Department of Homeland Security
Federal Law Enforcement Training Center
Office of Chief Counsel
Legal Training Division

May 2013

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 .

This edition of *The Informer* may be cited as "5 INFORMER 13".

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Pushing the Limits Until the Limits Push Back

Jeff Fluck
Senior Legal Instructor
Legal Division
Federal Law Enforcement Training Center
Glynco, Georgia

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Free FLETC Informer Webinar Series Schedule

The FLETC Informer Webinar Series continues in May and June with the following webinars:

1. **Use of Force: The United States Supreme Court's analysis under *Graham v. Connor* for judging law enforcement officers accused of using excessive force.**

   50-minute webinar presented by Tim Miller, FLETC Legal Division.

   Dates and Times: Friday May 31**,** 2013: 12:30 pm EDST Click **HERE** to Login **or**

   Friday June 21**,** 2013: 12:30 pm EDST Click **HERE** to Login.

2. **eDiscovery: Best Practices for eCommunications in criminal investigations and prosecutions.**

   50-minute webinar presented by Robert Cauthen, FLETC Legal Division

   Date and Time: Tuesday June 4, 2013: 2:30 pm EDST Click **HERE** to Login.

3. ***Kalkines* and *Garrity* – Getting the Basics: An introduction to some of the parameters of the important case holdings of *Kalkines* and *Garrity*.**

   50-minute webinar presented by John Besselman, FLETC Legal Division.

   Date and Time: Thursday June 6, 2013: 2:30 pm EDST Click **HERE** to Login.

4. **Government Workplace Searches: A review of the law that controls the government's ability to intrude into its employees' workspaces.**

   50-minute webinar presented by John Besselman, FLETC Legal Division.

   Date and Time: Wednesday June 12**,** 2013: 2:30 pm EDST Click **HERE** to Login.

5. **Canines, Cops, and Curtilage – Using Police Dogs After *Florida v. Jardines***

   50-minute webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   Dates and Times: Monday June 17, 2013: 10:30 am EDST Click **HERE** to Login **or**

   Monday June 24, 2013: 10:30 am EDST Click **HERE** to Login.

6. **Searches After *U.S. v. Jones***

   Two-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   Dates and Times: Tuesday June 18, 2013: 2:30 pm EDST Click **HERE** to Login or

   Tuesday June 25, 2013: 2:30 pm EDST Click **HERE** to Login.

7. **The Federal Law on Compelling Unencrypted Data, Encryption Codes and/or Passwords**

   50-minute webinar presented by Robert Cauthen, FLETC Legal Division

   Dates and Times: Thursday June 20, 2013: 2:30 pm EDST Click **HERE** to Login **or**

   Wednesday June 26, 2013: 2:30 pm EDST Click **HERE** to Login.

If there are any specific legal topics that you would like to see offered in future FLETC Informer webinars, please let us know!

Address any inquiries to lgdwebinar@fletc.dhs.gov

Missouri v. McNeely[1]*:* Pushing the Limits Until the Limits Push Back

Jeff Fluck
Senior Legal Instructor
Legal Division
Federal Law Enforcement Training Center
Glynco, Georgia

Exigent circumstances have had a good run in the Supreme Court over the last seven years. In 2006, a unanimous Court approved a warrantless law enforcement entry into a home to prevent a thrown punch from devolving into a more serious affray.[2] In 2009, the Court united in a short opinion to approve the warrantless entry into a home to prevent a bloodied and berserk suspect from further injuring himself.[3] In 2011, a large majority [8-1] of the Court agreed that an exigent entry of a home to prevent the final destruction of already-burning marijuana was justified.[4] Just last year, the Court came together to grant qualified immunity in a lawsuit generated by four officers' exigent entry of a home because of a sensible concern that an occupant might be arming herself with a gun.[5]

This run ended with a run-of-the-mill drunk driving case on April 17 of this year. The facts are simple. On October 3, 2010, at 2:08 AM, Corporal Mark Winder pulled over Tyler McNeely's pickup because the truck was speeding and had crossed the highway's centerline three times. McNeely's bloodshot eyes, slurred speech, odor of alcohol, and poor performance on four field sobriety tests concluded with Corporal Winder's arrest of McNeely for drunk driving. McNeely refused breath and blood tests. Corporal Winder testified that during his 17 years of duty, he had always gotten a search warrant in similar situations to authorize a nonconsensual blood draw. However, he had recently read an article written by a prosecutor that stated a warrant was no longer required in Missouri. Corporal Winder directed a phlebotomist to take a nonconsensual blood draw at a hospital at approximately 2:35 AM. McNeely's blood alcohol concentration (BAC) tested at .154 percent[6].

The trial court suppressed the BAC evidence. By the time the state's appeal reached the United States Supreme Court, the issue had simplified in the Court's eyes:

> The question presented here is whether the natural metabolization of alcohol in the bloodstream presents **a *per se* exigency** that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in **all** drunk-driving cases [emphasis added].

Faced with a categorical question, which admitted no exception, the Court made short work of it:

> We conclude that it does not, and we hold, consistent with general *Fourth Amendment* principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

Even with routine drunk driving cases, courts must examine the facts of each particular case to decide whether an officers' decision to draw blood without a warrant was a good one. This is not a surprising result.

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[1] 2013 U.S. LEXIS 3160 (April 17, 2013).
[2] *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006).
[3] *Michigan v. Fisher*, 130 S. Ct. 546 (2009).
[4] *Kentucky v. King*, 131 S. Ct. 1849 (2011).
[5] *Ryburn v. Huff*, 132 S. Ct. 987 (2012).
[6] *State v. McNeely*, 2011 Mo. App. LEXIS 858 (Mo. Ct. App. 2011); *State v. McNeely*, 358 S.W.3d 65 (Mo. 2012).

Nevertheless, there are some useful lessons to derive from *McNeely*.

First, the nature of the exigency matters. Excusing a warrant because of exigent circumstances is at its most compelling when the situation officers confront is both dangerous and impossible to anticipate. By contrast, McNeely had already been arrested. His drunken driving could no longer imperil the public. The problem his metabolism presented− loss of evidence− is commonplace, and expedited warrant procedures can be put in place to deal with it.

Second, this case should prod law enforcement departments and agencies to craft policy guidance and procedures capitalizing on electronic communication and the Internet to speed the search warrant application process for blood draws. While the guilty human body's slow saunter to innocent sobriety may seldom create an actual exigency, it certainly presents an impending exigency. If, despite good-faith law enforcement efforts, telephonic and electronic warrants cannot be rapidly obtained, then a solid basis for a warrantless blood draw exists.

How much time must elapse before a warrantless draw is justified? Each department and agency will want to answer that question for its own officers in light of its mission and the logistical constraints—availability of magistrates in late-night hours, average time it takes to reach a phlebotomist, etc.—the agency's officers confront. However, the first order of business is to use 21st-century tools to put procedures in place to deal with the impending exigency that drunk drivers and their refusals routinely pose.

In fact, the Chief Justice has pointed the way in his concurrence:

> In a case such as this, applying the exigent circumstances exception to the general warrant requirement of the *Fourth Amendment* seems straightforward: If there is time to secure a warrant before blood can be drawn, the police must seek one. If an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant, or he applies for one but does not receive a response before blood can be drawn, a warrantless blood draw may ensue.

As the Chief Justice notes earlier in his concurrence, officers in one Kansas county are e-mailing applications to judges' iPads and getting warrants back in 15 minutes.

