
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. You can join *The Informer* Mailing List, and have *The Informer* delivered directly to you via e-mail by clicking on the link below. You can visit <https://leolaw.podbean.com> to view past editions of *The Informer* dating back to December 2020.

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FLETC Informer Webinar Schedule – July 2021

1. Understanding Protective Sweeps

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, Georgia.

In this webinar we will discuss Maryland v. Buie, decided by the Supreme Court in 1990, in which the Court outlined the level of suspicion required, scope, and duration of protective sweeps conducted by law enforcement officers in conjunction with in-home arrests.

Wednesday, July 21, 2021 – 2:30 p.m. Eastern / 1:30 p.m. Central / 12:30 p.m. Mountain / 11:30 a.m. Pacific

To participate in this webinar:

<https://share.dhs.gov/understandingprotectivesweeps/>



2. Use of Force and the Duty to Intervene

Presented by Arie J. Schaap, Attorney Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

This webinar will look at an officer's duty to intervene, sometimes referred to as the duty to intercede, and what it entails. Courts have determined that officers have a constitutional duty to intervene when witnessing unconstitutional conduct and that the failure to intervene can lead to civil liability just like that of the officer committing the unconstitutional conduct. While this duty to intervene is broader than just use of force cases, since it extends to any unconstitutional conduct, the focus of this webinar will be on excessive use of force cases.

Wednesday, July 28, 2021 – 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

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



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FLETC Office of Chief Counsel Podcast Series

1. Fundamentals of the Fourth Amendment – A 15-part podcast series that covers the following Fourth Amendment topics:

- A Flash History of the Fourth Amendment
- What is a Fourth Amendment Search?
- What is a Fourth Amendment Seizure?
- Fourth Amendment Levels of Suspicion
- Stops and Arrests
- Plain View Seizures
- Mobile Conveyance (Part 1 and Part 2)

- Exigent Circumstances
- Frisks
- Searches Incident to Arrest (SIA)
- Consent (Part 1 and Part 2)
- Inventories
- Inspection Authorities

2. Fifth and Sixth Amendment Series – A 10-Part podcast series that covers the following Fifth and Sixth Amendment topics:

- What's In the Fifth Amendment?
- Right Against Self-Incrimination
- Kalkines / Garrity
- Miranda – The case
- Miranda – Custody

- Miranda – Interrogation
- Miranda – Waiver
- Miranda – Invocation of Rights
- Miranda – Grab Bag of Issues
- Sixth Amendment – Right to Counsel

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CASE SUMMARIES

United States Supreme Court

United States v. Cooley, 2021 U.S. LEXIS 2816 (June 1, 2021)

Officer James Saylor of the Crow Police Department was driving on United States Highway 212, a public right-of-way within the Crow Reservation, located within the State of Montana. Officer Saylor saw a truck parked on the westbound side of the highway. Believing the occupants might need assistance, Officer Saylor approached the truck and spoke to the driver, Joshua Cooley. Officer Saylor noticed that Cooley had “watery, bloodshot eyes” and “appeared to be non-native.” Officer Saylor also noticed two semiautomatic rifles lying on the front seat. Officer Saylor ordered Cooley out of the truck, conducted a patdown search, and called tribal and county officers for assistance.

While waiting for the officers to arrive, Officer Saylor returned to Cooley’s truck where he saw a glass pipe and plastic bag that contained methamphetamine. When the other officers arrived, including an officer with the federal Bureau of Indian Affairs, they directed Officer Saylor to seize all contraband in plain view, leading him to discover more methamphetamine. Officer Saylor transported Cooley to the Crow Police Department where federal and local officers questioned him.

After the government charged Cooley with drug and firearm offenses, he filed a motion to suppress the drug evidence seized by Officer Saylor. The district court granted Cooley’s motion, holding that Officer Saylor, as a Crow Tribe police officer, lacked the authority to investigate non-apparent violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation. The government appealed.

The Ninth Circuit Court of Appeals affirmed the district court’s ruling. The court held that a tribal police officer could stop and hold for a reasonable time a non-Indian suspect, but only if: (1) the officer first tried to determine whether “the person is an Indian,” and, if the person turns out to be a non-Indian, (2) it is “apparent” that the person has violated state or federal law. In this case, because Officer Saylor had not initially tried to determine whether Cooley was an Indian, the court held that the district court properly suppressed the evidence. The government appealed and the Supreme Court agreed to hear the case.

