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The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Center's Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List; have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting the Legal Division web page http://www.fletc.gov/training/programs/legal-division/the-informer .

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CASE SUMMARIES

Circuit Courts of Appeals

4th Circuit

United States v. Holness, 2013 U.S. App. LEXIS 2834 (4th Cir. Md. Feb. 11, 2013)

The State of Maryland indicted Holness for murdering his wife and appointed him a public defender. At the county detention center, Holness shared a cell with McGrath. McGrath told an investigator Holness made comments to McGrath that led McGrath to believe Holness had killed his wife. The investigator told McGrath to reinitiate contact with Holness if he volunteered any additional information. Holness then made incriminating statements to McGrath, which were reported to the investigator. Shortly afterward, the state dismissed the murder charge against Holness after a federal grand jury indicted him for several offenses related to the death of his wife, to include, travelling in interstate commerce with the intent to kill or injure his spouse. At trial, McGrath testified about the incriminating statements Holness made to him.

Holness claimed his *Sixth Amendment* right to counsel was violated after the district court allowed McGrath to testify about the incriminating statements he made to McGrath. Holness argued McGrath became an agent of the police after he met with the investigator and the investigator urged him to reinitiate contact with Holness. By that time, Holness had been appointed an attorney for the state murder charge and the attorney was not present during his subsequent jail cell conversations with McGrath.

The court disagreed. The *Sixth Amendment* right to counsel is offense specific and the right does not attach until a prosecution is commenced. While Holness was initially arrested and charged with a state offense, he was ultimately convicted of a federal offense. Any *Sixth Amendment* violation that may have occurred was committed by a state law enforcement officer before Holness was indicted by the federal grand jury. Consequently, when Holness made the incriminating statements to McGrath, even if McGrath was an agent of the police, Holness' *Sixth Amendment* right to counsel had not yet attached to the federal charges.

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

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United States v. Yengel, 2013 U.S. App. LEXIS 3290 (4th Cir. Va. Feb. 15, 2013)

Police officers arrested Yengel at his house after responding to a 911 call from his wife concerning a domestic assault. After Yengel was removed from the scene, Mrs. Yengel told the officers her husband kept a large number of firearms and a grenade inside the house. Officers also learned Mrs. Yengel's young son was asleep in his bedroom. One of the officers asked Mrs. Yengel to show him where the grenade was located and she directed him to a guest bedroom next to her son's bedroom. Mrs. Yengel pointed to a locked closet, to which she did not have access, and told the officer the grenade was inside. At this point, the officer had not notified explosive experts, did not evacuate the house or nearby homes and did not remove Mrs. Yengel's son from the adjoining bedroom. Without a search warrant, the officer pried the closet door open

with a screwdriver. After the officer saw an ammunition canister he believed might contain the grenade, he evacuated Yengel's house and several neighboring houses. An explosive ordinance disposal team later searched the closet and found a backpack that contained a partially assembled explosive device, but no grenade. Yengel was charged with possession of an unregistered destructive device.

The court agreed with the district court, which held the warrantless entry and search of the closet was not justified by exigent circumstances. Under the emergency-scene exigency, an officer making a warrantless entry and search must have an objectively reasonable belief an emergency exists that requires immediate entry to render assistance or prevent harm to others. In this case, the court held a reasonable officer would not have believed the circumstances created an emergency that would have justified a warrantless entry and search of the closet.

First, Mrs. Yengel told the officer only that there was a grenade in the house. Mrs. Yengel did not tell the officer when she last saw the grenade or give the officer any facts that could support a conclusion the grenade was "live" or could detonate at any moment. Here, the possible existence of a grenade, without other facts to establish that it posed a threat of danger, did not create an exigency to justify a warrantless search.

Second, the immobile and inaccessible location of the threat further diminished the scope of any possible danger. The suspected grenade was inside a locked closet that only Yengel could access. Once Yengel was arrested and removed from the scene, the threat that someone might access the closet and gain control of the grenade was significantly diminished.

Finally, because no officers on the scene attempted to evacuate Mrs. Yengel's son, who was asleep in the room directly next to the suspected grenade, or any of the nearby homes, provided clear evidence the officers did not believe an on-going emergency existed when he entered the closet.

