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The Federal Law Enforcement -Informer-

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS AND AGENTS

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Miranda Custody

Howes v. Fields
Decision Below: **617 F.3d 813 (6th Cir. 2010)**

Issue: Whether a prisoner is always "in custody" for *Miranda* purposes any time he is isolated from the general prison population and questioned about conduct that occurred oustide the prison.

Argument Date: October 4, 2011

*****

Suspicionless Strip Searches in Jail

Florence v. Board of Chosen Freeholders
Decision Below: **621 F.3d 296 (3d Cir. 2010)**

Issue: Whether the *Fourth Amendment* allows jail personnel to conduct strip searches of everyone admitted to the jail for any crime, even without any reason to believe that the person possesses hidden weapons or contraband.

Argument Date: October 12, 2011

*****

Immunity From Civil Damages and Perjured Testimony

Rehberg v. Paulk
Decision Below: **611 F.3d 828 (11th Cir. 2010)**

Issue: Whether a government official who acts as a "complaining witness" by presenting perjured testimony against an innocent person is entitled to absolute immunity from a *42 § 1983* claim for civil damages.

Argument Date: November 1, 2011

*****

Identifications Made Under Suggestive Circumstances

Perry v. New Hampshire
Decision Below: **NHSC 2009-0590App1**. The New Hampshire Supreme Court's order refers to its published opinion in **State v. Addision, 160 N.H. 792 (2010).**

Issue: Whether the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances or only when the suggestive circumstances are orchestrated by the police.

Argument Date: November 2, 2011

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GPS Tracking

United States v. Jones
Decision Below: **615 F.3d 544 (D.C. Circuit 2010)**

Issues (1): Whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated the *Fourth Amedment*. (2) Whether the government violated Jones's *Fourth Amendment* rights by installing the GPS tracking device on his vehicle without a valid warrant or without his consent.

Argument Date: November 8, 2011

*****

Qualified Immunity

Messerschmidt v. Millender
Decision Below: **620 F.3d 1016 (9th Cir. 2010)**

Issue: Whether officers were entitled to qualified immunity after they obtained a valid warrant to search the home of a gang-member for firearms and gang related items after he fired a sawed-off shotgun at his girlfriend.

Argument Date: December 5, 2011

*****

Confrontation Clause

Williams v. Illinois
Decision Below: **238 Ill. 2d 125 (2010)**

Issue: Whether a state rule of evidence that permits an expert witness to testify about the results of DNA testing performed by non-testifying analysts violates the *Confrontation Clause*, when the defendant has no opportunity to confront the actual analysts.

Argument Date: December 6, 2011

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Arrest and Detention of Material Witnesses

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Introduction

After September 11, 2001, Abdullah al-Kidd, an American citizen, who converted to Islam while in college, was arrested on a "material witness" warrant pursuant to 18 U.S.C. §3144. The warrant was based on a government affidavit that said he was "crucial to the prosecution" of a Mr. Hussayen. He was held in custody for 16 days. He was not charged with a crime nor asked to testify against anyone. He filed a *Bivens* lawsuit against then United States Attorney General John Ashcroft alleging that his *Fourth Amendment* rights had been violated. The federal District Court and the Ninth Circuit Court of Appeals rejected the government's claims that Ashcroft was entitled to absolute immunity or qualified immunity, ruling in favor of al-Kidd.[1]

It has been asserted that the statute has been used as a pretext to jail a suspect prior to the development of probable cause to support a criminal accusation. In June 2005, the Human Rights Watch (HRW) and the American Civil Liberties Union (ACLU) published an article entitled "Witness to Abuse: Human Rights Abuses under the Material Witness Law Since September 11." The report asserted that, since the attacks of September 11, 2001, at least seventy men living in the United States – all but one of whom are Muslims – "have been thrust into a Kafkaesque world of indefinite detention without charges, secret evidence, and baseless accusations of terrorist links." In response, the Department of Justice (DOJ) initiated an investigation to review fourteen matters discussed in the report. The DOJ report concluded that "…based on the results or our investigations, we conclude that the material witness statute was not misused in the cases we reviewed."

