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

June 2014

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 Centers' 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 Centers. *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 http://www.fletc.gov/training/programs/legal-division/the-informer.

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Free FLETC Informer Webinar Series Schedule
June / July 2014

(See the bottom of page 3 for instructions on how to participate in a webinar)

1. **Law Enforcement Legal Refresher Training (2-hours)**

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

   This is a two-hour block of instruction focuses on *Fourth* and *Fifth Amendment* law and is designed to meet the training requirements for state and federal law enforcement officers who have mandated two-hour legal refresher training requirements.

   Date and Time:

   Monday June 30, 2014 1:00 pm EDT

   To participate in this webinar: **https://share.dhs.gov/lgd0312**

2. **Law of Video Surveillance**

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

   This course will review statutory and case law concerning video surveillance.

   Date and Time:

   Tuesday July 29, 2014: 10:30am EDT

   To participate in this webinar: **https://share.dhs.gov/lawofvideosurveillance/**

3. **United States Supreme Court Wrap-Up: 2013 Term**

   1-hour webinar presented by Ken Anderson and John Besselman, FLETC Legal Division

   This webinar will review nine United States Supreme Court cases decided in the October 2013 Term that affect law enforcement officers. The cases are: *Fernandez v. California*, *U.S. v. Apel*, *U.S. v. Castleman*, *Navarette v. California*, *Wood v. Moss*, *Plumhoff v. Rickard*, *Abramski v. U.S.*, *Riley v. California* and *U.S. v. Wurie*.

   Dates and Times:

   Monday July 14, 2014: 2:30pm EDT; Monday July 21, 2014: 2:30 pm EDT; or
   Monday July 28, 2014: 10:30 am EDT

   To participate in any of the webinars listed above: **https://share.dhs.gov/usscwrapup2013term**

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5. You will now be in the meeting room and will be able to participate in the webinar.
6. Even though meeting rooms may be accessed before a webinar, there may be times when a meeting room is closed while an instructor is setting up the room.
7. Meeting rooms will be open and fully accessible at least one-hour before a scheduled webinar.
8. Training certificates will be provided at the conclusion of each webinar.

FLETC Informer Webinar Schedule – June 2014

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29	30 **Law Enforcement Legal Refresher** **1:00 PM EDT** **2-hours** **https://share.dhs.gov/lgd0312**					

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CASE SUMMARIES

United States Supreme Court

Wood v. Moss, 2014 U.S. LEXIS 3614 (U.S. 2014)

With permission from local law enforcement officials, a group of supporters and a group of protesters assembled on opposite sides of the street on which the President's motorcade was to travel. At the last minute, the President decided to make an unscheduled stop at a restaurant for dinner. As a result, the President's motorcade deviated from the planned route and proceeded to the outdoor dining area of the restaurant. After learning of the route change, the protestors moved down the sidewalk to the area in front of the restaurant, while the President's supporters remained at their original location. At their new location, the protesters had a direct line of sight to the outdoor patio where the President was located. At the direction of Secret Service agents, state and local police officers cleared the block on which the restaurant was located and moved the protesters two blocks away to a street beyond handgun or explosive reach of the President. The move placed the protesters one block farther away from the restaurant than the supporters. After the President dined, the motorcade left the restaurant and passed the President's supporters who had remained in their original location. The protesters remained two blocks away, beyond the President's sight.

The protestors sued the Secret Service agents, claiming the agents engaged in viewpoint discrimination, in violation of the *First Amendment*. Specifically, the protesters claimed the agents denied the protesters equal access to the President when the agents moved the protesters away from the restaurant while allowing the supporters to remain in their original location.

The court disagreed, holding the agents were entitled to qualified immunity. Qualified immunity protects government officials from liability for civil damages unless the plaintiff can establish the official violated a statutory or constitutional right, and that the right was clearly established at the time of the incident.

First, the court stated it has never held a violation of a right guaranteed by the *First Amendment* gives rise to an implied cause of action for damages against federal officers. However, without deciding the issue, the court assumed an individual could sue a federal official for a *First Amendment* violation.

Next, the court held no clearly established law required Secret Service agents engaged in crowd control to ensure that groups with differing viewpoints are at comparable locations or maintain equal distances from the President. The court noted when the 200 to 300 protesters moved from their original location to the area closer to the restaurant, they were within weapons range and had a largely unobstructed view of the President on the restaurant's patio. Consequently, because of their location the protesters posed a potential security risk to the President. In contrast, the supporters, who remained in their original location, did not pose a security risk because a large two-story building blocked their line of sight and weapons access to the patio where the President dined.

