreed and followed Little into the house without asking permission to enter. Once inside the house, Little gave the officer his cell phone, which contained the nude photographs of the fourteen-year-old girl.

The court held that the officer entered the house in violation of the *Fourth Amendment.* There were two ways that the officer could have lawfully entered the house: by obtaining a search warrant or by requesting and obtaining consent from Little. The court followed the Eleventh Circuit, which has held that consent cannot be inferred, by the simple act of disengaging from conversation with an officer and walking into a house. Because of the unlawful entry, the evidence obtained from the cell phone should have been suppressed.

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

*****

U.S. v. Johnson, 656 F.3d 375 (6th Cir. 2011)

Officers conducted a knock-and-talk at a residence after they received a tip that the occupants possessed illegal drugs. Johnson and his wife were separated, but he had been living at the residence off and on for several months. Johnson refused to consent to a search of the residence but his wife did consent. Relying on the wife's consent the officers searched a bedroom that Johnson and his wife shared and found counterfeit currency and illegal drugs.

The court held that the search of the bedroom was unreasonable as to Johnson. Johnson had a reasonable expectation of privacy in the bedroom he shared with his wife. His express objection to the search was sufficient to render the search of the bedroom unreasonable as to him, notwithstanding the consent given by his wife.

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

*****

U.S. v. Beauchamp, 659 F.3d 560 (6th Cir. 2011)

Officers were patrolling an area near a housing project at 2:30 a.m. because they had received complaints about illegal drug activity taking place there. An officer approached Beauchamp, who was standing with another individual. Beauchamp walked away without making eye contact with the officer. The officer radioed another officer and told him to stop the "suspicious subject." The officer saw Beauchamp two blocks away, ordered him to stop, and then told him to walk around the fence toward him. Beauchamp complied. The officer began to frisk Beauchamp for weapons. During the frisk, he asked Beauchamp if he could search him more thoroughly and Beauchamp consented. The officer found a plastic baggie containing crack cocaine down the back of his pants.

The court held that the officer did not have reasonable suspicion to detain Beauchamp; therefore, the stop was an illegal seizure that violated the *Fourth Amendment*. A person is seized when an officer restrains his freedom of movement by force or show of authority. In this case, the officer seized Beauchamp once he ordered him to stop and walk around the fence and Beauchamp complied.

In order to detain Beauchamp, the officer needed to have reasonable suspicion that he was engaged in criminal activity. The court held that the totality of the circumstances did not provide the officer with that reasonable suspicion. Although the officer saw Beauchamp in an area where there had been complaints of drug activity, he did not see him engage in any behavior consistent with buying or selling drugs. The officer saw Beauchamp interact with another person then walk away. Walking away from an officer, by itself, does not create reasonable suspicion.

The court further held that Beauchamp's consent to search was not obtained voluntarily. Beauchamp consented to the search while the officer was still conducting his frisk, and after another officer had arrived. The court stated that a person is not in a position to say no to a police officer whose hands are still on his body while another officer is standing a few feet away. The officer's search of Beauchamp was unreasonable under the *Fourth Amendment*.

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

*****

U.S. v. Knope, 655 F.3d 647 (7th Cir. 2011)

The court held that Knope's consent to search his home and computer was obtained voluntarily. Knope claimed that he was coerced into signing the consent form after the officer told him if he did not consent that there were other ways she could search his computer. If an officer's expressed intent to obtain a warrant is genuine, and not merely a pretext to induce consent, it does not invalidate that consent. Here, Knope had already admitted that he viewed and downloaded child pornography on his home computer and that he had been using his computer when he engaged in online chats with the undercover officer. Therefore, the officer had a legitimate belief that she could obtain a warrant to search Knope's residence and computer.

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

*****

U.S. v. Vinton, 631 F.3d 476 (8th Cir. 2011)

Vinton allowed officers to enter his home and search for a burglary suspect who had reportedly been there earlier in the day. Vinton asked an officer if their investigation had anything to do with guns. After the officer said yes, Vinton told him there were some guns in a closet and gave the officer permission to seize them, and to search the house for other weapons and drugs. The officers found several stolen firearms and a sawed-off shotgun in a bedroom.

The court held that Vinton voluntarily consented to the search of his house. The officers did not raise their voices, draw their guns, or otherwise threaten or coerce Vinton. Vinton was unrestrained and rational when he consented to the searches.

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

*****

U.S. v. Quintero, 648 F.3d 660 (8th Cir. 2011)

The court agreed with the lower court's finding that the defendant did not voluntarily consent to the search of her motel room and that the drug evidence was properly suppressed. It was not improper for the lower court to consider the fact that the defendants were rousted out of bed at 10:30 p.m. by a number of officers and security personnel. The time of day during which a search takes place is a relevant factor in analyzing its voluntariness.

In this case, the fact that the officers inexplicably delayed their investigation, for over five hours, culminating in a nighttime knock-and-talk designed to obtain a full-scale search, was relevant to the court's determination. The officers' rousting the defendants from bed at night helped create a more coercive atmosphere and the court properly considered this in its analysis.

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

*****

U.S. v. Rogers, 661 F.3d 991 (8th Cir. 2011)

An officer suspected that Rogers was involved in a series of thefts, one of which involved a rifle. He learned that Rogers was staying with Tina Spriggs in her apartment. The officer went to the apartment and asked Rogers for consent to search. Rogers declined, telling the officer that the apartment belonged to Spriggs. Spriggs told the officer she was not sure whether she wanted to consent or not. While outside the apartment, the officer asked Rogers if there were any weapons in the apartment. Rogers told the officer that he had a hunting rifle that he had borrowed from a friend and he agreed to show it to the officer. The officer followed Rogers into the apartment without any objection from Spriggs or Rogers. Rogers retrieved the rifle and handed it to the officer who determined that it had been reported stolen. Spriggs became upset after she learned that Rogers had been storing a loaded weapon on the premises so she gave the officer consent to search the entire apartment. The officer found other stolen items.

Rogers argued that the officer's warrantless entry into the apartment violated the *Fourth Amendment*. The court disagreed. First, after the officer learned that Rogers had been staying

overnight in the apartment, he could reasonably believe that Rogers had the authority to consent to an entry into the apartment. Second, the officer reasonably believed that Rogers actually consented to his entry into the apartment. Consent can be inferred from words, gestures or other conduct. Here, when the officer asked Rogers if he could see the rifle, Rogers agreed to show it to him and he did not object when the officer followed him into the apartment. Under these circumstances, it was reasonable for the officer to believe Rogers had consented to his entry into the apartment.

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

*****

U.S. v. Polly, 630 F.3d 991 (10th Cir. 2011)

Polly consented to a search of his person and officers recovered crack cocaine. The court held the officers obtained Polly's consent voluntarily because the officers did not have their weapons drawn, they used a conversational tone when speaking to him, Polly was in a public place, and there were only two officers present.

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

*****

U.S. v. Davis, 636 F.3d 1281 (10th Cir. 2011)

The court held that the officers had reasonable suspicion to detain Davis at the conclusion of the traffic stop in order to conduct a canine sniff. The officers' reasonable suspicion of illegal activity was based on the inconsistent travel plans provided by Davis and the driver, their abnormal nervousness, and Davis's prior history of drug trafficking.

The court also held that Davis voluntarily consented to a search of the vehicle. Initially Davis refused to consent to a search of the vehicle. After the officer requested a canine unit, Davis asked the officer how long it would take for the canine unit to arrive compared with the time it would take the officers to search the vehicle if he consented. After the officer told Davis it would take thirty minutes for the canine unit to arrive, but he could search the vehicle in five to ten minutes, Davis consented. The officer inquired to confirm that Davis was consenting to a search of the vehicle, and David confirmed his consent. The officer obtained Davis's consent voluntarily and not through coercion or force.

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

*****

U.S. v. Harrison, 639 F.3d 1273 (10th Cir. 2011)

Federal agents suspected that Harrison was illegally selling firearms and drugs out of his apartment. Two agents went to the apartment to conduct a knock and talk with Harrison in an attempt to gain consent to search the apartment. One of the agents told Harrison they had received a tip that there were drugs and a bomb inside the apartment. They stated that their boss had sent them to investigate to see if there was any threat or danger to the community. Harrison

consented to a search of the apartment. The agents found a gun in the apartment and arrested Harrison.

The court agreed with the lower court, which held that the deceitful tactics used by the federal agents to gain consent to search the apartment rendered Harrison's consent to search involuntary. Not all deception or trickery will render a search invalid. An undercover office may gain entry into a person's home by deception and purchase narcotics with no violation of the *Fourth Amendment*. However, in this case, Harrison knew he was opening his home to law enforcement officers who had expertise in explosives. The court agreed with the lower court, which found that the false statements by the agents implied that a bomb may have been planted in the apartment and that Harrison was in danger. The agent's comment to Harrison that they were not interested in a small bag of "weed" emphasized that a bomb, not drugs was the focus of their concern. As a result, Harrison had two choices. He could deny consent to search and accept the risk that a bomb had been planted in the apartment or consent to the search. Under these circumstances, any consent to search obtained was coercive.

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

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Consent Once Removed

O'Neill v. Louisville / Jefferson County Metro Government, 662 F.3d 723 (6th Cir. 2011)

The O'Neills bred their adult bulldogs to each other and advertised the puppies for sale in a local newspaper. Two potential buyers went to their home to look at the puppies. After looking at the puppies, the potential buyers, who were actually undercover Louisville Metro Animal Services (LMAS) officers, stepped outside to discuss whether they wanted to purchase a puppy. A few minutes later several uniformed LMAS officers knocked on the door, entered the O'Neills' home without a warrant or consent, and confiscated the two adult dogs and the dogs' litter of seven puppies. The LMAS officers said that they were seizing the dogs because the O'Neills did not have a breeder's license. The LMAS neutered and spayed the two adult dogs, implanted microchips in all nine dogs, and then required the O'Neills to pay over one thousand dollars to retrieve them. No criminal charges were ever filed against the O'Neills. The O'Neills sued, claiming that their *Fourth Amendment* rights were violated by the warrantless search of their home and the seizure of their nine dogs. The district court dismissed the suit, concluding that the O'Neills were operating an unlicensed kennel in violation of the city's animal-control ordinance. The Court of Appeals disagreed and reinstated the majority of the O'Neills' claims.

First, the court found that the animal-control ordinance applied to full time commercial kennels but not to a private residence where two family pets are bred for a single litter of puppies, as was the case here.

As to the the O'Neills' *Fourth Amendment* claims, the court held that the initial entry by the undercover LMAS officers was lawful. The O'Neills opened a portion of their home to the public when they invited those who responded to their newspaper advertisement to come and look at the puppies. When the undercover officers initially entered the home, they did not intrude any more than any other person who responded to the advertisement. As such, the court concluded that no *Fourth Amendment* search occurred regarding the officers' initial entry.

However, the court found that the O'Neills sufficiently pleaded a *Fourth Amendment* violation based on the uniformed LMAS officers' second warrantless entry into their home. The officers claimed that their entry was lawful under the consent-once-removed doctrine. This doctrine allows government agents to enter a suspect's premises to arrest him without a warrant if the undercover agents: enter at the express invitation of someone with authority to consent; while inside the premises they establish the existence of probable cause to effect an arrest or search; and immediately summon help from the other officers. The court disagreed, holding that the consent-once-removed doctrine did not apply in this situation. After the undercover officers left the house, the back-up officers did not rush in to effect an arrest. Instead, they knocked on the O'Neills' door to request proof of a breeder's license, discussed the need for such a license with them and entered only after the O'Neills specifically objected to their coming into the house. The LMAS officers never intended to arrest the O'Neills; therefore, the consent-once-removed doctrine could not support the LMAS officers' second entry into their home.

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

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Third Party Consent

U.S. v. Stabile, 633 F.3d 219 (3d Cir. 2011)

United States Secret Service agents and Sheriff's Department investigators, suspecting that Stabile had passed counterfeit checks, went to his house to question him. Debbie Deetz answered the door and gave the agents consent to search the house. Deetz showed the agents around the house and consented to the seizure of six computer hard drives and several DVDs bearing sexually suggestive labels that caused the agents to believe they contained child pornography. While the agents were conducting their search, Stabile arrived home and attempted to revoke Deetz's consent to the search the house. The agents left shortly thereafter; however, Stabile did not request that they return the hard drives or DVDs.

The USSS agents took Stabile's computer hard drives to their office and the deputies took the DVDs back to the sheriff's department. An immediate examination of the DVDs revealed that they did not contain child pornography, but this was not communicated to the USSS agents.

The USSS case agent did not apply for a warrant to search the hard drives for three months because shortly after their seizure he was assigned to a protective detail. Eventually the USSS agent obtained a state search warrant, which authorized a search of the hard drives for evidence of financial crimes and possession of child pornography. Before the search of the hard drives occurred, the USSS agent learned that the DVDs, which were the sole basis for their application to search for child pornography, did not contain child pornography. The forensic agent was told to conduct a forensic examination of the hard drives, but to confine his search for evidence of financial crimes and not child pornography.

During his search of one of the hard drives, the forensic agent discovered a folder entitled "Kazvid." The agent understood this folder to reference "Kaaza," a peer-to-peer file sharing program, which based on his experience could contain evidence of any type of crime. The agent

highlighted the "Kazvid" folder, which allowed him to view a list of file names contained in the folder. The agent saw a list of file names with file extensions indicating video files and file names suggestive of child pornography. Although the agent believed that these files contained child pornography, and not evidence of financial crimes, he opened twelve different video files from within the "Kazvid" folder. After confirming that these files contained child pornography, the agent contacted a prosecutor and stopped his search of the hard drive.

The USSS agent obtained a federal search warrant for child pornography for that particular hard drive only. The federal search warrant was based solely on the sexually suggestive names on the files in the "Kazvid" folder and not on the contents of the twelve files that the forensic agent had viewed. The search warrant affidavit did not mention that the forensic agent had opened any files in the "Kazvid" folder.

During the execution of the federal search warrant, a different forensic agent found numerous child pornography files on the hard drive he examined. However, by mistake, the federal search warrant authorized the search of one of the other hard drives seized by the agents and not the hard drive the original forensic agent had examined which contained the "Kazvid" folder.

Stabile filed a variety of motions seeking to suppress evidence discovered by the agents.

The court held that the investigators' warrantless search of the house did not violate the *Fourth Amendment* because Deetz voluntarily consented to the search. Deetz had authority to consent to a search of the house, because as a co-habitant, she used the property along with Stabile and exercised joint access and control over the house. Deetz's mistaken belief that she was married to Stabile did not change the analysis because an unmarried cohabitant has authority to consent to a search of shared premises.

The court found that Deetz had the authority to consent to the seizure of the six computer hard drives. The hard drives were not password protected and they were located in common areas of the home where she had access to them.

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

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U.S. v. Cantu, 426 Fed. Appx. 253 (5th Cir. 2011)(unpublished)

The court held that the officer's warrantless search of Cantu's handbags, during a traffic stop, violated the *Fourth Amendment*. Although the driver consented to search of the vehicle, he had neither the actual nor the apparent authority to consent to a search of his passenger's property. The officer had no authority to search inside Cantu's closed bags without her consent, which he neither sought nor obtained, and he knew the bags he was searching belonged to her.

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

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U.S. v. Hunter, 663 F.3d 1136 (10th Cir. 2011)

The court held that Isaacson gave valid consent to search which led to the discovery of the contraband in the car. There is no legal authority that prohibits a person, who is not on the rental contract, from giving valid consent to search a rented car. A third party may have actual or apparent authority to consent to a search if he has mutual use of the property by virtue of joint access or some control over the property. Here, under either theory, the court held that Isaacson had the authority to consent to the search because she exercised control over the car by driving it.

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

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U.S. v. Bass, 661 F.3d 1299 (10th Cir. 2011)

Officers suspected that Bass was involved in illegal drug activity. They watched him leave his trailer and then conducted a traffic stop. After the officers arrested Bass for several drug offenses, they went back to his trailer. Ramsey answered the door and told the officers that she was Bass's girlfriend and that she lived there with him. Officers recognized her from a previous surveillance they had conducted on the trailer. At first, Ramsey refused to consent to a search, but after the officers told her that Bass was in jail, she began to cooperate with them and eventually consented to a search of the trailer. During the search, Ramsey told the officers about drugs she had seen in the trailer and mentioned that Bass often stored guns in black bags and backpacks. Officers found a black leather zipper bag in the living room on the floor next to the couch. Inside the bag, officers found an illegal firearm.

Bass claimed that Ramsey's consent was not obtained voluntarily, but even if it was, he argued that she did not have the authority to consent to a search of the trailer. He further argued that even if she had the authority to consent to a search of the trailer, she did not have authority to consent to a search of the black bag. The court disagreed with all of his assertions.

First, the court held that Ramsey's consent was voluntary. Although she initially refused to consent, she changed her mind after being told that Bass was in jail. Additionally, she remained at the trailer during the search, provided information to the officers during the search and signed a written consent-to-search form

Next, the court found that Ramsey had apparent authority to consent to a search of the trailer. During their surveillance, the officers saw Ramsey at the trailer. Later when they returned, she was still there. Once the officers talked to her, she told them that she lived there with her boyfriend, Bass. Based on these facts, it was reasonable for the officers to believe that Ramsey was a joint occupant with common authority over the premises.

Finally, the court held that Ramsey had apparent authority to consent to a search of the black bag. The officers found the bag on the living room floor next to the couch. Considering the relationship between Bass and Ramsey, officers could reasonably believe that he had assumed the risk that she would examine the contents of the bag or allow others to do so. Consequently, it was reasonable for the officers to believe that Ramsey had the authority to consent to the search of the unlocked bag located in a common area.

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

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Exigent Circumstances

Kentucky v. King, 131 S. Ct. 1849 (2011)

Officers set up a controlled buy of crack cocaine outside an apartment complex. After the deal, the suspect went into the apartment building. Officers followed the suspect into a breezeway where they saw two apartments, one on the left and one on the right. The officers did not see which apartment the suspect entered. The officers smelled marijuana smoke emanating from the apartment on the left as they approached the door. One of the officers knocked loudly on the door an announced, "Police, police, police." The officers did not demand entry or threaten to break down the door. As soon as the officer started banging on the door, he heard noises that led him to believe that drug related evidence was being destroyed inside the apartment. At this point, the officers announced they were going to enter the apartment and they kicked down the door. Once inside the apartment the officers performed a protective sweep and recovered marijuana and powder cocaine in plain view. Officers eventually entered the apartment on the right and found the suspected drug dealer who was the initial target of their investigation.