The Court recognized that in [Oliphant v. Suquamish Tribe](#), it held that an Indian tribe could not “exercise criminal jurisdiction over non-Indians.” However, in [Montana v. United States](#), the Court set forth an exception to this general rule, holding that “a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.*”

First, the Court concluded that the exception outlined in [Montana](#) “fits the present case almost like a glove,” as its primary concern is the protection of the “health or welfare of the tribe.” The Court added, “to deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Such threats may be posed by, for instance,

non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation.”

Second, the Court noted that it has applied the exception from Montana in several cases involving a tribe’s jurisdiction over the activities of non-Indians within the reservation. Specifically, since the Montana decision, the Court has held that tribal police have the authority to: 1) patrol roads within a reservation, including rights-of-way made part of a state highway; 2) detain and turn over to state officers non-tribe members stopped on the highway for violations of state law; 3) detain non-tribe members for violations of state law and transport them to the proper authorities; and, 4) search non-tribe members prior to transport.

Consequently, the Court vacated the judgment of the Ninth Circuit and held that a tribal police officer has authority to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law.

For the Court’s opinion: https://www.supremecourt.gov/opinions/20pdf/19-1414_8m58.pdf

Lange v. California, 2021 U.S. Lexis 3396 (June 23, 2021)

Arthur Lange drove past a California highway patrol officer listening to loud music with his windows down and repeatedly honking his horn. The officer began to follow Lange and, soon afterward, turned on his overhead lights to signal that Lange should pull over. By that time, though, Lange was only about a hundred feet (some four-seconds drive) from his home. Rather than stopping, Lange continued to his driveway and entered his attached garage. The officer followed Lange in and began questioning him. Observing signs of intoxication, the officer put Lange through field sobriety tests. Lange did not do well, and a later blood test showed that his blood-alcohol content was more than three times the legal limit.

The State charged Lange with the misdemeanor of driving under the influence of alcohol, as well as a noise infraction. Lange filed a motion to suppress all evidence obtained after the officer entered his garage, arguing that the warrantless entry had violated the Fourth Amendment. The State argued that the officer had probable cause to arrest Lange for the misdemeanor offense of failing to comply with a police signal. The State further argued that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry. The Superior Court denied Lange’s motion, and its appellate division affirmed.

The California Court of Appeal also affirmed. In the court’s view, Lange’s “fail[ure] to immediately pull over” when the officer flashed his lights created probable cause to arrest him for a misdemeanor. The court added that a misdemeanor suspect could “not defeat an arrest which has been set in motion in a public place” by “retreat[ing] into” a house or other “private place.” Instead, the court concluded that an “officer’s ‘hot pursuit’ into the house to prevent the suspect from frustrating the arrest” is always permissible under the exigent circumstances “exception to the warrant requirement.” Consequently, the court held that “because the officer was in hot pursuit” of a misdemeanor suspect, “the officer’s warrantless entry into [the suspect’s] driveway and garage [was] lawful.” After the California Supreme Court denied review of the case, Lange appealed to the United States Supreme Court.

The Supreme Court recognized that lower courts are divided over whether the Fourth Amendment always permits an officer to enter a home without a warrant in pursuit of a fleeing misdemeanor

suspect. Some courts have adopted such a categorical rule, while others have required a case-specific showing of exigency. The Court agreed to accept this case to resolve the conflict.

The Fourth Amendment generally requires that law enforcement officers obtain a “judicial warrant” before they can enter a home without permission. However, the “warrant requirement is subject to certain exceptions.” One important exception is for exigent circumstances. It applies when “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.” The Court recognized that its cases have generally applied the exigent-circumstances exception on a “case-by-case basis.” Against this backdrop, the question before the Court was whether to use that approach, or instead apply a categorical warrant exception, when a suspected misdemeanant flees from police into his home. Under the usual case-specific view, an officer can follow the misdemeanant when, but only when, an exigency, such as the need to prevent destruction of evidence, allows insufficient time to get a warrant.

The Court concluded that the flight of a suspected misdemeanant does not always justify a warrantless entry into a home. The Court held that an officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter, such as to prevent imminent harms of violence, destruction of evidence, or escape from the home. However, when the officer has time to get a warrant, he must do so, even though the misdemeanant fled. Because the California Court of Appeal applied the categorical rule that the Court rejected, the Court vacated its judgment and remanded the case so the state court could determine if the circumstances specific to this case justified the officer’s warrantless entry.

