2010
SUPREME COURT and CIRCUIT COURTS OF APPEALS CASE SUMMARIES
BY SUBJECT

(Click on the subject in the Table of Contents to go to those cases)
Current through 6 INFORMER 10.

Cases are arranged with Supreme Court decisions first followed by Courts of Appeals decisions. Miscellaneous Federal Rules of Evidence and Criminal Statutes are arranged in numerical order.

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Fourth Amendment

Governmental Action / Private Searches

U.S. v. Day, 591 F.3d 679 (4th Cir.) January 8, 2010

The Fourth Amendment does not provide protection against searches by private individuals acting in a private capacity. Similarly, the sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. The defendant bears the burden of proving that a private individual acted as a government agent.

There are two primary factors to be considered: (1) whether the government knew of and acquiesced in the private individual's challenged conduct; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation.

With regard to the first factor, there must be some evidence of government participation in or affirmative encouragement of the private search. Passive acceptance by the government is not enough. Virginia's extensive armed security guard regulatory scheme simply empowers security guards to make an arrest. This mere governmental authorization for an arrest, in the absence of more active participation or encouragement, is insufficient to implicate the Fourth and Fifth Amendments.

With regard to the second factor, even if the sole or paramount intent of the security officers had been to assist law enforcement (in deterring crime), such an intent would not transform a private action into a public action absent a sufficient showing of government knowledge and acquiescence under the first factor of the agency test.

Under the "public function" test typically utilized for assessing a private party's susceptibility to a civil rights suit under 42 U.S.C. § 1983, private security guards endowed by law with plenary police powers such that they are *de facto* police officers, may qualify as state actors. Security guards who are authorized to arrest only for offenses committed in their presence do not have plenary police powers and are not *de facto* police officers**.**

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

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Searches

Reasonable Expectation of Privacy

US. v Marquez, 605 F.3d 604 (8th Cir.) May 21, 2010

To establish a *Fourth Amendment* violation, a defendant must show that he had a reasonable expectation of privacy in the area searched. A defendant lacks standing to contest the search of a place to which he has an insufficiently close connection. Acosta-Marquez neither owned nor

drove the Ford and was only an occasional passenger therein. He therefore lacked standing to contest the installation and use of the GPS device.

Even if Acosta-Marquez had standing, we would find no error. A person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another. When electronic monitoring does not invade upon a legitimate expectation of privacy, no search has occurred. When police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time.

In this case, there was nothing random or arbitrary about the installation and use of the device. The installation was non-invasive and occurred when the vehicle was parked in public. The police reasonably suspected that the vehicle was involved in interstate transport of drugs. The vehicle was not tracked while in private structures or on private lands.

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

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U.S. v. Bynum, 604 F.3d 161 (4th Cir.) May 5, 2010

Even if Bynum could show that he had a subjective expectation of privacy in his subscriber information, such an expectation would not be objectively reasonable. Indeed, every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the *Fourth Amendment's* privacy expectation.

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

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U.S. v. Hernandez-Mendoza, 600 F.3d 971 (8th Cir.) April 6, 2010

The Trooper had legitimate security reasons for recording the sights and sounds within his vehicle. The defendants had no reasonable expectation of privacy in a marked patrol car, which is owned and operated by the state for the express purpose of ferreting out crime.
Click **HERE** for the court's opinion.

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U.S. v. Borowy, 595 F.3d 1045 (9th Cir.) February 17, 2010

Defendant purchased and installed a version of the file sharing software LimeWire that allows the user to prevent others from downloading or viewing the names of files on his computer. He attempted, but failed, to engage this feature. Even though his purchase and attempt show a subjective expectation of privacy, his files were still entirely exposed to public view. Anyone with access to LimeWire could download and view his files without hindrance. Defendant's

subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access. The agent's access to defendant's files through LimeWire and the use of a keyword search to locate these files did not violate the Fourth Amendment.

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

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U.S. v. Pineda-Moreno, 591 F.3d 1212 (9th Cir.) January 11, 2010

Agents installed mobile tracking devices on the underside of defendant's Jeep on seven different occasions. Each device was about the size of a bar of soap and had a magnet affixed to its side, allowing it to be attached to the underside of a car. On five of these occasions, the vehicle was located in a public place. On the other two occasions, between 4:00 and 5:00 a.m., agents attached the device while the Jeep was parked in defendant's driveway a few feet away from his trailer. The driveway leading up to the trailer was open, and there was no fence, gate, or "No Trespassing" sign.

The undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy.

Even assuming the Jeep was on the curtilage, it was parked in his driveway, which is only a semiprivate area. In order to establish a reasonable expectation of privacy in his driveway, defendant must detail the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it. Because defendant did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home. The time of day agents entered the driveway is immaterial.

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

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Seizure

U.S. v. Struckman, 603 F.3d 731 (9th Cir.) May 4, 2010

The police officers' warrantless seizure of Struckman within his backyard and their entry into the yard to perfect his arrest violated the *Fourth Amendment.* Police officers must either obtain a warrant or consent to enter before arresting a person inside a home or its curtilage *or* make a reasonable attempt to ascertain that he is actually a trespasser before making the arrest. That easily could have been done here by asking Struckman to identify himself, a step one would ordinarily expect from the police where trespass is suspected.

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

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Armijo v. Peterson, 601 F.3d 1065 (10th Cir.) April 13, 2010

Absent exigent circumstances and probable cause, or a warrant, officers may not enter a home and seize an individual for routine investigatory purposes, no matter whether the seizure is an investigatory stop or an arrest. In that sense, *Terry* stops have no place in the home. However, just as exigent circumstances permit a warrantless home entry, emergencies may justify a warrantless seizure in the home.

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

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U.S. v. Cha, 597 F.3d 995 (9th Cir.) March 9, 2010

There are four factors used for determining the reasonableness of a seizure of a residence pending issuance of a search warrant: (1) whether there was probable cause to believe that the residence contained evidence of a crime or contraband; (2)whether there was good reason to fear that, unless restrained, the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether the police make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and (4) whether the police imposed the restraint for a limited period of time — in other words, was the time period no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.
Because the police refused to allow defendant into his home even with an escort to obtain his diabetes medicine and because there was a 26.5 hour delay between seizing the home and obtaining the warrant, the seizure violated the Fourth Amendment. The test asks only how long was reasonably *necessary* for police, acting with diligence, to obtain the warrant. Even absent evidence of bad faith, the delay was too long.

The evidence was not the "product" of the unconstitutional action because the unconstitutional seizure was not the "but for" cause of the discovery of the evidence. The evidence was seized pursuant to a search warrant issued on probable cause. Even so, the evidence is suppressed as a direct result of the unconstitutional seizure of the home pending the warrant.

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

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U.S. v. Prince, 593 F.2d 1178 (10th Cir.) February 1, 2010

Even if it were a mistake of law for ATF agents to conclude that "AK-47 flats" i.e., pieces of flat metal containing holes and laser perforations, are "receivers" and therefore "firearms," such a mistake of law carries no legal consequence if it furnishes the basis for a consensual encounter, as opposed to a detention or arrest.

It is well established that consensual encounters between police officers and individuals implicate no Fourth Amendment interests. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual and request consent to search property belonging to the individual that is otherwise protected by the Fourth Amendment. The agents' purported mistake of law neither independently resulted in a Fourth Amendment violation nor otherwise "tainted" the entire investigation.

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

Editor's Note: The Court declined to decide whether the flats at issue are "receivers" and therefore "firearms."

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Burg v. Gosselin, 591 F.3d 95 (2nd Cir.) January 7, 2010

Looking at this issue for the first time, the court decides:

The issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restrictions, does not constitute a Fourth Amendment seizure. This summons does no more than require appearance in court on a single occasion, and operates to effectuate due process.

The 1st, 3rd, 6th, 7th, 8th, 9th, 10th, and 11th circuits agree (cites omitted).

Editor's Note: In a previous 2nd Circuit case (cite omitted), a defendant accused of offenses that included two felonies was released post-arraignment, but was ordered not to leave the State of New York pending resolution of the charges against him, thereby restricting his constitutional right to travel outside of the state. He was obligated to appear in court in connection with those charges whenever his attendance was required, culminating in some eight appearances during the year in which his criminal proceeding was pending. The Court ruled that these restrictions imposed on the defendant constituted a "seizure" within the meaning of the Fourth Amendment.

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

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Voluntary Contacts

U.S. v. Lewis, 2010 U.S. App. LEXIS 10872 (4th Cir.) May 27, 2010

The police may approach an individual on a public street and ask questions without implicating the *Fourth Amendment's* protections. The officers were thus entitled to approach Lewis, who was sitting in his parked car, late at night. As they approached the vehicle, one of the officers related to Officer Mills that there was an open beer bottle in the vehicle. Mills then approached the driver-side window and asked Lewis for identification. When Lewis rolled down his window to comply, Mills smelled the odor of marijuana emanating from the vehicle. At that point, the

officers possessed probable cause to search the vehicle, and they were entitled to order Lewis out of the vehicle while their search was accomplished.

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

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Terry Stops / Reasonable Suspicion

U.S. v. Manes, 603 F.3d 451 (8th Cir.) May 10, 2010

The *Fourth Amendment* is not violated when a law enforcement officer briefly detains an individual to investigate circumstances which gave rise to a reasonable suspicion that criminal activity was underway. A confidential informant's tip may support a reasonable suspicion if it has sufficient indicia of reliability, such as the informant's track record as a reliable source or independent corroboration of the tip. When an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. The reasonableness of such an inference is bolstered if the tip is corroborated not only by matching an identity or description, but also by accurately describing a suspect's future behavior.

Based on the informant's track record and corroboration of significant aspects of the tip, the officers reasonably inferred that the two white males traveling in the maroon truck were attempting to engage in an illicit drug transaction.

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

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Terry Frisks

U.S. v Muhammad, 604 F.3d 1022 (8th Cir.) May 11, 2010

Under *Terry*, a law enforcement officer may conduct a warrantless pat-down search for the protection of himself or others nearby in order to discover weapons if he has a reasonable, articulable suspicion that the person may be armed and presently dangerous. An officer may, however, seize other evidence discovered during a pat-down search for weapons as long as the search stays within the bounds marked by *Terry*. Muhammad contends that because Agent McCrary knew that the object in Muhammad's back pocket was not a weapon or an object concealing a weapon, Agent McCrary could not lawfully remove the wallet from Muhammad's pocket. The record does not support this assertion. Agent McCrary testified that during a pat-down search it is often difficult to tell whether an object is a weapon or might conceal a weapon merely by touching the object. He stated that officers must generally "pull the suspicious object out and actually inspect it" to determine whether the object presents a safety concern. He further testified that he was not certain what the hard four-inch long and three-inch wide object in Muhammad's pocket was, but he said that the item "felt like an object that could conceal a weapon." This pat-down search stayed within the bounds of *Terry*, and the *Fourth Amendment*

permitted Agent McCrary to remove the object from Muhammad's pocket.

