2015

United States Supreme Court
and
Circuit Courts of Appeals Case Digest

(As briefed in 2 Informer 15 through 1 Informer16 covering January – December 2015)

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United States Supreme Court

Dep't of Homeland Security v. MacLean, 574 U.S. ____, 135 S. Ct. 913 (2015)

In July 2003, the Department of Homeland Security issued a confidential advisory concerning a potential hijacking plot. The Transportation Security Administration (TSA) then briefed all air marshals, including MacLean, about the plot. A few days after the briefing, MacLean received a text message from the TSA canceling all overnight missions from Las Vegas until early August. MacLean, who was stationed in Las Vegas, told his supervisor and the DHS Inspector General's office he believed the cancellation of overnight missions would jeopardize public safety. When MacLean did not receive a satisfactory response, MacLean told a reporter about the canceled missions. The reporter published a story about the TSA's decision to cancel overnight missions, which led several members of Congress to criticize the TSA. Within twenty-four hours, the TSA reversed its decision and put air marshals back on overnight flights. After the TSA discovered MacLean was the reporter's source of information, he was fired for violating a TSA regulation concerning the disclosure of sensitive security information (SSI) without authorization.

MacLean challenged his firing before the Merit Systems Protection Board (MSPB), arguing his disclosure was protected under the Whistleblower Protection Act of 1989 (WPA) because he reasonably believed the leaked information disclosed a substantial and specific danger to public health or safety. The MSPB ruled against MacLean, finding he did not qualify for protection under the WPA because his disclosure was "specifically prohibited by law," as it violated the TSA regulation prohibiting the unauthorized disclosure of SSI.

On appeal, the Court of Appeals for the Federal Circuit vacated the decision by the MSPB and the government appealed to the United States Supreme Court.

First, the Supreme Court held the exemption from protection under the WPA for disclosures "specifically prohibited by law" does not apply to disclosures prohibited solely by TSA regulations. Instead, the exemption for disclosures "specifically prohibited by law" requires the underlying prohibition, such as the unauthorized disclosure of SSI in this case, to be contained in the language of a statute.

Second, the court held the Aviation and Transportation Security Act of 2001 (ATSA), which authorized the TSA to create regulations, did not specifically prohibit MacLean's disclosure of information to the reporter. Instead, the court found the ATSA authorized the TSA to "prescribe regulations." Therefore, by its own terms, the ATSA did not prohibit anything.

Click **HERE** for the court's opinion.

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Yates v. United States, 574 U.S. ___, 135 S. Ct. 1074 (2015)

While conducting an offshore inspection of a commercial fishing vessel in the Gulf of Mexico, a conservation officer found the ship's catch contained undersized red grouper, a violation of federal regulations. The officer directed Yates, the ship's captain, to keep the undersized fish separated from the rest of the catch until the ship returned to port. However, when the ship returned, four days later, the officer suspected the fish presented to him were not the same fish he had discovered during his initial inspection. The officer questioned a crew member who admitted that Yates had instructed him to throw the undersized fish overboard and replace them with fish from the rest of the catch.

The government charged Yates with destroying, concealing, and covering up undersized fish to impede a federal investigation in violation of *18 U.S.C. 1519*. *Section 1519* provides that a person may be fined or imprisoned for up to 20 years if he "knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry in any record, document, or *tangible object* with the intent to impede, obstruct, or influence" a federal investigation. *Section 1519* is part of the Sarbanes-Oxley Act, passed in 2002 after the Enron Corporation accounting scandal in which the government alleged that corporate files were destroyed when corporate officials began to fear criminal prosecution. Yates argued he could not be prosecuted under *§1519* because the phrase "tangible object" only applied to objects "used to record or preserve information, such as papers, computer hard drives, or electronic files, and not fish.

The Court agreed, holding that a "tangible object" within the meaning of *§1519* is one used to record or preserve information, and not the fish that were at issue in this case. The court noted that *§1519*'s caption, "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," conveys no suggestion that *§1519* prohibits the destruction of all physical evidence. In addition, the section of the Sarbanes-Oxley Act in which *§1519* was placed is entitled "Criminal penalties for altering documents." The court found the titles of these sections indicated that Congress did not intend the term "tangible objects" in *§1519* to include physical objects that could not be described as records, documents or devices closely associated to them.

Click **HERE** for the court's opinion.

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Grady v. North Carolina, 575 U.S. ____, 135 S. Ct. 1368 (2015)

A North Carolina state trial court ordered Grady to participate in a satellite-based monitoring (SBM) program as a recidivist sex offender for the rest of his life. Grady argued the monitoring program, under which he would be forced to wear a tracking device at all times, would violate his *Fourth Amendment* right to be free from unreasonable searches and seizures. The North Carolina Court of Appeals rejected Grady's argument, holding the state's system of nonconsensual satellite-based monitoring did not constitute a *Fourth Amendment* search.

The United States Supreme Court disagreed. In *U.S. v. Jones*, the court held a *Fourth Amendment* search occurs when the government obtains information by physically intruding upon a constitutionally protected area. Here, the court concluded the SBM

program was clearly designed to obtain information by physically intruding on a person's body. As a result, ordering Grady to participate in the SBM program constituted a *Fourth Amendment* search.

However, the court noted its decision did not determine the constitutionality of the SBM program, as the *Fourth Amendment* only prohibits unreasonable searches and seizures. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. Consequently, the court remanded the case to the state court where Grady will be able to argue that mandatory participation in the SBM program violates his right to privacy, while the state can argue that mandatory participation is reasonable in order to track the movements of a recidivist sex offender.

Click **HERE** for the court's opinion.

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Rodriguez v. United States, 575 U.S. ___, 135 S. Ct. 1609 (2015)

A police officer stopped Rodriguez for a traffic violation. After completing all of the tasks related to the stop, to include checking Rodriguez's driver's license and issuing a warning ticket, the officer asked Rodriguez for permission to walk his drug-sniffing dog around Rodriguez's car. After Rodriguez refused, the officer directed Rodriguez to get out of the car until a back-up officer arrived. After the back-up officer arrived, the officer walked his dog around Rodriguez's car and the dog alerted to the presence of drugs. The officer searched the car, found a large bag of methamphetamine and arrested Rodriguez. Approximately seven or eight minutes elapsed from the time the officer issued the warning ticket until the dog alerted on Rodriguez's car.

Rodriguez moved to suppress the evidence seized from his car. Rodriguez argued that after issuing the ticket, the officer violated the *Fourth Amendment* by extending the duration of the traffic stop without reasonable suspicion in order to conduct the dog sniff.

The district court denied Rodriguez's motion. The court held that dog sniffs that occur shortly after the completion of a traffic stop are lawful if they constitute only a *de minimis* intrusion on a person's liberty. Here, the court found the seven to eight minutes added to the duration of the stop constituted a *de minimis* intrusion on Rodriguez's personal liberty; therefore, it was reasonable for the officer to extend the duration of the stop after issuing Rodriguez a ticket.

The Eighth Circuit Court of Appeals affirmed the district court. Because the court held the delay in this case constituted an acceptable *de minimis* intrusion on Rodriguez's personal liberty, the court declined to address whether the officer established independent reasonable suspicion to extend the duration of the stop after issuing Rodriguez the ticket.

The issue before the Supreme Court was whether an officer may extend an already completed traffic stop for a dog sniff without reasonable suspicion or other lawful justification. In a 6-3 decision, the court held that "a police stop exceeding the time needed to handle the matter for which the stop was made" constitutes an unreasonable seizure under the *Fourth Amendment*. When conducting a traffic stop, officers may

check the driver's license, determine whether there are outstanding warrants against the driver and inspect the automobile's registration and proof of insurance. The court noted that all of these tasks are related to the objective of the stop, which is enforcement of the traffic code and ensuring that vehicles on the road are operated safely and responsibly. On the other hand, a dog sniff aimed at detecting evidence of a crime is not a routine measure ordinarily incident to a traffic stop. Consequently, the court noted the critical question is not whether the dog sniff occurs before or after the officer issues the ticket, but whether conducting the dog sniff extends the duration of the stop. If the dog sniff extends the duration of the stop, it is a violation of the *Fourth Amendment* unless the officer has reasonable suspicion of criminal activity. As the Eighth Circuit Court of Appeals never determined whether the officer had reasonable suspicion of criminal activity to justify the seizure of Rodriguez beyond the time needed to issue the ticket, the Supreme Court remanded the case to the Eighth Circuit to decide this issue.

Click **HERE** for the court's opinion.

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Henderson v. United States, 575 U.S. ___, 135 S. Ct. 1780 (2015)

Henderson, a former United States Border Patrol Agent, was charged with distribution of marijuana, a federal felony. As a condition of his bond, Henderson voluntarily surrendered nineteen firearms to the Federal Bureau of Investigation (FBI). Henderson pled guilty to the drug charge and became a convicted felon in 2007. In 2008, the FBI refused to return the firearms after Henderson proposed to transfer them to a potential buyer. Henderson then filed a motion under *Rule 41(g)* of the *Federal Rules of Criminal Procedure* requesting that he be allowed to transfer ownership of the firearms to the potential buyer, or alternatively, to his wife.