For the Court’s opinion: https://www.supremecourt.gov/opinions/20pdf/20-18_new_6k47.pdf

Circuit Courts of Appeals

Fourth Circuit

United States v. Davis, 997 F.3d 191 (4th Cir. 2021)

On March 1, 2017, at around 2:45 p.m., police officer Derek Richardson of the Holly Springs, North Carolina Police Department stopped a car driven by Howard Davis because he believed that the vehicle’s windows were tinted too dark in violation of North Carolina law. Officer Richardson approached Davis and explained that he had pulled Davis over because of the vehicle’s window tint and obtained Davis’s license and proof of insurance. A search of the relevant databases revealed that Davis’s license was valid and that he “had a history of felony drug charges and convictions.”

Two additional uniformed officers arrived in a separate patrol car, parked behind Officer Richardson’s vehicle, and activated their car’s lights. About three minutes into the stop, while Officer Richardson talked with the other two officers, Davis put his hand out of his window and “ma[de] a pointing gesture indicating that he was leaving.” Davis then drove off without his license or proof of insurance, which were still in Officer Richardson’s possession.

The officers chased Davis. The pursuit continued until Davis reached a dead-end cul-de-sac, drove in between two houses and into someone’s backyard. At this point, Davis got out of his vehicle

carrying a backpack, ran on foot into a swamp, and got stuck in knee-high water. When Officer Richardson ordered Davis to come out of the swamp, Davis complied by returning to dry land, dropping the backpack, and lying down on his stomach. Officer Richardson patted Davis down and found a large amount of cash on Davis's person. Officer Richardson then handcuffed Davis's hands behind his back and placed him under arrest for "several traffic violations".

Afterward, Officer Richardson unzipped the closed backpack and discovered "large amounts of cash and two plastic bags containing what appeared to be cocaine." A search of Davis's vehicle revealed a digital scale, a bag containing bundles of cash, and other items. The officers also received a report that a witness had observed Davis toss a firearm out of his car window while fleeing. Acting on this information, the officers recovered a .45 caliber handgun from Davis's path of flight through the residential area.

The government charged Davis with three drug and firearms related offenses. Davis filed a motion to suppress the evidence seized from his backpack and vehicle, claiming that the officers' warrantless searches violated the Fourth Amendment. The district court denied Davis's motion and upon conviction he appealed.

In [Chimel v. California](#), the Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement allows arresting officers to search "both the arrestee's person and the area within his immediate control." The Court concluded that it was "reasonable" for arresting officers to search the person being arrested and the area within his reach (1) "in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and (2) "in order to prevent [the] concealment or destruction" of evidence.

Subsequently, in [New York v. Belton](#), the Court recognized that the "courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area includes the interior of an automobile." As a result, the Court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, "as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." In the years following [Belton](#), the Court noted that lower courts have "treat[ed] the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement" rather than as an exception justified by the two reasons articulated in [Chimel](#).

Consequently, in [Arizona v. Gant](#), the Supreme Court held that, incident to an arrest, a vehicle may be searched without a warrant if it was reasonable for the police to believe that the arrestee "could have accessed the car at the time of the search" (the first [Gant](#) holding). The Court further held that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle" (the second [Gant](#) holding).

In this case, the issue before the Fourth Circuit Court of Appeals was whether the Supreme Court's holding in [Gant](#) applied beyond the automobile context to the search of Davis's backpack. The court concluded that the first [Gant](#) holding applied to searches of non-vehicular containers. Specifically, the court held that police officers can conduct warrantless searches of non-vehicular containers incident to a lawful arrest "only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search." The court added that the Third, Ninth, and Tenth Circuits have reached that same conclusion in similar cases.

Applying the first [Gant](#) holding, the court held that Officer Richardson's warrantless search of Davis's backpack was unlawful. First, when Officer Richardson searched the backpack, Davis

was secured, as he was lying face down on the ground, surrounded by three officers, with his hands cuffed behind his back. Second, Davis was not within reaching distance of the backpack when Officer Richardson unzipped and searched it. Although Davis dropped the backpack next to him before lying down, by the time of the search, Davis was handcuffed, which severely curtailed the distance he could reach.