Third, *McNeely* continues the Court's renewed infatuation with the bedrock principle that judicially-issued warrants are the preferred path to constitutional searches and seizures. Last year the Court held that, at least for the time being, the lack of a judicially-issued tracking warrant invalidated installing a GPS device on a car and using the device to track the car's whereabouts.[7] Two months ago, the Court narrowly held that the lack of a search warrant invalidated taking a drug dog onto the front porch of a grow house and using the dog's alert to provide probable cause.[8] Both of those cases are driven by the Court's perception that the *Fourth Amendment* applies when the government installs a GPS on personal property or takes a drug dog onto a home's front porch. *McNeely* is analytically different: It says that when it comes to DWI blood-draws, the exigent-circumstances escape-hatch is not always open just because getting a search warrant is inconvenient or may take a while. Regardless of how the Court has been reaching the result, the teaching point is that there continues to be wisdom in seeking warrants.

[7] *United States v. Jones*, 132 S. Ct. 945 (2012).
[8] *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

CASE SUMMARIES

United States Supreme Court

Missouri v. McNeely, 133 S. Ct. 1552 (April 17, 2013)

A police officer stopped McNeely for speeding and crossing the centerline. After McNeely refused to take a breath test, the officer took him to a hospital for blood testing. McNeely refused to consent to the blood test. Without obtaining a search warrant, the officer directed a lab technician to take a sample of McNeely's blood. A subsequent test measured McNeely's blood alcohol concentration at 0.154 percent, which was above the legal limit of 0.08 percent. McNeely was charged with driving while intoxicated.

McNeely argued taking his blood for chemical testing without first obtaining a search warrant violated his rights under the *Fourth Amendment*. The state trial court and the Missouri Supreme Court agreed. The State of Missouri appealed to the United States Supreme Court.

The Supreme Court held in drunk-driving investigations the natural dissipation of alcohol in the bloodstream does not automatically create an exigency sufficient to justify conducting a blood test without a warrant. The court recognized in some cases the circumstances will make obtaining a search warrant impractical and the dissipation of alcohol from the bloodstream will create an exigency justifying a properly conducted warrantless blood test. However, the court concluded whether such an exigency exists must be determined case by case based on the totality of the circumstances.

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

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Circuit Courts of Appeals

1st Circuit

United States v. Palmquist, 712 F.3d 640 (1st Cir. Me. Apr. 11, 2013)

Palmquist, a military veteran, worked as a civilian employee with the U.S. Department of Veterans Affairs. A criminal investigator with the Office of Inspector General suspected Palmquist had been receiving benefits to which he was not entitled. Palmquist agreed to an interview with the investigator. Before asking him any questions, the investigator presented Palmquist with a form entitled, "Advisement of Rights (Federal Employees – Garrity)." Palmquist briefly reviewed the form, signed it and spoke to the investigator. Palmquist was later convicted of fraud in connection with his receipt of veterans benefits.

Palmquist argued the statements he made to the investigator should have been suppressed because they were coerced, claiming the investigator forced him to choose between losing his job or giving up his right to remain silent under the *Fifth Amendment*.

The court disagreed, holding that nothing the investigator said or presented to Palmquist could have led him believe, if he remained silent, he would automatically lose his job or suffer similarly severe employment consequences solely for having remained silent. In addition, the Advisement-of-Rights form specifically informed Palmquist he could not be fired solely for refusing to participate in the interview, although his silence could be used as evidence in an administrative proceeding.

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

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United States v. Dapolito, 2013 U.S. App. LEXIS 7309 (1st Cir. Me. Apr. 11, 2013)

At 2:39 a.m., two police officers saw Dapolito standing alone in an alcove of a building that contained a door to a bar on the first floor, which was closed, and a door to condominiums on the second floor. An ATM machine was next door to the condominiums. The officers approached Dapolito who appeared to be intoxicated. The officers told Dapolito they were patrolling the area because of some recent burglaries, but they saw no evidence Dapolito was involved in a burglary and he did not appear to be in possession of burglary tools. One of the officers asked Dapolito for identification. Dapolito told the officer he did not have any identification, but provided his name and date of birth. After some initial confusion on the spelling of Dapolito's name, the dispatcher told the officer there was no record for Dapolito in the computer system. Convinced Dapolito was lying about his identity, the officer asked Dapolito if he could pat him down for identification. Dapolito refused. The officer asked Dapolito for consent to search a second time, but again he refused. The officer saw what appeared to be the outline of an identification card in Dapolito's front pants pocket and asked Dapolito what it was. Dapolito took an Electronic Benefit Transfer (EBT) card from his pants pocket and gave it to the officer. The card had Dapolito's name spelled the same way as he had previously told the officer. The officer told Dapolito he was going to be taken to the county jail so his identity could be confirmed. The officer ordered Dapolito to place his hands on his head so he could be frisked, but Dapolito refused. After the officer drew his Taser, Dapolito complied. When Dapolito raised his hands, his shirt and jacket lifted, revealing a handgun in his waistband. At the jail, the officers confirmed Dapolito's identity and discovered he was a convicted felon. Dapolito was later charged with being a felon in possession of a firearm.

Dapolito moved to suppress the handgun, claiming the officers found the handgun as the result of an unlawful *Terry* stop.

The government claimed by the time the officer found the handgun, there was reasonable suspicion to believe Dapolito was involved in criminal activity, and the frisk was justified by an objective concern for officer safety.

The court held that the district court properly ruled the officers did not have reasonable suspicion to believe Dapolito was involved in criminal activity by the time they told him he was going to jail and frisked him.

Under the circumstances, it was reasonable for the officers to approach Dapolito to determine if he needed assistance or was involved in criminal activity. However, what began as a consensual encounter turned into a *Terry* stop when the officers told Dapolito they were taking him to jail. At that point, the officers could not justify detaining Dapolito as a burglary suspect because there was no evidence of any recent burglaries in the area and Dapolito's behavior did not tie him to a

burglary. Additionally, Dapolito was not tampering with any of the doors in the alcove or the ATM machine, and he did not possess any tools that are commonly used in burglaries.

Similarly, the officers could not justify detaining Dapolito on the theory that there may have been an outstanding warrant for his arrest. While there may have initially been some confusion over the spelling of Dapolito's name, Dapolito voluntarily gave the officers the EBT card, which had his name spelled the same way he told the officers it was spelled. Even though the officers became suspicious after dispatch could not find Dapolito's name on record, the failure to get an affirmative match from a government records system does not, by itself, create reasonable suspicion of a crime.

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

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5th Circuit

Davila v. United States, 2013 U.S. App. LEXIS 6749 (5th Cir. Tex. Apr. 3, 2013)

Davila, his adult son Tocho and Tocho's girlfriend Mata were driving into the United States from Mexico in Davila's truck when they were stopped at a border checkpoint. After an initial inspection, a Border Patrol agent referred Davila's truck to secondary inspection and told Davila, Tocho and Mata to remain there until a K-9 unit could be brought in from a different checkpoint. After two hours elapsed without the K-9 unit arriving, Tocho left without permission in Davila's truck while Davila and Mata remained at the inspection site. A local police officer at the checkpoint pursued Tocho in a high-speed chase and eventually apprehended him. While the pursuit was ongoing, Davila and Mata were handcuffed and taken to a county jail, where they were processed, issued jail clothing and placed into cells. Davila and Mata were released several hours later without explanation and no charges were ever filed against them. Tocho was charged with several offenses, including assaulting a federal law enforcement officer. Tocho failed to appear to answer the charges and a warrant was issued for his arrest.

