2013
United States Supreme Court and Circuit Courts of Appeals Case Summaries – By Subject

(As reported in 2Informer13 through 1Informer14, covering January – December 2013)

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First Amendment

Zalaski v. City of Hartford, 723 F.3d 382 (2d Cir. 2013)

Members of the Animal Rights Front (ARF), carrying a 6 x 4 foot banner, appeared at a charity fundraising run to protest the treatment of animals by one of the event's co-sponsors. A police officer asked the protestors to move from a walkway to a nearby grassy knoll because the protestors were partially obstructing access to the registration and refreshment area. After two ARF members refused to move, the officer arrested them for criminal trespass and misdemeanor obstruction of free passage. The charges were later dismissed and the two ARF members sued the police department and arresting officer for false arrest, malicious prosecution and interference with free expression.

The district court held the arresting officer did not violate the plaintiffs' *First Amendment* rights because the officer's request for the protestors to move was content-neutral, and a reasonable time, place and manner restriction. The district court further held even if the officer's conduct did violate the *First Amendment*, the officer was entitled to qualified immunity because a reasonable police officer in his position could have thought the relocation request was lawful.

The district court further held the officer had probable cause to arrest the protestors for disorderly conduct, although the officer charged the protestors with two other criminal offenses.

The court of appeals, while not ruling whether the officer had probable cause to arrest for disorderly conduct, held the officer was entitled to qualified immunity because he had arguable probable cause to arrest the protestors. Even when it is determined probable cause to arrest does not exist; a police officer will still be entitled to qualified immunity if the officer can establish there was arguable probable cause to arrest. Arguable probable cause exists if either it was objectively reasonable for the officer to believe probable cause existed or if officers of reasonable competence could disagree on whether the probable cause test was met.

Here, the court concluded when the officer saw individuals holding a large banner partially blocking access to the registration and refreshment area, it was reasonable to believe probable cause existed to arrest the individuals for disorderly conduct.

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

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Tobey v. Jones, 706 F.3d 379 (4th Cir. 2013)

Tobey was scheduled to fly from Richmond to Wisconsin to attend a funeral. After going through the initial security checkpoint, Transportation Security Administration (TSA) agents randomly selected Tobey for a secondary inspection. In anticipation that he might be subjected to enhanced screening, Tobey had written the text of the *Fourth Amendment* on his chest, as he believed the full-body scanner used as part of the secondary inspection was unconstitutional. Before proceeding through the full-body scanner, Tobey removed his sweatpants and t-shirt, leaving him in running shorts and socks, revealing the text of the *Fourth Amendment* written on his chest. The TSA agent told Tobey he did not have to remove his clothes and Tobey replied he wished to express his view that the enhanced screening procedure was unconstitutional. The

TSA agent radioed for assistance. Richmond airport police officers responded and immediately handcuffed and arrested Tobey for creating a public disturbance. The TSA officials did not tell the police officers what occurred at the screening station, nor did the police officers ask. The disorderly conduct charge against Tobey was later dismissed.

Tobey sued the TSA agents, claiming in part, they violated his *First Amendment* rights by having him arrested in retaliation for displaying the text of the *Fourth Amendment* on his chest.

The court held Tobey had adequately alleged a violation of his *First Amendment* rights and the TSA agents were not entitled to qualified immunity.

The court noted even if Tobey's behavior was bizarre, bizarre behavior, by itself, cannot be enough to arrest someone. In addition, bizarre behavior does not automatically equal disruptive or disorderly conduct. Here, the TSA agents seemed to think that removing clothing was *per se* disruptive. However, passengers routinely remove clothing at an airport screening station, many times per TSA regulations. Tobey calmly took off his t-shirt and sweatpants without causing a disruption as was evidenced by the fact the TSA agents never asked him to put his clothes back on. While it is possible further facts will establish the TSA agents acted reasonably in having Tobey arrested, based on the record before it, the court could not make that conclusion.

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

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Ford v. City of Yakima, 706 F.3d 1188 (9th Cir. 2013)

A police officer stopped a car driven by Ford for a noise ordinance violation. As Ford retrieved his driver's license and registration, he told the officer he thought the traffic stop was racially motivated. During the verbal exchange that ensued, the officer told Ford, "Stop running your mouth and listen, if you cooperate, I may let you go with a ticket today. If you run your mouth, I will book you in jail for it." Ford responded with disbelief to the prospect of being arrested for a noise ordinance violation, but after repeated threats that he would be taken to jail if he kept talking, Ford stopped yelling and answered the officer's questions. After the officer consulted with another officer who had arrived, he decided to arrest Ford. The officer told Ford he arrested him for playing his music too loud and because he "acted a fool." While driving to the jail, the officer told Ford, "You talked yourself into this on video. It's all well recorded."

After the municipal court acquitted Ford, he sued the officers, claiming they arrested him in retaliation for exercising his *First Amendment* right to freedom of speech.

The court denied the officers qualified immunity. The court noted the *First Amendment* protects a significant amount of verbal criticism directed at police officers. Here, the court held Ford's comments to the officer during their encounter was protected speech. As a result, the officers violated Ford's *First Amendment* right when they arrested him in retaliation for making those comments, even though probable cause existed to arrest him. Ford's criticism of the police for what he perceived to be an unlawfully and racially motivated traffic stop falls "squarely within the protective umbrella of the *First Amendment*," and any action to punish or deter such speech is unconstitutional.

The court further held at the time of this incident, it was clearly established in the Ninth Circuit that it was unlawful for police officers to use their authority to retaliate against individuals for their protected speech.

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

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Moss v. United States Secret Service, 711 F.3d 941 (9th Cir. 2013)

During the 2004 presidential campaign, Moss and others who opposed President Bush organized a demonstration at a campaign stop in Oregon. The Bush protestors claimed Secret Service agents engaged in viewpoint discrimination in violation of the *First Amendment* by moving them to a location where they had less opportunity than the Bush supporters to communicate their message to the President and those around him.

The Bush protestors also claimed the State Police supervisors, who were not present, but whose officers carried out the Secret Service agents' directions used excessive force in violation of the *Fourth Amendment*.

The court held the Secret Service agents were not entitled to qualified immunity. If true, the allegations by the Bush protestors would be sufficient to support a claim of viewpoint discrimination in violation of the *First Amendment*. Additionally, the court held this right was clearly established in 2004.

The court held the State Police supervisors were entitled to qualified immunity because the Bush protestors did not allege the supervisors directed or approved the shoving, use of clubs or shooting of pepper spray bullets at the protestors in an effort to move them. However, the court directed the district court to determine if the Bush protestors should be allowed to amend their complaint against the State Police supervisors.

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

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Fourth Amendment

Border Searches

United States v. Stewart, 729 F.3d 517 (6th Cir. 2013)

Stewart arrived at the Detroit Metropolitan Airport on a plane from Japan with two laptop computers, a Twinhead Customs and a Sony. A Customs and Border Protection Officer (CBP) randomly approached Stewart and began asking him questions about his passport and declaration sheet. After Stewart became confrontational, the CBP officer directed Stewart to a secondary inspection area where he could ask Stewart questions and search his luggage and computers before clearing customs.

The CBP officer attempted to search the Twinhead computer, but could not because it had a dead battery and required a foreign power cord converter. While searching the Sony computer, the CBP officer found a dozen images of nude children that he believed to be child pornography.

The CBP officer turned the computers over to an Immigration and Customs Enforcement (ICE) agent who told Stewart he was free to go, but that his computers were being detained for further examination. Later that day, the ICE agent transported the two computers to ICE's main office in downtown Detroit, approximately twenty miles away, so they could be further examined.
The next day, another ICE agent conducted a brief search of the Twinhead computer and found what he believed were images of child pornography. The agent stopped his search and five days later, the initial ICE agent obtained a warrant to search both computers. A forensic examination of Stewarts' computers revealed images of child pornography.

After he was indicted, Stewart filed a motion to suppress all evidence obtained from his computers at ICE's Detroit office, arguing he was subjected to an extended border search without reasonable suspicion, in violation of the *Fourth Amendment*.

The court disagreed. The Supreme Court has recognized an exception to the *Fourth Amendment's* warrant requirement of probable cause or a warrant for searches conducted at the border. Under the border search exception, searches of people and their property at the borders are automatically considered reasonable because the government has a strong interest in preventing the entry of unwanted persons and items into the United States.

Distinct from border searches, an extended border search occurs after an individual or his property has been granted access into the United States. The typical extended border search takes place at a location away from the border where entry is not apparent, but where a police officer has reasonable certainty of a recent border crossing and reasonable suspicion of criminal activity. With an extended border search, an individual is assumed to have cleared the border and regained an expectation of privacy in any property brought with him across the border.

In this case, Stewart was not subjected to an extended border search because his laptop computers never cleared the border. Although Stewart was cleared to enter the United States after the initial search of his Sony computer, his computers were not cleared for entry. The follow-up examination of the Twinhead computer that occurred the next day at the ICE field office twenty miles away from the airport was a continuation of the routine border search from the day before.

Consequently, the extended border search exception did not apply and the government's border search of Stewart's computers did not violate the *Fourth Amendment*.

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

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United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013)

Cotterman and his wife were driving home to the United States from Mexico when they reached a port of entry in Arizona. During primary inspection by a border agent, the Treasury Enforcement Communication System (TECS) returned a hit indicating Cotterman had previous convictions for sex offenses involving children, and that he was potentially involved in child sex tourism. Based upon this information, Cotterman and his wife were referred to secondary inspection. The border agents called the contact person listed in the TECS entry, and following their conversation, believed the hit to reflect Cotterman's involvement in some type of child

pornography offense. The border agents learned the TECS hit was part of Operation Angel Watch, which was aimed at combatting child sex tourism by identifying registered sex offenders who travel frequently outside the United States. The border agents were advised to review any computers or cameras for evidence of child pornography. The agents searched two laptop computers and three digital cameras they found in Cotterman's vehicle and discovered personal photographs along with several password-protected files. Afterward, the border agents seized Cotterman's laptops and transported them to a forensic examiner, located approximately one hundred seventy miles away. Two days later, the forensic examiner discovered images of child pornography within the unallocated space and password protected files on Cotterman's computers.

Cotterman argued the warrantless search of his computers violated the *Fourth Amendment*.

The district court suppressed the child pornography evidence. A three-judge panel of the Ninth Circuit Court of Appeals reversed the trial court. (See 4 Informer 11) Subsequently, a majority of the Ninth Circuit Court of appeals judges ordered a rehearing in front of all of the Ninth Circuit Court of Appeals judges.

First, the court held the forensic examination of Cotterman's computers was not an extended border search. An extended border search is a search away from the border, where entry into the United States is not apparent, and requires the officers have a reasonable certainty of a recent border crossing and reasonable suspicion of criminal activity. Here, Cotterman was stopped and searched at the border. The border search of Cotterman's computers was not transformed into an extended border search simply because the devices were transported and examined at a location away from the border.

Second, the court held the forensic examination of Cotterman's computers required a showing of reasonable suspicion. After the initial search at the border, a forensic examiner made copies of the computers' hard drives and performed examinations that took several days before the child pornography evidence was discovered. An exhaustive forensic search of a copied computer hard drive intrudes upon privacy and dignity interests to a far greater degree than a cursory search at a border. The court determined that applying reasonable suspicion, as the standard, would not impede law enforcement's ability to monitor and secure our borders, or to conduct appropriate searches of electronic devices.

Finally, the court held the border agents had reasonable suspicion to conduct their initial search at the border and subsequent forensic examination of Cotterman's computers. Cotterman's TECS alert, prior child-related convictions, frequent travels, crossing from a country known for sex tourism, and collection of electronic equipment along with the parameters of the Operation Angel Watch program, gave rise to reasonable suspicion of criminal activity.

In addition, the existence of password-protected files was relevant in assessing the reasonableness of the scope and duration of the search of Cotterman's computers. After Cotterman failed to provide the agents with the passwords to the protected files, it took the forensic examiner days to override the computer security and open the image files of child pornography. Consequently, the scope and manner of the search was reasonable under the *Fourth Amendment*.

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

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Foreign Searches

United States v. Lee, 723 F.3d 134 (2nd Cir. 2013)

Law enforcement officers in Jamaica investigated a marijuana trafficking organization that included Lee. After Jamaican police intercepted wire communications on several telephones in Jamaica, they notified the DEA, pursuant to a Memorandum of Understanding (MOU) that existed between the two countries concerning the investigation of drug trafficking organizations. Although Lee was not the target of the Jamaican investigation, he was heard speaking about drug shipments on some of the wiretaps. These conversations were presented to a federal grand jury in the United States that indicted Lee.

At trial, Lee sought to suppress the Jamaican government's recordings of the intercepted conversations.

Generally, suppression of evidence is not required when foreign law enforcement officials obtain the evidence at issue. However, evidence obtained by a foreign law enforcement agency may be suppressed where the conduct of foreign law enforcement officials rendered them "virtual agents" of United States law enforcement officials. Lee claimed the close, ongoing and formalized collaboration between the Jamaican police and the DEA rendered the Jamaican police "virtual agents" of the DEA.

The court disagreed. Even though the United States and Jamaica agreed on several measures designed to facilitate collaboration and cooperation in drug trafficking investigations, the Jamaican investigation of Lee was an independent undertaking by a foreign sovereign. First, the Jamaican police initiated their investigation into the marijuana trafficking organization before the DEA began its investigation. Second, the Jamaican police did not ask the DEA for its assistance or seek the DEA's approval before conducting their electronic surveillance. Third, DEA agents were not involved in the interception or translation of the conversations at issue. Finally, the DEA did not make a formal request that Jamaican police conduct surveillance on Lee or any other members of the marijuana trafficking organization.

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

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United States v. Getto, 729 F.3d 221 (2d Cir. 2013)

Getto, an American citizen, was convicted of mail and wire fraud for his involvement in a conspiracy that defrauded American victims through a lottery telemarketing scheme that operated out of Israel.

Getto appealed the district court's denial of his motion to suppress evidence obtained through searches and surveillance undertaken in Israel by the Israeli National Police (INP) following a request by American Law Enforcement pursuant to a mutual legal assistance treaty.

The court held the ongoing collaboration between American Law Enforcement officers and the INP did not require application of the exclusionary rule to evidence obtained outside the United

States by the INP. Even though the American Law Enforcement officers requested assistance with investigating Getto and shared the results of their preliminary investigation with the INP, the INP conducted an independent, parallel investigation of Getto. There was no evidence American Law Enforcement officers directed or controlled the investigation by the INP or that they participated in any law enforcement actions by the INP in Israel.

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

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Governmental Action / Private Searches

United States v. Booker, 728 F.3d 535 (6th Cir. 2013)

Police officers arrested Booker for possession of marijuana. At the police station, officers noticed Booker was fidgeting and trying to put his hands in the back of his pants. The officers transported Booker to the jail where they strip searched him because the officers suspected Booker was concealing contraband in his buttocks. When the officers had Booker bend over and spread his buttocks, they saw a small string protruding from Booker's anus. After an officer asked Booker about the string, Booker moved his hand to cover the area and tried to push the object further into his rectum. This led to an altercation that led to Booker being restrained and taken to the hospital.

At the hospital, Booker denied having anything in his rectum and did not cooperate when a doctor attempted a digital rectal examination. The doctor ordered a nurse to administer a muscle relaxant to Booker, who remained uncooperative, but the doctor was able to feel a foreign object inside Booker's rectum. The doctor then directed a nurse to administer a sedative and a paralytic agent and had Booker intubated to control his breathing. While Booker was paralyzed, the doctor removed a rock of crack cocaine from his rectum. Booker remained intubated for one hour, unconscious for twenty to thirty minutes and paralyzed for seven to eight minutes.

The government indicted Booker for possession with intent to distribute crack cocaine. Booker moved to suppress the crack cocaine, arguing his treatment at the hospital violated the *Fourth Amendment*.

The district court concluded the rectal examination was lawful because it was not a search under the *Fourth Amendment* and even if it was, the doctor and the officers acted reasonably.

Booker was convicted and appealed.

The court of appeals reversed Booker's conviction.

The *Fourth Amendment* does not apply to searches or seizures by private citizens. However, in this case, the court held the doctor was considered an agent of the government for *Fourth Amendment* purposes. First, Booker was in police custody when the officers took him to the hospital. Second, the officers knew what the doctor was doing to Booker. Third, the officers knew Booker did not consent to any of the procedures to which he was subjected. Finally, no reasonable police officer could believe that, without direction from the police, a doctor could lawfully intubate and paralyze a suspect without the suspect's consent.

The court further held the forced paralysis, intubation, and digital rectal examination to which Booker was involuntarily subjected amounted to an unreasonable search in violation of the *Fourth Amendment*. The court noted Booker was subjected to a highly intrusive and dehumanizing procedure while there were less intrusive means available to determine whether Booker was hiding contraband in his rectum.

Finally, the court held suppression of the evidence was warranted.

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

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United States v. Stevenson, 727 F.3d 826 (8th Cir. 2013)

In the course of operating its business, AOL, an internet service provider, scans files sent through its network with a tool called the Image Detection and Filtering Process. When the filtering process detects an image containing child pornography, it automatically forwards a report to the National Center for Missing and Exploited Children (National Center).

After AOL's filtering process detected one of its users had emailed images depicting child pornography, it triggered an alert to the National Center. The National Center then passed the information on to police officers in Iowa, who discovered the AOL account belonged to Stevenson.

The officers obtained a warrant, searched Stevenson's home and discovered hundreds of images depicting child pornography on his computers and thumb drives.

Stevenson argued AOL violated the *Fourth Amendment* by scanning his email for child pornography. While AOL is not a government entity, Stevenson argued the United States Code section that requires AOL to report child pornography it discovers to the National Center makes AOL an agent of the government for *Fourth Amendment* purposes.

The district court disagreed and held AOL was a private actor; therefore, it was not bound by the *Fourth Amendment*.

The court agreed. First, nothing in the United States Code requires AOL to scan the email of its users. Second, the reporting requirement, by itself, does not transform an Internet service provider into a government agent for *Fourth Amendment* purposes whenever it chooses to voluntarily scan files sent on its network for child pornography.

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

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United States v. Goodale, 738 F.3d 917 (8th Cir. 2013)

Goodale was living with a woman and her thirteen-year-old son. After the boy showed his mother a history of gay teen pornography sites on Goodale's laptop computer, the mother took the computer to the police. While being interviewed, the boy opened the laptop, and demonstrated that the phrase "gay teen porn" auto-populated when he typed "ga" in the search box. A police officer moved the laptop and touched the keypad for approximately 17 seconds

during this process. The boy also described to the officer how Goodale sexually abused him and Goodale's thirteen-year-old nephew. The officer seized Goodale's laptop and obtained a warrant to search it two days later. Goodale was convicted and sentenced to life in prison.

On appeal, Goodale argued the police seized and searched his computer in violation of the *Fourth Amendment*.

The court disagreed, holding the private search exception applied. A search or seizure, even an unreasonable one, conducted by a private individual does not violate the *Fourth Amendment*, as long as the person conducting the search or seizure is not acting as an agent of the government or with the participation or knowledge of any government official. Here, after discovering a history of teen pornography sites, the mother took Goodale's computer to the police where the boy showed the officer the laptop's web history. This search was neither instigated nor performed on behalf of the police. In addition, while the officer touched the laptop during this time, there was no evidence to show the officer's viewing of the contents on the computer went further than the boy's search.

The court further held the continuing seizure of Goodale's computer until the search warrant was obtained was lawful to prevent the destruction of evidence. The officer had probable cause to believe Goodale's laptop contained evidence of child pornography based on the boy's statements about the computer's internet history and allegations of sexual abuse. In addition, Goodale knew about the investigation and could have destroyed the evidence if he had been allowed to retain the computer.

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

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United States v. Tosti, 733 F.3d 816 (9th Cir. 2013)

Tosti took his computer to a CompUSA store for service. After a computer technician found child pornography on Tosti's computer, he called the police. When an officer arrived, there were numerous photographs appearing on Tosti's computer monitor in a very small thumbnail format. Even though the officer could tell the thumbnail photographs depicted child pornography, the officer directed the computer technician open the photographs in slideshow format. In slideshow format, the photographs appeared larger and were viewable one by one. A second officer arrived later and scrolled through the photographs in thumbnail format. The officers seized Tosti's computer and eventually arrested Tosti.

A few days later, Tosti's wife gave a police officer a computer, several external hard drives and numerous DVDs that appeared to contain child pornography. Ms. Tosti signed a Consent-to-Search Form, which indicated the items came from a home office, to which she had access and that both she and her husband used the computer and storage devices.

Tosti was convicted of possession of child pornography.

On appeal, Tosti argued both officers violated the *Fourth Amendment* by exceeding the scope of the computer technician's private search. Tosti claimed the initial violation occurred when the first officer directed the computer technician to open the photographs in slideshow format and the second violation occurred when the other officer scrolled through the thumbnail photographs.

The court disagreed. First, the court held neither officer searched Tosti's photographs for *Fourth Amendment* purposes because the computer technician's prior viewing of the photographs destroyed Tosti's reasonable expectation of privacy in them. Second, even if the first officer viewed the enlarged versions of the thumbnails in slideshow format, the officer did not exceed the scope of the computer technician's prior search because the thumbnail photographs clearly depicted child pornography. The officer learned nothing new by enlarging the photographs and viewing them in slideshow format. Finally, the court held Tosti was not entitled to suppression on the basis that the second officer scrolled through the thumbnails because the officer did not view any more photographs than the computer technician had viewed.

Tosti also argued his wife had neither actual nor apparent authority to consent to the searches of the items she turned over to the police.

Again, the court disagreed. The Tostis were married and resided in their shared residence for over twenty years. Ms. Tosti told the officer both she and her husband used the computer and storage devices located in their home. There was no indication at the time of the search the officer knew Ms. Tosti might not have the authority to consent. Even if Ms. Tosti's representations were not true, there was no objective indication her access to the home office was limited. In addition, the computer and electronic media were neither password neither protected nor encrypted. As a result, the officer reasonably believed Ms. Tosti had authority to consent.

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

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United States v. Benoit, 713 F.3d 1 (10th Cir. 2013)

Benoit's girlfriend Rose called the police after she found what appeared to be child pornography on Benoit's computer while she was using it to pay bills online. When the police officer arrived at Rose's home, she had a friend who was more familiar with computers open the file she suspected contained child pornography and show it to the officer. The friend offered to open additional files but the officer told her it was not necessary. The officer contacted an investigator with the cybercrimes unit and then seized Benoit's computer until a search warrant could be obtained. After the police obtained the warrant, investigators found hundreds of images and videos of child pornography. Benoit was indicted for two child pornography related offenses.

Benoit claimed Rose did not have actual or apparent authority to consent to the officer's initial search of his computer because she had told the officer the computer did not belong to her.

The court held the officer's viewing of the child pornography video prior to seizing Benoit's computer was not a search under the *Fourth Amendment*; therefore, the issue of consent was irrelevant. The *Fourth Amendment* only applies to governmental action. It does not apply to searches conducted by private individuals unless they are acting as an agent for the government or a government official actively participates in the search. When the officer responded to Rose's home, she had already found what she believed to be child pornography on Benoit's computer. Once at the home, the officer did not touch the computer, actively assist, or encourage the friend as she opened the file for him to view. The court concluded the officer did not conduct a search or direct a private search of Benoit's computer; rather he only acted as a witness.

In addition, the court held the officer's warrantless seizure of Benoit's computer was lawful under the plain view doctrine. The officer was lawfully present in Rose's home and the incriminating nature of child pornography was immediately apparent to the officer when the friend opened the video file.

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

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Reasonable Expectation of Privacy / Standing

United States v. Castellanos, 716 F.3d 828 (4th Cir. 2013)

A police officer patrolling a truck stop saw a commercial car carrier and became suspicious when he saw one of the vehicles on the car carrier, a Ford Explorer, bore a dealership placard instead of a regular license plate. The driver of the car carrier gave the officer shipping information indicating the owner of the vehicle was Wilmer Castenada. The officer was unsuccessful in reaching Castenada by telephone. When the officer attempted to verify the origin and destination addresses provided by the car carrier, he could not find anyone who knew Castenada or was expecting delivery of a vehicle. The officer obtained consent to search the Explorer from the driver of the car carrier and found bricks of cocaine hidden in the gas tank.

Afterward, an individual claiming to be Castenada called the car carrier and asked about the status of the Explorer. The individual was told the vehicle had been impounded and provided information on how to recover it. Castellanos then arrived to claim the Explorer. Castellanos had the title to the Explorer, tracking information for the vehicle from the car carrier and a piece of paper with the officer's phone number from earlier calls. Castellanos claimed he was in the process of purchasing the Explorer from Castenada. The government indicted Castellanos for conspiracy to distribute cocaine.

Castellanos argued the cocaine found in the Explorer's gas tank should have been suppressed.

The court disagreed. Castellanos did not enter the title to the Explorer into evidence or otherwise establish he was the owner of the vehicle before the police searched it. As a result, Castellanos failed to establish he had a reasonable expectation of privacy in the Explorer; therefore, he could not challenge the search.

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

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See U.S. v. Powell, 732 F.3d 361 (5th Cir. Tex. 2013)

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United States v. Skoda, 705 F.3d 834 (8th Cir. 2013)

A police officer saw a van parked on a gravel driveway that led to a shed on a piece of property the officer thought was vacant. As the officer approached the van, he saw another vehicle behind it. Bargen got out of the van and told the officer Skoda had called him about car trouble, but had since walked away. The officer saw items associated with the production of methamphetamine

near both vehicles. The officer called Skoda's father, who owned the property, and obtained consent to search it. The officer also saw what he believed was a pseudoephedrine pill and empty pseudoephedrine boxes in Skoda's vehicle. The officer searched Bargen's van then Skoda's vehicle and found additional items associated with the production of methamphetamine in both.

Skoda moved to suppress the evidence found at the property and in his vehicle. Skoda claimed he had a reasonable expectation of privacy in the property because it was owned by his family, and the officers lacked probable cause to search his vehicle.

The court disagreed, holding Skoda had no legitimate expectation of privacy in the property because he had no ownership or possessory interest in it. The fact the property belonged to his father was irrelevant because defendants have no expectation of privacy in a parent's home when they do not live there. In addition, Skoda's father expressly permitted the officer to search the property.

The court further held the officers lawfully searched Skoda's vehicle under the automobile exception to the warrant requirement because they had probable cause it contained contraband. It was late at night in a remote area and the suspiciousness of Bargen's presence was heightened by his story about Skoda calling for help and then walking away. The officer saw implements of methamphetamine production near both vehicles, including a lithium battery shell casing, pliers, lithium strips, tin foil and a gas can with a plastic tube coming out of it. The officer saw a red tablet that looked like pseudoephedrine in the car along with a bag containing pseudoephedrine boxes on the floorboard. Finally, the other implements of methamphetamine production found in Bargen's van increased the probability that contraband or evidence of a crime was in Skoda's vehicle.

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

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United States v. Lopez-Cruz, 730 F.3d 803 (9th Cir. 2013)

A border patrol agent conducted a traffic stop on Lopez. While talking to Lopez, the agent saw two cell phones in the car's center console. The agent asked Lopez whether the phones were his and Lopez told the agent the phones, as well as the car, belonged to a friend. The agent asked Lopez, "Can I look in the phones? Can I search the phones?" Lopez consented by responding "yes." While searching the phones, one of the phones rang three times. Each time the agent answered the phone, pretended to be Lopez and engaged in a conversation with the caller. As a result of the phone calls, the agent obtained information that led to Lopez's arrest for conspiracy to transport illegal aliens.

Lopez filed a motion to suppress the evidence obtained when the agent answered the incoming phone calls, arguing the agent exceeded the scope of his consent to search the phones.

The government argued Lopez did not have standing to challenge the search because he disclaimed ownership of the phones. Alternatively, the government argued answering the cell phone fell within the scope of Lopez's consent.

First, the court held Lopez had standing to challenge the agent's search of the phone. To have standing to object to a search, a person must show he had a reasonable expectation of privacy in the item searched. The court noted the location of the phones within the car suggested the phones were in Lopez's possession and being used by Lopez when the agent encountered him.

In addition, even though Lopez denied ownership of the phones, ownership is only one factor used to determine whether a person has a reasonable expectation of privacy in an item. When Lopez told the agent the phones belonged to a friend, Lopez did not disclaim use of them or otherwise disassociate himself from them. The fact that the agent sought Lopez's permission before searching the phones suggests the agent did not believe Lopez had abandoned his privacy interest in the phones. Consequently, the court held Lopez had a reasonable expectation of privacy in the phones by virtue of possessing and using them and he had not abandoned his privacy interest by denying their ownership.

Second, the court held the agent's act of answering the incoming phone calls exceeded the scope of Lopez's consent. The scope of consent is determined by asking what a reasonable person would have understood by the exchange between the officer and the suspect. Here, the court held Lopez's consent to search the cell phone, by itself, did not constitute consent to answer the phone if it rang.

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

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Abandonment

United States v. McClendon, 713 F.3d 1211 (9th Cir. 2013)

At 2:20 a.m. a man called 911 stating an unknown vehicle was parked in his driveway with its engine and lights off and that someone had knocked on his door. When officers arrived, a woman got out of the car. She claimed the car had run out of gas and McClendon had gone to get more. The woman consented to a search and the officers found a backpack in the car the woman said belonged to Eddie McClendon. An officer searched the backpack and found a sawed-off shotgun, a wig, walkie-talkies and binoculars. Officers ran a records check and learned McClendon had a previous felony weapons conviction. Officers began to search the neighborhood for McClendon.

The officers saw a man fitting McClendon's description walking down the street. After the man confirmed his name was Eddie, he turned and began to walk away from the officers. The officers drew their guns, told McClendon he was under arrest and ordered him to show his hands. McClendon ignored the officers and continued to walk away. The officers saw McClendon reach toward his waistband and then "fling" something away. The officers tackled McClendon, handcuffed him and placed him under arrest. The officers found a loaded handgun, still warm to the touch, a few feet away. McClendon denied discarding the handgun.

The government indicted McClendon for two counts of felon in possession of a firearm for the shotgun and handgun.

The district court held the search of the backpack violated the *Fourth Amendment* because the woman did not have authority to consent to its search and there was no exigency that allowed the officers to search it without a warrant. The government did not appeal this ruling.

However, the district court denied McClendon's motion to suppress the handgun.

McClendon argued on appeal the handgun should have been suppressed. He claimed the officers only discovered the handgun as the result of a seizure that was prompted by the illegal search of his backpack.

The court of appeals disagreed, holding McClendon was not seized under the *Fourth Amendment* until the officers tackled him. However, by then, he had already discarded the firearm. Consequently, McClendon lost his ability to challenge the admissibility of the handgun as the fruit of an illegal seizure.

In addition, the court held the discovery of the handgun should not be suppressed as a fruit of the unlawful search of McClendon's backpack. An officer testified he would have searched for McClendon even if the backpack had not been searched. Even if the officers were motivated to search for McClendon because of what they found in the backpack, McClendon's act of walking away from them was an intervening event that purged any taint from the backpack search.

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

*****

Curtilage

Florida v. Jardines, 133 S. Ct. 1409 (2013)

The police received an anonymous tip from a person who claimed Jardines was growing marijuana in his house. After conducting surveillance on the house for fifteen minutes, two police officers approached Jardines' house with a drug-detection dog. The dog alerted to the presence of drugs while on the front porch and after sniffing at the base of the front door. Based upon this information, officers obtained a warrant to search Jardines' house where they seized live marijuana plants and equipment used to grow those plants.

At trial, Jardines moved to suppress the marijuana plants and related equipment, arguing the dog-sniff constituted an unreasonable search. The Florida Supreme Court held the sniff-test conducted by the drug-dog was a substantial government intrusion into Jardines' house and constituted a *Fourth Amendment* search, requiring suppression of the evidence the officers had seized.

The United States Supreme Court agreed and held the government's use of trained police dogs to investigate the home and its immediate surroundings is a "search" within the meaning of the *Fourth Amendment*.

First, as the Supreme Court recently articulated in *U.S. v. Jones*, when the government obtains information by physically intruding on persons, houses, papers or effects, a *Fourth Amendment* search has occurred. Here, the police officers were gathering information on Jardines' front

porch, clearly part of the curtilage of the house, which is afforded the same *Fourth Amendment* protections as the rest of the house.

Second, the police officers gathered information, in the form of the drug dog's alert, by physically entering and occupying the curtilage of the house without Jardines' explicit or implicit permission to be there. The courts have held homeowners implicitly permit visitors to approach their houses by walking up to the front door, knocking promptly, and waiting briefly for a response. As a result, a police officer may approach a home and knock just as any private citizen might do. However, introducing a trained police dog to explore the area around the home, hoping to discover incriminating evidence is different. It is not reasonable to believe a homeowner's implicit invitation for visitors to approach his front door extends to police officers wishing to approach the front door to conduct a search with a drug-dog.

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

*****

United States v. Bausby, 720 F.3d 652 (8th Cir. 2013)

When a man drove past Bausby's house, he saw a motorcycle inside the chain-link fenced front yard that resembled a motorcycle stolen from him two months earlier. The motorcycle had a "For Sale" sign next to it. The man called the police and waited for officers to arrive.

When officers arrived, the man gave the officers the Vehicle Information Number (VIN) for his stolen motorcycle. The officers entered Bausby's front yard through an unlocked gate in the chain-link fence. The officers walked up to the front door of the house, which was only accessible after entering the fenced-in front yard. After knocking on the front door and receiving no answer, the officers checked the VIN on the motorcycle. The officers confirmed the VIN on the motorcycle matched the VIN provided by the man and confirmed that it matched the VIN reported to the police by the man. The officers also saw several automobiles in an unfenced driveway shared with a neighboring house. Some of the vehicles had missing VINs and one of the vehicles had been reported stolen.

The officers obtained a warrant, searched Bausby's house and discovered a shotgun. Bausby was charged with being a felon in possession of a firearm.

Bausby claimed the officers' warrantless entry into the chain-link fenced front yard of his house violated the *Fourth Amendment*. Bausby argued that area constituted the curtilage of his home and the officers entered it without a warrant, consent or an exception.

The court held the area of the front yard where the motorcycle was displayed did not constitute the curtilage of Bausby's house. Even though the motorcycle was close to the house and the front yard was enclosed with a chain-link fence, these factors were outweighed by the fact that Bausby took affirmative steps to draw the attention of the public to the front yard of his house.

First, Bausby used the front yard to display the motorcycle and other items he was selling to the public who passed by his house. The court stated, "What a person knowingly exposes to the public, even in his own home, is not a subject of *Fourth Amendment* protection."

Second, while the front yard was fenced, the fence was only a four or five-foot chain-link fence and not a fence designed to limit the observation of those passing by.

Because the front yard of Bausby's house where he displayed the stolen motorcycle was outside the curtilage of the home, the officers were allowed to enter that area to observe the motorcycle and its VIN more closely without violating the *Fourth Amendment*.

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

*****

United States v. Mathias, 721 F.3d 952 (8th Cir. 2013)

A police officer received information from an anonymous source that led him to believe Mathias was growing marijuana in the back yard of his home. A tall fence constructed of vertical wooden slats spaced approximately a quarter-inch apart surrounded Mathias' back yard. After the officer's initial attempts to view Mathias' back yard were unsuccessful, the officer contacted a neighbor living on the adjacent property to the north of Mathias' home. The officer obtained the neighbor's permission to walk along the neighbor's southern property line. However, the officer was unaware Mathias' fence was set approximately eighteen inches south of the property line. As a result, when walking along the north side of the fence, the officer was physically trespassing along an eighteen-inch strip of grass and weeds on Mathias' property.

While on the eighteen-inch strip, the officer looked through the gap in the wooden slats into Mathias' back yard. The officer saw a number of potted marijuana plants. The officer obtained a warrant, searched Mathias' home and recovered marijuana plants, scales, packaging material and cash. Mathias was indicted for conspiring to manufacture marijuana.

Mathias moved to suppress the evidence seized from his home, arguing he had a reasonable expectation of privacy in the eighteen-inch strip of land because it was part of the curtilage of his home.

The court disagreed. While the strip of land was close to Mathias' home, it was not included within Mathias' fence, there was no indication Mathias' put the strip of land to any use commonly associated with the home, and there was no indication Mathias made any effort to protect the strip of land from observation by others. Consequently, the court held the strip of land constituted an open field, and *Fourth Amendment* protection does not extend to open fields.

Mathias also argued the officer's actions while standing on the strip of land constituted a trespassory search, in violation of the *Fourth Amendment*. In *U.S. v. Jones*, the Supreme Court held a physical trespass for the purposes of gathering information constitutes a trespassory search prohibited by the *Fourth Amendment*. However, a *Jones* trespassory search requires the officer's intrusion to be into a constitutionally protected area. As the police officer was within an open field when he looked through Mathias' fence, his actions did not constitute a trespassory search.

Finally, Mathias argued the officer's observations from the strip of land violated the reasonable expectation of privacy he had in his back yard.

Again, the court disagreed. The officer lawfully observed Mathias' backyard from the strip of land on the other side of Mathias' fence. While the presence of the fence established Mathias

had a subjective expectation of privacy in the back yard, the gaps in the fence through which his back yard could be seen unaided, rendered this expectation of privacy objectively unreasonable.

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

*****

United States v. McDowell, 713 F.3d 571 (10th Cir. 2013)

A police officer was dispatched to a house to attempt to locate a woman under investigation for an assault. To reach the front door, the officer had to cross the driveway. As the officer walked diagonally across the driveway, he smelled a strong odor of fresh marijuana that appeared to be coming from the garage. At the front door, the officer the officer still smelled the odor of fresh marijuana. The officer used this information to obtain a search warrant which led to the seizure of over six hundred pounds of marijuana from the garage.

McDowell argued the marijuana evidence should have been suppressed because the officer intruded upon the house's curtilage while gathering information used to support the search warrant.

The court disagreed, noting even if the officer did enter the curtilage, the warrant to search the house was still valid. The United States Supreme Court in *Jardines* recently stated a police officer without a warrant is allowed to approach a home and knock on the door to the same extent any private citizen might do. Whether or not the driveway and front sidewalk were curtilage, the officer did not violate the *Fourth Amendment* by walking across them on his way to the front door. As a result, the smell of marijuana that reached him while he was in the driveway was not fruit of an unlawful search.

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

*****

United States v. Shuck, 713 F.3d 563 (10th Cir. 2013)

A person called the police after he smelled the odor of marijuana coming from the trailer house next door. Police officers walked to the front of the trailer and saw a gated chain link fence that enclosed the front yard and part of the driveway. The gate appeared to be locked and that it had not been used recently because of the amount of dirt accumulated at the bottom of the gate. Officers walked around the fence to the back door, which appeared to be the way a person would enter the trailer. The officers knocked on the door, but received no response. During this time, the officers saw a PVC pipe to the right of the back door. One of the officers bent down and smelled the end of the pipe and detected the odor of marijuana. The officers returned to their office and learned from the utility company the trailer was being billed for an extremely high amount of water per month. The officers obtained a warrant, searched the trailer, discovered a marijuana growing operation and arrested Shuck.

Shuck argued the officers violated the *Fourth Amendment* when they entered his backyard and conducted a search under the pretext of doing a knock and talk interview. He claimed the officers unlawfully entered the trailer home property when they decided not to approach the front

door, but went directly into the backyard. Shuck also claimed the officer conducted an illegal search when he smelled the PVC pipe.

The court disagreed. Even if the area the officers entered was within the curtilage, they did not violate the *Fourth Amendment* by walking up to the back door and knocking on it. Police officers may enter the portion of the curtilage that is the normal route of access for anyone visiting a home. Here, the back door appeared to be the door commonly used by anyone entering the trailer. Therefore, the officers did not violate the *Fourth Amendment* when they approached the trailer's back door to speak with its occupants about the reported odor of marijuana.

The court also concluded the officer did not violate the *Fourth Amendment* by smelling the PVC pipe. Shuck's exposure of the marijuana odor to the public defeated his subsequent claim to *Fourth Amendment* protection. In addition, the PVC pipe was clearly noticeable by anyone standing at the back door of the trailer. The *Fourth Amendment* does not protect any observations the officers made from the back door, including the officer's smell of the PVC pipe.

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

*****

DNA Sample from Arrestees

Maryland v. King, 133 S. Ct. 1958 (2013)

In 2009, police arrested King and charged him with first and second-degree assault. Under the Maryland DNA Collection Act, because King had been charged with a "serious offense" a sample of King's DNA was taken by applying a cotton swab to the inside of his cheeks. King's DNA profile generated a match to a DNA profile developed from a sample collected from a victim in an unsolved sexual assault case from 2003. A grand jury indicted King for the 2003 sexual assault, and he was convicted and sentenced to life in prison.

The Maryland Court of Appeals reversed King's conviction, holding the portions of the DNA Act authorizing the collection of a DNA sample from a mere arrestee were unconstitutional as applied to King.

The United States Supreme Court in a 5-4 decision reversed the Maryland Court of Appeals and held that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. The court stated,

> "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the *Fourth Amendment*."

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

*****

Parolees/Probationers

United States v. Edelman, 726 F.3d 305 (2d Cir. 2013)

After his release from state custody, Edelman began serving three years of federal supervised release to which he had been sentenced as part of an unrelated federal conviction. A condition of the supervised release required Edelman to subject himself and his property to a search at any time. Edelman voluntarily signed a waiver agreeing to these terms of the supervised release.

After two months, Edelman left the halfway house where he had been serving his supervised release and never returned.

Following a tip from a confidential informant, federal agents arrested Edelman two months later in the lobby of an apartment complex. The agents took a set of keys from Edelman that opened one of the apartments in the building. The agents learned the apartment had been rented by a woman who had subsequently sublet it to Edelman. With the woman's consent, but without a search warrant, the agents entered the apartment where they found evidence of drug trafficking in plain view. Later that day, the agents returned to the apartment with a search warrant and seized drugs, packaging material and paraphernalia. Edelman was charged with several drug offenses.

Edelman argued the agents violated the *Fourth Amendment* by initially entering his apartment without a search warrant.

The court disagreed, holding Edelman did not have an objectively reasonable expectation of privacy in the apartment. As a condition of his supervised release, Edelman agreed to subject himself and his property to search by federal law enforcement officers. Individuals on supervised release who sign waivers, as Edelman did, are on notice that their expectation of privacy is greatly reduced. Edelman's residence in the apartment began after he escaped from the halfway house in violation of federal law. A person, such as Edelman, whose expectation of privacy is already greatly reduced, cannot increase his legitimate expectation of privacy by escaping.

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

*****

United States v. Huart, 735 F.3d 972 (7th Cir. 2013)

As Huart was nearing the completion of his sentence for possession of child pornography, the Bureau of Prisons (BOP) transferred him to a privately operated halfway house that contracted with the BOP. Huart was not permitted to possess a cell phone while at the halfway house. During a random search of Huart's room, a staff member found a cell phone on Huart's bed. A search of the phone revealed numerous images of child pornography. Huart admitted to possessing the phone and the images. The director of the halfway house gave Huart's phone to the FBI who obtained a warrant to search it. Because Huart's phone was password protected, it had to be sent to FBI headquarters for analysis. It was unclear why the staff at the halfway house was able to search Huart's phone initially, but the FBI could not. Agents did not unlock the phone and locate the images of child pornography until February 13, 2012. The warrant to search Huart's phone specified that the search was to be conducted before December 15, 2011.

Huart claimed he had a reasonable expectation of privacy in his cell phone and that its confiscation and subsequent search of its contents violated that privacy. Huart argued because the FBI failed to break the passcode and examine the contents of the phone before the warrant's expiration date, the search was unlawful. Huart also argued the government's seizure of his cell phone violated his privacy because it was a trespass under *U.S. v. Jones*.

The court disagreed, holding Huart had no reasonable expectation of privacy in the cell phone or its contents. Huart was not permitted to possess a cell phone while at the halfway house; therefore, any phone he brought into the facility was contraband, subject to confiscation and search. Because Huart lacked a reasonable expectation of privacy in his cell phone and its contents, the confiscation and search of the phone did not implicate the *Fourth Amendment*.

The court further held because the Huart's phone was contraband, it was not a trespass for the halfway house staff to confiscate the phone from his room and search it. The court stated even if *Jones* applied to this case, it would establish only that a *Fourth Amendment* search occurred, not that the search was unreasonable.

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

*****

United States v. King, 711 F.3d 986 (9th Cir. 2013)

Police officers believed King was involved in a homicide. When they checked his criminal history, the officers learned he was on felony probation. A term of King's probation allowed officers to search King's premises, without a warrant, any time of the day or night with or without probable cause. Based on this authority, officers searched King's residence and found an unloaded shotgun under his bed. The government indicted King for being a felon in possession of a firearm.

King argued the search of his residence, without any suspicion he was involved in criminal activity, violated the *Fourth Amendment*.
The court noted the judge who sentenced King determined it was necessary to condition King's probation on his acceptance of the suspicionless search provision. The probation order clearly expressed this provision, and King knowingly accepted it. As a result, the court held a suspicionless search conducted pursuant to a suspicionless-search condition of an individual's probation agreement does not violate the *Fourth Amendment*.

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

*****

United States v. Grandberry, 730 F.3d 968 (9th Cir. 2013)

After police officers arrested Grandberry for selling drugs, they searched a nearby apartment Grandberry had entered several times in the days before his arrest. The officers did not obtain a warrant to search the apartment because Grandberry was on parole and a condition of Grandberry's parole allowed officers to search his residence without a warrant. Inside the apartment, officers found cocaine and a firearm.

Grandberry moved to suppress the cocaine and firearm arguing the officers lacked probable cause the apartment was his residence. Grandberry claimed the apartment was his girlfriend's residence and when the officers saw him entering it, he was an invited guest.

Police officers may lawfully search a parolee's residence without a warrant when the parolee is subject to a provision authorizing warrantless searches and the officers have probable cause to believe that the parolee is a resident of the location to be searched. There was no issue that Grandberry's parole authorized warrantless searches; however, the court held the officers' observations were not sufficient to establish probable cause Grandberry lived at the apartment they searched. First, the officers knew Grandberry reported to his parole officer that he lived in a house at a different address, which was the same address on file with the Department of Motor Vehicles, and the officers did not check with Grandberry's parole officer to confirm where Grandberry lived. Second, the officers conducted minimal surveillance at the house and while they noticed it appeared to be occupied, they did not interview anyone at the house or any neighbors to determine if Grandberry lived there. Third, the officers never observed any signs that Grandberry stayed overnight at the apartment, even though some of the surveillance was conducted late in the evening.

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

*****

United States v. Mabry, 728 F.3d 1163 (10th Cir. 2013)

Mabry was on parole from Kansas when he was discovered in Utah as a passenger in a vehicle, which contained twenty-two pounds of marijuana. Mabry was not arrested, but after his parole officer learned about the incident, an order to arrest and detain Mabry was issued on the basis Mabry had violated his parole by traveling out of state without first receiving permission. Officers went to Mabry's house, arrested him, searched the house, and discovered a sawed-off shotgun in a closet. Mabry was charged with unlawful possession of the firearm.

Even though Mabry's parole agreement contained a provision which allowed officers to search his house, Mabry argued the officers did not have reasonable suspicion to support the search of his house as required by Kansas Law.

The court disagreed. First, as a parolee, Mabry had a diminished expectation of privacy. Second, there was reliable information that Mabry had violated his parole and was involved with distributing drugs, which gave the officers reasonable suspicion to search his house. Finally, the State had a strong interest in monitoring Mabry's behavior to prevent his recidivism.

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

*****

Subscriber Information from Internet Service Provider

United States v. Suing, 712 F.3d 1209 (8th Cir. 2013)

The court held Suing had no expectation of privacy in the government's acquisition of his subscriber information, to include his IP address and name from the third-party internet service provider; therefore, there was no *Fourth Amendment* violation.

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

*****

Trash Pulls

United States v. Jackson, 728 F.3d 367 (4th Cir. 2013)

Police officers suspected Jackson was selling drugs from his girlfriend's apartment where he regularly stayed. As part of the investigation, officers pulled two bags of trash from a can behind the apartment building. The trashcan was located beyond the apartment's rear patio, sitting partially on a two to three-foot wide strip of grass and partially on a common sidewalk that ran the length of the building.

After recovering items from the trash bags consistent with drug trafficking, the officers obtained a warrant to search the apartment where the officers seized evidence that led to Jackson's conviction for drug trafficking.

Jackson argued the trash pull violated the *Fourth Amendment* because the officers intruded upon the apartment's curtilage when they removed the trash bags from the can located near the rear patio of the apartment.

The court disagreed and held the trashcan was not within the apartment's curtilage. First, the trashcan was located at least twenty feet from the apartment's back door. While a twenty-foot distance is usually not great, in the context of an apartment complex where multiple units shared a common area, it was too far away to be considered part of the curtilage. Second, the trashcan was not located within an enclosure that surrounded the apartment and Jackson did not take any steps to shield the area from view by others. Finally, the trashcan was located in a common area behind the apartment used by all residents of the building.

In addition, Jackson argued the officers violated his reasonable expectation of privacy in the contents of the trashcan because the trashcan was not located at the curb of the public street for collection, but rather behind the apartment building.

