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Confrontation Clause Developments and Their Impact on Effective Investigation and Prosecution: One Step Forward After Two Steps Back?

Part 1

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Introduction: The *Sixth Amendment's* Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Read literally, this means the prosecution must produce all of its witnesses at trial, and defense counsel must have the chance to cross-examine them. But until recently, such a literal reading had long been out of vogue, and the Confrontation Clause lurked hidden in the thicket of the hearsay rule and its many exceptions. Prosecutors, by routinely overcoming the hearsay rule, defeated Confrontation Clause objections as well. This meant prosecutors could often use statements given outside court in the trial without producing the person who actually made the statement.[1] This all changed in 2004 with the Supreme Court case of *Crawford v. Washington*.[2]

***Crawford v. Washington:* The Facts.** It started with the stabbing of Ken Lee in August 1999. Earlier that day, Sylvia Crawford had told her husband, Mike Crawford, that Ken had tried to rape her. The couple found him at his apartment. In the fight that followed, "[Ken] was stabbed in the torso and [Mike's] hand was cut."[3]

The couple was arrested and interviewed separately. Each was interviewed twice. In his second statement, Mike tried to set up a self-defense claim:

> **Q**. Okay. Did you ever see anything in [Ken's] hands?
> **A**. I think so, but I'm not positive.
>
> **Q**. Okay, when you think so, what do you mean by that?
> **A**. I coulda swore I seen him goin' for somethin' **before, right before** everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later. (Emphasis added)[4]
>
> Sylvia's second separate interview generally tracked Mike's story, but seemed to veer away from Mike's assertion that Ken had already pulled something out of his pocket before Mike stabbed Ken:

[1] To do that, the prosecution calls someone (referred to as a "witness" in this context) who perceived the out-of-court person (referred to as a "declarant" in this context) make the statement. If the judge decides the hearsay rule is overcome by an exception, the witness tells the jury what the declarant said or wrote.
[2] 541 U.S. 36 (2004). As of 30 September 2011, *Crawford v. Washington* has been cited 9,863 times in court opinions and mentioned 1,891 times in law reviews and other legal publications.
[3] 541 U.S. at 38.
[4] 541 U.S. at 38-39.

Q. Did Kenny do anything to fight back from this assault?
A. (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.

Q. After he was stabbed?
A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

Q. Okay, you, you gotta speak up.
A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?
A. Yeah, **after, after the fact**, yes.

Q. Did you see anything in his hands at that point?
A. (pausing) um um (no). (Emphasis added)[5]

***Crawford v. Washington*: The Trial.** When the prosecution tried to call Sylvia to repeat what she had told the police, Mike's defense counsel invoked Washington's expansive spousal privilege to block her testimony.[6] Using then-standard prosecution arguments, the prosecutor was able to convince the judge over defense objection to admit Sylvia's statement.[7] Mike was convicted of first-degree assault with a deadly weapon in November 1999.

***Crawford v. Washington*: The Supreme Court Appeal.** The Supreme Court disagreed. Justice Scalia wrote the opinion. He said that the Confrontation Clause meant what it said and that it had been violated in Mike Crawford's case when the prosecution admitted Sylvia's statement. He wrote, "Where testimonial evidence is at issue, however, the [Confrontation Clause] demands what the common law required: unavailability [of the declarant Sylvia[8]] and a prior opportunity for cross-examination [of the declarant Sylvia].[9] The opinion stated that if Sylvia's statement had been "nontestimonial," it could have been admitted. What did the

[5] 541 U.S. at 39-40.
[6] When examined in tandem with the defense's later objection to admitting her written statement, this combination has a certain irony. Defense's refusal to waive the spousal privilege made Sylvia unavailable to testify. Following up with an objection based on the very unavailability that the refusal had just produced is mind-bending. That the objection was based on a denial of the husband's right to "confront" his wife—given the extra-judicial "confrontation" that no doubt had ensued when the two spouses compared notes after their interrogations—only deepens the irony.
[7] The police officer (witness) who took Sylvia's (declarant's) statement testified at trial and told the jury what Sylvia had said.
[8] A requirement that was met when Mike's lawyer invoked the spousal privilege.
[9] A requirement that could not be met because Mike's lawyer had never officially cross-examined Sylvia. 541 U.S. at 68.

