
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 <https://www.fletc.gov/legal-resources>.

This edition of *The Informer* may be cited as 5 INFORMER 16.

Join THE INFORMER E-mail Subscription List

**It's easy! Click HERE to subscribe,
change your e-mail address, or unsubscribe.**

THIS IS A SECURE SERVICE. No one but the FLETC Legal Division will have access to your address, and you will receive mailings from no one except the FLETC Legal Division.

The Informer – May 2016

Article

The “But-For” Test: How *Burrage v. United States* Impacts Drug Distribution Investigations.....4

By Michelle M. Heldmyer, Attorney-Advisor / Senior Instructor, Office of Chief Counsel / Legal Division, Federal Law Enforcement Training Centers, Artesia, New Mexico

Case Summaries

Circuit Courts of Appeals

First Circuit

United States v. Hamilton : Whether officers lawfully entered the house where they located and arrested the defendant.....7

Third Circuit

United States v. Murray: Whether officers lawfully entered a motel room and then lawfully frisked the defendant.....8

Fourth Circuit

United States v. Palmer: Whether an officer unlawfully expanded the scope of a traffic stop to conduct a drug investigation.....9

Sixth Circuit

United States v. Carpenter: Whether the government violated the *Fourth Amendment* by not obtaining a search warrant to obtain business records from a wireless carrier.....10

Seventh Circuit

United States v. Mays: Whether an officer had reasonable suspicion to frisk the defendant..11

United States v. Whitaker: Whether the warrantless use of a drug-sniffing dog in a common hallway of an apartment building violated the *Fourth Amendment*.....11

United States v. Contreras: Whether the officers’ warrantless entry into the defendant’s garage and protective sweep of his house violated the *Fourth Amendment*.....12

United States v. Leiva: Whether the defendant’s consent to search his vehicle was valid when the officer’s request to search, spoken in Spanish, did not request exactly what the officer intended.....13

Eighth Circuit

United States v. Adams: Whether the defendant unequivocally invoked his right to remain silent, and whether he impliedly waived his right to remain silent.....14

United States v. Pile: Whether an officer lawfully opened the door to look inside the defendant’s camper after arresting the defendant outside the camper.....16

United States v. Tamayo-Baez: Whether an officer had reasonable suspicion to stop the defendant.....16

United States v. Smith: Whether officers’ warrantless entry into the defendant’s house was lawful under the community caretaking exception17

United States v. Makeeff: Whether federal probation officers’ warrantless seizure and search of a USB drive violated the *Fourth Amendment*.....19

Tenth Circuit

Perea v. Baca: Whether officers were entitled to qualified immunity in a lawsuit for excessive use of force when they continued to deploy a taser against Perea after he was subdued.....20

Eleventh Circuit

United States v. Smith: Whether statements obtained from the defendant were compelled in violation of *Garrity v. New Jersey*.....21

District of Columbia Circuit

United States v. Scurry: Whether evidence obtained through a wiretap order that was invalid on its face should be suppressed.....22



FLETC Informer Webinar Series

1. Fourth Amendment Overview

2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division. This webinar provides an overview of the *Fourth Amendment* to include: levels of suspicion, (hunches, reasonable suspicion, and probable cause) what constitutes a search and a seizure, and a discussion of “reasonableness.”

Dates and Times: **Wednesday June 15, 2016 2:30 p.m. EDT and
Monday June 20, 2016 2:30 p.m. EDT**

To join this webinar on either date: <https://share.dhs.gov/informer>



To participate in a FLETC Informer Webinar:

1. Click on the link to access the Homeland Security Information Network (HSIN).
2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account click on the button next to “Enter as a Guest.”
4. Enter your name and click the “Enter” button.
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 at least one-hour before a scheduled webinar.
8. Training certificates will be provided at the conclusion of each webinar.

The “But-For” Test: How *Burrage v. United States* Impacts Drug Distribution Death Investigations

By Michelle M. Heldmyer, Attorney-Advisor / Senior Instructor
Office of Chief Counsel, Legal Division, Federal Law Enforcement Training Centers
Artesia, New Mexico

Too often, controlled substance distribution investigations in the United States lead to the disturbing discovery that controlled substance customers of the target distributor have accidentally overdosed and died as a result of their drug use. The Centers for Disease Control and Prevention reports that from 2000 to 2014, nearly half a million Americans died from drug overdose.¹

Opioid overdoses, including prescription drugs and heroin, hit record levels in 2014, increasing by 14 percent in just one year. The prescription drugs oxycodone and hydrocodone are involved in more overdose deaths than any other opioid type. *Id.* The CDC calls it an epidemic – a fact that few law enforcement agencies would dispute.

But this epidemic is more than just a statistic. Discovering an overdose death during a drug investigation transforms the case in many ways. It puts a face on an otherwise “victimless” crime and adds fuel to law enforcement’s desire to achieve justice. Investigators intuitively know that a more serious and demanding crime has occurred, one with victims and families and pain. The law validates this assessment. When an overdose death occurs, enhanced penalties for the defendant who distributed the drug may be applicable. But the investigation and prosecution of an overdose death is far from simple. In 2014, the Supreme Court clarified the path to conviction, but also significantly increased the already-challenging burden on the government in many cases.

Prosecutions of controlled substance offenses can occur in both state and federal courts. Title 21 of the United States Code contains the federal criminal treatment of controlled substance use, distribution and manufacture. Section 841, the heart of these prohibitions, contains the most commonly encountered conducts and their concomitant penalties. This statute is utilized in federal prosecutions for controlled substance distributions by street drug dealers as well as health care professionals, such as doctors and nurse practitioners.

In 1986, pursuant to the Anti-Drug Abuse Act, Congress increased the maximum penalties and added minimum mandatory penalties for certain criminal acts within Title 21. These sentencing enhancements are typically tied to the quantity and type of controlled substances involved in the crime.

In addition, Congress created an enhanced penalty for certain criminal acts in which “death or serious bodily injury results from the use of such substance....” 21 U.S.C. §§ 841(b)(1)(A)-(C). The enhancement is significant. It carries a minimum mandatory 20 years up to life imprisonment.

The causation provision, commonly called the “death results” enhancement, seems a logical and effective tool to combat the epidemic of controlled substance use and distribution. People

¹ CDC MORBIDITY AND MORTALITY WEEKLY REPORT; INCREASE IN DRUG AND OPIOID OVERDOSE DEATHS – UNITED STATES, 2000-2014 (JAN 1, 2016).

are dying as a result of their narcotics abuse, and to hold those who provided the substances to them responsible for the death could assist courts in targeting those who are seen as more culpable than are the end users.