One well recognized exception to the warrant requirement applies when the exigencies of the situation makes the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the *Fourth Amendment.* The need to prevent the imminent destruction of evidence has been identified as one of the exigencies that may justify the warrantless search of a home. Where, as here, the police do not create the exigency by engaging or threatening to engage in conduct that violates the *Fourth Amendment*, warrantless entry to prevent the destruction of evidence is reasonable.

When officers who do not have a warrant knock on a door, they do no more than any private citizen might do, and the occupant has no obligation to open the door or speak to them. It was only after the officers knocked on the door and announced, "Police, police, police," did the exigency arise. Because the officers did not violate or threaten to violate the *Fourth Amendment* by demanding entry, or threatening to enter the apartment, the court held that the exigency that arose afterward justified the officers' warrantless entry into the apartment.

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

*****

Destruction of Evidence

U.S. v. Aguirre, 664 F.3d 606 (5th Cir. 2011)

Federal agents arrested Mendoza shortly after he drove away from his home and they recovered marijuana and cocaine from his car. The agents went back to Mendoza's home to conduct a knock and talk interview with the remaining occupants. After knocking on the door and announcing themselves, the agents received no verbal response but did see a person look through the window, then quickly retreat toward the back of the home. Fearing the destruction of drug evidence, the officers immediately entered the home without a warrant or consent. Once inside

the home the agents saw marijuana and drug paraphernalia in plain sight. The agents secured the home and the occupants while they applied for a search warrant. After obtaining the search warrant, the agents searched Aguirre's cell phone that was lying in plain view on a bed, and discovered several incriminating text messages.

The court held that the agents' warrantless entry into the home was lawful. First, they had probable cause to believe it contained evidence of illegal drugs and drug dealing. Agents had just arrested Mendoza, after watching him leave the home, and had recovered marijuana and cocaine from his car. Second, after knocking and announcing their presence, the reaction of the occupants reasonably caused the agents to believe that evidence was being destroyed. The agents' entry into the home was justified by the exigent circumstance of destruction of evidence and supported by probable cause.

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

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U.S. v. Hendrix, 664 F.3d 1334 (10th Cir. 2011)

Officers spoke to an informant who told them he had purchased methamphetamine from a man named "Keith" who was staying in Room 327 at a nearby motel. The informant gave the officers a physical description and stated that Keith had two pounds of methamphetamine in the room as well as a surveillance camera and monitor that he used to view the motel's north parking lot.

The officers went to the motel and confirmed that there was a Room 327 on the north side of the building. The officers knocked on the door to Room 327 and gave a false name when a woman inside asked who was there. The woman responded by telling the officers that she did not know anyone by that name. The officers then told the woman that they were the police. At that point, the officers heard the sound of people moving around inside the room and a toilet flushing. The officers entered the room where they saw Ziploc bags filled with methamphetamine in plain view on a table. The officers arrested the woman and a man that matched the informant's description of Keith. The officers also saw a video monitor, which displayed the motel's north parking lot. The officers secured the room and obtained a search warrant.

The court held that the officers had probable cause to believe that illegal drug activity was taking place in Room 327. The officers corroborated that the motel was located at the address provided by the informant and that it had a Room 327 that was on the north side of the building. After knocking on the door to Room 327, the officers heard people moving around and a toilet flushing. These actions reasonably caused the officers to believe that the occupants were destroying evidence and justified their warrantless entry into the room.

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

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Emergency Scene

U.S. v. Shetler, 665 F.3d 1150 (9th Cir. 2011)

Police received an anonymous tip that Shetler was manufacturing and using methamphetamine at his home. Officers went to Shetler's home, which had an attached garage. Without a warrant, the officers entered the garage through a door that had been left open. The officers did not see any evidence that methamphetamine was being cooked in the garage, but they did see several items that they knew to be related to the production of methamphetamine. The officers left the garage, went to the front of the house and knocked on the door. Shetler came out of a side door and met the officers who handcuffed and detained him. The officers entered Shetler's house through the front door and conducted a sweep. After completing the sweep, officers remained inside the house and obtained consent to conduct a more thorough search of the premises from Shetler's girlfriend, who also lived there. The officers searched the house and seized evidence related to methamphetamine manufacturing. Shetler was detained outside the house during the five-hour search and after being *Mirandized* confessed to the officers that he had been manufacturing methamphetamine in his garage. The next day, officers advised Shetler of his *Miranda* rights again and he made more incriminating statements.

The district court held that the officers' initial entry and sweep of Shetler's garage was justified under the exigent circumstances, emergency and protective sweep exceptions to the *Fourth Amendment*. The evidence observed was admissible and neither party challenged this issue on appeal. The district court held that the officers' warrantless sweep of Shetler's house could not be justified under any of the exceptions that applied to the initial search of the garage, and was therefore illegal. Additionally, the girlfriend's consent to search the house was tainted because the officers sought her consent while they remained physically inside the house after they had already illegally searched it. However, the district court held that Shetler's statements made to the officers the night of his arrest and the next day were admissible.

Regarding the statements, the court of appeals disagreed, ruling that all of Shetler's statements to the officers should have been suppressed. First, the court held that the government did not bear its burden of showing that Shetler's statements were not made because of the illegal searches. There was no evidence to show that the officers did not confront Shetler with any of the illegally seized evidence when they questioned him.

Second, there was no evidence to demonstrate that Shetler's answers to the officers' questions were not influenced by the illegal search. The officers detained Shetler outside his home for more than five hours while he witnessed the illegal search of his house. Witnessing the search, which led to the seizure of items commonly used in methamphetamine manufacturing, could have caused Shetler to make the incriminating statements to the officers.

Third, there were no intervening circumstances between the illegal search and Shetler's incriminating statements. Shetler was in police detention and did not speak to a lawyer before speaking to the officers. Although Shetler received *Miranda* warnings after the illegal search but before he spoke to the officers, this was not enough to purge the taint of the illegal search.

Finally, the court held that there was no evidence to establish that the officers' warrantless entry into Shetler's home to conduct their protective sweep was anything but flagrant misconduct.

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

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U.S. v. Martinez, 643 F.3d 1292 (10th Cir. 2011)

An emergency services dispatcher received a 911 call from Mr. Martinez's residence. However, the dispatcher only heard static on the line, and when she placed a return call there was no answer, but only static on the line. The dispatchers contacted an officer who knew that line problems or bad weather sometimes caused static-only telephone calls but sent officers to check Martinez's residence as a precaution.

The responding officers walked around the residence and saw no signs of forced entry or evidence that anyone was home. The officers entered the residence through a closed but unlocked sliding glass door after announcing their presence and getting no response. The officers conducted a sweep of the residence to ensure no one was injured, unconscious or in need of assistance. During their search, the officers saw drugs and child pornography in plain view. The officers exited the residence after they were convinced that no one inside the residence needed emergency assistance. They spent approximately five minutes inside. After the search was complete, but before the officers left the property, Martinez returned home and was arrested.

The court held that the warrantless search of Martinez's home was not justified by exigent circumstances because the officers did not have an objectively reasonable basis to believe there was a person inside his home in need of immediate aid.

A static 911 call, by itself, is insufficient to create an objectively reasonable belief that someone inside a home is in need of aid. With a static 911 call, there is no assurance that a person initiated the call. It was common knowledge among officers and 911 dispatchers that electrical or weather anomalies can cause such calls.

Additionally, once at Martinez's residence, the officers did not hear or see anyone near the house, they saw no signs of forced entry, they saw no cars near the house and the gate to the property was closed. None of the officers' observations created a reasonable belief that there was an emergency inside the home.

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

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Hot Pursuit

Mascorro v. Billings, 656 F.3d 1198 (10th Cir. 2011)

An officer saw Mascorro's seventeen-year-old son, Joshua, driving without taillights at 11:30 p.m. and attempted a traffic stop. Joshua did not stop, but instead drove two blocks to his parents' house, ran inside and hid in the bathroom. While both parties dispute what exactly happened, officers eventually entered the house without a warrant and arrested Joshua.

The court held that the officers were not entitled to qualified immunity after they entered Mascorro's home without a warrant to arrest her son for driving without taillights. The court did

not find any circumstances that created an exigency that would have allowed the officers to enter the house without a warrant. The intended arrest was for a minor traffic violation, committed by a minor with whom the officer was acquainted. There was no evidence that could have potentially been destroyed and there were no officer or public safety concerns. The warrantless entry based on hot pursuit was not justified.

Additionally, it would have been clear to a reasonable officer, at the time the officers entered the Mascorro house, that their entry was unlawful under the circumstances presented. No reasonable officer would have thought pursuit of a minor for a mere misdemeanor traffic offense constituted the sort of exigency permitting entry into a home without a warrant.

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

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Inspections

Airport Screening

U.S. v. McCarty, 648 F.3d 820 (9th Cir. 2011)

A Transportation Security Administration (TSA) screener searched McCarty's bag after it triggered an alarm while passing through a security x-ray machine. When she opened the bag to remove a laptop computer, several photographs fell out of an envelope onto the floor. After she examined the laptop and determined it did not pose a risk, she picked up the photographs. While looking through the photographs to ensure that there were no sheet explosives concealed within, she noticed that several photographs depicted nude children. McCarty was arrested and a search of his computer revealed images and video clips of child pornography.

The court held that the screener's review of the photographs occurred within the scope of an ongoing lawful administrative search. The screener was permitted to search McCarty's bag until she was convinced it posed no threat to airline safety. At no time did the screener state that she had abandoned her primary search for aircraft safety hazards at the time she viewed the photographs. When she looked through the photographs, she was still acting to ensure that there were no sheet explosives hidden inside.

However, the screener went beyond the bounds of a permissible administrative search when she read the contents of some letters and looked at some newspaper articles that were in the bag. At this point, she was no longer searching for safety hazards, but reviewing the items to confirm her feelings that the photographs were contraband. The screener's actions taken during this part of the search violated McCarty's *Fourth Amendment* rights because they were more extensive and intrusive than necessary to detect air-travel safety concerns.

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

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Inventory Searches

U.S. v. Garreau, 658 F.3d 854 (8th Cir. 2011)

Officers received a tip that Garreau was traveling with a stolen firearm in his vehicle. They also discovered that Garreau's driver's license was suspended and that he had an outstanding arrest warrant. An officer saw Garreau's vehicle, and after pulling him over for speeding, arrested him on the outstanding warrant. The officer performed an inventory search of the vehicle and found a firearm in a plastic bag under the spare tire, which was in a compartment under the carpet on the floor of the vehicle's trunk. The officer confirmed that the firearm was stolen.

The court held that the officer's search of the vehicle was a valid inventory search under the *Fourth Amendment*. The officer substantially followed his agency's policy governing inventory searches. The fact that the officer listed the stolen firearm in the evidence log as opposed to the inventory log, as required by the inventory policy was of no consequence. The court noted that inventory searches do not need to be conducted in a totally mechanical fashion. The officer's minor deviation from the policy was not unreasonable and it was not enough to make the search unlawful.

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

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U.S. v. Creighton, 639 F.3d 1281 (10th Cir. 2011)

An inventory search should promote three administrative purposes: (1) the protection of the owner's property while it is in police custody, (2) the protection of the police against claims or disputes over lost or stolen property, and (3) the protection of the police from potential danger.

The court held that the inventory search of the defendant's luggage was conducted pursuant to the police department's "Standard Operating Guidelines" and that these guidelines were sufficient to serve the purposes of a legitimate inventory search.

Additionally, the court agreed with the lower court, which held that the defendant lacked standing to challenge the officers' entry into the motel room where they observed incriminating evidence in plain view. Prior to the entry by the police, the defendant knew that the hotel management had claimed the rent was overdue and had told the registered occupant to pay or vacate the premises. An individual's expectation of privacy in a hotel room generally ends upon expiration of the rental period. By remaining in the hotel room beyond the rental period, the defendant gave up any expectation of privacy in that room.

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

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Plain View

U.S. v. Paneto, 661 F.3d 709 (1st Cir. 2011)

Paneto sold crack cocaine to a confidential informant from his apartment. He unknowingly accepted a $20 bill that an officer had marked with a small ink slash through a zero in number 20 that appeared on the front of the bill. Shortly after the sale, officers went to Paneto's apartment to conduct a knock and talk interview. Paneto invited the officers into the apartment. An officer saw a $20 bill on the coffee table, which he believed was the marked money from the drug buy. The officer picked up the bill, confirmed the presence of the ink slash through the number 20, and seized it. Paneto denied that the $20 bill was his; however, he consented to a search of the apartment. The officers found crack cocaine and an illegal firearm. Paneto argued that his consent to search and the contraband seized was tainted by the officer's manipulation of the $20 bill.

The court disagreed. An officer may seize an object in plain view as long as he is lawfully in a location where he can see the object, he has the right to access the object and the incriminating nature of the object is immediately apparent to him.

Here, Paneto invited the officers into his apartment where the $20 bill was laying on the coffee table visible to the naked eye. The bill was out in the open providing the officer unrestricted access to it. Finally, the incriminating nature of the bill was immediately apparent. An informant had just purchased a quantity of crack cocaine from the apartment and the denomination of the bill on the coffee table matched the denomination of the marked bill. There was no other currency in sight and the court commented that people usually keep bills of large denominations in a wallet or purse. Even though the officer could not see the ink slash on the bill until he picked it up, it was reasonable for him to believe that the $20 bill the on the coffee table was the marked bill from the drug buy; therefore, the officer lawfully seized it under the plain view exception to the *Fourth Amendment*.

In a footnote, the court noted that had the officer merely bent over to get a closer look at the $20 bill, without picking it up, there would have been no *Fourth Amendment* search or seizure issue.

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

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U.S. v. Galaviz, 2011 FED App. 0115P (6th Cir. 2011)

The court held that the officers lawfully seized the gun from the defendant's car under the plain-view and automobile exceptions to the warrant requirement. Even if the arresting officer lacked reasonable suspicion to seize the defendant, other officers discovered the gun before he was arrested. The officers discovered the gun because it was in plain view, not because of anything the defendant said or anything the arresting officer found on him after his detention.

The court found that the gun was in plain view because: (1) the officers were lawfully in a position from which to see the gun. The defendant's car was parked in a short driveway, and given the characteristics of it, the driveway could not be considered to be within the curtilage of the house; (2) the incriminating nature of the gun was immediately apparent because the officers were clearly able to identify the object protruding from beneath the driver's seat as part of a

handgun. State law prohibits carrying a pistol in a vehicle without a firearms license and places the burden of establishing possession of a license on the defendant; (3) after the officers saw the gun in the car, which constituted a violation of state law; they had probable cause to conduct a warrantless search of the car to retrieve the gun. This gave the officers the lawful right to access the interior of the car, and therefore satisfy the requirements for a plain-view seizure of the gun.

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

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U.S. v. Brooks, 645 F.3d 971 (8th Cir. 2011)

The court held that the officers lawfully seized the discarded firearm under the plain-view doctrine. When Brooks saw the officers, he threw a bag containing a long object into a crawl space and ran down a staircase into the apartment building. The officers retrieved the bag, which contained a shotgun.

First, the officers lawfully arrived at the place where they saw Brooks discard the bag. Neither the staircase nor any part of the backyard could be considered curtilage of the apartment building. The staircase led to the basement of the multi-family dwelling, in which there was a common area shared by all tenants. There is no expectation of privacy in the common areas of an apartment building. Additionally, the gates to the backyard were open and unlocked, the backyard and staircase were visible from public areas and there we no "no trespassing" signs on the property. Because the staircase was not within the curtilage of the residence, the officers did not violate the *Fourth Amendment* in arriving at the place from which the bag containing the shotgun could be seen.

The incriminating nature of the gun was immediately apparent to the officers because Brooks's behavior corroborated a previously reliable confidential informant's information that Brooks was selling guns from his basement apartment.

Finally, the officer had a lawful right of access to the object because the bag containing the shotgun was on the ground in front of the officer who retrieved it.

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

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U.S. v. Brown, 653 F.3d 656 (8th Cir. 2011)

Brown stabbed two men and drove away in a Chevy Blazer. An officer later located Brown at a friend's house and arrested her on an unrelated warrant while he continued his investigation into the stabbing. The officer used his flashlight to look into the windows of the Blazer where he saw a knife and a pair of brass knuckles.

The court held that the officer had probable cause to enter the parked vehicle without a warrant and seize the weapons he saw inside it. The court stated that the officer's looking through the parked car's windows was not a search under the *Fourth Amendment*. Additionally, the incriminating nature of the knife and brass knuckles was immediately apparent because the officer knew that Brown was implicated in a recent stabbing and that possession of brass

knuckles was illegal. The officer then had probable cause to enter the vehicle, without a warrant and seize the weapons.

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

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U.S. v. Darr, 661 F.3d 375 (8th Cir. 2011)

Officers suspected that David Darr, Sr. had sexually assaulted several children. Officers obtained a warrant to search the home he shared with his adult son, David Darr, Jr., for two bathroom brushes and a container of Vicks Vapor rub. These items were allegedly used in connection with the sexual assaults. While searching Darr, Jr.'s bedroom, an officer opened a VHS cassette holder and found children's underwear and computer printouts of child pornography. At this point, the officers stopped their search and applied for a second warrant.

The second warrant authorized the seizure of specific digital images found in Darr's bedroom, the underwear found in the VHS cassette holder and Polaroid photographs found underneath Darr, Sr.'s bed. After the search resumed, officers opened a cooler in Darr, Jr.'s bedroom and found VHS videotapes, a green tin and a camera memory card. Inside the tin, an officer found images of child pornography. The officers obtained a third search warrant, for the videotapes and camera memory card, which revealed images of Darr, Jr. engaged in sex acts with a minor.

The court held that the first warrant was supported by probable cause and that the information upon which it relied was not stale, even though the last allegation of sexual assault had occurred seven months prior. Considering the nature of the crimes, the ongoing related activity of Darr, Sr. and the nature of the property sought, the information set forth in the warrant was not so stale as to preclude a finding of probable cause. Darr, Sr. had allegedly used the items sought in the search warrant on more than one occasion during incidents that occurred more than two years apart. Additionally, Darr, Sr. had tried to arrange to have several children spend time at his home within the last month. The fact that Darr, Sr. recently had sought additional contact with children at his home supported the inference that evidence used in such encounters would still be present.

The court also held that the officers did not exceed the scope of the first warrant by searching Darr, Jr.'s bedroom and the VHS cassette holder. As a result, the evidence found within it was lawfully seized under the plain view exception to the warrant requirement. Because the search warrant authorized the search of the entire premises for the items listed, officers did not exceed its scope by searching Darr, Jr.'s bedroom, even though the warrant was issued based upon information concerning the criminal activities of Darr, Sr.