Crawford opinion say was the difference between "testimonial" and "nontestimonial" statements? Justice Scalia wrote, "We leave for another day any effort to spell out a comprehensive definition of "testimonial."[10]

The Two Problematic Branches of Post-*Crawford* Cases. Two lines of cases stem from the *Crawford* holding that a witness's testimony at trial about what a declarant said out-of-court is constitutionally barred unless the declarant:

> [1] is unavailable for trial; AND
>
> [2] was already cross-examined by the defense counsel.

First, forensic tests establishing, for example, that seized drugs are in fact cocaine or another controlled substance must be excluded if the forensic specialist who performed the test does not testify at trial.[11] We'll discuss this branch later.

Second, witness statements given to law enforcement cannot be used at trial if the witness does not show up unless the witness statement was nontestimonial.[12] We'll discuss those cases next.

***Davis* and *Hammon*:[13] Drawing the Distinction Between Admissible Nontestimonial Statements and Inadmissible Testimonial Statements.** Consolidated by the Supreme Court for decision, both of these cases grew out of domestic abuse.

At 11:54 AM on February 1, 2001, Michelle McCottry, "hysterical and crying," called 911 to get help because her ex-boyfriend Adrian Davis "had used his fists to beat her and… had left the residence moments earlier[14]". She told the 911 operator that she had obtained a restraining order against Davis. The police arrived within four minutes. Michelle was distraught, and the police could see what "appeared to be fresh injuries to her forearm and face."[15] Davis was tried for felony violation of the restraining order. As often happens in domestic violence cases, Michelle McCottry could not be located and did not testify. The trial court admitted the tape of McCottry's 911 call over defense objection that doing so violated Davis's right to confront McCottry. Davis was convicted.[16] His appeal reached the Supreme Court where it was joined to *Hammon v. Indiana.*

Hammon v. Indiana started when police arrived late in the night of February 26, 2003, at the home of Amy and Hershel Hammon. Someone had reported a domestic disturbance. The police found:

> …Amy alone on the front porch, appearing "'somewhat frightened,'" but she told them that "'nothing was the matter,'" She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming out of the . . . partial glass front. There were pieces of

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[10] Id.
[11] *Melendez-Diaz v. Massachusetts*, 129 S.Ct 2527, (2009); *Briscoe v. Virginia,* 130 S.Ct. 1316 (per curiam) (2010); and *Bullcoming v. New Mexico,* 131 S.Ct. 2705 (2011).
[12] *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006); *Giles v. California*, 554 U.S. 353 (2008); *Michigan v. Bryant,* 131 S.Ct. 1143 (2011). *See also, Banos v. California,* 555 U.S. 801 (2008) and *Her v. Minnesota,* 555 U.S. 1092 (2009).
[13] 547 U.S. 813 (2006).
[14] *State v. Davis*, 111 P.3d 844, 846 (Wash. 2005).
[15] *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005).
[16] Id.

> glass on the ground in front of it and there was flame emitting from the front of the heating unit."
>
> Hershel, meanwhile, was in the kitchen. He told the police "that he and his wife had 'been in an argument' but 'everything was fine now' and the argument 'never became physical.'" By this point Amy had come back inside. One of the officers remained with Hershel; the other went to the living room to talk with Amy, and "again asked [her] what had occurred." Hershel made several attempts to participate in Amy's conversation with the police, but was rebuffed. The officer later testified that Hershel "became angry when I insisted that [he] stay separated from Mrs. Hammon so that we can investigate what had happened." After hearing Amy's account, the officer "had her fill out and sign a battery affidavit." Amy handwrote the following: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter ." (citations omitted).[17]

Hershel was charged with domestic battery and violating parole. Despite being subpoenaed, Amy did not appear or testify. Over defense objection, one of the officers told the court what Amy had told him. Hershel was convicted and sentenced to one year of imprisonment with all but twenty days suspended.[18] His appeal reached the Supreme Court.

Deciding the two cases required the court to decide whether McCottry's 911 call and Amy's statements to the police were testimonial (hence inadmissible) or nontestimonial (hence admissible). The Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[19]

Applying this standard to the two cases before it, the Court found that McCottry's 911 call was an admissible nontestimonial statement. It found that Amy's statements were inadmissible testimonial statements.