Three months later, Davila was driving his car in a National Park when National Park Service (NPS) law enforcement rangers pulled him over and surrounded his car with law enforcement vehicles. The rangers pointed their guns at Davila and the other occupants of the car, ordered everyone out, handcuffed them and then searched the car. Unbeknownst to Davila, the government had issued a be-on-the-lookout (BOLO) notice for Davila's car because it had once been associated with Tocho. The rangers pulled Davila over in response to the BOLO, claiming Tocho, a fugitive, could have been concealed in the car and might have weapons. After the rangers searched Davila's car without finding Tocho, weapons or contraband, everyone was released.

Davila sued the federal government for false imprisonment under the Federal Tort Claims Act (FTCA) after he was taken to the county jail after Tocho fled the checkpoint in his truck. In addition, Davila sued the NPS Rangers claiming the traffic stop violated his *Fourth Amendment* rights and that the rangers used excessive force during the stop.

The court of appeals reversed the district court, which had dismissed Davila's FTCA claim against the government under the detention-of-goods exception. The FTCA, which waives the government's immunity from lawsuit, is subject to several exceptions. The detention-of-goods exception provides the government cannot be sued for any claims arising out of the detention of

any goods, merchandise or other property by any customs or law enforcement officer. The court of appeals held this exception did not apply because Davila's claim of false imprisonment did not occur while his truck was being searched by the Border Patrol agents. Davila's claim arose two hours after the initial search of his truck while the agents waited for a K-9 from a different checkpoint to arrive.

The court of appeals agreed with the district court, which held the NPS Rangers were entitled to qualified immunity concerning the traffic stop and search of Davila's car. The BOLO provided the rangers with reasonable suspicion that Tocho might be hidden in the vehicle and justified the stop and search of Davila's car.

The court of appeals further held the rangers were entitled to qualified immunity on Davila's excessive use of force claim as the rangers' use of force was reasonable under the circumstances. Given the information at their disposal, the rangers' decision to draw their weapons, handcuff Davila and the other occupants and make them kneel on the ground outside the vehicle did not constitute excessive force.

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

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Tolan v. Cotton, 2013 U.S. App. LEXIS 8548 (5th Cir. Tex. Apr. 25, 2013)

Just before 2:00 a.m., Officer Edwards saw a black Nissan turn abruptly onto a residential street that ended in a cul-de sac. Edwards became suspicious because he knew twelve cars had been burglarized in the town the night before. Edwards saw Robbie Tolan and another man get out of the car and walk towards a house. Edwards ran a computer check on the Nissan's license plate; however, he mistakenly entered an incorrect character, which resulted in a match with a stolen car of the same make and approximate year of manufacture. Edwards approached the Nissan and saw Tolan and his friend taking items from the car to the house. Edwards drew his firearm and ordered the men to the ground, telling them he believed the Nissan was stolen. Robbie Tolan and his friend cursed Edwards and refused to get on the ground until Robbie's parents came out of the house and convinced them to comply with Edwards. Mrs. Tolan told Edwards the car belonged to her while repeatedly walking in front of Edwards' drawn pistol, insisting no crime had been committed.

Sergeant Cotton responded to the scene to back-up Edwards. When Cotton arrived, he saw Mrs. Tolan moving around Edwards in an agitated state, Mr. Tolan and Robbie's friend laying prone on the ground. He did not see Robbie, who was lying in a dark area. Cotton moved in to assist Edwards, who told him, "The two on the ground had gotten out of a stolen vehicle." To control the situation, Cotton asked Mrs. Tolan to move out of the officers' way so they could investigate the situation. Mrs. Tolan refused and when Cotton tried to physically move her, she screamed, "Get your hands off me." Robbie yelled at Cotton "Get your hand off my mom", pulled his outstretched arms to his torso, and began to get up from the ground, turning towards Cotton. Fearing Robbie was reaching into his waistband for a weapon, Cotton drew his firearm and fired three shots at Robbie, hitting him once in the chest. Robbie was wearing a dark jacket that concealed his waistband and a subsequent search revealed Robbie was unarmed. Between Cotton's arriving on scene and his discharging his firearm, thirty-two seconds had elapsed.

Sergeant Cotton was charged in a state-court indictment with one count of aggravated assault by a public servant and was acquitted after a jury trial.

Robbie Tolan and his mother sued Sergeant Cotton and Officer Edwards claiming the officers violated their right to be free from excessive force under the *Fourth Amendment*.

The district court held both officers were entitled to qualified immunity. The Tolans appealed only the grant of qualified immunity to Sergeant Cotton.

The court of appeals held Sergeant Cotton was entitled to qualified immunity. An objectively reasonable officer in Sergeant Cotton's position would not have known nor had reason to believe Officer Edwards had mistakenly identified the Nissan as a stolen vehicle; therefore, an objectively reasonable officer would have been justified in believing Robbie and his friend had stolen it.

In addition, an objectively reasonable officer in Sergeant Cotton's position could have believed Robbie's verbal threats and getting up from a prone position presented an immediate threat to the safety of the officers. The late hour, recent criminal activity in the area, Mrs. Tolan's refusal to comply with the officers' requests and the officers being outnumbered on the scene compounded the threat presented by Robbie. Although tragic, Sergeant Cotton's actions were not objectively unreasonable.

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

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6th Circuit

United States v. Daws, 711 F.3d 725 (6th Cir. Tenn. April 2, 2013)

Police officers responded to the scene of an armed home invasion. The victim told officers Daws had entered his house, threatened him with a shotgun, stole his cash and then warned the victim he would return and kill him if the victim called the police. While interviewing the victim, the officers received a call from a man who claimed Daws had just come over to his house, and asked the man to hide a shotgun for him. In addition, several officers knew that Daws had felony convictions for weapons violations and had served prison time for robbing a gas station at gunpoint.

The officers immediately went to Daws' house where they saw a man sitting outside. The officers overheard the man telling someone on his cell phone that he and Daws had "done something bad" and they were probably going to jail. The man told the officers Daws was inside the house. The officers entered Daws' house through an open door and found Daws asleep. After arresting him, the officers performed a protective sweep and seized Daws' shotgun. Daws was charged with possession of a firearm and ammunition by a convicted felon.

Daws moved to suppress the shotgun and ammunition, arguing the officers' warrantless entry into his house violated the *Fourth Amendment*.

The court disagreed, holding exigent circumstances justified the officers' warrantless entry into Daws' house. Daws had just committed a serious crime and the officers knew about his extensive criminal history involving firearms. It was reasonable for the officers to immediately go to Daws' house and quickly apprehend him based on the threat he posed to the community.

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

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United States v. Woods, 711 F.3d 737 (6th Cir. Mich. April 3, 2013)

A police officer arrested Woods for driving without a valid license. While conducting a pat down the officer felt a hard lump in Woods' pocket. The officer asked Woods, "What is in your pocket?" Woods responded that he was "bogue," a street term meaning "in possession of something illegal," such as weapons or narcotics. After Woods repeated, "I'm bogue," the officer, who was concerned Woods might be carrying a gun, asked Woods whether the contraband item was drugs or a gun. Woods told the officer it was a gun. The officer asked Woods where the gun was located and Woods told him it was in the car. The officer searched the car and found a handgun and a bag of crack cocaine on the floorboard. The hard object in Woods' pocket was his keys. Woods was indicted for drug and firearms offenses.

