

THE FEDERAL LAW ENFORCEMENT - INFORMER -

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

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Law Enforcement Case Granted Certiorari by the United States Supreme Court for the October 2011 Term

Probable Cause and *First Amendment* Retaliatory Arrest / Immunity from Suit

Reichle v. Howards

Decision Below: [634 F.3d 1131 \(10th Cir. 2011\)](#)

See: [4 Informer 11](#) for case brief.

Two United States Secret Service Agents on a protective detail arrested Howards after an encounter with Vice President Cheney. The agents had probable cause to arrest Howards for a violation of *18 U.S.C. § 1001* after he falsely denied making physical contact with the Vice President. Howards brought a *First Amendment* retaliatory arrest claim against the agents claiming that the agents arrested him because of comments he made about the Vice President.

Issue 1: Whether an individual is prohibited from bringing a *First Amendment* retaliatory arrest claim when the officers have probable cause for the arrest. The Second, Sixth, Eighth and Eleventh Circuits have held that probable cause bars such a claim while the Ninth and Tenth Circuits have held that it does not.

Issue 2: Whether the 10th Circuit Court of Appeals improperly denied qualified and absolute immunity to the agents where probable cause existed for Howards' arrest, the arrest comported with the *Fourth Amendment*, and the denial of immunity threatens to interfere with the split-second, life-or-death decisions of Secret Service agents protecting the President and Vice President.

The Supreme Court granted certiorari on December 5, 2011 and will decide the case later this year.

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

Part 2

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Last month we discussed the Court's delineation between statements taken out-of-court that could sometimes be admitted in trial and those that could not. The distinction turned on the purpose behind the statement. If the statement was taken to deal with an ongoing emergency, then it could be admitted. But if "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution,"¹ then the statement was inadmissible.

Giles v. California:² **Open season?** 2008 brought a case to the Supreme Court in which the logic of their earlier Confrontation Clause cases drove a spectacularly queasy result. Giles was tried for murder after he shot his unarmed former girlfriend, Brenda, six times outside her grandmother's house. There were no witnesses to the shooting, but the victim's grandmother and niece heard the shots, ran outside and saw Giles with a gun in his hand. One bullet had gone through Brenda's upturned hand. Another wound was consistent with her having been shot while she was on the ground. Giles ran and was caught two weeks later.³

Giles pled self-defense. Prosecutors responded with the testimony of a police officer who had talked to Brenda three weeks before the killing while following-up on a domestic violence complaint. The officer testified that Brenda said that Giles had accused her of having an affair, grabbed her, picked her up and choked her. She told the officer when she broke free and fell to the floor, Giles punched her in the face and head, and after she broke free again, he opened a folding knife, held it about three feet away from her, and threatened to kill her if he found her cheating on him.⁴

Giles objected unsuccessfully and was convicted of murder.

The Supreme Court vacated the conviction. After all, Brenda was unavailable and had not been cross-examined. For six of the nine justices, it followed that admitting her statement violated the Confrontation Clause. Importantly, because the prosecution did not dispute it, Justice Scalia, writing for the majority, accepted that Brenda's statement was "testimonial."⁵ Justice Scalia then rejected the prosecution's contention that the Confrontation Clause should not shield Giles because he had forfeited its protection when he killed Brenda. He found that this forfeiture-by-wrongdoing doctrine had long existed. But he also found that preceding cases had only applied

¹ *Davis v. Washington*, 547 U.S. 813, 822 (2005).

² 554 U.S. 353 (2008).

³ 554 U.S. at 356.

⁴ 554 U.S. at 356-357.

⁵ 554 U.S. at 358.

it when the wrongdoing was “designed” to prevent the witness from appearing and testifying.⁶ In the absence of evidence that Giles had actually killed Brenda to prevent her from testifying that he had earlier threatened to kill her, the Confrontation Clause barred admitting Giles’s threats when he was charged with murderously carrying them out. And these things uneasily sat until *Michigan v. Bryant*.⁷

Michigan v. Bryant (2011): The Facts. In the middle of a spring night in 2001 in Detroit, Anthony Covington visited Bryant. Bryant shot him in the belly through the closed back door of his house. Bryant drove away, but collapsed outside his car in a gas station. When the police found him, they asked him “what had happened, who had shot him, and where the shooting had occurred.” He told them and died hours later. Bryant was arrested a year later in California.⁸ The jury could not reach a verdict in Bryant’s first trial. A second jury convicted him of second-degree murder and firearms offenses. Covington’s gas-station statement had been admitted over defense objection. After several state appeals, the question of whether admitting the gas-station statement violated the Confrontation Clause reached the Supreme Court.⁹

Michigan v. Bryant (2011): The Supreme Court Decision. Justice Sotomayor, a former prosecutor and the junior member of the majority, wrote the opinion.¹⁰ Citing *Davis*, the six-member majority held that:

... the circumstances of the interaction between Covington and the police objectively indicate that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency.” [Citation omitted]. Therefore, Covington's identification and description of the shooter and the location of the shooting were not testimonial statements, and their admission at Bryant's trial did not violate the Confrontation Clause.¹¹

The Court began by noting that figuring out whether the police questions and Covington’s answers were designed for the “primary purpose” of dealing with an “on-going emergency” proceeds objectively. The actual, subjective motives of the police and Covington were unimportant. Instead, the Court asked what would guide the typical officer and victim in this situation.¹²

Noting that all of its previous cases involved domestic violence, the Court found that this case did not. That meant that instead of confining offender and victim to a single family, the unidentified shooter could be anyone and could pose a danger to anyone else for any number of reasons.¹³

⁶ 554 U.S. at 359.

⁷ 131 S. Ct. 1143 (U.S. 2011).

⁸ 131 S. Ct. at 1164.

⁹ 131 S. Ct. at 1150-1151, *People v. Bryant*, 483 Mich. 132, 137 (Mich. 2009).

¹⁰ The opinion drew a scorching dissent from Justice Scalia, a primary architect of the earlier Confrontation Clause cases already discussed. “Today’s tale... is so transparently false that professing to believe it demeans this institution,” “patently incorrect conclusion,” “benign judicial mischief,” “distorts our Confrontation Clause jurisprudence and leaves it in a shambles,” “the Court makes itself the obfuscator of last resort.” And that’s just the first paragraph. 131 S.Ct. at 1168.