Again, the court disagreed. It was not relevant that the trashcan was not at the curb awaiting collection. Jackson could not have a reasonable expectation of privacy in the contents of a trashcan located outside the curtilage of the apartment that was readily accessible to any member of the public.

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

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Searches (*Jones*)

United States v. Sparks, 711 F.3d 58 (1st Cir. 2013)

Federal agents suspected Sparks was involved in three bank robberies. In December 2009, the agents, without a warrant, placed a global positioning satellite (GPS) tracker on a car used by Sparks. The agents used the tracker to locate the car near the scene of a bank robbery. After losing sight of the car, the agents used the tracker to re-locate it and attempted to conduct a traffic stop. The car crashed and Sparks and another occupant fled on foot. The agents searched the car and found evidence related to the bank robbery.

Sparks moved to suppress the evidence obtained as a result of the placement of the GPS tracker on the car. The district court denied this motion, holding the agents' use of the GPS tracker was not a search under the *Fourth Amendment* while Sparks was traveling on public roads.

After the district court denied Sparks' motion to suppress, the United States Supreme Court decided *U.S. v. Jones*, which held "the government installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" for *Fourth Amendment* purposes.

The court of appeals found that even if the agents' use of the GPS tracker violated the *Fourth Amendment* in light of *Jones*, suppression of the evidence would be improper because the good-faith exception to the exclusionary rule applied. When the agents installed and monitored the GPS tracker in December 2009, binding precedent in the First Circuit allowed the agents to install and monitor a GPS tracker as they did. The agents' reliance on clear and settled circuit precedent to install a GPS tracker and monitor it for one week was objectively reasonable.

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

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United States v. Aguiar, 737 F.3d 251 (2d Cir. 2013)

In January 2009, federal agents installed a GPS tracking device on Aguiar's car without a search warrant. Data obtained from the tracking device was admitted against Aguiar at trial. Aguiar argued the warrantless installation and subsequent monitoring of the tracking device violated the *Fourth Amendment*. The trial court disagreed, the GPS evidence was admitted and Aguiar was convicted.

Following Aguiar's conviction, in January 2012, the United States Supreme Court decided *U.S. v. Jones*. In *Jones*, the court held "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" for *Fourth Amendment* purposes. *Jones* left unanswered the question of whether the warrantless use of GPS devices would be "reasonable, and thus lawful, under the *Fourth Amendment* where officers have reasonable suspicion, and indeed probable cause" to conduct such a search.

Following *Jones*, the First, Fifth and Ninth Circuit Courts of Appeals and district courts for the District of Massachusetts and the District of Rhode Island have applied the good-faith exception to allow evidence obtained from pre-*Jones* warrantless searches to stand. However, the Third

Circuit Court of Appeals, district courts for the Eastern District of Missouri, Eastern District of Kentucky and the Northern District of Mississippi have not applied the good-faith exception.

Here, the court held that when the agents installed and monitored the GPS device, they relied in good faith on *U.S. v. Knotts*. In *Knotts*, decided in 1983, the United States Supreme Court held the warrantless use of a tracking device to monitor the movements of a vehicle on public roads did not violate the *Fourth Amendment*. Because the beeper technology used in *Knotts* was sufficiently similar to the GPS technology used by the government in this case, the court held the agents relied in good faith on *Knotts* in placing the GPS device on Aguiar's vehicle.

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

*****

United States v. Katzin, 732 F.3d 187 (3d Cir. 2013)

Police officers suspected Katzin was involved in a series of pharmacy burglaries. In December 2010, after consulting with the United States Attorney's office, FBI agents placed a magnetic GPS tracker on the exterior of Katzin's van. A few days later, the police tracked Katzin's van to a neighboring town where it remained parked near a pharmacy for over two hours. After the van began to move again, officers discovered the pharmacy had been burglarized. The police conducted a traffic stop on Katzin's van and discovered items stolen from the pharmacy. The police arrested Katzin and his two brothers who were passengers in the van. The Katzins moved to suppress the evidence discovered in the van.

In January 2012, the United States Supreme Court, in *U.S. v. Jones*, held that attaching a GPS device to a suspect's automobile constituted a *Fourth Amendment* search. After *Jones*, however, the question remained whether the warrantless use of GPS devices would be reasonable under the *Fourth Amendment*. The court held the police must obtain a warrant prior to attaching a GPS device on a vehicle. As a result, because the police did not obtain a warrant, their GPS search of Katzin's van was unreasonable and violated the *Fourth Amendment*. The court further held the evidence discovered in Katzin's van was properly suppressed under the exclusionary rule.

The court discussed several exceptions to the warrant requirement and explained why they were not applicable to situations involving the installation of a GPS device on a suspect's automobile. For example, the automobile exception allows officers to search a vehicle when probable cause exists to believe the vehicle contains evidence. However, the court found attaching and monitoring a GPS tracker is different because the GPS tracker creates a continuous police presence designed to discover evidence that may come into existence and be placed inside the vehicle in the future.

The court further held the good faith exception to the exclusionary rule did not apply. The government argued the officers acted in good faith because in December 2010 the officers relied on guidance from two Supreme Court cases, *U.S. v. Knotts* and *U.S. v. Karo*, which held the use of electronic tracking devices did not violate the *Fourth Amendment*. The court disagreed, holding the facts from the cases relied on by the government could be easily distinguished from the facts of this case. First, the court noted neither case involved a physical trespass onto the target vehicle. Second, in both cases the police placed a beeper inside a container, which was

then loaded into the target vehicle. Finally, the court stated there are significant technological differences between the use of beepers and GPS trackers.

The court also ruled the good faith exception did not apply because there was a split between the federal circuit courts of appeals on the validity of the use of warrantless GPS trackers.

Finally, the court stated the police acted in the face of unsettled law at a time when courts were becoming more open to the argument that warrantless GPS surveillance violated the *Fourth Amendment*. Consequently, the court concluded suppressing the evidence in this case would provide the police an incentive to err on the side of constitutional behavior and help prevent future *Fourth Amendment* violations.

The court further held Katzin's brothers had standing to challenge the admissibility of the evidence discovered in the van.

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

*****

United States v. Andres, 703 F.3d 828 (5th Cir. 2013)

Andres argued the warrantless placement and use of the GPS device to monitor the movements of his truck violated the *Fourth Amendment* in light of the United States Supreme Court decision in *U.S. v. Jones*, decided in 2012.

The court declined to rule on whether warrantless GPS searches are *per se* unreasonable. Even assuming a *Fourth Amendment* violation had occurred, the court held the evidence should not be suppressed in this case because in December 2009, it was objectively reasonable for agents in the Fifth Circuit to believe that warrantless GPS tracking was allowed under circuit precedent.

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

*****

United States v. Huart, 735 F.3d 972 (7th Cir. 2013)

As Huart was nearing the completion of his sentence for possession of child pornography, the Bureau of Prisons (BOP) transferred him to a privately operated halfway house that contracted with the BOP. Huart was not permitted to possess a cell phone while at the halfway house. During a random search of Huart's room, a staff member found a cell phone on Huart's bed. A search of the phone revealed numerous images of child pornography. Huart admitted to possessing the phone and the images. The director of the halfway house gave Huart's phone to the FBI who obtained a warrant to search it. Because Huart's phone was password protected, it had to be sent to FBI headquarters for analysis. It was unclear why the staff at the halfway house was able to search Huart's phone initially, but the FBI could not. Agents did not unlock the phone and locate the images of child pornography until February 13, 2012. The warrant to search Huart's phone specified that the search was to be conducted before December 15, 2011.

Huart claimed he had a reasonable expectation of privacy in his cell phone and that its confiscation and subsequent search of its contents violated that privacy. Huart argued because the FBI failed to break the passcode and examine the contents of the phone before the warrant's

expiration date, the search was unlawful. Huart also argued the government's seizure of his cell phone violated his privacy because it was a trespass under *U.S. v. Jones*.

The court disagreed, holding Huart had no reasonable expectation of privacy in the cell phone or its contents. Huart was not permitted to possess a cell phone while at the halfway house; therefore, any phone he brought into the facility was contraband, subject to confiscation and search. Because Huart lacked a reasonable expectation of privacy in his cell phone and its contents, the confiscation and search of the phone did not implicate the *Fourth Amendment*.

The court further held because the Huart's phone was contraband, it was not a trespass for the halfway house staff to confiscate the phone from his room and search it. The court stated even if *Jones* applied to this case, it would establish only that a *Fourth Amendment* search occurred, not that the search was unreasonable.

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

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United States v. Mathias, 721 F.3d 952 (8th Cir. 2013)

A police officer received information from an anonymous source that led him to believe Mathias was growing marijuana in the back yard of his home. A tall fence constructed of vertical wooden slats spaced approximately a quarter-inch apart surrounded Mathias' back yard. After the officer's initial attempts to view Mathias' back yard were unsuccessful, the officer contacted a neighbor living on the adjacent property to the north of Mathias' home. The officer obtained the neighbor's permission to walk along the neighbor's southern property line. However, the officer was unaware Mathias' fence was set approximately eighteen inches south of the property line. As a result, when walking along the north side of the fence, the officer was physically trespassing along an eighteen-inch strip of grass and weeds on Mathias' property.

While on the eighteen-inch strip, the officer looked through the gap in the wooden slats into Mathias' back yard. The officer saw a number of potted marijuana plants. The officer obtained a warrant, searched Mathias' home and recovered marijuana plants, scales, packaging material and cash. Mathias was indicted for conspiring to manufacture marijuana.

Mathias moved to suppress the evidence seized from his home, arguing he had a reasonable expectation of privacy in the eighteen-inch strip of land because it was part of the curtilage of his home.

The court disagreed. While the strip of land was close to Mathias' home, it was not included within Mathias' fence, there was no indication Mathias' put the strip of land to any use commonly associated with the home, and there was no indication Mathias made any effort to protect the strip of land from observation by others. Consequently, the court held the strip of land constituted an open field, and *Fourth Amendment* protection does not extend to open fields.

Mathias also argued the officer's actions while standing on the strip of land constituted a trespassory search, in violation of the *Fourth Amendment*. In *U.S. v. Jones*, the Supreme Court held a physical trespass for the purposes of gathering information constitutes a trespassory search prohibited by the *Fourth Amendment*. However, a *Jones* trespassory search requires the officer's

intrusion to be into a constitutionally protected area. As the police officer was within an open field when he looked through Mathias' fence, his actions did not constitute a trespassory search.

Finally, Mathias argued the officer's observations from the strip of land violated the reasonable expectation of privacy he had in his back yard.

Again, the court disagreed. The officer lawfully observed Mathias' backyard from the strip of land on the other side of Mathias' fence. While the presence of the fence established Mathias had a subjective expectation of privacy in the back yard, the gaps in the fence through which his back yard could be seen unaided, rendered this expectation of privacy objectively unreasonable.

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

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United States v. Barraza-Maldonado, 732 F.3d 865 (8th Cir. 2013)

Federal agents in Phoenix, Arizona, installed a GPS tracking device on a car while it was in a public parking lot because the agents believed the car would be transporting drugs to Minneapolis, Minnesota. Several weeks later, Barraza borrowed the car from its registered owner to drive it from Phoenix to Minneapolis. When the car entered Minnesota, federal agents notified local police. After a police officer saw Barraza commit two traffic violations, he conducted a stop. Officers eventually seized a large quantity of cocaine in the spare tire compartment and arrested Barraza. The day after Barraza's arrest, the United States Supreme Court decided *U.S. v. Jones*.

Barraza argued the warrantless installation and use of the GPS tracking device to monitor the car's movements constituted a search that violated the *Fourth Amendment*; therefore, the cocaine seized from the car should have been suppressed.

The court disagreed, holding the good faith exception to the exclusionary rule applied because binding Ninth Circuit precedent at the time allowed the warrantless installation and use of GPS tracking devices. Specifically, the court held when the federal agents installed the GPS tracking device in Phoenix, it was lawful under Ninth Circuit case law to do so without a warrant as long as the car was located in a public place. The court further held Ninth Circuit case law at the time authorized the agents to use a GPS tracking device to monitor where the car travelled on public roads.

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

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United States v. Smith, 2013 U.S. App. LEXIS 25555 (11th Cir. Fla. Dec. 23, 2013)

In January 2011, police officers installed GPS trackers on two of Smith's vehicles without a search warrant. The police used information obtained from the GPS trackers in their search warrant application for Smith's house and seized evidence that was used against him at trial.

On appeal, citing *U.S. v. Jones*, Smith argued the officers violated the *Fourth Amendment* when they searched his home pursuant to a warrant that relied in part on information collected from the warrantless GPS surveillance.

The court disagreed. When the officers attached the GPS trackers in January 2011, binding Eleventh Circuit case law specifically authorized police officers to install electronic tracking devices in a suspect's vehicle upon a showing of reasonable suspicion, which the officers had in this case. Even if *Jones* would have made the warrantless searches in this case unreasonable, the court held the officers' good-faith reliance upon that binding case law did not warrant suppression of the evidence.

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

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Seizure / Persons

United States v. Jeter, 721 F.3d 746 (6th Cir. 2013)

Police officers noticed a group of individuals loitering in the parking lot of a shopping center. The shopping center was located in an area from which the police department had received many complaints pertaining to robberies, thefts, drug activity and loitering. As part of a larger police operation to address the loitering issue by saturating the parking lot with police officers, two officers in a marked police car approached Jeter, who was exiting the parking lot on a bicycle. One of the officers asked to speak with Jeter; however, Jeter did not respond. The officers pulled their police car in front of Jeter, which blocked Jeter from leaving the parking lot. As the officers got out of their car, Jeter paused briefly, dropped his bicycle and then ran away. The officers chased Jeter down an alley. As Jeter ran, the officers saw him clutching the right front pocket of his shorts. When the officers caught Jeter, they frisked him and recovered a handgun from the right front pocket of Jeter's shorts. Jeter was charged with being a felon in possession of a firearm.

Jeter claimed the officers illegally seized him when they first approached him on his bicycle and again when the officers caught him after the foot chase. As a result, Jeter argued, the handgun should have been suppressed.

The court disagreed. Regarding Jeter's first encounter with the officers, the court noted, a suspect must submit to an officer's show of authority to be seized under the *Fourth Amendment*. Here, Jeter's momentary pause before fleeing from the officers could not be considered submission to the officers' authority, especially when Jeter did not attempt to talk to the officers, but rather ignored the officers and their request to speak with him. Consequently, because Jeter was not seized, there could be no *Fourth Amendment* violation.

Next, the court ruled Jeter was lawfully seized when the officers apprehended him after the foot chase. The court held Jeter's flight, combined with the grabbing of his front pants pocket in a high crime area gave officers reasonable suspicion to conduct a *Terry* stop. The court found there was no evidence to support Jeter's claim the officers provoked Jeter to flee, based in part on Jeter's admission that he ran because he had a gun. Because the officers had reasonable suspicion to stop Jeter once he fled, Jeter was legally seized, and the gun found in his pocket was not the fruit of the poisonous tree.

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

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Consensual Encounters

United States v. Hinojosa, 534 Fed. Appx. 468 (6th Cir. 2013)

While patrolling a high-crime, high-drug area, two police officers followed Hinojosa for several blocks until he turned his car into a driveway of a sub-divided house and parked. The officers knew there had been reports of drug manufacturing in one of the apartments in the house. One of the officers approached Hinojosa, who was still seated in his car while the other officer positioned the police car in such a way that it would not have blocked Hinojosa's car from backing down the driveway. As the officer approached Hinojosa's car he held up one hand, signaling Hinojosa that he wanted to talk while keeping his other hand on his duty weapon. When the officer reached Hinojosa's car, he knocked on the driver's side window and asked Hinojosa if he could talk to him. Hinojosa agreed and then gave the officer his driver's license after the officer asked if he had any identification on him. The officer ran checks on Hinojosa's license information and discovered the license had been suspended. Because the officer had seen Hinojosa driving, he arrested Hinojosa for driving with a suspended license. During the search incident to arrest, the officer found a pistol in Hinojosa's waistband. The government indicted Hinojosa for being a felon in possession of a firearm.

Hinojosa moved to suppress the pistol, claiming the officers violated the *Fourth Amendment* by seizing him without reasonable suspicion he was engaged in criminal activity.

The court disagreed, holding Hinojosa's arrest resulted from a consensual encounter with the officers and not a *Fourth Amendment* seizure.

Police officers may approach individuals and ask them questions without having any reasonable suspicion of criminal activity as long as the officers do not convey to the individuals that they are not free to leave.

Here, none of the officers' actions during the encounter with Hinojosa, prior to the arrest, amounted to a *Fourth Amendment* seizure. First, the officer parked the police car so it was not blocking Hinojosa from terminating the encounter and leaving the area. Second, even though the officer's hand was on his gun as he approached Hinojosa, it was reasonable under the circumstances and was neither threatening nor coercive. Third, Hinojosa agreed to discuss some questions with the officer. Finally, the officer asked for Hinojosa's identification, he did not demand it or convey the message that Hinojosa would not be able to leave unless he produced it.

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

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Terry Stops / Reasonable Suspicion

United States v. Dapolito, 713 F.3d 141 (1st Cir. 2013)

At 2:39 a.m., two police officers saw Dapolito standing alone in an alcove of a building that contained a door to a bar on the first floor, which was closed, and a door to condominiums on the second floor. An ATM machine was next door to the condominiums. The officers approached Dapolito who appeared to be intoxicated. The officers told Dapolito they were patrolling the area because of some recent burglaries, but they saw no evidence Dapolito was involved in a

burglary and he did not appear to be in possession of burglary tools. One of the officers asked Dapolito for identification. Dapolito told the officer he did not have any identification, but provided his name and date of birth. After some initial confusion on the spelling of Dapolito's name, the dispatcher told the officer there was no record for Dapolito in the computer system. Convinced Dapolito was lying about his identity, the officer asked Dapolito if he could pat him down for identification. Dapolito refused. The officer asked Dapolito for consent to search a second time, but again he refused. The officer saw what appeared to be the outline of an identification card in Dapolito's front pants pocket and asked Dapolito what it was. Dapolito took an Electronic Benefit Transfer (EBT) card from his pants pocket and gave it to the officer. The card had Dapolito's name spelled the same way as he had previously told the officer. The officer told Dapolito he was going to be taken to the county jail so his identity could be confirmed. The officer ordered Dapolito to place his hands on his head so he could be frisked, but Dapolito refused. After the officer drew his Taser, Dapolito complied. When Dapolito raised his hands, his shirt and jacket lifted, revealing a handgun in his waistband. At the jail, the officers confirmed Dapolito's identity and discovered he was a convicted felon. Dapolito was later charged with being a felon in possession of a firearm.

Dapolito moved to suppress the handgun, claiming the officers found the handgun as the result of an unlawful *Terry* stop.

The government claimed by the time the officer found the handgun, there was reasonable suspicion to believe Dapolito was involved in criminal activity, and the frisk was justified by an objective concern for officer safety.

The court held that the district court properly ruled the officers did not have reasonable suspicion to believe Dapolito was involved in criminal activity by the time they told him he was going to jail and frisked him.

Under the circumstances, it was reasonable for the officers to approach Dapolito to determine if he needed assistance or was involved in criminal activity. However, what began as a consensual encounter turned into a *Terry* stop when the officers told Dapolito they were taking him to jail. At that point, the officers could not justify detaining Dapolito as a burglary suspect because there was no evidence of any recent burglaries in the area and Dapolito's behavior did not tie him to a burglary. Additionally, Dapolito was not tampering with any of the doors in the alcove or the ATM machine, and he did not possess any tools that are commonly used in burglaries.

Similarly, the officers could not justify detaining Dapolito on the theory that there may have been an outstanding warrant for his arrest. While there may have initially been some confusion over the spelling of Dapolito's name, Dapolito voluntarily gave the officers the EBT card, which had his name spelled the same way he told the officers it was spelled. Even though the officers became suspicious after dispatch could not find Dapolito's name on record, the failure to get an affirmative match from a government records system does not, by itself, create reasonable suspicion of a crime.

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

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United States v. Mouscardy, 722 F.3d 68 (1st Cir. 2013)

A person called 911 and reported a man was assaulting a woman on a street corner. When police officers arrived, they found a man and woman fitting the description provided by the 911 caller. The officers detained the man, who refused to provide identification or tell the officers his name. After a few minutes, the man became visibly agitated, nervous and fidgety and refused an officer's request to remove his hand from his jacket pocket. When the officer attempted to conduct a *Terry* frisk, the man fled. The officers apprehended the man, later identified as Mouscardy, and recovered a small handgun Mouscardy removed from his jacket pocket during the chase. Mouscardy was charged with being a felon in possession of a firearm.

Mouscardy argued the officers did not have reasonable suspicion to detain him, the duration of the stop was unreasonable, and the initiation of the *Terry* frisk was unlawful.

The court held the officers had reasonable suspicion to support a *Terry* stop. A few minutes after receiving the 911 call, the officers found a man and woman at the location described by the caller. Based on these facts, it was objectively reasonable for the officers to suspect Mouscardy was involved in criminal activity.

The court further held the duration of the stop was reasonable. The purpose for stopping and questioning Mouscardy was to investigate a reported assault. The officers diligently performed their investigation; however, Mouscardy's unresponsiveness to the officer's reasonable questions prevented the officers from completing their investigation more quickly. Mouscardy could not complain about a delay he caused.

Finally, the court held the officers had reasonable suspicion to believe Mouscardy had a weapon. The officers responded to a report of a man beating a woman in the street. When an officer has reasonable suspicion a crime of violence has occurred, the same facts that supported the initial stop will also support a *Terry* frisk. In addition, Mouscardy's failure to identify himself, his refusal to remove his hand from his jacket pocket and his nervous and agitated behavior were relevant factors to support the reasonable belief Mouscardy might be armed and dangerous.

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

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United States v. Carrigan, 724 F.3d 39 (1st Cir. 2013)

An individual called 911 and reported a man driving an Acura attempted to rob him at gunpoint. The caller described the assailant and provided a license plate number for the Acura. Within thirty minutes, police officers located the unoccupied Acura parked on the street. A short time later, a man fitting the description of the assailant got into the Acura and drove away. Police officers followed the Acura and saw the driver turn into a residential driveway and turn off the headlights in what the officers believed was an attempt to avoid marked police cars stationed at an intersection the driver had been approaching. After the driver pulled to the end of the driveway, he backed down the driveway, opened his door briefly and then accelerated back up the driveway.

Several police officers, some with their weapons drawn approached the Acura, identified themselves and told the driver to raise his hands. One of the officers opened the passenger's side

door, turned off the ignition and put the car in park. Another officer pulled the driver, later identified as Carrigan, out of the driver's side door. The officer handcuffed Carrigan, pushed him to the ground and performed a *Terry* frisk. The officer found a loaded handgun in Carrigan's jacket pocket. Carrigan was charged with being a felon in possession of a firearm.

Carrigan argued the officers lacked reasonable suspicion to stop him, and what began as a *Terry* stop became a *de facto* arrest without probable cause when the officers forcefully pulled him out of the car and handcuffed him.

The court disagreed. Carrigan fit the description of the assailant provided by the 911 caller and was driving the car described by the 911 caller with the same license plate number. Once Carrigan got into the Acura, the officers saw him pull into a driveway in an attempt to avoid marked police cars at an upcoming intersection, then act suspiciously once he was in the driveway. The information provided by the 911 caller combined with the officer's observations once Carrigan got into the Acura provided the officers reasonable suspicion to initiate a *Terry* stop.

In addition, the court held the forceful seizure of Carrigan and the use of handcuffs did not turn the lawful *Terry* stop into a *de facto* arrest. The officers had a reasonable belief such measures were necessary to protect their safety because Carrigan had not put the car into park, the engine was still running when the officers approached it, the driveway was narrow and the officers believed Carrigan was armed. Consequently, to officers acted reasonably in making sure Carrigan was seized and handcuffed as part of the *Terry* stop.

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

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United States v. Campbell, 2013 U.S. App. LEXIS 25585 (1st Cir. Me. Dec. 23, 2013)

A man entered an electronics store and purchased two video gaming systems, paying with a credit card. After the man left, a second man entered the store and attempted a similar purchase, but both credit cards he presented were declined. The name on both declined credit cards was the same name as the one on the credit card presented by the first man. After the second man left, a third man entered the store and expressed an interest in purchasing a video gaming system. The clerk refused to sell him anything and suggested the man try another nearby store. After the third man left, the clerk saw him get into a vehicle with the first two men and drive away. The clerk called the police and provided descriptions of the three men and a description of their car and license plate number. The clerk told the police the men were likely going to the other store she had recommended.

A police officer drove through the parking lot of the second store and saw an unoccupied vehicle matching the description provided by the clerk. While watching the vehicle, the officer saw three men matching the descriptions provided by the clerk from the electronics store, carrying bags of merchandise. The men got into the vehicle and left. The officer followed the vehicle and conducted a traffic stop in a hotel parking lot. The driver, Barnes, told the officer the vehicle was rented. Another officer arrived, and spoke to Campbell, who was sitting in the back seat. Campbell initially told the officer he had been to the electronics store, but later denied being there. When the officer asked Campbell about using credit cards at the electronics store Campbell replied, "What cards, what credit cards." After receiving consent to search the vehicle,

officers found fifty identification and credit cards and three wallets in the vehicle. The three men, Barnes, Campbell and Porteous, were charged with a variety of offenses related to their fraudulent use of the credit cards and identifications. All three were convicted.

On appeal, Campbell and Porteous argued the evidence obtained from the vehicle and their statements to the officers should have been suppressed because the officers unlawfully stopped their vehicle and did not provide *Miranda* warnings before speaking to the men.

The court disagreed. The stop occurred after the police received a report from a store employee who suspected the three men had engaged in credit card fraud. The clerk gave the officer specific information concerning her encounter with the men to include that two of the men had attempted to use credit cards bearing the same name. The clerk also described the men, their vehicle and the probable location of their next stop. The police corroborated some of this information by locating the three men who fit the clerks' description coming out of the same store mentioned by the clerk and driving the same vehicle the clerk described. As a result, the officer established reasonable suspicion to conduct a *Terry* stop and detain the three men to investigate the possibility of credit card fraud.

Following the stop, the court further stated Campbell never claimed to be the renter of the vehicle and Porteous later denied he was the one who had rented it. Because neither Campbell nor Porteous established a reasonable expectation of privacy in the vehicle, the court held they did not have standing to object to the search of the vehicle by the officers.
Finally, the court held the officers were not required to provide *Miranda* warnings to Campbell and Porteous before questioning them, prior to their arrest. Generally, police officers are not required to give *Miranda* warnings during *Terry* stops. However, *Miranda* warnings are required "as soon as the suspect's freedom of action is curtailed to a degree associated with a formal arrest." Here, the court ruled the circumstances surrounding the stop would not be viewed by a reasonable person as the functional equivalent of a formal arrest. First, the men were questioned in a neutral location, a parking lot. Second, there was no indication the police to suspect ratio was overwhelming to the men, as there were four or five police officers on the scene questioning the three men, and no more than two officers questioned each man at any time. Third, neither Campbell nor Porteous was physically restrained during the questioning. Finally, the duration of the questioning was brief and related to the reason for the stop.

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

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United States v. Freeman, 735 F.3d 92 (2d Cir. 2013)

A 911 operator received two anonymous calls, from the same person, reporting a Hispanic male, wearing a black hat and white t-shirt had a gun. The caller refused to identify herself and the 911 operator could not re-contact the caller after making multiple attempts. The 911 operator was never able to verify whether the anonymous caller actually saw a gun. When police officers arrived, they saw a person fitting the description, later identified as Freeman, walking down the street. One of the officers approached Freeman and attempted to talk to him; however, Freeman continued to walk down the street. The officer then placed his hand on Freeman's elbow, but Freeman kept walking. Finally, the officer grabbed Freeman around the waist in a "bear hug" and the pair fell to the ground. After a short struggle, the officers handcuffed Freeman and

removed a gun from his waistband. Freeman was charged with being a felon in possession of a firearm.

Freeman argued the police lacked reasonable suspicion to stop him: therefore, the gun recovered from his waistband should have been suppressed.

The court agreed, holding the officer never established reasonable suspicion to stop Freeman.

The officer stopped Freeman based on information provided by two anonymous 911 phone calls. Anonymous tips, without further corroboration by the police to demonstrate that the tip has sufficient indicia of reliability, are insufficient to provide the reasonable suspicion needed to conduct a valid *Terry* stop. Here, there was no way for the police to assess the caller's credibility and there was no risk of consequence if the caller was making false reports. When the officer first encountered him, Freeman had the right to ignore the officer and go about his business. In addition, Freeman's refusal to cooperate with the officer, without more, could not provide the officer reasonable suspicion to stop him. When the officer grabbed Freeman around the waist, Freeman was seized for *Fourth Amendment* purposes; however, the officer had still not established reasonable suspicion to stop him.

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

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United States v. Benoit, 730 F.3d 280 (3d Cir. 2013)

Law enforcement officers in Grenada received an anonymous tip that the vessel, Laurel, which was registered in the United States, was smuggling illegal drugs. Acting on this tip, the United States Coast Guard intercepted the Laurel and boarded it to investigate. Coast Guard officers attempted to conduct a space accountability inspection, which consists of taking measurements of a vessel to determine if there are any hidden compartments. After the officers were unable to complete this inspection because of rough seas, the Laurel was directed to the nearest United States port. In addition, Benoit, the master of the Laurel, gave officers inconsistent responses when questioned about the Laurel's destination and purpose for travel.
Once in port, two different drug dogs alerted to the presence of narcotics in the same area of the Laurel. Customs and Border Protection Officers then used a machine to search for anomalies in the vessel and found anomalous masses mid-ship and in the stern. The officers drilled a hole in the stern of the Laurel and found a substance that field-tested positive for cocaine. The officers eventually found 250 brick-like packages containing cocaine hidden in the stern.

Benoit was convicted of two federal drug offenses. On appeal, Benoit argued officers violated the *Fourth Amendment* by arresting him and searching the Laurel without probable cause.

The court disagreed. The United States Coast Guard has broad authority to board vessels on the open sea. The Coast Guard may stop American vessels to conduct document and safety inspections without having any suspicion of criminal activity and may conduct more intrusive searches based on reasonable suspicion. Here, the court held the information from the authorities in Grenada and Benoit's inconsistent statements to the Coast Guard officers established reasonable suspicion to briefly detain the Laurel and search the vessel for contraband. Because rough seas prevented the officers from completing their search, it was reasonable to direct the

Laurel to the nearby port and detain it until the search was completed. Once the drug dogs alerted to the presence of narcotics, the officers had probable cause to arrest Benoit. Finally, drilling a hole into the vessel was reasonable after the drug dogs alerted and the officers discovered the anomalous masses in the vessel.

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

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United States v. Bumpers, 705 F.3d 168 (4th Cir. 2013)

A police officer saw Bumpers and another man standing next to a pair of garbage dumpsters near the back of a convenience store's parking lot. When the men saw the officer, they began walking away from him at a fast pace. Suspecting the men were trespassing, the officer told them they were not free to go and demanded their identification. One man ran, but Bumpers stopped. The officer arrested Bumpers after a computer check indicated he had an active arrest warrant. During the search incident to arrest, the officer found a loaded handgun in Bumpers' pocket.

The court held the officer had reasonable suspicion to conduct a *Terry* stop on Bumpers. First, the convenience store was in a high-crime area and was part of a shopping plaza where multiple shootings and drug arrests had taken place. Second, Bumpers had been standing in an area posted with "No Trespassing" signs and he was not carrying shopping bags or items that would have indicated he was patron of the store. Third, Bumpers' attempt to leave the area upon seeing the officer was behavior more consistent with that of a trespasser than a lawful customer. Finally, when Bumpers left the premises he walked past the store's front doors, but did not enter. Based on these facts, the officer had reasonable suspicion to believe Bumpers was trespassing.

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

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United States v. Black, 707 F.3d 531 (4th Cir. 2013)

Two uniformed police officers saw a vehicle parked at a convenience store gas pump and noticed the driver, who was the only person in the vehicle, did not get out of the car to pump gas or go into the store. The officers claimed this behavior suggested the driver was involved in a drug transaction. The officers followed the vehicle to a nearby parking lot located between two apartment complexes in a high crime area. The driver got out of the vehicle and walked up to Black and four other men who were talking to each other. The two officers contacted other police units for assistance because they wanted to make a voluntary contact and believed it was better if they were not outnumbered. Two other uniformed officers immediately responded and three other officers joined them later. The officers approached and seized a firearm that one of the men was openly carrying in a holster, on his hip, in compliance with state law. After seizing the firearm, the officers began to frisk the other men, stating they had been trained to operate on the "Rule of Two," meaning if the police find one firearm; there will most likely be another firearm in the immediate area. The officers also recognized one of the men as having prior drug arrests. At this point, Black offered his identification to one of the officers, telling them he did not live in the area but was there visiting friends. The officer did not return Black's identification, but instead pinned it to his uniform. When Black started to walk away, the officer

stepped in front of him and told him he was not free to leave. As Black continued to walk away, the officer grabbed his arm, but Black pulled away and began to run toward an apartment building. Another officer tackled Black and recovered a firearm that fell from his clothing. Black was charged with possession of a firearm by a convicted felon.

The court held the police seized Black for *Fourth Amendment* purposes when the officer pinned Black's identification to his uniform while another officer began to frisk the other men in the group. By this time, seven uniformed officers were present, with at least two of them performing perimeter duty to ensure none of the men left the area. Under these circumstances, a reasonable person in Black's position would have believed he was not free to leave. In addition, the officer's statement to Black that he was not free to leave was not the initiation of the seizure, but instead an affirmation that Black was not free to leave.

Next, the court held the officers did not have reasonable suspicion to believe Black was engaged in criminal activity; therefore, his seizure was unreasonable. The court reiterated a police officer's level of suspicion must be "particularized" to the person who is seized and there is no reasonable suspicion by association.

First, the court stated the officer's suspicion that a lone driver sitting at a gas pump was engaged in illegal drug activity "bordered on the absurd."

Second, the prior arrest history of one of the men in the group could not be a logical basis for a reasonable particularized suspicion Black was engaged in criminal activity.

Third, in a state that allows individuals to openly carry firearms, the exercise of that right, without more, cannot justify an investigatory detention. Even if the officers were justified in detaining the man who openly displayed the firearm, reasonable suspicion to him did not amount to particularized reasonable suspicion to believe Black was engaged in criminal activity.
Fourth, the officers' "Rule of Two" is a law enforcement created rule that is not based on reasonableness. The practical implication of applying this rule suggests anyone in proximity to an individual with a gun is involved in criminal activity; therefore, subject to seizure and search. As there are no safeguards against the unlawful use of discretion by the officer applying such an arbitrary rule, it cannot be a basis for reasonable suspicion of criminal activity.

Fifth, the fact that Black voluntarily provided his identification to the officer and was "overly cooperative" did not create reasonable suspicion to believe he was engaged in criminal activity, as the government argued.

Finally, just because Black and the others were present in a high crime area, at night, even when coupled with the officers' previous irrational assumptions, failed to establish that Black was engaged in criminal activity.

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

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United States v. Hernandez-Mandujano, 721 F.3d 345 (5th Cir. 2013)

Border Patrol agents stopped Hernandez as he was driving on Interstate 10, approximately 450 miles from the nearest United States-Mexico border crossing. The agents believed Hernandez

was transporting illegal aliens because he was driving an SUV; had both hands on the steering wheel, and he was not exhibiting the relaxed nature of most drivers. In addition, Hernandez's speed dropped from 70 miles per hour to 60 miles per hours as the agents followed him, and when the agents pulled alongside Hernandez, he stopped talking to the person in the passenger's seat. The agents learned the car was registered to a woman; however, it had not been reported stolen, had no outstanding warrants or criminal activity associated with it, and had not recently crossed the border.

During the stop, Hernandez told the agents he was a Mexican national in the United States illegally. The government indicted Hernandez for reentry without permission by an alien deported after conviction for an aggravated felony, in violation of *18 U.S.C. § 1326(a)* and *(b)(2).*

Hernandez moved to suppress his statements to the agents, arguing the stop could not be considered an extended border search and the agents lacked reasonable suspicion to conduct a *Terry* stop.

The district court agreed the stop was not an extended border search, but held the agents had reasonable suspicion of illegal activity to support a *Terry* stop.

The court of appeals held the agents did not have reasonable suspicion to stop Hernandez. First, the stop occurred 450 miles from the nearest border crossing and there was no reason to believe Hernandez had come from the border. Second, Hernandez's driving posture speed change and the fact the SUV was registered to a woman was not indicative of criminal activity. Third, the SUV had not been reported stolen, had no outstanding warrants or criminal activity associated with it, and had not recently been documented as crossing the border. Finally, the agents could not identify anything about the SUV that rendered it more likely than other SUVs to be transporting illegal aliens.

Even though the agents violated the *Fourth Amendment* in stopping Hernandez, the court still denied Hernandez's motion to suppress. The court noted previous Fifth Circuit case law held an alien's INS file and identity are not subject to suppression when law enforcement officers learn of a deported alien's unlawful reentry after an allegedly unconstitutional stop.

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

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United States v. Abdo, 733 F.3d 562 (5th Cir. 2013)

After receiving information from employees at a gun store and an army/navy surplus store, police officers believed Abdo planned to detonate a bomb and shoot service members stationed at Fort Hood, Texas. When the officers encountered Abdo they drew their firearms, separated Abdo from the backpack he was carrying, handcuffed him and then placed him in the back of a police car. Abdo admitted to the officers that he planned to attack soldiers at Fort Hood. Abdo was then formally arrested and transported to the jail.

Abdo argued the district court should have suppressed evidence found at the time of his arrest and statements he made to the police. Abdo claimed his detention at gunpoint and placement in

a police car in handcuffs was a full arrest rather than a *Terry* stop, which was not supported by probable cause.

The court disagreed. Pointing a firearm and handcuffing a suspect does not automatically convert a *Terry* stop into an arrest. Here, when the officers encountered Abdo, they knew he had purchased shotgun shells, an extended magazine for a handgun and a large amount of gunpowder in a manner that was not consistent with its normal use. The officers also knew Abdo purchased an army uniform and asked for the kind of patches used at Fort Hood. In addition, Abdo was carrying a large, overstuffed backpack on a very hot day and one of the officers had experience with terrorists using similar tactics of concealing explosives in backpacks and obtaining fake uniforms to facilitate an attack. Under these circumstances, the officers acted reasonably in drawing their firearms and handcuffing Abdo while they effected a valid *Terry* stop, which was supported by reasonable suspicion.

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

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United States v. Powell, 732 F.3d 361 (5th Cir. 2013)

A confidential informant (CI) told a police officer that Powell and a woman, later identified as Akin, had purchased crack cocaine in Lubbock, Texas, which the couple planned to sell in Midland, Texas. The CI described the make, model, and color of Powell's car and gave the officer a partial license plate number. The CI had worked with police in the past and had provided credible information. However, the CI failed to tell the officer he had cooked the crack cocaine Powell and Akin had just purchased.

Officers located Powell's vehicle on a road leading into Midland, Texas, and conducted a traffic stop. During the stop, the officers received consent to search the vehicle. Because of inclement weather and the amount of traffic on the highway, the officers moved Powell's vehicle to the police station. At the station, an officer pulled a button off the dashboard and saw drugs and currency concealed behind the dash, which were seized. During the search, the officers also found a cell phone between the door and the driver's seat. Akin denied ownership, claiming the phone belonged to Powell; however, Powell also denied ownership of the phone. Later in the evening, the officers examined the phone and identified several text messages between Powell and the CI concerning the purchase of crack cocaine. At trial, the court admitted the drugs, currency, cell phone, text messages and other evidence discovered from the search of Powell's vehicle.

Powell and Akin argued the CI's tip was not sufficiently reliable to provide the officers with reasonable suspicion they were engaged in a drug crime because the CI was a drug dealer and he concealed this fact from the officers. Additionally, Akin argued the evidence obtained from the cell phone should have been suppressed; therefore not admissible against her.

While the CI's role of the sale of the crack cocaine to Powell and Akin damaged his credibility, the court held the totality of the circumstances rendered the tip reliable; therefore, establishing reasonable suspicion Powell and Akin were involved in a drug crime. The CI's tip was based on first-hand knowledge of events that had just taken place. The CI identified Powell and a female companion. The CI also gave the officer a very specific description of Powell's vehicle and

travel plans. Officers were able to corroborate this information when they saw a car matching the CI's description on a road leading into Midland. These factors were sufficient to overcome the flaws in the CI's personal credibility and reliability.

For the same reasons the CI's tip was sufficient to establish reasonable suspicion, the court held it was sufficient to provide probable cause the vehicle contained crack cocaine. Because the officers had probable cause Powell's vehicle contained crack cocaine, they could lawfully move the vehicle to a safer location to conduct their search. In addition, the existence of probable cause allowed the officers to search any part of the vehicle where crack cocaine might be concealed. Consequently, the officers were allowed to remove a button from the dashboard to see if the crack cocaine was concealed behind the dash.

Finally, the court held Akin did not have standing to object to the admission of the evidence from the cell phone because she denied ownership of it.

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

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United States v. Figuerdo-Diaz, 718 F.3d 568 (6th Cir. 2013)

Federal agents suspecting Rivas was trafficking drugs followed him to a restaurant parking lot. The agents saw Rivas climb into the driver's seat of a tractor-trailer. The agents saw Diaz in the passenger seat of the tractor-trailer. The agents confirmed the tractor-trailer was registered to Rivas. After a few minutes, Rivas got out of the tractor-trailer and got into a car driven by Loya. Diaz followed Loya and Rivas in the tractor-trailer.

The agents followed Loya, Rivas and Diaz to a warehouse and approached the men to conduct a *Terry* stop. Rivas ran from the officers, but was apprehended after a brief foot chase, while Loya and Diaz were detained without incident.

The agents walked a drug dog around the tractor-trailer and the dog gave a positive alert. The agents searched and found over two-thousand pounds of marijuana hidden in the trailer's undercarriage. The agents arrested Rivas, Diaz and Loya.

All three men moved to suppress the marijuana recovered from the trailer, claiming it was seized as a result of their unlawful detention.

The district court suppressed the evidence as to Loya and Diaz, but declined to suppress the evidence as to Rivas. The district court found the agents had reasonable suspicion to detain Rivas, but did not have reasonable suspicion to detain Diaz and Loya. The government appealed the suppression order regarding Diaz and Loya.

The court of appeals reversed the district court and held the marijuana should not have been suppressed as to Diaz and Loya. The exclusionary rule prohibits the government from using evidence caused by an illegal seizure, not evidence found around the same time as an illegal seizure. Here, the agents' detention of Diaz and Loya did not cause the agents to find the marijuana in the trailer. Instead, it was the agents' reasonable suspicion regarding Rivas that caused the agents to detain the tractor-trailer, conduct the dog sniff and discover the marijuana.

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

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United States v. Jeter, 721 F.3d 746 (6th Cir. 2013)

Police officers noticed a group of individuals loitering in the parking lot of a shopping center. The shopping center was located in an area from which the police department had received many complaints pertaining to robberies, thefts, drug activity and loitering. As part of a larger police operation to address the loitering issue by saturating the parking lot with police officers, two officers in a marked police car approached Jeter, who was exiting the parking lot on a bicycle. One of the officers asked to speak with Jeter; however, Jeter did not respond. The officers pulled their police car in front of Jeter, which blocked Jeter from leaving the parking lot. As the officers got out of their car, Jeter paused briefly, dropped his bicycle and then ran away. The officers chased Jeter down an alley. As Jeter ran, the officers saw him clutching the right front pocket of his shorts. When the officers caught Jeter, they frisked him and recovered a handgun from the right front pocket of Jeter's shorts. Jeter was charged with being a felon in possession of a firearm.

The court ruled Jeter was lawfully seized when the officers apprehended him after the foot chase. The court held Jeter's flight, combined with the grabbing of his front pants pocket in a high crime area gave officers reasonable suspicion to conduct a *Terry* stop. The court found there was no evidence to support Jeter's claim the officers provoked Jeter to flee, based in part on Jeter's admission that he ran because he had a gun. Because the officers had reasonable suspicion to stop Jeter once he fled, Jeter was legally seized, and the gun found in his pocket was not the fruit of the poisonous tree.

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

*****

United States v. Howard, 729 F.3d 655 (7th Cir. 2013)

A police officer had probable cause to arrest Johnson for pistol-whipping a man one week earlier. When the officer saw Johnson and Carthans get out of a van and walk towards an apartment building, the officer got out of his vehicle and drew his gun, believing Johnson could be armed and dangerous. As the officer approached the men, Howard and Williams got out of the van. Until that time, the officer believed only two men had been in the van. The officer turned his gun towards Howard and Williams, who were closer to him, and ordered all four men to the ground.
A back-up officer arrived a few moments later and arrested Johnson, who had blood on his clothing, while the original officer placed Howard in handcuffs and frisked him for weapons. After placing Johnson in his patrol car, the back-up officer noticed Howard and Williams also had blood on their clothing. The back-up officer frisked Howard and while moving his hand over Howard's pocket, he felt what he believed to be a sandwich bag containing drugs. The officer removed the sandwich bag, which contained crack cocaine.

The officers searched the van and found a baseball bat and a gun wrapped in a bloody shirt. A short time later, the officers learned the four men were suspects in an armed robbery that had

occurred in a neighboring city less than an hour earlier. Howard, Williams and Carthans were arrested and charged with armed robbery in state court. Howard was also charged in federal court with firearm and drug offenses.

Howard moved to suppress the crack cocaine, arguing his detention and the second frisk that led to the discovery of the drugs violated the *Fourth Amendment* because the officer did not have reasonable suspicion to stop and frisk him.

First, the court held it was reasonable for the officer to briefly detain Howard while arresting Johnson. The officer was alone and attempting to arrest Johnson for a violent crime involving a gun. Even though being ordered to the ground at gunpoint was a substantial infringement on Howard's rights, the officer's interest in ensuring he could safely arrest Johnson without having to worry about others who had just exited the same vehicle with him outweighed this brief intrusion.

Next, the court held the officers established reasonable suspicion to further detain Howard after the officers saw blood on Johnson's, Howard's and Williams' clothing. The officers' suspicion increased after they found the bloody gun in the van in which the men had been riding, and then learned the men were suspects in a recent armed robbery.
Finally, the court declined to decide whether the officer's second frisk of Howard was reasonable. Even if the cocaine had not been found in Howard's pocket during the second frisk, the court held it would have inevitably been discovered in the search incident to his arrest for armed robbery.

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

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United States v. Lyons, 733 F.3d 777 (7th Cir. 2013)

Lyons was a passenger in a car driven by White. Police officers saw White and attempted to conduct a traffic stop because they knew White's driver's license was suspended. Additionally, the officers knew White had been involved in a vehicle chase previously where a gun had been recovered from his car. When the officers activated their emergency lights, White accelerated, drove two blocks and ran a red light before he finally pulled over. One of the officers ordered White out of the car and another officer frisked him. A third officer ordered Lyons out of the car. Lyons appeared nervous, his hands were shaking and he avoided eye contact with the officer. When the officer told Lyons he was going to frisk him, Lyons said, "I have a gun on me." The officer recovered a loaded firearm from Lyons' waistband. Lyons was arrested and charged with possession of a firearm by a convicted felon.

Lyons argued the officers did not have reasonable suspicion to believe he was armed and dangerous; therefore, the firearm seized during the *Terry* frisk violated the *Fourth Amendment*.

The court disagreed. First, Lyons appeared nervous and his hands were shaking when the officer approached him. Second, Lyons was in the car with White, whom the officers knew had been arrested for firearms offenses in the past. Finally, the officers could have reasonably believed, based on White's behavior and their experience, that White accelerated his car in order to buy time to transfer a firearm to Lyons before pulling over.

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

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United States v. Chantharath, 705 F.3d 295 (8th Cir. 2013)

Officers, aware of Chantharath's two prior felony drug convictions, received reports he was selling methamphetamine from motel rooms in Sioux Falls. Officers set up surveillance on a motel after they learned someone had rented a room in Chantharath's name there. The officers saw a gray Lexus registered to Chantharath's sister parked at the motel throughout the day. At one point, two women left the motel in the Lexus and returned with a man who rented a room there. The officers saw the women make frequent trips between Chantharath's room and the other man's room. Later, officers stopped the women as they left the motel, arrested them and seized cash, marijuana and drug paraphernalia from them. After the women's arrest, the officers saw a white van arrive at the motel and the driver enter Chantharath's room. A short time later, two men left the room and drove away in the white van. The officers conducted a traffic stop to question the van's occupants. The driver and passenger, later identified as Chantharath, admitted to using and possessing methamphetamine and marijuana. The officers arrested both men, and during the search incident to arrest found methamphetamine on Chantharath.

Chantharath argued the officers did not have reasonable suspicion to stop the van.

The court disagreed, holding the officers had reasonable suspicion to justify a *Terry* stop. The officers had information Chantharath had recently been selling drugs from motel rooms in Sioux Falls. The officers knew Chantharath had rented a room at the motel, and a Lexus linked to him was on the property. The officers knew the two women who had been in the motel room and using the Lexus had been arrested with cash, drugs and drug paraphernalia. Consequently, there was reasonable suspicion for the officers to suspect the occupants of the white van were involved in drug activity.