As we will see next month, this seemingly simple-to-apply standard would lead to uncomfortable results.

[17] *Davis v. Washington*, 547 U.S. 813, 819-820 (2005).
[18] *Hammon v. State*, 829 N.E.2d 444, 447 (Ind. 2005).
[19] *Davis v. Washington*, 547 U.S. 813, 822 (2005).

CASE SUMMARIES

United States Supreme Court

Bobby v. Dixon, 2011 U.S. LEXIS 7926, November 7, 2011

Dixon was convicted of murder in Ohio state court and sentenced to death. The Ohio Supreme Court ruled that Dixon's confession to the murder was admissible. The Sixth Circuit Court of Appeals disagreed and held that Dixon's confession was inadmissible. The United States Supreme Court reversed the Sixth Circuit, agreeing with the Ohio Supreme Court that Dixon's confession was admissible.

Dixon had three relevant encounters with the police in this case. On November 4, while Dixon was voluntarily at the police station on an unrelated matter, an officer questioned him about the victim's disappearance. The officer gave Dixon *Miranda* warnings, even though it was not a custodial situation. Dixon declined to answer any questions without a lawyer present and left the station.

As the investigation continued, the police arrested Dixon on November 9 for forging the victim's name on a check. At this point, the officers suspected that Dixon and a co-defendant were responsible for the victim's disappearance. Officers questioned Dixon, but intentionally did not provide him with *Miranda* warnings for fear that he would again refuse to speak with them. During this questioning, Dixon admitted to forging the victim's name on a check, but denied any knowledge concerning the victim's disappearance. The officers urged Dixon to tell them the truth, falsely claiming that the co-defendant was also being interviewed, and that he was giving them useful information. Dixon still refused to cooperate with the officers and was transported from the police station to the jail.

Approximately four hours later, officers brought Dixon back to the police station. Prior to any police questioning, Dixon told the officers he heard that they had found the victim's body and he wanted to tell them what happened. An officer *Mirandized* Dixon, he waived his rights and then confessed to murdering the victim, trying to pin most of the blame on the co-defendant.

The Sixth Circuit held that the officers could not speak to Dixon on November 9 because on November 4 he had refused to speak to them without his lawyer. The Supreme Court disagreed. Dixon was not in custody during his chance encounter with the police on November 4 and a person cannot validly invoke his *Miranda* rights in anticipation of a future custodial interrogation. The officers were free to attempt an interview with Dixon on November 9.

Next, the court held that the Sixth Circuit improperly ruled that the officers violated the *Fifth Amendment* by urging Dixon to "cut a deal" before his accomplice did so. The court has refused to find that a defendant's confession is "involuntary" when he confesses after being falsely told that a co-defendant has already provided information. The police are not prohibited from urging a suspect to confess before another suspect does so.

Finally, the court held that the Sixth Circuit improperly ruled that Dixon's confession was a result of a deliberate question-first, warn-later strategy. In the question-first, warn-later strategy,

an officer intentionally fails to *Mirandize* a suspect in the hope of obtaining a confession. After obtaining the confession, the officer then *Mirandizes* the suspect, hoping that the suspect waives those rights and repeats the earlier unwarned confession.

The court found that even though the police intentionally failed to *Mirandize* Dixon when they first interrogated him on November 9, the question-first, warn-later strategy was not applicable because there was no earlier confession to repeat. Dixon contradicted his prior unwarned statement when he confessed to the murder. In addition, there was no evidence that the police used Dixon's admission to forgery to induce him to waive his right to silence later. Dixon declared his desire to tell the police what had happened even before the second interrogation session began. There was no nexus between Dixon's unwarned admission to forgery and his later, warned confession to murder.

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

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Circuit Courts of Appeals

1st Circuit

U.S. v. Kasenge, 2011 U.S. App. LEXIS 22099, November 2, 2011

Kasenge offered the use of his driver's license and social security card to a friend, for a nominal fee, so he could get a job. The friend obtained two jobs under the identity of Thomas Kasenge. The government charged Kasenge with aiding and abetting aggravated identity theft in violation of *18 U.S.C. §§ 2 and 1028A.*

Kasenge argued that because he consented to his friend's use of his identification documents that there was no crime of aggravated identify theft for him to aid and abet.