On May 31, 2011, a unanimous Supreme Court (Kagan, J. recused) in the al-Kidd case ruled that Ashcroft cannot be sued personally for directing federal agents to use "material witness" warrants to round up and jail Muslims during the so-called "war on terror." The court held that (1) The objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the ground that the arresting authority allegedly had an improper motive; and (2) because former Attorney General Ashcroft did not violate clearly established law, he is entitled to qualified immunity.[2]

Although this procedure has been used with some frequency in the aftermath of September 11, 2001, it is not a new idea. In *Blair v. United States,*, 250 U.S. 273 (1919), the Supreme Court stated, "At the foundation of our federal government the inquisitorial function of the grand jury and compulsion of witnesses were recognized as incidents of the judicial power of the United States…[B]y the *Sixth Amendment*, in all criminal prosecutions the accused was given the right to a speedy trial and public trial, with compulsory process for obtaining witnesses in his favor….[I]t is clearly recognized that the giving of testimony and the attendance upon court or

[1] *Abdullah al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009).
[2] *Ashcroft v. Abdullah al-Kidd*, 563 U.S. ___ (2011).

grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned…."

In *Stein v, New York*, 346 U.S. 156 (1953), the Supreme Court stated, "[t]he duty to disclose knowledge of crime…is so vital that one known to be innocent may be detained in the absence of bail, as a material witness."

The Statute

Title 18 U.S.C. § 3144: Release or detention of a material witness

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

It is possible for a person, who is not suspected of any criminal activity, to legally be arrested, held for bail, and in some cases detained if the requirements of 18 U.S.C. § 3144 are met. The law allows only for arrest and detention for the purpose of and time necessary to obtain the testimony of the witness. It does not authorize the government to detain a criminal suspect for whom there is insufficient probable cause to charge him criminally.

Warrant of Arrest

A material witness warrant may be issued by federal or state judges or magistrates.[3]

The statute has been applied to grand jury witnesses as well as potential trial witnesses because a grand jury investigation is a "criminal proceeding."[4]

The statute authorizes an arrest of a material witness upon the request of either the government or the defendant in a criminal case.

A material witness warrant must be based on an affidavit filed by the requesting party establishing probable cause: (1) that testimony of a person is material to a criminal proceeding, and (2) that it may become impractical to secure his presence by subpoena. In *U.S. v. McVeigh*, 940 F.Supp.1541 (D.Colo. 1996), the Oklahoma City bombing case, probable cause supported witnesses' arrest as a "material witness." After reciting why the testimony of both the witnesses and his brother was required before the investigating grand jury, the Federal Bureau of

[3] As stated above, "…a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title." A judicial officer for this purpose is defined in 18 U.S.C. §3156(a)(1) the term "judicial officer" means … any person or court authorized pursuant section 3041 of this title, or the Federal rules of Criminal Procedure, to detain, or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia."

[4] *U.S. v. Awadallah*, 349 F.3d 42 (2d Cir. 2003).

Investigation (FBI) agent stated that witnesses' renunciation of United States citizenship and association with the defendant who had already been arrested in connection with the bombing, indicated that the witnesses' testimony could not be secured by a subpoena.

U.S. Customs and Border Protection Agencies use material witness warrants to detain people who have unlawfully entered the United States. The use of material witness warrants is often the only way to guarantee the testimony of undocumented aliens in criminal cases involving those charged with transporting them across the border. Frequently, when an alien smuggling case is developed, a few of the undocumented aliens are held as material witnesses.

The case of *U.S. v. Nai*, 949 F.Supp. 42 (D. Mass. 1996) involved over 100 Chinese aliens who had hopes of being smuggled into the United States on board a Chinese cargo vessel. The government established by preponderance of evidence that if material witnesses were released, they would not appear as required. The evidence supported an inference that they would flee in an effort to evade the Immigration and Naturalization Service.

