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A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW
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The Informer – June 2019

Case Summaries

United States Supreme Court

- Nieves v. Bartlett**: Whether the existence of probable cause defeated the plaintiff’s claim that his arrest was in retaliation for speech protected by the First Amendment.....5
- Gamble v. United States**: Whether the Court should overrule the dual-sovereignty doctrine.....6

Circuit Courts of Appeals

Fifth Circuit

- United States v. Tello**: Whether a Border Patrol agent unreasonably extended the duration of a stop at an immigration checkpoint.....7

Sixth Circuit

- United States v. Coleman**: Whether agents established probable cause to install tracking devices on the defendant’s vehicles and whether an agent violated the Fourth Amendment when he entered the defendant’s condominium complex and driveway to install them.....8
- United States v. Belakhdhar**: Whether driving in tandem with a vehicle suspected of drug trafficking established reasonable suspicion to conduct a traffic stop.....10

Seventh Circuit

- United States v. Richmond**: Whether officers were justified in entering the defendant’s curtilage to conduct a Terry stop and whether it was reasonable for the officers to open a screen door to conduct a limited search for weapons.....11
- Gant v. Hartman**: Whether an officer was entitled to qualified immunity in a lawsuit alleging an excessive use of force for shooting the plaintiff when a factual dispute existed between the officer and the plaintiff concerning the incident and whether video recordings of the shooting clearly refuted the plaintiff’s version of the incident.....12

Eighth Circuit

- United States v. Bradley**: Whether an officer established probable cause to obtain warrants to search the defendant’s residence and vehicle.....14

Tenth Circuit

- United States v. Loera**: Whether federal agents exceeded the scope of a search warrant for the defendant’s electronic devices.....14

Eleventh Circuit

- United States v. Babcock**: Whether the warrantless seizure of the defendant’s phone was reasonable under the exigent circumstances (destruction of evidence) exception to the Fourth Amendment’s warrant requirement.....17



FLETC Informer Webinar Schedule

1. Government Workplace Searches (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, and Ken Anderson, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Glynco, GA.

This webinar examines how public employees might create a Reasonable Expectation of Privacy (REP) in their workplaces (computers, cars, offices, etc.), and, if so, how the government can intrude upon that REP. This course is recommended for government supervisors, the IG community, and those whose duties include conducting internal investigations.

Tuesday July 9, 2019 – 10:30 am. Eastern / 9:30 a.m. Central / 8:30 a.m. Mountain / 7:30 a.m. Pacific

To participate in this webinar: <https://share.dhs.gov/govtworksearch/>



2. Understanding the Administrative Search (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, and Ken Anderson, Attorney / Advisor – Senior Instructor, Federal Law Enforcement Training Centers, Glynco, GA.

The unique government authority to conduct administrative searches / inspections and its limitations is, at times, misunderstood. This webinar will explain how, why and when an agency has the ability to conduct an administrative search. All are welcome to attend. Recommended for those agencies that possess an inspection authority.

Thursday July 18, 2019 – 10:30 am Eastern / 9:30 am Central / 8:30 am Mountain / 7:30 am Pacific

To participate in this webinar: <https://share.dhs.gov/inspections/>



3. Policing and the Americans with Disabilities Act, Part 1 (1-hour)

Presented by Mary M. Mara, Attorney Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, NM.

The Americans with Disabilities Act (ADA) prohibits discrimination against persons who suffer from a disability. Questions sometimes arise as to whether the ADA requires law enforcement officers to make special accommodations when interacting with disabled persons. Both line officers and their supervisors need to be aware of this concern. This webinar will examine this critical issue and assess the impact of the ADA on everyday police activities.

Wednesday July 31, 2019 – 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: <https://share.dhs.gov/artesia>



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CASE SUMMARIES

United States Supreme Court

Nieves v. Bartlett, 2019 U.S. LEXIS 3557 (May 28, 2019)

Sergeant Nieves was speaking to a group of attendees at “Arctic Man,” a winter sports event held in a remote part of Alaska, when a seemingly intoxicated man, later identified as Russell Bartlett, shouted at the group instructing them not to talk to the police. When Sergeant Nieves approached him, Bartlett began yelling at the officer to leave. Deciding not to escalate the situation, Sergeant Nieves left.

A few minutes later, Bartlett approached Officer Weight who was questioning a minor concerning underage drinking. Bartlett positioned himself between Officer Weight and the minor and yelled with slurred speech that Officer Weight should not speak with the minor. When Bartlett stepped toward Officer Weight, the officer pushed him back. Sergeant Nieves witnessed the confrontation and along with Officer Weight arrested Bartlett for disorderly conduct and resisting arrest. After he was handcuffed, Bartlett claimed that Sergeant Nieves said, “bet you wish you would have talked to me now.”

Bartlett sued Sergeant Nieves and Officer Weight under 42 U.S.C. § 1983 for false arrest and excessive use of force in violation of the Fourth Amendment. Bartlett also sued the officers for retaliatory arrest in violation of the First Amendment. Bartlett claimed the officers arrested him in retaliation for his speech, specifically for his initial refusal to speak with Sergeant Nieves and his subsequent intervention in Officer Weight’s discussion with the minor.

