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

February 2013

The Federal Law Enforcement -Informer-

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

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

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Free FLETC Informer Webinar

Back by Popular Demand: *U.S. v. Jones*

The landmark decision of *U.S. v. Jones* fundamentally changed the definition of a "search" under the *Fourth Amendment*. While the implications of this decision on the installation of tracking devices was straightforward, the decision in this case has far reaching implications regarding searches under the *Fourth Amendment* that may not be so readily apparent.

Join us **Thursday March 14, 2013 at 2:30 p.m. Eastern Time or Friday March 22, 2013 at 9:30 a.m. Eastern time** for a webinar where we will explain the current status of the law of searches under the *Fourth Amendment* in light of *U.S. v. Jones*. In this two-hour webinar, DHS Attorney and FLETC Senior Instructor Bruce-Alan Barnard will explain how *U.S. v. Jones* has altered the *Fourth Amendment* landscape. Now, through the Homeland Security Information Network, you can participate in one of Mr. Barnard's seminars from anywhere you have a computer and an internet connection.

As a subscriber to the FLETC Informer, there is **NO COST** to you for this seminar, **but space is limited!** To register for this webinar, please email bruce.barnard@fletc.dhs.gov indicating you would like to attend. All registrants will be sent detailed webinar login information.

CASE SUMMARIES

United States Supreme Court

Smith v. United States, 2013 U.S. Lexis 601 (U.S. 2013)

The court unanimously held a defendant charged with criminal conspiracy has the burden to prove he withdrew from the conspiracy. The *Due Process Clause* does not require the government to prove the absence of withdrawal beyond a reasonable doubt. The court noted the defendant has this burden whether his withdrawal terminates his criminal liability for the post-withdrawal acts of his co-conspirators, or whether it occurred outside the statute-of-limitations period, which would create a complete defense to the conspiracy charge.

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

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Bailey v. United States, 2013 U.S. LEXIS 1075 (U.S. 2013)

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

In *Michigan v. Summers*, the United States Supreme Court held it was reasonable under the *Fourth Amendment* for police officers to detain occupants found on the premises during the execution of a search warrant. No additional suspicion is required as the court held the detention allows the officers the opportunity to conduct a safe and efficient search.

The Second Circuit followed the Fifth, Sixth and Seventh Circuit Courts of Appeal and held the officers' authority under *Summers* to detain Bailey incident to the execution of the search warrant was not strictly confined to the physical premises of the apartment as long as the detention occurred as soon as practicable after Bailey left the apartment. The officers' decision to wait until Bailey had driven out of view of the apartment before detaining him was reasonable given their concern for officer safety and the potential of alerting other possible occupants of the apartment.

The Eighth and Tenth Circuits had declined to extend *Summers* to allow officers to detain an occupant at a location away from that residence even if the occupant was seen leaving the residence subject to a search warrant.

The Court held *Michigan v. Summers* does not permit the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant. Here, the officers detained

Bailey approximately one mile from his apartment, a point beyond any reasonable understanding of the immediate vicinity of the premises being searched. If police officers elect to detain an individual after he leaves the immediate vicinity of the premises being searched, that detention must be justified by some other rationale. For example, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause would be permitted.

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

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Florida v. Harris, 2013 U.S. LEXIS 1121 (U.S. 2013)

During a traffic stop, a police officer noticed Harris had an open beer can and appeared to be very nervous. After Harris refused to a consent search, the officer walked his drug-detection dog, Aldo, around Harris' truck. Aldo alerted at the driver's side door handle, leading the officer to believe he had probable cause to search Harris' truck. The officer did not find any drugs in Harris' truck but he did find two hundred loose pseudoephedrine pills and other ingredients commonly used in the manufacture of methamphetamine. Harris was arrested and charged with illegal possession of those ingredients.

The trial court held the officer had probable cause to search Harris' truck. The Florida Supreme Court reversed, holding the officer did not have probable cause to search Harris' truck, stating in part, "the fact that the dog has been trained and certified, by itself, is not enough to establish probable cause to search the interior of the vehicle." The court stressed the need for "evidence of the dog's performance history," including records showing "how often the dog has alerted in the field without contraband having been found."

The United States Supreme Court agreed with the trial court and reversed the Florida Supreme Court in holding the officer had probable cause to search Harris' truck.

In determining whether probable cause to search exists, the court has consistently looked to the totality of the circumstances and rejected rigid bright-line tests. The Florida Supreme Court ignored this established approach by creating a strict evidentiary checklist to assess a drug-detection dog's reliability. The question, similar to every inquiry into probable cause, is whether all the facts surrounding a dog's alert would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.

In this case, the state introduced substantial evidence describing Aldo's initial and refresher training and his continued proficiency in finding drugs. Because training records established Aldo's reliability in detecting drugs and Harris failed to undermine that showing, the officer had probable cause to search Harris' truck.