The court further held that the warrantless search of Davis's vehicle was unlawful. While Davis was initially pulled over because of his window tint, he was ultimately arrested for traffic violations. Consequently, the court held that under the second Gant holding, it was not reasonable for the officers to believe that evidence related to the crimes for which Davis was arrested would be found in his vehicle. The court added that Davis's flight from the officers and the cash found on his person did not establish probable cause to justify a warrantless search of Davis's vehicle under the automobile exception.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca4/20-4035/20-4035-2021-05-07.pdf?ts=1620412233>

Seventh Circuit

United States v. Shelton, 997 F.3d 749 (7th Cir. 2021)

The government charged Ethel Shelton with conspiracy to commit wire fraud and conspiracy to commit honest services fraud, based on her actions as an employee of the Calumet Township Trustee's Office. At the time, Shelton was the administrative assistant to Mary Elgin, the Calumet Township Trustee. At trial, Shelton learned that Federal Bureau of Investigation (FBI) Special Agent Nathan Holbrook had directed another employee in the Trustee's Office, Stafford Garbutt, who was acting as an informant, to conduct warrantless searches of Shelton's office. The information and evidence that Garbutt collected had been used to obtain a warrant to search the offices of the Trustee. The evidence obtained from that search then provided the basis for federal charges for several individuals, including Shelton.

Once Shelton learned of Garbutt's warrantless searches, she filed a motion for a mistrial, arguing among other things, violations of the Fourth Amendment. The government conceded that, if the court concluded that Shelton had a reasonable expectation of privacy in her office, no exception to the warrant requirement existed that would have permitted Garbutt to enter her office. The district court denied Shelton's motion, concluding that Shelton lacked a reasonable expectation of privacy in the areas searched by Garbutt. After the jury convicted Shelton, she appealed.

The Seventh Circuit Court of Appeals recognized that, like private employees, government employees may also have a reasonable expectation of privacy in their offices, depending on the surrounding circumstances.

The court found it was established at trial that: 1) Shelton was the sole occupant of her private, fully enclosed office for more than seven years; 2) although business invitees visited it for limited purposes, including in her absence, Shelton did not share her office or her desk with anyone else; 3) Shelton's office had a door, and she used it to exercise her right to exclude co-workers and visitors from her office; 4) one of the documents that Garbutt delivered to Agent Holbrook during his evidence collection efforts was an email from Shelton "to all staff of the Calumet Township on December 10, 2013, advising that her door will be closed during work hours for more privacy;"

5) on one occasion when Garbutt was visiting Shelton in her office, another employee came to visit, and Shelton turned papers face-down on her desk so that the visitor could not see them; 6) when Garbutt visited Shelton's office, he normally knocked before entering; 7) there was a separate waiting area outside Shelton's office for visitors; and, 8) Shelton kept personal, non-work related items in her office.

The court then noted that the district nonetheless relied on several factors, specific to Garbutt, in finding that Shelton lacked a reasonable expectation of privacy in her office. The factors relied upon by the district court were: 1) the presence of security cameras in the main office building; 2) the Trustee's office policy allowing workplace searches of employees and their possessions; 3) Garbutt entered Shelton's office daily to sign his time sheet; 4) Garbutt "passed by" Shelton's office to visit Elgin; 5) Garbutt regularly visited Shelton in her office; 6) the documents collected by Garbutt were on top of Shelton's desk; and, 7) Garbutt often arrived early at work.

In reviewing the first two factors, the court concluded that they were "wholly unrelated" to Garbutt's right to access Shelton's office. Specifically, the security cameras only monitored the comings and goings of individuals into the building, were not monitored by Garbutt, and he had no access to the video feed. Similarly, the only persons authorized by office policy to conduct searches of the workplace were the Security Deputy and the Deputy or supervisor of the affected employee. Garbutt was not the Security Deputy, a Deputy, nor was he Shelton's supervisor. As a result, the court held that neither the security cameras nor the workplace search policy gave Garbutt any right of access to Shelton's office.

Concerning the remaining factors, the court acknowledged that anything that Shelton knowingly exposed to Garbutt when he was present as a business invitee to her office would not be subject to Fourth Amendment protection. However, the court held that Garbutt far exceeded the limits of his access as a business invitee when he gathered the documents from Shelton's office.