The district court granted the officers qualified immunity and dismissed Bartlett’s claims against them. Bartlett appealed.

The Ninth Circuit Court of Appeals held that the officers were entitled to qualified immunity for Bartlett’s false arrest claim because they had arguable probable cause to arrest Bartlett for harassment, disorderly conduct, resisting arrest, or assault under Alaska law. The court further held that the officers were entitled to qualified immunity for Bartlett’s excessive use of force claim because the troopers’ limited use of force to effect Bartlett’s arrest was objectively reasonable.

However, the Ninth Circuit Court of Appeals reversed the district court on the latter issue and held that the officers were not entitled to qualified immunity on Bartlett’s retaliatory arrest claim. Citing its decision in [Ford v. City of Yakima](#) (See [3 Informer 13](#)), the Ninth Circuit Court of Appeals held that a plaintiff may still prevail on a retaliatory arrest claim even when the officers had probable cause to arrest. As a result, the court held that the district court improperly dismissed Bartlett’s retaliatory arrest claim against the officers. Sergeant Nieves and Officer Weight appealed to the Supreme Court.

The issue before the Court was:

Whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.

The Supreme Court held that probable cause to arrest a suspect should generally defeat a First Amendment retaliatory arrest claim brought under 42 U.S.C. § 1983. However, the Court added that a “narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” For example, the Court commented that at many intersections jaywalking is commonplace, and is a crime that rarely results in arrest. So, in a case where a person who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, where others have not routinely been arrested, the Court concluded the person’s First Amendment rights would not be sufficiently protected if a retaliatory arrest claim could be dismissed simply because probable cause existed to arrest him. Consequently, the court found that even if an officer has probable cause to arrest, a plaintiff’s First Amendment retaliatory arrest claim may survive so long as the plaintiff presents objective evidence that he was arrested when otherwise similarly situated persons not engaged in the same type of protected speech had not been arrested.

In this case, the Court held that Bartlett did not establish any evidence of retaliation on the part of Officer Weight, who was not involved in the initial encounter between Bartlett and Sergeant Nieves. In addition, any alleged retaliatory comments by Sergeant Nieves did not indicate what motivated Officer Weight to arrest Bartlett. Finally, Bartlett’s claim against Officer Weight and Sergeant Nieves failed as a matter of law because the officers had probable cause to arrest Bartlett.

For the Court’s opinion: https://www.supremecourt.gov/opinions/18pdf/17-1174_m5o1.pdf

Gamble v. United States, 2019 U.S. LEXIS 4173 (June 17, 2019)

In November 2015, a local police officer in Mobile, Alabama pulled Gamble’s car over for having a damaged headlight. After the officer smelled marijuana, he searched the car and found a loaded handgun. Because Gamble had been convicted of second-degree robbery, which was considered “a crime of violence” under Alabama law, his possession of the handgun was unlawful. The officer arrested Gamble, who pleaded guilty to this state offense.

The federal government subsequently charged Gamble with unlawful possession of a firearm by a convicted felon. Gamble filed a motion to dismiss the federal charge, arguing that the federal indictment was for “the same offence” as the one at issue in his state conviction and therefore exposed him to double jeopardy.

The district court denied Gamble’s motion to dismiss the charge. Gamble appealed to the Eleventh Circuit Court of Appeals, which affirmed the district court. In denying Gamble’s motion, both courts cited the dual-sovereignty doctrine. Gamble appealed to the Supreme Court.

The issue before the Court was:

Whether the Court should overrule the dual-sovereignty doctrine.

The Court refused to overrule the dual-sovereign doctrine and affirmed the court of appeals denial of Gamble’s motion to dismiss the federal charge against him.

The Double Jeopardy Clause of the Fifth Amendment provides that no person may be “twice put in jeopardy” “for the same offence.” The Court explained that the Double Jeopardy Clause means that those acquitted or convicted of a particular “offence” cannot be tried a second time for the

same “offence.” In this case, the Court stated that it had to determine what constituted an “offence” under the Double Jeopardy Clause.

The Court recognized that it has long held that a crime under one sovereign’s laws is not “the same offence” as a crime under the laws of another sovereign. As a result, under this “dual-sovereignty” doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted the defendant for the same conduct under a federal statute or the reverse may happen as it did here.

In addition, citing Supreme Court precedent dating back 170 years, the Court found that the Double Jeopardy Clause protects individuals from being twice put in jeopardy for the same “offence,” not the same conduct or actions. The Court added that an “offence” is defined by a law and each law is defined by a sovereign. Accordingly, where there are two sovereigns (federal and state) there are two laws and two “offences” for which a defendant may be prosecuted.