The court declined to decide whether the second search warrant authorized the search of the cooler and green tin found in Darr, Jr.'s bedroom. Instead, the court held that the officers had lawfully searched these areas under the first search warrant because the cooler and tin could have contained the items specified in the first warrant. The officers lawfully seized the images of child pornography discovered in the tin under the plain view exception to the warrant requirement.

Finally, the court held that the officers established probable cause to search the VHS videotapes and camera memory card for images of child pornography based on the previously discovered images of child pornography.

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

*****

Protective Sweeps

U.S. v. Hassock, 631 F.3d 79 (2d Cir. 2011)

Officers went to Hassock's apartment to conduct a knock and talk after they received information that he was unlawfully in possession of a handgun. Once at the apartment a woman answered the door and let the officers in. She told them that she and her boyfriend occupied the back bedroom and Hassock stayed in the front bedroom. The woman told the officers that she had just woken up, so she did not know who was in the apartment. She told officers that they could look around. Officers went into Hassock's bedroom and found a handgun under the bed.

The government argued that the officers seized the handgun during a valid protective sweep of the apartment. The court disagreed. The *Fourth Amendment* allows a limited protective sweep in conjunction with an in-home arrest when the officer possesses a reasonable belief, based on specific and articulable facts, that the area to be swept harbors an individual posing a danger to the officer or someone in the home. Additionally, this court allowed a protective sweep of a home when police entered pursuant to lawful process to accompany a person, who had a protective order against a roommate, when he went to their apartment to collect his belongings. Neither of these situations existed here. When Hassock did not answer the door, the "sweep" itself became a search for him that required a warrant, an exigency or authorized consent, none of which was present.

There is a split among the circuits regarding the proper basis for entry into a home when police conduct a protective sweep. The Ninth and Tenth circuits hold that the protective sweep doctrine applies only where entry has been made incident to an arrest in the home. The First, Fifth, Sixth, Seventh and D.C. Circuits have extended the doctrine to allow protective sweeps in non-arrest situations.

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

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U.S. v. Shetler, 665 F.3d 1150 (9th Cir. 2011)

See case brief above under Exigent Circumstances, Emergency Scene or **Click Here** .

*****

Searches Incident to Arrest (SIA)

U.S. v. Curtis, 635 F.3d 704 (5th Cir. 2011)

In July 2007, officers obtained an arrest warrant for Curtis after he made a false statement on a credit application he submitted to a car dealership. When the officers arrested Curtis he was driving his vehicle and talking on his cell phone. After he pulled over, Curtis placed the cell phone on the car's center console. An officer took the phone out of the car and began looking at the text messages on it. Later, while Curtis was being processed at the jail the officer resumed looking at the text messages on the cell phone.

The court held that the search of the cell phone was constitutional since it took place incident to a lawful arrest and it was within Curtis's reaching distance when the officers arrested him. The court followed *U.S. v. Finley, 477 F.3d 250 (5th Cir.)*, which held that the police could search the contents of an arrestee's cell phone incident to a valid arrest when it is recovered from the area within an arrestee's immediate control.

Curtis argued that the officer's search of the cell phone was unlawful in light of the Supreme Court's holding in *Gant*, decided in 2009, which held in part that the police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of arrest."

The court refused to apply the rule announced by *Gant* to a search incident to arrest that occurred before *Gant* was decided. Additionally, the court stated that even if it had ruled the search of the cell phone was unlawful, it would have refused to suppress the text messages under the good-faith exception to the exclusionary rule. The court noted that the good-faith exception applies to searches that were legal at the time they were conducted, but later determined to be unconstitutional by a subsequent change in the law.

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

*****

U.S. v. Hambrick, 630 F.3d 742 (8th Cir. 2011)

An informant, who had provided accurate information three times in the past, told police that Hambrick was in town to sell crack cocaine. He claimed that Hambrick would be driving a dark colored car, with Illinois license plates, and a missing gas-tank door, and that he would be going to a specific area of town. The informant told police that in the past he had seen Hambrick remove crack cocaine from his buttocks and distribute it to others.

After arresting Hambrick for driving under suspension, officers searched his car and found marijuana residue and a digital scale covered in cocaine residue. Officers strip searched Hambrick at the jail and recovered crack cocaine from between his buttocks.

The court held that officers recovered the drugs from Hambrick as part of a valid search incident to arrest. The strip search in this case was reasonable since it took place in an interrogation room at the police department, it was based on highly reliable information, and the officers allowed Hambrick to remove the drugs on his own, without touching him.

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

*****

Searches Incident to Arrest (vehicles)

U.S. v. Wilks, 647 F.3d 520 (4th Cir. 2011)

In 2006, an officer arrested Wilks for driving under suspension, secured him in his patrol car and searched Wilks's car incident to arrest. The officer found an unlawful firearm under the front seat. In 2006 it was lawful to search Wilks's vehicle incident to his arrest under these circumstances.

Wilks moved to suppress the firearm seized from his vehicle, relying on *Arizona v. Gant*, decided in 2009. *Gant*, held in part, that a vehicle search incident to a lawful arrest is not valid where the defendant is stopped for a traffic violation, arrested, handcuffed, and placed in the back of the patrol car prior to the time of the search. The district court granted to motion to suppress, deciding to apply *Gant* retroactively.

The court, citing the recent United States Supreme Court decision *Davis v. U.S.*, held that because the officer's search of Wilks's vehicle was permissible under binding circuit precedent at the time it occurred, the lower court improperly granted Wilks's motion to suppress.

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

*****

U.S. v. Slone, 636 F.3d 845 (7th Cir. 2011)

An undercover DEA agent drove a tractor-trailer filled with marijuana to a warehouse. The agent communicated to his surveillance team that some of the marijuana had been loaded into a Ford Explorer. The surveillance agents saw a Dodge truck pull in behind the Explorer as it left the warehouse. The surveillance agents followed both vehicles for twenty minutes. During this time, the Dodge truck remained behind the Explorer, even after it made multiple turns on several roads including a multi-lane highway. The occupants in the Dodge truck continually checked their rearview mirrors while talking on a cell phone. The agents stopped both vehicles and arrested all the vehicles' occupants for conspiracy to distribute marijuana. A search of the Dodge truck, Slone's vehicle, revealed a large quantity of cash and a cell phone. On the ride to jail, Slone made several unsolicited incriminating statements. Slone argued that the agents did not have probable cause to arrest him, therefore, the physical evidence and statements should have been suppressed as fruit of the poisonous tree.

The court held that the agents had probable cause to arrest Slone and that the search of his vehicle was a valid search incident to arrest under *Gant*. The officers had reason to believe that evidence related to the offense for which Slone was arrested would be found in the passenger compartment of his vehicle. Since the agents arrested Slone while he was conducting counter surveillance or security operations in a drug trafficking conspiracy they could have reasonably expected to find money, cell phones, maps, drawings or other evidence linking the occupants of the Dodge truck to the crime.

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

*****

U.S. v. Randolph, 628 F.3d 1022 (8th Cir. 2011)

A plain-clothes officer saw Randolph driving a car. The officer knew Randolph from a previous drug investigation and recognized the car as belonging to another person involved in illegal drug activity. The officer followed Randolph and saw him pull over to the curb without using his turn signal. The officer called for a uniformed patrol officer to stop Randolph for this traffic violation.

The patrol officer arrived as Randolph got out of the car and began to walk away. The patrol officer stopped Randolph and brought him back to the car. Randolph denied owning the car, and denied that he had just gotten out of it. The patrol officer ran a criminal history check on Randolph as another officer looked through the passenger's side window. The officer saw a handgun lying on the driver's side floorboard. After the patrol officer confirmed that Randolph was a convicted felon, he arrested him and the other officer retrieved the handgun from the car.

The court held that the initial traffic violation for failure to use a turn signal provided probable cause to justify the stop, even if the officer was suspicious of other crimes.

After the officer saw the handgun, and the patrol officer confirmed that Randolph was a felon, they arrested him. Having seen the handgun on the floor of the car, the officer had probable cause to believe the car contained evidence of the crime for which Randolph was arrested; therefore, under *Gant* he was allowed to retrieve the handgun as part of the search incident to arrest.

The court held that even if the search of the car were unconstitutional, Randolph had no standing to challenge the search. Since Randolph repeatedly disavowed any ownership interest in the car and failed to show that he had a legitimate expectation of privacy in the car, he is precluded from claiming that the search and seizure of the handgun from the car violated his rights.

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

*****

U.S. v. Hambrick, 630 F.3d 742 (8th Cir. 2011)

An informant, who had provided accurate information three times in the past, told police that Hambrick was in town to sell crack cocaine. He claimed that Hambrick would be driving a dark colored car, with Illinois license plates, and a missing gas-tank door, and that he would be going to a specific area of town. The informant told police that in the past he had seen Hambrick remove crack cocaine from his buttocks and distribute it to others.

An officer saw Hambrick driving a vehicle that matched the description given by the informant in the area of town where the informant claimed he would be. The officer confirmed that Hambrick had a suspended driver's license and conducted a traffic stop. After arresting Hambrick for driving under suspension, officers searched his car and found marijuana residue

and a digital scale covered in cocaine residue. Officers strip searched Hambrick at the jail and recovered crack cocaine from between his buttocks.

The court held that the officer lawfully stopped Hambrick because he was driving with a suspended driver's license. The search of Hambrick's vehicle was not a valid search incident to arrest under *Gant* since Hambrick was handcuffed in the back of a patrol car; therefore, he had no access to his vehicle while it was being searched. In addition, since Hambrick was arrested for driving under suspension, there was no reason to believe that his vehicle contained evidence of that offense. However, the officers had probable cause to search Hambrick's vehicle under the automobile exception to the warrant requirement. The informant had provided reliable information in the past; he supplied detailed information about Hambrick's vehicle and he correctly predicted where Hambrick would be driving.

The court held that officers recovered the drugs from Hambrick as part of a valid search incident to arrest. The strip search in this case was reasonable since it took place in an interrogation room at the police department, it was based on highly reliable information, and the officers allowed Hambrick to remove the drugs on his own, without touching him.

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

*****

U.S. v. Soza, 643 F.3d 1289 (10th Cir. 2011)

In 2007, during a traffic stop, an officer arrested Soza because he had an outstanding felony warrant. The officer secured Soza in his patrol car and searched Soza's vehicle incident to arrest where he found an illegal firearm and drugs.

Soza moved to suppress the evidence seized from his vehicle, relying on *Arizona v. Gant*, decided in 2009, which held in part that an officer may not search a vehicle incident to a recent occupant's arrest after the arrestee has been secured and is unable to access the interior of the vehicle.

The court, citing the recent United States Supreme Court decision *Davis v. U.S.*, held that because the officer's search of Soza's vehicle was permissible under binding circuit precedent at the time it occurred, the lower court correctly denied Soza's motion to suppress.

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

*****

Qualified Immunity / Civil – Municipal - Supervisor Liability / *Bivens*

Backes v. Village of Peoria, 662 F.3d 866 (7th Cir. 2011)

Backes got into an argument with his wife and left their home, suggesting that he might commit suicide. Mrs. Backes called the police, told the dispatcher that her husband was suicidal, on medication, and that he had access to weapons. Backes drove to a park, took a sleeping pill and passed out in his car. A Village of Peoria police officer, who was on patrol in the area, recognized the car and saw Backes sitting motionless in the front seat. The officer contacted his

chief of police, who requested assistance from an emergency response team that was comprised of officers from several different local police departments. The emergency response team removed Backes from his car and took him into custody. Backes claimed that he suffered injuries as a result of the emergency response team's actions. Backes sued the police chief who requested the assistance of the emergency response team, arguing that the chief should be liable as a supervisor for the conduct of the emergency response team.

A supervisor may be personally liable for the acts of his subordinates if he knows about their conduct, facilitates it, approves it, condones it or turns a blind-eye for fear of what he might see. Here, members of an inter-departmental emergency response team carried out the actions that were at the center of the Backes' claim. The two senior officers on the emergency response team who implemented the plan to remove Backes from his car, were members of a different police department. There was no evidence that the chief supervised the emergency response team or was involved in the operation in any way. Even if the emergency response team spoke to the chief about their plan and he condoned it, his actions were as a consultant from a separate police department and not as the emergency response team's supervisor.

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

*****

Mirmehdi v. U.S., 662 F.3d 1073 (9th Cir. 2011)

Mirmehdi and three others were arrested for immigration law violations and detained. The Mirmehdis brought a *Bivens* suit for monetary damages against several federal officials claiming that they were unlawfully detained during their deportation proceedings.

The court declined to extend *Bivens* to allow the Mirmehdis to sue federal agents for wrongful detention pending their deportation. First, the court noted that during the deportation process the Mirmehdis had the opportunity to challenge their detention. Second, the Mirmehdis were able to challenge their detention through the federal habeas corpus process. The Mirmehdis took full advantage of both. The court was not persuaded by the Mirmehdis' claims that they were still entitled monetary damaged under *Bivens* because neither the immigration system nor the habeas process provides for monetary compensation for unlawful detention.

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

*****

Use of Force Situations (Detention / Arrest)

Mlodzinski v. Cormier, 648 F.3d 24 (1st Cir. 2011)

The court held that the officers were entitled to qualified immunity after they detained the plaintiffs for forty-five minutes in handcuffs during the execution of a search warrant. Without deciding whether the officers violated the plaintiff's *Fourth Amendment* rights, the court stated that if there was a violation, it was not so clear as to give the officers fair warning that their conduct was unlawful.

The court, however, declined to grant qualified immunity to two officers who pointed their firearms at two individuals who were present during the execution of the search warrant. A reasonably competent officer would not have thought that it was permissible to point an assault rifle at the head of an innocent, non-threatening, and handcuffed fifteen-year-old girl for seven to ten minutes. This was far beyond the time it took to secure the premises, arrest, and remove the only suspect.

Regarding the second woman, it was objectively unreasonable for the officer to point his assault rifle at her head after she was handcuffed and lying partially nude in bed. The woman was not the suspect, she was not trying to resist, flee, or dispose of any contraband or weapons, and she was completely compliant with all orders.

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

*****

Glick v. Cunniffe, 655 F.3d 78 (1st Cir. 2011)

Glick was arrested for using his cell phone's digital camera to film several police officers arresting a man on the Boston Common. The charges against him for violating a state wiretap statute and two other offenses were eventually dismissed. Glick sued the officers under *42 U.S.C. § 1983* claiming that his arrest for filming the officers violated his *First* and *Fourth Amendment* rights.

The court held that the officers were not entitled to qualified immunity. First, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital and well-established liberty protected by the *First Amendment*. Glick was exercising clearly established *First Amendment* rights in filming the officers in the Boston Common, the oldest city park in the United States.

Additionally, the officers arrested Glick without probable cause, in violation of the *Fourth Amendment*. The state wiretap statute prohibits individuals from secretly recording others. Here, Glick told the officers he was recording their actions and they acknowledged this by arresting him. A reasonable officer would have known that arresting Glick for a wiretap offense under these circumstances was a violation of his *Fourth Amendment* rights.

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

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Lamont v. State of New Jersey, 637 F.3d 177 (3d Cir. 2011)

Quick stole a car and after a police chase abandoned it and fled into a densely wooded area. Back-up officers arrived shortly after 10:00 p.m. to help search for him. The officers located Quick, and from a distance of five to eight feet, with guns drawn and flashlights trained on him, ordered him to both show his hands and to freeze. Quick pulled his right hand out of his waistband as if he were drawing a pistol. Three officers opened fire. They shot continuously for ten seconds and fired thirty-nine rounds. At some point Quick turned away from the officers and eleven of the eighteen bullets that struck Quick hit him from behind. It could not be determined

when during the shooting the fatal bullets struck Quick. The officers discovered that Quick did not have a gun in his right hand, but rather a crack pipe.

The court held that the officers were entitled to qualified immunity for their initial use of deadly force. An officer who uses deadly force in the mistaken belief that a suspect is armed will be forgiven as long as the mistake is reasonable and the circumstances otherwise justify the use of such force. Quick stood with his right hand concealed in his waistband, apparently clutching an object. He then suddenly pulled his right hand out of the waistband in a movement described as being similar to that of drawing a gun. At that point, the officers were justified in opening fire. An officer is not constitutionally required to wait until he sets eyes upon a weapon before employing deadly force to protect himself against a fleeing suspect who moves as though to draw a gun.

In situations where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force no longer exists. Although Quick's weaponless right hand was fully visible immediately after the officers began firing, they continued to fire for approximately ten seconds, shooting a total of thirty-nine rounds. The court held that a reasonable jury could conclude that the officers should have recognized that Quick was unarmed and stopped firing at him after he turned away from them, no longer posing a threat, therefore, they were not entitled to qualified immunity. It may be that the officers were justified in their use of force at all times, but it will be up to a jury to make that decision.

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

*****

Noel v. Artson, 641 F.3d 580 (4th Cir. 2011)

After a nine day trial, a jury found that police officers executing a search warrant for narcotics did not violate the *Fourth Amendment* when they performed a no-knock entry into a residence and fatally shot a woman who was reaching for a firearm.

The court held that the district court gave the jury the proper instruction concerning the officers' use of force when it stated, "The correct standard, for all claims that law enforcement officers have used excessive force should be analyzed under the *Fourth Amendment* and its reasonableness standard."

The court also held that the district court's jury instruction properly discussed the need for both the officers' entry itself and their post-entry conduct to be reasonable. Additionally, the district court stated that the reasonableness of an officer's conduct in executing a search warrant, including the use of force, must be judged from the perspective of a reasonable officer on the scene, and not with the 20/20 vision of hindsight. The district court's jury instruction made clear that the reasonableness requirement governed the entire search, not just one segment of it.

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

*****

Short v. West, 662 F.3d 320 (5th Cir. 2011)

Short, an officer in the El Paso Police Department, (EPPD) was assigned to a narcotics task force for the 34th Judicial District. The 34th Judicial District includes both El Paso and Hudspeth counties. While conducting a task force related traffic stop in Hudspeth County, Short encountered a Hudspeth County Sheriff Department (HCSD) deputy who asked him what he was doing there. Short identified himself to the satisfaction of the deputy and told her that EPPD task force officers were working in Hudspeth County. The deputy contacted her dispatcher who in turn called Hudspeth County Sheriff West and told him that EPPD officers were performing traffic stops in Hudspeth County. Sheriff West ordered his deputies and find out whether the EPPD officers were, in fact, law enforcement officers. Sheriff West also ordered his deputies to round up the EPPD task force officers and escort them to his office.