We must next decide whether Agent McCrary lawfully seized the cash protruding from the wallet. The plain-view exception allows officers to seize contraband or other evidence of a crime in limited situations. Under the plain-view exception, officers may seize an object without a warrant if they are lawfully in a position from which they view the object, the incriminating character of the object is immediately apparent, and the officers have a lawful right of access to the object.

We conclude that Agent McCrary lawfully removed the wallet from Muhammad's pocket and Muhammad does not dispute that the cash was visible without opening the wallet; therefore the first and third requirements of the plain-view exception are met.

While cash is not inherently incriminating, under these circumstances, Agent McCrary had probable cause to believe that the cash protruding from the wallet was evidence of the robbery. The plain-view exception permitted Agent McCrary to seize the cash, which then allowed him to confirm that five of the $20 bills were bait bills taken during the robbery.

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

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Detaining Vehicles / Traffic Stops

Carmichael v. Village of Palatine, 605 F.3d 451 (7th Cir.) May 21, 2010

The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the officer at the time he acts. The record before us requires us to conclude that the district court erred in finding that probable cause supported the stop.

The doctrine of qualified immunity shields from liability public officials who perform discretionary duties and it thus protects police officers "who act in ways they reasonably believe to be lawful." The defense provides "ample room for mistaken judgments" and protects all but the "plainly incompetent or those who knowingly violate the law."

The record before us contains no evidence that Officer Sharkey had any factual basis for stopping the plaintiffs at gun point. He admits that the reasons that he initially gave for stopping the car, absence of a front license plate and tinted windows, were not known to him at the time that he affected the stop. The record shows, moreover, that the reason that he later gave for the stop, the absence of tail and brake lights, was not true. As the state court determined during the earlier criminal proceeding against the plaintiffs, there is simply no basis in the record upon which a determination of probable cause can be sustained. Certainly, any reasonable police officer, acting at the time Officer Sharkey acted, would have known this elementary principle of the law of arrest. Officer Sharkey is not entitled to qualified immunity with respect to the stop.

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

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U.S. v Hughes, 2010 U.S. App. LEXIS 10802 (6th Cir.) May 27, 2010

For a traffic stop to be permissible under the *Fourth Amendment*, a police officer must know or reasonably believe that the driver of the car is doing something that represents a violation of law at the time of the stop. An officer may not use after-the-fact rationalizations to justify a traffic stop where, at the time of the stop, the officer was not aware that a defendant's actions were illegal.

The Sixth Circuit has developed two separate tests to determine the constitutional validity of vehicle stops. An officer must have probable cause to make a stop for a civil infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation. In this case, the government raises only either civil infractions or misdemeanors that were clearly *completed* by the time the officer actually stopped Hughes. In order for the stop to have been proper the officer needed to have probable cause rather than reasonable suspicion that Hughes had violated a traffic ordinance at the time of the stop.

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

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U.S. v. Harrison, 2010 U.S. App. LEXIS 10694 (2nd Cir.) May 26, 2010

Officer Krywalski's questions to Harrison, a passenger in the vehicle, which lasted five to six minutes, did not measurably extend the duration of the lawful traffic stop, so as to render it unconstitutional.

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

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U.S. v. Sed, 601 F.3d 224 (3rd Cir.) April 6, 2010

Arrest of defendant in Ohio by Pennsylvania police officers was not unreasonable under the Fourth Amendment. The stop of defendant's car just before it entered Pennsylvania from Ohio was nothing more than an honest mistake and a *de minimis* one at that.
See *Virginia v. Moore*, 128 S. Ct. 1598 (2008)

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

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U.S. v. Everett, 601 F.3d 484 (6th Cir.) April 6, 2010

Looking at this issue for the first time, the court decides:
There is no categorical ban on suspicionless, unrelated questioning that may minimally prolong a traffic stop.

The 1st, 2nd, 9th, 8th, and 10th circuits (cites omitted).

The proper inquiry is whether the totality of the circumstances surrounding the stop indicates that the duration of *the stop as a whole* – including any prolongation due to suspicionless, unrelated questioning – was reasonable. The overarching consideration is the officer's diligence in ascertaining whether the suspected traffic violation occurred, and, if necessary, issuing a ticket.
The *subject* (that is to say, some questions are "farther afield" than others) and the quantity of the suspicionless, unrelated questions are part of the "totality of the circumstances" of the stop. Some amount of questioning relevant only to ferreting out unrelated criminal conduct is permissible. A lack of diligence may be shown when questions unrelated to the traffic violation constituted the bulk of the interaction between the trooper and the motorist.

Because the safety of the officer is a legitimate and weighty interest, the officers conducting a traffic stop may inquire about dangerous weapons.

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

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U.S. v. Fernandez, 600 F.3d 56 (1st Cir.) April 1, 2010

Looking at this issue for the first time, the court decides:
When police lawfully stop a vehicle, so long as the request does not measurably extend the duration of the stop, police do not need an independent justification to ask a passenger for identification.

The 4th, 9th, and 10th circuits agree (cites omitted).

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

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Probable Cause

U.S. v. Parish, 2010 U.S. App. LEXIS 10460 (8th Cir.) May 24, 2010

Since the police had probable cause to arrest Parish on the drug charges, his arrest was lawful. Because the only purpose of the arranged meeting was for Parish to distribute drugs, the police had probable cause to believe that evidence relevant to the drug crime would be found in the vehicle.

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

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U.S. v Thomas, 605 F.3d 300 (7th Cir.) May 13, 2010

Probable cause exists "when there is a 'fair probability' . . . that contraband or evidence of a crime will be found in a particular place. A magistrate need only find "reasonable grounds for belief" that evidence will be found in order to justify the issuance of a search warrant. When an affidavit relies on hearsay information from a confidential informant, the judicial officer (and reviewing court) must consider the veracity, reliability, and basis of knowledge for that information as part of the totality-of-the-circumstances review. Independent corroboration of the tip by police is not required when the court is provided with assurances that the informant is reliable. If the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required.

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

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U.S. v. Henderson, 595 F.3d 1198 (9th Cir.) February 17, 2010

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court never-the-less ruled the evidence admissible through the good faith exception to the exclusionary rule.

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U.S. v. Brooks, 594 F.3d 488 (6th Cir.) February 5, 2010

Probable cause to search a location is not dependent upon whether the officers already have probable cause or legal justification to make an arrest. The question is whether the information known by the affiant and conveyed to the magistrate makes it fairly probable that there will be additional contraband or evidence of a crime in the place to be searched.

Probable cause to search for more marijuana exists where there is evidence of marijuana use immediately prior to the officers' arrival (the strong odor of marijuana smoke). The magistrate is not required to assume that the defendant has just smoked his last bit of marijuana immediately

before the officers arrived. Instead, it is fairly probable under these facts that where there is smoke, there may be more there to smoke.

The same logic does not necessarily apply to the seeds in the ashtray as, standing alone and without the corroboration of the smell of marijuana smoke, it is impossible to know how long the seeds had been in the ashtray. Accordingly, the mere presence of marijuana seeds in an ashtray would likely be insufficient to establish probable cause to search the residence due to the uncertainty of how long ago the seeds got there.

"Even then, however, we [the Court] take note of the story told in Jim Stafford's down-home tribute to *Cannabis sativa*:
All good things gotta come to an end,
And it's the same with the wildwood weeds.
One day this feller from Washington came by,
And he spied 'em and turned white as a sheet.
Well, they dug and they burned,
And they burned and they dug,
And they killed all our cute little weeds.
Then they drove away,
We just smiled and waved,
Sittin' there on that sack of seeds!

JIM STAFFORD,WILDWOOD WEED (MGM 1974).

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

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U.S. v. Pappas, 592 F.3d 799 (7th Cir.) January 21, 2010

An officer can reasonably believe that the number of email messages containing child pornography (11 over two months in this case) sent to defendant, and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, is sufficient to establish probable cause for the crime of knowing possession of child pornography.

A warrant application that includes boilerplate language concerning the practices of collectors of child pornography must lay a foundation which shows that the person subject to the search is a member of the class. However, there is no magic "profile" of child pornography "collectors" that must be attested to in a search warrant affidavit. In fact, the moniker "collector" merely recognizes that experts in the field have found that because child pornography is difficult to come by, those receiving the material often keep the images for years. There is nothing especially unique about individuals who are "collectors" of child pornography; rather, it is the nature of child pornography, i.e., its illegality and the difficulty procuring it, that causes recipients to become "collectors." Where evidence indicates that an individual has uploaded or possessed multiple pieces of child pornography, there is enough of a connection to the "collector" profile to justify including the child pornography collector boilerplate in a search warrant affidavit.

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

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U.S. v. Palos-Marquez, 591 F.3d 1272 (9th Cir.) January 19, 2010

The in-person nature of a tip, even from an unidentified informant, gives it substantial indicia of reliability for two reasons. First, an in-person informant risks losing anonymity and being held accountable for a false tip. Second, when a tip is made in-person, an officer can observe the informant's demeanor and determine whether the informant seems credible enough to justify immediate police action without further questioning.

In the context of border patrol stops, relevant facts for reasonable suspicion include: (1) characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic and time of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver, including obvious attempts to evade officers; (6) appearance or behavior of passengers; (7) model and appearance of the vehicle; and, (8) officer experience.

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

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The Exclusionary Rule

U.S. v. Pappas, 592 F.3d 799 (7th Cir.) January 21, 2010

Obtaining a warrant is prima facie evidence of good faith on the part of the officer. Consulting with the prosecutor prior to applying for a search warrant provides additional significant evidence of that officer's objective good faith.

An officer can reasonably believe that the number of email messages containing child pornography (11 over two months in this case) sent to defendant, and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, is sufficient to establish probable cause for the crime of knowing possession of child pornography.