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

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United States v. Allen, 705 F.3d 367 (8th Cir. 2013)

A police officer patrolling an interstate highway saw a green sport utility vehicle (SUV) and a white minivan travelling at the same speed within four car lengths of each other. Both vehicles had Texas license plates and appeared to be rental vehicles. The officer stopped the white minivan for a traffic infraction. When the officer reached the passenger-side window, he saw the cargo area was packed with large bundles covered by a blanket and smelled an overwhelming odor of marijuana. The officer arrested the driver and radioed fellow officers, stating the green SUV should be stopped because he suspected it was travelling with the white minivan.

Five miles down the interstate, another officer saw the green SUV, driven by Allen, and initiated a traffic stop for investigative purposes, to determine if it was traveling with the white minivan. After the officer learned the green SUV and the white minivan were rented on the same day from the same rental location in Texas, he arrested Allen for conspiracy to distribute marijuana.

Allen argued the officers lacked probable cause for either traffic stop.

First, the court held Allen had no standing to challenge the search of the white minivan because he had no reasonable expectation of privacy in that vehicle.

Next, the court held the officer had reasonable suspicion to conduct a *Terry* stop on the green SUV. The first officer saw two apparent rental vehicles with license plates from the same state, traveling in tandem and then discovered a large quantity of marijuana in one of them. It was reasonable to initiate a brief stop of the green SUV to investigate its possible association with the white minivan.

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

*****

United States v. Hightower, 716 F.3d 1117 (8th Cir. 2013)

A police department received an anonymous call suggesting officers were needed at the local Boys and Girls Club. When the officers arrived, they found no problem at the Boys and Girls Club, but saw a group of ten to fifteen people across the street on the verge of fighting. As the officers crossed the street to investigate, Hightower and his girlfriend walked away from the group, got into his nearby car, and began to drive away. The officers ordered Hightower to stop but he did not comply until an officer walked alongside his slow-moving vehicle and drew his firearm. After Hightower stopped, the officers smelled the odor of alcoholic beverages coming from Hightower's car. The officers eventually arrested Hightower for public intoxication and discovered an illegal firearm in his car during their inventory search.

Hightower argued the officers did not have reasonable suspicion to support a *Terry* stop.

The court disagreed. Police officers responded to a vague, anonymous emergency call suggesting officers were needed at the Boys and Girls Club. When the officers arrived, they saw a group of individuals across the street talking in raised voices and acting as if they were about to fight. An officer testified the area near the Boys and Girls Club, including the apartment complex across the street, had been the scene of fights, drugs arrests and other criminal activity. These facts, combined with Hightower's initial refusal to comply with the officer's repeated orders to stop, gave the officers reasonable suspicion to conduct a *Terry* stop.

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

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United States v. Morgan, 729 F.3d 1086 (8th Cir. 2013)

At approximately 12:34 a.m., two police officers were patrolling 24-hour businesses in response to recent robberies in the area. From their patrol car, the officers saw a vehicle with tinted windows parked at the far corner of a grocery store parking lot. The officers noticed the occupants were ducked-down inside the vehicle. When the officers got out of their car to investigate, the person in the driver's seat sat up and reached under his seat with both hands. The officers drew their firearms and ordered the occupants out of the vehicle. Morgan, the driver, initially kept his hands under the seat, but complied with a second request to raise his hands. The officers handcuffed the three occupants of the car and searched the vehicle for weapons. When he reached under the driver's seat, one of the officers removed a lockbox that was large enough

to conceal a handgun. The officer asked Morgan, "What is this?" Morgan replied, "There's meth in there, and I'm a dealer." The officer read Morgan his *Miranda* rights and Morgan again voluntarily admitted to being a drug dealer. The officer opened the lockbox and found methamphetamine and a white powdery substance Morgan admitted was cocaine. After the substances in the lockbox field-tested positive for methamphetamine and cocaine, the officer arrested Morgan.

The district court suppressed the physical evidence and the statements Morgan gave to the officer after being *Mirandized*. The district court concluded the officers exceeded the scope of a *Terry* stop and Morgan's unlawful arrest led directly to the seizure of the physical evidence and his incriminating statements.

The government appealed.

The court of appeals reversed the district court, holding the officers had reasonable suspicion to conduct a *Terry* stop on Morgan. First, the officers saw a vehicle with tinted windows, parked away from a store entrance, in an area where there had been recent robberies. Second, the occupants of the vehicle were attempting to conceal themselves.

Next, the court held the officers had the right to conduct a *Terry* frisk because as the officers approached the vehicle, Morgan made furtive gestures under the seat and refused to remove his hands from under the seat when first ordered to do so. These actions gave the officers reason to believe there was a weapon in the vehicle, which justified the officer's search under seat. The officer was justified in searching the lockbox found under the seat, as it was large enough to conceal a weapon.

Finally, the court held the officers did not exceed the scope of the *Terry* stop. The officers established reasonable suspicion Morgan was involved in criminal activity and had reason to believe he was dangerous. The officer searched the vehicle for weapons immediately after securing Morgan and he did not use unreasonable force or detain Morgan for an unreasonably long time before arresting him.

The government did not challenge the district court's suppression of the statements Moran gave before he was *Mirandized*, that there was methamphetamine in the lock box and he was a drug dealer. The issue became whether the physical evidence and the statements Morgan made after being *Mirandized* should have been suppressed as the fruits of the *Miranda* violation.

First, the court noted the Supreme Court has held a *Miranda* violation does not justify the suppression of physical evidence obtained as the result of a voluntary statement; therefore, the methamphetamine and cocaine found in the lockbox should not have been suppressed.

Second, the court stated warned statements elicited after an initial *Miranda* violation may be admissible as long as the officers do not purposefully elicit an unwarned confession from a suspect in an effort to circumvent the *Miranda* requirements. In this case, after the officer *Mirandized* Morgan, Morgan volunteered he was a drug dealer and the substance in the lockbox was cocaine. There was no evidence the *Mirandized* statements were coerced. Consequently, Morgan's post-*Miranda* statements should not have been suppressed.

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

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United States v. De La Cruz, 703 F.3d 1193 (10th Cir. 2013)

De La Cruz drove his brother to a car wash to drop him off for work. Immigration and Customs Enforcement (ICE) agents were at the car wash looking for a suspect they believed was in the country unlawfully. Believing Del La Cruz to be their suspect, the agents surrounded his car and ordered him to get out. De La Cruz complied with the agents' request but his brother ran. The agents apprehended the brother and arrested him after they discovered he was in the United States unlawfully. When the agents returned to De La Cruz, they realized he was not their suspect. However, the agents continued to detain De La Cruz and requested identification from him. After the agents discovered the identification was fake and De La Cruz was in the United States unlawfully, they arrested him.

The court held when the agents initially seized De La Cruz by ordering him out of his vehicle, they had reasonable suspicion to believe he was their suspect. However, any suspicion that De La Cruz was their suspect was dispelled when the agents realized De La Cruz did not match their photograph of the suspect. The agents' justification to detain De La Cruz after this time, "just to be safe" was not reasonable. Once the agents realized De La Cruz was not their suspect, they had no justification to detain him any longer.

In addition, once the agents realized De La Cruz was not their suspect, the agents could not justify detaining him because of his brother's flight from them. Flight can create suspicion that the person fleeing is involved in criminal activity, but the court noted De La Cruz did not flee, only his brother did. As a result, the court held the district court improperly denied De La Cruz's motion to suppress the evidence the agents obtained from him at the car wash.

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

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United States v. Madrid, 713 F.3d 1251 (10th Cir. 2013)

A 911 operator received an anonymous call two men were arguing and about to get into a fight in an apartment complex parking lot. The operator dispatched police officers, telling them the caller had reported a fight in progress. The caller remained on the line and told the operator one of the men had driven away in a white Pontiac as the police cars arrived. Officers saw the white Pontiac and conducted a traffic stop. When the officers approached the Pontiac, they recognized the driver, Madrid, and knew he was a convicted felon. While one officer obtained Madrid's license and registration, another officer looked through the passenger side window into the car. The officer saw a rifle case on the back seat. The officer removed the case from the car, opened it and discovered a rifle inside. Madrid was charged with being a felon in possession of a firearm.

Madrid moved to suppress the rifle, arguing the officers did not have reasonable suspicion to conduct the traffic stop because a fight never occurred in the parking lot.

Based on the information provided by the 911 operator, the court held there was sufficient evidence to establish the officer did not realize a fight had not actually occurred in the parking lot. In addition, it was proper to consider Madrid's attempted exit from the parking lot in the

Pontiac when determining if the officer had reasonable suspicion to stop him. As a result, the officer had an objectively reasonable belief a fight had just occurred and the participants were leaving the scene.

Finally, the court held the anonymous call to 911 was sufficient to establish reasonable suspicion to stop Madrid. First, the caller was reporting contemporaneous, firsthand knowledge of the possible fight in the parking lot. Second, the caller provided detailed information about the events he was observing, to include descriptions of the clothing and vehicles of the individuals involved in the incident. Third, the responding officers verified much of the information provided by the caller.

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

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United States v. Briggs, 720 F.3d 1281 (10th Cir. 2013)

While on patrol in a high crime area, two police officers saw two men walking toward them. Although the officers were in an unmarked car, the car was identifiable as a law enforcement vehicle as it had tinted windows, light bars on the front and back windows and police lights on its fog lights and mirrors. Upon seeing the police car, the men immediately turned onto a cross street. One of the men, later identified as Briggs, repeatedly looked over his shoulder at the officers and grabbed at the waistline of his pants. As the officers got closer, the men picked up their pace and then split up and began to walk in different directions. When the officers got out of their car, Briggs continued to walk away from the officer and grab at his waistline. After one of the officers asked the men to come over and speak with them, Briggs turned, faced the officers and began to back away while the other man took off running. One of the officers drew his firearm and told Briggs not to run. Briggs said he would not run and then told the officer, "I've got a gun on me." The officer recovered a handgun from Briggs' waistline, the same area Briggs had been grabbing. Briggs was indicted for being a felon in possession of a firearm.

Briggs claimed the officers violated his *Fourth Amendment* rights by detaining him without reasonable suspicion that he was engaged in criminal activity; therefore, the handgun should have been suppressed.

The court disagreed. Briggs was seized for *Fourth Amendment* purposes when the officer drew his firearm, pointed it at Briggs and told Briggs not to run. By the time this occurred, the officers had reasonable suspicion to detain Briggs because Briggs and the other man were walking in a high crime area; the men changed direction and picked up their pace upon seeing the police vehicle; Briggs repeatedly grabbed at his waistline; the two men took divergent paths after turning away from the officers, when the officers asked to speak with the men, Briggs turned and backed away, and the other man fled after the officers got out of their car. The court stated none of these factors alone would have justified detaining Briggs; however, when taken together they provided a particularized, objective basis for concluding criminal activity was afoot and that further investigation was warranted.

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

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United States v. Rodriguez, 739 F.3d 481 (10th Cir. 2013)

Police in Albuquerque, New Mexico, received a report that two employees in a convenience store were showing each other handguns. When a police officer went into the store, he saw a silver handgun tucked in the back waistband of Rodriguez's pants as Rodriguez was bending over stocking shelves. When Rodriguez stood up, the gun was concealed by Rodriguez's shirt. The officer ordered Rodriguez to show his hands and to step outside the store. As Rodriguez walked by, the officer pulled the gun out of Rodriguez's waistband. Rodriguez told the officer he carried the gun for protection but that did not have a concealed weapons permit. Another officer examined the gun and discovered it was loaded. The officer also learned the gun had been reported stolen and that Rodriguez was a convicted felon. The officers arrested Rodriguez. The government charged Rodriguez with being a felon in possession of a firearm and ammunition.

Rodriguez claimed that possession of a concealed firearm in the State of New Mexico, by itself, cannot be the basis for a *Terry* stop or a *Terry* frisk. As a result, Rodriguez argued the officer unreasonably seized him and removed the handgun from his waistband.

The court disagreed. The seizure was justified because the officer had reasonable suspicion to believe Rodriguez was unlawfully carrying a handgun. First, the officer saw the gun in the waistband of Rodriguez's pants. Second, *Section 30-7-2* of the New Mexico Criminal Code makes it illegal to carry a concealed loaded firearm anywhere except on a person's property, in a private automobile, or unless a person has a valid concealed handgun license. In addition, the officer did not have to be certain the handgun was loaded to justify seizing Rodriguez. The officer only had to reasonably suspect the gun was loaded. Here, the court noted, believing "the defendant's handgun was probably loaded is simply a 'common sense conclusion about human behavior' that Officer Munoz could reasonably draw from the fact defendant sought to conceal the gun on his person."

The court further held the officer was justified in removing the gun from Rodriguez's waistband. The court stated, whether loaded or not, a handgun is a dangerous weapon. Consequently the officer was allowed to remove it so he could conduct his investigation without fear of violence.

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

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United States v. Valerio, 718 F.3d 1321 (11th Cir. 2013)

A federal agent was conducting surveillance on a store that sold hydroponic gardening equipment. The agent believed individuals who purchased this type equipment were often involved in growing marijuana. The agent saw Valerio drive up to the back of the store in a pick-up truck with no license plate and back into a parking space, in what the agent thought was an attempt to conceal the truck's missing license plate. Valerio entered the store and returned several minutes later carrying a plastic shopping bag. Valerio drove out of the parking lot followed by the agent who noticed Valerio kept looking in his rearview mirror, which the agented interpreted as nervousness. A few minutes later, Valerio pulled over to the side of the road and walked toward the rear of his truck, holding what appeared to be a license plate.

Two weeks later, the same agent was again conducting surveillance on the hydroponic gardening store. The agent saw Valerio drive up to the store in a pick-up truck with no license plate, and back into a parking spot. Valerio entered the store and came out several minutes later. Another federal agent saw Valerio's truck a short time later with a license plate affixed to it. The agents followed Valerio to a multi-unit warehouse the agents thought was suitable for a marijuana grow operation. The agents saw Valerio park his truck and walk toward the warehouse building but the agents did not see which specific unit Valerio entered.

The next day the agents conducted surveillance on the warehouse and saw light emanating from under one of the unit's doors. A week later, the agents brought a drug-dog to the warehouse and the dog alerted to the presence of drugs in one of the units. The agents obtained a warrant and searched the unit. Instead of corroborating their suspicions regarding Valerio, the agents discovered the unit was rented to an individual unrelated to Valerio. The agents learned the unit was used as a recording studio and the bands who recorded there often smoked marijuana.

After failing to find any evidence that Valerio was involved in a marijuana grow operation from the search of the warehouse, the agents went to Valerio's house to conduct a knock and talk interview. However, instead of knocking on Valerio's door to speak with him as instructed, the agents waited across the street until Valerio came out of his house and entered his pick-up truck, which was parked in the driveway. The agents blocked Valerio's exit from his driveway with their vehicle and approached Valerio with their guns pointed at him. The agents ordered Valerio out of his truck, conducted a *Terry* frisk, and escorted Valerio to the front of his truck. Valerio eventually admitted to growing marijuana in two of the units at the warehouse.

Valerio argued the agents' *Terry* stop at his house, one week after the agents had last observed him engage in any suspicious activity, violated the *Fourth Amendment*.

The court agreed. In *Terry v. Ohio*, the Supreme Court held for the first time that not all seizures must be supported by probable cause to comply with the *Fourth Amendment*. However, the Court held *Terry* stops are limited to situations where police officers are required to take "swift action" based upon on-the-spot observations. Consequently, police officers may not use *Terry* as an end-run around the warrant requirement in the context of a standard ongoing police investigation.

Here, the court held the timing and circumstances surrounding the agents' seizure of Valerio placed it well outside the scope of a valid *Terry* stop. The agents did not stop Valerio in response to suspicion that required "swift" law enforcement action. Instead, the agents went to Valerio's house nearly a week after they last observed him engage in suspicious behavior. The court stated:

> "The opportunity to *Terry* stop a suspect, a law enforcement power justified by and limited to the exigent circumstances of the moment, cannot be put in the bank and saved for use on a rainy day, long after the exigency has expired."

The court noted the agents were free to continue their surveillance of the warehouse or Valerio's house, attempt to verify through business or utility records that Valerio was a tenant at the warehouse or even initiate a voluntary contact with Valerio.

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

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Terry Frisks-Person/Vehicle

United States v. Mouscardy, 722 F.3d 68 (1st Cir. 2013)

A person called 911 and reported a man was assaulting a woman on a street corner. When police officers arrived, they found a man and woman fitting the description provided by the 911 caller. The officers detained the man, who refused to provide identification or tell the officers his name. After a few minutes, the man became visibly agitated, nervous and fidgety and refused an officer's request to remove his hand from his jacket pocket. When the officer attempted to conduct a *Terry* frisk, the man fled. The officers apprehended the man, later identified as Mouscardy, and recovered a small handgun Mouscardy removed from his jacket pocket during the chase. Mouscardy was charged with being a felon in possession of a firearm.

The court held the officers had reasonable suspicion to believe Mouscardy had a weapon. The officers responded to a report of a man beating a woman in the street. When an officer has reasonable suspicion a crime of violence has occurred, the same facts that supported the initial stop will also support a *Terry* frisk. In addition, Mouscardy's failure to identify himself, his refusal to remove his hand from his jacket pocket and his nervous and agitated behavior were relevant factors to support the reasonable belief Mouscardy might be armed and dangerous.

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

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United States v. George, 732 F.3d 296 (4th Cir. 2013)

At 3:30 a.m., a police officer conducted a traffic stop in a high-crime area after he saw a car aggressively following another vehicle, as if chasing it, and then running a red light. As the officer approached the car, he saw four men inside, including George, who was sitting in the back seat behind the driver. George was holding up his identification card with his left hand, while turning his head away from the officer. George's right hand was on the seat next to his leg and was concealed from view by his thigh. The officer told George to place both of his hand on the headrest of the driver's seat in front of him, but George only placed his left hand on the headrest. The officer told George to place both hands on the headrest four or five times before George complied, and George still would not make eye contact with the officer. The officer ordered George out of the car and conducted a *Terry* frisk. The officer felt an object in George's right front pocket that he recognized as a handgun. The officer handcuffed George and another officer removed the handgun from George's pocket. George was charged with possession of a firearm by a convicted felon.

George argued the officer did not have reasonable suspicion to conduct the *Terry* frisk.

The court disagreed. The court found the officer's frisk of George was supported by objective and particularized facts to support reasonable suspicion George was armed and dangerous. The court noted the stop occurred late at night, in a high crime area and was based on the officer seeing a car aggressively chasing the vehicle in front of it. Once the officer encountered George, George acted nervously, did not make eye contact and repeatedly refused to place his right hand

on the driver's headrest in front of him. In addition, there were four individuals in the car and the driver had given conflicting stories as to why he had been driving aggressively.

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

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United States v. Patton, 705 F.3d 734 (7th Cir. 2013)

Around 1:30 a.m., officers were dispatched to investigate a group of seven or eight men who were drinking beer on a public sidewalk in violation of a city ordinance. When the officers arrived, they directed the men to step over to a car parked nearby on the street. Instead of stepping over to the car, Patton backed away from the other men and nervously looked from side to side. When Patton realized there were officers behind him, he walked over to the car as originally ordered. An officer frisked Patton and felt the handle of a gun in the front waistband of his pants. The officer handcuffed Patton, removed the gun, and arrested him for being a felon in possession of a firearm.

While conceding the officer had reasonable suspicion to support a *Terry* stop, Patton argued the officer did not have reasonable suspicion to support a *Terry* frisk.

The court disagreed and held the officer had reasonable suspicion to believe Patton might be armed with a weapon. The officer encountered Patton at 1:30 a.m. in an area known for gang activity, one block away from the location of a drive-by shooting which occurred two days earlier. The officer's suspicions were aroused when Patton took several steps in the opposite direction after being ordered to step over to the parked car. Finally, Patton appeared to be more nervous than would be expected for a person who might be receiving a ticket for an open-container violation.

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

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Traffic Stops / Detaining Vehicles / Occupants

United States v. Andres, 703 F.3d 828 (5th Cir. 2013)

In December 2009, federal agents conducting an investigation into a large drug trafficking operation installed a GPS device underneath a pick-up truck, with a trailer attached to it, while it was parked on a public street after it had been loaded with twenty kilograms of cocaine. Agents monitored the truck's movements as it drove toward Chicago. The agents contacted the Illinois State Police, gave them information about the truck, and told them they would like to have the drugs discovered during a traffic stop so they would not have to disclose the existence of a federal investigation.

After being provided GPS information on the truck, a police officer saw it on an interstate highway and began to follow it. The officer conducted a traffic stop on the truck for improper lane usage and improper lighting after he saw the trailer was swaying back and forth within its lane and its taillights were flickering. After the officer wrote a warning ticket, he asked Andres to get out of the truck so he could talk to him about the taillight problem. After inspecting the

electrical connection between the truck and trailer, the officer handed Andres his clipboard so he could sign the ticket. While Andres was signing the ticket, the officer asked him where he was coming from. Andres told the officer he was coming from Joliet, but the officer knew this could not be possible based on the surveillance the officers had been conducting. The officer also noticed that Andres had begun to fidget and move his feet and arms around very nervously. When the officer asked Andres if he had any drugs in the truck, he said, "No" and then consented to a search with a drug dog. The drug dog alerted and the officers found twenty kilograms of cocaine hidden in the truck.

Andres argued the drug evidence should have been suppressed because the initial traffic stop was a pretext and not based on any actual traffic offense. Even if the traffic stop was valid, Andres claimed the officer's continued questioning and dog search were not reasonably related to the original reasons for the stop.

First, the court held the officer was justified in stopping Andres based on the traffic violations he saw. Second, the court held the officer's continued seizure of Andres after the reason for the initial traffic stop ended was supported by reasonable suspicion. It was reasonable for the officer, who had stopped Andres for a safety violation concerning his trailer, to ask him to get out of his truck to look at the trailer and discuss the problem. In addition, the officer's question, asking Andres where he was coming from, occurred before the officer had finished dealing with the traffic offenses and did not extend the scope or duration of the stop. Andres' untruthful answer created reasonable suspicion that justified his continued detention, which ultimately led to the officer receiving consent to search the truck.

Andres also argued the warrantless placement and use of the GPS device to monitor the movements of his truck violated the *Fourth Amendment* in light of the United States Supreme Court decision in *U.S. v. Jones*, decided in 2012.
The court declined to rule on whether warrantless GPS searches are *per se* unreasonable. Even assuming a *Fourth Amendment* violation had occurred, the court held the evidence should not be suppressed in this case because in December 2009, it was objectively reasonable for agents in the Fifth Circuit to believe that warrantless GPS tracking was allowed under circuit precedent.

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

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United States v. Garza, 727 F.3d 436 (5th Cir. 2013)

While on roving patrol, a Border Patrol agent received a radio broadcast to be on the lookout (BOLO) for a suspicious looking older model pickup truck carrying plywood in the bed, parked at a gas station at the corner of FM 650 and Highway 83 near Fronton, Texas. When the agent arrived at the gas station, he saw a pickup truck matching the BOLO description and got out of his vehicle to talk to the driver, later identified as Garza. As the agent approached, Garza acted nervously, moving fast to replace the gas cap, tensing up and shaking while doing so and then quickly entered the pickup truck. Garza attempted to drive away, but stopped when the agent activated the lights of his patrol car. Garza gave the agent consent to search the pickup truck and the agent found several people concealed underneath the plywood in the back of the truck who admitted they were in the United States unlawfully. The agent arrested Garza.

Based on the totality of the circumstances, the court held the agent had reasonable suspicion to stop of Garza's truck.

First, FM 650 is a well-known smuggling road for narcotics and aliens because it is the only route in an out of Fronton, as this court has noted in the past. Second, the agent had patrolled the border area regularly for over two and a half years and had investigated tips and made arrests in that same area for narcotics violations and alien smuggling. Third, the agent encountered Garza's truck five miles from the border between the United States and Mexico, which supported the reasonable belief the vehicle had recently crossed the border. Fourth, upon arriving at the gas station, the agent knew Garza's vehicle did not belong to a Fronton resident and Garza's nervous, erratic behavior and unprovoked flight supported a finding of reasonable suspicion. Finally, based on his experience, the agent knew smugglers often used plywood to conceal contraband in their trucks.

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

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United States v. Hockenberry, 730 F.3d 645 (6th Cir. 2013)

Police received a telephone call stating a man driving a black Jeep Cherokee was attempting to sell firearms at a local auto parts store. The caller, who identified himself as an employee of the store, gave police a description of the Jeep and provided its license plate number.

A few hours later, police officers saw the Jeep and initiated a traffic stop after the driver turned without signaling. The officers encountered Hockenberry, Gray and Hunt. The officers arrested Hunt after they discovered she had active arrest warrants. The officers decided to tow the Jeep after they discovered neither Hockenberry nor Gray had valid driver's licenses. The officers did not give Hockenberry an opportunity to call someone to retrieve the Jeep.

Before having the Jeep towed, the officers conducted an inventory search and found several firearms; however, the officers did not inventory some items they believed had no value. Hockenberry and Gray were indicted for possession of a firearm by a convicted felon.

Hockenberry and Gray argued the officers did not have probable cause to stop the Jeep, the officers failed to follow the department's standardized inventory search policy and the inventory search was a pretext for a search for criminal evidence.

The court disagreed. First the officers had probable cause to conduct the traffic stop after they saw the driver of the Jeep commit a traffic violation by failing to signal. Regardless of the officers' subjective motivation, the officers witnessed a traffic violation that supported stopping the Jeep.

Second, the officer's decision to impound the Jeep was reasonable as the vehicle was on a public street and neither Hockenberry nor Gray had a valid driver's license. In addition, the officers were not required to allow the men an alternative method of securing the Jeep. Given the circumstances, it was reasonable for the officers to conduct an inventory search. Even though the officers deviated from the department's inventory search policy by failing to inventory all items of "value" found in the Jeep, the officers immediately saw the firearms when they opened

the Jeep's tailgate. The court noted the law allows for some flexibility in determining what items in a vehicle are considered "valuable" for the purposes of an inventory search.

Finally, the court held there was no evidence to establish the officers conducted the inventory search as a pretext for a search for criminal evidence.

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

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United States v. Bueno, 703 F.3d 1053 (7th Cir. 2013)

A police officer stopped a van for speeding. Bueno was driving and Flores, the owner of the van, was a passenger. Both men told the officer they lived in Dallas and provided valid Texas driver's licenses. When the officer commented on the number of boxes in the back of the van, Flores told the officer he owned a transportation company and he and Bueno were transporting packages to Mexico. Flores then gave the officer a business card with a Chicago address.

The officer had Bueno join him in his patrol car where he wrote him a warning ticket for speeding. While he was writing the ticket, the officer asked Bueno about the transportation company, but Bueno was unable to give him any specific information about the business or contents of the packages in the van. After he issued the ticket, the officer made Bueno wait in the patrol car while he went back and spoke to Flores further about the packages in the van. After receiving consent to search, the officer walked his drug-detection dog around the van and it alerted to the presence of narcotics. A search of the van revealed brick-shaped objects wrapped in plastic that Bueno admitted were the proceeds from the sale of narcotics that he and Flores were transporting to Mexico.

The court held the officer's initial traffic stop, which lasted through the issuance of the warning ticket to Bueno, was supported by the officer's observation of Bueno's van exceeding the speed limit.

Next, the court held Bueno's continued detention, after the issuance of the warning ticket, was supported by reasonable suspicion the officer developed during the traffic stop. Before he finished writing the warning ticket, the officer saw the van was loaded with boxes that Flores told him were being transported to Mexico. Although Flores told the officer the packages were being delivered through his business, the van was registered to Flores, not the transportation company, and it bore no company markings, as would be expected on a company's van. In addition, while Flores said he owned the company and he and Bueno lived in Dallas, the business card he gave the officer contained a Chicago business address. Finally, when the officer questioned Bueno about the transportation company, as he wrote the warning ticket, Bueno was unable to give the officer specific answers about the company or the packages in the van. By the time the officer issued Bueno the warning ticket for speeding, he had developed reasonable suspicion to prolong the stop to ask Flores about his business and the packages he was transporting. It was during this time that Flores gave the officer consent to search the van.

Finally, once the drug-detection dog alerted to the presence of narcotics, the officers were entitled to search the van and detain Bueno further.

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

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United States v. Uribe, 709 F.3d 646 (7th Cir. 2013)

A police officer stopped a blue Nissan with Utah license plates after the license plate number came back as being registered to a white Nissan. After a positive alert by a drug-detection dog, Uribe gave consent to search the car, and the officers found approximately one pound of heroin.

Uribe argued the officer did not have reasonable suspicion to conduct the traffic stop based solely on the discrepancy between the actual color of his car and the color listed on his registration documents.

While several states have decided the issue, with different outcomes, in a case of first impression in federal courts, the court held the observed color of a car and the color listed on its registration, by itself, is not sufficient to establish reasonable suspicion of criminal activity.

The government argued the officer's stop was justified by reasonable suspicion that Uribe was driving a stolen vehicle. However, the government provided no evidence on the correlation between stolen vehicles and repainted ones. Without this information, the court could not determine whether a color discrepancy, by itself, was highly suggestive of a stolen vehicle or not.

In addition, the court held the government did not establish Indiana's vehicle registration requirements, which prohibit a motor vehicle from displaying a license plate belonging to another vehicle, applied to Uribe's car, which was registered in Utah.
Click **HERE** for the court's opinion.

*****

United States v. Beard, 708 F.3d 1062 (8th Cir. 2013)

A State Trooper discovered more than one hundred eighty pounds of raw marijuana in Beard's car after pulling him over for a traffic violation.

Beard argued the search violated the *Fourth Amendment* because the trooper did not have a lawful reason for the traffic stop.

The court disagreed. First, the trooper's description of Beard's erratic driving gave him reasonable suspicion Beard had violated Arkansas traffic laws. As a result, the trooper lawfully stopped Beard's car. Second, the trooper's search of the car and seizure of the marijuana was lawful under the automobile exception because the trooper immediately smelled raw marijuana after Beard rolled down his car window.

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

*****

United States v. Quintero-Felix, 714 F.3d 563 (8th Cir. 2013)

A police officer stopped Felix's vehicle for a license plate violation. During the stop, Felix appeared nervous, his hands were shaking, his legs were bouncing and he was picking imaginary balls of lint from his shirt. In addition, Felix and his passenger gave the officer conflicting

stories concerning their travel plans. After the officer issued Felix a warning ticket, and returned his documentation, the officer asked Felix if he could ask him a few more questions. Felix agreed and answered some of the officer's questions. The passenger consented to a drug dog sniff of the vehicle. After the drug dog alerted to the presence of drugs, the officer searched the vehicle and found a hidden compartment containing $16,000 in cash and a handgun. Police later identified $6,000 of the seized cash as pre-marked currency from a controlled drug buy.

Felix argued his statements and evidence from the traffic stop should have been suppressed because the officer unreasonably extended the traffic stop once he issued the warning ticket and returned Felix's documentation.

The court did not agree. By the time the officer issued Felix the warning ticket and returned his documentation, the officer had developed reasonable suspicion to extend the traffic stop. Felix exhibited nervous behavior throughout the stop and he and the passenger gave the officer conflicting accounts of their travel history. Consequently, extending the traffic stop approximately seven minutes until the drug dog arrived was not unreasonable.

The court added, even if the officer lacked reasonable suspicion, Felix consented to the extension of the stop. Felix remained in the officer's car and answered additional questions after the officer issued a warning ticket, returned Felix's documentation and told him he was free to leave.

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

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United States v. Valdes-Vega, 738 F.3d 1074 (9th Cir. 2013)

Border Patrol Agents stopped Vega 70 miles north of the U.S.–Mexico border. 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 an agent after the agent pulled his police car alongside the passenger side of Vega's truck. Vega consented to a search of his truck and the agents found approximately eight kilograms of cocaine.

The agents testified the justification for the stop was their belief that Vega's behavior was consistent with the behavior of alien and drug smugglers who encounter law enforcement officers in that area.

The district court denied Vega's motion to suppress the cocaine, finding the Border Patrol Agents had reasonable suspicion to stop Vega's truck.

The three-judge panel of the Ninth Circuit Court of Appeals disagreed, holding the totality of the circumstances did not provide the agents with reasonable suspicion to believe Vega was smuggling drugs or aliens. According to the court, 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 these facts described too broad a category of people to justify reasonable suspicion to believe that Vega was smuggling either drugs or aliens.

The Ninth Circuit Court of Appeals then agreed to re-hear the appeal in an en banc panel of eleven judges. The en banc court affirmed the district court's denial of Vega's motion to suppress the cocaine seized from his truck.

The en banc court held that in light of the totality of the circumstances, the two experienced Border Patrol Agents, who observed a truck with foreign license plates driving in a suspicious manner in an area frequented by smugglers, had a reasonable suspicion to believe the driver was smuggling contraband; therefore, justifying the stop.

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

*****

United States v. Nicholson, 721 F.3d 1236 (10th Cir. 2013)

Nicholson was stopped at a red light at a busy intersection in the left-turn lane. Nicholson planned to make a left turn onto Main Street, which had multiple lanes in each direction. When the traffic light changed, Nicholson made a left turn onto Main Street's outermost right lane. Although the intersection had no markings or instructions to indicate a driver must maintain and complete a turn by remaining in the left lane, a police officer stopped Nicholson. The officer believed Nicholson violated a city ordinance by failing to enter the left lane on Main Street when completing his left turn. As the officer approached Nicholson's car, he smelled marijuana. The officer asked Nicholson to get out of the car, and when Nicholson opened his door to get out, the officer saw two glass pipes commonly used for smoking methamphetamine in the driver's door pocket. After Nicholson refused consent to search his car, the officer allowed Nicholson to leave, but seized his car. The officer obtained a warrant, searched Nicholson's car and discovered methamphetamine, marijuana seeds, a scale and a handgun. Nicholson was charged with several drug and firearm related offenses.

Nicholson argued the city ordinance he was cited as violating did not prohibit the left turn he made; therefore, the traffic stop violated his *Fourth Amendment* rights.

The court agreed. The officer stopped Nicholson on the assumption the city ordinance required a driver making a left turn to complete the turn in the leftmost lane. Despite the many statutory provisions that regulate turns, the court held none specifically prohibited the type of left turn made by Nicholson. As a result, the traffic ordinance relied upon by the officer did not provide a legal basis to stop Nicholson. The court noted mistakes of law made by a police officer are objectively unreasonable. The court further stated, "Requiring law enforcement personnel to know the law they are asked to enforce comports with a basic policy of fairness. If a defendant is presumed to know the law, we must expect as much from law enforcement."

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

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United States v. Cash, 733 F.3d 1264 (10th Cir. 2013)

A police officer pulled Cash over for a traffic violation. During the stop, the officer saw an artificial bladder device in plain view in Cash's car and discovered Cash was on his way to take a drug test for his federal probation officer. Suspecting that Cash planned to use the bladder

device to defeat a urine test, a violation of Oklahoma State Law, the officer detained Cash until his federal probation officer arrived at the scene approximately nineteen minutes later.

When Cash's probation officer arrived, he saw a firearm in plain view in the back seat of Cash's car, a violation of Cash's supervised release. Cash fought with the officers as they tried to arrest him; however, Cash was eventually subdued, handcuffed and placed in the back of a police car. Cash was not given *Miranda* warnings. The officers conducted an inventory search of Cash's car and found a variety of illegal drugs. Cash then called his probation over to the police car, initiated a conversation with him and made several incriminating statements.

Cash was charged with drug and firearms offenses.

Cash moved to suppress the physical evidence found in his car as well as the incriminating statements he made to his probation officer.

The court held when officer saw the bladder device and then Cash admitted he was on his way to take a drug test, the officer had reasonable suspicion to detain Cash beyond the time needed to write the citation for the initial traffic violation. Consequently, Cash's prolonged detention was reasonable and the evidence seized from Cash's car was admissible.

The court further held the conversation between Cash and his probation officer did not constitute interrogation for *Miranda* purposes. First, Cash initiated the conversation when he called the probation officer over to the police car. In response to Cash's request to see him, the probation officer asked Cash, "What was going on?" Although phrased as a question, this was not interrogation as the probation officer was not trying to elicit an incriminating response from Cash, but rather trying to understand why Cash wanted to speak to him. Second, the probation officer's follow-up question, "What's the deal?" in response to Cash's statement that people were "trying to kill him" did not constitute interrogation. The court found this question was an attempt to clarify Cash's statement and not designed to elicit an incriminating response from Cash. Because neither of Cash's statements occurred during interrogation, there was no *Miranda* violation and the statements were admissible against Cash.

Finally, the court concluded that Cash's statements were made voluntarily to his probation officer. Even though Cash was injured while resisting arrest, there was no evidence the probation officer coerced him into making any of his statements.

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

*****

United States v. Watson, 717 F.3d 196 (D.C. Cir. 2013)

A police officer arrested Watson after conducting a traffic stop on Watson's van. Inside the van, police officers found cocaine. The next day, officers executed a search warrant on Watson's home and found firearms and drug paraphernalia. Watson was convicted of several drug offenses.

Watson argued the traffic stop violated the *Fourth Amendment*; therefore, the cocaine seized from the van should have been suppressed. In addition, Watson argued the subsequent search and seizure of evidence from his house was tainted by the unlawful traffic stop.

The court disagreed. The officer testified he stopped Watson's van because it was travelling too close to the vehicle ahead of it and the van had a tinted tag cover that obscured its license plate number. Regardless of any subjective motivation the officer may have had, it was objectively reasonable for him to believe Watson had violated two Maryland traffic laws; therefore, the officer's stop of Watson's van was lawful.

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

*****

Traffic-Safety Checkpoints

United States v. Bernacet, 724 F.3d 269 (2d Cir. 2013)

Bernacet drove up to a traffic-safety checkpoint at 11:45 p.m. and gave his driver's license to a police officer. A different officer ran Bernacet's license through his agency's computer system, which included information from multiple state and federal databases, and discovered Bernacet was on parole. Based on his twenty years of experience, the officer knew parolees typically had a 9:00 p.m. curfew; therefore, the officer believed Bernacet was in violation of his parole. After the officer arrested Bernacet for violating his parole, he found a handgun in Bernacet's pocket during the search incident to arrest. Bernacet was charged with being a felon in possession of a firearm.

Bernacet argued the search of law enforcement databases at a traffic-safety checkpoint was unreasonable, as it was not closely related to the purpose of the checkpoint.

The court disagreed. The database search took approximately one-minute per motorist and some portion of that time was used to search Department of Motor Vehicle records. Consequently the court held duration of the stop was not significantly increased by searching multiple databases; therefore, using Bernacet's driver's license to search law enforcement databases at the checkpoint was reasonable.

Bernacet also argued the officer lacked probable cause to believe he was violating his parole because the officer had no evidence Bernacet had a curfew as a condition of his parole.

Again, the court disagreed. The officer knew Bernacet was on parole and based on his experience, the officer knew parolees typically had a 9:00 p.m. curfew imposed as a condition of their parole. As a result, when the officer encountered Bernacet at 11:45 p.m. it was reasonable for the officer to believe Bernacet was violating his parole.

Finally, Bernacet argued because New York law prohibits warrantless arrests for parole violations that are not by themselves crimes, such as curfew violations, the handgun found after his arrest should have been suppressed.

The court agreed Bernacet's arrest violated New York law, but stated not every arrest that is illegal under state law violates the United States Constitution. Here, the court noted, the Supreme Court has held "an arrest on probable cause but prohibited by state law" is constitutional. Consequently, because Bernacet's arrest was constitutional, the handgun found during the search incident to arrest was admissible.

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

*****

Canine Sniffs

Florida v. Harris, 133 S. Ct. 1050 (2013)

During a traffic stop, a police officer noticed Harris had an open beer can and appeared to be very nervous. After Harris refused to a consent search, the officer walked his drug-detection dog, Aldo, around Harris' truck. Aldo alerted at the driver's side door handle, leading the officer to believe he had probable cause to search Harris' truck. The officer did not find any drugs in Harris' truck but he did find two hundred loose pseudoephedrine pills and other ingredients commonly used in the manufacture of methamphetamine. Harris was arrested and charged with illegal possession of those ingredients.

The trial court held the officer had probable cause to search Harris' truck. The Florida Supreme Court reversed, holding the officer did not have probable cause to search Harris' truck, stating in part, "the fact that the dog has been trained and certified, by itself, is not enough to establish probable cause to search the interior of the vehicle." The court stressed the need for "evidence of the dog's performance history," including records showing "how often the dog has alerted in the field without contraband having been found."

The United States Supreme Court agreed with the trial court and reversed the Florida Supreme Court in holding the officer had probable cause to search Harris' truck.

In determining whether probable cause to search exists, the court has consistently looked to the totality of the circumstances and rejected rigid bright-line tests. The Florida Supreme Court ignored this established approach by creating a strict evidentiary checklist to assess a drug-detection dog's reliability. The question, similar to every inquiry into probable cause, is whether all the facts surrounding a dog's alert would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.

In this case, the state introduced substantial evidence describing Aldo's initial and refresher training and his continued proficiency in finding drugs. Because training records established Aldo's reliability in detecting drugs and Harris failed to undermine that showing, the officer had probable cause to search Harris' truck.

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

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Florida v. Jardines, 133 S. Ct. 1409 (2013)

The police received an anonymous tip from a person who claimed Jardines was growing marijuana in his house. After conducting surveillance on the house for fifteen minutes, two police officers approached Jardines' house with a drug-detection dog. The dog alerted to the presence of drugs while on the front porch and after sniffing at the base of the front door. Based upon this information, officers obtained a warrant to search Jardines' house where they seized live marijuana plants and equipment used to grow those plants.

At trial, Jardines moved to suppress the marijuana plants and related equipment, arguing the dog-sniff constituted an unreasonable search. The Florida Supreme Court held the sniff-test conducted by the drug-dog was a substantial government intrusion into Jardines' house and constituted a *Fourth Amendment* search, requiring suppression of the evidence the officers had seized.

The United States Supreme Court agreed and held the government's use of trained police dogs to investigate the home and its immediate surroundings is a "search" within the meaning of the *Fourth Amendment*.

First, as the Supreme Court recently articulated in *U.S. v. Jones*, when the government obtains information by physically intruding on persons, houses, papers or effects, a *Fourth Amendment* search has occurred. Here, the police officers were gathering information on Jardines' front porch, clearly part of the curtilage of the house, which is afforded the same *Fourth Amendment* protections as the rest of the house.

Second, the police officers gathered information, in the form of the drug dog's alert, by physically entering and occupying the curtilage of the house without Jardines' explicit or implicit permission to be there. The courts have held homeowners implicitly permit visitors to approach their houses by walking up to the front door, knocking promptly, and waiting briefly for a response. As a result, a police officer may approach a home and knock just as any private citizen might do. However, introducing a trained police dog to explore the area around the home, hoping to discover incriminating evidence is different. It is not reasonable to believe a homeowner's implicit invitation for visitors to approach his front door extends to police officers wishing to approach the front door to conduct a search with a drug-dog.

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

*****

Arrest

Probable Cause

United States v. Ryan, 731 F.3d 66 (1st Cir. 2013)

Ryan was driving in the Charlestown Navy Yard, which is part of the Boston National Historic Park when a United States Park Ranger saw Ryan's car driving over the centerline of the road. The ranger followed Ryan, however, by the time the ranger pulled Ryan over, he and Ryan were no longer on federal land. The ranger arrested Ryan who was charged with three alcohol-related offenses. Ryan moved to suppress the evidence arising from his arrest, arguing the ranger had no statutory authority to arrest him outside the Park.

Even though the ranger lacked statutory authority to arrest Ryan, the court held the ranger established probable cause to arrest Ryan. Because Ryan's arrest was supported by probable cause, there was no *Fourth Amendment* violation; therefore, the court was not required to suppress the evidence obtained after Ryan's arrest.
Click **HERE** for the court's opinion.

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United States v. Bernacet, 724 F.3d 269 (2d Cir. 2013)

Bernacet drove up to a traffic-safety checkpoint at 11:45 p.m. and gave his driver's license to a police officer. A different officer ran Bernacet's license through his agency's computer system, which included information from multiple state and federal databases, and discovered Bernacet was on parole. Based on his twenty years of experience, the officer knew parolees typically had a 9:00 p.m. curfew; therefore, the officer believed Bernacet was in violation of his parole. After the officer arrested Bernacet for violating his parole, he found a handgun in Bernacet's pocket during the search incident to arrest. Bernacet was charged with being a felon in possession of a firearm.

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The court disagreed. The database search took approximately one-minute per motorist and some portion of that time was used to search Department of Motor Vehicle records. Consequently the court held duration of the stop was not significantly increased by searching multiple databases; therefore, using Bernacet's driver's license to search law enforcement databases at the checkpoint was reasonable.

Bernacet also argued the officer lacked probable cause to believe he was violating his parole because the officer had no evidence Bernacet had a curfew as a condition of his parole.

Again, the court disagreed. The officer knew Bernacet was on parole and based on his experience, the officer knew parolees typically had a 9:00 p.m. curfew imposed as a condition of their parole. As a result, when the officer encountered Bernacet at 11:45 p.m. it was reasonable for the officer to believe Bernacet was violating his parole.

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

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United States v. Johnson, 734 F.3d 270 (4th Cir. 2013)

Police officers pulled over Johnson's vehicle after they saw it weaving in and out of traffic and displaying a bent and illegible temporary registration tag in violation of Maryland law. The stop occurred in a neighborhood known for its high incidence of crime. The officers testified they often stopped motorists in this area for minor offenses in the hope that these encounters would lead them to information about more serious crimes. During the stop, Johnson spit out two small bags of marijuana he was hiding in his mouth. The officers arrested, handcuffed and placed

Johnson in the back of a patrol car. The officers did not advise Johnson of his *Miranda* rights at that time and did not cite him for the registration tag violation.

During the drive to the police station, Johnson said to the officers, "I can help you out, I don't want to go back to jail, I've got some information for you." One of the officers replied, "What do you mean?" Johnson told the officer, "I can get you a gun." The officer then gave Johnson a verbal *Miranda* warning and the other officer told Johnson not to say any more until they reached the police station.

At the police station, the officer read Johnson a second *Miranda* warning. Johnson signed a written waiver of his rights and told the officers the gun was in his home. Johnson signed a Consent-to-Search Form and the officers recovered the gun from Johnson's bedroom closet. The government charged Johnson with being a felon in possession of a firearm.

Johnson argued the officers did not have probable cause to stop his vehicle and that the officer's question, "what do you mean?" constituted an unwarned custodial interrogation in violation of *Miranda*.

The court recognized Maryland law requires a vehicle's registration tags be clearly legible. Consequently, regardless of the officers' true motives, and whether they pursued the traffic violation, it was reasonable for the officers to stop Johnson's vehicle when they saw it displayed an illegible registration tag.

The court further held the officer's question to Johnson, "what do you mean?" after Johnson voluntarily said, "I can help you out, I don't want to go back to jail, I've got information for you" did not constitute a custodial interrogation.

Miranda rules apply to police conduct that constitutes an interrogation or the functional equivalent of an interrogation. The functional equivalent of an interrogation is any police conduct the police know is likely to elicit an incriminating response from a suspect. In this case, the court found the officer's question, "what do you mean?" would not have seemed reasonably likely to elicit an incriminating response from Johnson. The officer's question would have reasonably been expected to elicit information incriminating someone else. The court was at a loss to explain why Johnson would have tried to get himself out of a misdemeanor drug charge by implicating himself in a felony gun charge.

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

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United States v. Smith, 715 F.3d 1110 (8th Cir. 2013)

Federal agents in St. Louis suspected Smith was involved in a scheme to obtain cash by false pretenses from U.S. Bank. The agents knew Smith had been involved in a similar scheme in Los Angeles and had since relocated to St. Louis. In addition, the agents traced emails sent to U.S. Bank to a house across the street from Smith's residence that had an unsecured wireless router, which would allow anyone within range to access the internet. Finally, U.S. Bank gave the agents a recording of a phone conversation between a bank employee and the individual trying to fraudulently obtain the cash. An agent familiar with Smith's voice confirmed the voice on the recording belonged to Smith.

While conducting surveillance, the agents saw Smith and another person, later identified as Lewis, go into a restaurant. The agents entered and arrested Smith as he came out of the restroom. The agents seized a messenger bag, which was approximately fifteen to twenty feet away at a table with Lewis.

An inventory search of the bag revealed a laptop computer, a cell phone and bank records. The agents secured the items and obtained a warrant to search the bag, laptop and cell phone.

Smith argued the agents did not have probable cause to arrest him; therefore, the items recovered from the messenger bag after his arrest should have been suppressed. Even if his arrest was supported by probable cause, Smith argued the messenger bag and its contents were illegally seized and searched by the agents before they obtained a warrant.

The court disagreed. First, the agents had probable cause to arrest Smith. The agents knew Smith was a suspect in a similar scheme conducted in Los Angeles and an agent identified the voice of the person calling U.S. Bank to set up the scheme as belonging to Smith.