The practical application of the “death results” provision, however, proved difficult. Though lured by the impressive penalties, most criminal investigators and prosecutors have no background in the medical field. Often for the first time, they are reading medical charts and autopsy reports, talking to forensic examiners, pharmacists and toxicologists, and attempting to preserve evidence they never knew existed. They study issues such as the forensic effects of Narcan use by responding EMTs, or how post-mortem lividity impacts toxicology results. And they attempt to educate judges who were often equally lacking in medical comprehension.

Even worse, Congress failed to define its new legal terminology, “death or serious bodily injury results from the use of such substance....” - a phrase which sounds to most investigators and prosecutors as more civil than criminal in nature. As a result of the uncertainty in meaning, usage of the “death results” enhancement was uneven, and the case law which developed varied widely amongst district and circuit courts.

Investigators working a death case learn that an overdose is rarely a simple event. A typical investigation follows the target distributor’s drugs to the addict, and then to the discovery that the addict overdosed and died sometime shortly thereafter. The link between the two events looks deceptively obvious. However, as is frequently learned only after acquiring the autopsy report, addicts tend to have other health issues.

They also tend to ingest multiple potentially harmful substances, some of which were obtained from other sources, and forensic experts tend to identify “poly-drug” intoxication as the cause of death. Alcohol and other illegal drugs are commonly found in the body along with prescription drugs. Some abused substances, such as “bath salts,” are not always included in standard toxicology screening, particularly when they are new on the scene.

Investigators are then left with an ambiguous question: *Did the overdose death result from the decedent’s use of the illegal controlled substance distributed by my target?* The question is multifaceted, and each facet must be proven. The death must be linked in some way to a specific target and a specific distribution. Causation must be proven, but what kind of causation? Actual cause? Proximate cause? Or something else entirely?

How to make that causal link is the subject of the 2014 Supreme Court decision, *Burrage v. United States*.² The case was a product of the uncertainty created by the “death results” language. Many courts had required only that the government prove the distributed drug, as charged in the indictment, contributed to the user’s death. This standard allowed for flexibility when faced with a “poly-drug” autopsy finding, or a toxicology opinion that some substance had a synergistic effect on the distributed drug,³ and, therefore, also contributed to the death. Also complicating the issue were pre-existing conditions, such as alcoholism, heart conditions, diabetes, and the like. While these issues were problematic even using simple contributing-cause standards, they could be overcome based upon the facts of a particular case and the strength of the forensic experts’ opinions.

² ___ U.S. ___, 134 S. Ct. 881 (2014).

³ Users often consume a cocktail of various substances, like oxycodone, alprazolam and carisoprodol, in order to enhance the effects of the opiate.

Burrage, however, created a different burden of proof. In *Burrage*, the defendant was charged with the death of one of his heroin customers, described as “a long-time drug user” who died “following an extended drug binge,” which included ingestion of substances not obtained from the defendant. 134 S. Ct. at 885. The autopsy and toxicology analysis revealed the user had multiple drugs in his system when he died, including heroin. The expert testified that he could not say the user would have lived but for the heroin ingestion, but could say the heroin “was a contributing factor” in the death as it interacted with the other substances to cause “respiratory and/or central nervous system depression.” *Id.* The official cause of death was “mixed drug intoxication.” 134 S. Ct. at 886.

The question before the Supreme Court was whether this “contributing factor” evidence constituted proof that the defendant’s distribution resulted in the user’s death. The Court said no. Contributing cause is not enough.

After applying a common legal definition of causation, the Court ultimately decided that, in order to prove death resulted from the distribution, the government must prove beyond a reasonable doubt that the harm would not have occurred *but for*, or in the absence of, the defendant’s conduct. This decision meant that none of the individuals who provided controlled substances to the user could be held accountable for his death, since none of the drugs alone could be said to have legally caused the death.

The Court did, however, offer some optimism in applying the standard to death and serious bodily injury cases involving poly-drug intoxication. First, the Court affirmed the proposition that where use of the drug distributed by the defendant is an independently sufficient cause of the victim’s death or serious bodily injury, the defendant can be found liable for the harm regardless of other factors. 134 S. Ct. at 892.

Second, the opinion explains other causes can play a part in the harm so long as, without the charged substance, the user would have lived.⁴ 134 S. Ct. at 888.

From the investigator’s standpoint, *Burrage* has clarified an area previously muddled by various viewpoints on causation, and now serves as the standard for drug death investigations and court presentations. Further, the test is universal, and applies whether the investigation targets are street drug dealers or medical professionals.⁵

Thus, when investigating a drug intoxication death, the focus for the investigator, the prosecutor, and the experts who will ultimately testify, is: *notwithstanding other contributing factors, would the harm have occurred, but for the distribution and use of the charged controlled substance?* The burden is greater under the “but-for” standard, but it is not insurmountable.

While the test does not alleviate the need to learn to read medical charts, it does at least simplify the process of determining whether the penalty enhancement fits the facts of each case and, therefore, the severity of the crime to be prosecuted. With a good team of experts and careful scrutiny of facts early in the investigation, successful “death resulted” prosecutions can be done post-*Burrage*.

⁴ The same analysis is used if “serious bodily injury” is charged.

⁵ However, a question not answered by this opinion is whether a controlled substance prescription cocktail, rather than one individual prescription, by a medical professional could be considered as one “distribution” for purposes of causation, where the combination of drugs killed the patient. It remains an open issue.

CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Hamilton, 2016 U.S. App. LEXIS 7172 (1st Cir. Mass. Apr. 20, 2016)

Police officers obtained a warrant to arrest Hamilton for armed bank robbery. The officers discovered several potential addresses for Hamilton in various databases, but focused on a house located at 16 Harrow Street. The officers also learned that an individual named Tommy Smith received mail at 16 Harrow Street, and that Smith had an outstanding arrest warrant for motor vehicle violations that listed 16 Harrow Street as his address. Officers from several law enforcement agencies, including special agents with the FBI Bank Robbery Task Force, went to 16 Harrow Street to arrest Tommy Smith, knowing that they might also be able to execute the arrest warrant for Hamilton at that address. When the officers arrived at 16 Harrow Street at 6:00 a.m., they discovered Tommy Smith was not present and that he had not been living at that address for over a year, although he did stop by occasionally to pick up his mail. However, the officers found Hamilton at 16 Harrow Street and arrested him. The officers then obtained consent to search from Hamilton's girlfriend and found a handgun and ammunition under a mattress shared by the couple.

The district court denied Hamilton's motion to suppress the evidence seized from 16 Harrow Street.

