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# 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](mailto: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>.

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# The Informer –October 2016

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## FLETC Informer Webinar Series

### **1. The Fifth Amendment and Compelling Unencrypted Data, Encryption Codes and/or Passwords**

1 ½ - hour webinar presented by Bob Cauthen, Assistant Chief, FLETC Legal Division. This webinar will examine the Fifth Amendment Self-Incrimination Clause and three United States Supreme Court decisions that form the underpinnings of the legal analysis concerning documents and data on electronic devices and then cover federal case law analyzing whether, and if so how, the government can compel a suspect or defendant to disclose a password or encryption code or produce an unencrypted version of data already lawfully in the government’s possession.

**Date and Time: Thursday November 10, 2016, 2:30 p.m. EDT**

**To join this webinar: <https://share.dhs.gov/informer>**

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# CASE SUMMARIES

## Circuit Courts of Appeal

### Third Circuit

#### **Johnson v. City of Philadelphia, 2016 U.S. App. LEXIS 17138 (3d Cir. Pa. Sept. 20, 2016)**

Officer Dempsey was on patrol at 2:00 a.m., when he received a report that a naked man was at a nearby intersection standing in the street. Dempsey and two other patrol officers responded to the call, but found no one. Around 5:30 a.m., Dempsey responded to another call about a naked man on the same block, but again found no one.

At approximately 6:00 a.m., a passing motorist told Officer Dempsey that a naked man was at a nearby intersection standing in the street. Officer Dempsey went to the location and saw a naked man, later identified as Kenyado Newsuan, standing in front of a residence. Dempsey estimated Newsuan to be six feet tall and 220 pounds. Dempsey did not contact his dispatch to report that he had encountered Newsuan or stopped his patrol car. As Newsuan walked toward the residence, Dempsey exited his car with his taser in his hand and told Newsuan to “come here.” In response, Newsuan began screaming and shouting obscenities at Dempsey and flailing his arms around. Dempsey could see that Newsuan was completely naked and had nothing in his hands. Dempsey told Newsuan to “come here” several times, but Newsuan ignored him and continued to walk toward the residence. Newsuan entered the residence, but emerged a few seconds later. Newsuan was still naked and Dempsey could see that he did not have a weapon.

Upon emerging from the residence, Newsuan began running toward Dempsey and yelling. Dempsey gave Newsuan two verbal commands to stop. When Newsuan was five feet away, Dempsey fired his taser into Newsuan’s chest. Newsuan kept coming forward and grabbed Dempsey’s shirt. A violent struggle ensued. Newsuan struck Dempsey in the head multiple times, threw Dempsey up against a parked van, and then pushed him into a parked SUV. As they were wrestling against the SUV, Newsuan reached for Dempsey's service weapon. Dempsey removed the gun from its holster, wedged it between his body and Newsuan's, and, from a distance of no more than two inches, fired two shots into Newsuan's chest. Newsuan attempted to reach for the gun, and Dempsey shot him again in the chest. Still grappling, Newsuan reached for the gun again, and Dempsey shot him again. Newsuan collapsed face down and died.

Johnson, representing Newsuan’s estate, filed suit under *42 U.S.C. § 1983*, alleging, among other things, that Officer Dempsey used excessive force against Newsuan in violation of the *Fourth Amendment*.

A claim that a police officer used excessive force during a seizure is analyzed under the *Fourth Amendment’s* objective reasonableness standard. There was no dispute that Dempsey seized Newsuan for *Fourth Amendment* purposes when he shot and killed him. The issue was whether Dempsey’s use of force was objectively reasonable under the totality of the circumstances.

First, the court concluded that once Newsuan began reaching for Dempsey’s gun, Dempsey was justified in using deadly force to defend himself. Three witnesses to the altercation testified that Newsuan rushed at Dempsey, began violently grappling with him, and slammed Dempsey into

multiple cars. All three witnesses agreed that Newsuan then attempted to grab Dempsey's gun out of its holster. At this point, there was a serious risk that Newsuan would kill Dempsey, and no reasonable juror could conclude that it was unreasonable for Dempsey to shoot Newsuan.