For the Court’s opinion: https://www.supremecourt.gov/opinions/18pdf/17-646_new_o759.pdf

Circuit Courts of Appeal

Fifth Circuit

United States v. Tello, 2019 U.S. App. LEXIS 15044 (5th Cir. TX May 21, 2019)

A tractor-trailer driven by Rafael Tello entered the primary inspection lane at the U.S. Border Patrol checkpoint near Falfurrias, Texas. A Border Patrol agent asked Tello if he was a U.S. citizen and Tello replied that he was a naturalized citizen. Satisfied with Tello’s answer, the agent did not ask Tello for proof of citizenship. The agent then asked Tello what he was hauling in the trailer. The agent asked this question to give a Border Patrol canine handler more time to conduct a canine sniff of the tractor-trailer. Tello told the agent that he was hauling carrots and gave the agent a bill of lading. The agent asked Tello whether he had made any stops after loading the carrots in the trailer and Tello replied that he had not made any stops since he left Pharr, Texas. At this point, the canine handler told the agent that he needed to send the tractor-trailer to the secondary inspection area. The agent asked Tello for consent to search and x-ray the tractor-trailer and Tello consented. By this time, the stop had lasted approximately 30 seconds.

In the secondary inspection area, another agent boarded the tractor-trailer to conduct a physical inspection before the x-ray inspection, a routine precaution to minimize the risk of exposing possible occupants to radiation. Under the bed in the sleeper area of the tractor-trailer was a compartment. Through a small hole in the compartment, the agent saw a person’s torso. The agent unlatched the bed and found three persons hiding in the storage compartment. The agent discovered the persons were illegally present in the United States.

The government charged Tello with transporting illegal aliens within the United States by means of a motor vehicle.

Tello filed a motion to suppress the evidence found during the immigration-checkpoint stop. Tello argued that the agents violated the Fourth Amendment by unlawfully extending the duration of the stop beyond its legitimate, limited immigration purpose before asking him for consent to search the tractor-trailer.

At a fixed immigration checkpoint, vehicles may be briefly stopped without a warrant or reasonable suspicion and the occupants questioned about their immigration status. In addition, Border Patrol agents may conduct a canine sniff to search for drugs or concealed aliens at immigration checkpoints as long as the sniff does not lengthen the stop beyond the time necessary to verify the immigration status of a vehicle's passengers.

Tello argued that the immigration-inspection purpose of the checkpoint stop was completed when he told the agent that he was a U.S. citizen and the agent was satisfied with that answer. Tello claimed that the agent's questions concerning his cargo and whether he had made any stops after loading his trailer were unrelated to his citizenship. Instead, Tello alleged that the agent's reason for asking these questions was to allow the canine handler more time to conduct a canine sniff of the tractor-trailer to look for violations of immigration law, which Tello claimed unreasonably extended the duration of the stop.

The court held that the canine sniff did not prolong the duration of the immigration stop. During the 30-second stop, the agent asked Tello about his citizenship, cargo, and travel history, all of which are permissible questions for an agent to ask at an immigration checkpoint. In addition, when the agent began questioning Tello about his citizenship, the canine and its handler were already circling the tractor-trailer. Therefore, the court concluded that the agent's questioning occurred simultaneously with the canine sniff.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/18-40347/18-40347-2019-05-21.pdf?ts=1558481414>

Sixth Circuit

United States v. Coleman, 2019 U.S. App. LEXIS 13366 (6th Cir. MI May 3, 2019)

Federal agents began investigating Eddie Powell, a suspected drug dealer, and his sources of narcotics. A confidential informant (CI) identified Ronald Coleman as one of Powell's sources. During the investigation, agents observed Coleman driving a Buick Enclave to a suspected drug sale to Powell. On one occasion, agents saw a person matching Coleman's description arrive at Powell's house, get out of the Enclave, enter the residence, and leave a few minutes later. Four days later, agents saw Coleman arrive at Powell's house in a different vehicle where he sold cocaine to the CI. In addition, the agents discovered that Coleman had two felony drug convictions for delivery or manufacture of a controlled substance. Finally, the agents learned that the Enclave and the other vehicle were registered to Coleman's father, a practice used by drug dealers to conceal their identities. An agent included these facts as well as details from the suspected drug sales in a supporting affidavit and obtained tracking warrants for Coleman's Enclave and other vehicle.

The next day, a federal agent attached the tracking devices to Coleman's vehicles. To install the trackers, the agent went to Coleman's condominium complex. There was no gate or fence at the entrance to the complex, but there was a small sign that read: "Private Property." The agent found Coleman's condominium which was located in a building shared by three other families. The driveway to Coleman's condominium was shared with a neighboring family. The driveway consisted of a single concrete slab leading to Coleman's garage and the garage of Coleman's

neighbor. No gate, fence, or hedge surrounded condominium and it was common for residents to walk past each other's vehicles over the course of a day.

The agent parked in a public parking spot across from Coleman's condominium, walked up to the Enclave which was parked in front of his garage a few feet onto the driveway and installed the tracking device. The agent also installed a tracking device on Coleman's other vehicle which was parked across the street in a parking spot shared by residents and guests.

Approximately two weeks later, Coleman sold cocaine to Powell on two occasions. On the date of the second sale, agents watched Coleman exit his residence, get into the Enclave, and drive to Powell's home. Agents also watched the GPS tracking data from the Enclave's vehicle tracker which appeared to show that Coleman traveled directly from his condominium to Powell's house. Based on this information, agents applied for a warrant to search Coleman's condominium. When the agents executed the warrant they found cocaine, a firearm, and evidence of money laundering.