A lieutenant in the HCSD located Short's supervisor, who produced identification showing him to be an officer with the EPPD and the task force. Short's supervisor ordered him and the other task force members to return to El Paso County. While on the way back to El Paso County, Short and several task force members were stopped and surrounded by HCSD deputies. The HCSD deputies ordered Short and the other task force members to go to a nearby HCSD substation. They were told that they would be arrested if they failed to comply. Short and the task force members went to the HCSD substation where Sheriff West complained that he had not been notified of the task activities in his county. He then told the task force officers that they were free to leave. Short sued Sheriff West under *42 U.S.C. § 1983* for violating his rights under the *Fourth Amendment*.

The court held that Sheriff West was not entitled to qualified immunity. First, the court found that Short was seized for *Fourth Amendment* purposes. The HCSD deputies surrounded the task force officers' vehicles prevented them from returning to El Paso County. In addition, Short was threatened with arrest if he did not accompany the deputies to the HCSD substation. A reasonable person would not feel free to ignore such a show of force and go about his business.

Second, the court found that such a seizure was objectively unreasonable. Sheriff West ordered the task force officers to be detained and brought to the HCSD substation so he could personally examine them. This was not likely to quickly confirm or dispel his suspicions as to whether or not the task force officers were legitimate law enforcement officers. There were less intrusive ways to accomplish this. Sheriff West could have contacted the EPPD Chief, whom he knew or he could have run the license plates on the task force officers' vehicles. It was unreasonable to not recognize or pursue these options as alternatives to seizing Short.

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

*****

Jones v. Clark, 630 F.3d 677 (7th Cir. 2011)

Officer Clark approached Jones, who is African-American, after receiving a report that a "person of color" was taking pictures of houses in an almost entirely white neighborhood. Jones was a meter reader for Commonwealth Edison (ComEd), and she used binoculars so she could take readings from a distance when she could not gain access to a yard. Clark approached Jones, who was dressed in a hat, shirt, pants, and a reflective vest, all emblazoned with a ComEd logo.

Jones told Clark that she was meter reader and gave him two ComEd identification cards that contained her full name and photograph. Jones showed the binoculars to Clark and explained to him why she used them. When Jones turned to walk away, the officer asked her for her date of birth. Jones, after accusing Clark of harassing her, took a few steps away from him and took out her cell phone to call her supervisor. Clark called for back up. Officer Kaminski arrived and after a brief exchange with Jones arrested her for obstructing a peace officer.

When Clark first approached Jones, it was a consensual encounter, and he was entitled to ask her what she was doing. However, once Clark asked Jones for her date of birth, he conceded that she was not free to leave. At this point, the court found that the officers could not point to a single fact that led them to believe that Jones was engaged in criminal activity. Jones was dressed in a ComEd uniform, she told Clark that she was reading meters, she provided two forms of company identification, she explained her use of binoculars, and a resident confirmed that she had read the meter at his house.

The court held that the officers did not have reasonable suspicion to detain Jones, nor did they have probable cause to arrest her. The officers argued that they had probable cause to arrest Jones for obstructing a peace officer and disorderly conduct; however, the court stated that the only disorderly conduct in this case came from the officers. As a result, the court held that the officers were not entitled to qualified immunity from Jones's false arrest claim.

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

*****

Aleman v. Village of Peoria, 662 F.3d 897 (7th Cir. 2011)

Aleman operated a day care center in his home. One morning Danielle Schrik dropped off her eleven-month-old son at Aleman's house. On the two previous days, the child had been lethargic and feverish. On this day, shortly after being dropped off he collapsed. Aleman picked the child up and gently shook him to elicit a response and after there was none, called 911. The child died four days later.

Aleman voluntarily went to the police station to be interviewed. After waiting forty-five minutes, without being interviewed, Aleman asked if he could leave. An officer told him, no, because he was under arrest. Five hours later, two officers entered the interrogation room and claimed that they had spoken to several people about what had happened to the child. The officers told Aleman that they had spoken to three doctors who all agreed that Aleman's shaking of the child must have caused the injuries since the child was sluggish but responsive when he arrived at Aleman's house that morning. This account of what the doctors had said was a lie. Aleman responded by telling the officers that if that was what the doctors had said, then he must have caused the injuries because he had shaken the child. However, he continued to express disbelief that his gentle shaking could have caused the child's injuries.

The officers arrested Aleman for aggravated battery on a child. Aleman made bail and was released from custody. Four days later the child died. Following the child's autopsy, the officers re-arrested Aleman and charged him with murder. As the investigation progressed however, the case against Aleman quickly fell-apart. Over a year later, all charges against him were dismissed. Aleman sued several officers for violating his constitutional rights.

The court held that Aleman's initial arrest for aggravated battery on a child was supported by probable cause. Officers had interviewed doctors who had told them, misleadingly, as they all later admitted, that the injuries to the child were "fresh." The doctors stated that "fresh" meant that the injuries had occurred within a week, while the officers interpreted "fresh" to mean that the injuries had occurred that day. It was natural for the officers to suspect Aleman, since he was the last person to have had custody of the child and he admitted to shaking him.

The court held that Aleman's second arrest for murder, however, was not supported by probable cause. At the child's autopsy, the pathologist stated that it was highly unlikely that his injuries had been caused by Aleman since the symptoms the child had displayed in the days before were consistent with a pre-existing brain injury. Later that day, an officer went back and told the pathologist that the child had been behaving normally when he arrived at Aleman's house. This was a lie and caused the pathologist to change her opinion and tell the prosecutor that the child's injuries had occurred while in Aleman's care. The investigation revealed that the officer lied to the pathologist to focus attention on Aleman and away from Danielle Schrick, the child's mother, to whom, it was suspected, the officer had become attracted. Without the officer's lie to the pathologist and his efforts to obstruct the investigation into Schrick, there would have been no basis for charging Aleman with any crime. The court refused to grant the officer qualified immunity because it was unreasonable for him to believe that Aleman had killed the child.

Finally, the court held that the officers violated *Miranda* when they interrogated Aleman after his initial arrest. Instead of ceasing their questioning, after Aleman sought his lawyer's aid, the officers exploited his distraught state and badgered him to waive his *Miranda* rights. Aleman indicated a desire for the assistance of counsel twice, and only after responding to further police-initiated custodial interrogation, did he agree to be questioned. When a suspect invokes his right to counsel, the police may not recommence questioning unless the suspect's lawyer is present or the suspect initiates the conversation himself.

In addition to the violation of *Miranda*, the court was troubled by the lies the officers told Aleman that convinced him that he must have caused the child's death. Not being a medical expert, Aleman could not contradict what was represented to him as settled medical opinion. Aleman had shaken the child. If medical opinion excluded any other possible causes of death, his shaking, although gentle, must have been the cause of death. Aleman had no rational basis, given his lack of medical training to think otherwise. Tricks that are likely to induce a false confession render that confession inadmissible because of its unreliability, even if it is otherwise voluntarily obtained.

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

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Chambers v. St. Louis County, 641 F.3d 898 (8th Cir. 2011)

The court held that an individual may prove an unreasonable seizure occurred, based on an excessive use of force, without having to show more than a *de minimis* injury.

Graham v. Conner requires that a particular use of force used to effect a seizure must be reasonable. This rule focuses on the reasonableness of the seizure and not on the degree of any

injury that an individual may suffer. It is possible to prove an excessive use of force that only causes a minor injury.

In this case, the court held that Chambers presented sufficient evidence, if believed, to establish a violation of the *Fourth Amendment*. However, the officers were entitled to qualified immunity since it was not clearly established at the time that an officer could violate an individual's rights by applying force that caused only *de minimis* injury.

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

*****

Johnson v. Carroll, 658 F.3d 819 (8th Cir. 2011)

Officers attempted to arrest Johnson's nephew. During this process, the nephew resisted and the officers physically took him to the ground. While he was on the ground, Johnson jumped onto his back to prevent the officers from arresting him. After Johnson failed to follow verbal orders by the officers to move, she was maced and physically removed from her nephew. Both were arrested and taken to jail.

The court held that the officers were not entitled to qualified immunity. The court concluded that as a matter of law, the officers' use of force was not objectively reasonable. There was no evidence that Johnson actively pushed the officers away from her nephew, threatened them or took any other action against them. Her attempts to interfere with her nephew's arrest did not amount to a severe or violent offense, as demonstrated by her arrest on a misdemeanor offense for obstructing legal process. The court stated that it would be up to a jury to determine whether the officers used excessive force against Johnson.

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

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Garcia v. County of Merced, 639 F.3d 1206 (9th Cir. 2011)

The court held that the officers were entitled to qualified immunity against Garcia's claim that they violated his *Fourth Amendment* rights for arresting him after he smuggled methamphetamine into the county jail to one of his clients. The officers carefully evaluated the information provided by the confidential informant, corroborated it, then applied to a judge for permission to use a controlled substance in order to conduct a reverse sting operation. Prior to the reverse sting operation the officers consulted with two deputy district attorneys who approved of this plan. The officers did not take Garcia into custody on the informant's information alone, but waited to see what his contact with Garcia would produce.

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

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Chism v. Washington State, 655 F.3d 1106 (9th Cir. 2011)

Chism and his wife claimed that officers violated their *Fourth Amendment* rights by obtaining search and arrest warrants against them with affidavits that deliberately or recklessly contained material omissions and false statements.

The court agreed, holding that a reasonable jury could find that the officers violated the *Fourth Amendment* through judicial deception. Specifically, the court found that the officers knowingly drafted affidavits for arrest and search warrants that contained false statements and omissions.

Additionally, the court held that the officers were not entitled to qualified immunity. It was clearly established at the time of the officers' conduct that government employees were not entitled to qualified immunity on judicial deception claims.

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

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Howards v. McLaughlin, 634 F.3d 1131 (10th Cir. 2011)

Secret Service agents arrested Howards for assaulting the Vice President after he touched the Vice President's right shoulder with his hand during a public appearance. The agents turned Howards over to the local Sheriff's Department. Howards was ultimately charged with harassment, in violation of Colorado state law. The state prosecutor subsequently dismissed the charges and no federal charges were ever filed.

Howards sued four Secret Service agents claiming that they unlawfully arrested him in violation of his *First* and *Fourth* Amendment rights.

As to the *Fourth Amendment* claim, the court held that the agents were entitled to qualified immunity because there was probable cause to arrest Howards for lying to them in violation of *18 U.S.C. § 100*1. At the time of his arrest, Howards had already falsely claimed that he had not touched the Vice President. The facts, as they were known to the agents at the time, objectively justified the arrest under *§ 1001*, despite the fact the agents based the arrest on another charge.

As to the *First Amendment* claim, the court held that two agents were not entitled to qualified immunity. The court concluded that Howards had presented enough evidence to allow a jury to find that the agents arrested him in retaliation for comments he made about the Vice President.

The *First Amendment* prohibits government officials from subjecting individuals to retaliatory actions, to include arresting them, for speaking out. Howards provided facts that suggested two agents might have been substantially motivated by his speech when they arrested him. One agent overheard Howards say into his cell phone, "I'm going to ask him how many kids he's killed today." The agent admitted that the comment disturbed him and that it was not healthy nor quite right for someone to make such a comment about the Vice President. When the second agent found out about Howards's comment, he became visibly angry and admitted that he considered the cell phone conversation when he decided to arrest Howards.

The court held that the remaining two agents were entitled to qualified immunity for the *First Amendment* claim because Howards offered no evidence that they participated in the decision to arrest him. These agents had no contact with Howards until after his arrest.

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

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Mascorro v. Billings, 656 F.3d 1198 (10th Cir. 2011)

An officer saw Mascorro's seventeen-year-old son, Joshua, driving without taillights at 11:30 p.m. and attempted a traffic stop. Joshua did not stop, but instead drove two blocks to his parents' house, ran inside and hid in the bathroom. While both parties dispute what exactly happened, officers eventually entered the house without a warrant and arrested Joshua.

The court held that the officers were not entitled to qualified immunity after they entered Mascorro's home without a warrant to arrest her son for driving without taillights. The court did not find any circumstances that created an exigency that would have allowed the officers to enter the house without a warrant. The intended arrest was for a minor traffic violation, committed by a minor with whom the officer was acquainted. There was no evidence that could have potentially been destroyed and there were no officer or public safety concerns. The warrantless entry based on hot pursuit was not justified.

Additionally, it would have been clear to a reasonable officer, at the time the officers entered the Mascorro house, that their entry was unlawful under the circumstances presented. No reasonable officer would have thought pursuit of a minor for a mere misdemeanor traffic offense constituted the sort of exigency permitting entry into a home without a warrant.

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

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Koch v. City of Del City, 660 F.3d 1228 (10th Cir. 2011)

Koch assumed control over the property and care of an elderly woman named Gladys Lance. Lance was supposed to be living with Koch, but Lance's niece became concerned after she could not contact her aunt for several months and then learned that Koch had been granted power of attorney over her. A state court issued an emergency pick-up order for Lance.

After learning about the pick-up order, an officer went to Koch's home to see if Lance was there. Koch told the officer to get off her property. The officer told Koch that if she did not tell him the whereabouts of Lance that he would arrest her for obstruction. Koch refused and the officer arrested her after a brief struggle. After her arrest, Koch told the officer that Lance was living in a nursing home. The obstruction charge against Koch was eventually dismissed. Koch sued the officer for false arrest and for using excessive force during the arrest.

The court held that the officer was entitled to qualified immunity on Koch's false arrest claim. First, it was reasonable for the officer to believe that Koch had information about Lance's whereabouts. Second, the court characterized the encounter between Koch and the officer as an investigative detention under *Terry*. The question then became whether the officer believed that Koch had a legal obligation to answer his questions concerning Lance and that if she refused, he had probable cause to arrest her for obstruction. Neither the Tenth Circuit nor the United States Supreme Court has ruled on whether an officer may use a suspect's refusal to answer his questions to establish probable cause for arrest. The court found no clearly established right

under the *First* or *Fourth Amendments* that recognized that a suspect may refuse to answer questions during a *Terry* stop.

Additionally, it was not clearly established whether the officer's conduct violated Koch's *Fifth Amendment* rights, where her refusal to answer the officer's questions formed the probable cause for her arrest, but she was never prosecuted on that charge. While a *Fifth Amendment* right to remain silent may be triggered during a *Terry* stop, the court has limited that right to pre-arrest custodial interrogations where incriminating questions were asked. Here, Koch did not claim that her pre-arrest encounter with the officer constituted a custodial interrogation. As a result, the court similarly found that there was no clearly established right under the *Fifth Amendment* to refuse to answer questions during a *Terry* stop.

The court emphasized that its holding was specific to the facts of this case and that a reasonable officer could have believed that Koch had information regarding Lance's whereabouts and that she was required to convey this information to him or be subject to arrest for obstruction.

The court held that the officer was entitled to qualified immunity on Koch's excessive force claim. Any injuries suffered during the handcuffing process were de minimus and not supported by any medical evidence. To the contrary, Koch went to the emergency room almost a month after her arrest and tried to have the hospital staff give her written documentation indicating that she had suffered nerve damage in her wrist.

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

*****

Coffin v. Brandau, 642 F.3d 999 (11th Cir. 2011)

Cynthia Coffin tried to shut her open garage door to prevent two officers from entering and serving a court order on her husband. As the garage door was closing, one of the officers stepped into the threshold, breaking the electronic-eye safety beam, causing the door to retreat to its open position. The officers, who did not possess either a search warrant or an arrest warrant, entered the open garage and arrested her for obstruction of justice.

The court held that entering the garage as Ms. Coffin tried to close the door was a violation of the *Fourth Amendment*. However, the court found that at the time it was not clearly established that entering the open garage in the face of Ms. Coffin's attempts to exercise her *Fourth Amendment* privacy rights would violate the *Fourth Amendment* therefore; the officers were entitled to qualified immunity.

The officers reasonably believed that Ms. Coffin was resisting service of legal process, a misdemeanor occurring in their presence, which would allow them to make an immediate arrest. The officers were faced with a split-second decision about whether or not to enter the garage. There was no binding case law that informed the officers that they were violating the *Fourth Amendment*, and the non-binding cases that existed indicated that entry into an attached open garage might not be a *Fourth Amendment* violation.

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

*****

Use of Force / Qualified Immunity – Taser

U.S. v. Norris, 640 F.3d 295 (7th Cir. 2011)

The court also held that it was reasonable for the officer to use his taser on the defendant after he ignored their commands to stop, and reached into his waistband after he threw a crumpled paper bag onto the sidewalk. The officer's actions were reasonable because the defendant exhibited behavior consistent with and intent to discard evidence and he engaged in actions that suggested he was reaching for a weapon. When the taser stopped cycling, the defendant rolled onto his side and the officers found a small pistol on the ground underneath him.

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

*****

Mattos v. Agarano, 661 F.3d 433 (9th Cir. 2011)

The Ninth Circuit heard two cases and consolidated them for disposition under this caption. In both cases, the court had to decide whether the use of a taser to subdue a suspect constituted an excessive use of force and then whether the officers were entitled to qualified immunity.

In the first case, *Brooks v City of Seattle*, an officer pulled Brooks over for a speeding, claiming that she was driving 32 miles-per-hour in a 20 mile-per-hour zone. The officer issued Brooks a citation and requested, per the municipal code, that she sign the citation as acknowledgement that she had received it. Brooks, who was seven months pregnant, denied that she was speeding and refused to sign the citation. Two other officers arrived on the scene and made the decision to arrest Brooks. After Brooks refused to get out of her car, the officers discussed where on her body to tase her because they knew she was pregnant. One of the officers then opened the car door and twisted Brooks's arm up behind her back while also removing the keys from the ignition. Brooks stiffened her body and grabbed the steering wheel to avoid the officer's efforts to remove her from the car. In the meantime, another officer applied his taser to Brooks's left thigh in drive-stun mode. The officer tased Brooks two more times in less than a minute. After the third tase, Brooks fell over in her car. The officers dragged her out, laying her face down on the street where they handcuffed her.

After applying the factors from *Graham v. Connor*, the court held that the officers' use of force was unreasonable. First, failing to sign a traffic citation for a minor speeding violation is not a serious offense. Second, at no time did Brooks pose an immediate threat to the safety of the officers or others. She did not threaten the officers and did not give any indication that she was armed. At most, the officers may have found Brooks to be uncooperative. However, after the officer grabbed her arm and removed the keys from the ignition, she no longer posed a potential threat to the officers. Finally, while Brooks engaged in some resistance to being arrested, she did not attempt to flee or behave violently against the officers. In fact, the officers had enough time to discuss where to tase Brooks after they realized that she was pregnant. Additionally, three tasings in such rapid succession provided no time for Brooks to recover from the pain she experienced, gather herself, and reconsider her refusal to comply.