The Eleventh Circuit Court of Appeals, in an unpublished opinion, denied Henderson's motion. The court held it would be in violation of *18 U.S.C. § 922(g)* if the court delivered actual or constructive possession of firearms to a convicted felon. The court noted Henderson acknowledged in his plea agreement that as a felon he would not be allowed to possess firearms. In addition, the court stated a defendant who has been convicted of a felony drug offense has "unclean hands" to demand the equitable return of his firearms.

The issue before the Supreme Court was whether *18 U.S.C. § 922(g)* prohibits a court from approving a convicted felon's request to transfer his firearms to another person.

The court reversed the Eleventh Circuit and held that a court ordered transfer of a felon's lawfully owned firearms from government custody to a third party is not prohibited by *18 U.S.C. § 922(g)* if the court is satisfied that the recipient will not give the felon control over the firearms. For example, the court noted that a court could order the guns be turned over to a firearms dealer for subsequent sale on the open market. Another option would be for the court to grant a felon's request to transfer his firearms to a third party who would maintain custody of them. Under either option, a court must first be satisfied that the recipient of the firearms will not allow the felon to either use the firearms or direct their use.

Click **HERE** for the court's opinion.

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San Francisco v. Sheehan, 575 U.S. ___, 135 S. Ct. 1765 (2015)

Sheehan, a woman who suffered from mental illness, lived in a group home that accommodated such persons. Sheehan's social worker became concerned about her deteriorating condition because Sheehan was not taking her medications. When the social worker entered Sheehan's room, Sheehan told the social worker to get out. In addition, Sheehan told the social worker she had a knife and threatened to kill him. The social worker left Sheehan's room, cleared the building of other residents and called the police to help him transport Sheehan to a mental health facility for an involuntary commitment for evaluation and treatment.

When Officers Reynolds and Holder arrived, the social worker told them he had cleared the building of other residents. The social worker also told the officers the only way for Sheehan to leave her room was by using the main door, as the window in Sheehan's room could not be used as a means of escape without a ladder. The officers then entered Sheehan's room without a warrant to confirm the social worker's assessment, and to take Sheehan into custody. When Sheehan saw the officers, she grabbed a knife and threatened to kill them, stating she did not wish to be taken to a mental health facility. The officers went back into the hallway and closed the door to Sheehan's room. The officers called for back-up, but before other officers arrived, Reynolds and Holder drew their firearms and forced their way back into Sheehan's room. After Sheehan threatened the officers with a knife, the officers shot Sheehan five or six times. Sheehan survived and sued the city and the officers, claiming the officers violated her *Fourth Amendment* rights by entering her room without a warrant and using excessive force.

The Ninth Circuit Court of Appeals held the officers first warrantless entry into Sheehan's room was justified under the emergency aid exception to the *Fourth Amendment's* warrant requirement. The court concluded that when the officers first entered Sheehan's room, they had an objectively reasonable basis to believe Sheehan was in need of emergency medical assistance based on the information provided by the social worker.

However, the court found that even though the officers might have been justified in entering Sheehan's room the second time, there were unresolved factual issues that had to be determined by a jury and not the court. For example, Sheehan produced evidence suggesting the officers deviated from training they received from their department on how to deal with mentally ill subjects. Consequently, because a reasonable jury could find that the officers acted unreasonably by forcing their way into Sheehan's room and provoking a near fatal confrontation, the court concluded the officers were not entitled to qualified immunity.

Concerning the officers' use of deadly force, the court held at the moment of the shooting, the officers' use of deadly force was reasonable because Sheehan posed an immediate threat of danger to the officers' safety. However, the court determined that under Ninth Circuit case law, police officers may be liable for an otherwise lawful use of

deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of a separate *Fourth Amendment* violation. In this case, the court found that Sheehan presented evidence from which a reasonable jury could find the officers acted recklessly by failing to take her mental illness into account and in forcing a deadly confrontation rather than attempting to de-escalate the situation.

The City of San Francisco and the officers appealed, and the United States Supreme Court agreed to hear arguments on the two questions presented below.

1. Whether Title II of the Americans with Disabilities Act (ADA) requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.

2. Whether it was clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the *Fourth Amendment* by reason of the anticipated resistance of an armed and violent suspect within.

First, the Supreme Court dismissed the first question presented by the city because at oral argument, the city did not argue the issue presented in the question. Instead of arguing that the ADA did not apply to enforcement actions by law enforcement officers, the city conceded that the ADA might apply to arrests. The city then argued that in this case, the officers were not required to provide Sheehan an accommodation under the ADA because of the threat she posed to the officers. Because the United States Supreme Court does not usually decide questions of law that were not presented to and ruled upon by a lower court, it decided to dismiss the first question presented by the city.

Concerning the second question presented by the officers, the court reversed the Ninth Circuit, holding the officers were entitled to qualified immunity. First, the court held the case law relied upon by the Ninth Circuit in denying the officers qualified immunity did not clearly establish that it was unreasonable for the officers to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and threatening others when there was no objective need for immediate entry. Second, even if the officers acted contrary to the training they received on how to deal with mentally ill subjects, the court held at the time of the incident is was not clearly established that the *Fourth Amendment* required the officers to accommodate Sheehan's mental illness before attempting to arrest her.

Click **HERE** for the court's opinion.

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Elonis v. United States, 575 U.S. ___, 135 S. Ct. 2001 (2015)

Elonis posted to Facebook rap lyrics he created which contained graphic and violent language concerning his estranged wife, co-workers and law enforcement officers. Elonis included disclaimers with his posts stating the lyrics were "fictitious," not intended to depict real persons, and that Elonis was exercising his *First Amendment* rights. Elonis' wife and others referenced in the posts felt threatened by their content and contacted law enforcement. Elonis was arrested and charged with violating *18 U.S.C. §*

875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another.

At trial, Elonis argued the government was required to prove his subjective intent to threaten under the true threat exception to the *First Amendment*. Elonis argued his Facebook posts were not threats, but protected speech because he did not subjectively intend the posts to be threatening. However, the district court instructed the jury that Elonis could be found guilty if a reasonable person would forsee that his (Elonis') statements would be interpreted as a threat. The jury convicted Elonis on four of the five counts.

On appeal, the Third Circuit Court of Appeals affirmed Elonis' convictions, holding that *Section 875(c)* required only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

The United States Supreme Court reversed the Third Circuit Court of Appeals. The jury was instructed the government only needed to prove that a "reasonable person" would regard Elonis' posts as threats in order to convict him. Such a "reasonable person" standard is a familiar feature of civil liability in tort law; however, it is does not take into account Elonis' mental state when he transmitted the posts to Facebook. Having criminal liability rest upon whether a "reasonable person" considered Elonis' posts threatening would allow Elonis to be convicted on a negligence standard. The court added that a defendant cannot be held criminally liable for mere negligence and that the government must establish the defendant's intent at the time of the crime.

Click **HERE** for the court's opinion.

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City of Los Angeles v. Patel, 576 U.S. ___, 135 S. Ct. 2443 (2015)

Los Angeles Municipal Code §41.49 requires hotel operators to record and keep specific information about their guests on the premises for 90 days. Section 41.49 also provides these records "shall be made available to any officer of the Los Angeles Police Department for inspection . . . at a time and in a manner that minimizes any interference with the operation of the business." A hotel operator's failure to make records available to an officer upon demand is a criminal misdemeanor, punishable by up to six months in jail and a $1,000 fine.

Patel, a motel owner in Los Angeles, sued the city, asking the court to prevent the continued enforcement of §41.49's warrantless inspection provision. Patel argued that as written, or on its face, §41.49 violated the *Fourth Amendment's* prohibition against unreasonable searches and seizures.

The Ninth Circuit Court of Appeals agreed. Although Patel did not allege that an unconstitutional search occurred at his motel, the court nevertheless held that § 41.49 was invalid on its face. Specifically, the court concluded §41.49 violated the *Fourth Amendment* because it authorized the inspection of hotel records without allowing the hotel owner an opportunity to obtain judicial review of the reasonableness of an officer's

demand before being potentially jailed or fined for refusing to comply. The City of Los Angeles then appealed to the United States Supreme Court.

The Supreme Court, in a 5-4 decision, first held that Patel was entitled to challenge the constitutionality of §41.49 on its face, or without first having alleged that his hotel was subjected to an unconstitutional search under §41.49. The court further held the provision of §41.49 that requires hotel operators to make their registries available to the police upon demand was unconstitutional because it penalized the hotel operators for declining to turn over their records without affording them any opportunity for pre-compliance review.

