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Law Enforcement and the Law
with Ken Wallentine

Top 10 Supreme Court decisions of 2010

The past 12 months have seen significant rulings from the United States Supreme Court in the areas of criminal procedure and public safety

Well, 2010 was another year of steady course for the United States Supreme Court, with law enforcemen interests generally supported in the Court's trio of Miranda cases. Those three cases begin the top ten. Next up is the Supreme Court's first decision addressing public employees' electronic communications privacy rights in *City o Ontario v. Quon*. Rounding out the Supreme Court cases is the second of the Court's 2nd Amendment decisions *McDonald v. City of Chicago*. Notable federal appellate cases included discussions of electronic control device use limitations on the *Arizona v. Gant* rule, questioning during traffic stops, and liability for canine use.

1. *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).
Thompkins was arrested for murder, assault and weapons charges. Detectives gave Thompkins a Miranda warning, which Thompkins appeared to understand. They questioned him for nearly three hours, with Thompkins saying nothing during most of the time. It was generally a one-sided interrogation. One of the detectives asked Thompkins whether he believed in God.

Thompson started to cry and said, "Yes."

The detective then asked, "Do you pray to God to forgive you for shooting that boy down?"

"Yes," replied Thompkins as he looked away. Shortly after that statement, the interrogation ended. The Sixth Circuit Court of Appeals held that the detective's failure to obtain an explicit waiver of Miranda rights from Thompkins rendered the answers inadmissible. The Supreme Court reversed that decision and held that there was no Miranda violation.

In a 5-4 split decision, the Court held that a suspect who wants to invoke his right to silence must affirmatively say so. It is not enough to sit silently or remain uncooperative throughout an interrogation. "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police."

Moreover, the Court held that Thompkins waived his Miranda rights by giving a one-word answer to the detectives. "Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's un-coerced statement establishes an implied waiver of the right to remain silent." The confession itself could be seen as a waiver and the confession was admissible. "After giving a Miranda warning police may interrogate a suspect who has neither invoked nor waived his or her Miranda rights."

Thus, the detectives did not violate Thompkin's Miranda rights when they continued to question him for several hours, even though he was generally unresponsive and uncooperative.

2. *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010).
Shatzer was serving time for child sexual abuse. An officer was investigating a report that Shatzer had forced his three-year-old son to fellate him and had masturbated next to the child (before his incarceration). The officer

attempted to interrogate Shatzer and Shatzer invoked his right to have counsel present. Two and a half years later, a social worker provided the police with additional details. A different officer visited Shatzer, who was now incarcerated in a different prison. Shatzer agreed to waive his Miranda rights and he made incriminating statements. Shatzer was charged with additional child sexual abuse felonies. He asked the court to suppress his statements, arguing that the second interrogation was unlawful because he had invoked his right to have counsel present during the first interrogation.

The landmark criminal procedure decision in *Miranda v. Arizona* held that custodial interrogation must stop once the suspect invokes the right to have counsel present during interrogation or the right to remain silent. In *Edwards v. Arizona*, the Court ruled that a suspect who invokes the right to have counsel present during interrogation may not be approached by officers attempting renewed interrogation. The Court stayed true to the *Edwards* rule in *Arizona v. Roberson* and *Minnick v. Mississippi*, holding that the Edwards rule applies even if interrogation is attempted by a different officer about a different crime, and even if the suspect has been consulted with legal counsel in the interim.

However, many appellate courts have imposed a "a break in custody" exception to the Edwards rule. The Supreme Court hinted, in *McNeil v. Wisconsin* that it might recognize such an exception. In *Maryland v. Shatzer*, the Court created a break-in-custody rule and imposed their own notion of a bright line requirement of a two week cooling-off period.

Several members of the Court have expressed doubts over the policy reasons behind rigid application of the *Edwards* rule.

Justice Scalia wrote for the Court: "When a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is farfetched to think that a police officer's asking the suspect whether he would like to waive his Miranda rights will any more wear down the accused than did the first such request at the original attempted interrogation."

Justice Scalia noted that the *Edwards* rule carries the cost of excluding some truly voluntary confessions from trial evidence and deters officers from attempting to obtain voluntary confessions.

The Court went on to approve the break-in-custody exception to the *Miranda/Edwards* rule: "The protections offered by Miranda, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is re interrogated after a break in custody that is of sufficient duration to dissipate its coercive effects."