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

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Exceptions to the Exclusionary Rule

No Standing To Object

US. v Marquez, 605 F.3d 604 (8th Cir.) May 21, 2010

A defendant lacks standing to contest the search of a place to which he has an insufficiently close connection. Acosta-Marquez neither owned nor drove the Ford and was only an occasional passenger therein. He therefore lacked standing to contest the installation and use of the GPS device.

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

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Good Faith

U.S. v. Henderson, 595 F.3d 1198 (9th Cir.) February 17, 2010

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court never-the-less ruled the evidence admissible through the good faith exception to the exclusionary rule.

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Plain View

U.S. v Muhammad, 604 F.3d 1022 (8th Cir.) May 11, 2010

We must decide whether Agent McCrary lawfully seized the cash protruding from the wallet. The plain-view exception allows officers to seize contraband or other evidence of a crime in limited situations. Under the plain-view exception, officers may seize an object without a warrant if they are lawfully in a position from which they view the object, the incriminating character of the object is immediately apparent, and the officers have a lawful right of access to the object.

We conclude that Agent McCrary lawfully removed the wallet from Muhammad's pocket and Muhammad does not dispute that the cash was visible without opening the wallet; therefore the first and third requirements of the plain-view exception are met.While cash is not inherently

incriminating, under these circumstances, Agent McCrary had probable cause to believe that the cash protruding from the wallet was evidence of the robbery.
The plain-view exception permitted Agent McCrary to seize the cash, which then allowed him to confirm that five of the $20 bills were bait bills taken during the robbery.

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

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U.S. v. Williams, 592 F.3d 511 (4th Cir.) January 21, 2010

The sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents.

The search warrant authorized a search of defendant's computers and digital media for evidence relating to the designated Virginia crimes of making threats and computer harassment. To conduct that search, the warrant impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization. To be effective, such a search could not be limited to reviewing only the files' designation or labeling, because the designation or labeling of files on a computer can easily be manipulated to hide their substance. Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality.

Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.

The warrant also authorized the police to search for things like disks and "thumbnail drives," which, the evidence showed, could be as small as a dime, and which could very easily have been stored in the lockbox where the machine gun and silencer were found. A thorough search of the lockbox would therefore have required the detective to move the gun and silencer, even if only within the confines of the lockbox. And before moving the gun, the detective was entitled to pick it up and determine whether it was loaded, for his own safety. Because it was during the course of a legitimate safety inspection that the incriminating character of the machine gun and silencer became "immediately apparent," the warrantless seizure of them was justified by the plain-view exception.

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

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Protective Sweeps

Armijo v. Peterson, 601 F.3d 1065 (10th Cir.) April 13, 2010

A protective sweep of a residence to ensure officer safety is not only authorized incident to an arrest, but may also be conducted under the exigent-circumstances doctrine *if* reasonable grounds exist to search to protect the safety of someone besides the officers.

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

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Searches Incident to Arrest

U.S. v. Pineda-Areola, 2010 U.S. App. LEXIS 7685 (7th Cir.) April 6, 2010

Defendant was arrested at the scene of a drug transaction, and his cell phone was seized. When, using another phone, officers dialed the phone number of the person through whom the drug transaction was arranged, defendant's phone vibrated.

Dialing a phone number causing defendant's phone to vibrate is not a "search." Even if dialing a phone were considered a search, the officers were entitled to search defendant and the phone incident to his lawful arrest.

Editor's Note: This is an unpublished opinion granting a request by defendant's counsel to withdraw from representing defendant on appeal. Counsel asserted, and the court agreed, that there were no non-frivolous grounds on which to appeal.

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Searches Incident to Arrest (Vehicles)

U.S. v. Davis, 598 F.3d 1259 (11th Cir.) March 11, 2010

In an incident that predated the Supreme Court decision of *Arizona v. Gant*, Davis, a passenger in a car stopped for a traffic offense, was arrested after giving the officer a false name. During a search of the car incident to the arrest, the officer seized a gun from the pocket of Davis' jacket left on the seat. The search violated the Fourth Amendment pursuant to the *Gant* decision because neither Davis nor the driver had access to the car and because it was not reasonable to believe that evidence of the crime of arrest was in the car.
However, the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on well settled precedent, even if that precedent is subsequently overturned. The gun is admissible evidence.

The 10th Circuit agrees (cite omitted).

The 9th Circuit disagrees (cite omitted).

Before *Gant*, the 5th Circuit refused to apply the exclusionary rule when police had relied in good faith on prior circuit precedent (cite omitted).

Before *Gant*, the 7th Circuit expressed skepticism about applying the rule's good-faith exception when police had relied solely on case law in conducting a search (cite omitted).

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

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U.S. v. Vinton, 594 F.3d 14 (D.C. Cir.) February 5, 2010

After lawfully stopping defendant for a traffic violation, the Park Police Officer saw a fishing knife with a five-and-a-half-inch sheath in plain view on the backseat. During a frisk of the passenger compartment, the officer found a "butterfly knife" under the passenger side floor mat.

Defendant was arrested for "possession of a prohibited weapon" (PPW), D.C. Code § 22-4514(b). However, because the offense of PPW requires proof of intent to use the weapon *unlawfully* against another, the officer lacked probable cause to arrest for PPW. The arrest was still valid because there was probable cause to believe defendant committed the offense of "carrying a dangerous weapon" (CDW), D.C. Code § 22-4504(a), which does not require proof of intent to use the weapon for an unlawful purpose." A "deadly or dangerous weapon" is anything that is *likely* to produce death or great bodily injury by the use made of it. Even though it may be used as a tool in certain trades or hobbies or may be carried for utilitarian reasons, the surrounding circumstances indicate that defendant's purpose for carrying the butterfly knife was its use as a weapon.

The search of a locked briefcase in the passenger compartment incident to the arrest was lawful under *Arizona v. Gant* because it was reasonable to believe that the briefcase contained evidence relevant to the crime of arrest. The "reasonable to believe" standard probably is akin to the "reasonable suspicion" standard required to justify a *Terry* search. Accordingly, the officer's assessment of the likelihood that there will be relevant evidence inside the car must be based on more than "a mere hunch," but "falls considerably short of needing to satisfy a preponderance of the evidence standard."

The defendant was caught with a type of contraband sufficiently small to be hidden throughout a car and frequently possessed in multiple quantities. Indeed, this fact was well-known to the officer, who testified that "generally if one weapon is there . . . there's the chance that other weapons could be there." Having found two objects, mace and earplugs, that suggested at least a possible association with weapons, along with two other objects, a sheathed knife and a butterfly knife, that were clearly capable of being used as weapons, the officer had an objectively reasonable basis for believing that additional weapons might be inside the briefcase inside the car.

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

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Search Warrants

U.S. v. Colbert, 605 F.3d 573 (8th Cir.) May 20, 2010

Although the search warrant affidavit in this case may not be a model of detailed police work, it sets forth a number of specific facts and explains the investigation that took place therefore the argument that the affidavit was too conclusory to establish probable cause fails.
There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography. Child pornography is in many cases simply an electronic record of child molestation. Accordingly, we conclude that Colbert's attempt to entice a child was a factor that the judicial officer reasonably could have considered in determining whether Colbert likely possessed child pornography, all the more so in light of the evidence that Colbert heightened the allure of his attempted inveiglement by telling the child that he had movies she would like to watch. That information established a direct link to Colbert's apartment and raised a fair question as to the nature of the materials to which he had referred.

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

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U.S. v Thomas, 2010 U.S. App. LEXIS 9838 (7th Cir.) May 13, 2010

Probable cause exists "when there is a 'fair probability' . . . that contraband or evidence of a crime will be found in a particular place. A magistrate need only find "reasonable grounds for belief" that evidence will be found in order to justify the issuance of a search warrant. When an affidavit relies on hearsay information from a confidential informant, the judicial officer (and reviewing court) must consider the veracity, reliability, and basis of knowledge for that information as part of the totality-of-the-circumstances review. Independent corroboration of the tip by police is not required when the court is provided with assurances that the informant is reliable. If the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required.

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

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US v Campbell, 603 F.3d 1218 (10th Cir.) May 10, 2010

A search warrant subsequently determined to lack probable cause demands suppression of the resulting evidence in at least four situations: (1) when "the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his 'reckless disregard of the truth'"; (2) "when the 'issuing magistrate wholly abandon[s her] judicial role'"; (3) "when the affidavit in support of the warrant is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; and, (4) "when a warrant is so facially deficient that the executing officer could not reasonably believe it was

valid."

Recently, the Supreme Court in *United States v. Herring, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)*, appears to have described another situation in which Leon would not apply--when the warrant's flaw results from recurring or systemic police negligence.
The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. When police error is the result of negligence, "rather than systemic error or reckless disregard of constitutional requirements," the exclusionary rule does not serve its purpose and, therefore, does not apply.
In this case: (1) probable cause existed to support the warrant, (2) the officers involved in the preparation of the affidavit supporting the warrant did not deliberately mislead or act with reckless indifference to the truth, and, otherwise, (3) law enforcement relied in objective good faith upon the warrant

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

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U.S. v. Lazar, 604 F.3d 230 (6th Cir.) May 4, 2010

The first paragraph of Attachment B to the search warrant gave sufficient direction when it referred to "the below listed patients" and "the following patients." Any patient list presented to the issuing Magistrate Judge thus was effectively incorporated into the search warrants. If the record otherwise shows that the government seized patient files according to the list, if any, presented to the issuing Magistrate Judge, a lack of formal incorporation by reference into the warrants does not justify a finding of facial insufficiency. Incorporation" of one thing into another need not be by express reference. Phrases such as 'incorporated by reference' are not talismanic, without which we do not consider additional necessary documents that effectuate the parties' agreement.

The Supreme Court's decision in *Groh v. Ramirez, 540 U.S. 551, 12, (2004)* controls, and requires suppression of all patient records seized beyond the scope of any patient list presented to the issuing Magistrate Judge.

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

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U.S. v. Claridy, 601 F.3d 276 (4th Cir.) April 9, 2010

Deciding this issue for the first time, the court holds:

When federal and state agencies cooperate and form a joint law-enforcement effort, investigating violations of both federal and state law, an application for a search warrant cannot categorically be deemed a "proceeding" governed by the Federal Rules of Criminal Procedure, based simply on the role that federal law-enforcement officers played in the investigation.