First, the fact that Garbutt "passed by" Shelton's office on his way to visit Elgin did not weigh in favor of the district court's finding that her office was so open to visitors that she lacked any reasonable expectation of privacy in it. Even if some visitors passed through Shelton's office in order to visit Elgin, there was no evidence that Shelton's office was so open that members of the public could wander in. In fact, there was a separate waiting area outside of Shelton's office for outside visitors, and the most direct paths for employees and other visitors to meet with Elgin bypassed Shelton's office.

Next, there was also no evidence that other employees, including Garbutt, entered Shelton's office for anything other than limited purposes as business invitees. Finally, there was no evidence that Garbutt collected this evidence when he was in Shelton's office as a business invitee; for example, when he dropped items off on Shelton's chair, signed the timekeeping sheet, passed by to see Elgin, or stopped in to visit Shelton herself. Instead, Garbutt searched Shelton's office "more often than not, very early in the morning" before anyone arrived at the office, a task Garbutt could not have accomplished during normal working hours.

Based on these facts, the court commented that behavior such as Garbutt's, where he entered Shelton's private office outside of normal business hours and lingered beyond any legitimate, anticipated or permissible purpose in order to remove and copy the papers on top of her desk would be unacceptable in any workplace. Accordingly, the court held that Garbutt's actions violated the Fourth Amendment because he was acting as an agent of the government at the time, and because he possessed no warrant to conduct his searches.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/19-3388/19-3388-2021-05-14.pdf?ts=1621009821>

Eighth Circuit

United States v. Puebla-Zamora, 996 F.3d 535 (8th Cir. 2021)

A police officer received a text message from a confidential informant reporting a possible burglary at the apartment of a known drug dealer. Based on that information, the officer and his partner went to the apartment to investigate. The officers knocked on door and Rafael Puebla-Zamora opened it. To avoid alerting him to the burglary, the officers asked about a noise complaint. Puebla-Zamora told the officers that he had heard nothing. The officers then asked his name and date of birth and Puebla-Zamora provided them. The officers contacted dispatch to check Puebla-Zamora for warrants and driver's license records. Dispatch found no records with the name and date of birth provided, so the officers asked for identification. Puebla-Zamora provided a Mexican passport. Because the officers could not verify his identity from the passport, they called the Border Patrol.

Supervisory Border Patrol Agent Tanner Branham ran a records check and discovered that Puebla-Zamora had previously been removed from the United States. Agent Branham asked Puebla-Zamora to identify his country of citizenship and any documents allowing him to be legally present in the United States. Puebla-Zamora responded that he was a Mexican citizen with a Nevada driver's license but no documents allowing him to be legally present in the United States.

At this point, Agent Branham told the officers that Puebla-Zamora was illegally present in the United States and requested they detain him until a Border Patrol agent could take him into custody. As requested, the officers took Puebla-Zamora into custody until a Border Patrol agent arrived. Once in custody of the Border Patrol, Puebla-Zamora was fingerprinted and eventually charged with "reentry of a deported alien," in violation of 8 U.S.C. § 1326(a).

Upon conviction, Puebla-Zamora appealed, claiming that the police officers violated his Fourth Amendment rights by detaining him at the request of the Border Patrol agent.

The Eighth Circuit Court of Appeals recognized that no "agreement" is required for state and local law enforcement to communicate or "otherwise to cooperate" with federal authorities "regarding the immigration status of any individual." In fact, the cooperation between the police officers and Agent Branham to detain Puebla-Zamora was within the authority conferred by Congress in 8 U.S.C. § 1357(g)(10). In this case, the court held that the officers reasonably contacted the Border Patrol to identify an individual with a foreign identification and Agent Branham reasonably questioned Puebla-Zamora about his legal presence in the United States pursuant to 8 U.S.C. § 1357(a)(1).

Next, the court held that police officers detained Puebla-Zamora at the express request of Border Patrol Agent Branham and that this request was supported by probable cause that Puebla-Zamora was illegally present in the United States and likely to escape before a warrant could be obtained for his arrest. The court based its holding on the fact that Puebla-Zamora presented a Mexican passport as his only identification, he admitted that he did not have any documents that would allow him to be in the United States legally, and Agent Branham discovered that Puebla-Zamora had previously been removed from the United States.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/20-1153/20-1153-2021-05-03.pdf?ts=1620055824>

United States v. Arredondo, 996 F.3d 903 (8th Cir. 2021)

On January 5, 2019, around 10:00 p.m., Deputy Eric Fenton was dispatched to Dane Arredondo's (Dane) house after a neighbor reported hearing a woman screaming and crying inside the residence. When Deputy Fenton arrived, Dane's brother, David Arredondo (David) answered the door. David volunteered that his girlfriend, Ashley, who was "really drunk," was down in the basement. Deputy Fenton went to the basement to check on Ashley. In the basement, Deputy Fenton found Dane and Ashley sitting on a mattress on the floor.