Although there were a number of issues raised in the district court, the sole issue on appeal was whether the officers had a reasonable belief that Tommy Smith lived at and would be present at 16 Harrow Street when the officers entered the residence.¹

An arrest warrant authorizes the police to enter a suspect's residence when the officers have reason to believe the suspect is inside. The court found that there were several reasons for the officers to reasonably believe that Smith resided at 16 Harrow Street. First, an outstanding arrest warrant, issued approximately five-weeks earlier listed 16 Harrow Street as Smith's residence. Second, postal records indicated that Smith received mail at that address. Third, several public databases connected Smith to 16 Harrow Street. As a result, the court held the information known to the officers supported a reasonable belief that Smith lived at 16 Harrow Street when they entered the residence to arrest him.

The court further held that once the officers reasonably believed that Smith lived at 16 Harrow Street, it was reasonable for them to believe that he would be home at 6:00 a.m.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/14-2150/14-2150-2016-04-20.pdf?ts=1461186004>

¹ For example, the government did not argue that the entry of 16 Harrow Street was justified by the arrest warrant for Hamilton. Instead, the government argued that the entry of 16 Harrow Street was lawful based on the arrest warrant for Smith. In addition, Hamilton did not argue that the execution of the arrest warrant for Smith was a pretext used to gain unlawful entry of 16 Harrow Street to arrest him.

Third Circuit

United States v. Murray, 2016 U.S. App. LEXIS 7697 (3d Cir. Pa. Apr. 28, 2016)

An officer investigating a suspected prostitution ring received information from a motel owner that a man driving a green Cadillac had picked up a prostitute from his motel. Later that day, the officer received a tip that a man driving a green Cadillac was in possession of drugs at a Knights Inn motel.

A few hours later, the officer and his partner saw a green Cadillac parked outside another nearby motel, the Neshaminy Motor Inn. The officers learned the car was registered to Room 302, which had been rented by Jamil Murray. The officers knew from their investigation that Murray had also rented rooms 157 and 158 at the Knights Inn earlier that day. In addition, the officers knew that Murray had paid cash and the officers had seen a copy of Murray's driver's license that was on file at the Knights Inn. When one of the officers knocked on the door to Room 302, a woman wearing lingerie answered the door, and asked the officer if he was "looking for a date." One officer replied, "no," and the officers then went to the Knights Inn where they saw the green Cadillac parked in front of Room 158. The officers saw a woman leaving Room 158, and saw Murray inside the room.

The officers returned to the Neshaminy Motor Inn and knocked on the door to Room 302. A woman inside told the officers she was busy, and to go away. When the officers identified themselves and told the woman they wanted to speak to her, she opened the door and allowed the officers to enter the room. The woman, identified as Jessica Burns, told the officers that she was a prostitute working for the person who had rented the room, who was also a drug dealer. While the officers were interviewing the woman, there was a knock on the door. When the officers opened the door, Murray entered the room. One of the officers frisked Murray, and Murray allowed him to remove items from his pockets to include a large sum of cash and hotel room keys, which were later discovered to be keys to Rooms 157 and 158 at the Knights Inn.

Based on the woman's statements and the evidence seized from Murray, officers obtained a warrant to search Rooms 157 and 158 at the Knights Inn and Murray's Cadillac. In Room 157, officers found a large quantity of crack cocaine.

The government charged Murray with a variety of criminal offenses.

Murray filed a motion to suppress the evidence seized from his person and from Room 157. Murray argued this evidence was "fruit of the poisonous tree" stemming from the officers' unlawful entry into Room 302 and then from an unlawful frisk.

The court held that Burns lawfully consented to the officers' entry into Room 302 because she had actual authority over the room. When more than one person has actual authority over an area or object to be searched, that person is said to have "common authority." The concept of common authority rests on the principle that one assumes the risk that a "co-inhabitant" might allow the common area to be searched. In this case, it was clear that Burns had access and control over Room 302. The fact that the officers knew the room was registered to Murray did not render Burns' consent invalid.

Alternatively, the court found that Burns possessed apparent authority over the room. When a person possesses only apparent, rather than actual common authority, consent to enter is still valid if the officers reasonably believe the person granting consent has common authority over

the area, but later learn that the person did not. Here, the facts known to the officers when they entered Room 302 warranted a reasonable belief that Burns was a prostitute who had access and control over the room for most purposes.

Next, the court held that the officers lawfully frisked Murray after he entered the room because they had reasonable suspicion to believe that he was armed and dangerous. The officers obtained evidence from Burns, supported by information from their investigation earlier in the day, that Murray was a drug dealer who was running a prostitution operation. Consequently, the court concluded it was reasonable for the officers to suspect Murray was armed. Importantly, the court held that the items taken from Murray were not seized as a result of the *Terry* frisk, but pursuant to Murray's valid consent.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca3/15-2054/15-2054-2016-04-28.pdf?ts=1461864631>

Fourth Circuit

United States v. Palmer, 2016 U.S. App. LEXIS 7224 (4th Cir. Va. Apr. 21, 2016)

An officer conducted a traffic stop on Palmer for a window-tint violation and because the inspection sticker on the vehicle's front windshield appeared to be fraudulent. While speaking to Palmer, the officer smelled the overwhelming odor of air freshener, and saw at least five air fresheners inside the vehicle. After obtaining Palmer's driver's license and registration, the officer conducted a database check that revealed Palmer was a suspected gang member with a criminal record for drug and firearm offenses. The officer returned to Palmer's vehicle and decided to verify the inspection sticker's authenticity by looking at the back of it. When the officer leaned through the open driver-side door to examine the back of the inspection sticker, which he concluded was legitimate, he smelled marijuana. The officer requested a drug-sniffing dog, which later alerted to the presence of drugs in Palmer's vehicle. The officer searched Palmer's vehicle, finding crack cocaine and a handgun.

The government charged Palmer with possession with intent to distribute crack cocaine and being a felon in possession of a firearm.

Palmer filed a motion to suppress the evidence seized from his vehicle.

First, Palmer argued the officer did not have an objectively reasonable basis for initiating the traffic stop.

The court disagreed. The court concluded that the district court properly credited the officer's testimony that he was familiar with the limits on window tint under Virginia law, and in his view, the tint on the windows of Palmer's vehicle was too dark.

Next, Palmer argued that the officer unreasonably expanded the scope of the stop by beginning an unjustified drug investigation instead of focusing on the suspected window tint and inspection sticker violations.

Again, the court disagreed. Before smelling the marijuana, the officer obtained Palmer's documentation and checked among other things, a criminal history check, which is allowed during a traffic stop. At this point, the court concluded that Palmer's criminal history, the

presence of multiple air fresheners, gang affiliation, and the location of the stop provided the officer with reasonable suspicion to believe Palmer was engaged in criminal activity.

