2012
United States Supreme Court and Circuit Courts of Appeals Case Summaries – By Subject

(As reported in 2 Informer 12 through 1 Informer 13, covering January – December 2012)

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First Amendment

Marcavage v. The City of New York, 689 F.3d 98 (2nd Cir. 2012)

Police arrested Marcavage and another protester during the 2004 Republican National Convention after they failed to comply with police instructions to move from a no-protest-zone to a designated protest-zone. The protesters sued under *42 U.S.C. § 1983*, claiming that the New York City Police Department's (NYPD) protest-zone policy violated the *First Amendment* and their arrests violated the *Fourth Amendment*.

The court held that the NYPD's protest-zone policy was a permissible time, place and manner restriction on *First Amendment* expression and that the protesters' arrests were supported by probable cause.

First, the NYPD policy on expressive activity around the convention was content-neutral. The restriction was not aimed at the content of the protesters' message; no demonstrating of any kind was allowed in the no-protest-zones. Second, the no-protest-zones were confined to a two-block stretch of Seventh Avenue and were in place only during the four days of the convention. The policy that created the no-protest-zones was tailored to meet the congestion and security challenges presented by the convention. Finally, the designated protest-zone, located one block from the primary entrance to the Convention site, was an ample alternative site for the protesters.

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

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Marcavage v. National Park Service, 666 F. 3d 856 (3d Cir. 2012)

The court held that the NPS Rangers were entitled to qualified immunity from Marcavage's claim that they arrested him in violation of the *First and Fourth Amendments* and the *Equal Protection Clause of the Fourteenth Amendment*.

Although this court ultimately held otherwise, the fact that two judges in the court below found no *First Amendment* violation by the Rangers indicates that Marcavage's constitutional right to demonstrate on the sidewalk was not clearly established. At the time, it was reasonable for the Rangers to believe that they could lawfully escort Marcavage off the sidewalk and issue him a citation. They should not be denied qualified immunity simply because this belief turned out to be mistaken.

Regarding Marcavage's arrest, the court found that the government presented sufficient evidence for the Magistrate Judge to have reasonably found Marcavage committed the charged offense. The fact that Marcavage's conviction was eventually reversed is of no consequence. A criminal conviction requires proof of guilt beyond a reasonable doubt, a much higher standard than that required for a finding of probable cause to arrest.

Finally, the court held that Marcavage was not similarly situated to the tourists, the horse and carriage operators and the breast-cancer-walk participants who were also on the sidewalk. Unlike the others, Marcavage was escorted from the sidewalk because he was leading a demonstration without a permit, creating excessive noise and potentially interfering with traffic flow.

Click **HERE** for the court's opinion. See **7 Informer 10** for the summary for the criminal case.

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Lefemine v. Wideman, 672 F. 3d 292 (4th Cir. 2012)

Police officers told members of an anti-abortion organization to remove large graphic signs, depicting aborted fetuses that they were using as part of a roadside demonstration. Neither party challenged the district court's holding that the officers' actions were impermissible content-based restriction on the demonstrators' *First Amendment* rights. The court, however, agreed with the district court and held that the officers were entitled to qualified immunity.

In November 2005, the case law from this circuit and from the Supreme Court was ambiguous concerning whether requiring demonstrators to remove such signs would violate their *First Amendment* rights. Therefore, it was not objectively unreasonable for the officers to believe they could allow the demonstrators to continue to remain on the sidewalk, but order them to remove the graphic signs to protect the public from potential traffic hazards based on the signs' proximity to the road and to prevent children from seeing the images.

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

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American Civil Liberties Union of Illinois v. Alvarez, 679 F. 3d 583 (7th Cir. 2012)

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

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

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

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Bernini v. City of St. Paul, 665 F. 3d 997 (8th Cir. 2012)

The court held the officers did not arrest anyone in retaliation for exercising their *First Amendment* free speech rights. Although the protestors were engaged in protected speech, officers did not arrest anyone until the group moved towards them in a threatening manner and began to block traffic along a major roadway. The group's conduct, not the protected speech, motivated the officers' actions.

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

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Reichle v. Howards, 132 S. Ct. 2088 (S. Ct. 2012)

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

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

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

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

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

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Fourth Amendment

Governmental Action / Private Searches

United States v. Cameron, 699 F.3d 621 (1st Cir. 2012)

Yahoo!, Inc. received an anonymous report that child pornography images were contained in a particular Yahoo! Photo account. Yahoo! personnel searched the account and discovered images they believed to be child pornography. As part of its internal process after discovering child pornography, Yahoo! created a child pornography (CP) Report and sent a copy to the National Center for Missing and Exploited Children (NCMEC). Based on the Yahoo! CP Report, the NCMEC created and sent a CyberTipline Report to the Maine State Police. The Maine State Police eventually obtained a warrant to search Cameron's residence and seize his computers. At trial, the government introduced evidence from Yahoo! through the testimony of an employee who had knowledge about Yahoo!'s data retention and legal procedures. The employee testified that Yahoo! recorded user log-on, IP address, and other user account information in the regular course of business. The employee also testified that Yahoo! automatically stored each CP Report as part of its ordinary business practice.

Cameron argued Yahoo!'s search for child pornography in his account violated the *Fourth Amendment* because Yahoo! had acted as an agent of the government. The court disagreed. The *Fourth Amendment* does not apply to searches and seizures, even unreasonable ones, conducted by private individuals who are not acting as agents of the government. Here, there was no

evidence that the government had any role in initiating or participating in the initial search. Yahoo! began searching Cameron's accounts after it received an anonymous tip concerning child pornography in one of the Yahoo! Photo albums registered to him. The Yahoo! employees conducted their search pursuant to Yahoo!'s own internal policy and there was no evidence that the government compelled Yahoo! to maintain such a policy. Even though Yahoo! had a duty under federal law to report child pornography to the NCMEC, the court noted that the statute did not impose any obligation to search for child pornography; it only required Yahoo! to report any child pornography it discovered.

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

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Reasonable Expectation of Privacy

U.S. v. Symonevich, 688 F.3d 12 (1st Cir. 2012)

A police officer conducted a traffic stop on the vehicle in which Symonevich was a front-seat passenger. As the officer approached the vehicle, he saw Symonevich lean down as if placing or retrieving something from underneath his seat. The officer searched under Symonevich's seat and found a can of tire-puncture sealant. The officer felt something solid move around inside the can and noticed that the bottom of the can was slightly separated from the rest of the can. The officer unscrewed the bottom of the can and found heroin inside. The officer arrested the Symonevich and the driver.

The court held that, as a passenger in the vehicle, Symonevich did not have a reasonable expectation of privacy in the space below the passenger seat from which the heroin was recovered. The court stated that even if Symonevich demonstrated that he owned the can, that ownership would not have created an expectation of privacy in it, because he placed the can in an area where he had no expectation of privacy.

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

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U.S. v. Pope, 686 F.3d 1078 (9th Cir. 2012)

A federal law enforcement officer in a national forest responded to an area where some people were creating a disturbance. The officer encountered Pope, whom he suspected was under the influence of marijuana. Pope told the officer that he had been smoking marijuana but denied that he had any on his person. The officer then ordered Pope to empty his pockets, but Pope refused.

The officer asked Pope, a second time, if he had any marijuana on his person. This time Pope admitted that he had marijuana in his pockets. The officer ordered Pope to place the marijuana on the hood of his police car and Pope complied.

The court held the officer's initial command to Pope to empty his pockets was not a search under the *Fourth Amendment*. Even though Pope had a reasonable expectation of privacy in the contents of his pockets, his non-compliance with the officer's command to empty them did not intrude on that reasonable expectation of privacy.

The government conceded the officer's second command for Pope to place the marijuana on the hood of his police car was a search under the *Fourth Amendment* because of Pope's compliance. However, the court held this warrantless search was reasonable because of the potential for the destruction of the evidence. When Pope admitted that he was in possession of marijuana, the officer had probable cause to arrest him for possession of a controlled substance. If the officer had allowed Pope to leave his presence, without searching him, there was a high risk that the evidence would have been hidden or destroyed. Finally, the search was minimally intrusive because the officer merely told Pope to place whatever marijuana he had on the hood of the car.

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

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United States v. Wahchumwah, 2012 U.S. App. LEXIS 24296 (9th Cir. 2012)

United States Fish and Wildlife Service (USFWS) agents began an investigation on Wahchumwah after receiving anonymous complaints that he was selling eagle parts. During a visit to Wahchumwah's home, an undercover agent wearing a concealed audio-video recording device purchased two eagle plumes from him.

Wahchumwah argued the warrantless audio-video recordings of the sale of the eagle plumes inside his home violated the *Fourth Amendment*.

The court disagreed and following the Second, Third and Fifth circuits held an undercover agent's warrantless use of a concealed audio-video device in a home into which he has been invited by a suspect does not violate the *Fourth Amendment*. As a result, the district court properly denied Wahchumwah's motion to suppress the evidence obtained by the use of the concealed audio-video device.

The court explained a person's expectation of privacy does not extend to what a person knowingly exposes to the public, even in his own home. In addition, a person generally has no privacy interest in that which he voluntarily reveals to a government agent. A government agent may also make an audio recording of a suspect's statements and those audio recordings, made with the consent of the government agent, do not require a warrant.

When Wahchumwah invited the undercover agent into his home, he forfeited his expectation of privacy as to those areas that were knowingly exposed to the agent. Wahchumwah could not reasonably argue that the recording violated his legitimate privacy interests when it revealed no more than what was already visible to the agent.

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

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U.S. v. Ruiz, 664 F. 3d 833 (10th Cir. 2012)

Ruiz flew a rented airplane to a small airport in Kansas. At the airport, Ruiz paid cash for fuel and for storing the plane overnight in a hangar. The hangar was secure but it contained airplanes belonging to other customers.

During Ruiz's flight, the Air and Marine Operations Center (AMOC) became suspicious because Ruiz had not filed a flight plan and an aircraft carrying drugs had landed at that airport six months earlier. The AMOC contacted an agent with Immigration and Customs Enforcement who arranged for local law enforcement officers to bring a drug detecting dog to the hangar. Once at the hangar, officers walked a certified drug dog around Ruiz's airplane and the dog alerted several times to the presence of narcotics. Officers obtained a search warrant for the airplane and discovered a suitcase containing twenty-eight kilograms of cocaine.

The court agreed with the Sixth Circuit Court of Appeals, holding that Ruiz had no objectively reasonable expectation of privacy in the airplane hangar. Here, the owner of the airport maintained control over the hangar at all times. The hangar stored aircraft and equipment belonging to the owner and other customers and Ruiz had no access to it after business hours. Even if Ruiz had a subjective expectation of privacy in the hangar, it was not an objectively reasonable one.

Additionally, Ruiz argued the search warrant affidavit improperly omitted the fact that the drug dog had falsely alerted his handler to the presence of drugs on three of his last ten sniffs.

The court disagreed. Generally, a search warrant based on a narcotics canine alert will be sufficient on its face if the affidavit states that the dog is trained and certified to detect narcotics. The court does not require the affiant to include a complete history of a drug dog's reliability beyond the statement that the dog has been trained and certified to detect drugs. Here, it was established that the drug dog was certified to detect heroin, cocaine methamphetamine and marijuana by the State of Oklahoma and by the National Narcotic Detector Dog Association.

Ruiz also contested an unrelated search of a rental home in which police officers found cocaine. Ruiz sent the owner a letter stating that he would no longer need to rent the house. The owner entered the house and called the police after he found several thousand dollars in the bathroom. Officers saw what appeared to be kilo packages of cocaine on a rafter in the basement ceiling. The officers stopped their search and obtained a search warrant.

The court held the officers' warrantless entry and initial search of the rental home was valid. When Ruiz sent the owner the letter terminating the lease, he effectively abandoned the rental house and any reasonable expectation of privacy he had in it when the police searched it at the request of the owner.

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

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Abandonment

U.S. v. Harrison, 689 F.3d 301 (3rd Cir. 2012)

Three police officers entered a house without a warrant because they believed it was abandoned. Once inside, the officers found Harrison sitting in a chair with a gun, scales, pills and cocaine on a table next to him.

The court concluded that Harrison had a reasonable expectation of privacy in the house; however, based on the totality of the circumstances it was reasonable for the officers to

mistakenly believe that the house was abandoned. As a result, the warrantless entry into the house did not violate the *Fourth Amendment*.

The officers testified consistently that the exterior of the house was in a severe state of disrepair and that there was trash all over the lawn, which was overgrown with weeds. In addition, the windows on both levels were either boarded up or exposed and the front door was left open. While this information alone would not have been enough to make their mistake reasonable, the officers knew more. First, they knew that the house was a drug-den. Second, the interior matched the rundown condition of the exterior. Third, there were no furnishings other than a single mattress on the top floor. Fourth, that human waste filled the bathtub and toilets. Finally, there was no running water or electricity in the house.

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

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U.S. v. Williams, 669 F. 3d 903 (8th Cir. 2012)

A police officer went to the defendant's house and retrieved three bags of trash that had been left at the curb for pick-up by a trash company. After finding cocaine residue within that trash, officers obtained a search warrant for the defendant's house.

The court stated that it is well settled there is no reasonable expectation of privacy in trash left at the curb in an area accessible to the public for pick-up by a trash company.

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

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Cellphones

U.S. v. Flores-Lopez, 670 F. 3d 803 (7th Cir. 2012)

Officers arrested the defendant, searched him and seized a cell phone from his person. An officer searched the cell phone to determine its telephone number, which the government later used to subpoena three months of call history from the service provider. At trial, the government introduced the call history into evidence.

The defendant argued the search of his cell phone was unreasonable because it was not conducted pursuant to a warrant. The court disagreed and held the warrantless search of the defendant's cell phone was reasonable under the *Fourth Amendment*. Any invasion of the defendant's privacy was slight because the officer only sought to determine the cell phone's number. The court declined to address the issue of whether a more intrusive search of the cell phone's contents would have been reasonable.

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

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Strip Searches

U.S. v. Gray, 669 F. 3d 556 (5th Cir. 2012)

Officers had probable cause to believe that Gray was concealing crack cocaine in his rectum. After conducting two strip searches, in which Gray was not fully cooperative, an officer told Gray he could either undergo a third strip search, be placed in a cell with a waterless toilet or he could consent to a rectal x-ray examination. After Gray refused to consent to any of these options, officers obtained a search warrant in which Gray was forced to submit to a proctoscopic examination under sedation. A doctor eventually recovered over nine grams of crack cocaine from within Gray.

The court held the search was unreasonable because it was demeaning and intrusive to Gray's personal privacy and bodily integrity and that there were less invasive ways to recover the evidence, such as a cathartic or an enema.

However, court held the evidence should not be suppressed because the police acted on good-faith reliance on a valid search warrant. In doing so, the court encouraged magistrates, where feasible, to hold a hearing to allow for more careful consideration of the competing interests at stake in medical procedure search cases.

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

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U.S. v. Freeman, 691 F.3d 893 (7th Cir. 2012)

The court held the jail officials had reasonable suspicion to conduct the strip search. Freeman was arrested for attempted drug distribution, which is exactly the type of crime that raises reasonable suspicion of concealed contraband. The officers knew of Freeman's habit of hiding drugs between his buttocks from the confidential informant. When the officers failed to find any drugs at the scene of the traffic stop, it was completely reasonable to think that he might be concealing drugs this way. Finally, Freeman's uncomfortable fidgeting while seated at the police station indicated that he may be concealing drugs on his person.

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

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Florence v. Board of Chosen Freeholders of the County of Burlington, 132 S. Ct. 1510 (S. Ct. 2012)

Police arrested Florence on an outstanding warrant. After being briefly incarcerated in two different jails, the charges against him were dismissed. Florence filed suit under *42 U.S.C. § 1983* claiming that individuals arrested for minor offenses could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the jail intake process. Florence argued that jail officials could conduct this kind of search only if they had reason to suspect a particular inmate of concealing a weapon, drugs or other contraband. The Supreme Court disagreed with Florence and affirmed the Third Circuit Court of Appeals, holding that the search procedures at the two jails struck a reasonable balance between inmate privacy and the needs of the institutions.

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

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Curtilage

U.S. v. Cooke, 674 F. 3d 491 (5th Cir. 2012)

While Cooke was in jail, federal agents approached him and asked for consent to search his house. He refused. A week later, while Cooke was still in jail, federal agents went to Cooke's house to conduct a knock-and-talk interview. Cooke's house was a windowless structure that had two large sliding exterior barn doors. Behind the barn doors was a large area with a dirt floor and a paved sidewalk path that led to a stoop and another set of doors. Behind these interior doors were the living quarters where Cooke, his wife and his mother lived. When the agents approached the house, they noticed that one of the exterior barn doors was damaged, allowing them access to walk directly up to the interior doors. Believing that knocking on the barn door would be futile, the agents walked through the open barn door and knocked on the interior set of doors. Cooke's mother answered the door and granted the agents consent to enter the house. Once inside the house, the agents saw a shotgun shell and gun safe in plain view. Based on these observations, the agents obtained a search warrant and found illegal firearms, ammunition and a bulletproof vest in Cooke's house.

Cooke argued the agents unlawfully entered the curtilage of his house when they crossed the threshold of the barn door without a warrant or consent.

The court held that the area inside the barn doors, but outside the interior doors was not part of the curtilage, so the agents did not violate Cooke's *Fourth Amendment* rights by entering the area without consent or a warrant in order to knock on the interior doors.

First, the area had a dirt floor and a paved sidewalk that led to the interior doors. Second, the contents of the area included non-operating washing machines and dryers, ladders, a grill and other items indicating that the space was used for storage. Finally, the barn door was open wide enough such that the items stored there were exposed to the elements, the public could see into the area from the street, and anyone would reasonably think that they would have to enter and knock on the interior doors when visiting.

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

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U.S. v. Robbins, 682 F.3d 1111 (8th Cir. 2012)

A police dispatcher received a 911 hang-up call. Two officers tried to locate the address associated with the telephone number to conduct a welfare check. The officers' GPS maps indicated the address was in an industrial area. The officers located a house near where they believed the hang-up call had originated. It was 10:00 pm and because there were so many lights on in the house, the officers believed that someone was home. The officers knocked on the front door but received no response. The officers walked around the house and returned to the front door where for the first time they smelled the odor of marijuana. A drug detection dog was

called to the scene and it alerted on the front door of the house. The officers obtained a search warrant and discovered marijuana-grow operation in the house. The officers later discovered that the 911 hang up call had originated from a phone line at a construction trailer, on a job-site, near Robbins' house.

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

The court noted that, "where a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the *Fourth Amendment*, provided that the intrusion upon one's privacy is limited." Here, the court found that the officers' acted in furtherance of a legitimate law enforcement objective and their intrusion upon Robbins' privacy was appropriately limited. After responding to a 911 call that they reasonably believed came from the house, the officers entered the normal access route for any visitor to the house. Walking around the perimeter in search of an occupant was reasonable based on the belief that the 911 call originated from the house and the officers' observation of the many lights on in the house.

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

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U.S. v. Perea-Rey, 680 F. 3d 1179 (9th Cir. 2012)

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

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

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

are *Fourth Amendment* searches" and that searches and seizures in the curtilage, without a warrant are presumed to be unreasonable.

The government argued the agents were entitled to enter the curtilage to conduct a knock-and-talk interview with Perea-Rey. While the court agreed that police officers are allowed to approach a home to contact individuals inside, in this case, the evidence did not support the agent's position that he agents entered Perea-Rey's property to initiate a consensual encounter with him. The court concluded that it was not objectively reasonable, as part of a knock-and-talk, for the agent to bypass the front door, which he had seen Perea-Rey open in response to a knock by Garcia, and intrude into an area of the curtilage where an uninvited visitor would not be expected to appear. By trespassing onto the curtilage and detaining Perea-Rey, the agent violated Perea-Rey's *Fourth Amendment* rights and the district court should have suppressed the evidence obtained as a result of the warrantless search.

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

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U.S. v. Duenas, 691 F.3d 1070 (9th Cir. 2012)

Local and federal police officers executed a search warrant on Duenas' property for evidence of narcotics trafficking. Members of the media and other civilians were allowed on the property during the search to film and photograph the scene. While the management of the scene was characterized as "woefully inadequate," the court refused to suppress the evidence seized by the officers.

The court held Duenas' front yard was not part of the curtilage; therefore, the presence of the media there did not violate the *Fourth Amendment*. However, some journalists were escorted beyond the front yard to photograph a marijuana patch in the back yard. In agreeing with the Eleventh Circuit, the court held that as long as the media did not discover or develop any of the evidence later used at trial, the evidence did not have to be suppressed. In this case, the media did not expand the scope of the search warrant and they did not assist the police or touch, handle or taint the admitted evidence in any way. The more appropriate remedy here would be a *Bivens* or *42 U.S.C. § 1983* action.

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

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Parolees/Probationers

U.S. v. Barner, 666 F. 3d 79 (2d Cir. 2012)

Barner was on parole for a state felony conviction. A condition of his parole was that his person, residence and property were subject to search and inspection by his parole officer. During this time, the parole officer received a report that Barner had fired a weapon at another person. The parole officer arrested Barner when he appeared at their next scheduled meeting. The parole officer took Barner back to his apartment and conducted a search. Officers found several firearms, ammunition and illegal drugs in a locked storage closet to which Barner had a key.

Warrantless searches conducted as a condition of parole are permitted as long as they are reasonably related to the performance of the parole officer's duty. Parole officers have a duty to investigate whether a parolee is violating the conditions of parole, one of which is that the parolee commits no further crimes. Here, the search was conducted in direct response to information the parole officer obtained and she had a duty to investigate further, both to determine if a crime had been committed and to prevent the commission of further crimes. As a result, the court held that the search of the storage room was proper under the "special needs" exception to the *Fourth Amendment* warrant requirement because it was reasonably related to the parole officer's duties, and was performed in furtherance of the special needs of the New York State parole system.

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

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U.S. v. Bolivar, 670 F. 3d 1091 (9th Cir. 2012)

Philine Black was on probation. As a condition of her probation, she had consented to a search of her property by probation and police officers. Pursuant to a warrant, officers arrested Black and searched the apartment she shared with Bolivar. In a bedroom closet, officers found a backpack that contained a sawed-off shotgun. Black claimed the weapon belonged to Bolivar.

The government charged Bolivar with possession of an unlawful sawed-off shotgun. Bolivar did not dispute that officers had reasonable suspicion to believe that Black exercised control over the backpack. Instead, he argued the officers needed probable cause to believe that the backpack belonged to Black before they could lawfully open it as part of the probation search.

The court disagreed, holding once police officers properly enter a residence pursuant to a probation search, they need only a reasonable suspicion to conclude that the probationer owns, controls, or possesses a particular item within the probationer's residence in order to search the item. Here, the backpack was found hanging in the middle of a closet, indicating that it could have been placed there by Black or that it might be jointly controlled by Black and Bolivar.

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

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U.S. v. King, 672 F. 3d 1133 (9th Cir. 2012)

The court held the information provided by the two informants was highly unreliable and did not provide the officers with reasonable suspicion that the defendant was involved in the homicide. The first informant had no track record of reliability and his/her basis of knowledge concerning the defendant's involvement in the crime was double hearsay. The second informant had no track record of reliability, lacked firsthand information concerning the defendant's involvement in the crime and did not meet with the officer face-to-face.

However, the court held the officers did not need reasonable suspicion to search the defendant's room. The defendant was subject to suspicionless search as a condition of his probation, whether or not the officers believed he was involved in any criminal activity. Suspicionless search conditions for individuals on probation do not violate the *Fourth Amendment*.

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

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Passengers in Vehicles

United States v. Smith, 697 F.3d 625 (7th Cir. 2012)

Smith, Evans and Swanson robbed a bank and fled in a green Cadillac. FBI agents later saw the Cadillac pull into a parking spot on the street. Approaching with guns drawn, the agents detained Smith when he got out of the Cadillac. Evans and Swanson then drove off at a high speed with other agents in pursuit. Evans crashed the Cadillac, fled on foot and was later apprehended. The agents apprehended Swanson at the scene of the crash. After confirming that the individuals in the Cadillac matched the descriptions of the bank robbers, the agents searched the Cadillac. Inside the car, the agents found a gun similar to the one used in the robbery, as well as clothing, black face masks, black stocking hats and multiple sets of gloves. The Cadillac was towed and later subjected to an inventory search. While agents pursued the Cadillac, another agent detained Smith in handcuffs for ten minutes until another agent arrived with photographs of the robbers taken by cameras in the bank. Smith's clothing matched one of the bank robber's clothing in the photographs and the agent arrested him. The agent searched Smith and recovered a pair of black gloves and a Velcro face mask.

First, Smith and Evans argued the agents did not have probable cause to support their warrantless search of the Cadillac. The court disagreed. Smith was a mere passenger, with no ownership interest in the Cadillac. As such, the court held Smith had no reasonable expectation of privacy in the Cadillac; therefore, his *Fourth Amendment* rights were not violated.

As for Evans, the agents arrested him for bank robbery immediately after he crashed the Cadillac. Under *Arizona v. Gant*, police officers may search a vehicle incident to a recent occupant's arrest if it is reasonable to believe the vehicle contains evidence of the offense of arrest. Here, the agents had reason to believe there was evidence of the bank robbery in the Cadillac. The robbery had just occurred, the occupants of the Cadillac matched the descriptions of the bank robbers and Evans sped off when the agents approached the vehicle. Even if the agents had not searched the Cadillac incident to Evans' arrest, the evidence would have been discovered during the lawful inventory search of the vehicle that occurred afterward.

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

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Use of GPS Information From Cell Phones

U.S. v. Skinner, 690 F.3d 772 (6th Cir. 2012)

Drug Enforcement Administration (DEA) agents suspected Skinner was driving cross-country in a motorhome with a load of marijuana. The agents obtained a court order that authorized the phone company to release subscriber information, cell site information, GPS real-time location and "ping" data for a pay-as-you-go cell phone owned by Skinner. By continuously "pinging" his phone, the agents learned that Skinner had stopped somewhere near Abilene, Texas where

they eventually found his motorhome parked at a truck stop. After Skinner denied the agents request to search the vehicle, an officer walked his drug-dog around the perimeter of the motorhome. The dog alerted to the presence of narcotics and the agents searched the motorhome where they discovered over 1,100 pounds of marijuana.

Skinner argued the use of the GPS location information emitted from his cell phone was a warrantless search that violated the *Fourth Amendment*.

The court held there was no *Fourth Amendment* violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone as he traveled on public roadways. If a tool used to transport contraband gives off a signal that can be tracked for location, the police may track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. In addition, although not necessary to a finding that there was no *Fourth Amendment* violation, the government's case was strengthened by the fact that the agents sought court orders to obtain information on Skinner's location because of the GPS capabilities of his cell phone.

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

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U.S. v. Oliva, 686 F.3d 1106 (9th Cir. 2012)

Oliva appealed the district court's denial of his motion to suppress evidence obtained from a series of surveillance orders that authorized the interception of communications over cellular phones associated with him and his co-conspirators. Oliva claimed that the surveillance orders authorized the government to transform the cellular phones into roving electronic bugs by using sophisticated eavesdropping technology.

The court agreed with the district court and stated if the government seeks authorization for the use of new technology to convert cellular phones into roving bugs, it must specifically request that authority. In this case, however, the surveillance orders were intended only to authorize standard interception techniques and the government only utilized standard interception techniques.

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

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Warrantless Search After Private Search

Rann v. Atchison, 689 F.3d 832 (7th Cir. 2012)

Rann's fifteen-year-old biological daughter reported to the police that Rann had sexually assaulted her and he had taken pornographic pictures of her. After her interview, Rann's daughter returned home, retrieved a memory card from Rann's digital camera and gave it to the police. The police officers did not direct Rann's daughter to attempt to recover evidence for them. Images downloaded from the memory card depicted Rann sexually assaulting his daughter. Sometime later, Rann's wife gave police officers a computer zipp-drive that contained additional pornographic images of her daughter and Rann.

Rann argued he received ineffective assistance from his trial attorney because the attorney did not attempt to suppress the incriminating images discovered on the memory card and zipp-drive. Rann claimed when the police conducted their warrantless searches of these storage devices, they exceeded the scope of the initial private searches conducted by his daughter and his wife.

The court disagreed, and agreeing with the Fifth Circuit, held the warrantless search of any material on digital media is valid if the private party, who conducted the initial search, has viewed at least one file on that media. The court held the trial court reasonably found that Rann's daughter and wife knew the contents of the memory card and zipp-drive. Because Rann's daughter and wife knew the contents of both the digital media devices, the subsequent warrantless searches of these devices by the police were valid. The court added, even if the police had searched the digital media devices and viewed images that Rann's daughter or wife had not viewed, their search still would not have exceeded or expanded the scope of the initial private searches.

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

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Searches (*Jones*)

U.S. v. Jones, 132 S. Ct. 945 (S. Ct. 2012)

The police installed a Global-Positioning-System (GPS) tracking device on a vehicle registered to Jones's wife, without a valid warrant, and tracked its movements twenty-four hours a day for four weeks.

The Supreme Court held that the government's installation of a GPS device on a target's vehicle, in this case the vehicle registered to Jones's wife, and its use of that device to monitor the vehicle's movements, constituted a "search." The court found that the government physically occupied private property for the purpose of obtaining information when it installed the GPS device on the vehicle, and that such a physical intrusion would have been considered a "search" under the *Fourth Amendment* when it was adopted.

The government argued that even if the attachment and use of the GPS device was a search, it was reasonable, and therefore lawful, under the *Fourth Amendment* because "the officers had reasonable suspicion and indeed probable cause" to believe that Jones was involved in a drug trafficking conspiracy. The court declined to decide this issue because the government did not raise it on appeal and as a result, the court of appeals did not have the opportunity to address it.

Click **HERE** for the court's opinion. See **9 Informer 10** for the case summary from the court of appeals opinion, *U.S. v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).

See the Legal Division Case Note **HERE** for more in-depth analysis and discussion of the decision in *Jones*.

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Officers Acting Outside Their Jurisdiction

United States v. Jones, 701 F.3d 1300 (10th Cir. 2012)

Police officers with the Missouri Highway Patrol were conducting surveillance on a hydroponics store in Kansas City, Missouri because they knew it sold equipment that could be used to grow marijuana. After Jones arrived at the store, one of the officers requested a computer check on his pick-up truck. The officer learned Jones had a Missouri address, his driver's license was suspended in Missouri and he was on parole in Missouri for a drug offense. After Jones left the store, the officers followed him to a house in Kansas City, Kansas. The officers stated they did not realize they had entered the State of Kansas. The officers approached Jones, briefly spoke with him, and then one of the officers asked Jones for his identification. After Jones gave the officer his identification, the officer told Jones he would like to search his house. Without responding, Jones walked with the officers to the back door and they all entered the house. Once inside, Jones stepped into a side room, grabbed a "long gun" and pointed it at one of the officers. Another officer fired his duty weapon at Jones, wounding him. Kansas City, Kansas police officers eventually obtained a search warrant for Jones' house and truck and seized over three hundred marijuana plants.

Jones argued the Missouri officers violated the *Fourth Amendment* when they seized him outside of their jurisdiction and that he had not voluntarily consented to the search of the house.

The court disagreed. Even though the Missouri officers were acting outside their jurisdiction and without authority under Kansas law, their actions did not constitute a *Fourth Amendment* violation. The Missouri officers' encounter with Jones triggered federal legal standards related to the reasonableness of their seizure of Jones. Whether the Missouri officers were acting without authority under Kansas law was irrelevant.

Next, the court determined the officers' interaction with Jones when they first walked up to him until they took his identification was a consensual encounter. Once the officers took Jones' identification, he was seized for *Fourth Amendment* purposes. However, by this time, the officers had established reasonable suspicion to believe he was involved in criminal activity. First, Jones had visited a store the officers knew sold equipment to grow marijuana. Second, the officers knew Jones had a prior drug conviction. Finally, when one of the officers first encountered Jones, he identified himself as a police officer and told Jones he was conducting a drug investigation. He then said to Jones, "I'm here for your marijuana plants," to which Jones responded by saying, "Oh shit." Upon hearing Jones' comment, the officer could have reasonably inferred Jones was concerned about his investigation of marijuana plants because Jones possessed some marijuana plants.

The court then found Jones voluntarily gave the officers consent to enter his house. Jones' non-verbal actions could have been reasonably interpreted by the Missouri officers as communicating Jones' consent to accompany him into his house.

Finally, the court held the information that the Missouri officers obtained during their investigation could lawfully form the basis of the search warrants obtained by the Kansas officers.

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

*****

Voluntary Contacts / Consensual Encounters

U.S. v. Hernandez, 670 F. 3d 616 (5th Cir. 2012)

Federal agents received an anonymous tip that Hernandez was harboring illegal aliens in her trailer. The agents conducted a knock-and–talk in which they banged on the doors and windows, with their weapons drawn, while demanding entry and then attempted a forced entry by breaking the glass on the door. When Hernandez answered the door, she admitted that an illegal alien was inside her trailer. Agents entered the trailer and arrested Hernandez and two illegal aliens. The court held the agents' conduct during their knock-and-talk violated the *Fourth Amendment*. Since a *Fourth Amendment* violation had occurred by the time Hernandez came to the door, the agents could not rely on her admission as probable cause to either enter the trailer or arrest her.

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

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U.S. v. Carr, 674 F. 3d 570 (6th Cir. 2012)

Officers saw Carr's Chevy Tahoe parked in an empty coin-operated car wash, which was located in an area known for drug activity. It was nighttime, and no one was washing the Tahoe. The officers parked their unmarked police vehicle, briefly activated their blue lights, then got out and approached the Tahoe. After seeing furtive movements and observing marijuana on the dashboard, the officers arrested Carr, searched the Tahoe and found a gun, crack cocaine and more marijuana.

First, the court held the officers had parked their vehicle so they were not blocking the Tahoe and that Carr could have driven it either forward or backward out of the car wash bay. As a result, no *Fourth Amendment* seizure occurred, but only a consensual encounter. The encounter remained consensual after the officers briefly activated their blue lights. The officers were merely identifying themselves to the occupant of the Tahoe, and under the circumstances, this was reasonable.

Next, when the officers approached the Tahoe on foot and began to talk with Carr, the encounter remained consensual. The officer did not engage in any coercive behavior, display their weapons or physically touch Carr.

Finally, when the officers asked Carr to step out of the Tahoe, he was seized for *Fourth Amendment* purposes. This seizure was constitutional because Carr's actions coupled with the officer's observation of marijuana in the Tahoe provided reasonable suspicion that Carr was engaging in illegal activity.

The court went on to state that even if the officers had seized Carr when they initially parked their vehicle near the Tahoe, that such a seizure would have been lawful. The car wash was a known meeting place for drug dealers, it was nighttime, there were no other vehicles around and the Tahoe was not being washed. Based on these facts, the officers had reasonable suspicion to approach the Tahoe and detain its occupants.

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

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U.S. v. Mabery, 686 F.3d 591 (8th Cir. 2012)

At about 3 a.m., officers saw a Jeep, with its dome light on, in the parking lot of an apartment complex. When the occupant of the Jeep saw the officers' police car, he shifted in his seat, away from the officers, and turned the dome light off. Because there had been previous "trouble" in the apartment complex, the officers stopped and shined the police car's spotlight on the Jeep. Mabery, who was in the Jeep, got out, threw down a bag containing marijuana and ran away from the officers. The officers chased Mabery, subdued him and then found a gun in pants pocket.

Mabery argued when the officers stopped their police car and illuminated his Jeep with their spotlight, that they unlawfully seized him under the *Fourth Amendment*.

The court disagreed. A seizure occurs when an officer, by means of physical force or show of authority, restrains a person's liberty. The act of shining the spotlight on Mabery, by itself, did not constitute a *Fourth Amendment* seizure before Mabery dropped his contraband and fled from the officers. The officers did nothing else that would support a demonstration of their authority, such as drawing their weapons or issuing verbal commands to Mabery. In addition, Mabery's act of running away from the officers did not support his argument that he did not feel free to leave the scene, because that was exactly what he tried to do. Here, the circumstances established a routine police-citizen encounter, until Mabery got out of the Jeep and ran away from the officers.

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

*****

U.S. v. Madden, 682 F.3d 920 (10th Cir. 2012)

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

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

The consensual encounter became an investigative detention when the officer asked Madden to step out of his vehicle and directed him to sit in the back of his patrol car while he obtained

Madden's personal information and ran it through his computer. By this time however, the officer had reasonable suspicion to believe that Madden may have been engaged in criminal activity. The officer found Madden in the driver's seat of his car and Madden admitted that he did not have his driver's license with him, a violation of state law. After discovering that Madden had two outstanding arrest warrants, the officer had probable cause to arrest him.

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

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

*****

United States v. Jones, 701 F.3d 1300 (10th Cir. 2012)

Police officers with the Missouri Highway Patrol were conducting surveillance on a hydroponics store in Kansas City, Missouri because they knew it sold equipment that could be used to grow marijuana. After Jones arrived at the store, one of the officers requested a computer check on his pick-up truck. The officer learned Jones had a Missouri address, his driver's license was suspended in Missouri and he was on parole in Missouri for a drug offense. After Jones left the store, the officers followed him to a house in Kansas City, Kansas. The officers stated they did not realize they had entered the State of Kansas. The officers approached Jones, briefly spoke with him, and then one of the officers asked Jones for his identification. After Jones gave the officer his identification, the officer told Jones he would like to search his house. Without responding, Jones walked with the officers to the back door and they all entered the house. Once inside, Jones stepped into a side room, grabbed a "long gun" and pointed it at one of the officers. Another officer fired his duty weapon at Jones, wounding him. Kansas City, Kansas police officers eventually obtained a search warrant for Jones' house and truck and seized over three hundred marijuana plants.

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The court disagreed. Even though the Missouri officers were acting outside their jurisdiction and without authority under Kansas law, their actions did not constitute a *Fourth Amendment* violation. The Missouri officers' encounter with Jones triggered federal legal standards related to the reasonableness of their seizure of Jones. Whether the Missouri officers were acting without authority under Kansas law was irrelevant.

Next, the court determined the officers' interaction with Jones when they first walked up to him until they took his identification was a consensual encounter. Once the officers took Jones' identification, he was seized for *Fourth Amendment* purposes. However, by this time, the officers had established reasonable suspicion to believe he was involved in criminal activity. First, Jones had visited a store the officers knew sold equipment to grow marijuana. Second, the officers knew Jones had a prior drug conviction. Finally, when one of the officers first encountered Jones, he identified himself as a police officer and told Jones he was conducting a drug investigation. He then said to Jones, "I'm here for your marijuana plants," to which Jones responded by saying, "Oh shit." Upon hearing Jones' comment, the officer could have

reasonably inferred Jones was concerned about his investigation of marijuana plants because Jones possessed some marijuana plants.

The court then found Jones voluntarily gave the officers consent to enter his house. Jones' non-verbal actions could have been reasonably interpreted by the Missouri officers as communicating Jones' consent to accompany him into his house.

Finally, the court held the information that the Missouri officers obtained during their investigation could lawfully form the basis of the search warrants obtained by the Kansas officers.

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

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Terry Stops / Reasonable Suspicion

U.S. v. Hart, 674 F. 3d 33 (1st Cir. 2012)

The court held the officers had reasonable suspicion to stop Hart. When Hart first saw the officers, he appeared to be startled, and he quickly walked away from them in the other direction. Hart was hunched over while he walked and he kept his hand in his waistband. Once he got to the car, Hart tried to shield his movements from the officers, but one of them saw him pull an object from his waistband and place it beside his seat. Hart's behavior indicated that the object he was carrying was unlawful and provided the officers reasonable suspicion to detain him.

The officers ordered Hart to get out of car because they recognized that he was a member of a local gang, he appeared nervous, he would not make eye contact with them, and he placed his hands on the dashboard without being asked. Once Hart got out of the car, the officers discovered the handgun in plain view. Based on their observations, the court concluded that the officers acted reasonably throughout the encounter.

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

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United States v. Rabbia, 699 F.3d 85 (1st Cir. 2012)

Police officers patrolling a high crime neighborhood heard three men discussing what they suspected was the beginning of a drug deal. Shortly afterward, one of the men, Bryan Bleau, got into a car driven by Anthony Rabbia and left. Rabbia and Bleau returned a few minutes later and Bleau rejoined the other two men after he removed a bag from the trunk of the Rabbia's car. The officers approached Bleau and the other two men with their guns drawn, detained them in handcuffs and frisked them. One of the officers then approached Rabbia, ordered him out of the car at gunpoint, handcuffed and frisked him. The officer told Rabbia that he was not under arrest and that he would remove the handcuffs once back-up officers arrived. Although none of the men were armed, the officers found a gun inside the bag. After back-up officers arrived, an officer removed Rabbia's handcuffs and asked him what he had been doing. Rabbia eventually told the officer that he had sold Bleau the gun in the bag. The officer asked Rabbia to describe

the gun, which Rabbia was able to do. The officers arrested Rabbia after they discovered that he had a prior felony conviction.

Rabbia argued the initial *Terry* stop was unlawful because it was not based on reasonable suspicion that he was involved in criminal activity. The court disagreed, holding that the officers had reasonable suspicion to believe that Rabbia, Bleau and the other two men were involved in a drug deal. First, the officers overheard a conversation that centered on money. Next, Rabbia and Bleau drove away, returned a short time later, and Bleau had retrieved a bag from the trunk of Rabbia's car. Finally, this activity occurred in an area known for drug activity. In addition, it did not matter that Rabbia was involved in an illegal gun sale and not a drug deal. The officers had facts that allowed them to reasonably believe that Rabbia was involved in criminal activity even though the nature of the criminal activity turned out to be different from what they originally thought.