¹¹ 131 S. Ct. at 1150.

¹² 131 S. Ct. at 1156.

¹³ 131 S. Ct. at 1158.

The Court identified several other factors that helped determine that the primary purpose of the gas-station questions was to meet an ongoing emergency. (1) Covington had not been injured in a fistfight; there was a loose gun in the hands of someone who had used it that night. (2) Covington's emergent medical condition made immediate questioning imperative. (3) The "informal" nature of the dialogue played a role; this had not been a considered, thorough deposition designed to memorialize Covington's testimony. (4) The bare-bones, "just-the-facts" nature of the dialogue also belied that its purpose had been to memorialize nuanced testimony for a later trial.¹⁴ In sum, the nature and scope of the crime and the gas-station questioning was dispositive. Police:

...did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred. The questions they asked... were the exact type of questions necessary to allow the police to "assess the situation, the threat to their own safety, and possible danger to the potential victim' " and to the public, [citation omitted] including to allow them to ascertain "whether they would be encountering a violent felon." [Citation omitted]. In other words, they solicited the information necessary to enable them "to meet an ongoing emergency [citation omitted]."¹⁵

The Court concluded that the gas-station statement was nontestimonial and that its admission did not violate the Confrontation clause.¹⁶

Practical Implications for Law Enforcement. Unquestionably, the problems posed by these cases fall hardest on prosecutors. But these problems can lead to acquittal, and solving these problems starts with the law enforcement officer who talked to the witness.

a. Be able to find the witness for trial. The basic imperative of these cases is that witnesses must appear and testify in person. America is a mobile society. The time lag between crime and trial is often measured in years. Even with the Internet, finding witnesses again can be difficult. Asking, "Who are the two people you don't live with who will always know where you are and what are their phone numbers?" and a few similar questions may yield huge dividends later.

b. Plan for their unavailability. The great majority of victims of domestic abuse will not testify against their abusers. Witnesses are reluctant to testify against gangs. Lots of people consider it dishonorable to snitch.

(1) Corroborate the statement. Quick thinking will lead to corroborating evidence that may be admissible even if the statement falls to the Confrontation Clause. In *Bryant*, for instance:

When the police left the gas station, they immediately proceeded to defendant's house. The police found what appeared to be blood and a bullet on defendant's back porch and what the police believed to be a bullet hole in the back door.¹⁷

¹⁴ 131 S. Ct. at 1163-1167.

¹⁵ 131 S. Ct. at 1165-1166.

¹⁶ 131 S. Ct. at 1167.

¹⁷ 483 Mich. at 136.

Although the Court did not expressly rule out a fruit-of-the-poisonous-tree suppression of such physical evidence, it is hard to see how such a motion could succeed. The Confrontation Clause cannot be violated until the Government **offers** the declarant's statement at trial. There is nothing improper about initially **taking** the statement. When the statement is taken and the corroborating evidence is found in March, it becomes impossible to argue that the evidence is somehow tainted by offering the statement at trial in December. Another source of corroboration is other witnesses who may be more willing to testify. A beaten wife may not be willing to testify against her husband. Her mother or sister might.

(2) Memorialize the facts that will later help the prosecutor characterize the statement as nontestimonial. If the statement is nontestimonial, the Confrontation Clause will not block the officer who took the statement from testifying about its contents if the declarant is unavailable. Per *Bryant*, the statement will be nontestimonial when the primary purpose of taking the statement was to enable police assistance to meet an ongoing emergency. Extrapolating from the cases, here is a list of some of the factors that will help the prosecutor win that argument and admit the statement.

- a) The suspect is unidentified.
- b) The suspect got away.
- c) The suspect was armed.
- d) The suspect committed a violent crime.
- e) Similar unsolved crimes had been committed earlier; the suspect may have committed them and is likely to commit similar crimes in the future.
- f) The questions that produced the statement were clearly pointed toward catching the criminal and preventing future crimes.
- g) The questions that produced the statement were brief, informal and unstructured.
- h) The questions that produced the statement were asked near in time and place to the crime itself.
- i) The questions that produced the statement were clearly focused on finding other injured victims or dealing with other exigencies generated by the crime or the criminal's escape.

Summary. *Michigan v. Bryant* may signal that a majority of the current Court is willing to move toward a less demanding and less rigid construction of the Confrontation Clause. If so, that can only be good news for criminal investigators and prosecutors. However, it is still too soon to tell. For now, when taking the statements of ordinary witnesses in the aftermath of a crime, realize that the statement will likely not substitute for the witness at trial. Plan for their unavailability by corroborating their words with physical evidence and other witnesses more likely and willing to testify. Plan for their unavailability by noting the factors that will enable the prosecutor to convince the judge that the statement's primary purpose was to assist law enforcement deal with an ongoing emergency.

Be sure to see next month's issue of The Informer for Part 3.

CASE SUMMARIES

Circuit Courts of Appeals

1st Circuit

U.S. v. Pontoo, 2011 U.S. App. LEXIS 24075, December 5, 2011

Two officers went to a home after Gary Austin called police dispatch and reported that he had killed a woman there. Earlier that evening, the first officer had responded to the same home to deal with a domestic dispute between Austin and his girlfriend. As they approached in separate vehicles, the first officer radioed that he saw a subject walking near the home. The second officer thought the first officer said that he saw “the suspect” walking near the home. The second officer saw “the suspect,” who was the only man in the vicinity, who also fit Austin’s general description. Believing that the man was Austin, the officer drew his gun, ordered him to the ground, handcuffed him, and performed a *Terry* frisk. The officer found a handgun in the man’s waistband. The man turned out to be the defendant, Gregory Pontoo, who had no connection to Austin or his girlfriend. Pontoo was charged with possession of a concealed weapon and possession of a firearm by a convicted felon. The officers later discovered that Austin had not killed his girlfriend, that at the time they were arresting Pontoo, other officers were arresting Austin and that Austin had a history of making false reports to the police.