Nothing in the Federal Rules of Criminal Procedure suggests that a joint task force cannot use either federal or state investigatory tools governed, respectively, by federal or state law. Search warrants obtained during a joint federal-state investigation may be authorized by Federal Rule 41(b) or by state law and may serve to uncover violations of federal law as well as state law.

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

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U.S. v. Cha, 597 F.3d 995 (9th Cir.) March 9, 2010

There are four factors used for determining the reasonableness of a seizure of a residence pending issuance of a search warrant: (1) whether there was probable cause to believe that the residence contained evidence of a crime or contraband; (2)whether there was good reason to fear that, unless restrained, the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether the police make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and (4) whether the police imposed the restraint for a limited period of time — in other words, was the time period no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.
Because the police refused to allow defendant into his home even with an escort to obtain his diabetes medicine and because there was a 26.5 hour delay between seizing the home and obtaining the warrant, the seizure violated the Fourth Amendment. The test asks only how long was reasonably *necessary* for police, acting with diligence, to obtain the warrant. Even absent evidence of bad faith, the delay was too long.

The evidence was not the "product" of the unconstitutional action because the unconstitutional seizure was not the "but for" cause of the discovery of the evidence. The evidence was seized pursuant to a search warrant issued on probable cause. Even so, the evidence is suppressed as a direct result of the unconstitutional seizure of the home pending the warrant.

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

******

U.S. v. Estey, 595 F.3d 836 (8th Cir.) February 19, 2010

Because child pornographers commonly retain pornography for a lengthy period of time, evidence developed within several months (5 months in this case) of an application for a search warrant for a child pornography collection and related evidence is not stale.

The 4th and 9th circuits agree (cites omitted).

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

******

U.S. v. Henderson, 595 F.3d 1198 (9th Cir.) February 17, 2010

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court never-the-less ruled the evidence admissible through the good faith exception to the exclusionary rule.

******

U.S. v. Williams, 592 F.3d 511 (4th Cir.) January 21, 2010

The sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents.

The search warrant authorized a search of defendant's computers and digital media for evidence relating to the designated Virginia crimes of making threats and computer harassment. To conduct that search, the warrant impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization. To be effective, such a search could not be limited to reviewing only the files' designation or labeling, because the designation or labeling of files on a computer can easily be manipulated to hide their substance. Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality.

Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.

The warrant also authorized the police to search for things like disks and "thumbnail drives," which, the evidence showed, could be as small as a dime, and which could very easily have been stored in the lockbox where the machine gun and silencer were found. A thorough search of the lockbox would therefore have required the detective to move the gun and silencer, even if only within the confines of the lockbox. And before moving the gun, the detective was entitled to pick it up and determine whether it was loaded, for his own safety. Because it was during the course of a legitimate safety inspection that the incriminating character of the machine gun and silencer became "immediately apparent," the warrantless seizure of them was justified by the plain-view exception**.**

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

******

U.S. v. Pappas, 592 F.3d 799 (7th Cir.) January 21, 2010

Obtaining a warrant is prima facie evidence of good faith on the part of the officer. Consulting with the prosecutor prior to applying for a search warrant provides additional significant evidence of that officer's objective good faith.

An officer can reasonably believe that the number of email messages containing child pornography (11 over two months in this case) sent to defendant, and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, is sufficient to establish probable cause for the crime of knowing possession of child pornography.

A warrant application that includes boilerplate language concerning the practices of collectors of child pornography must lay a foundation which shows that the person subject to the search is a member of the class. However, there is no magic "profile" of child pornography "collectors" that must be attested to in a search warrant affidavit. In fact, the moniker "collector" merely recognizes that experts in the field have found that because child pornography is difficult to come by, those receiving the material often keep the images for years. There is nothing especially unique about individuals who are "collectors" of child pornography; rather, it is the nature of child pornography, i.e., its illegality and the difficulty procuring it, that causes recipients to become "collectors." Where evidence indicates that an individual has uploaded or possessed multiple pieces of child pornography, there is enough of a connection to the "collector" profile to justify including the child pornography collector boilerplate in a search warrant affidavit.

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

******

U.S. v. Mann, 592 F.3d 779 (7th Cir.) January 20, 2010

Unlike a physical object that can be immediately identified as responsive to the warrant or not, computer files may be manipulated to hide their true contents. Images can be hidden in all manner of files, even word processing documents and spreadsheets. Criminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer.

The search warrant authorized a search for "images of women in locker rooms and other private places." Given the nature of the search and the fact that images of women in locker rooms could be virtually anywhere on the computers, using software known as "forensic tool kit" ("FTK") to catalogue the images on the computer into a viewable format did not, without more, exceed the scope of the warrant.

But, the "FTK" software also employed a filter known as "KFF (Known File Filter) Alert." The "KFF Alert" flags those files identifiable from a library of known files previously submitted by law enforcement—most of which are images of child pornography. The "KFF Alert" flagged four files. Once those files had been flagged, the detective knew (or should have known) that

files in a data base of known child pornography images would be outside the scope of the warrant. The detective exceeded the scope of the warrant by opening the four flagged "KFF Alert" files.

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

Editor's Note: The Court rejected the rule set out by the 9th Circuit in U.S. v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009), that directs magistrate judges to insist that the government waive reliance on the plain view doctrine. Instead, the court counsels officers and others involved in searches of digital media to exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described.

(On November 4, 2009, the 9th Circuit entered an order asking the parties in U.S. v. Comprehensive Drug Testing, Inc. to brief the question of whether the case should be reheard by the full en banc court (comprised of *all* active judges as opposed to the 11 ordinarily selected randomly for standard en banc review).)

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Stale Information

U.S. v. Estey, 595 F.3d 836 (8th Cir.) February 19, 2010

Because child pornographers commonly retain pornography for a lengthy period of time, evidence developed within several months (5 months in this case) of an application for a search warrant for a child pornography collection and related evidence is not stale.

The 4th and 9th circuits agree (cites omitted)**.**

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

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Mobile Conveyance Exception (Automobile Exception)

U.S. v. Lewis, 2010 U.S. App. LEXIS 10872 (4th Cir.) May 27, 2010

The police may approach an individual on a public street and ask questions without implicating the *Fourth Amendment's* protections. The officers were thus entitled to approach Lewis, who was sitting in his parked car, late at night. As they approached the vehicle, one of the officers related to Officer Mills that there was an open beer bottle in the vehicle. Mills then approached the driver-side window and asked Lewis for identification. When Lewis rolled down his window to comply, Mills smelled the odor of marijuana emanating from the vehicle. At that point, the officers possessed probable cause to search the vehicle, and they were entitled to order Lewis out of the vehicle while their search was accomplished.

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

******

U.S. v. Navas, 597 F.3d 492 (2nd Cir.) March 8, 2010

After getting consent to enter a warehouse, agents conducted a warrantless search of the unhitched trailer part of a tractor/trailer rig. The cab was not in the warehouse.
The Supreme Court has relied on two rationales to explain the reasonableness of a warrantless search pursuant to the automobile exception: vehicles' inherent mobility and citizens' reduced expectations of privacy in their contents.

A vehicle's inherent mobility — not the probability that it might actually be set in motion — is the foundation of the mobility rationale. When the Supreme Court introduced the mobility rationale in *Carroll v. U.S.*, 267 U.S. 132 (1925), it referenced "wagon[s]," which, like trailers, require an additional source of propulsion before they can be set in motion. At least for purposes of the Fourth Amendment, a trailer unhitched from a cab is no less inherently mobile than a wagon without a horse. The trailer remained inherently mobile as a result of its own wheels and the fact that it could have been connected to *any* cab and driven away. The fact that the trailer was detached from a cab with its legs dropped, did not eliminate its inherent mobility. Even where there is little practical likelihood that the vehicle will be driven away, the automobile exception applies when that possibility exists because of the vehicle's inherent mobility.

The very function of the automobile exception is to ensure that law enforcement officials need not expend resources to secure a readily mobile automobile during the period of time required to obtain a search warrant.

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

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U.S. v. Banuelos-Romero, 597 F.3d 763 (5th Cir.) February 23, 2010

Law enforcement may conduct a warrantless search of an automobile if (1) the officer conducting the search had probable cause to believe that the vehicle in question contained property that the government may properly seize; and (2) exigent circumstances justified the search. (Cites to prior 5th Circuit cases omitted.)

Merely fitting a drug courier profile will not suffice to raise probable cause. Evidence of a non-standard hidden compartment supports probable cause.

In a vehicle stop on a highway, the fact of the automobile's potential mobility supplies the requisite exigency.

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

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Exigent Circumstances

Emergency Scene

Armijo v. Peterson, 601 F.3d 1065 (10th Cir.) April 13, 2010

In response to a bomb threat at a local high school, police made a warrantless entry into a home, conducted a protective sweep, and temporarily seized the lone occupant.

The emergency exigency authorizing a warrantless entry exists when (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable.

In such an emergency, officers do not need probable cause. Reasonable belief does not require absolute certainty, and the standard is more lenient than probable cause.

The emergency exigency exception not only justifies warrantless entries into a house to aid *a potential victim in the house*, but also justifies warrantless entries into a house to stop *a person or property inside the house* from immediately harming *people not in or near the house*.

A protective sweep of a residence to ensure officer safety is not only authorized incident to an arrest, but may also be conducted under the exigent-circumstances doctrine *if* reasonable grounds exist to search to protect the safety of someone besides the officers.

Absent exigent circumstances and probable cause, or a warrant, officers may not enter a home and seize an individual for routine investigatory purposes, no matter whether the seizure is an investigatory stop or an arrest. In that sense, Terry stops have no place in the home. However, just as exigent circumstances permit a warrantless home entry, emergencies may justify a warrantless seizure in the home.

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

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Consent Searches

U.S. v. Garcia, 604 F.3d 186 (5th Cir.) April 14, 2010

When an officer asks for consent to search a vehicle and does not express the object of the search, the searched party, who knows the contents of the vehicle, has the responsibility explicitly to limit the scope of the search. Otherwise, an affirmative response to a general request is evidence of general consent to search.

When officers request permission to search a vehicle after asking whether it was carrying "anything illegal," it is natural to conclude that they might look for hidden compartments or containers.

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

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Third Party Consent

U.S. v. King, 604 F.3d 125 (3rd Cir.) April 30, 2010

The *Georgia v. Randolph*, 126 S. Ct. 1515 (2006), holding that the consent of one party with authority is trumped by the refusal of another present party with authority is limited to searches and seizures of the home.