Next, the court noted that a proper *Fourth Amendment* analysis required it to assess not only the reasonableness of Dempsey's actions at the moment of the shooting, but the totality of the circumstances leading up to the shooting.

The plaintiff argued that even if Dempsey was justified in shooting Newsuan after he was attacked, the seizure as a whole was unreasonable because Dempsey should never have confronted Newsuan in the first place. The plaintiff supported this argument by citing a Philadelphia Police Department directive that instructs officers who encounter severely mentally disabled persons, including persons experiencing drug-induced psychosis, to wait for back up, to attempt to de-escalate the situation through conversation, and to retreat rather than resort to force.

The plaintiff argued that Dempsey knew or should have known that Newsuan was obviously mentally disturbed, as Dempsey saw that Newsuan was naked and unarmed. In addition, the plaintiff pointed out that Dempsey had responded to two prior calls to the same area concerning a naked man standing in the street without receiving any indication that the man was endangering or threatening people. As a result, the plaintiff claimed that under these circumstances it was unreasonable for Dempsey to ignore departmental policy by initiating a one-on-one encounter with Newsuan.

The court disagreed. First, the court did not reject the plaintiff's argument that official police department policies may be considered when determining the reasonableness of an officer's use of force.<sup>1</sup> Second, the court noted that the totality of the circumstances analysis should include whether the officer's own reckless or deliberate conduct unreasonably created the need to use deadly force.

However, the court concluded it did not need to address these issues. Whether or not Dempsey acted unreasonably at the outset of his encounter with Newsuan, the plaintiff must still prove that Dempsey's allegedly unconstitutional actions proximately caused Newsuan's death. Under ordinary tort principles, a superseding cause breaks the chain of proximate causation, and the Third Circuit has recognized that this principle limits *Section 1983* liability for an officer's use of force even where the officer's initial actions violate the *Fourth Amendment*. Here, the court concluded that Newsuan's violent, precipitate, and illegal attack on Officer Dempsey severed any causal connection between Dempsey's initial actions and his subsequent use of deadly force during the struggle in the street. Consequently, the court held that Newsuan's life-threatening assault, coupled with his attempt to gain control of Dempsey's gun, was the direct cause of his death.

While the court held that Officer Dempsey did not violate the *Fourth Amendment* during his encounter with Newsuan, it is worth noting the court's concluding comments.<sup>2</sup>

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<sup>1</sup> The court recognized that the federal circuit courts of appeal are split on the question of whether police department policies may be used to assess whether a seizure is reasonable under the *Fourth Amendment*.

<sup>2</sup> The question of proximate causation in this case is made straightforward by the exceptional circumstances presented--namely, a sudden, unexpected attack that instantly forced the officer into a defensive fight for his life. As discussed above, that rupture in the chain of events, coupled with the extraordinary violence of Newsuan's assault, makes the *Fourth Amendment* reasonableness analysis similarly straightforward. Given the extreme facts of this case, our opinion should not be misread to broadly immunize police officers from *Fourth Amendment* liability whenever a mentally disturbed person threatens an officer's physical safety. Depending on the severity and immediacy of the

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca3/15-2346/15-2346-2016-09-20.pdf?ts=1474390846>

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## **Fifth Circuit**

### **United States v. Toussaint, 2016 U.S. App. LEXIS 17357 (5th Cir. La. Sept. 22, 2016)**

While monitoring a wiretap, an FBI agent overheard a suspected gang-member issue an order to kill Toussaint, who was said to be in a specific neighborhood driving a silver Infiniti. The agent immediately contacted a local police officer, who met with several other officers to discuss how they should attempt to locate and warn Toussaint. After their meeting, the officers went to the neighborhood mentioned in the wiretap and searched for silver Infinitis. As they were leaving the neighborhood, the officers saw a silver Infiniti. The officers followed the vehicle, determined it was travelling over the speed limit, and pulled it over. When the vehicle pulled over, the driver, Toussaint, fled from the officers on foot. After a brief chase, the officers caught Toussaint and arrested him. The officers searched Toussaint incident to arrest and recovered a 9mm pistol and a bag of crack cocaine. By this time, approximately forty-five minutes had elapsed between the initial threat overheard on the wiretap and the stop of Toussaint's vehicle.