Finally, Palmer argued that the officer conducted an unreasonable search of his vehicle when he stuck his head inside Palmer's vehicle to examine the inspection sticker.

The court commented that Palmer framed his argument regarding the officer's examination of the inspection sticker in terms of "reasonableness." However, the court found that Palmer, needed to establish that he had a reasonable expectation of privacy in the area searched. Because Palmer failed to argue that he had a reasonable expectation of privacy that the officer violated, the court held that he could not rely merely on the officer's examination of the inspection sticker as a basis for suppressing the evidence seized from his vehicle.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca4/14-4736/14-4736-2016-04-21.pdf?ts=1461265257>

Sixth Circuit

United States v. Carpenter, 2016 U.S. App. LEXIS 6670 (6th Cir. Mich. April 13, 2016)

The government charged Carpenter and Sanders with several counts of armed robbery. At trial, the government's evidence included business records from the defendants' wireless carriers, showing that each defendant used his cellphone within a half-mile to two miles of several robberies during the times the robberies occurred. The government obtained these records with a court order issued by a magistrate judge pursuant to *Section 2703(d)* of the Stored Communications Act.

The defendants filed a motion to suppress the government's cell-site evidence. The defendants argued the government violated the *Fourth Amendment* by not obtaining a search warrant to obtain the cell-site evidence.

The court disagreed. The *Fourth Amendment* protects the content of personal communications between individuals. Here, the business records maintained by the defendants' wireless carriers did not reveal anything about the content of any cell phone calls. Instead, the records included non-content related information, which wireless carriers gather in the ordinary course of business. For example, carriers track their customers' phone across different cell-site sectors to connect and maintain their customers' calls. The carriers also keep records of this data to find weak spots in their network and to determine if roaming charges apply. Consequently, the court held that the government's collection of cell-site records created and maintained by the defendants' wireless carriers was not a search under the *Fourth Amendment*.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/14-1572/14-1572-2016-04-13.pdf?ts=1460559660>

Seventh Circuit

United States v. Mays, 2016 U.S. App. LEXIS 6552 (7th Cir. Ind. Apr. 11, 2016)

While on patrol in a high-crime area an officer saw three people fighting, while a fourth person, later identified as Mays, watched. As the officer approached, Mays began to walk away. The officer ordered Mays to stop, but Mays continued to walk away. A back-up officer arrived and followed Mays on foot. The officer ordered Mays to stop and identify himself, but Mays continued to walk away from the officer and utter profanity at the officer. When the officer ordered Mays to remove his hands from his pants pockets, Mays only removed his left hand, while keeping his right hand in his pocket while angling his right side away from the officer as he continued to walk. Mays eventually stopped walking, but turned his body in a way that kept his right side away from the officer. The officer placed his left hand on Mays' right shoulder to keep Mays from turning around and to create distance between the two men. The officer again ordered Mays to remove his hand from his pocket, but Mays refused, cursed and then turned towards the officer. When Mays turned, the officer saw that he had a pistol in his right hand. The officer deployed his taser, striking Mays in the chest. Mays dropped his pistol and was arrested.

The government charged Mays with being a felon in possession of a firearm.

Mays filed a motion to suppress the pistol, arguing that the officer did not have reasonable suspicion to stop him.

The court disagreed. First, the court determined the officer seized Mays for *Fourth Amendment* purposes when the officer placed his hand on Mays' shoulder.

Second, the court concluded when the officer put his hand on Mays' shoulder, he had reasonable suspicion to believe Mays had a weapon in his right hand, and that Mays was about to use physical force against him. Throughout the encounter, Mays' repeatedly refused the officer's commands to stop, uttered profanity, and refused to remove his right hand from his pocket. The court concluded it was reasonable for the officer to believe that when Mays suddenly stopped and turned to face him that Mays had not changed his mind and decided to talk to the officer. Instead, the court found that the officer had reasonable suspicion to believe that Mays was armed and a danger to his safety. As a result, the court concluded the officer was justified in seizing Mays by placing his hand on Mays' shoulder.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-2152/15-2152-2016-04-11.pdf?ts=1460395864>

United States v. Whitaker, 2016 U.S. App. LEXIS 6655 (7th Cir. Wis. Apr. 12, 2016)

Officers obtained information that drugs were being sold from a specific apartment in Madison, Wisconsin. The officers received permission from the apartment property manager to bring a drug-sniffing dog, Hunter, into the locked, shared hallway of the apartment building. Hunter alerted to the presence of drugs in Whitaker's apartment when he walked past the door to the apartment. Officers then obtained a warrant, searched Whitaker's apartment and seized cocaine, heroin, and marijuana.

The government charged Whitaker with a variety of criminal offenses.

Whitaker filed a motion to suppress the evidence seized from his apartment. Whitaker argued that the use of the drug-sniffing dog in the hallway constituted a warrantless search that violated the *Fourth Amendment*.

In *Florida v. Jardines*, the United States Supreme Court held that the government's use of a trained police dog to investigate a home and its immediate surroundings was a search under the *Fourth Amendment*. However, in *Jardines*, the court was clear that its holding was based on the trespass to the Jardines' curtilage, not a violation of Jardines' expectation of privacy. In this case, Whitaker argued that *Jardines* should be extended to the hallway outside his apartment door because the officers took the dog to his door for the purpose of gathering incriminating forensic evidence.

The court agreed, holding that the use of the drug-sniffing dog in the hallway violated Whitaker's reasonable expectation of privacy. In *Kyllo v. United States*, the United States Supreme Court held that "where the government uses a (thermal imaging) device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." The court concluded that the dog sniff conducted in this case fell within *Kyllo*, as a trained drug-sniffing dog is a sophisticated sensing device not available to the general public. Here, Hunter detected the presence of drugs that the officers would not have known about unless they entered Whitaker's apartment. Just as police officers cannot stand on a person's front porch and look through a window with binoculars, or put a stethoscope to the door to listen, the court found that officers cannot bring a "super-sensitive" dog to detect objects or activities inside a home.

In conclusion, the court reminded the government that the *Fourth Amendment's* "core concern" is protecting the privacy of the home. While Whitaker did not have a reasonable expectation of complete privacy in his apartment hallway, he did have a reasonable expectation of privacy against persons in the hallway "snooping into his apartment using sensitive devices not available to the general public."