Rabbia also claimed the statements he gave to the officers at the scene should have been suppressed because he had not been given Miranda warnings. Rabbia argued that the officer's display of his gun, use of handcuffs and frisk transformed the *Terry* stop into a custodial arrest. Again, the court disagreed, holding that the officer's initial encounter with Rabbia was a *Terry* stop and not an arrest. First, it was reasonable for the officers to approach the men with guns drawn based on their suspicions that the men were engaged in a drug transaction. Because Rabbia was seated in his car, the lower half of his body was not visible to the approaching officer and he could have easily been concealing a weapon. Additionally, the approaching officer was effectively alone when he confronted Rabbia because the other officers were busy detaining Bleau and the other two men thirty to forty feet away. Second, it was also reasonable for the officers to handcuff and frisk the men because drug dealing is often associated with access to weapons. Finally, while the display of guns and use of handcuffs are often associated with custodial arrests, in this case both were appropriate to effect the *Terry* stop and allow the officers to conduct their brief investigation. In addition, Rabbia was only handcuffed for about five minutes, and the officers did not question him until after the handcuffs had been removed.

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

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United States v. Jones, 700 F.3d 615 (1st Cir. 2012)

Police officers received an anonymous call from a person who claimed to have recently used and purchased cocaine from five individuals at a nearby house. The caller gave the officers the street address and claimed the occupants of the house were armed with handguns. The caller also described a silver car parked outside the house that supposedly had cocaine inside it. Officers conducted surveillance on the house and a silver Toyota parked a short distance down the street. During this time, officers established the house and the silver Toyota were owned by individuals who were connected to past drug activity.

Four men eventually came out of the house, got into the silver Toyota and drove away. The officers conducted a traffic stop and approached the car with their guns drawn. The officers forcibly removed Jones from the front passenger seat after he refused their commands to exit the vehicle. Once Jones was secured, an officer conducting a visual search for weapons noticed that Jones' pants had slid down around his buttocks and a corner of a plastic bag was sticking out of

the waistband of his underwear. From experience, the officer knew suspects often hid drugs in this manner. The officer removed the bag, which contained cocaine.

First, the court held the officers sufficiently corroborated the anonymous tip and established reasonable suspicion to stop the silver Toyota. When the officers stopped the silver Toyota, they had verified a connection between the house and the car and that the house and the car were occupied and owned by individuals previously implicated in illegal drug activity. This information allowed the officers to suspect the individuals were involved in criminal activity and warranted further investigation.

Second, the court held the manner in which the officers conducted the stop was reasonable, in light of their legitimate safety concerns; therefore, the stop did not escalate into a de facto arrest requiring probable cause. Police officers conducting *Terry* stops are entitled to take reasonable measures to protect their safety and taking such measures does not transform a *Terry* stop into an arrest. Here, based on the information known to them, it was reasonable for the officers to believe the stop involved armed drug traffickers. Consequently, the use of multiple officers, drawn weapons and handcuffs did not turn the *Terry* stop in to a de facto arrest.

Finally, the court held the district court correctly ruled the drugs seized from Jones were in plain view when the officer saw the corner of a plastic bag protruding from his underwear and removed it.

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

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U.S. v. Navedo, 694 F.3d 463 (3rd Cir. 2012)

While performing surveillance on an unrelated case, two police officers saw a man approach Navedo as he stood on the porch of his apartment building. The man pulled what appeared to be a gun out of his book bag and showed it to Navedo. Navedo never touched the gun and the officers did not see him do anything illegal. The officers got out of their car, identified themselves and approached the men on the porch. Both men ran. One officer caught the man with the gun. Another officer chased Navedo into the building and up to his apartment. The officer tackled Navedo in the doorway and both men landed inside his apartment. The officer arrested Navedo and then saw several firearms and ammunition in the apartment. Navedo was convicted of illegally possessing the firearms that were seized from his apartment.

The district court held that the officers had reasonable suspicion to stop and question Navedo because he was looking at the gun on the porch. The court concluded that Navedo's flight from the officers elevated the reasonable suspicion into probable cause to arrest, and justified the officer's warrantless entry into his apartment where the firearms were seized.

The third circuit disagreed. While a suspect's flight from the police upon noticing them, plus some other indicia of wrongdoing can constitute reasonable suspicion, mere unprovoked flight from the approaching officers does not support probable cause to arrest. The officers had no reason to suspect that Navedo was involved in criminal activity. When the officers first saw Navedo standing on the porch, he was not doing anything unusual. After the other man pulled out the gun, Navedo never touched or possessed it and neither officer saw any conduct that

would have suggested that he was doing anything illegal. Even if the officers had reasonable suspicion to believe Navedo was involved in criminal activity, they would have only been entitled to detain him to investigate and not arrest him. As a result, the officers lacked probable cause to arrest Navedo and the district court should have suppressed the firearms that were seized from his apartment following that arrest.

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

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U.S. v. Jones, 678 F. 3d 293 (4th Cir. 2012)

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

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

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

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U.S. v. Jones, 673 F. 3d 497 (6th Cir. 2012)

A police officer saw two males who appeared to be engaging in a hand-to-hand transaction in an area known for extensive drug trafficking and violent crimes. The officer had seen more than two hundred hand-to-hand drug transactions in his nine-years as a police officer and he believed the men were exchanging cash for drugs. When the officer got out of his car to investigate, the defendant ran away. The officer told the defendant to stop several times but he kept running. The officer gave chase and saw the defendant throw down several unidentifiable items and a brown paper bag. The officer eventually caught the defendant and handcuffed him. Another officer retraced the defendant's path and found a loaded firearm. The officer read the defendant his *Miranda* rights and he admitted to possessing the firearm.

The defendant argued the officer detained him without reasonable suspicion and that the firearm and his confession should have been suppressed.

The court disagreed. Because the defendant did not comply with the officer's commands to stop, he was not seized until the officer physically restrained him by taking him down and handcuffing him. By the time this happened, the officer had already seen the defendant engage in a hand-to and transaction in an area known for drug activity, and then run away from the officer as he approached, throwing several items to the ground as he fled. These facts gave the officer reasonable suspicion to believe the defendant was engaged in criminal activity.

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

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United States v. Smith, 697 F.3d 625 (7th Cir. 2012)

Smith argued his initial encounter with the agent as he exited the Cadillac, was an arrest and that it was unlawful because it was not supported by probable cause. Smith also claimed that he was "arrested" because the agents approached the Cadillac with their guns drawn and then immediately handcuffed him.

The court disagreed, holding Smith's initial encounter with the agents was a valid *Terry* stop requiring reasonable suspicion and that the officer only arrested him after matching him to one of the robbers from the bank photographs.

Additionally, officers conducting a *Terry* stop may approach with guns drawn and handcuff a suspect, without automatically transforming the stop into an arrest, when it is warranted by the circumstances. Here, it was reasonable for the agents to approach the Cadillac with guns drawn because they had information that it was the get-away vehicle in a recent robbery. For the same reason, it was reasonable for the agent to handcuff Smith while he was alone with him on the street while the other agents chased Evans and before another agent could arrive with photographs from the bank.

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

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U.S. v. Dunning, 666 F. 3d 1158 (8th Cir. 2012)

Officers arrested Adam Henderson after employees of a vacation lodge discovered he had rented one of their cabins using stolen credit card information. A red Ford pick-up truck was listed on the registration card along with a second occupant named "Dennis." A lodge employee changed the electronic key card lock for Cabin 618 and an officer kept it under surveillance while other officers obtained a search warrant

During this time, the officer saw a red Ford pick-up truck park outside Cabin 618. A person got out carrying a bag over his shoulder and tried to use his key card to enter the cabin. When it did not work, he called out for "Adam." The officer approached the person and asked him to accompany him to an adjacent cabin. Once at the cabin the person identified himself as "Dennis." Dennis gave the officer consent to search and the officer found illegal drugs on his person. The officer saw more illegal drugs in plain view in an open pocket on the bag. Dunning

argued that the officer had unlawfully detained him; therefore, the evidence seized from his person, the bag and later from his truck should have been suppressed.

The court disagreed, holding the officer had reasonable suspicion to conduct a *Terry* stop of Dunning. The officer knew two men were staying at the cabin where other officers had found evidence of criminal activity. One of the occupants, named Adam, had used a false name to rent the cabin. A red Ford pick-up truck was listed as the vehicle the occupants drove. When Dunning approached the cabin he was driving a red Ford pick-up truck and when his key card did not work to open the door, he called out for "Adam." Finally, when the officer confronted him, Dunning stated that his first name was "Dennis," the name of the other occupant on the registration card.

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

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U.S. v. Philips, 679 F.3d 995 (8th Cir. 2012)

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

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

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

*****

U.S. v. Benson, 683 F.3d 934 (8th Cir. 2012)

Benson claimed the DNA evidence tying him to possession of a stolen handgun should have been suppressed as the fruit of an unlawful seizure.

The court disagreed. Shortly after a shoplifting was reported, a police officer spotted Benson, who matched the description of the shoplifter, running away from the store. These facts gave the officer a reasonable, articulable suspicion that Benson had just committed the shoplifting and justified a *Terry* stop.

The officer could not confirm or dispel his suspicions that led to the *Terry* stop until he transported Benson back to the store. Consequently, placing Benson in the back of the patrol car and transporting him back to the store for identification did not constitute an unreasonable seizure under the *Fourth Amendment*.

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

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U.S. v. Riley, 685 F.3d 691 (8th Cir. 2012)

During the course of a valid traffic stop, the court held the officer developed reasonable suspicion to detain Riley in order to search his vehicle. First, Riley exhibited undue nervousness in the form of a visibly elevated heart rate, shallow breathing and repetitive gesticulations, such as "wiping his face and scratching his head." Second, Riley gave vague or conflicting answers to simple questions about his travel itinerary. Finally, Riley misrepresented his criminal history to the officer by omitting his prior drug violations and felony arrests.

Next, the court held the officer's method of questioning Riley did not amount to an unreasonable "search" in violation of the *Fourth Amendment*. The officer asked Riley about his travel itinerary. These questions did not extend the traffic stop because the officer asked them while he was waiting for his dispatch to get back to him with a report on Riley's criminal history, which is allowed during a traffic stop.

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

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U.S. v. Zamora-Lopez, 685 F.3d 787 (8th Cir. 2012)

An informant told police officers he had regularly purchased methamphetamine from his supplier every three to five days for the past three years. The informant said that they would meet at a particular intersection where the supplier would get out of his vehicle, which was sometimes a silver SUV, driven by an unknown third person, and get into the informant's vehicle. After driving around and completing the drug deal, the informant would drop off the supplier, who would be picked up by the unknown third person driving the SUV.

The officers set up an undercover drug buy between the informant and his supplier, following their previous routine. After the supplier got out of a silver Jeep and into the informant's vehicle the officers followed the Jeep for a few blocks. The officers conducted a traffic stop and arrested the driver, Zamora-Lopez. The officers recovered a bag containing methamphetamine from Zamora-Lopez's coat pocket.

Zamora-Lopez argued the officers did not have reasonable suspicion to believe that he was involved in drug trafficking activity just because he was driving the Jeep.

The court disagreed. The informant described to the officers a very specific pattern of long-standing conduct that usually involved three people, the informant, the supplier and an unknown driver. The supplier and his driver sometimes arrived in silver SUV. The supplier's driver frequently stayed in the area to pick up the supplier after the drug transaction. The officers'

surveillance observations during the controlled buy confirmed the informant's account in almost every detail. The officers believed that the supplier was an experienced and high-volume drug trafficker and it would be reasonable for the officers to believe that he would a person he trusted to drive him to and from his drug transactions. Therefore, it was reasonable for the officers to suspect that the Jeep's driver was knowingly involved in the supplier's drug trafficking activities.

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

*****

U.S. v. Mendoza, 691 F.3d 954 (8th Cir. 2012)

Federal agents requested that a marked cruiser from the local police department stop a car they had under surveillance. The police officer conducted a traffic stop on the car because she thought that the vehicle's paper tag was improper. The driver gave consent to search and another officer found controlled substances in the car. Mendoza argued that the officer did not have reasonable suspicion or probable cause to conduct the traffic stop because the car displayed a valid temporary tag from another State.

The court disagreed. Whether reasonable suspicion exists for a traffic stop is determined by what the officer reasonably knows at the time of the stop, not what is discovered afterward. At the time of the traffic stop, the officer saw what appeared to be a paper tag in the car's rear window. The officer knew it was not an Iowa tag, and she was unable to identify the issuing State from a distance of fifteen or twenty feet. In addition, the large, handwritten block numbers on the tag, which the officer knew could be used to alter the date on the tag, aroused her suspicions. Given the tag's overall appearance, the officer thought it looked like something a person could have created on a printer. Combined with the officer's experience with falsified or fraudulent tags, these observations provided her with reasonable suspicion the tag was not a valid registration document and supported the traffic stop.

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

*****

U.S. v. Green, 691 F.3d 960 (8th Cir. 2012)

After receiving a description of a suspected bank robber, a police officer saw a black male with a medium build and facial hair wearing white Nike tennis shoes walking two blocks away from a bank that had just been robbed. Each of these features matched the description of the bank robber. The officer stopped Green, ran a computer check on him, and discovered that he had two outstanding warrants for his arrest. The officer arrested Green and during the search incident to arrest found a large amount of cash in his pants pocket. Green later made several incriminating statements to other officers concerning his involvement in the bank robbery.

The court held the officer had reasonable articulable suspicion to conduct a *Terry* stop on Green. The court commented that a *Terry* stop is justified when a suspect matches the description of a person involved in a crime near in time and location to the stop.

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

*****

U.S. v. King, 672 F. 3d 1133 (9th Cir. 2012)

The court held the information provided by the two informants was highly unreliable and did not provide the officers with reasonable suspicion that the defendant was involved in the homicide. The first informant had no track record of reliability and his/her basis of knowledge concerning the defendant's involvement in the crime was double hearsay. The second informant had no track record of reliability, lacked firsthand information concerning the defendant's involvement in the crime and did not meet with the officer face-to-face.

However, the court held the officers did not need reasonable suspicion to search the defendant's room. The defendant was subject to suspicionless search as a condition of his probation, whether or not the officers believed he was involved in any criminal activity. Suspicionless search conditions for individuals on probation do not violate the *Fourth Amendment*.

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

*****

United States v. Salas-Garcia, 698 F.3d 1242 (10th Cir. 2012)

Narcotics officers requested a marked police unit stop Salas-Garcia's vehicle after the confidential informant in an undercover drug operation told the officers "the drugs are here." Uniformed officers stopped Salas-Garcia's vehicle and placed him in handcuffs. The narcotics officers arrived and told Salas-Garcia that he was not under arrest but that they were conducting an investigation. Officers patted down Salas-Garcia and removed the handcuffs after he agreed to cooperate with them. Salas-Garcia admitted he was delivering the drugs for another person. The officers eventually found a kilogram of cocaine in his vehicle.

Salas-Garcia argued the officers exceeded the scope of a *Terry* stop and that they lacked probable cause to handcuff and detain him prior to questioning.

The court disagreed. The use of handcuffs during a *Terry* stop does not automatically turn a lawful *Terry* stop into an arrest under the *Fourth Amendment*. Here, the officers knew the drug transaction involved one kilogram of cocaine. Given the large amount and value of drugs to be exchanged, it was reasonable for the officers to believe the parties might be armed. Consequently, it was reasonable under the circumstances for the officers to place Salas-Garcia in handcuffs to ensure both officer and public safety. In addition, Salas-Garcia was only handcuffed for four to ten minutes. The officers removed the handcuffs when they discovered that Salas-Garcia was not armed and that he was cooperating with their investigation. The officers' brief detention of Salas-Garcia in handcuffs did not become an unlawful arrest that required probable cause.

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

*****

United States v. Guardado, 699 F.3d 1220 (10th Cir. 2012)

A police officer was patrolling a specific part of town because of an ongoing "tagging" or graffiti feud between gangs. There had also been aggravated assaults, a weapons offense and other crimes in that vicinity. Around 1:00 a.m., the officer saw four men in an area where foot traffic was usually very light at that hour. The officer saw two of the men were dressed in clothing specific to one of the local gangs and one of the other men had a backpack. From his experience, the officer knew that a majority of graffiti-related arrests involved suspects who carried their graffiti kits in backpacks. The officer pulled his patrol car twenty to thirty feet behind the men and got out so he could talk to them. As he was getting out of his car, the officer heard someone yell, "Cops." One of the men, later identified as Guardado, ran away. The officer chased and yelled for him to stop, but Guardado did not comply. During the chase, the officer saw that Guardado's hand was in front of his body, causing the officer to believe that Guardado was trying to conceal some type of evidence or retrieve a weapon. The officer eventually caught Guardado, tackled him, handcuffed and frisked him. The officer found a firearm located in the groin area of Guardado's pants. Guardado was arrested and charged with being a felon in possession of a firearm. Guardado argued that the officer did not have reasonable suspicion to justify the stop.

The court determined Guardado was seized for *Fourth Amendment* purposes when the officer tackled him. By that time, the court held that the officer had developed reasonable suspicion to believe Guardado was involved in criminal activity. First, the officer stopped Guardado in a high crime area. Second, the stop occurred around 1:00 a.m. Third, several of the men, including Guardado, were wearing clothing associated with a local gang. Finally and most importantly, Guardado fled from the officer upon seeing him and he was grabbing his waistband in what appeared to be an effort to conceal evidence or retrieve a weapon. When viewed together, these factors established reasonable suspicion to believe criminal activity was afoot and supported the officer's seizure of Guardado.

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

*****

United States v. Conner, 699 F.3d 1225 (10th Cir. 2012)

Around 11:00 p.m., a man called 911 to report that a light-skinned black male, wearing a fuzzy hunter hat, had exited a black SUV and placed a pistol in his waistband. The caller said this had occurred after he heard someone yelling, "No, no." The caller gave the location of SUV and provided the 911 operator with his address and phone number. Two officers responded to the location, which was in one of the most dangerous areas of the city because of the frequent stabbings and shootings that occurred there. Specifically, the officers knew that there had been a shooting or stabbing in the same area two nights before. Upon arrival, the officers saw a black SUV in the exact location the caller had given. They also saw a black male, later identified as Connor, wearing a fuzzy hunting hat, just as the caller had described, walking down the sidewalk away from the SUV. When the officer positioned the patrol car to block Connor's path, Connor turned off the sidewalk and into an empty parking lot, in what the officers thought was an attempt to avoid them. One of the officers got out of the patrol car and stopped Conner at

gunpoint. The officer frisked Connor and found a pistol concealed in his waistband. Connor was charged with being a felon in possession of a firearm.

Connor argued his seizure violated the *Fourth Amendment* because the 911 call was not reliable. Connor also argued that even if the call was reliable, it did not establish reasonable suspicion of criminal activity.

The court disagreed, holding the 911 call was sufficiently reliable. Although the caller did not disclose his name, he provided the 911 operator with his address and phone number, so he could be identified later if needed. The caller stated that he personally heard someone yell, "No, no," then saw a man place a pistol in his waistband and that these events had just occurred. The caller provided specific details regarding events, the suspect, and the location of the SUV. The caller provided enough personal information to suggest he was a concerned citizen and not a malicious tipster. Finally, the officers corroborated several details provided by the caller such as the color and location of the SUV as well as the location and description of the suspect.

The court further held the officers had reasonable suspicion to stop Connor. The stop occurred in a high crime area at night. While he did not run, Connor altered his route in what could be considered an evasive manner upon seeing the officers. Finally, Connor was in the area where the caller reported that he heard someone yell "No, no," and then saw a man put a pistol in his waistband. The officers had a reliable tip and a reasonable suspicion of criminal activity that justified stopping Connor.

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

*****

U.S. v. Lewis, 674 F. 3d 1298 (11th Cir. 2012)

Officers approached four men who were standing near a car in a restaurant parking lot and engaged them in a consensual conversation. One of the officers asked the men if any of them were carrying guns. Evans said that he had a gun in his backpack, which was in the open trunk of the car, and another man, McRae, told the officer that he had a gun in his waistband. The officers immediately drew their weapons and ordered all four men to sit on the ground. Lewis, who was acting very nervously, eventually complied, but he refused to sit still. The officers searched the area near Lewis and found a handgun underneath a car. McRae was not charged because he had a valid concealed weapons permit, however, Lewis was charged with a firearms violation and subsequent testing found Lewis's DNA on the gun.

The court held McCrae's admission to carrying a concealed weapon was sufficient to justify a *Terry* stop on him before the officers determined whether he possessed a valid concealed weapons permit. Although an individual may ultimately be engaged in conduct that is lawful, as turned out to be the case with McCrae, officers may detain the individual while they are making that determination.

The court also held it was reasonable for the officers to detain Lewis, Evans and the fourth man, under *Terry*, after McRae told the officers that he had a gun in his waistband and Evans said that he had a gun in his backpack.

The officers faced substantial immediate danger when they discovered that McRae and Evans each had access to a firearm. The Supreme Court and the Eleventh Circuit have established that, for safety reasons, in some circumstances, officers may briefly detain individuals about whom they have no individualized reasonable suspicion of criminal activity in the course of conducting a valid *Terry* stop on other related individuals.

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

*****

United States v. Griffin, 696 F.3d 1354 (11th Cir. 2012)

When a police officer responded to a 911 call from a store, a security guard told him a man had attempted to steal some clothing. The guard pointed to Griffin, who was walking away from the store and identified him as the perpetrator. The officer told Griffin to stop, but he continued to walk away. The officer grabbed Griffin by the wrist and told him he was investigating a theft. Griffin denied stealing anything. The officer frisked Griffin and felt what he believed to be C-cell batteries in Griffin's back pocket. The officer asked Griffin "What's in your pocket" and "Why do you have batteries?" Griffin told the officer that he had shotgun shells in his pocket, not batteries. The officer then asked Griffin if he had ever been to prison, and Griffin told him "Yes." Griffin was charged with being a felon in possession of ammunition under 18 U.S.C. § 922(g)(1).

The court held the initial *Terry* stop of Griffin was lawful because the officer reasonably suspected that Griffin had tried to steal some items of clothing.

The court next held officer's *Terry* frisk of Griffin was justified. First, the officer was alone at night in a high crime area. Second, Griffin acted evasively and refused to obey the officer's command to stop. Third, the officer had not finished investigating the alleged attempted theft.

The court further held the officer's questions to Griffin about the items in his pocket, while unrelated to the initial reason for the *Terry* stop did not extend the length of the stop. With this holding the court concurred with the Fourth, Sixth, Seventh, Ninth and Tenth Circuits, and with the United States Supreme Court's holdings in *Muehler v. Mena* and *Arizona v. Johnson*, that unrelated questions posed during a *Terry* stop do not create a *Fourth Amendment* issue unless they measurably extend the duration of the stop. In addition, to the extent that it believed that the officer's questions constituted a *Fourth Amendment* search, the district court was mistaken. Questions from a police officer to a suspect about what he has in his pants pocket and whether he has been to prison are not searches under the *Fourth Amendment.*

Finally, the court held the officer did not go beyond the scope of what is allowed in a *Terry* frisk. The officer did not conduct a second frisk after completing the first one and he did not improperly manipulate Griffin's back pocket. Instead, he asked Griffin why he was carrying batteries, which was entitled to do.

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

*****

Terry Frisks-Person/Vehicle

U.S. v. Brake, 666 F. 3d 800 (1st Cir. 2011)

An officer stopped and frisked Brake after seeing him walk away from a van parked near a residence where it had been reported a man was threatening others with a gun. During the frisk, the officer felt a "squishy" object in the front pocket of Brake's sweatshirt that felt like a plastic bag. Realizing that it was not a weapon, the officer asked Brake what he had in his pocket. Brake told him it was a plastic bag he had found in the bushes. The officer asked Brake if he would mind taking the bag out of his pocket. Brake said, "sure" and without hesitation he took the bag out of his pocket. After asking Brake if he was curious about the bag's contents, Brake opened the bag revealing hundreds of OxyContin tablets. Brake dropped the bag and disclaimed ownership of its contents.

The court held that the officer lawfully detained Brake after he saw him stop at a parked van, open the door, do something inside and then walk away from the officer. The court concluded that Brake's proximity to the residence, baggy clothing and activity at the van gave the officer reason to believe that he may have retrieved or deposited a weapon.

The court held that the officer conducted a lawful *Terry* frisk on Brake. Brake did not immediately respond to the officer when he tried to get his attention, but rather kept walking away from him. Brake's failure to heed the officer's attempt to stop him supported the officer's concerns for his safety and the eventual frisk. Brake's cooperative demeanor and lack of any threatening or furtive gestures after he finally stopped did not lessen the officer's concern that Brake may have posed a risk to him.

Finally, the court held that Brake voluntarily consented to removing the plastic bag from his pocket and opening it for the officer to see its contents. The officer did not coerce Brake in any way. Instead, Brake chose to cooperate with the officer of his own freewill, having decided to pursue a strategy of cooperation and ignorance about the origin and contents of the bag.

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

*****

U.S. v. Gaines, 668 F. 3d 170 (4th Cir. 2012)

Officers stopped the vehicle in which Gaines was a passenger for a traffic infraction. An officer ordered Gaines out of the car and while conducting a *Terry* frisk, he felt the trigger guard of a firearm in his waistband. Gaines struck the officer in the face with his elbow, punched another officer, and tried to flee. The officers subdued Gaines and arrested him. During the struggle, the firearm fell from Gaines's waistband and the officers recovered it.

The trial court granted Gaines's motion to suppress the firearm, holding the initial traffic stop was not supported by reasonable suspicion, therefore it was unlawful. On appeal, the government conceded that the traffic stop and pat down of Gaines was unlawful. However, the government argued that the taint of the unlawful stop was purged when Gaines assaulted the officers. Because the firearm had not been physically seized when the assault occurred, the

government argued that it could later be lawfully seized pursuant to a valid arrest for the assault on the officers and introduced into evidence against Gaines.

The court disagreed. The discovery of the gun, which the officer felt during the unlawful frisk, occurred before the independent criminal act of assaulting the officers. Consequently, that criminal act could not be considered an intervening event for determining whether the taint of the unlawful search had been purged. The court focused on when the officers discovered of the firearm and not when they seized it. There would have been a different outcome if the officers had discovered the firearm after Gaines assaulted them, even though the initial stop and frisk was unlawful.

The First and Sixth Circuits agree.

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

*****

U.S. v. Robinson, 670 F. 3d 874 (8th Cir. 2012)

The court held the officer did not exceed the scope of the *Terry* stop by handcuffing Robinson and placing him in her patrol car. The officer had specific information that Robinson had possessed a firearm, just minutes earlier, and that he was potentially intoxicated or hostile. It was reasonable for the officer to secure Robinson to eliminate the possibility that he would gain control of the firearm and threaten her safety.

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

*****

U.S. v. Aquino, 674 F. 3d 918 (8th Cir. 2012)

A police officer working with a drug interdiction unit at a bus station asked Aquino if he could conduct a *Terry* frisk, but Aquino declined, stating he did not want the officer to touch him. After the officer saw an unnatural bulge on the inside of Aquino's right calf, he asked him to lift his pants above the bulge. Aquino refused so the officer placed him in handcuffs for "his safety." Without first conducting a pat down, the officer lifted Aquino's pant leg above the bulge and saw a duct-taped bundle strapped on Aquino's right leg. The officer removed the bundle along with two other packages that were found strapped to Aquino's body. All of the packages contained methamphetamine.

The court held the officer violated the *Fourth Amendment* when he searched underneath Aquino's pant leg, without consent or probable cause, instead of performing a pat down to confirm whether the concealed bulge was a weapon.

The Eighth Circuit has previously ruled when an officer merely observes a concealed bulge under a person's clothing, standing alone, this does not establish probable cause to believe that the person is trafficking drugs. Additionally, an actual search of a person's body is not authorized under *Terry* until after a pat down confirms the presence of a weapon or contraband. Here, there was no valid reason for the officer to immediately search underneath Aquino's

clothing instead of first conducting a pat down to determine whether the concealed bulge was a weapon.

Because the officer exceeded the scope of a *Terry* frisk and Aquino was handcuffed at the time, the court found Aquino was effectively under arrest at the time of the search and not simply being detained. As a result, the officer needed to have probable cause before he conducted the non-consensual search of Aquino, which the court ruled he did not have.

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

*****

***U.S. v. Preston*,** 685 F.3d 685 (8th Cir. 2012)

A patrol officer saw a vehicle perform an illegal U-turn and began to follow it. The vehicle pulled over to the side of the road without being signaled to do so by the officer. While the officer was running the license plate through his computer, a woman got out of the vehicle and walked up to a nearby house and knocked on the front door. The officer saw a person in the house look out a window at the woman, but did not answer the door. By now, the officer had learned the vehicle was registered to a car lot and not to an individual. When the woman began to walk back towards the vehicle, the officer activated his lights, got out of his car and approached the vehicle. None of the four occupants of the vehicle had a valid driver's license and vehicle was not insured. The officer ordered everyone out of the vehicle so an inventory search could be conducted before the vehicle was impounded.

The officer recognized Preston, a back seat passenger, as having been involved in several domestic violence calls and gun cases. During a *Terry* frisk, one of the back-up officers found a loaded handgun in the pocket of Preston's jacket.

The court reversed the district court and held the *Terry* frisk was lawful because the totality of the circumstances created an objectively reasonable suspicion that Preston might be armed and dangerous. First, the stop took place at night. Second, the woman getting out of the vehicle and knocking on door of a house, whose occupants refused to answer the door, appeared to be an attempt to create a distraction. Third, none of the occupants had a valid license and the vehicle was registered to a car lot. Fourth, once the officer learned Preston's identity, he knew Preston had been involved in prior cases involving domestic violence and guns. Finally, allowing any of the occupants to walk away from the vehicle without having been searched would have posed a threat to officer safety.

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

*****

***United States v. Cotter*,** 701 F.3d 544 (8th Cir. 2012)

Officers responded to a call to check on the welfare of two women at a house where they had received previous complaints of illegal drug activity and stolen vehicles. Once at the house, the officers saw Cotter working on a Cadillac parked in the driveway. One of the officers spoke with one of the women at the house who told the officer she did not know Cotter or anything about the Cadillac. The other officer called-in the license plate number from the Cadillac and was told it

was registered to a Chevrolet. Cotter hesitated when the officers asked him for his date of birth and seemed nervous and shaky. One of the officers performed a *Terry* frisk and felt the butt of a handgun tucked into Cotter's front waistband. The officer removed the handgun and arrested Cotter.

Cotter claimed the officers did not have reasonable suspicion to believe criminal activity was afoot or that he was armed and dangerous.

The court disagreed. Although there could be an innocent explanation for each of Cotter's actions, when considered together it was reasonable for the officers to suspect the Cadillac was stolen and Cotter might be armed. As the officers approached him, Cotter was reaching inside the vehicle, which had a license plate registered to a different vehicle, at a house known for illegal drugs and stolen vehicles. In addition, Cotter appeared nervous and shaky and hesitated when the officer asked him for his date of birth.

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

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United States v. Griffin, 696 F.3d 1354 (11th Cir. 2012)

See *United States v. Griffin* above

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Traffic Stops / Detaining Vehicles / Occupants

U.S. v. Jenkins, 680 F. 3d 101 (1st Cir. 2012)

The court held the traffic stop that led to the officer finding the illegal firearm in Jenkins' car was supported by reasonable suspicion. When the officer saw a large blue disc behind the windshield of Jenkins's car, it was reasonable for him to suspect that Jenkins was in violation of Maine's law against civilian blue lights and conduct a traffic stop to get a better look at Jenkins' car. Even though the officer eventually discovered that Jenkins did not have an illegal blue light in his car, by the time the officer made contact with Jenkins, he had established reasonable suspicion that Jenkins may be involved in other criminal activity. Jenkins did not immediately pull over after being signaled to do so by the officer and he reached in front of and behind the passenger seat as if he were hiding something. Jenkins gave the officer an implausible explanation for his furtive movements and he was not able to provide the officer with a valid driver's license. The officer had ample grounds for suspecting that Jenkins was trying to hide evidence of something unlawful such as illegal drugs or other contraband.

The court further held the warrant obtained to search Jenkins' car was supported by probable cause. Additionally, the officers were not required to establish probable cause to search the car for a specific type of contraband. It was sufficient that the warrant authorized the officers to search Jenkins's car for any illegal drug and weapons that may have been inside it.

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

*****

U.S. v. Wilson, 699 F.3d 235 (2nd Cir. 2012)

Two tribal police officers, one of whom was cross-designated as a United States Customs Officer, conducted a traffic stop on a vehicle that had left the United States at an unguarded, undesignated border crossing, then returned to the United States less than twenty minutes later. Officers searched the vehicle and found three duffel bags containing marijuana.

The district court held that the traffic stop violated the *Fourth Amendment* because it occurred outside the officers' tribal jurisdictional boundaries, in violation of state law, and because the cross-designated customs officer violated ICE policy by not contacting an ICE official before making the stop.

The court held that the traffic stop did not violate the *Fourth Amendment* because the officer acting in his capacity as a cross-designated customs officer had probable cause to stop the vehicle for a violation of federal law. When the officers stopped Wilson, they knew he had left the United States and then reentered a short time later at an unguarded, undesignated border crossing. The tribal police officer was authorized to effect the stop because he was a validly designated customs officer. The violation of the ICE policy did not violate the *Fourth Amendment* because the policy's "prior authorization requirement" did not involve any *Fourth Amendment* issues. Because the stop was a lawful exercise of the officer's designated customs authority, the court did not decide whether it violated state law.

Once the officers stopped the vehicle, they were entitled to search it under the automobile exception to the warrant requirement. At the time of the search, officers knew the vehicle was registered to an individual, other than Wilson, who had recently been arrested with a large quantity of marijuana. They knew Wilson had lied about having crossed the border, and then admitted that he had lied. Finally, Wilson admitted that he had a marijuana pipe in his possession and that he had gotten a "little" marijuana across the border.

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

*****

U.S. v. Lewis, 672 F. 3d 232 (3d Cir. 2012)

The court held that the illegal window tint on the defendant's car could not provide a legal justification for the traffic stop because the officers only noticed it after the stop. Officers can only rely on facts known to them at the time of a stop to support their justification for the stop.

The court further held that the tip that led to the officer stopping the defendant's car was insufficient to justify the stop. The officer received a tip that individuals in a white Toyota Camry with "181" in the license plate had firearms in their possession. This information alone does not allow an officer to reasonably believe that possession of the firearms was illegal or that they were being used in a criminal manner. Without any information about the criminality of the firearms, there mere possession of them could not provide the officer with reasonable suspicion to stop the vehicle.

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

*****

U.S. v. McBride, 676 F. 3d 385 (4th Cir. 2012)

Officers saw McBride engaging in what they believed to be a drug transaction in the parking lot of a nightclub. The officers detained McBride's car for fifty-five minutes until a canine narcotics unit from a neighboring police department arrived. During that time, the officers allowed McBride to leave the scene. After McBride left, the narcotics canine arrived and alerted on his car. Using this information and other details from the investigation, the officers obtained a warrant to search McBride's car where they found an illegal firearm and crack cocaine.

The court held that the officers had reasonable suspicion to detain McBride's car. First, the officers observed unexplained traffic at an unusual hour at a location having a history of drug activity. Second, the officers saw McBride, who they knew from a prior drug investigation, engaged in what appeared to be a drug transaction with another individual who was found shortly thereafter in possession of over $9,000. Finally, McBride was found in the company of other men at the club who were known to have been involved in the drug trade. These factors, taken together, were sufficient to establish reasonable, articulable suspicion for the officers' detention of McBride's car on the ground that it may have contained illegal drugs.
Click **HERE** for the court's opinion.

*****

United States v. Vaughan, 700 F.3d 705 (4th Cir. 2012)

Vaughan and Scott were pulled over by a police officer for speeding. Based on Scott's nervousness, the presence of four cellular phones, to include two prepaid cell phones, and conflicting explanations for their travels, the officer called in a drug-detection dog. The dog arrived thirteen minutes after the initiation of the traffic stop and alerted on the trunk of the car two to three minutes later. Officers searched the trunk and found cocaine.

The court held the officer had reasonable suspicion to believe Vaughan and Scott were involved in criminal activity six minutes into the stop when Scott volunteered information concerning their travels that conflicted with Vaughan's information. By this time, the officer had already observed Scott's nervousness and had seen two prepaid cell phones that the officer knew were used by people involved with drugs. As a result, the officer was justified in briefly extending the stop and waiting for the drug-detection dog to arrive.

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

*****

United States v. Lawing, 703 F.3d 229 (4th Cir. 2012)

A confidential informant (CI), in the presence of police officers, made a recorded phone call to a person identified as "Drew" in which Drew agreed to drive to the CI's house and deliver crack cocaine within twenty minutes. The CI gave the officers a physical description of Drew, the car he would be driving and the route he would take to the CI's house. About twenty minutes later an officer in a marked patrol car conducted a traffic stop on a car that fit the description provided by the CI, driven by a man fitting Drew's description, one half mile from the CI's house. The officer obtained a driver's license from the driver which bore the name Lawing, not Drew. Other officers arrived, seized Lawing's cell phone and called the number the CI had previously used to

call Drew. Lawing's cell phone rang. Officers then searched the car but did not find any crack cocaine. However, the officers found two shotgun shells in the glove box lying on top of an identification card with Lawing's picture on it. Lawing was charged with possession of ammunition by a convicted felon.

The court held the officer had reasonable suspicion to stop Lawing's car because he corroborated the CI's description of Drew and his car as well as the time and circumstances surrounding the intended cocaine delivery.

The court also held the officers were justified in seizing Lawing's cell phone to see if it rang when they called the number the CI had used to place the crack cocaine order with Drew. Even though Lawing provided a driver's license that did not bear the name Drew, the totality of the circumstances provided the officers with reasonable suspicion to take minimal steps to determine whether Lawing was Drew.

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

*****

U.S. v. Rico-Soto, 690 F.3d 376 (5th Cir. 2012)

A Border Patrol Agent conducted a traffic stop on Rico-Soto's van and eventually arrested him for harboring illegal aliens. The court held the agent did not violate the *Fourth Amendment* because the stop was supported by reasonable suspicion.

First, the van was traveling on Interstate 10, a major corridor for alien smuggling, and the agent had pulled over vans transporting illegal aliens on this route multiple times. Second, various characteristics of the van and its passengers added to the agent's suspicions. The van was a fifteen-passenger model of the kind often used in transporting illegal aliens. There was a company name stenciled on the side of the van, but it was registered to a woman and not the transportation company. The agent knew that vans used to transport illegal aliens were often registered to individual women rather than to a transportation company. Third, the agent noticed that the passengers were seated in separate rows rather than clustered together as people normally would sit. Finally, the agent had specific information from his agency that this particular transportation company had become active in transporting illegal aliens. The agent's 19 ½ years of experience allowed him to recognize suspicious circumstances that might not be recognized by others and by themselves might not arouse suspicion, but when examined together, established reasonable suspicion to support the traffic stop.

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

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U.S. v. Mubdi, 691 F.3d 334 (5th Cir. 2012)

Two police officers stopped Mubdi after they both visually estimated he was speeding and he was following one of the officer's patrol cars too closely. One of the officers issued Mubdi a warning ticket and then had him step out of his car while the other officer walked his drug-detection dog around it. After the dog alerted to the presence of drugs, the officers searched Mubdi's car and found cocaine and two loaded firearms.

The court agreed with the district court, which held the officers had probable cause to stop Mubdi for speeding because they were trained in estimating vehicle speed and that their testimony regarding Mubdi's rate of speed was credible. The court further held that even if the officers were mistaken in believing that Mubdi was violating the law by following the officer's patrol vehicle too closely, it was a reasonable mistake, which did not affect the officers' probable cause to stop Mubdi for speeding.

The court held after the officers issued Mubdi the warning ticket, they had reasonable suspicion to detain him for further investigation. First, Mubdi took an excessive amount of time to pull over and he was extremely nervous when talking to the officers. Second, during the stop, he kept his foot on the car's brake pedal instead of shifting the transmission into park. Third, he could not provide details as to his destination or the family member he was going to visit. Fourth, he lied to the officer about who had rented the car; he was not an authorized driver of the car and the rental car was being driven out-of-state, which was prohibited by the rental contract. All of these circumstances supported the officers' decision to extend the duration of the initial traffic stop to conduct the open-air canine sniff, which eventually alerted the officers to the presence of contraband in Mubdi's car.

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

*****

U.S. v. McCraney, 674 F. 3d 614 (6th Cir. 2012)

An officer conducted a traffic stop on a vehicle after it failed to dim its headlights as it drove past him. The officer arrested the driver for driving with a suspended license and McCraney, the owner of the car, for unlawful entrustment of a motor vehicle. Before the two men were handcuffed, back-up officers searched the car and seized an unlawful firearm. Officers then handcuffed McCraney and the driver and placed them under arrest.

The government argued the warrantless search of the vehicle was either a valid search incident to arrest or a valid *Terry* frisk of the vehicle because the officers had reasonable suspicion to believe the occupants were dangerous and may have access to weapons.