Even though the officers' use of force was found to be excessive, the court held that they were entitled to qualified immunity on Brooks's *42 U.S.C § 1983* claim. When this incident occurred,

in November 2004, the law was not sufficiently clear to put the officers on notice that tasing Brooks under these circumstances constituted excessive force. The court, however, agreed with the lower court, which held that the officers were not entitled to qualified immunity for Brooks's assault and battery claims under Washington state law.

In the second case, police responded to the Mattos residence after receiving a 911 call for a domestic dispute. Officers found Troy Mattos intoxicated outside the house. The officers entered the house with him to check on his wife. Mrs. Mattos told the officers that she was okay and asked the officers to get out of her house. While this was happening, another officer tried to arrest Mr. Mattos. As the officer moved in to arrest Mr. Mattos, he pushed up against Mrs. Mattos who had been standing between them. Mrs. Mattos put her arms up to keep her chest from coming in contact with the officer, while suggesting that everyone calm down and go outside to talk, so they would not wake up her children. The officer, without warning, then shot his taser at Mrs. Mattos in dart-mode. The officers arrested both parties, charging Mrs. Mattos with harassment and obstructing government operations. Both charges against her were eventually dropped.

The court held that under the circumstances it was not reasonable for the officer to deploy his taser against Mrs. Mattos. Mrs. Mattos was physically trapped between the officer and her husband. Her only physical contact with the officer occurred when she defensively raised her hand to prevent him from pressing his body against hers after he came into contact with her. Finally, even though it was plausible to do so, the officer failed to warn Mrs. Mattos before deploying his taser against her. The court has held that when an officer fails to warn a person before deploying his taser, under circumstances where it would be plausible to issue a warning, it weighs in favor of finding a constitutional violation.

However, like the decision in *Brooks*, the court held that the officer was entitled to qualified immunity. When this incident occurred, in August 2006, there was no Supreme Court or Ninth Circuit Court of Appeals decision addressing the use of a taser in dart mode. Additionally, it would not have been clear to a reasonable officer that deploying his taser in dart mode against Mrs. Mattos constituted excessive force.

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

*****

Mistaken Use of Deadly Force (Firearm / Taser)

Henry v. Purnell, 652 F.3d 524 (4th Cir. 2011)

Purnell attempted to arrest Henry on an outstanding misdemeanor failure-to-pay-child-support warrant. Henry fled on foot and Purnell chased him. Purnell mistakenly drew his firearm instead of his taser and shot Henry in the elbow. A divided panel of the court held that Purnell was entitled to qualified immunity on Henry's *§ 1983* claim. (See 10 Informer 10)

However, after a rehearing in front of the full panel, the court reversed the earlier decision, holding that Purnell was not entitled to qualified immunity and remanded the case for trial. Although both parties agree that Purnell mistakenly fired his pistol instead of his taser, it is not the honesty of his actions that determine whether his conduct was constitutional, but rather the

objective reasonableness of his actions. There were several facts that Purnell knew or should have known that would have alerted any reasonable officer to the fact that he was holding his Glock and not his taser. (1) Purnell knew he carried his Taser in the holster on his right thigh, which was about a foot lower that the holster on his hip that held his Glock, (2) Purnell could feel the weight of the Glock in his hand which was nearly twice the weight of his Taser, and (3) Purnell knew the Taser had a thumb safety catch that had to be flipped to arm the weapon, while the Glock had no thumb safety.

Additionally, the court held that it would have been clear to a reasonable officer that shooting a fleeing, non-threatening misdemeant with a firearm was unlawful.

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

*****

Torres v. City of Madera, 648 F.3d 1119 (9th Cir. 2011)

Torres was handcuffed in the back of a police car. After he began yelling and kicking the rear car door from the inside, an officer opened the car door and mistakenly shot Torres in the chest with her Glock handgun instead of her Taser. Torres later died from the gunshot wound.

The court held that summary judgment in favor of the officer was inappropriate because a reasonable jury, after taking into account all the facts and circumstances facing the officer at the time of the mistaken shooting, could find that her mistake was unreasonable. The jury could conclude that (1) the officer's prior incidents of weapons confusion put her on notice of the risk of repeating this conduct, (2) her daily practice of drawing each weapon at her sergeant's instruction provided her with the training to avoid such instances and (3) the non-exigent circumstances surrounding the shooting did not warrant such hasty conduct which increased the risk of a weapons error. While a jury might ultimately find the officer's mistake of weapon to have been reasonable, it was not appropriate for the lower court to reach this conclusion.

The court also held that the officer was not entitled to qualified immunity because prior case law clearly established that an unreasonable mistake in the use of deadly force against an unarmed, non-dangerous suspect violates the *Fourth Amendment*. The focus is not on what the officer intended to do, but rather on the level of force actually used.

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

*****

Non-Use of Force Situations (Search Warrant Application / Execution / Other)

McInnis v. State of Maine, 638 F.3d 18 (1st Cir. 2011)

A probation officer authorized state law enforcement officers to arrest McInnis, without a warrant, for violating the terms of his probation and to conduct a warrantless search of his house for drugs. The probation officer did not know that McInnis's probation period had expired. McInnis's original sentence had been reduced, but never entered into the probation department's records.

The court held that the officers were entitled to qualified immunity. The officers reasonably relied on the probation officer's assertion that McInnis violated his probation when they arrested him. There was also evidence that McInnis possessed drugs inside the house. An informant told police that he saw the drugs and the officers knew that McInnis's probation had been revoked in the past for possession of drugs.

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

*****

Cochran v. Gilliam, 656 F.3d 300 (6th Cir. 2011)

The court held that officers were not entitled to qualified immunity after they violated Cochran's *Fourth Amendment* rights by assisting his landlord in wrongfully seizing all of his personal property during the execution of an eviction order.

Cochran's landlord obtained an eviction order against him for failure to pay the rent. Officers went with the landlord to assist him in taking possession of the house. Once at the house, however, the officers also helped the landlord remove all of Cochran's personal property that was inside so it could be sold to satisfy back-rent that was owed. The eviction order did not cover the disposition of Cochran's personal property inside the house or the issue of back-rent.

When police officers take an active role in a seizure or eviction, they are no longer merely passive observers and they may not be entitled to qualified immunity. In this case, there was neither a court order permitting the officers' conduct nor any exigent circumstances in which the government interest would outweigh Cochran's interest in his property.

The officers went beyond their role of keeping the peace during the repossession of the house when they interfered with Cochran's property in violation of the *Fourth Amendment*. The officers threatened to arrest Cochran if he interfered with the landlord's removal of his property and were photographed carrying items out of the house and loading them into the landlord's truck. In addition, an officer bought Cochran's television from the landlord at the scene for one hundred dollars. The officers' involvement in assisting the landlord in seizing all of Cochran's personal property was unreasonable because there was no legal basis for such action.

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

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Wheeler v. City of Lansing, 660 F.3d 931 (6th Cir. 2011)

Police were investigating a series of home invasion robberies. Officer Wirth arrested Brown for his involvement in two of those robberies. After Brown told Wirth that he took some of the stolen property to Wheeler's apartment, officers executed a search warrant there. The search warrant affidavit established probable cause to search for and seize items allegedly taken in those two robberies, which included televisions, a digital camera, game systems and cash. However, the warrant described other items to be searched for and seized, such as, shotguns, long guns, big-screen televisions, necklaces, rings and car stereo equipment. Among the items seized by the officers were three cameras, various pieces of gold jewelry, two watches, a laptop computer, two game systems, a video camera and a car stereo.

The court found that Wheeler's *Fourth Amendment* rights were violated when the officers seized items that were identified in the warrant but not supported by probable cause in the warrant affidavit. However, the court found that Wirth was entitled to qualified immunity for seizing those items. The court noted that a prosecuting attorney drafted the affidavit and warrant, and that a state magistrate approved the warrant. The court found that such a deficiency between an affidavit and a warrant was unusual and that it was reasonable for Wirth to fail to recognize it.

The court also found that Wheeler's *Fourth Amendment* rights were violated when the officers seized items that had not been described with sufficient particularity in the warrant. The warrant to search Wheeler's apartment listed broad categories of stolen property and provided no way to distinguish the stolen items from Wheeler's own personal property. Officer Wirth had additional information about the stolen items that he could have included in the warrant. For example, the warrant described one category of items to be seized simply as "cameras." However, the police reports listed the specific brands of the stolen cameras. In addition, two of the cameras the officers seized were Kodak cameras, even though none of the reports listed a Kodak-brand camera stolen. Additional details, if available, are required to help distinguish between contraband and legally possessed property.

The court held that it would have been apparent to a reasonable officer that listing general categories of items to be seized, even though further details were available, violated the *Fourth Amendment's* specificity requirement. As a result, Wirth was not entitled to qualified immunity for this particular violation.

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

*****

Huff v. City of Burbank, 632 F.3d 539 (9th Cir. 2011)

Four officers went to the Huffs' residence to investigate alleged threats made by their son at school. Two officers spoke to Mrs. Huff on the front steps while two officers stood near the sidewalk unable to hear the conversation. When Mrs. Huff turned and went into the house, the two officers who had been speaking to her followed her inside without her consent. The two officers on the sidewalk went into the house as well, believing that Mrs. Huff had consented to their entry. Once inside the home, Mr. Huff challenged the officers' authority to be there. The officers remained inside the home for five to ten minutes and left after they were satisfied that the Huffs' son had not threatened anyone.

The court held that the two officers who initially spoke with Mrs. Huff were not entitled to qualified immunity. Both officers were aware that they did not have probable cause to stop or detain Mrs. Huff or her son, and they knew they had not been given consent to enter the home. A reasonable officer in this situation may have been frustrated by being refused entry to the home; however, he would not have mistaken such a refusal or reluctance to answer questions as exigent circumstances, which would allow him to enter the home without a warrant.

The court held that the two officers who were standing on the sidewalk, although mistaken, were reasonable in believing that their colleagues had been given consent to enter the home. As a result, they were entitled to qualified immunity. No one told them the basis for entry into the

home or told them that they should remain outside. Under those circumstances, a reasonable officer may have believed that his fellow officers had been given consent to enter the home.

However, in *Ryburn v. Huff***,** the Supreme Court reversed the Ninth Circuit Court of Appeals, which had held that the two officers who initially entered the house were not entitled to qualified immunity. The Court found that the officers could have reasonably believed they were justified in making a warrantless entry into the house if there was an objectively reasonable basis for fearing that violence was imminent. In this case, a reasonable officer could have reached that conclusion. Mrs. Huff's behavior, especially after she ran into the house without answering the question of whether there were any guns inside, allowed the officers to reasonably believe that there could be weapons inside, and that family members or the officers themselves were in danger.

Click **HERE** for the U.S. Supreme Court's opinion.

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***Bravo v. City of Santa Maria*,** 665 F.3d 1076 (9th Cir. 2011)

A detective drafted a warrant to search Javier Bravo Sr.'s home for weapons that were used in a drive-by shooting four days earlier. In the search warrant affidavit, the detective claimed that Javier Bravo Jr. was living in his father's home and that he was a member of the gang that was involved in the shooting. The affidavit also stated that Javier Jr. had been convicted of receiving stolen property, but failed to mention that he was six months into serving a two-year prison sentence for that crime. The affidavit did not allege that Javier Sr. or any other members of his family were involved in the shooting. When other officers executed the search warrant, they learned that Javier Jr. had been in prison for six months. No weapons or other evidence connected to the drive-by shooting was discovered in the search.

The court held that the detective who drafted the search warrant affidavit was not entitled to qualified immunity. The court found that failing to include Javier Jr.'s custody status was a material fact that the detective omitted from the search warrant affidavit. The court then considered Javier Jr.'s custody status, along with the other information provided by the detective, and concluded that the officers did not have probable cause to search Javier Sr.'s home.

Additionally, the court disagreed with the lower court, which held that the detective's omission of Javier Jr.'s custody status was "negligent at most." The court held that a reasonable jury could conclude that the detective's omission was intentional or reckless. The detective testified that he had reviewed Javier Jr.'s rap sheet prior to drafting the search warrant affidavit and that he may have seen the notation that Javier Jr. had received a two-year prison sentence, but he could not remember. However, the detective also testified that if he had seen the prison sentence on Javier Jr.'s rap sheet, it would not have been something he would have checked into, which emphasized to the court the detective's disregard for the importance of full disclosure of information to the issuing magistrate.

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

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Federal Tort Claims Act (FTCA)

Hart v. U.S., 630 F.3d 1085 (8th Cir. 2011)

A federal grand jury indicted Block for three sex offenses and a warrant was issued for his arrest. A federal agent went to Block's home to arrest him. The agent had previously interviewed Block regarding the case, and they were familiar with each other. Block came out of the house but asked the agent if he could go back inside to finish cleaning his room before he was taken to jail. The agent agreed and Block went back inside. The agent heard a gunshot from the back of the house. When he went to investigate, he found Block dead from a self-inflicted gunshot wound to the head.

Block's mother sued the federal government. She alleged the federal agent did not adequately supervise, secure and detain her son after his arrest, which resulted in his suicide. The court dismissed her suit, holding that the discretionary function exception to the general waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) applied.

The United States is immune from suit unless it consents. Congress waived the sovereign immunity of the United States by enacting the FTCA, under which the federal government is liable for certain torts its agents commit in the course of their employment. However, the FTCA does not waive immunity when a federal employee performs a discretionary function.

The agent complied with his agency's handbook, which granted him the discretion to afford Block some freedom of movement before transporting him to jail. While it is the mandatory duty of law enforcement officers to enforce the laws, the court held that a federal law enforcement officer's on-the-spot decisions concerning how to effectuate an arrest, including how best to restrain, supervise, control or trust an arrestee, fall within the discretionary function exception to the FTCA.

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

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Fifth Amendment

Double Jeopardy

U.S. v. Reveles, 660 F.3d 1138 (9th Cir. 2011)

Reveles, who is in the United States Navy, was accused of drunk driving on base. The Navy charged him in an Article 15, Uniform Code of Military Justice, proceeding, which is considered non-judicial punishment (NJP). Reveles was found guilty. Based on the same incident, the government subsequently charged him in federal court for drunk driving under the *Assimilative Crimes Act (18 U.S.C. § 13).* Reveles pled guilty.

The court held that the government did not violate the *Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution* by prosecuting and convicting Reveles for a crime after the Navy punished him for the same offense. The court found that non-judicial punishment

administered by the Navy under *10 U.S.C. § 815* is not criminal in nature. The court noted that the legislative history confirmed Congress' intent to make non-judicial punishment non-criminal. Congress intended non-judicial punishments to deal with minor infractions of discipline without resorting to criminal law processes.

Additionally, the non-judicial punishment statute is not sufficiently punitive as to transform it into a criminal penalty that would implicate the *Double Jeopardy Clause*.

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

*****

Due Process

Pre-Trial Identification (Line-Ups, Show-Ups, Photo Arrays)

***U.S. v. Harris*,** 636 F.3d 1023 (8th Cir. 2011)

The court held that the photographic line-up used in this case was not impermissibly suggestive. The detective had significant experience in preparing photographic line-ups, and after obtaining a picture of Harris from a previous arrest, he entered Harris' physical characteristics into a computer program that randomly selected photographs of other individuals with similar characteristics. The detective considered the background color of each photograph and while no two photographs had identical backgrounds, each one had similar backgrounds. The slight variation in color in the backgrounds of the photographs did not create an impermissible suggestion to the witnesses that Harris was the person the police suspected.

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

*****

Self Incrimination

***Koch v. City of Del City*,** 660 F.3d 1228 (10th Cir. 2011)

It was not clearly established whether the officer's conduct violated Koch's *Fifth Amendment* rights, where her refusal to answer the officer's questions formed the probable cause for her arrest, but she was never prosecuted on that charge. While a *Fifth Amendment* right to remain silent may be triggered during a *Terry* stop, the court has limited that right to pre-arrest custodial interrogations where incriminating questions were asked. Here, Koch did not claim that her pre-arrest encounter with the officer constituted a custodial interrogation. As a result, the court similarly found that there was no clearly established right under the *Fifth Amendment* to refuse to answer questions during a *Terry* stop.

The court emphasized that its holding was specific to the facts of this case and that a reasonable officer could have believed that Koch had information regarding Lance's whereabouts and that she was required to convey this information to him or be subject to arrest for obstruction.

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

*****

Miranda

Bobby v. Dixon, 132 S.Ct. 181 (2011)

Dixon was convicted of murder in Ohio state court and sentenced to death. The Ohio Supreme Court ruled that Dixon's confession to the murder was admissible. The Sixth Circuit Court of Appeals disagreed and held that Dixon's confession was inadmissible. The United States Supreme Court reversed the Sixth Circuit, agreeing with the Ohio Supreme Court that Dixon's confession was admissible.

Dixon had three relevant encounters with the police in this case. On November 4, while Dixon was voluntarily at the police station on an unrelated matter, an officer questioned him about the victim's disappearance. The officer gave Dixon *Miranda* warnings, even though it was not a custodial situation. Dixon declined to answer any questions without a lawyer present and left the station.

As the investigation continued, the police arrested Dixon on November 9 for forging the victim's name on a check. At this point, the officers suspected that Dixon and a co-defendant were responsible for the victim's disappearance. Officers questioned Dixon, but intentionally did not provide him with *Miranda* warnings for fear that he would again refuse to speak with them. During this questioning, Dixon admitted to forging the victim's name on a check, but denied any knowledge concerning the victim's disappearance. The officers urged Dixon to tell them the truth, falsely claiming that the co-defendant was also being interviewed, and that he was giving them useful information. Dixon still refused to cooperate with the officers and was transported from the police station to the jail.

Approximately four hours later, officers brought Dixon back to the police station. Prior to any police questioning, Dixon told the officers he heard that they had found the victim's body and he wanted to tell them what happened. An officer *Mirandized* Dixon, he waived his rights and then confessed to murdering the victim, trying to pin most of the blame on the co-defendant.

The Sixth Circuit held that the officers could not speak to Dixon on November 9 because on November 4 he had refused to speak to them without his lawyer. The Supreme Court disagreed. Dixon was not in custody during his chance encounter with the police on November 4 and a person cannot validly invoke his *Miranda* rights in anticipation of a future custodial interrogation. The officers were free to attempt an interview with Dixon on November 9.

Next, the court held that the Sixth Circuit improperly ruled that the officers violated the *Fifth Amendment* by urging Dixon to "cut a deal" before his accomplice did so. The court has refused to find that a defendant's confession is "involuntary" when he confesses after being falsely told that a co-defendant has already provided information. The police are not prohibited from urging a suspect to confess before another suspect does so.