The court disagreed, holding that *18 U.S.C. § 1028A* does not require that the means of identification be stolen or otherwise illegally obtained for a violation to occur.

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

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U.S. v. Paneto, 2011 U.S. App. LEXIS 23325, November 22, 2011

Paneto sold crack cocaine to a confidential informant from his apartment. He unknowingly accepted a $20 bill that an officer had marked with a small ink slash through a zero in number 20 that appeared on the front of the bill. Shortly after the sale, officers went to Paneto's apartment to conduct a knock and talk interview. Paneto invited the officers into the apartment. An officer saw a $20 bill on the coffee table, which he believed was the marked money from the drug buy. The officer picked up the bill, confirmed the presence of the ink slash through the number 20, and seized it. Paneto denied that the $20 bill was his; however, he consented to a search of the apartment. The officers found crack cocaine and an illegal firearm. Paneto argued that his consent to search and the contraband seized was tainted by the officer's manipulation of the $20 bill.

The court disagreed. An officer may seize an object in plain view as long as he is lawfully in a location where he can see the object, he has the right to access the object and the incriminating nature of the object is immediately apparent to him.

Here, Paneto invited the officers into his apartment where the $20 bill was laying on the coffee table visible to the naked eye. The bill was out in the open providing the officer unrestricted access to it. Finally, the incriminating nature of the bill was immediately apparent. An informant had just purchased a quantity of crack cocaine from the apartment and the denomination of the bill on the coffee table matched the denomination of the marked bill. There was no other currency in sight and the court commented that people usually keep bills of large denominations in a wallet or purse. Even though the officer could not see the ink slash on the bill until he picked it up, it was reasonable for him to believe that the $20 bill the on the coffee table was the marked bill from the drug buy; therefore, the officer lawfully seized it under the plain view exception to the *Fourth Amendment*.

In a footnote, the court noted that had the officer merely bent over to get a closer look at the $20 bill, without picking it up, there would have been no *Fourth Amendment* search or seizure issue.

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

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4th Circuit

U.S. v. Cabrera-Beltran, 2011 U.S. App. LEXIS 22660, November 10, 2011

At trial, the government used Treasury Enforcement Communications System (TECS) records to show that the defendant and other co-conspirators crossed the border on certain dates and in certain vehicles.

The defendant argued that the admission of the TECS records into evidence violated his *Sixth Amendment Confrontation Clause* right to cross-examine the border patrol personnel who produced the information and statements contained in the TECS records.

The TECS is a case management system that is used to keep a record of individuals and their methods of entry into the United States. For vehicular border crossings, TECS maintains a record of the vehicles used and their license plate information. In this case, the TECS records were not specifically created for use at trial, but rather for maintaining a record of what was coming into the United States. As such, the TECS records are non-testimonial and their introduction into evidence did not violate the *Confrontation Clause*.

In addition, the court agreed with the Fifth and Ninth Circuit Courts of Appeal, which have held that TECS records are admissible under the public records exception to the hearsay rule.

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

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U.S. v. Guijon-Ortiz, 2011 U.S. App. LEXIS 22661, November 10, 2011

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

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

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

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

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

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

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U.S. v. Powell, 2011 U.S. App. LEXIS 22795, November 14, 2011

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

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

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

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

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

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5th Circuit

Short v. West, 2011 U.S. App. LEXIS 22141, November 2, 2011

Short, an officer in the El Paso Police Department, (EPPD) was assigned to a narcotics task force for the 34th Judicial District. The 34th Judicial District includes both El Paso and Hudspeth counties. While conducting a task force related traffic stop in Hudspeth County, Short encountered a Hudspeth County Sheriff Department (HCSD) deputy who asked him what he was

doing there. Short identified himself to the satisfaction of the deputy and told her that EPPD task force officers were working in Hudspeth County. The deputy contacted her dispatcher who in turn called Hudspeth County Sheriff West and told him that EPPD officers were performing traffic stops in Hudspeth County. Sheriff West ordered his deputies and find out whether the EPPD officers were, in fact, law enforcement officers. Sheriff West also ordered his deputies to round up the EPPD task force officers and escort them to his office.