The court reiterated the well-settled rule that warrantless searches of homes or commercial premises are *per se* unreasonable, unless they fall within one of the few established exceptions to the *Fourth Amendment's* warrant requirement. One of these exceptions provides for warrantless administrative searches. The primary purpose of an administrative search is to ensure compliance with some type of governmental record keeping, health or safety requirement, and not for the discovery of criminal evidence. Under such circumstances, the court recognized the *Fourth Amendment's* warrant and probable cause requirements were not practical; therefore, it was reasonable to allow warrantless administrative searches. However, the court held for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain pre-compliance review of the lawfulness of the search before a neutral decision maker. Without deciding the exact form an opportunity for pre-compliance review must take, the court indicated that an administrative subpoena would be sufficient in most cases. For example, in this case, if a subpoenaed hotel operator believed that an attempted search of his records was unlawful, he could request an administrative law judge quash the subpoena before he suffered any criminal penalties for failure to comply with the subpoena. Conversely, if an officer reasonably suspected a hotel operator might tamper with the requested records while the motion before the judge is pending, the officer would be able to guard the records until the required hearing occurred. Finally, the court stressed that its holding had no bearing on cases where exigent circumstances would allow a warrantless records search or where the record owners consented to the search.

Click **HERE** for the court's opinion.

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Kingsley v. Hendrickson, 576 U.S. ___, 135 S. Ct. 2466 (2015)

Kingsley was arrested and detained in a county jail pending trial. Officers forcibly removed Kingsley from his cell after he refused to comply with instructions to remove a piece of paper that was covering the light fixture above his bed. Kingsley later filed a lawsuit under *42 U.S.C. § 1983*, alleging the officers used excessive force against him, in violation of the *Fourteenth Amendment's Due Process Clause* when they removed him from his cell.

The district court instructed the jury that to prevail, Kingsley had to establish the officers acted with malice and intended to harm Kingsley when they used force against him, a

subjective standard. Kingsley disagreed, arguing the correct standard for judging a pretrial detainee's excessive force claim is objective unreasonableness.

The United States Supreme court accepted the case to resolve a split among the circuits and determine whether to prove an excessive force claim, a pretrial detainee must show the officers were subjectively aware their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable.

The Court concluded the appropriate standard to apply to a pretrial detainee's excessive force claim is an objective one. First, the court noted this holding is consistent with court precedent. In *Bell v. Wolfish*, the court held a pretrial detainee could prevail on an excessive force claim by providing objective evidence the alleged use of force was not related to a legitimate governmental objective or that the force was excessive in relation to the alleged reason for its use. Second, the court held an objective standard is "workable," as many facilities, including the one in this case, train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard. Finally, the court held the use of an objective standard protects an officer who acts in "good faith." The court recognized that running a detention facility is difficult and that officers facing disturbances are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving. In addition, the court explained as part of the objective reasonableness analysis, it is appropriate to give deference to a facility's policies and practices, which are in place to maintain order and institutional security.

Click **HERE** for the court's opinion.

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Mullenix v. Luna, 577 U. S. ____, 136 S. Ct. 305 (2015)

At approximately 10:21 p.m., a police officer followed Leija to a fast food restaurant and attempted to arrest him on an outstanding misdemeanor arrest warrant. After some discussion with the officer, Leija fled in his vehicle with the officer in pursuit. A state trooper took the lead in the pursuit as Leija continued onto an interstate highway. Twice during the pursuit, Leija called the police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats, along with a report that Leija might be intoxicated, to the officers.

Approximately eighteen minutes into the pursuit, Leija approached an overpass where an officer had deployed a spike strip in the roadway. In addition, Trooper Mullenix positioned himself on top of the overpass with an M-4 rifle. Mullenix fired six rounds at Leija's car, which then engaged the spike strip, hit the median and rolled over. Leija was pronounced dead at the scene. Leija's cause of death was later determined to be one of the shots fired by Mullenix.

Leija's estate sued Mullenix, claiming Mullenix violated the *Fourth Amendment* by using excessive force to stop Leija. Mullenix argued his use of force was objectively reasonable because he acted to protect the officers involved in the pursuit, the officer below the overpass, and other motorists who might have been in the path of the pursuit.

The Court of Appeals for the Fifth Circuit held Mullenix was not entitled to qualified immunity because he violated the clearly established rule that a police officer may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."

Mullenix appealed to the United States Supreme Court,

Qualified immunity protects officers from civil liability as long as long as their conduct does not violate a clearly established right. In the context of excessive force cases involving vehicle pursuits, the Supreme Court noted existing case law was not sufficiently clear to put Mullenix on notice that his actions violated Leija's *Fourth Amendment* right to be free from an unlawful seizure. Instead, the Court stated it has never found the use of deadly force in connection with a dangerous car chase to be a violation of the *Fourth Amendment*, let alone the basis for denying an officer qualified immunity. In *Scott v. Harris*, the Court held an officer did not violate the *Fourth Amendment* by ramming a fleeing suspect whose reckless driving "posed an actual and imminent threat to the lives" of other motorists and the officers involved in the chase. In *Plumhoff v. Rickard*, the Court reaffirmed *Scott* by holding that an officer acted reasonably when he fatally shot a fugitive who was "intent on resuming" a chase that "posed a deadly threat for others on the road." In this case, while Leija did not pass as many cars as the drivers in *Scott* or *Plumhoff* during the pursuit, Leija verbally threatened to kill any officers in his path, and he was about to come upon an officer as he approached the overpass. As a result, the Court reversed the Fifth Circuit's determination that Mullenix was not entitled to qualified immunity.

Click **HERE** for the court's opinion.

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First Circuit

United States v. Molina-Gomez, 781 F.3d 13 (1st Cir. 2015)

Molina arrived at the airport in Puerto Rico after a trip to Columbia with a carry-on bag, a laptop computer and a Play Station gaming system. Because this was Molina's third trip to Columbia, a known drug source of illegal drugs, in four months, a Customs and Border Protection (CBP) officer referred Molina to secondary inspection. After initially questioning Molina, the officer suspected Molina might be involved in drug smuggling. The officer escorted Molina to a small windowless room where Molina remained for approximately two-hours. During this time, the officer asked Molina about his trip to Columbia and drug trafficking in general.

In the meantime, other CBP officers were inspecting Molina's laptop, Play Station and cell phones. Although the officers found no drugs, they found no data on the computer after they turned it on. In addition, a review of Molina's phones revealed text messages from numerous individuals concerning money transactions. Suspecting that Molina was smuggling drugs, the officers sent his laptop and Play Station to the CBP Forensic Lab. Approximately three weeks later, a forensic chemist discovered heroin concealed in sophisticated compartments of both items. Federal agents arrested Molina when he appeared to pick up his property.

Molina argued the search of his laptop and Play Station constituted a non-routine and unreasonable border search.

The court disagreed. Without deciding whether the search was routine or non-routine, the court held the officers were justified to search Molina's electronics because the officers established reasonable suspicion that Molina might be smuggling drugs. First, the officers knew Molina had traveled to Columbia three times in the last four months. Second, Molina gave odd and suspicious answers to the officers' routine questions. Third, Molina's laptop was operational, yet it contained no data. Finally, Molina's phones contained text messages concerning prior and future money transactions. The court further held the detention of Molina's property for twenty-two days before conducting the search was reasonable under the circumstances.

Molina also argued the additional questioning conducted by the officer in the small windowless room violated his *Fifth Amendment* rights because he was not given his *Miranda* warnings prior to being questioned.

The court agreed, concluding that Molina's two-hour detention in a small, windowless room while being asked questions about potential illegal drug activity went beyond a routine Customs inspection to determine whether Molina should be admitted into the United States. Therefore, the court held Molina was in-custody for *Miranda* purposes. In addition, the officer's questions to Molina constituted "interrogation," because the officers focused on Molina's involvement with drug smuggling. As a result, the court held Molina's statements regarding drug activity should have been suppressed.

Click **HERE** for the court's opinion.

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United States v. Hufstetler, 782 F.3d 19 (1st Cir. 2015)

Officers arrested Hufstetler and his girlfriend, Sheena, for bank robbery. While interrogating Hufstetler, the officers confronted him with evidence obtained during the investigation and told Hufstetler they believed he was guilty. During the interrogation, the officers also told Hufstetler that he had the opportunity to explain Sheena's role in the robbery, and that they knew Hufstetler was concerned about the consequences she was facing. After Hufstetler expressed concern for Sheena, the officers told him the information he provided could either help her or hurt her. The officers consistently told Hufstetler that he needed to tell the truth; however, the officers also told him that they lacked the authority to make any guarantees or promises in exchange for his cooperation. Hufstetler eventually confessed, taking full responsibility for the robbery.

Prior to trial, Hufstetler moved to suppress his confession. Hufstetler claimed it was only after the officers convinced him that Sheena's freedom hinged on his willingness to cooperate that he finally confessed.

The court disagreed, holding Hufstetler's confession to the officers was obtained voluntarily. Although the officers' statements were difficult for Hufstetler to accept, the court held the officers never lied, exaggerated the situation or conditioned either his or Sheena's release on Hufstetler's willingness to speak. Instead, the officers truthfully told Hufstetler that Sheena was a suspect and unless new information became known to discount her participation in the robbery, she would continue to face criminal charges. In addition, the court noted the officers emphasized to Hufstetler that they could not and would not promise Hufstetler anything in exchange for his confession.

Click **HERE** for the court's opinion.