First, the police are authorized to search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Neither side argued that it was reasonable to believe that the vehicle contained evidence of either driving with a suspended license or unlawful entrustment. However, the government argued that it would have been possible for either McCraney or the driver to gain access to the passenger compartment at the time of the search. The court disagreed. Although neither McCraney nor the driver were handcuffed, they were standing two or three feed behind the rear bumper of the vehicle, as instructed, with three officers standing around them. It was not improper for the district court to hold that McCraney and the driver were not within reaching distance of the passenger compartment at the time of the search.

Next, the court held that the original traffic violation for failing to dim headlights and the subsequent arrests for driving under suspension and negligent entrustment did not provide reasonable suspicion to believe that McCraney or the driver were dangerous or had access to

weapons in the vehicle. Additionally, the arresting officer testified that if McCraney's license had not also been suspended, he would have let him drive the vehicle away from the scene. The court found that this was not consistent with an officer who had reasonable suspicion to support a *Terry* frisk of the vehicle.

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

*****

U.S. v. Stepp, 680 F. 3d 651 (6th Cir. 2012)

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

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

*****

U.S. v. Jackson, 682 F.3d 448 (6th Cir. 2012)

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

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

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

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

*****

U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012)

While investigating a prescription drug ring and Medicare fraud scheme, DEA agents obtained information that a woman would be arriving at a house that was under their surveillance. The woman, Lyons, arrived and met with the leader of the drug ring. A short time later, Lyons drove away from the house. The agents contacted the Michigan State Police who agreed to have state troopers conduct a traffic stop on Lyons' vehicle. The agents gave the troopers limited information about their investigation and why they believed narcotics would be found in Lyons' vehicle. The troopers eventually found thirty-nine bottles of codeine cough syrup in the vehicle.

The court held the agents had reasonable suspicion to believe that Lyons visited the house for drug trafficking purposes. First, Lyons vehicle had out-of-state license plates, which was consistent with three prior traffic stops that were made during the course of the investigation. Second, it was unusual to see the leader of the drug ring at that particular house. Third, when Lyons entered the driveway, she was directed to park behind the house where her vehicle could not be seen from the road. Finally, the agents had intercepted a phone call between members of the drug ring that indicated Lyons was unfamiliar with the area and needed directions to the house. The fraudulent patients that had previously visited the house were usually local residents, and neither the doctor nor his assistant was at the house that day.

The court further held the state troopers lawfully conducted the traffic stop on Lyons' vehicle under the collective knowledge doctrine. Even though the troopers were unaware of all of the facts that supported agents' reasonable suspicion, they had all of the information that they needed to conduct the stop. In addition, they executed the stop within the bound of the agents' reasonable suspicion that Lyons was involved in drug trafficking.

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

*****

United States v. Cochrane, 702 F.3d 334 (6th Cir. 2012)

In February 2011, police officers stopped Cochrane for a stop-sign violation. A drug-dog alerted on Cochrane's vehicle, the officers searched it, however they did not find any drugs. Five weeks later, the same officers stopped Cochrane because his vehicle did not have a front license plate, as required by Ohio law. One of the officers told Cochrane why he had been stopped, then asked Cochrane if he had any drugs or guns in his vehicle. Cochrane said, "No" to which the officer replied, "You know we're going to want to take a look." Cochrane said to the officer, "Go ahead." The officers searched the vehicle, found a handgun and arrested Cochrane.

Cochrane argued the officers unreasonably prolonged the traffic stop because they focused on searching his vehicle and not on the license plate violation.

The court disagreed. Although the officer asked for Cochrane's driver's license and registration after asking him about the presence of contraband, there is no rule that an officer must ask questions in a certain order. The officer's extraneous questions were brief and reasonable under the circumstances.

The court also held Cochrane voluntarily consented to the search of his vehicle. There was nothing to indicate the atmosphere was coercive. In addition, the officers did not physically

threaten or intimidate Cochrane and they had not yet arrested him or threatened to arrest him when he gave consent.

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

*****

U.S. v. Bohman, 683 F.3d 861 (7th Cir. 2012)

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

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

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

*****

U.S. v. Robinson, 670 F. 3d 874 (8th Cir. 2012)

A security guard at a nightclub told an officer, who was providing security there, Robinson had returned to the club with a gun shortly after an altercation that had led to his ejection, and Robinson had just left in a white car. The officer saw the white car as it was leaving the club and performed a traffic stop. After conducting a frisk for weapons, the officer placed Robinson in the back of her patrol car and ran a computer check for outstanding warrants. The officer discovered that Robinson was a convicted felon and that there were several outstanding warrants for his arrest. The officer returned to the white car and seized a handgun that was sticking out from under the driver's seat

The court held the officer had reasonable suspicion to detain Robinson. It was reasonable for the officer to believe the information provided by the security guard because they had worked directly with each other to provide security at the nightclub and it was unlikely that he would intentionally provide false information to her. In addition, the officer corroborated part of the information when she saw the white car described by the security guard leaving the club.

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

*****

U.S. v. Mendoza, 677 F. 3d 822 (8th Cir. 2012)

Mendoza claimed the officer unlawfully seized him after he conducted a traffic stop without probable cause. Mendoza claimed the officer's in-court testimony concerning his alleged traffic

violations was not credible because the officer's incident report stated Mendoza made "random turns and stops," but did not describe any specific violations of the traffic code. The court noted the trial judge found in the officer's testimony that he observed "traffic violations," including "not signaling" and "driving in other lanes of traffic" to be credible. This testimony was consistent with the officer's report and believable, so the trial judge was entitled to accept it.

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

*****

U.S. v. Stoltz, 683 F.3d 934 (8th Cir. 2012)

Stoltz argued the district court should have suppressed all evidence obtained after the officer told him to exit his vehicle, because, at that point, he was unlawfully arrested without probable cause. The court disagreed, stating, "It is well settled that once a motor vehicle has been lawfully detained for a traffic violation, police officers may order the driver to get out of the vehicle without violating the *Fourth Amendment's* proscription of unreasonable seizures."

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

*****

U.S. v. Hollins, 685 F.3d 703 (8th Cir. 2012)

Officers conducted a traffic stop on the SUV in which Hollins was a passenger because it had no license plates. After approaching the SUV, one of the officers saw what appeared to be a valid "In-Transit" sticker. The officer's experience with phony In-Transit stickers had taught him to verify them, so he asked the driver for his license, insurance card and registration. The officer eventually arrested the driver because he had two outstanding arrest warrants. Hollins could not lawfully drive the SUV because he had a suspended driver's license. Before impounding the vehicle, the officers conducted an inventory search and found a handgun under the center console. The officers arrested Hollins who was a previously convicted felon.

Hollins argued the handgun should have been suppressed. He claimed that because the SUV had a valid In-Transit sticker, the officers did not have reasonable suspicion or probable cause to stop the SUV.

The court disagreed, holding the initial traffic stop and investigation, which led to the search and Hollins' arrest, was valid. When the officers initially observed the SUV, it did not have license plates and they could not see the In-Transit sticker. Only after shining his spotlight, getting out of his patrol car, and approaching the SUV, did the officer see the sticker. Even then, however, it was not immediately verifiable as a valid sticker. The officer did not see its expiration date and his experience had taught him that In-Transit stickers that appear to be valid might not be, because it was common to come across stickers that had been illegally distributed. The officer then conducted a reasonable investigation by requesting the driver's license, insurance card and registration.

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

*****

U.S. v. Hastings, 685 F.3d 724 (8th Cir. 2012)

Officers followed a vehicle that left a house where a suspected bank robbery suspect had been hiding. After witnessing the driver commit a traffic violation, the officer conducted a traffic stop. The passenger jumped out of the vehicle and fled on foot with an officer in pursuit. The officer shot the passenger after he pulled a knife on the officer.

Initially, other officers detained the driver, Hastings, and then they transported him to the police station where he was charged with driving with a suspended license several hours later. The next day the officers obtained a warrant to search the vehicle for evidence related to the bank robbery. Inside the vehicle, the officers recovered a rifle and a handgun. Hastings was then charged with being a felon in possession of a firearm.

The court held the officer was justified in conducting the traffic stop because it was objectively reasonable for him to conclude that it was unsafe for Hastings to abruptly cross two highway lanes, while driving at fifty miles-per-hour, while just barely making it onto the off-ramp.

The court also held there was no connection between Hastings' prolonged detention, prior to his arrest for driving with a suspended license, and the eventual discovery of the illegal firearms in the vehicle. Hastings' argument that, except for the prolonged detention, he would have driven the car away was clearly incorrect. At the conclusion of the traffic stop Hastings would not have been allowed to drive the vehicle away. First, the vehicle would have been detained as part of the investigation into the officer-involved shooting. Second, the vehicle would have been detained as part of the bank robbery investigation.

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

*****

U.S. v. Roberts, 687 F.3d 1096 (8th Cir. 2012)

A police officer conducted a traffic stop on a vehicle because its rear license plate was not illuminated. The officer requested and received identification from the driver, Roberts and two other passengers. The officer learned Roberts had an outstanding warrant, arrested him and found an unlawful firearm on his person.

Roberts argued the officer unlawfully extended the traffic stop beyond the time reasonably necessary to complete the initial purpose of the stop when he turned his focus away from the initial reason for the stop and toward the identity and warrant status of the vehicle's passengers.

Because the officer's investigation into Roberts' warrant status was concurrent with his investigation into the initial purpose of the traffic stop, the traffic stop was not prolonged by the inquiry into Roberts' warrant status.

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

*****

United States v. Coleman, 700 F.3d 329 (8th Cir. 2012)

A police officer patrolling Interstate 80 saw the passenger-side tires on Coleman's motor home twice cross over the fog line onto the shoulder of the highway. The officer stopped Coleman for driving on the shoulder. The officer asked Coleman to sit with him in the front of his patrol car while he wrote a citation and checked Coleman's license status and criminal history. The officer asked Coleman about his criminal history and Coleman told the officer he had never been arrested. Dispatch then responded and told the officer that Coleman had an extensive criminal history that included drug, robbery and weapons offenses. The officer asked Coleman about his drug use and Coleman admitted to having medical marijuana in the front part of the motor home.

The officer searched the motor home and saw a bag that resembled a gun case under the bed. Inside the bag, the officer found a rifle and ammunition. He also found marijuana in the front part of the motor home. The officer confirmed that Coleman was a convicted felon and arrested him for unlawful possession of a firearm.

Coleman argued the officer did not have probable cause to stop him and that the officer's questions concerning his drug use improperly exceeded the scope of a normal traffic stop.

The court commented that a traffic violation, no matter how minor, provides an officer with probable cause to stop the driver. At the time of the stop, a driver who briefly crossed onto the shoulder of the highway could be cited for a traffic violation. Therefore, the court held the officer had probable cause to stop Coleman.

The court further held the officer was justified in asking Coleman about drug use in order to eliminate drug use as a possible cause of Coleman's crossing onto the shoulder of the highway. Coleman's dishonesty regarding his criminal history increased the officer's suspicions and prompted him to ask clarifying questions. Regardless, any additional questioning was brief and the court has held that such short detentions do not violate the *Fourth Amendment*.

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

*****

United States v. Farnell, 701 F.3d 256 (8th Cir. 2012)

A police officer received a report a bank robbery had occurred earlier that morning. The suspect's vehicle was a white van and the suspect was a heavy-set white male. The officer had previously received two bulletins concerning several other armed bank robberies in the area committed by a heavy-set white male driving a white van. While securing the perimeter of a potential get-away route, the officer saw a white van driven by a heavy-set white male, later identified as Farnell. When the van drove past the officer, the driver held up his hand to conceal his face. The officer conducted a traffic stop and obtained consent to search the van. After finding a handgun, the officer handcuffed Farnell and placed him in another officer's patrol car. The officer resumed his search of Farnell's van and located evidence connected to the bank robbery.

The court held the officer had reasonable suspicion to stop Farnell. First, the officer was aware of several previous armed bank robberies committed by a heavy-set white male driving a white van. Second, the officer knew a heavy-set white male driving a white van had committed a bank robbery that morning and he saw a person and vehicle fitting these descriptions driving on a road

leading away from the bank. Finally, the driver of the van tried to shield his face as he drove past the officer.

The court also held Farnell voluntarily consented to the search of his van. The officer did not threaten Farnell or promise him anything and Farnell was not under the influence of drugs or alcohol.

Finally, after the officer found the handgun in the van, the court held the officer was entitled to go back and continue to search the van. Without deciding whether the officer's subsequent search was a new and separate search or a continuation of the consent search, the court held the automobile exception applied. The officer's discovery of the handgun, along with his previous knowledge concerning the bank robbery suspect and van, gave him probable cause to believe additional evidence of the bank robbery would be found inside the van.

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

*****

U.S. v. Valdes-Vega, 685 F.3d 1138 (9th Cir. 2012)

A Border Patrol agent stopped Valdez-Vega 70 miles north of the U.S.–Mexico border. Valdes-Vega's pickup truck had Mexican license plates, he was driving 90 miles-per-hour on the highway while the other vehicles were driving between 70 and 80 miles-per-hour, he was weaving in and out of traffic and he did not make eye contact with the agent after the pulled his police car alongside the passenger side of Valdes-Vega's truck. Valdes-Vega consented to a search of his truck and the agents found approximately 8 kilograms of cocaine.

The Border Patrol Agent testified his justification for the stop was his belief that Valdes-Vega's behavior was consistent with the behavior of alien and drug smugglers who encounter law enforcement officers in that area.

The court held the totality of the circumstances did not provide the Border Patrol Agent with reasonable suspicion to believe that Valdes-Vega was smuggling drugs or aliens. The totality of the circumstances revealed a driver with Mexican license plates committing traffic infractions on an interstate 70 miles north of the border. The court concluded that this describes too broad a category of people to justify reasonable suspicion to believe that Valdes-Vega was smuggling either drugs or aliens.

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

*****

U.S. v. McGee, 672 F. 3d 860 (10th Cir. 2012)

An officer saw the car in which McGee was a passenger illegally parked in front of a house known for drug trafficking. By the time the officer turned around to conduct a traffic stop, the driver had moved the car and legally parked it. When the officer approached the car, he smelled a strong odor of PCP. Inside the car, the officer saw a vanilla extract bottle that he knew was commonly used to store PCP. As a back-up officer removed the driver from the car to arrest

him, the officer saw McGee kick a handgun underneath his seat. The officer arrested McGee and found crack cocaine on his person.

The court held the officer was justified to conduct a traffic stop on the car, even though by the time the officer made contact with McGee, the driver had legally parked the car. A traffic stop is valid under the *Fourth Amendment* if based on an observed traffic violation that has occurred. Here, the officer was entitled to conduct a traffic stop in order to issue a citation for the parking violation that he had seen.

Once the officer made contact with the driver, he was justified in expanding the scope of the traffic stop to determine whether the occupants were engaged in illegal drug activity after he smelled PCP and saw the vanilla extract bottle. Once the officer saw McGee kick the handgun underneath the seat, he had probable cause to arrest him. Finally, the crack cocaine found on McGee's person was seized pursuant to a lawful search incident to arrest.

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

*****

U.S. v. Neff, 681 F.3d 1134 (10th Cir. 2012)

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

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

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

*****

U.S. v. Burciaga, 687 F.3d 1229 (10th Cir. 2012)

The court held the officer lawfully stopped the Burciaga's car for a lane-change violation after Burciaga changed from the left to the right lane on the interstate, after passing the officer's patrol car, without engaging is turn signal in a timely manner. In reversing the district court, the court held that the government did not have to go so far as to establish that Burciaga's lane change "most likely" would affect surrounding traffic. Instead, the government only had to prove a "reasonable possibility" existed that Burciaga's lane change might do so.

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

*****

Collective Knowledge Doctrine

U.S. v. Whitley, 680 F.3d 1227 (10th Cir. 2012)

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

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

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

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

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

*****

Canine Sniffs

U.S. v. McBride, 676 F. 3d 385 (4th Cir. 2012)

The court held the fifty-five minute period between the beginning of the detention and the arrival of the canine narcotics unit was reasonable. Shortly after the officers decided to detain McBride's car, they requested the assistance of the nearest canine narcotics unit. In the context of a fifty-five minute detention, the fact that the officers did not have a canine narcotics unit in their own department does not count against them. Once the officers detained McBride's car they were diligent in conducting their investigation.

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

*****

U.S. v. Earvin, 682 F.3d 502 (6th Cir. 2012)

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

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

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

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

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

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

*****

U.S. v. Sharp, 689 F.3d 616 (6th Cir. 2012)

Police officers found methamphetamine and marijuana in a shaving kit located on the passenger seat of Sharp's car. The officers searched the shaving kit after a trained narcotics-dog jumped into the car through the driver's side window and alerted to the presence of the drugs inside of it.

Even though the dog had some history of jumping into open car windows, the court found that in this case dog jumped into Sharp's car because it smelled drugs in the car, not because the officers encouraged or facilitated the jump. As a result, the court held a trained narcotic dog's sniff inside of a car, after instinctively jumping into the car, is not a search that violates the *Fourth Amendment* as long as the officers did encourage or facilitate the dog's jump.

The 3rd, 8th and 10th Circuits agree.

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

*****

U.S. v. Mendoza, 677 F. 3d 822 (8th Cir. 2012)

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

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

*****

U.S. v. Riley, 685 F.3d 691 (8th Cir. 2012)

The court held the fifty-four minutes spent waiting for the drug-detection dog to arrive was reasonable. The officer called for the drug-detection dog within eleven minutes of his initial stop and immediately after he established reasonable suspicion that criminal activity was afoot in Riley's vehicle. No drug-detection dogs were on duty in the area, so the officer had to call an off-duty officer to come to the scene. The court found that this amount of time spent waiting for the drug-detection dog to arrive was unavoidable and reasonable based on the diligence shown by the officer.

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

*****

United States v. Grant, 696 F.3d 780 (8th Cir. 2012)

After a police officer issued Grant a warning ticket for speeding, he asked Grant if he could search his car. Grant responded, "I'd rather not," and "I just want to leave." The officer then said,

> "I think what we're going to do is, because of your - - I mean, what would you think about it if I had a dog come and go around it? If he doesn't indicate anything, then we'll get you going."

Grant told the officer, "OK" and then "Sure" when asked if that was all right. A canine unit responded and the dog alerted. The officer searched Grant's car and found cocaine.

Grant argued the officer unreasonably prolonged the traffic stop for a dog sniff without Grant's consent and without probable cause or reasonable suspicion of criminal activity. The court disagreed and held the period between the officer's issuance of the warning ticket and the dog's alert on Grant's vehicle was a consensual encounter, not a *Fourth Amendment* seizure. The court ruled the officer's statement, "If he doesn't indicate anything, then we'll get you going," could be reasonably viewed as an explanation of what would happen if Grant agreed to stay and allow the dog sniff. It was not a statement indicating to Grant that he was not free to leave and that the officer would "release" him if the dog did not alert on the car. The court concluded a reasonable person in Grant's position would have understood he could decline the officer's request to remain at the scene and wait for the canine unit. The court added that Grant's refusal of consent to search demonstrated it was possible for him to decline the officer's subsequent requests.

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

*****

Arrest (Probable Cause)

Marcavage v. The City of New York, 689 F.3d 98 (2nd Cir. 2012)

The court held that the officers had probable cause to arrest the protesters under New York law for obstruction of governmental administration after the protesters ignored seventeen requests by three officers to leave the no-protest-zone.

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

*****

United States v. Sowards, 690 F.3d 583 (4th Cir. 2012)

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

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

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

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

*****

U.S. v. Ochoa, 667 F. 3d 643 (5th Cir. 2012)

Federal agents arrested Ochoa after he met with a government informant who was supposed to deliver a quantity of cocaine to him. The informant had used a contact; known only to him as "Julio4," to set up the meeting with Ochoa. After his arrest, an agent drove Ochoa's car to his office. During the drive, the agent heard a cell phone ringing but he could not locate it. Once at the office, agents searched the car, located the cell phone and searched through its contact list. The contact list included the name "Julio4" and indicated that Ochoa had called the phone number associated with "Julio4" several times that evening.

The court held the agents had probable cause to arrest Ochoa. First, he arrived several minutes after "Julio4" told the informant that someone would meet with him shortly with instructions with what to do with the cocaine. Second, after Ochoa entered the parking lot, he drove directly to the informant's car and parked behind it. Finally, the agents had arranged for the informant to give the "bust" signal once the person with whom he was supposed to meet identified himself by a code name. The agents saw the informant give the "bust" signal shortly after he began talking with Ochoa.

Even though Ochoa argued the "Julio4" information obtained from the warrantless search of his cell phone should have been suppressed, the court never directly addressed this issue. Instead, the court simply concluded that search of Ochoa's vehicle, that led to the discovery of his cell phone was lawful. The court reasoned that the agents would have inevitably discovered Ochoa's cell phone pursuant to their inventory search of the car.

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

*****

United States v. Rodriguez, 702 F.3d 206 (5th Cir. 2012)

Rodriguez and Izquierdo were arrested at a checkpoint after Border Patrol agents found over forty-five kilograms of marijuana in a concealed compartment in the cab of their tractor-trailer after a drug-dog alerted on the vehicle. Neither man claimed ownership of the marijuana, however, both were convicted of possession with intent to distribute marijuana and conspiracy.

Rodriguez argued his mere presence in the truck did not establish probable cause to arrest him and that the warrantless search of the contents of his cell phone constituted an unlawful search incident to his arrest.

The court disagreed with both arguments. First, the court noted the Supreme Court, in Maryland v. Pringle, allowed the warrantless arrest of all the passengers in a car in which drugs were found when none of the passengers claimed ownership of the drugs. Here, it was reasonable for the Border Patrol agents to believe either or both men had knowledge of, and exercised dominion and control over, the marijuana that was found.

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

*****

U.S. v. Gill, 685 F.3d 606 (6th Cir. 2012)

A confidential informant arranged by telephone to buy cocaine from Gill at a particular location later that day. The informant told the officers that Gill would be driving a green Acura. The officers set up surveillance in the area where the informant said he would meet Gill. The officers saw Gill arrive in a green Acura, where he got out and joined a group of people in front of a row-house. As the officers approached him and identified themselves, Gill ran away. After a brief chase, the officers arrested him. The officers found marijuana in his waistband, cocaine in his car and a loaded handgun on the ground near the area where the officers had arrested him.

The court held suppression of the evidence was not warranted because the officers had probable cause to arrest Gill the moment they encountered him. The officers had corroborated the key information provided by the informant, specifically, the color and make of the car that Gill was driving and the location of the arranged drug sale. The officers had also heard the informant's end of the telephone conversation in which the informant agreed to meet Gill for a drug deal and they had debriefed the informant immediately following the call to determine what Gill had said.

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

*****

U.S. v. Freeman, 691 F.3d 893 (7th Cir. 2012)

Freeman and another man showed up at the appointed time and place for a drug transaction with a police informant. They were in a mini-van that matched the description provided by the informant. After remaining at the scene for only a few minutes, they drove away. An officer conducted a traffic stop on the van and a drug dog alerted to presence of drugs, however the officers did not find any drugs inside the van. The officers arrested the men for attempted cocaine distribution. At the station, one of the officers noticed that Freeman was visibly uncomfortable while seated and that he kept fidgeting and changing positions in his seat. During the booking process at the jail, Freeman was strip-searched and found to be concealing a bag containing crack cocaine between his buttocks.

Freeman argued the officers did not have probable cause to arrest him and that they did not have reasonable suspicion to conduct the strip-search.

The court disagreed. At the time of his arrest, the officers had probable cause to believe Freeman had committed the crime of attempted distribution of cocaine. Freeman pulled into the parking lot at precisely the time the drug transaction was to occur, in a van that matched the description provided by the informant. Once the traffic stop occurred, an officer heard Freeman speak in a raspy voice, similar to the voice on the phone that had set up the sale. In addition, Freeman had a cast on his leg, which matched information from the informant that Freeman had recently been in the hospital because of a problem with his leg.

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

*****

U.S. v. Washington, 670 F. 3d 1321 (D.C. Cir. 2012)

Officers performed a traffic stop, at 3:00 a.m., on a car that was driving without its headlights on. The car did not immediately pull over, but after he did, the officers smelled a strong odor of alcohol coming from the vehicle and they saw a plastic cup in a cup holder as well as a puddle of liquid on the floorboard near the driver's seat. Washington, the only occupant of the car, handed the cup to one of the officers. The cup contained a small amount of red liquid that smelled like an alcoholic beverage. The officers arrested Washington for possession of an open container of alcohol in a vehicle. While searching the car for additional items of evidence related to that charge, the officers discovered an illegal firearm underneath the driver's seat. The government prosecuted Washington for unlawful possession of a firearm by a felon.

The court held the officers had probable cause to arrest Washington for possession of an open container of alcohol in a vehicle. While there was only a small amount of liquid in the cup, the officers smelled the odor of an alcoholic beverage coming from the car and saw a puddle of liquid on the floor near the driver's seat. A reasonable officer could infer that the defendant had poured alcohol out of the cup and onto the floor of the car before he pulled over. Because the officers had probable cause to arrest Washington for the alcohol related offense, under *Arizona v. Gant*, they were entitled to search his car for evidence related to that arrest. It was reasonable for the officers to believe they might find another container of alcohol in the car, such as the source of the liquid in the cup and the puddle on the floor.

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

*****

Entering Third Party's Home to Make an Arrest

United States v. Collins, 699 F.3d 1039 (8th Cir. 2012)

Police officers had an outstanding arrest warrant for Collins who was a convicted felon. After a reliable source told an officer Collins was staying with someone at a residence in Des Moines, officers went to the house to arrest him. Outside the house, the officers met the man who owned the property. He said that Krista Stoekel rented the house and that Collins had been there recently. An officer spoke to Stoekel at the front door of the house but she denied knowing Collins. The officer then asked for consent to search the house, but Stoekel refused. She did allow the officer to enter the house so they could continue to talk, but she told the officer that he could go no further than the living room. Once in the living room, the officer cautioned Stoekel that he "did not want her to be in trouble" and he knew that she was lying to him about not knowing Collins. Stoekel finally admitted to knowing Collins and that, "he may have come home last night." Stoekel then gave the officers consent to search the upstairs bedroom where Collins stayed. The officers found Collins asleep in the bedroom and arrested him. The officers seized a firearm that was in an open bag next to the bed.

Collins argued the firearm should have been suppressed because Stoekel's consent to search the bedroom had been obtained by coercion. The court disagreed. While Stoekel was induced to cooperate, there was no unreasonable coercion. When the officer confronted Stoekel about her lie, she became increasingly concerned about the legal consequences she might face. As a result, it

was reasonable for the officer to believe that she voluntarily changed her mind and consented to the search. While she may have been reluctant to grant consent, Stoekel still voluntarily gave it.

Even if the officers went upstairs to look for Collins without Stoekel's consent, the court concluded they did not violate the *Fourth Amendment*. Police officers may enter a third person's home to execute an arrest warrant if they have a reasonable belief the suspect resides there and have reason to believe that the suspect is present at the time the warrant is executed. The property owner told the officers that Collins had been there recently and then Stoekel told the officers that Collins "may have come home last night." This information gave the officers a reasonable belief that Collins was present in the house and gave them the authority to go to that part of the house to arrest him.

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

*****

The Exclusionary Rule

U.S. v. Valdivia, 680 F. 3d 33 (1st Cir. 2012)

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

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

Valdivia claimed the American officers were working with the Aruban officers when the wiretap evidence was obtained. The court disagreed. First, Aruban authorities had already initiated their investigation into the drug trafficking network prior to the arrival of any American officers. Second, the wiretap was neither requested nor in any way organized or managed by the American officers. Third, the wiretap orders were sought from and approved exclusively by Aruban courts. Finally, only Aruban officers actively participated in the implementation of the wiretaps and the recording of conversations. American officers were not permitted to enter the recording room nor listen to the recorded conversations while the investigation was ongoing. It was only after the investigation had concluded that an American officer, through official channels, requested an authorized copy of the recordings for purposes of prosecution in an American court. While American officers were present in Aruba during periods of the wiretap investigation, they were not active participants in the operation, they did not carry guns or badges, they did not retain the authority to make arrests and they often worked on other unrelated cases.

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

*****

Exceptions to the Exclusionary Rule

Good Faith

U.S. v. Voustianiouk, 685 F.3d 206 (2nd Cir. 2012)

The court held that agents could not have relied in good faith on the search warrant because on its face the warrant explicitly authorized a search of the first-floor apartment only. There can be no doubt that a search warrant for one apartment in a building does not allow the police to enter and search other apartments. Nothing in the warrant or accompanying affidavit provided any reason for these agents to conclude that the magistrate judge had authorized them to search the building's second floor and neither document mentioned Voustianiouk as the occupant of the apartment that the agents were authorized to search.

The court added that there was no question the agents could have called a magistrate judge on the telephone that morning to obtain a new search warrant and that they could have detained Voustianiouk outside his apartment while they obtained a new warrant to search his second-floor apartment.

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

*****

United States v. Pavulak, 700 F.3d 651 (3rd Cir. 2012)

Police officers obtained a warrant to search Pavulak's computers for child pornography. Pavulak claimed that the affidavit submitted in support of the search warrant applications did not establish probable cause to search his computers because it lacked details about what the alleged images of child pornography depicted.

When evaluating a search warrant application for child pornography, the magistrate must be able to evaluate whether the contents of the alleged images meet the legal definition of child pornography. To do this the magistrate can personally view the images, the search warrant affidavit can provided a sufficiently detailed description of the images or the search warrant application can provide some other facts that tie the images' contents to child pornography.

In this case, the search warrant applications alleged that Pavulak was "dealing in child pornography" in violation of Delaware State Law. To support this claim, the affidavit relied on three pieces of information. First, that Pavulak had two prior convictions for child molestation. Second, the affidavits stated that two witnesses had seen Pavulak viewing "child pornography" of females between twelve and eighteen years old. However, the affidavit did not provide any details about what the images depicted. Third, the officers were able to corroborate Pavulak's ownership of the Yahoo! email account and his presence at the office where the computers were located.

The court held that this information did not establish probable cause to believe that the images seen by the witnesses contained child pornography. The label "child pornography," without more, did not present any facts from which the magistrate could determine with a fair degree of probability that what was depicted in the images met the statutory definition of child

pornography. For example, the affidavit did not describe whether the minors depicted in the images were nude or clothed or whether they were engaged in any "prohibited sexual act" as defined by Delaware Law. Presented with the label "child pornography," the most the magistrate could infer was that the officer who drafted the affidavit concluded the images contained child pornography.

Although the warrants did not establish probable cause, the court held that the evidence should not be suppressed. It was reasonable for the officers to rely on the warrant, even though the supporting affidavit did not contain details about the content of the images, as the state of the law in the Third Circuit at the time was not clear on this issue. As a result, the officers relied on the warrant in good faith.

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

*****

U.S. v. Gray, 669 F. 3d 556 (5th Cir. 2012)

Officers had probable cause to believe that Gray was concealing crack cocaine in his rectum. After conducting two strip searches, in which Gray was not fully cooperative, an officer told Gray he could either undergo a third strip search, be placed in a cell with a waterless toilet or he could consent to a rectal x-ray examination. After Gray refused to consent to any of these options, officers obtained a search warrant in which Gray was forced to submit to a proctoscopic examination under sedation. A doctor eventually recovered over nine grams of crack cocaine from within Gray.

The court held the search was unreasonable because it was demeaning and intrusive to Gray's personal privacy and bodily integrity and that there were less invasive ways to recover the evidence, such as a cathartic or an enema.

However, court held the evidence should not be suppressed because the police acted on good-faith reliance on a valid search warrant. In doing so, the court encouraged magistrates, where feasible, to hold a hearing to allow for more careful consideration of the competing interests at stake in medical procedure search cases.

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

*****

U.S. v. Houston, 665 F. 3d 991 (8th Cir. 2012)

Houston's niece told her mother that Houston, who lived in South Dakota, had molested her six years earlier in Wisconsin. State police in South Dakota seized Houston's computer pursuant to a South Dakota state search warrant. An investigator from Wisconsin obtained a warrant from a Wisconsin state magistrate to search the seized computers for evidence relating to sexual assault and possession of child pornography in violation of Wisconsin statutes. During this search, investigators found several hundred images of child pornography. Based on this evidence, the federal government charged Houston, in South Dakota, with possession of child pornography in violation of federal law.

Houston argued the search warrant issued in Wisconsin was invalid because there was no probable cause to search his computers, located in South Dakota, for child pornography. Houston also argued the *Leon* good-faith exception to the exclusionary rule should not apply. He claimed the warrant was so obviously deficient that no officer could reasonably presume that it allowed a search of computers seized from South Dakota, for evidence relating to violations of Wisconsin statutes.

Without deciding whether probable cause existed, the court held the officers in Wisconsin conducted the search of Houston's computers in good faith. The court stated that an officer aware of Houston's alleged molestation of his niece and contemporaneous viewing of pictures of naked children in her presence could have reasonably presumed the warrant to search for child pornography on his computer to be valid. The court has previously acknowledged that there is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography. Because the officers acted reasonably in obtaining the search warrant, the court declined to rule on whether the law prohibited a Wisconsin judge from authorizing a search in South Dakota for a violation of Wisconsin law.

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

*****

U.S. v. Lomeli, 676 F. 3d 734 (8th Cir 2012)

The court refused to admit the wiretap evidence under the good-faith exception. The court held that no wiretap applicant could, in good faith, rely upon a court order authorizing the wiretap, when the applicant failed to comply with the federal wiretap statute when obtaining the order.

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

*****

U.S. v. Swift, 690 F.3d 944 (8th Cir. 2012)

Police officers obtained a warrant to search Swift's house, after they encountered him at the home of another drug suspect on the same day they seized a large amount of methamphetamine from that home. The officers seized $16,000 in cash hidden in a heater vent pipe in Swift's house. Swift moved to suppress this evidence, arguing that the warrant to search his house lacked information necessary to establish probable cause to believe that evidence of drug trafficking would be found there.

The court refused to suppress the evidence, holding the good-faith exception applied. Under the good-faith exception, disputed evidence will be admitted if it was objectively reasonable for the officer executing the search warrant to have relied on good faith on the judge's determination that there was probable cause to issue the warrant.

Here, it was reasonable for the state judge who issued the search warrant to infer that evidence connected to drug trafficking would be at Swift's house. As a result, the officer reasonably believed that the information in the affidavit that placed Swift at a house where a large quantity of methamphetamine had been seized earlier in the day, established probable cause to search his

house. Reliance on the search warrant was reasonable and there was no evidence the officer acted in bad faith.

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

*****

U.S v. Grant, 682 F.3d 827 (9th Cir. 2012)

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

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

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

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

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

*****

Independent Source Doctrine

U.S. v. Fofana, 666 F. 3d 985 (6th Cir. 2012)

During a search of Fofana's personal items at the airport, TSA officials found three passports bearing Fofana's photo but different names. One of the passports contained Fofana's picture and the name Ousamane Diallo. At this point, the government was already involved in a bank fraud investigation in which identification bearing Diallo's name was used to open two bank accounts. Investigators were now able to connect Fofana to these bank accounts.

The government indicted Fofana on three counts of possession of a false passport and two counts of bank fraud. The trial court held that the TSA officials' search of Fofana's belongings at the airport was unlawful and suppressed the three passports. The government dismissed the possession of false passport charges but elected to go forward with the bank fraud charges.

Fofana argued that the government be precluded from introducing bank account records in the name of Ousamane Diallo as fruits of the unlawful airport search. The trial court agreed, holding

the government had not established the connection of Fofana to his alias, Diallo, would have been made through an independent source or through inevitable discovery.

The court of appeals disagreed. First, the bank records at issue were already in the government's possession and had been obtained independently of the airport search. These records included at least one photograph of Fofana that could link him to the bank accounts once his identity was known. The court held that the bank records did not need to be suppressed just because their relevance or usefulness became apparent as a result of the unlawful airport search.

Second, the unlawful airport search was not directed to the crime of bank fraud, for which the discovered information turned out to be useful, therefore, eliminating much of the deterrent effect of suppression in this case.

Third, a more direct and effective way to deter unlawful searches is to exclude the items that are actually discovered during the search. Here, the government was not permitted to use the passports as evidence.

Finally, exclusion of the bank records in this case would burden the truth-seeking function of the court. Once the investigators learned who "Diallo" really was, it would be extremely difficult for them to identify him without using information obtained because of the unlawful search.

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

Inevitable Discovery Doctrine

United States v. Pelletier, 700 F.3d 1109 (7th Cir. 2012)

Pelletier argued he involuntarily consented to the search of his computer. Without deciding the issue of consent, the court held the child pornography evidence was admissible under the inevitable discovery doctrine. First, Pelletier's admission that his computer contained child pornography established probable cause to apply for a warrant to search it. Second, the Cyber Crimes agent had contacted both federal and state prosecutors about obtaining a search warrant and he testified that he would have applied for one if Pelletier had refused consent.

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

*****

U.S. v. McManaman, 673 F. 3d 841 (8th Cir. 2012)

Federal agents arrested the defendant at his house on various gun and drug charges. The agents found marijuana and methamphetamine pipes in his pockets during their search incident to arrest. An agent then asked the defendant if there was anything else illegal inside the house and the defendant told them that there was a shotgun in the basement. While searching for the shotgun, the agents discovered boxes that contained child pornography magazines.

Prior to his trial on the gun and drug charges, the district court found the agents violated the defendant's *Fifth* and *Sixth Amendment* rights, but concluded these violations did not require the suppression of the shotgun because of the inevitable discovery doctrine. Specifically, the court ruled that the drug paraphernalia found in the defendant's pockets when he was arrested would

have provided probable cause for a search warrant of the house that would have led to the discovery of the shotgun.

At his trial on the child pornography charges, the defendant argued the evidence of child pornography would have been outside the scope of a properly obtained search warrant for guns and drugs. The court disagreed, holding that the child pornography evidence would have been discovered under the plain view doctrine if the police had obtained a warrant. The child pornography magazines were found in a box that would have been subject to search under a warrant for guns and drugs and the incriminating nature of the evidence was immediately apparent to the agents. Even if the pictures were folded up in the box, the agents could have lawfully unfolded them to see if they contained drugs because drugs are often contained within folded pieces of paper.

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

*****

Search Warrants

U.S. v. Stoltz, 683 F.3d 934 (8th Cir. 2012)

Stoltz argued the pawn receipts the officers seized from his wallet, while executing a search warrant on the vehicle, should have been suppressed because the search of the wallet fell outside the scope of the search warrant. Again, the court disagreed. The search warrant expressly authorized the officers to search the vehicle for "receipts" and "other items evidencing the expenditure of money." Because receipts may be found in a wallet, the officers' search of the wallet did not exceed the scope of the search warrant.

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

*****

Probable Cause

U.S. v. Kearney, 672 F. 3d 81 (1st Cir. 2012)

Kearney sent child pornography images and videos to an undercover police officer over the internet through Yahoo messenger in May 2008. Investigators also connected the Yahoo messenger screen name to a MySpace account. The investigators established that those accounts belonged to Kearney and that he accessed them on May 21 and 22, 2008 from a particular IP address. Based on this information, investigators executed a search warrant at Kearney's house.

The court held the officers had established probable cause in their search warrant application. Although Kearney's IP address was "dynamic", it was undisputed his Yahoo and MySpace accounts were the conduits for the child pornography he transmitted to the undercover officer. Kearney's Yahoo account was accessed from that same IP address 288 times from April to May 21, 2008. Kearney's own expert witness testified that internet service providers sometimes keep dynamic IP addresses for months or even years. It was reasonable to infer that whoever accessed these accounts on May 21 and 22, 2008, was also the user of these accounts earlier that month

and in June 2008, when they were used to engage in communications with the undercover officer.

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

*****

U.S. v. Farlow, 681 F.3d 15 (1st Cir. 2012)

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

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

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

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

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

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

*****

U.S. v. Grupee, 682 F.3d 143 (1st Cir. 2012)

In May 2008, officers obtained a warrant to search the house Grupee shared with Roderiques for a cell phone that had been used to set up a drug deal with an informant in November 2007. The court held that is was reasonable for the officers to think that Roderiques still possessed the cell phone used to set up the November 2007 drug deal and that he lived at that particular address in May 2008. First, there was abundant evidence tying the cell phone to Roderiques. Second, the

officers confirmed that the phone number used to arrange the drug transaction in November was still active, even though it did not prove conclusively that Roderiques was the one answering calls to that number. Third, Roderiques was in business and his customers presumably knew how to reach him through that cell phone number. Roderiques had to maintain some degree of continuity at the risk of losing buyers. Finally, officers had seen Roderiques come and go from the house on numerous occasions and he had used that address when he applied for his driving permit.

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

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

*****

U.S. v. Clark, 685 F.3d 72 (1st Cir. 2012)

Officers obtained a warrant to search Clark's house for evidence of animal cruelty and the unlicensed operation of a breeding kennel. In the defendant's bedroom, near a computer workstation, officers saw a handwritten list of web sites with titles suggestive of child pornography, along with nude photographs appearing to depict underage males. The officers stopped their search and obtained a second warrant that authorized them to search the house for child pornography. While executing this warrant, officers seized child pornography.

Clark argued the original search warrant was not supported by probable cause. As a result, he claimed that any evidence found during this search could not be used to establish probable cause to obtain the second search warrant.