Woods claimed his initial incriminating "bogue" statement as well as the drugs and handgun recovered from his car should have been suppressed because the officer failed to advise him of his *Miranda* rights.

The court held the officer's question, "What is in your pocket?" did not constitute a custodial interrogation. The Supreme Court has held the term "interrogation" does not refer to routine questions asked by the officer during the course of an arrest. Here, after the officer felt the hard lump in Woods' pocket, the question, "What is in your pocket?" was an automatic, reflexive question directed at determining the identity of the object that was legitimately within the officer's power to examine as part of a search incident to arrest. As a result, the officer was not required to advise Woods of his *Miranda* rights.

In addition, the court recognized this case was unusual, as Woods' response to the officer that he was "bogue" had nothing to do with the question, "What is in your pocket?" This unexpected and unresponsive reply could not retroactively turn a non-interrogation inquiry into an interrogation for *Miranda* purposes.

The court further held it did not have to decide whether the officer's subsequent questions as to whether the "bogue" items were drugs or a gun and whether they were on Woods' person or in the car constituted custodial interrogation. After Woods' initial statement that he was in possession of a contraband item, the officer would have searched the car and found the drugs and gun regardless of whether he asked Woods any further questions.

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

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Martin v. City of Broadview Heights, 712 F.3d 951 (6th Cir. Ohio April 9, 2013)

While responding to a call, a police officer saw a naked male, later identified as Martin, running towards his patrol car, speaking quickly and nonsensically. As the officer approached, Martin asked the officer for help, placed his hands behind his back and insisted the officer to take him to jail. When the officer grabbed Martin's hands and reached for his handcuffs, Martin ran away. The officer chased Martin and tackled him to the ground. A second officer arrived and jumped on top of the first officer, who was lying on Martin's back, and delivered one or two "compliance body shots" to Martin's side with his knee. During the struggle, Martin bit the first

officer's knuckle. In response, the first officer struck Martin in the face with two "hammer punches." The second officer then used all of his force to strike Martin's face, back and ribs at least five times. In the meantime, the first officer folded his legs around Martin's hips and upper thighs and gripped Martin's chin with his right arm. Eventually, a third officer arrived and helped handcuff Martin. After Martin was handcuffed, the first two officers continued to hold Martin in a facedown position on the ground. The two officers soon heard Martin make a "gurgling" sound. The officers rolled Martin onto his side, but he was unresponsive. Attempts at resuscitation failed, and Martin died.

Martin's mother sued, claiming the officers used excessive force to seize her son in violation of the *Fourth Amendment*.

The court of appeals affirmed the district court in holding the officers were not entitled to qualified immunity. Applying the factors from *Graham v. Connor*, the court concluded a reasonable officer should have known that subduing an unarmed, minimally dangerous, mentally unstable individual with compressive body weight, head and body strikes, neck or chin restraints and torso locks would violate that person's right to be free from excessive force.

The court specifically commented the first officer acted unreasonably when he tackled Martin and fell on top of him. Afterward, the officers' used a degree of force that did not match the threat presented by Martin. Finally, after Martin was handcuffed and subdued, the officers unreasonably used their arms to keep Martin in a facedown position.

In addition, Sixth Circuit case law and the police department's policies on use of force and positional asphyxia clearly established on the date of the incident, that the force the officers used to restrain Martin was excessive.

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

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United States v. Rose, 2013 U.S. App. LEXIS 7764 (6th Cir. Ohio April 18, 2013)

Police officers suspected Rose had sexually abused three minors in his home. As a result, the officers obtained a search warrant for 709 Elberon Avenue. The warrant identified Kenneth Rose as the subject of the search and immediately below Rose's name identified the location to be searched as 709 Elberon Avenue. In addition, the warrant described the physical attributes of the address and included a photograph of the property from the county auditor's website. However, the search warrant affidavit did not include Rose's address. It merely stated the victims' allegations that Rose sexually abused them in his bedroom. Nevertheless, the magistrate judge issued the warrant. Officers executed the warrant and seized computers containing numerous images of child pornography.

Rose argued the child pornography evidence should have been suppressed because the search warrant affidavit did not establish probable cause as it failed to establish the required nexus between the place to be searched and the evidence sought.

The court agreed the search warrant affidavit failed to connect Rose to 709 Elberon Avenue. To find probable cause, the judge issuing the search warrant must have a substantial basis for believing there is a fair probability that evidence of a crime will be found on the premises to be searched. This requires a nexus between the premises and the evidence sought. To establish a

sufficient nexus, there must be reasonable cause to believe the items sought are located on the premises to be searched. Here, while the search warrant provided a description of Rose's premises, the affidavit did not provide a link between the premises and Rose. The affidavit only explained that the victims testified criminal activity took place in Rose's bedroom, without linking Rose to 709 Elberon Avenue. If the affidavit stated that the victims alleged the sexual misconduct took place at 709 Elberon Avenue or that the investigation revealed that Rose lived at 709 Elberon Avenue, there would have been probable cause to believe evidence of the crimes described in the affidavit would be found at 709 Elberon Avenue.

Even though the search warrant affidavit failed to link Rose to 709 Elberon Avenue, the court held the good-faith exception applied, therefore, the child pornography evidence was admissible. Considering everything, the officers conducting the search of Rose's home exercised good faith and acted in objectively reasonable reliance on the warrant's legality. First, the affidavit established the victims had spent time in Rose's home and provided detailed testimony regarding the sexual assault that occurred there. Second, it was reasonable to conclude that either the testimony of the three victims or the independent investigation by the officers revealed that Rose lived at 709 Elberon Avenue. Finally, the exclusionary rule was designed to deter police misconduct rather than to punish the errors of judges and magistrates. There was no police misconduct to deter in this case. The affidavit's failure to provide Rose's address was similar to a clerical error and a result of poor drafting.

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

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United States v. Hodge, 2013 U.S. App. LEXIS 7848 (6th Cir. Mich. April 19, 2013)

An individual told the police he witnessed the manufacture of methamphetamine, several firearms and a bomb at Hodge's home. In addition, he told the police Hodge claimed the bomb had enough power to blow up the entire house if detonated.

Police officers corroborated the witness' story by confirming Hodge's identity and residence and learning he had recently purchased ephedrine or pseudoephedrine from local stores on three occasions. Officers also discovered two "silent observer" tips from the prior week stating there was a large amount of traffic around Hodge's house and that the callers believed there was "methamphetamine activity and guns" located there.

Based on the witness' statements and their investigative findings, officers obtained a warrant to search Hodge's house for methamphetamine and weapons. Once the officers breached the front door, they subdued and handcuffed Hodge. Without first giving Hodge *Miranda* warnings, an officer asked him if there was an active methamphetamine lab or bombs in the house. Hodge said no. A few minutes later, Hodge admitted there was a bomb in the house. The officer asked Hodge questions regarding the bomb's location, appearance, construction and method of detonation, out of concern for the safety of the officers in the house. Hodge told the officer where the bomb was located and officers found and neutralized it. The officers arrested Hodge and he was indicted for two offenses regarding his possession of the bomb.

Hodge argued the warrant to search his house was not supported by probable cause and the pipe bomb should have been suppressed because the officers failed to provide him *Miranda* warnings before he made incriminating statements to them about its location.