The government charged Toussaint with drug and firearm violations.

Toussaint filed a motion to suppress the evidence the officers seized as a result of the stop. The district court granted the motion, and the government appealed.

The Court of Appeals reversed the district court. The emergency-aid exception to the *Fourth Amendment's* warrant requirement allows officers to conduct warrantless searches or seizures when exigent circumstances exist. One recognized exigent circumstance is the need to assist persons who are seriously injured or threatened with serious injury. While the vast majority of cases have involved warrantless entries into homes, the court found no logical difference with extending this exception to vehicle stops. As a result, in a case of first impression, the court held that the emergency aid exception can be used to justify a traffic stop under the proper circumstances.

The court then held that the emergency-aid exception applied in this case; therefore, the officers were justified in stopping Toussaint. Here, the officers received what all parties agreed was a credible threat against a specific individual, who was located within a specific area of the city and was driving a specific vehicle. The court held that it was reasonable for the officers to believe the

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threat and any potential risk to public safety posed by an officer's delayed action, it may be appropriate for an officer to retreat or await backup when encountering a mentally disturbed individual. It may also be appropriate for the officer to attempt to de-escalate an encounter to eliminate the need for force or to reduce the amount of force necessary to control an individual. Nor should it be assumed that mentally disturbed persons are so inherently unpredictable that their reactions will always sever the chain of causation between an officer's initial actions and a subsequent use of force. If a plaintiff produces competent evidence that persons who have certain illnesses or who are under the influence of certain substances are likely to respond to particular police actions in a particular way that may be sufficient to create a jury issue on causation. And of course, nothing we say today should discourage police departments and municipalities from devising and rigorously enforcing policies to make tragic events like this one less likely. The facts of this case, however, are extraordinary. Whatever the *Fourth Amendment* requires of officers encountering emotionally or mentally disturbed individuals, it does not oblige an officer to passively endure a life-threatening physical assault, regardless of the assailant's mental state.

threat on Toussaint's life had not ended within the forty-five minutes it took to locate him; therefore, the emergency still existed that justified the traffic stop.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/15-30748/15-30748-2016-09-22.pdf?ts=1474587032>

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## **Sixth Circuit**

### **United States v. Calvetti, 2016 U.S. App. LEXIS 16496 (6th Cir. Mich. Sept. 8, 2016)**

During a traffic stop, an officer seized sixteen kilograms of cocaine from the vehicle in which Cortez and Calvetti were travelling. The officer arrested the pair and transported them to the U.S. Drug Enforcement Administration (DEA) field office for questioning.

At the DEA office, an agent advised Calvetti of her *Miranda* rights. Calvetti signed a *Miranda*-rights form indicating that she understood her rights, but she did not want to answer questions. Nevertheless, agents questioned Calvetti. Among other things, the agents asked Calvetti about her residence. A short time later, Calvetti signed a consent-to-search form for her residence. The agents searched Calvetti's residence and found drug-packaging materials similar to those that had been used to wrap the cocaine seized from her vehicle.

The government charged Cortez and Calvetti with two drug offenses.

Calvetti filed a motion to suppress the statements she made to the agents and the evidence seized from her residence, arguing that the agents violated her *Miranda* rights.

If a defendant invokes the right to remain silent before or during an interrogation, questioning must stop. Here, the court held that Calvetti clearly and unambiguously invoked her right to remain silent by signing her name on the "No" signature line below the question, "Are you willing to answer some questions?" However, after seeing Calvetti's "No" signature on the *Miranda*-waiver form, the agents asked her questions anyway.