The government charged Coleman with several drug-related offenses.

Coleman filed a motion to suppress evidence seized as a result of the tracking warrants and residential search warrant.

Coleman argued that the warrant authorizing the tracking device on his Enclave was not supported by probable cause.

The court disagreed, finding that the agent's affidavit established numerous facts supporting the conclusion that the use of a tracking device on Coleman's Enclave could uncover further evidence of criminal activity. First, the CI identified Coleman as a current drug supplier to Powell. Second, agents had investigated four drug sales at Powell's residence, one of which involved Coleman delivering cocaine to Powell. Third, an agent saw a person matching Coleman's description drive to Powell's house in the Enclave, stay a few minutes, and leave, which is activity that is consistent with the movement of a person engaging in an illegal drug sale. Fourth, Coleman had two prior felony convictions for delivery / manufacture of controlled substances. Finally, a records check on the vehicle identified Coleman's father as the Enclave's owner. The agents knew from experience that drug traffickers frequently registered their vehicles in the names of family or friends to conceal their identities.

Next, Coleman argued that the agents violated the Fourth Amendment when an agent entered Coleman's condominium complex despite there being a sign at the entrance to the complex reading "Private Property."

Again, the court disagreed. Although the complex displayed a "Private Property" sign at its entrance, anyone could drive into the complex without express permission. No gate prevented outsiders from entering and the condominium association had not taken any steps to keep non-residents out. Accordingly, the court held that the agent did not violate the Fourth Amendment by entering the complex.

Finally, Coleman argued that the agent violated the Fourth Amendment when the agent intruded upon the curtilage of his condominium by entering his driveway to install the tracking device to the Enclave.

Courts have identified four factors to determine when a person has a reasonable expectation of privacy in an area; therefore, placing the area within the home's curtilage: (1) the area's proximity

to the home; (2) whether the area is within an enclosure around the home; (3) use of the area; and (4) steps taken to protect the area from observation by passersby.

While the proximity of the driveway to the residence weighed in favor of considering the driveway to be curtilage, the court found that the other factors supported a finding that the driveway was not within the curtilage of Coleman's condominium. Specifically, the driveway was not enclosed, Coleman had not taken any steps to protect the driveway from observation, and the driveway was used as a point of entry into the condominium. As a result, the court held that the agent did not intrude upon the curtilage of Coleman's condominium to install the vehicle tracker; therefore, the agent did not violate the Fourth Amendment.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/18-1083/18-1083-2019-05-03.pdf?ts=1556902902>

United States v. Belakhdhar, 2019 U.S. App. LEXIS 15743 (6th Cir. MI May 28, 2019)

Henry Soto agreed to drive a shipment of heroin from Chicago to Detroit and deliver it to a person he did not realize was a confidential informant (CI) for the Drug Enforcement Administration (DEA). The next day, DEA agents saw Soto's vehicle traveling on Interstate 94. As the agents watched Soto's vehicle, they saw another vehicle directly behind it, driving at approximately the same speed and changing lanes at the same time. Like Soto's vehicle, the second vehicle bore Illinois license plates. The agents concluded that the vehicles were traveling "in tandem," a common practice of large-scale drug traffickers gathering counter-surveillance or attempting to defeat law enforcement officers during the trip. DEA agents asked the Michigan State Police to stop both cars.

When a trooper stopped the second car, driven by Mohamed Belakhdhar, he obtained identification from Belakhdhar and the passenger, and obtained consent to search the vehicle. After failing to find any contraband, the trooper allowed Belakhdhar to leave.

Afterward, DEA agents continued to conduct surveillance on the second vehicle and investigate Belakhdhar's identification information. After the agents determined that Belakhdhar lacked legal immigration status, they requested a Border Patrol agent stop the car again. During the second stop, a Border Patrol agent walked a drug dog around the vehicle. The dog alerted to the back bumper. The agents opened the trunk, found two kilograms of heroin hidden in a microwave, and arrested Belakhdhar.

The government charged Belakhdhar with possession of heroin with intent to distribute.

Belakhdhar filed a motion to suppress the drug evidence. Belakhdhar argued that the DEA agents and state trooper lacked reasonable suspicion of criminal activity to justify the first stop. Accordingly, Belakhdhar argued that during this unlawful stop, he provided his identification information, which directly led to the second stop and the discovery of the drug evidence.

The district court agreed and suppressed the evidence. The government appealed. On appeal, the sole issue before the Sixth Circuit Court of Appeals was whether driving in tandem with a vehicle suspected of drug trafficking established reasonable suspicion to conduct a traffic stop.