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

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Plumhoff v. Rickard, 2014 U.S. LEXIS 3816 (U.S. 2014)

On July 18, 2004, around midnight, a police officer conducted a traffic stop on a car driven by Rickard because it had only one operating headlight. When Rickard failed to produce his driver's license, the officer asked him to step out of the car. Instead of stepping out, Rickard sped away. The officer pursued Rickard on an interstate highway along with officers in five other police cars. During the pursuit, Rickard was swerving through traffic at speeds over 100 miles per hour. After Rickard exited the interstate highway, he made a sharp turn causing contact between his car and one of the police cars. This contact caused Rickard's car to spin out into a parking lot and collide with Officer Plumhoff's police car. Officers Evans and Plumhoff got out of their cars and approached Rickard's car. Evans with gun in hand, pounded on the passenger side window of Rickard's car. At this point, Rickard's tires started spinning and his car was rocking back and forth, an indication that Rickard was using the accelerator even though his bumper was flush against the police car in front of him. Plumhoff fired three shots into Rickard's car, but Rickard put his car in reverse and turned around, forcing Ellis to step to the side to avoid being struck. As Rickard accelerated down the street away from the officers, two other officers fired 12 shots towards the fleeing suspect. Rickard lost control of the car and crashed into a building. Both Rickard and his passenger, Allen, died from a combination of gunshot wounds and injuries suffered in the crash.

Rickard's daughter sued Plumhoff and five other police officers claiming they violated the *Fourth Amendment* by using excessive force to stop Rickard.

The court held the officers were entitled to qualified immunity. Rickard led the officers on a chase with speeds exceeding 100 miles per hour and lasted over five minutes. During the chase, Rickard passed more than two dozen other vehicles, several of which were forced to alter their course. After Rickard's car collided with a police car and appeared to be stopped, Rickard resumed maneuvering his car in an attempt to escape. Under the circumstances, the court found Rickard's outrageously reckless driving posed a grave public safety risk. As a result, a reasonable officer could have concluded that Rickard was intent on resuming his flight, and if he were allowed to do so, he would once again pose a deadly threat for others on the road. Consequently, the court held the police officers acted reasonably by firing at Rickard to end that risk.

The court added the officers were justified in firing 15 shots at Rickard, stating, "If police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." Here, during the 10-second span when the officers fired their shots, Rickard continued to flee until he crashed. In addition, the court stated Allen's presence in the car had no bearing in the analysis of whether the officers acted reasonably by firing at Rickard because *Fourth Amendment* rights are personal and cannot be asserted by another person. As such, the court did not consider Allen's presence in the car when determining the reasonableness of the officers' actions.

Finally, the court held even if the officers' use of force against Rickard had been unreasonable, the officers would still have been entitled to qualified immunity. The court found that at the time of the incident, no clearly established law prohibited the officers from firing at a fleeing vehicle to prevent harm to others.

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

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Abramski v. United States, 2014 U.S. LEXIS 4170 (U.S. June 16, 2014)

Abramski agreed to purchase a Glock 19 handgun for his uncle. As a former police officer, Abramski could obtain a more favorable price from the firearms dealer than his uncle could. Abramski completed Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473, indicating he was the actual buyer of the handgun. Form 4473 clearly warned that a straw purchaser, someone who buys a gun on behalf of another person, is not considered the actual buyer. Abramski was convicted of making a false statement that was material to the lawfulness of a firearms sale, in violation of *18 U.S.C. § 922(a)(6)* and making a false statement with respect to information required to be kept in the records of a licensed firearms dealer in violation of *18 U.S.C. § 924(a)(1)(A)*.

Abramski argued he could only be prosecuted under *§ 922(a)(6)* if it was unlawful for his uncle to possess a firearm. Abramski claimed because his uncle could lawfully possess the firearm, the "actual buyer" question on Form 4473 was not material to the lawfulness of the sale. Abramski also argued he could not be prosecuted for violating *18 U.S.C. § 924(a)(1)(A)* because the information he provided on Form 4473 was not required to be kept in the gun dealer's permanent records.

In a 5-4 decision, the Supreme Court held Abramski's misrepresentation on Form 4473 was material. The court found when Congress passed the Gun Control Act of 1968, the language in *18 U.S.C. § 922(a)(6)* was intended to refer to the true buyer of a firearm and not a straw purchaser. The court explained federal gun laws have established an elaborate system of in-person identification and background checks to ensure guns are kept out of the hands of felons and other prohibited purchasers. The court added these provisions would be meaningless if a potential gun buyer could avoid them by having someone else purchase a gun for him. As a result, the court ruled Abramski's misrepresentation was material and the government could prosecute him under *§ 922(a)(6)* even though his uncle could have lawfully purchased the firearm on his own.