First, the court found that the second officer had reasonable suspicion to believe that Austin had killed his girlfriend. The officer knew there had been trouble earlier at the girlfriend’s home involving Austin, and that Austin had called dispatch claiming that he had killed her.

Next, the court found that it was objectively reasonable for the second officer to mistake Pontoo for Austin. Pontoo fit Austin’s general description and he was the only man in the vicinity of the girlfriend’s home at 3:30 a.m. Additionally, it was reasonable, under the stress of the situation, for the second officer to believe the first officer had said that he saw “the suspect” instead of “the subject.”

The court also held that scope of *Terry* stop on Pontoo was reasonable. When an officer stops a person who is suspected of having just committed a murder, it is reasonable for the officer to conclude that he is armed and dangerous. Here, it was reasonable for the officer to draw his gun on Pontoo, order him to the ground, handcuff him and conduct a frisk for weapons. These actions did not transform the *Terry* stop into a de facto arrest. Only a few seconds elapsed between the stop and the discovery of the gun. By that time, reasonable suspicion to stop Pontoo for a possible murder had turned into probable cause to arrest him for possession of a concealed weapon.

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

U.S. v. Ramos-Gonzalez, 2011 U.S. App. LEXIS 24439, December 9, 2011

The defendant was convicted of possession with intent to distribute cocaine. The forensic chemist who analyzed the cocaine was unavailable to testify at trial. The trial court allowed

another chemist, who was not present when the cocaine was tested, to testify to the results contained in the original chemist's report.

The court held that the admission of the chemist's testimony violated the defendant's *Sixth Amendment Confrontation Clause* rights. The testifying chemist was never asked his independent expert opinion as to the nature of the substance in question. Instead, he merely recited what was in the original chemist's report. This amounted to the admission of prohibited testimonial hearsay. Defense counsel could not effectively cross-examine the testifying chemist about how the substance was tested and what procedures were followed. Failure to provide the defendant with that opportunity violated his right of confrontation.

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

U.S. v. Trinh, 2011 U.S. App. LEXIS 25147, December 20, 2011

The court held that the search warrant affidavit, while largely dependent on information provided by a confidential informant, established probable cause to search the defendant's premises.

First, the agent who drafted the affidavit deemed the confidential informant to be a trustworthy source because he had provided credible and reliable information in the past that led to the seizure of illegal drugs. Inclusion of the confidential informant's history of providing information to law enforcement indicated some assurance of reliability, as opposed to an anonymous tipster.

Second, much of the confidential informant's information indicated that he had first-hand knowledge as to the defendant's marijuana cultivation operation.

Third, the agents corroborated a great deal of the confidential informant's information through surveillance of the defendant's movements as well as intercepted telephone conversations.

Finally, the agent stated his particular knowledge and experience in the area of marijuana cultivation operations in the affidavit.

The court also held that a one to two month gap between information included in the search warrant affidavit regarding criminal activity and the issuance of the search warrant did not render the warrant stale. Here the facts in the affidavit pointed to a large-scale marijuana cultivation operation that targeted items, which were likely to be of use to the operation for a considerable amount of time.

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

U.S. v. Guerrier, 2011 U.S. App. LEXIS 25555, December 22, 2011

Federal agents suspected that Guerrier was involved in a robbery at a crack house. The agents asked Guerrier's parole officer to help them set up a meeting with him. At his next scheduled parole meeting, the parole officer told Guerrier that some men wanted to talk to him. The two agents were in plain clothes and had their weapons concealed. They told Guerrier that they wanted to speak to him about a matter unrelated to his parole status, that he was not under arrest

and that he did not have to talk to them. Guerrier agreed to speak with the agents. Guerrier, the parole officer and the two agents got into the agents' police car and went to a fast food drive-thru where they bought Guerrier a drink. The agent drove the group to a nearby strip-mall parking lot to conduct the interview. The agents again told Guerrier that he did not have to say anything to them, that he was not under arrest and that they would drive him anywhere he wanted, if he wanted out. Guerrier agreed to talk to the agents and during the 20-25 minute interview; he made several incriminating statements concerning his involvement with the crack house robbery. The agents had not provided Guerrier *Miranda* warning before interviewing him.

Guerrier claimed that his statements to the agents were inadmissible because he had not been advised of his *Miranda* rights. The court disagreed, holding that Guerrier was not in-custody for *Miranda* purposes when the agents interviewed him; therefore, they were not required to *Mirandize* him. The agents wore plain clothes, had their weapons concealed, and on more than one occasion told Guerrier that he was not under arrest, that he did not have to answer any questions, and that he was free to go at any time. Although the interview occurred in a police car, the agents left the doors unlocked and parked in a busy public parking lot. The interview lasted a relatively short time and no one badgered Guerrier for answers or menaced him in any way. This encounter did not rise to the level of a custodial interrogation.

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

4th Circuit

U.S. v. Montieth, 2011 U.S. App. LEXIS 24078, December 5, 2011

Officers obtained a warrant to search Montieth's home for marijuana, firearms and evidence of drug trafficking. The officers knew that Montieth lived with his wife and two young children. In an effort to minimize the trauma to Montieth's family as well as the safety risks of the search, the officers planned to detain Montieth away from his home and obtain his cooperation in executing the warrant.

While conducting surveillance, officers saw Montieth leave his home in his car. Officers pulled him over eight-tenths of a mile down the street. The officers handcuffed Montieth and placed him in the back of a police car. After an officer told him about the warrant, Montieth admitted to having marijuana in his home. When they arrived at Montieth's home, the officers allowed his wife and children to leave while they searched. The officers brought Montieth inside and advised him of his *Miranda* rights. Montieth waived his rights, made several incriminating statements, and identified locations in his home where the officers found marijuana and firearms.

First, the court determined that the search warrant was supported by probable cause. The officers conducted a trash pull at Montieth's home after receiving information that he possessed a large quantity of marijuana. Within the trash, officers found extensive evidence of marijuana trafficking to include several burnt marijuana cigarettes and marijuana residue.

