

THE FEDERAL LAW ENFORCEMENT – INFORMER –

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

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Supreme Court Law Enforcement Cases October 2012 Term

Fourth Amendment: Dog Sniff

Florida v. Jardines

Decision Below: [73 So. 3d 34 \(Fla. 2011\)](#)

The police received an anonymous tip from a person who claimed that Jardines was growing marijuana in his house. After conducting surveillance on the house for fifteen minutes, two police officers approached the front door with a drug-detection dog. After the dog alerted to the odor of narcotics, the officers obtained a warrant to search Jardines' house where they found live marijuana plants and equipment used to grow those plants.

The Florida Supreme Court held that the "sniff-test" conducted by the drug-detection dog was a substantial government intrusion into Jardines' house and constituted a *Fourth Amendment* search.

The issue before the Supreme Court is whether a sniff by a trained drug-detection dog at the front door of a suspected grow house is a search under the *Fourth Amendment* requiring probable cause.

The Court heard oral arguments in this case on October 31, 2012.

Fourth Amendment: Dog Sniff

Florida v. Harris

Decision Below: [71 So. 3d 756 \(Fla. 2011\)](#)

The Florida Supreme Court held that when a drug-detection dog alerts, the fact that the dog has been trained and certified, by itself, is not enough to establish probable cause to search the interior of the vehicle and the person who was inside the vehicle. The issue before the Supreme Court is whether this holding conflicts with established United States Supreme Court precedent.

The Florida Supreme Court held that the State, which bears the burden of establishing probable cause, must present all records and evidence that are necessary to allow the trial court to evaluate the reliability of the dog. The fact that the dog has been properly trained and certified is a starting point in this analysis. Because there is no uniform standard for training and certification of drug-detection dogs, the State must explain the training and certification so that the trial court can evaluate how well the dog is trained. This information must include whether the dog falsely alerts in training, and if so, the percentage of false alerts. The State should also keep and present records of the dog's performance in the field regarding verified alerts and false alerts. Finally,

the State must present evidence of the experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then evaluate the dog's reliability.

The Court heard oral arguments in this case on October 31, 2012.

Fourth Amendment: Detaining an Individual During the Execution of a Search Warrant

Bailey v. United States

Decision Below: [652 F.3d 197 \(2d Cir. 2011\)](#)

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

In a case of first impression, the Second Circuit Court of Appeals held that the officers' authority under [*Michigan v. Summers*](#) to detain Bailey incident to a search was not strictly confined to the physical premises of the apartment as long as the detention occurred as soon as practicable after Bailey left the apartment. The officers' decision to wait until Bailey had driven out of view of the apartment before detaining him was reasonable given their concern for officer safety and the potential of alerting other possible occupants of the apartment.

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

The issue before the Supreme Court is whether *Michigan v. Summers* allows police officers to detain an individual, incident to the execution of a search warrant, when the individual has left the immediate vicinity of the premises before the warrant is executed.

The Court heard oral arguments in this case on November 1, 2012.

Fourth Amendment: Obtaining Nonconsensual and Warrantless Blood Samples from Suspected Drunk Drivers

Missouri v. McNeely

Decision Below: [358 S.W.3d 65 \(Mo. 2012\)](#)

McNeely refused to consent to an alcohol breath test or a blood test after a police officer arrested him for driving while intoxicated. The officer, without obtaining a warrant, ordered a medical

professional to draw McNeely's blood. The trial court held that the nonconsensual and warrantless blood draw violated the *Fourth Amendment* and suppressed the blood test results.

The Supreme Court of Missouri agreed. The United States Supreme Court in [*Schmerber v. California*](#) provided a limited exception to the warrant requirement for the taking of a blood sample in alcohol-related arrests. In *Schmerber*, the court relied on the existence of "special facts" that might have led the officer to reasonably believe he was faced with an emergency in which the delay in obtaining a warrant would threaten the destruction of evidence. The threat of evidence destruction was caused by the fact that the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops and because time had to be taken to investigate the accident scene and transport the defendant to the hospital. These events left no time for the officer to obtain a search warrant and constituted "special facts" that allowed the officer to obtain a blood sample without a warrant. In this case, however, the officer was not faced with any "special facts" as there was no accident to investigate and no need to arrange for medical treatment. The officer could have obtained a search warrant because there were no circumstances that threatened the destruction of evidence.

The issue before the Supreme Court is whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver, under the exigent circumstances exception to the *Fourth Amendment* warrant requirement, based upon the natural dissipation of alcohol in the bloodstream.

The Court will hear oral arguments in this case on January 9, 2013.