Except those who possess evidence favorable to the defendant, the other aliens are deported or granted voluntary departure in lieu of deportation. The United States Supreme Court has held that the Executive Branch's responsibility to faithfully execute Congress' immigration policy of prompt deportation of illegal aliens justifies deportation of undocumented alien witnesses upon the Executive's good-faith determination that the aliens possess no evidence favorable to the defendant.[5]

"Material"

"Material" evidence is that which has a "natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it is addressed."[6] In *U.S. v. Feingold*, 416 F.Supp. 627 (E.D.N.Y. 1976), the subject of a material witness warrant had appeared as a witness before the grand jury that indicted the defendant for income tax evasion. The IRS Special Agent asserted that the witness would give material testimony at trial and that the witness had signed checks totaling approximately $50,000 payable to the company of which defendant was sole proprietor. The court held that there was sufficient factual data to support the magistrate's finding of probable cause in issuance of the warrant.

Subpoena Impracticality

This element may be shown by evidence of possible flight,[7] or of an expressed refusal to cooperate, or of difficulty experienced in serving a subpoena on a trial witness.

In *U. S. v. Coldwell*, 476 F.Supp. 305 (E.D.Okla. 1979) the government's application for a warrant of arrest alleged that the witness was a purchaser of controlled substances from the defendant, was the sole eyewitness to alleged offenses, had refused to cooperate with law enforcement officials, and had indicated that he would not testify unless the state narcotics agency satisfied certain conditions that the agent stated were impossible to meet. The court issued the material witness warrant.

[5] *U.S. v. Valenzuela-Bernal*, 458 U.S. 858 (1982).
[6] *Nedr v. U.S.*, 527 U.S. 1 (1999).
[7] *In re Material Witness Warrant*, 77 F.3d 1277 (10th Cir. 1996).

In *Feingold*, supra p.3, 416 F.Supp. 627 (E.D.N.Y. 1976), the government's material witness warrant was granted where the government's application averred that there had been several unsuccessful attempts to serve the subject with a subpoena either through his attorney or on seven different days at his home.

Bail

Generally, the federal bail laws apply to material witnesses.[8] "A common sense reading of Section 3144 requires the court to evaluate the material witness' risk of flight, likelihood that the person will appear, and danger to the community or nation." [9] A witness is entitled to be released on his personal recognizance or bond unless the court finds that such assurances to be insufficient to guarantee his subsequent appearance or to ensure public or individual safety.[10] Upon such finding by the court, the witness may be detained.

If and when a witness is released, "the court, in its discretion, may direct that he be provided with transportation and subsistence in returning to the place of arrest, or at his election, to the place of his bona fide residence…." [11] A witness who fails to appear can be prosecuted.[12]

Deposition

Title 18 U.S.C § 3144 states that "[n]o material witness may be detained because of inability to comply with any conditions of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice." Thus, the material witness, the government, or the defendant may request that a material witness be deposed.

In *U.S. v. Linton*, 502 F.Supp.878 (D.C.Nev. 1980) the material witness was entitled to an order permitting his deposition to be taken and providing for his release on his personal recognizance subsequent to the taking of the deposition.

Appointment of Counsel

Where an individual is arrested and the government seeks to detain him as a material witness, and a judicial officer determines that the individual should not be released on his own recognizance or on an unsecured appearance bond, the court must appoint an attorney to represent the individual if the individual is financially unable to obtain representation.[13]

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[8] 18 U.S.C. § 3144…a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title…."

[9] *In re Grand Jury Material Witness Detention*, 271 F.Supp.2d at 1269

[10] 18 U.S.C § 3142

[11] 18 U.S.C. § 4282

[12] 18 U.S.C. § 3146 "… (b) the punishment for an offence under this section is – (B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for nor more than one year, or both…."; 18 U.S.C. § 1073 "Whoever moves or travels in interstate or foreign commerce with intent either… (2) to avoid giving testimony in any criminal proceeding in such place in such place in which the commission of an offence punishable by death or in which a felony under the laws of such place, is charged … shall be fined under this title or imprisoned not more than five years, or both."