The court held that Montieth's detention qualified as a valid *Terry* stop. In this case, the warrant specified the Montieth's person, as well as his home was subject to search for evidence of drug trafficking. Once the officers pulled Montieth over and smelled the odor of marijuana in his car, they were further justified in detaining him in the police car.

In response to an argument made by Montieth, the court went on to state that the officers acted reasonably when they decided to detain Montieth a short distance from his home prior to executing the search warrant. The court refused to find that every detention incident to the execution of a search warrant must take place inside the home itself. Instead, the court considered whether the officers detained Montieth “as soon as practicable” after observing him leave his residence. In this case, the court determined that they had. However, the court was careful to state that not every detention that occurs away from a home to be searched will automatically be considered reasonable.

The court also held that Montieth’s statements to the officers before he was *Mirandized* were admissible. Montieth’s incriminating statements to the officers, while in the back of the police car, were spontaneously made and not elicited as the result of any questions or routine statements made by the officers.

Finally, the court found the officers’ failure to leave a copy of the search warrant at Montieth’s home was not a constitutional violation. The officers mistakenly believed that they had left a copy of the warrant in the home when they left. The officers were only required to have a valid warrant before conducting their search, which they clearly did.

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

U.S. v. Wellman, 2011 U.S. App. LEXIS 24203, December 7, 2011

Officers in West Virginia received a spreadsheet from a Wyoming Criminal Investigation Task Force indicating that child pornography had been transmitted over a peer-to-peer file-sharing network. The pornographic files were not identified by name, type or description, but by hash value. Each entry on the spreadsheet contained a hash value for a digital file, the Internet Protocol (IP) address of the computer offering the file for download, the locality in which that computer operated, the time and date the file was observed and the officer from the Task Force who identified the file. One of the IP addresses was from West Virginia and was suspected of having hosted five different digital files of child pornography. A West Virginia officer identified Wellman as the person associated with the IP address.

The officer drafted a search warrant application for Wellman’s home in which he stated that he did not have copies of the suspected child pornography images or any description of what the images depicted. However, the officer did include the information from the spreadsheet regarding the hash values and the IP address, as well as other background information he had gathered on Wellman.

As an initial matter, the court followed the ninth circuit and refused to require that a search warrant application involving child pornography must include an image of the alleged pornography. While the inclusion of such material would assist in the probable cause determination, the court declined to make it an absolute requirement. Instead, the court stated that it would review a search warrant application in its entirety to determine if the officer stated facts sufficient for a finding of probable cause.

Next, without deciding the issue, the court assumed that the search warrant was not supported by probable cause. However, the court concluded that the evidence seized from Wellman’s home was not subject to suppression because the officers relied in good faith on the warrant.

The court concluded that the judge that issued the search warrant did not act as a “rubber stamp” or abandon his role as a neutral and detached decision maker. The officer who drafted the search warrant application explained the significance of the information from the spreadsheet and then performed additional research into Wellman’s background to provide corroboration and to minimize the possibility of mistake or confusion. The officer thoroughly explained the technology involved in the case and how that technology was used to identify Wellman. This took place over a six-week period and was not the result of a hasty investigation.

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

U.S. v. Glover, 2011 U.S. App. LEXIS 24453, December 9, 2011

Two officers saw Glover standing by the side of a gas station at 4:40 a.m. He appeared to be surreptitiously watching the attendant who was in the parking lot bent down checking the levels of the fuel tanks. Both officers knew that armed robberies and assaults had occurred in the neighborhood, and that this particular gas station had been robbed within the last year. The officers pulled around the building and back into the otherwise deserted parking lot. During that time, Glover approached the clerk, who was unaware of his presence, and was standing over him. The officers approached Glover. One of the officers frisked Glover, retrieved a handgun from his pants pocket and arrested him.

Glover argued that the stop-and-frisk violated the *Fourth Amendment* because the officers lacked reasonable suspicion of criminal activity. The court disagreed. The officers had first-hand knowledge of the high degree of crime in the area and that the gas station had been robbed in the past. Coupled with the time of day and the lack of other people in the area, Glover’s behavior indicated that he planned to rob or assault the clerk. The court noted that the Supreme Court, in *Terry v. Ohio*, upheld a stop-and-frisk on less threatening behavior. The court commented that the stop-and-frisk here could only be viewed as good police work.

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

U.S. v. Edwards, 2011 U.S. App. LEXIS 25930, December 29, 2011

Officers saw Edwards at 11:30 p.m. on a public street and arrested him on an outstanding arrest for domestic violence that alleged he had threatened his girlfriend with a firearm. An officer handcuffed Edwards behind his back and conducted a pat-down search for weapons but did not find any. When the transport van arrived, the officer decided to search Edwards a second time. The officer unfastened Edwards’ belt and pulled his pants and underwear six or seven inches away from his body. Three other officers were present and one of them directed a flashlight beam inside the front and back of Edwards’ underwear. While they were looking inside Edwards’ underwear, the officers saw that there was a plastic sandwich baggie tied in a knot around Edwards’ penis. After this discovery, one officer held Edwards’ pants and underwear open while another officer put on gloves, took a knife and cut the sandwich bag off Edwards’ penis, retrieving it after it dropped down into his underwear. The sandwich baggie contained forty-three smaller Ziploc baggies, which contained a total of almost three grams of cocaine base.

First, the court first held that the search conducted inside Edwards' underwear constituted a strip search. A suspect does not have to be fully undressed for a search to be considered a strip search. Here, pulling Edwards' underwear away from his body and exposing his pelvic area to the officers qualified as a strip search.

Next, the court found the officers did not meet the reasonableness standard that has been applied in cases involving strip searches. Specifically, the court held that the search was unreasonable because the officer removed the drugs from Edwards' body in an unnecessarily dangerous manner. The court stated that the use of a knife in cutting the sandwich baggie off Edwards' penis posed a significant and unnecessary risk of injury to Edwards. The court listed several alternatives that were available to the officers for removing the baggie, which would not have compromised their safety or Edwards's safety to include: untying the baggie, removing it by hand, tearing the baggie, or requesting that blunt scissors be brought to the scene to remove the baggie. Additionally, the fact that Edwards was not injured was irrelevant to the reasonableness analysis.