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

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Circuit Courts of Appeals

1st Circuit

Robinson v. Cook, 2013 U.S. App. LEXIS 1532 (1st Cir. Mass. Jan. 23, 2013)

Police officers arrested Robinson and his son for their involvement in a hit-and-run, and seized Robinson's car. After the charges were dismissed, Robinson and his son sued the officers for their warrantless arrests and for the warrantless seizure of Robinson's car.

The court held the officers were entitled to qualified immunity.

First, the officers had probable cause to seize Robinson's car under the automobile exception to the *Fourth Amendment's* warrant requirement. The victim's description of the car that struck him closely matched Robinson's car, which was found within a mile of the hit-and-run site, with its engine still warm. These circumstances created a fair probability Robinson's car was involved in the hit-and-run.

Next, the court held the officers had probable cause to arrest Robinson. The court found it was reasonable for the officers to rely on the victim's identification of Robinson's car as the one that struck him. It was also reasonable for the officers to believe Robinson when he told them he had been driving the car that day but not to believe him when he said he had only driven to work and then back home. An officer is not required to rely upon a suspect's self-serving statements when other evidence contradicts it.

Finally, the court held the officers had probable cause to arrest Robinson's son, on an aiding-and-abetting theory, based on the victim's identification of him as the passenger in the car that struck him. Even though it was a show-up identification, it occurred a few hours after the incident, the victim got a good look at the passenger in the car and the victim recognized the son's distinct hairstyle.

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

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2nd Circuit

Swartz v. Insogna, 2013 U.S. App. LEXIS 186 (2d Cir. N.Y. Jan. 3, 2013)

Swartz was a passenger in a car driven by his wife, Judy, when he saw a police officer using a radar device at an intersection. Swartz expressed his displeasure at what the officer was doing by reaching his right arm outside the passenger side window and extending his middle finger over the car's roof. When the Swartzs arrived at their destination a few minutes later, they saw a police car, with its lights flashing, behind them. Officer Insogna approached and requested Judy's driver's license and registration. After reviewing the documents, Insogna returned them and told the Swartzs they could go. Swartz told Insogna he would like to speak to him man-to-man, but another officer stepped in front of him. Swartz said to the officer, "I feel like an ass." When a third officer asked him what he said, Swartz repeated himself. The officer then arrested Swartz. At the police station, the officer told Swartz he had been arrested for disorderly conduct. The charge was eventually dismissed. Swartz sued Insogna and the other officers.

The court held Insogna did not have reasonable suspicion that criminal activity or a traffic violation was afoot; therefore, the stop was unlawful. The only act Insogna saw that caused him to initiate the stop was Swartz's giving-the-finger gesture. Insogna testified he thought Swartz, "was trying to get my attention for some reason," and he "was concerned for the safety of the female driver." The court did not find this explanation reasonable. Instead, the court commented, "this ancient gesture of insult is not the basis for a reasonable suspicion of a traffic violation or impending criminal activity." In addition, no passenger planning some criminal conduct toward the driver of a vehicle would call attention to himself by giving the finger to a police officer. Consequently, the court held Insogna was not entitled to qualified immunity.

The court held the other officers did not have probable cause to arrest Swartz for disorderly conduct. Even under New York's expansive definition of disorderly conduct, Swartz's comment could not create a reasonable suspicion a disorderly conduct violation had occurred. None of the officers' reports claimed Swartz was disruptive, threatening or creating a public disturbance. Because an objectively reasonable officer would not have believed probable cause existed to arrest Swartz, the officers were not entitled to qualified immunity.

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

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4th Circuit

United States v. Watson, 2013 U.S. App. LEXIS 30 (4th Cir. Md. Jan. 2, 2013)

Watson worked at a convenience store and lived in a room located on the second floor of the same building. After police officers arrested several individuals for dealing drugs near the convenience store, they discovered one of the individuals lived in one of the rooms on the second floor of the building. After the officers decided to obtain a search warrant for the building, they entered the convenience store and detained Watson and the owner of the store. Neither Watson nor the store owner were among the individuals the officers suspected of selling drugs and the officers did not have information linking Watson or the store owner to any kind of criminal activity. The officers kept Watson and the owner in the back area of the store for three hours while they waited for the search warrant. Other officers eventually returned with the warrant and during the search, officers went into Watson's room and found a handgun and ammunition. When asked about the items, Watson made an incriminating statement. Watson was charged with possession of a firearm and ammunition by a felon.

The court found while the seizure of the building may have been supported by probable cause, Watson's seizure was not. The officers did not suspect Watson of any criminal activity, and they had no reason to believe he might attempt to destroy or hide the evidence sought in the search warrant application. As a result, Watson's three hour detention was unreasonable and constituted an unlawful custodial arrest in violation of the *Fourth Amendment*.

The court further held Watson's incriminating statement should have been suppressed because it was the product of his unlawful custodial arrest. Watson's statement occurred as part of an uninterrupted course of events, during which, there were no significant intervening events. Therefore, Watson's statement was the product of his unlawful arrest and not an act of free will.