The court further held federal law requires licensed firearms dealers to maintain records of gun sales as required by Attorney General regulations. Attorney General regulations compel gun dealers to keep as part of their records each Form 4473 generated from gun sales. Consequently, the court found Abramski's material misrepresentation about the identity of the true buyer on Form 4473 violated *18 U.S.C. § 924(a)(1)(A)* because that misrepresentation pertained to information a gun dealer was required to keep in his permanent records.

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

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Riley v. California; U.S. v. Wurie, 2014 U.S. LEXIS 4497 (U.S. June 25, 2014)

Police officers arrested Riley and searched the cell phone he was carrying incident to his arrest. The officers discovered photographs and videos on Riley's cell phone that were admitted as evidence against him at trial. Riley was convicted. The California Court of Appeal affirmed Riley's conviction, ruling the warrantless search of Riley's cell phone incident to arrest was lawful.

Police officers arrested Wurie for distribution of crack cocaine and seized two cell phones from him. Officers searched the call log on one of the cell phones and determined the phone number labeled "my house" was associated with a nearby apartment. Officers went to the apartment and saw the name "Wurie" written on the mailbox. The officers obtained a warrant, searched the apartment and found drugs and firearms.

Wurie filed a motion to suppress the evidence seized from his apartment, arguing the officers violated the *Fourth Amendment* by searching his cell phone incident to arrest.

In reversing Wurie's conviction, the First Circuit Court of Appeals held the search incident to arrest exception to the *Fourth Amendment's* warrant requirement did not authorize the warrantless search of data on cell phones seized from individuals arrested by police officers.

The Supreme Court consolidated the cases, holding that police officers generally may not search digital information on a cell phone seized from an individual who has been arrested, without first obtaining a warrant.

Previously, the court held police officers could conduct warrantless searches of arrestees and possessions within the arrestees' control, indident to a custodial arrest. The court concluded such searches were reasonable in order to discover weapons or any evidence on the arrestee's person so that evidence could not be concealed or destroyed.

The court concluded this rationale does not apply to modern cell phones. First, digital data stored on a cell phone cannot be used as a weapon to harm an arresting officer or aid an arrestee in escaping. The court emphasized that police officers may still examine the physical aspects of phone to ensure that it will not be used as a weapon. For example, the court noted a police officer may examine a cell phone to determine whether there is a razor blade hidden between the phone and its case. However, once an officer has secured a phone and eliminated any potential threats the data on the phone cannot harm anyone.

Second, the court stated the government provided little evidence to believe that loss of evidence from a seized cell phone, by remote wiping of the data on the phone, was a common occurrence. Even if remote wiping were a concern, the court listed two ways remote wiping could be prevented. First, the officer could turn the phone off or remove its battery. Second, the officer could put the phone inside a device, called a Faraday bag, that would isolate the phone from radio waves. The court added that Faraday bags are cheap, lightweight, and easy to use and a number of law enforcement agencies already encourage their use. In addition, the court commented that if a police officers are truly confronted with individualized facts suggesting that a defendant's phone will be the target of an imminent remote wiping attempt, they may be able to rely on exigent circumstances to search that phone immediately.

The court further recognized that cell phones are different from other objects that an arrestee might have on his person. Before cell phones existed, a search of an arrestee generally constituted a small instrusion on the arrestee's privacy. However, modern cell phones are, in essence, mini-computers that have immense storage capacity on which many people keep a digital record of nearly aspect of their lives. Consequenly, the warrantless search of a cell phone consitutes a significant intrusion upon a person's privacy. If police officers wish to search a cell phone incident to arrest, they need to obtain a warrant.

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

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Circuit Courts of Appeal

2nd Circuit

United States v. Medunjanin, 2014 U.S. App. LEXIS 9306 (2d Cir. N.Y. May 20, 2014)

In September 2009, agents with the Joint Terrorism Task Force (JTTF) arrested one of Medunjanin's associates on terrorism related charges. As a result, Medunjanin hired Gottlieb to act as Medunjanin's attorney in connection with the JTTF investigation. Gottlieb told JTTF agents and the Assistant United States Attorney he represented Medunjanin and requested that Medunjanin not be interviewed unless Gottlieb was present.