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United States v. Aviles-Vega, 783 F.3d 69 (1st Cir. 2015)

An anonymous caller reported that he had witnessed the front-seat passenger in the car travelling in front of him, pass a firearm to a rear-seat passenger. The caller described the car, provided a partial license plate number as well as the location of the incident and the car's direction of travel. Within thirty minutes, officers located a car matching the description of the car provided by the caller. The officers ordered the four occupants, including Vega, out of the car. An officer frisked Vega and seized a loaded handgun from him. The government charged Vega with being a felon in possession of a firearm.

Vega argued the firearm should have been suppressed because the information provided by the anonymous caller was not sufficiently reliable to provide the officers with reasonable suspicion to stop and then frisk him.

The court disagreed. First, the court recognized that Puerto Rico is a concealed-carry jurisdiction; therefore, a person must carry a firearm in a concealed manner even if he possesses a license to carry the firearm. Consequently, the court concluded if the information provided by the caller was correct, the officers had reasonable suspicion to

believe the occupants in Vega's car had violated the conceal-carry law. Second, the court held the information provided by the anonymous caller was sufficiently reliable to establish reasonable suspicion for the officers to stop Vega and frisk him. Here, the caller reported that he had just witnessed the passing of a firearm in Vega's car and provided a detailed description and location of the car. The court found that the caller's tip suggested he was a concerned citizen reporting his direct observation of a crime and not a person making a false report.

Click **HERE** for the court's opinion.

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United States v. Gamache, 792 F.3d 194 (1st Cir. 2015)

A temporary order of protection was issued against Gamache after his former wife alleged he abused her. Among other things, the order required Gamache to surrender any firearms in his possession. When the officers arrived at Gamache's apartment, Gamache answered the door and motioned for the officers to enter. Once inside, one of the officers asked Gamache if he had any firearms in the apartment. Gamache pointed to the living room wall, where two shotguns were clearly visible and prominently displayed. The officers seized the shotguns, one of which had a barrel length of less than 18 inches. The government indicted Gamache for possession of an unregistered sawed-off shotgun.

The court held the officers made a lawful plain view seizure of the sawed-off shotgun from Gamache's apartment. First, the officers were lawfully present, as Gamache voluntarily consented to the officers' entry into his apartment. Second, the sawed-off shotgun was clearly visible from the officers' lawful vantage point. Although the officers did not immediately realize the length of the shotgun's barrel was less than 18 inches, the officers had probable cause to seize it based upon the court order, which prohibited Gamache from possessing any firearms. Finally, once the officers were lawfully inside the apartment, the court order gave the officers lawful access to the clearly visible firearms.

Click **HERE** for the court's opinion.

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United States v. Hinkley, 803 F.3d 85 (1st Cir. 2015)

On July 19, 2012, police officers received a report that Hinkley had inappropriate contact with two boys at his apartment. An officer spoke with Hinkley and asked him to come to the police station for an interview. Hinkley agreed and transported himself to the police station. At the beginning of the interview the officer told Hinkley that he was not in custody, asked him if he would mind if the door was closed and reminded Hinkley how to exit the police station in the event of an emergency. Twenty-nine minutes into the interview, the officer told Hinkley that he was still free to leave. Approximately thirty-nine minutes into the interview, the officer told Hinkley that he was no longer free to leave, and advised Hinkley of his *Miranda* warnings. Hinkley told the officer he understood his rights and continued to answer questions. In addition, Hinkley signed a consent-to-search form for his apartment. During the search, officers discovered images

of child pornography on Hinkley's computer. The officers arrested Hinkley and transported him to jail.

On July 20, 2012, the officer interviewed Hinkley again. Before asking Hinkley any questions, the officer asked Hinkley if he remembered the *Miranda* warnings he had received the previous day. Hinkley told the officer he remembered the *Miranda* warnings, and when the officer asked Hinkley whether he wanted the warnings repeated, Hinkley said no. No new *Miranda* warnings were provided and Hinkley made incriminating statements.

First, Hinkley argued his statements from the July 19 interview should have been suppressed. Hinkley claimed he was in custody from the beginning of the interview, but did not receive *Miranda* warnings until thirty-eight minutes later.

The court disagreed. Hinkley arrived voluntarily at the police station and was told at the beginning of the interview, and again twenty-nine minutes into the interview, that he was free to leave. In addition, Hinkley was never restrained, and one officer only interviewed him. The court found the mere fact an interview occurs at a police station does not automatically create a custodial situation. Consequently, the court held Hinkley was not in custody for *Miranda* purposes at the beginning of the interview and *Miranda* warnings were not required until thirty-eight minutes into the interview when the officer told Hinkley that he was no longer free to leave. The court further held Hinkley made a valid waiver of his *Miranda* rights by making uncoerced statements to the officer after acknowledging that he understood his rights.

Second, Hinkley argued the physical evidence seized from his apartment should have been suppressed because Hinkley only consented to the search after the officer told him that his apartment would be searched eventually, with or without his consent.

Again, the court disagreed. The court held Hinkley's consent was not rendered involuntary by the officer's statement to Hinkley, as it was reasonable for the officer to believe that he would be able to obtain a warrant to search the apartment even if Hinkley refused consent to search.
Finally, Hinkley argued his statements from July 20 should have been suppressed because the officer was required to re-administer the full *Miranda* warnings rather than ask Hinkley if he recalled the warnings from the previous day.

The court stated that once effective *Miranda* warnings are administered, those warnings remain in effect until the passage of time or an intervening event makes the defendant unable to fully consider the consequences of waiving them. In this case, Hinkley acknowledged that he remembered the *Miranda* warnings, remained familiar with them, and did not need them repeated less than twenty-four hours after he received them the first time. As a result, the court found there was no indication the passage of time was long enough to make Hinkley's second waiver involuntary; therefore, his statements to the officer on July 20 were admissible.

Click **HERE** for the court's opinion.

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United States v. Peake, 804 F.3d 81 (1st Cir. 2015)

Federal agents presented a magistrate judge with a draft search warrant for his consideration. After reviewing the warrant, the judge crossed out a paragraph under Attachment A, which described the "premises" to be searched. The stricken paragraph would have allowed the government to search "briefcases, laptop computers, hand-held computers, cell phones, Blackberries and other moveable document containers" found on the premises described in the warrant. However, the judge left standing in the warrant other references to electronically stored documents and records. In addition, the judge added two handwritten provisions, which stated that any seized computer equipment or electronic storage devices would be returned to the defendant within 30 days.

The agents executed the warrant and seized Peake's laptop computer and Blackberry. The agents imaged both items and returned the laptop and Blackberry to Peake on-site the same day. A subsequent search of the images copies of Peake's laptop computer and Blackberry revealed information that was introduced at trial against Peake.

Peake argued the information collected from his laptop computer and Blackberry should have been suppressed because both items were outside the scope of the search warrant. Peake claimed when the judge struck the paragraph in Attachment A, the agents were specifically prohibited from searching and seizing any laptop computer or Blackberry devices they discovered.

The court disagreed. While the judge struck a paragraph from Attachment A, the court noted other intact passages in the warrant expressly demonstrated the judge approved searching for all documents and records stored in "an electronic or digital format." Given that Peake's personal electronic devices were on the premises to be searched, and the warrant specifically mentioned electronically-stored documents, the court concluded the agents acted within the scope of the warrant when they searched Peake's devices.

Click **HERE** for the court's opinion.

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United States v. White, 804 F.3d 132 (1st Cir. 2015)

A confidential informant (CI) made two controlled purchases of cocaine from White. On both occasions, White drove to a pre-arranged location where he met the CI, who made the controlled purchases inside White's car. A few months later, the CI reported White was planning to restock his cocaine supply. Officers had the CI call White and order a "full" ounce of cocaine. White told the CI he would be leaving "pretty soon" and that he would bring the full amount of cocaine requested. Approximately ten minutes later, surveillance officers saw White exit his house, get into his car and drive away. After White drove a short distance, a police officer conducted a traffic stop. Another officer arrived a few minutes later and walked his drug-sniffing dog around White's car. After the dog alerted, officers searched White's car and found one pound of cocaine in the trunk and a gun in the driver' side door pocket. Using information obtained from the traffic stop, officers obtained a warrant to search White's house where they found additional drugs and a handgun. The government indicted White on drug and firearm offenses.

White argued the officers did not have probable cause to stop and search his vehicle; therefore, the evidence obtained from his car, and later his house, should have been suppressed.

The court disagreed, holding the traffic stop and warrantless search of White's car was lawful under the automobile exception to the *Fourth Amendment's* warrant requirement. First, the officers corroborated information the CI had provided them concerning White, such as White's home address and vehicle information. Second, on two occasions the officers worked with the CI to execute two controlled purchases of drugs from White, with both purchases taking place in White's car. Finally, on the day of the traffic stop, White agreed to sell the CI drugs and told the CI he was going to be leaving his house "pretty soon." Within minutes, officers saw White come out of his house, get into his car and drive away. As a result, based on the totality of the circumstances, the court concluded, at the time of the traffic stop, officers had ample reason to believe White was en route to conduct a sale of cocaine, and that a search of his vehicle would yield evidence of drug dealing activity.

Click **HERE** for the court's opinion.