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

5th Circuit

U.S. v. Aguirre, 2011 U.S. App. LEXIS 24633, December 13, 2011

Federal agents arrested Mendoza shortly after he drove away from his home and they recovered marijuana and cocaine from his car. The agents went back to Mendoza's home to conduct a knock and talk interview with the remaining occupants. After knocking on the door and announcing themselves, the agents received no verbal response but did see a person look through the window, then quickly retreat toward the back of the home. Fearing the destruction of drug evidence, the officers immediately entered the home without a warrant or consent. Once inside the home the agents saw marijuana and drug paraphernalia in plain sight. The agents secured the home and the occupants while they applied for a search warrant. After obtaining the search warrant, the agents searched Aguirre's cell phone that was lying in plain view on a bed, and discovered several incriminating text messages.

The court held that the agents' warrantless entry into the home was lawful. First, they had probable cause to believe it contained evidence of illegal drugs and drug dealing. Agents had just arrested Mendoza, after watching him leave the home, and had recovered marijuana and cocaine from his car. Second, after knocking and announcing their presence, the reaction of the occupants reasonably caused the agents to believe that evidence was being destroyed. The agents' entry into the home was justified by the exigent circumstance of destruction of evidence and supported by probable cause.

Aguirre argued that the search and seizure of her cell phone was improper because the warrant did not particularly describe it as one of the items to be seized. The court noted that while the *Fourth Amendment* requires that a warrant particularly describe the place to be searched and the person or thing to be seized, each item does not need to be precisely described in the warrant. The particularity requirement can be satisfied where a seized item is not specifically named in the warrant, but the functional equivalent of other items are adequately described. Here, the

agents were authorized to search for items used to facilitate drug trafficking to include records, correspondence, address books and telephone directories. While this list did not include cell phones, the court held that cellular text messages, the directory and call logs of Aguirre's cell phone could be characterized as the functional equivalent of several items included in the search warrant such as: correspondence, address books and telephone directories. Aguirre's cell phone served as the equivalent of records and documentation of sales or other drug activities and as such, the agents lawfully searched it under the authority of the search warrant.

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

7th Circuit

U.S. v. Moody, 2011 U.S. App. LEXIS 24744, December 14, 2011

Officers arrested Moody in 2007 for methamphetamine trafficking and searched his cell phone incident to arrest. One of the phone numbers was identified in the phone's memory with the letter "G." This information was documented but played no part in Moody's 2007 prosecution.

Officers arrested Moody and Gutierrez in 2009 for conspiracy to distribute methamphetamine following an investigation that utilized a confidential informant and a controlled purchase of methamphetamine that was captured on audio and video. After their arrests, an investigator subpoenaed Moody and Gutierrez's cell phone records. After reviewing these records, the investigator realized that the telephone number identified as "G" in Moody's phone from his 2007 arrest corresponded to Gutierrez's cell phone number. At trial, the government presented evidence from the subpoenaed cell phone records as well as testimony from the arresting officer, which indicated that prior to his arrest in 2007 Moody had received a recent call from "G."

Moody argued that the warrantless search of his cell phone incident to his 2007 arrest violated the *Fourth Amendment* and that it improperly led to subsequent evidence that the government used to show that he was involved in a large methamphetamine distribution conspiracy.

The court declined to rule on whether the officer's warrantless search of Moody's cell phone, incident to his arrest in 2007, was constitutional but instead, applied the independent source doctrine. The independent source doctrine allows the admission of evidence initially discovered during an unlawful search if the evidence was later discovered through a source untainted by the initial unlawful search. Here, there was no evidence that the search of Moody's cell phone in 2007 had any bearing on the investigator's decision to subpoena Moody and Gutierrez's cell phone records in 2009. The phone number identified as "G" in 2007 was ignored until later discovered in the subpoenaed cell phone records in 2009. In 2009, the investigators connected "G" to Moody's case, when, under heavy surveillance, Gutierrez met with Moody to deliver methamphetamine. Prior to that meeting, there was no indication that law enforcement was even aware of Gutierrez's existence. These facts were sufficient to establish the necessary basis to subpoena cell phone records and they were derived entirely independent of the search of Moody's cell phone in 2007.

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

U.S. v. Brown, 2011 U.S. App. LEXIS 26015, December 30, 2011

Officers arrested Brown for illegal possession of a firearm. While Brown was in the back of the patrol car, one of the officers informed him of his *Miranda* rights. When the officer asked Brown if he understood his rights, Brown bobbed his head and made a sighing sound. The officer interpreted this to mean that Brown knew his rights, so he began to question him. Brown made incriminating statements and tried to negotiate a deal with the officer. At the police station, the officer again informed Brown of his *Miranda* rights and Brown responded “yeah” when asked if he understood those rights and if he wished to continue speaking to the officer.

Brown argued that he did not clearly indicate to the officer that he understood his *Miranda* rights and that he had not voluntarily waived them while in the back of the police car or later at the police station.

The court disagreed. A person may take actions that constitute a waiver of rights without expressly saying so. In each instance, it was clear that Brown understood and waived his rights. Officers gave him *Miranda* warnings twice. After each set of warnings, Brown made it known that he understood those rights and answered the officer’s questions. It was immaterial that he did not sign a waiver form or even utter a clear “yes” in response to the first *Miranda* warnings he received.

Even if the court were to consider Brown’s nodding of his head as ambiguous, his immediate actions constituted an implied waiver of his *Miranda* rights. Brown had extensive experience with the criminal justice system and he did not request an attorney or remain silent. Instead, Brown voluntarily answered some of the officer’s questions, while declining to answer others, in an effort to negotiate a deal for himself.

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

U.S. v. Martin, 2011 U.S. App. LEXIS 26021, December 30, 2011

Police arrested Martin after finding illegal drugs and a firearm in his vehicle. An officer advised Martin of his *Miranda* rights, obtained a waiver, and began to interview him. Martin answered all of the officer’s questions, but when the officer asked Martin if he would provide a written statement, Martin told him, “I’d rather talk to an attorney first before I do that.” The officer ended the interview and processed Martin into the jail. Two to three hours later, detectives from a different police agency arrived at the jail to interview Martin about a recent robbery. The detectives were not told that Martin had requested to speak to an attorney. The detectives advised Martin of his *Miranda* rights, which he waived. Martin then made incriminating verbal statements to the detectives. The detectives never requested a written statement and Martin did not ask to speak to an attorney during this interview.