Calvetti also argued the evidence seized from her residence should have been suppressed because the *Miranda* violation tainted her consent to search.

The court noted that *Miranda* warnings are not independent rights, but stem from the *Fifth Amendment* right against self incrimination. The right against self incrimination protects a person from being compelled to testify against himself, or otherwise provide the government with evidence that is testimonial, or communicative in nature. To be testimonial, a person's communication must convey a "factual assertion," or disclose information.

The court concluded that giving consent to search is not a testimonial statement because it does not convey a factual assertion or disclose information. As a result, the court held that a person's consent to search is not a statement protected by the self incrimination clause of the *Fifth Amendment*. Consequently, the violation of Calvetti's right to remain silent did not provide a basis for suppressing the evidence seized at her residence arising out of her consent to search.

The court also held that Calvetti's consent was obtained voluntarily. Although Calvetti told the officer during the traffic stop that she had been driving for twenty-four hours, she never complained of sleep deprivation, or said that she was tired, confused, or uncomfortable.

Finally, Calvetti argued the evidence seized from her residence should have been suppressed because she did not know that she could refuse the agents' request for consent.

The court disagreed. The Supreme Court has rejected the argument that consent cannot be valid unless the defendant knows that he has the right to refuse the request. Here, the consent-to-search form that Calvetti signed indicated that Calvetti "freely consented" to the search and had "not been threatened, nor forced in any way."

Calvetti and Cortez also filed a joint motion to suppress the cocaine seized from their vehicle, arguing that the officers lacked reasonable suspicion to prolong the traffic stop.

The court disagreed. First, Calvetti and Cortez claimed they were moving to Michigan and they had been driving for twenty-four straight hours, but their vehicle contained a small amount of luggage. Second, the pair had criminal histories, which included drug-related offenses. Third, Calvetti appeared to be extremely nervous and gave inconsistent statements as to whether she owned the vehicle. Consequently, the court held these factors gave the officers reasonable suspicion to extend the duration of the initial stop to question Calvetti and Cortez further.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-1526/15-1526-2016-09-08.pdf?ts=1473354197>

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## **Seventh Circuit**

### **United States v. Wright, 2016 U.S. App. LEXIS 17429 (7th Cir. Ill. Sept. 23, 2016)**

Police officers responded to a domestic dispute between Wright and Leslie Hamilton. In their incident report, the officers noted that Hamilton called Wright a "pedophile" during the altercation.

The next day, an officer who specialized in handling crimes against children, reviewed the officers' report. Concerned about Hamilton's use of the word "pedophile," the officer contacted Hamilton and requested a meeting.

Hamilton met with the officer and told him that Wright used his cell phone to visit a website that the officer knew featured pornographic images of underage girls. Hamilton also told the officer that she saw a video with a "disturbing title" on the family's home computer. Hamilton then gave the officer consent to search the couple's apartment and computers for evidence of child pornography.

When the officer arrived at the apartment, Hamilton let him in using her key. Once inside, the officer saw a desktop computer on the living-room floor connected to a flat-screen television. Hamilton told the officer the computer belonged to Wright; however, it was used as a family computer, and anytime she or her children wanted to use it, they did. Hamilton told the officer she used the computer to watch movies, play games, check the children's grades, and store work-related documents. The officer "previewed" the desktop computer's hard drive by connecting it to his own laptop, a standard forensic procedure that allows investigators to view the drive's contents without altering it. This preview revealed images of child pornography. Hamilton then gave the officer consent to seize the computer for further investigation. A subsequent forensic analysis of the computer revealed images and videos containing child pornography.



The government indicted Wright on child-pornography and child exploitation charges.

Wright filed a motion to suppress the evidence recovered from the computer, arguing that Hamilton did not have the authority to grant the officer consent to search his computer.