The court disagreed and concluded that probable cause existed to search Clark's house for evidence of animal cruelty and the unlicensed operation of a breeding kennel. First, the witness who gave the officers information concerning Clark's kennel had no reason to lie. In addition, lying to the officers could have resulted in criminal charges being brought against her. Second, the witness' statements were consistent with other complaints an officer had received about Clark. Because the first warrant was supported by probable cause, and Clark did not challenge the second warrant, the district court properly denied Clark's motion to suppress the child pornography evidence.

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

*****

U.S. v. Crooker, 688 F.3d 1 (1st Cir. 2012)

The court held federal agents had established probable cause to believe evidence of a crime would be found at Crooker's house. The government had specific information from a confidential informant that ricin was buried in Crooker's backyard, that his uncle had concealed

various weapons and biological agents in numerous locations and that he moved those items around to avoid detection.

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

*****

U.S. v. Voustianiouk, 685 F.3d 206 (2nd Cir. 2012)

Federal agents received information that particular Internet Protocol (IP) address had downloaded child pornography. The agents learned that the IP address was assigned to Voustianiouk and that he listed, as part of his physical address that he lived in "Apartment # 1."

The agents went to Voustianioiuk's physical address and found a two-story building, which contained two apartments, one on the first floor and one on the second floor. The agents could not confirm in which apartment Voustianiouk lived. The agents eventually obtained a warrant to search the first-floor apartment only. The agents intentionally omitted Voustianiouk's name from both the search warrant and the accompanying affidavit.

When the agents arrived to conduct their search, they discovered that Voustianiouk lived in the apartment on the second floor, not the first floor. The agents searched the second-floor apartment and discovered child pornography on Voustianiouk's computers.

In determining the scope of a search warrant, the court must look to the place that the magistrate judge who issued the warrant intended to be searched, not the place that the police intended to search when they applied for the warrant. Here, it was clear that the magistrate judge intended the scope of the search warrant to cover the first-floor apartment only. The search warrant and the accompanying affidavit explicitly authorized the search of the first-floor apartment and made no mention of the second-floor apartment. In addition, the affidavit in support of the search warrant would not have provided probable cause to search Voustianiouk's second-floor apartment because the omission of Voustianiouk's name did not provide any basis for concluding that he may have been involved in a crime. As a result, the agents conducted a warrantless search of the second-floor apartment in violation of the *Fourth Amendment* and all of the evidence they seized should have been suppressed.

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

*****

U.S. v. Ramos - Cruz, 667 F. 3d 487 (4th Cir. 2012)

The court held the search warrant for Ramos-Cruz's home was supported by probable cause. The search warrant affidavit clearly stated that an officer had identified the individual in a photograph, who was spray-painting graffiti, as Ramos-Cruz. In addition, another officer stated that based on his training and experience in gang investigations, individuals who create graffiti typically keep their materials at their homes.

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

*****

Sennett v. U.S., 667 F. 3d 531 (4th Cir. 2012)

Sennett was a photojournalist who covered a protest in which several individuals committed acts of vandalism at a hotel. Officers identified Sennett from hotel security cameras and obtained a warrant to search her apartment for evidence connected to the vandalism at the hotel.

Sennett brought suit against the United States claiming the search of her apartment violated the *Privacy Protection Act (PPA) 42 U.S.C. § 2000aa*.

The court held the "suspect" exception to the *PPA* barred her claim because there was probable cause to believe that Sennett was involved in the criminal activity at the hotel and the search of her apartment related to the investigation of that incident.

Sennett arrived at the hotel at 2:30 a.m., within seconds of the vandals, and she was dressed as they were in dark clothing and a backpack. After the vandalism occurred, she fled the area in the same direction as the vandals.

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

*****

U.S. v. Henry, 673 F. 3d 285 (4th Cir. 2012)

The court held that the affidavit provided a sufficient basis to establish probable cause for the issuance of the thermal-imaging search warrant. In the affidavit, the officer included information provided by two unidentified sources and a cooperating informant. If considered separately, this information may not have established probable cause. However, when considered collectively, the information demonstrated that three individuals with no connection to each other provided consistent statements regarding the Henrys' marijuana grow operation. In addition, many details provided by these three sources were corroborated by the officer's independent investigation.

Finally, while the officer failed to provide information to assist the magistrate judge in determining whether the Henrys' power usage was excessive for a property of that size, he did determine that the residence was heated by gas, rather than electric power. This information allowed the magistrate judge to consider the Henrys' electric power usage information in that relevant context.

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

*****

U.S. v. Evers, 669 F. 3d 645 (6th Cir. 2012)

Evers argued that the search warrant authorizing the seizure of his computers, camera and other electronic media did not authorize a search of the computer's hard drive; therefore, the police exceeded the scope of the warrant when they searched the contents of the computer without obtaining a second search warrant.

The court disagreed, holding that a warrant authorizing the seizure of a defendant's home computer equipment and digital media for a subsequent off-site electronic search is reasonable as long as the probable cause showing in the warrant application and affidavit demonstrate a

significant chance of locating evidence. In addition, a second warrant to search a properly seized computer is not necessary where the evidence obtained in the search did not exceed the probable cause articulated in the original warrant.

In this case, Evers did not contest that the affidavit and warrant established probable cause to believe that there would be child pornography on his digital camera, computer and accessories.

Evers also argued the search warrant failed to describe with particularity the computer files to be searched or to require the use of a search protocol to avoid a general search of his computer.

The *Fourth Amendment's* particularity requirement in the context of computer searches are unique because images on a computer may be anywhere on a computer and manipulated in ways to hide their true content. A computer search may by as extensive as reasonably required to locate the items described in the warrant based on probable cause.

Here, the court held the search was reasonable. The warrant was as specific as the circumstances and the nature of the crime under investigation allowed and confined the search to evidence of child pornography on the computer, camera and electronic media described by the victim.

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

*****

U.S. v. Carney, 675 F.3d 1007 (6th Cir. 2012)

The court affirmed Carney's conviction, holding that the search warrant was supported by probable cause because the affidavit contained enough facts to indicate a fair probability that evidence of a crime would be found in the car Carney had driven and in his apartment.

First, while Carney pointed to some alleged misstatements and omissions in the search warrant affidavit, the court held that he failed to show that the officer made any of those statements and omissions knowingly and intentionally or with reckless disregard for the truth.

Second, the affidavit described two separate transactions involving different denominations of counterfeit money that occurred in the same area and within seven days of each other. On both occasions, the person who passed the counterfeit money drove away in a white SUV that was later seen parked in front of Carney's apartment and registered to a person who lived at that address. Additionally, a witness picked Carney out of a photo lineup as the individual who had passed counterfeit money at one of the stores. Finally, officers confirmed that Carney lived in the apartment and when they knocked on the door, Carney answered it. Based on the totality of the circumstances, the search warrant affidavit established a fair probability that evidence of counterfeiting would be found in the apartment and car.

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

*****

U.S. v. Archibald, 685 F.3d 553 (6th Cir. 2012)

Police officers obtained a warrant to search Archibald's apartment after using a confidential informant to make a controlled buy of drugs there. The court held the search warrant affidavit

established probable cause to search Archibald's apartment. Specifically, the officers' corroboration of the controlled buy, the statement that the buy took place at that location within the last 72 hours, and the statement as to the informant's reliability, although minimal, was enough to support a finding of probable cause, even after only one controlled buy.

The court also held the probable cause outlined in the search warrant affidavit did not go stale by the time the state court judge issued the warrant, three days after the controlled buy.

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

*****

U.S. v. Clark, 668 F. 3d 934 (7th Cir. 2012)

The police obtained a warrant to search Clark's computer for evidence of child pornography. Clark argued his alleged sexual assault on his niece did not support probable cause that he possessed child pornography.

The court noted that boilerplate language in a warrant about the tendencies of child pornography collectors supports probable cause for a search when the affidavit also includes facts that suggest the target of the search has the characteristics of a prototypical child pornography collector.

While the investigator did not provide an example of Clark's downloading child pornography, he did not need to do so in order to establish Clark's sexual interest in children and connect him to the "collector" profile. First, the investigator's affidavit extensively described Clark's sexual assault on his four-year old niece and detailed his sexual advances on a nine-year old boy and another six-year old girl. Second, the investigator described how Clark watched pornography on his computer in presence of the six-year old girl, while asking her to take her clothes off.

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

*****

U.S. v. Spears, 673 F. 3d 598 (7th Cir. 2012)

Officers obtained a warrant to search the defendant's house for evidence that he was growing marijuana there. The application and affidavit in support of the warrant included information from a confidential informant, information from the power company regarding electric usage at the house and criminal history information for the defendant. At a pre-trial hearing, there were inconsistencies between the information contained in the affidavit and the testimony of several law enforcement officers concerning the information from the power company and the defendant's criminal history.

The court held even if the electricity and criminal history information were taken out of the affidavit, the remaining portions of the affidavit would have been sufficient for a finding of probable cause.

First, the informant provided detailed information about the marijuana-grow operation and stated that he had obtained the information firsthand. Second, the officers corroborated that the defendant lived at the house and during a trash-pull discovered evidence indicating that marijuana was being grown there. Finally, a short period of time elapsed between the

informant's information, the corroboration of that information and the application for the search warrant.

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

*****

U.S. v. Vega, 676 F. 3d 708 (8th Cir. 2012)

Vega argued the affidavit in support of the search warrant for his house did not establish probable cause and his statements were involuntary because the police officers did not read him his *Miranda* rights and they threatened to have his children taken away from him.

The court disagreed. First, from the affidavit, it can be reasonably inferred that Horvath, the drug dealer, obtained the methamphetamine that he sold to the cooperating witness from Vega. When the cooperating witness met Horvath, Horvath told him he had to go get the methamphetamine. Horvath then left his house and walked across the street to Vega's house. When he returned to his house a few minutes later, Horvath handed the cooperating witness a small Ziploc bag containing methamphetamine.

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

*****

U.S. v. Seidel, 677 F. 3d 334 (8th Cir. 2012)

The court held there was sufficient evidence to establish probable cause for the issuance of a search warrant for Seidel's house and garage. First, members of the Narcotics Task Force conducted a trash pull at Seidel's home. Second, officers discovered in the trash nine spiral-bound notebook pieces of paper that had ledgers on them. Based on his training and experience, an officer testified that those pieces of paper were pay-owe sheets used to keep track of drug sales. Third, the officers recovered improperly disposed syringes in the trash, which is indicative of illegal drug use. Finally, the an officer recovered a metal paper clip with marijuana residue on it from the trash and testified that paper clips are commonly used to clean out marijuana pipes. This evidence suggested that criminal drug activity was occurring at Seidel's house and was sufficient for a finding of probable cause. The court further held the officer's sworn, oral testimony, recorded by the judge was sufficient to support the issuance of the search warrant. Seidel did not cite any state or federal law providing that the officer had to provide a written affidavit in lieu of recorded, sworn oral testimony.

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

*****

U.S v. Grant, 682 F.3d 827 (9th Cir. 2012)

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

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

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

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

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

*****

U.S. v. Ruiz, 664 F. 3d 833 (10th Cir. 2012)

Ruiz flew a rented airplane to a small airport in Kansas. At the airport, Ruiz paid cash for fuel and for storing the plane overnight in a hangar. The hangar was secure but it contained airplanes belonging to other customers.

During Ruiz's flight, the Air and Marine Operations Center (AMOC) became suspicious because Ruiz had not filed a flight plan and an aircraft carrying drugs had landed at that airport six months earlier. The AMOC contacted an agent with Immigration and Customs Enforcement who arranged for local law enforcement officers to bring a drug detecting dog to the hangar. Once at the hangar, officers walked a certified drug dog around Ruiz's airplane and the dog alerted several times to the presence of narcotics. Officers obtained a search warrant for the airplane and discovered a suitcase containing twenty-eight kilograms of cocaine.

The court agreed with the Sixth Circuit Court of Appeals, holding that Ruiz had no objectively reasonable expectation of privacy in the airplane hangar. Here, the owner of the airport maintained control over the hangar at all times. The hangar stored aircraft and equipment belonging to the owner and other customers and Ruiz had no access to it after business hours. Even if Ruiz had a subjective expectation of privacy in the hangar, it was not an objectively reasonable one.

Additionally, Ruiz argued the search warrant affidavit improperly omitted the fact that the drug dog had falsely alerted his handler to the presence of drugs on three of his last ten sniffs.

The court disagreed. Generally, a search warrant based on a narcotics canine alert will be sufficient on its face if the affidavit states that the dog is trained and certified to detect narcotics. The court does not require the affiant to include a complete history of a drug dog's reliability beyond the statement that the dog has been trained and certified to detect drugs. Here, it was established that the drug dog was certified to detect heroin, cocaine methamphetamine and marijuana by the State of Oklahoma and by the National Narcotic Detector Dog Association.

Ruiz also contested an unrelated search of a rental home in which police officers found cocaine. Ruiz sent the owner a letter stating that he would no longer need to rent the house. The owner entered the house and called the police after he found several thousand dollars in the bathroom. Officers saw what appeared to be kilo packages of cocaine on a rafter in the basement ceiling. The officers stopped their search and obtained a search warrant.

The court held the officers' warrantless entry and initial search of the rental home was valid. When Ruiz sent the owner the letter terminating the lease, he effectively abandoned the rental house and any reasonable expectation of privacy he had in it when the police searched it at the request of the owner.

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

*****

U.S. v. Haymond, 672 F. 3d 948 (10th Cir. 2012)

Haymond claimed the agent's affidavit submitted in support of the search warrant was insufficient to establish probable cause to search his home for evidence of child pornography. The court disagreed. The agent's affidavit described in detail his undercover Limewire investigation, including the fact that he observed a user, with an IP address linked to Haymond's residence, who had numerous files of child pornography available for other Limewire users to access, view and download. This information would cause a reasonable person to believe evidence of child pornography would be recovered from Haymond's residence.

Haymond also argued the information in the affidavit was stale because the agent obtained the search warrant 107 days after he completed his Limewire investigation. The court disagreed, holding that in other cases it had rejected similar claims of staleness and that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes.

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

*****

Delay in Execution

U.S. v. Archibald, 685 F.3d 553 (6th Cir. 2012)

The court held the five-day delay in executing the warrant after the officers obtained it was reasonable. In Tennessee, a search warrant that is executed within five days of being obtained is presumed to retain its probable cause, unless the defendant can establish otherwise. Here, the five-day delay based on a holiday weekend and scheduling conflicts of the officers was reasonable. There was nothing to suggest that the officers requested the search warrant on the Friday of a holiday weekend so that they could purposely delay its execution for five days. In addition, nothing changed between the issuance of the warrant and its execution, which affected the existence of probable cause.

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

*****

U.S. v. Burgard, 675 F. 3d 1029 (7th Cir. 2012)

A police officer seized Burgard's cell phone, without a warrant, after he established probable cause to believe it contained images of child pornography. The officer wrote his report and forwarded it to an investigator who was assigned to work with a cyber-crimes task force. The investigator obtained a warrant to search the cell phone six days later and discovered images of child pornography. Burgard argued that the images from his cell phone should have been suppressed because it was unreasonable for the officer to wait six days to obtain the search warrant.

After seizing an item, police must obtain a search warrant within a reasonable amount of time to comply with the *Fourth Amendment*. Even though the investigator may have been able to work more quickly, his delay was not because he completely abandoned his work on the case or failed to realize the importance of obtaining a warrant in a timely manner. Rather, the investigator wanted to ensure that he had all the information he needed from the seizing officer and he wanted to consult with the federal prosecutor, while also attending to his other law enforcement duties. As a result, the court held that the six-day delay in obtaining the search warrant for Burgard's cell phone was reasonable under the *Fourth Amendment*.

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

*****

United States v. Laist, 702 F.3d 608 (11th Cir. 2012)

An FBI agent suspected Laist was involved in the possession and distribution of child pornography so he went to Laist's apartment to conduct a knock and talk interview. During the interview, Laist admitted there was child pornography on his computer and on five external hard drives he owned. Laist accessed the computer and showed the agent an image that appeared to be child pornography. Laist then signed a consent form, which allowed the agent to seize his computer and five external hard drives and search them.

Eight days later, the agent received a letter from an attorney that revoked Laist's consent to search. The agent immediately began to draft a search warrant application and affidavit for Laist's computer and external hard drives. The warrant application and affidavit were submitted to a magistrate judge twenty-five days later. The judge issued the warrant and the subsequent search uncovered thousands of images and videos of child pornography.

Laist argued the evidence discovered on his computer and external hard drives should have been suppressed because the twenty-five delay in obtaining the search warrant, after he revoked his consent, was unreasonable and therefore violated the *Fourth Amendment*.

The court disagreed. A temporary warrantless seizure supported by probable cause is reasonable as long as the police diligently obtain a warrant in a reasonable amount of time. First, the government clearly had probable cause to believe Laist's computer and external hard drives contained child pornography. Second, the agent acted diligently to obtain a search warrant once Laist revoked his consent as he began drafting the search warrant application and affidavit the same day he received notice of Laist's revocation. In addition, the investigation was complex, taking over a year to conduct and it involved numerous FBI agents. The agent worked closely

with the U.S. Attorney's Office and included extensive amounts of non-boilerplate information drafted specifically for this warrant application. Finally, it was clear the agent put a considerable amount of work into the preparation of the search warrant documents. Based on these facts, the court found the twenty-five day delay in obtaining the search warrant to be reasonable.

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

*****

Detaining Occupants During Search Warrant Execution

U.S. v. Cowan, 674 F. 3d 947 (8th Cir. 2012)

Officers encountered Cowan at an apartment during the execution of a search warrant for drugs. The court held it was lawful for the officers to detain, temporarily handcuff and frisk Cowan because they were executing a warrant at a place of suspected drug trafficking, where weapons may have been present, and the suspects outnumbered the officers.

The court held when an officer felt keys in Cowan's front pocket, he was justified in reaching into the pocket and seizing the keys and the attached key fob. The officer immediately recognized the object as keys and the search warrant specifically authorized the seizure of keys as indicia of occupancy or ownership of the premises.

After seizing the keys from Cowan's pocket, the officer pressed the alarm button on the key fob until it set off an alarm on a car parked in front of the apartment building. Another officer brought a drug-dog to the scene to conduct a sniff around the car. After the dog alerted to the presence of drugs, officers searched the car and found crack cocaine.

The court held the officer's use of the key fob to identify Cowan's car was lawful because he did not have a reasonable expectation of privacy in the identity of his car. Additionally, in light of the United States Supreme Court's recent holding in *United States v. Jones*, the court had to consider whether the officer's use of the key fob constituted a search by "physically intruding on a constitutionally protected area to find something or obtain information." The court held the officer did not trespass on the key fob itself because he had lawfully seized it. The court went on to state that even if the use of the key fob was a search, the court held that it would have been reasonable under the *Fourth Amendment's* automobile exception.

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

*****

Knock and Announce

U.S. v. Ramos - Cruz, 667 F. 3d 487 (4th Cir. 2012)

Without deciding if the officers violated the knock-and-announce rule before they entered Ramos-Cruz's home, the court reiterated that in *Hudson v. Michigan*, the Supreme Court held that the exclusionary rule does not apply to knock-and-announce violations.

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

*****

Youngbey v. March, 676 F. 3d 1114 (D.C. Cir. 2012)

Youngbey claimed police officers violated his *Fourth Amendment* rights by planning and conducting a 4:00 a.m. search on a warrant that did not authorize a nighttime search and by breaking and entering into her home without first knocking and announcing their presence.

The court reversed the district court and held the officers were entitled to qualified immunity because neither their no-knock entry into the home nor their nighttime search violated clearly established law.

The court held the officers did not have to knock and announce before they entered Youngbey's house because of the exigent circumstances that existed at the time. It was not disputed that before their entry, the officers knew that the victim, Mallory, had died from multiple gunshot wounds and that Youngbey' son had confessed to killing him. Additionally, the warrant authorized the officers to search for the firearm used in the killing, believed to be an assault rifle, and the officers verified that Youngbey's son lived in the house.

Regarding the nighttime search, the warrant form authorized the officers "to search in the daytime / at any time of the day or night." The judge who issued the warrant did not cross out, circle or otherwise mark either "in the daytime" or "at any time of the day or night." The court held that there was no clearly established law under the *Fourth Amendment* that supported Youngbey's position that "no reasonable officer could have believed that the warrant authorized a nighttime search."

First, even though the timing of a search might affect its reasonableness, the *Fourth Amendment* does not specifically prohibit nighttime searches.

Second, there is no clearly established law under the *Fourth Amendment* prohibiting nighttime searches where the warrant is unmarked or silent as to the authorized time of execution.

Third, the language of the warrant here cannot be construed to authorize only a daytime search.

Finally, even if a District of Columbia law may have applied, which the court said it did not, its prohibition on nighttime searches was unclear.

The court concluded there is no clearly established law under the *Fourth Amendment* that prohibits the nighttime execution of a warrant, where, as here, the warrant does not prohibit such a search.

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

*****

Stale Information

U.S. v. Seiver, 692 F.3d 774 (7th Cir. 2012)

Seiver argued that federal agents relied on stale information to obtain the warrant to search his computer that led to the discovery of child pornography. He claimed that there was no reason to

believe that seven months after he had uploaded child pornography there would still be evidence of the crime on his computer.

The court disagreed. Even if even if defendant had deleted the child pornography, a successful recovery of the images from his hard drive by an FBI computer forensic expert would establish that he had possessed them at one time, well within the five-year statute of limitations. The court noted that the issue of staleness is highly relevant to the legality of a search for a perishable or consumable object, like cocaine, but rarely relevant when it is a computer file. The court explained that a deleted file would seem to have vanished only because the computer had removed it from the user interface and the user could not "see" it any more. However, such a file would remain on the computer and normally would be recoverable by computer experts until it was overwritten because there was no longer unused space in the computer's hard drive.

The court concluded that even after seven months, it was still probable the images of child pornography would be present on Seiver's computer.

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

*****

U.S. v. Haymond, 672 F. 3d 948 (10th Cir. 2012)

Haymond claimed the agent's affidavit submitted in support of the search warrant was insufficient to establish probable cause to search his home for evidence of child pornography. The court disagreed. The agent's affidavit described in detail his undercover Limewire investigation, including the fact that he observed a user, with an IP address linked to Haymond's residence, who had numerous files of child pornography available for other Limewire users to access, view and download. This information would cause a reasonable person to believe evidence of child pornography would be recovered from Haymond's residence.

Haymond also argued the information in the affidavit was stale because the agent obtained the search warrant 107 days after he completed his Limewire investigation. The court disagreed, holding that in other cases it had rejected similar claims of staleness and that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes.

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

*****

Automobile Exception (mobile conveyance exception)

U.S. v. Wilson, 699 F.3d 235 (2nd Cir. 2012)

Two tribal police officers, one of whom was cross-designated as a United States Customs Officer, conducted a traffic stop on a vehicle that had left the United States at an unguarded, undesignated border crossing, then returned to the United States less than twenty minutes later. Officers searched the vehicle and found three duffel bags containing marijuana.

The district court held that the traffic stop violated the *Fourth Amendment* because it occurred outside the officers' tribal jurisdictional boundaries, in violation of state law, and because the

cross-designated customs officer violated ICE policy by not contacting an ICE official before making the stop.

The court held that the traffic stop did not violate the *Fourth Amendment* because the officer acting in his capacity as a cross-designated customs officer had probable cause to stop the vehicle for a violation of federal law. When the officers stopped Wilson, they knew he had left the United States and then reentered a short time later at an unguarded, undesignated border crossing. The tribal police officer was authorized to effect the stop because he was a validly designated customs officer. The violation of the ICE policy did not violate the *Fourth Amendment* because the policy's "prior authorization requirement" did not involve any *Fourth Amendment* issues. Because the stop was a lawful exercise of the officer's designated customs authority, the court did not decide whether it violated state law.

Once the officers stopped the vehicle, they were entitled to search it under the automobile exception to the warrant requirement. At the time of the search, officers knew the vehicle was registered to an individual, other than Wilson, who had recently been arrested with a large quantity of marijuana. They knew Wilson had lied about having crossed the border, and then admitted that he had lied. Finally, Wilson admitted that he had a marijuana pipe in his possession and that he had gotten a "little" marijuana across the border.

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

*****

U.S. v. Oritz, 669 F. 3d 439 (4th Cir. 2012)

The Maryland State Police received a tip from the New Jersey State Police that a white Mitsubishi automobile, which was believed to be connected with large volumes of drugs and money was driving southbound into Maryland. Trooper Decker spotted the car and performed a traffic stop after he determined it traveling thirteen miles-per-hour over the speed limit. As he approached the car, Trooper Decker smelled a strong scent of air freshener coming from the car, which he knew was used as a masking agent to conceal the odor of illegal drugs. While speaking with the defendant, Trooper Decker saw several cans of air freshener in the car. The defendant also appeared very nervous and was unable to explain his destination to him. While Trooper Decker was writing a traffic ticket, Trooper Gussoni arrived on the scene and asked the defendant for permission to search his car, which he granted. Before the search began, however, the Trooper Decker handed the traffic ticket to the defendant and asked him if he could search the car for any signs that the vehicle had been tampered with or was stolen. The defendant again gave his consent. Two minutes into the search, the Trooper Gussoni lifted up the back seat and found a hidden compartment that contained six kilograms of cocaine.

The court held the district court improperly suppressed the evidence discovered by Trooper Gussoni during the warrantless search of the defendant's car.

The information provided by the New Jersey State Police along with the information developed by the Maryland State Police, after they stopped the defendant, established probable cause to believe that contraband was in the vehicle. As a result, the officers lawfully searched the defendant's car under the automobile exception to the warrant requirement.

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

*****

U.S. v. Earvin, 682 F.3d 502 (6th Cir. 2012)

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

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

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

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

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

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

*****

U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012)

The court held the search of Lyons' vehicle was lawful. Lyons did not have a valid driver's license, she provided inconsistent answers about her travel plans and her vehicle smelled strongly of an odor commonly used to mask the scent of drugs. These facts established probable cause to search the vehicle under the automobile exception to the *Fourth Amendment's* warrant requirement.

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

*****

U.S. v. Riley, 685 F.3d 691 (8th Cir. 2012)

The court held the drug-detection dog's alert on Riley's vehicle provided probable cause that drugs were present, which allowed the officers to search the vehicle under the automobile exception to the *Fourth Amendment's* warrant requirement.

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

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United States v. Coleman, 700 F.3d 329 (8th Cir. 2012)

Coleman argued the search of his motor home violated the *Fourth Amendment* because it should have been treated like a residence. As such, he claimed that the officer should have limited his search to the front part of the motor home, the space within Coleman's immediate control, where he claimed the marijuana was located.

The court disagreed. Officers may search a vehicle without a warrant if they have probable cause to believe the vehicle contains contraband. This automobile exception applies equally to a motor home in transit on a public highway because it is being used as a vehicle. Once Coleman told the officer that there was marijuana in his motor home, the officer had probable cause to search it for drugs. This allowed the officer to search every part of the motor home where marijuana might have been concealed, including under the bed where the rifle was found. Even if the officer did not have probable cause to search the motor home beyond where Coleman told him the marijuana was located, the court found the officer was justified in performing a protective sweep to make sure no passengers were hiding in the motor home.

Finally, the court held once the officer saw the bag under bed and it was readily identifiable as a gun case, the officer had probable cause to believe it contained contraband and he could lawfully seize it because he knew that Coleman's criminal history included felony offenses.

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

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United States v. Farnell, 701 F.3d 256 (8th Cir. 2012)

A police officer received a report a bank robbery had occurred earlier that morning. The suspect's vehicle was a white van and the suspect was a heavy-set white male. The officer had previously

received two bulletins concerning several other armed bank robberies in the area committed by a heavy-set white male driving a white van. While securing the perimeter of a potential get-away route, the officer saw a white van driven by a heavy-set white male, later identified as Farnell. When the van drove past the officer, the driver held up his hand to conceal his face. The officer conducted a traffic stop and obtained consent to search the van. After finding a handgun, the officer handcuffed Farnell and placed him in another officer's patrol car. The officer resumed his search of Farnell's van and located evidence connected to the bank robbery.

The court held the officer had reasonable suspicion to stop Farnell. First, the officer was aware of several previous armed bank robberies committed by a heavy-set white male driving a white van. Second, the officer knew a heavy-set white male driving a white van had committed a bank robbery that morning and he saw a person and vehicle fitting these descriptions driving on a road leading away from the bank. Finally, the driver of the van tried to shield his face as he drove past the officer.

The court also held Farnell voluntarily consented to the search of his van. The officer did not threaten Farnell or promise him anything and Farnell was not under the influence of drugs or alcohol.

Finally, after the officer found the handgun in the van, the court held the officer was entitled to go back and continue to search the van. Without deciding whether the officer's subsequent search was a new and separate search or a continuation of the consent search, the court held the automobile exception applied. The officer's discovery of the handgun, along with his previous knowledge concerning the bank robbery suspect and van, gave him probable cause to believe additional evidence of the bank robbery would be found inside the van.

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

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U.S. v. Cervantes, 678 F. 3d 798 (9th Cir. 2012)

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

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

The court then held the seizure and subsequent inventory search of Cervantes's car was not justified by the community caretaking exception to the *Fourth Amendment's* warrant requirement. Under the community caretaking exception, police officers may impound vehicles that jeopardize public safety and the efficient movement of traffic. Neither officer provided testimony that Cervantes's car was parked illegally, posed a safety hazard, nor was vulnerable to

vandalism or theft. Although Cervantes's car was not located close to his home when the officers impounded it, there was no evidence that it would have been vulnerable to vandalism or theft if it were left in its residential location or that it posed a safety hazard. The court concluded that seizure and inventory search of Cervantes's car was a pretext for an investigatory search for evidence of narcotics trafficking.

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

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Border Searches

Reasonable Suspicion During a Routine Border Search

United States v. I.E.V., Juvenile Male, 705 F.3d 430 (9th Cir. 2012)

The defendant, a juvenile, was a passenger in a car driven by his brother when they entered a United States Border Patrol Checkpoint in Arizona, approximately one hundred miles from the Arizona - Mexico border. As the car entered the primary inspection area of the checkpoint, a police dog displayed alert behavior that indicated the presence of either drugs or concealed humans in the car. Because of this alert, the car was sent to secondary inspection where the defendant and his brother were asked to get out of the car. An officer frisked the driver, who appeared to be nervous but found nothing. A different officer frisked the defendant and asked him about an object he felt under the defendant's shirt. Without permission, the officer then lifted the defendant's shirt and found a brick-shaped object taped to the defendant's abdomen. The officers frisked the brother again and this time they found a similar brick-shaped object taped to his abdomen. Both bricks contained marijuana.

The district court concluded the officers were justified in frisking the defendant and his brother for weapons based on the totality of the circumstances, to include, the proximity to the border, the canine alert to contraband, the nervous behavior exhibited by the defendant's brother, and the officer's experience that often individuals transporting contraband also carry firearms.

The court disagreed. The court noted the officers were justified in conducting a *Terry* stop because the canine alert provided them reasonable suspicion that criminal activity was afoot. However, the court held the officer was not justified in frisking the defendant. The court stated at the time of the frisk, the officer could not point to any suspicious behavior by the defendant, who was behaving in a non-threatening and compliant manner. Even if the frisk was justified, the court further held that the officer exceeded the scope of a *Terry* frisk because it was not obvious from the record whether the officer immediately identified the bundle on the defendant as contraband or a weapon.

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

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Computers / Electronic Devices / Wiretaps

United States v. Wahchumwah, 704 F.3d 606 (9th Cir. 2012)

United States Fish and Wildlife Service (USFWS) agents began an investigation on Wahchumwah after receiving anonymous complaints that he was selling eagle parts. During a visit to Wahchumwah's home, an undercover agent wearing a concealed audio-video recording device purchased two eagle plumes from him.

Wahchumwah argued the warrantless audio-video recordings of the sale of the eagle plumes inside his home violated the *Fourth Amendment*.

The court disagreed and following the Second, Third and Fifth circuits held an undercover agent's warrantless use of a concealed audio-video device in a home into which he has been invited by a suspect does not violate the *Fourth Amendment*. As a result, the district court properly denied Wahchumwah's motion to suppress the evidence obtained by the use of the concealed audio-video device.

The court explained a person's expectation of privacy does not extend to what a person knowingly exposes to the public, even in his own home. In addition, a person generally has no privacy interest in that which he voluntarily reveals to a government agent. A government agent may also make an audio recording of a suspect's statements and those audio recordings, made with the consent of the government agent, do not require a warrant.

When Wahchumwah invited the undercover agent into his home, he forfeited his expectation of privacy as to those areas that were knowingly exposed to the agent. Wahchumwah could not reasonably argue that the recording violated his legitimate privacy interests when it revealed no more than what was already visible to the agent.

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

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In RE: Grand Jury Subpoena Duces Tecum Dated March 25, 2011; U.S. v. Doe, 670 F. 3d 1335 (11th Cir. 2012)

Law enforcement officers obtained a warrant to search two computers and five external hard drives that belonged to Doe. Forensic examiners analyzed the digital media, but were unable to access certain portions of the hard drives. Doe was served with a grand jury subpoena duces tecum that required him to appear before the grand jury and produce the unencrypted contents located on the computers and the five external hard drives. Doe told the government that when he appeared before the grand jury he would invoke his *Fifth Amendment* right against self-incrimination and refuse to comply with the subpoena. The government then requested and received from the court, an order that would grant Doe immunity and require him to respond to the subpoena. Doe refused to decrypt the hard drives, arguing that the government's use of the decrypted contents of the computers and hard drives would constitute derivative use of his immunized testimony that was not protected by the district court's grant of immunity. The district court disagreed and ordered Doe to be incarcerated for contempt of court.

The court of appeals reversed the district court and held that compelling Doe to decrypt and produce the contents of the hard drives would significantly implicate his *Fifth Amendment* privilege to be free from self-incrimination.

First, the decryption and production of the contents of the drives would be testimonial because it would require the use of the contents of Doe's mind and could not be fairly characterized a physical act that would be non-testimonial in nature. The decryption and production would be like compelling testimony from Doe about his knowledge of the existence and location of potentially incriminating files; of his possession, control and access to the encrypted portions of the drives; and of his capability to decrypt the files.

Second, there was nothing in the record to establish that the government even knew whether any files existed on the hard drives or where they were located on the drives. The government established that the combined storage space on the drives was capable of containing millions of files. However, the government did not show that the drives actually contained any files, nor did it show which of the millions of potential files the drives were capable of holding may prove useful. Further, the government could not establish that Doe was even capable of accessing the encrypted portions of the drives.

In two other cases where the government compelled suspects to produce unencrypted versions of computer hard drives, the government had knowledge of the existence of files on those drives. As a result, the court lawfully compelled the suspects to decrypt the drives and produce them.

Additionally, the court held the district court's grant of immunity was not sufficient. Doe's immunity only covered his act of decrypting and producing the unencrypted hard drives. With this immunity, the government could still use the evidence on the hard drives, that Doe was compelled to decrypt and produce, against him at trial. The court held in order to compel Doe to decrypt and produce the hard drives, he was also entitled to immunity for any criminal charges that may arise from evidence discovered on the drives. Because the immunity offered here was insufficient, Doe could not be compelled to decrypt and produce the drives.

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

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Wiretaps

U.S. v. Valdivia, 680 F. 3d 33 (1st Cir. 2012)

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

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

Valdivia claimed the American officers were working with the Aruban officers when the wiretap evidence was obtained. The court disagreed. First, Aruban authorities had already initiated their investigation into the drug trafficking network prior to the arrival of any American officers. Second, the wiretap was neither requested nor in any way organized or managed by the American officers. Third, the wiretap orders were sought from and approved exclusively by Aruban courts. Finally, only Aruban officers actively participated in the implementation of the wiretaps and the recording of conversations. American officers were not permitted to enter the recording room nor listen to the recorded conversations while the investigation was ongoing. It was only after the investigation had concluded that an American officer, through official channels, requested an authorized copy of the recordings for purposes of prosecution in an American court. While American officers were present in Aruba during periods of the wiretap investigation, they were not active participants in the operation, they did not carry guns or badges, they did not retain the authority to make arrests and they often worked on other unrelated cases.

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

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U.S. v. Lomeli, 676 F. 3d 734 (8th Cir 2012)

The court affirmed the district court's suppression of evidence the government obtained against Lomeli and a co-defendant as the result of a wiretap.

Wiretap applications may only be authorized by certain people specifically designated by the Attorney General who are listed in *18 U.S.C. § 2516(1).* Additionally, under *18 U.S.C. § 2518(1)(a)* all wiretap applications must identify the law enforcement officers making the application and indicate the Department of Justice officer who authorized it.

In this case, the wiretap application approved by the federal judge stated that the documents that identified the authorizing officials were attached to the application. However, these documents were not attached.

The court held the wiretap application was insufficient on its face because it did not comply with the *§ 2518(1)(a)* requirement. The court stated that the authorizing judge had no way of knowing the name of the actual, statutorily designated official that had authorized the application. Additionally, the government offered no evidence that the judge knew the identity of the appropriate authorizing official or if the necessary authority was obtained. It was not until the magistrate judge conducted the supplemental hearing that the government offered the supporting documents. The court found that these omissions were not merely technical defects, and that suppression of the wiretap evidence was warranted.

In a footnote, the court noted that in ***U.S. v. Gray***, the Sixth Circuit refused to suppress wiretap evidence obtained by the government under similar circumstances.

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

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U.S. v. McTiernan, 695 F.3d 882 (9th Cir. 2012)

McTiernan hired a private investigator to illegally wiretap telephone conversations of two individuals. When FBI agents questioned McTiernan about the private investigator's activities, McTiernan claimed that he knew nothing about any wiretapping. However, the FBI had obtained a digital recording that the private investigator had made in which he and McTiernan discussed the illegal wiretapping. McTiernan did not know the private investigator had recorded this conversation. After being convicted of making a material false statement to the FBI agents, McTiernan arged that this recording should have been suppressed.

The court disagreed. Because the recording was not made for the purpose of committing a criminal or tortious act, the court concluded that the district court did not err in denying the motion to suppress.

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

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U.S. v. Glover, 681 F.3d 411 (D.C. Cir. 2012)

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

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

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

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

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Consent Searches

United States v. Moreno, 701 F.3d 64 (2nd Cir. 2012)

The court held that Moreno voluntarily consented to the search of her luggage. Although Moreno was in custody and had been subjected to a display of force, this did not automatically mean that any subsequent consent she gave was involuntary, as sufficient time had elapsed between the agents' initial entry into Moreno's room and her consent to search. The court found that Moreno was calm when the agents asked for consent to search and that they did not use any intimidating or coercive language or gestures in seeking her consent. Moreno immediately provided oral consent and then signed a written consent-to-search form, which affirmed that she had not been threatened or forced in any way to give consent. Finally, Moreno stated that she understood the form and she signed it without hesitation.

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

*****

United States v. Murphy, 703 F.3d 182 (2nd Cir. 2012)

A police officer put ruse drug-checkpoint signs on the side of an interstate highway just before an exit. The officer stopped a car driven by Michael Webster, claiming Webster failed to use his turn signal when he got off the highway at that exit. After returning Webster's documents and issuing a warning, the officer obtained Webster's consent to search the car. The officer found cocaine in a hidden compartment in the trunk and arrested Webster and his passenger Michael Murphy. The officer advised Webster and Murphy of their *Miranda* rights, and then told them, "You can decide at any time to give up these rights, and not talk to us, okay." Murphy told the officer he understood, but Webster never indicated if he understood or had even heard the officer's *Miranda* warnings. Both men subsequently denied knowing about the hidden compartment or the cocaine.

First, the district court found the officer's testimony that he saw Webster commit a traffic violation was not credible; therefore, it held the officer had unlawfully seized the defendants. The court concluded this was a proper finding by the district court.

Next, the court held Webster's subsequent consent to search the car was tainted by the unlawful seizure; therefore, the district court properly suppressed the drugs found in the trunk. Less than one minute elapsed between the end of the unlawful seizure, when the officer returned Webster's documents, and when Webster gave the officer consent to search the car. In addition, the officer did not tell Webster the stop was over, he was free to go or he did not have to consent to a search. The court stated a reasonable person would not have felt free to go at that time. The court also noted the district court questioned the officer's motivation for the traffic stop, when it commented that the officer appeared to tailor his testimony in an attempt to justify the stop and search.

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

*****

U.S. v. Whiteford, 676 F. 3d 348 (3d Cir. 2012)

There was no evidence that Wheeler's statements to the agents or his consent to search his house were involuntary. Wheeler told the agents that the weapons were in his bedroom and he offered to show them exactly where he had put them. He signed a consent to search form and helped the agents gain entry into the house. Wheeler participated in a one and a half hour discussion with the agents, answering their questions and retrieving documents at their request. During this time, there were no threats, raised voices nor did Wheeler tell the agents that he wished to stop answering questions.

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

*****

U.S. v. Oritz, 669 F. 3d 439 (4th Cir. 2012)

The court held the defendant voluntarily consented to the search of his car, first when he gave permission to search the car for drugs and again when he gave consent to search the car to determine whether it was stolen. Once voluntary consent is given, it remains valid until it is withdrawn by the defendant. Here, the defendant gave his consent to search the car for drugs, never withdrew that consent and the search that took place was conducted within the scope of that consent. Lifting up the back seat, which revealed the hidden compartment in which the cocaine was hidden, was within the scope of this consent.