After other officers arrived, Deputy Fenton accompanied Dane upstairs to retrieve his identification. At some point, David came upstairs, and Deputy Fenton directed him to sit on one of the couches. At some point, Deputy Fenton glanced at a different couch behind David and saw some small clear medicine vials. Picking one up, Deputy Fenton asked, "What are these?" David responded that Dane is a paramedic "so he has a prescription". Deputy Fenton then grabbed another small vial off of the couch and held it up to read the label, identifying it as a Ketamine vial. Deputy Fenton asked David if Dane had a prescription for Ketamine. David indicated Deputy Fenton should look in a black box, which contained Dane's paramedic license. Deputy Fenton, uncertain of the nature of the drugs, researched on his phone if any of the vials contained controlled substances. In addition, another officer told Deputy Fenton that he would have to look into whether Dane could be charged with possession of a controlled substance, as Dane was a paramedic. After determining that at least some of the empty vials previously contained controlled substances, the officers placed the vials in evidence bags.

The government subsequently charged Dane with several drug-related offenses. Dane filed a motion to suppress the vials, arguing their warrantless seizure by the officers violated the Fourth Amendment. The district court agreed and suppressed the vials because their "incriminating character" was not immediately apparent; therefore, they were not subject to seizure under the plain view exception to the Fourth Amendment. The government appealed.

The plain view exception authorizes an officer to seize an object without a warrant if: (1) the officer lawfully arrived at the location from which he or she views the object; (2) the object's "incriminating character" is "immediately apparent"; and, (3) "the officer has a lawful right of access to the object itself." In this case, even assuming the first and third prongs were satisfied, the court held the second prong was not because the "incriminating character" of the vials was not "immediately apparent." For an item's "incriminating character" to be "immediately apparent," the officer must have probable cause to associate it with criminal activity.

The court concluded that Deputy Fenton possessed no such probable cause. When he came upon small glass containers that looked similar to containers that hold common household items, such as contact lenses, essential oils, or medications for insulin or fertility, there was no basis to immediately suspect contraband. Whether the vials contained contraband was even less immediately apparent here, as they were observed on a dark couch in a poorly lit room in a residence where Deputy Fenton knew one of the occupants was a paramedic. While Deputy Fenton believed that the vials laying on the couch "seem[ed] a little odd," something seeming "a little odd" is usually a hunch and not probable cause. In addition, although the officers witnessed

strange behavior from Dane, David, and Ashley, the presence of bottles and cans strewn about the basement floor and upstairs living room gave the officers reason to believe that the three individuals inside the house were drunk, which is not, itself, unlawful. When Deputy Fenton picked up the vials, held them higher to get a better view, and turned them to read the labels, he had no idea of the contents. At that moment, the vials had been searched and seized, before Deputy Fenton had probable cause to believe they were an illegally possessed controlled substance.

The court also noted that there were no facts to suggest that Deputy Fenton had specialized expertise or training with regard to narcotics such that his specific knowledge could be a basis for finding probable cause. In fact, after picking up and reading a vial, Deputy Fenton did not know whether Ketamine was a controlled substance. He used his phone to conduct research. Similarly, another officer told Deputy Fenton that he would have to look into whether Dane could be charged with possession of a controlled substance since Dane was a paramedic. Deputy Fenton had nothing more than a hunch that the vials could be incriminating, which is not enough for the plain view exception to apply.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/20-1382/20-1382-2021-05-10.pdf?ts=1620660626>

Ninth Circuit

United States v. Brown, 996 F.3d 998 (9th Cir. 2021)

Shortly after 11:00 a.m., two police officers responded to a motel after receiving a report from motel staff concerning two “transients” in the motel parking lot. The caller reported that one of the individuals was a white male who had a bike and who had been seen urinating in the bushes and the other individual was a female.