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/14-3506/14-3506-2016-04-12.pdf?ts=1460494851>

United States v. Contreras, 2016 U.S. App. LEXIS 7036 (7th Cir. Ill. Apr. 19, 2016)

Officers suspected that Soto was involved in a drug-trafficking operation. While conducting surveillance, officers saw Soto come out of his house and get into a vehicle with two large garbage bags. The officers followed Soto and saw him discard the bags in a dumpster. Officers recovered the bags and found materials used to package illegal drugs. In addition, a drug-sniffing dog alerted to the presence of cocaine on the items. In the meantime, other officers followed Soto to Contreras' house, where he drove his vehicle into the attached garage. The officers remained in their vehicles, parked on the public street a short distance from Contreras' house. A few minutes later, the garage door opened and, using binoculars, the officers had a clear view of what was happening inside the garage. The officers saw Soto remove a shoebox from his vehicle. As Soto handled the box, he dropped it and a rectangular, white object wrapped in plastic fell out. Based on their experience, the officers recognized the object as a kilogram of narcotics. Soto picked up the box and appeared to place it inside a tan plastic bag.

At this point, the officers entered Contreras' garage without a warrant and arrested the men. The officers searched the shoebox and found five wrapped bricks of cocaine. The officers then conducted a brief protective sweep of Contreras' house because as they entered the garage they heard a woman scream and run inside the house. The agents later found Contreras' sister-in-law in the house. After securing the house, the officers took Contreras inside where he signed a consent-to-search form in English and Spanish. The agents searched Contreras' house and found among other things, another 2.5 kilograms of cocaine.

The government charged Contreras with conspiracy to possess with intent to distribute cocaine.

Contreras filed a motion to suppress the evidence seized from his garage and house, arguing that the officers' search of the garage and protective sweep of his house violated the *Fourth Amendment*. Contreras also claimed that he did not voluntarily consent to the search of his house.

First, the court held the officers' entry and search of Contreras' garage was reasonable. Once Contreras opened the garage door, the court concluded that he no longer had an expectation of privacy in the activities conducted inside it. As a result, the officers who were parked on a public street lawfully observed what they reasonably believed to be a drug transaction. In addition, the officers' use of binoculars to improve their visibility of objects already in plain view has long been held to be constitutional.

Next, the court held that once the officers saw the suspected contraband fall out of the shoebox, they lawfully entered the garage without a warrant to prevent the destruction of the evidence. The court commented that in this case what the officers saw in plain view triggered the exigent circumstances (destruction of evidence) that allowed them to enter the garage without a warrant.

The court further held the protective sweep of Contreras' house was lawful because as the officers entered the attached garage, they heard a woman scream and run into the house. In addition, the officers' sweep lasted less than a minute and the officers did not search drawers, containers or other places for evidence, but rather looked for people so they could ensure officer safety.

Finally, the court held Contreras voluntarily consented to the search of his house. Contreras signed two consent forms, one in English and one in Spanish, and both forms explicitly stated that, "I have not been threatened nor forced in any way. I freely consent to this search." In addition, Contreras spoke freely to the officers, describing his drug dealings with Soto, and he directed the officers where to successfully find the additional cocaine in his house.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-1279/15-1279-2016-04-19.pdf?ts=1461087147>

United States v. Leiva, 2016 U.S. App. LEXIS 7956 (7th Cir. Ill. Apr. 29, 2016)

After completing a traffic stop, an officer asked Leiva, "Puedo buscar su coche?" The officer believed he was asking Leiva, "May I search your car?" Leiva immediately told the officer in English, "Yes," then nodded, and said, "Si." The officer asked, "Si?" and Leiva again said "Si."

The officer searched Leiva's car and found fraudulent credit cards and property he suspected Leiva and the passengers in his car had purchased with fraudulent credit cards.

The government charged Leiva with among other things, conspiracy to possess and use counterfeit credit cards with intent to defraud.

Leiva filed a motion to suppress the evidence recovered from his car. Leiva, who only speaks Spanish argued that he did not give the officer valid consent to search his car. Specifically, Leiva claimed the officer's question, "Puedo buscar su coche?" does not mean, "Can I search your car?" but instead it means, "May I *look for* your car?", "May I *get* your car?", or "May I *locate* your car?"

Even accepting that the officer's Spanish question did not mean exactly what he intended, the court held that Leiva voluntarily consented to the search of his car. First, the court noted Leiva answered the officer's question without hesitation and he did not seem confused by the question. Second, the court found it would have been unreasonable for Leiva to think the officer wanted to find or locate Leiva's car, which had not been moved during the stop and there was no reason for the officer to ask Leiva if he could "locate" or "look for" a car that was 20 to 25 feet away from them.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-1930/15-1930-2016-04-29.pdf?ts=1461963645>

Eighth Circuit

United States v. Adams, 2016 U.S. App. LEXIS 6534 (8th Cir. Minn. Apr. 11, 2016)

Adams was arrested for armed bank robbery. A special agent with the Federal Bureau of Investigation (FBI) went to the jail to interrogate Adams. The agent advised Adams of his *Miranda* rights, reading aloud an FBI "Advice of Rights" form. Adams told the agent he understood his rights, but he refused to sign his name at the bottom of the form. Adams told the agent that he did not understand why he was being questioned and that he did not like "dealing with cops." The agent explained to Adams that he could refuse to answer questions, could choose to answer some questions, but not answer others, and could terminate the interrogation at any time. Approximately three minutes and forty seconds into the interrogation, the agent asked Adams if he wanted to answer questions. The two men then had the following exchange:

ADAMS: No, I don't think I wanna, you know—

AGENT: I'll explain what's going on. We've got you in the . . . bank. We've talked to a lot of people and collected a lot of information. And that's why you're here, for robbing the bank.

Approximately six minutes into the interview, Adams stated:

ADAMS: I was at my girlfriend's Rebecca's—

AGENT: Okay, so you were—

ADAMS: **Nah, I don't want to talk, man.** I mean, I—

AGENT: Okay, so you were saying you were at your girlfriend Rebecca's house.—

ADAMS: **I mean**—

AGENT That's where the problem is, okay, because we know you weren't at your girlfriend Rebecca's house.—

ADAMS: I just, I just, I just wanna, you know what I'm saying?—

AGENT: Okay, okay, that's fine, but just so you know, your alibi of being at Rebecca's house all day, every second—

ADAMS: No, I wasn't there all . . . I wasn't there all day.

AGENT: Okay.

The interrogation continued for approximately sixteen additional minutes, during which time Adams made statements professing his innocence.

Prior to trial, Adams filed a motion to suppress the statements he made during the interrogation. Adams argued that his statement, “*I don’t want to talk, man*” was an unequivocal invocation of his right to remain silent and that the agent’s continued questioning violated *Miranda*.