Martin argued that his statements to the detectives in the second interview should have been suppressed because he had invoked his *Fifth Amendment* right to counsel during the first interview.

In *Edwards v. Arizona*, the Supreme Court held that if an accused invokes his right to counsel, all questioning must stop until counsel has been made available to him, unless the accused initiates

contact with the police. The *Edwards* rule serves as an absolute prohibition of further interrogation only if an accused invokes his right to counsel for all purposes. Here, the court held that Martin's statement, "I'd rather talk to an attorney before I do that," was limited in its scope to written statements only. Martin did not provide a written statement, nor did the detectives request one during the second interview.

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

8th Circuit

U.S. v. Rogers, 2011 U.S. App. LEXIS 23490, November 23, 2011

An officer suspected that Rogers was involved in a series of thefts, one of which involved a rifle. He learned that Rogers was staying with Tina Spriggs in her apartment. The officer went to the apartment and asked Rogers for consent to search. Rogers declined, telling the officer that the apartment belonged to Spriggs. Spriggs told the officer she was not sure whether she wanted to consent or not. While outside the apartment, the officer asked Rogers if there were any weapons in the apartment. Rogers told the officer that he had a hunting rifle that he had borrowed from a friend and he agreed to show it to the officer. The officer followed Rogers into the apartment without any objection from Spriggs or Rogers. Rogers retrieved the rifle and handed it to the officer who determined that it had been reported stolen. Spriggs became upset after she learned that Rogers had been storing a loaded weapon on the premises so she gave the officer consent to search the entire apartment. The officer found other stolen items.

Rogers argued that the officer's warrantless entry into the apartment violated the *Fourth Amendment*. The court disagreed. First, after the officer learned that Rogers had been staying overnight in the apartment, he could reasonably believe that Rogers had the authority to consent to an entry into the apartment. Second, the officer reasonably believed that Rogers actually consented to his entry into the apartment. Consent can be inferred from words, gestures or other conduct. Here, when the officer asked Rogers if he could see the rifle, Rogers agreed to show it to him and he did not object when the officer followed him into the apartment. Under these circumstances, it was reasonable for the officer to believe Rogers had consented to his entry into the apartment.

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

U.S. v. Blackmon, 2011 U.S. App. LEXIS 23821, December 1, 2011

Officers responded to an apartment complex after it was reported that Blackmon was there in violation of a protection order and that he appeared to be under the influence of drugs. Blackmon ignored the officers' commands to get on the ground and then raised his fists towards them as if he was ready to fight. An officer deployed his Taser on Blackmon while other officers tackled and handcuffed him. The officers confirmed that the protection order was valid and arrested Blackmon for violating it. A search incident to arrest revealed a bottle containing PCP and over \$1,700 in United States currency. Officers took Blackmon to jail where he was recognized being the same person in a surveillance photo who had robbed a bank earlier that day.

As an initial matter, the court held that the officers had reasonable suspicion to stop and detain Blackmon. Once they arrived at the apartment complex, the officers saw Blackmon, who fit the description of the person they were sent to investigate. Additionally, Blackmon's confused and unresponsive state was consistent with PCP use and provided the officers with justification to detain him and conduct their investigation.

The court then held that the officers had probable cause to arrest Blackmon after he refused their commands to get on the ground and instead raised his fists towards them. At that point, the officers had probable cause to arrest Blackmon for resisting arrest under Missouri law. Because the officers had probable cause to arrest Blackmon, their subsequent search of his person that uncovered the PCP and currency did not violate the *Fourth Amendment*.

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

U.S. v. Aldridge, 2011 U.S. App. LEXIS 24842, December 15, 2011

Federal agents suspected that Aldridge was involved in a methamphetamine distribution ring. The agents asked Aldridge's probation officer to contact him and direct him to meet with her at her office in the courthouse. This was a ruse to get Aldridge to come to the courthouse. When Aldridge arrived for the meeting, the agents stopped him outside the courthouse and asked if he would be willing to speak with him. Aldridge agreed and the agents took him to an interrogation room. They did not advise Aldridge of his *Miranda* rights but the agents told him that he was not under arrest and that he could leave at any time. The agents asked Aldridge to cooperate with them and at one point told him that they had his fingerprints on a bag of methamphetamine, which was not true. After Aldridge made several incriminating statements the agents allowed him to leave and Aldridge agreed to cooperate with them in the future. Three days later Aldridge voluntarily met with the agents, who again told him that he was not under arrest and that he was free to leave. During this meeting, Aldridge made more incriminating statements. After the meeting, Aldridge stopped cooperating with the agents and they arrested him.

Aldridge claimed that the agents violated his *Fifth Amendment* rights by not giving him *Miranda* warnings during their two meetings. The court held that in both instances, Aldridge was not in-custody for *Miranda* purposes, therefore the agents were not required to provide him with *Miranda* warnings.

During their first meeting, the agents told Aldridge that he was not under arrest and that he could leave at any time. The fact that his probation officer ordered Aldridge to report to her office at the courthouse did not turn the agents' meeting with Aldridge into a custodial situation. The court held that Aldridge could not have feared a revocation of his probation if he refused to speak to the agents. The court found the most Aldridge could have feared was that his probation officer would start a formal inquiry into whatever the agents were investigating. Aldridge would not have been punished for ending the interview with the agents. Additionally, even though the agents used deception by falsely telling Aldridge that his fingerprints were found on a bag of methamphetamine, under the totality of the circumstances, a reasonable person would still have felt free to end the meeting.

The court also held that Aldridge was not in-custody during the second meeting. Aldridge initiated contact with the agents who told him that he was not under arrest and that he was free to leave at any time.