On January 7, 2010, JTTF agents executed a warrant to search Medunjanin's apartment. When Medunjanin asked the agents if they had contacted Gottlieb, the agents replied they had not, but that Medunjanin could contact the attorney if he wished. Medunjanin declined to call Gottlieb at that time, but Medunjanin called Gottlieb after the agents left. Later that day, the JTTF agents arrested Medunjanin. Three times between the afternoon of January 7 and the morning of January 8, 2014, Medunjanin waived his *Miranda* rights and made incriminating statements.

On the afternoon of January 8, a grand jury indicted Medunjanin. When JTTF agents approached him for another interview, Medunjanin told the agents he wished to speak with Gottlieb. The agents complied with Medunjanin's request and stopped questioning him.

On appeal, Medunjanin argued the trial judge should have suppressed his post-arrest statements because questioning by the JTTF agents violated his *Miranda* rights. Specifically, Medunjanin claimed the September 2009 requests by Gottlieb that Medunjanin not be questioned without Gottlieb present constituted an invocation of Medunjanin's right to counsel. Medunjanin also argued he invoked his right to counsel on January 7, during the execution of the search warrant, when Medunjanin asked the JTTF agents if they had contacted Gottlieb.

The court disagreed, holding Gottlieb's requests to the agents in September 2009 did not constitute a valid invocation of Medunjanin's right to counsel under *Miranda*. Even if there was a legal basis for recognizing a pre-custodial invocation of the right to counsel, this right was personal to Medunjanin; therefore, only Medunjanin could waive it or properly invoke it, not his attorney.

Second, the court held Medunjanin did not validly invoke his right to counsel under *Miranda* in January 2010 when he asked the agents conducting the search at his apartment if they had notified Gottlieb. The court stated, even assuming that *Miranda* rights could be invoked by a suspect before being in custody, Medujanin did not clearly and unambiguously invoke his right to counsel. The court noted individuals cannot invoke their right to counsel by simply asking police officers if the officers have contacted their attorneys.

Third, the court held Medunjanin voluntarily waived his *Miranda* rights three times, in writing, after the agents arrested him.

Medunjanin also argued the agents violated his *Sixth Amendment* right to counsel.

Again, the court disagreed. After the grand jury indicted him, Medunjanin told the agents he wished to see Gottlieb. At that point, the agents immediately stopped questioning Medunjanin. The court rejected Medunjanin's argument that the agents' conduct prior to Medujanin's indictment turned into

a post-indictment violation of Medunjanin's *Sixth Amendment* right to counsel. The court noted Medunjanin was not denied his choice of counsel; Medunjanin met with Gottlieb prior to his arraignment, and Gottlieb continued to represent Medunjanin.

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

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Betts v. Shearman, 2014 U.S. App. LEXIS 8373 (2d Cir. May 2, 2014)

Police officers responded to a domestic violence call at a residence where Shearman lived with her husband, Betts. Upon arrival, Shearman told the officers Betts had assaulted her. Based on Shearman's allegations, the officers arrested Betts. Afterward, the officers learned Shearman had lied about being assaulted by Betts. The state later dismissed all charges against Betts.

Betts sued the police officers for false arrest, false imprisonment and malicious prosecution. Betts claimed the officers should have doubted Shearman's credibility because Shearman was visibly intoxicated, had made false accusations against Betts in the past, and there was no physical evidence to support Shearman's claims.

The court held the officers were entitled to qualified immunity. First, Betts never claimed the officers knew of Shearman's alleged prior history of making false allegations against him. Second, even if the officers knew Shearman was intoxicated, it was still reasonable for the officers to believe Betts had assaulted Shearman. Finally, the lack of physical evidence of an assault on Shearman's body did not require the officers to discount the fact Shearman told them Betts had assaulted her. Given the facts available to the officers, it was objectively reasonable for the officers to believe probable cause existed to arrest Betts.

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

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Third Circuit

Carman v. Carroll, 2014 U.S. App. LEXIS 9039 (3d Cir. Pa. May 15, 2014)

Trooper Carroll and another trooper were dispatched to Carman's house to search for Zita. The troopers were told Zita had stolen a car, was armed, and might have fled to Carman's residence. The troopers had never been to Carmen's property, and they did not know what Zita looked like. In addition, the troopers did not have warrants to search Carman's property or arrest Zita. Once at Carmen's house, the troopers entered Carman's backyard and walked toward the garage, instead of walking up the clearly marked path to the front door. When the troopers did not see anyone in the garage, they walked through the backyard and onto the back deck of Carman's house. A man, later identified as Carman, came out of his house and voiced his displeasure with troopers' presence. Given the man's behavior, Trooper Carroll believed this individual might be Zita. When Carroll asked the man to identify himself, the man refused, made a quick move away from the troopers, and reached for his waistband. Believing the man might be reaching for a weapon, Carroll grabbed him by the arm. When Carroll saw the man was unarmed, he let go; however, Carmen twisted and fell off the deck. Carman's wife came out of the house, and after the troopers explained their presence, received consent to search Carman's house. The troopers searched Carman's house and did not find Zita. The Carmans were not charged with any crimes.