Second, the agents lawfully seized Smith's bag because they had probable cause to believe the bag contained evidence of a crime. The bag resembled the type of bag used to transport a laptop computer and the agents knew e-mails were sent to U.S. Bank from various access points, making it likely a laptop had been used in the scheme. Immediate seizure of the bag was necessary to prevent the destruction of evidence.

Finally, even though the agents slightly deviated from their agency's inventory search policy, the search was still reasonable because it was not pretext for a general search for evidence.

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

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United States v. Baldenegro-Valdez, 703 F.3d 1117 (8th Cir. 2013)

During a controlled buy, a confidential informant purchased methamphetamine from Camarena and Baldenegro-Valdez. Later that day, the informant made a second controlled buy. During the second buy, Camarena got out of Baldenegro-Valdez's car and into the informant's car. Baldenegro-Valdez followed in his car. After the informant signaled he had seen methamphetamine on Camarena, the officers conducted traffic stops on both vehicles. An officer wrote Baldenegro-Valdez a ticket for having a cracked windshield and arrested him for not having a valid driver's license. The officer did not mention the drug investigation so as not to compromise its integrity. Officers impounded Baldenegro-Valdez's car and during their inventory search found methamphetamine inside.

Even though Baldenegro-Valdez's arrest for not having a valid driver's license was improper, as the license he provided the officers was valid in his native country, the court found the officers had probable cause to arrest him based on his participation in one completed and one ongoing controlled methamphetamine buy.

Once the officers arrested Baldenegro-Valdez, the court noted the officers were allowed to perform an inventory search of his car. The court concluded the inventory search was conducted pursuant to the arresting agency's policy, and the methamphetamine the officers discovered was admissible.

Even if the inventory search was not valid, the court commented the officers could have searched the car under the automobile exception, given the vehicle's involvement in the controlled methamphetamine buys earlier in the day.

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

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United States v. Allen, 713 F.3d 382 (8th Cir. 2013)

After police officers arrested three individuals for attempting to pass counterfeit checks, they found a receipt for a hotel room. Officers went to the hotel, conducted surveillance on the room and saw Allen throw away a white plastic bag behind the hotel. Officers recovered the bag, which contained torn-up checks that matched checks found during the arrests of the three individuals. The officers returned to the hotel where they saw Allen loading items from a luggage cart into his car. Two black duffel bags and a combination printer, scanner, and copier machine were visible on the luggage cart. The officers arrested Allen. The officers searched Allen's car and found thousands of dollars in cash. The officers also searched the black duffel bags on the luggage cart and found a laptop computer, check stock and blank checks.

Allen argued the officers did not have probable cause to arrest him and the search of his car and the duffel bags on the luggage cart violated the *Fourth Amendment*.

The court held the officers had probable cause to arrest Allen for possession of counterfeit checks. First, the hotel receipt linked Allen to three individuals recently arrested attempting to pass counterfeit checks. Second, officers saw Allen discard a plastic bag that contained torn-up checks that matched the ones used by the other individuals. Finally, officers saw a combination printer, scanner and copier on Allen's luggage cart and they knew such a machine is typically associated with counterfeit check cases.

In addition, the court held the officers lawfully searched Allen's car incident to his arrest. Police officers can lawfully search a vehicle incident to an arrest if the arrestee is within reaching distance of the vehicle during the search or if the police have reason to believe the vehicle contains evidence relevant to the crime of arrest. Based on information discovered during the investigation, the search of Allen's car incident to his arrest was lawful because the officers had reason to believe the vehicle contained evidence relevant to the crime of conspiracy to possess counterfeit securities.

Finally, the court concluded even if the officers could not search the items on the luggage cart incident to Allen's arrest, the evidence inside the duffel bags would have been discovered during an inventory search. An officer testified, after arresting Allen, his property on the luggage cart would have been taken to the police station for safekeeping and inventoried to guard against loss or theft, according to departmental policy.

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

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Entering Suspect's Home to Make an Arrest

United States v. Shaw, 707 F.3d 666 (6th Cir. 2013)

Two police officers were assigned to serve an arrest warrant for criminal trespass on Phyllis Brown at 3171 Hendricks Avenue. When the officers got to Hendricks Avenue, they could not find a house with a 3171 address; however, they did find two houses, on opposite sides of the street, that both had 3170 as the their address. The officers went up to one of the two houses that appeared to be occupied and knocked on the door. A woman opened the door and immediately shut it when she saw the officers. One of the officers knocked again and the same woman opened the door. The officer falsely told the woman he had a warrant "for this address." The woman let the officers into the house. While performing a protective sweep, the officers found a large quantity of cocaine. The house belonged to Shaw, Phyllis Brown's neighbor.

The court held the officers' entry into Shaw's house was unreasonable. An officer may not falsely tell a homeowner he has a warrant to make an arrest at a given address when he does not and then use that false statement as the basis for obtaining entry into the house.

The court further held the false statement could not justify the officers' continued presence in the house after one of the occupants asked the officers what right they had to be there.

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

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United States v. Williams, 731 F.3d 1222 (11th Cir. 2013)

Two uniformed police officers went to a rooming house to conduct a knock and talk interview after receiving complaints of drug sales occurring there. Williams answered the door and after a brief conversation, gave one of the officers consent to search him. When the officer reached for Williams' pocket to search him, Williams pushed the officer, causing the officer to stumble backwards. Williams ran back into the rooming house with the officers in pursuit. Once inside, Williams fought with the officers. During the fight, a handgun fell out of Williams' waistband. After the officers handcuffed Williams, the officers conducted a search incident to arrest and discovered illegal drugs in Williams' pockets. Williams was convicted of firearm and drug offenses.

Williams argued the firearm and drugs should have been suppressed because he did not consent to being searched by the officer.

First, the court of appeals held the district court's finding that the officer's version of events was credible and Williams' version was not credible was not in error. Second, the officers lawfully approached the front door of the rooming house to conduct a knock and talk interview. Third, the officer obtained Williams' consent before attempting to search Williams. Fourth, after Williams pushed the officer, the officers had probable cause to arrest Williams for battery of a law enforcement officer. Because the officers had probable cause to arrest Williams, they were entitled to pursue him into the rooming house to effect the arrest. Finally, the discovery of evidence in Williams' pocket resulted from a valid search incident to arrest.

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

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Length of Detention

United States v. Watson, 703 F.3d 684 (4th Cir. 2013)

Watson worked at a convenience store and lived in a room located on the second floor of the same building. After police officers arrested several individuals for dealing drugs near the convenience store, they discovered one of the individuals lived in one of the rooms on the second floor of the building. After the officers decided to obtain a search warrant for the building, they entered the convenience store and detained Watson and the owner of the store. Neither Watson nor the store owner were among the individuals the officers suspected of selling drugs and the officers did not have information linking Watson or the store owner to any kind of criminal activity. The officers kept Watson and the owner in the back area of the store for three hours while they waited for the search warrant. Other officers eventually returned with the warrant and during the search, officers went into Watson's room and found a handgun and ammunition. When asked about the items, Watson made an incriminating statement. Watson was charged with possession of a firearm and ammunition by a felon.

The court found while the seizure of the building may have been supported by probable cause, Watson's seizure was not. The officers did not suspect Watson of any criminal activity, and they had no reason to believe he might attempt to destroy or hide the evidence sought in the search warrant application. As a result, Watson's three hour detention was unreasonable and constituted an unlawful custodial arrest in violation of the *Fourth Amendment*.

The court further held Watson's incriminating statement should have been suppressed because it was the product of his unlawful custodial arrest. Watson's statement occurred as part of an uninterrupted course of events, during which, there were no significant intervening events. Therefore, Watson's statement was the product of his unlawful arrest and not an act of free will.

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

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The Exclusionary Rule

United States v. Collins, 714 F.3d 540 (7th Cir. 2013)

A police officer pulled Collins over for speeding. As the officer approached his car, Collins sped away and the officer chased him. Collins crashed his car and fled on foot. The officer pursued Collins who refused commands to stop. The officer caught Collins who resisted the officer's efforts to arrest him. Collins was subdued after a back-up officer deployed his Taser twice against him. After arresting Collins, officers found a bag containing cocaine Collins had thrown into the bushes during the foot chase and a quantity of cash in his pocket. Collins was indicted for two drug offenses.

Collins moved to suppress the drugs and money, claiming the officers only discovered this evidence after using excessive force to arrest him.

The court of appeals agreed with the district court, which concluded the use of excessive force in effecting an arrest cannot warrant the suppression of evidence. Further, even if the suppression of evidence were warranted, Collins discarded the drugs before the officers applied any force and the money would have been seized during a search incident to arrest. As a result, there would be no connection between the discovery of the evidence and the alleged excessive use of force. The court noted that a civil lawsuit for damages was the better remedy for Collins to address any allegations of excessive force against the officers.

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

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Exceptions to the Exclusionary Rule

Good Faith

United States v. Woerner, 709 F.3d 527 (5th Cir. 2013)

A detective with the local police department obtained a state warrant to search Woerner's house for evidence of possession and distribution of child pornography. The warrant was valid for three days. Six days later, believing the warrant to be expired, police officers nonetheless executed it, seized computers, cameras and photographs from Woerner's house, and arrested him.

During this same time, the Federal Bureau of Investigation (FBI) was independently investigating Woerner for possession and distribution of child pornography. As FBI agents prepared to execute a federal search warrant on Woerner's house, they learned of the earlier search and arrest by the local officers. The FBI agents went to the jail, advised Woerner of his *Miranda* rights, obtained a waiver, and interviewed him. Woerner made incriminating statements, which the agents used to establish probable cause to obtain a federal search warrant for several of Woerner's email accounts. A search of one of those email accounts revealed Woerner had sent numerous emails containing child pornography images and videos.

The district court suppressed all physical evidence seized from Woerner's house pursuant to the expired state search warrant. Second, the district court suppressed the incriminating statements Woerner made to the FBI agents, holding they were tainted by the unlawful search of his house. Third, the court held the good faith exception to the exclusionary rule applied to the email evidence.

The court of appeals agreed the good faith exception applied to the email evidence. The FBI agents were not aware of the local police department's investigation until after Woerner's home was searched and he was arrested. The agent who drafted the search warrant for Woerner's email accounts could not have known the statements made by Woerner in the FBI interview would later be suppressed. In addition, Woerner signed a valid *Miranda* waiver before making incriminating statements in the FBI interview. Even though the search warrant application included statements made by Woerner that were later suppressed, the executing officer's reliance on the warrant was objectively reasonable and made in good faith.

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

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United States v. Rose, 714 F.3d 362 (6th Cir. 2013)

Police officers suspected Rose had sexually abused three minors in his home. As a result, the officers obtained a search warrant for 709 Elberon Avenue. The warrant identified Kenneth Rose as the subject of the search and immediately below Rose's name identified the location to be searched as 709 Elberon Avenue. In addition, the warrant described the physical attributes of the address and included a photograph of the property from the county auditor's website. However, the search warrant affidavit did not include Rose's address. It merely stated the victims' allegations that Rose sexually abused them in his bedroom. Nevertheless, the magistrate judge issued the warrant. Officers executed the warrant and seized computers containing numerous images of child pornography.

Rose argued the child pornography evidence should have been suppressed because the search warrant affidavit did not establish probable cause as it failed to establish the required nexus between the place to be searched and the evidence sought.

The court agreed the search warrant affidavit failed to connect Rose to 709 Elberon Avenue. To find probable cause, the judge issuing the search warrant must have a substantial basis for believing there is a fair probability that evidence of a crime will be found on the premises to be searched. This requires a nexus between the premises and the evidence sought. To establish a sufficient nexus, there must be reasonable cause to believe the items sought are located on the premises to be searched. Here, while the search warrant provided a description of Rose's premises, the affidavit did not provide a link between the premises and Rose. The affidavit only explained that the victims testified criminal activity took place in Rose's bedroom, without linking Rose to 709 Elberon Avenue. If the affidavit stated that the victims alleged the sexual misconduct took place at 709 Elberon Avenue or that the investigation revealed that Rose lived at 709 Elberon Avenue, there would have been probable cause to believe evidence of the crimes described in the affidavit would be found at 709 Elberon Avenue.

Even though the search warrant affidavit failed to link Rose to 709 Elberon Avenue, the court held the good-faith exception applied, therefore, the child pornography evidence was admissible. Considering everything, the officers conducting the search of Rose's home exercised good faith and acted in objectively reasonable reliance on the warrant's legality. First, the affidavit established the victims had spent time in Rose's home and provided detailed testimony regarding the sexual assault that occurred there. Second, it was reasonable to conclude that either the testimony of the three victims or the independent investigation by the officers revealed that Rose lived at 709 Elberon Avenue. Finally, the exclusionary rule was designed to deter police misconduct rather than to punish the errors of judges and magistrates. There was no police misconduct to deter in this case. The affidavit's failure to provide Rose's address was similar to a clerical error and a result of poor drafting.

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

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United States v. Cannon, 703 F.3d 407 (8th Cir. 2013)

During a routine fire safety inspection at a car dealership, the fire marshal came upon a locked door in the building. An employee told the fire marshal the door led to three rooms used by Cannon, an employee at the dealership. The fire marshal directed Cannon to open the door so he could complete his inspection. The fire marshal entered the rooms and saw a poster of a nude boy on the wall, a collection of bound, blindfolded and mutilated naked dolls hanging from the ceiling, a child's bed, a tri pod for a camera, a big-screen television and several children's toys. The fire marshal called the police. Investigators responded and entered the rooms to confirm the fire marshal's observations. Deciding they would need a warrant to search further, the investigators secured the premises and applied for a search warrant. During this time, the investigators spoke to Cannon who told them he had no home and he stayed at the car dealership three nights a week while serving as a night security guard for the business. Once the investigators obtained the search warrant, they seized Cannon's computers, which were later found to contain thousands of images and videos of child pornography.

Cannon argued the investigators violated his *Fourth Amendment* rights when they initially entered his living quarters without a warrant, consent or an exigency.

Without deciding the issue, the court held even if the search warrant was based on evidence collected in violation of the *Fourth Amendment*, the good-faith exception applied. First, the investigators learned Cannon lived in the rooms only after they first entered them and made their initial observations. The court found the investigators reasonably could have believed they were entering another part of the car dealership, not a private residence, when they entered the rooms.

Second, the investigators fully disclosed the nature of the rooms to the state court judge in the warrant application. The investigators stated that in the course of their initial inspection of the rooms, they discovered someone appeared to be living there. Once the state court judge considered these facts and issued the warrant, it was reasonable for the investigators to believe the warrant was valid.

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

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United States v. Needham, 718 F.3d 1190 (9th Cir. 2013)

In June 2010, police suspected Needham, a registered sex offender, had molested a five-year old boy in the restroom at a local mall. A detective obtained a warrant to search Needham's home. The warrant authorized a search for clothing matching the description of what Needham was wearing at the mall the day he was suspected of molesting the boy and for a credit card Needham had used. The warrant also authorized the search of Needham's electronic and digital storage devices for child pornography. Other than the detective's opinion that individuals who molest children are likely to possess child pornography, the warrant did not provide any other reason to suspect Needham possessed child pornography in his home.

Officers seized Needham's iPod and discovered images and videos of child pornography.

Needham moved to suppress the evidence obtained from his iPod, arguing the search warrant was not supported by probable cause he possessed child pornography. Needham further argued the lack of probable cause was so obvious that the good-faith exception should not apply.

The officers relied on a warrant based on the inference that those who molest children are likely to possess child pornography. In 2011, the Ninth Circuit decided a case, which held such an inference, by itself, does not establish probable cause to search a suspected child molester's home for child pornography. However, because the search in this case occurred before 2011, the court held it was objectively reasonable for the officers to rely in good faith on the search warrant.

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

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See *U.S. v. Barajas,* 710 F.3d 1102 (10th Cir. 2013)

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United States v. Ponce, 734 F.3d 1225 (10th Cir. 2013)

Police officers received information from a confidential informant that Ponce was selling methamphetamine from the duplex where he lived. While conducting surveillance, a police officer walked a drug dog along the garage door of Ponce's duplex. The drug dog gave a positive alert for the presence of narcotics. In late June 2011, the officers obtained a search warrant for Ponce's duplex and discovered methamphetamine, firearms and cash. The government charged Ponce with several drug and firearm offenses.

Ponce argued, in part, the sniff by the drug dog outside the garage door of his duplex was an illegal warrantless search in violation of the *Fourth Amendment*.

The court commented the United States Supreme Court decision in *Florida v. Jardines*, decided in 2013, might call into question some of its precedent in this area. However, without deciding whether the use of the drug dog violated the *Fourth Amendment*, the court held the officers acted in good-faith reliance on the warrant. The court held, in June 2011, the officer could have reasonably believed the drug dog's alert outside Ponce's garage door was not a search for *Fourth Amendment* purposes. In addition, the court found it was reasonable for the officer to believe the drug dog alert and the information from the confidential informant established probable cause to search Ponce's duplex.

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

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Independent Source Rule

United States v. Brooks, 715 F.3d 1069 (8th Cir. 2013)

Brooks robbed a bank and then stole a van before the police arrested him. The police found a cell phone in the van, searched it without a warrant, and discovered photographs and a video of a man who resembled Brooks posing with a firearm that matched the one used in the bank robbery.

Eight months later, police officers obtained a warrant to conduct a more thorough search of the cell phone.

Brooks moved to suppress the photographs and video discovered during the warrantless search of the cell phone. Brooks argued the eight-month delay in obtaining the warrant was to cure the illegality of the initial search.

Without deciding the issue, the court held even if the warrantless search of the cell phone was illegal, the independent source rule applied. The police suspected Brooks had an accomplice in the bank robbery. Prior to seeking the search warrant, officers obtained additional information concerning the accomplice. An officer testified the investigators sought the warrant to obtain cell phone call and text records to help identify the accomplice. The officer also testified that investigators sought warrants for other phones in an effort to identify Brooks' accomplice and the initial search of the cell phone did not recover any call logs or text messages. The court noted the police did not include any details from the photographs or video in their search warrant application and concluded the investigators would have applied for the warrant even without the information obtained from the initial warrantless search.

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

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Inevitable Discovery Doctrine

United States v. Stokes, 733 F.3d 438 (2d Cir. 2013)

Police officers established probable cause to arrest Stokes for murder. After the officers learned Stokes was staying in a motel, they made plans to arrest him. The lead investigator asked an Assistant District Attorney (ADA) to obtain an arrest warrant; however, the ADA declined. Under New York law, once an arrest warrant is issued, police officers are not allowed to question a suspect without his lawyer present. The ADA believed if the investigator could talk to Stokes outside the presence of a lawyer, Stokes would cooperate in the current case and in an unrelated homicide.

The investigator decided to arrest Stokes without a warrant and assembled a group of officers to go to the motel where the investigator learned Stokes had checked into a room with a female companion. The investigator arrived outside Stokes' room and saw the door ajar. The investigator pushed the door open and called out to Stokes, who answered him. The investigator then entered the room without Stokes' consent and saw Stokes sitting on the bed in his underwear. As the investigator told Stokes to get dressed, he handed Stokes a pair of pants that were lying on top of a gym bag. Once the investigator picked up the pants, he saw the bag was open and that it contained a handgun. The investigator gave the bag to another officer who searched it and found nine firearms and ammunition. Stokes was charged with two federal firearms violations.

Stokes argued the investigator's warrantless entry into his motel room violated the *Fourth Amendment*; therefore, the firearms and ammunition should have been suppressed.

Even if the investigator's entry violated the *Fourth Amendment*, the district court held the firearms and the ammunition were admissible under the inevitable discovery doctrine.

The court of appeals held the district court improperly applied the inevitable discovery doctrine and reversed the denial of Stokes' motion to suppress the evidence.

First, the court had to determine whether suppression of the firearms and ammunition was an appropriate remedy in this case. The court assumed the officers had probable cause to arrest Stokes. While probable cause would have allowed the officers to arrest Stokes without a warrant if they encountered him in a public place, it has long been established that entry into a premises, to include a motel room, to search for or arrest a suspect requires an arrest or search warrant. The investigator testified even though he was familiar with this rule, he deliberately entered Stokes' room without a warrant or consent. Consequently, the court held the exclusion of the firearms and ammunition was appropriate in such a clear case of illegal police conduct.

Next, the court held the district court improperly applied the inevitable discovery doctrine. The inevitable discovery doctrine is an exception to the exclusionary rule, which provides that the fruit of an unlawful search or seizure is admissible at trial if the government can establish the officers would have inevitably obtained the evidence by lawful means, without the constitutional violation.

The court concluded the government failed to prove the officers would have inevitably discovered the firearms and ammunition through a lawful search of Stokes' room.

First, at the time of the investigator's entry, Stokes and his companion, Fulmes, had two days remaining on their room registration. If Fulmes had left the room carrying the gym bag, the officers would have had no basis for stopping or searching her. Second, if Stokes left the room without the gym bag and the officers arrested him, they would have had no basis for searching the room without a warrant. In addition, if the officers had arrested Stokes outside the room, Fulmes would have had the opportunity to check out of the room and remove the gym bag.

Because of the number of possible contingencies, the court concluded the discovery of the firearms and ammunition in Stokes' room pursuant to a lawful search was not inevitable.

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

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United States v. McClendon, 713 F.3d 1211 (9th Cir. 2013)

At 2:20 a.m. a man called 911 stating an unknown vehicle was parked in his driveway with its engine and lights off and that someone had knocked on his door. When officers arrived, a woman got out of the car. She claimed the car had run out of gas and McClendon had gone to get more. The woman consented to a search and the officers found a backpack in the car the woman said belonged to Eddie McClendon. An officer searched the backpack and found a sawed-off shotgun, a wig, walkie-talkies and binoculars. Officers ran a records check and learned McClendon had a previous felony weapons conviction. Officers began to search the neighborhood for McClendon.

The officers saw a man fitting McClendon's description walking down the street. After the man confirmed his name was Eddie, he turned and began to walk away from the officers. The officers drew their guns, told McClendon he was under arrest and ordered him to show his hands. McClendon ignored the officers and continued to walk away. The officers saw McClendon

reach toward his waistband and then "fling" something away. The officers tackled McClendon, handcuffed him and placed him under arrest. The officers found a loaded handgun, still warm to the touch, a few feet away. McClendon denied discarding the handgun.

The government indicted McClendon for two counts of felon in possession of a firearm for the shotgun and handgun.

The district court held the search of the backpack violated the *Fourth Amendment* because the woman did not have authority to consent to its search and there was no exigency that allowed the officers to search it without a warrant. The government did not appeal this ruling.

However, the district court denied McClendon's motion to suppress the handgun.

McClendon argued on appeal the handgun should have been suppressed. He claimed the officers only discovered the handgun as the result of a seizure that was prompted by the illegal search of his backpack.

The court held the discovery of the handgun should not be suppressed as a fruit of the unlawful search of McClendon's backpack. An officer testified he would have searched for McClendon even if the backpack had not been searched. Even if the officers were motivated to search for McClendon because of what they found in the backpack, McClendon's act of walking away from them was an intervening event that purged any taint from the backpack search.

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

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Search Warrants

Anticipatory Search Warrants

United States v. Donnell, 726 F.3d 1054 (8th Cir. 2013)

An undercover police officer made a number of controlled purchases of drugs from a person named Roy. The officer suspected after he paid Roy for the drugs, Roy went to Donnell's house, retrieved the drugs, and then gave the drugs to him.

The undercover officer planned to make another drug purchase from Roy while another drug task force agent obtained an anticipatory search warrant for Donnell's residence. An anticipatory search warrant is based upon an affidavit showing that probable cause to believe evidence of a crime will be located at a specific place sometime in the future, upon some triggering event. Here, the search warrant affidavit stated probable cause to search Donnell's residence would exist if three triggering events occurred. First, if law enforcement officers maintained direct visual surveillance of Roy's vehicle from the time the undercover officer gave Roy documented investigative funds for the purchase of marijuana until the time Roy's vehicle arrived at Donnell's residence. Second, if law enforcement officers maintained direct visual surveillance of Roy's vehicle leaving Donnell's residence until Roy met again with the undercover officer. Finally, if the undercover officer confirmed receipt of some form of controlled substance from Roy.

After a magistrate judge issued the anticipatory warrant to search Donnell's house, the undercover officer met with Roy to buy marijuana. When the officer gave Roy marked United States currency, Roy told the officer he needed to obtain the marijuana from his source. While under surveillance, Roy drove to a driveway, which led solely to Donnell's house. The surveillance officers lost sight of Roy's vehicle as it went up the driveway. Approximately six minutes later, the surveillance officers regained sight of Roy's vehicle as it drove back down Donnell's driveway and followed it until Roy met with the undercover officer. After the meeting, the undercover officer confirmed Roy had given him approximately two pounds of marijuana.

Believing the three triggering events had occurred, police officers executed a search of Donnell's house and recovered marijuana, firearms and the marked currency from the undercover officer's drug transaction.

Donnell claimed the search of his home was not supported by probable cause because the required triggering events had not taken place. Specifically, Donnell argued the surveillance officers' loss of continuing visual contact with Roy's vehicle for six minutes violated the first and second triggering conditions.

The district court disagreed, concluding, "A common sense reading of the warrant only required law enforcement to observe Roy's vehicle leaving the residential property of Donnell, which would include the driveway that exclusively led to Donnell's house."

The court of appeals agreed and found the police officers, satisfied the first and second triggering conditions of the warrant by maintaining visual surveillance of Roy's vehicle leaving Donnell's residence, which included the driveway leading to Donnell's house.

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

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Probable Cause

United States v. Gifford, 727 F.3d 92 (1st Cir. 2013)

Police officers executed a search warrant at Gifford's home and uncovered evidence of a marijuana grow-operation. The search warrant affidavit relied on information from an unnamed informant as well as electrical power records for Gifford's home and two nearby homes. The affidavit alleged the electrical usage in these nearby homes was significantly lower than that of Gifford's home, which led police to believe Gifford used high amounts of electricity to power the electrical equipment needed to sustain an indoor marijuana grow-operation.

Gifford moved to suppress the evidence seized at his home, arguing the search warrant affidavit lacked probable cause. The district court agreed and suppressed the evidence. The government appealed.

The court of appeals agreed with Gifford and affirmed the district court.

First, nothing in the search warrant affidavit gave the issuing judge a sufficient basis for determining the informant's reliability. The affidavit did not explain how the informant knew

Gifford was operating a marijuana grow-operation, for example, whether the informant had direct, first-hand knowledge of the grow-operation or if he heard about it as hearsay. In addition, the affidavit did not mention any past history with the informant to establish his credibility, and the police did not attempt to corroborate any of the informant's statements.

Second, the court held the search warrant affidavit recklessly omitted material facts. The affidavit failed to mention one of the neighboring homes used in the electricity-usage comparison was mobile home with only 1,392 square feet of heated space, while Gifford's house was a three-bedroom home with a basement and an attic totaling 5,372 square feet. The court found the square footage differential, by itself, was enough to doubt whether the electrical usage at Gifford's home was suspiciously high. In addition, the affidavit failed to mention Gifford operated a horse boarding business out of his home, which could account for an increase in the amount of electricity used.

The court found both omitted facts effected the significance given to the electrical usage information contained in the search warrant affidavit. The court also found the information was recklessly omitted from the search warrant affidavit, as the government was aware of both facts when the affidavit was submitted.

Finally, the court held the omitted information, when included in the affidavit, did not establish probable cause to search Gifford's home.

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

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United States v. Abramski, 706 F.3d 307 (4th Cir. 2013)

Federal agents executed a search warrant at Abramski's house after he became a suspect in a bank robbery. During the search, agents found a green bank bag, which contained a written receipt from a person to whom Abramski had transferred a Glock handgun. The government never charged Abramski with bank robbery, however, Abramski, a former police officer, was convicted of two federal firearms violations after admitting he was an illegal "straw purchaser" of the Glock handgun.

Abramski argued the search warrant for his house was not supported by probable cause.

The court disagreed, finding there was a substantial basis for the magistrate judge to conclude probable cause existed for the search of Abramski's house. First, Abramski was flagged as a suspicious customer at the bank a few days before the robbery, was having financial difficulties and had been fired by the police department for stealing money. Second, Abramski fit the description of the robber, had test-driven a car the day of the robbery that matched the description of the get-away vehicle and had purchased firearms with large amounts of cash after the bank robbery.

The court also held the agents were entitled to seize the receipt to Abramski from the purchaser of the Glock. The receipt was found inside a green zippered bag with the bank's logo on it, and at the time, the agents knew the robbery had been committed with a firearm similar to a Glock handgun.

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

*****

United States v. Kinison, 710 F.3d 678 (6th Cir. 2013)

Lauren Omstott told the police her boyfriend, Kinison, had been sending her text messages describing his desire to get them both involved with a group that allegedly adopted children and then allowed others to engage in sex with those children. Omstott consented to a search of her cell phone, and an officer downloaded over sixteen hundred pages of text messages, corroborating Omstott's claims. In one of the text messages, Kinison admitted to viewing child pornography videos on the internet. When asked about this text message, Omstott told the officers Kinison was viewing the videos on his home computer. The officers conducted a records check and verified Kinison's address. Shortly afterward, the officers obtained a warrant to search Kinison's house. While the officers were executing the warrant, Kinison drove up in his car. The officers saw Kinison's cell phone in plain view in the vehicle's console and obtained a warrant to search his car and seize the phone. A forensic examination of Kinison's computer revealed images and videos of child pornography.

The district court granted Kinison's motion to suppress, finding the search warrant affidavit failed to establish probable cause to search Kinison's house and car.

The court of appeals reversed, holding the search warrant affidavit provided the magistrate with a substantial basis for believing evidence of child pornography would be found in Kinison's home and car.

First, Omstott was a credible witness. She met with the officers three times and subjected herself to prosecution if she made false statements to them. In addition, some of the text messages she voluntarily provided to the officers, subjected her to potential criminal prosecution based upon their content. The court noted, such admissions of crime establish indicia of credibility.

Second, the court found there was a nexus between the place to be searched, Kinison's house and car, and the evidence sought, child pornography, on Kinison's computer and phone. The language of the text messages clearly indicated Kinison's interest in joining a group that sexually abused children and that he had viewed child pornography videos on the internet. The fact Kinison would be viewing child pornography at home is consistent with the court's prior rulings that child pornography crimes are generally carried out in the secrecy of the home.

Finally, because the text messages to Omstott were sent from a phone, there was probable cause to believe evidence of child pornography would be found in Kinison's car after the officers saw a cell phone in plain view in his car.

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

*****

United States v. Hodge, 714 F.3d 380 (6th Cir. 2013)

An individual told the police he witnessed the manufacture of methamphetamine, several firearms and a bomb at Hodge's home. In addition, he told the police Hodge claimed the bomb had enough power to blow up the entire house if detonated.

Police officers corroborated the witness' story by confirming Hodge's identity and residence and learning he had recently purchased ephedrine or pseudoephedrine from local stores on three occasions. Officers also discovered two "silent observer" tips from the prior week stating there was a large amount of traffic around Hodge's house and that the callers believed there was "methamphetamine activity and guns" located there.

Based on the witness' statements and their investigative findings, officers obtained a warrant to search Hodge's house for methamphetamine and weapons. Hodge was indicted for two offenses regarding possession of bomb the officers found in his house.

Hodge argued the warrant to search his house was not supported by probable cause.

The court held the evidence presented in the search warrant affidavit supported a finding Hodge was engaged in methamphetamine production. First, statements from a witness, such as the one in this case, are generally sufficient to establish probable cause because the legal consequences of lying to police officers tend to ensure their reliability. Second, the officers corroborated the witness' story by examining ephedrine and pseudoephedrine purchase logs, police records and "silent observer" tips and including that information in the search warrant affidavit.

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

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United States v. Rodriguez, 711 F.3d 928 (8th Cir. 2013)

Police officers executed a search warrant at Rodriguez's home and found methamphetamine, firearms and other drug related paraphernalia. Rodriguez was indicted on a variety of charges.

Rodriguez argued the search of his home violated the *Fourth Amendment*, claiming the search warrant affidavit did not establish probable cause and because the firearms, which the officers seized, were not listed in the warrant.

Again, the court disagreed. First, the affidavit included information from two separate reliable sources, one being a former law enforcement officer, who was lawfully in Rodriguez's home when he smelled chemicals associated with methamphetamine production. Second, the officers corroborated much of the information provided by the confidential sources, to include verifying Rodriguez's address and the type of car he drove. Finally, even though the firearms were not listed on the search warrant, the officers lawfully seized them under the plain view doctrine. The officers found the firearms under a mattress, a place they were entitled to search under the warrant. In addition, the incriminating nature of the firearms was immediately apparent, as they were found near a large quantity of drugs and drug paraphernalia, and because the officers knew Rodriguez was a convicted felon, who could not lawfully possess them.

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

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United States v. Wallace, 713 F.3d 422 (8th Cir. 2013)

A woman brought police officers a videotape she claimed to have removed from Wallace's home that depicted Wallace sexually assaulting minor females. The officers matched the face in the video to a copy of Wallace's driver's license photograph. The woman told the officers a maroon colored suitcase in Wallace's spare bedroom contained additional sexually explicit material involving minors.

Based on this information, officers obtained a warrant to search Wallace's home and located the maroon-colored suitcase. The suitcase contained numerous sexually explicit images and videotape recordings of minors. Officers arrested Wallace, who waived his *Miranda* rights and drafted a handwritten confession.

Wallace argued the search warrant was not supported by probable cause and the officers pressured him into signing the written confession.

The court held the search warrant for Wallace's home was supported by probable cause. Even though the woman had a criminal history and had never provided the government with reliable information that led to a conviction, the officers corroborated most of her information. Because there was independent corroboration of the videotape contents, it was permissible to infer that the other information, including the location of the other material in the maroon-colored suitcase, was reliable.

The court further held Wallace's confession was made knowingly, intelligently and voluntarily. The officers advised Wallace of his *Miranda* rights and he signed a written waiver of those rights, which explicitly stated he had not been threatened, coerced or promised anything in exchange for giving up those rights.

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

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United States v. Winarske, 715 F.3d 1063 (8th Cir. 2013)

A confidential informant (CI), who had provided police with accurate information about local criminal activity in the past, told officers Winarske had a stolen handgun he wished to sell. The CI told officers that Winarske was a registered sex offender who was currently on probation. Officers confirmed a handgun had recently been stolen from a vehicle two blocks from Winarske's house and that Winarske was a convicted felon and registered sex offender currently on probation.

Winarske agreed to meet the CI in the parking lot of a shopping mall and sell him a stolen handgun. Prior to the meeting, the CI told the officers the time and place of the meeting in addition to the color, make and model of Winarske's vehicle and the fact that Winarske's girlfriend would be present. Police officers conducted surveillance at the mall and just before the arranged meeting time, they saw Winarske and a female, later identified as Winarske's girlfriend, enter a vehicle that matched the description of the vehicle provided by the CI. The officers approached the vehicle, removed Winarske and his girlfriend, patted them down and then handcuffed them. Winarske admitted there was a handgun in the vehicle. Officers searched the

car and seized a handgun and ammunition. The government charged Winarske with being a felon in possession of a firearm.

Winarske argued the information provided by the informant did not establish probable cause to arrest him; therefore, the warrantless search of the vehicle violated the *Fourth Amendment*.

The court disagreed. First, the officers had reason to believe the CI was reliable based on his established track record of providing accurate information on local criminal activity. Second, the CI provided identifying information about Winarske that was independently corroborated by police, to include, Winarske's first and last names, criminal history and supervision status. Third, the CI provided accurate information about the time and place of a planned meeting with Winarske to purchase a stolen handgun. Consequently, the court held the officers had probable cause to support a warrantless arrest of Winarske when they encountered him in the mall parking lot.

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

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U.S. v. Underwood, 725 F.3d 1076 (9th Cir. 2013)

Federal and local law enforcement officers suspected Underwood was a courier for a drug trafficking organization that distributed hundreds of thousands of pills of ecstasy per week. While conducting surveillance, federal agents saw Underwood transfer two large unmarked crates to a vehicle driven by two co-conspirators. The crates were subsequently seized from a drug stash house and found to contain thousands of ecstasy pills.

Three months later, federal agents obtained a federal arrest warrant for Underwood and a federal search warrant for a house where they believed Underwood lived. Once at the house, the agents found Underwood's mother, who told them Underwood lived in a house on Mansa Drive. The agents went to the house on Mansa Drive, arrested Underwood and conducted a protective sweep. During the sweep, agents saw a small amount of marijuana on a table. After Underwood refused to consent to a full search of the house, a federal agent directed a local police officer to obtain a state search warrant for the Mansa Drive house. To assist the local officer, the federal agent emailed the officer a summary of the case against Underwood, which included a copy of the federal search warrant affidavit.

In the state search warrant affidavit, the officer listed his narcotics training and experience and then copied information from the federal search warrant affidavit nearly verbatim. The officer never indicated he was copying directly from the federal affidavit nor did the officer attach the federal affidavit to his affidavit. The state search warrant affidavit alleged Underwood was a courier for an ecstasy trafficking organization, it referenced the transfer of the two crates from Underwood to the co-conspirators three months prior, without mentioning the crates contained ecstasy, and the affidavit stated the officers had found a small amount of "personal-use" marijuana during their protective sweep. Based on the officer's affidavit, a state court judge issued a search warrant for the Mansa Drive house, which resulted in the seizure of thirty-three kilograms of cocaine, $417,000 in cash, 104 ecstasy pills and a written record of drug transactions.

Underwood moved to suppress the evidence seized from his Mansa Drive house, arguing the affidavit supporting the state search warrant lacked probable cause. Underwood also argued the good faith exception to the exclusionary rule did not apply because the affidavit was a "bare bones" affidavit that lacked indicia of probable cause.

The district court agreed and suppressed the evidence seized during the search of Underwood's Mansa Drive home.

The government appealed and the Ninth Circuit Court appeals affirmed the district court's order suppressing the evidence.

A search warrant is supported by probable cause if the issuing judge finds that facts set forth in the affidavit establish a fair probability that contraband or evidence of a crime will be found in a particular place. Conclusions of the affiant unsupported by underlying facts cannot be used to establish probable cause.

In this case, the state search warrant did not give a reasonable judge sufficient basis to believe it was fairly probable that Underwood was an ecstasy courier or that evidence of ecstasy trafficking would be found in the Mansa Drive house. First, even though the affidavit indicated the officers seized a personal-use amount of marijuana from the Mansa Drive house, that fact lacked a nexus with ecstasy trafficking; therefore, it could not support the conclusion that Underwood was an ecstasy trafficker. Second, the fact that federal agents saw Underwood deliver two crates, three months earlier, to two co-conspirators could not support the conclusion that Underwood was a drug courier, as the affidavit did not include any facts to establish the crates contained ecstasy. Third, the affidavit included the officer's conclusions that drug traffickers often kept records of drug transactions at their residences. The affidavit did not provide any facts to support the conclusion that Underwood was in the business of buying and selling ecstasy. Fourth, probable cause to search the Mansa Drive house could not be established just because the officer stated a federal search warrant had previously been issued in this case for another residence connected to Underwood. The court further held the good faith exception to the exclusionary rule did not apply. The court agreed with Underwood that the affidavit was so deficient that reliance on the search warrant for the Mansa Drive house was unreasonable.

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

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United States v. Schesso, 730 F.3d 1040 (9th Cir. 2013)

Police officers discovered a child pornography video that was made available for download over a peer-to-peer file-sharing network from an Internet Protocol (IP) address assigned to Schesso. Officers obtained a warrant to search Schesso's residence for any computer, electronic equipment, or digital storage device that was capable of containing evidence of child pornography violations. Officers seized multiple pieces of electronic media and data storage devices and discovered hundreds of images and videos of child pornography.

The district court granted Schesso's motion to suppress the child pornography evidence, holding the search warrant affidavit did not establish probable cause to believe Schesso possessed child pornography.

The government appealed and the court of appeals reversed the district court. The court of appeals held the search warrant affidavit included facts, when combined with reasonable inferences from those facts, that provided probable cause to search Schesso's entire computer system and his digital storage devices for evidence of possession of or dealing in child pornography. Key to the court's determination that probable cause existed was the fact that Schesso took the affirmative steps of uploading and distributing the video on a network designed for sharing and trading. Based on that information, the officers could reasonably infer Schesso possessed or had downloaded other files containing child pornography.

Once the officers established probable cause to believe Schesso collected child pornography, the officers were entitled to seize and search his entire computer system and digital storage devices.

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

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United States v. Cardoza, 713 F.3d 656 (D.C. Cir. 2013)

Police officers arrested Cardoza and Ungar after they recovered over four grams of cocaine from the car in which the two men had been sitting. In a search incident to arrest, officers recovered three disposable cell phones, almost three thousand dollars in cash and a plastic bag containing marijuana. Cardoza gave the officers a false address and a records check revealed he had previously been arrested for possession with intent to distribute marijuana.

Officers obtained a warrant to search Cardoza's apartment for evidence relating to illegal narcotics distribution and found cocaine, marijuana, handguns, a large quantity of cash and paraphernalia associated with drug distribution.

The district court granted Cardoza's motion to suppress the evidence seized from his apartment after ruling the search warrant affidavit included four false statements and concluding that without those statements; the officers did not have probable cause to search Cardoza's apartment.

The court of appeals reversed the district court, holding the officer's search warrant affidavit established probable cause to search Cardoza's apartment even without the four false statements.

First the court found the evidence seized during the search incident to arrest along with Cardoza's prior arrest record and false address established probable cause to believe Cardoza was engaged in drug trafficking. Next, the officer stated in the affidavit that based on his training and experience drug traffickers often kept additional supplies of drugs within their homes along with weapons and large sums of cash. Prior case law has established drug dealers must have a secure location from which to work and that location is most often in their home. Consequently, when there is probable cause a suspect is dealing drugs, there often tends to be probable cause evidence of drug dealing will be found in the suspect's home.

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

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Scope

United States v. Hager, 710 F.3d 830 (8th Cir. 2013)

State Police officers investigating Mueller for child pornography offenses discovered he had sent electronic images of his daughters to Hager. Federal agents applied for a warrant to search Hager's residence for copies of the images of Mueller's daughters, and for the metadata, to aid the state officers in their case against Mueller. The magistrate judge issued a warrant authorizing the agents to search Hager's residence for, and the seizure of "sexually suggestive images depicting Mueller's minor daughters wherever they may be stored or found." During the search of Hager's residence, federal agents found over seven hundred VHS tapes. Hager told the agents he used a WebTV connection to copy information from the Internet to VHS tapes. One of the agents contacted an Assistant United States Attorney and who told the agent the VHS tapes were within the scope of the search warrant. Agents seized the tapes and upon viewing, they found child pornography. The agents stopped viewing the tapes and obtained an additional warrant.

Hager argued the first warrant authorized only a search for the metadata of the sexually suggestive images of Mueller's daughters and not a search of the VHS tapes because the VHS tapes could not contain metadata.

The court disagreed, holding the agents did not exceed the scope of the search warrant because it authorized the agents to search for and seize the images of Mueller's daughters "wherever they may be stored or found." Even though the agents sought to examine any metadata from the Mueller images, they sought to recover the metadata in addition to, not to the exclusion of, the images themselves.

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

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Delay in Execution

United States v. Cote, 72 M.J. 41 (2013)

A State Police officer conducting an online child pornography investigation requested assistance from a federal agent in identifying an individual associated with a particular IP address. After the agent determined the IP address was registered to Cote, he obtained a warrant from a federal magistrate judge on July 1, 2008 to search Cote's dormitory room at Minot Air Force Base, North Dakota. The warrant stated any electronic devices or storage media seized under the warrant must be searched within ninety days, unless "for good cause demonstrated, such date is extended by an order of the Court."

On July 2, 2008 the agents searched Cote's dormitory room and seized, among other things, an external hard drive. The State Police were unable to access the hard drive because it was broken, and sometime after August 18, 2008 the case was transferred to the Air Force. Ninety days after the issuance of the warrant, Cote's hard drive had not been searched, and no extension had been requested.

On September 8, 2009, more than one year after the judge issued the search warrant, agents with the Air Force Office of Special Investigations (AFOSI) submitted a request to the Defense

Computer Forensics Laboratory (DCFL) to determine if they could repair Cote's hard drive. The DCFL repaired the hard drive, which contained evidence of child pornography. Cotes filed a motion to suppress all evidence recovered from the hard drive because it was discovered after the ninety-day period specified in the warrant had expired.

After the military judge granted Cote's motion to suppress, the government appealed to the U.S. Air Force Court of Criminal Appeals (CCA). The CCA agreed with the military judge that the DCFL search of the hard drive violated the ninety-day time limit in the search warrant, but held the military judge incorrectly concluded the violation required suppression of the evidence. Cote was convicted of possession of child pornography based on solely on the evidence found on the external hard drive. Cote appealed the CCA's ruling that the evidence recovered from his hard drive was admissible.

The Court of Appeals for the Armed Forces (CAAF) concluded the ninety-day limitation in the search warrant reflected a judicial determination that under the circumstances of this case, ninety days was a reasonable period in which to conduct the search of Cote's hard drive. In addition, the judge established a procedure to extend the search period if the Government found they were unable to meet the ninety-day limitation. Consequently, the CAAF held the Government's violation of the warrant's time limits constituted more than a *de minimis* violation of the search warrant and resulted in an unreasonable search. As a result, the CAAF reversed Cote's conviction and dismissed the child pornography charge.

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

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Detaining Occupants During Search Warrant Execution

Bailey v. United States, 133 S. Ct. 1031 (2013)

Police officers obtained a search warrant for Bailey's apartment. While conducting surveillance prior to the execution of the warrant, the officers saw Bailey come out of the apartment, get into a car and drive away. The officers followed Bailey's car for approximately one mile and then conducted a traffic stop. The officers handcuffed Bailey, told him he was being detained incident to the execution of the search warrant, and drove him back to the apartment. Bailey denied living in the apartment. After the officers found guns and drugs in the apartment, they arrested Bailey. The officers found a key to the apartment in Bailey's pocket during the search incident to arrest. Bailey argued the key should have been suppressed because the officers detained him in violation of the *Fourth Amendment*.

In *Michigan v. Summers*, the United States Supreme Court held it was reasonable under the *Fourth Amendment* for police officers to detain occupants found on the premises during the execution of a search warrant. No additional suspicion is required as the court held the detention allows the officers the opportunity to conduct a safe and efficient search.

The Second Circuit followed the Fifth, Sixth and Seventh Circuit Courts of Appeal and held the officers' authority under *Summers* to detain Bailey incident to the execution of the search warrant was not strictly confined to the physical premises of the apartment as long as the detention occurred as soon as practicable after Bailey left the apartment. The officers' decision

to wait until Bailey had driven out of view of the apartment before detaining him was reasonable given their concern for officer safety and the potential of alerting other possible occupants of the apartment.

The Eighth and Tenth Circuits had declined to extend *Summers* to allow officers to detain an occupant at a location away from that residence even if the occupant was seen leaving the residence subject to a search warrant.

The Court held *Michigan v. Summers* does not permit the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant. Here, the officers detained Bailey approximately one mile from his apartment, a point beyond any reasonable understanding of the immediate vicinity of the premises being searched. If police officers elect to detain an individual after he leaves the immediate vicinity of the premises being searched, that detention must be justified by some other rationale. For example, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause would be permitted.

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

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Particularity

United States v. Dargan, 738 F.3d 643 (4th Cir. 2013)

Police officers suspected Reginald Dargan was involved in the armed robbery of a jewelry store and obtained a warrant to search his residence. Attachment A to the warrant listed items subject to seizure, including among other things, "indicia of occupancy." During the search, officers seized a purchase receipt for a Louis Vuitton belt. The receipt was found in a bag located on top of a dresser in Dargan's bedroom. The receipt indicated the belt cost $461.10 and the buyer, who identified himself as "Regg Raxx," purchased the belt with cash the day after the jewelry store robbery. Dargan was later convicted of the robbery.

On appeal, Dargan argued the seizure of the belt receipt violated the particularity requirement *Fourth Amendment* because the receipt did not fall under any of the items specifically listed Attachment A, which outlined the scope of the search warrant.

The court disagreed. First, the officers were lawfully in Dargan's residence, pursuant to the search warrant. Second, the officers were justified in opening the bag on top of the dresser in Dargan's bedroom to determine whether it contained any of the items they were authorized by the warrant to seize. Third, Attachment A to the search warrant, which listed the items subject to seizure, included "indicia of occupancy, residency of the premises . . . including but not limited to, utility and telephone bills and cancelled envelopes." Police officers may seize an item pursuant to a warrant even if the warrant does not expressly mention or specifically describe the item. Here, the officers conducting the search could have plausibly believed the occupant of the premises was also the purchaser identified on the belt receipt discovered in the bedroom. The receipt, which listed the buyer as "Regg Raxx," therefore constituted at least some indication of occupancy and fell within the terms of Attachment A.