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

U.S. v. Robinson, 2011 U.S. App. LEXIS 24843, December 15, 2011

A detective in an unmarked police car received an anonymous tip that three or four black males were in a maroon Cadillac that possibly contained firearms and stolen property. While on the way to investigate, the detective saw three black males in a maroon Cadillac stopped in an alley. The detective followed the Cadillac in his unmarked police car, and when the Cadillac committed a traffic violation, he called dispatch to have a marked police car "stop" the Cadillac. An officer in a marked police car conducted a traffic stop and arrested the driver for having a suspended driver's license. During the pre-impoundment inventory search the officer found a gun in the glove compartment. The officer then frisked, Robinson, who was one of the passengers, after he kept putting his hands in his pockets after being told to keep his hands out of his pockets. As the officer began his frisk, a handgun fell from Robinson's pants. The officer arrested Robinson.

While the uniformed officer may not have known every detail as to why he was stopping the Cadillac, the court held that he became part of the detective's "team," therefore, the collective knowledge doctrine applied. When multiple officers are involved in an investigation, probable cause may be based on their collective knowledge. Probable cause does not need to be based solely on the information known only by the arresting officer, as long as there is some degree of communication between the officers. Here, the detective had probable cause to stop the Cadillac for a traffic violation. When he told to his dispatcher to have an officer in a marked police car "stop" the Cadillac, the uniformed officer was allowed to rely on the detective's probable cause to conduct a valid traffic stop. In addition, the detective was present when the uniformed officer made the stop, reinforcing the conclusion that the uniformed officer was not acting on his own, but rather as part of a team.

The court further held that the uniformed officer had reasonable suspicion to frisk Robinson. Robinson's baggy clothes, nervous demeanor, and refusal to keep his hands out of his pockets, along with the discovery of a firearm in the glove compartment provided the officer justification to frisk him.

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

U.S. v. Thomas, 2011 U.S. App. LEXIS 25571, December 22, 2011

Thomas shot and killed a woman after she taunted him about his relationship with his girlfriend. Later that day, Thomas called the police and requested that the officers investigating the case meet with him at his mother's house. The officers went to the house, spoke to Thomas and arrested him after he made several incriminating statements. The officers did not advise Thomas of his *Miranda* rights before their conversation, which lasted only a minute or two.

The court held that the officers were not required to advise Thomas of his *Miranda* rights because his statements were made in a non-custodial setting. Thomas requested that the officers come speak to him and invited them inside when they arrived at his mother's house. Even though Thomas was not told that the questioning was voluntary, he was free to move about the house and the officers did not use any coercive tactics.

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

U.S. v. Patten, 2011 U.S. App. LEXIS 25873, December 28, 2011

Officers obtained a warrant to search Patten's home for evidence relating to accusations that he had sexually abused his fifteen-year old stepdaughter and taken sexually explicit photographs of her. Probable cause to support the warrant was established by information provided by the stepdaughter, but in the search warrant application, the officer did not refer to the stepdaughter by name or use her initials when referring to her as the source of his information. During the search, officers discovered a camera and memory cards described by the stepdaughter.

Patten argued that the search warrant was not supported by probable cause because the application contained no finding of reliability concerning the source of the information, it provided no indication of who the source was and it contained no statement as to the source's credibility.

The court declined to rule on whether or not the search warrant affidavit was sufficient to establish probable cause and instead held that the evidence was admissible against Patten under the good-faith exception. Disputed evidence will be admitted if it was objectively reasonable for the officer executing a search warrant to have relied in good faith on the judge's determination that there was probable cause to issue the warrant.

Here, it was reasonable for the officers to believe that the warrant contained probable cause to justify the search of Patten's home. First, an officer consulted with an assistant county attorney in drafting the application for the warrant. Second, an officer interviewed the stepdaughter in person and had an opportunity to assess her credibility. Finally, the stepdaughter had first-hand knowledge of the sexual abuse and photographs because she was the subject of the abuse.

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

9th Circuit

Bravo v. City of Santa Maria, 2011 U.S. App. LEXIS 24383, December 9, 2011

A detective drafted a warrant to search Javier Bravo Sr.'s home for weapons that were used in a drive-by shooting four days earlier. In the search warrant affidavit, the detective claimed that Javier Bravo Jr. was living in his father's home and that he was a member of the gang that was involved in the shooting. The affidavit also stated that Javier Jr. had been convicted of receiving stolen property, but failed to mention that he was six months into serving a two-year prison sentence for that crime. The affidavit did not allege that Javier Sr. or any other members of his family were involved in the shooting. When other officers executed the search warrant, they

learned that Javier Jr. had been in prison for six months. No weapons or other evidence connected to the drive-by shooting was discovered in the search.

The court held that the detective who drafted the search warrant affidavit was not entitled to qualified immunity. The court found that failing to include Javier Jr.'s custody status was a material fact that the detective omitted from the search warrant affidavit. The court then considered Javier Jr.'s custody status, along with the other information provided by the detective, and concluded that the officers did not have probable cause to search Javier Sr.'s home.

Additionally, the court disagreed with the lower court, which held that the detective's omission of Javier Jr.'s custody status was "negligent at most." The court held that a reasonable jury could conclude that the detective's omission was intentional or reckless. The detective testified that he had reviewed Javier Jr.'s rap sheet prior to drafting the search warrant affidavit and that he may have seen the notation that Javier Jr. had received a two-year prison sentence, but he could not remember. However, the detective also testified that if he had seen the prison sentence on Javier Jr.'s rap sheet, it would not have been something he would have checked into, which emphasized to the court the detective's disregard for the importance of full disclosure of information to the issuing magistrate.

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

U.S. v. Shetler, 2011 U.S. App. LEXIS 25901, December 28, 2011

Police received an anonymous tip that Shetler was manufacturing and using methamphetamine at his home. Officers went to Shetler's home, which had an attached garage. Without a warrant, the officers entered the garage through a door that had been left open. The officers did not see any evidence that methamphetamine was being cooked in the garage, but they did see several items that they knew to be related to the production of methamphetamine. The officers left the garage, went to the front of the house and knocked on the door. Shetler came out of a side door and met the officers who handcuffed and detained him. The officers entered Shetler's house through the front door and conducted a sweep. After completing the sweep, officers remained inside the house and obtained consent to conduct a more thorough search of the premises from Shetler's girlfriend, who also lived there. The officers searched the house and seized evidence related to methamphetamine manufacturing. Shetler was detained outside the house during the five-hour search and after being *Mirandized* confessed to the officers that he had been manufacturing methamphetamine in his garage. The next day, officers advised Shetler of his *Miranda* rights again and he made more incriminating statements.