Finally, the court held that the Sixth Circuit improperly ruled that Dixon's confession was a result of a deliberate question-first, warn-later strategy. In the question-first, warn-later strategy,

an officer intentionally fails to *Mirandize* a suspect in the hope of obtaining a confession. After obtaining the confession, the officer then *Mirandizes* the suspect, hoping that the suspect waives those rights and repeats the earlier unwarned confession.

The court found that even though the police intentionally failed to *Mirandize* Dixon when they first interrogated him on November 9, the question-first, warn-later strategy was not applicable because there was no earlier confession to repeat. Dixon contradicted his prior unwarned statement when he confessed to the murder. In addition, there was no evidence that the police used Dixon's admission to forgery to induce him to waive his right to silence later. Dixon declared his desire to tell the police what had happened even before the second interrogation session began. There was no nexus between Dixon's unwarned admission to forgery and his later, warned confession to murder.

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

*****

U.S. v. Hughes, 640 F.3d 428 (1st Cir. 2011)

The court held that the defendant's interview was non-custodial; therefore, no *Miranda* warnings were required. The interview took place in the defendant's house after the officers went there to conduct a "knock and talk" interview. There were four officers present, but only two participated in the interview, and there was never any show of force toward the defendant. Only two officers carried visible weapons, which remained in their holsters for the entire visit. The officers did not make any physical contact with the defendant, and the atmosphere was non-confrontational and relaxed throughout the interview. The interview took place in the late morning and the defendant was appropriately dressed. The totality of the circumstances established that the defendant's freedom of movement was not restrained to such a degree that a reasonable person in his position would have thought that he was under arrest.

The court held that the defendant voluntarily made incriminating statements to the officers. The officers did not make any promises or threats to the defendant, the length of the interview was reasonable and the tone cordial. The defendant was mature, had taken some college courses and had a respectable employment history. After the defendant suffered a panic attack, the officers stopped their questioning and summoned medical assistance. They did not resume questioning the defendant until after an EMT advised them that the defendant's condition had stabilized.

Finally, the court declined to rule on whether or not the defendant voluntarily consented to a search of his computer. Instead, the court held that the inevitable discovery doctrine applied. The defendant's voluntary confession gave the officers probable cause to obtain a warrant to search the house and his computer. Additionally, the defendant voluntarily gave the officers videotapes containing child pornography prior to the discussion about a consent search. The discovery of the child pornography would have occurred regardless of the defendant's consent.

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

*****

U.S. v. Melendez-Santiago, 644 F.3d 54 (1st Cir. 2011)

The court held that the after being indicted and arrested, Melendez waived his *Fifth* and *Sixth Amendment* rights. Melendez initiated the first interview with the officers himself, after being advised twice of his *Miranda* rights. Later, after being advised of both his *Fifth* and *Sixth Amendment* rights by the magistrate judge at his initial appearance, he continued to cooperate with the officers without requesting counsel. Under all the circumstances, Melendez voluntarily and intelligently waived both his right to remain silent and his right to counsel when he made his statements to the officers.

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

*****

U.S. v. Rogers, 659 F.3d 74 (1st Cir. 2011)

Rogers sold a computer in which the buyer found what he believed to be child pornography. He gave the material to the local police who contacted the Naval Criminal Investigative Service (NCIS) because Rogers was a non-commissioned naval officer. While Rogers was on duty, local officers obtained a search warrant for his home. Rogers's commanding officer ordered him to report to two NCIS agents, and then to return to his home. Once at home, Rogers remained outside in his driveway, spoke to the officers and admitted to downloading the child pornography. Rogers then agreed to go the police station for more formal questioning. At the police station, an officer read Rogers his *Miranda* rights; he waived them and made more incriminating statements.

The court held that the officers deliberately planned to subject Rogers to questions, without the benefit of *Miranda* warnings under circumstances that would make it difficult for him to avoid answering them. They chose to execute their search warrant when Rogers was not home, then arranged for his commanding officer to order him to go home. A member of the armed services would not reasonably believe that he could disregard such an order, and once at his house would have felt that he had to answer the officers' questions. As a result, Rogers was in custody for *Miranda* purposes. Because the officers did not provide him with *Miranda* rights, the court held that Rogers's statements made to the officers at the house should have been suppressed.

The court did not rule on whether or not Rogers's subsequent statements to the officers, at the police station, after he had been *Mirandized* were admissible. The court remanded the issue to the trial court to determine, if under the circumstances, the *Miranda* warnings given to Rogers were sufficient to convey to him that he was not required to speak to the officers, notwithstanding his earlier admissions.

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

*****

U.S. v. Guerrier, 669 F.3d 1 (1st Cir. 2011)

Federal agents suspected that Guerrier was involved in a robbery at a crack house. The agents asked Guerrier's parole officer to help them set up a meeting with him. At his next scheduled

parole meeting, the parole officer told Guerrier that some men wanted to talk to him. The two agents were in plain clothes and had their weapons concealed. They told Guerrier that they wanted to speak to him about a matter unrelated to his parole status, that he was not under arrest and that he did not have to talk to them. Guerrier agreed to speak with the agents. Guerrier, the parole officer and the two agents got into the agents' police car and went to a fast food drive-thru where they bought Guerrier a drink. The agent drove the group to a nearby strip-mall parking lot to conduct the interview. The agents again told Guerrier that he did not have to say anything to them, that he was not under arrest and that they would drive him anywhere he wanted, if he wanted out. Guerrier agreed to talk to the agents and during the 20-25 minute interview; he made several incriminating statements concerning his involvement with the crack house robbery. The agents had not provided Guerrier *Miranda* warning before interviewing him.

Guerrier claimed that his statements to the agents were inadmissible because he had not been advised of his *Miranda* rights. The court disagreed, holding that Guerrier was not in-custody for *Miranda* purposes when the agents interviewed him; therefore, they were not required to *Mirandiz*e him. The agents wore plain clothes, had their weapons concealed, and on more than one occasion told Guerrier that he was not under arrest, that he did not have to answer any questions, and that he was free to go at any time. Although the interview occurred in a police car, the agents left the doors unlocked and parked in a busy public parking lot. The interview lasted a relatively short time and no one badgered Guerrier for answers or menaced him in any way. This encounter did not rise to the level of a custodial interrogation.

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

*****

Wood v. Ercole, 644 F.3d 83 (2d Cir. 2011)

The court found that Wood's videotaped statement was taken after he told the officer "I think I should get a lawyer." This request was unambiguous, as evidenced by the fact that the officer replied "ok," provided Wood a telephone, then left the room, presumably to allow a more private conversation between counsel and client. Consequently, the interrogators had an obligation to stop all questioning after Wood asserted his right to counsel. Admission of Wood's videotaped statement at trial violated his *Fifth and Fourteenth Amendment* rights.

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

*****

U.S. v. Plugh, 648 F.3d 118 (2d Cir. 2011)

Officers arrested Plugh, advised him of his *Miranda* rights, and then asked him to sign a waiver-of-rights form. Plugh told the officer that he understood his rights, but he declined to sign the waiver, telling the officers, "I am not sure if I should be talking to you and I don't know if I need a lawyer." Plugh repeatedly asked the officers for advice on what to do during the ride to their office, but the officers refused to discuss the case with him. Once at the office the officers told Plugh that he was going to be booked in to the jail and that if he wanted to make any statements that this was the time to do it. Plugh told the officers he wished to speak to them. The officers

re-advised Plugh of his *Miranda* rights. Plugh signed a waiver-of-rights form and made several incriminating statements.

Applying the standard outlined by the Supreme Court in *Berghuis v. Thompkins*, the court held that for a defendant to invoke either the right to remain silent or the right to counsel, he must do so unambiguously. The defendant's initial refusal to sign the waiver-of-rights form was not sufficient to establish an unambiguous invocation of those rights. While his refusal to sign the form presented to him upon arrest may have unequivocally established that he did not wish to waive his rights at that time, his statements to the officers made it equally clear that he was not seeking to invoke his rights. Consequently, the officers were under no obligation to cease further questioning.

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

*****

U.S. v. Warren, 642 F.3d 182 (3d Cir. 2011)

The defendant claimed that the officer provided him a deficient *Miranda* warning because it failed to advise him of his right to an attorney after questioning had begun. As part of his *Miranda* warnings, the officer told the defendant, "You have the right to an attorney. If you cannot afford to hire an attorney, one will be appointed to represent you without charge before any questioning if you wish."

While at a loss to understand why the officer recited the *Miranda* warnings from memory instead of reading them from a card, since the questioning occurred in the police station where a *Miranda* card should have been readily available, the court held that the warning adequately conveyed to the defendant his rights under *Miranda*.

The court concluded that the words the officer used put the defendant on notice that his right to an attorney, whether he hired one or had one appointed, became effective before he answered any questions and that nothing in the words the officer used indicated that counsel's presence would be restricted after questioning began.

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

*****

U.S. v. Oliver, 630 F.3d 397 (5th Cir. 2011)

Oliver argued that incriminating statements he made to the agents during his custodial interrogation should have been suppressed, claiming that he had not waived his *Miranda* rights. After agents arrested Oliver, he was advised him of his *Miranda* rights and given two forms. Oliver signed the first form acknowledging that he understood his rights, but he refused to sign the second form waiving those rights. Nevertheless, Oliver told the agents that he wished to answer their questions and he confessed to his role in a mail fraud and identity theft scheme.

A suspect may waive his *Miranda* rights if the waiver is made voluntarily, knowingly and intelligently. The mere refusal to sign a written *Miranda* waiver does not automatically make subsequent statements by a defendant inadmissible. The court held that the circumstances

surrounding Oliver's arrest and interview established that Oliver's waiver was voluntary, even though he refused to sign the wavier form. Specifically: (1) agents provided Oliver with a copy of the *Miranda* warning waiver form and read it aloud to him as he followed along, (2) Oliver expressly told the agents that although he would not sign the *Miranda* waiver form, he would discuss the fraud scheme, (3) Oliver never requested an attorney, (4) Oliver was articulate, coherent and not under the influence of alcohol or drugs, and appeared to understand what was going on, (5) Oliver clearly understood his rights since he signed the first form that acknowledged this, and he had extensive experience with the criminal justice system, and (6) Oliver was not coerced in any way during the interview.

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

*****

U.S. v. Carrillo, 660 F.3d 914 (5th Cir. 2011)

While Carrillo was in jail on a parole violation, officers went to interview him about his involvement in a drug distribution conspiracy. On September 9, after being read his *Miranda* rights, Carrillo invoked his right not to be questioned without an attorney present. The officers stopped talking to him and left. The next day Carrillo told jailers that he wished to speak to the officers from the day before. The officers returned to the jail, advised Carrillo of his *Miranda* rights, which then led to a discussion about Carrillo's right to an attorney. Carrillo made three comments during this time. He told the officers, "I wish I had a lawyer right here," I wanted to see if we could push this thing to where I could get my lawyer," and "I wanted to see if you could work with me and push this deal to where I can get a lawyer and just sit down and talk about it." After one of the officers told Carrillo that he would get an attorney at his arraignment, Carrillo asked the officer what would happen if he agreed to talk to the officer now. The officer told Carrillo that he would just be cooperating and helping himself and once he got into the federal system he would get an attorney. Carrillo agreed to talk to the officers and made several incriminating statements.

The court recognized that Carrillo's three comments, when viewed separately, appeared to indicate that he was invoking his right to counsel. However, the court held that when considering the entire context in which Carrillo made the comments, a reasonable police officer would not have understood him to be saying that he wanted to stop talking with the police without an attorney present.

Carrillo's comments to the officers were ambiguous at best. They expressed Carrillo's preference to have an attorney present, however, the fact that he kept talking to the officers indicated that he also wished to keep the interview going and not to end it by invoking his right to counsel. Carrillo re-initiated communication with the officers after he ended the interview the day before by invoking his right to counsel, so he was clearly aware of how he could end the interview. Carrillo was merely weighing the pros and cons of talking to the officers without an attorney present which he eventually decided to do.

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

*****

U.S. v. Melancon, 662 F.3d 708 (5th Cir. 2011)

Officers went to the prison where the defendant was located to interview him in connection with a criminal case. The officers met with the defendant in the warden's office. Before the interview began, the officers told the defendant that he was not required to answer their questions and that he was free to leave at any time. The defendant told the officers that he knew his rights and wished to cooperate. The officers did not provide the defendant with *Miranda* warnings. During the interview, the defendant made false statements to the officers, which later became the basis of criminal charges against him.

The court held that the defendant was not in custody for *Miranda* purposes during the interview. A prison inmate is not automatically always "in custody" for *Miranda* purposes, even though the prison setting may increase the likelihood that he is.

The court further explained that even if the defendant was in custody for *Miranda* purposes, because his statements to the officers were themselves charged as criminal conduct, they were properly admitted as the key evidence on the counts of making false statements. The defendant was not free to lie to the officers and be absolved from the consequences of those lies because of the lack of *Miranda* warnings. The exclusionary rule does not act as a bar to the prosecution of a crime where the statements themselves are the crime.

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

*****

U.S. v. Cantu, 426 Fed. Appx. 253 (5th Cir. 2011) (unpublished)

The court held that the officer's warrantless search of Cantu's handbags, during a traffic stop, violated the *Fourth Amendment*. Although the driver consented to search of the vehicle, he had neither the actual nor the apparent authority to consent to a search of his passenger's property. The officer had no authority to search inside Cantu's closed bags without her consent, which he neither sought nor obtained, and he knew the bags he was searching belonged to her.

After her arrest, while being transported to jail, Cantu made incriminating statements to the officer, without having been properly *Mirandized*. Approximately 4.5 hours later, DEA agents met with Cantu, *Mirandized* her, obtained a valid waiver and obtained a written confession from her.

The court held that the DEA interrogation and resulting confession were not tainted by the arresting officer's earlier *Miranda* violation while transporting Cantu to the jail. There was little continuity between the two interrogations. The arresting officer asked his questions in his patrol car, while different personnel working for a different agency conducted the later DEA interview in a different location. There was a 4.5-hour break between the two interrogations and the DEA agents, in their interview, did not exploit or refer back to Cantu's earlier statements.

Additionally, the court refused to suppress Cantu's written confession to the DEA agents based on the arresting officer's illegal search of her bags. The court held that the illegality of the search was clear however, the connection between the evidence it produced and Cantu's confession to the DEA agents was weak. There was nothing to indicate that the discovery of a small amount of marijuana in the bags compelled Cantu to confess to possession of a large

quantity of cocaine later found hidden in the vehicle. Further, Cantu was provided *Miranda* warnings, interviewed by different officers from a different agency and approximately seven hours had passed between the search of Cantu's purse and the receipt of her written confession. The full circumstances of the DEA interrogation served to purge the taint of the earlier illegal search.

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

*****

U.S. v. Littledale, 652 F.3d 698 (7th Cir. 2011)

The court held that Littledale was not in custody when he confessed; therefore, the agents were not required to read him his *Miranda* rights. Although the interview took place in the campus police station, the officers took Littledale to a private office, not an interrogation room. Littledale consented to the interview twice, and the officers did not touch, threaten to touch or handcuff him. While the officers did not explicitly tell Littledale that he was free to leave, they did tell him that he was not under arrest.

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

*****

U.S. v. Knope, 665 F.3d 647 (7th Cir. 2011)

Knope argued that statements he made, after being arrested, while seated in the back of the police car were improperly admitted because they were a result of custodial interrogation and he had not been provided *Miranda* warnings. Specifically, Knope objected to the admission of biographical information that revealed his home address, claiming that his answer provided the likely location of the computer that he had used for his online chats.

The court considered the officer's questions to Knope concerning his name, date of birth address and phone number to be routine booking questions. Routine booking questions asked before *Miranda* warnings are given are not usually grounds for suppression of a defendant's statements that reveal his identity and residence. The court found that the officer did not ask Knope where he lived in order to identify a place to search.

The court held that Knope's consent to search his home and computer was obtained voluntarily. Knope claimed that he was coerced into signing the consent form after the officer told him if he did not consent that there were other ways she could search his computer. If an officer's expressed intent to obtain a warrant is genuine, and not merely a pretext to induce consent, it does not invalidate that consent. Here, Knope had already admitted that he viewed and downloaded child pornography on his home computer and that he had been using his computer when he engaged in online chats with the undercover officer. Therefore, the officer had a legitimate belief that she could obtain a warrant to search Knope's residence and computer.

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

*****

Aleman v. Village of Peoria, 662 F.3d 897 (7th Cir. 2011)

Aleman operated a day care center in his home. One morning Danielle Schrik dropped off her eleven-month-old son at Aleman's house. On the two previous days, the child had been lethargic and feverish. On this day, shortly after being dropped off he collapsed. Aleman picked the child up and gently shook him to elicit a response and after there was none, called 911. The child died four days later.

Aleman voluntarily went to the police station to be interviewed. After waiting forty-five minutes, without being interviewed, Aleman asked if he could leave. An officer told him, no, because he was under arrest. Five hours later, two officers entered the interrogation room and claimed that they had spoken to several people about what had happened to the child. The officers told Aleman that they had spoken to three doctors who all agreed that Aleman's shaking of the child must have caused the injuries since the child was sluggish but responsive when he arrived at Aleman's house that morning. This account of what the doctors had said was a lie. Aleman responded by telling the officers that if that was what the doctors had said, then he must have caused the injuries because he had shaken the child. However, he continued to express disbelief that his gentle shaking could have caused the child's injuries.

The officers arrested Aleman for aggravated battery on a child. Aleman made bail and was released from custody. Four days later the child died. Following the child's autopsy, the officers re-arrested Aleman and charged him with murder. As the investigation progressed however, the case against Aleman quickly fell-apart. Over a year later, all charges against him were dismissed. Aleman sued several officers for violating his constitutional rights.

The court held that Aleman's initial arrest for aggravated battery on a child was supported by probable cause. Officers had interviewed doctors who had told them, misleadingly, as they all later admitted, that the injuries to the child were "fresh." The doctors stated that "fresh" meant that the injuries had occurred within a week, while the officers interpreted "fresh" to mean that the injuries had occurred that day. It was natural for the officers to suspect Aleman, since he was the last person to have had custody of the child and he admitted to shaking him.

The court held that Aleman's second arrest for murder, however, was not supported by probable cause. At the child's autopsy, the pathologist stated that it was highly unlikely that his injuries had been caused by Aleman since the symptoms the child had displayed in the days before were consistent with a pre-existing brain injury. Later that day, an officer went back and told the pathologist that the child had been behaving normally when he arrived at Aleman's house. This was a lie and caused the pathologist to change her opinion and tell the prosecutor that the child's injuries had occurred while in Aleman's care. The investigation revealed that the officer lied to the pathologist to focus attention on Aleman and away from Danielle Schrick, the child's mother, to whom, it was suspected, the officer had become attracted. Without the officer's lie to the pathologist and his efforts to obstruct the investigation into Schrick, there would have been no basis for charging Aleman with any crime. The court refused to grant the officer qualified immunity because it was unreasonable for him to believe that Aleman had killed the child.