During an interrogation, if a person clearly and unequivocally indicates that he wishes to remain silent, the officer must honor that request and stop questioning the person. In this case, the court noted that after Adams said, “*Nah, I don’t want to talk, man. I mean, I,*” he immediately engaged in an exchange with the agent. The court concluded that the phrase “*I mean*” indicated that Adams intended to clarify the statement, “*I don’t want to talk man,*” therefore, it was not an unequivocal invocation of his right to remain silent. In addition, Adams continued to talk with the agent for an additional sixteen minutes, never clarifying his earlier statement or otherwise unequivocally invoking his right to remain silent.

Adams also argued that he did not impliedly waive his *Miranda* rights when he answered the agent’s questions. Adams claimed that his refusal to sign the “Advice of Rights” form and his statement to the agent that he did not like talking with law enforcement indicated that he did not intend to waive his right to remain silent.

The court disagreed. A person may expressly waive his right to remain silent, or his waiver may be inferred from his actions and words. When the government establishes that *Miranda* warnings were given and understood by the suspect, the suspect’s subsequent uncoerced statements establish an implied waiver of the right to remain silent.

Here, it was undisputed that Adams was informed of his *Miranda* rights and that he understood them. The court held that when Adams subsequently made uncoerced statements to the agent, that he impliedly waived his right to remain silent.

Finally, the court held that Adams’ implied waiver of his right to remain silent was voluntary. The officer did not use coercive tactics, Adams knew his rights, and he was familiar with police interrogations, having successfully invoked his right to remain silent two week earlier when a different officer attempted to interrogate him.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca8/14-3339/14-3339-2016-04-11.pdf?ts=1460386880>

United States v. Pile, 2016 U.S. App. LEXIS 6536 (8th Cir. Ar. Apr. 11, 2016)

A confidential informant and an undercover police officer went to Pile's residence, a camper, and attempted to purchase methamphetamine from him. After Pile refused to make the sale at that time, other officers decided to arrest Pile on outstanding felony arrest warrants. When two officers approached Pile outside of his camper he ran. The officers chased Pile, apprehended him, and brought him back to an area approximately 15 feet from the camper. After reading Pile his *Miranda* rights, an officer asked Pile whether there was anyone else at the campsite. Pile told the officer that his friend was inside the camper. The officer opened the door to the camper, announced his presence, and saw a person lying on the couch. After he asked the person to exit the camper, the officer, while standing outside, saw two glass pipes commonly used to smoke methamphetamine on a table inside the camper.

Based on the officer's observations and Pile's postponed methamphetamine sale to the undercover officer, law enforcement obtained a warrant to search the camper. During the execution of the warrant, officers seized the two glass pipes from the table, other drug paraphernalia, a handgun, and ammunition.

Pile filed a motion to suppress the evidence seized from his trailer. Pile argued the officer violated the *Fourth Amendment* when he opened the door to the camper, allowing him to see the two suspected methamphetamine pipes, which established the probable cause to obtain the search warrant for the camper.

The court disagreed. The court held that after arresting Pile, officers were entitled to enter his camper to conduct a protective sweep. A protective sweep is a quick and limited search of premises, incident to an arrest, conducted to protect the safety of police officers or others. The sweep must be limited to a visual inspection of places where a person might be hiding, based on facts that would allow a reasonable officer to believe that the area to be swept harbors an individual posing a danger to those on the arrest scene. In addition, the protective sweep may occur after a person is arrested, and the facts of a particular case might support a protective sweep of a premises to secure the arrest scene when the arrest occurs outside the premises.

Here, officers had reasonable suspicion to conduct the sweep based upon Pile's statement that his friend was inside the camper. Given the unsecured, unknown individual inside the camper, the court found that a reasonable experienced officer would be concerned with securing the arrest scene. As a result, the court held the officer was justified in believing the camper could "harbor an individual posing a danger to those on the arrest scene." Therefore, the officer did not violate the *Fourth Amendment* when he opened the door to the camper, asked the individual inside to come out, and in the process observed contraband.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1882/15-1882-2016-04-11.pdf?ts=1460386896>

United States v. Tamayo-Baez, 2016 U.S. App. LEXIS 6539 (8th Cir. Iowa Apr. 11, 2016)

In 2014, Immigration and Customs Enforcement agents were investigating the fraudulent use of social security numbers by illegal immigrants by checking vehicle registrations at worksites in Iowa. During their investigation, agents found a black Jeep Cherokee registered to Baez's wife with a Hampton, Iowa address. The agents performed a computer check and discovered

that Baez's name was associated with that address. The agents then conducted a criminal history check on Baez and discovered that he was convicted of domestic abuse assault in 2009. However, the agents also discovered that Baez had been ordered removed by an Immigration Judge on March 9, 2004, and that Baez had been removed to Mexico one week later. Finally, a social media inquiry revealed a photograph of Baez in front of a black Jeep Cherokee. Based on these facts, the agents believed Baez had unlawfully reentered the United States, and went to the house in Hampton where they believe he was living.

While parked outside the house an agent saw a man matching Baez's description come out, get into a black Jeep Cherokee, and drive away. The agent followed the Jeep for a short distance and then conducted a traffic stop. After a brief conversation, the agent arrested Baez for violating immigration law, and the government indicted him for illegal reentry by a removed alien.

Baez filed a motion to suppress, arguing that the agent lacked reasonable suspicion to perform the traffic stop because the agent only had a "hunch" as to the identification of the driver prior to the stop.

The court disagreed, holding that the agent had reasonable suspicion to perform the traffic stop. First, agents found a black Jeep Cherokee registered to Baez's wife at a Hampton address and associated Baez's name with that address. Second, the agents discovered that Baez had been convicted of a crime in the United States in 2009, nearly five years after he had been ordered removed to Mexico. Finally, the agents found a picture of Baez on social media standing in front of a black Jeep Cherokee that matched the description of the Jeep registered to his wife. Therefore, the court concluded when the agent identified a man matching Baez's description get into a black Jeep Cherokee at the Hampton, Iowa, address, the agent had reasonable suspicion that the man in the vehicle was Baez, and that Baez was committing a crime by being in the United States illegally.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2063/15-2063-2016-04-11.pdf?ts=1460386900>

United States v. Smith, 2016 U.S. App. LEXIS 6749 (8th Cir. S.D. Apr. 14, 2016)

A resident of a half-way house called the police and requested a well-being check on Alexis Wallace, another resident of the half-way house. The caller reported she was concerned Wallace was being held against her will by her ex-boyfriend, Smith. The caller stated Wallace had gone to Smith's house to retrieve some of her personal belongings and that she had not returned to the half-way house as expected, nor had Wallace returned any of her phone calls or text messages. The caller also said she had heard Smith yelling at Wallace over the phone earlier that day. Finally, the caller told police that a no-contact order existed between Smith and Wallace and that Smith was a known drug user with a bad temper.