The court found that the government established evidence that Soto, a known drug dealer, operated the first car and that large-scale drug traffickers routinely use multiple cars to transport

drugs. These facts, along with Belakhdhar's driving behavior while following Soto's vehicle, allowed the DEA agents to reasonably conclude that Belakhdhar's vehicle was working in concert with Soto's vehicle. The court held that tandem driving with a vehicle suspected of being involved with drug activity, can by itself, support reasonable suspicion to conduct a stop. As a result, the court vacated the district court's decision.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/18-1884/18-1884-2019-05-28.pdf?ts=1559073630>

Seventh Circuit

United States v. Richmond, 2019 U.S. App. LEXIS 14171 (7th Cir. WI May 13, 2019)

Two Milwaukee police officers were on patrol in an area known for drug trafficking, armed robberies, and gun violence. Just before midnight, as the officers drove their marked police car through an intersection, both officers saw Richmond walking toward them on a sidewalk. Richmond had his left hand at his side and his right hand in the "kangaroo" pocket on the front of his shirt. The officers saw a large bulge in this pocket. Based on their experience and training as police officers almost 20 years for one officer and 6 years for the other officer, front pocket bulges like the one they observed were caused by concealed firearms.

Richmond made eye contact with the officers as they approached. After the officers passed Richmond, he changed direction, quickened his pace, crossed the lawn of a residential duplex, and moved toward the stairs up to its front porch. Unknown to the officers, Richmond was walking toward the front door of the duplex where he lived. Based on their observations, the officers turned around and parked in front of the duplex to talk to Richmond.

As the officers exited their car, Richmond walked up the stairs toward the front door. From approximately 20 to 25 feet away, the officers saw Richmond open the outside screen door with his left hand, bend down, and with his right hand place a dark, medium-sized object on the doorframe between the screen door and the front door, which was closed. The front porch light illuminated Richmond's action, but the officers could not identify the object that Richmond placed on the threshold. In addition, the bottom third of the screen door was opaque, so the officers could not see the object. After Richmond placed the object on the doorframe, he closed the screen door and turned around as the officers waked up to the porch.

While one officer questioned Richmond, the other officer partially opened the screen door. Richmond stood within the door's swing radius, so the officer could open it only partially before hitting Richmond's back. At this point, the officer saw a black semi-automatic .40 caliber handgun resting where the officers saw Richmond place the dark, medium-sized object from his pocket. After Richmond told the officers that he was a convicted felon, they arrested him and seized the handgun. The entire encounter from when the officers first saw Richmond walking on sidewalk to Richmond confirming that he was a convicted felon lasted no more than 30 seconds.

The government charged Richmond with unlawful possession of a firearm by a felon. Richmond filed a motion to suppress the handgun, arguing that the officer's act of opening the screen door constituted an unreasonable warrantless search of the curtilage of his home. The district court denied Richmond's motion and he appealed.

The Seventh Circuit Court of Appeals held that the officers had reasonable suspicion to believe Richmond was involved in criminal activity, which justified the Terry stop. When the officers saw Richmond: (1) he was walking down the street near midnight in a neighborhood known for drug trafficking and gun violence; (2) there was a significant bulge in Richmond's front T-shirt pocket; (3) in the officers' over 25 combined years of police training and experience, a bulge like this was more often than not a gun; (4) after the officers passed Richmond in their marked patrol car, Richmond quickened his pace, changed his direction, cut across a property, and hid what the officers suspected was a gun between the screen door and front door.

The court added that while the Supreme Court has yet to directly address the constitutionality of a Terry stop within a home's curtilage, the Seventh Circuit Court of Appeals previously applied Terry to uphold the stop of a defendant in his condominium garage when officers established reasonable suspicion to believe the defendant was involved in criminal activity. Similarly, in this case, the court found that the officers articulated objectively reasonable grounds to suspect Richmond was engaged in criminal activity that justified their entry onto the porch.

Next, the court noted that for protective searches for weapons, the Supreme Court has held that area searches are allowed "in the Terry context" because "the arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby." In addition, the Seventh Circuit Court of Appeals has held that under Terry, an officer may conduct a protective search for weapons of an individual's person, "and area within his immediate control," if a "reasonably prudent person" believed that his safety or that of others was in danger.

Against this backdrop, the court held that the facts articulated by the officers to establish reasonable suspicion to stop Richmond also supported reasonable suspicion that Richmond might be armed and dangerous. The court found that it was reasonable for the officers to believe that Richmond had placed a gun behind the screen door. After Richmond placed the gun in this location, the court found that the officers faced two obvious risks: (1) Richmond might lunge toward what they suspected was a gun, or (2) unknown duplex occupants might access the gun by opening the front door and picking it up off the threshold. The court concluded that the officers acted reasonably to ensure their safety by limiting their search to opening the screen door, the area where both officers saw Richmond place the object, later confirmed to be a handgun.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/18-1559/18-1559-2019-05-13.pdf?ts=1557781216>

Gant v. Hartman, 2019 U.S. App. LEXIS 1468 (7th Cir. IN May 14, 2019)

Police officers responded to a report of an ongoing armed robbery at a Dollar General Store in Fort Wayne, Indiana. The officers knew there had been a series of armed robberies at various Dollar General stores in the area in which no arrests had been made. In the previous robberies, two men entered the stores, displayed handguns, and proceeded to steal cash, cigarettes, and employees' cell phones.