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

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Stale Information

United States v. Garcia, 707 F.3d 1190 (10th Cir. 2013)

Local police officers obtained a warrant to search Garcia's residence for methamphetamine. In the search warrant application, Garcia's residence was described as a single-wide mobile home, without an address, but bearing the number 32 on its west end. Officers included a photograph of the mobile home with their search warrant application. However, the search warrant mistakenly listed the place to be searched as 1220 Mescalero Street. While preparing to execute the warrant, the officers discovered 1220 Mescalero Street was not the mobile home described or pictured in the search warrant application, but rather a traditional house. Regardless, the officers still planned to execute the search on the single-wide mobile home bearing the number 32 as depicted in the photograph in the search warrant affidavit even though that residence was not 1220 Mescalero Street. In addition, although the warrant commanded the officers to conduct the search "forthwith," the search of Garcia's residence did not occur until nine days after the warrant was issued. The officers seized methamphetamine, marijuana, cash and other drug paraphernalia from Garcia's mobile home.

The court held the search warrant was not stale even though the search occurred nine days after the judge issued it, as there was probable cause to believe drugs would continue to be found in Garcia's home. The search warrant affidavit stated the amount of methamphetamine observed in Garcia's home was consistent with "trafficking." This assertion and other statements in the affidavit concerning the ongoing criminal activity at Garcia's home made the passage of time less critical. The court also held the nine-day delay in executing the warrant was within the ten-day limit outlined in Federal Rule of Criminal Procedure 41, regardless of the use of the word "forthwith."

Finally, while obtaining a corrected warrant would have been a better choice, the court held the error concerning the address did not require suppression of the evidence. The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort and whether there is any reasonable probability another premises might be mistakenly searched. Here, the photograph and description of Garcia's home in the affidavit, combined with the knowledge of the officers involved, allowed the executing officers to locate the premises without difficulty and virtually eliminated the possibility of searching the wrong residence.

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

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Automobile Exception (mobile conveyance exception)

Florida v. Harris, 133 S. Ct. 1050 (2013)

During a traffic stop, a police officer noticed Harris had an open beer can and appeared to be very nervous. After Harris refused to a consent search, the officer walked his drug-detection dog, Aldo, around Harris' truck. Aldo alerted at the driver's side door handle, leading the officer

to believe he had probable cause to search Harris' truck. The officer did not find any drugs in Harris' truck but he did find two hundred loose pseudoephedrine pills and other ingredients commonly used in the manufacture of methamphetamine. Harris was arrested and charged with illegal possession of those ingredients.

The trial court held the officer had probable cause to search Harris' truck. The Florida Supreme Court reversed, holding the officer did not have probable cause to search Harris' truck, stating in part, "the fact that the dog has been trained and certified, by itself, is not enough to establish probable cause to search the interior of the vehicle." The court stressed the need for "evidence of the dog's performance history," including records showing "how often the dog has alerted in the field without contraband having been found."

The United States Supreme Court agreed with the trial court and reversed the Florida Supreme Court in holding the officer had probable cause to search Harris' truck.

In determining whether probable cause to search exists, the court has consistently looked to the totality of the circumstances and rejected rigid bright-line tests. The Florida Supreme Court ignored this established approach by creating a strict evidentiary checklist to assess a drug-detection dog's reliability. The question, similar to every inquiry into probable cause, is whether all the facts surrounding a dog's alert would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.

In this case, the state introduced substantial evidence describing Aldo's initial and refresher training and his continued proficiency in finding drugs. Because training records established Aldo's reliability in detecting drugs and Harris failed to undermine that showing, the officer had probable cause to search Harris' truck.

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

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See U.S. v. Powell, 732 F.3d 361 (5th Cir. 2013)

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United States v. Johnson, 707 F.3d 655 (6th Cir. 2013)

A police officer stopped a car driven by Johnson for a seat-belt law violation. As the officer approached the car, he smelled the odor of marijuana. Johnson's female passenger admitted to having smoked marijuana in the car a few minutes earlier. Johnson then told the officer he knew he would be arrested because a condition of release for a prior conviction required him to stay away from the passenger. Johnson also told the officer he was a convicted felon and there was a loaded gun in his car. The officer handcuffed Johnson and placed him in the back of his patrol car. The officer confirmed the passenger's identity, searched Johnson's car, found the gun and confirmed Johnson was a convicted felon.

Johnson claimed the search of his vehicle was not incident to a valid arrest because the officer arrested him prior to confirming the identity of the passenger as the person listed on his condition of release.

Without deciding the search incident to arrest issue, the court held the officer lawfully searched Johnson's car under the automobile exception to the warrant requirement. First, the officer had probable cause to believe Johnson's car contained evidence of a crime after he smelled the odor of marijuana in the vehicle. Second, the officer had probable cause to believe there was a gun in the car after Johnson voluntarily told him he was a convicted felon and there was a loaded gun under the seat.

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

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United States v. Richards, 719 F.3d 746 (7th Cir. 2013)

An undercover police officer agreed to purchase ten kilograms of cocaine from a high-level drug dealer at his house. As directed, the officer followed a pick-up truck from a mall parking lot to the drug dealer's house and then backed his car into the garage once the truck left. After men loaded bags into the trunk, the undercover officer drove away. Police officers maintained surveillance on the house after the buy because the undercover officer suspected additional drugs remained on the property, while other police officers followed the pick-up truck.

About twenty minutes later, the officers saw the same pick-up truck meet a gray Lexus in the same mall parking lot. The Lexus followed the pick-up truck to the house and backed into the garage as the undercover officer had done. Ten minutes later, the Lexus emerged from the garage and drove away. While following the Lexus, officers confirmed the substance previously loaded into the undercover officer's car had tested positive for cocaine. After an hour of surveillance during which the Lexus violated no traffic laws, the officers conducted a traffic stop. Without consent, the officers searched the car and found a backpack in the trunk. Inside the backpack, the officers found approximately ten kilograms of cocaine. Richards, the driver, and Rodgers, the passenger, denied ownership of the bag; however, both were arrested. None of the officers involved in the operation had any information connecting either Richards or Rodgers to the target drug dealer before they drove up to his house in the gray Lexus. In addition, the officers had no information that another drug deal would occur at the house that day.

Richards moved to suppress the cocaine found in the backpack, arguing the officers lacked probable cause to stop and search the gray Lexus.

The court disagreed, holding the facts and circumstances known to the officers at the time of the stop provided probable cause to believe the Lexus had picked up drugs during its brief stop at the house. Consequently, the officers were allowed to search the Lexus under the automobile exception to the *Fourth Amendment's* warrant requirement.

First, the officers knew an undercover police officer had purchased ten kilograms of cocaine from the house less than an hour before the Lexus arrived, and the undercover officer believed more cocaine remained at the house.

Second, the officers knew the Lexus met another vehicle and then followed that vehicle to the house, as the undercover officer had done. After arrival, the other vehicle left and the Lexus backed into the garage where it remained for approximately ten minutes before leaving, as the

undercover officer had done. These facts and circumstances generated a fair probability that Richards had picked up drugs just as the undercover officer had.

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

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United States v. Skoda, 705 F.3d 834 (8th Cir. 2013)

A police officer saw a van parked on a gravel driveway that led to a shed on a piece of property the officer thought was vacant. As the officer approached the van, he saw another vehicle behind it. Bargen got out of the van and told the officer Skoda had called him about car trouble, but had since walked away. The officer saw items associated with the production of methamphetamine near both vehicles. The officer called Skoda's father, who owned the property, and obtained consent to search it. The officer also saw what he believed was a pseudoephedrine pill and empty pseudoephedrine boxes in Skoda's vehicle. The officer searched Bargen's van then Skoda's vehicle and found additional items associated with the production of methamphetamine in both.

Skoda moved to suppress the evidence found at the property and in his vehicle. Skoda claimed he had a reasonable expectation of privacy in the property because it was owned by his family, and the officers lacked probable cause to search his vehicle.

The court disagreed, holding Skoda had no legitimate expectation of privacy in the property because he had no ownership or possessory interest in it. The fact the property belonged to his father was irrelevant because defendants have no expectation of privacy in a parent's home when they do not live there. In addition, Skoda's father expressly permitted the officer to search the property.

The court further held the officers lawfully searched Skoda's vehicle under the automobile exception to the warrant requirement because they had probable cause it contained contraband. It was late at night in a remote area and the suspiciousness of Bargen's presence was heightened by his story about Skoda calling for help and then walking away. The officer saw implements of methamphetamine production near both vehicles, including a lithium battery shell casing, pliers, lithium strips, tin foil and a gas can with a plastic tube coming out of it. The officer saw a red tablet that looked like pseudoephedrine in the car along with a bag containing pseudoephedrine boxes on the floorboard. Finally, the other implements of methamphetamine production found in Bargen's van increased the probability that contraband or evidence of a crime was in Skoda's vehicle.

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

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United States v. Rodriguez, 711 F.3d 928 (8th Cir. 2013)

A police officer pulled Rodriguez over because his car did not have license plates and the registration had expired. Rodriguez told the officer his driver's license was suspended, but provided his date of birth. The officer ran a records check and learned Rodriquez had a possible felony warrant pending in California. During this time, the officer saw Rodriguez and the front-

seat passenger reaching for the floorboard and looking back towards him. After a back-up officer arrived, Rodriguez was ordered out of his car. The officer asked Rodriguez what he had been searching for in the car and Rodriguez told him there was a handgun in the center console. The officer handcuffed Rodriguez and placed him in his patrol car and then handcuffed the passenger and put him in a separate patrol car. The officer then asked Rodriguez if there was any other contraband in the car, and Rodriguez told him there was a methamphetamine pipe under the seat. The officer searched the car and found a loaded handgun and the methamphetamine pipe. Rodriguez was arrested and charged with drug and firearms offenses.

Among other things, Rodriguez claimed the search of his car was an improper search incident to arrest, citing *Arizona v. Gant*. Without deciding the *Gant* issue, the court held the search was lawful under the automobile exception. After Rodriguez told the officer a handgun and methamphetamine pipe were located in the vehicle, the officer had probable cause to search the car.

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

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See U.S. v. Guevara, 731 F.3d 824 (8th Cir. 2013)

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Computers / Electronic Devices / Wiretaps /Bugs

Wiretaps

United States v. North, 728 F.3d 429 (5th Cir. 2013)

As part of a drug trafficking investigation, federal agents obtained a wiretap order on North's cell phone from a federal judge in the Southern District of Mississippi. Information obtained from the interception of North's cell phone on May 9 and 16, 2009, led to North's arrest for possession of cocaine.

Title III of the Omnibus Crime Control and Safe Streets Act of 1986 authorizes the use of wiretap surveillance in criminal investigations. Under Title III, a federal judge may enter an order authorizing the interception of cell phone communications within the territorial jurisdiction of the court in which the judge is sitting. The Fifth Circuit Court of Appeals has held the "interception" includes both the location of a tapped telephone and the original listening post, and that a judge in either jurisdiction has authority under Title III to issue wiretap orders.

North argued the district court in Mississippi lacked territorial jurisdiction to authorize the interception of the cell phone call on May 9, 2009, because when the agents intercepted the call his phone was located in Texas and the government's listening post was located in Louisiana.

The court agreed. The district court located in the Southern District of Mississippi lacked the authority to permit interception of cell phone calls made from Texas at a listening post in Louisiana. In addition, the court held suppression of the information obtained from the May 9, 2009, wiretap was warranted.

North further argued the agents failed to follow the minimization protocols during interception of the May 16, 2009, phone call between North and a female friend who was not under investigation. North claimed the agents conducted uninterrupted monitoring of a one-hour telephone conversation that had no connection to the drug smuggling investigation.

The court agreed and suppressed the evidence obtained from the interception of the phone conversation. The agents were authorized to spot-monitor North's cell phone conversations for no more than two minutes at a time. However, the agents were authorized to continue monitoring if the conversation related to the drug smuggling investigation. The court found the agents did not stop listening when it was made clear the conversation was not criminal in nature and they did not conduct subsequent spot checks by checking on the conversation to determine if it had turned to criminal matters. Rather, the agents listened to the conversation for several minutes before dropping out for less than one minute at a time before resuming their near continuous listening. Under these circumstances, the court held it was not objectively reasonable for the agents to listen for nearly one hour to a conversation that did not turn to criminal matters until the last few minutes.

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

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United States v. Barajas, 710 F.3d 1102 (10th Cir. 2013)

During an investigation into a drug trafficking organization, federal agents engaged in wiretap surveillance and global positioning satellite (GPS) pinging of cell phones used by members of the organization, to include Barajas. Under the court orders that authorized the wiretaps, agents were also authorized to conduct the GPS pings, where the agents would contact the service provider, and the service provider would give the agents the current GPS coordinates of the particular cell phone, within a certain radius.

At trial, the government introduced conversations recorded during the wiretaps and GPS data obtained from pinging Barajas' cell phones.

Barajas argued the affidavits in support of the wiretaps did not establish necessity for the wiretaps as required under *Title III*. Barajas also argued GPS pinging should not have been covered by the wiretap orders because there was no probable cause in the affidavits to support the search for GPS data.

First, the court held the government satisfied the necessity requirement in its affidavits requesting the wiretaps. In each affidavit, the agent explained why traditional investigative techniques such as confidential sources and visual surveillance were ineffective, and why other techniques like trash searches and search warrants would prove ineffective if tried. The court commented the government was not required to exhaust all other conceivable investigative procedures before resorting to wiretapping. In addition, the need for the government to discover the size and scope of a criminal conspiracy often justifies the authorization of wiretaps.

Second, the court was not convinced Barajas' use of the cell phones for criminal activity was enough to authorize the agents access to the GPS data. Without an explanation of how Barajas' location would reveal information about the workings of the conspiracy, the court was reluctant

to find probable cause existed to obtain to the GPS data. However, the court held it did not have to resolve this issue as the good-faith exception applied.

The court held the affidavit in support of the wiretap order established a minimally sufficient nexus between the illegal activity and the place to be searched. The government knew a person known only as "Samy" was using the cell phones for criminal activity. The government did not know "Samy's" identity; therefore, access to the GPS data would help the government identify him. Further, because the area of electronic law is very much unsettled, there is no reason to believe the government cannot obtain GPS data though a wiretap order. Assuming that pinging is a search, the standard needed to obtain GPS data is probable cause, the same standard needed to obtain a wiretap order.

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

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Installation of Audio Recording Device (Bug) in Suspect's Vehicle

United States v. Glover, 736 F.3d 509 (D.C. Cir. 2013)

The FBI obtained a warrant from a district court judge in the District of Columbia to install an audio recording device in Glover's truck. At the time, Glover's truck was parked in Baltimore, Maryland. The warrant stated the FBI agents could forcibly enter Glover's truck, regardless of whether the vehicle was located in the District of Columbia, District of Maryland or the Eastern District of Virginia. Information obtained from the recording device was admitted against Glover at trial.

Glover argued the evidence obtained from the recording device should have been suppressed because the warrant authorizing its installation was invalid. Specifically, Glover claimed under 18 U.S.C. § 2518(3) the judge in the District of Columbia could not authorize the installation of the recording device in his truck while the truck was located in in Maryland.

The government argued the district court judge in the District of Columbia could authorize the installation of the recording device on a vehicle located anywhere in the United States.

The court agreed with Glover. The court held under 18 U.S.C. § 2518(3) a judge could not authorize the installation of an electronic recording device, if at the time the warrant was issued, the property on which the recording device was to be installed was not located in the authorizing judge's jurisdiction. Consequently, the judge from the District of Columbia did not have the authority to issue the warrant authorizing the installation of the recording device in Glover's truck while the truck was located in the District of Maryland.

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

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Consent Searches

United States v. Robertson, 736 F.3d 677 (4th Cir. 2013)

A person called the police department and reported three African-American males in white t-shirts were chasing an individual who was holding a firearm. When police officers arrived, they saw a group of six or seven individuals in a nearby sheltered bus stop. Three of the individuals were African-American males wearing white shirts. Robertson was also in the bus shelter, but he was wearing a dark colored shirt. While three or four officers dealt with the males in the white shirts, another officer focused on Robertson. The officer stood in front of Robertson, who was seated and blocked on three sides by the walls of the bus shelter. The officer asked Robertson if he had anything illegal on him, but Robertson remained silent. The officer then waved Robertson forward while at the same time asking Robertson if he would consent to being searched. Robertson stood up, turned around and raised his hands. The officer searched Robertson and recovered a firearm from him. Robertson was arrested for illegal possession of a firearm.

Robertson argued the firearm should have been suppressed because he did not consent to being searched by the officer. Instead, Robertson claimed, when he stood up, turned around and raised his hands, he was complying with an order issued by the officer.

Even after exclusively relying on the facts taken from the officer's testimony, the court agreed with Robertson. The officer's questioning was immediately accusatory, with the officer's first question being whether Robertson had anything illegal on him. After Robertson responded with silence, the officer waved Robertson forward and asked to conduct a search. The officer blocked Robertson's exit and never told Robertson he had the right to refuse the search. The officer's initial, accusatory question, combined with the police dominated atmosphere in the bus shelter, clearly communicated to Robertson that he was not free to leave or to refuse the officer's request to conduct a search. Robertson's behavior was not a clear voluntary invitation to be searched, but rather a begrudging surrender to the officer's order.

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

*****

United States v. Cotton, 722 F.3d 271 (5th Cir. 2013)

Cotton was driving his rental car, when without changing lanes or slowing his speed as required by Texas law, he passed a police officer parked on the side of the road. The officer, having already received a tip Cotton might be carrying drugs, conducted a traffic stop. The officer twice asked Cotton for consent to search the car. Cotton replied both times the officer could search his luggage. After locating and searching luggage located in the backseat of the car, the officer examined the driver's side rear door for evidence of contraband and saw loose screws and tool marks on the door's panel. The officer pried back the panel and discovered crack cocaine. The officer arrested Cotton who then made incriminating statements to the officer.

Cotton argued the officer exceeded the scope of his limited consent to search when, instead of only searching his luggage, the officer searched the entire car for contraband.

The court agreed. Cotton's consent only allowed the officer to search anywhere in the car luggage might be found and then search the luggage. However, the video evidence and the officer's own testimony revealed the officer discovered the loose screws and tool markings on the door panel after he had located and searched Cotton's luggage. The court concluded the officer impermissibly expanded the scope of Cotton's consent by examining the driver's side rear door after he had already located and searched Cotton's luggage. Consequently, the court held the drugs discovered during the officer's unlawful search should have been suppressed as well as Cotton's incriminating statements.

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

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United States v. Perry, 703 F.3d 906 (6th Cir. 2013)

Two police officers responded to a boarding house where Perry lived after one of the residents reported she had pointed a handgun at him. The officers found Perry in the hallway outside her room. The officers handcuffed and frisked Perry but found no gun. The officers asked for Perry's consent to search her room, which she granted. Inside Perry's room, the officers found a handgun sticking out from a pillow on her bed. Perry was charged with being a felon in possession of a firearm.

Perry claimed she did not consent to the search of her room, but if she did, her consent had been obtained involuntarily because when she gave consent she was handcuffed, the officers were armed, the officers never told her she could decline and she was drunk.

First, the two officers and a third witness testified Perry consented to the search of her room. After reviewing the record, the court found the district court did not commit any error by crediting their testimony.

Second, notwithstanding Perry's claims, the facts clearly supported the district court's finding Perry voluntarily consented to the search of her room. Perry was no stranger to the criminal justice system, having been arrested fifty seven times and presumably handcuffed each time. Perry's encounter with the officers in the hallway was brief, without any repeated questioning or physical abuse. In addition, none of the other facts she cited supported a finding that her consent was involuntarily obtained.

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

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United States v. Sabo, 724 F.3d 891 (7th Cir. 2013)

Suspecting Sabo was smoking marijuana in his trailer, a police officer knocked on the trailer door. Sabo opened the door and stood in the doorway, physically blocking the officer's entry. The officer asked Sabo, "Do you mind if I step inside and talk with you?" Sabo said nothing, but instead stepped back and to the side and left the door open. The officer entered the trailer and immediately noticed a strong odor of marijuana and several guns leaning against a wall. Knowing Sabo was a convicted felon, the officer had Sabo sit on the couch while the guns were

secured. The officer then obtained a warrant and seized marijuana from the trailer. Sabo was charged with several drug and firearm offenses.

Sabo argued the officer violated the *Fourth Amendment* when the officer entered his trailer without consent.

The court disagreed, holding Sabo's non-verbal response to the officer's question constituted implied consent for the officer to enter his trailer. The court commented that on more than one occasion it had found that the act of opening a door and stepping back to allow an officer to enter was sufficient to demonstrate consent.

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

*****

United States v. $304,980.00 in United States Currency, 732 F.3d 812 (7th Cir. 2013)

Police officers conducted a traffic stop on a tractor-trailer driven by Davis. After Davis denied he was transporting any drugs or large sums of money, he orally consented to a search of his truck and unlocked the driver's side door for one of the officers. While the officer began searching, another officer explained a Consent-to-Search Form that had been given to Davis. Davis became agitated and he asked the officer what they were looking for in his truck. The officer told Davis they were looking for drugs or large sums of money. After Davis refused to sign the form, the officer told his colleague to stop searching Davis' truck. When the search officer asked Davis if they still had his consent to search, Davis wrote something on the consent form and gave it back to the officer. The officer glanced at the consent form, saw what appeared to be a signature on the bottom, and put the form in his pocket. The search officer continued searching and found a piece of plywood underneath the mattress in the sleeping compartment. The officer used a screwdriver to pry up the edge of the plywood and discovered a hidden compartment containing $304,000 in United States currency. The officers took Davis into custody and seized the truck and the cash. A few days later, the officers examined the consent form and discovered that rather than signing his name on the signature line, Davis had written the words "UNDER PROTEST," in an elaborate script along with his initials.

Davis was not criminally charged, however the government kept the truck and the cash and filed a civil forfeiture action.

Davis moved to suppress the currency, arguing the search of his truck violated the *Fourth Amendment* because it was conducted without consent or probable cause.

The court held Davis consented to the search of his truck when he gave the officer oral consent and then unlocked the driver's side door. Once inside the truck, the officer lawfully searched the hidden compartment beneath the mattress because it was capable of concealing drugs or money.

The court further held Davis never withdrew or limited the scope of his consent. First, Davis wrote something on the consent form and gave the form back to the officer without saying anything. The court found this act would have led an objective officer to believe Davis had signed the form and affirmed his consent. Second, the officer looked at the form, and seeing two words written on the signature line, believed Davis had signed it. The court examined the form and found the officer's belief to be reasonable. Finally, Davis' conduct after he signed the form

was not consistent with a person who had revoked his consent, as Davis engaged the officer in casual conversation and volunteered that he had been in trouble with the law in the past.

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

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United States v. Suing, 712 F.3d 1209 (8th Cir. 2013)

An Arizona police officer stopped Suing, a resident of Nebraska, for a traffic violation and obtained consent to search his vehicle. During the search, the officer found what he believed might be a hidden compartment used to transport drugs. After a drug-dog alerted on Suing's vehicle, the officer brought it to the police station for a more thorough search. The officer found an external computer hard drive in a bag on the front seat. Based on his experience of hard drives containing evidence of narcotics activities, such as ledgers, photographs and other incriminating information, the officer plugged the hard drive into a computer to search its contents. Almost immediately, the officer found a number of thumbnail images of child pornography. The officer shut the computer down, contacted a local prosecutor for advice, and then obtained a warrant to search Suing's hard drive for evidence of child pornography. Suing was arrested after the officer found thousands of images and videos of child pornography on the hard drive.

After police in Nebraska learned of Suing's arrest in Arizona, they obtained a warrant to search his apartment. During that search, officers found images and videos of child pornography on computer hard drives in the apartment.

Suing claimed the search of his computer hard drive for child pornography by the police in Arizona exceeded the scope of his consent to search his vehicle for drugs. Suing also claimed the search of his apartment in Nebraska was unlawful because the search warrant was based on evidence unlawfully obtained by the police in Arizona. Finally, Suing claimed subpoenas issued by the prosecutor in Nebraska to his internet service provider, which allowed the prosecutor to obtain his subscriber information, violated his *Fourth Amendment* rights.

The court held even if Suing's consent was limited to a search of the vehicle for evidence of drug activity, the officer did not exceed the scope of that consent. When the officer found images of child pornography on the computer hard drive, he immediately stopped searching for evidence of illegal drug activity, called a prosecutor for advice and obtained a warrant authorizing the search for child pornography.

Consequently, because the Arizona officer lawfully obtained evidence of child pornography from the computer hard drive, that information could be included in the search warrant affidavit drafted in support of the warrant to search Suing's Nebraska apartment.

In conclusion, the court held Suing had no expectation of privacy in the government's acquisition of his subscriber information, to include his IP address and name from the third-party internet service provider; therefore, there was no *Fourth Amendment* violation.

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

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United States v. Capps, 716 F.3d 494 (8th Cir. 2013)

A police officer conducted a traffic stop because the officer knew Capps did not have a valid driver's license and there was an active felony warrant for Capps' arrest. During the stop, the officer discovered the license plates on Capps' vehicle were registered to a different vehicle. After the officer asked Capps for consent to search the vehicle, Capps told the officer to check the trunk for a second set of license plates. The officer clarified he wanted to search the entire vehicle and told Capps he could refuse this request if he wished. Capps eventually responded, "just go ahead and look." During the search, the officer found a bag containing methamphetamine under the hood of Capps' vehicle.

Capps moved to suppress the methamphetamine, arguing the officer violated the *Fourth Amendment* because any consent he provided was involuntary, in part because the officer failed to advise Capps of *Miranda* rights before asking for consent to search.

The court disagreed. Capps was in his thirties at the time of the incident and did not claim to possess below average intelligence or any other barriers to effective communication. In addition, Capps appeared to be sober and his prior interactions with law enforcement make it more likely he was aware of his rights. Finally, while lack of *Miranda* warnings is a relevant factor to consider, the Eighth Circuit has never required a police officer to provide *Miranda* warnings before requesting consent to search. Here, the weight of the other factors indicated the absence of *Miranda* warnings prior to the search did not affect Capps' otherwise voluntary consent.

Capps further argued even if his consent was voluntary, his consent to search the vehicle was limited to the trunk.
Again, the court disagreed. The court determines the scope of a person's consent by considering what an objectively reasonable person would have understood the consent to include. Here, the court held that Capps' statement, "just go ahead and look" would have led an objectively reasonable person to believe Capps consented to a search of the entire vehicle.

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

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United States v. Guevara, 731 F.3d 824 (8th Cir. 2013)

A police officer stopped Guevara for "impeding traffic" because Guevara was driving seven miles-an-hour under the speed limit, in the left hand lane of the interstate highway, forcing other traffic to pass her in the right lane. Guevara told the officer she was going to visit her aunt and had borrowed the car from a person whom she did not know very well. After Guevara gave the officer consent to search her car, the officer had Guevara sit in his car while he conducted the search. Guevara's sister, who was a passenger in the car, separately told a back-up officer the women were going to visit their mother. After searching the passenger compartment and underside of the car, the officers began to search the engine compartment. The officers noticed the engine was very clean for such an old vehicle and saw the bolts on the intake manifold had an unusual amount of wear. The officers also saw fingerprints and smudge marks, which suggested someone, had touched the area. The officers removed the bolt securing the air manifold intake cover and discovered a hidden compartment. The officers drilled a hole into the compartment and saw cardboard and plastic. The officers detained Guevara and had her car

towed to a garage. At the garage, methamphetamine was discovered in the hidden compartment. Guevara was convicted of possession with intent to distribute methamphetamine.

Guevara argued that even though she initially consented to the search of the car, her consent was rendered invalid because she was deprived of an opportunity to withdraw or limit her consent by being placed in the officer's car during the search.

After holding the officer had probable cause to stop Guevara, the court explained there were no decisions to date which held that officers have a duty to ensure an individual has an opportunity to withdraw or limit consent. Even if the officers had such a duty, the court held Guevara failed to make an effort to withdraw or limit her consent in a timely manner. Although Guevara claimed she knocked on the window of the officer's car to get his attention so she could withdraw or limit her consent, the squad car's video indicated the officers found the hidden compartment five or six minutes before Guevara claims to have knocked on the window.

Guevara also argued the officers did not have probable cause to conduct a destructive search of her car's engine compartment.

Again, the court disagreed. First, the women gave the officers inconsistent stories concerning their travel plans. Second, the engine compartment was unusually clean and bolts on the intake manifold looked like they had been taken on and off. Third, the car had been loaned to Guevara by a third party. Finally, the hidden compartment in the intake manifold was, in the officer's experience, a typical location in which to smuggle drugs in a vehicle of that type. Based on these facts, once the officers discovered the hidden compartment, they had probable cause to believe drugs were concealed in intake manifold and were entitled to search the vehicle in a destructive manner.

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

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Third Party Consent (Common Authority / Apparent Authority)

United States v. Lindsey, 702 F.3d 1092 (8th Cir. 2013)

Two officers went to a house where they thought a suspect was located. The officers knocked on the door and a woman answered. After the woman denied the suspect was inside, she allowed the officers to come in and search the house. The officers did not locate the suspect; however, they found Lindsey and arrested him on an outstanding warrant. The officers recovered a cell phone on Lindsey during their search incident to arrest. Information from the cell phone was later used against Lindsey at trial.

Lindsey argued the cell phone information should have been suppressed, claiming the woman could not lawfully consent to the search of the house where the officers arrested him.

The court held the officers reasonably relied on the woman's apparent authority to consent to the search. The woman answered the door and showed familiarity with the house when she denied the suspect the officers were seeking was present and then she consented to the officers' request to walk through the house. The court found answering the door and showing knowledge of the occupants inside sufficiently demonstrated the woman's authority over the premises.

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

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United States v. Scott, 732 F.3d 910 (8th Cir. 2013)

Federal agents suspected Scott robbed a bank and then used his car as the get-away vehicle. Agents went to Scott's apartment complex, where they saw Scott's girlfriend, Michon Starnes, drive up and get out of Scott's car. Starnes told the agents the car belonged to Scott, but she had the only set of keys and was the primary driver because Scott's license was suspended. Starnes gave the agents written consent to search the car. The agents found a dark mask inside the car containing Scott's DNA, which was later admitted against him at his trial for bank robbery.

Scott argued mask should have been suppressed because Starnes did not have authority to consent to the search of his car.

The court disagreed, holding the trial court properly ruled that Starnes had common authority over car. The court noted Starnes was the car's only licensed driver, she possessed the only set of keys to the car, and Scott had allowed Starnes to drive the car home from work the day the agents encountered her. Consequently, Starnes had authority to consent to the search Scott's car.

The court further held Starnes' consent was obtained voluntarily. Starnes testified when the agents asked her for consent to search she said, "yes" and then unlocked the car for the agents.

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

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United States v. Tosti, 733 F.3d 816 (9th Cir. 2013)

Tosti took his computer to a CompUSA store for service. After a computer technician found child pornography on Tosti's computer, he called the police. When an officer arrived, there were numerous photographs appearing on Tosti's computer monitor in a very small thumbnail format. Even though the officer could tell the thumbnail photographs depicted child pornography, the officer directed the computer technician open the photographs in slideshow format. In slideshow format, the photographs appeared larger and were viewable one by one. A second officer arrived later and scrolled through the photographs in thumbnail format. The officers seized Tosti's computer and eventually arrested Tosti.

A few days later, Tosti's wife gave a police officer a computer, several external hard drives and numerous DVDs that appeared to contain child pornography. Ms. Tosti signed a Consent-to-Search Form, which indicated the items came from a home office, to which she had access and that both she and her husband used the computer and storage devices.

Tosti was convicted of possession of child pornography.

On appeal, Tosti argued both officers violated the *Fourth Amendment* by exceeding the scope of the computer technician's private search. Tosti claimed the initial violation occurred when the first officer directed the computer technician to open the photographs in slideshow format and the second violation occurred when the other officer scrolled through the thumbnail photographs.

The court disagreed. First, the court held neither officer searched Tosti's photographs for *Fourth Amendment* purposes because the computer technician's prior viewing of the photographs destroyed Tosti's reasonable expectation of privacy in them. Second, even if the first officer viewed the enlarged versions of the thumbnails in slideshow format, the officer did not exceed the scope of the computer technician's prior search because the thumbnail photographs clearly depicted child pornography. The officer learned nothing new by enlarging the photographs and viewing them in slideshow format. Finally, the court held Tosti was not entitled to suppression on the basis that the second officer scrolled through the thumbnails because the officer did not view any more photographs than the computer technician had viewed.

Tosti also argued his wife had neither actual nor apparent authority to consent to the searches of the items she turned over to the police.

Again, the court disagreed. The Tostis were married and resided in their shared residence for over twenty years. Ms. Tosti told the officer both she and her husband used the computer and storage devices located in their home. There was no indication at the time of the search the officer knew Ms. Tosti might not have the authority to consent. Even if Ms. Tosti's representations were not true, there was no objective indication her access to the home office was limited. In addition, the computer and electronic media were neither password protected nor encrypted. As a result, the officer reasonably believed Ms. Tosti had authority to consent.

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

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United States v. Arreguin, 735 F.3d 1168 (9th Cir. 2013)

Federal agents went to a house to conduct a knock and talk investigation because they suspected the occupants were involved in drug trafficking. An agent testified he and his fellow agents did not know who lived in the house, but they planned to obtain this information during the knock and talk. The agent also acknowledged that when the agents approached the house, they did not know who was inside. After the agent knocked on the door, Valencia opened it. The agent told Valencia he knew drug-related activity occurred at the house in the past and then said to Valencia, "We would like to come in and look around. Can we come in?" Valencia said "Yes," and stepped back to allow the agents to enter the house.

The agents went into the master bedroom and attached master bathroom where under the sink they found a shoebox containing a white powdery substance. The agents also went through a door in the master bedroom that led to the garage. In the garage, the agents seized cash from a car parked there.
While agents searched the house, Arreguin told one of the agents he and his wife lived in the house and that Valencia was a guest visiting from out-of-town.

After the government indicted Arreguin, he moved to suppress the evidence seized by the agents, claiming the agents lacked valid consent for the warrantless search of his house.

The court held it was not objectively reasonable for the agents to believe Valencia had authority to consent to a search of the master bedroom and bathroom or the garage just because he answered the door. When the agents obtained Valencia's consent to "look around" the house, the court concluded they knew virtually nothing about Valencia, the various rooms and areas

inside the house or the nature and extent of Valencia's connection to those areas. Instead of asking Valencia additional questions, the agents quickly rushed past him in a state of near ignorance when they searched the master bedroom and garage. The agents knew far too little to hold an objectively reasonable belief that Valencia could consent to a search of those areas.

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

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Exigent Circumstances

Destruction of Evidence

Missouri v. McNeely, 133 S. Ct. 1552 (2013)

A police officer stopped McNeely for speeding and crossing the centerline. After McNeely refused to take a breath test, the officer took him to a hospital for blood testing. McNeely refused to consent to the blood test. Without obtaining a search warrant, the officer directed a lab technician to take a sample of McNeely's blood. A subsequent test measured McNeely's blood alcohol concentration at 0.154 percent, which was above the legal limit of 0.08 percent. McNeely was charged with driving while intoxicated.

McNeely argued taking his blood for chemical testing without first obtaining a search warrant violated his rights under the *Fourth Amendment*. The state trial court and the Missouri Supreme Court agreed. The State of Missouri appealed to the United States Supreme Court.

The Supreme Court held in drunk-driving investigations the natural dissipation of alcohol in the bloodstream does not automatically create an exigency sufficient to justify conducting a blood test without a warrant. The court recognized in some cases the circumstances will make obtaining a search warrant impractical and the dissipation of alcohol from the bloodstream will create an exigency justifying a properly conducted warrantless blood test. However, the court concluded whether such an exigency exists must be determined case by case based on the totality of the circumstances.

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

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United States v. Smith, 715 F.3d 1110 (8th Cir. 2013)

Federal agents in St. Louis suspected Smith was involved in a scheme to obtain cash by false pretenses from U.S. Bank. The agents knew Smith had been involved in a similar scheme in Los Angeles and had since relocated to St. Louis. In addition, the agents traced emails sent to U.S. Bank to a house across the street from Smith's residence that had an unsecured wireless router, which would allow anyone within range to access the internet. Finally, U.S. Bank gave the agents a recording of a phone conversation between a bank employee and the individual trying to fraudulently obtain the cash. An agent familiar with Smith's voice confirmed the voice on the recording belonged to Smith.

While conducting surveillance, the agents saw Smith and another person, later identified as Lewis, go into a restaurant. The agents entered and arrested Smith as he came out of the

restroom. The agents seized a messenger bag, which was approximately fifteen to twenty feet away at a table with Lewis.

An inventory search of the bag revealed a laptop computer, a cell phone and bank records. The agents secured the items and obtained a warrant to search the bag, laptop and cell phone.

Smith argued the agents did not have probable cause to arrest him; therefore, the items recovered from the messenger bag after his arrest should have been suppressed. Even if his arrest was supported by probable cause, Smith argued the messenger bag and its contents were illegally seized and searched by the agents before they obtained a warrant.

The court disagreed. First, the agents had probable cause to arrest Smith. The agents knew Smith was a suspect in a similar scheme conducted in Los Angeles and an agent identified the voice of the person calling U.S. Bank to set up the scheme as belonging to Smith.

Second, the agents lawfully seized Smith's bag because they had probable cause to believe the bag contained evidence of a crime. The bag resembled the type of bag used to transport a laptop computer and the agents knew e-mails were sent to U.S. Bank from various access points, making it likely a laptop had been used in the scheme. Immediate seizure of the bag was necessary to prevent the destruction of evidence.

Finally, even though the agents slightly deviated from their agency's inventory search policy, the search was still reasonable because it was not pretext for a general search for evidence.

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

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Emergency Scene

United States v. Yengel, 711 F.3d 392 (4th Cir. 2013)

Police officers arrested Yengel at his house after responding to a 911 call from his wife concerning a domestic assault. After Yengel was removed from the scene, Mrs. Yengel told the officers her husband kept a large number of firearms and a grenade inside the house. Officers also learned Mrs. Yengel's young son was asleep in his bedroom. One of the officers asked Mrs. Yengel to show him where the grenade was located and she directed him to a guest bedroom next to her son's bedroom. Mrs. Yengel pointed to a locked closet, to which she did not have access, and told the officer the grenade was inside. At this point, the officer had not notified explosive experts, did not evacuate the house or nearby homes and did not remove Mrs. Yengel's son from the adjoining bedroom. Without a search warrant, the officer pried the closet door open with a screwdriver. After the officer saw an ammunition canister he believed might contain the grenade, he evacuated Yengel's house and several neighboring houses. An explosive ordinance disposal team later searched the closet and found a backpack that contained a partially assembled explosive device, but no grenade. Yengel was charged with possession of an unregistered destructive device.

The court agreed with the district court, which held the warrantless entry and search of the closet was not justified by exigent circumstances. Under the emergency-scene exigency, an officer making a warrantless entry and search must have an objectively reasonable belief an emergency

exists that requires immediate entry to render assistance or prevent harm to others. In this case, the court held a reasonable officer would not have believed the circumstances created an emergency that would have justified a warrantless entry and search of the closet.

First, Mrs. Yengel told the officer only that there was a grenade in the house. Mrs. Yengel did not tell the officer when she last saw the grenade or give the officer any facts that could support a conclusion the grenade was "live" or could detonate at any moment. Here, the possible existence of a grenade, without other facts to establish that it posed a threat of danger, did not create an exigency to justify a warrantless search.

Second, the immobile and inaccessible location of the threat further diminished the scope of any possible danger. The suspected grenade was inside a locked closet that only Yengel could access. Once Yengel was arrested and removed from the scene, the threat that someone might access the closet and gain control of the grenade was significantly diminished.

Finally, because no officers on the scene attempted to evacuate Mrs. Yengel's son, who was asleep in the room directly next to the suspected grenade, or any of the nearby homes, provided clear evidence the officers did not believe an on-going emergency existed when he entered the closet.

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

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United States v. Daws, 711 F.3d 725 (6th Cir. 2013)

Police officers responded to the scene of an armed home invasion. The victim told officers Daws had entered his house, threatened him with a shotgun, stole his cash and then warned the victim he would return and kill him if the victim called the police. While interviewing the victim, the officers received a call from a man who claimed Daws had just come over to his house, and asked the man to hide a shotgun for him. In addition, several officers knew that Daws had felony convictions for weapons violations and had served prison time for robbing a gas station at gunpoint.

The officers immediately went to Daws' house where they saw a man sitting outside. The officers overheard the man telling someone on his cell phone that he and Daws had "done something bad" and they were probably going to jail. The man told the officers Daws was inside the house. The officers entered Daws' house through an open door and found Daws asleep. After arresting him, the officers performed a protective sweep and seized Daws' shotgun. Daws was charged with possession of a firearm and ammunition by a convicted felon.

Daws moved to suppress the shotgun and ammunition, arguing the officers' warrantless entry into his house violated the *Fourth Amendment*.

The court disagreed, holding exigent circumstances justified the officers' warrantless entry into Daws' house. Daws had just committed a serious crime and the officers knew about his extensive criminal history involving firearms. It was reasonable for the officers to immediately go to Daws' house and quickly apprehend him based on the threat he posed to the community.

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

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United States v. Timmann, 2013 U.S. App. LEXIS 25108 (11th Cir. Fla. Dec. 18, 2013)

A woman returned home from a ten-day trip and called the police after she found what appeared to be three bullet holes in an interior wall of her apartment. A police officer inspected the holes as well as a bullet fragment lodged in the carpet. Suspecting the bullets had been fired from the apartment next door, where Timmann lived, the officer knocked on his door. After receiving no response, the officer discovered Timmann's car was not in the parking lot and that he was likely at work.

The next day, police officers returned to the apartment complex and spoke to the manager. The manager believed Timmann was at work because she had seen his car in the parking lot earlier, but it was not there now. The manager gave the officers a key to Timmann's apartment. The officers knocked on the door to Timmann's apartment, but no one answered. The officers then entered Timmann's apartment, using the key provided by the manager. The officers found no one in the kitchen and living areas of the apartment and they saw no signs of a struggle, bullet holes, blood or other evidence of injury. The officers yelled to announce their presence, but received no answer. When the officers got to the bedroom door, they discovered it was locked. The officers knew from the layout of the two apartments the bullet holes they had seen must have passed through the wall of Timmann's bedroom. The officers knocked on the bedroom door but received no response. The officers did not hear any noise or sounds of movement from the bedroom. One of the officers kicked open the bedroom door. The officers found no one present and no signs of injury. However, the officers saw numerous firearms and ammunition lying in plain view. The officers also saw bullet holes in the wall. The officers took photographs of the bedroom, then left Timmann's apartment. Back at the police station, one of the officers discovered Timmann had two prior felony convictions.

Later that day, a police officer spoke to Timmann by telephone. Timmann told the officer he knew the police were at his apartment investigating the bullet holes in the wall. Timmann told the officer he had received a rifle from a friend and accidentally discharged it inside the apartment. The officer did not tell Timmann that he and other officers had entered Timmann's apartment and discovered the firearms and ammunition.

The police spoke to Timmann a second and third time by telephone later that day. On both occasions, the officers told Timmann the police knew he was a convicted felon and that officers had entered his apartment and discovered the firearms and ammunition in his bedroom. During both phone calls, Timmann admitted to owning the firearms.

The police subsequently obtained a warrant to search Timmann's apartment and seized the firearms and ammunition from Timmann's bedroom. The government indicted Timmann for possession of a firearm by a convicted felon.

Timmann moved to suppress the firearms and ammunition. Timmann argued there was no probable cause or exigent circumstances to justify the officers' initial warrantless entry into his apartment. Timmann also moved to suppress his telephone statements to the police.

The district court held that the officers' initial warrantless entry into Timmann's apartment was justified under the emergency aid exception to the *Fourth Amendment's* warrant requirement.

The court of appeals disagreed. The court found it was not reasonable for the officers to believe that someone inside Timmann's apartment was in danger and in need of immediate aid. The officers did not receive a report regarding an ongoing disturbance, but rather a service call regarding what appeared to be bullet holes. The officers did not know when the holes had been made and both times the officers went to Timmann's apartment there was no indication a fight had taken place or anyone had been injured. In addition, the officers did not have any information that would cause them to suspect Timmann might be suicidal. On the contrary, the absence of Timmann's vehicle suggested he was likely not at home.

Next, even though the officers' warrantless entry into Timmann's apartment violated the *Fourth Amendment*, Timmann's statements to the police during the first phone call were admissible. When the officer spoke to Timmann, he did not tell Timmann the officers had already entered his apartment and found firearms and ammunition. Instead, the officer only spoke to Timmann about the bullet hole in the wall of his neighbor's apartment. Because the officer did not use the evidence obtained in the unlawful search to induce Timmann's statement that he had obtained a rifle from a friend, this statement did not need to be suppressed. However, the court held Timmann's statements to the police obtained in the second and third phone calls should have been suppressed. During those calls, the officers confronted Timmann with evidence they obtained through the unlawful search of Timmann's apartment, which elicited incriminating statements from Timmann.

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

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Inventory Searches

United States v. Hockenberry, 730 F.3d 645 (6th Cir. 2013)

Police received a telephone call stating a man driving a black Jeep Cherokee was attempting to sell firearms at a local auto parts store. The caller, who identified himself as an employee of the store, gave police a description of the Jeep and provided its license plate number.

A few hours later, police officers saw the Jeep and initiated a traffic stop after the driver turned without signaling. The officers encountered Hockenberry, Gray and Hunt. The officers arrested Hunt after they discovered she had active arrest warrants. The officers decided to tow the Jeep after they discovered neither Hockenberry nor Gray had valid driver's licenses. The officers did not give Hockenberry an opportunity to call someone to retrieve the Jeep.

Before having the Jeep towed, the officers conducted an inventory search and found several firearms; however, the officers did not inventory some items they believed had no value. Hockenberry and Gray were indicted for possession of a firearm by a convicted felon.

Hockenberry and Gray argued the officers did not have probable cause to stop the Jeep, the officers failed to follow the department's standardized inventory search policy and the inventory search was a pretext for a search for criminal evidence.

The court disagreed. First the officers had probable cause to conduct the traffic stop after they saw the driver of the Jeep commit a traffic violation by failing to signal. Regardless of the

officers' subjective motivation, the officers witnessed a traffic violation that supported stopping the Jeep.

Second, the officer's decision to impound the Jeep was reasonable as the vehicle was on a public street and neither Hockenberry nor Gray had a valid driver's license. In addition, the officers were not required to allow the men an alternative method of securing the Jeep. Given the circumstances, it was reasonable for the officers to conduct an inventory search. Even though the officers deviated from the department's inventory search policy by failing to inventory all items of "value" found in the Jeep, the officers immediately saw the firearms when they opened the Jeep's tailgate. The court noted the law allows for some flexibility in determining what items in a vehicle are considered "valuable" for the purposes of an inventory search.

Finally, the court held there was no evidence to establish the officers conducted the inventory search as a pretext for a search for criminal evidence.

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

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United States v. Baldenegro-Valdez, 703 F.3d 1117 (8th Cir. 2013)

During a controlled buy, a confidential informant purchased methamphetamine from Camarena and Baldenegro-Valdez. Later that day, the informant made a second controlled buy. During the second buy, Camarena got out of Baldenegro-Valdez's car and into the informant's car. Baldenegro-Valdez followed in his car. After the informant signaled he had seen methamphetamine on Camarena, the officers conducted traffic stops on both vehicles. An officer wrote Baldenegro-Valdez a ticket for having a cracked windshield and arrested him for not having a valid driver's license. The officer did not mention the drug investigation so as not to compromise its integrity. Officers impounded Baldenegro-Valdez's car and during their inventory search found methamphetamine inside.

Even though Baldenegro-Valdez's arrest for not having a valid driver's license was improper, as the license he provided the officers was valid in his native country, the court found the officers had probable cause to arrest him based on his participation in one completed and one ongoing controlled methamphetamine buy.

Once the officers arrested Baldenegro-Valdez, the court noted the officers were allowed to perform an inventory search of his car. The court concluded the inventory search was conducted pursuant to the arresting agency's policy, and the methamphetamine the officers discovered was admissible.

Even if the inventory search was not valid, the court commented the officers could have searched the car under the automobile exception, given the vehicle's involvement in the controlled methamphetamine buys earlier in the day.

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

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United States v. Allen, 713 F.3d 382 (8th Cir. 2013)

After police officers arrested three individuals for attempting to pass counterfeit checks, they found a receipt for a hotel room. Officers went to the hotel, conducted surveillance on the room and saw Allen throw away a white plastic bag behind the hotel. Officers recovered the bag, which contained torn-up checks that matched checks found during the arrests of the three individuals. The officers returned to the hotel where they saw Allen loading items from a luggage cart into his car. Two black duffel bags and a combination printer, scanner, and copier machine were visible on the luggage cart. The officers arrested Allen. The officers searched Allen's car and found thousands of dollars in cash. The officers also searched the black duffel bags on the luggage cart and found a laptop computer, check stock and blank checks.

Allen argued the search of his car and the duffel bags on the luggage cart violated the *Fourth Amendment*.