The court held the evidence presented in the search warrant affidavit supported a finding Hodge was engaged in methamphetamine production. First, statements from a witness, such as the one in this case, are generally sufficient to establish probable cause because the legal consequences of lying to police officers tend to ensure their reliability. Second, the officers corroborated the witness' story by examining ephedrine and pseudoephedrine purchase logs, police records and "silent observer" tips and including that information in the search warrant affidavit.

The court further held under the public safety exception to *Miranda*, the officers' questions, Hodge's answers and the evidence obtained from his house was admissible.

The information provided by the witness led the officers to believe there was a bomb in Hodge's house. Consequently, the officers were allowed to ask Hodge about the presence of a bomb in the house, without having to first provide him with *Miranda* warnings, because such a question was narrowly confined to the information they possessed and addressed valid public safety concerns.

Once Hodge admitted there was a bomb in his house, the officers' questions were all directed to obtaining information about the bomb's construction and stability, even though there was no evidence a third party could access the bomb. These questions were all driven by valid public safety concerns; therefore, the officers were not required to first advise Hodge of his *Miranda* rights.

The court concluded even if the officers never asked Hodge about the bomb, they would have inevitably discovered it while executing the search warrant. The bomb was wrapped in a towel and sitting on top of a kitchen cabinet. The officers would have been authorized under the search warrant to examine this unusual object to determine if it contained contraband and most certainly would have if Hodge had not told them about the bomb.

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

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7th Circuit

United States v. Collins, 2013 U.S. App. LEXIS 7774 (7th Cir. Ind. Apr. 18, 2013)

A police officer pulled Collins over for speeding. As the officer approached his car, Collins sped away and the officer chased him. Collins crashed his car and fled on foot. The officer pursued Collins who refused commands to stop. The officer caught Collins who resisted the officer's efforts to arrest him. Collins was subdued after a back-up officer deployed his Taser twice against him. After arresting Collins, officers found a bag containing cocaine Collins had thrown into the bushes during the foot chase and a quantity of cash in his pocket. Collins was indicted for two drug offenses.

Collins moved to suppress the drugs and money, claiming the officers only discovered this evidence after using excessive force to arrest him.

The court of appeals agreed with the district court, which concluded the use of excessive force in effecting an arrest cannot warrant the suppression of evidence. Further, even if the suppression of evidence were warranted, Collins discarded the drugs before the officers applied any force and the money would have been seized during a search incident to arrest. As a result, there would be

no connection between the discovery of the evidence and the alleged excessive use of force. The court noted that a civil lawsuit for damages was the better remedy for Collins to address any allegations of excessive force against the officers.

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

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8th Circuit

United States v. Rodriguez, 711 F.3d 928 (8th Cir. Mo. April 4, 2013)

A police officer pulled Rodriguez over because his car did not have license plates and the registration had expired. Rodriguez told the officer his driver's license was suspended, but provided his date of birth. The officer ran a records check and learned Rodriquez had a possible felony warrant pending in California. During this time, the officer saw Rodriguez and the front-seat passenger reaching for the floorboard and looking back towards him. After a back-up officer arrived, Rodriguez was ordered out of his car. The officer asked Rodriguez what he had been searching for in the car and Rodriguez told him there was a handgun in the center console. The officer handcuffed Rodriguez and placed him in his patrol car and then handcuffed the passenger and put him in a separate patrol car. The officer then asked Rodriguez if there was any other contraband in the car, and Rodriguez told him there was a methamphetamine pipe under the seat. The officer searched the car and found a loaded handgun and the methamphetamine pipe. Rodriguez was arrested and charged with drug and firearms offenses.

Two months later, officers executed a search warrant at Rodriguez's home and found methamphetamine, firearms and other drug related paraphernalia. Rodriguez was indicted on a variety of charges stemming from both incidents.

Regarding the traffic stop, Rodriguez argued he was in-custody when the officer ordered him out of his car; therefore, the statements he made to the officer should have been suppressed because he had not been advised of his *Miranda* rights.

The court disagreed. Roadside questioning during a traffic stop is considered the same as questioning during a *Terry* stop, where an officer with reasonable suspicion may detain an individual in order to ask a moderate number of questions to determine his identity and to obtain information confirming or dispelling the officer's suspicions.

Here, the officer ordered Rodriguez out of the car because he believed Rodriguez could be dangerous. Rodriguez had a possible outstanding felony arrest warrant and the officer saw Rodriguez reaching around inside the car and looking back at him. After Rodriguez told the officer he had a handgun in the car, the officer handcuffed Rodriguez, but told him he was not under arrest. Numerous cases have held that a police officer's use of handcuffs can be a reasonable precaution during a *Terry* stop. The court concluded ordering Rodriguez to exit his car was not the functional equivalent of a formal arrest because the officer was temporarily detaining Rodriguez to investigate his identity and the existence of a possible arrest warrant in California. As a result, Rodriguez's motion to suppress was properly denied.

Rodriguez also claimed the search of his car was an improper search incident to arrest, citing *Arizona v. Gant*. Without deciding the *Gant* issue, the court held the search was lawful under the

automobile exception. After Rodriguez told the officer a handgun and methamphetamine pipe were located in the vehicle, the officer had probable cause to search the car.

Rodriguez argued the search of his home violated the *Fourth Amendment*, claiming the search warrant affidavit did not establish probable cause and because the firearms, which the officers seized, were not listed in the warrant.

Again, the court disagreed. First, the affidavit included information from two separate reliable sources, one being a former law enforcement officer, who was lawfully in Rodriguez's home when he smelled chemicals associated with methamphetamine production. Second, the officers corroborated much of the information provided by the confidential sources, to include verifying Rodriguez's address and the type of car he drove. Finally, even though the firearms were not listed on the search warrant, the officers lawfully seized them under the plain view doctrine. The officers found the firearms under a mattress, a place they were entitled to search under the warrant. In addition, the incriminating nature of the firearms was immediately apparent, as they were found near a large quantity of drugs and drug paraphernalia, and because the officers knew Rodriguez was a convicted felon, who could not lawfully possess them.

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

*****

United States v. Suing, 712 F.3d 1209 (8th Cir. Neb. Apr. 10, 2013)

An Arizona police officer stopped Suing, a resident of Nebraska, for a traffic violation and obtained consent to search his vehicle. During the search, the officer found what he believed might be a hidden compartment used to transport drugs. After a drug-dog alerted on Suing's vehicle, the officer brought it to the police station for a more thorough search. The officer found an external computer hard drive in a bag on the front seat. Based on his experience of hard drives containing evidence of narcotics activities, such as ledgers, photographs and other incriminating information, the officer plugged the hard drive into a computer to search its contents. Almost immediately, the officer found a number of thumbnail images of child pornography. The officer shut the computer down, contacted a local prosecutor for advice, and then obtained a warrant to search Suing's hard drive for evidence of child pornography. Suing was arrested after the officer found thousands of images and videos of child pornography on the hard drive.

After police in Nebraska learned of Suing's arrest in Arizona, they obtained a warrant to search his apartment. During that search, officers found images and videos of child pornography on computer hard drives in the apartment.

Suing claimed the search of his computer hard drive for child pornography by the police in Arizona exceeded the scope of his consent to search his vehicle for drugs. Suing also claimed the search of his apartment in Nebraska was unlawful because the search warrant was based on evidence unlawfully obtained by the police in Arizona. Finally, Suing claimed subpoenas issued by the prosecutor in Nebraska to his internet service provider, which allowed the prosecutor to obtain his subscriber information, violated his *Fourth Amendment* rights.