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

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United States v. Saraeun Min, 2013 U.S. App. LEXIS 94 (4th Cir. Va. Jan. 3, 2013)

Several individuals conspired to steal cocaine from the stash house of a drug cartel. However, before they could commit the robbery, law enforcement officers arrested them. Unknown to the conspirators, the drug stash house and the cocaine did not exist, but were a fiction created by undercover law enforcement officers.

In a case of first impression, the court followed the First, Seventh, Ninth and Eleventh circuits and held that factual impossibility is not a defense to the crime of conspiracy. It is irrelevant the stash house and drugs did not exist and it would have been impossible to commit such a robbery. The crime of conspiracy is the agreement to commit an unlawful act, in this case a robbery, not the completion of the act itself.

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

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United States v. Bumpers, 2013 U.S. App. LEXIS 1075 (4th Cir. Va. Jan. 16, 2013)

A police officer saw Bumpers and another man standing next to a pair of garbage dumpsters near the back of a convenience store's parking lot. When the men saw the officer, they began walking away from him at a fast pace. Suspecting the men were trespassing, the officer told them they were not free to go and demanded their identification. One man ran, but Bumpers stopped. The officer arrested Bumpers after a computer check indicated he had an active arrest warrant. During the search incident to arrest, the officer found a loaded handgun in Bumpers' pocket.

The court held the officer had reasonable suspicion to conduct a *Terry* stop on Bumpers. First, the convenience store was in a high-crime area and was part of a shopping plaza where multiple shootings and drug arrests had taken place. Second, Bumpers had been standing in an area posted with "No Trespassing" signs and he was not carrying shopping bags or items that would have indicated he was patron of the store. Third, Bumpers' attempt to leave the area upon seeing the officer was behavior more consistent with that of a trespasser than a lawful customer. Finally, when Bumpers left the premises he walked past the store's front doors, but did not enter. Based on these facts, the officer had reasonable suspicion to believe Bumpers was trespassing.

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

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United States v. Abramski, 2013 U.S. App. LEXIS 1881 (4th Cir. Va. Jan. 23, 2013)

Federal agents executed a search warrant at Abramski's house after he became a suspect in a bank robbery. During the search, agents found a green bank bag, which contained a written receipt from a person to whom Abramski had transferred a Glock handgun. The government never charged Abramski with bank robbery, however, Abramski, a former police officer, was convicted of two federal firearms violations after admitting he was an illegal "straw purchaser" of the Glock handgun.

Abramski argued the search warrant for his house was not supported by probable cause.

The court disagreed, finding there was a substantial basis for the magistrate judge to conclude probable cause existed for the search of Abramski's house. First, Abramski was flagged as a suspicious customer at the bank a few days before the robbery, was having financial difficulties and had been fired by the police department for stealing money. Second, Abramski fit the description of the robber, had test-driven a car the day of the robbery that matched the description of the get-away vehicle and had purchased firearms with large amounts of cash after the bank robbery.

The court also held the agents were entitled to seize the receipt to Abramski from the purchaser of the Glock. The receipt was found inside a green zippered bag with the bank's logo on it, and at the time, the agents knew the robbery had been committed with a firearm similar to a Glock handgun.

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

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Tobey v. Jones, 2013 U.S. App. LEXIS 2133 (4th Cir. Va. Jan. 25, 2013)

Tobey was scheduled to fly from Richmond to Wisconsin to attend a funeral. After going through the initial security checkpoint, Transportation Security Administration (TSA) agents randomly selected Tobey for a secondary inspection. In anticipation that he might be subjected to enhanced screening, Tobey had written the text of the *Fourth Amendment* on his chest, as he believed the full-body scanner used as part of the secondary inspection was unconstitutional. Before proceeding through the full-body scanner, Tobey removed his sweatpants and t-shirt, leaving him in running shorts and socks, revealing the text of the *Fourth Amendment* written on his chest. The TSA agent told Tobey he did not have to remove his clothes and Tobey replied he wished to express his view that the enhanced screening procedure was unconstitutional. The TSA agent radioed for assistance. Richmond airport police officers responded and immediately handcuffed and arrested Tobey for creating a public disturbance. The TSA officials did not tell the police officers what occurred at the screening station, nor did the police officers ask. The disorderly conduct charge against Tobey was later dismissed.

Tobey sued the TSA agents, claiming in part, they violated his *First Amendment* rights by having him arrested in retaliation for displaying the text of the *Fourth Amendment* on his chest.

The court held Tobey had adequately alleged a violation of his *First Amendment* rights and the TSA agents were not entitled to qualified immunity.

The court noted even if Tobey's behavior was bizarre, bizarre behavior, by itself, cannot be enough to arrest someone. In addition, bizarre behavior does not automatically equal disruptive or disorderly conduct. Here, the TSA agents seemed to think that removing clothing was *per se* disruptive. However, passengers routinely remove clothing at an airport screening station, many times per TSA regulations. Tobey calmly took off his t-shirt and sweatpants without causing a disruption as was evidenced by the fact the TSA agents never asked him to put his clothes back on. While it is possible further facts will establish the TSA agents acted reasonably in having Tobey arrested, based on the record before it, the court could not make that conclusion.