A lieutenant in the HCSD located Short's supervisor, who produced identification showing him to be an officer with the EPPD and the task force. Short's supervisor ordered him and the other task force members to return to El Paso County. While on the way back to El Paso County, Short and several task force members were stopped and surrounded by HCSD deputies. The HCSD deputies ordered Short and the other task force members to go to a nearby HCSD substation. They were told that they would be arrested if they failed to comply. Short and the task force members went to the HCSD substation where Sheriff West complained that he had not been notified of the task activities in his county. He then told the task force officers that they were free to leave. Short sued Sheriff West under *42 U.S.C. § 1983* for violating his rights under the *Fourth Amendment*.

The court held that Sheriff West was not entitled to qualified immunity. First, the court found that Short was seized for *Fourth Amendment* purposes. The HCSD deputies surrounded the task force officers' vehicles prevented them from returning to El Paso County. In addition, Short was threatened with arrest if he did not accompany the deputies to the HCSD substation. A reasonable person would not feel free to ignore such a show of force and go about his business.

Second, the court found that such a seizure was objectively unreasonable. Sheriff West ordered the task force officers to be detained and brought to the HCSD substation so he could personally examine them. This was not likely to quickly confirm or dispel his suspicions as to whether or not the task force officers were legitimate law enforcement officers. There were less intrusive ways to accomplish this. Sheriff West could have contacted the EPPD Chief, whom he knew or he could have run the license plates on the task force officers' vehicles. It was unreasonable to not recognize or pursue these options as alternatives to seizing Short.

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

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U.S. v. Melancon, 2011 U.S. App. LEXIS 22625, November 9, 2011

Officers went to the prison where the defendant was located to interview him in connection with a criminal case. The officers met with the defendant in the warden's office. Before the interview began, the officers told the defendant that he was not required to answer their questions and that he was free to leave at any time. The defendant told the officers that he knew his rights and wished to cooperate. The officers did not provide the defendant with *Miranda* warnings. During the interview, the defendant made false statements to the officers, which later became the basis of criminal charges against him.

The court held that the defendant was not in custody for *Miranda* purposes during the interview. A prison inmate is not automatically always "in custody" for *Miranda* purposes, even though the prison setting may increase the likelihood that he is.

The court further explained that even if the defendant was in custody for *Miranda* purposes, because his statements to the officers were themselves charged as criminal conduct, they were properly admitted as the key evidence on the counts of making false statements. The defendant was not free to lie to the officers and be absolved from the consequences of those lies because of the lack of *Miranda* warnings. The exclusionary rule does not act as a bar to the prosecution of a crime where the statements themselves are the crime.

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

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6th Circuit

O'Neill v. Louisville / Jefferson County Metro Government, 2011 U.S. App. LEXIS 22530, November 8, 2011

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

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

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

However, the court found that the O'Neills sufficiently pleaded a *Fourth Amendment* violation based on the uniformed LMAS officers' second warrantless entry into their home. The officers claimed that their entry was lawful under the consent-once-removed doctrine. This doctrine allows government agents to enter a suspect's premises to arrest him without a warrant if the undercover agents: enter at the express invitation of someone with authority to consent; while inside the premises they establish the existence of probable cause to effect an arrest or search; and immediately summon help from the other officers. The court disagreed, holding that the consent-once-removed doctrine did apply in this situation. After the undercover officers left the

house, the back-up officers did not rush in to effect an arrest. Instead, they knocked on the O'Neills' door to request proof of a breeder's license, discussed the need for such a license with them and entered only after the O'Neills specifically objected to their coming into the house. The LMAS officers never intended to arrest the O'Neills; therefore, the consent-once-removed doctrine could not support the LMAS officers' second entry into their home.

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

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Wheeler v. City of Lansing, 2011 U.S. App. LEXIS 22531, November 8, 2011

Police were investigating a series of home invasion robberies. Officer Wirth arrested Brown for his involvement in two of those robberies. After Brown told Wirth that he took some of the stolen property to Wheeler's apartment, officers executed a search warrant there. The search warrant affidavit established probable cause to search for and seize items allegedly taken in those two robberies, which included televisions, a digital camera, game systems and cash. However, the warrant described other items to be searched for and seized, such as, shotguns, long guns, big-screen televisions, necklaces, rings and car stereo equipment. Among the items seized by the officers were three cameras, various pieces of gold jewelry, two watches, a laptop computer, two game systems, a video camera and a car stereo.