Neither the attorneys for Shatzer or Maryland had argued for a specific cooling-off time frame. After all, two and a half years had passed in this case. The Court chose a 14-day period. "The 14-day limitation meets Shatzer's concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his Miranda right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for re-interrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its coercive effect, there will be nothing to gain by such gamesmanship — "nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his Miranda rights."

Thus, the bright-line rule for officers resulting from this case is that when a suspect invokes his right to counsel during custodial interrogation, and the suspect is then released, an officer may attempt renewed interrogation after a 14-day break and after a fresh set of Miranda warnings. "In every case involving *Edwards*, the courts must determine whether the suspect was in custody when he requested counsel and when he later made the statements he seeks to suppress. Now, in cases where there is an alleged break in custody, they simply have to repeat the inquiry for the time between the initial invocation and re-interrogation. In most cases that determination will be easy. And when it is determined that the defendant pleading Edwards has been out of custody for two weeks before the contested interrogation, the court is spared the fact intensive inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel."

3. *Florida v. Powell*, 130 S. Ct. 1195 (2010).
Officers looking for Powell in connection with a robbery went to his girlfriend's apartment and saw Powell coming out of a bedroom. They arrested Powell and searched the bedroom, finding a gun. At the police station, officers read the following warning statement: "You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview."

Powell agreed to talk to the officers. He told the officers that he bought the gun for $150 from a street source because he needed protection.

The Florida Supreme Court held that the warning was inadequate, because Powell "was not clearly informed of his right to have counsel present during questioning." The United States Supreme Court reversed the Florida court. Relying on an earlier decision, *Duckworth v. Eagan*, in which the Supreme Court held that there was no magic language required to give a Miranda warning, the Court held that, "in combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times."

The Court applied the reasonable person standard. "A reasonable suspect in a custodial setting who has just been read his rights, we believe, would not come to the counterintuitive conclusion that he is obligated, or allowed, to hop in and out of the holding area to seek his attorney's advice."

The landmark Miranda decision required that officers administer the following warnings prior to custodial interrogation:

1.) the person has a right to remain silent
2.) that anything the person says can be used against him in a court of law
3.) that the person has the right to the presence of an attorney
4.) that if the person cannot afford an attorney one will be appointed for him prior to any questioning, if he desires

In Powell, the Court stated: "In determining whether police officers adequately conveyed the four warnings, we have said, reviewing courts are not required to examine the works employed as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by Miranda."

4. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).
Sergeant Jeff Quon and another officer sued their agency's paging service provider for privacy breaches after their text messages were provided to the department after the chief requested an audit of the text message usage to determine whether the department had a high enough character limit to meet officers' work communications needs. Quon sent messages that were described by the trial court as "sexually explicit in nature." The department disciplined him. Quon's wife and his mistress both joined the lawsuit.

The department had a written policy that warned officers that use of department email, Internet and computer resources could be monitored. Even though limited personal use was permitted, the policy also stated that officers should not expect that their electronic communications made through department resources were private or confidential. Quon acknowledged the policy, but said that he had been told that he could use his pager for personal messages as long as he paid the over-limit charges.

This was the Supreme Court's first opinion directly addressing public employees' electronic privacy rights in communications made through agency resources. Two decades ago, in *Ortega v. O'Connor*, the Supreme Court considered the search of a public employee's desk. The Court held that a public employer enjoys broad authority to search the physical workplace as long as the employer had a "a work related purpose" for the search and the search is not unduly intrusive.

Justice Kennedy's opinion for the Court assumes that the officers held a reasonable expectation of privacy in their text messages. However, the Court did not conclusively resolve this issue and public employers are free to argue in future cases that a public employee does not have an expectation of privacy in electronic communications

facilitated with agency resources. The Court easily identified a work related purpose for reading the text messages. The department "had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the city was not paying for extensive personal communications." The Court noted that the officers held, at best, only "a limited privacy expectation" in the text messages. The Court also held that the search was not excessive in scope. Thus, the search was reasonable.

The Court cautioned against a broad reading of its holding. Justice Kennedy wrote: "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer." State privacy laws might create a different standard. Some states have statutes that require an employer to notify an employee when electronic communications are being monitored. Quon puts agencies on notice that they should state their electronic communications policy up front, give notice and train employees on the policy.

5. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).
The Supreme Court decision in *McDonald v. City* of Chicago raises far more questions than it answers. For 2nd Amendment purists, it does answer — in the affirmative — the question of whether the right to own a keep and bear arms is a fundamental constitutional right. Thus, state and local firearms regulations must comport with the 2nd Amendment. But what does that mean?

There is no majority opinion in this case. Instead, there is a plurality, meaning that five of the justices reached agreement on the result, though one needs a complex play sheet to determine which justice supports the various facets of the five plurality and dissenting opinions in the case.

Justice Breyer wrote a dissenting opinion raising a number of vital questions that are not answered by the McDonald plurality. "Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semi-automatic weapons? When is a gun semi-automatic? Where are different kinds of weapons likely needed? Does time of day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? Do police need special rules permitting pat downs designed to find guns? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders? Prior alcohol abusers? How would the right interact with a state or local government's ability to take special measures during, say, national security emergencies?"

Though Justice Breyer was trotting out a parade of potential horribles, at least some of these are questions likely to be presented to courts.

6. *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).
Several federal and state appellate courts considered the use of tracking devices. Modern devices can be rapidly placed and use global positioning satellite and internet technology to provide real-time tracking from almost any computer terminal or even a mobile iPad. These devices may "go to sleep" when not moving, conserving battery life and ensuring that tracking only happens when the vehicle is moving in public. The following case gives a good overview of the majority view of courts considering challenges to tracking device use.

An alert officer noticed Pineda-Moreno and other men at a Home Depot buying a large amount of the type of fertilizer used in marijuana plantations. The officer learned that Pineda Morales also had recently bought large amounts of groceries, irrigation equipment and deer repellant — California boasts happy cows in cheese ads; does California also have happy deer? — at several stores. Investigators attached a GPS tracking device to the underside of Pineda-Morales' Jeep on seven occasions over the course of four months. On two of the times that a new GPS device was attached, the Jeep was parked in Pineda Morales' driveway, next to his home. There was no fence around the property, nor was there any Ano trespassing@ sign. On the other times, the Jeep was parked in a public parking lot or on the public street. The installations were done in the early morning hours under cover of darkness. The tracking information helped lead to a marijuana grow. When the GPS device signaled that the Jeep was leaving the grow site, officers stopped the Jeep and smelled fresh marijuana. Pineda-Morales consented to a search of his home and officers found a large amount of harvested marijuana. Pineda-Morales claimed that the installation of the GPS devices violated the Fourth Amendment because the officers came onto the curtilage of his property. He also claimed that the continuous monitoring of the Jeep's movements violated his Fourth Amendment privacy interest.

Courts routinely hold that there is no expectation of privacy in the exterior of a car, and therefore no expectation of privacy that protects against installation of a tracking device on the exterior of a car. Pineda Moreno claimed that the intrusion on the curtilage itself created a violation. The court disagreed, holding that the driveway was a "semi-private" area, lacking barriers or enclosures that would hide it from street view. "Because Pineda-Moreno did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home." The fact that officers installed the GPS devices during the night was of no consequence.

The Supreme Court has held that there is no expectation of privacy in the movement of a vehicle on roadways. United *States v. Karo*; United *States v. Knotts*. As long as the officer installs the tracking device from a place where the officer has a right to be, no warrant is required. Pineda-Morales asked the court to apply a more recent Supreme Court case, *Kyllo v. United States*, in which the Court held that police cannot use a thermal imager to detect the activities inside a private dwelling. Pineda-Morales argued that Kyllo bans sensory-enhancing technology to track private movements. The Court of Appeals disagreed, holding that tracking movement of a car on public roadways is not a search in any sense under the Fourth Amendment. Some courts impose a requirement for a warrant for monitoring based upon their respective state constitutions. If the device is installed under the hood or within the car itself, or if officers must otherwise violate a legitimate expectation of privacy, a warrant to install is required.

7. *United States v. Everett*, 601 F.3d 484 (6th Cir. 2010).

The past couple of years have brought greater clarity to the rules governing questioning during a traffic stop that is unrelated to the underlying justification for the stop. Courts have significantly relaxed former restrictions in light of recent Supreme Court decisions. The case of unfortunate Mr. Everett illustrates the current view in federal courts.