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

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United States v. Black, 2013 U.S. App. LEXIS 4251 (4th Cir. N.C. Feb. 25, 2013)

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

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

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

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

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

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

Third, in a state that allows individuals to openly carry firearms, the exercise of that right, without more, cannot justify an investigatory detention. Even if the officers were justified in detaining the man who openly displayed the firearm, reasonable suspicion to him did not amount to particularized reasonable suspicion to believe Black was engaged in criminal activity.

Fourth, the officers' "Rule of Two" is a law enforcement created rule that is not based on reasonableness. The practical implication of applying this rule suggests anyone in proximity to an individual with a gun is involved in criminal activity; therefore, subject to seizure and search. As there are no safeguards against the unlawful use of discretion by the officer applying such an arbitrary rule, it cannot be a basis for reasonable suspicion of criminal activity.

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

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

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

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5th Circuit

United States v. Gonzalez-Garcia, 2013 U.S. App. LEXIS 3366 (5th Cir. Tex. Feb. 15, 2013)

A federal agent saw Gonzalez walk out of a house under surveillance as part of a drug investigation. The agent approached Gonzalez, handcuffed him and placed him in his police vehicle. Without advising Gonzalez of his *Miranda* rights, the agent asked him if he was guarding a drug-house and if there were drugs in the house. Gonzalez replied, "Yes" to both questions and then requested an attorney. The agent asked Gonzalez for consent to search the house, which Gonzalez granted. The agents found over two thousand kilograms of marijuana in the house.

The district court suppressed Gonzalez's admissions that he was guarding marijuana in the house because they were obtained in violation of *Miranda*, which the government conceded on appeal. However, the district court refused to suppress the marijuana recovered from the house. First, Gonzalez argued the marijuana should have been suppressed because the agent obtained consent to search from Gonzalez after he requested an attorney. Second, Gonzalez claimed the agents' use of his admissions, which were later suppressed, automatically rendered his consent to search involuntary.

The court disagreed. In *Edwards v. Arizona* the Supreme Court held when an accused invokes his right to counsel, he is not subject to further questioning until counsel has been made available to him. However, a violation of the *Edwards* rule does not require suppression of physical, non-testimonial evidence. Consequently, even if the agent violated *Edwards* when he asked Gonzalez for consent to search the house, that violation would not justify suppression of the marijuana, which is physical, non-testimonial evidence.

Next, the court held Gonzalez's consent was not automatically rendered involuntary because his *Miranda* rights were violated. Such a rule is not consistent with the multi-factor approach courts must use when determining voluntariness. Using that approach, and considering the *Miranda* violation, the district court found Gonzalez voluntarily consented to the search of the house.

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

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United States v. Woerner, 2013 U.S. App. LEXIS 3742 (5th Cir. Tex. Feb. 22, 2013)

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

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

for several of Woerner's email accounts. A search of one of those email accounts revealed Woerner had sent numerous emails containing child pornography images and videos.

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

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

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

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6th Circuit

United States v. Johnson, 2013 U.S. App. LEXIS 3520 (6th Cir. Tenn. Feb. 20, 2013)

A police officer stopped a car driven by Johnson for a seat-belt law violation. As the officer approached the car, he smelled the odor of marijuana. Johnson's female passenger admitted to having smoked marijuana in the car a few minutes earlier. Johnson then told the officer he knew he would be arrested because a condition of release for a prior conviction required him to stay away from the passenger. Johnson also told the officer he was a convicted felon and there was a loaded gun in his car. The officer handcuffed Johnson and placed him in the back of his patrol car. The officer confirmed the passenger's identity, searched Johnson's car, found the gun and confirmed Johnson was a convicted felon.

Johnson claimed the search of his vehicle was not incident to a valid arrest because the officer arrested him prior to confirming the identity of the passenger as the person listed on his condition of release.