The court held even if Suing's consent was limited to a search of the vehicle for evidence of drug activity, the officer did not exceed the scope of that consent. When the officer found images of child pornography on the computer hard drive, he immediately stopped searching for evidence of

illegal drug activity, called a prosecutor for advice and obtained a warrant authorizing the search for child pornography.

Consequently, because the Arizona officer lawfully obtained evidence of child pornography from the computer hard drive, that information could be included in the search warrant affidavit drafted in support of the warrant to search Suing's Nebraska apartment.

In conclusion, the court held Suing had no expectation of privacy in the government's acquisition of his subscriber information, to include his IP address and name from the third-party internet service provider; therefore, there was no *Fourth Amendment* violation.

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

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Joseph v. Allen, 712 F.3d 1222 (8th Cir. Mo. Apr. 15, 2013)

Joseph called 911 and reported, "A lady is going crazy in my house." When officers arrived at Joseph's apartment, they encountered Latavia Jones. Jones was wearing a ripped shirt, she had lacerations on her hands and a two-inch cut on her arm. Jones told the officers Joseph cut her with a knife after she told him she was ending their relationship. An officer seized a knife on the floor in the apartment after Jones identified it as the one that cut her. The officers arrested Joseph, who was eventually acquitted of the domestic assault charge.

Joseph sued the officers, claiming they violated his *Fourth Amendment* rights because they did not have probable cause to arrest him.

The court held the officers were entitled to qualified immunity. Jones' physical injuries, as well as other evidence at the scene, corroborated her statements and provided indicia of reliability. Under the circumstances, it was reasonable for the officers to believe Joseph was the aggressor and he had at least attempted to cause serious physical injuries to Jones.

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

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United States v. Allen, 2013 U.S. App. LEXIS 7920 (8th Cir. Ark. Apr. 22, 2013)

After police officers arrested three individuals for attempting to pass counterfeit checks, they found a receipt for a hotel room. Officers went to the hotel, conducted surveillance on the room and saw Allen throw away a white plastic bag behind the hotel. Officers recovered the bag, which contained torn-up checks that matched checks found during the arrests of the three individuals. The officers returned to the hotel where they saw Allen loading items from a luggage cart into his car. Two black duffel bags and a combination printer, scanner, and copier machine were visible on the luggage cart. The officers arrested Allen. The officers searched Allen's car and found thousands of dollars in cash. The officers also searched the black duffel bags on the luggage cart and found a laptop computer, check stock and blank checks.

Allen argued the officers did not have probable cause to arrest him and the search of his car and the duffel bags on the luggage cart violated the *Fourth Amendment.*

The court held the officers had probable cause to arrest Allen for possession of counterfeit checks. First, the hotel receipt linked Allen to three individuals recently arrested attempting to

pass counterfeit checks. Second, officers saw Allen discard a plastic bag that contained torn-up checks that matched the ones used by the other individuals. Finally, officers saw a combination printer, scanner and copier on Allen's luggage cart and they knew such a machine is typically associated with counterfeit check cases.

In addition, the court held the officers lawfully searched Allen's car incident to his arrest. Police officers can lawfully search a vehicle incident to an arrest if the arrestee is within reaching distance of the vehicle during the search or if the police have reason to believe the vehicle contains evidence relevant to the crime of arrest. Based on information discovered during the investigation, the search of Allen's car incident to his arrest was lawful because the officers had reason to believe the vehicle contained evidence relevant to the crime of conspiracy to possess counterfeit securities.

Finally, the court concluded even if the officers could not search the items on the luggage cart incident to Allen's arrest, the evidence inside the duffel bags would have been discovered during an inventory search. An officer testified, after arresting Allen, his property on the luggage cart would have been taken to the police station for safekeeping and inventoried to guard against loss or theft, according to departmental policy.

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

*****

United States v. Wallace, 2013 U.S. App. LEXIS 8377 (8th Cir. Ark. Apr. 25, 2013)

A woman brought police officers a videotape she claimed to have removed from Wallace's home that depicted Wallace sexually assaulting minor females. The officers matched the face in the video to a copy of Wallace's driver's license photograph. The woman told the officers a maroon colored suitcase in Wallace's spare bedroom contained additional sexually explicit material involving minors.

Based on this information, officers obtained a warrant to search Wallace's home and located the maroon-colored suitcase. The suitcase contained numerous sexually explicit images and videotape recordings of minors. Officers arrested Wallace, who waived his *Miranda* rights and drafted a handwritten confession.

Wallace argued the search warrant was not supported by probable cause and the officers pressured him into signing the written confession.

The court held the search warrant for Wallace's home was supported by probable cause. Even though the woman had a criminal history and had never provided the government with reliable information that led to a conviction, the officers corroborated most of her information. Because there was independent corroboration of the videotape contents, it was permissible to infer that the other information, including the location of the other material in the maroon-colored suitcase, was reliable.

The court further held Wallace's confession was made knowingly, intelligently and voluntarily. The officers advised Wallace of his *Miranda* rights and he signed a written waiver of those rights, which explicitly stated he had not been threatened, coerced or promised anything in exchange for giving up those rights.

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

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9th Circuit

Cameron v. Craig, 2013 U.S. App. LEXIS 7563 (9th Cir. Cal. Apr. 16, 2013)

Deputy Buether filed a criminal complaint stating someone had used his credit card without authorization to purchase household furnishings. Buether told Detective Craig he believed Cameron, the mother of his two children had used the credit card after she was removed from their home pursuant to a court order. Buether and Craig had attended the police academy together, worked the same shift and responded to hundreds of calls together. After corroborating much of Buether's information, Craig obtained a warrant to search Cameron's apartment for the items purchased with Buether's credit card. After Buether gave Craig his child custody schedule, Craig executed the search warrant at a time she knew Cameron would have custody of the couple's two young children. Six to ten police officers executed the search warrant. Upon entering the apartment, officers pointed guns at Cameron and handcuffed her arms behind her back tightly enough to leave bruising that lasted a few days. Officers arrested Cameron for a variety of property offenses; however, the prosecutor later dismissed all of the charges.

Cameron sued the officers, claiming her *Fourth Amendment* rights were violated when police officers conspired with the father of her children, a police officer with the same department, to obtain a warrant to search her home without probable cause, used excessive force while executing that warrant and then arrested her.

The court held the officers were entitled to qualified immunity to Cameron's unlawful search and arrest claims. Detective Craig's affidavit established probable cause that Buether did not authorize Cameron to use his credit card after she was removed from their home and the items purchased were inside Cameron's apartment. For similar reasons, the court held Craig had probable cause to arrest Cameron. Even though Cameron told Craig she had permission to use Buether's credit card, an objectively reasonable officer could have chosen to believe Buether instead.

The court, however, declined to grant Detective Craig qualified immunity on Cameron's excessive use of force allegation. The court concluded a jury could find the level of force used was excessive. Cameron's suspected crimes were relatively minor and non-violent. The officers had no reason to suspect Cameron would pose a threat to their safety and Cameron was not resisting arrest. A reasonable jury could easily determine the deployment of six to ten heavily armed officers was unnecessary to execute a search warrant for stolen property.

The court further held Detective Craig was not entitled to qualified immunity on Cameron's claim the search warrant was executed in such a way to intimidate her and to secure an unfair advantage for Buether in the couple's child custody proceedings. A reasonable jury could conclude Detective Craig and Buether conspired to abuse their power as law enforcement officers because they were friends and close colleagues, because Craig knew Buether and Cameron were engaged in mediation over custody of their children, and because Craig intentionally executed the search warrant when she knew the children would be present. In addition, a reasonable jury could also find Buether sought to exploit the raid by immediately calling the mediator after Cameron was arrested.