Tax day — April 15th — was just not Everett's day. In the evening, Everett kindly helped soon to be ex-wife move into a new house. She told Everett that he had to take away some of his belongings, including his shotgun. By the time he had finished, it was approximately 2030. Being tax day, Everett needed to get to the tax preparation company office, before closing time — which he believed to be 9:00 p.m. — in order to seek help filing for an extension to file his tax return. Not surprisingly, he was speeding and a detective assigned to a crime suppression unit saw him. The detective followed Everett into a parking lot and spoke with him. His day plummeting to the bottom of the toilet, Everett admitted that his driver license was suspended. The detective smelled the odor of alcohol on Everett's breath. She asked Everett whether he had any alcohol. Everett told her that he had a Big Gulp-sized beer and a shotgun. He also volunteered that he knew that he should not have the shotgun because he was a convicted felon.

Everett was charged with possession of a dangerous weapon by a convicted felon. Everett sought suppression of the evidence and the statements obtained during the traffic stop. Everett claimed, and the detective conceded, that the traffic detention was a pretext to investigate other criminal activity. Pretextual traffic stops were expressly approved by the Supreme Court in Whren v. United States. In Whren, the Supreme Court ruled that no Fourth Amendment violation occurs for a traffic stop based on a minor violation when the violation is a pretext rather than the actual motivation for the stop. Following *Muehler v. Mena*, most courts have allowed questioning unrelated to the initial purpose of the traffic detention. After Whren, courts applied the reasonableness test of the Fourth Amendment to determine whether the particular stop was appropriate. Courts consider whether the duration and scope of the stop were justified by reasonable suspicion for the stop.

Last year, in *Arizona v. Johnson*, the Supreme Court held that "an officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." The Court's holding raised the question of what it means to measurably extend the duration of the stop. In this case, the court declined "to construe Muehler and Johnson as imposing a categorical ban on suspicionless unrelated questioning that may minimally prolong a traffic stop."

Thus, there is no bright line rule prohibiting a brief extension to a traffic stop to ask a few questions unrelated to the initial justification for the stop. "Muehler and Johnson make clear that an officer may ask unrelated questions to his heart's content, provided he does so during the supposedly dead time while he or another officer is completing a task related to the traffic violation. A police officer intent on asking extraneous questions could... delegate the standard traffic stop routine to a backup officer, leaving himself free to conduct unrelated

questioning all the while, or simply by learning to write and ask questions at the same time."

The court did note that in many cases where other courts reached different results, the questioning occurred after the officer had completed all of the business associated with the initial purpose of the stop. This strongly suggests that officers consider using the "free time" or "dead time" during the stop. The ultimate question that courts should ask is "whether the totality of the circumstances surrounding the stop' indicates that the duration of the stop as a wholeCincluding any prolongation due to suspicionless unrelated questioningCwas reasonable."

The court noted that it would examine the content of the officer's extraneous questioning, as well as the length of the questioning, to rule on the reasonableness of the detention. The court suggested that questions about travel plans, travel history, officer safety issues and dangerous weapons will generally be permitted. In this case, the detective was asking about weapons, which the court found to be "is reasonably related to the legitimate and weighty consideration of officer safety." Thus, almost two years to the day after tax day, the court of appeals upheld Everett's conviction.

8. *United States v. Shakir*, 616 F.3d 315 (3rd Cir. 2010).
Last year's decision in *Arizona v. Gant* shook up the rules of search incident to arrest. Many courts have narrowly applied the *Gant* rule. United *States v. Shakir* is one such case, with a rationale similar to many 2010 federal and state cases.

Shakir was wanted on a Pennsylvania arrest warrant for bank robbery. An officer learned that Shakir might be staying at the Trump Casino in Atlantic City. When the officer went to the casino, he learned that Shakir had been gambling there and was expected to check into the hotel that afternoon. Shortly after that, the officer spotted Shakir. He approached him, grabbed him and arrested Shakir. Shakir dropped a nylon gym bag that he was holding. The officer frisked Shakir and attempted to handcuff him. Shakir explained to the officer that three pairs of handcuffs were normally required to secure him.