The consent by one party to the seizure of a computer shared equally without password protection is valid even when the other party is present and refuses consent.

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

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Border Searches

US v. Alfaro-Moncada, 2010 U.S. App. LEXIS 10841 (11th Cir.) May 27, 2010

The suspicionless search of the defendant's cabin on a foreign cargo ship, while it was docked at the Antillean Marine on the Miami River, was not a violation of the *Fourth Amendment*. The CBP Agricultural Enforcement Team had statutory authority under *19 U.S.C. § 1581 (a)* to search the defendant's cabin.

Given the dangers we face, the paramount national interest in conducting border searches to protect this nation and its people makes it unreasonable to require any level of suspicion to search any part of a foreign cargo vessel coming into this country. Crew members' cabins are no exception because, like any other part of a vessel, they can be used to smuggle in weapons of mass destruction, illegal devices, or other contraband, such as child pornography, as was the case here.

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

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Computers and Electronic Devices

U.S. v. Bynum, 604 F.3d 161 (4th Cir.) May 5, 2010

The defendant raised two *Fourth Amendment* challenges to the district court's refusal to suppress evidence seized during the search of the Bynum home, including the computer that uploaded and

stored the child pornography at issue here.

The 'touchstone' of *Fourth Amendment* analysis is whether the individual has a reasonable expectation of privacy in the area searched. In order to demonstrate a legitimate expectation of privacy, Bynum must have a subjective expectation of privacy, and that subjective expectation must be reasonable.

In this case, Bynum can point to no evidence that he had a subjective expectation of privacy in his internet and phone "subscriber information"--*i.e.*, his name, email address, telephone number, and physical address--which the Government obtained through the administrative subpoenas. Bynum voluntarily conveyed all this information to his internet and phone companies. In so doing, Bynum assumed the risk that those companies would reveal that information to the police. Moreover, Bynum deliberately chose a screen name derived from his first name, *compare* "markie_zkidluv6" *with* "Marques," and voluntarily posted his photo, location, sex, and age on his Yahoo profile page.

Even if Bynum could show that he had a subjective expectation of privacy in his subscriber information, such an expectation would not be objectively reasonable. Indeed, every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the *Fourth Amendment's* privacy expectation.

Additionally, Bynum presented no reason as to why minor date discrepancies, or the delay between the administrative subpoenas and the request for the warrant undermine the magistrate judge's reasonable conclusion the home of Bynum's mother contained evidence of a crime.

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

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U.S. v. Vosburgh, 602 F.3d 512 (3rd Cir.) April 20, 2010

Deciding this issue for the first time, the court holds:

IP addresses are fairly "unique" identifiers. Evidence that the user of a computer employing a particular IP address possessed or transmitted child pornography can support a search warrant for the physical premises linked to that IP address.

Although there undoubtedly exists the possibility of mischief and mistake, the IP address provides a substantial basis to conclude that evidence of criminal activity would be found at the defendant's home, even if it did not *conclusively* link the pornography to the residence.

Although it is technically possible that the offending emails "originate outside of the residence to which the IP address was assigned, it remains *likely* that the source of the transmissions is inside that residence.

In those cases where officers know or ought to know, for whatever reason, that an IP address does not accurately represent the identity of a user or the source of a transmission, the value of that IP address for probable cause purposes may be greatly diminished, if not reduced to zero. The 5th, 6th, 8th, 9th, and 10th circuits agree (cites omitted).

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

******

U.S. v. Borowy, 595 F.3d 1045 (9th Cir.) February 17, 2010

Defendant purchased and installed a version of the file sharing software LimeWire that allows the user to prevent others from downloading or viewing the names of files on his computer. He attempted, but failed, to engage this feature. Even though his purchase and attempt show a subjective expectation of privacy, his files were still entirely exposed to public view. Anyone with access to LimeWire could download and view his files without hindrance. Defendant's subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access. The agent's access to defendant's files through LimeWire and the use of a keyword search to locate these files did not violate the Fourth Amendment.

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

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U.S. v. Henderson, 595 F.3d 1198 (10th Cir.) February 17, 2010

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court never-the-less ruled the evidence admissible through the good faith exception to the exclusionary rule.

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U.S. v. Williams, 592 F.3d 511 (4th Cir.) January 21, 2010

The sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents.

The search warrant authorized a search of defendant's computers and digital media for evidence relating to the designated Virginia crimes of making threats and computer harassment. To conduct that search, the warrant impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization. To be effective, such a search could not be limited to reviewing only the files' designation or labeling, because the designation or labeling of files on a computer can easily be manipulated to hide their substance. Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality.

Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.

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

******

U.S. v. Mann, 592 F.3d 779 (7th Cir.) January 20, 2010

Unlike a physical object that can be immediately identified as responsive to the warrant or not, computer files may be manipulated to hide their true contents. Images can be hidden in all manner of files, even word processing documents and spreadsheets. Criminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer.

The search warrant authorized a search for "images of women in locker rooms and other private places." Given the nature of the search and the fact that images of women in locker rooms could be virtually anywhere on the computers, using software known as "forensic tool kit" ("FTK") to catalogue the images on the computer into a viewable format did not, without more, exceed the scope of the warrant.

But, the "FTK" software also employed a filter known as "KFF (Known File Filter) Alert." The "KFF Alert" flags those files identifiable from a library of known files previously submitted by law enforcement—most of which are images of child pornography. The "KFF Alert" flagged four files. Once those files had been flagged, the detective knew (or should have known) that files in a data base of known child pornography images would be outside the scope of the warrant. The detective exceeded the scope of the warrant by opening the four flagged "KFF Alert" files.

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

Editor's Note: The Court rejected the rule set out by the 9th Circuit in U.S. v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009), that directs magistrate judges to insist that the government waive reliance on the plain view doctrine. Instead, the court counsels officers and others involved in searches of digital media to exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described.

(On November 4, 2009, the 9th Circuit entered an order asking the parties in U.S. v. Comprehensive Drug Testing, Inc. to brief the question of whether the case should be reheard by the full en banc court (comprised of *all* active judges as opposed to the 11 ordinarily selected randomly for standard en banc review).)

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GPS Tracking Devices

US. v Marquez, 605 F.3d 604 (8th Cir.) May 21, 2010

Even if Acosta-Marquez had standing, we would find no error. A person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another. When electronic monitoring does not invade upon a legitimate expectation of privacy, no search has occurred. When police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time.

In this case, there was nothing random or arbitrary about the installation and use of the device. The installation was non-invasive and occurred when the vehicle was parked in public. The police reasonably suspected that the vehicle was involved in interstate transport of drugs. The vehicle was not tracked while in private structures or on private lands.

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

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U.S. v. Pineda-Moreno, 591 F.3d 1212 (9th Cir.) January 11, 2010

Agents installed mobile tracking devices on the underside of defendant's Jeep on seven different occasions. Each device was about the size of a bar of soap and had a magnet affixed to its side, allowing it to be attached to the underside of a car. On five of these occasions, the vehicle was located in a public place. On the other two occasions, between 4:00 and 5:00 a.m., agents attached the device while the Jeep was parked in defendant's driveway a few feet away from his trailer. The driveway leading up to the trailer was open, and there was no fence, gate, or "No Trespassing" sign.

The undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy.

Even assuming the Jeep was on the curtilage, it was parked in his driveway, which is only a semiprivate area. In order to establish a reasonable expectation of privacy in his driveway, defendant must detail the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it. Because defendant did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation

of privacy in it, regardless of whether a portion of it was located within the curtilage of his home. The time of day agents entered the driveway is immaterial.

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

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Qualified Immunity / Civil Liability

Carmichael v. Village of Palatine, 605 F.3d 451 (7th Cir.) May 21, 2010

The record before us contains no evidence that Officer Sharkey had any factual basis for stopping the plaintiffs at gun point. He admits that the reasons that he initially gave for stopping the car, absence of a front license plate and tinted windows, were not known to him at the time that he affected the stop. The record shows, moreover, that the reason that he later gave for the stop, the absence of tail and brake lights, was not true. As the state court determined during the earlier criminal proceeding against the plaintiffs, there is simply no basis in the record upon which a determination of probable cause can be sustained. Certainly, any reasonable police officer, acting at the time Officer Sharkey acted, would have known this elementary principle of the law of arrest. Officer Sharkey is not entitled to qualified immunity with respect to the stop.

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

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Elliot-Park v. Manglona, 592 F.3d 1003 (9th Cir.) January 12, 2010

While an officer's discretion in deciding whom to arrest is certainly broad, it cannot be exercised in a racially discriminatory fashion. There is no right to state protection against madmen or criminals, but there is a constitutional right (equal protection) to have police services administered in a nondiscriminatory manner—a right that is violated when a state actor denies such protection to disfavored persons. A complete withdrawal of police protective services based on race or ethnicity violates equal protection. Diminished police services also don't satisfy the government's obligation to provide services on a non-discriminatory basis. The government may not racially discriminate in the administration of *any* of its services.

The right to non-discriminatory administration of protective services is clearly established. The very purpose of 42 U.S.C § 1983 was to provide a federal right of action against states that refused to enforce their laws when the victim was black.

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

******

Use of Force

Penley v. Eslinger, 605 F.3d 843 (11th Cir.) May 3, 2010

Christopher Penley, a fifteen-year-old middle school student brought a pistol to school. He briefly held one classmate hostage who escaped before the police officers arrived. Penley eventually took refuge in a bathroom, and on three occasions walked laterally past the open bathroom door, aiming his gun at the police officers. On Penley's third pass Lieutenant Weippert fired a single shot from his scoped semi-automatic rifle, striking Penley in the head. Police entered the bathroom and discovered that Penley's gun was a plastic air pistol modified to look like a real gun. Penley died two days later.

The Penleys' claim that, when he shot their son, Lieutenant Weippert used excessive force, in violation of Mr. Penley's *Fourth Amendment* right to be free from unreasonable seizure.

To satisfy the objective reasonableness standard imposed by the *Fourth Amendment*, Lieutenant Weippert must establish that the countervailing government interest was great. Analysis of this balancing test is governed by (1) the severity of the crime at issue; (2) whether Mr. Penley posed an immediate threat to the officers or others; and (3) whether he actively resisted arrest. In this case, the reasonableness analysis turns on the second of these factors: presence of an imminent threat.