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

*****

U.S. v. Collins, 683 F.3d 697 (6th Cir. 2012)

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

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

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

*****

U.S. v. Saucedo, 688 F.3d 863 (7th Cir. 2012)

During a traffic stop, Saucedo gave a state trooper consent to search his truck and trailer after the trooper asked him if he was carrying any weapons or drugs. At no time did Saucedo limit the scope of the search. Inside the cab of the truck, the trooper found what he thought was an alteration to a small alcove that housed a compartment in the sleeper/bunk area behind the driver's seat. The trooper used a screwdriver to disassemble one screw, pulled back the plastic molding around the alcove, looked in, and found a hidden compartment. The trooper eventually removed the hidden compartment from its location, opened it and found ten kilograms of cocaine inside.

Saucedo argued the trooper exceeded the scope of his general consent to search the tractor-trailer by using a flashlight and screwdriver to remove the screws holding the molding in place that covered the hidden compartment. The court noted the scope of a consent search is determined by the expressed object of the search. Here, the trooper received Saucedo's consent to search for drugs and weapons. A reasonable person may be expected to know that drugs are generally carried in some kind of a container. As a result, Saucedo's consent allowed the trooper to search all compartments inside the tractor-trailer, including the sleeper area, where drugs could be concealed. If Saucedo did not want the hidden compartment to be searched, he could have limited the scope of his consent.

Saucedo also argued the trooper exceeded the scope of his consent because he used a flashlight and screwdriver to look behind a television, unscrew the molding, and remove the hidden compartment from the cab. The court disagreed, stating it was objectively reasonable for the trooper to believe that the scope of consent allowed him to open the compartment by removing the screws that held it in place. The removal of the hidden compartment did not dismantle any functional part of the vehicle; the compartment had no function other than to conceal drugs.

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

*****

U.S. v. Dunning, 666 F. 3d 1158 (8th Cir. 2012)

The court held Dunning voluntarily consented to the search of his person. Dunning appeared to have normal mental ability and while he smelled of marijuana, he did not appear to be under the influence of drugs. The time the officer detained Dunning until the time he obtained consent was less than five minutes, the officer did not threaten or intimidate him, and Dunning did not object to the search.

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

*****

U.S. v. Anderson, 674 F. 3d 821 (8th Cir. 2012)

Anderson gave the officers consent to search his motel room for firearms. An officer found five shotgun shells in a shell compartment on an orange hunting vest hanging in a closet. The government prosecuted Anderson for being a felon in possession of ammunition.

The court held the search of hunting vest was within the scope of the consent given by Anderson. Firearms could be located in clothing hanging in a closet, especially in an orange hunting vest. In addition, the searching officer identified the ammunition without searching any areas that were too small to conceal a firearm.

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

*****

U.S. v. Mendoza, 677 F. 3d 822 (8th Cir. 2012)

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

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

*****

U.S. v. Lumpkins, 687 F.3d 1011 (8th Cir. 2012)

Police officers conducted a traffic stop on a car they believed had illegally tinted windows. The car pulled into a driveway, and when the driver refused to a command to "come here" the officers placed him in handcuffs. One of the officers looked through the windshield and saw marijuana in the center console. The officer tried to open the door to seize the marijuana, but it was locked and the keys were lying on the driver's seat. The officers discovered the car was a rental and that it was several days overdue for return. Both Lumpkins and the authorized renter refused to give consent to search the car. A manager from the rental car company arrived, unlocked the car and gave the officers consent to search. The officers found marijuana, crack cocaine and a loaded firearm in the car.

The court held the manager from the rental car company had the right to take immediate control of the car and give the officers valid consent to search it because, at the time of the search, the car was overdue for return.

The court also held the manager's consent to search the rental car was valid even though the person named in the rental agreement and Lumpkins both refused consent to the search. The court commented that a driver of an overdue rental car who is on notice that the rental car company is entitled to repossess it at any time, may not exercise authority over the car, contrary to the rental car company.

Finally, the court did not rule on whether Lumpkins' initial detention violated the *Fourth Amendment*. However, even if it did, the court held that evidence against Lumpkins was discovered as the result of a valid consent search and not as the result of his detention.

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

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United States v. Collins, 699 F.3d 1039 (8th Cir. 2012)

Police officers had an outstanding arrest warrant for Collins who was a convicted felon. After a reliable source told an officer Collins was staying with someone at a residence in Des Moines, officers went to the house to arrest him. Outside the house, the officers met the man who owned the property. He said that Krista Stoekel rented the house and that Collins had been there recently. An officer spoke to Stoekel at the front door of the house but she denied knowing Collins. The officer then asked for consent to search the house, but Stoekel refused. She did allow the officer to enter the house so they could continue to talk, but she told the officer that he could go no further than the living room. Once in the living room, the officer cautioned Stoekel that he "did not want her to be in trouble" and he knew that she was lying to him about not knowing Collins. Stoekel finally admitted to knowing Collins and that, "he may have come home last night." Stoekel then gave the officers consent to search the upstairs bedroom where Collins stayed. The officers found Collins asleep in the bedroom and arrested him. The officers seized a firearm that was in an open bag next to the bed.

Collins argued the firearm should have been suppressed because Stoekel's consent to search the bedroom had been obtained by coercion. The court disagreed. While Stoekel was induced to cooperate, there was no unreasonable coercion. When the officer confronted Stoekel about her lie, she became increasingly concerned about the legal consequences she might face. As a result, it was reasonable for the officer to believe that she voluntarily changed her mind and consented to the search. While she may have been reluctant to grant consent, Stoekel still voluntarily gave it.

Even if the officers went upstairs to look for Collins without Stoekel's consent, the court concluded they did not violate the *Fourth Amendment*. Police officers may enter a third person's home to execute an arrest warrant if they have a reasonable belief the suspect resides there and have reason to believe that the suspect is present at the time the warrant is executed. The property owner told the officers that Collins had been there recently and then Stoekel told the officers that Collins "may have come home last night." This information gave the officers a reasonable belief that Collins was present in the house and gave them the authority to go to that part of the house to arrest him.

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

*****

U.S. v. Russell, 664 F. 3d 1279 (9th Cir. 2012)

An officer working with a narcotics task force at the Seattle-Tacoma International Airport suspected that Russell might be a drug courier. The officer approached Russell, identified himself as a police officer investigating narcotics and told him that he was free to go and that he was not under arrest. The officer then asked Russell for consent to search his bag and his person. Russell consented and spread his arms and legs to facilitate the search. While searching Russell's groin area the officer felt something hard and unnatural. The officer arrested Russell. The entire search occurred outside Russell's clothing and the officer never patted or reached inside the pants. The officer later discovered 700 Oxycodone pills in Russell's underwear.

The court held Russell voluntarily consented to the search of his person and that the officer's full-body pat-down, including the groin area outside Russell's pants, was reasonable and did not exceed his consent.

The officer specifically told Russell he was looking for narcotics. After consenting to the search, Russell cooperated with the officer by lifting his arms and spreading his legs. Russell could have objected and revoked his consent before the officer began his search or any time after the officer had begun his search. Additionally, it would be reasonable for a person in Russell's position to understand that a search for drugs would include a pat-down of all areas of the body, including the groin area.
The 11th and District of Columbia Circuit Courts of Appeal agree.

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

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U.S. v. Pariseau, 685 F.3d 1129 (9th Cir. 2012)

The court held Pariseau voluntarily consented to the search in which officers found illegal drugs strapped to his legs when he got off a plane at the Seattle airport. After the officers approached him, they told Pariseau that he could refuse consent, but that he would be detained while they sought a warrant to search him. Pariseau replied, "You may as well search me now." Pariseau's consent was not obtained as a result of threats or coercion. The officers told him that he could refuse consent and wait for a search warrant and that it was not certain that the search warrant would be issued.

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

*****

U.S. v. Welch, 683 F.3d 1304 (11th Cir. 2012)

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

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

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

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U.S. v. Smith, 688 F.3d 730 (11th Cir. 2012)

Police officers went to Smith's house to conduct a knock and talk interview after they received a tip that he had child pornography on his laptop computer. The officers entered Smith's home through an unlocked door, to check on his welfare, after he did not respond to their knocking. Once inside, the officers encountered Smith, who agreed to talk to them outside. After a brief conversation, Smith and the officers went back into the house where Smith gave the officers consent to search his home and to seize his laptop computer. Smith also agreed to go to the police station for an interview. During the interview, Smith confessed to downloading child pornography and to making it available for upload to others, through a peer-to-peer file-sharing program. The officers obtained a search warrant and found child pornography on Smith's laptop computer.

The court declined to rule on whether or not the officers' initial entry violated the *Fourth Amendment*. However, the court held that even if the entry was illegal, the officers did not exploit the circumstances of their entry to obtain the evidence later used to convict Smith. Once inside the house, the officers went to Smith's bedroom to check on his welfare and they withdrew from the house after they realized he was not in any danger. The officers did not search the house for computers and they did not examine the laptop computer sitting in plain view in the living room. The officers waited outside for Smith while he got dressed and did not go back into the house until they went back inside with him. These events broke any connection between the officers' initial entry and Smith's consent to search the house, the seizure his computer and his confession. As a result, the court concluded that district court properly refused to suppress the evidence against Smith.

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

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Third Party Consent

U.S. v. Shrader, 675 F. 3d 300 (4th Cir. 2012)

Federal agents arrested Shrader at the home he shared with his aunt. Shrader was alone when the agents arrived and he refused to give consent to search the house for firearms that he admitted were inside. While several agents took Shrader to jail, other agents waited for his aunt to return home. Two hours later, she arrived and consented to a search of the house. The agents seized several illegal firearms.

Shrader argued that his aunt's consent to the search of their shared home was invalid because he had previously refused to consent to the search.

The court disagreed. In *Georgia v. Randolph*, the Supreme Court made it clear that to invalidate a co-tenant's consent to search, the defendant must be both "present and objecting." While the police may not try to exploit this rule by removing the potentially objecting person for the sake of avoiding a possible objection, there was no evidence that the agents did so in this case. They

went to Shrader's house for the express purpose of executing a valid arrest warrant and his removal from the premises cannot be considered a pretext for later seeking consent from is aunt.

With this holding, the court joined the Seventh and Eighth Circuits, which have followed the clearly established rule outlined in *Randolph* that requires that the defendant be physically present to dispute his co-tenant's consent. The court declined to adopt the more expansive view articulated by the Ninth Circuit in *U.S. v. Murphy,* which permits a defendant's refusal to consent to remain in effect indefinitely, "barring some indefinite manifestation that he has changed his position and no longer objects."

Click **HERE** for the court's opinion.
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U.S. v. Cooke, 674 F. 3d 491 (5th Cir. 2012)

Cooke argued under *Georgia v. Randolph* the warrantless search was invalid because his mother's consent to the agents' entry into the house was trumped by his previous refusal to consent. The court disagreed, stating *Randolph* only applied to co-tenants who were physically present and immediately objected to the other co-tenant's consent. Here, Cooke was not a present and objecting co-tenant, but rather was miles away from his home and in jail when he objected to the search.

The Seventh and Eighth Circuits agree and allow searches under similar circumstances; however, the Ninth Circuit does not.

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

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U.S. v. Garcia, 690 F.3d 860 (7th Cir. 2012)

After police officers arrested Garcia for attempting to possess and distribute cocaine, they found a piece paper in his pocket with an address on it. The officers went to the address and discovered that Garcia's sister and eighteen year-old niece lived there. Garcia's eight-year-old son was also present. The niece told the officers that she took care of the child often and that she had a key to Garcia's apartment so she could get the child dressed for school when Garcia was not home. The niece signed a consent-to-search form for Garcia's apartment. Inside a closet, officers found thirteen kilograms of cocaine.

The court held the officers had a reasonable belief that the niece was authorized to consent to the search of Garcia's apartment. Garcia gave his niece unlimited access to his apartment so she could take care of his child. She spend time there getting the child dressed for school in the mornings and often stayed with the child in the apartment after school when Garcia was not there. The defendant kept a large quantity of cocaine in a closet that also contained his child's clothing, which is an indication of the trust he had in his niece because part of her responsibility was getting the child dressed for school.

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

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U.S. v. Clutter, 674 F. 3d 980 (8th Cir. 2012)

The court held the officers' warrantless seizure of three computers from the house where Clutter lived was reasonable under the *Fourth Amendment*.

First, Clutter's father, who was in actual possession of the computers, consented to their seizure. The computers were located in areas of the home accessible to the father and the officers reasonably relied on the father's actual or apparent authority to consent to a temporary seizure of them.

Second, the officers had probable cause to believe that the computers contained evidence of child pornography offenses. Under the *Fourth Amendment*, officers are allowed to temporarily seize property, while they wait for a warrant to search its contents, if the exigencies of the circumstances require it. It is reasonable to seize a computer without a warrant to ensure the hard drive is not tampered with while a search warrant is obtained.

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

*****

U.S. v. Beasley, 688 F.3d 523 (8th Cir. 2012)

The court held the seizure of Beasley's digital camera and other property from his mother's house was reasonable. First, there was no meaningful interference with Beasley's possessory interest in the items because he was incarcerated when the officer seized them Second, Beasley's mother consented to the officer seizing the items. Third, Beasley's efforts to conceal the items and the other evidence of his production and possession of child pornography gave the officer probable cause to believe the items contained evidence of child abuse and child pornography. Finally, the officer had a legitimate interest in preserving the evidence and Beasley's mother had a legitimate reason to be rid of the items.

The court further held Beasley's consent to search the camera and other items was obtained voluntarily.

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

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Exigent Circumstances

Destruction of Evidence

United States v. Moreno, 701 F.3d 64 (2nd Cir. 2012)

Drug Enforcement Administration (DEA) agents in New York received information from a DEA agent in Colombia that over a kilogram of heroin was to be transferred from Moreno to another person later that day in New York. The agent in Colombia provided the name of the hotel and the room number where the deal was supposed to occur. While conducting surveillance on the hotel, the agents in New York saw a woman matching Moreno's description repeatedly walk in and out of the hotel room and survey the parking lot. The agents had a housekeeper knock on the door to Moreno's room. Moreno opened the door, but when she saw two DEA agents behind the

housekeeper, she tried to slam the door shut. One of the agents blocked this attempt, entered the room and handcuffed Moreno while the other agent conducted a protective sweep. Moreno gave the agents oral and written consent to search the room and her luggage. The agents found a kilogram of heroin inside her suitcase.

The court held that exigent circumstances justified the agents' warrantless entry into the hotel room. First, the agents had probable cause to believe that Moreno was a drug courier. The agent in Colombia provided the agents in New York with detailed information concerning the description of the courier and the location of the drug deal, which they corroborated during their surveillance. In addition, the agents saw Moreno going in and out of the hotel room to check the parking lot as if she was expecting someone to arrive. This behavior added to the agents' belief that Moreno was about to engage in a drug transaction. Second, Moreno's reaction to seeing the agents at her door and her attempt to slam the door in their faces created an urgent need for the agents to enter the room to ensure that evidence was not destroyed. The agents' warrantless entry into Moreno's hotel room was reasonable under the *Fourth Amendment*.

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

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United States v. Brown, 701 F.3d 120 (4th Cir. 2012)

Police officers established files containing child pornography had been downloaded to an IP address registered to a private ambulance company. The officers focused their investigation on Brown and another employee after they discovered the pair were always on duty when the child pornography was downloaded. The officers obtained a warrant to search the company's computers but did not locate any child pornography on them. During the execution of the search warrant, Brown and the other employee returned from a call. An officer seized a laptop computer that Brown had in the ambulance with him. The officer obtained a warrant to search Brown's laptop, which contained videos and images of child pornography.

The court held the officer's warrantless seizure of Brown's laptop did not violate the *Fourth Amendment*. Based on their investigation, the officers had probable cause to believe any computer used by either Brown or his co-worker during their shifts at the ambulance company contained child pornography, to include Brown's laptop, which he possessed during his work shift. Under the exigent circumstances exception to the *Fourth Amendment's* warrant requirement, it was reasonable for the officers to seize Brown's laptop computer to prevent either it or its contents from being destroyed until a search warrant could be obtained.

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

*****

U.S. v. Clutter, 674 F. 3d 980 (8th Cir. 2012)

The court held the officers' warrantless seizure of three computers from the house where Clutter lived was reasonable under the *Fourth Amendment*.

First, Clutter's father, who was in actual possession of the computers, consented to their seizure. The computers were located in areas of the home accessible to the father and the officers

reasonably relied on the father's actual or apparent authority to consent to a temporary seizure of them.

Second, the officers had probable cause to believe that the computers contained evidence of child pornography offenses. Under the *Fourth Amendment*, officers are allowed to temporarily seize property, while they wait for a warrant to search its contents, if the exigencies of the circumstances require it. It is reasonable to seize a computer without a warrant to ensure the hard drive is not tampered with while a search warrant is obtained.

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

*****

U.S. v. Ramirez, 676 F. 3d 755 (8th Cir. 2012)

Officers arrested two men at a bus terminal for smuggling heroin in their shoes. Their investigation revealed the two men were travelling with three other men who had already left the bus station, who also had heroin in their shoes. Over a two-hour period, the officers tracked the three men to a motel room and obtained a key card for the room from the desk clerk. The officers swiped the key card in an attempt to gain entry to the room but it did not work. The officers then knocked on the door and announced "housekeeping." One of the men, Hector Cruz, partially opened the door and then attempted to close it after he realized the officers were outside. The officers used a ram to force the door open and entered the room. Once inside, the officers saw two pairs of shoes that were similar to the shoes worn by the two men arrested at the bus station. After all of the men denied ownership of the shoes, the officers searched them and discovered heroin in each pair.

The government argued when the officers were outside the motel room, exigent circumstances justified their warrantless entry because the officers believed, even before they swiped the key card, that the destruction of evidence was imminent.

The court disagreed and reversed the defendant's conviction, finding there were no exigent circumstances that allowed the officers to enter the motel room without a warrant or consent.

First, Cruz's attempt to shut the door in response to the officers' knock does not support the existence of an exigency. This occurred after the officers unsuccessfully attempted to unlawfully enter the room with the key card, which they admitted compromised their position outside the room. While officers have the right to merely knock on a door and seek entry, when the occupants choose not to respond or choose to open the door and then close it, the officers must bear the consequences of this method of investigation.

Second, there was no evidence the three men knew the officers were tracking them and the officers' knowledge that drugs were probably in the room does not automatically support the conclusion that their destruction was imminent.

Finally, prior to using the key card, the officers had no indication there was any activity at all in the room, let alone any activity that might lead them to believe the occupants inside might imminently destroy evidence. The lack of any sounds coming from the room supported the inference that nothing was going on inside.

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

*****

U.S. v. Pope, 686 F.3d 1078 (9th Cir. 2012)

A federal law enforcement officer in a national forest responded to an area where some people were creating a disturbance. The officer encountered Pope, whom he suspected was under the influence of marijuana. Pope told the officer that he had been smoking marijuana but denied that he had any on his person. The officer then ordered Pope to empty his pockets, but Pope refused.

The officer asked Pope, a second time, if he had any marijuana on his person. This time Pope admitted that he had marijuana in his pockets. The officer ordered Pope to place the marijuana on the hood of his police car and Pope complied.

The court held the officer's initial command to Pope to empty his pockets was not a search under the *Fourth Amendment*. Even though Pope had a reasonable expectation of privacy in the contents of his pockets, his non-compliance with the officer's command to empty them did not intrude on that reasonable expectation of privacy.

The government conceded the officer's second command for Pope to place the marijuana on the hood of his police car was a search under the *Fourth Amendment* because of Pope's compliance. However, the court held this warrantless search was reasonable because of the potential for the destruction of the evidence. When Pope admitted that he was in possession of marijuana, the officer had probable cause to arrest him for possession of a controlled substance. If the officer had allowed Pope to leave his presence, without searching him, there was a high risk that the evidence would have been hidden or destroyed. Finally, the search was minimally intrusive because the officer merely told Pope to place whatever marijuana he had on the hood of the car.

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

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U.S. v. Franklin, 694 F.3d 1 (11th Cir. 2012)

Police officers went to Franklin's fiancée's house to arrest him on a warrant for absconding from his conditional release while on parole. After seeing several cars in the driveway and lights on in the house, officers knocked on the front door but received no response. An officer went around to the back of the house and saw Franklin through a window as well as several firearms. The officers continued to knock on the front door for ten to fifteen minutes, receiving no response. An officer then telephoned Franklin several times using his cell phone number. At first, someone answered the cell phone and then immediately hung up. Franklin eventually spoke to the officers on his cell phone; a few minutes later Franklin came out of the house and the officers arrested him. Officers entered the house and seized the firearms that had been seen through the window. Franklin argued that the firearms should have been suppressed because the officers violated the *Fourth Amendment* by entering the house and seizing them without a warrant, his consent or exigent circumstances.

The court disagreed. A warrantless search is allowed where both probable cause and exigent circumstances exist. The officers had probable cause because Franklin was known to be a felon

and he was seen in plain view in the presence of weapons that he had no right to lawfully possess. Exigent circumstances existed because the officers could have reasonably believed that the firearms would be removed or concealed before they could obtain a warrant. The officers knew there was at least one other person in the house who had already shown the willingness to help Franklin avoid arrest by not answering the door.

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

*****

Emergency Scene

United States v. Infante, 701 F.3d 386 (1st Cir. 2012)

Infante called 911 and requested an ambulance, telling the dispatcher he had severed the tip of his finger and seriously cut his hand when a hand-held propane tank exploded inside his house. Ten minutes later Infante called 911 to report he was driving to the hospital because the ambulance was taking too long to arrive. Infante saw the responding paramedics on his way to the hospital and pulled over to allow them to render aid. When the paramedics asked him what had happened, Infante told them he was inside his house, filling a butane lighter, when it exploded. The paramedics bandaged Infante's finger and hand and treated shrapnel-type wounds on his chest, but Infante refused to allow them to transport him to the hospital, insisting to drive himself.

In the meantime, firefighters were dispatched to Infante's house based on his initial report of a propane explosion. A firefighter looked through a window, saw a trail of blood on the floor, and then crawled through the unlocked window into the house. The firefighter unlocked the front door to allow the other firefighters to enter so they could search for the source of the explosion. The firefighters followed the blood trail to the cellar where they discovered marijuana plants, growing equipment and three pipe bombs.

After the discovery at Infante's house, investigators went to the hospital to interview him. Before the interview, the investigators did not inform Infante of his *Miranda* rights, but did tell him the interview was voluntary, he was not under arrest and he did not have to talk to them. Infante spoke to the investigators, and in two separate interviews, he made incriminating statements.

The court held the firefighters' warrantless entry into Infante's house and search of the cellar fell within the emergency exception to the *Fourth Amendment's* warrant requirement. After Infante reported a propane gas explosion inside his house and the paramedics saw that he suffered from injuries consistent with an explosion, the firefighters had probable cause to believe a secondary explosion from escaping gas could occur. After entering Infante's house, the firefighters limited the scope of their search for the explosion's origin to cellar because they saw the blood trail leading there. The evidence recovered from the cellar was observed by the firefighters in plain view.

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

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United States v. Schmidt, 700 F.3d 934 (7th Cir. 2012)

Police officers responded to a report of multiple gunshots that were heard at an intersection near Schmidt's residence. During the investigation, officers learned one person had been shot in the leg and already taken to the hospital. While canvassing the area two hours later, an officer approached a two-duplex unit from an alley. The officer saw bullet holes in a car parked in the alley as well as bullet holes in Duplex A. The officer also saw several spent shell casings on the ground near Duplex A and one spent shell casing within the backyard. Without a warrant, the officer entered the common backyard shared by Duplexes A and B through an open chain-link gate, and panned the area with his flashlight. In the corner of the yard, the officer saw the scope and breech of a firearm. The officer moved a plastic lid that was covering the stock of the firearm, pushed some tall grass aside, and discovered that the firearm was a .308 caliber rifle, which he seized. The rifle belonged to Schmidt, a convicted felon, who lived in Duplex B.

Schmidt claimed the back yard was curtilage and that the officer violated the *Fourth Amendment* by entering it without a warrant. Even if the officer was lawfully in the backyard, Schmidt argued that the officer did not have the right seize the rifle.

Without deciding whether the backyard was curtilage, the court held that the officer's entry was justified by exigent circumstances. Although two hours had passed since the last gunshots had been heard, the officer saw bullet holes in a car adjacent to the backyard, bullet holes in Duplex A, spent shell casings on the ground and one spent shell casing in the yard. These circumstances made it reasonable for an officer to believe, at the time of the search, that people in the backyard area may have recently been shot and in need of immediate aid. Consequently, the officer's warrantless presence in the backyard was justified whether the backyard was curtilage or not.

The court further held the seizure of the rifle was justified under the plain view doctrine. First, the officer was lawfully present in the backyard. Second, the rifle's scope and the breech were clearly visible to the officer, so he knew that the object was a firearm before he moved the plastic lid and grass to see the stock and caliber of the rifle. Finally, based on the report of recent gunshots, the bullet holes and the spent shell casings, the officer had probable cause to believe the rifle was linked to those gunshots.

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

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Hot Pursuit

U.S. v. Anderson, 688 F.3d 339 (8th Cir. 2012)

Anderson sold cocaine base to an undercover police officer. Other officers moved in to arrest him, but Anderson fled into an apartment building. The officers stepped onto the balcony of the apartment unit where Anderson had gone and saw him and another individual inside. The court held the officers' warrantless entry onto the balcony was lawful under the hot pursuit exception to the *Fourth Amendment's* warrant requirement. Where the police attempt to make an arrest for a "serious offense" in a public place, they may pursue the suspect into a private home or business without obtaining a warrant, as long as their pursuit is "immediate and continuous."

In this case, because Anderson committed a "serious offense" by selling cocaine base to an undercover police officer and because the other officers "immediately and continuously" pursued Anderson after the transaction, they entered the balcony of the apartment lawfully. As a result, the observations by the officers while on the balcony did not taint the affidavit that the officers drafted in support of the warrant they later obtained to search the apartment.

The court also held Anderson's girlfriend, the lessee of the apartment where he had fled, first gave the officers consent to enter the apartment to detain Anderson and then later gave them consent to conduct a protective sweep.
Click **HERE** for the court's opinion.

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Inventory Searches

U.S. v. McKinnon, 681 F. 3d 203 (5th Cir. 2012)

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

The Supreme Court has recognized the police may seize vehicles without a warrant in furtherance of their community caretaking function. This usually occurs when officers impound damaged or disabled vehicles or vehicles that violate parking ordinances or impede the flow of traffic. As long as an officer's decision to impound a vehicle for community caretaking purposes is reasonable, it will not violate the *Fourth Amendment.*

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

In addition, while one of the passengers possessed a valid driver's license, the car's registration sticker was expired, so it could not have been lawfully driven away from the scene.
Finally, the HPD tow policy provides for the towing of vehicles when the owner is not able to designate a tow operator to remove the vehicle and no other authorized person is present. The registered owner of the vehicle was not present to designate a tow operator and there was nothing to suggest that she had authorized either of the two passengers, who were present, to operate her car.

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

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

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U.S. v. Jackson, 682 F.3d 448 (6th Cir. 2012)

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

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

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

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U.S. v. Cervantes, 678 F. 3d 798 (9th Cir. 2012)

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

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

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

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

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Plain View Seizure

U.S. v. Crooker, 688 F.3d 1 (1st Cir. 2012)

The court held the agents lawfully seized ammunition and a cigarette-rolling device, from a tackle box, under the plain-view exception to the warrant requirement. First, the agents were lawfully present in Crooker's house. Second, the warrant authorized the agents to search for evidence of biological weapons, including small amounts of ricin powder, which could have been concealed in the tackle box. Third, once inside the tackle box, the agents had probable cause to seize the ammunition and because they knew that Crooker could not lawfully possess it, and the rolling device, because the agents believed it was used to roll marijuana cigarettes.

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

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United States v. Schmidt, 700 F.3d 934 (7th Cir. 2012)

Police officers responded to a report of multiple gunshots that were heard at an intersection near Schmidt's residence. During the investigation, officers learned one person had been shot in the leg and already taken to the hospital. While canvassing the area two hours later, an officer approached a two-duplex unit from an alley. The officer saw bullet holes in a car parked in the alley as well as bullet holes in Duplex A. The officer also saw several spent shell casings on the ground near Duplex A and one spent shell casing within the backyard. Without a warrant, the officer entered the common backyard shared by Duplexes A and B through an open chain-link gate, and panned the area with his flashlight. In the corner of the yard, the officer saw the scope and breech of a firearm. The officer moved a plastic lid that was covering the stock of the firearm, pushed some tall grass aside, and discovered that the firearm was a .308 caliber rifle, which he seized. The rifle belonged to Schmidt, a convicted felon, who lived in Duplex B.

Schmidt claimed the back yard was curtilage and that the officer violated the *Fourth Amendment* by entering it without a warrant. Even if the officer was lawfully in the backyard, Schmidt argued that the officer did not have the right seize the rifle.

Without deciding whether the backyard was curtilage, the court held that the officer's entry was justified by exigent circumstances. Although two hours had passed since the last gunshots had been heard, the officer saw bullet holes in a car adjacent to the backyard, bullet holes in Duplex A, spent shell casings on the ground and one spent shell casing in the yard. These circumstances made it reasonable for an officer to believe, at the time of the search, that people in the backyard area may have recently been shot and in need of immediate aid. Consequently, the officer's warrantless presence in the backyard was justified whether the backyard was curtilage or not.

The court further held the seizure of the rifle was justified under the plain view doctrine. First, the officer was lawfully present in the backyard. Second, the rifle's scope and the breech were clearly visible to the officer, so he knew that the object was a firearm before he moved the plastic lid and grass to see the stock and caliber of the rifle. Finally, based on the report of recent

gunshots, the bullet holes and the spent shell casings, the officer had probable cause to believe the rifle was linked to those gunshots.

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

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U.S. v. McManaman, 673 F. 3d 841 (8th Cir. 2012)

Federal agents arrested the defendant at his house on various gun and drug charges. The agents found marijuana and methamphetamine pipes in his pockets during their search incident to arrest. An agent then asked the defendant if there was anything else illegal inside the house and the defendant told them that there was a shotgun in the basement. While searching for the shotgun, the agents discovered boxes that contained child pornography magazines.

Prior to his trial on the gun and drug charges, the district court found the agents violated the defendant's *Fifth* and *Sixth Amendment* rights, but concluded these violations did not require the suppression of the shotgun because of the inevitable discovery doctrine. Specifically, the court ruled that the drug paraphernalia found in the defendant's pockets when he was arrested would have provided probable cause for a search warrant of the house that would have led to the discovery of the shotgun.

At his trial on the child pornography charges, the defendant argued the evidence of child pornography would have been outside the scope of a properly obtained search warrant for guns and drugs. The court disagreed, holding that the child pornography evidence would have been discovered under the plain view doctrine if the police had obtained a warrant. The child pornography magazines were found in a box that would have been subject to search under a warrant for guns and drugs and the incriminating nature of the evidence was immediately apparent to the agents. Even if the pictures were folded up in the box, the agents could have lawfully unfolded them to see if they contained drugs because drugs are often contained within folded pieces of paper.

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

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U.S. v. Hastings, 685 F.3d 724 (8th Cir. 2012)

The court held the plain-view doctrine allowed the officers to seize the firearms from the vehicle even though the search warrant did not list them as items to be seized. Hastings claimed that plain-view did not apply because the incriminating nature of the firearms was not immediately apparent. The court noted that for the incriminating nature of the firearms to be immediately apparent, the officers only need probable cause to associate the firearms with criminal activity, not absolute certainty. Here, passenger in the vehicle was suspected of committing a bank robbery where he used a note saying that he had a gun, a fact that the officers included in the search warrant affidavit. Under these circumstances, the court concluded that the incriminating nature of the rifle and handgun was immediately apparent.

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

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Protective Sweeps

U.S. v. Jones, 667 F. 3d 477 (4th Cir. 2012)

Officers arrested Jones on an outstanding arrest warrant while he was standing in the open doorway of his house. While one officer placed Jones in handcuffs, other officers entered the house through the front door to conduct a protective sweep, even though Jones and his wife had told the officers that there was no one else present. The officers saw several items in plain view that they knew to be precursor materials for the manufacture of methamphetamine. The officers secured the house while a search warrant was obtained. The subsequent search of the house uncovered additional evidence of methamphetamine manufacturing.

The court held that the protective sweep was lawful. Officers are permitted to perform a protective sweep, beyond areas immediately adjoining the arrest area, when they have articulable facts that would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. Here, the officers saw seven vehicles parked at the Jones residence at 1:00 a.m., while only encountering Jones and his wife. The officers also had first-hand knowledge that known drug users frequented the house. As a result, was reasonable for the officers to believe that there were others in the house that could have posed a threat to them.

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

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U.S. v. Laudermilt, 677 F. 3d 605 (4th Cir. 2012)

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

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

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

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

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

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

U.S. v. Taylor, 666 F. 3d 406 (6th Cir. 2012)

Officers went to Taylor's house and arrested him and another woman pursuant to valid warrants. During the protective sweep, officers recovered a handgun and bag of marijuana on a dresser and a machine gun in a closet. The officers also recovered a handgun concealed in a couch. Based on these findings, the officers obtained a search warrant and discovered more drugs.

The court held that officers' initial entry into the home was lawful. The officers knocked on the door, which they were entitled to do. After realizing that the woman who answered the door had an active arrest warrant, they lawfully entered the house to arrest her.

The court also held the officers had conducted a valid protective sweep of the home. The police can search a home pursuant to arresting someone there if there are articulable facts that would warrant a reasonably prudent officer in believing that the area to be swept harbors a person posing a danger to those on the arrest scene. Here, the officers had reason to believe there were more people in the house. Prior to their entry, the officers had seen several people entering the house and earlier surveillance suggested that it had been a hub for a drug trafficking organization. Additionally, during a previous search of the house, officers had discovered guns and the current arrest warrants included charges for weapons violations. Finally, the officers saw other people in the house when they entered. The officers were entitled to sweep the areas where they had seen these people and it was in these areas that the first guns and drugs were found.

Finally, the court held the search of the couch was reasonable. One of the women in the house told the officers that there was a gun in that location after he directed her to sit there to nurse her baby. Although this search was not part of the protective sweep, it was reasonable for the officer to search this area, before he relinquished control of it to an occupant of the house, and take possession of the gun.

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

*****

Searches Incident to Arrest (vehicles)

U.S. v. McCraney, 674 F. 3d 614 (6th Cir. 2012)

An officer conducted a traffic stop on a vehicle after it failed to dim its headlights as it drove past him. The officer arrested the driver for driving with a suspended license and McCraney, the owner of the car, for unlawful entrustment of a motor vehicle. Before the two men were handcuffed, back-up officers searched the car and seized an unlawful firearm. Officers then handcuffed McCraney and the driver and placed them under arrest.

The government argued the warrantless search of the vehicle was either a valid search incident to arrest or a valid *Terry* frisk of the vehicle because the officers had reasonable suspicion to believe the occupants were dangerous and may have access to weapons.

First, the police are authorized to search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Neither side argued that it was reasonable to believe that the vehicle contained evidence of either driving with a suspended license or unlawful entrustment. However, the government argued that it would have been possible for either McCraney or the driver to gain access to the passenger compartment at the time of the search. The court disagreed. Although neither McCraney nor the driver were handcuffed, they were standing two or three feed behind the rear bumper of the vehicle, as instructed, with three officers standing around them. It was not improper for the district court to hold that McCraney and the driver were not within reaching distance of the passenger compartment at the time of the search.

Next, the court held that the original traffic violation for failing to dim headlights and the subsequent arrests for driving under suspension and negligent entrustment did not provide reasonable suspicion to believe that McCraney or the driver were dangerous or had access to weapons in the vehicle. Additionally, the arresting officer testified that if McCraney's license had not also been suspended, he would have let him drive the vehicle away from the scene. The court found that this was not consistent with an officer who had reasonable suspicion to support a *Terry* frisk of the vehicle.

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

*****

U.S. v. Gill, 685 F.3d 606 (6th Cir. 2012)

The court held the search of the Acura, incident to Gill's arrest, was lawful because his arrest occurred before the Supreme Court's decision in *Arizona v. Gant* in 2009. At the time of Gill's arrest, officers were allowed to search a vehicle incident to a suspect's arrest even when the suspect no longer occupied the vehicle.

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

*****

United States v. Smith, 697 F.3d 625 (7th Cir. 2012)

Smith, Evans and Swanson robbed a bank and fled in a green Cadillac. FBI agents later saw the Cadillac pull into a parking spot on the street. Approaching with guns drawn, the agents detained Smith when he got out of the Cadillac. Evans and Swanson then drove off at a high speed with other agents in pursuit. Evans crashed the Cadillac, fled on foot and was later apprehended. The agents apprehended Swanson at the scene of the crash. After confirming that the individuals in the Cadillac matched the descriptions of the bank robbers, the agents searched the Cadillac. Inside the car, the agents found a gun similar to the one used in the robbery, as well as clothing, black face masks, black stocking hats and multiple sets of gloves. The Cadillac was towed and later subjected to an inventory search. While agents pursued the Cadillac, another agent detained

Smith in handcuffs for ten minutes until another agent arrived with photographs of the robbers taken by cameras in the bank. Smith's clothing matched one of the bank robber's clothing in the photographs and the agent arrested him. The agent searched Smith and recovered a pair of black gloves and a Velcro face mask.

First, Smith and Evans argued the agents did not have probable cause to support their warrantless search of the Cadillac. The court disagreed. Smith was a mere passenger, with no ownership interest in the Cadillac. As such, the court held Smith had no reasonable expectation of privacy in the Cadillac; therefore, his *Fourth Amendment* rights were not violated.

As for Evans, the agents arrested him for bank robbery immediately after he crashed the Cadillac. Under *Arizona v. Gant*, police officers may search a vehicle incident to a recent occupant's arrest if it is reasonable to believe the vehicle contains evidence of the offense of arrest. Here, the agents had reason to believe there was evidence of the bank robbery in the Cadillac. The robbery had just occurred, the occupants of the Cadillac matched the descriptions of the bank robbers and Evans sped off when the agents approached the vehicle. Even if the agents had not searched the Cadillac incident to Evans' arrest, the evidence would have been discovered during the lawful inventory search of the vehicle that occurred afterward.

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

*****

U.S. v. Tschacher, 687 F.3d 923 (9th Cir. 2012)

A police officer arrested Tschacher for driving with a suspended license. While Tschacher was handcuffed in his patrol car, the officer searched Tschacher's vehicle incident to arrest and found two illegal firearms. Tschacher argued that the firearms should have been suppressed because the search of his vehicle did not comply with *Arizona v. Gant*. Under *Gant*, police officers may search the passenger compartment of a vehicle incident to arrest only if the arrestee might have access to the vehicle at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of the arrest.

While neither of these factors was present when the officer searched Tschacher's vehicle, this incident occurred before the Supreme Court's ruling in *Gant*. The Supreme Court has held it is unnecessary to suppress evidence under *Gant* where the search occurred prior to the *Gant* decision. As a result, the court held the illegal firearms should not be suppressed because the search of Tschacher's vehicle occurred before the *Gant* was decided and that it was lawful based on the case law at the time.

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

*****

Searches Incident to Arrest (cellphones)

United States v. Rodriguez, 702 F.3d 206 (5th Cir. 2012)

The court cited *U.S. v. Finley*, where the Fifth Circuit held the search of the contents of a cell phone found on a person incident to his arrest, for evidence of his crime, was permitted. As a

result, the court held the warrantless search of the contents of Rodriguez's cell phone, incident to his arrest, was lawful.

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

*****

Qualified Immunity / Absolute Immunity / Civil – Municipal - Supervisor Liability / *Bivens*

Prosecutors

Giraldo v. Kessler, 694 F.3d 161 (2nd Cir. 2012)

Giraldo went to the hospital after she suffered a laceration above her eye. Suspecting domestic abuse, doctors contacted the police. Police officers interviewed Giraldo and her boyfriend and eventually arrested the boyfriend. After her treatment, the officers took Giraldo against her will to the district attorney's office where two prosecutors interviewed her. Even though Giraldo told the prosecutors she did not want to talk to them, they interviewed her for two hours before she was released. Giraldo sued the prosecutors for violating her civil rights.

The court held that the prosecutors were entitled to absolute immunity. Absolute immunity bars a civil suit against a prosecutor for advocacy conduct that is intimately associated with the judicial phase of the criminal process. This immunity covers conduct in court as well as conduct preliminary to the initiation of a prosecution that occurs outside of court. In this case, the actions by the prosecutors were well within their legitimate functions as advocates. The police had arrested Giraldo's boyfriend before the prosecutors interviewed her. Once that arrest occurred, legal decisions at the core of the prosecutorial function had to be made quickly. For example, the prosecutors had to determine whether to pursue the charges, and if so, make decisions concerning arraignment and bail. The prosecutors' interrogation of Giraldo was clearly in preparation for a court proceeding in which they would be acting as advocates.

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

*****

Elizondo v. Green, 671 F. 3d 506 (5th Cir. 2012)

The court held Officer Green's use of force was reasonable and that he was entitled to qualified immunity. The subject ignored repeated instructions to put down the knife he was holding and he seemed intent on provoking Green. When Green discharged his firearm, the subject was hostile, armed with a knife and in close proximity to him and moving closer. Considering the totality of the circumstances, it was reasonable for Green to conclude that the subject posed a threat of serious harm.