When officers Robert Wining and Robert Nasland arrived, they encountered James Brown and Jon Bartlett seated on a low cinder block wall in the parking lot. Bartlett fit the description provided by the caller, as he was a white male, who had a bike with him. Brown did not fit the description of either of the reported individuals, as he was an African-American male and had no bicycle with him.

Brown told the officers that he was staying at the motel and Bartlett stated that he was not staying at the motel but that he was there to help Brown “to get some stuff” out of a U-Haul van located in the parking lot. Officer Wining was skeptical of Bartlett’s story because, in his experience, he knew drug deals were common for the area. In addition, Officer Wining saw a small Leatherman-brand multi-tool that was still in its packaging that was located on top of the cinder block wall between Brown and Bartlett. When Officer Wining asked Bartlett if he was selling the tool to Brown he said, “No,” and then claimed that he just found the unopened package “under a bridge.” While asking about the multi-tool, Officer Wining noticed that Brown “put his hands down to his sides” and that he then “reach[ed] his index finger into his right pocket.” Officer Wining then ordered Brown to stand up and turn around. Officer Wining explained, “I saw you reaching in that pocket,” and when Brown denied that he had done so, Officer Wining said, “Yeah, you were.” Brown complied with Officer Wining’s instructions and allowed Officer Wining to secure his arms behind his back in a finger hold. Pointing with his free hand to Brown's pants pocket, Officer Wining asked, “What's in here?” Brown responded, “I'm not quite sure.” Officer Wining then reached into Brown’s pocket and pulled out a plastic bag. Brown claimed that it was coffee, but

after inspecting it, Officer Wining said, “That is not coffee, James, that’s heroin.” Officer Wining conducted a more thorough search of Brown, finding several thousand dollars, several unused syringes, and suboxone strips used to treat opioid withdrawal.

The government charged Brown with possession with intent to distribute heroin. Brown filed a motion to suppress the evidence seized by Officer Wining. First, Brown claimed that Officer Wining violated the Fourth Amendment because Officer Wining seized him without having reasonable suspicion that he was involved in criminal activity. Alternatively, Brown argued that, even if Officer Wining had reasonable suspicion to detain him under [Terry v. Ohio](#), the search of his pocket exceeded the scope of a [Terry](#) frisk.

The district court denied Brown’s motion to suppress, finding that Officer Wining’s actions were “reasonable in light of the totality of the circumstances.” Upon conviction, Brown appealed.

First, the Ninth Circuit Court of Appeals concluded that the officers’ encounter with Brown was consensual until the point at which Officer Wining ordered Brown to stand up and turn around. At that point, the court held that Brown’s seizure was justified because, by that time, Officer Wining had developed reasonable suspicion that Brown was engaged in a drug transaction with Bartlett.

Next, the court concluded that Officer Wining had justification to conduct a protective frisk. However, the court held that Officer Wining’s search of Brown’s pocket exceeded the permissible scope of such a frisk.

In [Terry v. Ohio](#), the Supreme Court held that a police officer who stopped three men based on reasonable suspicion that they were planning to commit a robbery, properly limited his protective search to “what was minimally necessary to learn whether the men were armed and to disarm them once he discovered weapons.” Specifically, the officer “patted down the outer clothing” of the three men, and he “did not place his hands in their pockets or under the outer surface of their garments *until* he had felt weapons” in the outer clothing of the men, and “then he merely reached for and removed the guns” that he felt. In [Sibron v. New York](#), a companion case to [Terry](#), the Court found that it was unreasonable for an officer to immediately “thrust his hand” into the suspect’s pocket without first making any attempt to conduct a limited search for weapons.

In this case, as in [Sibron](#), the court held that Officer Wining did not bother to conduct an “initial limited” search for weapons or conduct any other less intrusive examination, but instead proceeded to immediately search Brown’s pocket. The court added that there were no “special factors” present that might have justified Officer Wining’s immediate search of Brown’s pocket. The court also commented that the government cited no Supreme Court or Ninth Circuit case that has upheld a “pocket search” as the initial means of conducting a protective search of a fully compliant detainee during a [Terry](#) stop. As a result, the court held that the district improperly denied Brown’s motion to suppress the evidence seized from his pocket.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca9/19-50250/19-50250-2021-05-12.pdf?ts=1620838994>

District of Columbia Circuit

United States v. Mabry, 997 F.3d 1239 (D.C. Cir. 2021)