Both the first and third factors weigh in Lieutenant Weippert's favor. Bringing a firearm to school, threatening the lives of others, and refusing to comply with officers' commands to drop the weapon are undoubtedly serious crimes. As the Penleys themselves concede, they "have never taken the position that because the gun turned out to be a toy, the situation was any less serious." The third factor favors a finding of reasonableness as well. While the Penleys argue that Mr. Penley did not attempt to run from the bathroom, they do not contest that their son refused to comply with repeated commands to drop his weapon. Non-compliance of this sort supports the conclusion that use of deadly force was reasonable.

Though a closer call, the second factor also supports Lieutenant Weippert's argument that he acted reasonably. Mr. Penley demonstrated his dangerous proclivities by bringing to school what reasonable officers would believe was a real gun. He refused to drop the weapon when repeatedly commanded to do so. Most importantly, he pointed his weapon several times at Lieutenant Weippert and Deputy Maiorano. We have held that a suspect posed a grave danger under less perilous circumstances than those confronted by Lieutenant Weippert.

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

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Brooks v. Seattle, 599 F.3d 1018 (9th Cir.) March 26, 2010

The use of the Taser in drive-stun mode is painful, certainly, but also temporary and localized, without incapacitating muscle contractions or significant lasting injury. This amount of force is more on par with pain compliance techniques, which this court has found involve a "less significant" intrusion upon an individual's personal security than most claims of force, even when they cause pain and injury. This quantum of force is less than the intermediate.

The Officers were attempting to take Brooks into custody for refusing to sign the Citation to Appear. Her behavior also gave the officers probable cause to arrest her for obstructing a police officer in the exercise of his official duties. Although obstructing an officer is a more serious offense than the traffic violations, it is nonetheless not a serious crime.

It would also be incorrect to say Brooks posed *no* threat to officers. While she might have been *less* of a threat because her force so far had been directed solely at immobilizing herself, a suspect who repeatedly refuses to comply with instructions or leave her car escalates the risk involved for officers unable to predict what type of noncompliance might come next. That Brooks remained in her car, resisting even the pain compliance hold the officers first attempted, also reveals that she was not under their control.

There is little question that Brooks resisted arrest: the district court noted she "does not deny that she used force to resist the [O]fficers' efforts," she grasped the steering wheel and wedged herself between the seat and steering wheel, and she refused to get out of the car when asked. Her conduct is classified as "active resistance."

The officers gave multiple warnings that a Taser would be used and explained its effects. Even though the Taser was used three times in this case, which constitutes a greater application of force than a single tasing, in light of the totality of the circumstances, this does not push the use of force into the realm of excessive.

This case presents a less-than intermediate use of force, prefaced by warnings and other attempts to obtain compliance, against a suspect accused of a minor crime, but actively resisting arrest, out of police control, and posing some slight threat to officers. The officers' behavior did not amount to a constitutional violation.

Editor's Note: The Court did not hold that the use of a Taser in drive-stun mode can never amount to excessive force, but solely that such use was not excessive based upon Brooks's conduct.

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

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Espinosa v. City & County of San Francisco, 598 F.3d 528 (9th Cir.) March 9, 2010

Pointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force. The pointing of a gun at someone may constitute excessive force, even if it does not cause physical injury.

Where a police officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force. If an officer intentionally or recklessly violates a suspect's constitutional rights, then the violation may be a provocation creating a situation in which force was necessary and such force would have been legal but for the initial violation.

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

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Fifth Amendment

Self Incrimination

U.S. v. Estey, 595 F.3d 836 (8th Cir.) February 19, 2010

Agents appropriately advised defendant of his rights prior to a noncustodial interview by telling him that he did not have to speak with them if he chose not to do so, that he had the right to refuse to answer all or any particular question, and that he was free to leave. The practice of agents providing such advice is a proper method to ensure that a noncustodial interview is not misinterpreted as a custodial interrogation and to avoid *Miranda* problems.

Because child pornographers commonly retain pornography for a lengthy period of time, evidence developed within several months (5 months in this case) of an application for a search warrant for a child pornography collection and related evidence is not stale.

The 4th and 9th circuits agree (cites omitted).

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

******

U.S. v. Allmon, 594 F.3d 981 (8th Cir.) February 10, 2010

A witness who has previously testified may not assert a Fifth Amendment privilege and refuse to give precisely the same testimony in a subsequent hearing. Testifying consistently with his prior testimony would not expose the witness to any further jeopardy beyond that which existed by virtue of prior testimony.

A witness who has previously testified may not assert a Fifth Amendment privilege and refuse to testify in a subsequent hearing because fear of reprisals would cause him to commit perjury for which he could then be prosecuted. The Fifth Amendment confers no right upon a witness to avoid testifying simply because he refuses, for one reason or another, to do so truthfully.

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

******

Account Services Corp. v. U.S., 593 F.3d 155 (2nd Cir.) February 1, 2010

Under the long-established "collective entity rule," corporations do not have a Fifth Amendment privilege against self-incrimination. The custodian of corporate records, who acts as a representative of the corporation, cannot refuse to produce corporate records on Fifth Amendment grounds.

However, because the act of producing documents can be both incriminating and testimonial - such as when it confirms the documents' existence, possession, or authenticity - a subpoenaed individual may be able to resist production on Fifth Amendment grounds. Even though a corporation's custodian of records cannot resist a subpoena on Fifth **Amendment grounds,** should the custodian stand trial, the government cannot introduce evidence that the custodian himself produced the records since he acted in his representative and not personal capacity. The jury might permissibly infer that the custodian was the source of the documents based on his position at the corporation.

A one person corporation does not have a Fifth Amendment privilege against self-incrimination. The corporation must produce the subpoenaed records even when the corporation is "essentially a one-man operation." This is true even when, although the government cannot introduce evidence of the production, a jury could conclude that the "one-man" actually produced the incriminating records.

The 1st and 4th circuits agree (cites omitted).

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

******

U.S. v. Day, 591 F.3d 679 (4th Cir.) January 8, 2010

The Fourth Amendment does not provide protection against searches by private individuals acting in a private capacity. Similarly, the sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. The defendant bears the burden of proving that a private individual acted as a government agent.

There are two primary factors to be considered: (1) whether the government knew of and acquiesced in the private individual's challenged conduct; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation.

With regard to the first factor, there must be some evidence of government participation in or affirmative encouragement of the private search. Passive acceptance by the government is not enough. Virginia's extensive armed security guard regulatory scheme simply empowers security guards to make an arrest. This mere governmental authorization for an arrest, in the absence of more active participation or encouragement, is insufficient to implicate the Fourth and Fifth Amendments.

With regard to the second factor, even if the sole or paramount intent of the security officers had been to assist law enforcement (in deterring crime), such an intent would not transform a private action into a public action absent a sufficient showing of government knowledge and acquiescence under the first factor of the agency test.

Under the "public function" test typically utilized for assessing a private party's susceptibility to a civil rights suit under 42 U.S.C. § 1983, private security guards endowed by law with plenary police powers such that they are *de facto* police officers, may qualify as state actors. Security guards who are authorized to arrest only for offenses committed in their presence do not have plenary police powers and are not *de facto* police officers.

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

******

Miranda

Berghuis v. Thompkins, 2010 U.S. LEXIS 4379 (U.S. Supreme Court) June 1, 2010

Police arrested Thompkins and attempted to question him about his role in a shooting. After advising him of his rights under *Miranda* the officers began their interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police or that he wanted an attorney. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."

About 2 hours and 45 minutes into the interrogation, Detective Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. Thompkins moved to suppress the statements made during the interrogation arguing that he invoked his privilege to remain silent by not saying anything for a

sufficient period of time; therefore the interrogation should have ceased before he made his inculpatory statements.

Reversing the Sixth Circuit Court of Appeals, (see 12 Informer 08) the Court held that the *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.

A suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompkins's right to remain silent before interrogating him.

The Court held that there was no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. In *Davis v. United States, 512 U.S. 452 (1994),* the Court held that when a suspect invokes the *Miranda* right to counsel he must do so "unambiguously". If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights. There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and . . . provide[s] guidance to officers" on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity.

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

******

Maryland v. Shatzer, 130 S. Ct. 1213, February 24, 2010

Lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*. Such incarceration is not necessarily "custody" for *Miranda* purposes. A subsequent waiver of *Miranda* rights by a suspect who has previously invoked right to counsel under *Miranda,* who remains in custody, and who is re-approached by law enforcement is presumed to be involuntary.

A break in Miranda custody of fourteen (14) days provides ample time for the suspect to get reacclimated to his normal life, to consult with friends and family and counsel, and shake off any

residual coercive effects of prior custody. After a fourteen (14) day break in custody, law enforcement may re-approach the suspect who is now back in custody. A waiver of Miranda rights then obtained is not presumed involuntary.

If a suspect invokes counsel under Miranda while in custody and is then released, nothing prohibits law enforcement from approaching, asking questions, and obtaining a statement without the Miranda lawyer present from the suspect who remains out of custody.

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

Editor's Note: The majority and Justice Thomas raise the specter of a "catch and release" tactic where, after invoking counsel, a suspect is released and then re-arrested. Unless fourteen (14) days elapse between release and re-arrest, the previous invocation remains effective. Although it does not expressly state so, Justice Thomas suggests that the majority opinion requires law enforcement to wait fourteen (14) days after release before re-approaching a suspect who remains out of custody after previously invoking counsel under *Miranda*.

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Florida v. Powell, 130 S. Ct. 1195, February 23, 2010

Miranda warnings that failed to expressly state that the suspect had a right to have a lawyer present during the questioning, but advised that he had "the right to talk to a lawyer before answering any of our questions" and the right to exercise that right at "anytime you want during this interview," adequately conveyed his rights under *Miranda.*

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

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U.S. v. Guzman, 603 F.3d 99 (1st Cir.) May 3, 2010

The government indicted Guzman for two counts of arson in violation of 18 U.S.C. § 844 (i) for fires that occurred on April 3 and June 9, 2003. After his arrest on June 9, Guzman was taken to the police station and read his *Miranda* rights. Guzman invoked his right to counsel and was not questioned further. Guzman was charged in state court for the June 9 arson and was released on bail from July 2003 until November 2003 when he was returned to state custody for violating conditions of his bail.