Upon arrival, Officer Hartman approached the front entrance to the store. At this point, the first suspect, later identified as Christopher Johnson, ran out of the front entrance. As the officers shouted for Johnson to get down on the ground, Officer Hartman began to run towards him. As he did so, Officer Hartman saw the second suspect, later identified as Anthony Gant, standing in the doorway. Gant had his left arm extended, holding the door open. Officer Hartman fired two

shots, striking Gant in the abdomen once. It was later determined that Gant had not been holding a handgun, nor any object in his hand when Officer Hartman shot him.

Officer Hartman explained afterward that he feared for his life because he believed Gant was holding a handgun, preparing to shoot, and Hartman had no cover from a potential shot. When Officer Hartman fired at Gant, he estimated that he was less than 20 feet from Gant. In addition, Officer Hartman stated that Gant showed no signs of surrendering or obeying commands to get down on the ground. The shooting was recorded by the cameras of two patrol cars facing the store entrance. According to a frame-by-frame analysis of the videos, one second elapsed from the time Officer Hartman started to approach the entrance to the store until he fired at Gant.

Gant filed a lawsuit under 42 U.S.C. § 1983 in which he alleged that Officer Hartman used excessive force against him in violation of the Fourth Amendment. Gant claimed that it was unreasonable for Officer Hartman to shoot him because: (1) he was attempting to surrender, and (2) that he was given no opportunity to respond to the officers' commands because he was shot immediately as he was exiting the store.

Officer Hartman filed a motion to dismiss the lawsuit based on qualified immunity, which the district court denied. The court found that when viewing the facts as alleged by Gant, as it was required to do, a jury would need to decide whether it was reasonable for an officer in Officer Hartman's position to believe that Gant had a gun. The court also found that, based on Gant's claims, a reasonable juror could conclude either that Gant was in the process of obeying Officer Hartman's commands or that Gant was not given the opportunity to obey those commands. Officer Hartman appealed.

The court dismissed Officer Hartman's appeal. For an appellate court to have jurisdiction to review a lower court's denial of qualified immunity, the officer must claim that the lower court incorrectly applied the law. When a lower court concludes the parties dispute the facts of a case, as occurred here, an appellate court lacks jurisdiction to hear the officer's appeal. Because Gant and Officer Hartman disputed the facts that lead to the shooting, the district court properly found that it was up to the jury to determine which side to find credible.

Officer Hartman also argued that the video evidence from the two patrol cars clearly indicated that there could be no dispute that Gant was not attempting to surrender when Hartman shot him, even though Gant claimed otherwise.

In [Scott v. Harris](#), the Supreme Court found that the defendant police officer could challenge the district court's finding that a factual dispute existed between the parties because a video recording of the incident "utterly discredited" the plaintiff's testimony that he was driving carefully. In [Scott](#), the police dash-cam video of the plaintiff driving erratically during a high-speed chase was irrefutable evidence that he "posed an actual and imminent threat to the lives" of others and that, "as a matter of pure law in light of that incontestable fact," the defendant police officer used reasonable force to stop him.

However, after watching the videos of Gant's shooting and arrest, the court held that the videos did not "utterly discredit" Gant's contentions that he was trying to comply with orders or did not have time to respond to Officer Hartman's commands. The videos showed Gant standing in the doorway, his arm extended holding the door, and then his arm lowering slightly before Officer Hartman fired. All of this happened within one second. Consequently, the court held that the videos did not provide irrefutable proof that it was reasonable for Officer Hartman to believe Gant was holding a gun when he was shot.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/18-1287/18-1287-2019-05-14.pdf?ts=1557862215>

Eighth Circuit

United States v. Bradley, 2019 U.S. App. LEXIS 14136 (8th Cir. MO May 13, 2019)

During the course of a drug investigation, a police officer obtained a warrant to put a GPS tracker on Bradley's truck. Based on information from the GPS tracker and physical surveillance, officers obtained warrants to search Bradley's truck and residence in Boone County, Missouri. Officers seized several firearms and over \$12,000 cash from Bradley's house as well as cocaine and a digital scale from Bradley's truck.

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

Bradley filed a motion to suppress the evidence seized by the officers, arguing that the warrant authorizing the tracking device was not supported by probable cause.

The court held that the GPS warrant application contained sufficient information to establish probable cause. In his affidavit, the officer described a recent, supervised, controlled buy between Bradley and a confidential informant (CI). The officer established the CI's reliability by noting that "on numerous occasions," the informant "provided specific information as to the location, vehicles, and persons involved in illegal drug transactions," the information has never "proven unreliable," and past information resulted in drug-charge arrests in Boone County. The court concluded that the supervised, controlled buy provided a substantial basis for the issuing judge to find probable cause.