Finally, the court held that the officers violated *Miranda* when they interrogated Aleman after his initial arrest. Instead of ceasing their questioning, after Aleman sought his lawyer's aid, the officers exploited his distraught state and badgered him to waive his *Miranda* rights. Aleman

indicated a desire for the assistance of counsel twice, and only after responding to further police-initiated custodial interrogation, did he agree to be questioned. When a suspect invokes his right to counsel, the police may not recommence questioning unless the suspect's lawyer is present or the suspect initiates the conversation himself.

In addition to the violation of *Miranda*, the court was troubled by the lies the officers told Aleman that convinced him that he must have caused the child's death. Not being a medical expert, Aleman could not contradict what was represented to him as settled medical opinion. Aleman had shaken the child. If medical opinion excluded any other possible causes of death, his shaking, although gentle, must have been the cause of death. Aleman had no rational basis, given his lack of medical training to think otherwise. Tricks that are likely to induce a false confession render that confession inadmissible because of its unreliability, even if it is otherwise voluntarily obtained.

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

*****

U.S. v. Brown, 664 F.3d 1115 (7th Cir. 2011)

Officers arrested Brown for illegal possession of a firearm. While Brown was in the back of the patrol car, one of the officers informed him of his *Miranda* rights. When the officer asked Brown if he understood his rights, Brown bobbed his head and made a sighing sound. The officer interpreted this to mean that Brown knew his rights, so he began to question him. Brown made incriminating statements and tried to negotiate a deal with the officer. At the police station, the officer again informed Brown of his *Miranda* rights and Brown responded "yeah" when asked if he understood those rights and if he wished to continue speaking to the officer.

Brown argued that he did not clearly indicate to the officer that he understood his *Miranda* rights and that he had not voluntarily waived them while in the back of the police car or later at the police station.

The court disagreed. A person may take actions that constitute a waiver of rights without expressly saying so. In each instance, it was clear that Brown understood and waived his rights. Officers gave him *Miranda* warnings twice. After each set of warnings, Brown made it known that he understood those rights and answered the officer's questions. It was immaterial that he did not sign a waiver form or even utter a clear "yes" in response to the first *Miranda* warnings he received.

Even if the court were to consider Brown's nodding of his head as ambiguous, his immediate actions constituted an implied waiver of his *Miranda* rights. Brown had extensive experience with the criminal justice system and he did not request an attorney or remain silent. Instead, Brown voluntarily answered some of the officer's questions, while declining to answer others, in an effort to negotiate a deal for himself.

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

*****

U.S. v. Martin, 664 F.3d 684 (7th Cir. 2011)

Police arrested Martin after finding illegal drugs and a firearm in his vehicle. An officer advised Martin of his *Miranda* rights, obtained a waiver, and began to interview him. Martin answered all of the officer's questions, but when the officer asked Martin if he would provide a written statement, Martin told him, "I'd rather talk to an attorney first before I do that." The officer ended the interview and processed Martin into the jail. Two to three hours later, detectives from a different police agency arrived at the jail to interview Martin about a recent robbery. The detectives were not told that Martin had requested to speak to an attorney. The detectives advised Martin of his *Miranda* rights, which he waived. Martin then made incriminating verbal statements to the detectives. The detectives never requested a written statement and Martin did not ask to speak to an attorney during this interview.

Martin argued that his statements to the detectives in the second interview should have been suppressed because he had invoked his *Fifth Amendm*ent right to counsel during the first interview.

In *Edwards v. Arizona*, the Supreme Court held that if an accused invokes his right to counsel, all questioning must stop until counsel has been made available to him, unless the accused initiates contact with the police. The *Edwards* rule serves as an absolute prohibition of further interrogation only if an accused invokes his right to counsel for all purposes. Here, the court held that Martin's statement, "I'd rather talk to an attorney before I do that," was limited in its scope to written statements only. Martin did not provide a written statement, nor did the detectives request one during the second interview.

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

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U.S. v. Vanover, 630 F.3d 1108 (8th Cir. 2011)

The court held that the defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights before he made incriminating statements to the officers. The officers holstered their weapons after securing the premises; no one raised their voices or argued; the defendant was not under the influence of alcohol or drugs; the officers wore plain-clothes; although he was handcuffed, the defendant was in his own home, and he was calm and pleasant during the interview.

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

*****

U.S. v. Vinton, 631 F.3d 476 (8th Cir. 2011)

Vinton allowed officers to enter his home and search for a burglary suspect who had reportedly been there earlier in the day. Vinton asked an officer if their investigation had anything to do with guns. After the officer said yes, Vinton told him there were some guns in a closet and gave the officer permission to seize them, and to search the house for other weapons and drugs. The officers found several stolen firearms and a sawed-off shotgun in a bedroom. The officers arrested Vinton and transported him to an interview room at the police station. An officer

advised Vinton of his *Miranda* rights, obtained a waiver and questioned Vinton who made several incriminating statements.

The court held that when Vinton made his pre-arrest statements he was not in custody; therefore, the officers were not required to advise him of his *Miranda* rights. The court found that Vinton was not in custody because a reasonable person in his position would have felt at liberty to terminate the interrogation and ask the officers to leave. The court found that Vinton made the statements during a five-minute period, in his own home, and that this location was not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation. The court stated that the officer and Vinton were alone during the questioning and that Vinton was not restrained, threatened or coerced.

The court held that Vinton voluntarily consented to the search of his house. The officers did not raise their voices, draw their guns, or otherwise threaten or coerce Vinton. Vinton was unrestrained and rational when he consented to the searches.

The court held that Vinton's *Miranda* waiver was voluntary, knowing and intelligent. There was no evidence that the officers intimidated, coerced or threatened Vinton prior to or during his interview at the police station. An officer read the waiver form out loud to Vinton, who indicated that he understood his rights and agreed to waive them, and then he signed, initialed and dated a *Miranda* waiver form.

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

*****

U.S. v. Maldonado, 646 F.3d 1061 (8th Cir. 2011)

During a *Terry* stop of a vehicle, the officer asked Maldonado for his cell phone number, which was instrumental in establishing at trial that he had talked to a co-conspirator over the phone 279 times. Maldonado argued that by asking for his phone number, the officer exceeded the permissible scope of the investigative detention.

The court held that the request for Maldonado's phone number was within the scope of the investigative detention. The task force members had observed the involvement of the two occupants of the vehicle in two drug transactions earlier that day. The transactions had been arranged by phone, so the officers conducting the stop could reasonably conclude that learning the phone numbers of the occupants of the vehicle might establish or negate their involvement with the crime.

Additionally, the statements that Maldonado gave to the officers during the investigative detention were not obtained in violation of *Miranda*. The officers asked Maldonado for his name and phone number in the context of a brief investigative stop. Generally, the temporary and relatively non-threatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody. Because Maldonado never was subjected to a formal arrest or a restraint on his freedom of movement of the degree associated with a formal arrest, he was not in custody for *Miranda* purposes when he gave the officers his phone number.

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

*****

U.S. v. Riesselman, 646 F.3d 1072 (8th Cir. 2011)

The court held that there was no connection between the illegal search of Riesselman's person and the incriminating statements he subsequently made to the officers. The officers *Mirandized* Reisselman twice before they questioned him. After the officers found drugs in Riesselman's pockets, they moved him into the house to talk to him. There was no evidence to indicate that the illegal search was conducted in bad faith. While the officers had a search warrant for the house, it did not authorize a search of Riesselman's person. However, the focus of the officers' questioning was not the drugs found on Riesselman, but other drug transactions and weapons in general. Riesselman's statements were obtained voluntarily under circumstances that demonstrated they were not a result of the illegal search.

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

*****

U.S. v. Perrin, 659 F.3d 718 (8th Cir. 2011)

During the execution of a search warrant, Perrin admitted to an officer that he possessed child pornography. The court held that Perrin was not in custody during the ten minutes of voluntary questioning that occurred in his bedroom. Prior to the interview, the officer had told Perrin and the other residents that they were free to leave the premises and did not have to answer questions if they stayed. A reasonable person in his position would have felt at liberty not to answer the officer's questions. As a result, no *Miranda* warnings were required before the officer interviewed Perrin.

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

*****

U.S. v. Aldridge, 664 F.3d 705 (8th Cir. 2011)

Federal agents suspected that Aldridge was involved in a methamphetamine distribution ring. The agents asked Aldridge's probation officer to contact him and direct him to meet with her at her office in the courthouse. This was a ruse to get Aldridge to come to the courthouse. When Aldridge arrived for the meeting, the agents stopped him outside the courthouse and asked if he would be willing to speak with him. Aldridge agreed and the agents took him to an interrogation room. They did not advise Aldridge of his *Miranda* rights but the agents told him that he was not under arrest and that he could leave at any time. The agents asked Aldridge to cooperate with them and at one point told him that they had his fingerprints on a bag of methamphetamine, which was not true. After Aldridge made several incriminating statements the agents allowed him to leave and Aldridge agreed to cooperate with them in the future. Three days later Aldridge voluntarily met with the agents, who again told him that he was not under arrest and that he was free to leave. During this meeting, Aldridge made more incriminating statements. After the meeting, Aldridge stopped cooperating with the agents and they arrested him.

Aldridge claimed that the agents violated his *Fifth Amendment* rights by not giving him *Miranda* warnings during their two meetings. The court held that in both instances, Aldridge was not in-

custody for *Miranda* purposes, therefore the agents were not required to provide him with *Miranda* warnings.

During their first meeting, the agents told Aldridge that he was not under arrest and that he could leave at any time. The fact that his probation officer ordered Aldridge to report to her office at the courthouse did not turn the agents' meeting with Aldridge into a custodial situation. The court held that Aldridge could not have feared a revocation of his probation if he refused to speak to the agents. The court found the most Aldridge could have feared was that his probation officer would start a formal inquiry into whatever the agents were investigating. Aldridge would not have been punished for ending the interview with the agents. Additionally, even though the agents used deception by falsely telling Aldridge that his fingerprints were found on a bag of methamphetamine, under the totality of the circumstances, a reasonable person would still have felt free to end the meeting.

The court also held that Aldridge was not in-custody during the second meeting. Aldridge initiated contact with the agents who told him that he was not under arrest and that he was free to leave at any time.

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

*****

U.S. v. Thomas, 664 F.3d 217 (8th Cir. 2011)

Thomas shot and killed a woman after she taunted him about his relationship with his girlfriend. Later that day, Thomas called the police and requested that the officers investigating the case meet with him at his mother's house. The officers went to the house, spoke to Thomas and arrested him after he made several incriminating statements. The officers did not advise Thomas of his *Miranda* rights before their conversation, which lasted only a minute or two.

The court held that the officers were not required to advise Thomas of his *Miranda* rights because his statements were made in a non-custodial setting. Thomas requested that the officers come speak to him and invited them inside when they arrived at his mother's house. Even though Thomas was not told that the questioning was voluntary, he was free to move about the house and the officers did not use any coercive tactics.

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

*****

U.S. v. Basher, 629 F.3d 1161 (9th Cir. 2011)

The court held that the officers were not required to *Mirandize* Basher before asking him about the presence of a gun since Basher was not in custody for *Miranda* purposes. He had not been formally arrested and there was no restraint on his freedom of movement to the degree associated with a formal arrest. The officers did not display their weapons, there was no use of physical force and no threatening language was used. Even if Basher had been in custody when the officers asked about the presence of a gun, the court held that the public safety exception to *Miranda* would have applied. An officer's questioning of a suspect without a *Miranda* warning is proper if the questioning is related to an objectively reasonable need to protect the officer or

the public from any immediate danger associated with a weapon. Basher had not been searched or handcuffed, and the officers had reliable information that there was a gun at the campsite.

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

*****

Doody v Ryan, 649 F.3d 986 (9th Cir. 2011)

The court held that the *Miranda* warnings provided to Doody were defective because the detective downplayed the warnings' significance, deviated from an accurate reading of the *Miranda* waiver form, and expressly misinformed Doody about his right to counsel.

While informing Doody of the right to counsel, the detective deviated from the form containing the juvenile *Miranda* warnings, and ad-libbed that Doody had the right to counsel if Doody was involved in a crime. The implication from this improperly qualified, unclear and confusing warning was that Doody only had the right to counsel if he were involved in a crime. Under these circumstances, if Doody invoked his right to counsel, it would be the same as admitting his involvement in a crime. Doody was never clearly or reasonably informed that he had the right to counsel.

Additionally, the lower court's ruling that Doody's confession was voluntary was unreasonable, in light of the police audiotapes that reflected the relentless, nearly thirteen-hour interrogation of a sleep-deprived juvenile by a tag team of detectives, without the presence of an attorney, and without the protections of proper *Miranda* warnings.

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

*****

U.S. v. Shetler, 665 F.3d 1150 (9th Cir. 2011)

Police received an anonymous tip that Shetler was manufacturing and using methamphetamine at his home. Officers went to Shetler's home, which had an attached garage. Without a warrant, the officers entered the garage through a door that had been left open. The officers did not see any evidence that methamphetamine was being cooked in the garage, but they did see several items that they knew to be related to the production of methamphetamine. The officers left the garage, went to the front of the house and knocked on the door. Shetler came out of a side door and met the officers who handcuffed and detained him. The officers entered Shetler's house through the front door and conducted a sweep. After completing the sweep, officers remained inside the house and obtained consent to conduct a more thorough search of the premises from Shetler's girlfriend, who also lived there. The officers searched the house and seized evidence related to methamphetamine manufacturing. Shetler was detained outside the house during the five-hour search and after being *Mirandized* confessed to the officers that he had been manufacturing methamphetamine in his garage. The next day, officers advised Shetler of his *Miranda* rights again and he made more incriminating statements.

The district court held that the officers' initial entry and sweep of Shetler's garage was justified under the exigent circumstances, emergency and protective sweep exceptions to the *Fourth Amendment*. The evidence observed was admissible and neither party challenged this issue on

appeal. The district court held that the officers' warrantless sweep of Shetler's house could not be justified under any of the exceptions that applied to the initial search of the garage, and was therefore illegal. Additionally, the girlfriend's consent to search the house was tainted because the officers sought her consent while they remained physically inside the house after they had already illegally searched it. However, the district court held that Shetler's statements made to the officers the night of his arrest and the next day were admissible.

Regarding the statements, the court of appeals disagreed, ruling that all of Shetler's statements to the officers should have been suppressed. First, the court held that the government did not bear its burden of showing that Shetler's statements were not made because of the illegal searches. There was no evidence to show that the officers did not confront Shetler with any of the illegally seized evidence when they questioned him.

Second, there was no evidence to demonstrate that Shetler's answers to the officers' questions were not influenced by the illegal search. The officers detained Shetler outside his home for more than five hours while he witnessed the illegal search of his house. Witnessing the search, which led to the seizure of items commonly used in methamphetamine manufacturing, could have caused Shetler to make the incriminating statements to the officers.

Third, there were no intervening circumstances between the illegal search and Shetler's incriminating statements. Shetler was in police detention and did not speak to a lawyer before speaking to the officers. Although Shetler received *Miranda* warnings after the illegal search but before he spoke to the officers, this was not enough to purge the taint of the illegal search.

Finally, the court held that there was no evidence to establish that the officers' warrantless entry into Shetler's home to conduct their protective sweep was anything but flagrant misconduct.

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

*****

Miranda and *Fed. Rule Crim. Pro. 5(a)* / *McNabb-Mallory* Rule

U.S. v. Valenzuela-Espinoza, 664 F.3d 1265 (9th Cir. 2011)

Federal agents arrested the defendant at a house at 11:15 a.m. and detained him there until 5:00 p.m. when they transported him to their office. During this time, one agent was drafting a search warrant application while eight other agents stayed at the house to make sure no one else came or went. After being *Mirandized*, the defendant waived his rights and made several incriminating statements around 7:50 p.m. The defendant was held in custody overnight and presented to a magistrate judge the next day at 2:00 p.m.

The court held that the defendant's statements should have been suppressed because the agents unnecessarily delayed presenting him to the magistrate judge, in violation of *Federal Rule of Criminal Procedure 5(a)* and the *McNabb-Mallory* rule. *Rule 5(a)* requires that an arrested person be presented to a magistrate judge "without unnecessary delay." The *McNabb-Mallory* rule provides that "an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge." However, statements made within six hours after an arrest cannot be excluded solely based on a delay in presentment before the magistrate.

Here, there was no question that the defendant's statements were made more than six hours after his arrest. The court found that after arresting the defendant at 11:15 a.m., any one of the eight available agents could have taken him ten miles to the nearest magistrate for the daily 2:00 p.m. initial appearance. Instead, the agents detained the defendant who made incriminating statements to the officers more than eight hours after his arrest.

Although the magistrate court's policy required that paperwork for initial appearances be submitted no later than 10:30 a.m., the court found that this paperwork requirement, by itself, could not create "reasonable delay." The local paperwork policy must be tailored to the requirements of *McNabb-Mallory* and not the other way around.

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

*****

Miranda and Routine Customs Inquiries

U.S. v. FNU LNU a/k/a Sandra Calzada, 653 F.3d 144 (2d Cir. 2011)

The defendant arrived in the United States on an international flight. When a U.S. Customs and Border Protection agent ran the passenger manifest through a database, he received a notification that the defendant had an outstanding arrest warrant. Officers escorted the defendant to a secondary inspection room where they took her fingerprints and asked her a series of questions concerning her name, citizenship, place of birth. When her fingerprints did not match those in the arrest warrant, officers asked her questions about her passport and her passport application. The officers did not provide the defendant with *Miranda* warnings before questioning the defendant and she was eventually indicted for making a false statement on her passport application.

The court held that the defendant was not in custody for *Miranda* purposes; therefore, *Miranda* warnings were not required. The court reiterated that *Miranda* warnings do not need to be given to someone detained at the border and subjected to a routine customs inquiry. Here, the officers' questions were relevant to making a determination of the defendant's admissibility into the United States. The court noted that the use of handcuffs, drawn weapons, or questions unrelated to admissibility could turn a non-custodial situation into a custodial one where *Miranda* warnings would be required.

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

*****

Public Safety Exception

U.S. v. Simmons, 661 F.3d 151 (2d Cir. 2011)

Officers went to an apartment after receiving a call that a person inside had a gun. The officers met Jamar Vaz, who told them that Simmons, his roommate, had displayed a gun during a dispute they had a few days earlier. Vaz wanted the officers to accompany him into the apartment so he could retrieve his belongings. The officers went into the apartment with their

weapons drawn and saw Simmons lying on the bed in his room. Simmons got up and the officers pulled him out of the bedroom into the hallway. The officers asked Simmons about the gun and Simmons told them where it was located. One of the officers entered Simmons's bedroom and retrieved the gun.