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Second Circuit

Coggins v. Buonora, 776 F.3d 108 (2d Cir. 2015)

Coggins sued Buonora under *42 U.S.C. § 1983* claiming Buonora and another officer conspired to knowingly falsify and omit material facts from police reports, as well as lie to the district attorney and grand jury, which resulted in the malicious prosecution of Coggins.

Even though Buonora admitted he lied to the grand jury, Buonora claimed he was entitled to absolute immunity for any act associated with his perjury.

In *Rehberg v Paulk*, the United States Supreme Court held grand jury witnesses, including law enforcement officers, have "absolute immunity from any *§ 1983* claim based on the witness' testimony," even if that testimony is perjurious. However, the Supreme Court suggested this absolute immunity does not extend to activity a witness conducts outside the grand jury room.

In this case, the court held Buonora was not entitled to absolute immunity because Coggins' suit was not based on Buonora's perjurious grand jury testimony. Instead, Coggins' allegations were based on Buonora's police reports, the statements of another officer, Buonora's statements to the district attorney and police radio transmissions. Because these facts existed before Buonora perjured himself before the grand jury, the court found Coggins had the ability to prove his allegations without relying on Buonora's grand jury testimony.

The court further held Buonora was not entitled to qualified immunity because the alleged falsification of evidence and the related conspiracy, if true, constituted a violation of clearly established law and no objectively reasonable officer could have thought otherwise.

Click **HERE** for the court's opinion.

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United States v. Broughton, 600 Fed. Appx. 780 (2d Cir. 2015)

Broughton arrived at John F. Kennedy International Airport on a flight from Jamaica. Before Broughton reached the airport's customs checkpoint, a uniformed Customs and Border Protection (CBP) officer randomly selected her for an examination of her luggage. When the officer examined Broughton's luggage in an open area, just beyond the customs checkpoint, the officer found a woman's wedge-heeled shoe that was very heavy. When the officer probed the shoe, he discovered a white powdery substance inside the heel of the shoe. The officer moved Broughton to the CBP's private search area, where a field test of the white substance found in the shoe tested positive for cocaine. The officer then arrested Broughton. A further search of Broughton's luggage uncovered three additional shoes containing cocaine.

While Broughton's luggage was being examined in the private search area, she told CBP officers the shoes did not belong to her, but rather to a friend with whom she was

travelling. After the officer arrested Broughton, she said her friend might have "some kind of connection with drugs and shoes."

After Broughton's arrest, Homeland Security Investigations (HSI) agents arrived to interview her. One of the agents advised Broughton of her *Miranda* rights, which she waived. The interview lasted for approximately fifteen minutes. The agents then took Broughton to their offices to conduct a follow-up interview. During the two interviews, Broughton made incriminating statements to the agents.

Broughton argued she was in custody for *Miranda* purposes when the CBP officer escorted her to the private search area. As a result, Broughton claimed her un-*Mirandized* statements to the CBP officer should have been suppressed.

The court disagreed. The court noted that a reasonable traveler arriving at an American airport will expect some constraints as well as questions concerning his or her authorization to enter the country. Here, the CBP officer was engaged in a routine aspect of border control, examining Broughton's luggage, when he encountered the suspicious shoe. When the officer discovered the white powdery substance, he escorted Broughton, without placing her in handcuffs, to a more private part of the airport. It was only after the officer confirmed the substance in the shoe was cocaine and he arrested Broughton that she was in custody for *Miranda* purposes.

The court added that even if Broughton was in custody when she made all three statements to the CBP officers, *Miranda* was not required because the officers did not "interrogate" Broughton. Instead, the court concluded Broughton voluntarily and spontaneously made statements regarding her friend's ownership of the shoes.

The court further held Broughton's statements to the HSI agents were admissible, as they were voluntarily made after a valid waiver of her *Miranda* rights.

Click **HERE** for the court's opinion.

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United States v. Raymonda, 780 F.3d 105 (2d Cir. 2015)

A cybercrimes investigator discovered a user at a particular IP address had accessed 76 images from a website, the majority of which were thumbnail images of child pornography. In addition, the IP log suggested all 76 images were accessed over a period of seventeen seconds and showed no user requests for any full-sized versions of the thumbnail images.

Six months later, investigators identified Raymonda as the individual who lived at the address associated with the IP address. Three months later, a federal agent applied for a warrant to search Raymonda's computers for evidence of child pornography. In his affidavit, the agent did not attach the full IP log to his warrant application nor state that the time stamps on the IP log only covered a period of seventeen seconds. In addition, the agent stated that individuals who have a sexual interest in children commonly hoard images of child pornography and retain those images for many years. A magistrate judge issued the warrant and agents found over 1,000 images of child pornography on

Raymonda's computers. The government charged Raymonda with receiving and possessing child pornography.

Raymonda argued the child pornography discovered on his computers should have been suppressed because the evidence that a user with his IP address accessed images of child pornography nine months earlier was too stale to suggest that pornographic images would still be found on his computers at the time of the search.

The court recognized the determination of staleness in child pornography investigations is unique. In certain circumstances, courts have inferred a suspect was a hoarder of child pornography based upon a single incident of possession or receipt of such materials. For example, where the suspect's access to the pornographic images depended on a series of complicated steps, courts have found this suggested a willful intention to view the files. However, in those instances, the inference that a suspect was a collector of child pornography did not proceed solely from evidence of the suspect's one-time access to child pornography. Instead, it proceeded from circumstances suggesting the suspect had accessed those images willfully and deliberately, actively seeking them out to satisfy a preexisting predilection. Such circumstances, the court noted, tend to negate the possibility that a suspect's "brush" with child pornography was a purely negligent or inadvertent encounter.

In this case, the court found it was not enough for the agent to apply for a warrant based on nine-month old evidence that Raymonda had accessed thumbnail images of child pornography on one occasion for seventeen seconds. Instead, it was necessary to show Raymonda accessed the images under circumstances sufficiently deliberate or willful to suggest he was an intentional collector of child pornography. Here, the agent's affidavit contained no evidence suggesting Raymonda had deliberately sought to view those thumbnails or that he discovered them while searching for child pornography. In addition, there was no evidence Raymonda saved the thumbnails to his hard drive or that he even saw all of the images, many of which may have downloaded in his browser outside his immediate view. The information in the agent's affidavit was equally consistent with an innocent user inadvertently stumbling upon a child pornography website and promptly closing the browser window. Consequently, the court held the evidence suggesting Raymonda accessed child pornography on one occasion, without any indication he deliberately intended to access those images, did not support an inference that he was a hoarder of child pornography sufficient to create probable cause to believe that child pornography would be found on his computers nine months later.

However, the court further held the good faith exception to the exclusionary rule applied. The court found any errors in the agent's affidavit supporting the warrant application were neither intentionally false, nor grossly negligent. As a result, the agents were entitled to rely in good faith on the warrant and the evidence against Raymonda should not have been suppressed.

Click **HERE** for the court's opinion.

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United States v. Foreste, 780 F.3d 518 (2d Cir. 2015)

A Massachusetts State Trooper pulled over a car for speeding. During the stop, the trooper encountered Cesar, the driver and Foreste, the passenger. After the Trooper asked Cesar for the registration, Foreste gave the trooper an expired rental agreement. Suspecting the car might be stolen, the trooper contacted a trooper in Vermont, seeking information he might have on Cesar and Foreste, as both men were from Vermont. While waiting for this information, the trooper contacted a representative from the rental car company who stated there was no problem with the expired rental agreement as long as the car was ultimately returned. The trooper issued Cesar a ticket for speeding and let the men go. The stop lasted approximately twenty-two minutes.

After the men left, the Vermont trooper contacted the Massachusetts trooper with information concerning Foreste. The Vermont trooper discovered Foreste was a known cocaine and oxycodone dealer who transported large quantities of drugs from New York City to Vermont in rental cars. Approximately thirty-minutes later, the Vermont trooper saw Foreste's rental car at a rest stop in Vermont. The trooper followed the car and conducted a traffic stop after Cesar rolled through a stop sign. While speaking with the men, the trooper saw what he believed to be marijuana "chafe" on Cesar's pants and a white residue around Foreste's nostrils, which he deemed consistent with someone who had nasally ingested cocaine or other powdered narcotics. An officer with a drug-sniffing dog arrived thirty-minutes later. The dog alerted to the presence of narcotics, and a subsequent search revealed unlawful prescription pills in the car. The trooper arrested Foreste and found over 600 oxycodone pills hidden in Foreste's underwear during the search incident to arrest. Foreste was indicted for possession with intent to distribute oxycodone.

Foreste argued the drug evidence should have been suppressed because the combined duration of the two traffic stops was unreasonable. Foreste argued that combining the duration of the stops was appropriate because the troopers were working together and each detained him as part of a joint drug investigation.