Fourth Amendment: The Collection of DNA Samples from Individuals Arrested and Charged with Serious Crimes

Maryland v. King

Decision Below: [42 A.3d 549 \(Md. 2012\)](#)

In 2009, King was arrested on first and second-degree assault charges. Under the Maryland DNA Collection Act, King's DNA was collected, analyzed and entered into Maryland's DNA database. King's DNA profile generated a match to a profile developed from a sample collected in an unsolved sexual assault case from 2003. This hit provided probable cause for a subsequent grand jury indictment for the sexual assault. King was convicted and sentenced to life in prison. The Maryland Court of Appeals reversed King's conviction, holding that the portions of the DNA Act authorizing the collection of a DNA sample from a mere arrestee were unconstitutional as applied to King.

The Supreme Court will decide whether the *Fourth Amendment* allows the states to collect and analyze DNA from people arrested and charged with serious crimes.

The Court has not scheduled a date for oral arguments in this case.

Federal Tort Claims Act (FTCA)

Millbrook v. United States

Decision Below: [No. 12-1531, 2012 U.S. App. Lexis 8089 \(3d Cir. Apr. 23, 2012\)](#)

Millbrook sued the United States under the Federal Tort Claims Act (FTCA) alleging that three Correctional Officers, while acting within the scope of their employment, subjected him to a sexual assault and battery while he was an inmate at a federal prison.

Under the FTCA, the United States is generally not liable for intentional torts of its employees, except for certain intentional torts committed by investigative or law enforcement officers while executing searches, seizing evidence or making arrests for violations of federal law.

In an unpublished opinion, the Third Circuit Court of Appeals affirmed the district court's dismissal of Millbrook's claim because he did not allege that the officers' conduct occurred during a search, seizure of evidence or course of an arrest for a violation of federal law.

The issue before the Supreme Court is whether the FTCA waives the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to execute searches, seize evidence or make arrests for violations of federal law.

The Court has not scheduled a date for oral arguments in this case.

CASE SUMMARIES

Circuit Courts of Appeals

2nd Circuit

Payne v. Jones, 696 F.3d 189 (2d Cir. N.Y. 2012)

Payne's wife took him to the emergency room after he accidentally cut his thumb. Payne, a Vietnam War veteran, who suffers from severe post-traumatic stress disorder, was combative and disoriented when he arrived at the emergency room. Hospital staff called the police and Officer Jones responded. Officer Jones arrested Payne under a New York Statute that authorizes the arrest of individuals who appear to be mentally ill and a danger to themselves. While waiting for an ambulance to transport Payne to a mental health facility, Officer Jones slapped Payne in the side of the head. Once at the mental health facility, Payne resisted Officer Jones' efforts to move him from a gurney into a room at the facility. Officer Jones wrapped Payne in a bear hug and pushed him into the room. As Officer Jones was placing Payne on the bed, he saw Payne's USMC tattoos and made a disparaging remark about the Marine Corps. In response, Payne kicked Officer Jones in the groin. Officer Jones then punched Payne, who was still handcuffed, seven to ten times in the neck and face until a nurse grabbed Officer Jones and he stopped. A doctor examined Payne and found that his face was bloody and swollen. The doctor reported the

incident to Officer Jones' department. The police department investigated and terminated Officer Jones, finding that he had committed an egregious assault against Payne and then lied about it to the internal affairs investigators.

Payne sued Officer Jones claiming that he had used excessive force and had committed a battery against him. The case went to trial and the jury returned a verdict against Officer Jones. The jury awarded Payne \$60,000 in compensatory damages and \$300,000 in punitive damages.

While Officer Jones' conduct was reprehensible and justified the imposition of punitive damages, the court held that \$300,000 in punitive damages was unreasonably high. The court ordered a new trial to determine the amount of punitive damages, unless Payne agreed to reduce the amount of punitive damages to \$100,000.

Click [HERE](#) for the court's opinion.

U.S. v. Wilson, 2012 U.S. App. LEXIS 22212 (2d Cir. N.Y. Oct. 25, 2012)

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

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

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

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

Click [HERE](#) for the court's opinion.

United States v. Oehne, 2012 U.S. App. LEXIS 22213 (2d Cir. Conn. Oct. 25, 2012)

Police officers suspected that Oehne had sexually abused a minor when he lived in Connecticut. The officers learned that Oehne lived in Virginia, where he had a pending criminal case for sexual abuse of another minor girl. Officers went to Oehne's house, placed him in handcuffs and seated him in a police car while other officers secured the house until a search warrant could be obtained. After an officer read the first line from a *Miranda* Advice-of-Rights form, Oehne said that he had a lawyer. The officer asked Oehne if the lawyer was for his pending case in Virginia, and Oehne said, "Yes." Oehne eventually waived his *Miranda* rights and made several incriminating statements.