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

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Meyers v. Baltimore County, 2013 U.S. App. LEXIS 2282 (4th Cir. Md. Feb. 1, 2013)

Mrs. Meyers called 911 to report her adult sons, Ryan and Billy, were fighting. When police officers arrived, Mrs. Meyers, Mr. Meyers and Billy were outside. Mr. Meyers had a laceration on his nose the officers believed was caused by Ryan. The officers could see Ryan pacing back and forth inside the house carrying a baseball bat. The officers knew Ryan suffered from a mental illness and felt he posed a threat to their safety because he was holding a baseball bat. After the officers failed to get Ryan to surrender, they entered the house and Officer Mee ordered Ryan to drop the baseball bat. After Ryan refused, Officer Mee deployed his taser in probe mode against Ryan. Ryan, who was approximately six feet tall, weighing two hundred sixty pounds, did not drop the bat or fall to the floor in response to the first taser shock. Officer Mee deployed his taser against Ryan a second time. This shock caused Ryan to drop the bat but he continued to advance toward the officers. Officer Mee deployed his taser a third time, which caused Ryan to fall to the ground. Once on the ground, the officers sat on Ryan's back. While the other officers remained on Ryan's back, Officer Mee deployed his taser a fourth time in probe mode, then changed the taser to stun mode and delivered six additional shocks to Ryan until he was unconscious. Ryan eventually died.

Ryan's parents sued the officers, claiming a variety of *Fourth Amendment* violations.

First, the court held the officers' entry into the house to arrest Ryan was reasonable. The officers had probable cause to believe Ryan had assaulted his father and that he could cause further injury or property damage because he was armed with a baseball bat.

Second, the court held Officer Mee's first three deployments of his taser did not amount to an unreasonable or excessive use of force. During the period Officer Mee administered the first three taser shocks, Ryan was acting erratically, holding a baseball bat he did not drop until after he received the second shock, and was advancing toward the officers until the third shock caused him to fall to the ground. Under these circumstances, Ryan posed an immediate threat to the officers' safety and he was actively resisting arrest. Officer Mee's first three uses of the taser were objectively reasonable and did not violate the *Fourth Amendment*.

Third, the court held it was not reasonable for Officer Mee to deploy his taser the last seven times against Ryan. Witness testimony established that after Ryan fell to the floor he was no longer actively resisting arrest and did not pose a continuing threat to the officers' safety, yet Officer Mee continued to use his taser until Ryan was unconscious. The court concluded,

> "It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who no longer is armed, has been brought to the ground, has been restrained physically by several other officers, and no longer is actively resisting arrest."

Finally, the court held, at the time of the incident, it was clearly established that officers who use unnecessary, gratuitous and disproportionate force to seize an unarmed citizen, are not acting in an objectively reasonable manner and therefore, are not entitled to qualified immunity.

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

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5th Circuit

United States v. Andres, 2013 U.S. App. LEXIS 143 (5th Cir. Tex. Jan. 3, 2013)

In December 2009, federal agents conducting an investigation into a large drug trafficking operation installed a GPS device underneath a pick-up truck, with a trailer attached to it, while it was parked on a public street after it had been loaded with twenty kilograms of cocaine. Agents monitored the truck's movements as it drove toward Chicago. The agents contacted the Illinois State Police, gave them information about the truck, and told them they would like to have the drugs discovered during a traffic stop so they would not have to disclose the existence of a federal investigation.

After being provided GPS information on the truck, a police officer saw it on an interstate highway and began to follow it. The officer conducted a traffic stop on the truck for improper lane usage and improper lighting after he saw the trailer was swaying back and forth within its lane and its taillights were flickering. After the officer wrote a warning ticket, he asked Andres to get out of the truck so he could talk to him about the taillight problem. After inspecting the electrical connection between the truck and trailer, the officer handed Andres his clipboard so he could sign the ticket. While Andres was signing the ticket, the officer asked him where he was coming from. Andres told the officer he was coming from Joliet, but the officer knew this could not be possible based on the surveillance the officers had been conducting. The officer also noticed that Andres had begun to fidget and move his feet and arms around very nervously. When the officer asked Andres if he had any drugs in the truck, he said, "No" and then consented to a search with a drug dog. The drug dog alerted and the officers found twenty kilograms of cocaine hidden in the truck.

Andres argued the drug evidence should have been suppressed because the initial traffic stop was a pretext and not based on any actual traffic offense. Even if the traffic stop was valid, Andres claimed the officer's continued questioning and dog search were not reasonably related to the original reasons for the stop.

First, the court held the officer was justified in stopping Andres based on the traffic violations he saw. Second, the court held the officer's continued seizure of Andres after the reason for the initial traffic stop ended was supported by reasonable suspicion. It was reasonable for the officer, who had stopped Andres for a safety violation concerning his trailer, to ask him to get out of his truck to look at the trailer and discuss the problem. In addition, the officer's question, asking Andres where he was coming from, occurred before the officer had finished dealing with the traffic offenses and did not extend the scope or duration of the stop. Andres' untruthful answer created reasonable suspicion that justified his continued detention, which ultimately led to the officer receiving consent to search the truck.