The court held the officers lawfully searched Allen's car incident to his arrest. Police officers can lawfully search a vehicle incident to an arrest if the arrestee is within reaching distance of the vehicle during the search or if the police have reason to believe the vehicle contains evidence relevant to the crime of arrest. Based on information discovered during the investigation, the search of Allen's car incident to his arrest was lawful because the officers had reason to believe the vehicle contained evidence relevant to the crime of conspiracy to possess counterfeit securities.

Finally, the court concluded even if the officers could not search the items on the luggage cart incident to Allen's arrest, the evidence inside the duffel bags would have been discovered during an inventory search. An officer testified, after arresting Allen, his property on the luggage cart would have been taken to the police station for safekeeping and inventoried to guard against loss or theft, according to departmental policy.

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

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United States v. Arrocha, 713 F.3d 1159 (8th Cir. 2013)

Police officers arrested Arrocha on an outstanding arrest warrant after they encountered him at a convenience store. The officers decided to tow and impound Arrocha's vehicle, which was properly parked in the store's parking lot. During their inventory search, the officers found a handgun inside the car. Arrocha was indicted for unlawful possession of the handgun by a convicted felon.

Arrocha claimed the officers' decision to tow his vehicle violated the *Fourth Amendment*.

First, although the officers exercised some discretion in deciding whether to tow Arrocha's vehicle, the court held the officers followed their department's operations manual, which outlined the procedures for the towing of vehicles. Second, there was no evidence the officers' use of this discretion was a ruse for a general search of Arrocha's vehicle to discover incriminating evidence.

Finally, even though Arrocha's vehicle was parked on private property, the court noted police may take protective custody of a vehicle when they have arrested its occupants, even if it is lawfully parked and poses no public safety hazard. Here, while the officers did not consult with the convenience store employees before towing Arrocha's vehicle, the officers testified the police had an informal agreement with the convenience store that vehicles abandoned in its busy parking lot because of an arrest would be towed.

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

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Plain View Seizure

United States v. Rodriguez, 711 F.3d 928 (8th Cir. 2013)

Police officers executed a search warrant at Rodriguez's home and found methamphetamine, firearms and other drug related paraphernalia. Rodriguez was indicted on a variety of charges.

Rodriguez argued the search of his home violated the *Fourth Amendment*, claiming the search warrant affidavit did not establish probable cause and because the firearms, which the officers seized, were not listed in the warrant.

Again, the court disagreed. First, the affidavit included information from two separate reliable sources, one being a former law enforcement officer, who was lawfully in Rodriguez's home when he smelled chemicals associated with methamphetamine production. Second, the officers corroborated much of the information provided by the confidential sources, to include verifying Rodriguez's address and the type of car he drove. Finally, even though the firearms were not listed on the search warrant, the officers lawfully seized them under the plain view doctrine. The officers found the firearms under a mattress, a place they were entitled to search under the warrant. In addition, the incriminating nature of the firearms was immediately apparent, as they were found near a large quantity of drugs and drug paraphernalia, and because the officers knew Rodriguez was a convicted felon, who could not lawfully possess them.

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

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United States v. Benoit, 713 F.3d 1 (10th Cir. 2013)

Benoit's girlfriend Rose called the police after she found what appeared to be child pornography on Benoit's computer while she was using it to pay bills online. When the police officer arrived at Rose's home, she had a friend who was more familiar with computers open the file she suspected contained child pornography and show it to the officer. The friend offered to open additional files but the officer told her it was not necessary. The officer contacted an investigator with the cybercrimes unit and then seized Benoit's computer until a search warrant could be obtained. After the police obtained the warrant, investigators found hundreds of images and videos of child pornography. Benoit was indicted for two child pornography related offenses.

Benoit claimed Rose did not have actual or apparent authority to consent to the officer's initial search of his computer because she had told the officer the computer did not belong to her.

The court held the officer's viewing of the child pornography video prior to seizing Benoit's computer was not a search under the *Fourth Amendment*; therefore, the issue of consent was irrelevant. The *Fourth Amendment* only applies to governmental action. It does not apply to searches conducted by private individuals unless they are acting as an agent for the government or a government official actively participates in the search. When the officer responded to Rose's home, she had already found what she believed to be child pornography on Benoit's computer. Once at the home, the officer did not touch the computer, actively assist, or encourage the friend as she opened the file for him to view. The court concluded the officer did not conduct a search or direct a private search of Benoit's computer; rather he only acted as a witness.

In addition, the court held the officer's warrantless seizure of Benoit's computer was lawful under the plain view doctrine. The officer was lawfully present in Rose's home and the incriminating nature of child pornography was immediately apparent to the officer when the friend opened the video file.

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

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Protective Sweeps

United States v. Starnes, 2013 U.S. App. LEXIS 25588 (7th Cir. Ill. Dec. 23, 2013)

Police officers arranged an undercover controlled purchase of crack cocaine from a lower level apartment of a two-story house. Three days later, officers obtained a search warrant that described the premises to be searched as a "two story, two-family dwelling, white with black trim, located on the west side of the street with the numbers '922' appearing on the front of the residence with the lower apartment being located on the ground floor." In addition, the officers knew a few hours before the planned raid a shooting had occurred at the house and that two aggressive pit bulls lived on the premises.

After knocking on the front door and receiving no response, the officers forced their way into the house. Once inside, the officers saw two open doors, one leading to the first-floor apartment and one leading to an upstairs apartment. The officers also encountered a pit bull that initially ran up the stairs toward the upper apartment, but then changed direction and charged at the officers. After shooting and killing the dog, an officer conducted a protective sweep on the upstairs apartment. As the officer ran through the kitchen of the upstairs apartment, he saw mixing bowls, several large chunks of an off-white substance, some scales and rubber gloves. In the bedroom, the officer found Starnes and a woman. The officer escorted Starnes and the woman downstairs. While one of the officers left to seek a second warrant to search the upstairs apartment, the other officers searched the lower apartment. The officers seized various firearms, ammunition and drug paraphernalia from the lower apartment. After executing the second search warrant on the upstairs apartment, the officers seized Starnes' identification cards, cocaine, cash and additional drug trafficking paraphernalia. The government indicted Starnes on several drug and firearm offenses.

Starnes moved to suppress the evidence seized from the upstairs apartment. Starnes argued the first search warrant did not cover the officer's entry into the upstairs apartment and there had been no lawful reason for the officers to enter that area.

The court disagreed, holding the officers were entitled to conduct a protective sweep of the upstairs apartment. A protective sweep is a quick and limited search of premises conducted to protect the safety of police officers and others and is an exception to the *Fourth Amendment's* warrant requirement. For a valid protective sweep, the officers must have a reasonable belief the area to be swept contains someone who could pose a threat to them. Here, it was reasonable for the officers to believe there might be someone in the upstairs apartment who posed a threat to them. First, the officers knew a shooting had occurred on the premises earlier that day. Second, the officers knew two aggressive pit bulls were on the premises, but they had only encountered one of the dogs. Third, once inside the premises, the officers discovered two open doors that allowed internal access between the two apartments. Fourth, the officers did not know whether there were other access points between the two apartments. Finally, the officer conducting the sweep only looked in places where a person could hide. Once the officer discovered Starnes and the woman, he moved them to the first floor and secured the upstairs apartment until the second search warrant was obtained.

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

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Search Incident to Arrest (cell phones)

United States v. Wurie, 728 F.3d 1 (1st Cir. 2013)

Police officers arrested Wurie for distributing crack cocaine and took him to the police station. When Wurie arrived at the station, two cell phones were taken from him. A few minutes later, one of the officers noticed one of Wurie's cell phones was repeatedly receiving calls from a number identified as "my house" on the external caller ID screen on the front of the phone. The officers were able to see the caller ID screen and the "my house" label in plain view. A few minutes later, an officer opened the phone and pressed a button to look at Wurie's call log to determine the phone number associated with the "my house" caller ID reference. An officer typed the phone number into an online phone directory and discovered the address associated with the phone number was a nearby apartment. Officers connected Wurie to the apartment, obtained a warrant, and searched the apartment finding drugs and firearms.

Wurie filed a motion to suppress the evidence from his apartment, arguing the officers violated the *Fourth Amendment* by opening his cell phone and accessing his call log to determine the phone number associated with the "my house" caller ID reference.

The court held the search incident to arrest exception does not authorize the warrantless search of data on cell phones seized from individuals arrested by the police. The court recognized a modern cell phone is not like a purse, wallet or other type of container an officer might typically find on an arrestee. A cell phone has the ability to store a large amount of highly personal information such as photographs, videos, text messages and emails. Allowing the police to search the data on a cell phone without a warrant any time they conducted a lawful arrest would create a serious and recurring threat to the privacy of countless individuals.

Even though the evidence should have been suppressed in this case, the court recognized other exceptions to the warrant requirement might justify a warrantless search of cell phone data in certain situations. For example, the exigent circumstances exception would allow the police to

conduct an immediate, warrantless search of a cell phone's data where the phone is believed to contain evidence necessary to locate a kidnapped child or to investigate a bombing plot or incident.

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

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Search Incident to Arrest (vehicles)

United States v. Allen, 713 F.3d 382 (8th Cir. 2013)

After police officers arrested three individuals for attempting to pass counterfeit checks, they found a receipt for a hotel room. Officers went to the hotel, conducted surveillance on the room and saw Allen throw away a white plastic bag behind the hotel. Officers recovered the bag, which contained torn-up checks that matched checks found during the arrests of the three individuals. The officers returned to the hotel where they saw Allen loading items from a luggage cart into his car. Two black duffel bags and a combination printer, scanner, and copier machine were visible on the luggage cart. The officers arrested Allen. The officers searched Allen's car and found thousands of dollars in cash. The officers also searched the black duffel bags on the luggage cart and found a laptop computer, check stock and blank checks.

Allen argued the search of his car and the duffel bags on the luggage cart violated the *Fourth Amendment*.

The court held the officers lawfully searched Allen's car incident to his arrest. Police officers can lawfully search a vehicle incident to an arrest if the arrestee is within reaching distance of the vehicle during the search or if the police have reason to believe the vehicle contains evidence relevant to the crime of arrest. Based on information discovered during the investigation, the search of Allen's car incident to his arrest was lawful because the officers had reason to believe the vehicle contained evidence relevant to the crime of conspiracy to possess counterfeit securities.

Finally, the court concluded even if the officers could not search the items on the luggage cart incident to Allen's arrest, the evidence inside the duffel bags would have been discovered during an inventory search. An officer testified, after arresting Allen, his property on the luggage cart would have been taken to the police station for safekeeping and inventoried to guard against loss or theft, according to departmental policy.

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

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United States v. Winarske, 715 F.3d 1063 (8th Cir. 2013)

A confidential informant (CI), who had provided police with accurate information about local criminal activity in the past, told officers Winarske had a stolen handgun he wished to sell. The CI told officers that Winarske was a registered sex offender who was currently on probation. Officers confirmed a handgun had recently been stolen from a vehicle two blocks from

Winarske's house and that Winarske was a convicted felon and registered sex offender currently on probation.

Winarske agreed to meet the CI in the parking lot of a shopping mall and sell him a stolen handgun. Prior to the meeting, the CI told the officers the time and place of the meeting in addition to the color, make and model of Winarske's vehicle and the fact that Winarske's girlfriend would be present. Police officers conducted surveillance at the mall and just before the arranged meeting time, they saw Winarske and a female, later identified as Winarske's girlfriend, enter a vehicle that matched the description of the vehicle provided by the CI. The officers approached the vehicle, removed Winarske and his girlfriend, patted them down and then handcuffed them. Winarske admitted there was a handgun in the vehicle. Officers searched the car and seized a handgun and ammunition. The government charged Winarske with being a felon in possession of a firearm.

Winarske argued the information provided by the informant did not establish probable cause to arrest him; therefore, the warrantless search of the vehicle violated the *Fourth Amendment*.

The court disagreed. First, the officers had reason to believe the CI was reliable based on his established track record of providing accurate information on local criminal activity. Second, the CI provided identifying information about Winarske that was independently corroborated by police, to include, Winarske's first and last names, criminal history and supervision status. Third, the CI provided accurate information about the time and place of a planned meeting with Winarske to purchase a stolen handgun. Consequently, the court held the officers had probable cause to support a warrantless arrest of Winarske when they encountered him in the mall parking lot.

The court further held the officers lawfully searched the vehicle incident to Winarske's arrest. Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense for which the suspect is being arrested.

Here, it was reasonable for the officers to believe the vehicle contained evidence of the offense of arrest in the form of the handgun. Even if Winarske was not under arrest at the time of the search, the court concluded the officers could have lawfully searched the vehicle without a warrant under the automobile exception, as the court already concluded the police had probable cause to believe Winarske arrived at the mall to conduct an illegal firearms sale.

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

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Special Needs Exception

Lynch v. City of New York, 737 F.3d 150 (2d Cir. 2013)

The New York City Police Department (NYPD) enacted a policy, which required the administration of a breathalyzer test to any officer whose discharge of his firearm within New York City resulted in death or injury to any person. The union representing New York City's police officers sought to block the NYPD from enforcing this policy. The union argued the

policy violated the *Fourth Amendment* because it was unreasonable to compel officers to submit to warrantless searches without any suspicion of wrongdoing.

The district court disagreed, and refused to block enforcement of the policy. The union appealed.

The Second Circuit Court of Appeals held the NYPD policy was lawful under the special needs exception to the *Fourth Amendment's* warrant requirement. First, the court concluded the primary purpose of the policy was not to obtain criminal evidence to prosecute police officers, but rather personnel management by determining an officer's fitness for duty and the maintenance of public confidence in the NYPD. Second, the court ruled the policy was narrowly and specifically defined as officers were put on notice they would have to submit to a breathalyzer test; therefore, requiring a search warrant would not add any further notice and was unnecessary.

After determining the policy qualified as a special need, the court further held the policy was reasonable. First, the court noted because NYPD officers are authorized to carry firearms and use deadly force, they have a diminished expectation of privacy in employer testing that ensures their fitness for duty. Second, the court found the breathalyzer was minimally intrusive and the NYPD's special needs outweighed the privacy interests of the officers.

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

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Qualified Immunity / Absolute Immunity / Civil – Municipal - Supervisor Liability / *Bivens*

Brady Violation

United States v. Tavera, 719 F.3d 705 (6th Cir. 2013)

Police officers arrested Mendoza and Tavera after they discovered methamphetamine hidden under a bucket of nails in the truck the men were driving. At trial, Tavera testified he did not know about the drugs in the truck. The jury convicted Tavera.

After his conviction, Tavera learned a few days before the trial Mendoza had participated in plea negotiations in which Mendoza told the Assistant United States Attorney (AUSA) Tavera did not know about the drugs in the truck. The AUSA did not disclose Mendoza's statements to Tavera.

Tavera appealed his conviction, arguing *Brady v. Maryland* required the AUSA to disclose Mendoza's statements to him.

The court agreed. In *Brady v. Maryland*, the United States Supreme Court held the government must disclose material, exculpatory evidence in its possession and failure to do so results in a trail that is fundamentally unfair. Here, Mendoza's statements to the AUSA were material to Tavera's case. The government's proof of Tavera's intent to join the drug conspiracy and distribute drugs was not overwhelming. If Tavera had been able to bolster his own testimony with Mendoza's statements, it would have significantly strengthened his case.

In addition, the court rejected the government's argument that Tavera's attorney should have exercised due diligence and discovered the statements on his own by interviewing Mendoza and asking him if he had talked to the AUSA. The "due diligence" defense is not valid because it releases the prosecutor from his duty of disclosure clearly outlined in *Brady* and places the burden of discovering exculpatory information on the defendant.

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

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Engel v. Buchan, 710 F.3d 698 (7th Cir. 2013)

Engel was released from prison after the Missouri Supreme Court vacated his conviction based upon the State's failure to disclose exculpatory evidence in violation of *Brady v. Maryland*. Engel subsequently sued Buchan, a former federal agent, under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*. Engle claimed Buchan framed him by fabricating evidence, manipulating witnesses and then suppressing this evidence in violation of *Brady*.

Buchanan argued Engel could not sue him for monetary damages under *Bivens* for a *Brady* violation.

First, the court held a *Bivens* cause of action is available for a *Brady* violation committed by a federal law enforcement officer in connection with a state criminal prosecution.

Second, the court held Engel's complaint contained sufficient factual allegations to state a plausible claim for violation of his due process rights under *Brady*.

Third, because the *Brady* right was clearly established at the time of the alleged violation, Buchanan was not entitled to qualified immunity.

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

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***First Amendment* Retaliation**

George v. Rehiel, 738 F.3d 562 (3d Cir. 2013)

George arrived at the Philadelphia International Airport for a scheduled flight to California to begin his senior year in college. At the security checkpoint, George emptied his pockets and handed over a set of approximately 80 handwritten Arabic-English flashcards to a Transportation Security Administration (TSA) screener. The flashcards contained words and phrases such as "day before yesterday," "fat," "thin," "really," "nice," "sad," "summer," "pink," and "friendly." However, the flashcards also contained the words "bomb," "terrorist," "explosion," "attack," "battle," "kill," "to target," "to kidnap," and "to wound." After seeing the flashcards, the TSA screener took George to another screening area where a second TSA employee swabbed George's cell phone for explosives and searched his carry-on items. A TSA supervisor arrived within 30 minutes and questioned George for another 15 minutes. George claimed he was using the flashcards to learn Arabic vocabulary. In addition to discussing the flashcards, the TSA supervisor commented about a book that had been found in George's carry-on luggage that was critical of United States' foreign policy. During the interview, a Philadelphia police officer

arrived, handcuffed George and took him to the Airport Police Station where he was detained in a cell for more than four hours. The Philadelphia police officer contacted the FBI Joint Terrorist Task Force (JTTF) who sent two federal agents to interview George. The JTTF agents interviewed George for 30 minutes before concluding he was not a threat, and allowed George to leave.

George sued the two Philadelphia police officers, three TSA employees, two JTTF agents and the United States government. In part, George claimed the three TSA officials and the two JTTF agents violated the *Fourth Amendment* by subjecting him to an unreasonable search and seizure. George also claimed the federal officials detained him in retaliation for possessing the Arabic language flash cards and because of the content of the book he was carrying, in violation of the *First Amendment*.

The court held the three TSA employees and two JTTF agents were entitled to qualified immunity because George could not establish any individual federal official violated his *Fourth Amendment* rights. First, the court ruled that once the TSA screeners found the Arabic-English flashcards, it was reasonable to conduct a brief investigation. The court stated, "it is simply not reasonable to require TSA Officials to turn a blind eye to someone trying to board an airplane carrying Arabic-English flashcards with words such as 'bomb,' 'to kill,' etc." In addition, George failed to establish an agency relationship between the TSA officials and the Philadelphia police officer that handcuffed George and took him away. Specifically, George could not show the TSA officials had any control over the decision by the Philadelphia police officer to detain George at the Airport Police Station for over four hours. Second, the court found the JTTF agents went to the Airport Police Station at the request of the Philadelphia Police. After questioning George for 30 minutes, the agents concluded George was not a threat and allowed him to leave. The court held it was reasonable for the JTTF agents to question George for this brief period to determine if he was a threat and that the JTTF agents were not involved in George's allegedly unconstitutional seizure and detention by the Philadelphia Police.

The court further held the federal officials were entitled to qualified immunity on George's *First Amendment* retaliation claim. Even though George had a right to possess the flashcards and book he was carrying, that did not mean the TSA screeners had to ignore their content or refrain from investigating him further because of the words they contained. A reasonable person could believe these items raised the possibility that George might pose a threat to airline security. In addition, because the TSA officials' search and questioning of George during the screening did not violate the *Fourth Amendment*, the court felt it would be "hard-pressed" to find that it could result in a *First Amendment* retaliation claim.

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

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Kristofek v. Village of Orland Hills, 712 F.3d 979 (7th Cir. 2013)

Officer Kristofek arrested an individual for several traffic violations. While Kristofek was filling out the arrest paperwork at the police station, he was ordered to release the individual because he was the son of a former mayor of a nearby town, and to delete any information concerning the arrest from the computer. Kristofek disagreed with what he believed was political corruption, and expressed his concerns to fellow officers, his supervisors and eventually made a report to the

Federal Bureau of Investigation (FBI). When the police chief found out about this conduct, he fired Kristofek.

Kristofek sued the chief and the village, claiming he was fired in retaliation for voicing his concerns over alleged corruption in the department, in violation of the *First Amendment*.

A *First Amendment* retaliation claim by a public employee requires, at a minimum, the speech being retaliated against involves a matter of "public concern."

The district court dismissed the lawsuit, holding Kristofek's speech did not involve a matter of public concern because his sole motive in reporting the incident was to protect himself from potential civil and criminal liability.

The court of appeals disagreed and reversed the dismissal of Kristofek's lawsuit against the chief. After he was told to release the individual because of his political connections, Kristofek told his deputy chief the unequal application of the law due to political considerations was improper and possibly illegal. While Kristofek may have been trying to protect himself by reporting the incident, it was plausible he was also motivated to help the public. Any reasonable person would understand a report to the FBI could result in changes to police practices within the department.

The court of appeals also reversed the dismissal of Kristofek's lawsuit against the village. To hold the village liable for the chief's actions, Kristofek had to establish the chief was the person with final policymaking authority for the village regarding hiring and firing within the police department. The court held Kristofek made a plausible claim the chief had at least *de facto* authority to set policy for hiring and firing. Kristofek's lawsuit suggested the chief was fully in charge of the police department and that his hiring and firing decisions were not reviewed.

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

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Use of Force and Suppression of Evidence

United States v. Collins, 714 F.3d 540 (7th Cir. 2013)

A police officer pulled Collins over for speeding. As the officer approached his car, Collins sped away and the officer chased him. Collins crashed his car and fled on foot. The officer pursued Collins who refused commands to stop. The officer caught Collins who resisted the officer's efforts to arrest him. Collins was subdued after a back-up officer deployed his Taser twice against him. After arresting Collins, officers found a bag containing cocaine Collins had thrown into the bushes during the foot chase and a quantity of cash in his pocket. Collins was indicted for two drug offenses.

Collins moved to suppress the drugs and money, claiming the officers only discovered this evidence after using excessive force to arrest him.

The court of appeals agreed with the district court, which concluded the use of excessive force in effecting an arrest cannot warrant the suppression of evidence. Further, even if the suppression of evidence were warranted, Collins discarded the drugs before the officers applied any force and the money would have been seized during a search incident to arrest. As a result, there would be

no connection between the discovery of the evidence and the alleged excessive use of force. The court noted that a civil lawsuit for damages was the better remedy for Collins to address any allegations of excessive force against the officers.

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

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Use of Force Situations (Detention / Arrest / Search Warrant Execution / Other Seizures)

Stanton v. Sims, 134 S. Ct. 3 (2013)

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 Patrick. Stanton did not realize Sims was standing behind the gate, and when the gate flew open, it hit Sims 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.

The Ninth Circuit Court of Appeals held Stanton was not entitled to qualified immunity. The court ruled Stanton's warrantless entry into Sims' yard was unconstitutional. The court also found the law to be clearly established that Stanton's pursuit of Patrick did not justify his warrantless entry, given that Patrick was suspected of only a misdemeanor.

Stanton appealed and the Supreme Court reversed the Ninth Circuit. While not deciding whether Stanton's entry into Sims' yard in pursuit of Patrick was constitutional, the Supreme Court held it is not clearly established whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect.

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

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See George v. Rehiel above.

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Robinson v. Cook, 706 F.3d 25 (1st Cir. 2013)

Police officers arrested Robinson and his son for their involvement in a hit-and-run, and seized Robinson's car. After the charges were dismissed, Robinson and his son sued the officers for their warrantless arrests and for the warrantless seizure of Robinson's car.

The court held the officers were entitled to qualified immunity.

First, the officers had probable cause to seize Robinson's car under the automobile exception to the *Fourth Amendment's* warrant requirement. The victim's description of the car that struck him closely matched Robinson's car, which was found within a mile of the hit-and-run site, with its engine still warm. These circumstances created a fair probability Robinson's car was involved in the hit-and-run.

Next, the court held the officers had probable cause to arrest Robinson. The court found it was reasonable for the officers to rely on the victim's identification of Robinson's car as the one that struck him. It was also reasonable for the officers to believe Robinson when he told them he had been driving the car that day but not to believe him when he said he had only driven to work and then back home. An officer is not required to rely upon a suspect's self-serving statements when other evidence contradicts it.

Finally, the court held the officers had probable cause to arrest Robinson's son, on an aiding-and-abetting theory, based on the victim's identification of him as the passenger in the car that struck him. Even though it was a show-up identification, it occurred a few hours after the incident, the victim got a good look at the passenger in the car and the victim recognized the son's distinct hairstyle.

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

*****

Swartz v. Insogna, 704 F.3d 105 (2d Cir. 2013)

Swartz was a passenger in a car driven by his wife, Judy, when he saw a police officer using a radar device at an intersection. Swartz expressed his displeasure at what the officer was doing by reaching his right arm outside the passenger side window and extending his middle finger over the car's roof. When the Swartzs arrived at their destination a few minutes later, they saw a police car, with its lights flashing, behind them. Officer Insogna approached and requested Judy's driver's license and registration. After reviewing the documents, Insogna returned them and told the Swartzs they could go. Swartz told Insogna he would like to speak to him man-to-man, but another officer stepped in front of him. Swartz said to the officer, "I feel like an ass." When a third officer asked him what he said, Swartz repeated himself. The officer then arrested Swartz. At the police station, the officer told Swartz he had been arrested for disorderly conduct. The charge was eventually dismissed. Swartz sued Insogna and the other officers.

The court held Insogna did not have reasonable suspicion that criminal activity or a traffic violation was afoot; therefore, the stop was unlawful. The only act Insogna saw that caused him to initiate the stop was Swartz's giving-the-finger gesture. Insogna testified he thought Swartz, "was trying to get my attention for some reason," and he "was concerned for the safety of the female driver." The court did not find this explanation reasonable. Instead, the court commented, "this ancient gesture of insult is not the basis for a reasonable suspicion of a traffic violation or impending criminal activity." In addition, no passenger planning some criminal conduct toward the driver of a vehicle would call attention to himself by giving the finger to a police officer. Consequently, the court held Insogna was not entitled to qualified immunity.

The court held the other officers did not have probable cause to arrest Swartz for disorderly conduct. Even under New York's expansive definition of disorderly conduct, Swartz's comment could not create a reasonable suspicion a disorderly conduct violation had occurred. None of the officers' reports claimed Swartz was disruptive, threatening or creating a public disturbance. Because an objectively reasonable officer would not have believed probable cause existed to arrest Swartz, the officers were not entitled to qualified immunity.

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

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Carroll v. County of Monroe, 712 F.3d 649 (2d Cir. 2013)

Police officers assigned to a narcotics enforcement team executed a no-knock warrant for Carroll's house. After a battering ram was used to break through the front door, the first officer into the house shot and killed Carroll's dog, which charged at him while barking and growling.

Carroll sued the officers, claiming the shooting of her dog was an unconstitutional seizure in violation of the *Fourth Amendment*. Carroll argued the officers, knowing she had a dog, should have formulated a plan to secure the dog by non-lethal means.

After a two-day trial, the jury returned a verdict in favor of the officers.

While the unreasonable killing of a companion animal constitutes an unconstitutional seizure of personal property under the *Fourth Amendment*, in some circumstances it is reasonable for an officer to shoot a dog he believes poses a threat to his safety or the safety of others.

Based upon the evidence presented at trial, the court of appeals found that no amount of planning or training would have changed the outcome in the case. Carroll did not offer evidence to establish a non–lethal means of controlling her dog would have allowed the officers to escape the fatal-funnel inside the doorway and effectively execute the no-knock warrant. Consequently, the jury could have reasonably found the officer would still have needed to shoot Carroll's dog, even if the officers had developed a non-lethal plan to restrain it.

In addition, there was sufficient evidence for the jury to find the officer reasonably feared for his safety when Carroll's dog aggressively approached him in the entryway, and the jury was entitled to believe the officer's testimony that non-lethal methods would not have controlled the dog.

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

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Tobey v. Jones, 706 F.3d 379 (4th Cir. 2013)

Tobey was scheduled to fly from Richmond to Wisconsin to attend a funeral. After going through the initial security checkpoint, Transportation Security Administration (TSA) agents randomly selected Tobey for a secondary inspection. In anticipation that he might be subjected to enhanced screening, Tobey had written the text of the *Fourth Amendment* on his chest, as he believed the full-body scanner used as part of the secondary inspection was unconstitutional. Before proceeding through the full-body scanner, Tobey removed his sweatpants and t-shirt,

leaving him in running shorts and socks, revealing the text of the *Fourth Amendment* written on his chest. The TSA agent told Tobey he did not have to remove his clothes and Tobey replied he wished to express his view that the enhanced screening procedure was unconstitutional. The TSA agent radioed for assistance. Richmond airport police officers responded and immediately handcuffed and arrested Tobey for creating a public disturbance. The TSA officials did not tell the police officers what occurred at the screening station, nor did the police officers ask. The disorderly conduct charge against Tobey was later dismissed.

Tobey sued the TSA agents, claiming in part, they violated his *First Amendment* rights by having him arrested in retaliation for displaying the text of the *Fourth Amendment* on his chest.

The court held Tobey had adequately alleged a violation of his *First Amendment* rights and the TSA agents were not entitled to qualified immunity.

The court noted even if Tobey's behavior was bizarre, bizarre behavior, by itself, cannot be enough to arrest someone. In addition, bizarre behavior does not automatically equal disruptive or disorderly conduct. Here, the TSA agents seemed to think that removing clothing was *per se* disruptive. However, passengers routinely remove clothing at an airport screening station, many times per TSA regulations. Tobey calmly took off his t-shirt and sweatpants without causing a disruption as was evidenced by the fact the TSA agents never asked him to put his clothes back on. While it is possible further facts will establish the TSA agents acted reasonably in having Tobey arrested, based on the record before it, the court could not make that conclusion.

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

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Cooper v. Sheehan, 735 F.3d 153 (4th Cir. 2013)

Just after 11:00 p.m., a neighbor called 911 to report a disturbance at Cooper's mobile home after hearing two men screaming at each other. The caller did not indicate whether the men were armed or otherwise dangerous. Two police officers arrived in separate cars, without activating their blue lights or sirens, parked on the edge of Cooper's property and approached the mobile home on foot. To alert the occupants of the officers' presence, one of the officers tapped on a window with his flashlight, but neither officer announced his presence or identified himself as a police officer. Cooper called out for anyone in the yard to identify himself, but neither officer responded. Cooper retrieved a shotgun, and pointing the muzzle toward the ground opened the back door and walked onto the porch. After the officers saw Cooper holding the shotgun, they drew their service weapons, fired at Cooper without warning, and wounded him.

Cooper sued the officers for excessive use of force in violation of the *Fourth Amendment* and several state law torts.

The court held the officers were not entitled to qualified immunity.

Citing *Tennessee v. Garner*, the court noted a reasonable police officer is entitled to use deadly force "where the police officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to the officer or to others."

Here, when the officers fired on Cooper, he was standing at the threshold of his home, holding the shotgun in one hand, with its muzzle pointed at the ground. Cooper made no sudden moves or threats and the officers had no other information suggesting that Cooper might harm them. The court held these facts failed to establish that a reasonable officer would have had probable cause to feel threatened by Cooper's actions.

In addition, the court found it reasonable for Cooper to bear a firearm while investigating a disturbance on his property. The court found it significant that the officers never identified themselves, even after being asked by Cooper, and that no reasonable officer could have believed Cooper was aware of the officers' presence when he stepped onto his porch. If Cooper had been aware of the officers' presence and still come onto the porch with a firearm, it would have been more likely for the court to find that Cooper posed a threat to the officers.

Finally, the court held, at the time of the shooting, it was clearly established that individuals who posed no threat to police officers had the right to be free from the use of deadly force against them.

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

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Davila v. United States, 713 F.3d 248 (5th Cir. 2013)

Davila, his adult son Tocho and Tocho's girlfriend Mata were driving into the United States from Mexico in Davila's truck when they were stopped at a border checkpoint. After an initial inspection, a Border Patrol agent referred Davila's truck to secondary inspection and told Davila, Tocho and Mata to remain there until a K-9 unit could be brought in from a different checkpoint. After two hours elapsed without the K-9 unit arriving, Tocho left without permission in Davila's truck while Davila and Mata remained at the inspection site. A local police officer at the checkpoint pursued Tocho in a high-speed chase and eventually apprehended him. While the pursuit was ongoing, Davila and Mata were handcuffed and taken to a county jail, where they were processed, issued jail clothing and placed into cells. Davila and Mata were released several hours later without explanation and no charges were ever filed against them. Tocho was charged with several offenses, including assaulting a federal law enforcement officer. Tocho failed to appear to answer the charges and a warrant was issued for his arrest.

Three months later, Davila was driving his car in a National Park when National Park Service (NPS) law enforcement rangers pulled him over and surrounded his car with law enforcement vehicles. The rangers pointed their guns at Davila and the other occupants of the car, ordered everyone out, handcuffed them and then searched the car. Unbeknownst to Davila, the government had issued a be-on-the-lookout (BOLO) notice for Davila's car because it had once been associated with Tocho. The rangers pulled Davila over in response to the BOLO, claiming Tocho, a fugitive, could have been concealed in the car and might have weapons. After the rangers searched Davila's car without finding Tocho, weapons or contraband, everyone was released.

Davila sued the NPS Rangers claiming the traffic stop violated his *Fourth Amendment* rights and that the rangers used excessive force during the stop.

The court of appeals agreed with the district court, which held the NPS Rangers were entitled to qualified immunity concerning the traffic stop and search of Davila's car. The BOLO provided

the rangers with reasonable suspicion that Tocho might be hidden in the vehicle and justified the stop and search of Davila's car.

The court of appeals further held the rangers were entitled to qualified immunity on Davila's excessive use of force claim as the rangers' use of force was reasonable under the circumstances. Given the information at their disposal, the rangers' decision to draw their weapons, handcuff Davila and the other occupants and make them kneel on the ground outside the vehicle did not constitute excessive force.

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

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Tolan v. Cotton, 713 F.3d 299 (5th Cir. 2013)

Just before 2:00 a.m., Officer Edwards saw a black Nissan turn abruptly onto a residential street that ended in a cul-de sac. Edwards became suspicious because he knew twelve cars had been burglarized in the town the night before. Edwards saw Robbie Tolan and another man get out of the car and walk towards a house. Edwards ran a computer check on the Nissan's license plate; however, he mistakenly entered an incorrect character, which resulted in a match with a stolen car of the same make and approximate year of manufacture. Edwards approached the Nissan and saw Tolan and his friend taking items from the car to the house. Edwards drew his firearm and ordered the men to the ground, telling them he believed the Nissan was stolen. Robbie Tolan and his friend cursed Edwards and refused to get on the ground until Robbie's parents came out of the house and convinced them to comply with Edwards. Mrs. Tolan told Edwards the car belonged to her while repeatedly walking in front of Edwards' drawn pistol, insisting no crime had been committed.

Sergeant Cotton responded to the scene to back-up Edwards. When Cotton arrived, he saw Mrs. Tolan moving around Edwards in an agitated state, Mr. Tolan and Robbie's friend lying prone on the ground. He did not see Robbie, who was lying in a dark area. Cotton moved in to assist Edwards, who told him, "The two on the ground had gotten out of a stolen vehicle." To control the situation, Cotton asked Mrs. Tolan to move out of the officers' way so they could investigate the situation. Mrs. Tolan refused and when Cotton tried to physically move her, she screamed, "Get your hands off me." Robbie yelled at Cotton "Get your hand off my mom", pulled his outstretched arms to his torso, and began to get up from the ground, turning towards Cotton. Fearing Robbie was reaching into his waistband for a weapon, Cotton drew his firearm and fired three shots at Robbie, hitting him once in the chest. Robbie was wearing a dark jacket that concealed his waistband and a subsequent search revealed Robbie was unarmed. Between Cotton's arriving on scene and his discharging his firearm, thirty-two seconds had elapsed.

Sergeant Cotton was charged in a state-court indictment with one count of aggravated assault by a public servant and was acquitted after a jury trial.

Robbie Tolan and his mother sued Sergeant Cotton and Officer Edwards claiming the officers violated their right to be free from excessive force under the *Fourth Amendment*.

The district court held both officers were entitled to qualified immunity. The Tolans appealed only the grant of qualified immunity to Sergeant Cotton.

The court of appeals held Sergeant Cotton was entitled to qualified immunity. An objectively reasonable officer in Sergeant Cotton's position would not have known nor had reason to believe Officer Edwards had mistakenly identified the Nissan as a stolen vehicle; therefore, an objectively reasonable officer would have been justified in believing Robbie and his friend had stolen it.

In addition, an objectively reasonable officer in Sergeant Cotton's position could have believed Robbie's verbal threats and getting up from a prone position presented an immediate threat to the safety of the officers. The late hour, recent criminal activity in the area, Mrs. Tolan's refusal to comply with the officers' requests and the officers being outnumbered on the scene compounded the threat presented by Robbie. Although tragic, Sergeant Cotton's actions were not objectively unreasonable.

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

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Alman v. Reed, 703 F.3d 887 (6th Cir. 2013)

Alman was arrested at the conclusion of an undercover operation in a public park conducted by the police after they received complaints of lewd conduct and sexual activity taking place in the park. The undercover officer claimed he was standing next to Alman when Alman reached out and grabbed his crotch with a completely cupped hand. Alman stated he only brushed his hand up against the front of the officer's pants. After the arrest, Sgt. Swope, the undercover officer's supervisor, directed a third officer to charge Alman with accosting and soliciting and fourth degree criminal sexual conduct. In addition, the police seized the car Alman had driven to the park, which was owned by Barnes. Barnes paid a nine hundred dollar redemption fee to recover his car. The county prosecutor eventually dismissed the state charges against Alman. The police then charged Alman with disorderly conduct and battery, which were municipal ordinance violations. A state court judge first dismissed the disorderly conduct charge and later the battery charge, after none of the officers appeared in court.

Alman and Barnes sued the police officers, alleging various violations of their constitutional rights. The sole issue on appeal was whether Sgt. Swope was entitled to qualified immunity on the claims against him.

First, the court held there was no probable cause to support any of the charges brought against Alman. As to the initial charges, no reasonable officer could have believed the brief touch in question was achieved by force or coercion, an element of fourth degree criminal sexual conduct. In addition, the two men were engaged in a sexually flirtatious conversation when Alman reached out and touched the undercover officer's crotch. No reasonable officer could have interpreted Alman's actions as an invitation to commit a lewd or immoral act in public, an element necessary to support the charge of solicitation or accosting.

As to the second set of charges, the officers did not have probable cause to arrest Alman for disorderly conduct because they could not have reasonably believed he was about to expose himself to the undercover officer. Finally, the officers did not have probable cause to arrest Alman for battery because some degree of force or violence is a required element, which was not present here.

Second, the court held Swope was not entitled to qualified immunity because it was not reasonable for him to believe probable cause existed to arrest Alman. Swope testified he could not hear the conversation between the undercover officer and Alman. Swope also stated he did not ask any follow-up questions about how Alman had touched the officer before completing Alman's arrest. Without having more facts, Swope had no reasonable basis to believe any of the offenses Alman was charged with had occurred.

Finally, the court held Swope was not entitled to qualified immunity for the seizure of Barnes' car as it was seized as the result of Alman's arrest without probable cause.

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

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Stricker v. Twp. of Cambridge, 710 F.3d 350 (6th Cir. 2013)

Susan Stricker called 911 and requested help for her son, Andrew, who was suffering from an apparent drug overdose. Following policy, police officers responded to the call to secure the premises for the paramedics. One of the officers had previously arrested Andrew on a drug charge and knew he was addicted to heroin. When the officers arrived, Stricker and her husband refused to allow them to enter their house without a warrant. However, the Strickers allowed the officers to talk to Andrew through a closed window. Andrew appeared pale, his eyelids were heavy and he had trouble focusing on the officers. After unsuccessfully trying to convince the Strickers to let the officers enter the house or to have their son come out, the officers forced their way in, conducted a search of the house, and arrested the Strickers while the paramedics treated their son. The Strickers sued various police officers for violating their *Fourth Amendment* rights in connection with their response to the 911 call.

The court affirmed the holding of the district court in which the officers were granted qualified immunity.

The court held the officers' warrantless entry into the Strickers' house was objectively reasonable under the exigent circumstances exception to the *Fourth Amendment's* warrant requirement. The combination of the 911 call requesting help for a drug overdose, the officers' independent knowledge and observations confirming the reported overdose and the Strickers' attempts to deny the officers access to their house, despite their initial call for help, made it objectively reasonable for the officers to believe Andrew needed immediate aid.

In addition, the court held the officers were justified in conducting a protective sweep of the entire house after Andrew was located so the paramedics could safely treat him. Based on the Strickers' refusal to allow entry into the house, it was reasonable for the officers to think they or someone else inside the house might take further action against them.

The court further held the officers were entitled to search dresser drawers and cabinets in the house. It was reasonable for the officers to search these areas to look for clues as to what Andrew ingested in order to aid the paramedics in treating him.
Next, the court held the officers reasonably believed the Strickers' failure to comply with their lawful commands to allow entry into the house could provide probable cause to arrest them.

Finally, the court held the officers used a reasonable amount of force against the Strickers during this encounter. Although the Strickers alleged the officers used excessive force in applying handcuffs, neither complained the handcuffs were too tight, the officers ignored any such complaint or they suffered any injuries because of the handcuffs being too tight. In addition, the court held it was reasonable for the officers to point their firearms and tasers at the Strickers during the arrest process as both had attempted to evade arrest by flight once the officers entered the house.

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

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Martin v. City of Broadview Heights, 712 F.3d 951 (6th Cir. 2013)

While responding to a call, a police officer saw a naked male, later identified as Martin, running towards his patrol car, speaking quickly and nonsensically. As the officer approached, Martin asked the officer for help, placed his hands behind his back and insisted the officer to take him to jail. When the officer grabbed Martin's hands and reached for his handcuffs, Martin ran away. The officer chased Martin and tackled him to the ground. A second officer arrived and jumped on top of the first officer, who was lying on Martin's back, and delivered one or two "compliance body shots" to Martin's side with his knee. During the struggle, Martin bit the first officer's knuckle. In response, the first officer struck Martin in the face with two "hammer punches." The second officer then used all of his force to strike Martin's face, back and ribs at least five times. In the meantime, the first officer folded his legs around Martin's hips and upper thighs and gripped Martin's chin with his right arm. Eventually, a third officer arrived and helped handcuff Martin. After Martin was handcuffed, the first two officers continued to hold Martin in a facedown position on the ground. The two officers soon heard Martin make a "gurgling" sound. The officers rolled Martin onto his side, but he was unresponsive. Attempts at resuscitation failed, and Martin died.

Martin's mother sued, claiming the officers used excessive force to seize her son in violation of the *Fourth Amendment*.

The court of appeals affirmed the district court in holding the officers were not entitled to qualified immunity. Applying the factors from *Graham v. Connor*, the court concluded a reasonable officer should have known that subduing an unarmed, minimally dangerous, mentally unstable individual with compressive body weight, head and body strikes, neck or chin restraints and torso locks would violate that person's right to be free from excessive force.

The court specifically commented the first officer acted unreasonably when he tackled Martin and fell on top of him. Afterward, the officers' used a degree of force that did not match the threat presented by Martin. Finally, after Martin was handcuffed and subdued, the officers unreasonably used their arms to keep Martin in a facedown position.
In addition, Sixth Circuit case law and the police department's policies on use of force and positional asphyxia clearly established on the date of the incident, that the force the officers used to restrain Martin was excessive.

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

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Smith v. Stoneburner, 716 F.3d 926 (6th Cir. 2013)

Officers Stoneburner and Knapp went to Charles Smith's house after an employee at a local store reported that Charles had stolen a cell phone charger. Once at the house, the officers found Charles' brother, Logan, outside. After the officers confirmed Charles was in the house, they asked Logan if they could enter the house. According to Logan, he told the officers to wait outside on the back deck while he went inside to check with his mother. As Logan went into the house, Officer Stoneburner followed him inside and Officer Knapp remained outside. Logan found Charles and his mother and they went with Officer Stoneburner back outside. Once outside, the officers asked Charles about the shoplifting incident, which Charles denied. Charles began to walk back inside the house, but Officer Stoneburner grabbed him by the wrist, pulled him back outside and arrested him for stealing the cell phone charger. During the arrest, Charles and his mother both struggled with the officers.

The Smiths sued Officer Stoneburner claiming he violated the *Fourth Amendment* by unlawfully entering their house twice and then using excessive force against Charles and his mother.

The court held Officer Stoneburner was not entitled to qualified immunity.

First, whether Officer Stoneburner violated the Smiths' *Fourth Amendment* rights when he followed Logan into the house to look for Charles was a question for the jury to decide, as each party gave a different version as to what happened. If a jury chose to believe Logan, that would mean Officer Stoneburner ignored Logan's request to stay outside the house. If Officer Stonebruner ignored this request, he would have violated the *Fourth Amendment* because he would have entered the house without a warrant, and no exception to the warrant requirement applied.

Second, Officer Stoneburner admitted that by reaching across the doorway to grab Charles by the wrist to arrest him, he entered the house a second time. The court held Officer Stoneburner's warrantless entry could not be justified under the hot pursuit or destruction of evidence exceptions to the *Fourth Amendment's* warrant requirement.

The court concluded Officer Stoneburner's entry into the house was neither a "pursuit" nor "hot." Charles voluntarily agreed to talk with Officer Stoneburner and Stoneburner did not attempt to arrest Charles when they spoke. In a consensual encounter, a person has the right to walk away from the police officer and go about his business. The result may have been different if Officer Stoneburner had told Charles he was under arrest and then Charles decided to walk away. In addition, no emergency required immediate police action and the risk of the destruction of evidence was remote. If Officer Stoneburner wished to pursue the investigation, he could have contacted a magistrate and obtained a warrant instead of choosing to act as his own magistrate and enter the house.

Finally, the Smiths and the officers gave differing accounts as to the amount of force that was used to arrest Charles. These differing accounts create a question of fact for a jury to decide. If a jury decides Charles resisted, the officers' use of force may have been reasonable; if not, their use of force may have been excessive.

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

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Hocker v. Pikeville City Police Dep't., 738 F.3d 150 (6th Cir. 2013)

Hocker's girlfriend called 911 at 10:30 p.m. and told the operator Hocker had appeared at her house in violation of a protection order. The girlfriend said Hocker was intoxicated, suicidal and had just left her home in a red car. Police officers spotted Hocker's car driving with its lights off and attempted to conduct a traffic stop. However, Hocker led police officers on a high-speed chase for seven miles before pulling onto a darkened gravel road. Two officers exited their patrol cars with guns drawn and ordered Hocker to show his hands and turn off his car. Instead, Hocker put his vehicle in reverse and rammed one of the police cars, pushing it thirty feet towards a ditch. During this time, one of the officers briefly had his arm trapped in the door of the police car as it swung shut after the collision. The second officer opened fire on Hocker's car and when the first officer freed his arm, he opened fire. The officers fired twenty shots, hitting Hocker nine times. After Hocker was convicted and received a ten-year sentence in state court, he sued the officers for excessive use of force.

The court held the officers were entitled to qualified immunity because their use of force was reasonable under the circumstances. First, Hocker, who was possibly drunk and suicidal, posed a threat to anyone on the road after he refused to stop for the officers and continued to drive on a winding road, with his lights off, at speeds between 70 and 80 miles per hour. Second, after Hocker stopped, he rammed a police car while an officer was standing behind the car's open door, temporarily trapping the officer and pushing the police car thirty feet. In addition, a second officer had to move out of the way to avoid being struck by the police car as it was pushed towards him. Only after these direct risks to their own safety did both officers fire at Hocker's car. The court noted the officers' responses to the risks created by Hocker's actions were the kinds of split-second judgments that officers must make in tense, uncertain and rapidly evolving circumstances that sometimes occur in the line of duty.

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

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Ramos v. City of Chicago, 716 F.3d 1013 (7th Cir. 2013)

Police officers learned a burglary suspect, known only as "Jose" lived at 7249 South Lawndale Avenue. The police also knew Jose was male, Hispanic, in his twenties, approximately 5'2" tall, bald, and might be wearing a red shirt. As officers approached the South Lawndale address, they saw an Hispanic male, who appeared to be in his mid-twenties, wearing a red shirt, pulling away from the curb in a vehicle. An officer performed a traffic stop and asked the man for his driver's license. The man told the officer he did not possess a valid driver's license; however, he gave the officer a state identification card, which identified the man as Pedro Ramos. In addition, Ramos was 6'1" tall. The officer had Ramos get out of the vehicle, handcuffed him and placed him in the back of a police car. The officer told Ramos he was being detained in connection with a burglary investigation. Shortly afterward, another officer brought a witness from the burglary to the scene, and the witness positively identified Ramos as one of the perpetrators. The officers

then arrested Ramos for burglary. Ramos remained incarcerated for 253 days until he was acquitted of the burglary offense.

Ramos filed a lawsuit, claiming the police officers violated the *Fourth Amendment* by stopping his vehicle, handcuffing him and then placing him in the back of a police car until the burglary victim arrived and identified him.