Oehne argued that he had invoked his *Fifth Amendment* right to counsel by telling the officer that he had a lawyer in another case and by refusing to sign the Advice-of-Rights form. The court disagreed. For a defendant to invoke his right to counsel, he must do so through a clear, unambiguous affirmative action or statement. When Oehne told the officers that he had a lawyer, he was referring to an attorney representing him in a separate pending charge in Virginia. Oehne never requested a lawyer for the current custodial interrogation and telling the officers that a lawyer represented him in an unrelated matter did not constitute an unequivocal request for counsel. In addition, Oehne did not refuse to sign the Advice-of-Rights form because the officers never asked him to sign it.

The court added that even if Oehne had invoked his *Fifth Amendment* rights, he later waived them by voluntarily initiating a conversation with the officers and discussing the case.

Click [HERE](#) for the court's opinion.

7th Circuit

United States v. Smith, 2012 U.S. App. LEXIS 20673 (7th Cir. Ill. Oct. 4, 2012)

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

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

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

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

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

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

Click [HERE](#) for the court's opinion.

8th Circuit

Winslow v. Smith, 696 F.3d 716 (8th Cir. Neb. 2012)

Six individuals were convicted in 1989 for participating in a 1985 rape and murder. However, in 2008, DNA testing established that the semen and blood type found in the victim's apartment came from an individual who had no connection to any of the six individuals. Three of the six who were still in prison were released and all six received full pardons. Winslow and three others sued members of the sheriff's department and the prosecutor for violating their rights to due process by recklessly investigating the murder and by coercing them into pleading guilty.

The court held that the district court improperly granted the law enforcement officer-defendants qualified immunity. The court found that the evidence allowed for a reasonable inference that the officers' investigation crossed the line from gross negligence to recklessness as the officers manufactured false evidence and repeatedly ignored any evidence that did not fit their theory of the case. Specifically, there was evidence to suggest that the officers systematically coached witnesses into providing false testimony that was consistent with their theory as to how the murder had been committed.

Even though five of the individuals pled guilty in the case, the court held that their due process rights were still violated because the prosecutor introduced the false evidence generated by the officers at the plea hearing.

The court held that the prosecutor was entitled to absolute immunity. Although there was evidence that the prosecutor consulted with one of the officers about the investigation, there was no evidence that any action taken by the prosecutor before he filed the criminal complaints was unconstitutional as he relied upon the information provided by the officers. Once the charging documents were filed, the prosecutor was protected by absolute immunity.

Click [HERE](#) for the court's opinion.

White v. Smith, 696 F.3d 740 (8th Cir. Neb. 2012)

Based on the same set of facts as *Winslow*, a different district court judge held that the officers were not entitled to qualified immunity in White's lawsuit against them. The same circuit court panel that decided *Winslow* held that the district court judge properly denied the officers qualified immunity. The evidence offered by White suggested that the officers systematically and intentionally coached witnesses into providing false testimony that fit the officers' theory of the case.

Click [HERE](#) for the court's opinion.

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

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

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

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

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

that Grant's refusal of consent to search demonstrated that it was possible for him to decline the officer's subsequent requests.

Click [HERE](#) for the court's opinion.

Royster v. Nichols, 2012 U.S. App. LEXIS 22355 (8th Cir. Mo. Oct. 30, 2012)

The court held that Royster's refusal to sign the credit card receipt for his \$156.00 restaurant bill gave the officer probable cause to arrest him for theft of restaurant services, even if Royster correctly believed that he did not have to sign it. The officer was entitled to rely on the restaurant manager's statement that Royster had not paid his bill and on Royster's statement to the officer that he was not going to sign the credit card receipt.

Royster also argued that the officer used excessive force when the officer handcuffed his hands behind his back despite Royster's request that the officer handcuff him in the front because of a previous back and shoulder injury. Although handcuffing a suspect behind the back in the face of a severe and obvious medical injury may constitute excessive force, in this case, the evidence did not support the claim that Royster's back or shoulder injury was obvious or visible. Royster only told the officer that he had a preexisting injury. Any aggravation of that old injury was not caused by an excessive use of force.

Click [HERE](#) for the court's opinion.

9th Circuit

United States v. Budziak, 2012 U.S. App. LEXIS 20814 (9th Cir. Cal. Oct. 5, 2012)

Following the First, Eighth and Tenth Circuits, the court held that the evidence is sufficient to support a conviction for distribution under 18 U.S.C. § 2252(a)(2) when it shows that the defendant maintained child pornography in a shared folder, knew that doing so would allow others to download it, and another person actually downloaded it.

Click [HERE](#) for the court's opinion.