Andres also argued the warrantless placement and use of the GPS device to monitor the movements of his truck violated the *Fourth Amendment* in light of the United States Supreme Court decision in *U.S. v. Jones*, decided in 2012.

The court declined to rule on whether warrantless GPS searches are *per se* unreasonable. Even assuming a *Fourth Amendment* violation had occurred, the court held the evidence should not be suppressed in this case because in December 2009, it was objectively reasonable for agents in the Fifth Circuit to believe that warrantless GPS tracking was allowed under circuit precedent.

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

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6th Circuit

Alman v. Reed, 2013 U.S. App. LEXIS 364 (6th Cir. Mich. Jan. 7, 2013)

Alman was arrested at the conclusion of an undercover operation in a public park conducted by the police after they received complaints of lewd conduct and sexual activity taking place in the park. The undercover officer claimed he was standing next to Alman when Alman reached out and grabbed his crotch with a completely cupped hand. Alman stated he only brushed his hand up against the front of the officer's pants. After the arrest, Sgt. Swope, the undercover officer's supervisor, directed a third officer to charge Alman with accosting and soliciting and fourth degree criminal sexual conduct. In addition, the police seized the car Alman had driven to the park, which was owned by Barnes. Barnes paid a nine hundred dollar redemption fee to recover his car. The county prosecutor eventually dismissed the state charges against Alman. The police then charged Alman with disorderly conduct and battery, which were municipal ordinance violations. A state court judge first dismissed the disorderly conduct charge and later the battery charge, after none of the officers appeared in court.

Alman and Barnes sued the police officers, alleging various violations of their constitutional rights. The sole issue on appeal was whether Sgt. Swope was entitled to qualified immunity on the claims against him.

First, the court held there was no probable cause to support any of the charges brought against Alman. As to the initial charges, no reasonable officer could have believed the brief touch in question was achieved by force or coercion, an element of fourth degree criminal sexual conduct. In addition, the two men were engaged in a sexually flirtatious conversation when Alman reached out and touched the undercover officer's crotch. No reasonable officer could have interpreted Alman's actions as an invitation to commit a lewd or immoral act in public, an element necessary to support the charge of solicitation or accosting.

As to the second set of charges, the officers did not have probable cause to arrest Alman for disorderly conduct because they could not have reasonably believed he was about to expose himself to the undercover officer. Finally, the officers did not have probable cause to arrest Alman for battery because some degree of force or violence is a required element, which was not present here.

Second, the court held Swope was not entitled to qualified immunity because it was not reasonable for him to believe probable cause existed to arrest Alman. Swope testified he could not hear the conversation between the undercover officer and Alman. Swope also stated he did not ask any follow-up questions about how Alman had touched the officer before completing Alman's arrest. Without having more facts, Swope had no reasonable basis to believe any of the offenses Alman was charged with had occurred.

Finally, the court held Swope was not entitled to qualified immunity for the seizure of Barnes' car as it was seized as the result of Alman's arrest without probable cause.

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

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United States v. Perry, 2013 U.S. App. LEXIS 503 (6th Cir. Tenn. Jan. 9, 2013)

Two police officers responded to a boarding house where Perry lived after one of the residents reported she had pointed a handgun at him. The officers found Perry in the hallway outside her room. The officers handcuffed and frisked Perry but found no gun. The officers asked for Perry's consent to search her room, which she granted. Inside Perry's room, the officers found a handgun sticking out from a pillow on her bed. Perry was charged with being a felon in possession of a firearm.

Perry claimed she did not consent to the search of her room, but if she did, her consent had been obtained involuntarily because when she gave consent she was handcuffed, the officers were armed, the officers never told her she could decline and she was drunk.

First, the two officers and a third witness testified Perry consented to the search of her room. After reviewing the record, the court found the district court did not commit any error by crediting their testimony.

Second, notwithstanding Perry's claims, the facts clearly supported the district court's finding Perry voluntarily consented to the search of her room. Perry was no stranger to the criminal justice system, having been arrested fifty seven times and presumably handcuffed each time. Perry's encounter with the officers in the hallway was brief, without any repeated questioning or physical abuse. In addition, none of the other facts she cited supported a finding that her consent was involuntarily obtained.

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

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Stricker v. Twp. of Cambridge, 2013 U.S. App. LEXIS 846 (6th Cir. Mich. Jan. 14, 2013)

Susan Stricker called 911 and requested help for her son, Andrew, who was suffering from an apparent drug overdose. Following policy, police officers responded to the call to secure the premises for the paramedics. One of the officers had previously arrested Andrew on a drug charge and knew he was addicted to heroin. When the officers arrived, Stricker and her husband refused to allow them to enter their house without a warrant. However, the Strickers allowed the officers to talk to Andrew through a closed window. Andrew appeared pale, his eyelids were heavy and he had trouble focusing on the officers. After unsuccessfully trying to convince the Strickers to let the officers enter the house or to have their son come out, the officers forced their way in, conducted a search of the house, and arrested the Strickers while the paramedics treated their son. The Strickers sued various police officers for violating their *Fourth Amendment* rights in connection with their response to the 911 call.