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

*****

Waganfeald v. Gusman, 674 F. 3d 475 (5th Cir. 2012)

New Orleans police officers arrested Waganfeald and his friend for public intoxication approximately forty-eight hours before Hurricane Katrina struck the city. After being evacuated to several different locations, the two men were released from custody approximately five weeks later. Under Louisiana law, a person who is arrested and in custody is entitled to a determination of probable cause within forty-eight hours of arrest. The statute states if this does not occur, the arrested person shall be released on his own recognizance. The men sued several law enforcement officers, claiming that their detention for this five-week period, without the benefit of a probable cause determination within forty-eight hours of their arrests, was unlawful.

The court disagreed. If a probable cause determination is not made within forty-eight hours of arrest, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstances. The court held Hurricane Katrina was a bona-fide emergency within the meaning of the emergency exception to the forty-eight hour rule. As a result, the officers did not falsely imprison the men by holding them without a probable cause determination rather than releasing them into Hurricane Katrina.

The court also held the officers did not act unreasonably by refusing to allow the men to use their cell phones to make calls after it was discovered that the landline telephones were not working. When the men were booked into the detention facility, jail personnel confiscated their cell phones. There was no established case law that would have put the officers on notice that they had to allow pre-trial detainees the use cell phones when the landline telephone service was disrupted. To the contrary, the court has ruled that prisoners have no right to unlimited telephone access and have afforded prison officials a great deal of deference in implementing policies that are needed to preserve order and discipline and to maintain institutional security.

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

*****

Winslow v. Smith, 696 F.3d 716 (8th Cir. 2012)

Six individuals were convicted in 1989 for participating in a 1985 rape and murder. However, in 2008, DNA testing established the semen and blood type found in the victim's apartment came from an individual who had no connection to any of the six individuals. Three of the six who were still in prison were released and all six received full pardons. Winslow and three others sued members of the sheriff's department and the prosecutor for violating their rights to due process by recklessly investigating the murder and by coercing them into pleading guilty.

The court held the district court improperly granted the law enforcement officer-defendants qualified immunity. The court found the evidence allowed for a reasonable inference that the officers' investigation crossed the line from gross negligence to recklessness as the officers manufactured false evidence and repeatedly ignored any evidence that did not fit their theory of the case. Specifically, there was evidence to suggest that the officers systematically coached witnesses into providing false testimony that was consistent with their theory as to how the murder had been committed.

Even though five of the individuals pled guilty in the case, the court held that their due process rights were still violated because the prosecutor introduced the false evidence generated by the officers at the plea hearing.

The court held the prosecutor was entitled to absolute immunity. Although there was evidence that the prosecutor consulted with one of the officers about the investigation, there was no evidence that any action taken by the prosecutor before he filed the criminal complaints was unconstitutional as he relied upon the information provided by the officers. Once the charging documents were filed, the prosecutor was protected by absolute immunity.

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

*****

Witnesses

Rehberg v. Paulk, 132 S. Ct. 1497 (S. Ct. 2012)

Paulk, the chief investigator for the district attorney's office, was the sole "complaining witness" at three different grand jury proceedings that resulted in three separate indictments being returned against Rehberg. After all of the indictments were dismissed, Rehberg brought suit under *42 U.S.C. § 1983* claiming that Paulk presented false testimony to the grand jury.

The Eleventh Circuit Court of Appeals dismissed Rehberg's suit, holding that Paulk had absolute immunity from a *§ 1983* claim, based on his grand jury testimony. The Supreme Court affirmed, holding that a witness in a grand jury proceeding is entitled to the same absolute immunity from suit under *§ 1983* as a witness who testifies at trial.

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

*****

Use of Force Situations (Detention / Arrest)

Valentin v. Mueller, 680 F. 3d 70 (1st Cir. 2012)

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

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

the area, the agents reasonably could have concluded that the level of force that they used was appropriate.

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

*****

Terranova v. State of New York, 674 F. 3d 1298 (2d Cir. 2012)

State troopers stopped traffic on a highway to apprehend several speeding motorcyclists who were driving towards their location. One of the motorcyclists collided with a stopped car causing two other motorcyclists to crash. Terranova, who was driving one of the motorcycles, died at the scene. Terranova's family sued the troopers claiming they had used excessive force to unlawfully seize him. At trial, the jury found the troopers were not liable for Terranova's death. The family appealed, claiming that *Tennessee v. Garner* established the constitutional standard for the use of deadly force and that by failing to instruct the jury on the *Garner* factors, the district court did not accurately explain the law to the jury.

The court disagreed. Claims that the police used excessive force are judged under the *Fourth Amendment's* objective reasonableness standard. However, following *Garner*, some courts held that the Supreme Court established a special rule concerning deadly force, which could require a separate jury instruction in any case in which police conduct created a substantial risk of death or serious bodily injury. More recently in *Scott v. Harris*, the Supreme Court rejected the view that *Garner* created a special rule that applies when officers use deadly force, stating that "*Garner* was simply an application of the *Fourth Amendment's* reasonableness test . . . to the use of a particular type of force in a particular situation."

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

*****

Payne v. Jones, 696 F.3d 189 (2nd Cir. 2012)

Payne's wife took him to the emergency room after he accidentally cut his thumb. Payne, a Vietnam War veteran, who suffers from severe post-traumatic stress disorder, was combative and disoriented when he arrived at the emergency room. Hospital staff called the police and Officer Jones responded. Officer Jones arrested Payne under a New York Statute that authorizes the arrest of individuals who appear to be mentally ill and a danger to themselves. While waiting for an ambulance to transport Payne to a mental health facility, Officer Jones slapped Payne in the side of the head. Once at the mental health facility, Payne resisted Officer Jones' efforts to move him from a gurney into a room at the facility. Officer Jones wrapped Payne in a bear hug and pushed him into the room. As Officer Jones was placing Payne on the bed, he saw Payne's USMC tattoos and made a disparaging remark about the Marine Corps. In response, Payne kicked Officer Jones in the groin. Officer Jones then punched Payne, who was still handcuffed, seven to ten times in the neck and face until a nurse grabbed Officer Jones and he stopped. A doctor examined Payne and found that his face was bloody and swollen. The doctor reported the incident to Officer Jones' department. The police department investigated and terminated Officer Jones, finding that he had committed an egregious assault against Payne and then lied about it to the internal affairs investigators.

Payne sued Officer Jones claiming that he had used excessive force and had committed a battery against him. The case went to trial and the jury returned a verdict against Officer Jones. The jury awarded Payne $60,000 in compensatory damages and $300,000 in punitive damages.

While Officer Jones' conduct was reprehensible and justified the imposition of punitive damages, the court held that $300,000 in punitive damages was unreasonably high. The court ordered a new trial to determine the amount of punitive damages, unless Payne agreed to reduce the amount of punitive damages to $100,000.

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

*****

Marcavage v. National Park Service, 666 F. 3d 856 (3d Cir. 2012)

The court held that the NPS Rangers were entitled to qualified immunity from Marcavage's claim that they arrested him in violation of the *First and Fourth Amendments* and the *Equal Protection Clause of the Fourteenth Amendment*.

Although this court ultimately held otherwise, the fact that two judges in the court below found no *First Amendment* violation by the Rangers indicates that Marcavage's constitutional right to demonstrate on the sidewalk was not clearly established. At the time, it was reasonable for the Rangers to believe that they could lawfully escort Marcavage off the sidewalk and issue him a citation. They should not be denied qualified immunity simply because this belief turned out to be mistaken.

Regarding Marcavage's arrest, the court found that the government presented sufficient evidence for the Magistrate Judge to have reasonably found Marcavage committed the charged offense. The fact that Marcavage's conviction was eventually reversed is of no consequence. A criminal conviction requires proof of guilt beyond a reasonable doubt, a much higher standard than that required for a finding of probable cause to arrest.

Finally, the court held that Marcavage was not similarly situated to the tourists, the horse and carriage operators and the breast-cancer-walk participants who were also on the sidewalk. Unlike the others, Marcavage was escorted from the sidewalk because he was leading a demonstration without a permit, creating excessive noise and potentially interfering with traffic flow.

Click **HERE** for the court's opinion. See **7 Informer 10** for the summary of the criminal case.

*****

James v. City of Wilkes-Barre, 700 F.3d 675 (3rd Cir. 2012)

Cheryl James' fifteen-year-old daughter, Nicole, sent a text message to a friend stating that she planned to commit suicide. The friend called 911 and police officers were dispatched to James' house. When questioned by her parents, Nicole told them that she had changed her mind. However, one of the officers told the parents that Nicole still had to go to the hospital for an evaluation. The parents eventually consented but refused to accompany Nicole to the hospital. After an officer insisted, Cheryl James agreed to ride to the hospital in the ambulance with her

daughter. James later sued the officer for false arrest and false imprisonment for insisting that she accompany Nicole to the hospital in the ambulance.

The court held that the officer was entitled to qualified immunity because James was not seized in violation of the *Fourth Amendment*; therefore, no constitutional violation occurred.

James' allegations were insufficient to establish a show of authority that rose to the level of a *Fourth Amendment* seizure. The officer's insistence that James accompany her daughter to the hospital would not cause a reasonable person to feel powerless to decline the officer's request.

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

*****

Seremeth v. Board of County Commissioners, 673 F. 3d 333 (4th Cir. 2012)

Officers were dispatched to Seremeth's house in response to a domestic disturbance call. The dispatcher told the officers the entire family was deaf. A few of the officers already knew this because they had responded to similar calls at Seremeth's house in the past. When the officers arrived, they handcuffed Seremeth's wrists behind his back. The officers requested a sign–language interpreter through a company that had a contract with the county. However, the contract provided that the interpreter had one hour to arrive at their location. In the meantime, Seremeth's father, attempted to interpret for Seremeth and the officers. Additionally, an officer, who was studying sign language arrived, however, her efforts to communicate with Seremeth failed because of her lack of fluency. An hour and fifteen minutes after their arrival, the officers released Seremeth after concluding that no crime had occurred. Seremeth sued the officers under the Americans with Disabilities Act (ADA) and the Rehabilitation Act claiming that the officers had not reasonably accommodated him during their investigation.

The court first ruled that the ADA applies to law enforcement officers when they are conducting criminal investigations. The court then ruled that the officers were entitled to qualified immunity because their conduct toward Seremeth was reasonable under the circumstances. It was reasonable for the officers to attempt to accommodate Seremeth's disability by calling the contract interpreter as well as the officer, who was studying sign language, to assist in communication and by attempting to use Seremeth's father as an interpreter. Due to the exigencies inherent in responding to a domestic violence situation, the court stated that no further accommodations were required than the ones made by the officers. The officers were not required to wait until the contract interpreter arrived in order to perform their duties and attempt to question Seremeth.

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

*****

Merchant v. Bauer, 677 F. 3d 656 (4th Cir. 2012)

Officer Bauer arrested Merchant for impersonation of a police officer. At the time, Merchant was employed as Deputy Director for a county Department of Corrections in Maryland. The court held Bauer was not entitled to qualified immunity. Under the circumstances, no reasonable

person would have believed that Merchant violated the Impersonation Statute; therefore, Bauer lacked probable cause to arrest her.

Merchant accurately told Bauer that she was a Deputy Director in the Department of Corrections and that she worked in public safety. Even though Merchant referred to her county-issued vehicle as a "police car," she did so by using air-quotes, which suggested that the term "police car" was not actually accurate for the situation. Merchant also carried a lawfully issued badge that she did not display to Bauer during their encounter.

After the encounter, Bauer confirmed Merchant was employed by the Department of Corrections and that some of its non-law enforcement officers carried badges. This information served to corroborate Merchant's representations to Bauer rather than support a claim that she had violated the Impersonation Statute. A prudent person in Bauer's position would not conclude that Merchant's badge, which he was never shown nor asked to see, was evidence that Merchant was impersonating a law enforcement officer.

The court further held at the time of Merchant's arrest, it was clearly established that police officers were not allowed to arrest individuals for impersonating a police officer without probable cause.

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

*****

Durham v. Horner, 690 F.3d 183 (4th Cir. 2012)

Officer Horner arrested Michael Durham, who was incarcerated for more than three months, before the prosecutor realized the wrong Michael Durham had been arrested and indicted. The court held Horner was entitled to qualified immunity. The court concluded there was enough evidence for a reasonable law enforcement officer to believe Durham was involved in the three drug transactions for which he was charged, even though it turned out that the officer was mistaken.

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

*****

Cantrell v. City of Murphy, 666 F. 3d 911 (5th Cir. 2012)

Officers responded to a residence on October 2, 2007 after Ave Cantrell called 911 when she found her twenty-one month old son entangled by his neck and arm in soccer net. The officers pulled Ave away from her son and had her wait in an adjacent bedroom. To the officers, the child appeared to be deceased. Two minutes later, paramedics arrived. They carried the child to the ambulance and began life-saving procedures. During this time, Ave was extremely distraught and at one point asked one of the officers for her gun so she could kill herself. The officers took Ave out of the residence and to the police station in an attempt to interview her and because of her suicidal statements. At the station, Ave made more suicidal statements, which prompted the officers to seek an emergency mental health commitment. The child died two days later at the hospital.

The Cantrells claimed the officers denied their son his due process rights by interfering with attempts to perform life saving measures and by failing to perform such measures themselves. They argued that the officers created a "special relationship" with their child when they separated him from his mother and that this relationship imposed a duty upon them to care for and protect the child from his death. They claimed the officers breached this duty by failing to administer aid and by delaying treatment from the paramedics.

The court held the officers were entitled to qualified immunity. At the time of the incident there were no cases involving sufficiently similar situations would have provided reasonable officers with notice that they had an affirmative constitutional duty to provide medical care and protection to a young child when they temporarily physically separate the child from his mother.

Next, the court held the officers were entitled to qualified immunity on the Cantrells' claim that the officers unlawfully seized Ave under the *Fourth Amendment* when they transported her from her house to the police station.

Based on the suicidal statements made by Ave at her home, a reasonable officer would have had probable cause to detain her for emergency mental commitment under Texas law.

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

*****

Jones v. Lowndes County, Mississippi, 678 F. 3d 344 (5th Cir. 2012)

Jones and Nance sued the county, the Sheriff and Bryan, a deputy sheriff, claiming their rights were violated when they were detained for more than 48 hours without a probable cause hearing or an initial appearance.

Bryan arrested Jones and Nance at 5:33 p.m. on a Saturday afternoon. Because there was no judge on duty over the weekend, Bryan attempted to schedule an appearance before a judge on Monday afternoon around 2:30 p.m., when he returned to work his normal shift. However, the chief judge had left for the day and there was no other judge available. Jones and Nance appeared before a judge on Tuesday morning and the judge determined that their arrests were supported by probable cause.

The court held Bryan was entitled to qualified immunity. He had no way of knowing the county judges would close their courtrooms early that Monday afternoon or that their doing so was potentially unlawful. Under these circumstances, the court concluded that a reasonable officer would not have known he was required to make alternative arrangements, such as coming in early on Monday before his normal shift or preparing a written report to allow another officer to attend the probable cause hearing in his place.

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

*****

Khan v. Normand, 683 F.3d 192 (5th Cir. 2012)

Khan, who suffered from a mental illness, began running around inside a supermarket screaming that people outside were trying to kill him. A security guard and an off-duty police officer

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

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

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

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

*****

Nettles-Nickerson v. Free, 687 F.3d 288 (6th Cir. 2012)

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

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

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

*****

Green v. Throckmorton, 681 F.3d 853 (6th Cir. 2012)

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

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

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

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

*****

Patrizi v. Connole, 690 F.3d 459 (6th Cir. 2012)

Police officers arrested Patrizi, an attorney, for "obstructing official police business" in violation of a local ordinance, after they claimed she interfered with their investigation of an assault at a nightclub. After the criminal charge was dismissed, Patrizi sued the officers claiming that she was arrested without probable cause.

The obstruction ordinance under which Patrizi was arrested requires an affirmative act that interrupts police business. Convictions under this statute that are based on speech towards the officer have been upheld when that speech involved yelling, cursing, aggressive conduct and/or persistent disruptions, after warnings from the police, against disrupting the investigation.

Here, the court concluded Patrizi's actions did not constitute an affirmative act under the obstruction ordinance. Patrizi asked the officers questions in a calm and measured manner; she did not continuously interrupt the officers and she did not in any way exhibit aggressive, boisterous or unruly disruptive conduct. Because if was clearly established at the time of her arrest Patrizi's conduct did not constitute an affirmative act under the obstruction ordinance, the court refused to grant the officers qualified immunity.

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

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Embody v. Ward, 695 F.3d 577 (6th Cir. 2012)

Embody went to a state park in Tennessee, dressed in camouflage and armed with a Draco AK-47 pistol that had an eleven-and-one-half inch barrel and a fully loaded thirty-round clip attached to it. Tennessee law allows individuals with gun permits to carry handguns in public places owned or operated by the state (*Tenn. Code 39-17-1311(b)(1)(H)*) and defines a "handgun" as "any firearm with a barrel length of less than twelve inches" designed or adapted to be fired with one hand.

A park ranger disarmed Embody at gunpoint and detained him to determine whether the AK-47 was a legitimate pistol under Tennessee law. Once the ranger determined that Embody had a valid gun permit and that the AK-47 fit the definition of a handgun under state law, he returned the gun to Embody and released him. Embody sued the officer, claiming violations of his constitutional rights.

The court held the park ranger was entitled to qualified immunity. First, Embody's AK-47, carried openly and fully loaded through a state park gave the ranger ample reason to suspect that Embody possessed an illegal firearm. The barrel was a half-inch shy of the legal limit and when coupled with the thirty-round ammunition clip, looked more like a rifle than a handgun. In addition, Embody had painted the tip of the barrel of the gun orange, typically an indication that the gun is a toy. An officer could fairly suspect that Embody had used the paint to disguise an illegal weapon. Second, the scope of the ranger's investigation was reasonable. Ordering Embody to the ground at gunpoint was reasonable under the circumstances as was the two and one half hours detention the ranger spent trying to confirm or dispel his suspicions, especially when Embody insisted that a supervisor be called to the scene, which he was told, would delay his release.

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

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Marcilis v. Township of Redford, 693 F.3d 589 (6th Cir. 2012)

Federal and state law enforcement officers obtained warrants to search two residences for evidence of drug distribution. Marcilis sued the officers claiming the officers used excessive force, lacked probable cause by relying upon stale information to obtain the warrants, seized items outside the scope of the warrants, and illegally detained individuals during the execution of the warrants.

The court disagreed and granted the officers qualified immunity. First, the use of handcuffs and display of firearms during the execution of the warrants did not constitute excessive force. The officers could have reasonably believed that these actions were necessary to control the situation because they were searching for weapons and drugs in both homes and they knew that one of the occupants had previously been convicted of assaulting a police officer.

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

*****

King v. Taylor, 694 F.3d 650 (6th Cir. 2012)

Officer Taylor shot and killed King while attempting to arrest him at King's house. The court held that Taylor was not entitled to qualified immunity against the plaintiffs' claim of excessive force.

After viewing the facts in the light most favorable to King, the court found that expert testimony and common sense could lead a jury to reject the officers' testimony that King was pointing a gun at them when Officer Taylor shot him.

First, the officers unequivocally testified King pointed a gun at them while facing them. If the officers are to be believed, the bullet should have entered the left side of King's face and traveled to the right. In addition, because King was seated and at a lower position than Taylor, who was standing, the bullet should have traveled slightly downward through King's head. However, the bullet did not take this path. According to the autopsy report, the bullet entered the right side of King's face and traveled two and one half inches to the left and three inches upward. The path of the bullet is consistent with King being in a reclined position looking straight ahead, not at the officers when shot, rather than sitting up and looking toward the officers as they claimed. This body position is consistent with the plaintiff's theory that King was shot while lying on his couch, not making any threatening gestures toward the officers.

Second, the officers' testimony that King was pointing a gun at them before he was shot was called into dispute by expert testimony. After he was killed, King was found with a gun in his right hand, which was resting on his right hip. Two medical experts stated that the extent of King's head injury would have caused his outstretched arm to fall to the floor, not neatly into his lap. What exactly happened just before King was shot is a question for the jury because both sides' theories of what occurred are sufficiently supported by the evidence in the record.

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

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Campbell v. City of Springboro, 700 F.3d 779 (6th Cir. 2012)

Spike, a police dog in the Springboro Police Department's canine unit, attacked Samuel Campbell and Chelsie Gemperline in two separate incidents. Both sued Officer Clarke, Spike's handler, the Chief of Police and the City of Springboro alleging excessive force, failure to supervise, failure to train as well as state-law claims for assault and battery.

First, the court held a reasonable jury could find that Officer Clarke unreasonably deployed Spike against Campbell and Gemperline; therefore, the district court properly denied him qualified immunity.

According to Campbell, when Officer Clarke found him, he was lying face down with his arms at his sides and he never resisted arrest. In addition, there was ample evidence to suggest that the deployment of Spike in the search for Campbell was unreasonable because by Officer Clarke's own admission, he had failed to adequately maintain Spike's training. Officer Clark knew that Spike had issues with excessive biting and the failure to keep Spike on the accepted training regimen may have played a role in his aggressive behavior.

In Gemperline's case, Officer Clark arrested her for underage drinking and placed her in the back of his patrol car. Gemperline slipped the handcuffs, lowered the window in the patrol car and escaped. She fled down the street and hid in a children's plastic playhouse a short distance away. When told Gemperline had escaped, Officer Clarke was heard to say, "This bitch, I've had it" and "She's gonna get a nice rude awakening here in a second or two." Officer Clarke used Spike to track Gemperline who leapt headfirst through the window of the playhouse and bit Gemperline. As soon as Gemperline screamed, Officer Clarke grabbed Spike by the collar so he would release her.

While Gemperline may have committed a felony by escaping from police custody, the court found the crime was not violent and that she had not harmed anyone. Officer Clarke initially arrested Gemperline for a minor crime. She was neither fleeing nor posing a threat to anyone when Spike bit her. A jury could find that Officer Clarke's use of Spike to apprehend Gemperline was objectively unreasonable. In addition, there was evidence to suggest that the reason Officer Clarke grabbed Spike by the collar to get him off Gemperline may have been that Spike did not always respond to Clarke's verbal commands as consistently as he should have. This suggested a link between Gemperline's injury and Spike's inadequate training.

Second, the court agreed the district court properly denied the Chief of Police qualified immunity. The Chief allowed Spike in the field even after his training lapsed and he never required appropriate supervision of the canine unit, letting it run itself. He failed to establish and publish an official K-9 unit policy and he seemed oblivious to the increasing frequency of dog-bite incidents involving Spike. The Chief also ignored Officer Clarke's complaints regarding his need to keep Spike up-to-date on his training. A jury could reasonably conclude that the Chief's apparent indifference to maintaining a properly functioning K-9 unit led to the injuries suffered by Campbell and Gemperline.

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

*****

Fleming v. Livingston County, Illinois, 674 F. 3d 874 (7th Cir. 2012)

An officer arrested Fleming for breaking into a home and fondling two teenage girls. The state filed criminal charges against Fleming, but those charges were eventually dismissed. Fleming brought suit against the officer for false arrest under *42 U.S.C. § 1983*.

The court held the officer was entitled to qualified immunity. An officer is entitled to qualified immunity for false arrest as long as he reasonably believed that he had probable cause to arrest a suspect. An officer is not required to show that he knew with certainty that the person he arrested committed the offense.

Here, the officer spotted Fleming, in the early morning hours, approximately seven minutes after being told of a possible break-in and assault, one-half block from the crime scene. Fleming was the only person in the area and he substantially matched the description of the intruder provided by one of the victims. A police officer could have reasonably, if mistakenly believed that he had probable cause to arrest Fleming. In addition, the officer took the added precaution of calling a state prosecutor and only arrested Fleming after the prosecutor agreed that he had probable cause to arrest Fleming.

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

*****

Phillips v. Community Insurance Corporation, 678 F. 3d 513 (7th Cir. 2012)

Phillips claimed police officers used excessive force in arresting her when they shot her four times in the leg with an SL6 baton launcher after she disregarded their orders to come out of her car. The court agreed with Phillips and additionally held that the officers were not entitled to qualified immunity.

First, the officers who arrested Phillips testified they believed she was driving a stolen car. Initially there was some confusion about the status of vehicle. However, at the time of Phillips' arrest, the officers had received information that called into question whether or not the car was stolen. The officers could not simply ignore subsequent information that a different car had been stolen when they considered the appropriate amount of force to use against Phillips. As a result, the officers' certainty that they were dealing with a car theft was objectively unreasonable based on the contrary information they had received.

Second, the force the officers used to apprehend Phillips exceeded the level that was reasonable under the circumstances. Although the officers testified they believed Phillips was drunk, she never exhibited any aggressive behavior toward the officers nor did she attempt to escape. The officers had Phillips' vehicle surrounded with seven squad cars and behind her vehicle was a steep drop-off. An officer told dispatch the driver was "secured, not in handcuffs, but stabilized in the car." The scene was stabilized for fifteen minutes before the officers shot Phillips four times with rounds from the SL6. During this time, Phillips had given no indication that she intended to harm the officers or anyone else. While it may have been reasonable in hitting Phillips with the first SL6 round, multiple shots fired at her exceeded the level of force permissible to effect the arrest. It was unreasonable to shoot Phillips four times when she posed no immediate threat and offered no active resistance.

Finally, the court concluded the officers were not entitled to qualified immunity. While it may have been lawful to shoot Phillips the first time, the officers should have known it was unlawful to escalate force by shooting her three more times when she was unresponsive, presented no threat and made no attempt to flee or even avoid police fire. It was clearly established at the time of this incident that officers could not use such a significant level of force on a non-resisting or passively resisting individual.

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

*****

Tebbens v. Mushol, 692 F.3d 807 (7th Cir. 2012)

Officer Mushol saw Tebbens, a former firefighter, soliciting funds for a charity using a firefighter's boot. During this encounter, Mushol found a firefighter's identification card in Tebbens' wallet. Tebbens claimed the identification card was a souvenir from the fire department.

A few months later, Mushol saw Tebbens again soliciting funds for a charity using a firefighter's boot. Mushol arrested Tebbens for theft related to the firefighter identification card because he had discovered, after their first encounter, that Tebbens was not permitted to possess an active firefighter identification card. Tebbens agreed to an order of supervision on the theft charge, which prohibited him from holding himself out as a member of the fire department or collecting money using a boot similar to a firefighter's boot.

Mushol saw Tebbens for a third time soliciting funds for a charity, using a large boot and arrested him for violating the order of supervision. Tebbens sued Mushol, claiming that Mushol had arrested him without probable cause.

The court held Mushol was entitled to qualified immunity. First, the court concluded Mushol had the authority to arrest Tebbens for violating the terms of his supervision. Second, the court held that a Mushol could reasonably conclude that, in soliciting funds on an intersection using a large rubber boot, Tebbens was holding himself out as a firefighter and soliciting funds on behalf of the fire department, in violation of the terms of his supervision.

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

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Harney v. City of Chicago, 702 F.3d 916 (7th Cir. 2012)

Timothy Harney and Patricia Muldoon sued the City of Chicago and one of its police officers claiming the officer entered their residence and arrested them without a warrant or probable cause in violation of the *Fourth Amendment*.

The court held the officer was entitled to qualified immunity.

First, the officer had probable cause to arrest Harney and Muldoon. The victim told the officer her car had been vandalized and she suspected Harney and Muldoon. The officer saw damage to the victim's car and he reviewed a security camera videotape that showed Harney bending down to examine the tire on the victim's car and Muldoon walking past the victim's car with keys in her hand.

Second, the officer arrested Harney, without a warrant, in a common area in his condominium complex. As long as an officer has probable cause, he may arrest an individual in a public place without a warrant. No reasonable jury could believe the common area constituted the curtilage of the condominium; therefore, the officer was not required to obtain a warrant to arrest Harney.

Finally, after the officer arrested Harney, he told Harney he planned to arrest Muldoon. Harney agreed to get Muldoon and he entered their condominium, with the officer following him. Once inside, the officer arrested Muldoon. The court held Muldoon could not establish the officer's following Harney into their condominium was unreasonable as neither objected to the officer's presence or otherwise indicated they did not consent to him being there.

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

*****

Bernini v. City of St. Paul, 665 F. 3d 997 (8th Cir. 2012)

On the first day of the Republican National Convention in 2008 in St. Paul, crowds of protestors broke windows, threw objects at cars and buses and vandalized police cars. After marches with permits had ended, the police ordered that no one be allowed to enter the downtown area so a law enforcement presence could be reestablished around the convention site. Officers arrested one hundred sixty people who had refused their commands to disperse after they threw rocks and other objects at them.

Thirty-two people filed suit claiming the officers violated their *Fourth Amendment* rights by conducting mass arrests when they only had probable cause to arrest a smaller number of individuals.

The court disagreed, holding a reasonable officer could have concluded that the entire group was acting together as a whole and that they intended to break through the police line in an attempt to access downtown St. Paul. While the officers arrested one hundred sixty people, they did release approximately two hundred others in an attempt to avoid custodial arrest of innocent bystanders. Even if mistaken, it was objectively reasonable for the officers under the circumstances to believe that the one hundred sixty people were part of the unit that had gathered to enter downtown St. Paul.

The court also held it was objectively reasonable for the officers to use non-lethal munitions to direct the crowd away from an intersection and toward a park where they could be controlled.

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

*****

Molina-Gomes v. Welinski, 676 F. 3d 1149 (8th Cir. 2012)

Police officers arranged for an undercover officer to make a payment to Molina-Campos for drugs he had supplied to an informant. As the officers moved in to arrest Molina-Campos, he attempted to drive away, dragging along the undercover officer and ramming an unmarked police car that blocked his path. Officer Welinski shot Molina-Campos with his service weapon and he died at the scene.

Molina-Gomes claimed Officer Welinski violated Molina-Campos' *Fourth Amendment* rights by using excessive force in trying to arrest him. The court disagreed, holding that Officer Welinski was entitled to qualified immunity. The reckless driving by Molina-Campos in his attempt to escape was a danger to the arresting police officers and to any drivers on the roadway. When Molina-Campos sped backwards, he dragged the undercover officer along, knocking him to the ground. He then crashed into a police vehicle before driving around Officer Welinski's vehicle toward a public road. When Office Welinski fired his weapon, he had probable cause to believe that Molina-Campos posed a threat of serious danger to the officers as well as to other motorists. Officer Welinski's use of force under these quickly evolving dangerous actions by Molina-Campos was objectively reasonable under the circumstances.

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

*****

Hemphill v. Hale, 677 F. 3d 799 (8th Cir. 2012)

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

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

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

*****

Winslow v. Smith, 696 F.3d 716 (8th Cir. 2012)

Six individuals were convicted in 1989 for participating in a 1985 rape and murder. However, in 2008, DNA testing established the semen and blood type found in the victim's apartment came from an individual who had no connection to any of the six individuals. Three of the six who were still in prison were released and all six received full pardons. Winslow and three others sued members of the sheriff's department and the prosecutor for violating their rights to due process by recklessly investigating the murder and by coercing them into pleading guilty.

The court held the district court improperly granted the law enforcement officer-defendants qualified immunity. The court found the evidence allowed for a reasonable inference that the officers' investigation crossed the line from gross negligence to recklessness as the officers manufactured false evidence and repeatedly ignored any evidence that did not fit their theory of the case. Specifically, there was evidence to suggest that the officers systematically coached witnesses into providing false testimony that was consistent with their theory as to how the murder had been committed.

Even though five of the individuals pled guilty in the case, the court held that their due process rights were still violated because the prosecutor introduced the false evidence generated by the officers at the plea hearing.

The court held the prosecutor was entitled to absolute immunity. Although there was evidence that the prosecutor consulted with one of the officers about the investigation, there was no evidence that any action taken by the prosecutor before he filed the criminal complaints was unconstitutional as he relied upon the information provided by the officers. Once the charging documents were filed, the prosecutor was protected by absolute immunity.

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

*****

White v. Smith, 696 F.3d 740 (8th Cir. 2012)

Based on the same set of facts as *Winslow*, a different district court judge held the officers were not entitled to qualified immunity in White's lawsuit against them. The same circuit court panel that decided *Winslow* held the district court judge properly denied the officers qualified immunity. The evidence offered by White suggested that the officers systematically and intentionally coached witnesses into providing false testimony that fit the officers' theory of the case.

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

*****

Royster v. Nichols, 698 F.3d 681 (8th Cir. 2012)

The court held Royster's refusal to sign the credit card receipt for his $156.00 restaurant bill gave the officer probable cause to arrest him for theft of restaurant services, even if Royster correctly believed that he did not have to sign it. The officer was entitled to rely on the restaurant manager's statement that Royster had not paid his bill and on Royster's statement to the officer that he was not going to sign the credit card receipt.

Royster also argued the officer used excessive force when the officer handcuffed his hands behind his back despite Royster's request that the officer handcuff him in the front because of a previous back and shoulder injury. Although handcuffing a suspect behind the back in the face of a severe and obvious medical injury may constitute excessive force, in this case, the evidence did not support the claim Royster's back or shoulder injury was obvious or visible. Royster only told the officer that he had a preexisting injury. Any aggravation of that old injury was not caused by an excessive use of force.

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

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Livers v. Schenck, 700 F.3d 340 (8th Cir. 2012)

Matthew Livers and Nicholas Sampson were arrested and jailed awaiting trial for the murders of Livers' aunt and uncle after Livers confessed to the murders and implicated Sampson as an accomplice. A few weeks after the crime, investigators traced a ring found at the crime scene to a truck stolen by two individuals from another state with no connection to the Livers, Sampson or the victims. DNA and other physical evidence connected the two individuals to the murders and they eventually confessed. The charges against Livers and Sampson were dismissed and both men sued various law enforcement officers, alleging violations of their constitutional rights.

The court held the officers were not entitled to qualified immunity on Livers' claim they coerced his confession from him, in violation of his *Fourteenth Amendment* right to due process. First, there was evidence Livers was mentally retarded and the officers knew this when they interrogated him. Second, the officers interrogated Livers for approximately six and one half hours before his confessed. During this time, Livers denied knowledge of or involvement in the murders more than eighty times before he began to confess. Additionally, the officers obtained Livers' confession almost entirely by using leading questions that provided details about the murders. Third, the

officers used threatening tones and language, ridiculed Livers' claims of innocence, promised to help him if he confessed and told him that he would be executed if he did not. Further, at the time of Livers' confession, it was clearly established that coercing a confession from a suspect violated the *Fourteenth Amendment*.

The court also held the officers were not entitled to qualified immunity based upon Livers' and Sampson's claims that the officers manufactured false evidence, which caused them to be arrested without probable cause in violation of the *Fourteenth Amendment*. The court noted that Livers and Sampson presented evidence that would allow a jury to infer that an officer planted blood evidence in a car linked to them.

Finally, the court held the officers were not entitled to qualified immunity with regard to Livers' and Sampson's claims that the officers conspired to violate their constitutional rights.

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

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Avina v. U.S., 681 F.3d 1127 (9th Cir. 2012)

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

The court held the district court properly granted summary judgment in favor of the United States as to Thomas and Rosalie because the agents' use of force against them was reasonable. The agents were executing a search warrant at the residence of a suspected drug trafficker. This presented a dangerous situation for the agents and the use of handcuffs on the adult members of the family was reasonable to minimize the risk of harm to the officers and the Avinas. In addition, the agents did not act unreasonably when they forcefully pushed Thomas Avina to the floor. At the time of the push, Avina was refusing the agents' commands to get down on the ground. Because this refusal occurred during the initial entry, the agents had no way of knowing whether Avina was associated with the suspected drug trafficker, whom they thought lived there.

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

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

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Nelson v. City of Davis, 685 F.3d 867 (9th Cir. 2012)

Nelson suffered permanent injury when he was shot in the eye by a pepperball projectile fired from the weapon of a police officer when the police attempted to clear an apartment complex of partying college students. Nelson sued, claiming among other things, that the officers violated his *Fourth Amendment* right to be free from unreasonable seizures.

The officers argued they did not intentionally seize Nelson, so there could be no *Fourth Amendment* violation. The court disagreed. A person is seized when a police officer, by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied.

Here, the police officers took aim and intentionally fired in the direction of a group of people which included Nelson. Nelson was hit in the eye by a projectile filled with pepper spray and, after being struck, was rendered immobile until he was removed by an unknown person. Although the officers did not specifically target Nelson, the intentionality requirement is satisfied when the termination of freedom of movement occurs through means intentionally applied. Regardless of whether Nelson was the specific object of governmental force, he and his fellow students were the undifferentiated objects of shots intentionally fired by the officers in the direction of that group. Although the officers may have intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement. Nelson was therefore intentionally seized under the *Fourth Amendment*.

After determining Nelson was seized, the court considered the factors outlined in *Graham v. Connor* to determine if that seizure was reasonable. First, the severity of the crime at issue weighted heavily in favor of Nelson and against the use of force employed by the officers. The officers did not claim that Nelson or any of his companions were committing a crime at the time he was shot. After he was incapacitated, the officers did not place him under arrest, but rather walked past him as he lay on the ground. Second, the undisputed facts supported the conclusion that the officers did not reasonably believe Nelson or his companions posed a threat. In their depositions, several officers that they did not see anyone in Nelson's group throw anything at them or engage in any threatening or dangerous behavior. Finally, no one in Nelson's group was actively resisting or attempting to evade arrest.

As a result, the court denied the officers' qualified immunity, holding their use of force against Nelson was unreasonable and that the law at the time of the incident should have placed the officers on notice that the shooting of the pepperballs under the circumstances was an act of excessive force.

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

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Coles v. Eagle, 704 F.3d 624 (9th Cir. 2012)

Officer Eagle conducted a traffic stop on a car driven by Coles after he learned it had been reported stolen. Coles eventually pulled over and was approached by Eagle and Officer Robertson, who had arrived on scene. The officers simultaneously ordered Coles to exit the vehicle and keep his hands on the wheel. The officers claimed Coles was making furtive hand movements that did not allow them to see his hands. Coles claimed he moved his hands in an effort to open the car door, but then placed his hands on the steering wheel. Both officers denied Coles ever placed his hands on the steering wheel. Without warning, Eagle then smashed the driver's side window with his baton and both officers pulled Coles out of the car through the window. Coles claimed after the officers removed him from the car they threw him on the ground and repeatedly kicked him and that Eagle struck him with his baton. The officers denied they beat Coles after removing him from the car.

The district court held the force used to break the car window and pull Coles from the car was reasonable and granted the officers qualified immunity, but that the officers were not entitled to qualified immunity for the use of force used once Coles was pulled from the car.

The court of appeals reversed the district court and held the officers were not entitled to qualified immunity for breaking the car window and removing Coles from the car. The court concluded there was a material factual dispute as to whether Coles' hands were on the steering wheel, Coles saying yes, the officers saying no, when they broke the window and pulled him from the car. The district court improperly granted the officers qualified immunity because a reasonable jury could believe Coles' version of the event and find the officers' use of force was not justified.

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

*****

Romero v. Story, 672 F. 3d 880 (10th Cir. 2012)

Romero claimed the officer unlawfully arrested him under a New Mexico statute that makes it a crime to intentionally flee or evade an officer when the person knows that the officer is attempting to detain or arrest him.

The court held the officer was not entitled to qualified immunity. The statute applies only where law enforcement officers have reasonable suspicion to detain or probable cause to arrest a person prior to his flight. To be charged, a person must attempt to flee or evade knowing that the officer was attempting to detain or arrest him.

Here, the officer claimed Romero's flight was the reason he arrested him. Because the officer did not have a reasonable suspicion to detain Romero, prior to his flight, he did not have probable cause to arrest him for flight or evasion. As a result, the officer violated Romero's right to be free from an unlawful arrest.

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

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Morris v. Noe, 672 F. 3d 1185 (10th Cir. 2012)

The court held Officer Noe was not entitled to qualified immunity for unlawful arrest. When the other individual involved in the dispute came towards him, Morris raised his hands in a defensive position and backed away from him. A reasonable officer in Noe's position would not have believed he had probable cause to arrest Morris for assault. The fact that Noe noticed signs of Morris' intoxication after he had taken him down and handcuffed him is not relevant. Morris' behavior up to the point of arrest was not threatening, loud or disorderly and he had complied with all of the officer's orders. Noe had no reason to arrest Morris for any offense.

The court further held Morris' right to be free from an unlawful arrest was clearly established at the time. A reasonable officer would know the offense of assault requires at least some attempt to use "force or violence" to cause harm to another. Here, Morris exhibited no signs of violence or intent to cause harm. Instead, Morris was calm and remained out of reach of the other individual and he backed up at the first sign the other individual wanted to escalate the encounter. Such non-violent conduct is not enough for any reasonable officer to believe Morris was committing an assault.

The court also held that Officer Noe was not entitled to qualified immunity on Morris's claim he used excessive force when he arrested him. Applying the *Graham* factors, the court noted that the officer believed he had probable cause to arrest for assault and that a forceful takedown may be appropriate for effecting this kind of arrest in some circumstances. However, in this case, Morris posed little threat to the safety of the officers or the other individual. Additionally, Morris was neither resisting arrest nor attempting to flee. He was backing toward the officers, away from the other individual, when he was grabbed from behind and taken to the ground.

The court found that Morris' right to be free from the degree of force used by the officer was clearly established. A reasonable officer would know, based on his training, that the degree of force used was not justified. Noe had reason to believe, at most, that Morris had committed a misdemeanor but that he did not pose a threat to the officers or others nor was he actively resisting arrest or trying to flee. Morris' right to be free from a forceful takedown was clearly established under *Graham*.