Without deciding the search incident to arrest issue, the court held the officer lawfully searched Johnson's car under the automobile exception to the warrant requirement. First, the officer had probable cause to believe Johnson's car contained evidence of a crime after he smelled the odor of marijuana in the vehicle. Second, the officer had probable cause to believe there was a gun in the car after Johnson voluntarily told him he was a convicted felon and there was a loaded gun under the seat.

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

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United States v. Shaw, 2013 U.S. App. LEXIS 3619 (6th Cir. Tenn. Feb. 21, 2013)

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

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

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

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

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7th Circuit

United States v. Uribe, 2013 U.S. App. LEXIS 2941 (7th Cir. Ind. Feb. 13, 2013)

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

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

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

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

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

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

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United States v. Hunter, 2013 U.S. App. LEXIS 4128 (7th Cir. Ill. Feb. 28, 2013)

A police officer shot Hunter in the buttocks and foot after Hunter fired on the officer during a foot chase. At the hospital, a different officer was assigned to guard Hunter until investigators arrived. The officer sat silently while hospital personnel treated Hunter. When Hunter asked if there were any police officers in the room, the officer identified himself and then advised Hunter of his *Miranda* rights. After the officer and Hunter spoke briefly about the charges Hunter might be facing, Hunter asked the officer, "Can you call my attorney?" A few minutes later, the investigators arrived and advised Hunter of his *Miranda* rights. Hunter agreed to speak to the investigators and made several incriminating statements to them.

The court agreed with the district court and held Hunter had made an unambiguous invocation of his right to counsel when he asked the first officer, "Can you call my attorney?" The court found this request was sufficient to have put a reasonable officer on notice that Hunter was invoking his right to counsel. Once Hunter invoked his right to counsel, he should not have been questioned by any officers until counsel had been made available to him, unless he reinitiated further communication with the investigators. As neither occurred here, the district court properly suppressed Hunter's incriminating statements made to the investigators.

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

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8th Circuit

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

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

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

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

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

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

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

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United States v. Chavez, 705 F.3d 381 (8th Cir. Neb. 2013)

A federal agent arrested Chavez based on probable cause that she had committed the crime of identity theft. At the same time, the agent had reasonable suspicion to detain Chavez as an illegal alien. Chavez was indicted for misuse of a social security number and later pled guilty.

The court held Chavez was taken into criminal, not civil custody, as the district court incorrectly ruled. As a result, Chavez was entitled to be taken promptly before a magistrate as provided for in Federal Rule of Criminal Procedure 5(a). Because Chavez was not taken promptly before the magistrate judge, the government violated Rule 5(a). In addition, the lack of a prompt probable cause determination violated the *Fourth Amendment*.

However, the court ruled the appropriate remedy for these violations was not dismissal of the indictment as Chavez argued, but instead the suppression of any statements made after arrest and before presentment to the magistrate.

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

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Atkinson v. City of Mountain View, 2013 U.S. App. LEXIS 2703 (8th Cir. Mo. Feb. 8, 2013)

Atkinson intervened in a verbal dispute between his brother-in-law and another man. The man rushed Atkinson and rammed his shoulder into Atkinson's chest, which caused him to fall backward ten to fifteen feet into a parked vehicle. Police officers then arrested Atkinson, who had suffered broken ribs, a punctured lung and other serious injuries.

Atkinson later discovered the man who caused his injuries was the chief of police. The chief was on duty; however, was not in uniform, had neither his gun nor his badge, and never identified himself as a police officer before striking Atkinson. All charges against Atkinson were dismissed.

Atkinson sued the city and the chief of police, claiming the chief used excessive force and that the city was liable for his unlawful conduct.

The court held the chief of police was not entitled to qualified immunity.

First, the court held the chief seized Atkinson, under the *Fourth Amendment*, when he intentionally barreled into Atkinson and caused him to fall back against the parked vehicle.

Second, the court held the seizure of Atkinson was unreasonable. Reviewing the factors from *Graham v. Connor*, the court found Atkinson had not committed any serious crime, he did not pose an immediate threat to the chief or others and he could not have been resisting arrest or attempting to evade arrest by flight because the chief never identified himself as a police officer before striking him. Atkinson only attempted to prevent a fight between his brother-in-law and the man he later learned was the chief of police. A reasonable jury could find the chief was an overzealous police officer, whom without identifying himself as a law enforcement officer, used excessive force and unreasonably caused Atkinson severe injuries in violation of the *Fourth Amendment*.