[13] *In re Class Action Application for habeas Corpus on Behalf of All Material Witnesses in Western District of Texas*, 612 F.Supp. 940 (W.D.Tex.1985).

Release of the witness can be delayed if the criminal defendant does not have counsel or if defendant's counsel has not had sufficient discovery to effectively depose the material witness.

State Material Witness Statutes

Most states have state statutes generally comparable to the federal statute.[14]

[14] See for example Wash. CRR 4.10; N.J. Stat. § 2C:104-5 (2011); Cal Pen Code § 881, (2010); N.J. Stat. § 2C:104-4 (2011); (Ohio) ORC Ann. 2937.18 (2011); Fla. Stat. § 92.50 (2011); Tex. Code Crim. Proc. art. 24.13.

CASE SUMMARIES

Circuit Courts of Appeals

1st Circuit

U.S. v. Rogers, 2011 U.S. App. LEXIS 20122, October 4, 2011

Rogers sold a computer in which the buyer found what he believed to be child pornography. He gave the material to the local police who contacted the Naval Criminal Investigative Service (NCIS) because Rogers was a non-commissioned naval officer. While Rogers was on duty, local officers obtained a search warrant for his home. Rogers's commanding officer ordered him to report to two NCIS agents, and then to return to his home. Once at home, Rogers remained outside in his driveway, spoke to the officers and admitted to downloading the child pornography. Rogers then agreed to go the police station for more formal questioning. At the police station, an officer read Rogers his *Miranda* rights; he waived them and made more incriminating statements.

The court held that the officers deliberately planned to subject Rogers to questions, without the benefit of *Miranda* warnings under circumstances that would make it difficult for him to avoid answering them. They chose to execute their search warrant when Rogers was not home, then arranged for his commanding officer to order him to go home. A member of the armed services would not reasonably believe that he could disregard such an order, and once at his house would have felt that he had to answer the officers' questions. As a result, Rogers was in custody for *Miranda* purposes. Because the officers did not provide him with *Miranda* rights, the court held that Rogers's statements made to the officers at the house should have been suppressed.

The court did not rule on whether or not Rogers's subsequent statements to the officers, at the police station, after he had been *Mirandized* were admissible. The court remanded the issue to the trial court to determine, if under the circumstances, the *Miranda* warnings given to Rogers were sufficient to convey to him that he was not required to speak to the officers, notwithstanding his earlier admissions.

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

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U.S. v. Garcia-Hernandez, 2011 U.S. App. LEXIS 20667, October 12, 2011

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

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

The 7th and 9th Circuits agree.

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

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Spencer v. Roche, 2011 U.S. App. LEXIS 20991, October 18, 2011

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

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

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

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2nd Circuit

U.S. v. Simmons, 2011 U.S. App. LEXIS 21661, October 26, 2011

Officers went to an apartment after receiving a call that a person inside had a gun. The officers met Jamar Vaz, who told them that Simmons, his roommate, had displayed a gun during a dispute they had a few days earlier. Vaz wanted the officers to accompany him into the apartment so he could retrieve his belongings. The officers went into the apartment with their weapons drawn and saw Simmons lying on the bed in his room. Simmons got up and the officers pulled him out of the bedroom into the hallway. The officers asked Simmons about the gun and Simmons told them where it was located. One of the officers entered Simmons's bedroom and retrieved the gun.

The court held that under the public safety exception, Simmons's statements regarding the presence and location of the gun were admissible. The court noted that *Miranda* warnings do not have to be provided before an officer can ask a suspect questions that are reasonably prompted by a concern for the public safety or for the safety of the arresting officers. Here, the officers had reasonable safety concerns when they entered the apartment. The questions they asked Simmons were related to those concerns and not a pretext to collect testimonial evidence against him.