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

*****

Armijo v. Perales, 688 F.3d 685 (10th Cir. 2012)

Criminal investigators from the district attorney's office obtained a warrant to search a police chief's house for two firearms. The investigators claimed that the chief had purchased the two firearms for personal use as part of a transaction where other firearms were purchased for his department.

After locating the two firearms in the chief's house, the investigators obtained a warrant to arrest him for larceny of the firearms. All charges were later dismissed and the chief sued the investigators under *42 U.S.C. § 1983* claiming false arrest, false imprisonment, and illegal search and seizure in violation of the *Fourth Amendment*. The chief also claimed the search of his

house and his arrest violated the *First Amendment* because they were in retaliation for reporting an alleged battery committed by the mayor to the state police.

The court agreed with the district court, which had held that the investigators were not entitled to qualified immunity for searching the chief's house or arresting him.

First, the search warrant authorized the investigators to search for a number of items not related to the two firearms including, controlled substances, records and documents relating to controlled substances, photographs or videotapes and financial records. However, the affidavit submitted in support of the search warrant only provided evidence of the chief's alleged larceny of the two firearms. The affidavit offered no evidence linking the chief to any missing funds, narcotics or other police department property. If the investigators wanted to search for other items that may have been stolen from the police department's inventory, they needed to include information in the affidavit to establish probable cause. Even if the allegations regarding the two firearms were sufficient to believe the two firearms were improperly obtained, the warrant violated the *Fourth Amendment* because its scope far exceeded the probable cause to support it.

In addition, the court concluded a reasonably well-trained officer would have known a search pursuant to such an obviously overbroad warrant was illegal under clearly established law.

Second, the arrest warrant lacked probable cause. The affidavit clearly stated while the town originally received a bid sheet for six firearms, the town only paid for four firearms and the chief purchased the remaining two firearms for personal use. However, the affidavit did not allege that the chief used police department funds to pay for the two firearms, nor did it claim that he was somehow restricted from purchasing these firearms for personal use because of some department policy. The only evidence in the affidavit regarding the purchase of the two firearms indicated that the chief, not the town paid for the firearms. This was insufficient to establish probable cause to arrest the chief for larceny. The investigators failed to provide any reason why the chief's possession of the two firearms was illegal. A reasonable officer would have known that an arrest warrant stating that the chief had purchased two firearms, without any allegation of criminal activity, did not establish probable cause to arrest him.

The court held it did not have jurisdiction to decide the *First Amendment* issue, therefore the district court's denial of qualified immunity to the investigators remained unchanged.

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

*****

Storey v. Taylor, 696 F.3d 987 (10th Cir. 2012)

The police department dispatched two officers to Storey's address after receiving an anonymous call reporting a loud argument there. When the officers arrived, they heard no argument. They knocked on the front door and Storey answered. Storey admitted that he and his wife had been arguing and after the argument ended, she had left the house. While the officers were questioning Storey, his wife returned home and entered the house through the attached garage. Officer Taylor asked Storey about the subject of the argument, and when Storey refused to tell him, he ordered Storey to step out of the house. After Storey refused, Officer Taylor arrested him for failure to obey a lawful order.

Storey sued the officers, claiming his *Fourth Amendment* rights were violated because he was arrested without a warrant or exigent circumstances that would justify a warrantless arrest.

While Officer Taylor admitted he did not believe that Storey had committed a domestic violence related offense, he claimed that he had probable cause to arrest Storey for failing to obey his order to step out of the house.

The court disagreed. Unless exigent circumstances were present, Officer Taylor's order for Storey to step out of his house was not lawful and Storey's refusal to obey it could not justify his arrest. The report of a loud argument, without more, that had ended by the time the officers arrived, did not create exigent circumstances to justify a warrantless arrest.

Taylor also claimed he lawfully arrested Storey in the performance of his community caretaking duties. Again, the court disagreed because the facts did not show a likelihood of violence such that Taylor's actions were necessary to protect the safety of Storey, his wife, the officers or others.

Finally, the court held Taylor was not entitled to qualified immunity because at the time of Storey's arrest it was clearly established that a police officer must have probable cause to arrest an individual and that community caretaking detentions must be based on facts that warrant the detention.

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

*****

Kaufman v. Higgs, 697 F.3d 1297 (10th Cir. 2012)

Two police officers went to Kaufman's home to question him about a vehicle he owned that an eyewitness saw hit an unoccupied car in a jewelry store parking lot. The eyewitness told the officers that the car had been driven by a female and there had been a male passenger. The officers confirmed that Kaufman had made a purchase from the jewelry store a few minutes before the accident. The officers arrested Kaufman, an attorney, for obstruction of justice, after he claimed "privilege" and refused to identify the driver of the vehicle.

The charges were eventually dismissed. Kaufman sued the officers, claiming they violated his *Fourth Amendment* rights by arresting him without probable cause.

The court held the officers were not entitled to qualified immunity. Kaufman's refusal to answer questions during a consensual encounter could not be considered an "obstacle" as the term is used in Colorado's obstruction statute. Silence accompanied by an explanation for that silence does not obstruct anything. In addition, it is well established that a citizen has no obligation to answer an officer's questions during a consensual encounter. Here, the officers could have continued to question Kaufman, sought out other members of his family for questioning or they could have sought to compel Kaufman to answer their questions with a grand jury subpoena.

The court also held at the time of Kaufman's arrest it was clearly established through Colorado state case law that mere verbal opposition to the police, by itself, could not constitute obstruction of justice. Because words alone are not enough to constitute obstruction, it follows that silence cannot be enough to constitute obstruction either. In this case, no officer could reasonably have

thought that Kaufman's silence constituted a criminal act; therefore, the officers violated his clearly established *Fourth Amendment* right to be free from unreasonable seizures.

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

*****

Terrell v. Smith, 668 F. 3d 1244 (11th Cir. 2012)

Officers in an unmarked police car requested that officers in a marked police cruiser "check out" a car that had been driving down the street in the middle of the night without headlights. Two officers approached the car, which was now parked. The officers ordered the driver and passenger out of the car and they complied. The driver, Aaron Zylstra, acted as if he was going to kneel down, but instead he turned and jumped back into the car. Officer Smith ran after Zylstra and placed himself in the open doorway of the car. As Zylstra attempted to make a U-turn in Smith's direction, Smith ran alongside the car as it moved forward. Smith repeatedly warned Zystra to stop the car but Zystra turned the car causing the door and frame to strike Smith. After multiple warnings, Smith fired two shots, killing Zylstra.

Zylstra's family claimed Officer Smith used excessive force against him in violation of the *Fourth Amendment* and brought suit under *Title 42 U.S.C. § 1983*.

The court held Officer Smith was entitled to qualified immunity. First, Officer Smith was justified in stopping Zylstra's car in order to write a traffic citation for driving at night without lit headlights. Second, Officer Smith was permitted to ask for identification and order the driver and passenger out of the car. Finally, under the circumstances that developed, it was objectively reasonable for Officer Smith to use deadly force.

The Eleventh Circuit has consistently upheld an officer's use of force and granted qualified immunity in cases where the decedent used or threatened to use his car as a weapon to endanger officers or civilians immediately preceding the officer's use of deadly force. Here, Officer Smith pursued Zylstra in order to arrest him and clearly instructed him to stop the car. Instead of complying with Smith's orders, Zylstra attempted to turn the car in a manner that caused it to strike the officer. Officer Smith was forced to make a split-second decision concerning whether the use of lethal force was necessary. In addition to himself, two other people were within a few feet of the moving vehicle as these rapidly unfolding and uncontrolled events transpired. Officer Smith's actions were reasonable and did not violate Zylstra's *Fourth Amendment* rights.

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

*****

Butler v. Sheriff of Palm Beach County, 685 F.3d 1261 (11th Cir. 2012)

Dorethea Collier was a corrections officer at county boot-camp facility for minors run by the Sheriff's Office. Collier came home from work and found her nineteen-year-old daughter naked in her bedroom. Collier then found Butler, her daughter's boyfriend, naked in the bedroom closet. While still wearing her uniform, Collier punched Butler one time and then drew her firearm and threatened to shoot Butler if he moved. Collier handcuffed Butler and threatened to kill him if he did not obey her commands. Collier called her supervisor and asked what charges

she could bring against Butler. Collier eventually let Butler get dressed and leave the house after she decided that he had not committed any crime.

Butler filed a lawsuit against Collier, individually and in her official capacity as a corrections officer with the Sheriff's Office. In addition to several state law claims, Butler claimed that Collier had violated *42 U.S.C. § 1983* by using excessive force and by effecting an unreasonable search and seizure on him while acting under the color of state law.

The court noted a defendant acts under the color of state law when he deprives the plaintiff of a right through the exercise of authority that is held by virtue of his position. Consequently, the court must determine if the defendant was exercising power based on state authority or acting only as a private individual.

The court held Collier's conduct towards Butler was not a result of her status as a corrections officer, but rather as that of an irate mother with an anger management problem. Collier walked into her own house just like any private individual returning home from work. When she punched, handcuffed, and held Butler at gunpoint, she did not represent that she was exercising he authority as a corrections officer. The fact Collier pointed her duty weapon at Butler and used her department issued handcuffs on him does not automatically mean that she was acting under the color of state law. Because Butler's alleged mistreatment was not inflicted under the color of state law, the district court correctly dismissed his *§ 1983* claims.

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

*****

Use of Force / Qualified Immunity – Taser

Austin v. Redford Township Police Department, 690 F.3d 490 (6th Cir. 2012)

Austin sued three police officers, claiming that they had used excessive force when they arrested him. The district court held the officer who first deployed his taser against Austin was entitled to qualified immunity for its initial use. However, the district court held the same officer was not entitled to qualified immunity for the subsequent deployment of his taser against Austin, nor was the second officer who deployed his taser against Austin, nor was the third officer who deployed his police dog against Austin.

After the initial deployment of the taser against him, Austin claimed he was subdued on the ground to the point that he posed no significant threat to the officers and that the subsequent use of the tasers and the police dog against him were excessive. The officers argued the videotapes taken from the in-car-cameras in their patrol cars blatantly contradicted Austin's version of the incident. Consequently, the officers argued the district court should have determined the issue of qualified immunity based on the facts depicted in the videotapes.

The court held even after considering the videotape evidence, it was not blatantly or demonstrably false for the district court to conclude that there remained a genuine dispute regarding whether Austin was subdued once he was on the ground and if the subsequent use of the tasers and the police dog against him were excessive.

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

*****

Hagans v. Franklin County Sheriff's Office, 695 F.3d 505 (6th Cir. 2012)

Police officers were dispatched to Hagans' house after a neighbor called 911 to report a disturbance there. The first officer on the scene saw Hagans running toward him and ordered Hagans to stop. Hagans ignored the officer and ran around the house where he tried to open the locked driver's side door of a police cruiser that belonged to another officer that had just arrived. Hagans did not comply with officer's command to stop. The two officers scuffled with Hagans who refused to be handcuffed. A third officer arrived and deployed his taser in drive-stun mode to Hagans' back as he continued to fight with the other two officers on the ground. The officer tased Hagans a second time after the initial shock did not subdue him. After the second shock, Hagans continued to fight with the officers and grabbed for the taser. The officer tased Hagans two to four more times in drive-stun mode. Realizing that the shocks were not working, the officer joined the other two officers in trying to subdue Hagans by hand. After the officers secured Hagans with handcuffs and leg shackles, he lost consciousness and stopped breathing. Hagans died three days later. The coroner found cocaine in Hagans' system and concluded that Hagans' death was caused by respiratory complications due to cocaine intoxication.

Hagans' estate claimed the officer used excessive force, in violation of the *Fourth Amendment*, by repeatedly deploying his taser against Hagans.

The court disagreed and held the officer was entitled to qualified immunity. First, it was not clearly established in May 2007, when this incident occurred, that using a taser repeatedly on a suspect who was actively resisting arrest and refusing to be handcuffed amounted to excessive force. Second, cases from this circuit and others, before and after May 2007 have held that if a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the *Fourth Amendment* by using a taser to subdue him.

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

*****

Shekleton v. Eichenberger, 677 F. 3d 361 (8th Cir. 2012)

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

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

unarmed suspected misdemeanant, who did not resist, did not threaten the officer did not attempt to run from him and did not behave aggressively towards him. A reasonable officer would not have deployed is taser against Shekleton under these circumstances.

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

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

*****

Marquez v. City of Phoenix, 2012 U.S. App. LEXIS 19048, September 11, 2012 (9th Cir. 2012)

Lydia Marquez called the police after she heard screaming coming from the spare bedroom in her home. Inside the bedroom were her son Ronald, her adult granddaughter and her three-year old great granddaughter. Once at the house, the officers learned Ronald was attempting to perform an exorcism on the three-year-old girl. The officers radioed for instructions, but after they heard the little girl screaming and crying, they decided to enter the bedroom. Inside the bedroom, the officers saw Ronald sitting on the bed, with the three-year-old, now silent and motionless, in a choke-hold. The granddaughter was naked in the corner screaming and her face showed evidence of a recent beating. One of the officers deployed his Taser in probe-mode against Ronald after he refused to let the child go. The Taser did not appear to affect Ronald and he attacked the officer. Over the next few minutes, during the ongoing fight, the officer continued to apply the Taser in drive-stun mode against Ronald. After the officers secured Ronald, they had to subdue the granddaughter, who was now trying to assault them. After the officers secured her, they found that Ronald had gone into cardiac arrest. Despite their efforts at resuscitation, he died. Marquez claimed that Taser should have warned that repeated exposure to its products could lead to sudden death due to cardiac failure and that the officers used excessive force against Ronald, in violation of the *Fourth Amendment*.

The court held under Arizona law, Taser provided sufficient warnings about the dangers associated with prolonged or continuous exposure to the Taser device's electrical discharge. These warnings covered exactly what happened in this case. In addition, a more detailed warning could have detracted from the officers' ability to process the warnings that were given.

Although Ronald received nine five-second cycles from the Taser, two while it was ineffectively deployed in probe mode and seven when it was deployed in drive-stun mode, the court held that the officer's use of force was reasonable. Applying the factors from *Graham v. Connor*, the court determined this amount of force was reasonable because the officers had reason to believe a serious crime had occurred, Ronald was actively resisting arrest, and the officers could have reasonably believed that he posed an immediate risk to themselves and to others in the room.

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

*****

Mistaken Use of Deadly Force (Firearm / Taser)

Marrero-Rodriguez v. Municipality of San Juan, 677 F. 3d 497 (1st Cir. 2012)

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

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

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

*****

Non-Use of Force Situations (Search Warrant Application / Execution / Other)

Edmonds v. Oktibbeha County, Mississippi, 675 F. 3d 911 (5th Cir. 2012)

Kristi Fulgham shot and killed her husband shortly before taking her thirteen-year old brother, Tyler Edmonds, and two of her children on a trip. Fulgham told Edmonds that she had shot her husband and asked him to take the blame to protect her from the death penalty. Edmonds confessed to the murder but a few days later recanted his confession.

Edmonds and his mother sued the county under *42 U.S.C. § 1983,* claiming that police officers coerced the confession from Edmonds and separated him from his mother while he was confessing.

The court held under the totality of the circumstances, Edmonds's confession was voluntarily given and its introduction at trial did not violate the *Fifth Amendment*. Although a thirteen-year old's separation from his mother, his desire to please adults, and his inexperience with the criminal justice system all weighed against a finding of voluntariness, Edmonds's express desire to help his sister decided the issue. There was no evidence that the officers' interrogation tactics would have produced a confession if it were not for Edmonds desire to help his sister. While Fulgham may have used her brother's love to get him to lie on her behalf, there was no evidence that the officers knew of her plan.

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

*****

Clemente v. Vaslo, 679 F. 3d 482 (6th Cir. 2012)

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

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

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

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

*****

Marcilis v. Township of Redford, 693 F.3d 589 (6th Cir. 2012)

Officers established probable cause to search because information provided by a confidential informant was verified through their independent investigation. The officers observed controlled drug purchases between the confidential informant and Marcilis and they found evidence of drug distribution after they searched the garbage outside both homes. In addition, the information in the search warrant affidavit was not stale because it detailed ongoing criminal activity, including evidence of a controlled buy from one of the homes within thirty-five hours before submission to the judge.

The court held the officers did not seize items outside the scope of the warrants. The officers may have reasonably believed that the money, photographs, weapons permits, marriage license and property deed contained information related to the sale and possession of narcotics, possession and ownership of firearms and the ownership of the searched homes.

The court also held the officers acted reasonably in detaining the occupants of the first house for the duration of the search, which lasted ninety minutes. The occupants of the second house were detained for ten minutes, a reasonable amount of time, before the officers established probable cause and arrested them.

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

*****

Hensley v. Gassman, 693 F.3d 681 (6th Cir. 2012)

Gassman went to Hensley's house to repossess a vehicle. At Gassman's request, two police officers were dispatched to provide a police presence during the repossession. Gassman told the officers he had a repossession order and showed them a file, but the officers did not read any of the documents in it. While Gassman tried to tow the vehicle, Hensley got into the vehicle, started it and locked the doors. The officers told Gassman to pull the vehicle out of the driveway, and after he did, an officer broke one of the windows, opened the door and pulled Hensley out. Gassman towed the vehicle, which was returned to Hensley the next day after it was discovered her payments were current. Hensley claimed that the officers' participation in the repossession caused an unreasonable seizure of her car in violation of the *Fourth Amendment*.

The court agreed and denied the officers qualified immunity. When a person tries to hold a police officer liable for participation in a repossession of his property, some kind of state action must be established. A police officer's presence during a repossession, by itself, is not enough to convert the repossession into "state action." However, the likelihood that state action will be found increases when the officer takes a more active role in the repossession, as occurred here. The officers' actions between the time they arrived and the time Hensley got in the car were more than mere police presence. For example, the officers ignored Hensley's protests that her car payments were current and told her that Gassman was still going to tow the car. In addition, breaking the car window, removing Hensley from the car and ordering her to remove her belongings from the car clearly constituted state action by the officers. The officers' participation in the repossession amounted to state action that resulted in the seizure of Hensley's vehicle.

The court then held the seizure of Hensley's vehicle was unreasonable. The officers knew that the repossession was a private civil matter and they lacked any evidence that supported Gassman's claim that he was authorized to repossess the vehicle.

Finally, the court held since 1992 it has been clearly established that state actors violate the *Fourth Amendment* by taking an active role in private repossessions when there is no apparent legal basis for such action.

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

*****

Tucker v. Williams, 682 F.3d 654 (7th Cir. 2012)

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

The court held Williams was entitled to qualified immunity because Tucker gave him consent to seize the backhoe on June 22. A reasonable person in Williams' position would have understood

Tucker's consent to seize the backhoe on June 22 to be indefinite and not limited to that day only. Tucker did nothing to indicate to Williams he wished to withdraw his consent; therefore, that consent was still valid and effective when Williams seized the backhoe on August 29.

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

*****

Betker v. Gomez, 692 F.3d 854 (7th Cir. 2012)

Debbie Capol told Officer Gomez her estranged sister, Sharon Betker, was a convicted felon and that she had a firearm in her home. Based largely on Capol's statement, Officer Gomez obtained a no-knock warrant to search Betker's home. A police officer shot Sharon's husband, Richard Betker, during the execution of the warrant. Richard Betker sued Officer Gomez under *42 U.S.C. § 1983* for violating his right to be free from unreasonable searches and seizures.

Betker claimed Officer Gomez made a series of false or misleading statements in the affidavit he submitted to obtain the no-knock search warrant and without those statements, probable cause would not have existed. Betker supported this claim by producing sworn deposition testimony from Capol that contradicted information included in Officer Gomez's probable cause affidavit.

As required, the court viewed the facts in the light most favorable to Betker and held that Officer Gomez was not entitled to qualified immunity. The court noted that a reasonable jury could believe that Officer Gomez knowingly made a false statement by swearing that Capol saw her sister possess a firearm in her home within the last five days. In her deposition, Capol stated that she had not been in her sister's home in several years. Consequently, if a jury believed that Officer Gomez's statement was false, probable cause for the no-knock warrant would not have existed.

Finally, it was clearly established at the time of this search a search warrant violates the *Fourth Amendment* if the requesting officer knowingly, intentionally, or with reckless regard for the truth, makes false statements in the supporting affidavit, when such statements are necessary to establish probable cause.

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

*****

Burke v. Sullivan, 677 F. 3d 367 (8th Cir. 2012)

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

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

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

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

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

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Sims v. Stanton, 2012 U.S. App. LEXIS 24803 (9th Cir. 2012)

Officer Stanton and his partner responded to a radio call regarding an "unknown disturbance" involving a baseball bat. When the officers arrived, they did not see any disturbance, but only three men walking in the street. Two men turned into an apartment complex and the third man, Nicholas Patrick, walked quickly toward Drendolyn Sims home. Patrick was not carrying a baseball bat and there was no indication he had been involved in the disturbance the officers were investigating. Stanton got out of the patrol car and ordered Patrick to stop. Patrick ignored Stanton, opened the gate to Sims' front yard and entered the front yard with the gate shutting behind him. Believing Patrick was disobeying his lawful order, Stanton kicked opened the gate to Sims' front yard to go after him. Stanton did not realize Sims was standing behind the gate, and when it flew open it hit her in the head. Sims was knocked unconscious and suffered injuries to her head and shoulder.

Sims sued Stanton claiming her *Fourth Amendment* rights had been violated by Stanton's warrantless entry into her front yard.

First, the court determined Sims' front yard constituted curtilage because the gate Stanton kicked open was part of a fence made of solid wood, more than six feet tall, that completely enclosed the front yard to Sims' home. As curtilage, Sims' front yard was entitled to the same *Fourth Amendment* protections as her home.

Second, the court ruled exigent circumstances did not exist, which would have allowed Stanton to enter Sims' front yard without a warrant. At best, Stanton had probable cause to believe Patrick had committed a misdemeanor by disobeying his order to stop. The possible escape of a person fleeing from a misdemeanor arrest did not justify Stanton's warrantless entry into Sims' front yard. In addition, Stanton's warrantless intrusion was particularly egregious because it violated the *Fourth Amendment* rights of a person not involved in the initial encounter.

Third, the court ruled the emergency exception did not apply. Even though Stanton was called to investigate a disturbance involving a baseball bat, he did not see Patrick carrying a baseball bat or any other weapon. Once Patrick fled into Sims' front yard without indicating he would return with a weapon or otherwise threaten Stanton with violence, it was unreasonable for Stanton to believe Patrick posed an imminent threat to himself or anyone else.

The court held the law at the time would have placed a reasonable officer on notice that a warrantless entry into the curtilage of a home constituted an unlawful search, which could not be

excused under the exigency or emergency exceptions to the warrant requirements under these circumstances. Consequently, Stanton was not entitled to qualified immunity.

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

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Armijo v. Perales, 688 F.3d 685 (10th Cir. 2012)

See *Armijo v. Perales*, above

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Ryburn v. Huff, 132 S. Ct. 987 (S. Ct. 2012)

Four officers went to the Huffs' residence to investigate after their son, Vincent, had allegedly written a letter in which he threatened to "shoot-up" his school. Two officers went up to the front door and two remained on the sidewalk. After knocking on the front door and receiving no answer, one of the officers called Mrs. Huff on her cell phone. She said that she was inside the house but quickly hung up the phone. A few minutes later, she and Vincent stepped out onto the front steps. The officer asked Mrs. Huff is they could talk inside, but she refused. When the officer asked Mrs. Huff if there were any guns in the house, she immediately turned around and ran into the house. Based on Mrs. Huff's behavior, the two officers entered the house behind her. The two officers on the sidewalk also entered the house, having assumed that Mrs. Huff had given the other two officers permission to enter. 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 Vincent had not threatened anyone.

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 court's opinion. See **2 Informer 11** for the case summary of the court of appeals opinion, *Huff v. City of Burbank*, 632 F.3d 539 (9th Cir. 2011).

*****

Messerschmidt v. Millender, 132 S. Ct. 1235 (S. Ct. 2012)

Officers obtained a warrant to search Augusta Millender's home after Jerry Ray Bowen threatened to kill his girlfriend and then fired a sawed-off shotgun at her when she fled from him. The officers confirmed that Bowen had been arrested and convicted for numerous violent and firearms related offense, that he was a member of two gangs and that he was staying at Millender's home. The warrant authorized the officers to search for all firearms and ammunition as well as evidence of gang membership.

The Ninth Circuit Court of Appeals refused to grant the officers qualified immunity. While the officers had probable cause to search for a sawed-off shotgun, the court held that they did not have probable cause to search for the broad class of firearms, ammunition and gang related material that was listed in the warrant. As a result, the court held that the warrant was so invalid on its face that no officer could have reasonably relied on it.

The Supreme Court reversed the Ninth Circuit, holding that the officers were entitled to qualified immunity. Given Bowen's possession of one illegal gun, his gang membership and willingness to use the gun to kill someone, it was reasonable for the officers to conclude that Bowen owned other guns. An officer could also reasonably believe that seizure of firearms was necessary to prevent further assaults on Bowen's girlfriend. California law allowed the officers to seize items, such as firearms, that Bowen could potentially use to harm another person, and the officers referenced this statute in their search warrant application.

The Court also held that it was permissible for the officers to search for gang-related materials. A reasonable officer could view Bowen's attack on his girlfriend as motivated by a concern that she might disclose his gang activities to the police and not solely as a domestic dispute. As a result, it would reasonable for an officer to believe that evidence of Bowen's gang affiliation would be helpful in prosecuting him for the attack on his girlfriend.

Additionally, the officers sought and obtained approval of the warrant application from a superior officer and a deputy district attorney before submitting it to the magistrate. This provided further support for the conclusion that the officers could reasonably have believed that the scope of the warrant was supported by probable cause.

Click **HERE** for the case brief for the 9th Circuit Court of Appeals opinion as reported in 9 Informer 10.

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

*****

Reichle v. Howards, 132 S. Ct. 2088 (S. Ct. 2012)

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

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

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

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

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

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Federal Tort Claims Act (FTCA)

Ignacio v. United States, 674 F. 3d 252 (4th Cir. 2012)

A Pentagon police officer allegedly assaulted Ignacio, a contract security officer assigned to the Pentagon, while they were stationed at a security checkpoint for Pentagon employees. Ignacio sued the United States for assault under the Federal Tort Claims Act (FTCA). While both sides agreed that the Pentagon police officer qualified under the FTCA as an "investigative or law enforcement officer," the district court held that because the officer was not engaged in investigative or law enforcement activity when he allegedly assaulted Ignacio, the United States retained sovereign immunity from his lawsuit.

The court of appeals disagreed, holding the FTCA waives the government's sovereign immunity whenever an "investigative or law enforcement officer" commits one of the specified intentional torts, including assault, regardless of whether the officer is engaged in investigative or law enforcement activity at the time.

The court declined to address whether the alleged assault occurred within the scope of the officer's employment because neither side raised the issue.

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

*****

Municipal Liability

Jones v. Town of East Haven, 691 F.3d 72 (2nd Cir. 2012)

Jones sued the Town of New Haven under *42 U.S.C. § 1983* after an East Haven police officer shot and killed her son. She claimed, among other things, that the Town's custom, policy, or usage of deliberate indifference to the rights of black people caused the killing of her son.

The court concluded the evidence that Jones presented at trial was not sufficient to support a reasonable finding that her son's death was caused by a custom, policy or usage of deliberate indifference by the Town of East Haven. Even though Jones showed instances of illegal and unconstitutional conduct by individual East Haven police officers, to hold the town liable, she needed to show that her loss was attributable to a custom, policy or usage by the Town's supervisory officials. At trial, Jones showed three instances, over a period of several years, in which a small number of officers abused the rights of black people. This evidence fell short of showing a policy, custom or usage of the officers to abuse the rights of black people, and far short of showing abusive conduct among officers so persistent that it must have been known to the Town's supervisory personnel.

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

*****

Jones v. Lowndes County, Mississippi, 678 F. 3d 344 (5th Cir. 2012)

Jones and Nance sued the county, the Sheriff and Bryan, a deputy sheriff, claiming their rights were violated when they were detained for more than 48 hours without a probable cause hearing or an initial appearance.

Bryan arrested Jones and Nance at 5:33 p.m. on a Saturday afternoon. Because there was no judge on duty over the weekend, Bryan attempted to schedule an appearance before a judge on Monday afternoon around 2:30 p.m., when he returned to work his normal shift. However, the chief judge had left for the day and there was no other judge available. Jones and Nance appeared before a judge on Tuesday morning and the judge determined that their arrests were supported by probable cause.

The court held the district court properly dismissed the suit against the county and the Sheriff because Jones and Nance failed to show that they were liable for any alleged violation of their *Fourth Amendment* rights. The Sheriff's Department's policy was for arrestees to have a probable cause hearing "within 48 hours but no later than 72 hours and as soon as reasonably possible and without unnecessary delay." This policy is consistent with the guidance provided by the United States Supreme Court, which stated that while a 48-hour timeline is a useful benchmark, probable cause hearings that occur more than 48 hours after arrest are not always unreasonable. Here, the delay was caused by unavailability of the judges, which neither the county nor the Sheriff could control.

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

*****

Fifth Amendment

Pre-Trial Identification (Line-Ups, Show-Ups, Photo Arrays)

U.S. v. Jones, 689 F.3d 12 (1st Cir. 2012)

The government charged Jones with conspiracy to distribute crack cocaine after he approached an undercover officer and found out how much crack cocaine the officer wished to buy. The video recording of the incident was out of focus and blurry, but another officer, who was familiar with the drug trade in the area, identified Jones as the man who had approached the undercover officer. After the officer showed the undercover officer a booking photograph of Jones, the undercover officer identified Jones as the person that had approached him.

Jones argued that the undercover officer's out-of-court identification of him from the booking photograph should have been suppressed because it had been obtained by an unduly suggestive process and was unreliable.

The court agreed with the district court, which held the method used to identify Jones, was unnecessarily suggestive. The court commented that it would have imposed little, if any, additional burden on the police to have shown the undercover officer several different photographs, including one of Jones. However, the court also agreed that the circumstances

surrounding the identification established that it was still reasonably reliable and that it should not have been suppressed.

First, the encounter between the undercover officer and Jones took place in full daylight and the officer had ten to fifteen seconds to get a good look at Jones. Second, the officer's degree of attention would have been high because he was a law enforcement officer who was trained to identify people who sold him drugs. Finally, the officer identified Jones the day after their encounter.

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

*****

U.S. v. Ford, 683 F.3d 761 (7th Cir. 2012)

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

The court held the photo array was unduly suggestive.

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

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

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

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

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

While it may have been improper for the trial court to allow the manager to testify about his previous identification of the defendant as the robber, the court held that any error was harmless and affirmed Ford's conviction. There was no doubt that the dust mask found outside the bank was the robber's and the DNA found on the dust mask matched Ford's DNA. In addition, the

manager could have described the robber to the jury and they could have compared his description with the pictures of the robber taken by the bank's surveillance camera that were shown at the trial.

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

*****

Perry v. New Hampshire, 132 S. Ct. 716 (S. Ct. 2012)

Around 3 a.m., police officers responded to an apartment complex to investigate the report of an African-American man breaking into cars. When the first officer arrived, she saw Perry standing between two cars. He walked toward the officer, holding two car stereo amplifiers in his hands. The officer went into the apartment building to interview the witness who had reported the break-ins. She left Perry standing in the parking lot with another officer who had arrived on scene. The officer asked the witness to describe the person she had seen breaking into the victim's car. The witness told the officer that the man she saw breaking into the car was the same African-American man that was standing next to the other officer in the parking lot. Perry was arrested and charged with the break-ins.

At trial, Perry argued that the witness' identification of him as the perpetrator, while he was standing next to the police officer in the parking lot, amounted to an unduly suggestive one-person show-up. He claimed that this procedure all but guaranteed that the witness would identify him as the person she had seen committing the break-ins. The trial court disagreed. The witness' identification testimony was allowed and the jury convicted Perry.

The Supreme Court held that the *Due Process Clause* did not require the trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification, made under suggestive circumstances, when those circumstances were not arranged by the police.

The *Due Process Clause* provides a check on the reliability of an identification only after the defendant establishes improper police conduct. First, the police in this case did not arrange the suggestive circumstances surrounding the witness' identification. Second, even if the defendant could have established that the police used an identification procedure that was both suggestive and unnecessary, the identification would not have automatically been excluded. Instead, the court would have determined, after considering the totality of the circumstances, whether there was a substantial likelihood of misidentification because of the unnecessarily suggestive identification procedure. The trial court never had to determine this issue.

In this case, the police did not arrange the identification procedure; therefore, the *Due Process Clause* was not implicated. In addition, other protection such as the right to counsel and cross-examination provided the defendant the opportunity to challenge the reliability of the identification at trial.

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

*****

Miranda

U.S. v. Moore, 670 F. 3d 222 (2d Cir. 2012)

A state judge issued an arrest warrant for Moore on charges that arose from a carjacking and attempted armed robbery in which shots were fired. While fleeing from an officer, Moore tossed a gun away. The officer lost Moore and could not find the gun. Another officer arrested Moore the next day. At the jail, Moore saw an officer that he knew from a previous case and agreed to show him where he had thrown the gun, in an attempt to get help with his current charges. This officer was not involved in Moore's carjacking case. After the officer retrieved the gun, the investigators from the carjacking case interviewed Moore. After being advised of his *Miranda* rights, Moore made several incriminating statements. Moore was eventually charged in federal court for being a felon in possession of a firearm in violation of *18 U.S.C. § 922 (g)*.

The district court held that Moore's first statements were obtained in violation of *Miranda* but that his post-*Miranda* warning statements were admissible.

Moore argued that his post-*Miranda* statements should have been suppressed. He claimed that the officers had engaged in a deliberate two-step interrogation process designed to deprive him of his *Miranda* rights.

The court disagreed. First, the initial questioning was brief and it focused on the location of the missing gun because of the potential threat to the public. Second, the post-*Miranda* questioning was focused on the carjacking and attempted robbery and was conducted by different officers. The investigators from the carjacking case were not present when the officer initially questioned Moore about the location of the gun and that officer was not present when the investigators questioned Moore about the carjacking case. Third, ninety minutes elapsed between the two interviews. This was enough time for Moore to have reasonably believed the second interview was not a continuation of the first one.

Moore also argued that the second interview violated his *Sixth Amendment* right to counsel. The court disagreed, holding that Moore's confession did not violate the *Sixth Amendment* because his right to counsel had not yet attached, for either his state or federal offenses, at the time of the second interview.

Moore's *Sixth Amendment* right to counsel attached for the state charges at his arraignment. Here, the officers interviewed him before that time and there was no indication that they intentionally delayed the arraignment in order to interview him.

The court found that even if Moore's *Sixth Amendment* right to counsel had attached for the state charges, at the time of his second interview, it had not attached for the federal firearms charge. The *Sixth Amendment* right to counsel is offense specific. At the time of the second interview, the federal firearms charge had not yet been initiated against Moore, therefore, his *Sixth Amendment* right to counsel had not attached.

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

*****

U.S. v. Williams, 681 F. 3d 35 (2d Cir. 2012)

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

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

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

*****

U.S. v. Ramos, 685 F.3d 120 (2nd Cir. 2012)

Ramos claimed that his *Fifth Amendment* right against self-incrimination was violated because he was compelled to make incriminating statements during a mandatory polygraph examination that was conducted as a condition of his parole.

The court disagreed. First, the parole officer did not tell Ramos that he would lose his freedom if he invoked his *Fifth Amendment* privilege against self-incrimination. Rather, the consent forms Ramos signed warned him that his failure to fully and truthfully answer all questions asked by the parole officer could lead to the initiation of violation proceedings or the revocation of his parole. Second, there was no evidence that Ramos subjectively felt compelled to answer incriminating questions during the polygraph examination or the ICE agents' later investigation.

Finally, Ramos could not have reasonably believed that his parole would be revoked for exercising his *Fifth Amendment* right because the Supreme Court has ruled that this would be unconstitutional.

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

*****

United States v. Oehne, 698 F.3d 119 (2nd Cir. 2012)

Police officers suspected that Oehne had sexually abused a minor when he lived in Connecticut. The officers learned that Oehne lived in Virginia, where he had a pending criminal case for sexual abuse of another minor girl. Officers went to Oehne's house, placed him in handcuffs and seated him in a police car while other officers secured the house until a search warrant could be obtained. After an officer read the first line from a *Miranda* Advice-of-Rights form, Oehne said that he had a lawyer. The officer asked Oehne if the lawyer was for his pending case in Virginia,

and Oehne said, "Yes." Oehne eventually waived his *Miranda* rights and made several incriminating statements.

Oehne argued that he had invoked his *Fifth Amendment* right to counsel by telling the officer that he had a lawyer in another case and by refusing to sign the Advice-of-Rights form. The court disagreed. For a defendant to invoke his right to counsel, he must do so through a clear, unambiguous affirmative action or statement. When Oehne told the officers that he had a lawyer, he was referring to an attorney representing him in a separate pending charge in Virginia. Oehne never requested a lawyer for the current custodial interrogation and telling the officers that a lawyer represented him in an unrelated matter did not constitute an unequivocal request for counsel. In addition, Oehne did not refuse to sign the Advice-of-Rights form because the officers never asked him to sign it.

The court added that even if Oehne had invoked his *Fifth Amendment* rights, he later waived them by voluntarily initiating a conversation with the officers and discussing the case.

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

*****

United States v. Siddiqui, 699 F.3d 690 (2nd Cir. 2012)

Siddiqui claimed the trial court improperly admitted incriminating, un-Mirandized statements that she gave to federal agents while she was hospitalized. The trial court held that the statements were made voluntarily; therefore, the government could use them in its rebuttal case after Siddiqui testified.

The court agreed. In its case in chief, the government may not introduce statements taken from the defendant in violation of Miranda. However, the government may introduce un-Mirandized statements to impeach the defendant's testimony, as long as they were made voluntarily because a defendant is under an obligation to testify truthfully.

Here, while the agents did not Mirandize Siddiqui, she was kept in soft restraints while in the hospital and the agents' conduct was not overbearing or abusive. The agents attempted to meet her basic needs and never denied her access to the restroom, food, water or medical attention. The agents talked with Siddiqui when she wanted to talk and sat quietly in her room when she did not want to talk. In addition, Siddiqui is highly educated, having earned undergraduate and graduate degrees. Most importantly, Siddiqui was lucid and able to engage the agents in coherent conversation despite suffering pain associated with her injury.

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

*****

United States v. Murphy, 703 F.3d 182 (2nd Cir. 2012)

The court held that Murphy had not knowingly waived his *Miranda* rights because the officer's *Miranda* warning confused the waiver of rights with the exercise of rights. The officer's statement strongly suggested Webster and Murphy would waive their rights to silence and counsel by not talking to him. While slight deviations from the standard *Miranda* warnings will

not automatically invalidate a defendant's waiver of his rights, in this case, the substance of the warnings was confusing enough to cast serious doubt on whether Murphy understood his rights.

As to Webster, the officer testified he did not know whether Webster heard the *Miranda* warnings he read. The government argued Webster's wavier of his *Miranda* rights should be inferred based solely on the fact the officer read the warnings in a clear voice while standing near him. Although a defendant's waiver may be implied through his silence, along with an understanding of his rights and some conduct indicating a waiver, the court held the government must do more that show that a *Miranda* warning was given and the individual later made a statement. Here, the government could not establish that Webster understood the *Miranda* rights given by the officer, incorrect as they were; therefore, Webster could not validly waive them.

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

*****

U.S. v. Whiteford, 676 F. 3d 348 (3d Cir. 2012)

Whiteford and Wheeler were United States Army reserve officers who were convicted of conspiracy for participating in a bid-rigging scheme that involved directing millions of dollars in contracts to several different companies owned by another co-conspirator.

Wheeler claimed that incriminating statements he made to the agents after his arrest and weapons recovered from his house should have been suppressed.

When the agents approached Wheeler, he told them he had spoken to an attorney and that the attorney directed him to cooperate unless he "got stumped." The court held that this comment did not amount to a request for counsel under *Miranda.*

Next, the court held that Wheeler had voluntarily waived his *Miranda* rights. The agents did not intimidate or coerce Wheeler and he voluntarily signed an Advice of Rights form. Although Wheeler argued that the agents' failure to inform him of the specific charges against him amounted to psychological pressure, he could not point to anything to show that his will was overcome. Further, there is no requirement that a person must know of the charges against him before he can waive his *Miranda* rights.

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

*****

U.S. v. Holmes, 670 F. 3d 586 (4th Cir. 2012)

Holmes was charged with sexually abusing his stepdaughter while he was on active duty with the United States Air Force. Holmes claimed that his oral and written statements to special agents with the Air Force Office of Special Investigations (OSI) should have been suppressed because his interrogation was conducted under circumstances that caused him to involuntarily confess.

To support his argument, Holmes focused on his lengthy return trip from Qatar immediately preceding the interview and the OSI agents' failure to allow him more than twelve hours' re-acclimation prior to the interrogation. He also pointed to the OSI agent's statements that his

career might be salvaged if he admitted to the acts and that if he confessed his stepdaughter would be spared the trauma of testifying.

The court disagreed, holding that there was no evidence in the record that the OSI agents coerced Holmes into making any statements or otherwise overreached in order to cause him to confess.