Carman sued Carroll, claiming Carroll's warrantless entry into his backyard, garage, and deck violated the *Fourth Amendment*. Carroll argued he did not violate the *Fourth Amendment* because he entered onto Carman's property to conduct a knock and talk interview. In addition, Carman claimed Carroll unlawfully seized him when Carroll grabbed his arm. At trial, the jury returned a verdict in favor of Carroll on both claims and Carman appealed.

Notwithstanding the jury's verdict, the court held Carroll's entry into Carman's backyard and deck violated the *Fourth Amendment* as a matter of law. It was undisputed as soon as Carroll entered Carman's backyard, Carroll was in the curtilage surrounding Carman's house, which is afforded the same protections under the *Fourth Amendment* as the home itself. In addition, it was undisputed that Carroll did not have a warrant, consent or exigent circumstances. Finally, the court stated the knock and talk exception, where a police officer without a warrant may approach a home and attempt to make contact with the occupants, did not apply because Carroll did not knock on Carman's front door, but instead proceeded directly through the backyard of Carman's property. While it may have been more convenient for Carroll to cut through the backyard and knock on the back door, the court commented, the *Fourth Amendment* is not based on expediency. The knock and talk exception requires that police officers begin their encounter at the front door, where they have an implied invitation to go. Consequently, Carroll's warrantless entry into Carman's curtilage violated the *Fourth Amendment*.

The court further held it was clearly established, at the time of the incident, that a police officer's right to knock at the front door while conducting a knock and talk did not automatically allow the officer to enter other parts of the curtilage.

Concerning Carman's unlawful seizure claim, the court affirmed the jury's verdict, concluding there was sufficient evidence to support the jury's finding that Carroll acted reasonably when he grabbed Carman by the arm.

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

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Fifth Circuit

United States v. Hill, 2014 U.S. App. LEXIS 9960 (5th Cir. Miss. May 29, 2014)

Hill was sitting in his car with his girlfriend in the parking lot of her apartment complex at 11:00 pm on a Saturday night when seven to eight police officers in three to four cars entered the parking lot. The officers were driving around the county looking for suspicious activity. When the officers arrived, Hill's car was legally parked, backed into its parking space. When one of the police cars parked near Hill's car, Hill's girlfriend got out of the car and began to walk toward the apartment building. An officer got out, approached Hill's car, and told Hill to roll down the window. Hill told the officer the window would not roll down, and Hill opened the door. The officer immediately asked Hill, "Where's your gun?" Hill told the officer he did not have a gun. The officer then asked Hill for his driver's license and Hill replied that he did not have one. The officer ordered Hill to step out of the car and turn around so the officer could frisk him. When Hill turned around, the officer saw the handle of a handgun in Hill's pocket. The officer arrested Hill who was convicted of being a felon in possession of a firearm and ammunition.

Hill moved to suppress the handgun and ammunition. Hill argued the police officer seized him in violation of the *Fourth Amendment* because the officer did not have reasonable suspicion to believe he was engaged in criminal activity.

The court agreed and reversed Hill's conviction.

The officer testified he ordered Hill out of the car because he believed Hill was engaged in a drug crime. However, the court noted Hill was not doing anything suspicious when the officers encountered him. The court stated Hill was simply sitting with a woman in a car in an apartment parking lot, which, by itself, was not unusual behavior at 11:00 p.m. on a Saturday night. The court added the officers were not responding to a report of criminal activity, and even though the apartment complex might have been located in a "high crime area," the officer could not point to any facts that indicated Hill was involved in criminal activity. Finally, while Hill's girlfriend got out of the car and began to walk away when the officers arrived, Hill remained in his car and made no suspicious movements. Consequently, the court concluded no reasonable officer who came upon a couple sitting in a car in an apartment complex parking lot on a weekend night would, without more, suspect criminal activity.