On November 12, 2003 two ATF agents traveled to the correctional facility to interview Guzman about the April 3 arson. Guzman agreed to meet with the agents and signed a form consenting to the interview. At the outset of the meeting, the agents advised Guzman of his *Miranda* rights, and Guzman signed the top half of a form acknowledging that he had been advised of his rights. The bottom half of the form, containing a waiver of *Miranda* rights, remained unsigned at this time. Guzman was also told by the agents several times that he could leave the meeting at any time.

The ATF agents told Guzman that they were there to speak about the April 3 fire. After listening to the agents for about an hour, Guzman responded, saying that the April 3 fire had been "bothering him." He gave his version of the events and admitted that he had helped Cruz commit the arson by providing fuel and acting as a lookout. After Guzman had told his story, the ATF agents asked Guzman to provide a written or recorded version of his statement. Guzman said that he would do so only with his lawyer present. The agents ceased questioning him but asked Guzman to sign the bottom half of the *Miranda* waiver form, indicating that he had waived his rights and agreed to talk with them. Guzman signed the waiver at approximately 1:15 p.m., but, at the agents' request, Guzman indicated on the form that he had waived his rights at 12:15 p.m., when he began telling his version of events to the officers.

On appeal Guzman argued that he was in the ATF agents' custody at the time that he gave the November 12 statement, and that, as a result, his June 9 invocation of his right to counsel barred the ATF agents from initiating further interrogation, even though he was released on bail for a period of about four months between the time of the first and second interrogations. Because of the very recent Supreme Court decision in *Shatzer*, Guzman's argument fails. Even assuming arguendo that the November 12 meeting between Guzman and the agents was a "custodial interrogation," *Shatzer* forecloses the claim.

In *Shatzer*, the Supreme Court established a bright-line rule that if a suspect who has invoked his right to have counsel present during a custodial interrogation is released from police custody for a period of fourteen days before being questioned again in custody, then the *Edwards* presumption of involuntariness will not apply.

In this case, Guzman was released on bail for about four months between the time that he originally invoked his right to counsel and the ATF agents' subsequent attempt to question him. This far exceeds the time period required by *Shatzer* and thus its break-in-custody exception to *Edwards* applies.

The court also found that Guzman voluntarily waived his *Miranda* rights when he spoke to the ATF agents about the April 3 fire.

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

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U.S. v. Ellison, 2010 U.S. App. LEXIS 7814 (1st Cir.) April 15, 2010

While being held at a county jail charged with attempting to set fire to the building where his ex-girlfriend lived, defendant indicated his willingness to give the police information about a pair of unsolved robberies elsewhere. The next day a second interview took place in the jail library. Defendant was brought there in restraints, but these were removed. Defendant was told that he was not under arrest for the robberies, did not have to answer any questions, and was free to end the interview at any time by pushing a button on the table to summon the guards. Defendant was not advised of other rights required by *Miranda*.
Custody under *Miranda* means a suspect is not free to go away; but, a suspect's lack of freedom to go away does not necessarily mean that questioning is custodial interrogation for purposes of

Miranda. Never is this distinction more important than when the subject of interrogation is independently incarcerated. Even when he is given the option to end the interrogation as he chooses, he is not in the position of a suspect who is free to walk away and roam around where he pleases. Still, the restrictions on his freedom do not necessarily equate his condition during any interrogation with *Miranda* custody. In the usual circumstances of someone serving prison time following a conviction, so long as he is not threatened with harsher confinement than normal until he talks, he knows that the worst that can happen to him will be his return to prison routine, and that he will be back on the street (in most cases) whether he answers questions or refuses.

The 4th, 9th, and 11th circuits agree (cites omitted).
It is true that the condition of someone being held while awaiting trial, like defendant, is not exactly the same as the convict's position, since the suspect might reasonably perceive that the authorities have a degree of discretion over pretrial conditions, at least to the point of making recommendations to a court. But we see nothing in the facts of this case that would be likely to create the atmosphere of coercion subject to *Miranda* concern.

Click HERE for the court's opinion.

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U.S. v. Hernandez-Mendoza, 600 F.3d 971 (8th Cir.) April 6, 2010

The Trooper's act of leaving the defendants alone in his vehicle, with a recording device activated, was not the functional equivalent of express questioning. The Trooper may have expected that the two men would talk to each other if left alone, but an expectation of voluntary statements does not amount to deliberate elicitation of an incriminating response. Officers do not interrogate a suspect simply by hoping that he will incriminate himself.
The Trooper had legitimate security reasons for recording the sights and sounds within his vehicle. The defendants had no reasonable expectation of privacy in a marked patrol car, which is owned and operated by the state for the express purpose of ferreting out crime.

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

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U.S. v. Cook, 599 F.3d 1208 (10th Cir.) April 5, 2010

While defendant was incarcerated at a county detention center as a federal pretrial detainee in connection with a federal drug case, one of his cellmates was strangled to death in the cell.

Two months later, in March, sheriff's office investigators had defendant brought from his housing area to an interview room for questioning. Almost immediately after being brought to the interview room, defendant stated that he did not want to speak to the investigators and that he had a right to an attorney. Defendant went to the door and asked to be returned to his cell. The interview was terminated, and defendant was taken back to his cell.

Federal authorities promised to recommend leniency for an informant, himself facing a lengthy federal sentence, should he agree to approach defendant and question him about the murder. The FBI then became involved in the murder investigation, and the sheriff's office withdrew shortly thereafter. The FBI was not informed of defendant's March encounter with the sheriff's office investigators, or that he invoked his *Miranda* rights during that encounter.

In June, through the efforts of the FBI, the cooperating informant was wired and placed in a cell with defendant. The cooperating informant asked defendant about the murder, and defendant described the roles that each of the three inmates played in the killing.

Defendant was completely unaware that he was in the presence of a government agent. Because *Miranda* and its progeny were directed at the prevention of pressure and coercion in custodial interrogation settings, the fears motivating exclusion of confessions which are the product of such custodial interrogation settings are simply not present in this case.

Deception which takes advantage of a suspect's misplaced trust in a friend or fellow inmate does not implicate the right against self-incrimination or the Fifth Amendment right to counsel. A suspect in those circumstances speaks at his own peril. The concerns underlying *Miranda* are inapplicable in the undercover agent context, even when the suspect is incarcerated.

Under *Edwards v. Arizona*, 451 U.S. 477 (1981), after an accused clearly invokes his right to have counsel present during a custodial interrogation, officers must cease all questioning and may not reinitiate questioning on any matter until counsel is provided, unless the accused himself initiates further communications, exchanges, or conversations with the police. But in order to implicate *Miranda* and *Edwards*, there must be a custodial interrogation. *Edwards* depended on the existence of custodial interrogation. In this case, defendant was unaware that he was speaking to a government agent. As a result, his questioning lacked the police domination inherent in custodial interrogation. Thus, without custodial interrogation, *Edwards* does not apply. And because *Edwards* does not apply, it is irrelevant that defendant had previously invoked his right to counsel in March when questioned by the sheriff's office investigators.

Under *Michigan v. Mosley*, 423 U.S. 96 (1975) law enforcement must honor an individual's invocation of the right to remain silent in order to counteract the coercive pressures of the custodial setting. Defendant did not know he was speaking to a government agent, and therefore, he was not subject to the pressures of a custodial setting. Thus, *Mosley* does not apply.

Defendant spoke freely with the cooperating informant, was not coerced, and the circumstances surrounding their conversation were nothing akin to police interrogation. Such casual questioning by a fellow inmate does not equate to "police interrogation," even though the government coordinated the placement of the fellow inmate and encouraged him to question defendant.

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

Editor's Note: The Court noted that since it "concluded that Cook was not subject to custodial interrogation when he made the incriminating statements at issue,"…"the rule announced in [*Maryland v. Shatzer*, 130 S. Ct. 1213 (2010)] is likewise inapplicable."

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Conspiracy and Parties

U.S. v. Torres, 604 F.3d 58 (2nd Cir.) May 5, 2010

The evidence at trial, viewed as a whole and taken in the light most favorable to the government, was insufficient to permit the jury to find beyond a reasonable doubt that Torres knew that the packages addressed to him contained narcotics, and hence was insufficient to establish that he had knowledge of the purposes of the conspiracy of which he was accused.

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

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Mistake of Law

U.S. v. Prince, 593 F.2d 1178 (10th Cir.) February 1, 2010

Even if it were a mistake of law for ATF agents to conclude that "AK-47 flats" i.e., pieces of flat metal containing holes and laser perforations, are "receivers" and therefore "firearms," such a mistake of law carries no legal consequence if it furnishes the basis for a consensual encounter, as opposed to a detention or arrest.

It is well established that consensual encounters between police officers and individuals implicate no Fourth Amendment interests. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual and request consent to search property belonging to the individual that is otherwise protected by the Fourth Amendment. The agents' purported mistake of law neither independently resulted in a Fourth Amendment violation nor otherwise "tainted" the entire investigation.

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

Editor's Note: The Court declined to decide whether the flats at issue are "receivers" and therefore "firearms."

******

Defenses

Necessity

U.S. v. Kilgore, 591 F.3d 890 (7th Cir.) January 8, 2010

In the case of a felon in possession of a firearm, the justification (necessity) defense only applies to the individual who in the heat of a dangerous moment disarms someone else, thereby possessing a gun briefly in order to prevent injury to himself. It is available when the felon, not being engaged in criminal activity, does nothing more than grab a gun with which he or another is being threatened (the other might be the possessor of the gun, threatening suicide). The defense is a rare one and is unavailable in a setting where no ongoing emergency exists or where legal alternatives to possession are available.

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

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FEDERAL RULES OF EVIDENCE

FRE 701 (Lay Witness Testimony)

U.S. v. Roe, 2010 U.S. App. LEXIS 10865 (4th Cir.) May 27, 2010

Sergeant Russell's testimony was properly admitted as lay testimony, pursuant to *Fed. R. Evid. 701*. He was in charge of the unit that issues handgun carry permits as well as security guard and private detective certifications in Maryland. Based on his personal knowledge acquired in that capacity he was qualified to testify as to the requirements for getting such permits and certifications, and to state what possessing those permits allowed an individual to do.