Before the interview, the agent asked Holmes if he was tired or too sleepy to conduct the interview at that time. Holmes said that he "felt fine" and at no time after the interview began did he ask for it to end, claim that he was tired or otherwise indicate that he was unwilling to proceed.

Even though the agent told Holmes that he had known individuals charged with crimes to maintain their careers, there was no evidence to indicate that the agent made any direct or implied promises regarding Holmes' career that induced him to provide any statements.

Finally, the agent's statement to Holmes that his confession would spare his stepdaughter the trauma of testifying was an acceptable truthful statement that reflected on how Holmes' decision on whether or not to cooperate could affect his stepdaughter. Statements by law enforcement officers that are merely uncomfortable or create a predicament for a defendant are not automatically coercive.

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

*****

U.S. v. Burgess, 684 F.3d 445 (4th Cir. 2012)

Burgess claimed the district court should have suppressed certain statements that he made to police officers after he was arrested. Burgess argued that he provided those statements with the understanding they were protected by "informal use immunity" or "transactional immunity." According to Burgess, the custom and practice in the Western District of North Carolina was to grant such immunity to cooperating defendants.

The court disagreed. Burgess could not identify any action or statement on the part of the government sufficient to establish an agreement regarding immunity for his statements. The officers informed Burgess his *Miranda* rights before every interview and they never made any express statements to him concerning immunity. In addition, the officers' conduct could not be viewed as having impliedly offering immunity to Burgess or accepting such an offer from him.

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

*****

United States v. Ayesh, 702 F.3d 162 (4th Cir. 2012)

The U.S. State Department hired Ayesh, a resident of Amman, Jordan, to work as the shipping and customs supervisor at the U.S. Embassy in Baghdad, Iraq. During this time, Ayesh diverted Unites States funds intended for shipping and customs clearance vendors to his wife's bank account. Once U.S. officials figured out Ayesh's scheme, they arranged for him to come to the United States under the pretext of attending a training seminar. Federal agents arrested Ayesh

after he retrieved his checked luggage from the baggage claim area at the airport. During an interview that lasted approximately five hours, Ayesh confessed to the agents.

Ayesh claimed his confession was involuntary and coerced because he made it during a lengthy interview after traveling from Jordan for nineteen hours without sleep or food.

The court disagreed. Ayesh was fluent in written and spoken English and he declined the agents' offer of a translator. Ayesh then initialed each of his *Miranda* rights on the Advice-of-Rights Form and signed the form indicating he understood his rights and that he was waiving them. In addition, Ayesh never told that agents he was fatigued or needed sleep and he did not appear to be either physically or mentally tired. When Ayesh requested a break, one was provided, and the agents offered him food and drink on several occasions. Ayers freely and voluntarily confessed to the agents.

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

*****

U.S. v. Hernandez, 670 F. 3d 616 (5th Cir. 2012)
The court held the incriminating statements Hernandez made to the agents, after her arrest at their office, were inadmissible. They occurred only a few hours after an egregious *Fourth Amendment* violation and no intervening events occurred to break the connection between her arrest and her statements.

Finally, the court held the statements obtained from the two illegal aliens were inadmissible against Hernandez. The government offered nothing more than pure speculation that their statements would have been inevitably obtained but even if they had, their statements were not sufficiently separated from the *Fourth Amendment* violation to make them admissible.

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

*****

U.S. v. Collins, 683 F.3d 697 (6th Cir. 2012)

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

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

*****

U.S. v. Vreeland, 684 F.3d 653 (6th Cir. 2012)

Vreeland met with his federal probation officer for his regular monthly meeting. The probation officer had concluded, based on his investigation, that Vreeland had violated his supervised release by committing a home invasion robbery. The probation officer told Vreeland that he was a suspect in the home invasion and without advising his of his *Miranda* warnings, asked him specific questions about it. Vreeland denied any knowledge of the incident. The probation officer told Vreeland that it was a violation of federal law to make a false statement to a federal officer. Vreeland was convicted of making false oral and written statements concerning the home invasion to the probation officer.

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

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

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

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

*****

U.S. v. Scott, 693 F.3d 715 (6th Cir. 2012)

After the police arrested Scott, a detective read Scott his *Miranda* rights and gave him an Advice-of-Rights form, which informed Scott of his right to remain silent and his right to have a lawyer present during questioning. Below the warning, the form included the question, "Having these rights in mind, do you wish to talk to us now?" Scott wrote, "no" underneath this question. The detective stopped the interview and transported Scott to the jail.

The next day, Scott was brought back to the detective's office where he was *Mirandized* again. This time Scott wrote "yes" under the question on the form that asked whether he wished to talk to the police. Scott then made several incriminating statements.

The court held Scott had invoked his right to counsel when he wrote "no" in response to the question "Having these rights in mind, do you wish to talk to us now?" on the Advice-of-Rights form. According to the language of the question itself, the "no" response was related directly to "these rights," referenced in the question, which included the right to have a lawyer present during police questioning. If there was any ambiguity about Scott's right to have a lawyer present during questioning, it was from the form itself and not from Scott's invocation of that right. The form used by the police was far from clear and any ambiguity in the form could not be held against Scott.

The court remanded the case to district court to determine whether the police re-approached Scott after he invoked his right counsel or whether Scott re-initiated contact with the officers. If Scott initiated further discussion with the police, he waived his right to counsel. If Scott did not initiate further discussion with the police, he did not waive his right to counsel and the police were prohibited from re-approaching him.

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

*****

U.S. v. Anderson, 695 F.3d 390 (6th Cir. 2012)

Police officers arrested Anderson after he crashed his vehicle and then tried to flee from them on foot. An officer read Anderson his *Miranda* rights at the scene and again at the police station. Anderson waived those rights and made several incriminating statements. Anderson argued that the court should have suppressed those statements because his mental and physical condition at the time of his arrest prevented him from making a voluntary waiver of his *Miranda* rights.

The court disagreed. The arresting officer testified Anderson was out of breath and had a scratch on his face, but other than that, was coherent. The officer who interviewed Anderson stated Anderson appeared to understand his rights and that he did not appear to be traumatized or incoherent. Although Anderson had a swollen bump on his head, he declined medical treatment, did not complain about the injury and did not give any indication that the injury was affecting his ability to understand his *Miranda* rights and knowingly waive them.

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

*****

U.S. v. Hampton, 675 F. 3d 720 (7th Cir. 2012)

Officers arrested Hampton. At the jail, Hampton signed a *Miranda* waiver and began to give a statement, but then invoked his right to counsel. The officers stopped the interview and asked a guard to take Hampton back to his cell. Hampton then changed his mind and asked to speak with the officers without counsel present. The officers read Hampton his *Miranda* warnings again and asked him if he wanted a lawyer. Hampton replied, "Yeah, I do, but you . . ." Upon hearing this, the officers reminded Hampton that they could not talk to him if he was asking for counsel. After a long pause, Hampton continued the conversation, telling the officers unambiguously that he wanted to continue without a lawyer. Hampton made incriminating statements to the officers that were admitted against him at trial.

Hampton argued his statements should have been suppressed because the officers violated *Miranda* and *Edwards* by questioning him after he invoked is right to counsel. The court disagreed, holding the officers did not violate the *Miranda/Edwards* rule. The officers honored Hampton's initial request for counsel and immediately stopped questioning him. Hampton then reinitiated the interview with the officers. After he was advised of his *Miranda* rights a second time, Hampton never made a clear and unambiguous request for counsel. The officers' effort to obtain clarification from Hampton was appropriate and consistent with good police practices recommended by the United States Supreme Court in *U.S. v. Davis* .

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

*****

U.S. v. Wysinger, 683 F.3d 784 (7th Cir. 2012)

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

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

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

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

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

*****

U.S. v. Vega, 676 F. 3d 708 (8th Cir. 2012)

The court noted that the district court had ruled that the officers had read Vega his *Miranda* rights and that neither officer had used any threats against him to obtain a confession, contrary to Vega's argument. The court stated that witness credibility determinations made by the district court are virtually unreviewable on appeal. Consequently, the court concluded Vega's incriminating statements to the officers were voluntary and that the district court properly refused to suppress them.

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

*****

U.S. v. Boe, 678 F. 3d 629 (8th Cir. 2012)

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

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

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

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

*****

United States v. Santistevan, 701 F.3d 1289 (10th Cir. 2012)

While driving to the jail to interview Santistevan, an FBI agent received a call from an attorney who advised him she represented Santistevan. The attorney said Santistevan did not wish to speak to the agent, and if he went to the jail Santistevan had a letter for the agent she had drafted. When the agent arrived at the jail, he told Santistevan he had spoken to an attorney who claimed to represent him and then asked Santistevan whether he had a letter. Santistevan gave the agent a letter, which stated in part, "Mr Santistevan does not wish to speak with you without counsel." The agent told Santistevan even though he had been advised by an attorney not to talk to him, it was up to Santistevan whether he wished to talk to the agent or not. Santistevan agreed to talk to the agent without a lawyer present. The agent advised Santistevan of his *Miranda* rights, which he waived, and then Santistevan made several incriminating statements.

The court of appeals agreed with the district court, which held Santistevan had unambiguously invoked his right to counsel when he handed the letter drafted by his attorney to the agent. When Santistevan gave the letter to the agent, the court concluded he ratified the contents of the letter as his own personal communication to the agent. Once Santistevan did this, he effectively invoked his right to counsel and all questioning should have stopped. Because the agent continued to question Santistevan, the district court properly suppressed the incriminating statements he made to the agent.

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

*****

U.S. v. Woods, 684 F.3d 1045 (11th Cir. 2012)

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

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

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

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

*****

Admission of Statements after *4th Amendment* Violation

U.S. v. Conrad, 673 F. 3d 728 (7th Cir. 2012)

The court agreed with the district court which held the agents' warrantless entry onto the back deck of the house violated Conrad's *Fourth Amendment* rights because he had a reasonable expectation of privacy in his father's house, including the curtilage. As a result, all evidence and statements obtained at that time were properly suppressed.

However, the court agreed with the district court, which held the evidence and statements obtained two hours later from Conrad at his apartment were admissible because they were sufficiently attenuated from the original *Fourth Amendment* violation.

First, two hours elapsed between the curtilage violation and the evidence and statements obtained at Conrad's apartment. During this time, Conrad had the opportunity to reflect upon his situation and talk to his father.

Second, Conrad's repeated consents to search and his waiver of *Miranda* rights, which the agents were not required to give because Conrad was not in "custody," occurred two hours after the curtilage violation and at a different location. Conrad voluntarily agreed to go from the family home to his apartment and during this time, he was able to obtain advice from his father, which he chose to ignore by talking to the agents.

Finally, the agents' curtilage violation was not so flagrant that it warranted the exclusion of evidence obtained at Conrad's apartment. The agents' conduct at Conrad's apartment showed that their earlier constitutional blunder reflected only a temporary lapse in judgment, which had been cured by the time they reached the apartment.

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

*****

Custody

U.S. v. Crooker, 688 F.3d 1 (1st Cir. 2012)

The court held Crooker was not in custody for *Miranda* purposes and that the district court had properly refused to suppress statements he made to the agents. First, Crooker was questioned in familiar surroundings. Second, even though there were numerous agents in his house, they holstered their firearms after they cleared the house and left them holstered during their search. Third, no more than two agents were in direct conversation with Crooker at one time. Fourth, the agents never physically restrained Crooker, and freely moved about his property throughout the search, even leaving the property for some time after he was questioned.

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

*****

United States v. Murdock, 699 F.3d 665 (1st Cir. 2012)

A police officer stopped Murdock as he was walking up to his residence after the officer learned that Murdock, a convicted felon, might have received some firearms in the mail. Murdock initially ignored the officer's request to stop, but complied after the officer unholstered his firearm, but did not point it at him. The officer reholstered his weapon, frisked Murdock and told him that he was looking for weapons. Four other officers arrived and eventually found a red overnight bag containing two handguns and ammunition in the trunk of a car in the garage. After the officer told Murdock that he had found "the blue bag with your weapons in it," Murdock replied that the bag was red. The officer then agreed that the bag was red. During the forty-five minute to one-hour search, Murdock remained in the small front yard, spoke to his wife, used his

cell phone, sat in a chair and drank a beverage. He was not handcuffed, restrained or told that he could not leave.

Murdock argued that his statement concerning the color of the bag should have been suppressed because he was in custody and had not been given his Miranda rights.

The court disagreed. While Murdock remained on the lawn, he was only in the presence of one or two police officers. Murdock was not handcuffed, he was able to sit down, use his cell phone and drink a beverage. Although the officer drew his firearm, he only did it after Murdock initially refused to stop and he reholstered it once Murdock did stop. The officer's conversation with Murdock about the red bag was brief and non-confrontational. As result, Murdock was not in custody for Miranda purposes; therefore, the officer's failure to provide them to Murdock was not a constitutional violation.

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

*****

United States v. Infante, 701 F.3d 386 (1st Cir. 2012)

The court held Infante was not in custody when the investigators interviewed him at the hospital; therefore, he was not entitled to *Miranda* warnings. Based on the circumstances, the court found a reasonable person in Infante's position would have felt free to terminate the interviews and ask the investigators to leave. The investigators told Infante each interview was voluntary, he did not have to talk to them and he was not under arrest or in custody. In addition, the investigators did not impede hospital personnel from coming and going freely into Infante's room, the investigators were in plainclothes, their weapons remained in their holsters, the atmosphere was non-confrontational and the interviews were relatively short.

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

*****

U.S. v. Cavazos, 668 F. 3d 190 (5th Cir. 2012)

Federal agents executed a warrant on Cavazos's home between 5:30 a.m. and 6:00 a.m. searching for evidence that he had sent sexually explicit material to a minor female. Approximately fourteen agents and officers entered the residence and handcuffed Cavazos as he was getting out of bed. After the home was secured, agents removed the handcuffs and took Cavazos to a bedroom for an interview. Agents told Cavazos it was a "non-custodial" interview, he was free to get something to eat and drink during it, and he was free to use the bathroom. The agents then began questioning Cavazos without reading him his *Miranda* rights. Cavazos admitted he had been "sexting" the victim and he described communications he had been having with other minor females.

The court affirmed the trial court and held that Cavazos was subjected to a custodial interrogation when the agents questioned him in his home. As a result, the incriminating statements made by Cavazos were properly suppressed.

A suspect is in custody for *Miranda* purposes when placed under formal arrest or when a there is a restraint on his movement to the degree associated with a formal arrest, even when there is no arrest. The key question is under the circumstances, would a reasonable person have felt he was at liberty to terminate the interrogation and leave. Here, the court said no. First, fourteen agents entered Cavazos's home, in the early morning, without his consent. Second, although Cavazos was free to use the bathroom or get a snack, when he did, he was followed by the agents and closely monitored. Third, although Cavazos was allowed to use a telephone to call his brother, the agents had him position the phone so they could listen to the conversation. This indicated the agents' control over Cavazos while implying that he had no privacy.

While the agents told Cavazos the interview was "non-custodial," such a statement made to a reasonable lay-person is not the same as telling him that he can terminate the interrogation and leave. Also, such a statement, made in a person's home does not have the same effect as if the agents had offered to leave at any time upon request.

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

*****

U.S. v. Ambrose, 668 F. 3d 943 (7th Cir. 2012)

The court held that, a law enforcement officer, was not in custody for *Miranda* purposes when he made incriminating statements during two sets of interviews; therefore, they were admissible against him at trial. At the beginning of the first interview, Ambrose was told he was not under arrest. The interviewers were unarmed, dressed in business attire, the tone of the conversation was business-like and Ambrose was not physically prevented from leaving the conference room. Even though Ambrose had his weapon, cell phone and keys taken from him when he entered the building, these security measures are not indicative of "custody" because they were uniformly applied to all who entered the building. Security requirements of the police station are not enough to transform a non-custodial voluntary interview into a custodial one.

After the first interview, Ambrose was allowed to speak one-on-one with three different individuals in the conference room concerning his situation. Ambrose was not in custody at this time because was given free access to these individuals, there were no investigators present, no one eavesdropped on the conversations and there were no restrictions placed on the content or the duration of the conversations.

Finally, Ambrose argued his statements were not voluntary because he was forced to either incriminate himself or be faced with losing his job. The court held that there was no evidence that anyone threatened Ambrose with the loss of his job if he failed to cooperate. The initial interviewer told Ambrose several times that any decision regarding Ambrose's job was beyond his control. The other person who urged Ambrose to cooperate was one of the people that Ambrose specifically asked to meet. Ambrose cannot complain that he followed the advice of the person that he sought out.

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

*****

U.S. v. Johnson, 680 F. 3d 996 (7th Cir. 2012)

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

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

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

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

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

*****

United States v. Pelletier, 700 F.3d 1109 (7th Cir. 2012)

Pelletier applied for a job with the Federal Bureau of Investigation (FBI). As part of the application process, he went to the FBI office to undergo a personnel security interview and to take a polygraph examination. Pelletier failed the polygraph examination. When the polygraph examiner asked him how he thought he did, Pelletier told him he had some trouble with some of the questions because of a set of files on his home computer that contained images of naked children. The polygraph examiner then invited an agent from the Cyber Crimes Unit to join them. The agent did not *Mirandize* Pelletier who admitted to downloading child pornography from the internet for a graduate school research project. The agent asked Pelletier for consent to search his computer but Pelletier refused. The agent left the room and directed other agents to go to Pelletier's home and secure it until a search warrant or consent could be obtained. The agent also contacted federal and state prosecutors about obtaining search warrants for Pelletier's home and computer. The agent returned to the interview room and told Pelletier if he did not consent to a search that he was going to apply for a search warrant. Pelletier signed a written consent to search form and was allowed to leave. As he left, Pelletier asked the agent if "this was going to slow down the application process." It did. The FBI found over six hundred images of child pornography on Pelletier's computer and instead of hiring him, arrested him.

Pelletier claimed several of his incriminating statements should have been suppressed because he never received *Miranda* warnings. He argued that the job interview became a custodial interrogation by the time the agent from the Cyber Crimes Unit, who was wearing a badge and carrying his duty weapon entered the interview room.

The court did not agree. Pelletier came to the FBI office as a job applicant, not a suspect. A reasonable applicant for an FBI job would expect to go through lengthy interviews in an FBI office, encounter armed FBI agents and be subject to security measures limiting free movement through the building. Pelletier never expressed any discomfort, asked to leave or asked for an attorney. The agents offered him snacks, sodas, and restroom breaks several times and Pelletier remained friendly and talkative throughout the day. Pelletier's statement to agents as he was leaving showed that he believed he was still in the running for an FBI job. Under these circumstances, a reasonable person would not have thought himself in custody; therefore, Pelletier was not entitled to *Miranda* warnings.

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

*****

U.S. v. Huether, 673 F. 3d 789 (8th Cir. 2012)

Huether argued the district court should have suppressed incriminating statements he made to the officers because he had not been given *Miranda* warnings.

The court held Huether was not in custody for *Miranda* purpose; therefore, he was not entitled to the warnings. First, an officer told Huether, at least twice, that he was not under arrest or in custody. Heuther did not ask to leave, refuse to answer questions, or request anything during the interview even though he had been told that he was not under arrest or in custody. Huether became more responsive to the officer's questions as the interview progressed and he cooperated with the officer in providing access to his laptop computer.

Second, when Huether signed the search warrant, he became aware of the number of officers present. As a result, he could not complain later when the interviewing officer mentioned the other officers, and it was a verbal show of force that made the interview custodial.

Finally, Huether had prior experience in being interviewed by police officers. This indicated he was no stranger in speaking with them and he voluntarily chose to be cooperative.

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

*****

U.S. v. Cowan, 674 F. 3d 947 (8th Cir. 2012)

The court held that several statements obtained from Cowan were properly suppressed. Cowan was detained, handcuffed, patted down and then questioned by the officer who did not first advise him of his *Miranda* rights. The court found that Cowan was in-custody for *Miranda* purposes because a reasonable person in his position would not have felt free to end the questioning and leave and no one told Cowan that he was free to leave or refuse to answer questions.

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

*****

U.S. v. Sanchez, 676 F. 3d 627 (8th Cir. 2012)

Sanchez confronted a man at a gas station and made several threatening statements towards him and his family. The man's wife was a cooperating witness in a federal criminal case against three of Sanchez's children. The next day, Sanchez attended a hearing regarding the case and while she was sitting in the courtroom, a federal agent gestured for Sanchez to join her in the hallway. Once in the hallway, the agent led Sanchez to an office in the court's basement that was normally used by the federal prosecutor. A second agent asked Sanchez to join him and a third agent in an adjoining interview room. After she complied, the agent told her that she was not under arrest and asked her if she would answer questions about the gas station incident. Sanchez agreed and neither agent issued *Miranda* warnings. Sanchez initially denied the incident, but after the agent raised his voice and called her a liar, she made some incriminating statements. The interview lasted ten to fifteen minutes and the agents did not arrest Sanchez when it ended.

While there were several factors that favored a finding of custody, the court ultimately held Sanchez was not in custody during the interview; therefore, the agents were not required to provide her with *Miranda* warnings. Although the interview was police dominated, the agent told Sanchez she was not under arrest. The agent did not employ strong-arm tactics or use deception during the interview. The agent's raised voice and assertions to Sanchez that she was lying to him were not coercive interview methods. Finally, Sanchez was not arrested at the end of the interview. The court found that a reasonable person in Sanchez's position would have felt free to end the interview.

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

*****

United States v. Coleman, 700 F.3d 329 (8th Cir. 2012)

Coleman claimed the officer violated his *Fifth Amendment* rights by questioning him without first advising him of his *Miranda* rights. Although a driver is technically seized during a traffic stop, *Miranda* warnings are not required when the driver is not subjected to the functional equivalent of a formal arrest. Here, Coleman was seated in the front seat of the officer's patrol car and he was not handcuffed. The officer's tone was conversational and the questions were limited in number and scope. Because the officer did not subject Coleman to restraints comparable to those of a formal arrest, he was not required to give *Miranda* warnings before questioning him.

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

*****

Howes v. Fields, 132 S. Ct. 1181 (S. Ct. 2012)

While serving a jail sentence, a corrections officer escorted Fields to a conference room where two police officers questioned him about an unrelated crime. At the beginning of the interview, the officers told Fields that he could leave whenever he wanted. Fields eventually confessed to the crime. The officers never advised Fields of his *Miranda* warnings or told him that he did not have to speak with him.

The Sixth Circuit Court of Appeals held that any time an inmate is taken from the general prison population and questioned about a crime that occurred outside the prison, he is always in-custody for *Miranda* purposes.

The Supreme Court disagreed. The court held that serving a term of imprisonment, by itself, is not enough to constitute *Miranda* custody. When a prisoner is questioned, the determination of *Miranda* custody should focus on all of the circumstances surrounding the interrogation, to include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.

In this case, the court held that Fields was not in-custody for *Miranda* purposes. Although the interview lasted between five and seven hours and continued well past the time Fields went to bed, the officers told Fields several times that he could leave and go back to his cell whenever he wanted. Additionally, the interview was conducted in comfortable conference room, the officers did not physically restrain or threaten Fields and they offered him food and water. All of these facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.

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

*****

Immunity From Prosecution

U.S. v. Stadfeld, 689 F.3d 705 (7th Cir. 2012)

Instead of obtaining formal immunity from prosecution, Stadfeld agreed to talk to state investigators informally, in exchange for an oral non-prosecution agreement from the state prosecutor. Stadfeld's retained attorney mistakenly advised him that this non-prosecution agreement prevented any prosecutor, state or federal, from using his statements against him. Four years later, Stadfeld was indicted by a federal grand jury, based in part on his statements to the state investigators.

Stadfeld moved to suppress the use of his statements, arguing that he spoke to the investigators only because he was under the mistaken impression that he had full immunity.

The court held Stadfeld's statements were not caused by law enforcement coercion. Neither the state prosecutor nor the investigators made any threats or false promises of leniency to obtain Stadfeld's statements. In addition, the erroneous advice from his attorney did not make Stadfeld's statements involuntary or inadmissible based on ineffective assistance of counsel.

The court also held regardless of any misunderstanding about the scope of the non-prosecution agreement, Stadfeld breached it by lying to the investigators.

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

*****

Miranda and *Fed. Rule Crim. Pro. 5(a) / McNabb-Mallory/ Corley*

U.S. v. Cantu-Ramirez, 669 F. 3d 619 (5th Cir. 2012)

In this multiple co-defendant case, Lauro Grimaldo argued that the district court should have suppressed his confession because federal agents delayed in presenting him to a magistrate judge for more than two hours for the purpose of interviewing him and obtaining a confession.

The court disagreed after applying the Supreme Court's guidance from *Corley v. United States*.

First, because Grimaldo's presentment was delayed for less than six hours, his confession was admissible as long as it was obtained voluntarily.

Second, based on the totality of the circumstances, the court found nothing about the interview indicated his confession was involuntary. The interview lasted only ninety minutes, the agents wore casual clothing, Grimaldo was not handcuffed and the agents offered him food and drink and allowed him to make several phone calls. The agents advised Grimaldo of his *Miranda* rights and took care to ensure that he understood and voluntarily waived them. The agents obtained Grimaldo's confession voluntarily and it was properly admitted against him.

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

*****

U.S. v. McDowell, 687 F.3d 904 (7th Cir. 2012)

After federal agents arrested McDowell on drug charges, McDowell claimed he was working undercover for the Chicago Police Department (CPD). Because it was after hours, the agents asked McDowell if he would be willing to waive his right to prompt presentment before a magistrate judge while they tried to verify his claim. McDowell agreed and signed a written *Federal Rule of Criminal Procedure 5(a)* waiver and spent the night in jail. The federal agents eventually discovered that McDowell worked for the CPD as an informant, but that he was not working under their direction at the time of the transaction that led to his arrest. The next morning, approximately sixteen hours after his arrest, McDowell waived his *Miranda* rights and made several incriminating statements. After that, McDowell was brought before a magistrate judge for his initial appearance. McDowell argued that his incriminating statements should have been suppressed because the delay in bringing him in front of the magistrate was unreasonable.

The court disagreed. By signing the *Rule 5(a)* waiver, McDowell gave up his right to prompt presentment to the magistrate for the length of time specified in the waiver, which in this case was 72 hours. As a result, McDowell also gave up the right to challenge the admissibility of his incriminating statements on the grounds of his delay in presentment to the magistrate. There was no dispute that McDowell signed the *Rule 5(a)* waiver voluntarily. In addition, McDowell did not argue that his confession was otherwise inadmissible. All parties agreed that the agents complied with *Miranda* and that McDowell confessed voluntarily.

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

*****

Public Safety Exception

United States v. Ferguson, 702 F.3d 89 (2nd Cir. 2012)

Police officers arrested Ferguson in front of his apartment less than an hour after he had fired a pistol into the air during an argument with two women. Ferguson was not armed when the officers arrested him. At the police station, without providing *Miranda* warnings, another officer questioned Ferguson about the location of the firearm. Ferguson told the officer the firearm was at his sister's apartment and then accompanied officers there to recover it.

Ferguson argued the officer should have provided him with *Miranda* warnings before questioning him about the firearm.

The court disagreed. Even though the officer did not provide Ferguson with *Miranda* warnings, his questions fell within the scope of the public safety exception to the *Miranda* requirement. Under this exception, the concern for public safety may justify an officer's failure to provide *Miranda* warnings before he asks questions designed to locate an abandoned weapon. Here, Ferguson had reportedly discharged a firearm; however, the officers did not recover a firearm when they arrested him less than an hour later. Not knowing where Ferguson had gone during that time, the officers had an objectively reasonable need to protect the public from the possibility that he had hidden the firearm in a public place. In addition, the officer's questions

were not investigatory in nature or asked in such a way as to obtain testimonial evidence, but rather they were supported by a genuine concern for public safety.

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

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Sixth Amendment

Confrontation Clause

United States v. Cameron, 699 F.3d 621 (1st Cir. 2012)

Cameron also argued the admission of evidence, through the testimony of the Yahoo! employee, violated his *Confrontation Clause* rights. The court held that the log-on, IP address and user account information was properly admitted under Federal Rule of Evidence 803(6) as non-testimonial business records. This information was collected by Yahoo! to serve business functions that were completely unrelated to any trial or law enforcement purpose. Because the primary purpose of collecting this data was not to assist a subsequent criminal prosecution, the court held that its admission did not violate the *Confrontation Clause*.

However, the court concluded that there was strong evidence that the CP Reports, while created in the ordinary course of business, were testimonial because they were prepared with the primary purpose of establishing or proving past events potentially relevant to a later criminal prosecution. As a result, the court held that the admission of the CP Reports violated the *Confrontation Clause* because Cameron did not have the opportunity to cross-examine the Yahoo! employees who prepared them, but only an employee who had knowledge of Yahoo!'s data retention and legal procedures.

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

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Williams v. Illinois, 132 S. Ct. 2221 (S. Ct. 2012)

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

While five justices agreed with the Supreme Court of Illinois, which held that, there was no *Confrontation Clause* violation in this case, only four justices agreed as to the reason. Writing for the plurality, Justice Alito held that out-of-court statements, such as the private lab report, that are referenced by the expert witness solely for explaining the assumptions on which that witness' opinion rests, are not offered for their truth and therefore fall outside the scope of the

Confrontation Clause. In addition, even if the private lab report had been admitted into evidence there would have been no *Confrontation Clause* violation. The report was produced before any suspect was identified and it was not sought for the purpose of obtaining evidence against Williams, who was not under suspicion at the time, but for the purpose of finding a rapist who was still at-large.

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

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Right to Counsel

U.S. v. Moore, 670 F. 3d 222 (2d Cir. 2012)

A state judge issued an arrest warrant for Moore on charges that arose from a carjacking and attempted armed robbery in which shots were fired. While fleeing from an officer, Moore tossed a gun away. The officer lost Moore and could not find the gun. Another officer arrested Moore the next day. At the jail, Moore saw an officer that he knew from a previous case and agreed to show him where he had thrown the gun, in an attempt to get help with his current charges. This officer was not involved in Moore's carjacking case. After the officer retrieved the gun, the investigators from the carjacking case interviewed Moore. After being advised of his *Miranda* rights, Moore made several incriminating statements. Moore was eventually charged in federal court for being a felon in possession of a firearm in violation of *18 U.S.C. § 922 (g).*

The district court held that Moore's first statements were obtained in violation of *Miranda* but that his post-*Miranda* warning statements were admissible.

Moore argued that his post-*Miranda* statements should have been suppressed. He claimed that the officers had engaged in a deliberate two-step interrogation process designed to deprive him of his *Miranda* rights.

The court disagreed. First, the initial questioning was brief and it focused on the location of the missing gun because of the potential threat to the public. Second, the post-*Miranda* questioning was focused on the carjacking and attempted robbery and was conducted by different officers. The investigators from the carjacking case were not present when the officer initially questioned Moore about the location of the gun and that officer was not present when the investigators questioned Moore about the carjacking case. Third, ninety minutes elapsed between the two interviews. This was enough time for Moore to have reasonably believed the second interview was not a continuation of the first one.

Moore also argued that the second interview violated his *Sixth Amendment* right to counsel. The court disagreed, holding that Moore's confession did not violate the *Sixth Amendment* because his right to counsel had not yet attached, for either his state or federal offenses, at the time of the second interview.

Moore's *Sixth Amendment* right to counsel attached for the state charges at his arraignment. Here, the officers interviewed him before that time and there was no indication that they intentionally delayed the arraignment in order to interview him.

The court found that even if Moore's *Sixth Amendment* right to counsel had attached for the state charges, at the time of his second interview, it had not attached for the federal firearms charge. The *Sixth Amendment* right to counsel is offense specific. At the time of the second interview, the federal firearms charge had not yet been initiated against Moore, therefore, his *Sixth Amendment* right to counsel had not attached.

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

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Brady Material

Smith v. Cain, 132 S. Ct. 627 (S. Ct. 2012)

Smith was convicted of murder based on the testimony of a single eyewitness, Larry Boatner. During postconviction relief proceedings, Smith obtained police files containing statements by Boatner that contradicted his trial testimony. Smith claimed that the prosecution's failure to disclose those statements, prior to trial, violated *Brady v. Maryland*.

Under *Brady*, the state violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. The state conceded that Boatner's statements in the police files were favorable to Smith, but argued that they were not material to a determination of his guilt.

The court disagreed. Boatner's testimony was the only evidence linking Smith to the crime, and his undisclosed statements directly contradicted his trial testimony. Boatner told the jury that he had "no doubt" that Smith was the gunman he stood "face-to-face" with on the night of the crime. However, the officer's notes indicated that Boater said that he "could not identify anyone because he could not see faces" and "would not know them if he saw them." Boatner's undisclosed statements were both favorable to the defense and material to the verdict and they were sufficient to undermine the confidence in Smith's conviction.

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

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Federal Rules of Evidence (FRE)

FRE (615)

United States v. Herney, 696 F.3d 938 (9th Cir. 2012)

After a jury trial, Herney was convicted of assaulting a federal law enforcement officer. He argued that the district court abused its discretion and denied him due process by refusing to exclude the officer from the courtroom, by allowing the officer to sit at the prosecution's table and by refusing to require the officer to testify first.

The court disagreed. Federal Rule of Evidence 615 allows the district court to permit a designated officer to be present during trial. There is no general rule that prohibits a case-agent, who is also the victim in the case, to sit at the prosecution's table. Therefore, district court did not abuse its discretion or commit a due process violation by allowing the law enforcement

officer, who was also the victim of the assault, to sit at the prosecution's table as the designated case-agent.

While it might be good practice to require the case-agent to testify first, the court stated there was no rule that required it and the court was reluctant to create such a rule that would deprive the prosecution from presenting its own case without interference.

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

*****

Freedom of Information Act (FOIA)

Hulstein v. Drug Enforcement Administration, 671 F. 3d 690 (8th Cir. 2012)

Hulstein brought suit under the Freedom of Information Act (FOIA) against the Drug Enforcement Administration (DEA) seeking unredacted versions of three DEA reports.

The court agreed with the government and held the "Details" section of the 1990 report was provided by a person who had an assurance of confidentiality, making it exempt from release under section 7d. The court stated that the DEA is not required to make a detailed explanation regarding the alleged confidentiality of each source. The courts have held that the violence and risk of retaliation in drug cases supports an implied grant of confidentiality for such sources, even after the passage of time and whether or not the allegation was acted upon by the agency.

The court also agreed with the government and held the DEA did not have to disclose the names and signatures of the law enforcement officers listed in two reports from 2008. The court found that the withheld information could be used to identify a private individual and therefore triggered the privacy concerns under section 7c. The withheld information also revealed little about the DEA's conduct and nothing meaningful about the DEA's performance of its statutory duties. Unless there was an allegation of wrongdoing by the government in the investigation, which there was not, the privacy interests of the private citizens in the report outweighed any public interest in their disclosure to Hulstein.

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

*****

Entrapment

U.S. v. Davila - Nieves, 670 F. 3d 1 (1st Cir. 2012)

Davila went to a mall where he had arranged to meet a thirteen-year-old girl, named Vanessa, prior to engaging in sexual activity with her. When he arrived for the meeting, he was met by police officers and arrested. The thirteen-year-old girl with whom he had been communicating was actually an undercover police officer.

Davila claimed that the trial judge should have given a jury instruction on entrapment. To be entitled to a jury instruction on entrapment, the defendant must establish that the government induced him to commit the crime and that he was not already predisposed to commit that crime.

The court first noted that there was no improper government inducement. Although Vanessa reinitiated contact with Davila after a seven-month break in their communication, this government conduct did not rise to the level of actually planting in his mind the idea to commit the crime. Davila was eager to get back to where he started when the pair last spoke and he quickly steered the conversation with Vanessa toward sexual topics. Davila repeatedly engaged in sexually explicit conversations with Vanessa, which clearly demonstrated an eagerness to commit the crime, rather than reluctance that was overcome only by government inducement.

In addition, while Vanessa may have initiated contact with Davila, she never broached the subject of engaging in a sexual relationship with him. Davila not only discussed engaging in sexual relations with Vanessa, he followed through with that idea by attempting to meet her for that purpose. Providing a suspect the opportunity to commit a crime does not constitute an inducement that would entitle the suspect to a jury instruction on entrapment.

Because the court determined that no reasonable jury could conclude that there was improper government inducement, the court declined to consider the second factor of predisposition.

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

*****

U.S. v. Cooke, 675 F. 3d 1153 (8th Cir. 2012)

Undercover police officers, posing as pimps, placed an advertisement on the internet related to underage girls. Cooke replied to the ad and requested more information and pictures of the girls. The officers emailed Cooke a digitally morphed photograph of an underage girl and quoted prices for spending up to an hour with her. Cooke eventually exchanged fourteen emails and had five telephone conversations with the officers. Officers arrested Cooke shortly after he arrived at a house where he expected to meet one of the girls.

The district court refused to give an entrapment instruction to the jury and the court of appeals agreed that Cooke was not entitled to one. The court is not required to give an entrapment instruction if there is sufficient evidence that the defendant has a predisposition to engage in the crime with which he is charged.

Here, there was ample evidence that Cooke was predisposed to commit two crimes involving sex with minors. Cooke made the first contact with the officers. Throughout the telephone calls and emails, Cooke repeatedly sought assurances that he was not dealing with law enforcement. After learning that the "girls" were thirteen and fifteen years old, he still requested photographs of them and a meeting. Finally, Cooke drove to the undercover house and upon entering, took out his wallet, offered the undercover officer money and requested the use of a bedroom for privacy.

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

*****

Miscellaneous Criminal Statutes / CFR Provisions

18 U.S.C § 1152

U.S. v. Diaz, 679 F. 3d 1183 (10th Cir. 2012)

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

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

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

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

*****

18 U.S.C. § 922

U.S. v. Rehlander, 666 F. 3d 45 (1st Cir. 2012)

Rehlander and Smalls were involuntarily admitted to psychiatric hospitals under Maine's "emergency procedure," *Me. Rev. Stat. tit. 34-B § 3863*. Each was later convicted for possessing firearms after having been "committed to a mental institution" under *Title 18 U.S.C. § 922 (g)(4).*

The court held that *section 3863* proceedings do not qualify as a "commitment" for federal purposes. After the Supreme Court's decision in *Heller*, the right to possess arms is no longer something that can be withdrawn by the government on a permanent and irrevocable basis without due process.

Section 3863 permits three-day involuntary hospitalization without any adversary proceeding and with no finding by an independent judicial or even administrative officer that the subject is either mentally disturbed or dangerous. This is all that is practical for an emergency hospitalization and provides adequate due process for that purpose. However, this temporary hospitalization

procedure does not provide due process to deprive individuals permanently of their right to bear arms.

The court noted that another Maine code provision, *Section 3864,* allows for involuntary commitment for psychiatric reasons, but only after the court holds an adversary proceeding. In this proceeding, the patient has counsel, the right to testify and the right to call and cross-examine witnesses. If committed after this proceeding, the patient would be banned from future possession of firearms under *Title 18 U.S.C. § 922 (g)(4).*

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

*****

U.S. v. Griffin, 684 F.3d 691 (7th Cir. 2012)

Griffin was convicted of being a felon in possession of a firearm and ammunition after police officers conducted a search of his parent's house, where he was living. He claimed the firearm and ammunition belonged to his father and that was no evidence to establish he intended to exercise any control over them.

The court agreed and reversed his conviction. Griffin was present in a home where firearms and ammunition were present, but the government offered no evidence that would have allowed a reasonable jury to find beyond a reasonable doubt that he had constructive possession of those items.

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

*****

18 U.S.C. § 924

U.S. v. Miranda, 666 F. 3d 1280 (11th Cir. 2012)

Miranda gave two undercover police officers fifty grams of heroin in exchange for seven firearms. After Miranda placed the bag containing the firearms in his vehicle, federal agents arrested him. The government indicted Miranda for five offenses, including possession of a firearm in furtherance of a drug trafficking crime in violation of *Title 18 U.S.C. § 924(c)(1)(A).*

Miranda argued his "passive receipt" of firearms did not further a drug trafficking offense.

The court disagreed. The court held bartering drugs to acquire firearms constitutes "possession in furtherance of" a drug trafficking crime.

The 1st, 2nd, 3rd,4th, 6th,7th, 9th, and 10th Circuits agree.

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

*****

18 U.S.C. § 2252

United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012)

Following the First, Eighth and Tenth Circuits, the court held that the evidence is sufficient to support a conviction for distribution under 18 U.S.C. § 2252(a)(2) when it shows that the defendant maintained child pornography in a shared folder, knew that doing so would allow others to download it, and another person actually downloaded it.

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

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31 U.S.C. § 3729 (False Claims Act)

Hooper v. Lockheed Martin Corporation, 688 F.3d 1037 (9th Cir. 2012)

Hooper sued Lockheed Martin under the qui tam provisions of the False Claims Act (FCA) *31.U.S.C. §§ 3729-3733*. Hooper claimed Lockheed violated the FCA by submitting a fraudulently low bid, based on knowing underestimates of its costs, to improve its chances in winning a contract with the United States Air Force. Lockheed claimed that the allegedly "false" estimates could not be the basis for liability under the FCA because an estimate is a type of opinion or prediction. Lockheed argued that estimates of what costs might be in the future are based on inherently judgmental information and a piece of purely judgmental information cannot be considered a false statement under the FCA.

The court agreed with Hooper and held false estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming the other elements of an FCA claim are met.

The First and Fourth Circuits have also held that FCA liability may attach in such a situation.

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

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