The court disagreed. Consent may be obtained from the defendant or from a third party who exercises common authority over the property to be searched. Common authority does not require the exercise of an ownership interest in the property, but instead it rests upon mutual use of the property by persons generally having joint access or control over it. The premise of this rule is that a defendant who allows another person to use his property assumes the risk that the person will allow others to access the property.

Here, the court held that Hamilton's mutual use of, access to, and control over the computer established that she enjoyed common authority over it with Wright. First, the forensic analysis corroborated Hamilton's claim that she and her children freely used the computer, as the internet history revealed the computer had been used recently to view children's movies and games, as well as the login page at the children's school. Second, Wright left the computer in a common area of the apartment, leaving Hamilton with unrestricted access to it when he was not home. Consequently the court held that Hamilton had actual authority to grant the officer consent to search Wright's computer.

The court further held that Hamilton also exercised apparent authority over Wright's computer. Apparent authority exists if the facts available to an officer at the time of a search would allow a reasonable person to believe that the consenting party had authority over the property to be searched.

Here, the court found that what the officer saw at the apartment was consistent with Hamilton's claim that she and the children could use the computer at any time. Specifically, when the officer arrived at the apartment, the officer saw the computer on the living-room floor connected to the television. The officer also saw children's toys and women's clothes scattered around the room. As a result, the court held it was reasonable for the officer to conclude that Hamilton exercised common authority over Wright's computer.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-3109/15-3109-2016-09-23.pdf?ts=1474668048>

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## **Ninth Circuit**

### **United States v. Williams, 2016 U.S. App. LEXIS 17150 (9th Cir. Nev. Sept. 20, 2016)**

A man called a police hotline and reported that another man was sleeping inside a grey Ford, which was located in an apartment complex parking lot. The caller stated the man was a known drug dealer and did not live in the apartment complex. The caller provided his name, address and phone number. Two uniformed officers in a marked police car responded and saw the grey Ford in the parking lot. The officers turned on their patrol car's overhead lights, shining them inside the Ford. After the officers turned on their lights, a man, later identified as Williams, sat up in the driver's seat inside the Ford. Williams started the car, placed it in reverse and then quickly shifted the car back into park. By this time, both officers were approaching the Ford on foot. The officers ordered Williams out of the car and Williams complied. When the officers got within a few feet

of Williams, he ran away from them. The officers chased Williams who fell down and remained on the ground. One of the officers conducted a pat down of Williams' backside, handcuffed him, and then helped Williams to his feet. The officers brought Williams back to their patrol car and conducted a pat down of Williams' front side. An officer then reached into all of Williams' pockets. The officer found a plastic bag containing individually wrapped pieces of crack cocaine in Williams' right front pocket and over \$1,000 in cash in small denominations in Williams' left front pocket.

The officers brought Williams back to the parking lot where the Ford was still parked. With Williams handcuffed in the back of the patrol car, the officer searched the Ford. Inside the car, the officers found a purse that contained a handgun.

The government charged Williams with drug and firearm offenses.

Williams filed a motion to suppress the cocaine seized from his pocket and the handgun found during the search of the Ford.

The district court granted Williams' motion, and the government appealed.

The Ninth Circuit Court of Appeals reversed the district court. First, the court held that the officers had reasonable suspicion to conduct a *Terry* stop of Williams. A caller reported that Williams, a known drug dealer, was sleeping inside a car in the parking lot of an apartment complex in which Williams did not live. When the officers arrived, they saw a car matching the description in the location provided by the caller. The court found that the caller's tip was reliable, and that it alleged an ongoing crime, criminal trespass, by Williams. In addition, the officers' suspicion was increased when Williams started the car and shifted it into reverse after the officers shined their lights on his car.