However, the court held that the officer's warrantless search for the gun in Simmons's bedroom violated the *Fourth Amendment*. Before the search was conducted, the officers had already effectively resolved their concerns for their safety. They had exercised control over Simmons and the premises, thereby neutralizing any threat that Simmons or the gun may have initially posed. There was nothing in the record to suggest that it would have been impracticable to continue securing the bedroom during the time necessary for one of the officers to obtain a search warrant. Additionally, the officers conceded they did not believe that anyone else was present in Simmons' bedroom that could gain access to the gun.

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

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3rd Circuit

Doe v. Luzerne County, 2011 U.S. App. LEXIS 20650, October 12, 2011

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

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

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

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

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5th Circuit

U.S. v. Carrillo, 2011 U.S. App. LEXIS 21056, October 18, 2011

While Carrillo was in jail on a parole violation, officers went to interview him about his involvement in a drug distribution conspiracy. On September 9, after being read his *Miranda* rights, Carrillo invoked his right not to be questioned without an attorney present. The officers stopped talking to him and left. The next day Carrillo told jailers that he wished to speak to the officers from the day before. The officers returned to the jail, advised Carrillo of his *Miranda* rights, which then led to a discussion about Carrillo's right to an attorney. Carrillo made three comments during this time. He told the officers, "I wish I had a lawyer right here," I wanted to see if we could push this thing to where I could get my lawyer," and "I wanted to see if you could work with me and push this deal to where I can get a lawyer and just sit down and talk about it." After one of the officers told Carrillo that he would get an attorney at his arraignment, Carrillo asked the officer what would happen if he agreed to talk to the officer now. The officer told Carrillo that he would just be cooperating and helping himself and once he got into the federal system he would get an attorney. Carrillo agreed to talk to the officers and made several incriminating statements.

The court recognized that Carrillo's three comments, when viewed separately, appeared to indicate that he was invoking his right to counsel. However, the court held that when considering the entire context in which Carrillo made the comments, a reasonable police officer would not have understood him to be saying that he wanted to stop talking with the police without an attorney present.

Carrillo's comments to the officers were ambiguous at best. They expressed Carrillo's preference to have an attorney present, however, the fact that he kept talking to the officers indicated that he also wished to keep the interview going and not to end it by invoking his right to counsel. Carrillo re-initiated communication with the officers after he ended the interview the day before by invoking his right to counsel, so he was clearly aware of how he could end the interview. Carrillo was merely weighing the pros and cons of talking to the officers without an attorney present which he eventually decided to do.

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

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U.S. v. Zamora, 2011 U.S. App. LEXIS 21146, October 19, 2011

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

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

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

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

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

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6th Circuit

U.S. v. Beauchamp, 2011 U.S. App. LEXIS 21498, October 25, 2011

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

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

In order to detain Beauchamp, the officer needed to have reasonable suspicion that he was engaged in criminal activity. The court held that the totality of the circumstances did not provide the officer with that reasonable suspicion. Although the officer saw Beauchamp in an area where there had been complaints of drug activity, he did not see him engage in any behavior consistent

with buying or selling drugs. The officer saw Beauchamp interact with another person then walk away. Walking away from an officer, by itself, does not create reasonable suspicion.

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

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

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7th Circuit

U.S. v. McCauley, 2011 U.S. App. LEXIS 20206, October 6, 2011

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

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

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

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8th Circuit

Johnson v. Carroll, 2011 U.S. App. LEXIS 20385, October 7, 2011

Officers attempted to arrest Johnson's nephew. During this process, the nephew resisted and the officers physically took him to the ground. While he was on the ground, Johnson jumped onto his back to prevent the officers from arresting him. After Johnson failed to follow verbal orders by the officers to move, she was maced and physically removed from her nephew. Both were arrested and taken to jail.

The court held that the officers were not entitled to qualified immunity. The court concluded that as a matter of law, the officers' use of force was not objectively reasonable. There was no

evidence that Johnson actively pushed the officers away from her nephew, threatened them or took any other action against them. Her attempts to interfere with her nephew's arrest did not amount to a severe or violent offense, as demonstrated by her arrest on a misdemeanor offense for obstructing legal process. The court stated that it would be up to a jury to determine whether the officers used excessive force against Johnson.