The court added that other information in the officer's affidavit reinforced this conclusion. For example, the officer included information from other sources that connected Bradley and his truck to drug dealing. The officer established the reliability of these sources through the controlled buy. The officer also included information concerning Bradley's drug-related criminal history and the officer verified details concerning Bradley's truck. Consequently, the court held that probable cause supported the issuance of the search warrants.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-2295/18-2295-2019-05-13.pdf?ts=1557761420>

Tenth Circuit

United States v. Loera, 2019 U.S. App. LEXIS 14163 (10th Cir. NM May 13, 2019)

The Federal Bureau of Investigation (FBI) began investigating Jason Loera for illegally intercepting e-mails and other computer-fraud related offenses. As part of that investigation, FBI agents obtained a warrant to search Loera's residence for evidence of computer fraud located on electronic devices or storage media ("the first warrant"). Agents executed the warrant and discovered a large volume of electronic media including CDs, DVDs, and a laptop computer.

Agents Cravens and Nishida were responsible for “previewing” the CDs at Loera’s residence to ensure that the FBI seized only those CDs that contained information relevant to the computer fraud investigation.

Agent Cravens attempted to view the files of the first CD using a program that would have allowed Cravens to limit his search to a particular type of file, for example, only image, text, or audio files. However, the program did not work, so Cravens opened the CD on a computer and used the “thumbnail view” to preview the files stored on it. Using the thumbnail view, Cravens saw small images of the files, the file names, and the file types in a vertical list that he had to scroll through to see in its entirety. While Cravens was scrolling down the thumbnail images, he found an image of a nude child. Cravens opened the file to confirm it was an image of child pornography. After determining that it was, Cravens ejected the CD from his computer, set it aside, and searched the rest of the CDs assigned to him for evidence of computer fraud. Cravens later found a child pornography image on a second CD. As he did with the first, Cravens set the CD aside after discovering the image and did not open any other files on that CD.

Agent Nishida took a different approach to his search. He previewed the files on his assigned CDs using the “details view” of Windows Explorer, meaning that he saw a list of the files, file names, and last-modified dates of those files, but not images associated with those files. Nishida opened two or three files on each CD and if he found something he believed was evidence of computer fraud in the sampled files, he would set the CD aside to be reviewed off-site. As he was sampling files, Nishida found child pornography on two CDs. However, unlike Cravens, Nishida did not stop searching those CDs after discovering child pornography. Instead, Nishida continued sampling files on the CDs to determine if they contained evidence of computer fraud.

The FBI seized 13 CDs and six other electronic devices from Loera’s residence. Four CDs contained images of child pornography and nine contained evidence of computer fraud.

One week later, Agent Cravens decided to apply for a warrant to search the items seized from Loera’s residence for child pornography. Cravens wanted to include in his warrant affidavit a detailed description of one child pornography image from each of the four CDs on which he and Agent Nishida had found child pornography during their on-site preview. Consequently, Cravens opened the four CDs, viewing multiple images on each, to find child pornography images that he could accurately describe. During this time, Cravens saw multiple images of children in various states of dress. Cravens then provided a detailed description of one image from each CD that depicted a minor engaged in sexually explicit conduct.

Two days later, based on Cravens’ affidavit, a federal magistrate judge approved a warrant to search the 13 CDs and six other electronic devices that were seized from Loera’s residence for evidence of child pornography (“the second warrant”). Agent Nishida searched Loera’s laptop pursuant to the first and second warrants, looking for evidence of computer fraud and child pornography and found more than 730 images of child pornography. Agent Nishida then searched the 4 CDs pursuant to the second warrant and found approximately 330 images of child pornography and two videos of child pornography.

The government charged Loera with possession of child pornography based on the evidence discovered on his laptop and CDs.

Loera filed a motion to suppress the evidence discovered during the various searches of his electronic devices. First, Loera argued that, although the first warrant permitted the agents to

search his CDs for evidence of computer fraud, the agents' search exceeded the scope of the first warrant when they continued searching the CDs after discovering evidence of child pornography.

The court disagreed. The initial searches Loera's CDs were conducted within the scope of the first warrant because at all times the agents were focused on discovering evidence of computer fraud. After the agents discovered evidence of child pornography, they resumed their search for evidence of computer fraud on the CDs. In addition, there were no folders, labels, or distinctive titles that set apart the child pornography images from the other files on the discs. Finally, the agents' search methods were reasonable under the circumstances, considering the fact that the CDs were not particularly organized. Given that the warrant authorized the agents to search the CDs for "photographs," "documents," and "configuration files," it was reasonable for the agents to search all file types on the CDs (image, video, and text) for evidence of computer fraud rather than to narrow their searches to one particular type of file.

Next, Loera argued that Agent Cravens' second search of the 4 seized CDs was unreasonable because Cravens was searching for evidence of child pornography, which was outside the scope of the first warrant.

The court agreed. The first warrant authorized the agents to search for evidence of computer fraud. However, Agent Cravens testified that his second search of the 4 CDs was directed at finding child pornography so he could include descriptions of images from the discs to obtain a second search warrant. The court held that Agent Cravens' second search was unreasonable because it exceeded the scope of the first warrant and that none of the exceptions to the warrant requirement applied.

Finally, Loera argued that the child pornography evidence that Agent Nishida discovered when he executed the second search warrant should have been suppressed because the second warrant was not supported by probable cause and no exceptions to the warrant requirement applied.