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

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6th Circuit

Kinlin v. Kline, 2014 U.S. App. LEXIS 9414 (6th Cir. Ohio 2014)

Trooper Kline saw Kinlin make an unsafe lane change in violation of state law and conducted a traffic stop. After smelling the odor of alcohol, Kline asked Kinlin how much Kinlin had had to drink. Kinlin admitted he consumed two beers earlier that evening. As a result, Kline asked Kinlin to submit to a field sobriety test. When Kinlin refused, Kline arrested him for driving under the influence of alcohol (DUI). A test administered later indicated Kinlin had a blood-alcohol content of .012%, well below Ohio's legal limit of .08%.

Kinlin sued Kline, claiming Kline did not have probable cause to initiate the traffic stop or to arrest him after Kinlin refused the field sobriety test.

The court disagreed, affirming the district court, which had granted Kline qualified immunity.

First, the court held Kline's in-car video showed that Kline had a reasonable basis to conclude Kinlin had violated state law. Kline's video showed that Kinlin executed a sudden lane change that did not leave sufficient space between the car ahead of him and the car behind him. As a result, the court concluded, Kline had probable cause to stop Kinlin.

Second, the court held Kline had probable cause to arrest Kinlin for DUI after Kline saw Kinlin make an unsafe lane change, smelled the odor of alcohol, and Kinlin admitted he had been drinking. Under these circumstances, the court concluded it was objectively reasonable for Kline to believe probable cause existed to arrest Kinlin for DUI.

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

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7th Circuit

United States v. Hernandez, 2014 U.S. App. LEXIS 8613 (7th Cir. Ill. May 7, 2014)

Two police officers saw Hernandez pick up a red bag from beside a garbage can and run up an alley. When Hernandez saw the officers, he dropped the red bag on the ground and told the approaching officers, "I just have some dope." Hernandez then handed one of the officers a key holder that contained five small bags of what appeared to be heroin. After the officers arrested Hernandez, one of the officers asked him what was in the red bag. Hernandez told the officers he had "ripped the guys around the corner for dope and a gun." The officers looked in the red bag and found a loaded handgun and baggies containing crack cocaine and marijuana.

Hernandez was convicted of being a felon in possession of a firearm.

Hernandez argued his statement concerning the red bag should have been suppressed because it was obtained in violation of *Miranda*.

The court disagreed. Officers are allowed to ask suspect questions, without having to provide *Miranda* warnings, when the questions are designed to prevent the officers from hurting themselves during a search of a suspect or his possessions. In this case, whatever was in the red bag had prompted Hernandez to run when he had it, and had prompted Hernandez to drop it when he saw the police officers. After Hernandez gave the officers the key holder containing what appeared to be heroin, it was reasonable for the officers to believe the red bag might contain a syringe or a weapon. The court added, grabbing or opening the red bag would have placed the officers at risk of harm from impalement on a heroin needle or bumping a loaded firearm. As a result, the court held the officer's question about what the red bag contained was within the public safety exception to *Miranda*.

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

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8th Circuit

United States v. Hill, 2014 U.S. App. LEXIS 8557 (8th Cir. Mo. May 7, 2014)

LimeWire is on an online "peer to peer" file-sharing program that allows users to share files with any other LimeWire users in the world. A police officer assigned to a cybercrimes task force investigating Internet crimes against children used LimeWire to access Hill's computer. The officer downloaded ten images of what he believed to be child pornography from Hill's shared folder on LimeWire. Hill was convicted of two child pornography related offenses.

Hill argued the officer violated the *Fourth Amendment* by using LimeWire to access his computer and download files from his LimeWire shared folder.

The court disagreed. LimeWire is a publicly accessible program available for free download by anyone with a computer and an internet connection. When Hill downloaded and actively used LimeWire file-sharing software, Hill made the child pornography files in his shared folder accessible to any LimeWire user in the world, to include police officers. As Hill had no expectation of privacy in such publicly shared files, no unlawful search or seizure occurred when the officer accessed Hill's LimeWire shared folder.

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

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United States v. Ovando-Garzo, 2014 U.S. App. LEXIS 10062 (8th Cir. N.D. May 30, 2014)

A state trooper arrested J. Perez for driving with a suspended driver's license. The trooper then discovered the passengers, Garzo and D. Perez, did not have valid driver's licenses either. Concerned about leaving Garzo and Perez stranded five miles from the nearest town in freezing weather, the trooper asked the men to identify themselves. Both men told the trooper their names, but neither man could produce identification documents. In addition, both men had difficulty communicating in English and appeared to be nervous. These facts, combined with the recent rise of undocumented aliens in the area, caused the trooper to believe Garzo and D. Perez might be in the United States unlawfully. When the trooper asked the men if they were in the United States unlawfully, both admitted they were. The government charged Garzo with one count of reentry after removal in violation of *18 U.S.C. § 1326(a)*.