Once Shakir was secured by two backup officers, the officer searched the gym bag and found a large amount of cash. Some of the bills were traced to another bank robbery (not the robbery that lead to the arrest warrant). Shakir was convicted of the second robbery. He appealed, claiming that the search of the bag and seizure of the cash was not part of a valid search incident to arrest. Shakir argued that he was compliant and secured at the time of the search. Thus, Shakir argued that the officer safety and evidence destruction rationales articulated in *Chimel v. California* did not justify the search incident to the arrest.

For many years, officers understood that a search incident to arrest could be conducted even after a person was temporarily secured in handcuffs as long as the search was reasonably contemporaneous with the arrest. This approach found support in *New York v. Belton*. In *Arizona v. Gant*, the Supreme Court retreated from the Belton holding and overturned a search after Rodney Gant had been handcuffed and placed in a patrol car near the vehicle that Gant had been driving at the time of his arrest. The Court said that the search could not be justified under the officer safety and evidence preservation rationales of Chimel because Gant was no longer a threat and could no longer access the car. Another important factor is that Gant was initially arrested for a driver license violation and it was unlikely that there would be evidence of that violation found in the car which he was driving.

The Supreme Court stated, "we hold that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search incident to arrest exception are absent and the rule does not apply."

The Third Circuit appellate court disagreed with Shakir's argument that Gant prevented a lawful search of his gym bag and the seizure of the incriminating cash that it contained. "Although it would have been more difficult for Shakir to open the bag and retrieve a weapon while handcuffed, we do not regard this possibility as remote enough to render unconstitutional the search incident to arrest."

The court did acknowledge that Gant had signaled a retreat from Belton. The *Gant* opinion should be understood to have focused on the question of whether Gant could get to his car or not at the time of the search. The Third Circuit continued: "We do read Gant as refocusing our attention on a suspect's ability (or inability) to access weapons or destroy evidence at the time a search incident to arrest is conducted." The court must consider whether the suspect was effectively secured at the time of the search.

Even though the suspect's ability to access weapons and evidence is an important factor, that does not

automatically preclude a lawful search incident to an arrest of items found on or near an arrested person. "Accordingly, we understand Gant to stand for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it... We hold that a search is permissible incident to a suspect's arrest when, under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched. Although this standard requires something more than the mere theoretical possibility that a suspect might access a weapon or evidence, it remains a lenient standard."

The court acknowledged that handcuffs have temporary and limited utility to secure suspects. The opinion cited reports of officers being killed by handcuffed suspects and said that handcuffs are not failsafe. Because the bag was located at Shakir's feet, even though he was handcuffed at the time of the search, there was a reasonable possibility that he could reach into the bag for a weapon. Thus, the court upheld the search and conviction.

9. *Melgar v. Greene*, 593 F.3d 348 (4th Cir. 2010).
This case made it into the top ten because it is the latest case to protect K9 handlers from liability when the handler is just trying to do the job right (the author, a former K9 handler, admits some bias in favor of police service dog handlers).

Melgar, a 13-year-old boy, became intoxicated for his first time at a birthday party. Melgar and his 13-year-old friend were told to "go outside and walk it off" when the friend got a little too physical with one of the female partiers. The boys quickly became lost in the cold winter night. They had only light clothing. The boys separated and Melgar's friend fell asleep under a bush after he vomited and urinated on himself. A couple of hours later a passer by saw the boy and called police. The friend was suffering from hypothermia and alcohol poisoning. The officers learned that Melgar was still missing. A K-9 officer responded. The only dog available to find Melgar was a patrol dog, trained to find and bite suspects. The officer called out to Melgar and began to track, with the dog on a 15-foot lead. The dog found Melgar, who was asleep or passed out, and bit him on the ankle before the handler realized that the dog had located his quary.

Grateful (or not) that police saved his highly-intoxicated young boy from near-certain death, Melgar's father sued. The officer testified that he normally would have considered using a bloodhound to track. However, the department's bloodhound was incapacitated with an injury. The officer considered that it was biting cold, the boy was reportedly highly intoxicated, his companion was seriously hypothermic, another bloodhound was at least an hour away and there was no known scent readily available, other officers had searched the neighborhood with lights and by calling out, and his belief that he would see the lost boy before his dog got close enough to bite.