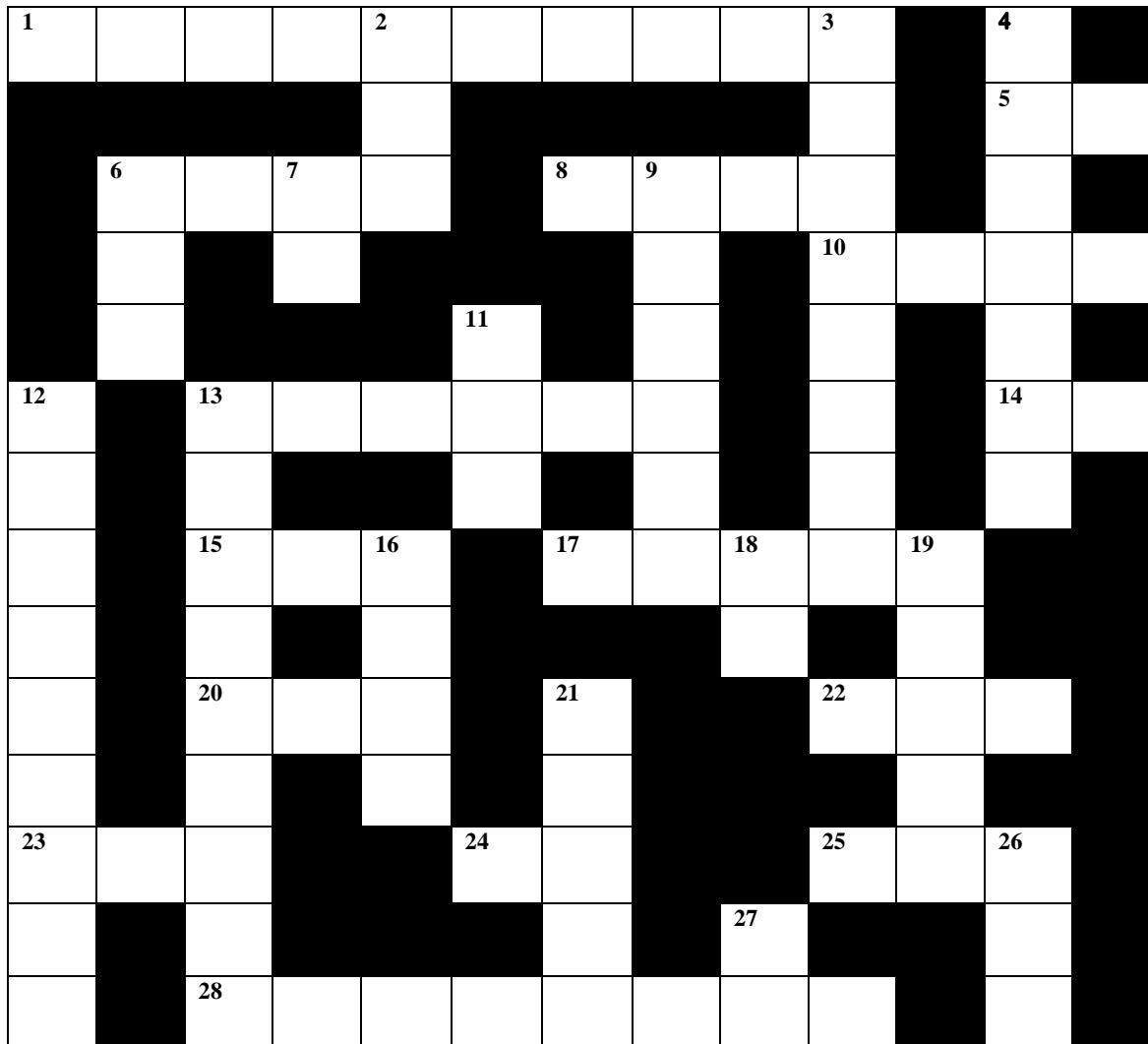
Next, the court held that once the officers established reasonable suspicion to detain Williams, they had the right under *Nevada Revised Statute (N.R.S.) § 171.23* to determine his identity. However, instead of speaking with the officers, Williams fled; therefore, violating *N.R.S. § 199.280*, Nevada's obstruction statute. At this point, the court concluded the officers had probable cause to arrest Williams. The court reiterated that the officers did not arrest Williams solely because he ran from them, but because he ran from the officers after the officers had reasonable suspicion to detain him to ascertain his identity. Consequently, the court held the officers conducted a valid search incident to arrest when they searched Williams' pockets and found the crack cocaine and cash.