Garzo moved to suppress the evidence of his immigration status obtained by the trooper during the traffic stop. Specifically, Garzo claimed the arrest of the driver terminated the traffic stop; therefore, the questioning that followed unlawfully extended the scope of the traffic stop.

The court held the trooper's questioning was properly within the lawful scope of the traffic stop as a logical extension necessary to determine what to do with the pickup truck and its passengers following the arrest of the driver. The traffic stop occurred five miles from the nearest town, in freezing temperatures and neither Garzo or D. Perez had a valid driver's license. The circumstances of the arrest required the trooper to engage in a community caretaking function of safely removing the pickup truck and its occupants from the side of the road, and certain questioning was required to accomplish this task. The court concluded the trooper's questions were reasonably related to the purpose of terminating the traffic stop and did not unreasonably prolong the duration of the stop.

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

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9th Circuit

George v. Edholm, 2014 U.S. App. LEXIS 9798 (9th Cir. Cal. May 28, 2014)

Police officers arrested George and transported him to jail. After George removed his clothes in preparation for a strip search, he fell to the floor as if he were having a seizure. While George was on the floor, the officers saw George reach under his body and push his finger into his anus in an attempt to conceal a plastic baggie. Although the officers believed George was faking a seizure so he could conceal what the officers believed was a bag of cocaine, the officers contacted paramedics who transported George to the hospital. At the hospital, the doctor could not remove the plastic baggie by hand because of George's resistance. As a result, the doctor sedated George, without George's consent, and removed the plastic baggie, which contained approximately nine grams of cocaine.

George sued the police officers and the doctor, claiming the treatment administered by the doctor violated his *Fourth Amendment* right to be free from unreasonable searches.

The district court dismissed the lawsuit as to the police officers, holding the doctor acted as a private citizen whose conduct could not be attributed to the police officers. The district court further held even if the officers violated George's constitutional rights, they were entitled to qualified immunity.

The court of appeals disagreed, holding the police officers could be held responsible for the procedures performed by the doctor. Even as a private citizen, the doctor's treatment of George could be attributed to the officers if they induced the doctor to perform a search he would not otherwise have performed. Here, hospital records indicated "the police department" told intake personnel George had swallowed cocaine, had put cocaine into his rectum and possibly had a seizure. As a result, the doctor testified the information in the intake records caused him to perform a more invasive search than he otherwise would have performed. The court also noted, the paramedics told the officers George had not suffered a seizure, before arriving at the hospital, and the officers testified they believed George was faking a seizure. In addition, there was no evidence in the record showing either police officer believed George had swallowed any cocaine. Consequently, the court held a reasonable jury could conclude the officers gave false information about George's medical condition to the hospital staff with the intent of inducing the doctor to perform an invasive search.

Next, the court held the officers were not entitled to qualified immunity. The court stated intrusive body searches are allowed when they are reasonably necessary to respond to an immediate medical emergency. In this case, no such medical emergency existed. The doctor never testified that he believed the baggie in George's rectum had ruptured, only that it could rupture. In addition, the doctor did not testify he had any reason to believe the baggie in George's rectum was more likely to rupture than in any other similar drug concealment case. The court held a reasonable jury could conclude the only actual risk to George's health was the possibility the baggie of cocaine could rupture, and that sort of speculative, generalized risk could not justify the non-consensual invasive procedures performed by the doctor. As a result, the court held the jury could conclude the procedures performed by the doctor violated the *Fourth Amendment*.

Finally, the court held case law clearly established the possibility that a baggie of drugs could rupture inside a suspect, by itself, could not justify a warrantless search as intrusive as the search conducted in this case.

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

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10th Circuit

United States v. Davis, 2014 U.S. App. LEXIS 8583 (10th Cir. Kan. May 7, 2014)

In March 2011, an investigation into a string of armed robberies led police officers to suspect the robbers were using a car belonging to Baker's girlfriend. Police officers installed a GPS tracking device onto the rear bumper of the car while it was parked at an apartment complex. Police officers also obtained a warrant to track the GPS signal from Baker's cell phone. Immediately after the robbery of a store, police officers used a combination of GPS coordinates from the car and Baker's cell phone to locate and stop the car containing Baker and Davis. Inside the car, officers found evidence connecting Baker and Davis to the robbery. The government charged Davis with a variety of criminal offenses.

Davis moved to suppress the evidence found in the car, arguing ***United States v. Jones***, decided in 2012, held that the warrantless attachment and use of the GPS device violated the *Fourth Amendment*.