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

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United States v. Barnes, 2013 U.S. App. LEXIS 7785 (9th Cir. Alaska Apr. 18, 2013)

At the request of federal agents, Barnes' parole officer scheduled a meeting with him. Barnes, who was required by the terms of his parole to attend the meeting, did not tell Barnes the agents would be present. When Barnes arrived, instead of meeting with him at the window in the lobby of the building as usual, he was searched and escorted through a locked door to his parole officer's office. Once in her office, the two federal agents began to question Barnes about an undercover drug buy that occurred a few months earlier. The agents did not advise Barnes of his *Miranda* rights. After Barnes denied involvement in the transaction, the agents played a portion of a recorded phone call between Barnes and a confidential informant. Barnes then told the agents he remembered the transaction. The agents read Barnes his *Miranda* rights. Barnes waived his rights and confessed his involvement in the drug transaction. Barnes was indicted on several drug charges.

Barnes argued his statements to the agents were obtained in violation of *Miranda*.

The court agreed. First, the court held Barnes was in custody for *Miranda* purposes. Barnes was told to appear for a meeting with his parole officer under threat of revocation of his parole. When he arrived, instead of meeting with his parole officer, federal agents confronted Barnes directly with evidence implicating him in a drug transaction. The agents interviewed Barnes in a small office behind a closed door instead of in the lobby of the building as usual. Even though the agents eventually advised Barnes of his *Miranda* rights, this was anything but a typical meeting with his parole officer. A reasonable person in Barnes' position would not have felt free to leave.

Second, the court held the agents engaged in a deliberate two-step interrogation process. Such an interrogation occurs when a police officer deliberately questions a suspect without *Miranda* warnings and obtains a confession or the suspect makes incriminating statements. The officer then advises the suspect of his *Miranda* rights, obtains a waiver and has the suspect repeat his confession or incriminating statements. Here, the agent feared if Barnes heard the *Miranda* warnings he would be less likely to talk about the drug transaction and provide information about another suspect the agents were targeting. Even if the agents' primary reason to question Barnes was to gather information on another suspect, the agents were required to provide Barnes *Miranda* warnings when they began to question him.

Finally, the court found Barnes' pre and post *Miranda* warning confessions were only slightly different. The agents treated the second interrogation as continuation of the first interrogation with no break in between and they did not tell Barnes what he had said before the warnings could not be used against him. As a result, the *Miranda* warnings Barnes received were not effective and Barnes' post *Miranda* confession should have been suppressed.

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

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United States v. McClendon, 2013 U.S. App. LEXIS 8094 (9th Cir. Wash. Apr. 19, 2013)

At 2:20 a.m. a man called 911 stating an unknown vehicle was parked in his driveway with its engine and lights off and that someone had knocked on his door. When officers arrived, a woman got out of the car. She claimed the car had run out of gas and McClendon had gone to get more. The woman consented to a search and the officers found a backpack in the car the

woman said belonged to Eddie McClendon. An officer searched the backpack and found a sawed-off shotgun, a wig, walkie-talkies and binoculars. Officers ran a records check and learned McClendon had a previous felony weapons conviction. Officers began to search the neighborhood for McClendon.

The officers saw a man fitting McClendon's description walking down the street. After the man confirmed his name was Eddie, he turned and began to walk away from the officers. The officers drew their guns, told McClendon he was under arrest and ordered him to show his hands. McClendon ignored the officers and continued to walk away. The officers saw McClendon reach toward his waistband and then "fling" something away. The officers tackled McClendon, handcuffed him and placed him under arrest. The officers found a loaded handgun, still warm to the touch, a few feet away. McClendon denied discarding the handgun.

The government indicted McClendon for two counts of felon in possession of a firearm for the shotgun and handgun.

The district court held the search of the backpack violated the *Fourth Amendment* because the woman did not have authority to consent to its search and there was no exigency that allowed the officers to search it without a warrant. The government did not appeal this ruling.

However, the district court denied McClendon's motion to suppress the handgun.

McClendon argued on appeal the handgun should have been suppressed. He claimed the officers only discovered the handgun as the result of a seizure that was prompted by the illegal search of his backpack.

The court of appeals disagreed, holding McClendon was not seized under the *Fourth Amendment* until the officers tackled him. However, by then, he had already discarded the firearm. Consequently, McClendon lost his ability to challenge the admissibility of the handgun as the fruit of an illegal seizure.

In addition, the court held the discovery of the handgun should not be suppressed as a fruit of the unlawful search of McClendon's backpack. An officer testified he would have searched for McClendon even if the backpack had not been searched. Even if the officers were motivated to search for McClendon because of what they found in the backpack, McClendon's act of walking away from them was an intervening event that purged any taint from the backpack search.

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

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10th Circuit

United States v. Benoit, 713 F.3d 1 (10th Cir. Okla. April 2, 2013)

Benoit's girlfriend Rose called the police after she found what appeared to be child pornography on Benoit's computer while she was using it to pay bills online. When the police officer arrived at Rose's home, she had a friend who was more familiar with computers open the file she suspected contained child pornography and show it to the officer. The friend offered to open additional files but the officer told her it was not necessary. The officer contacted an investigator with the cybercrimes unit and then seized Benoit's computer until a search warrant could be

obtained. After the police obtained the warrant, investigators found hundreds of images and videos of child pornography. Benoit was indicted for two child pornography related offenses.

Benoit claimed Rose did not have actual or apparent authority to consent to the officer's initial search of his computer because she had told the officer the computer did not belong to her.

The court held the officer's viewing of the child pornography video prior to seizing Benoit's computer was not a search under the *Fourth Amendment*; therefore, the issue of consent was irrelevant. The *Fourth Amendment* only applies to governmental action. It does not apply to searches conducted by private individuals unless they are acting as an agent for the government or a government official actively participates in the search. When the officer responded to Rose's home, she had already found what she believed to be child pornography on Benoit's computer. Once at the home, the officer did not touch the computer, actively assist, or encourage the friend as she opened the file for him to view. The court concluded the officer did not conduct a search or direct a private search of Benoit's computer; rather he only acted as a witness.

In addition, the court held the officer's warrantless seizure of Benoit's computer was lawful under the plain view doctrine. The officer was lawfully present in Rose's home and the incriminating nature of child pornography was immediately apparent to the officer when the friend opened the video file.

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

*****

United States v. McDowell, 2013 U.S. App. LEXIS 7430 (10th Cir. Kan. Apr. 12, 2013)

A police officer was dispatched to a house to attempt to locate a woman under investigation for an assault. To reach the front door, the officer had to cross the driveway. As the officer walked diagonally across the driveway, he smelled a strong odor of fresh marijuana that appeared to be coming from the garage. At the front door, the officer the officer still smelled the odor of fresh marijuana. The officer used this information to obtain a search warrant which led to the seizure of over six hundred pounds of marijuana from the garage.

McDowell argued the marijuana evidence should have been suppressed because the officer intruded upon the house's curtilage while gathering information used to support the search warrant.

The court disagreed, noting even if the officer did enter the curtilage, the warrant to search the house was still valid. The United States Supreme Court in *Jardines* recently stated a police officer without a warrant is allowed to approach a home and knock on the door to the same extent any private citizen might do. Whether or not the driveway and front sidewalk were curtilage, the officer did not violate the *Fourth Amendment* by walking across them on his way to the front door. As a result, the smell of marijuana that reached him while he was in the driveway was not fruit of an unlawful search.