Finally, the court held it would have been clear to a reasonable officer the amount of force used against Atkinson in this situation was unreasonable.
The court held the city could not be held liable for the chief's actions because he was not one of the city's final policy makers. In addition, Atkinson could not show other instances where excessive force had been used by the chief or other police officers, which could establish the city's deliberate indifference to such a problem.

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

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United States v. Skoda, 2013 U.S. App. LEXIS 2948 (8th Cir. Neb. Feb. 13, 2013)

A police officer saw a van parked on a gravel driveway that led to a shed on a piece of property the officer thought was vacant. As the officer approached the van, he saw another vehicle behind it. Bargen got out of the van and told the officer Skoda had called him about car trouble, but had since walked away. The officer saw items associated with the production of methamphetamine near both vehicles. The officer called Skoda's father, who owned the property, and obtained consent to search it. The officer also saw what he believed was a pseudoephedrine pill and empty pseudoephedrine boxes in Skoda's vehicle. The officer searched Bargen's van then Skoda's vehicle and found additional items associated with the production of methamphetamine in both.

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

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

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

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

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Small v. McCrystal, 2013 U.S. App. LEXIS 3372 (8th Cir. Iowa Feb. 19, 2013)

Police officers responded to a disturbance at a golf course. Officer McCrystal arrested Small by tackling him from behind as Small was walking toward the parking lot. Afterward, Officer McCrystal and another officer obtained arrest warrants for other individuals involved in the disturbance.

Small and the other arrestees sued the officers, claiming a variety of constitutional violations.

The court held Officer McCrystal was not entitled to qualified immunity for any of Small's claims.

First, the court ruled a reasonable officer would not have believed he had probable cause to arrest Small for unlawful assembly as neither Small nor any other person at the time of his arrest was "acting in a violent manner," as required by the state statue.

Second, a reasonable officer would not have believed he had probable cause to arrest Small for failure to disperse, as there was no "riot" as defined by the state statute and Small was not ordered to disperse.

Third, a reasonable officer would not have believed he had probable cause to arrest Small for disorderly conduct because Smalls did not engage in any fighting, violent behavior or other acts prohibited by the state statute.

Fourth, it was unreasonable for Officer McCrystal to tackle Small from behind to effect his arrest. Small was charged with non-violent misdemeanors and did not pose an immediate threat to the safety of the officers or others. In addition, Small was not resisting arrest or fleeing to evade arrest because McCrystal had not yet told him he was under arrest.

The court also held the officers who later obtained arrest warrants for the other individuals were not entitled to qualified immunity. The court found the arrestees alleged a valid *Fourth Amendment* violation by claiming the officers' false police reports caused their arrest warrants to be issued without probable cause. It is clearly established the *Fourth Amendment* requires a warrant application to contain a truthful factual showing of probable cause.

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

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Folkerts v. City of Waverly, 2013 U.S. App. LEXIS 3847 (8th Cir. Iowa Feb. 25, 2013)

Travis Folkerts, who has an intellectual disability diagnosed as mental retardation, was accused of committing a lewd and lascivious conduct with a minor, a misdemeanor offense. The investigating officer, knowing of Travis's disability, went to his apartment to interview him. The officer advised Travis of his *Miranda* rights, more fully explaining them to accommodate for Travis' limitations. Believing Travis understood his rights, the officer transported him to the police station to conduct an interview. Once at the police station, the officer questioned Travis in a conference room, instead of the usual interrogation room, because it was less intimidating. At Travis' request, the officer telephoned Travis' mother, who declined to come to the police station. The officer continued his questioning, and Travis made several incriminating statements. After the officer decided to arrest Travis, he contacted Travis' parents so one of

them could be present during the booking process. The court declared Travis incompetent to stand trial and dismissed the case against him. Travis' parents sued the police department and the officer, claiming Travis' due process rights had been violated.