The court found that Wheeler's *Fourth Amendment* rights were violated when the officers seized items that were identified in the warrant but not supported by probable cause in the warrant affidavit. However, the court found that Wirth was entitled to qualified immunity for seizing those items. The court noted that a prosecuting attorney drafted the affidavit and warrant, and that a state magistrate approved the warrant. The court found that such a deficiency between an affidavit and a warrant was unusual and that it was reasonable for Wirth to fail to recognize it.

The court also found that Wheeler's *Fourth Amendment* rights were violated when the officers seized items that had not been described with sufficient particularity in the warrant. The warrant to search Wheeler's apartment listed broad categories of stolen property and provided no way to distinguish the stolen items from Wheeler's own personal property. Officer Wirth had additional information about the stolen items that he could have included in the warrant. For example, the warrant described one category of items to be seized simply as "cameras." However, the police reports listed the specific brands of the stolen cameras. In addition, two of the cameras the officers seized were Kodak cameras, even though none of the reports listed a Kodak-brand camera stolen. Additional details, if available, are required to help distinguish between contraband and legally possessed property.

The court held that it would have been apparent to a reasonable officer that listing general categories of items to be seized, even though further details were available, violated the *Fourth Amendment's* specificity requirement. As a result, Wirth was not entitled to qualified immunity for this particular violation.

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

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7th Circuit

Backes v. Village of Peoria, 2011 U.S. App. LEXIS 22652, November 10, 2011

Backes got into an argument with his wife and left their home, suggesting that he might commit suicide. Mrs. Backes called the police, told the dispatcher that her husband was suicidal, on medication, and that he had access to weapons. Backes drove to a park, took a sleeping pill and passed out in his car. A Village of Peoria police officer, who was on patrol in the area, recognized the car and saw Backes sitting motionless in the front seat. The officer contacted his chief of police, who requested assistance from an emergency response team that was comprised of officers from several different local police departments. The emergency response team removed Backes from his car and took him into custody. Backes claimed that he suffered injuries as a result of the emergency response team's actions. Backes sued the police chief who requested the assistance of the emergency response team, arguing that the chief should be liable as a supervisor for the conduct of the emergency response team.

A supervisor may be personally liable for the acts of his subordinates if he knows about their conduct, facilitates it, approves it, condones it or turns a blind-eye for fear of what he might see. Here, members of an inter-departmental emergency response team carried out the actions that were at the center of the Backes' claim. The two senior officers on the emergency response team who implemented the plan to remove Backes from his car, were members of a different police department. There was no evidence that the chief supervised the emergency response team or was involved in the operation in any way. Even if the emergency response team spoke to the chief about their plan and he condoned it, his actions were as a consultant from a separate police department and not as the emergency response team's supervisor.

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

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Aleman v. Village of Peoria, 2011 U.S. App. LEXIS 23241, November 21, 2011

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

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

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

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

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

Finally, the court held that the officers violated *Miranda* when they interrogated Aleman after his initial arrest. Instead of ceasing their questioning, after Aleman sought his lawyer's aid, the officers exploited his distraught state and badgered him to waive his *Miranda* rights. Aleman indicated a desire for the assistance of counsel twice, and only after responding to further police-initiated custodial interrogation, did he agree to be questioned. When a suspect invokes his right to counsel, the police may not recommence questioning unless the suspect's lawyer is present or the suspect initiates the conversation himself.

In addition to the violation of *Miranda*, the court was troubled by the lies the officers told Aleman that convinced him that he must have caused the child's death. Not being a medical expert, Aleman could not contradict what was represented to him as settled medical opinion. Aleman had shaken the child. If medical opinion excluded any other possible causes of death, his shaking, although gentle, must have been the cause of death. Aleman had no rational basis, given his lack of medical training to think otherwise. Tricks that are likely to induce a false confession render that confession inadmissible because of its unreliability, even if it is otherwise voluntarily obtained.