The court disagreed. The court found each stop was justified by a separate traffic violation and probable cause. However, more importantly, the court held independent reasonable suspicion justified the extension of each stop for further investigation. The Massachusetts trooper stopped Foreste and Cesar for speeding and extended the duration of the stop to sort out the expired rental agreement and make a brief call to the Vermont trooper. The Massachusetts trooper suspected the rental car might be stolen and she took a reasonable amount of time, twenty-two minutes, to dispel that suspicion. The Vermont trooper stopped Foreste and Cesar for running a stop sign and extended the duration of the stop after he saw what he believed to be marijuana "chafe" on Cesar's pants and cocaine residue on Foreste's nostrils. The court found the forty-minute duration of the stop was within the range other courts have found reasonable for similar canine investigations.

It is worth noting, while it did not happen in this case, the court was concerned about the intrusiveness of successive investigations based on the same reasonable suspicion. The court concluded that where the same suspicion justifies successive investigations and the officer conducting the subsequent investigations is aware of the prior investigation and

the suspicion that supported it, the investigations' duration and scope must be both individually and collectively reasonable under the *Fourth Amendment*.

Finally, while the court upheld the validity of both traffic stops, it held the district court improperly denied Foreste's discovery motion to compel the government to provide the field performance records for the drug-sniffing dog. While the government provided the dog's certification records and some training records, the court held the dog's field performance records were relevant to determine whether the dog's alert on the car was sufficiently reliable to establish probable cause it contained drugs. As a result, the court remanded the case so the district court could reconsider Foreste's motion to suppress solely on the ground that the dog's alert was not reliable.

Click **HERE** for the court's opinion.

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United States v. Watson, 787 F.3d 101 (2d Cir. 2015)

Two police officers were directed to locate and arrest Butler for third-degree robbery. The officers were provided a photograph of Butler as well as Butler's race, height, weight, hair color and age. In addition, approximately one-year earlier, one of the officers, Vaccaro, had arrested Butler and spent 15 to 30 minutes with him during processing. While looking for Butler, Officer Vaccaro approached a man, later identified as Watson, and asked him for identification, explaining to the man that he looked like Butler. Watson denied being Butler and told Officer Vaccaro that he kept his identification in his jacket pocket. Vaccaro removed the identification from Watson's pocket and then asked Watson if he had any contraband. After Watson denied possessing contraband, Vaccaro frisked him and removed a firearm from Watson's waistband and crack cocaine from his pocket. Officer Vaccaro arrested Watson, later claiming that he was not certain the man he arrested was not Butler, until after Watson was fingerprinted at the police station.

The government indicted Watson on cocaine and weapon possession charges.

The district court granted Watson's motion to suppress the drugs and firearm evidence. The court held the physical disparities between Butler and Watson were too significant for the officers' mistake of identity to be objectively reasonable, and that the officers did not actually believe that Watson was Butler.

The Court of Appeals agreed with the district court's conclusion that a reasonable officer, once he had a chance to view Watson up close, could not have reasonably believed he was Butler as the men had materially different facial features, skin tones, heights, and ages.

Click **HERE** for the court's opinion.

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United States v. Bershchansky, 788 F.3d 102 (2d Cir. 2015)

Federal agents suspected Bershchansky was offering child pornography for others to download on a peer-to-peer file-sharing network. The agents believed Bershchansky lived in apartment number 2 in a multi-family dwelling that contained three apartments. As a result, the agents obtained a warrant to search 2462 Gerritsen Avenue, Apt. #2, and seize evidence of child pornography. During a pre-search briefing, the agents' Enforcement Operation Plan repeatedly identified Apartment 2 as the place to be searched and included no other physical description of the building.

When the agents arrived at the building located at 2462 Gerritsen Avenue, they entered Apartment 1 and conducted their search, seizing a desktop computer and two external hard drives. Photographs of the exterior of building clearly showed that both the outer and inner doors to the apartments located within the building were clearly marked "1" and "2." Bershchansky was present during the search of Apartment 1 and admitted to receiving and possessing child pornography. A forensic examination of the seized computer and hard drives revealed files containing child pornography. Bershchansky was arrested and charged with possession of child pornography.

Bershchansky filed a motion to suppress his incriminating statement and the evidence discovered in the search of Apartment 1.

The district court concluded the agents exceeded the scope of the warrant by searching Apartment 1 because the warrant only authorized the agents to search Apartment 2. As a result, the court ordered the suppression of the evidence seized and Bershchansky's statements made during the execution of the warrant. The government appealed.

The court of appeals affirmed the district court, holding it was apparent from the face of the warrant as well as the agent's supporting affidavit that the magistrate judge authorized a search of Apartment 2 only. The finding of probable cause was based on evidence that child pornography was being shared from a computer with an internet protocol (IP) address the agent believed was associated with a user in Apartment 2. In addition, the agent repeatedly referred to Apartment 2 in his affidavit and represented that he received confirmation from the internet service provider, the utility company and a neighbor that Apartment 2 was the apartment in question. Consequently, when the agents searched Apartment 1 rather than Apartment 2, they searched an apartment the magistrate judge did not authorize them to search. When they did so, the agents conducted a warrantless search in violation of the Fourth *Amendment*.

The court further held the good faith exception to the exclusionary rule did not apply because it was not objectively reasonable for the agents to believe they were authorized to search Apartment 1 when the warrant clearly authorized only a search of Apartment 2. The court added that a reasonable police officer would have recognized the warrant authorized only a search of Apartment 2. The court further stated a reasonable police officer would have contacted the magistrate for permission to search Apartment 1 instead of bypassing constitutionally mandated procedure and taking a shortcut.

Click **HERE** for the court's opinion.

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United States v. Thomas, 788 F.3d 345 (2d Cir. 2015)

During an investigation into child pornography offenses committed by using peer-to-peer (P2P) file-sharing software, an officer used an automated software program called Child Protective Systems (CPS) to identify an internet protocol (IP) address traced to Thomas' house that offered to share images and video files tagged as child pornography. A private company created CPS, which it licenses to law enforcement agencies. Before CPS was available, officers would attempt to detect files containing child pornography by manually sending out search queries over P2P networks. CPS automates this process by canvassing P2P networks, identifying files that contain child pornography, cataloguing this information, and providing officers with a list of the online users who are sharing these files over P2P networks. After the officer confirmed the files identified by CPS constituted child pornography by comparing their hash values with the hash values of images of known child pornography, he obtained a warrant to search Thomas' house and computers. In his affidavit, the officer provided a detailed explanation of P2P file sharing, how P2P child file-sharing software is used to exchange child pornography, how CPS was used in the investigation and a description of the files that CPS detected on Thomas' computer. The affidavit did not identify the company that created CPS nor did it refer to the CPS software by name. After files containing child pornography were discovered on Thomas' computer, he was arrested.

Thomas argued the evidence discovered on his computer should have been suppressed because the officer omitted from the search warrant affidavit the fact that CPS, a third-party software source, generated the information upon which the government relied to establish probable cause. Thomas also argued the search warrant affidavit did not include any information regarding the reliability of the CPS software.

The court disagreed. First, the CPS software merely aggregated existing public information; therefore, the fact that a third party created it was not relevant. In addition, Thomas provided no authority to support his argument that the government was required to disclose the commercial name of the software used to uncover evidence of his crime. The court noted that just as an informant's name can be presented anonymously in an affidavit, so can a company's name. Probable cause determinations are made on the veracity of an informant's information, not on the informant's name. Similarly, the court found the primary relevance of automated third-party software is not in the name of the software, but in how the software works. In this case, the officer described in his affidavit the CPS software's purpose and then described in considerable detail how the software operated. No additional or more specific information was required.

The court further held the search warrant affidavit established the reliability of the CPS software. The officer verified and corroborated the information received from CPS through a hash value analysis and made a reasonable argument that evidence of a crime would be found on Thomas' computer.

Click **HERE** for the court's opinion.

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United States v. Singletary, 798 F.3d 55 (2d Cir. 2015)

Officers saw Singletary walking on the sidewalk holding an object wrapped in a brown paper bag. Although she could not tell what the object was, one of the officers saw it was the size of a beer can. Based on her experience, the officer knew that individuals often concealed open containers of alcohol in brown paper bags because such possession in public was illegal. In addition, the officer saw Singletary was holding the object as if to avoid spilling its contents. When the officers approached Singletary to investigate, he tried to walk away. After one of the officers put his hand on Singletary's shoulder, Singletary pulled away, threw the brown paper bag down, and ran away. Some of the can's contents spilled on one of the officers, who could smell that it was beer. After a brief chase, the officers arrested Singletary and seized a handgun and marijuana from him incident to arrest. The government charged Singletary with drug and weapons charges.

Singletary argued the handgun and drugs seized from him should have been suppressed because the officers did not have reasonable suspicion to stop him.

The court disagreed. First, the officer saw Singletary carrying an object that appeared to be the size of a beer can. Second, the officer saw Singletary was carrying the suspected beer can inside a brown paper bag. The officer knew from her experience that persons carrying open containers of alcohol in public frequently conceal the containers in brown paper bags. Finally, the officer saw that Singletary was carrying the brown paper bag in a steady manner, so as to avoid spilling its contents. Based on these facts, the court held the officers had reasonable suspicion to conduct a *Terry* stop to determine if Singletary was violating the open-container law. Consequently, the court concluded Singletary's arrest and the evidence seized incident to arrest was lawful.

Click **HERE** for the court's opinion.