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

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U.S. v. Garreau, 2011 U.S. App. LEXIS 20606, October 11, 2011

Officers received a tip that Garreau was traveling with a stolen firearm in his vehicle. They also discovered that Garreau's driver's license was suspended and that he had an outstanding arrest warrant. An officer saw Garreau's vehicle, and after pulling him over for speeding, arrested him on the outstanding warrant. The officer performed an inventory search of the vehicle and found a firearm in a plastic bag under the spare tire, which was in a compartment under the carpet on the floor of the vehicle's trunk. The officer confirmed that the firearm was stolen.

The court held that the officer's search of the vehicle was a valid inventory search under the *Fourth Amendment*. The officer substantially followed his agency's policy governing inventory searches. The fact that the officer listed the stolen firearm in the evidence log as opposed to the inventory log, as required by the inventory policy was of no consequence. The court noted that inventory searches do not need to be conducted in a totally mechanical fashion. The officer's minor deviation from the policy was not unreasonable and it was not enough to make the search unlawful.

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

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U.S. v. Bowman, 2011 U.S. App. LEXIS 21837, October 28, 2011

An officer stopped Bowman for speeding and a window tint violation. The officer noticed that Bowman smelled like air freshener, which the officer knew was often used to mask the odor of drugs. He also noticed that Bowman's breathing was fast-paced and his carotid artery was pulsing rapidly. The officer spoke briefly to the passenger in the car, who gave the officer a conflicting story as to where he and Bowman were going and how long they would be gone. Approximately fourteen minutes after the stop the officer issued Bowman a warning ticket. After issuing the ticket, the officer asked Bowman if he had time to answer a couple of quick questions, to which Bowman replied, yes. Bowman refused to allow the officer to search his car, but consented to a free air search of the car by Jake, a drug-sniffing dog. Jake alerted to the presence of drugs in the car. The officers eventually transported the car to a garage where they found cocaine in a compartment behind the rear seat.

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

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

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

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

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U.S. v. Perrin, 2011 U.S. App. LEXIS 21836, October 28, 2011

During the execution of a search warrant, Perrin admitted to an officer that he possessed child pornography. The court held that Perrin was not in custody during the ten minutes of voluntary questioning that occurred in his bedroom. Prior to the interview, the officer had told Perrin and the other residents that they were free to leave the premises and did not have to answer questions if they stayed. A reasonable person in his position would have felt at liberty not to answer the officer's questions. As a result, no *Miranda* warnings were required before the officer interviewed Perrin.

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

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9th Circuit

Mattos v. Agarano, 2011 U.S. App. LEXIS 20957, October 17, 2011

The Ninth Circuit heard two cases and consolidated them for disposition under this caption. In both cases, the court had to decide whether the use of a taser to subdue a suspect constituted an excessive use of force and then whether the officers were entitled to qualified immunity.

In the first case, *Brooks v City of Seattle*, an officer pulled Brooks over for a speeding, claiming that she was driving 32 miles-per-hour in a 20 mile-per-hour zone. The officer issued Brooks a citation and requested, per the municipal code, that she sign the citation as acknowledgement that she had received it. Brooks, who was seven months pregnant, denied that she was speeding and refused to sign the citation. Two other officers arrived on the scene and made the decision to arrest Brooks. After Brooks refused to get out of her car, the officers discussed where on her body to tase her because they knew she was pregnant. One of the officers then opened the car door and twisted Brooks's arm up behind her back while also removing the keys from the ignition. Brooks stiffened her body and grabbed the steering wheel to avoid the officer's efforts to remove her from the car. In the meantime, another officer applied his taser to Brooks's left thigh in drive-stun mode. The officer tased Brooks two more times in less than a minute. After

the third tase, Brooks fell over in her car. The officers dragged her out, laying her face down on the street where they handcuffed her.