The court agreed that the second warrant was not supported by probable cause. After omitting the child pornography descriptions that Agent Cravens obtained as a result of his unlawful second search of the 4 CDs, the court concluded that the remaining information in his affidavit was not sufficient to establish probable cause to search the CDs or Loera's other electronic devices for child pornography.

However, the court held that suppression of the child pornography evidence discovered during the execution of the second search warrant was not warranted. The court found that the FBI would have inevitably discovered the child pornography evidence on Loera's electronic devices through lawful means independent from Agent Cravens' unlawful second search.

The FBI had the authority under the first warrant to search Loera's electronic devices for evidence of computer fraud, which it still had in its possession. The court found that had the second warrant never been obtained, Agent Nishida would have searched Loera's laptop for evidence of computer fraud pursuant to the first warrant. During this lawful search, the court found that Agent Nishida would have searched the folders where he discovered the child pornography when he executed the second warrant. The court also found that had Agent Nishida discovered child pornography during the search of the laptop pursuant to the first warrant, this discovery would have supported probable cause to obtain a warrant to search the laptop, CDs, and Loera's other devices for evidence of child pornography.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/17-2180/17-2180-2019-05-13.pdf?ts=1557777653>

Eleventh Circuit

United States v. Babcock, 2019 U.S. App. LEXIS 15506 (11th Cir. FL 2019)

A police officer went to Darrell Babcock's residence and approached a camper parked on the property in response to a report that a female had been heard yelling, "Stop, stop, stop!" When the officer knocked on the door of the camper, Babcock exited, closed the door behind him, and told the officer that no one else was inside. However, a few seconds later, a teenage girl exited the camper. After the officer noticed the girl had blood on her thigh, Babcock handed the officer his cell phone to show her a video of the girl sitting on a bed, holding a knife to her own throat and saying that she wanted to die. In the video, Babcock could be heard berating the girl.

After other officers arrived, Babcock and the girl were interviewed separately. Babcock told an officer the girl used to be his neighbor and that she had shown up at his camper unannounced, in the middle of the night, and that he did not know the girl's age. The girl, whose identification indicated that she was 16 years old, told an officer that she and Babcock had attended a party the night before, where she had consumed alcohol, cocaine, and other substances. After answering a few questions, the girl began either panicking or experiencing the effects of a drug overdose, so officers called an ambulance to transport the girl to the hospital.

In the meantime, a detective arrived and obtained Babcock's consent to search the camper. The detective saw blood on the bedsheets and prescription pills scattered around the camper. When the detective asked to further inspect Babcock's phone, which the detective had received from the other officer, Babcock refused and asked to have it back. Babcock offered to email the detective the video clip of the girl holding the knife, but the detective decided to keep the phone instead.

The detective went to the hospital and interviewed the girl who admitted that she and Babcock had been in a relationship. The girl also told the detective that he would find sexually explicit images of her on Babcock's phone. Two days later, the detective obtained a warrant to search Babcock's phone where he discovered nude images of the girl and explicit video recordings of Babcock and the girl together.

The government charged Babcock with child pornography related offenses.

Babcock filed a motion to suppress the evidence discovered on his phone, arguing that the detective seized his phone without a warrant or probable cause. The government argued that the warrantless seizure of Babcock's phone was reasonable to prevent the destruction of evidence.

The seizure of private property generally requires a warrant. However, the warrantless seizure of property is reasonable under the Fourth Amendment when police can show: (1) probable cause to believe the property contains contraband or evidence of a crime and (2) exigent circumstances exist, such as a belief that evidence will be removed or destroyed before a warrant can be obtained to search the property.

The court held that the officers' collective knowledge at the time Babcock's phone was seized established probable cause to believe that the phone contained evidence of criminal activity. The court found that when the detective retained possession of Babcock's phone, the officers knew:

(1) that a domestic-disturbance call had reported a female at Babcock's residence yelling, "Stop, stop, stop!"; (2) that after Babcock had denied that anyone else was in his camper, a teenage girl emerged with cuts on her legs; (3) that Babcock had accompanied the girl to a party the night before, where she had consumed alcohol and drugs, and that she was in his camper the next morning; (4) that the girl had been on Babcock's bed and had left traces of blood there; (5) that the girl had been distraught, holding a knife to her own throat and saying, "I just want to die"; and (6) that shortly after the officers arrived, the girl appeared to be panicking or suffering an overdose.

The court emphasized that the officers did not have to establish probable cause to believe that the phone contained evidence of the crimes with which Babcock was eventually charged, child pornography-related offenses. Instead, the officers just had to establish probable cause that a criminal offense had been committed or was being committed. The court found that based on their investigation, by the time the officers seized the phone, they had probable cause to believe it contained evidence of violations of several Florida state criminal statutes.

The court further held that a reasonable officer could have believed that Babcock, a suspect in the case, would delete any incriminating evidence on the phone before a warrant could be obtained. The court based this conclusion on Babcock's attempt to deceive the first officer about the presence of the girl in the trailer and subsequent lies he told the officers concerning his relationship with the girl.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca11/17-13678/17-13678-2019-05-24.pdf?ts=1558706446>