Officers went to Smith's house. Smith told the officers that Wallace was not there, he was alone in the house, and he had not had any recent contact with Wallace. Smith then refused to give the officers consent to search the house for Wallace. The officers returned to their patrol car where they confirmed through dispatch that Wallace was not currently at the local jail, hospital, detox facility, or similar location. During this time, the officers also learned that Smith had several outstanding warrants for his arrest.

Several minutes later, the officers saw Smith exit his house to take out the trash. The officers arrested Smith and placed him in their patrol car. As the officers prepared to enter Smith's house to search for Wallace, they saw someone look out the back window of Smith's house. The officers entered Smith's house and called out to Wallace, who indicated that she was in the bedroom. The officers went to the bedroom and located Wallace who told the officers that Smith had prevented her from leaving the house. While in the bedroom, the officers saw an AK-47 rifle partially covered by a bed sheet and seized it.

The government charged Smith with being a felon in possession of a firearm.

Smith filed a motion to suppress the evidence found in his home, arguing the officers' warrantless entry violated the *Fourth Amendment*.

An exception to the *Fourth Amendment's* warrant requirement applies when police officers are acting in a community caretaking function. The community caretaking functions are activities conducted by law enforcement officers that are "totally divorced from the detection, investigation, or acquisition of evidence" relating to the violation of a crime. A police officer may enter a residence without a warrant, as a community caretaker, where the officer has a reasonable belief that an emergency exists that requires his attention. In addition, the "reasonable belief" standard "is a less exacting standard than probable cause." Finally, a search or seizure under the community caretaking function is reasonable if the governmental interest in law enforcement's exercise of that function, based on specific and articulable facts, outweighs the individual's interest in freedom from government intrusion.

Here, the court held that the officers had a reasonable belief that Wallace was in danger such that their entry into Smith's residence was a justifiable exercise of their community caretaking function. First, Wallace left the half-way house and had not returned by 5:00 p.m., the time she indicated she would return. Second, Smith denied having any recent contact with Wallace, even though officers had information that Smith had argued with Wallace on the phone earlier that day. Third, Wallace had not responded to any phone calls or text message since she left the half-way house three-hours earlier. Finally, the officers saw a person's face at the back window of Smith's house after Smith told officers Wallace was not there.

Next, the court held that the government's interest in the officers' entry into Smith's residence outweighed Smith's right to be free from government intrusion. As far as the officers knew, Wallace could have been incapacitated in any number of ways that would prevent her from emerging from the home after the officers arrested Smith. Wallace's lack of response to any phone calls or text messages since leaving the half-way house suggested that she was not able to respond.

Finally, after the officers entered Smith's residence they went straight to the bedroom where Wallace had indicated she was located. While lawfully in the bedroom, the court concluded the officers made a plain view seizure of the AK-47.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1742/15-1742-2016-04-14.pdf?ts=1460647855>

United States v. Makeeff, 2016 U.S. App. LEXIS 7756 (8th Cir. Iowa Apr. 29, 2016)

Makeeff was on federal supervised release following a period of incarceration for possession of child pornography. While on supervised release, Makeeff, among other things, was prohibited from viewing or possessing any form of pornography, and from possessing a computer without the prior approval of his probation officer. After receiving a tip that Makeeff had bragged about using a computer and possessing child pornography while under supervision, two probation officers conducted an unannounced home visit at Makeeff's residence.

During the visit, the officers seized a USB drive sitting on a table in plain view in a spare bedroom of the residence. After the officers left the residence, Makeeff called them and admitted to using a computer, using the internet, and viewing adult pornography. Although he denied ownership of the USB drive, Makeeff told the officers it had been infected with a virus that had put child pornography on the device.

Later that day, the officers viewed the contents of the USB drive and confirmed that it contained child pornography. A subsequent search of the USB drive pursuant to a warrant revealed thousands of images and several videos depicting child pornography. The forensic analysis concluded that the child pornography was not placed on the USB device by a virus, as Makeeff had claimed.

The government charged Makeeff with possession of child pornography.

Makeeff filed a motion to suppress the contents of the USB drive, arguing the seizure and warrantless search of the device violated the *Fourth Amendment*.

The court disagreed. Because Makeeff was a probationer on supervised release, the officers only needed to establish reasonable suspicion to search Makeeff's residence. Here, the court concluded the probation officers established reasonable suspicion to seize the USB drive located in Makeeff's house. First, the officers received a tip that Makeeff was viewing child pornography. Second, Makeeff's prior conviction was for possession of child pornography, and while on probation he had had a prior violation for viewing pornography. Finally, a USB drive is a common computer accessory used to store data and is readily usable as a means to conceal prohibited images from discovery. These facts collectively established reasonable suspicion that Makeeff was viewing pornography, a violation of his supervised release.

The court further held the officers had reasonable suspicion the USB drive contained child pornography. In addition to the previously stated facts, the court added, most importantly, that after seizing the USB drive, Makeeff called them and admitted the device contained child pornography, an additional violation of the terms of his supervised release.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2320/15-2320-2016-04-29.pdf?ts=1461942067>

Tenth Circuit

Perea v. Baca, 2016 U.S. App. LEXIS 6127 (10th Cir. N.M. Apr. 4, 2016)

Merlinda Perea called 911 and reported that her son, Perea, was on drugs and she was concerned for his safety. Officers Baca and Jaramillo were then dispatched to Perea's residence to perform a welfare check. Upon arrival, Merlinda Perea told the officers that her son had just ridden away on his bicycle. The officers left and began to search for Perea, believing he might pose a danger to himself. When Perea saw the officers approaching, he pedaled away from them, disregarding a stop sign. After a brief chase, Officer Jaramillo pushed Perea off his bicycle. Jaramillo then reached for Perea's hands in an attempt to detain him. The officers did not tell Perea why they were following him, or why he was being seized and they never asked Perea to stop. Perea struggled and thrashed while holding a crucifix. After Perea began to struggle, Office Baca told Jaramillo to use his taser against Perea. Jaramillo shot Perea in the chest with his taser on "probe" mode. When the initial shot proved ineffective, Jaramillo put the taser in "stun" mode. Jaramillo tased Perea nine additional times, for a total of ten taserings in less than two minutes. Before Jaramillo stopped tasing Perea, the officers had effectively subdued him by getting on top of him. At some point after tasing Perea, the officers noticed he had stopped breathing. Perea was transported to the hospital where he later died.

Melinda Perea sued the officers claiming they used excessive force in violation of the *Fourth Amendment* by continuing to deploy the taser against Perea after he had been subdued.

The court applied the factors outlined in *Graham v. Connor* to the actions of the officers to determine if their use of force against Perea was objectively reasonable under the *Fourth Amendment*.