The trial court refused to grant qualified immunity to the K9 handler. The appellate court reversed, holding that there was no clearly-established law concerning whether a find-and-bite dog may be used to locate a missing person. Moreover, the court recognized that the handler had used the dog as a last resort to find a boy presumed to be in great danger and missing for several hours. The court also recognized that the handler had tried to keep the dog from biting by using a leash and watching the dog. The court noted that the plaintiff's attempt to establish liability by citing the much-criticized IACP guideline that police dogs should be trained to find and bark was unhelpful. The IACP guideline reflects an opinion, but not clearly-established law. Moreover, the IACP guidelines do provide for use of a patrol dog to locate missing persons when precautions are taken. The handler in this case followed those precautions.

10. *Bryan v. MacPherson*, F.3d , 2010 WL 4925422, superseding 608 F.3d 614 (9th Cir. 2010).
This case is at the bottom of the Top Ten, just where it belongs. Litigation over electronic control devices is becoming increasingly popular. Though the vast majority of cases illustrate that these valuable tools are being used properly and often in place of far more serious force, some courts are struggling with a coherent approach to applying the principles of *Graham v. Connor* to the use of an electronic control device. This case represents one court's difficulty with clarity. Thankfully, the law in other federal appellate circuits is developing in a more rationale and comprehensible fashion.

The Ninth Circuit Court of Appeals added heat and subtracted light from its earlier opinions on the use of TASER devices with its newly-amended decision in the case of *Bryan v. MacPherson*. The Ninth Circuit panel wrote that the TASER or any other electronic control device is an "intermediate or medium, though not insignificant, quantum of force." This language, coupled with its confused application to the facts by the majority, prompted some needless alarm in law enforcement circles.

Bryan was stopped, for the second time in an hour, while driving on a Southern California freeway. During the second stop, based on a seatbelt violation, Bryan got out of the car, wearing only boxer shorts and tennis shoes, and became highly agitated. The officer told Bryan to get back in the car. Bryan was striking himself and yelling unintelligibly when he took a step toward the officer (Bryan later denied advancing toward the officer). The officer feared that Bryan was under the influence of drugs or in mental health crisis. The officer deployed a TASER. It appears that Bryan was facing away from the officer when the darts struck him. One of the probes became deeply embedded in Bryan's thigh, ultimately requiring removal by a doctor. Bryan fell and broke four teeth and suffered minor contusions. The officer believed that Bryan was mentally disturbed and needed to be secured.

The court examined its prior TASER cases and concluded that the applicable law was not clearly established at the time of the incident. Thus, the officer was entitled to qualified immunity, even if he had made a mistake of law in selecting a particular force option. The majority further opined that the officer's use of the TASER constituted excessive force under its own internal resolution of facts disputed in the trial court and not yet resolved at that level. The Bryan court did not believe the use of a TASER was justified because it believed that Bryan did not pose an immediate threat to the officer or any other person. That conclusion seems unsupportable based on the evidence presented by the officer.

The present opinion was issued by a sharply divided 4-3 Ninth Circuit panel of judges. The Bryan panel's majority decision is also at odds with other federal circuit courts of appeals. These factors enhance the likelihood of Supreme Court review of *Bryan v. MacPherson* or some other case with similar issues. This decision is binding, insofar as it is comprehensible, only on officers within the 9th Circuit. Officers are responsible to know and follow "clearly established" law. The appellate judges generated an opinion that is anything but clear and one is left to wonder what law, if any, is "established" by the panel.

Hold on, there are two other TASER cases, *Brooks v. Seattle* and *Mattos v. Aragano*, in the pipeline that may be assigned to judges who may say more clearly what the law means. The 9th Circuit panels can twist and shout in their various viewpoints, but the ultimate authority on constitutional interpretation is the Supreme Court. The Supreme Court remains true to the proven principle of *Graham v. Connor's* "objective reasonableness" as the yardstick for measuring the propriety of an officer's chosen force option. Those who persist with rigid force continua in their agency policies — see The Risky Continuum, under the Publications tab at KenWallentine.com — will lose hair and sprout migraines as they attempt to fit the panel's weak and probably temporary majority decision on to the framework of a force continuum.

About the author

Ken Wallentine is Chief of Law Enforcement for the Utah Attorney General. The views expressed herein are his own. A veteran officer and attorney, his most recent book, *The K9 Officer's Legal Handbook* is now available from LexisNexis. For more information about this valuable new book, go to www.kenwallentine.com. Chief Wallentine publishes Xiphos, a free biweekly legal update newsletter for law enforcement officers. Free subscription information is available at his website.