The court disagreed, holding the officer was entitled to qualified immunity. To establish a due process violation, the Folkerts had to establish the officer's conduct was so outrageous that it "shocked the conscience." The court held the officer's behavior did not shock the conscience because the officer altered his questioning style, more fully explained the *Miranda* rights, interviewed Travis in a less intimidating room and called Travis' mother at his request and invited her to the police station. In addition, the court held the officer's investigation, as a whole, to include the decision to charge Travis, did not shock the conscience.

The court further held that no reasonable jury could conclude the officer failed to make reasonable accommodations for Travis, under the Americans with Disabilities Act, during the interview and arrest process.

Finally, the court held the Folkerts failed to allege a pattern of similar constitutional violations by other police officers and as a result dismissed the portion of the lawsuit against the city.

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

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9th Circuit

Ford v. City of Yakima, 2013 U.S. App. LEXIS 2716 (9th Cir. Wash. Feb. 8, 2013)

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

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

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

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

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

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Maxwell v. County of San Diego, 2013 U.S. App. LEXIS 3106 (9th Cir. Cal. Feb. 14, 2013)

Lowell Bruce, a police officer, shot his wife, Kristin, in the jaw with his Glock .40 caliber service pistol in the couple's bedroom. At the time, Lowell, Kristin and their two children lived with Kristin's parents, Jim and Kay Maxwell. Various police officers and emergency medical technicians (EMTs) responded to the scene. When the police sergeant arrived, he believed he was the ranking officer; however, there was a lieutenant and captain on the scene. Nonetheless, the lieutenant and captain stayed near the end of the driveway and did not interfere with the sergeant, who took control of the scene. The EMTs concluded Kristin had to go to the hospital quickly and arranged to have an ambulance transport her to a nearby landing zone where an air ambulance, with advanced medical capabilities, would fly her to the hospital. The police sergeant, however, refused to let the ambulance leave immediately because he viewed the area as a crime scene and thought Kristin had to be interviewed. The ambulance was able to leave after a five to twelve minute delay, but Kristin died en route to meet the air ambulance due to blood loss from the gunshot wound.

In the meantime, the sergeant ordered the house be evacuated and sealed and the Maxwell's separated. Kay and the children were placed in a motor home on the driveway and Jim was allowed to remain outside on the driveway. Jim and Kay repeatedly asked to be allowed to follow Kristin to the hospital, but were told they had to stay and wait separately for investigators to interview them. When Jim found out Kristin had died he wanted to tell Kay. After the officer refused, Jim began to walk down the driveway toward the motor home. The officer sprayed Jim three times with pepper spray, struck him with his baton and handcuffed him. Jim was released from handcuffs thirty minutes later, but still kept apart from Kay.

First, the Maxwells sued the police officers, claiming Kristin's rights to bodily security under the *Fourteenth Amendment's Due Process Clause* were violated by delaying her ambulance, which resulted in her death.

Generally, police officers cannot be held liable for an injury inflicted by a third party; however, in this case, the court held the danger-creation exception applied. The danger-creation, which was clearly established at the time of this incident, applies when an officer places a person in a more dangerous situation than the one in which they found her. In the Ninth Circuit, impeding access to medical care amounts to leaving a victim in a more dangerous situation. Here, the officers found Kristin facing a preexisting danger from her gunshot wound and they increased that danger by preventing her ambulance from leaving. This arguably left Kristin worse off than if the ambulance had been allowed to bring her to an air ambulance that had advanced medical capabilities and was ready to fly her to the hospital. As a result, the officers were not entitled to qualified immunity.

The court further held the existence of a crime scene did not justify the officers delaying the ambulance. The victim was the only one in the ambulance, Lowell had confessed to the shooting and was in custody, and the officers had recovered the gun used in the crime.

Second, the Maxwells claimed their multi-hour detention and separation from each other was an unreasonable *Fourth Amendment* seizure.

The court agreed and denied the officers qualified immunity. At the time of the incident it was well settled while the police have the right to request citizens to answer questions voluntarily, they have no right to compel them to answer. Consequently, officers were on notice they could not detain, separate, and interrogate the Maxwells for hours instead of allowing them to accompany Kristin to the hospital.