The court affirmed the holding of the district court in which the officers were granted qualified immunity.

The court held the officers' warrantless entry into the Strickers' house was objectively reasonable under the exigent circumstances exception to the *Fourth Amendment's* warrant requirement. The combination of the 911 call requesting help for a drug overdose, the officers' independent knowledge and observations confirming the reported overdose and the Strickers'

attempts to deny the officers access to their house, despite their initial call for help, made it objectively reasonable for the officers to believe Andrew needed immediate aid.

In addition, the court held the officers were justified in conducting a protective sweep of the entire house after Andrew was located so the paramedics could safely treat him. Based on the Strickers' refusal to allow entry into the house, it was reasonable for the officers to think they or someone else inside the house might take further action against them.

The court further held the officers were entitled to search dresser drawers and cabinets in the house. It was reasonable for the officers to search these areas to look for clues as to what Andrew ingested in order to aid the paramedics in treating him.

Next, the court held the officers reasonably believed the Strickers' failure to comply with their lawful commands to allow entry into the house could provide probable cause to arrest them.

Finally, the court held the officers used a reasonable amount of force against the Strickers during this encounter. Although the Strickers alleged the officers used excessive force in applying handcuffs, neither complained the handcuffs were too tight, the officers ignored any such complaint or they suffered any injuries because of the handcuffs being too tight. In addition, the court held it was reasonable for the officers to point their firearms and tasers at the Strickers during the arrest process as both had attempted to evade arrest by flight once the officers entered the house.

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

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7th Circuit

United States v. Bueno, 2013 U.S. App. LEXIS 372 (7th Cir. Ill. Jan. 7, 2013)

A police officer stopped a van for speeding. Bueno was driving and Flores, the owner of the van, was a passenger. Both men told the officer they lived in Dallas and provided valid Texas driver's licenses. When the officer commented on the number of boxes in the back of the van, Flores told the officer he owned a transportation company and he and Bueno were transporting packages to Mexico. Flores then gave the officer a business card with a Chicago address.

The officer had Bueno join him in his patrol car where he wrote him a warning ticket for speeding. While he was writing the ticket, the officer asked Bueno about the transportation company, but Bueno was unable to give him any specific information about the business or contents of the packages in the van. After he issued the ticket, the officer made Bueno wait in the patrol car while he went back and spoke to Flores further about the packages in the van. After receiving consent to search, the officer walked his drug-detection dog around the van and it alerted to the presence of narcotics. A search of the van revealed brick-shaped objects wrapped in plastic that Bueno admitted were the proceeds from the sale of narcotics that he and Flores were transporting to Mexico.

The court held the officer's initial traffic stop, which lasted through the issuance of the warning ticket to Bueno, was supported by the officer's observation of Bueno's van exceeding the speed limit.

Next, the court held Bueno's continued detention, after the issuance of the warning ticket, was supported by reasonable suspicion the officer developed during the traffic stop. Before he finished writing the warning ticket, the officer saw the van was loaded with boxes that Flores told him were being transported to Mexico. Although Flores told the officer the packages were being delivered through his business, the van was registered to Flores, not the transportation company, and it bore no company markings, as would be expected on a company's van. In addition, while Flores said he owned the company and he and Bueno lived in Dallas, the business card he gave the officer contained a Chicago business address. Finally, when the officer questioned Bueno about the transportation company, as he wrote the warning ticket, Bueno was unable to give the officer specific answers about the company or the packages in the van. By the time the officer issued Bueno the warning ticket for speeding, he had developed reasonable suspicion to prolong the stop to ask Flores about his business and the packages he was transporting. It was during this time that Flores gave the officer consent to search the van.

Finally, once the drug-detection dog alerted to the presence of narcotics, the officers were entitled to search the van and detain Bueno further.

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

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Abbott v. Sangamon County, 2013 U.S. App. LEXIS 1963 (7th Cir. Ill. Jan. 29, 2013)

An animal control officer went to Cindy Abbott's house to investigate a complaint that her dog had been running loose in the neighborhood. After Travis Abbott, Cindy's adult son, threatened the animal control officer, police officers were dispatched to the house. An officer arrested Travis, handcuffed him with his arms behind his back and placed him in the back of his police car. As the officer was driving away, Travis began to struggle in the backseat, causing the officer to collide with Cindy's parked car. Cindy began screaming at the officer and approached his police car. The officer got out of his car and ordered Cindy to stop, but she did not. The officer shot Cindy in the abdomen with his taser in dart mode, which caused her to fall to the ground. After Cindy refused the officer's commands to roll over onto her stomach, he deployed his taser against her a second time. The officer then rolled Cindy onto her stomach and handcuffed her. The officer went back to his car and discovered Travis had gotten his arms in front of his body while still handcuffed and removed his seatbelt. Travis fought with the officer who deployed his taser in drive-stun mode several times against Travis until he was subdued.