The first *Graham* factor the court considered, the severity of Perea's crime, weighed heavily against the use of anything more than minimal force. The officers were performing a welfare check, not looking for Perea because they suspected him of criminal activity. Even if the officers saw Perea violate a traffic law by pedaling his bicycle through a stop sign, the court concluded the officers' repeated tasing of Perea was not proportional to this minor infraction.

The court held the second *Graham* factor, whether Perea posed an immediate threat to the safety of the officers or others, weighed against the officers. The officers did not argue that Perea posed a danger to anyone other than himself before they attempted to seize him. After that point, any threat posed came from Perea's resisting arrest after the officers pushed him off his bicycle without warning or explanation.

Finally, the court held the third factor, whether Perea resisted arrest, weighed in favor of the use of some force during the time Perea was resisting the officers. However, even if Perea initially posed a threat to the officers that justified tasing him, the justification ended when Perea was under the officers' control. As a result, because the officers' repeated use of the taser after Perea was subdued was unreasonable, the court found the third *Graham* factor weighed against the officers.

After concluding that the officers' use of force against Perea was objectively unreasonable, the court held that at the time of the incident it was clearly established that the use of disproportionate force to arrest an individual who is not suspected of committing a serious crime, and who poses no threat to others, constitutes excessive force. Consequently, the court held the officers were not entitled to qualified immunity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/14-2214/14-2214-2016-04-04.pdf?ts=1459789337>

Eleventh Circuit

United States v. Smith, 2016 U.S. App. LEXIS 7762 (11th Cir. Ala. Apr. 29, 2016)

Smith was a Lieutenant employed at a state prison in Alabama. After an inmate, Mack, assaulted a corrections officer, Smith and other corrections officers beat Mack who eventually died from his injuries.

A federal grand jury indicted Smith on charges related to the beating and death of Mack.

Prior to trial, Smith filed a motion to suppress statements he made after Mack's death. First, Smith argued the statements he made in his duty report and incident report concerning Mack's death were compelled by the state in violation of *Garrity*. Second, Smith argued the statements he gave state investigators were compelled, and then improperly shared with federal investigators in violation of *Garrity*.

In *Garrity v. New Jersey*, the Supreme Court held that *Fifth Amendment* protections apply to public employees who, under the threat of job loss, are required to make incriminating statements. The Court ruled that such compelled statements by public employees cannot be used in any criminal proceeding or prosecution.

The court held that Smith's statements in the duty and incident reports were not compelled within the meaning of *Garrity*. The court noted the administrative regulations of the Alabama Department of Corrections (ADOC) require employees to complete a report of all unusual incidents that occur during a shift, and to cooperate with investigations by providing information to include verbal and / or written statements. Further, the failure to comply with ADOC regulations can lead to progressive disciplinary sanctions. However, the court concluded that where there is no direct threat, the mere possibility of future discipline is not enough to trigger the *Garrity* protections.

Second, the Eleventh Circuit has held that before a police officer's testimony will be considered "coerced" under *Garrity*, the officer must show that he subjectively believed that he would lose his job if he refused to answer questions and that his belief was objectively reasonable. Here, the court held that Smith failed to present any evidence that he subjectively believed that he would be terminated if he refused to submit the reports. Instead, Smith's motive to make the written statements more than likely was to deflect suspicion and avoid criminal prosecution rather than to retain his employment.

The court then held that Smith's statements to an investigator with the Alabama Bureau of Investigation (ABI) were not compelled under *Garrity*. The court found there was no evidence that the investigator told Smith that he could or would be terminated if he failed to answer questions. Instead, the investigator told Smith that he was conducting a criminal investigation into Mack's death and advised Smith of his *Miranda* rights. Smith then waived his *Miranda* rights and answered the investigator's questions. Even though Smith's supervisor ordered him to meet with the investigator, the court found there was no evidence that Smith was told he had to answer the investigator's questions. The court also held that Smith did not present any

evidence that he subjectively believed that failing to answer the investigator's questions would lead to termination.

Finally, the court held that Smith's statements made to ADOC officials and investigators at his pre-termination conference were admissible in his federal trial. Without deciding the issue, the court assumed these statements were compelled by the state under *Garrity*. However, the court found that Smith waived his *Garrity* protections as to those statements when he signed a consent form during his interview with federal investigators. First, Smith voluntarily met with federal investigators. Second, the federal investigators told Smith they did not review his previous statements to the state officials because they likely had been compelled. Third, the federal investigators then advised Smith of his *Garrity* rights, which Smith waived. Finally, the *Garrity* waiver included a sentence which stated that Smith, understanding his rights, nevertheless wanted the federal government to have all pertinent information for its investigation.

As a result, the court concluded that by signing the consent form, Smith voluntarily, knowingly, and intelligently agreed to make all of his prior statements available to federal investigators and prosecutors, even with the understanding that those statements could be used against him if he chose not to testify at trial.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca11/13-15476/13-15476-2016-04-29.pdf?ts=1461945678>

District of Columbia Circuit

United States v. Scurry, 2016 U.S. App. LEXIS 6401 (D.C. Cir. Apr. 8, 2016)

The government suspected Scurry, Hudson, and Johnson were members of a narcotics trafficking organization. During the investigation, the government obtained court orders to conduct wiretaps on cell phones associated with the three men. After being charged with a variety of drug-trafficking offenses, the defendants filed motions to suppress the government's wiretap evidence.

Title III of the Omnibus Crime Control and Safe Street Act of 1968 (Title III) codified at *18 U.S.C. § 2510 et seq.* outlines requirements the government must satisfy to obtain a wiretap order from the court. At issue in this case, was the requirement in *18 U.S.C. § 2518(4)(d)* that the government must specify the identity of the high-level Justice Department official who approved the wiretap application. In the government's wiretap application, where the official's name should have appeared, there were only asterisks. The order authorizing the wiretap on Hudson's phone read, "the application was authorized by ***** Deputy Assistant Attorney General of the Criminal Division, United States Department of Justice. . ." The order authorizing the wiretap of Johnson's phone was similarly lacking the name of the Justice Department official.

The court held that a wiretap order is "insufficient on its face" where it fails to identify the Justice Department official who approved the underlying application, as required by Title III *Section 2518 (4)(d)*. As a result, the court suppressed evidence from wiretaps on the phones belonging to Hudson and Johnson.

The court further held the evidence obtained from the wiretap on Scurry's phone was admissible, as the government established probable cause that Scurry's phone was being and would be used to commit specific narcotics offenses. In addition, the court held the government satisfied Title III's necessity and minimization requirements.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/cadc/12-3104/12-3104-2016-04-08.pdf?ts=1460125889>