The court held the initial stop of the vehicle as it was pulling away from curb at 7249 South Lawndale Avenue was supported by reasonable suspicion; therefore, the officers were entitled to qualified immunity. At the time of the stop, the officers had information that a burglary suspect lived at the South Lawndale address, that he was an Hispanic male and that he may be wearing a red shirt. The similarity between Ramos' appearance and the description of the suspect, particularly given that the suspect was pulling away from the curb at the address identified as that of the suspect, gave the officers reasonable suspicion to conduct a *Terry* stop.

Even though the officers were granted qualified immunity, the court voiced concern over the officers' decision to handcuff and detain Ramos after the initial stop. The court noted that once the officers pulled Ramos over, their basis for reasonable suspicion diminished. Ramos provided the officers with identification, which indicated his name was Pedro not Jose and he was significantly taller than the height reported for the burglary suspect. Further, while the court has upheld the use of handcuffs to ensure officer safety in a *Terry* stop without automatically escalating the encounter into an arrest, that does not mean law enforcement can routinely handcuff suspects in every situation. The court stated:

> "The proliferation of cases in this court in which '*Terry*' stops involve handcuffs and ever-increasing wait times in police vehicles is disturbing, and we would caution law enforcement officers that the acceptability of handcuffs in some cases does not signal that the restraint is not a significant consideration in determining the nature of the stop."

The court further noted it did not need to decide if the officers' use of handcuffs turned the initial *Terry* stop into an arrest because the officers had probable cause to arrest Ramos after he failed to produce a valid driver's license after the initial lawful stop.

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

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Rabin v. Flynn, 725 F.3d 628 (7th Cir. 2013)

After a police officer saw Rabin carrying a holstered gun on his hip in public, the officer handcuffed and detained Rabin for approximately ninety minutes while the officer and two back-up officers sought to confirm the validity of Rabin's carrying license. None of the officers were familiar with the unique license Rabin possessed, one carried primarily by private detectives and security officers. When the officers confirmed Rabin's license was legitimate, he was released.

Rabin sued Officers Flynn, Quinlan and Knepper for unlawful arrest, arguing the officers should have known about the type of license he possessed and released him as soon as he presented it. Rabin also sued the officers for using excessive force, claiming his handcuffs were overly tight and exacerbated a pre-existing medical condition.

The court held the three officers were entitled to qualified immunity on Rabin's unlawful arrest claim. The court concluded even if the officers had known what type of license Rabin had, it was still reasonable to detain Rabin while the officers verified the legitimacy of the license. Even though the length of Rabin's detention was unfortunate, it was largely caused by the government's failure to have an efficient system of license verification. There was no evidence the individual officers were responsible for the prolonged verification process.

The court further held Officers Flynn and Quinlan were entitled to qualified immunity on Rabin's excessive force claim, but Officer Knepper was not. Rabin claimed he told Officer Knepper the handcuffs were too tight and about his pre-existing neck and hand injuries. Given that Rabin was already handcuffed, no reasonable officer who was aware of Rabin's medical condition would have believed exacerbating Rabin's medical problems by keeping the handcuffs as tight as they were was necessary to ensure officer safety. While Officer Knepper was not entitled to qualified immunity, the court stated he would have an opportunity at trial to dispute Rabin's claim or explain why he did not loosen the handcuffs.

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

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Williams v. City of Chicago, 733 F.3d 749 (7th Cir. 2013)

Williams arrived home from work at 2:30 a.m. and saw his neighbor's house on fire. Williams went onto the porch and banged on the front door to rouse anyone who might be inside the house. Two police officers responded and saw Williams on the front porch. Williams told the officers he was a neighbor and was concerned there might be people in the house. The officers kicked open the locked front door and entered the house. The officers did not find anyone inside, but they saw a neatly stacked pile of wood, which was on fire, and burning sheets of newspaper stuffed into exposed insulation in the walls.

The officers arrested Williams on suspicion of arson. After the prosecutor declined to file the arson charge, the officers charged Williams with criminal trespass, which was later dismissed.

Williams sued the officers and the City of Chicago for false arrest and malicious prosecution.

The court held the officers were not entitled to qualified immunity on Williams' false arrest claim. When the officers arrived on scene, Williams was on the porch of a burning house, banging on the front door. The officers did not see anything that would indicate Williams had set the fire. Williams' mere presence on the porch, without more, was not enough to provide probable cause to arrest him for arson or criminal trespass. In addition, the court held it was not reasonable for the officers to even mistakenly believe Williams had set the fire.

The court further held the Williams offered sufficient evidence from which a jury could find the officers and the city are liable for an unconstitutional false arrest and malicious prosecution under state law.

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

*****

Atkinson v. City of Mountain View, 709 F.3d 1201 (8th Cir. 2013)

Atkinson intervened in a verbal dispute between his brother-in-law and another man. The man rushed Atkinson and rammed his shoulder into Atkinson's chest, which caused him to fall backward ten to fifteen feet into a parked vehicle. Police officers then arrested Atkinson, who had suffered broken ribs, a punctured lung and other serious injuries.

Atkinson later discovered the man who caused his injuries was the chief of police. The chief was on duty; however, was not in uniform, had neither his gun nor his badge, and never identified himself as a police officer before striking Atkinson. All charges against Atkinson were dismissed.

Atkinson sued the city and the chief of police, claiming the chief used excessive force and that the city was liable for his unlawful conduct.

The court held the chief of police was not entitled to qualified immunity.

First, the court held the chief seized Atkinson, under the *Fourth Amendment*, when he intentionally barreled into Atkinson and caused him to fall back against the parked vehicle.

Second, the court held the seizure of Atkinson was unreasonable. Reviewing the factors from *Graham v. Connor*, the court found Atkinson had not committed any serious crime, he did not pose an immediate threat to the chief or others and he could not have been resisting arrest or attempting to evade arrest by flight because the chief never identified himself as a police officer before striking him. Atkinson only attempted to prevent a fight between his brother-in-law and the man he later learned was the chief of police. A reasonable jury could find the chief was an overzealous police officer, whom without identifying himself as a law enforcement officer, used excessive force and unreasonably caused Atkinson severe injuries in violation of the *Fourth Amendment*.

Finally, the court held it would have been clear to a reasonable officer the amount of force used against Atkinson in this situation was unreasonable.
The court held the city could not be held liable for the chief's actions because he was not one of the city's final policy makers. In addition, Atkinson could not show other instances where excessive force had been used by the chief or other police officers, which could establish the city's deliberate indifference to such a problem.

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

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Small v. McCrystal, 708 F.3d 997 (8th Cir. 2013)

Police officers responded to a disturbance at a golf course. Officer McCrystal arrested Small by tackling him from behind as Small was walking toward the parking lot. Afterward, Officer McCrystal and another officer obtained arrest warrants for other individuals involved in the disturbance.

Small and the other arrestees sued the officers, claiming a variety of constitutional violations.

The court held Officer McCrystal was not entitled to qualified immunity for any of Small's claims.

First, the court ruled a reasonable officer would not have believed he had probable cause to arrest Small for unlawful assembly as neither Small nor any other person at the time of his arrest was "acting in a violent manner," as required by the state statue.

Second, a reasonable officer would not have believed he had probable cause to arrest Small for failure to disperse, as there was no "riot" as defined by the state statute and Small was not ordered to disperse.

Third, a reasonable officer would not have believed he had probable cause to arrest Small for disorderly conduct because Smalls did not engage in any fighting, violent behavior or other acts prohibited by the state statute.

Fourth, it was unreasonable for Officer McCrystal to tackle Small from behind to effect his arrest. Small was charged with non-violent misdemeanors and did not pose an immediate threat to the safety of the officers or others. In addition, Small was not resisting arrest or fleeing to evade arrest because McCrystal had not yet told him he was under arrest.

The court also held the officers who later obtained arrest warrants for the other individuals were not entitled to qualified immunity. The court found the arrestees alleged a valid *Fourth Amendment* violation by claiming the officers' false police reports caused their arrest warrants to be issued without probable cause. It is clearly established the *Fourth Amendment* requires a warrant application to contain a truthful factual showing of probable cause.

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

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Folkerts v. City of Waverly, 707 F.3d 975 (8th Cir. 2013)

Travis Folkerts, who has an intellectual disability diagnosed as mental retardation, was accused of committing a lewd and lascivious conduct with a minor, a misdemeanor offense. The investigating officer, knowing of Travis's disability, went to his apartment to interview him. The officer advised Travis of his *Miranda* rights, more fully explaining them to accommodate for Travis' limitations. Believing Travis understood his rights, the officer transported him to the police station to conduct an interview. Once at the police station, the officer questioned Travis in a conference room, instead of the usual interrogation room, because it was less intimidating. At Travis' request, the officer telephoned Travis' mother, who declined to come to the police station. The officer continued his questioning, and Travis made several incriminating statements. After the officer decided to arrest Travis, he contacted Travis' parents so one of them could be present during the booking process. The court declared Travis incompetent to stand trial and dismissed the case against him. Travis' parents sued the police department and the officer, claiming Travis' due process rights had been violated.

The court disagreed, holding the officer was entitled to qualified immunity. To establish a due process violation, the Folkerts had to establish the officer's conduct was so outrageous that it "shocked the conscience." The court held the officer's behavior did not shock the conscience because the officer altered his questioning style, more fully explained the *Miranda* rights,

interviewed Travis in a less intimidating room and called Travis' mother at his request and invited her to the police station. In addition, the court held the officer's investigation, as a whole, to include the decision to charge Travis, did not shock the conscience.

The court further held that no reasonable jury could conclude the officer failed to make reasonable accommodations for Travis, under the Americans with Disabilities Act, during the interview and arrest process.

Finally, the court held the Folkerts failed to allege a pattern of similar constitutional violations by other police officers and as a result dismissed the portion of the lawsuit against the city.

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

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Burlison v. Springfield Public Schools, 708 F.3d 1034 (8th Cir. 2013)

Police officers arrived at a public high school to conduct a sweep of randomly selected areas in the building with a drug-dog. The sweep was conducted in accordance with the school district's standard operating procedures in an effort to combat the drug problem at the school. One of the areas to be swept was a science classroom. The officers directed all students and the teacher to leave the room, and to leave all backpacks, purses and personal belongings behind. Afterward, the officers spent five minutes in the classroom, however, the drug-dog did not alert to anything. The officers testified they did not search any students' possessions during this time.

Burlison brought a lawsuit on behalf of her son, C.M., claiming the school district, superintendent, principal and sheriff violated her son's *Fourth Amendment* rights by separating him from his backpack during the drug-dog sweep.

The court held the school district, officials and sheriff were entitled to qualified immunity. Even if C.M.'s backpack was seized when the officers directed him to leave it in the classroom while the sweep occurred, the court concluded the seizure was part of a reasonable procedure to maintain the safety and security of the students at the school. In addition, C.M.'s rights were not violated by his brief separation from his backpack because he normally would not have been able to access or move it during class time without permission.

In addition, the school district and its officials established a need for drug-dog sweeps as there was substantial evidence showing there were drug problems in the schools within the district. The procedures used by the school district and police officers to conduct the sweeps reasonably addressed the concerns over drug usage in school in a manner that was minimally intrusive to the students and their belongings.

Finally, the sheriff was not liable because he did not participate in the sweep and there was no evidence he failed to train or supervise the officers who conducted it.

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

*****

Joseph v. Allen, 712 F.3d 1222 (8th Cir. 2013)

Joseph called 911 and reported, "A lady is going crazy in my house." When officers arrived at Joseph's apartment, they encountered Latavia Jones. Jones was wearing a ripped shirt, she had lacerations on her hands and a two-inch cut on her arm. Jones told the officers Joseph cut her with a knife after she told him she was ending their relationship. An officer seized a knife on the floor in the apartment after Jones identified it as the one that cut her. The officers arrested Joseph, who was eventually acquitted of the domestic assault charge.

Joseph sued the officers, claiming they violated his *Fourth Amendment* rights because they did not have probable cause to arrest him.

The court held the officers were entitled to qualified immunity. Jones' physical injuries, as well as other evidence at the scene, corroborated her statements and provided indicia of reliability. Under the circumstances, it was reasonable for the officers to believe Joseph was the aggressor and he had at least attempted to cause serious physical injuries to Jones.

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

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Mitchell v. Shearrer, 729 F.3d 1070 (8th Cir. 2013)

Mitchell allowed grass clippings and leaves from his lawn to be cast upon the street in front of his house in violation of a local ordinance. After the police department received a complaint about the clippings and leaves, Officer Shearrer went to Mitchell's house to investigate.

Officer Shearrer opened the glass storm door and knocked on the interior wooden door, which Mitchell answered. Officer Shearrer asked Mitchell to come outside so he could show Mitchell the grass clippings and leaves in the street. Mitchell refused and as he began to shut the interior door, Officer Shearer put his foot into the doorway, preventing the door from closing. Officer Shearrer repeated his request that Mitchell come outside, but Mitchell refused. Office Shearrer told Mitchell he was under arrest and then reached for Mitchell's arm as Mitchell stood in the doorway trying to shut the door. A short scuffle ensued and two back back-up officers helped Officer Shearer subdue and handcuff Mitchell.

Mitchell sued Officer Shearrer and the two back-up officers, claiming they violated his constitutional rights by arresting him in his home without first obtaining an arrest warrant.

The district court granted the back-up officers qualified immunity, but denied it as to Officer Shearrer. Officer Shearrer appealed.

The court of appeals held Officer Shearrer was not entitled to qualified immunity. Officer Shearrer decided to arrest Mitchell after Mitchell attempted to close the interior door to his house. A reasonable jury could find Mitchell was within his home, standing far enough away from the threshold where he had a reasonable expectation of privacy when Officer Shearrer tried to arrest him without a warrant.

Next, the court noted it is clearly established in the Eighth Circuit that unless exigent circumstances are present, an officer cannot reach over the threshold and into a person's home to

forcibly make a warrantless arrest. Accordingly, the court held a reasonable officer would have known when Mitchell tried to close the interior door, he stood within his house; therefore, the officer could not pull Mitchell out of the house and arrest him without exigent circumstances.

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

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Coker v. Arkansas State Police, 734 F.3d 838 (8th Cir. 2013)

A police officer clocked Coker's motorcycle travelling 102 mph and pursued Coker in his patrol car. After a brief chase, the officer bumped the motorcycle with his patrol car, causing the motorcycle to tip over and Coker to fall to the ground. Coker then jumped up and ran to the side of the road, outside the view of the patrol car's dash camera. The officer claimed when he got out of his patrol car to pursue Coker on foot, Coker turned to face him in a crouched fighting stance. According to the officer, he told Coker to get on the ground, but Coker refused. The officer stated he kicked Coker in the face, knocking him to the ground, and may have struck Coker in the face with his metal Maglite flashlight during the ensuing struggle to handcuff Coker. Coker claimed he complied with all of the officer's commands and immediately fell to the ground, waiting to be handcuffed. At that point, Coker claimed the officer kicked him in the face and then struck him in the face with his flashlight, breaking his cheek bones. Coker also claimed the officer struck him in the face with his elbow after he was handcuffed.

Coker claimed the officer used excessive force in violation of the *Fourth Amendment* during the arrest.

Without the aid of video or an understandable audio recording, the court concluded it was impossible to determine what happened after Coker ran out of view of the patrol car's dash camera without weighing the officer's version of events against Coker's version. However, the court stated it is the job of the jury and not the court to determine issues of witness credibility when there are two conflicting versions of an event and to decide whose story is more plausible. Consequently, the officer was not entitled to qualified immunity, as a reasonable jury could find the severity of Coker's injuries resulted from an excessive use of force, especially if the jury believed the office struck Coker with his metal flashlight after Coker was on the ground and allegedly complying with the officer's commands.

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

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Ford v. City of Yakima, 706 F.3d 1188 (9th Cir. 2013)

A police officer stopped a car driven by Ford for a noise ordinance violation. As Ford retrieved his driver's license and registration, he told the officer he thought the traffic stop was racially motivated. During the verbal exchange that ensued, the officer told Ford, "Stop running your mouth and listen, if you cooperate, I may let you go with a ticket today. If you run your mouth, I will book you in jail for it." Ford responded with disbelief to the prospect of being arrested for a noise ordinance violation, but after repeated threats that he would be taken to jail if he kept talking, Ford stopped yelling and answered the officer's questions. After the officer consulted with another officer who had arrived, he decided to arrest Ford. The officer told Ford he arrested

him for playing his music too loud and because he "acted a fool." While driving to the jail, the officer told Ford, "You talked yourself into this on video. It's all well recorded."

After the municipal court acquitted Ford, he sued the officers, claiming they arrested him in retaliation for exercising his *First Amendment* right to freedom of speech.

The court denied the officers qualified immunity. The court noted the *First Amendment* protects a significant amount of verbal criticism directed at police officers. Here, the court held Ford's comments to the officer during their encounter was protected speech. As a result, the officers violated Ford's *First Amendment* right when they arrested him in retaliation for making those comments, even though probable cause existed to arrest him. Ford's criticism of the police for what he perceived to be an unlawfully and racially motivated traffic stop falls "squarely within the protective umbrella of the *First Amendment*," and any action to punish or deter such speech is unconstitutional.
The court further held at the time of this incident, it was clearly established in the Ninth Circuit that it was unlawful for police officers to use their authority to retaliate against individuals for their protected speech.

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

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Maxwell v. County of San Diego, 708 F.3d 1075 (9th Cir. 2013)

Lowell Bruce, a police officer, shot his wife, Kristin, in the jaw with his Glock .40 caliber service pistol in the couple's bedroom. At the time, Lowell, Kristin and their two children lived with Kristin's parents, Jim and Kay Maxwell. Various police officers and emergency medical technicians (EMTs) responded to the scene. When the police sergeant arrived, he believed he was the ranking officer; however, there was a lieutenant and captain on the scene. Nonetheless, the lieutenant and captain stayed near the end of the driveway and did not interfere with the sergeant, who took control of the scene. The EMTs concluded Kristin had to go to the hospital quickly and arranged to have an ambulance transport her to a nearby landing zone where an air ambulance, with advanced medical capabilities, would fly her to the hospital. The police sergeant, however, refused to let the ambulance leave immediately because he viewed the area as a crime scene and thought Kristin had to be interviewed. The ambulance was able to leave after a five to twelve minute delay, but Kristin died en route to meet the air ambulance due to blood loss from the gunshot wound.

In the meantime, the sergeant ordered the house be evacuated and sealed and the Maxwell's separated. Kay and the children were placed in a motor home on the driveway and Jim was allowed to remain outside on the driveway. Jim and Kay repeatedly asked to be allowed to follow Kristin to the hospital, but were told they had to stay and wait separately for investigators to interview them. When Jim found out Kristin had died he wanted to tell Kay. After the officer refused, Jim began to walk down the driveway toward the motor home. The officer sprayed Jim three times with pepper spray, struck him with his baton and handcuffed him. Jim was released from handcuffs thirty minutes later, but still kept apart from Kay.

First, the Maxwells sued the police officers, claiming Kristin's rights to bodily security under the *Fourteenth Amendment's Due Process Clause* were violated by delaying her ambulance, which resulted in her death.

Generally, police officers cannot be held liable for an injury inflicted by a third party; however, in this case, the court held the danger-creation exception applied. The danger-creation, which was clearly established at the time of this incident, applies when an officer places a person in a more dangerous situation than the one in which they found her. In the Ninth Circuit, impeding access to medical care amounts to leaving a victim in a more dangerous situation. Here, the officers found Kristin facing a preexisting danger from her gunshot wound and they increased that danger by preventing her ambulance from leaving. This arguably left Kristin worse off than if the ambulance had been allowed to bring her to an air ambulance that had advanced medical capabilities and was ready to fly her to the hospital. As a result, the officers were not entitled to qualified immunity.

The court further held the existence of a crime scene did not justify the officers delaying the ambulance. The victim was the only one in the ambulance, Lowell had confessed to the shooting and was in custody, and the officers had recovered the gun used in the crime.

Second, the Maxwells claimed their multi-hour detention and separation from each other was an unreasonable *Fourth Amendment* seizure.

The court agreed and denied the officers qualified immunity. At the time of the incident it was well settled while the police have the right to request citizens to answer questions voluntarily, they have no right to compel them to answer. Consequently, officers were on notice they could not detain, separate, and interrogate the Maxwells for hours instead of allowing them to accompany Kristin to the hospital.

Third, the Maxwells claimed the officers arrested Jim without probable cause and used excessive force against him when he tried to rejoin his wife after being told of Kristin's death. The court held the officers were not entitled to qualified immunity. The officers claimed Jim's refusal to obey the officer's command not to rejoin his family was a criminal violation. However, as the separation of the Maxwells was unlawful, Jim was entitled to resist an unlawful order to keep them apart. Additionally, the amount of force used against Jim was unreasonable under the circumstances.

Finally, the court held the lieutenant and captain were not entitled to qualified immunity. Although neither directly participated in any of the unlawful acts, a jury could reasonably find they were liable for their subordinates' constitutional violations if they knew of those violations and failed to act to prevent them. It was undisputed that the lieutenant and captain were aware of the Maxwells' detention and witnessed at least part of Jim's arrest and beating.

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

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Moss v. United States Secret Service, 711 F.3d 941 (9th Cir. 2013)

During the 2004 presidential campaign, Moss and others who opposed President Bush organized a demonstration at a campaign stop in Oregon. The Bush protestors claimed Secret Service

agents engaged in viewpoint discrimination in violation of the *First Amendment* by moving them to a location where they had less opportunity than the Bush supporters to communicate their message to the President and those around him.

The Bush protestors also claimed the State Police supervisors, who were not present, but whose officers carried out the Secret Service agents' directions used excessive force in violation of the *Fourth Amendment*.

The court held the Secret Service agents were not entitled to qualified immunity. If true, the allegations by the Bush protestors would be sufficient to support a claim of viewpoint discrimination in violation of the *First Amendment*. Additionally, the court held this right was clearly established in 2004.

The court held the State Police supervisors were entitled to qualified immunity because the Bush protestors did not allege the supervisors directed or approved the shoving, use of clubs or shooting of pepper spray bullets at the protestors in an effort to move them. However, the court directed the district court to determine if the Bush protestors should be allowed to amend their complaint against the State Police supervisors.

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

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Cameron v. Craig, 713 F.3d 1012 (9th Cir. 2013)

Deputy Buether filed a criminal complaint stating someone had used his credit card without authorization to purchase household furnishings. Buether told Detective Craig he believed Cameron, the mother of his two children had used the credit card after she was removed from their home pursuant to a court order. Buether and Craig had attended the police academy together, worked the same shift and responded to hundreds of calls together. After corroborating much of Buether's information, Craig obtained a warrant to search Cameron's apartment for the items purchased with Buether's credit card. After Buether gave Craig his child custody schedule, Craig executed the search warrant at a time she knew Cameron would have custody of the couple's two young children. Six to ten police officers executed the search warrant. Upon entering the apartment, officers pointed guns at Cameron and handcuffed her arms behind her back tightly enough to leave bruising that lasted a few days. Officers arrested Cameron for a variety of property offenses; however, the prosecutor later dismissed all of the charges.

Cameron sued the officers, claiming her *Fourth Amendment* rights were violated when police officers conspired with the father of her children, a police officer with the same department, to obtain a warrant to search her home without probable cause, used excessive force while executing that warrant and then arrested her.

The court held the officers were entitled to qualified immunity to Cameron's unlawful search and arrest claims. Detective Craig's affidavit established probable cause that Buether did not authorize Cameron to use his credit card after she was removed from their home and the items purchased were inside Cameron's apartment. For similar reasons, the court held Craig had probable cause to arrest Cameron. Even though Cameron told Craig she had permission to use

Buether's credit card, an objectively reasonable officer could have chosen to believe Buether instead.

The court, however, declined to grant Detective Craig qualified immunity on Cameron's excessive use of force allegation. The court concluded a jury could find the level of force used was excessive. Cameron's suspected crimes were relatively minor and non-violent. The officers had no reason to suspect Cameron would pose a threat to their safety and Cameron was not resisting arrest. A reasonable jury could easily determine the deployment of six to ten heavily armed officers was unnecessary to execute a search warrant for stolen property.

The court further held Detective Craig was not entitled to qualified immunity on Cameron's claim the search warrant was executed in such a way to intimidate her and to secure an unfair advantage for Buether in the couple's child custody proceedings. A reasonable jury could conclude Detective Craig and Buether conspired to abuse their power as law enforcement officers because they were friends and close colleagues, because Craig knew Buether and Cameron were engaged in mediation over custody of their children, and because Craig intentionally executed the search warrant when she knew the children would be present. In addition, a reasonable jury could also find Buether sought to exploit the raid by immediately calling the mediator after Cameron was arrested.

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

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Gonzalez v. City of Anaheim, 715 F.3d 766 (9th Cir. 2013)

Officers Wyatt and Ellis conducted a traffic stop on a van driven by Gonzalez. Gonzalez pulled over and the officers approached the van on foot from each side. After Officer Wyatt saw Gonzalez reach back between the seats, he drew his gun and told Gonzalez not to reach back there. Officer Ellis twice told Gonzalez to turn off the van but he did not respond. Gonzalez also refused to open his right hand, which appeared to be concealing a plastic baggie. The officers opened the driver and passenger side doors, and Officer Wyatt reached in and struck Gonzalez on the arm with his flashlight three times. Gonzalez responded by moving his right hand toward his mouth, attempting to swallow whatever was in his hand. Officer Ellis then attempted to apply a carotid restraint or sleeper-hold on Gonzalez, who struggled with him, while Officer Wyatt entered the van on the passenger side and began punching Gonzalez in the head and face. After Gonzalez tried to shift the van into gear, Officer Ellis struck him on the back of the head three times with his flashlight. Nonetheless, Gonzalez shifted the van into gear and it began to pull away with Officer Wyatt still in the passenger seat. After Gonzalez accelerated, Officer Wyatt yelled at him to stop and tried to knock the van out of gear, but Gonzalez slapped his hand away. Officer Wyatt pulled out his gun and shot Gonzalez in the head. The van hit a parked vehicle and stopped. Gonzalez died.

Gonzalez's family sued the officers, claiming the officers used excessive force several times against Gonzalez in violation of his *Fourth Amendment* rights.

Applying the factors from *Graham v. Connor*, the court held the officers were entitled to qualified immunity.

First, the court held Office Wyatt's striking Gonzalez in the arm with the flashlight three times was not excessive force given Gonzalez's refusal to follow the officers' commands.

Second, the court held Officer Ellis' attempted use of a carotid restraint, Officer Wyatt's punches to Gonzalez's face and Officer Ellis' flashlight strikes to Gonzalez's head were objectively reasonable because the officers had reason to believe Gonzalez possessed illegal drugs and was trying to destroy evidence. In addition, Gonzalez posed an immediate threat to the officers as he repeatedly refused to obey the officers' commands and Gonzalez shifted the van into gear with an officer inside the van. It was reasonable for the officers to believe Gonzalez had a hidden weapon and that remaining inside the van posed a threat to Officer Wyatt. Finally, Gonzalez was actively resisting arrest and attempted to evade arrest by fleeing in the van.

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

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Courtney v. State of Oklahoma, ex rel., Department of Public Safety, 722 F.3d 1216 (10th Cir. 2013)

During a traffic stop, Courtney told the police officer he had a gun in the trunk of his car. The officer seized the gun and arrested Courtney for possession of a firearm by convicted felon, under Oklahoma law, after the officer learned Courtney had been adjudicated delinquent of a felony as a juvenile approximately twelve years prior. The district attorney ordered Courtney released from jail and never filed any criminal charges. Courtney's gun was returned to him almost a year after his release.

Courtney sued the officer, for among other things, arresting him without probable cause in violation of the *Fourth Amendment*. Courtney also sued the State of Oklahoma for conversion, as his firearm was not returned to him for almost one year after his release.

The court held the officer was not entitled to qualified immunity. While Oklahoma law prohibits the possession of firearms by convicted felons, a juvenile adjudication over ten years old does not qualify as an underlying felony. When the officer arrested Courtney, he knew the felony on Courtney's record was disposed of as a juvenile adjudication and it was over ten years old. Therefore, the court concluded, based on the facts known to him at the time of arrest, the officer lacked probable cause to arrest Courtney for possession of a firearm by a convicted felon.

The court further held Oklahoma's felon-in-possession statute is not ambiguous insofar as persons adjudicated delinquent for a felony as juveniles are only prohibited from possessing firearms for ten years. The information known to the officer at the time of arrest made clear Courtney's juvenile adjudication fell into this category. As a result, the court concluded it was clearly established the officer lacked probable cause to arrest Courtney of violation of the felon-in-possession statute.

The court also held the district court improperly dismissed Courtney's claim for conversion. It was undisputed that even after Courtney had been released from jail and it had been determined it was legal for him to possess a firearm, the State retained possession of his firearm for almost one year.

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

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Morton v. Kirkwood, 707 F.3d 1276 (11th Cir. 2013)

Officer Kirkwood shot Morton seven times while Morton sat inside his car. According to Officer Kirkwood, he shot Morton after Morton accelerated his car, threatening the life of a nearby officer. Morton claimed he never accelerated his car and Kirkwood shot him after he put the car in park and raised his hands.

Morton sued Officer Kirkwood for excessive use of force in violation of the *Fourth Amendment* and for assault and battery under Alabama Law. Officer Kirkwood filed a motion for summary judgment, claiming he was entitled to qualified immunity. With this type of motion, the court was required to accept Morton's account of the incident as true. The court acknowledged the facts accepted at this stage of the proceedings may not be the actual facts of the case. With this in mind, the court concluded Officer Kirkwood was not entitled to qualified immunity.
The court held if Morton's version of events was accurate, a reasonable officer on the scene would not have shot Morton seven times while he sat stationary in his car with his hands up. This alleged conduct violated Morton's *Fourth Amendment* rights, and clearly established law gave Officer Kirkwood fair warning that the use of deadly force under these circumstances would be unconstitutional. In addition, such conduct would also strip Officer Kirkwood of state agent immunity regarding the assault and battery allegation.

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

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Myers v. Bowman, 713 F.3d 1319 (11th Cir. 2013)

Myers and Bowman ended their engagement to be married. Myers and his father retrieved some personal property from Bowman's house, to include the couple's dog, which Myers had purchased. Bowman called her father, who was a county magistrate judge, who in turn called Myers and demanded the return of the dog. Myers refused. The magistrate followed Myers' vehicle and reported to local police officers someone had stolen his dog, a felony offense based on the value of the dog. Police officers conducted a traffic stop, pulled Myers out of his vehicle, wrestled him to the ground and arrested him. Myers suffered injuries to his head, neck, wrist and knees because of the officer's use of force. Another officer arrested Myers' father. After the magistrate recovered the dog from Myers' vehicle, he berated and threatened Myers for approximately seven minutes before he ordered the officers to release Myers and his father.

Myers sued the police officer for arresting him without probable cause and for excessive use of force in violation of the *Fourth Amendment*. Myers sued the magistrate for manufacturing probable cause that caused the officer to arrest him and use excessive force against him.

The court held the officer was entitled to qualified immunity. First, the officer had probable cause to arrest Myers. When the officer arrested Myers, it was reasonable for the officer to believe Myers had committed felony theft and fled the scene of the crime. The officer's knowledge was based on the magistrate's claim Myers had stolen the dog. The officer was entitled to rely on the magistrate's claim his dog was stolen, as an officer is entitled to rely on a

victim's complaint as support for probable cause. In addition, the officer was entitled to presume the magistrate was a reliable and trustworthy source because he was a government official.

Second, the court concluded the officer did not use excessive force by grabbing Myers by the arm, forcing him to the ground, placing him in handcuffs and searching him. When the officer used this force, he had probable cause to arrest Myers and he did not know whether Myers was armed or whether he would resist arrest.

The court further held the magistrate was entitled to qualified immunity because the officers did not use excessive force against Myers. In addition, the magistrate did not act under color of law as a state employee when he reported the theft of the dog, but rather as a private citizen

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

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Use of Force / Qualified Immunity – Taser

Meyers v. Baltimore County, 713 F.3d 723 (4th Cir. 2013)

Mrs. Meyers called 911 to report her adult sons, Ryan and Billy, were fighting. When police officers arrived, Mrs. Meyers, Mr. Meyers and Billy were outside. Mr. Meyers had a laceration on his nose the officers believed was caused by Ryan. The officers could see Ryan pacing back and forth inside the house carrying a baseball bat. The officers knew Ryan suffered from a mental illness and felt he posed a threat to their safety because he was holding a baseball bat. After the officers failed to get Ryan to surrender, they entered the house and Officer Mee ordered Ryan to drop the baseball bat. After Ryan refused, Officer Mee deployed his taser in probe mode against Ryan. Ryan, who was approximately six feet tall, weighing two hundred sixty pounds, did not drop the bat or fall to the floor in response to the first taser shock. Officer Mee deployed his taser against Ryan a second time. This shock caused Ryan to drop the bat but he continued to advance toward the officers. Officer Mee deployed his taser a third time, which caused Ryan to fall to the ground. Once on the ground, the officers sat on Ryan's back. While the other officers remained on Ryan's back, Officer Mee deployed his taser a fourth time in probe mode, then changed the taser to stun mode and delivered six additional shocks to Ryan until he was unconscious. Ryan eventually died.

Ryan's parents sued the officers, claiming a variety of *Fourth Amendment* violations.

First, the court held the officers' entry into the house to arrest Ryan was reasonable. The officers had probable cause to believe Ryan had assaulted his father and that he could cause further injury or property damage because he was armed with a baseball bat.

Second, the court held Officer Mee's first three deployments of his taser did not amount to an unreasonable or excessive use of force. During the period Officer Mee administered the first three taser shocks, Ryan was acting erratically, holding a baseball bat he did not drop until after he received the second shock, and was advancing toward the officers until the third shock caused him to fall to the ground. Under these circumstances, Ryan posed an immediate threat to the officers' safety and he was actively resisting arrest. Officer Mee's first three uses of the taser were objectively reasonable and did not violate the *Fourth Amendment*.

Third, the court held it was not reasonable for Officer Mee to deploy his taser the last seven times against Ryan. Witness testimony established that after Ryan fell to the floor he was no longer actively resisting arrest and did not pose a continuing threat to the officers' safety, yet Officer Mee continued to use his taser until Ryan was unconscious. The court concluded,

> "It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who no longer is armed, has been brought to the ground, has been restrained physically by several other officers, and no longer is actively resisting arrest."

Finally, the court held, at the time of the incident, it was clearly established that officers who use unnecessary, gratuitous and disproportionate force to seize an unarmed citizen, are not acting in an objectively reasonable manner and therefore, are not entitled to qualified immunity.

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

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Ramirez v. Martinez, 716 F.3d 369 (5th Cir. 2013)

Deputy Martinez and other police officers went to Ramirez's landscaping business to execute a warrant for the arrest of Ramirez's sister-in-law. Ramirez confronted Deputy Martinez and the two exchanged profanities. Deputy Martinez ordered Ramirez to turn around and place his hands behind his back. After Ramirez failed to comply, Deputy Martinez grabbed Ramirez's hand and told him to turn around, but Ramirez pulled his arm away. Deputy Martinez then deployed his Taser, striking Ramirez in the chest. Deputy Martinez and several other officers forced Ramirez to the ground and restrained him with handcuffs. Deputy Martinez deployed his Taser a second time, while Ramirez was lying face down on the ground in handcuffs. Deputy Martinez arrested Ramirez for disorderly conduct; however, the charge was later dismissed.

Ramirez sued Deputy Martinez and several other officers for false arrest and excessive use of force.

The court held Deputy Martinez was entitled to qualified immunity on Ramirez's false arrest claim. Under Ramirez's version of the incident, a reasonable officer on the scene would have thought he had probable cause to arrest Ramirez for resisting arrest after Ramirez pulled his arm out of Deputy Martinez's grasp.

However, the court held Deputy Martinez was not entitled to qualified immunity on Ramirez's excessive force claim. The court concluded Ramirez's version of the facts was sufficient to establish under the *Graham* factors that Deputy Martinez used excessive force. First, analyzing the severity of the crime, the court noted while Ramirez pulled his arm out of Deputy Martinez's grasp, there was a dispute regarding any subsequent resistance up until Deputy Martinez deployed his Taser.

Second, the court held a reasonable officer could not have concluded Ramirez posed an immediate threat to the safety of the officers by questioning their presence at his place of business or while lying on the ground in handcuffs. Pulling his arm out of Deputy Martinez's grasp, without more, was insufficient to find Ramirez posed an immediate threat to the safety of the officers.

Finally, the court held is was objectively unreasonable for Deputy Martinez to deploy his Taser twice against Ramirez when the only resistance Ramirez offered was pulling his arm out of Deputy Martinez's grasp.

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

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Abbott v. Sangamon County, 705 F.3d 706 (7th Cir. 2013)

An animal control officer went to Cindy Abbott's house to investigate a complaint that her dog had been running loose in the neighborhood. After Travis Abbott, Cindy's adult son, threatened the animal control officer, police officers were dispatched to the house. An officer arrested Travis, handcuffed him with his arms behind his back and placed him in the back of his police car. As the officer was driving away, Travis began to struggle in the backseat, causing the officer to collide with Cindy's parked car. Cindy began screaming at the officer and approached his police car. The officer got out of his car and ordered Cindy to stop, but she did not. The officer shot Cindy in the abdomen with his taser in dart mode, which caused her to fall to the ground. After Cindy refused the officer's commands to roll over onto her stomach, he deployed his taser against her a second time. The officer then rolled Cindy onto her stomach and handcuffed her. The officer went back to his car and discovered Travis had gotten his arms in front of his body while still handcuffed and removed his seatbelt. Travis fought with the officer who deployed his taser in drive-stun mode several times against Travis until he was subdued.

The Abbotts sued the officer for false arrest, false imprisonment and excessive use of force.

The court held the officer was entitled to qualified immunity for the Abbotts' false arrest and false imprisonment claims. As to Travis, the officer had probable cause to arrest him for assault and disorderly conduct based on the threats and gestures he made to the animal control officer. The officer had probable cause to arrest Cindy because her failure to obey the officer's command to stop could be construed as obstructing the officer's efforts to arrest Travis.

The court held the officer was entitled to qualified immunity regarding Travis' excessive force claim. It was undisputed the officer only deployed his taser against Travis until he stopped fighting. Because Travis continued to resist after the first tasing, the officer did not violate clearly established law by using the taser in drive-stun mode several more times until Travis was subdued.

Regarding Cindy, the court held the officer's second use of his taser against her could be determined by a jury to have been unreasonable. Even though an officer's initial use of force may be justified, it does not automatically mean all subsequent uses of force will be justified. There was no evidence Cindy posed a threat to the officer after the first tasing. Even though Cindy did not comply with the officer's request to turn onto her stomach, she was not moving or otherwise actively resisting arrest.

The court further held on the date of this incident, it was clearly established that it was unlawful to deploy a taser in dart mode against a non-violent misdemeanant who had just been tased in dart mode who did not move when ordered to turn over after the first tasing. In addition, the

court noted it was also clearly established police officers could not use significant force against non-resisting or passively resisting suspects.

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

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LaCross v. City of Duluth, 713 F.3d 1155 (8th Cir. 2013)

LaCross claimed a police officer deployed his Taser against him while he was handcuffed and seated in the back of a police car on September 17, 2006. The next day, LaCross sought medical care for bruising on his wrists from the handcuffs, but he did not complain of any injuries related to the Taser application. LaCross filed suit in 2010 claiming the officer's use of the Taser constituted excessive use of force.

The court held the officer was entitled to qualified immunity because he did not violate LaCross' then clearly established constitutional rights. In September 2006, a reasonable officer could have believed that as long as he did not cause more than *de minimis* injury to an arrestee, his actions would not violate the *Fourth Amendment*. It was not until 2011 that the Eighth Circuit determined the appropriate inquiry in excessive force cases was whether the force used to effect a particular seizure was "reasonable," not the degree of injury suffered by an arrestee.

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

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Gravelet-Blondin v. Shelton, 728 F.3d 1086 (9th Cir. 2013)

Police officers were dispatched to a 911 call of a suicide in progress. When the officers arrived, they found an elderly man sitting in his car, which was parked in the side yard of his house with a hose running from the exhaust pipe to one of the car's windows. The officers had been warned the man owned a gun and would have it with him. Sergeant Shelton asked the man to get out of the car and the man complied, however, the man refused multiple commands to show his hands. Sgt. Shelton instructed another officer to deploy his Taser against the man in dart mode. After the officer deployed his Taser, the man fell to the ground and other officers moved in to handcuff him.

During this time, one of the man's neighbors, Blondin , heard the commotion and went outside to investigate. Blondin heard his neighbor moaning and saw several officers holding him on the ground. When Blondin was approximately thirty-seven feet away, he asked Sgt. Shelton what the officers were doing to his neighbor. Sgt. Shelton ran towards Blondin, pointing his Taser and ordered Blondin to get back, while another officer told Blondin to stop. Blondin froze. Sgt. Shelton began to warn Blondin that he would deploy his Taser against him if he did not leave. However, Sgt. Shelton deployed his Taser in dart mode before he finished giving Blondin that warning. After Blondin fell down, Sgt. Shelton arrested him for obstructing a police officer. The charge was later dismissed.

Blondin sued Sgt. Shelton for excessive use of force, unlawful arrest and malicious prosecution. The court held Sgt. Shelton was not entitled to qualified immunity.

Concerning Sgt. Shelton's use of force, the court considered the factors outlined in *Graham v. Connor*. First, even if Sgt. Shelton had probable cause to arrest Blondin for obstruction of justice for not immediately backing away from the arrest scene, it was not a serious offense. In addition, Blondin was standing thirty-seven feet away and had received conflicting orders from two police officers. Second, based on Blondin's behavior, demeanor and distance from the officers, there was no reason to believe he posed an immediate threat to the officers or others. Finally, Blondin did not resist arrest or attempt to evade arrest by flight. The court also noted while Sgt. Shelton warned Blondin, he did so as he fired his Taser, leaving Blondin no time to react. The court held a reasonable jury could conclude Sgt. Sheldon's use of force was unreasonable and excessive in violation of the *Fourth Amendment*.

The court further held at the time of the incident it was clearly established the use of a Taser against someone who is merely engaging in passive resistance was more than a trivial use of force.

In addition, the court held a reasonable jury could conclude that Sgt. Shelton did not have probable cause to arrest Blondin; therefore, Sgt. Shelton was not entitled to qualified immunity on Blondin's unlawful arrest and malicious prosecution claims.

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

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Roosevelt-Hennix v. Prickett, 717 F.3d 751 (10th Cir. 2013)

A police officer arrested Hennix for driving under the influence (DUI), handcuffed her arms behind her back, placed her in the back seat of his patrol car and closed the door. Hennix banged her head against the window of the patrol car to get the officer's attention. Officer Pricket, who had arrived on the scene, opened the door and told Hennix to calm down and stop banging her head against the window. At some point, Officer Prickett decided Hennix should have her legs restrained for the ride to the police station. Officer Prickett opened the door to the patrol car and ordered Hennix to place her feet outside the vehicle. Hennix claimed she told Officer Prickett that she could not lift herself and turn her body to place her feet outside the police car because of a pre-existing back injury. Officer Prickett deployed his Taser against Hennix in drive-stun mode one time. After Officer Prickett deployed his Taser, another officer removed Hennix's legs from the patrol car and placed them in restraints. Hennix immediately told the officers she could not feel her legs and the next day underwent back surgery for paralysis in her lower extremities.

The court held Officer Prickett was not entitled to qualified immunity. The court found there was sufficient evidence for a jury to conclude Hennix told the officers she was physically unable to comply with their requests to move her feet outside the patrol car. The court further found there was sufficient evidence for a jury to conclude the officers never attempted to help Hennix in moving her feet outside the patrol car before Officer Prickett deployed his Taser.

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

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Non-Use of Force Situations (Search Warrant Application / Execution / Other)

Winfield v. Trottier, 710 F.3d 49 (2d Cir. 2013)

Officer Trottier stopped Winfield for speeding. During the stop, Winfield gave Trottier consent to search her car. Trottier, who admitted he was not looking for anything in particular, found an envelope, opened it and read the document that was inside. After finishing the search and finding nothing, Trottier issued a speeding citation and allowed Winfield to leave.

Winfield sued Trottier, claiming he violated the *Fourth Amendment* by reading her mail.

The district court held Trottier was not entitled to qualified immunity.

The court of appeals held Winfield's consent to search her car did not extend to Trottier's reading the document inside the envelope. The *Fourth Amendment* specifically protects the right of the people to be secure in their papers. The court noted, reading a person's personal mail is a far greater intrusion than a search for contraband because it can invade a person's thoughts. Given this greater intrusion, a reasonable person would not assume giving consent to a general search of a car would include consent to search a person's personal papers. Once Trottier opened the envelope and failed to discover large sums of money or contraband, he should have moved on to search the rest of the car. Trottier exceeded the scope of Winfield's consent when he read the letter and violated her *Fourth Amendment* right to be free from unreasonable searches.

However, the court of appeals held Trottier was entitled to qualified immunity because the right he violated was not clearly established at the time of the incident.

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

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Armstrong v. Asselin, 734 F.3d 984 (9th Cir. 2013)

Armstrong gave a fourteen-year old boy a book that the boy's parents considered pornographic. The boy's parents gave the book to the police who obtained an arrest warrant charging Armstrong with dissemination of indecent material to a minor as well as a warrant to search Armstrong's home for evidence of the dissemination offense. In the warrant applications, the police included a four-page excerpt from the alleged pornographic book. The state district judge who approved both warrants reviewed the applications at the same time did not request the full copy of the book and consulted the dissemination ordinance before signing the warrants. The dissemination charge against Armstrong was later dismissed.

Armstrong sued several police officers claiming that a reasonable officer would have known the warrant applications failed to establish probable cause.

The court held the officers were entitled to qualified immunity. First, in their warrant applications, the officers only needed to establish probable cause, not absolute proof that giving the alleged pornographic book to the minor violated the ordinance. The book's cover portraying a bare buttocks squatting over a dinner plate and the four-page excerpt included in the warrant applications supported a reasonable belief the book as a whole contained material that violated

the ordinance. Second, the officers consulted prosecutors and submitted their warrant applications to a neutral and detached judge for review before they arrested Armstrong and searched his home.

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

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Federal Tort Claims Act (FTCA)

Millbrook v. United States, 133 S. Ct. 1441 (2013)

Millbrook sued the United States under the Federal Tort Claims Act (FTCA) alleging three Correctional Officers subjected him to a sexual assault and battery while he was an inmate at a federal prison.

Under the FTCA, the United States is not liable for intentional torts committed by its employees, except for certain intentional torts committed by investigative or law enforcement officers acting within the scope of their employment.

In an unpublished opinion, the Third Circuit Court of Appeals affirmed the district court's dismissal of Millbrook's claim because he did not allege the officers' conduct occurred during a search, seizure of evidence or course of an arrest for a violation of federal law.

In a unanimous opinion, the Supreme Court reversed the Third Circuit, holding the law enforcement provision to the FTCA applies to all conduct of law enforcement officers within the scope of their employment, not just to their investigative or law enforcement activities. The court held there was no basis for concluding a law enforcement officer's intentional tort must occur in the course of executing a search, seizing evidence or making an arrest in order to subject the federal government to liability.

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

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Davila v. United States, 713 F.3d 248 (5th Cir. 2013)

Davila, his adult son Tocho and Tocho's girlfriend Mata were driving into the United States from Mexico in Davila's truck when they were stopped at a border checkpoint. After an initial inspection, a Border Patrol agent referred Davila's truck to secondary inspection and told Davila, Tocho and Mata to remain there until a K-9 unit could be brought in from a different checkpoint. After two hours elapsed without the K-9 unit arriving, Tocho left without permission in Davila's truck while Davila and Mata remained at the inspection site. A local police officer at the checkpoint pursued Tocho in a high-speed chase and eventually apprehended him. While the pursuit was ongoing, Davila and Mata were handcuffed and taken to a county jail, where they were processed, issued jail clothing and placed into cells. Davila and Mata were released several hours later without explanation and no charges were ever filed against them. Tocho was charged with several offenses, including assaulting a federal law enforcement officer. Tocho failed to appear to answer the charges and a warrant was issued for his arrest.

Davila sued the federal government for false imprisonment under the Federal Tort Claims Act (FTCA) after he was taken to the county jail after Tocho fled the checkpoint in his truck.

The court of appeals reversed the district court, which had dismissed Davila's FTCA claim against the government under the detention-of-goods exception. The FTCA, which waives the government's immunity from lawsuit, is subject to several exceptions. The detention-of-goods exception provides the government cannot be sued for any claims arising out of the detention of any goods, merchandise or other property by any customs or law enforcement officer. The court of appeals held this exception did not apply because Davila's claim of false imprisonment did not occur while his truck was being searched by the Border Patrol agents. Davila's claim arose two hours after the initial search of his truck while the agents waited for a K-9 from a different checkpoint to arrive.

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

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Fifth Amendment

Double Jeopardy

United States v. Stoltz, 720 F.3d 1127 (9th Cir. 2013)

Stoltz was an active duty enlisted member of the United States Coast Guard assigned to a Coast Guard cutter. While moored for a routine port call, a shipmate saw Stoltz aboard the cutter viewing child pornography on his laptop computer. Stoltz later told investigators he possessed child pornography aboard the cutter.