The Abbotts sued the officer for false arrest, false imprisonment and excessive use of force.

The court held the officer was entitled to qualified immunity for the Abbotts' false arrest and false imprisonment claims. As to Travis, the officer had probable cause to arrest him for assault and disorderly conduct based on the threats and gestures he made to the animal control officer. The officer had probable cause to arrest Cindy because her failure to obey the officer's command to stop could be construed as obstructing the officer's efforts to arrest Travis.

The court held the officer was entitled to qualified immunity regarding Travis' excessive force claim. It was undisputed the officer only deployed his taser against Travis until he stopped fighting. Because Travis continued to resist after the first tasing, the officer did not violate clearly established law by using the taser in drive-stun mode several more times until Travis was subdued.

Regarding Cindy, the court held the officer's second use of his taser against her could be determined by a jury to have been unreasonable. Even though an officer's initial use of force may be justified, it does not automatically mean all subsequent uses of force will be justified. There was no evidence Cindy posed a threat to the officer after the first tasing. Even though Cindy did not comply with the officer's request to turn onto her stomach, she was not moving or otherwise actively resisting arrest.

The court further held on the date of this incident, it was clearly established that it was unlawful to deploy a taser in dart mode against a non-violent misdemeanant who had just been tased in dart mode who did not move when ordered to turn over after the first tasing. In addition, the court noted it was also clearly established police officers could not use significant force against non-resisting or passively resisting suspects.

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

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United States v. Patton, 2013 U.S. App. LEXIS 1964 (7th Cir. Ill. Jan. 29, 2013)

Around 1:30 a.m., officers were dispatched to investigate a group of seven or eight men who were drinking beer on a public sidewalk in violation of a city ordinance. When the officers arrived, they directed the men to step over to a car parked nearby on the street. Instead of stepping over to the car, Patton backed away from the other men and nervously looked from side to side. When Patton realized there were officers behind him, he walked over to the car as originally ordered. An officer frisked Patton and felt the handle of a gun in the front waistband of his pants. The officer handcuffed Patton, removed the gun, and arrested him for being a felon in possession of a firearm.

While conceding the officer had reasonable suspicion to support a *Terry* stop, Patton argued the officer did not have reasonable suspicion to support a *Terry* frisk.

The court disagreed and held the officer had reasonable suspicion to believe Patton might be armed with a weapon. The officer encountered Patton at 1:30 a.m. in an area known for gang activity, one block away from the location of a drive-by shooting which occurred two days earlier. The officer's suspicions were aroused when Patton took several steps in the opposite direction after being ordered to step over to the parked car. Finally, Patton appeared to be more nervous than would be expected for a person who might be receiving a ticket for an open-container violation.

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

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8th Circuit

United States v. Cannon, 2013 U.S. App. LEXIS 436 (8th Cir. Ark. Jan. 8, 2013)

During a routine fire safety inspection at a car dealership, the fire marshal came upon a locked door in the building. An employee told the fire marshal the door led to three rooms used by Cannon, an employee at the dealership. The fire marshal directed Cannon to open the door so he could complete his inspection. The fire marshal entered the rooms and saw a poster of a nude

boy on the wall, a collection of bound, blindfolded and mutilated naked dolls hanging from the ceiling, a child's bed, a tri pod for a camera, a big-screen television and several children's toys. The fire marshal called the police. Investigators responded and entered the rooms to confirm the fire marshal's observations. Deciding they would need a warrant to search further, the investigators secured the premises and applied for a search warrant. During this time, the investigators spoke to Cannon who told them he had no home and he stayed at the car dealership three nights a week while serving as a night security guard for the business. Once the investigators obtained the search warrant, they seized Cannon's computers, which were later found to contain thousands of images and videos of child pornography.

Cannon argued the investigators violated his *Fourth Amendment* rights when they initially entered his living quarters without a warrant, consent or an exigency.

Without deciding the issue, the court held even if the search warrant was based on evidence collected in violation of the *Fourth Amendment*, the good-faith exception applied. First, the investigators learned Cannon lived in the rooms only after they first entered them and made their initial observations. The court found the investigators reasonably could have believed they were entering another part of the car dealership, not a private residence, when they entered the rooms.

Second, the investigators fully disclosed the nature of the rooms to the state court judge in the warrant application. The investigators stated that in the course of their initial inspection of the rooms, they discovered someone appeared to be living there. Once the state court judge considered these facts and issued the warrant, it was reasonable for the investigators to believe the warrant was valid.

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

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United States v. Lindsey, 702 F.3d 1092 (8th Cir. Minn. 2013)

Two officers went to a house where they thought a suspect was located. The officers knocked on the door and a woman answered. After the woman denied the suspect was inside, she allowed the officers to come in and search the house. The officers did not locate the suspect; however, they found Lindsey and arrested him on an outstanding warrant. The officers recovered a cell phone on Lindsey during their search incident to arrest. Information from the cell phone was later used against Lindsey at trial.