After applying the factors from *Graham v. Connor,* the court held that the officers' use of force was unreasonable. First, failing to sign a traffic citation for a minor speeding violation is not a serious offense. Second, at no time did Brooks pose an immediate threat to the safety of the officers or others. She did not threaten the officers and did not give any indication that she was armed. At most, the officers may have found Brooks to be uncooperative. However, after the officer grabbed her arm and removed the keys from the ignition, she no longer posed a potential threat to the officers. Finally, while Brooks engaged in some resistance to being arrested, she did not attempt to flee or behave violently against the officers. In fact, the officers had enough time to discuss where to tase Brooks after they realized that she was pregnant. Additionally, three tasings in such rapid succession provided no time for Brooks to recover from the pain she experienced, gather herself, and reconsider her refusal to comply.

Even though the officers' use of force was found to be excessive, the court held that they were entitled to qualified immunity on Brooks's *42 U.S.C § 1983* claim. When this incident occurred, in November 2004, the law was not sufficiently clear to put the officers on notice that tasing Brooks under these circumstances constituted excessive force. The court, however, agreed with the lower court, which held that the officers were not entitled to qualified immunity for Brooks's assault and battery claims under Washington state law.

In the second case, police responded to the Mattos residence after receiving a 911 call for a domestic dispute. Officers found Troy Mattos intoxicated outside the house. The officers entered the house with him to check on his wife. Mrs. Mattos told the officers that she was okay and asked the officers to get out of her house. While this was happening, another officer tried to arrest Mr. Mattos. As the officer moved in to arrest Mr. Mattos, he pushed up against Mrs. Mattos who had been standing between them. Mrs. Mattos put her arms up to keep her chest from coming in contact with the officer, while suggesting that everyone calm down and go outside to talk, so they would not wake up her children. The officer, without warning, then shot his taser at Mrs. Mattos in dart-mode. The officers arrested both parties, charging Mrs. Mattos with harassment and obstructing government operations. Both charges against her were eventually dropped.

The court held that under the circumstances it was not reasonable for the officer to deploy his taser against Mrs. Mattos. Mrs. Mattos was physically trapped between the officer and her husband. Her only physical contact with the officer occurred when she defensively raised her hand to prevent him from pressing his body against hers after he came into contact with her. Finally, even though it was plausible to do so, the officer failed to warn Mrs. Mattos before deploying his taser against her. The court has held that when an officer fails to warn a person before deploying his taser, under circumstances where it would be plausible to issue a warning, it weighs in favor of finding a constitutional violation.

However, like the decision in *Brooks*, the court held that the officer was entitled to qualified immunity. When this incident occurred, in August 2006, there was no Supreme Court or Ninth Circuit Court of Appeals decision addressing the use of a taser in dart mode. Additionally, it would not have been clear to a reasonable officer that deploying his taser in dart mode against Mrs. Mattos constituted excessive force.

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

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U.S. v. Reveles, 2011 U.S. App. LEXIS 21480, October 24, 2011

Reveles, who is in the United States Navy, was accused of drunk driving on base. The Navy charged him in an Article 15, Uniform Code of Military Justice, proceeding, which is considered non-judicial punishment (NJP). Reveles was found guilty. Based on the same incident, the government subsequently charged him in federal court for drunk driving under the *Assimilative Crimes Act (18 U.S.C. § 13)*. Reveles pled guilty.

The court held that the government did not violate the *Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution* by prosecuting and convicting Reveles for a crime after the Navy punished him for the same offense. The court found that non-judicial punishment administered by the Navy under *10 U.S.C. § 815* is not criminal in nature. The court noted that the legislative history confirmed Congress' intent to make non-judicial punishment non-criminal. Congress intended non-judicial punishments to deal with minor infractions of discipline without resorting to criminal law processes.

Additionally, the non-judicial punishment statute is not sufficiently punitive as to transform it into a criminal penalty that would implicate the *Double Jeopardy Clause*.

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

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10th Circuit

U.S. v. Chavez, 2011 U.S. App. LEXIS 20981, October 18, 2011

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

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

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

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

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