The cutter's commanding officer decided not to court-martial Stoltz, so the government would not be precluded from charging Stoltz in civilian criminal court. However, after seven months passed and no civilian criminal charges had been filed, the commanding officer imposed non-judicial punishment (NJP) on Stoltz.

Generally, service members facing NJP can choose to reject the NJP and demand trial by court martial. If that occurs, the decision of whether to proceed with a court-martial rests with the proper convening authority. However, the right to reject NJP in favor of a court-martial is subject to the "vessel exception." If the service member is attached to or embarked on a vessel, he does not have the right to reject NJP. If the vessel exception does not apply, the service member faced with NJP must be informed of his right to reject NJP in favor of a court-martial and NJP cannot be imposed unless the service member voluntarily, knowingly, and intelligently waives that right in writing. Here, Stoltz was never informed that he could reject NJP and demand a court martial, nor did he waive that right.

Approximately two years later, after Stoltz's discharge from the Coast Guard, a federal grand jury indicted him for possession of child pornography.

Stoltz moved to dismiss the indictment, claiming it violated the *Double Jeopardy Clause* of the *Fifth Amendment* and constituted a due process violation.

The district court dismissed the indictment, concluding the vessel exception did not apply; therefore, Stoltz should have been given the opportunity to reject NJP and demand a court-martial. The district court further held because Stoltz had not been made aware of his right to demand a court-martial, the government violated the *Double Jeopardy Clause* by charging him with the same crime in civilian court.

The Ninth Circuit disagreed. Even if the vessel exception did not apply, and the Coast Guard had improperly imposed NJP on Stoltz, the *Double Jeopardy Clause* was not violated. Double jeopardy bars Stoltz's prosecution only if he was previously placed in jeopardy for the same child pornography offense. The Supreme Court has consistently held that jeopardy does not attach until a defendant is "put to trial before the trier of facts, whether the trier be a jury or a judge." Here, both sides acknowledged that NJP is non-criminal and until he was indicted, Stoltz was never charged with possession of child pornography, in either a court-martial or civilian criminal court. Consequently, the district court improperly dismissed the indictment on double jeopardy grounds.

The court further held even if a due process violation occurred, it occurred as part of the NJP proceeding and not the current prosecution.

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

*****

Due Process (electronic recording of custodial interrogations)

United States v. French, 719 F.3d 1002 (8th Cir. 2013)

Police officers arrested French. After advising French of his *Miranda* rights and obtaining a signed waiver, the officers interviewed French about two bank robberies and a shooting. A few hours later, French signed a statement admitting he participated in both robberies and intentionally shot a security guard. Officers did not electronically record French's interview, even though recording equipment was available in the building.

French argued the district court improperly admitted his statement into evidence. French claimed his *Fifth Amendment* right to due process was violated when police officers failed to capture his statement on audio or video tape even though the officers had the equipment and opportunity to do so.

The court disagreed, holding, "The Constitution does not mandate electronically recording a defendant's custodial interrogation." In addition, the court noted, "Other circuits have held that incriminating statements are not inadmissible simply because the police failed to record or take notes of the conversations."

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

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Identification Procedure (Photo Array)

United States v. Washington, 714 F.3d 962 (6th Cir. 2013)

Washington and another man confronted John Nesbitt in a parking lot, pointed a gun at Nesbitt's head and demanded that Nesbitt hand over his car keys. Nesbitt saw Washington clearly, as Washington did not use anything to cover his face. Nesbitt described his attacker as a black male, nineteen years-old, with a medium brown complexion, 5'9", 150 pounds, with a small beard.

Five months later, police officers asked Nesbitt to view a photo array to determine if he could recognize the men who carjacked him. The officers told Nesbitt the photographs in the array could be affected by the lighting of the cameras, and that some features in the photographs, such as hair and facial hair, could be easily changed. After receiving these instructions, Nesbitt viewed the photo array and immediately picked out Washington as the man who carjacked him.

Washington filed a motion to suppress Nesbitt's identification, arguing it was unduly suggestive. Specifically, Washington claimed after Nesbitt described his attacker as having light brown skin, the police officers chose darker skinned individuals than Washington to appear in the photo array alongside him.

The court disagreed, holding the identification procedure was not impermissibly suggestive to the extent there was a likelihood of misidentification. First, the photo array contained five African-American men in addition to Washington. Second, at least four of the men appeared to have some sort of facial hair and all five men appeared to be around the same age as Washington. Third, even though Washington has lighter skin tone than some of the other men in the photo array, the difference was not drastic. Finally, although Washington's photo had a glare on his face from the camera flash, the officer told Nesbitt the lighting and appearance of the individuals in the photos could be easily altered.

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

*****

Miranda

Custody

United States v. Diaz, 736 F.3d 1143 (8th Cir. 2013)

Federal agents believed Diaz was hired to transport cocaine in his truck. While conducting surveillance, the agents saw Diaz take a suitcase they believed contained cocaine from his truck into a hotel room. After Diaz came out of the hotel room without the suitcase, three agents followed him to restaurant where they asked Diaz if he would cooperate with their investigation. Diaz admitted to delivering the suitcase to the hotel room, but he denied being involved in any criminal activity. Diaz agreed to go back to the hotel with the officers and was left unhancuffed in the back of an unmarked police car for twenty minutes while the agents conducted a knock and talk interview at the hotel room. During the knock and talk, the agents obtained consent to search the suitcase from one of the men in the hotel room. After the agents discovered cocaine

in the suitcase, they released Diaz. Several months later, a grand jury indicted Diaz for conspiracy to distribute and possession with intent to distribute cocaine.

Diaz argued his statements to the officers and the seizure of the cocaine should have been suppressed because he was in custody when the agents questioned him and he had not been given *Miranda* warnings.

The court disagreed, finding Diaz was not in custody when the agents interviewed him. First, there was undisputed testimony the agents were armed but their weapons were not visible to Diaz when they talked to him. Second, when the agents approached him, Diaz voluntarily agreed to talk to the agents, and the interview occurred in a public location. Third, there was no evidence the officers surrounded Diaz, used coercive tactics or restrained Diaz's freedom of movement in any way. Finally, at the end of the encounter, the agents did not arrest Diaz. The court found a reasonable person in Diaz's position would have felt free to terminate the encounter with the agents and leave. As a result, Diaz was not in custody for *Miranda* purposes when he made the statements to the agents.

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

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United States v. Barnes, 713 F.3d 1200 (9th Cir. 2013)

At the request of federal agents, Barnes' parole officer scheduled a meeting with him. Barnes, who was required by the terms of his parole to attend the meeting, did not tell Barnes the agents would be present. When Barnes arrived, instead of meeting with him at the window in the lobby of the building as usual, he was searched and escorted through a locked door to his parole officer's office. Once in her office, the two federal agents began to question Barnes about an undercover drug buy that occurred a few months earlier. The agents did not advise Barnes of his *Miranda* rights. After Barnes denied involvement in the transaction, the agents played a portion of a recorded phone call between Barnes and a confidential informant. Barnes then told the agents he remembered the transaction. The agents read Barnes his *Miranda* rights. Barnes waived his rights and confessed his involvement in the drug transaction. Barnes was indicted on several drug charges.

Barnes argued his statements to the agents were obtained in violation of *Miranda*.

The court agreed. First, the court held Barnes was in custody for *Miranda* purposes. Barnes was told to appear for a meeting with his parole officer under threat of revocation of his parole. When he arrived, instead of meeting with his parole officer, federal agents confronted Barnes directly with evidence implicating him in a drug transaction. The agents interviewed Barnes in a small office behind a closed door instead of in the lobby of the building as usual. Even though the agents eventually advised Barnes of his *Miranda* rights, this was anything but a typical meeting with his parole officer. A reasonable person in Barnes' position would not have felt free to leave.

Second, the court held the agents engaged in a deliberate two-step interrogation process. Such an interrogation occurs when a police officer deliberately questions a suspect without *Miranda* warnings and obtains a confession or the suspect makes incriminating statements. The officer

then advises the suspect of his *Miranda* rights, obtains a waiver and has the suspect repeat his confession or incriminating statements. Here, the agent feared if Barnes heard the *Miranda* warnings he would be less likely to talk about the drug transaction and provide information about another suspect the agents were targeting. Even if the agents' primary reason to question Barnes was to gather information on another suspect, the agents were required to provide Barnes *Miranda* warnings when they began to question him.

Finally, the court found Barnes' pre and post *Miranda* warning confessions were only slightly different. The agents treated the second interrogation as continuation of the first interrogation with no break in between and they did not tell Barnes what he had said before the warnings could not be used against him. As a result, the *Miranda* warnings Barnes received were not effective and Barnes' post *Miranda* confession should have been suppressed.

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

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Deliberate Two-Step Interrogation Process

See United States v. Barnes, 713 F.3d 1200 (9th Cir. 2013)

See United States v. Morgan, 729 F.3d 1086 (8th Cir. 2013)

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Interrogation

United States v. Johnson, 734 F.3d 270 (4th Cir. 2013)

Police officers pulled over Johnson's vehicle after they saw it weaving in and out of traffic and displaying a bent and illegible temporary registration tag in violation of Maryland law. The stop occurred in a neighborhood known for its high incidence of crime. The officers testified they often stopped motorists in this area for minor offenses in the hope that these encounters would lead them to information about more serious crimes. During the stop, Johnson spit out two small bags of marijuana he was hiding in his mouth. The officers arrested, handcuffed and placed Johnson in the back of a patrol car. The officers did not advise Johnson of his *Miranda* rights at that time and did not cite him for the registration tag violation.

During the drive to the police station, Johnson said to the officers, "I can help you out, I don't want to go back to jail, I've got some information for you." One of the officers replied, "what do you mean?" Johnson told the officer, "I can get you a gun." The officer then gave Johnson a verbal *Miranda* warning and the other officer told Johnson not to say any more until they reached the police station.

At the police station, the officer read Johnson a second *Miranda* warning. Johnson signed a written waiver of his rights and told the officers the gun was in his home. Johnson signed a Consent-to-Search Form and the officers recovered the gun from Johnson's bedroom closet. The government charged Johnson with being a felon in possession of a firearm.

Johnson argued the officers did not have probable cause to stop his vehicle and that the officer's question, "what do you mean?" constituted an unwarned custodial interrogation in violation of *Miranda*.

The court recognized Maryland law requires a vehicle's registration tags be clearly legible. Consequently, regardless of the officers' true motives, and whether they pursued the traffic violation, it was reasonable for the officers to stop Johnson's vehicle when they saw it displayed an illegible registration tag.

The court further held the officer's question to Johnson, "what do you mean?" after Johnson voluntarily said, "I can help you out, I don't want to go back to jail, I've got information for you" did not constitute a custodial interrogation.

Miranda rules apply to police conduct that constitutes an interrogation or the functional equivalent of an interrogation. The functional equivalent of an interrogation is any police conduct the police know is likely to elicit an incriminating response from a suspect. In this case, the court found the officer's question, "what do you mean?" would not have seemed reasonably likely to elicit an incriminating response from Johnson. The officer's question would have reasonably been expected to elicit information incriminating someone else. The court was at a loss to explain why Johnson would have tried to get himself out of a misdemeanor drug charge by implicating himself in a felony gun charge.

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

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United States v. Woods, 711 F.3d 737 (6th Cir. 2013)

A police officer arrested Woods for driving without a valid license. While conducting a pat down the officer felt a hard lump in Woods' pocket. The officer asked Woods, "What is in your pocket?" Woods responded that he was "bogue," a street term meaning "in possession of something illegal," such as weapons or narcotics. After Woods repeated, "I'm bogue," the officer, who was concerned Woods might be carrying a gun, asked Woods whether the contraband item was drugs or a gun. Woods told the officer it was a gun. The officer asked Woods where the gun was located and Woods told him it was in the car. The officer searched the car and found a handgun and a bag of crack cocaine on the floorboard. The hard object in Woods' pocket was his keys. Woods was indicted for drug and firearms offenses.

Woods claimed his initial incriminating "bogue" statement as well as the drugs and handgun recovered from his car should have been suppressed because the officer failed to advise him of his *Miranda* rights.

The court held the officer's question, "What is in your pocket?" did not constitute a custodial interrogation. The Supreme Court has held the term "interrogation" does not refer to routine questions asked by the officer during the course of an arrest. Here, after the officer felt the hard lump in Woods' pocket, the question, "What is in your pocket?" was an automatic, reflexive question directed at determining the identity of the object that was legitimately within the officer's power to examine as part of a search incident to arrest. As a result, the officer was not required to advise Woods of his *Miranda* rights.

In addition, the court recognized this case was unusual, as Woods' response to the officer that he was "bogue" had nothing to do with the question, "What is in your pocket?" This unexpected and unresponsive reply could not retroactively turn a non-interrogation inquiry into an interrogation for *Miranda* purposes.

The court further held it did not have to decide whether the officer's subsequent questions as to whether the "bogue" items were drugs or a gun and whether they were on Woods' person or in the car constituted custodial interrogation. After Woods' initial statement that he was in possession of a contraband item, the officer would have searched the car and found the drugs and gun regardless of whether he asked Woods any further questions.

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

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United States v. Morgan, 717 F.3d 719 (9th Cir. 2013)

A Border Patrol agent arrested Morgan after discovering several bundles of marijuana concealed in her vehicle as she drove into the United States from Mexico. The agent advised Morgan of her *Miranda* rights and Morgan agreed to speak to the agent. However, soon after the conversation began, Morgan invoked her right to counsel and the agent terminated the interview.

The agent transported Morgan and the marijuana to the Casa Grande Border Patrol station for processing. While processing Morgan, the agent read her a portion of an I-214 Form that contained the *Miranda* warnings. Morgan signed the I-214 Form, acknowledging she was provided *Miranda* rights and that she understood those rights. Although the I-214 Form contained a section on waiving *Miranda* rights, the agent did not read this section to Morgan or attempt to obtain from her a waiver of her *Miranda* rights because she had previously invoked her right to counsel. The agent testified all Border Patrol agents at the Casa Grande Border Patrol station are required, as part of the routine processing of every arrestee, to read the *Miranda* warnings from the I-214 Form. The officer then must obtain an acknowledgement from the arrestee the form was read. This applied even if the arrestee has previously invoked his or her *Miranda* rights at the scene of the arrest.

After Morgan acknowledged her rights, she told the agent she wished to speak with him. The agent told Morgan he could not talk to her without the presence of her attorney because she had already invoked her right to counsel. Morgan told the agent she did not need an attorney and wanted to waive her right to counsel. The agent gave Morgan the opportunity to read and sign the waiver section of the I-214 Form. During her interview, Morgan admitted to smuggling marijuana.

Morgan argued the agent's reading of the I-214 Form constituted a re-initiation of interrogation after she had already invoked her right to counsel.

The term "interrogation" refers to express questioning or the functional equivalent of questioning which includes words or actions on the part of the police, other than those normally related to the arrest and custody process, that the police should know are reasonably likely to elicit an incriminating response. In this case, part of the station's standard processing procedure was to advise arrestees of their *Miranda* rights from the I-214 Form, even if the arrestees had previously

invoked their rights. Because the reading of the I-214 Form was a normal a part of the arrest and custody process and the agent made no effort to question Morgan or obtain a waiver of her previously invoked right to counsel, the court held the agent's actions were not the functional equivalent of questioning. Consequently, reading the I-214 Form to Morgan was not "interrogation" in violation of *Miranda*.

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

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United States v. Cash, 733 F.3d 1264 (10th Cir. 2013)

A police officer pulled Cash over for a traffic violation. During the stop, the officer saw an artificial bladder device in plain view in Cash's car and discovered Cash was on his way to take a drug test for his federal probation officer. Suspecting that Cash planned to use the bladder device to defeat a urine test, a violation of Oklahoma State Law, the officer detained Cash until his federal probation officer arrived at the scene approximately nineteen minutes later.

When Cash's probation officer arrived, he saw a firearm in plain view in the back seat of Cash's car, a violation of Cash's supervised release. Cash fought with the officers as they tried to arrest him; however, Cash was eventually subdued, handcuffed and placed in the back of a police car. Cash was not given *Miranda* warnings. The officers conducted an inventory search of Cash's car and found a variety of illegal drugs. Cash then called his probation over to the police car, initiated a conversation with him and made several incriminating statements.

Cash was charged with drug and firearms offenses.

Cash moved to suppress the physical evidence found in his car as well as the incriminating statements he made to his probation officer.

The court held when officer saw the bladder device and then Cash admitted he was on his way to take a drug test, the officer had reasonable suspicion to detain Cash beyond the time needed to write the citation for the initial traffic violation. Consequently, Cash's prolonged detention was reasonable and the evidence seized from Cash's car was admissible.

The court further held the conversation between Cash and his probation officer did not constitute interrogation for *Miranda* purposes. First, Cash initiated the conversation when he called the probation officer over to the police car. In response to Cash's request to see him, the probation officer asked Cash, "What was going on?" Although phrased as a question, this was not interrogation as the probation officer was not trying to elicit an incriminating response from Cash, but rather trying to understand why Cash wanted to speak to him. Second, the probation officer's follow-up question, "What's the deal?" in response to Cash's statement that people were "trying to kill him" did not constitute interrogation. The court found this question was an attempt to clarify Cash's statement and not designed to elicit an incriminating response from Cash. Because neither of Cash's statements occurred during interrogation, there was no *Miranda* violation and the statements were admissible against Cash.

Finally, the court concluded that Cash's statements were made voluntarily to his probation officer. Even though Cash was injured while resisting arrest, there was no evidence the probation officer coerced him into making any of his statements.

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

*****

Right to Silence

Salinas v. Texas, 133 S. Ct. 2174 (2013)

During the course of a murder investigation, Salinas gave his shotgun to the police for ballistics testing and then voluntarily went to the police station for questioning. The police did not advise Salinas of his *Miranda* rights and all parties agreed Salinas was not in-custody for *Miranda* purposes. For most of the one-hour interview, Salinas answered the police officer's questions. However, when the officer asked Salinas whether his shotgun "would match the shells recovered at the scene of the murder," Salinas declined to answer. After a few moments of silence, the officer asked other questions, which Salinas answered.

Salinas was charged with murder. At trial, the prosecution argued to the jury Salinas' failure to answer the officer's question concerning the shotgun was evidence of his guilt. The jury convicted Salinas.

Salinas argued the prosecution violated the *Fifth Amendment* by commenting on Salinas' silence when the officer asked him about the shotgun.

Without deciding the issue raised by Salinas, the court reiterated the privilege against self-incrimination generally was not self-executing and a witness who wanted its protection needed to invoke it explicitly. The court stated, "a suspect who stands mute had not done enough to put police on notice that he is relying on his *Fifth Amendment* privilege." Consequently, before Salinas could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the Texas Court of Criminal Appeals properly rejected his claim that the prosecution's use of his silence in its case-in-chief violated the *Fifth Amendment*.

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

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Roadside Questioning

United States v. Campbell, 2013 U.S. App. LEXIS 25585 (1st Cir. Me. Dec. 23, 2013)

A man entered an electronics store and purchased two video gaming systems, paying with a credit card. After the man left, a second man entered the store and attempted a similar purchase, but both credit cards he presented were declined. The name on both declined credit cards was the same name as the one on the credit card presented by the first man. After the second man left, a third man entered the store and expressed an interest in purchasing a video gaming system. The clerk refused to sell him anything and suggested the man try another nearby store. After the third man left, the clerk saw him get into a vehicle with the first two men and drive away. The clerk called the police and provided descriptions of the three men and a description of their car and license plate number. The clerk told the police the men were likely going to the other store she had recommended.

A police officer drove through the parking lot of the second store and saw an unoccupied vehicle matching the description provided by the clerk. While watching the vehicle, the officer saw three men matching the descriptions provided by the clerk from the electronics store, carrying bags of merchandise. The men got into the vehicle and left. The officer followed the vehicle and conducted a traffic stop in a hotel parking lot. The driver, Barnes, told the officer the vehicle was rented. Another officer arrived, and spoke to Campbell, who was sitting in the back seat. Campbell initially told the officer he had been to the electronics store, but later denied being there. When the officer asked Campbell about using credit cards at the electronics store Campbell replied, "what cards, what credit cards." After receiving consent to search the vehicle, officers found fifty identification and credit cards and three wallets in the vehicle. The three men, Barnes, Campbell and Porteous, were charged with a variety of offenses related to their fraudulent use of the credit cards and identifications. All three were convicted.

On appeal, Campbell and Porteous argued the evidence obtained from the vehicle and their statements to the officers should have been suppressed because the officers unlawfully stopped their vehicle and did not provide *Miranda* warnings before speaking to the men.

The court disagreed. The stop occurred after the police received a report from a store employee who suspected the three men had engaged in credit card fraud. The clerk gave the officer specific information concerning her encounter with the men to include that two of the men had attempted to use credit cards bearing the same name. The clerk also described the men, their vehicle and the probable location of their next stop. The police corroborated some of this information by locating the three men who fit the clerks' description coming out of the same store mentioned by the clerk and driving the same vehicle the clerk described. As a result, the officer established reasonable suspicion to conduct a *Terry* stop and detain the three men to investigate the possibility of credit card fraud.

Following the stop, the court further stated Campbell never claimed to be the renter of the vehicle and Porteous later denied he was the one who had rented it. Because neither Campbell nor Porteous established a reasonable expectation of privacy in the vehicle, the court held they did not have standing to object to the search of the vehicle by the officers.

Finally, the court held the officers were not required to provide *Miranda* warnings to Campbell and Porteous before questioning them, prior to their arrest. Generally, police officers are not required to give *Miranda* warnings during *Terry* stops. However, *Miranda* warnings are required "as soon as the suspect's freedom of action is curtailed to a degree associated with a formal arrest." Here, the court ruled the circumstances surrounding the stop would not be viewed by a reasonable person as the functional equivalent of a formal arrest. First, the men were questioned in a neutral location, a parking lot. Second, there was no indication the police to suspect ratio was overwhelming to the men, as there were four or five police officers on the scene questioning the three men, and no more than two officers questioned each man at any time. Third, neither Campbell nor Porteous was physically restrained during the questioning. Finally, the duration of the questioning was brief and related to the reason for the stop.

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

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United States v. Rodriguez, 711 F.3d 928 (8th Cir. 2013)

A police officer pulled Rodriguez over because his car did not have license plates and the registration had expired. Rodriguez told the officer his driver's license was suspended, but provided his date of birth. The officer ran a records check and learned Rodriquez had a possible felony warrant pending in California. During this time, the officer saw Rodriguez and the front-seat passenger reaching for the floorboard and looking back towards him. After a back-up officer arrived, Rodriguez was ordered out of his car. The officer asked Rodriguez what he had been searching for in the car and Rodriguez told him there was a handgun in the center console. The officer handcuffed Rodriguez and placed him in his patrol car and then handcuffed the passenger and put him in a separate patrol car. The officer then asked Rodriguez if there was any other contraband in the car, and Rodriguez told him there was a methamphetamine pipe under the seat. The officer searched the car and found a loaded handgun and the methamphetamine pipe. Rodriguez was arrested and charged with drug and firearms offenses.

Regarding the traffic stop, Rodriguez argued he was in-custody when the officer ordered him out of his car; therefore, the statements he made to the officer should have been suppressed because he had not been advised of his *Miranda* rights.

The court disagreed. Roadside questioning during a traffic stop is considered the same as questioning during a *Terry* stop, where an officer with reasonable suspicion may detain an individual in order to ask a moderate number of questions to determine his identity and to obtain information confirming or dispelling the officer's suspicions.
Here, the officer ordered Rodriguez out of the car because he believed Rodriguez could be dangerous. Rodriguez had a possible outstanding felony arrest warrant and the officer saw Rodriguez reaching around inside the car and looking back at him. After Rodriguez told the officer he had a handgun in the car, the officer handcuffed Rodriguez, but told him he was not under arrest. Numerous cases have held that a police officer's use of handcuffs can be a reasonable precaution during a *Terry* stop. The court concluded ordering Rodriguez to exit his car was not the functional equivalent of a formal arrest because the officer was temporarily detaining Rodriguez to investigate his identity and the existence of a possible arrest warrant in California. As a result, Rodriguez's motion to suppress was properly denied.

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

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Kalkines / Garrity

United States v. Palmquist, 712 F.3d 640 (1st Cir. 2013)

Palmquist, a military veteran, worked as a civilian employee with the U.S. Department of Veterans Affairs. A criminal investigator with the Office of Inspector General suspected Palmquist had been receiving benefits to which he was not entitled. Palmquist agreed to an interview with the investigator. Before asking him any questions, the investigator presented Palmquist with a form entitled, "Advisement of Rights (Federal Employees – Garrity)." Palmquist briefly reviewed the form, signed it and spoke to the investigator. Palmquist was later convicted of fraud in connection with his receipt of veterans benefits.

Palmquist argued the statements he made to the investigator should have been suppressed because they were coerced, claiming the investigator forced him to choose between losing his job or giving up his right to remain silent under the *Fifth Amendment*.

The court disagreed, holding that nothing the investigator said or presented to Palmquist could have led him believe, if he remained silent, he would automatically lose his job or suffer similarly severe employment consequences solely for having remained silent. In addition, the Advisement-of-Rights form specifically informed Palmquist he could not be fired solely for refusing to participate in the interview, although his silence could be used as evidence in an administrative proceeding.

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

*****

Request for Counsel (ambiguous requests)

United States v. Hunter, 708 F.3d 938 (7th Cir. 2013)

A police officer shot Hunter in the buttocks and foot after Hunter fired on the officer during a foot chase. At the hospital, a different officer was assigned to guard Hunter until investigators arrived. The officer sat silently while hospital personnel treated Hunter. When Hunter asked if there were any police officers in the room, the officer identified himself and then advised Hunter of his *Miranda* rights. After the officer and Hunter spoke briefly about the charges Hunter might be facing, Hunter asked the officer, "Can you call my attorney?" A few minutes later, the investigators arrived and advised Hunter of his *Miranda* rights. Hunter agreed to speak to the investigators and made several incriminating statements to them.

The court agreed with the district court and held Hunter had made an unambiguous invocation of his right to counsel when he asked the first officer, "Can you call my attorney?" The court found this request was sufficient to have put a reasonable officer on notice that Hunter was invoking his right to counsel. Once Hunter invoked his right to counsel, he should not have been questioned by any officers until counsel had been made available to him, unless he reinitiated further communication with the investigators. As neither occurred here, the district court properly suppressed Hunter's incriminating statements made to the investigators.

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

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United States v. Havlik, 710 F.3d 818 (8th Cir. 2013)

The Federal Bureau of Investigation (FBI) learned of Havlik's possible involvement in a child pornography ring during an investigation of commercial child pornography websites. The FBI forwarded Havlik's name to the United States Postal Inspection Service. A Postal Inspector sent Havlik a solicitation letter in which he posed as a distributor of child pornography, and invited Havlik to request a catalog. Havlik requested a catalog and afterward returned an order form for the purchase of three child pornography videos.

Postal Inspectors arranged for a controlled delivery of the child pornography videos to Havlik's post office and obtained a search warrant for his residence. After Havlik returned home with the videos, police officers entered his property and ordered him to the ground. When Havlik did not comply an officer forced him to the ground and handcuffed him. An emergency medical technician examined Havlik, who was complaining of chest pains, and then an officer read Havlik his *Miranda* rights. When the officer informed Havlik of his right to counsel, Havlik replied, "I don't have a lawyer. I guess I need to get one, don't I?" The officer continued by advising Havlik an attorney would be appointed for him if he could not afford one. Havlik responded, "I guess you better get me a lawyer then." The officer continued reading the *Miranda* rights but stopped when Havlik again complained of chest pains. After a brief medical examination, a Postal Inspector read Havlik his *Miranda* rights, Havlik waived his rights and made incriminating statements.

Havlik claimed the Postal Inspector violated the rule of *Edwards v. Arizona* by continuing to question him after he invoked his right to counsel. In addition, Havlik claimed he was entrapped by the government.

When a suspect requests counsel during an interrogation, police must cease questioning until counsel has been made available or the suspect reinitiates communication with the police. However, a suspect must articulate his request for counsel sufficiently clearly so a reasonable police officer would understand the statement to be a request for an attorney. In addition, there is no requirement an officer must ask clarifying questions when a suspect makes an ambiguous statement regarding counsel.

The court of appeals found Havlik's statement, "I don't have a lawyer. I guess I need to get one, don't I?" was insufficient to trigger the officer's obligation to stop questioning. A reasonable officer could have understood Havlik's statement to be a request for advice about whether to seek counsel, rather than a request for counsel.
The court also found Havlik's statement, "I guess you better get me a lawyer then." was not significantly different from the statement, "maybe I should talk to a lawyer," which the Supreme Court found to be an ambiguous request for counsel in *Davis v. United States*.

Because Havlik's statements were not an unequivocal or unambiguous request for counsel, and the officers were not required to ask clarifying questions, there was no violation of the *Edwards* rule when the Post Inspector subsequently obtained a *Miranda* waiver from Havlik and questioned him.

The court further ruled the facts surrounding Havlik's waiver and statements to the Postal Inspector established he made them voluntarily. Despite the presence of a team of law enforcement officers on the property, only three were involved in questioning Havlik. In addition, three different medical specialists evaluated Havlik and he signed the *Miranda* waiver after the last specialist concluded he had "calmed down" and was not seriously injured.

The court held the government did not entrap Havlik. When government agents offer a subject the opportunity to commit a crime, and the subject promptly accepts the offer, there is no entrapment. Here, the Postal Inspector sent Havlik one solicitation letter inviting him to request a catalog of child pornography. Havlik promptly requested a catalog and the Postal Inspector complied with that request. In addition, the government introduced evidence of Havlik's

predisposition to commit child pornography related offenses. The Postal Inspector sent Havlik the solicitation letter after the FBI discovered Havlik's name in customer records of a company that processed credit cards for commercial child pornography websites. In addition, during the execution of the search warrant, the officers found multiple VHS tapes containing child pornography Havlik obtained from sources other than the government.

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

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Waiver of *Miranda* (Knowing/Intelligent/Voluntary)

United States v. Wallace, 713 F.3d 422 (8th Cir. 2013)

A woman brought police officers a videotape she claimed to have removed from Wallace's home that depicted Wallace sexually assaulting minor females. The officers matched the face in the video to a copy of Wallace's driver's license photograph. The woman told the officers a maroon colored suitcase in Wallace's spare bedroom contained additional sexually explicit material involving minors.

Based on this information, officers obtained a warrant to search Wallace's home and located the maroon-colored suitcase. The suitcase contained numerous sexually explicit images and videotape recordings of minors. Officers arrested Wallace, who waived his *Miranda* rights and drafted a handwritten confession.

The court held Wallace's confession was made knowingly, intelligently and voluntarily. The officers advised Wallace of his *Miranda* rights and he signed a written waiver of those rights, which explicitly stated he had not been threatened, coerced or promised anything in exchange for giving up those rights.

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

*****

Voluntariness of Suspect's Statement

United States v. Taylor, 736 F.3d 661 (2d Cir. 2013)

Police arrested Taylor and interviewed him three hours later. After waiving his *Miranda* rights, Taylor confessed to the officers. The next day, Taylor was interviewed again, and after waiving his *Miranda* rights, confessed a second time. During the first interview, Taylor was dozing off and according to the officers had to be "re-focused" during the two to three hour interview. During the second interview, Taylor fell asleep several times and had to be awakened to be interviewed.

Taylor argued his two confessions should have been suppressed because his statements to the officers were not made voluntarily. Taylor claimed he was mentally incapacitated during the interviews because of the quantity of Xanax he had ingested immediately before his arrest.

Regarding Taylor's first confession, the court agreed, holding Taylor did not voluntarily confess to the officers. An officer testified that during the first interview, "Taylor's body was somewhat shutting down," and that "his body was giving up on him." While Taylor may have been

coherent at times, as the interview progressed, it became clear to the officers that Taylor was in and out of consciousness while giving his statement, and in a trance or a stupor most of the time when not actually asleep. Consequently, Taylor's statement was not voluntary and should have been suppressed.

The court further held Taylor's second confession should have been suppressed because it was tainted by Taylor's involuntary first confession. Taylor's second confession came less than one day after the first confession and during that interval, Taylor was hospitalized or unconscious most of the time. In addition, the officers testified Taylor fell asleep several times during the second interview and had to be awakened to complete the interview. This evidence of Taylor's continued incapacity along with the taint of his prior confession rendered Taylor's second *Miranda* waiver and confession involuntary.

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

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Admission of Physical Evidence after *Miranda* / *Edwards* Violation

United States v. Gonzalez-Garcia, 708 F.3d 682 (5th Cir. 2013)

A federal agent saw Gonzalez walk out of a house under surveillance as part of a drug investigation. The agent approached Gonzalez, handcuffed him and placed him in his police vehicle. Without advising Gonzalez of his *Miranda* rights, the agent asked him if he was guarding a drug-house and if there were drugs in the house. Gonzalez replied, "Yes" to both questions and then requested an attorney. The agent asked Gonzalez for consent to search the house, which Gonzalez granted. The agents found over two thousand kilograms of marijuana in the house.

The district court suppressed Gonzalez's admissions that he was guarding marijuana in the house because they were obtained in violation of *Miranda*, which the government conceded on appeal. However, the district court refused to suppress the marijuana recovered from the house. First, Gonzalez argued the marijuana should have been suppressed because the agent obtained consent to search from Gonzalez after he requested an attorney. Second, Gonzalez claimed the agents' use of his admissions, which were later suppressed, automatically rendered his consent to search involuntary.

The court disagreed. In *Edwards v. Arizona* the Supreme Court held when an accused invokes his right to counsel, he is not subject to further questioning until counsel has been made available to him. However, a violation of the *Edwards* rule does not require suppression of physical, non-testimonial evidence. Consequently, even if the agent violated *Edwards* when he asked Gonzalez for consent to search the house, that violation would not justify suppression of the marijuana, which is physical, non-testimonial evidence.

Next, the court held Gonzalez's consent was not automatically rendered involuntary because his *Miranda* rights were violated. Such a rule is not consistent with the multi-factor approach courts must use when determining voluntariness. Using that approach, and considering the *Miranda* violation, the district court found Gonzalez voluntarily consented to the search of the house.

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

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United States v. Morgan, 729 F.3d 1086 (8th Cir. 2013)

At approximately 12:34 a.m., two police officers were patrolling 24-hour businesses in response to recent robberies in the area. From their patrol car, the officers saw a vehicle with tinted windows parked at the far corner of a grocery store parking lot. The officers noticed the occupants were ducked-down inside the vehicle. When the officers got out of their car to investigate, the person in the driver's seat sat up and reached under his seat with both hands. The officers drew their firearms and ordered the occupants out of the vehicle. Morgan, the driver, initially kept his hands under the seat, but complied with a second request to raise his hands. The officers handcuffed the three occupants of the car and searched the vehicle for weapons. When he reached under the driver's seat, one of the officers removed a lockbox that was large enough to conceal a handgun. The officer asked Morgan, "What is this?" Morgan replied, "There's meth in there, and I'm a dealer." The officer read Morgan his *Miranda* rights and Morgan again voluntarily admitted to being a drug dealer. The officer opened the lockbox and found methamphetamine and a white powdery substance Morgan admitted was cocaine. After the substances in the lockbox field-tested positive for methamphetamine and cocaine, the officer arrested Morgan.

The district court suppressed the physical evidence and the statements Morgan gave to the officer after being *Mirandized*. The district court concluded the officers exceeded the scope of a *Terry* stop and Morgan's unlawful arrest led directly to the seizure of the physical evidence and his incriminating statements.
The government appealed.

The court of appeals reversed the district court, holding the officers had reasonable suspicion to conduct a *Terry* stop on Morgan. First, the officers saw a vehicle with tinted windows, parked away from a store entrance, in an area where there had been recent robberies. Second, the occupants of the vehicle were attempting to conceal themselves.

Next, the court held the officers had the right to conduct a *Terry* frisk because as the officers approached the vehicle, Morgan made furtive gestures under the seat and refused to remove his hands from under the seat when first ordered to do so. These actions gave the officers reason to believe there was a weapon in the vehicle, which justified the officer's search under seat. The officer was justified in searching the lockbox found under the seat, as it was large enough to conceal a weapon.

Finally, the court held the officers did not exceed the scope of the *Terry* stop. The officers established reasonable suspicion Morgan was involved in criminal activity and had reason to believe he was dangerous. The officer searched the vehicle for weapons immediately after securing Morgan and he did not use unreasonable force or detain Morgan for an unreasonably long time before arresting him.

The government did not challenge the district court's suppression of the statements Moran gave before he was *Mirandized*, that there was methamphetamine in the lock box and he was a drug dealer. The issue became whether the physical evidence and the statements Morgan made after being *Mirandized* should have been suppressed as the fruits of the *Miranda* violation.

First, the court noted the Supreme Court has held a *Miranda* violation does not justify the suppression of physical evidence obtained as the result of a voluntary statement; therefore, the methamphetamine and cocaine found in the lockbox should not have been suppressed.

Second, the court stated warned statements elicited after an initial *Miranda* violation may be admissible as long as the officers do not purposefully elicit an unwarned confession from a suspect in an effort to circumvent the *Miranda* requirements. In this case, after the officer *Mirandized* Morgan, Morgan volunteered he was a drug dealer and the substance in the lockbox was cocaine. There was no evidence the *Mirandized* statements were coerced. Consequently, Morgan's post-*Miranda* statements should not have been suppressed.

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

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Admission of Statements after *4th Amendment* Violation

United States v. Slaughter, 708 F.3d 1208 (11th Cir. 2013)

Slaughter met a fourteen-year-old girl in an internet chat room and made plans to meet her at a hotel for a sexual encounter. Unknown to Slaughter, the girl was actually an undercover FBI agent. The agent and local police officers went to the hotel, knocked on the door to Slaughter's room and immediately tackled him to the ground and handcuffed him when he opened the door. The agent did not have an arrest warrant for Slaughter or a search warrant for his room. However, Slaughter gave the agent written consent to search his room. After Slaughter's room was searched, the agent took him to the sheriff's office where he removed Slaughter's handcuffs and advised him of his *Miranda* rights. Slaughter signed a *Miranda* waiver and made incriminating statements.

Even though the warrantless entry into Slaughter's hotel room violated the *Fourth Amendment*, the district court held his subsequent incriminating statements were still admissible against him.

The circuit court agreed. In certain circumstances, statements following a violation of the *Fourth Amendment* are not subject to being suppressed. In *New York v. Harris*, the Supreme Court held, where the police have probable cause to arrest a suspect, the exclusionary rule does not prohibit the government's use of a statement, made by the suspect, outside his home, even though the statement was taken after an illegal entry.

In this case, like *Harris*, the agent had probable cause to arrest Slaughter for enticement of a minor. After his arrest, the agent transported Slaughter to the sheriff's office where he advised Slaughter of his *Miranda* rights. Slaughter then waived his rights and voluntarily made incriminating statements to the agent.

Click HERE for the court's opinion.

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Miranda and *Fed. Rule Crim. Pro. 5(a) / McNabb-Mallory/ Corley*

United States v. Chavez, 705 F.3d 381 (8th Cir. 2013)

A federal agent arrested Chavez based on probable cause that she had committed the crime of identity theft. At the same time, the agent had reasonable suspicion to detain Chavez as an illegal alien. Chavez was indicted for misuse of a social security number and later pled guilty.

The court held Chavez was taken into criminal, not civil custody, as the district court incorrectly ruled. As a result, Chavez was entitled to be taken promptly before a magistrate as provided for in Federal Rule of Criminal Procedure 5(a). Because Chavez was not taken promptly before the magistrate judge, the government violated Rule 5(a). In addition, the lack of a prompt probable cause determination violated the *Fourth Amendment*.

However, the court ruled the appropriate remedy for these violations was not dismissal of the indictment as Chavez argued, but instead the suppression of any statements made after arrest and before presentment to the magistrate.

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

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Public Safety Exception

United States v. Hodge, 714 F.3d 380 (6th Cir. 2013)

An individual told the police he witnessed the manufacture of methamphetamine, several firearms and a bomb at Hodge's home. In addition, he told the police Hodge claimed the bomb had enough power to blow up the entire house if detonated.

Police officers corroborated the witness' story by confirming Hodge's identity and residence and learning he had recently purchased ephedrine or pseudoephedrine from local stores on three occasions. Officers also discovered two "silent observer" tips from the prior week stating there was a large amount of traffic around Hodge's house and that the callers believed there was "methamphetamine activity and guns" located there.

Based on the witness' statements and their investigative findings, officers obtained a warrant to search Hodge's house for methamphetamine and weapons. Once the officers breached the front door, they subdued and handcuffed Hodge. Without first giving Hodge *Miranda* warnings, an officer asked him if there was an active methamphetamine lab or bombs in the house. Hodge said no. A few minutes later, Hodge admitted there was a bomb in the house. The officer asked Hodge questions regarding the bomb's location, appearance, construction and method of detonation, out of concern for the safety of the officers in the house. Hodge told the officer where the bomb was located and officers found and neutralized it. The officers arrested Hodge and he was indicted for two offenses regarding his possession of the bomb.

Hodge argued the warrant to search his house was not supported by probable cause and the pipe bomb should have been suppressed because the officers failed to provide him *Miranda* warnings before he made incriminating statements to them about its location.

The court held the evidence presented in the search warrant affidavit supported a finding Hodge was engaged in methamphetamine production. First, statements from a witness, such as the one in this case, are generally sufficient to establish probable cause because the legal consequences of lying to police officers tend to ensure their reliability. Second, the officers corroborated the witness' story by examining ephedrine and pseudoephedrine purchase logs, police records and "silent observer" tips and including that information in the search warrant affidavit.

The court further held under the public safety exception to *Miranda*, the officers' questions, Hodge's answers and the evidence obtained from his house was admissible.

The information provided by the witness led the officers to believe there was a bomb in Hodge's house. Consequently, the officers were allowed to ask Hodge about the presence of a bomb in the house, without having to first provide him with *Miranda* warnings, because such a question was narrowly confined to the information they possessed and addressed valid public safety concerns.

Once Hodge admitted there was a bomb in his house, the officers' questions were all directed to obtaining information about the bomb's construction and stability, even though there was no evidence a third party could access the bomb. These questions were all driven by valid public safety concerns; therefore, the officers were not required to first advise Hodge of his *Miranda* rights.

The court concluded even if the officers never asked Hodge about the bomb, they would have inevitably discovered it while executing the search warrant. The bomb was wrapped in a towel and sitting on top of a kitchen cabinet. The officers would have been authorized under the search warrant to examine this unusual object to determine if it contained contraband and most certainly would have if Hodge had not told them about the bomb.

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

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Sixth Amendment

Right to Counsel

United States v. Holness, 706 F.3d 579 (4th Cir. 2013)

The State of Maryland indicted Holness for murdering his wife and appointed him a public defender. At the county detention center, Holness shared a cell with McGrath. McGrath told an investigator Holness made comments to McGrath that led McGrath to believe Holness had killed his wife. The investigator told McGrath to reinitiate contact with Holness if he volunteered any additional information. Holness then made incriminating statements to McGrath, which were reported to the investigator. Shortly afterward, the state dismissed the murder charge against Holness after a federal grand jury indicted him for several offenses related to the death of his wife, to include, travelling in interstate commerce with the intent to kill or injure his spouse. At trial, McGrath testified about the incriminating statements Holness made to him.

Holness claimed his *Sixth Amendment* right to counsel was violated after the district court allowed McGrath to testify about the incriminating statements he made to McGrath. Holness

argued McGrath became an agent of the police after he met with the investigator and the investigator urged him to reinitiate contact with Holness. By that time, Holness had been appointed an attorney for the state murder charge and the attorney was not present during his subsequent jail cell conversations with McGrath.

The court disagreed. The *Sixth Amendment* right to counsel is offense specific and the right does not attach until a prosecution is commenced. While Holness was initially arrested and charged with a state offense, he was ultimately convicted of a federal offense. Any *Sixth Amendment* violation that may have occurred was committed by a state law enforcement officer before Holness was indicted by the federal grand jury. Consequently, when Holness made the incriminating statements to McGrath, even if McGrath was an agent of the police, Holness' *Sixth Amendment* right to counsel had not yet attached to the federal charges.

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

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Miscellaneous Criminal Law / Conspiracy / Entrapment

Smith v. United States, 133 S. Ct. 714 (2013)

The court unanimously held a defendant charged with criminal conspiracy has the burden to prove he withdrew from the conspiracy. The *Due Process Clause* does not require the government to prove the absence of withdrawal beyond a reasonable doubt. The court noted the defendant has this burden whether his withdrawal terminates his criminal liability for the post-withdrawal acts of his co-conspirators, or whether it occurred outside the statute-of-limitations period, which would create a complete defense to the conspiracy charge.

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

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United States v. Havlik, 710 F.3d 818 (8th Cir. 2013)

The Federal Bureau of Investigation (FBI) learned of Havlik's possible involvement in a child pornography ring during an investigation of commercial child pornography websites. The FBI forwarded Havlik's name to the United States Postal Inspection Service. A Postal Inspector sent Havlik a solicitation letter in which he posed as a distributor of child pornography, and invited Havlik to request a catalog. Havlik requested a catalog and afterward returned an order form for the purchase of three child pornography videos.

Postal Inspectors arranged for a controlled delivery of the child pornography videos to Havlik's post office and obtained a search warrant for his residence. After Havlik returned home with the videos, police officers entered his property and ordered him to the ground. When Havlik did not comply an officer forced him to the ground and handcuffed him. An emergency medical technician examined Havlik, who was complaining of chest pains, and then an officer read Havlik his *Miranda* rights. When the officer informed Havlik of his right to counsel, Havlik replied, "I don't have a lawyer. I guess I need to get one, don't I?" The officer continued by advising Havlik an attorney would be appointed for him if he could not afford one. Havlik

responded, "I guess you better get me a lawyer then." The officer continued reading the *Miranda* rights but stopped when Havlik again complained of chest pains. After a brief medical examination, a Postal Inspector read Havlik his *Miranda* rights, Havlik waived his rights and made incriminating statements.

Havlik claimed the Postal Inspector violated the rule of *Edwards v. Arizona* by continuing to question him after he invoked his right to counsel. In addition, Havlik claimed he was entrapped by the government.

When a suspect requests counsel during an interrogation, police must cease questioning until counsel has been made available or the suspect reinitiates communication with the police. However, a suspect must articulate his request for counsel sufficiently clearly so a reasonable police officer would understand the statement to be a request for an attorney. In addition, there is no requirement an officer must ask clarifying questions when a suspect makes an ambiguous statement regarding counsel.

The court of appeals found Havlik's statement, "I don't have a lawyer. I guess I need to get one, don't I?" was insufficient to trigger the officer's obligation to stop questioning. A reasonable officer could have understood Havlik's statement to be a request for advice about whether to seek counsel, rather than a request for counsel.

The court also found Havlik's statement, "I guess you better get me a lawyer then." was not significantly different from the statement, "maybe I should talk to a lawyer," which the Supreme Court found to be an ambiguous request for counsel in *Davis v. United States*.

Because Havlik's statements were not an unequivocal or unambiguous request for counsel, and the officers were not required to ask clarifying questions, there was no violation of the *Edwards* rule when the Post Inspector subsequently obtained a *Miranda* waiver from Havlik and questioned him.

The court further ruled the facts surrounding Havlik's waiver and statements to the Postal Inspector established he made them voluntarily. Despite the presence of a team of law enforcement officers on the property, only three were involved in questioning Havlik. In addition, three different medical specialists evaluated Havlik and he signed the *Miranda* waiver after the last specialist concluded he had "calmed down" and was not seriously injured.

The court held the government did not entrap Havlik. When government agents offer a subject the opportunity to commit a crime, and the subject promptly accepts the offer, there is no entrapment. Here, the Postal Inspector sent Havlik one solicitation letter inviting him to request a catalog of child pornography. Havlik promptly requested a catalog and the Postal Inspector complied with that request. In addition, the government introduced evidence of Havlik's predisposition to commit child pornography related offenses. The Postal Inspector sent Havlik the solicitation letter after the FBI discovered Havlik's name in customer records of a company that processed credit cards for commercial child pornography websites. In addition, during the execution of the search warrant, the officers found multiple VHS tapes containing child pornography Havlik obtained from sources other than the government.

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

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United States v. Saraeun-Min, 704 F.3d 314 (4th Cir. 2013)

Several individuals conspired to steal cocaine from the stash house of a drug cartel. However, before they could commit the robbery, law enforcement officers arrested them. Unknown to the conspirators, the drug stash house and the cocaine did not exist, but were a fiction created by undercover law enforcement officers.

In a case of first impression, the court followed the First, Seventh, Ninth and Eleventh circuits and held that factual impossibility is not a defense to the crime of conspiracy. It is irrelevant the stash house and drugs did not exist and it would have been impossible to commit such a robbery. The crime of conspiracy is the agreement to commit an unlawful act, in this case a robbery, not the completion of the act itself.

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

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