United States v. Herney, 696 F.3d 938 (9th Cir. Wash. 2012)

After a jury trial, Herney was convicted of assaulting a federal law enforcement officer. He argued that the district court abused its discretion and denied him due process by refusing to exclude the officer from the courtroom, by allowing the officer to sit at the prosecution's table and by refusing to require the officer to testify first.

The court disagreed. Federal Rule of Evidence 615 allows the district court to permit a designated officer to be present during trial. There is no general rule that prohibits a case-agent, who is also the victim in the case, to sit at the prosecution's table. Therefore, district court did not abuse its discretion or commit a due process violation by allowing the law enforcement

officer, who was also the victim of the assault, to sit at the prosecution's table as the designated case-agent.

While it might be good practice to require the case-agent to testify first, the court stated that there was no rule that required it and the court was reluctant to create such a rule that would deprive the prosecution from presenting its own case without interference.

Click [HERE](#) for the court's opinion.

10th Circuit

Storey v. Taylor, 696 F.3d 987 (10th Cir. N.M. 2012)

The police department dispatched two officers to Storey's address after receiving an anonymous call reporting a loud argument there. When the officers arrived, they heard no argument. They knocked on the front door and Storey answered. Storey admitted that he and his wife had been arguing and after the argument ended, she had left the house. While the officers were questioning Storey, his wife returned home and entered the house through the attached garage. Officer Taylor asked Storey about the subject of the argument, and when Storey refused to tell him, he ordered Storey to step out of the house. After Storey refused, Officer Taylor arrested him for failure to obey a lawful order.

Storey sued the officers, claiming that his *Fourth Amendment* rights were violated because he was arrested without a warrant or exigent circumstances that would justify a warrantless arrest.

While Officer Taylor admitted he did not believe that Storey had committed a domestic violence related offense, he claimed that he had probable cause to arrest Storey for failing to obey his order to step out of the house.

The court disagreed. Unless exigent circumstances were present, Officer Taylor's order for Storey to step out of his house was not lawful and Storey's refusal to obey it could not justify his arrest. The report of a loud argument, without more, that had ended by the time the officers arrived, did not create exigent circumstances to justify a warrantless arrest.

Taylor also claimed that he lawfully arrested Storey in the performance of his community caretaking duties. Again, the court disagreed because the facts did not show a likelihood of violence such that Taylor's actions were necessary to protect the safety of Storey, his wife, the officers or others.

Finally, the court held that Taylor was not entitled to qualified immunity because at the time of Storey's arrest it was clearly established that a police officer must have probable cause to arrest an individual and that community caretaking detentions must be based on facts that warrant the detention.

Click [HERE](#) for the court's opinion.

United States v. Salas-Garcia, 2012 U.S. App. LEXIS 21995 (10th Cir. N.M. Oct. 22, 2012)

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

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

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

Click [HERE](#) for the court's opinion.

Kaufman v. Higgs, 2012 U.S. App. LEXIS 22071 (10th Cir. Colo. Oct. 23, 2012)

Two police officers went to Kaufman's home to question him about a vehicle he owned that an eyewitness saw hit an unoccupied car in a jewelry store parking lot. The eyewitness told the officers that the car had been driven by a female and there had been a male passenger. The officers confirmed that Kaufman had made a purchase from the jewelry store a few minutes before the accident. The officers arrested Kaufman, an attorney, for obstruction of justice, after he claimed "privilege" and refused to identify the driver of the vehicle.

The charges were eventually dismissed. Kaufman sued the officers, claiming they violated his *Fourth Amendment* rights by arresting him without probable cause.

The court held that the officers were not entitled to qualified immunity. Kaufman's refusal to answer questions during a consensual encounter could not be considered an "obstacle" as the term is used in Colorado's obstruction statute. Silence accompanied by an explanation for that silence does not obstruct anything. In addition, it is well established that a citizen has no obligation to answer an officer's questions during a consensual encounter. Here, the officers could have continued to question Kaufman, sought out other members of his family for questioning or they could have sought to compel Kaufman to answer their questions with a grand jury subpoena.

The court also held that at the time of Kaufman's arrest it was clearly established through Colorado state case law that mere verbal opposition to the police, by itself, could not constitute

obstruction of justice. Because words alone are not enough to constitute obstruction, it follows that silence cannot be enough to constitute obstruction either. In this case, no officer could reasonably have thought that Kaufman's silence constituted a criminal act; therefore, the officers violated his clearly established *Fourth Amendment* right to be free from unreasonable seizures.

Click [HERE](#) for the court's opinion.

11th Circuit

United States v. Griffin, 2012 U.S. App. LEXIS 20543 (11th Cir. Fla. Oct. 2, 2012)

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

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

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

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

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

Click [HERE](#) for the court's opinion.