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United States v. Cacace, 796 F.3d 176 (2d Cir. 2015)

Prior to trial, Gioeli, one of the defendants in a multi-defendant organized crime prosecution, filed a motion to suppress evidence taken from his home by Andrea Calabro, the wife of another co-defendant. At the time, Calabro was working as a confidential informant for the government and she had already given federal agents photographs taken at social gatherings that she said were given to her by Mrs. Gioeli. At an agent's suggestion, Calabro accepted Mrs. Gioeli's offer to borrow more photographs. After Mrs. Gioeli gave Calabro some photographs, Calabro asked Mrs. Gioeli if she could come over to her house to examine Mrs. Gioeli's photo collection herself. Mrs. Gioeli agreed; however, when Mrs. Gioeli was momentarily absent, Calabro took an address book and several photographs from Gioeli's home without permission. Calabro gave the address book and photographs to the agent who examined them. The government later obtained a warrant to search Gioeli's home, which included information obtained from the address book.

Gioeli claimed any photographs given to Calabro while Calabro was in Gioeli's house, as well as the address book, and any photographs taken without Mrs. Gioeli's consent should have been suppressed.

The court disagreed. First, while it was undisputed that Calabro was acting as an agent of the government when she borrowed certain photographs from Mrs. Gioeli, the court found that Mrs. Gioeli voluntarily consented to Calabro's presence in the Gioelis' home to view and borrow these photographs.

Second, the court concluded Mrs. Gioeli's consent did not extend to the address book and the photographs Calabro took from the house without Mrs. Gioeli's consent. However, the court held that when Calabro took the address book and photographs, she did so as a private person, and not as a governmental agent. While the court found that Calabro exceeded the scope of her government agency, the court concluded the government did not know of her intent to do so, nor did the government have any reason to suspect that Calabro might do something more than borrow photographs with Mrs. Gioeli's consent. Consequently, Calabro's actions as a private person could not violate the *Fourth Amendment*, as the *Fourth Amendment* does not apply to searches or seizures by private persons.

Click **HERE** for the court's opinion.

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United States v. Diaz, 802 F.3d 234 (2d Cir. 2015)

A police officer in Meridian, Mississippi stopped an 18-wheel tractor-trailer after he saw the right rear wheels of the trailer twice cross the solid white fog line on the right side of road. The officer believed crossing the fog line constituted careless driving in violation of Mississippi state law. A subsequent search of the truck revealed large quantities of heroin and cocaine. As a result, the government indicted the occupants of the truck, Diaz and Wellington, with conspiracy to possess with intent to distribute heroin and cocaine.

The district court granted the defendants' motion to suppress the drugs. The court held the government failed to establish that the momentary touching of the fog line by the trailer's rear wheels, without other evidence of careless driving, constituted a violation under Mississippi law.

The government appealed, arguing that the officer had reasonable suspicion to stop the defendants for careless driving after he saw the trailer's wheels cross the fog line.

The court agreed. First, the court recognized the trailer's touching or crossing the white fog line might be explained by circumstances other than carelessness. For example, the court noted a driver might swerve to avoid an object in the road. However, the court emphasized the question is not whether driver actually violated the careless driving statute, but whether an objectively reasonable officer could have formed a reasonable suspicion of carelessness under the circumstances. The court supported its position by citing several Mississippi Court of Appeals decisions, which held that an officer's observation of one or more lane-line incursions justified a traffic stop pursuant to the Mississippi careless driving statute. As a result, the court held when the officer saw the trailer's rear wheels cross the fog line, he had reasonable suspicion to justify the traffic stop.

Click **HERE** for the court's opinion.

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United States v. Levy, 803 F.3d 120 (2d Cir. 2015)

Following a business trip to Panama, Levy returned to the Miami International Airport to face criminal charges he expected to be filed against him. At the time, Levy was aware he was the target of a criminal investigation into a series of stock manipulation schemes. At the airport, United States Customs and Border Protection (CBP) officers detained Levy and escorted him to a holding area after receiving information about the investigation into Levy from a Drug Enforcement Administration (DEA) task force. Outside of Levy's presence, the CBP officers inspected Levy's luggage, focusing on a spiral-bound notebook that contained eighteen pages of Levy's handwritten notes on a variety of subjects related to Levy's business dealings. After CBP officers examined and photocopied the notebook, they returned it to Levy, who was allowed to leave the airport.

At trial, the government entered the photocopy of Levy's notebook into evidence. After Levy was convicted, he argued the district court should have suppressed the photocopy of the notebook. Levy claimed the search of the notebook was a "non-routine' border search because it went beyond what a traveler expects at a point of entry into the United States.

The court disagreed. First, the court recognized the government has border search authority to conduct "routine" searches of people and items entering the United States without any degree of suspicion. Had the CBP officers merely reviewed Levy's notebook and returned it to him without copying it, the court had no doubt the search would have been "routine." However, the court added, whether searching and copying Levy's notebook constituted a "routine" border search that could be conducted without reasonable suspicion was debatable. Nevertheless, the court declined to decide the issue, instead holding the CBP officers' inspection and copying of the notebook was supported by reasonable suspicion that Levy was engaged in a financial crime. The court concluded that based on the information provided by the DEA task force, the CBP officers were aware of Levy's ongoing criminal participation in securities fraud schemes, which justified searching and copying Levy's notebook.

Second, the court concluded the CBP officers were entitled to rely on the information provided by the DEA task force to justify their search. Whether a Custom's official's reasonable suspicion arises entirely from his or her own investigation, or is prompted by another federal agency is irrelevant to the validity of a border search. The court stated the *Fourth Amendment* does not prohibit Customs officials from conducting a border search just because the search supports another federal agency's criminal investigation.

Finally, Levy argued that border searches conducted by the CBP, even at the prompting of another federal agency, should be confined to crimes the CBP is specifically authorized to investigate.

The court disagreed. While the primary purpose of a border search is to seize contraband property unlawfully brought into the United States, CBP officers are not required to ignore tangible or documentary evidence of other federal crimes. CBP officers have the

authority to search and review a traveler's documents and other items at the border when they have reasonable suspicion the traveler is engaged in criminal activity, even if the crime falls outside the primary scope of their official duties.

Click **HERE** for the court's opinion.

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Third Circuit

United States v. Wright, 777 F.3d 635 (3d Cir. 2015)

Officers suspected Wright was involved in a conspiracy to distribute marijuana and drafted a warrant application to search his apartment. In the portion of the search warrant that listed the items to be seized, the warrant incorporated by reference an attached affidavit that had been prepared by one of the officers. The affidavit summarized the officer's knowledge of the conspiracy and stated that the officers expected to find further evidence in Wright's apartment, including drugs, money and documents such as ledgers and phone lists. A magistrate judge approved the application, signing both the warrant and the attached affidavit. However, before officers executed the warrant, the affidavit listing the items to be seized was removed at the request of the government, and sealed in order to protect the ongoing investigation. When the officers received the final warrant, they did not realize that it no longer included the officer's affidavit listing the items to be seized. Officers executed the warrant on Wright's apartment without having the affidavit present, and seized evidence that was admitted against Wright.

Wright argued the search of his apartment violated the *Fourth Amendment* because the warrant did not describe with particularity the items to be seized, as it did not include the officer's affidavit.

Although the government conceded the seizure of evidence from Wright's apartment violated the *Fourth Amendment*, the court held the exclusionary rule did not apply. First, the court concluded the violation in this case did not undermine the purpose of the *Fourth Amendment's* particularity requirement because the officers confined their search to what was authorized in the warrant. Second, the magistrate judge found that probable cause existed to search for and seize every item listed in the officer's affidavit. When the magistrate approved the warrant, the affidavit was attached and expressly incorporated by reference in the space for identifying the items to be seized. In addition, the magistrate signed both the warrant and the affidavit. Finally, the court held the government did not gain anything from the *Fourth Amendment* violation. Even if the list of items to be seized had been present during the execution of the warrant, the officers would have collected the same evidence, and Wright would have been unable to stop them. Consequently, the *Fourth Amendment* violation in this case had no impact on the evidence that was used against Wright at trial.

Click **HERE** for the court's opinion.

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United States v. Lowe, 791 F.3d 424 (3d Cir. 2015)

At approximately 4:00 a.m., officers received an anonymous tip reporting a black male, wearing a gray hoodie with a gun in his waistband was talking to a female in front of a house. The officers knew the house was located in a violent, high-crime area, known for drug activity. In addition, earlier that night, the officers knew that a shot had been fired at a house around the corner from the house to which they were responding. Four officers in three marked police cars responded, and as they approached, they saw a man

who fit the description from the anonymous tip talking to a woman. The officers saw the man's hands were in the hoodie's pockets, not visible to the officers. However, the officers did not see a gun or anything indicating Lowe had a gun, nor did the officers see or hear any argument or disturbance when they pulled up to the house. The officers, one of whom had his firearm drawn, approached the pair and ordered them to show their hands. After Lowe did not remove his hands from his pockets, the officers frisked Lowe and seized a handgun from his waistband.

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

Lowe argued the handgun should have been suppressed because the officers did not have reasonable suspicion to conduct a *Terr*y stop when they seized him.