The district court held that the officers' initial entry and sweep of Shetler's garage was justified under the exigent circumstances, emergency and protective sweep exceptions to the *Fourth Amendment*. The evidence observed was admissible and neither party challenged this issue on appeal. The district court held that the officers' warrantless sweep of Shetler's house could not be justified under any of the exceptions that applied to the initial search of the garage, and was therefore illegal. Additionally, the girlfriend's consent to search the house was tainted because the officers sought her consent while they remained physically inside the house after they had already illegally searched it. However, the district court held that Shetler's statements made to the officers the night of his arrest and the next day were admissible.

Regarding the statements, the court of appeals disagreed, ruling that all of Shetler's statements to the officers should have been suppressed. First, the court held that the government did not bear its burden of showing that Shetler's statements were not made because of the illegal searches. There was no evidence to show that the officers did not confront Shetler with any of the illegally seized evidence when they questioned him.

Second, there was no evidence to demonstrate that Shetler's answers to the officers' questions were not influenced by the illegal search. The officers detained Shetler outside his home for more than five hours while he witnessed the illegal search of his house. Witnessing the search, which led to the seizure of items commonly used in methamphetamine manufacturing, could have caused Shetler to make the incriminating statements to the officers.

Third, there were no intervening circumstances between the illegal search and Shetler's incriminating statements. Shetler was in police detention and did not speak to a lawyer before speaking to the officers. Although Shetler received *Miranda* warnings after the illegal search but before he spoke to the officers, this was not enough to purge the taint of the illegal search.

Finally, the court held that there was no evidence to establish that the officers' warrantless entry into Shetler's home to conduct their protective sweep was anything but flagrant misconduct.

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

U.S. v. Valenzuela-Espinoza, 2011 U.S. App. LEXIS 25899, December 28, 2011

Federal agents arrested the defendant at a house at 11:15 a.m. and detained him there until 5:00 p.m. when they transported him to their office. During this time, one agent was drafting a search warrant application while eight other agents stayed at the house to make sure no one else came or went. After being *Mirandized*, the defendant waived his rights and made several incriminating statements around 7:50 p.m. The defendant was held in custody overnight and presented to a magistrate judge the next day at 2:00 p.m.

The court held that the defendant's statements should have been suppressed because the agents unnecessarily delayed presenting him to the magistrate judge, in violation of *Federal Rule of Criminal Procedure 5(a)* and *McNabb-Mallory* rule. *Rule 5(a)* requires that an arrested person be presented to a magistrate judge "without unnecessary delay." The *McNabb-Mallory* rule provides that "an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge." However, statements made within six hours after an arrest cannot be excluded solely based on a delay in presentment before the magistrate.

Here, there was no question that the defendant's statements were made more than six hours after his arrest. The court found that after arresting the defendant at 11:15 a.m., any one of the eight available agents could have taken him ten miles to the nearest magistrate for the daily 2:00 p.m. initial appearance. Instead, the agents detained the defendant who made incriminating statements to the officers more than eight hours after his arrest.

Although the magistrate court's policy required that paperwork for initial appearances be submitted no later than 10:30 a.m., the court found that this paperwork requirement, by itself, could not create "reasonable delay." The local paperwork policy must be tailored to the requirements of *McNabb-Mallory* and not the other way around.

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

10th Circuit

U.S. v. Rochin, 2011 U.S. App. LEXIS 24584, December 13, 2011

During a valid traffic stop an officer developed reasonable suspicion to conduct a *Terry* frisk of Rochin. The officer felt a long hard bulge in each of Rochin's front pants pockets. The officer asked Rochin what the objects were and Rochin told him that he did not know. The officer removed the objects, which turned out to be glass pipes containing drugs. The officer arrested Rochin and found an illegal firearm during the inventory search of his vehicle.

Rochin argued that the officer violated the *Fourth Amendment* when he removed the items from his pockets without knowing what they were. The court disagreed stating that a reasonable officer could have concluded that the long hard objects in Rochin's pants pockets could have been used to assault the officer. Even though drug pipes are not typically used as weapons, the scope of a *Terry* frisk is not limited to traditional weapons. During a *Terry* frisk, an officer may remove objects such as guns and knives as well as other objects that he reasonably thinks could be used as weapons to assault him. Here, the two long, hard objects in Rochin's pockets easily qualified as such.

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

U.S. v. Hendrix, 2011 U.S. App. LEXIS 25167, December 20, 2011

Officers spoke to an informant who told them he had purchased methamphetamine from a man named "Keith" who was staying in Room 327 at a nearby motel. The informant gave the officers a physical description and stated that Keith had two pounds of methamphetamine in the room as well as a surveillance camera and monitor that he used to view the motel's north parking lot.

The officers went to the motel and confirmed that there was a Room 327 on the north side of the building. The officers knocked on the door to Room 327 and gave a false name when a woman inside asked who was there. The woman responded by telling the officers that she did not know anyone by that name. The officers then told the woman that they were the police. At that point, the officers heard the sound of people moving around inside the room and a toilet flushing. The officers entered the room where they saw Ziploc bags filled with methamphetamine in plain view on a table. The officers arrested the woman and a man that matched the informant's description of Keith. The officers also saw a video monitor, which displayed the motel's north parking lot. The officers secured the room and obtained a search warrant.

The court held that the officers had probable cause to believe that illegal drug activity was taking place in Room 327. The officers corroborated that the motel was located at the address provided by the informant and that it had a Room 327 that was on the north side of the building. After knocking on the door to Room 327, the officers heard people moving around and a toilet flushing. These actions reasonably caused the officers to believe that the occupants were destroying evidence and justified their warrantless entry into the room.

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