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

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United States v. Shuck, 2013 U.S. App. LEXIS 7427 (10th Cir. Okla. Apr. 12, 2013)

A person called the police after he smelled the odor of marijuana coming from the trailer house next door. Police officers walked to the front of the trailer and saw a gated chain link fence that enclosed the front yard and part of the driveway. The gate appeared to be locked and that it had not been used recently because of the amount of dirt accumulated at the bottom of the gate. Officers walked around the fence to the back door, which appeared to be the way a person would enter the trailer. The officers knocked on the door, but received no response. During this time, the officers saw a PVC pipe to the right of the back door. One of the officers bent down and smelled the end of the pipe and detected the odor of marijuana. The officers returned to their office and learned from the utility company the trailer was being billed for an extremely high amount of water per month. The officers obtained a warrant, searched the trailer, discovered a marijuana growing operation and arrested Shuck.

Shuck argued the officers violated the *Fourth Amendment* when they entered his backyard and conducted a search under the pretext of doing a knock and talk interview. He claimed the officers unlawfully entered the trailer home property when they decided not to approach the front door, but went directly into the backyard. Shuck also claimed the officer conducted an illegal search when he smelled the PVC pipe.

The court disagreed. Even if the area the officers entered was within the curtilage, they did not violate the *Fourth Amendment* by walking up to the back door and knocking on it. Police officers may enter the portion of the curtilage that is the normal route of access for anyone visiting a home. Here, the back door appeared to be the door commonly used by anyone entering the trailer. Therefore, the officers did not violate the *Fourth Amendment* when they approached the trailer's back door to speak with its occupants about the reported odor of marijuana.

The court also concluded the officer did not violate the *Fourth Amendment* by smelling the PVC pipe. Shuck's exposure of the marijuana odor to the public defeated his subsequent claim to *Fourth Amendment* protection. In addition, the PVC pipe was clearly noticeable by anyone standing at the back door of the trailer. The *Fourth Amendment* does not protect any observations the officers made from the back door, including the officer's smell of the PVC pipe.

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

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United States v. Madrid, 2013 U.S. App. LEXIS 7755 (10th Cir. N.M. Apr. 17, 2013)

A 911 operator received an anonymous call two men were arguing and about to get into a fight in an apartment complex parking lot. The operator dispatched police officers, telling them the caller had reported a fight in progress. The caller remained on the line and told the operator one of the men had driven away in a white Pontiac as the police cars arrived. Officers saw the white Pontiac and conducted a traffic stop. When the officers approached the Pontiac, they recognized the driver, Madrid, and knew he was a convicted felon. While one officer obtained Madrid's license and registration, another officer looked through the passenger side window into the car. The officer saw a rifle case on the back seat. The officer removed the case from the car, opened it and discovered a rifle inside. Madrid was charged with being a felon in possession of a firearm.

Madrid moved to suppress the rifle, arguing the officers did not have reasonable suspicion to conduct the traffic stop because a fight never occurred in the parking lot.

Based on the information provided by the 911 operator, the court held there was sufficient evidence to establish the officer did not realize a fight had not actually occurred in the parking lot. In addition, it was proper to consider Madrid's attempted exit from the parking lot in the Pontiac when determining if the officer had reasonable suspicion to stop him. As a result, the officer had an objectively reasonable belief a fight had just occurred and the participants were leaving the scene.

Finally, the court held the anonymous call to 911 was sufficient to establish reasonable suspicion to stop Madrid. First, the caller was reporting contemporaneous, firsthand knowledge of the possible fight in the parking lot. Second, the caller provided detailed information about the events he was observing, to include descriptions of the clothing and vehicles of the individuals involved in the incident. Third, the responding officers verified much of the information provided by the caller.

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

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11th Circuit

Myers v. Bowman, 2013 U.S. App. LEXIS 7216 (11th Cir. Ga. Apr. 10, 2013)

Myers and Bowman ended their engagement to be married. Myers and his father retrieved some personal property from Bowman's house, to include the couple's dog, which Myers had purchased. Bowman called her father, who was a county magistrate judge, who in turn called Myers and demanded the return of the dog. Myers refused. The magistrate followed Myers' vehicle and reported to local police officers someone had stolen his dog, a felony offense based on the value of the dog. Police officers conducted a traffic stop, pulled Myers out of his vehicle, wrestled him to the ground and arrested him. Myers suffered injuries to his head, neck, wrist and knees because of the officer's use of force. Another officer arrested Myers' father. After the magistrate recovered the dog from Myers' vehicle, he berated and threatened Myers for approximately seven minutes before he ordered the officers to release Myers and his father.

Myers sued the police officer for arresting him without probable cause and for excessive use of force in violation of the *Fourth Amendment*. Myers sued the magistrate for manufacturing probable cause that caused the officer to arrest him and use excessive force against him.

The court held the officer was entitled to qualified immunity. First, the officer had probable cause to arrest Myers. When the officer arrested Myers, it was reasonable for the officer to believe Myers had committed felony theft and fled the scene of the crime. The officer's knowledge was based on the magistrate's claim Myers had stolen the dog. The officer was entitled to rely on the magistrate's claim his dog was stolen, as an officer is entitled to rely on a victim's complaint as support for probable cause. In addition, the officer was entitled to presume the magistrate was a reliable and trustworthy source because he was a government official.

Second, the court concluded the officer did not use excessive force by grabbing Myers by the arm, forcing him to the ground, placing him in handcuffs and searching him. When the officer

used this force, he had probable cause to arrest Myers and he did not know whether Myers was armed or whether he would resist arrest.

The court further held the magistrate was entitled to qualified immunity because the officers did not use excessive force against Myers. In addition, the magistrate did not act under color of law as a state employee when he reported the theft of the dog, but rather as a private citizen

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

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District of Columbia Circuit

United States v. Cardoza, 2013 U.S. App. LEXIS 7376 (D.C. Cir. Apr. 12, 2013)

Police officers arrested Cardoza and Ungar after they recovered over four grams of cocaine from the car in which the two men had been sitting. In a search incident to arrest, officers recovered three disposable cell phones, almost three thousand dollars in cash and a plastic bag containing marijuana. Cardoza gave the officers a false address and a records check revealed he had previously been arrested for possession with intent to distribute marijuana.

Officers obtained a warrant to search Cardoza's apartment for evidence relating to illegal narcotics distribution and found cocaine, marijuana, handguns, a large quantity of cash and paraphernalia associated with drug distribution.

The district court granted Cardoza's motion to suppress the evidence seized from his apartment after ruling the search warrant affidavit included four false statements and concluding that without those statements; the officers did not have probable cause to search Cardoza's apartment.

The court of appeals reversed the district court, holding the officer's search warrant affidavit established probable cause to search Cardoza's apartment even without the four false statements.

First the court found the evidence seized during the search incident to arrest along with Cardoza's prior arrest record and false address established probable cause to believe Cardoza was engaged in drug trafficking. Next, the officer stated in the affidavit that based on his training and experience drug traffickers often kept additional supplies of drugs within their homes along with weapons and large sums of cash. Prior case law has established drug dealers must have a secure location from which to work and that location is most often in their home. Consequently, when there is probable cause a suspect is dealing drugs, there often tends to be probable cause evidence of drug dealing will be found in the suspect's home.

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

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