Finally, the court held the warrantless search of Williams' car was lawful under the automobile exception to the *Fourth Amendment's* warrant requirement. Officers may conduct a warrantless search of an automobile, including containers within it, when the officers establish probable cause that the vehicle contains contraband or evidence of criminal activity. Based on the information the officers had before they arrested Williams and the contraband they found after arresting Williams, the court held the officers had probable cause to believe that Williams' car contained further contraband or other evidence of drug dealing.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca9/15-10008/15-10008-2016-09-20.pdf?ts=1474391082>

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## Fourth Amendment Crossword Puzzle



### ACROSS

1. The *Fourth Amendment* protects the people from this type of action.
5. The burden of proof to justify a *Terry Stop*, *Terry Frisk*, or protective sweep. (Abbr.)
6. The name of an investigative detention that begins with "*Terry*" and ends with \_\_\_\_\_ [one word].
8. Law enforcement officers cannot use this in routine law enforcement activities except to identify someone suspected of a crime.
10. An exception to the exclusionary rule may do this to the evidence.
13. Someone attempting to do this to evidence located in a home may justify going inside without a warrant.
14. An expectation of privacy is probably not reasonable if it can be seen on or heard on this household item. (Abbr.)
15. This signal from a ship may justify an emergency search of the vessel.
17. A search for weapons.
20. Most search warrants are executed at this time.
22. Whether a warrant is required under the *Carroll Doctrine*?
23. A reasonable expectation of privacy would begin here at check-in, and end at check-out.
24. This person can establish probable cause if he is credible and has a basis of knowledge. (Abbr.)

25. Trustworthy information that members of this group committed a crime in a certain location may allow officers to focus their investigation on white Caucasians. (Abbr.)
28. A search based on hot pursuit, destruction of the evidence, or an emergency.

### **DOWN**

2. A government intrusion into this is a search. (Abbr.)
3. May also be a search when done on a suspect's *person, house, papers, or effects*.
4. This type of action does not trigger the *Fourth Amendment*.
6. Should follow a custodial arrest. (Abbr.)
7. The proper conjunction between two words that describe when an officer can search: She needs a warrant \_\_\_\_ exception to the warrant requirement.
9. A question to think about before conducting a consent search: Does the person have actual authority over the place, or does it at least \_\_\_\_\_ [one word] that he does?
11. This type of pursuit may excuse a search warrant.
12. An inspection is considered to be this if the officer does not have a search warrant.
13. An arrest warrant will allow an officer to go inside this type of place when it's reasonable to believe the arrestee is there.
16. Corroborating what an anonymous informant \_\_\_\_ [one word] may establish probable cause.
18. Race, gender, and transgender may be used to \_\_\_\_ [abbr.] someone suspected of a crime.
19. A Fourth Amendment requirement before entering a dwelling that ends with "Announce."
21. Something that could be seized during a frisk.
26. A warrant or an exception is like a \_\_\_\_ [one word] into a place where someone has a reasonable expectation of privacy.
27. It's not capable of precise definition, but is specifically mentioned in the *Fourth Amendment*. (Abbr.)

Send comments / suggestions to:

Tim Miller, Legal Division, Federal Law Enforcement Training Center: [Tim.Miller@dhs.gov](mailto:Tim.Miller@dhs.gov)

<sup>1</sup> G	O	V	E	<sup>2</sup> R	N	M	E	N	<sup>3</sup> T		<sup>4</sup> P	
				E					R		<sup>5</sup> R	S
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<sup>23</sup> I	N	N			<sup>24</sup> C	I			<sup>25</sup> K	K	<sup>26</sup> K	
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N		<sup>28</sup> E	X	I	G	E	N	C	Y		Y	