The court held that under the public safety exception, Simmons's statements regarding the presence and location of the gun were admissible. The court noted that *Miranda* warnings do not have to be provided before an officer can ask a suspect questions that are reasonably prompted by a concern for the public safety or for the safety of the arresting officers. Here, the officers had reasonable safety concerns when they entered the apartment. The questions they asked Simmons were related to those concerns and not a pretext to collect testimonial evidence against him.

However, the court held that the officer's warrantless search for the gun in Simmons's bedroom violated the *Fourth Amendment*. Before the search was conducted, the officers had already effectively resolved their concerns for their safety. They had exercised control over Simmons and the premises, thereby neutralizing any threat that Simmons or the gun may have initially posed. There was nothing in the record to suggest that it would have been impracticable to continue securing the bedroom during the time necessary for one of the officers to obtain a search warrant. Additionally, the officers conceded they did not believe that anyone else was present in Simmons' bedroom that could gain access to the gun.

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

*****

Sixth Amendment

Confrontation Clause

U.S. v. Ramos-Gonzalez, 664 F.3d 1 (1st Cir. 2011)

The defendant was convicted of possession with intent to distribute cocaine. The forensic chemist who analyzed the cocaine was unavailable to testify at trial. The trial court allowed another chemist, who was not present when the cocaine was tested, to testify to the results contained in the original chemist's report.

The court held that the admission of the chemist's testimony violated the defendant's *Sixth Amendment Confrontation Clause* rights. The testifying chemist was never asked his independent expert opinion as to the nature of the substance in question. Instead, he merely recited what was in the original chemist's report. This amounted to the admission of prohibited testimonial hearsay. Defense counsel could not effectively cross-examine the testifying chemist about how the substance was tested and what procedures were followed. Failure to provide the defendant with that opportunity violated his right of confrontation.

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

*****

U.S. v. Cabrera-Beltran, 660 F.3d 742 (4th Cir. 2011)

At trial, the government used Treasury Enforcement Communications System (TECS) records to show that the defendant and other co-conspirators crossed the border on certain dates and in certain vehicles.

The defendant argued that the admission of the TECS records into evidence violated his *Sixth Amendment Confrontation Clause* right to cross-examine the border patrol personnel who produced the information and statements contained in the TECS records.

The TECS is a case management system that is used to keep a record of individuals and their methods of entry into the United States. For vehicular border crossings, TECS maintains a record of the vehicles used and their license plate information. In this case, the TECS records were not specifically created for use at trial, but rather for maintaining a record of what was coming into the United States. As such, the TECS records are non-testimonial and their introduction into evidence did not violate the *Confrontation Clause*.

In addition, the court agreed with the Fifth and Ninth Circuit Courts of Appeal, which have held that TECS records are admissible under the public records exception to the hearsay rule.

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

*****

U.S. v. Valdovinos-Mendez, 634 F.3d 1049 (9th Cir. 2011)

The defendant was convicted of illegally re-entering the United States following removal, in violation of *8 U.S.C. § 1326*. He argued that admission into evidence of a certificate of non-existence of record (CNR) and certain documents from his Alien Registration File (A-file) violated his rights under the *Sixth Amendment's Confrontation Clause*. He also argued that admission of testimony from an A-file custodian regarding the absence of any record of the defendant's applying for permission to re-enter the United States violated the best evidence rule.

The government conceded that the admission of the CNR at trial violated the defendant's right to confrontation. However, the court found that the admission of this evidence was harmless because the CNR was cumulative of other evidence that demonstrated the defendant's lack of permission to re-enter the United States.

The court held that admission of the documents from the defendant's A-file did not violate the defendant's *Sixth Amendment* rights because the documents were non-testimonial in nature.

The court held that the testimony of the agent as to her search of the databases, and the absence of any record of the defendant applying for permission to re-enter the United States, did not violate the best evidence rule. The best evidence rule applies when the contents of a writing are sought to be proved, not when records are searched and found not to contain any reference to the designated matter. Here, the agent testified only to the absence of records, not to the contents of records sought to be proved. Additionally, public records are an exception to the hearsay rule and under the *Federal Rules of Evidence* testimony from a qualified agent is permitted to show that a diligent search failed to disclose the record, report, statement or data compilation. As

public records, the Central Index System (CIS) and the Computer Linked Applications Information Management System (CIMS) databases are self-authenticating.

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

*****

Right to Counsel

U.S. v. Melendez-Santiago, 644 F.3d 54 (1st Cir. 2011)

The court held that the after being indicted and arrested, Melendez waived his *Fifth* and *Sixth Amendment* rights. Melendez initiated the first interview with the officers himself, after being advised twice of his *Miranda* rights. Later, after being advised of both his *Fifth* and *Sixth Amendment* rights by the magistrate judge at his initial appearance, he continued to cooperate with the officers without requesting counsel. Under all the circumstances, Melendez voluntarily and intelligently waived both his right to remain silent and his right to counsel when he made his statements to the officers.

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

*****

U.S. v. States, 652 F.3d 734 (7th Cir. 2011)

The filing of a criminal complaint under *Rule 3 of the Federal Rules of Criminal Procedure* does not constitute the initiation of adversary judicial proceedings. A criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the *Sixth Amendment* right to counsel.

In the federal system, the initial appearance, under *Rule 5 of the Federal Rules of Criminal Procedure*, marks the point at which interrogations by law enforcement cease to be controlled by the *Fifth Amendment* and begin to be governed by the *Sixth Amendment*. States did not enjoy the *Sixth Amendment's* protections at the time of his interrogation since it occurred before his initial appearance.

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

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Federal Rules of Evidence (FRE)

FRE 1002 (Best Evidence Rule)

U.S. v. Valdovinos-Mendez, 634 F.3d 1049 (9th Cir. 2011)

The defendant was convicted of illegally re-entering the United States following removal, in violation of *8 U.S.C. § 1326*. He argued that admission into evidence of a certificate of non-existence of record (CNR) and certain documents from his Alien Registration File (A-file)

violated his rights under the *Sixth Amendment's Confrontation Clause*. He also argued that admission of testimony from an A-file custodian regarding the absence of any record of the defendant's applying for permission to re-enter the United States violated the best evidence rule.

The government conceded that the admission of the CNR at trial violated the defendant's right to confrontation. However, the court found that the admission of this evidence was harmless because the CNR was cumulative of other evidence that demonstrated the defendant's lack of permission to re-enter the United States.

The court held that admission of the documents from the defendant's A-file did not violate the defendant's *Sixth Amendment* rights because the documents were non-testimonial in nature.

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

*****

Miscellaneous Criminal Law

Conspiracy and Parties

U.S. v. Delgado, 631F.3d 685 (5th Cir. 2011)

The court dismissed the conspiracy charge of the indictment because the government failed to introduce sufficient evidence to establish that Delgado entered into a conspiracy with anyone other than the government informant. While it takes at least two people to form a conspiracy, an agreement must exist among co-conspirators who actually intend to carry out the agreed upon criminal plan. A defendant cannot be criminally liable for conspiring solely with an undercover government agent or a government informant, therefore, evidence of any agreement Delgado had with the government informant cannot support a conspiracy conviction.

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

*****

U.S. v. Slone, 636 F.3d 845 (7th Cir. 2011)

An undercover DEA agent drove a tractor-trailer filled with marijuana to a warehouse. The agent communicated to his surveillance team that some of the marijuana had been loaded into a Ford Explorer. The surveillance agents saw a Dodge truck pull in behind the Explorer as it left

the warehouse. The surveillance agents followed both vehicles for twenty minutes. During this time, the Dodge truck remained behind the Explorer, even after it made multiple turns on several roads including a multi-lane highway. The occupants in the Dodge truck continually checked their rearview mirrors while talking on a cell phone. The agents stopped both vehicles and arrested all the vehicles' occupants for conspiracy to distribute marijuana. A search of the Dodge truck, Slone's vehicle, revealed a large quantity of cash and a cell phone. On the ride to jail, Slone made several unsolicited incriminating statements. Slone argued that the agents did not have probable cause to arrest him, therefore, the physical evidence and statements should have been suppressed as fruit of the poisonous tree.

The court held that the agents had probable cause to arrest Slone for being part of a drug conspiracy because of the extended, coordinated activity that the officers saw between him and the driver of the Explorer. Slone followed the Explorer for an improbably long time, making a series of turns on roads where cars often change relative position, while checking the mirrors and talking on a cell phone. It was reasonable for the agents to think that Slone was conducting counter surveillance or security for the marijuana in the Explorer.

The court held that the search of Slone's vehicle was a valid search incident to arrest under *Gant*. The officers had reason to believe that evidence related to the offense for which Slone was arrested would be found in the passenger compartment of his vehicle. Since the agents arrested Slone while he was conducting counter surveillance or security operations in a drug trafficking conspiracy they could have reasonably expected to find money, cell phones, maps, drawings or other evidence linking the occupants of the Dodge truck to the crime.

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

*****

Defenses

Self Defense

***U.S. v. Drapeau*,** 644 F.3d 646 (8th Cir. 2011)

A person is not justified in using force for the purpose of resisting arrest or impeding a law enforcement officer who is acting within the scope of his official duties. However, an individual may be justified in using force to resist excessive force used by a law enforcement officer. In this case, there was substantial evidence that the officer did not use excessive force against Drapeau. As result, it was reasonable for the jury to conclude that Drapeau was not acting in self-defense when he closed the window on the officer's arm as he tried to enter the home.

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

*****

Entrapment

U.S. v. Stallworth, 656 F.3d 721 (7th Cir. 2011)

Stallworth was a police officer who took money in exchange for protecting a drug dealer during drug transactions. The drug dealer was actually an undercover federal agent and Stallworth was charged with a variety of offenses.

The court held that Stallworth was not entitled to a jury instruction on the defense of entrapment. While a jury could have found that the government induced Stallworth to commit the crimes, the court noted that Stallworth was already predisposed to commit them. He was not an innocent person lured by the government into committing those crimes. Stallworth showed no reluctance in assisting the drug dealer; he profited from his participation and he even provided tips on how the drug dealer could avoid being caught in future drug transactions. Additionally, the undercover officer's inducement was not great. Stallworth was offered a reasonable amount of money for what was expected from him.

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

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Miscellaneous Criminal Statutes / CFR Provisions

18 U.S.C. § 111

U.S. v. Luna, 649 F.3d 91 (1st Cir. 2011)

The court held that a local police officer, who had been deputized as a member of an FBI gang task force, was a federal officer for the purposes of *18 U.S.C. §§ 111* and *1114*. *Section 111* allows for federal prosecution of anyone, who among other things, forcibly assaults a person designated in *§1114*. *Section 1114* protects any officer of the United States while the officer is engaged in the performance of his official duties.

The court further held that the evidence at trial supported the conclusion that the officer was engaged in federal duties when Luna shot at him. At the time of the shooting, the officer was covering a local rally. The FBI wanted any information that he could provide about gang members that attended the rally. Because of the nature of his role, the officer was often acting as a local police officer and a task force member simultaneously. Although the officer was assigned to the rally by his department, and was working solely with other local police officers, he contacted his FBI colleagues to report the incident within an hour after it occurred. He later forwarded a copy of his incident report regarding the assault to his FBI supervisor.

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

*****

18 U.S.C. § 922

U.S. v. Booker, 644 F.3d 12 (1st Cir. 2011)

An assault statute that allows for an individual to be convicted if he recklessly causes bodily injury or offensive physical contact to another person qualifies as a misdemeanor crime of domestic violence under *18 U.S.C. § 922(g)(9).* The statutory definition of a misdemeanor crime of domestic violence is not limited to circumstances where an individual acts intentionally or knowingly.

Additionally, the court held that *18 U.S.C. § 922(g)(9)* did not violate the defendant's right to bear arms under the *Second Amendment* since it substantially promotes an important government interest in preventing domestic gun violence.
The 7th Circuit agrees.

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

*****

U.S. v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011)

The defendant argued that his conviction for being an illegal alien in possession of a firearm, in violation of *18 U.S.C. § 922(g)(5)* violated the *Second Amendment*. The court held that "the people" referenced in the *Second Amendment* (. . . the right of the **people** to keep and bear Arms, shall not be infringed) does not include aliens illegally in the United States. The court noted that the Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens, and between lawful and illegal aliens, and as a result *18 U.S.C. § 922(g)(5)* is constitutional under the *Second Amendment*.

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

*****

U.S. v. Dugan , 657 F.3d 998 (9th Cir. 2011)

Officers arrested Dugan for illegally growing and selling marijuana. Dugan also had a business dealing in firearms and was convicted of shipping and receiving firearms, through interstate commerce while using a controlled substance in violation of *18 U.S.C. § 922(g)(3).*

The court held that *§ 922(g)(3)* did not violate Dugan's *Second Amendment* right to bear arms. The *Second Amendment* right to bear arms is not unlimited. Because Congress may constitutionally deprive felons and mentaly ill people of the right to posses and carry weapons, the court concluded that Congress may also prohibit illegal drug users from possessing firearms. Unlike people who have been convicted of a felony or committed to a mental institution and face lifetime bans, an unlawful drug user may regain his right to possess firearms simply by ending his drug abuse.

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

*****

18 U.S.C. § 1028A

U.S. v. Kasenge, 660 F.3d 537 (1st Cir. 2011)

Kasenge offered the use of his driver's license and social security card to a friend, for a nominal fee, so he could get a job. The friend obtained two jobs under the identity of Thomas Kasenge. The government charged Kasenge with aiding and abetting aggravated identity theft in violation of *18 U.S.C. §§ 2 and 1028A.*

Kasenge argued that because he consented to his friend's use of his identification documents that there was no crime of aggravated identify theft for him to aid and abet.

The court disagreed, holding that *18 U.S.C. § 1028A* does not require that the means of identification be stolen or otherwise illegally obtained for a violation to occur.

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

*****

U.S. v. Gonzalez-Diaz, 630 F.3d 1225 (9th Cir. 2011)

The defendant was convicted of being "found in" the United States following deportation, in violation of *8 U.S.C. § 1326*. The defendant argued that he was not "found in" the United States because his unlawful presence in the United States ended when he entered Canada on June 19, and because he was under official restraint when he re-entered the United States on June 20.

The court held that the defendant was "found in" the United States because he had never been legally admitted into Canada. The defendant's unlawful legal presence in the United States was not affected by his brief physical presence in Canada. The defendant was never legally in Canada and he was in some form of police custody throughout his physical presence there. He therefore remained "in" the United States until June 20 when he was "found" by the Customs and Border Protection agents and arrested.

Additionally, the defendant was not under official restraint when he was arrested because after having been denied legal entry into Canada, he was not entering the United States from a foreign country.

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

*****

U.S. v. Valdovinos-Mendez, 634 F.3d 1049 (9th Cir. 2011)

The defendant was convicted of illegally re-entering the United States following removal, in violation of *8 U.S.C. § 1326*. He argued that admission into evidence of a certificate of non-existence of record (CNR) and certain documents from his Alien Registration File (A-file) violated his rights under the *Sixth Amendment's Confrontation Clause*. He also argued that admission of testimony from an A-file custodian regarding the absence of any record of the defendant's applying for permission to re-enter the United States violated the best evidence rule.

The government conceded that the admission of the CNR at trial violated the defendant's right to confrontation. However, the court found that the admission of this evidence was harmless because the CNR was cumulative of other evidence that demonstrated the defendant's lack of permission to re-enter the United States.

The court held that admission of the documents from the defendant's A-file did not violate the defendant's *Sixth Amendment* rights because the documents were non-testimonial in nature.

The court held that the testimony of the agent as to her search of the databases, and the absence of any record of the defendant applying for permission to re-enter the United States, did not violate the best evidence rule. The best evidence rule applies when the contents of a writing are sought to be proved, not when records are searched and found not to contain any reference to the designated matter. Here, the agent testified only to the absence of records, not to the contents of records sought to be proved. Additionally, public records are an exception to the hearsay rule and under the *Federal Rules of Evidence* testimony from a qualified agent is permitted to show that a diligent search failed to disclose the record, report, statement or data compilation. As public records, the Central Index System (CIS) and the Computer Linked Applications Information Management System (CIMS) databases are self-authenticating.

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

*****

18 U.S.C. § 2252

U.S. v. Pires, 642 F.3d 1 (1st Cir. 2011)

To prove attempted receipt of child pornography in violation of *18 U.S.C. § 2252(a)(2)*, the government must establish that the defendant intended to receive child pornography and that he took a substantial step toward receiving it. The government does not have to prove that the defendant knew that the downloaded file actually contained child pornography, but only that he believed the file contained such images.

The court held that the government established that the defendant was attempting to acquire child pornography. The defendant told two officers that he deliberately used search terms associated with child pornography, that he had an interest in child pornography, that he had previously downloaded and viewed child pornography in the past, and the title of the file in question was highly suggestive of child pornography.

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

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U.S. v. Winkler, 639 F.3d 692 (5th Cir. 2011)

The court held that the evidence overwhelmingly established Winkler knowingly received child pornography, even though the videos were located in the temporary storage of his computer hard drive. This was not a case where a computer was infected with child pornography that belonged to a person who did not intend to access such material. The evidence established that Winkler repeatedly paid for members-only child pornography sites, and the only way the child

pornography files could have been copied to the cache was by Winkler's decision to click and watch the videos. Additionally, Winkler had downloaded dozens of images of child pornography and he kept a catalogue of child pornography links on his computer.

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

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36 C.F.R. § 2.32(a)(1)

U.S. v. Bibbins, 637 F.3d 1087 (9th Cir. 2011)

To obtain a conviction for resisting a government employee engaged in an official duty under *36 C.F.R. § 2.32(a)(1)*, the government must prove that the defendant willfully resisted the efforts of the employee. Here, there was substantial evidence to show that Bibbins willfully resisted the Park Rangers when they arrested him. First, Bibbins refused to comply with the Rangers' commands to raise his hands above his head. Bibbins then tensed his arms and made fists, jerked his right arm out of the officers' grip, did not get on the ground when ordered to do so, and rotated his body to the right when the Rangers tried to handcuff him. Bibbins finally complied with all of the Rangers' instructions once he fell to the ground after being tased in two places in his back.

The court also affirmed Bibbins's conviction for having an obstructed license plate on the pickup truck that he was towing behind his motor home. The court held that the pickup truck qualified as a motor vehicle even though it was being towed at the time Bibbins was cited for obstructing the license plate's visibility.

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

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