In *Jones*, the United States Supreme Court held the attachment of a GPS device to a car, and subsequent use of that device to monitor the car's movements constituted a *Fourth Amendment* "search." Without deciding whether the placement and monitoring of the GPS device violated the

Fourth Amendment in light of *Jones*, the court held Davis did not have standing to object to the stop. Because Davis did not own or regularly drive the car to which the GPS device was attached, the court concluded he did not have standing to object to the evidence obtained as a result of the alleged illegal placement of the GPS device on the car and its subsequent monitoring.

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

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United States v. Garcia, 2014 U.S. App. LEXIS 8816 (10th Cir. N.M. May 12, 2014)

While on patrol on a lightly traveled road, Officer Devos saw a car with a cracked windshield traveling in the opposite direction. Devos conducted a traffic stop and encountered Maner, the driver, and Garcia, the passenger. Devos arrested Maner for driving with a suspended driver's license and decided to have the car towed because it could not be driven safely with its cracked windshield. Before towing the car, department policy required Devos to inventory the contents of the car, which Devos had to do by himself because no other officers were available to assist him. Before conducting the inventory, Devos asked Garcia, who appeared to be nervous, to get out of the car. Devos recognized Garcia from a recent encounter. Two weeks earlier, Devos had deployed his Taser against Garcia after Garcia actively resisted arrest. In addition, Devos knew Garcia had a prior criminal history for armed robbery. Based on these facts, Devos decided to frisk Garcia for weapons before he turned his back on Garcia to conduct the inventory search. During the frisk, Devos found a gun magazine containing seven .380 caliber cartridges. The government indicted Garcia for being a felon in possession of ammunition.

Garcia argued Devos did not have reasonable suspicion that Garcia was armed and dangerous; therefore, the frisk was unlawful, and the ammunition should have been suppressed.

The court disagreed. First, Devos' previous encounter with Garcia and Devos' knowledge that Garcia had a criminal history that included armed robbery supported a reasonable suspicion Garcia was presently armed and dangerous. Second, Devos had a reasonable concern for his safety because the stop occurred on an isolated road, at night, and Devos needed to turn his back to Garcia to conduct the inventory search. Based on the totality of the circumstances, the court concluded Officer Devos had reasonable suspicion under the *Fourth Amendment* to frisk Garcia.

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

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11th Circuit

Morris v. Town of Lexington Ala., 2014 U.S. App. LEXIS 9443 (11th Cir. Ala. May 21, 2014)

A highly intoxicated woman called 911 in the early morning hours and reported she had been abandoned, that she did not know where she was, and requested someone be sent to pick her up. Police officers responded to the call, which led them to Morris' address where they saw the woman who made the call standing outside the house. The woman told the officers she was in danger and that someone had been beating Morris' horses. The officers knocked on the door of the house and Morris answered it. While Morris stood inside the threshold, the officers asked him about the drunken woman on the porch. Morris said he did not know the woman, but stated he was acquainted with the woman's sister. When the officers told Morris what the woman had said about his horses being abused, Morris told the officers he would put on his boots and check on them. One of the

officers told Morris he was "not going anywhere." When Morris stepped back toward the interior of his house, three officers crossed the threshold of the house behind him. After Morris told the officers to leave, two of the officers complied, but the third officer remained in the threshold. When Morris tried to close the door, the officer standing in the threshold shoved Morris. Morris retaliated by punching the officer. The other officers then came back into the house, subdued Morris with an electronic control device and arrested him for assaulting a police officer and resisting arrest. Morris was later acquitted of both charges.

Morris sued the police officers for a variety of constitutional violations, to include entering his home without a warrant, in violation of the *Fourth Amendment*.

The court held the officers were not entitled to qualified immunity. First, the court held it is clearly established that searches and seizures inside a home are presumed to be unreasonable unless a police officer has a warrant, consent or exigent circumstances. However, the officers claimed because they had reasonable suspicion to detain Morris under *Terry v. Ohio*, the officers were allowed to enter Morris' house to effect that detention. Even if *Terry* allowed the officers to enter Morris' house, which the court seriously doubted, the court held the officers did not have reasonable suspicion to detain Morris. When the officers knocked on the door to speak with Morris, they did not have reasonable suspicion Morris was involved in criminal activity, as the woman never stated Morris had done anything wrong. After Morris opened the door, the officers were faced with an unarmed man, who had just gotten out of bed, and was concerned for the safety of his horses after being told of the woman's claim. The court concluded the officers entered Morris' house without a warrant or "anything remotely approaching reasonable suspicion." Therefore, the court held the officers violated the *Fourth Amendment*.

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

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