Third, the Maxwells claimed the officers arrested Jim without probable cause and used excessive force against him when he tried to rejoin his wife after being told of Kristin's death. The court held the officers were not entitled to qualified immunity. The officers claimed Jim's refusal to obey the officer's command not to rejoin his family was a criminal violation. However, as the separation of the Maxwells was unlawful, Jim was entitled to resist an unlawful order to keep them apart. Additionally, the amount of force used against Jim was unreasonable under the circumstances.

Finally, the court held the lieutenant and captain were not entitled to qualified immunity. Although neither directly participated in any of the unlawful acts, a jury could reasonably find they were liable for their subordinates' constitutional violations if they knew of those violations and failed to act to prevent them. It was undisputed that the lieutenant and captain were aware of the Maxwells' detention and witnessed at least part of Jim's arrest and beating.

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

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Moss v. United States Secret Service, 2013 U.S. App. LEXIS 4112 (9th Cir. Or. Feb. 26, 2013)

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

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

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

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

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

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10th Circuit

United States v. Garcia, 2013 U.S. App. LEXIS 3046 (10th Cir. N.M. Feb. 13, 2013)

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

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

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

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

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11th Circuit

Morton v. Kirkwood, 2013 U.S. App. LEXIS 2754 (11th Cir. Ala. Feb. 8, 2013)

Officer Kirkwood shot Morton seven times while Morton sat inside his car. According to Officer Kirkwood, he shot Morton after Morton accelerated his car, threatening the life of a nearby officer. Morton claimed he never accelerated his car and Kirkwood shot him after he put the car in park and raised his hands.

Morton sued Officer Kirkwood for excessive use of force in violation of the *Fourth Amendment* and for assault and battery under Alabama Law. Officer Kirkwood filed a motion for summary judgment, claiming he was entitled to qualified immunity. With this type of motion, the court was required to accept Morton's account of the incident as true. The court acknowledged the facts accepted at this stage of the proceedings may not be the actual facts of the case. With this in mind, the court concluded Officer Kirkwood was not entitled to qualified immunity.

The court held if Morton's version of events was accurate, a reasonable officer on the scene would not have shot Morton seven times while he sat stationary in his car with his hands up. This alleged conduct violated Morton's *Fourth Amendment* rights, and clearly established law gave Officer Kirkwood fair warning that the use of deadly force under these circumstances would be unconstitutional. In addition, such conduct would also strip Officer Kirkwood of state agent immunity regarding the assault and battery allegation.

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

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United States v. Slaughter, 2013 U.S. App. LEXIS 2857 (11th Cir. Ga. Feb. 11, 2013)

Slaughter met a fourteen-year-old girl in an internet chat room and made plans to meet her at a hotel for a sexual encounter. Unknown to Slaughter, the girl was actually an undercover FBI agent. The agent and local police officers went to the hotel, knocked on the door to Slaughter's room and immediately tackled him to the ground and handcuffed him when he opened the door. The agent did not have an arrest warrant for Slaughter or a search warrant for his room. However, Slaughter gave the agent written consent to search his room. After Slaughter's room was searched, the agent took him to the sheriff's office where he removed Slaughter's handcuffs and advised him of his *Miranda* rights. Slaughter signed a *Miranda* waiver and made incriminating statements.

Even though the warrantless entry into Slaughter's hotel room violated the *Fourth Amendment*, the district court held his subsequent incriminating statements were still admissible against him.

The circuit court agreed. In certain circumstances, statements following a violation of the *Fourth Amendment* are not subject to being suppressed. In *New York v. Harris*, the Supreme Court held, where the police have probable cause to arrest a suspect, the exclusionary rule does not prohibit the government's use of a statement, made by the suspect, outside his home, even though the statement was taken after an illegal entry.

In this case, like *Harris*, the agent had probable cause to arrest Slaughter for enticement of a minor. After his arrest, the agent transported Slaughter to the sheriff's office where he advised

Slaughter of his *Miranda* rights. Slaughter then waived his rights and voluntarily made incriminating statements to the agent.

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

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