On April 21, 2018, shortly after 10:00 pm, three officers of the Metropolitan Police Department's Crime Suppression Team were patrolling an area where gun and drug-related crime was prevalent. When the officers saw three men "hanging out on the sidewalk, they exited their car to make contact and talk to them. As the officers neared, one of the three men began to walk away and Officer Goss approached him as he did. Mabry and the third man stayed where they were on the sidewalk in front of a fence. Officer Volcin approached Mabry and Officer Tariq approached the third man. The man who had tried to walk away became irate as Officer Goss spoke with him, so Officer Tariq walked over to help and patted the man down. Meanwhile, Officer Volcin stayed with Mabry and the third man. Officer Volcin asked the third man for permission to pat him down. Although the body-camera footage does not capture an audio response, it shows that Officer Volcin proceeded to pat the third man down with one hand while holding a flashlight in his other. Seeing this, Mabry raised his shirt and said, "I've got nothing on me," and "you have no probable cause to search me."

At that point Officer Volcin noticed Mabry was carrying a satchel secured by a strap across his body. According to Officer Goss, his team "ha[d] run into many individuals who are keeping firearms and narcotics ... in satchels because they're more concealable than carrying a backpack." Officer Volcin asked Mabry what he had in the satchel. Mabry told Officer Volcin that he had nothing in his satchel. As Officer Volcin persisted to ask questions about the satchel, Mabry continued to tell him there was nothing in it. Near the end of the exchange Mabry appeared to remove some headphones from his jacket pocket and show them to Officer Volcin. Mabry then took off running.

Officers Volcin and Goss chased Mabry. As they were running, Mabry discarded the satchel, which Officer Goss recovered. Mabry eventually stopped running and Officer Volcin handcuffed him. Officer Goss handed the unopened satchel to Officer Volcin. Officers Goss and Volcin walked Mabry back toward the site of their initial encounter. As they did so, Officer Volcin opened the satchel and discovered a spring for a large-capacity magazine. While walking, Mabry made two unsolicited statements indicating he was in possession of a firearm. He later said the police were lucky he did not start shooting. In response to questions about what he had in his pockets, Mabry said he had drugs. As officers were discussing the satchel, Mabry said it also contained drugs. The officers seized a handgun, ammunition, an extended magazine, crack cocaine, and amphetamines from Mabry and the satchel.

The government charged Mabry with drug and firearm offenses. Mabry filed a motion to suppress the physical evidence and the incriminating statements that he made to the officers. Mabry argued that his flight from the officers came after he had been seized for Fourth Amendment purposes. Accordingly, because the officers had neither probable cause nor reasonable suspicion when they seized him, Mabry claimed all evidence obtained after he fled should be suppressed. The district court denied Mabry's motion and he appealed.

The District of Columbia Court of Appeals noted that a Fourth Amendment seizure occurs when physical force is used to restrain a person's movement or when a person submits to an officer's show of authority. As the officers did not physically restrain Mabry, the court found that in this case Mabry was seized "if and only if (1) the police made a show of authority, and (2) Mabry submitted to that show of authority."

The court held that the officers made a show of authority. First, by the time Officer Volcin noticed the satchel, Mabry had already seen Officer Goss prevent one of the other men from walking away. Afterward, Mabry saw Officer Tariq help Officer Goss pat the man down and then saw Officer Volcin pat down the third man who had remained near Mabry. Second, even assuming that Officer Volcin did not command Mabry to show him the satchel, the persistent nature of his questioning, which continued despite Mabry's attempts to end the encounter, communicated to Mabry that Officer Volcin was not taking no for an answer. Finally, the court found that examining the officers' interaction with Mabry and the other men in a broader context intensified the coercive nature of the encounter. For example, the encounter occurred at night, with uniformed officers shining their flashlights at the three men, while Mabry's avenues of egress were at least partially restricted by the officers, their car, and a fence. Considering all the circumstances, the court concluded a reasonable person in Mabry's position would not have felt free to ignore Officer Volcin and walk away.

Next, the court held that by staying where he was even as Officer Volcin's questioning grew more persistent and not leaving although he clearly wanted to, Mabry submitted to Officer Volcin's show of authority, even if it was only for a brief time. As a result, the court held that Mabry was seized for Fourth Amendment purposes prior to fleeing from the officers; therefore the district court erred in denying his motion to suppress.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/cadc/19-3050/19-3050-2021-05-21.pdf?ts=1621609257>