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

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8th Circuit

U.S. v. Darr, 2011 U.S. App. LEXIS 22879, November 16, 2011

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

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

The court held that the first warrant was supported by probable cause and that the information upon which it relied was not stale, even though the last allegation of sexual assault had occurred seven months prior. Considering the nature of the crimes, the ongoing related activity of Darr, Sr. and the nature of the property sought, the information set forth in the warrant was not so stale as to preclude a finding of probable cause. Darr, Sr. had allegedly used the items sought in the search warrant on more than one occasion during incidents that occurred more than two years apart. Additionally, Darr, Sr. had tried to arrange to have several children spend time at his home within the last month. The fact that Darr, Sr. recently had sought additional contact with children at his home supported the inference that evidence used in such encounters would still be present.

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

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

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

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

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9th Circuit

Mirmehdi v. U.S., 2011 U.S. App. LEXIS 22159, November 3, 2011

Mirmehdi and three others were arrested for immigration law violations and detained. The Mirmehdis brought a *Bivens* suit for monetary damages against several federal officials claiming that they were unlawfully detained during their deportation proceedings.

The court declined to extend *Bivens* to allow the Mirmehdis to sue federal agents for wrongful detention pending their deportation. First, the court noted that during the deportation process the Mirmehdis had the opportunity to challenge their detention. Second, the Mirmehdis were able to challenge their detention through the federal habeas corpus process. The Mirmehdis took full advantage of both. The court was not persuaded by the Mirmehdis' claims that they were still entitled monetary damaged under *Bivens* because neither the immigration system nor the habeas process provides for monetary compensation for unlawful detention.

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

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10th Circuit

Koch v. City of Del City, 2011 U.S. App. LEXIS 22095, November 2, 2011

Koch assumed control over the property and care of an elderly woman named Gladys Lance. Lance was supposed to be living with Koch, but Lance's niece became concerned after she could not contact her aunt for several months and then learned that Koch had been granted power of attorney over her. A state court issued an emergency pick-up order for Lance.

After learning about the pick-up order, an officer went to Koch's home to see if Lance was there. Koch told the officer to get off her property. The officer told Koch that if she did not tell him the whereabouts of Lance that he would arrest her for obstruction. Koch refused and the officer arrested her after a brief struggle. After her arrest, Koch told the officer that Lance was living in a nursing home. The obstruction charge against Koch was eventually dismissed. Koch sued the officer for false arrest and for using excessive force during the arrest.

The court held that the officer was entitled to qualified immunity on Koch's false arrest claim. First, it was reasonable for the officer to believe that Koch had information about Lance's whereabouts. Second, the court characterized the encounter between Koch and the officer as an investigative detention under *Terry*. The question then became whether the officer believed that Koch had a legal obligation to answer his questions concerning Lance and that if she refused, he had probable cause to arrest her for obstruction. Neither the Tenth Circuit nor the United States Supreme Court has ruled on whether an officer may use a suspect's refusal to answer his questions to establish probable cause for arrest. The court found no clearly established right under the *First* or *Fourth Amendments* that recognized that a suspect may refuse to answer questions during a *Terry* stop.

Additionally, it was not clearly established whether the officer's conduct violated Koch's *Fifth Amendment* rights, where her refusal to answer the officer's questions formed the probable cause for her arrest, but she was never prosecuted on that charge. While a *Fifth Amendment* right to remain silent may be triggered during a *Terry* stop, the court has limited that right to pre-arrest

custodial interrogations where incriminating questions were asked. Here, Koch did not claim that her pre-arrest encounter with the officer constituted a custodial interrogation. As a result, the court similarly found that there was no clearly established right under the *Fifth Amendment* to refuse to answer questions during a *Terry* stop.

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

The court held that the officer was entitled to qualified immunity on Koch's excessive force claim. Any injuries suffered during the handcuffing process were de minimus and not supported by any medical evidence. To the contrary, Koch went to the emergency room almost a month after her arrest and tried to have the hospital staff give her written documentation indicating that she had suffered nerve damage in her wrist.

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

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U.S. v. Hunter, 2011 U.S. App. LEXIS 22882, November 16, 2011

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

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

The court held that he initial stop was valid. The court found that the officer's use of the two-second rule to determine that Hunter's car was following the other vehicle at a one-second interval, together with ten to fifteen seconds of observation, provided an objective justification to believe a traffic violation had occurred.

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

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

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

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

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U.S. v. Bass, 2011 U.S. App. LEXIS 2498, November 23, 2011

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

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

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

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

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

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

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