Lindsey argued the cell phone information should have been suppressed, claiming the woman could not lawfully consent to the search of the house where the officers arrested him.

The court held the officers reasonably relied on the woman's apparent authority to consent to the search. The woman answered the door and showed familiarity with the house when she denied the suspect the officers were seeking was present and then she consented to the officers' request to walk through the house. The court found answering the door and showing knowledge of the occupants inside sufficiently demonstrated the woman's authority over the premises.

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

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United States v. Baldenegro-Valdez, 2013 U.S. App. LEXIS 1033 (8th Cir. Mo. Jan. 16, 2013)

During a controlled buy, a confidential informant purchased methamphetamine from Camarena and Baldenegro-Valdez. Later that day, the informant made a second controlled buy. During the second buy, Camarena got out of Baldenegro-Valdez's car and into the informant's car. Baldenegro-Valdez followed in his car. After the informant signaled he had seen methamphetamine on Camarena, the officers conducted traffic stops on both vehicles. An officer wrote Baldenegro-Valdez a ticket for having a cracked windshield and arrested him for not having a valid driver's license. The officer did not mention the drug investigation so as not to compromise its integrity. Officers impounded Baldenegro-Valdez's car and during their inventory search found methamphetamine inside.

Even though Baldenegro-Valdez's arrest for not having a valid driver's license was improper, as the license he provided the officers was valid in his native country, the court found the officers had probable cause to arrest him based on his participation in one completed and one ongoing controlled methamphetamine buy.

Once the officers arrested Baldenegro-Valdez, the court noted the officers were allowed to perform an inventory search of his car. The court concluded the inventory search was conducted pursuant to the arresting agency's policy, and the methamphetamine the officers discovered was admissible.

Even if the inventory search was not valid, the court commented the officers could have searched the car under the automobile exception, given the vehicle's involvement in the controlled methamphetamine buys earlier in the day.

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

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United States v. Chantharath, 2013 U.S. App. LEXIS 1852 (8th Cir. S.D. Jan. 28, 2013)

Officers, aware of Chantharath's two prior felony drug convictions, received reports he was selling methamphetamine from motel rooms in Sioux Falls. Officers set up surveillance on a motel after they learned someone had rented a room in Chantharath's name there. The officers saw a gray Lexus registered to Chantharath's sister parked at the motel throughout the day. At one point, two women left the motel in the Lexus and returned with a man who rented a room there. The officers saw the women make frequent trips between Chantharath's room and the other man's room. Later, officers stopped the women as they left the motel, arrested them and seized cash, marijuana and drug paraphernalia from them. After the women's arrest, the officers saw a white van arrive at the motel and the driver enter Chantharath's room. A short time later, two men left the room and drove away in the white van. The officers conducted a traffic stop to question the van's occupants. The driver and passenger, later identified as Chantharath, admitted to using and possessing methamphetamine and marijuana. The officers arrested both men, and during the search incident to arrest found methamphetamine on Chantharath.

Chantharath argued the officers did not have reasonable suspicion to stop the van.

The court disagreed, holding the officers had reasonable suspicion to justify a *Terry* stop. The officers had information Chantharath had recently been selling drugs from motel rooms in Sioux

Falls. The officers knew Chantharath had rented a room at the motel, and a Lexus linked to him was on the property. The officers knew the two women who had been in the motel room and using the Lexus had been arrested with cash, drugs and drug paraphernalia. Consequently, there was reasonable suspicion for the officers to suspect the occupants of the white van were involved in drug activity.

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

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10th Circuit

United States v. De La Cruz, 2013 U.S. App. LEXIS 561 (10th Cir. Okla. Jan. 9, 2013)

De La Cruz drove his brother to a car wash to drop him off for work. Immigration and Customs Enforcement (ICE) agents were at the car wash looking for a suspect they believed was in the country unlawfully. Believing Del La Cruz to be their suspect, the agents surrounded his car and ordered him to get out. De La Cruz complied with the agents' request but his brother ran. The agents apprehended the brother and arrested him after they discovered he was in the United States unlawfully. When the agents returned to De La Cruz, they realized he was not their suspect. However, the agents continued to detain De La Cruz and requested identification from him. After the agents discovered the identification was fake and De La Cruz was in the United States unlawfully, they arrested him.

The court held when the agents initially seized De La Cruz by ordering him out of his vehicle, they had reasonable suspicion to believe he was their suspect. However, any suspicion that De La Cruz was their suspect was dispelled when the agents realized De La Cruz did not match their photograph of the suspect. The agents' justification to detain De La Cruz after this time, "just to be safe" was not reasonable. Once the agents realized De La Cruz was not their suspect, they had no justification to detain him any longer.

In addition, once the agents realized De La Cruz was not their suspect, the agents could not justify detaining him because of his brother's flight from them. Flight can create suspicion that the person fleeing is involved in criminal activity, but the court noted De La Cruz did not flee, only his brother did. As a result, the court held the district court improperly denied De La Cruz's motion to suppress the evidence the agents obtained from him at the car wash.

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

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