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

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FRE 801 (Hearsay)

U.S. v. Buchanan, 604 F.3d 517 (8th Cir.) May 4, 2010

The district court did not abuse its discretion in admitting the officers' testimony regarding the numeric inscription on the safe where the narcotics were found. The officers' testimony that the safe contained the inscription "2010" is not hearsay; instead, the inscription is similar to the marking of "Made in Spain" on the gun in *Thody*. (*U.S. v. Thody*, 978 F2d 625, 630 (10th Cir. 1992)). As the Tenth Circuit explained, such a marking is "technically not an assertion by a declarant" under *Rule 801*. Furthermore, the inscription was not offered "to prove the truth of the

matter asserted"--that the safe was, in fact, a 2010 model. Instead, it was admitted to show that the number on the safe matched the number on Buchanan's key.

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

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FRE 1002 (Best Evidence Rule)

U.S. v. Buchanan, 604 F.3d 517 (8th Cir.) May 4, 2010

Failure to seize the safe and introduce it into evidence did not implicate the Best Evidence Rule (FRE 1002), therefore the government witnesses could testify as to the inscription on the safe.

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

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MISCELLANEOUS CRIMINAL STATUTES

18 U.S.C. § 111

U.S. v. Williams, 602 F.3d 313 (5th Cir.) March 24, 2010

Looking at this issue for the first time, the court decides:

Title 18 U.S.C. § 111(a)(1) provides that
(a) In general—Whoever—
(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [federal officer] while engaged in or on account of the performance of official duties;
. . .
shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both,….

The statute contains two ambiguities. First, it distinguishes between misdemeanor and felony conduct by use of the undefined term "simple assault." Second, and central to this case, the statute appears to outlaw several forms of conduct directed against federal officers, only one of which is assault, but then distinguishes between misdemeanors and felonies by reference to the crime of assault.

Simple assault as an attempted or threatened battery.
Section 111(a)(1) prohibits more than assault, simple or otherwise. A misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct. The dual purpose of the statute is not simply to protect federal officers by punishing assault, but also to deter interference with federal law enforcement activities and ensure the integrity of federal operations by punishing obstruction and other forms of resistance.

The 6th Circuit agrees (cite omitted).

The 9th and D.C. circuits disagree (cites omitted).

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

******

18 U.S.C. § 641

U.S. v. Reagan, 596 F.3d 251 (5th Cir.) February 4, 2010

Looking at this issue for the first time, the court decides:

Title 18 U.S.C.§ 641 punishes "[w]hoever embezzles, steals, purloins or knowingly converts to his use . . . *any* record, voucher, money, or thing of value of the United States." (emphases added). Each individual transaction in which government money is received is a separate count, even if the transaction is part of an overarching scheme.

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

Editor's Note: No other circuits have addressed this specific issue.

******

18 U.S.C. § 922

U.S. Cook, 603 F.3d 434 (8th Cir.) May 7, 2010

To convict a defendant of being a felon in possession of ammunition, the government must prove beyond a reasonable doubt that (1) the defendant had previously been convicted of a crime punishable by a term of imprisonment exceeding one year, (2) the defendant knowingly possessed ammunition, and (3) the ammunition had traveled in or affected interstate commerce.
The testimony that Cook was found in possession of the loaded revolver is sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Cook knowingly possessed the ammunition in the revolver.
Click **HERE** for the court's opinion.

******

U.S. v. Nevils, 598 F.3d 1158 (9th Cir.) March 19, 2010

The 9th Circuit, *en banc*, vacates and reverses the earlier panel decision dated November 20, 2008, and reported in 12 Informer 08, that held the government had failed to prove

Nevils had *knowing possession* of the firearms. The conviction for felon in possession of firearms is now affirmed.

The evidence is sufficient to support a reasonable conclusion that Nevils knew he possessed firearms and ammunition. Nevils's actual possession of two loaded weapons, each lying on or against Nevils's body, would permit a reasonable juror to infer that Nevils knew of those weapons. Further, Nevils initially reached toward his lap when the officers first awakened him, raising the inference that he knew a loaded weapon was within reach. Nevils later cursed his cohorts who had left him in this compromising situation without warning him that the police were in the vicinity. Finally, and contrary to Nevils's representations, there was evidence tying Nevils to the particular apartment where he was found: Nevils had been arrested on narcotics and firearms charges in the same apartment just three weeks earlier. This evidence, construed in favor of the government, raises the reasonable inference that Nevils was stationed in Apartment 6 and armed with two loaded firearms in order to protect the drugs and cash in the apartment when he fell asleep on his watch.

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

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U.S. v. DuBose, 598 F.3d 726 (11th Cir.) March 1, 2010

Looking at this issue for the first time, the court decides:

Title 18 U.S.C. § 922(g)(8) prohibits possession of a firearm while subject to a protective order. Among other requirements, the protective order must either include a finding that such person represents a credible threat to the physical safety of such intimate partner or child (§ 922(g)(8)(C)(i)) or by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury (§ 922(g)(8)(C)(ii)). Since the protective order issued against DuBose, a lawyer and judge, did not include a specific finding that he was a credible threat, it must satisfy § 922(g)(8)(C)(ii).

Section 922(g)(8) does not require that the precise language found in subsection (C)(ii) must be used in a protective order for it to qualify under the statute. This order "restrained and enjoined" DuBose "from intimidating, threatening, hurting, harassing, or in any way putting the plaintiff, [], her daughters and/or her attorney in fear of their lives, health, or safety." The definition of "hurt" as a verb includes "to inflict with physical pain." Thus, the order's language restraining DuBose from "hurting" his wife or her daughters, at the very least, satisfies subsection (C)(ii)'s requirement that the order explicitly prohibit the use, attempted use, or threatened use of "physical force" that would reasonably be expected to cause bodily injury.

The 1st and 4th circuits, the only other circuits to address this specific issue, agree (cites omitted). Click **HERE** for the court's opinion.

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18 U.S.C. § 924

U.S. v. Doody, 600 F.3d 752 (7th Cir.) April 2, 2010

Looking at this issue for the first time, the court decides:

When a defendant receives a gun for drugs, he "possesses" the firearm in a way that "further[s], advance[s], or help[s] forward" the distribution of drugs in violation of 18 U.S.C. § 924(c)(1)(A). The 1st, 5th, 6th, 9th, and 10th circuits agree (cites omitted).

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

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U.S. v. Gardner, 602 F.3d 97 (2nd Cir.) March 10, 2010

Deciding this issue for the first time, the court decides:

Although acquiring a firearm using drugs as payment does not constitute "using" the gun "during and in relation to a drug trafficking crime" (see Watson v. United States, 552 U.S. 74 (2007)), it does constitute "possessing" that firearm "in furtherance of a drug trafficking crime" in violation of 18 U.S.C. § 924(c)(1)(A).

The 1st, 3rd, 4th, 9th, and 10th circuits agree (cites omitted).

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

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18 U.S.C. § 926A

Revell v. Erickson, 598 F.3d 128 (3rd Cir.) March 22, 2010

The Firearm Owners' Protection Act ("FOPA"), 18 U.S.C. § 926A, allows gun owners licensed in one state to carry firearms through another state under certain circumstances. In essence, § 926A allows a person to transport a firearm and ammunition from one state through a second state to a third state, without regard to the second state's gun laws, provided that the traveler is licensed to carry a firearm in both the state of origin and the state of destination and that the firearm is not readily accessible during the transportation. A person transporting a firearm across state lines must ensure that the firearm and any ammunition being transported is not readily accessible or directly accessible from the passenger compartment of the transporting vehicle.
Only the most strained reading of the statute could lead to the conclusion that having the firearm and ammunition inaccessible while in a vehicle means that, during the owner's travels, they can be freely accessible for hours at a time as long as they are not in a vehicle.

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

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18 U.S.C. § 1001

US v. Boffil-Rivera, 2010 U.S. App. LEXIS 10838 (11th Cir.) May 27, 2010

To sustain a conviction for violation of *18 U.S.C. section 1001*, the government must prove (1) that a statement was made; (2) that it was false; (3) that it was material; (4) that it was made with specific intent; and (5) that it was within the jurisdiction of an agency of the United States.
There was sufficient evidence for a jury to conclude that the defendant's statement to the ICE agents was false, that the defendant intended to deceive the agents and that the statement was material because it was capable of influencing the agency's investigation.

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

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18 U.S.C. § 1028A

U.S. v. Maciel-Alcala, 598 F.3d 1239 (9th Cir.) March 25, 2010

Looking at this issue for the first time, the court decides:

The word "person" as used in 18 U.S.C. § 1028A, Aggravated Identity Theft, includes the living and the dead. The government does not have to prove the defendant used the identification of a person he knew at the time was alive.

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

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U.S. v. Abdelshafi, 592 F.3d 602 (4th Cir.) January 25, 2010

To establish a violation of § 1028A(a)(1), the Government must prove the defendant (1) knowingly transferred, possessed, or used, (2) without lawful authority, (3) a means of identification of another person, (4) during and in relation to a predicate felony offense.

Nothing in the plain language of the statute requires that the means of identification at issue must have been stolen. For sure, stealing and then using another person's identification would fall within the meaning of "without lawful authority." However, there are other ways someone could possess or use another person's identification, yet not have lawful authority to do so. Defendant may have come into lawful possession, initially, of Medicaid patients' identifying information and had lawful authority to use that information for proper billing purposes, but he did not have lawful authority to use Medicaid patients' identifying information to submit fraudulent billing claims.

The application of § 1028A(a)(1) is not limited to cases in which an individual's identity has been misrepresented. Such an interpretation is not supported by the plain text of the statute.

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

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18 U.S.C. § 1030

U.S. v. John, 597 F.3d 263 (5th Cir.) February 9, 2010

Title 18 U.S.C. § 1030(a)(2) makes it unlawful to…

(2) intentionally access[] a computer without authorization or exceed[s] authorized access, and thereby obtain[]--

(A) information contained in a financial record of a financial institution, or of a card issuer….

Under 18 U.S.C. § 1030(e)(6), the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter. . . ."

"Authorized access" or "authorization" may encompass limits placed on *the use* of information obtained by permitted access to a computer system and data available on that system when the user knows or reasonably should know that he or she is not authorized to access a computer and information obtainable from that access in furtherance of or to perpetrate a crime. To give but one example, an employer may "authorize" employees to utilize computers for any lawful purpose but not for unlawful purposes and only in furtherance of the employer's business. An employee would "exceed authorized access" if he or she used that access to obtain or steal information as part of a criminal scheme.

The 1st Circuit agrees (cite omitted).

The 9th Circuit disagrees, limiting "exceeds authorized access" to cases in which the defendant had authorized access to the computer but not to the specific information accessed (cite omitted).

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

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