The court agreed. First, the court had to determine when the officers seized Lowe. A *Fourth Amendment* seizure occurs when an officer applies physical force to stop a suspect, or when a suspect submits to an officer's show of authority. The court noted that a person who remains stationary can still submit to an officer's show of authority. In such a case, a court must determine whether a reasonable person would have felt free "to decline the interaction" with the law enforcement officer. In this case, three marked police cars nearly simultaneously arrived in front of the house where Lowe was standing. Four uniformed officers, one with his firearm drawn then immediately exited their patrol cars, approached Lowe and the woman, ordering them to show their hands. The court determined it was at this point Lowe was seized for *Fourth Amendment* purposes. Although Lowe remained stationary, the court held a reasonable person in his position would not have felt free to disregard the officers and walk away.

Second, after the court determined when the officers seized Lowe, it had to determine if that seizure was supported by reasonable suspicion. Here, the facts known to the officers when they seized Lowe included an anonymous tip that a man matching Lowe's description was in possession of a gun, and the house to which they were responding was located in a high crime area where a shooting had occurred an hour earlier.

The court concluded these facts did not support reasonable suspicion to believe Lowe was involved in criminal activity. While the court realized it is in the interest of public safety to determine whether individuals are armed, in this case, the anonymous tip by itself did not support the *Terry* stop of Lowe. The court noted the officers could have conducted surveillance to observe Lowe's behavior or approached him and asked him questions to corroborate information provided in the anonymous tip. As a result, the court held the evidence seized from Lowe was properly suppressed.

Click **HERE** for the court's opinion.

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Fourth Circuit

United States v. Hill, 776 F.3d 243 (4th Cir. 2015)

Barker was serving a term of supervised release in connection with a federal drug conviction. One of the terms of his supervised release required Barker to allow probation officers to visit him at home at any time and seize contraband in plain view. Officers obtained a warrant to arrest Barker for violating a term of his supervised release and went to his apartment to arrest him. When the officers arrived at Barker's apartment, they arrested Barker and conducted a protective sweep. During the sweep, the officers encountered Hill and Dunigan, and discovered they were on supervised release. During the sweep, the officers saw needles, pills, packaging for synthetic marijuana and drug paraphernalia. After Barker, Hill and Dunigan were arrested for violating the terms of their supervised releases, and the protective sweep had ended, the officers conducted a walk-through of the apartment looking for other evidence of supervised release violations. After the walk-through, the officers brought in a drug dog that alerted to the presence of drugs in the ceiling. The officers removed a ceiling tile and found a plastic bag tucked inside the ceiling. The officers stopped the search, obtained a warrant, searched the bag and discovered controlled substances.

Barker, Hill and Dunigan were charged with a variety of federal drug offenses.
The defendants filed a motion to suppress the evidence, arguing that once the protective sweep ended, the officers needed a warrant to search the apartment further.

The court agreed. The supervision condition to which the defendants agreed required them to submit to a probation officer's visit and allowed the officer to confiscate contraband in plain view. None of the conditions of the defendants' supervised releases authorized warrantless searches. Consequently, the court concluded law enforcement officers generally may not search the home of an individual on supervised release who is not subject to a warrantless search condition unless the officers have a warrant supported by probable cause.

The government argued the officers would have sought a warrant to search the apartment based on their observations during the protective sweep, even if they had not conducted the walk-through and dog sniff. As a result, the government claimed the evidence should have been admitted against the defendants.

The court declined to determine the issue and remanded the case to the district court to determine whether the information obtained from the illegal walk-through and dog sniff affected the officer's decision to seek the search warrant.

Click **HERE** for the court's opinion.

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Covey v. Assessor of Ohio County, 777 F.3d 186 (4th Cir. 2015)

Crews, a field deputy for the county assessor's office entered Covey's property to collect data to assess the value of the property for tax purposes. Despite seeing "No Trespassing" signs, Crews continued up the driveway to Covey's house. In doing so, Crews was in violation of a state regulation that prohibits tax data collectors from entering property that is posted with "No Trespassing" signs. After finding no one home, Crews opened the front door and left a pamphlet inside the house. Crews then walked around the side of the house onto a basement patio where he saw marijuana plants. Crews left Covey's property and contacted local law enforcement officers.

After receiving Crews' report, a local officer and a federal agent went to Covey's house to investigate. The officers walked directly to patio area where they encountered Covey. The officers seized Covey and escorted him to their car. The officers went back to the patio area, opened the basement doors, leaned inside, took photographs, and seized marijuana from the patio area.

Although Covey later pled guilty in state court to manufacturing marijuana, he sued Crews as well as the state and federal law enforcement officers under *42 U.S.C. § 1983* and *Bivens* for conducting an unreasonable search and seizure at his home.

First, Crews argued he did not violate the *Fourth Amendment* because he entered Covey's property for a legitimate governmental interest. The court noted Crews' violation of the state regulation prohibiting data collectors from entering property where "No Trespassing" signs are posted did not amount to a per se violation of the *Fourth Amendment*. However, the court concluded that what began as a regulatory violation by Crews, turned into a potential *Fourth Amendment* violation when Crews dropped the pamphlet inside Covey's home and then walked around the curtilage to the patio area. As a result, the court held Covey alleged a plausible claim that Crews conducted an unreasonable search of his home and curtilage.

Second, the court found the officers were not conducting a valid knock and talk when they went onto the patio area of Covey's home. Under the knock and talk exception to the *Fourth Amendment's* warrant requirement, officers may approach the front door of a home without a warrant and attempt to make contact with someone inside the home. However, an officer may bypass the front door when circumstances reasonably indicate the officer might find the homeowner somewhere else on the property. In this case, however, the court held nothing in Covey's complaint suggested the officers had reason to believe Covey was in the patio area before proceeding there. Consequently, the court concluded Covey plausibly alleged the officers violated the *Fourth Amendment* by entering and searching the curtilage of his home without a warrant.

Third, the court held the officers were not entitled to qualified immunity because at the time of the incident it was clearly established that curtilage is entitled to the same level of *Fourth Amendment* protection as the rest of the home. In addition, Covey sufficiently alleged the officers violated clearly established law by proceeding directly to the patio area where they suspected marijuana would be found, without any reason to believe they would find Covey there.

Finally, the court directed the district court to determine if Covey's guilty plea to manufacturing marijuana barred his *§ 1983* and *Bivens* claims against the officers.

Click **HERE** for the court's opinion.

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United States v. Graham, 796 F.3d 332 (4th Cir. 2015)

The government charged Graham and Jordan with a variety of offenses arising from a series of armed robberies. During the investigation, the government recovered two cell phones connected to the defendants. The government subsequently obtained cell site location information (CSLI) from the phones pursuant to a court order issued under 18 U.S.C. § 2703(d). At trial, the government used the CSLI to establish the defendants' locations at various times before and after most of the robberies.

On appeal, the defendants argued the government's acquisition of the CSLI without a warrant based on probable cause was an unreasonable search in violation of the *Fourth Amendment*.

The court agreed, holding the government's warrantless procurement of the CSLI was an unreasonable search in violation of the defendants' *Fourth Amendment* rights. However, the court declined to reverse the defendants' convictions, holding the good faith exception to the exclusionary rule applied. The court concluded the government relied in good faith on court orders issued pursuant to § 2703(d) when it obtained the CSLI.

This decision created a circuit split with *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015), and *In re Application*, 724 F.3d 600 (5th Cir. 2013). The Computer Crime and Intellectual Property Section (CCIPS) of the United States Department of Justice can provide assistance to law enforcement officers concerning cells site issues.

Click **HERE** for the court's opinion.

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United States v. Slocumb, 804 F.3d 677 (4th Cir. 2015)

Around midnight, an officer saw Slocumb, his girlfriend, Lewis, and an infant standing near two cars in the parking lot of a salvage business that had closed hours earlier. Slocumb told the officer Lewis' car had broken down, and they were in the process of transferring a child car seat from one car to another car Slocumb had borrowed. The officer noticed Slocumb appeared to by hurrying Lewis, and he believed Slocumb was acting evasively, as Slocumb did not make eye contact and gave mumbled responses to the officer' s questions. The officer told Slocumb and Lewis they were not allowed to leave, and eventually asked Slocumb for identification. Slocumb told the officer he did not have any identification; however, he told the officer his name was "Anthony Francis." When Lewis told another officer that Slocumb's name was "Hakeem," the officer arrested Slocumb for providing a false name. Officers searched the car Slocumb had been driving and found methamphetamine and cocaine under the seat. The government indicted Slocumb for several drug offenses.

Slocumb argued the officer did not have reasonable suspicion of criminal activity when he detained him; therefore, the evidence discovered in the car should have been suppressed.

The court agreed. The court found the factors considered by the district court did not support a finding of reasonable suspicion to believe Slocum was involved in criminal activity. The court recognized the lateness of the hour and the fact the business had been closed for many hours were relevant; however; when considered along with Slocumb's behavior, concluded these facts did not establish reasonable suspicion. Here, Slocumb's actions, such as hurrying Lewis to finish the transfer of the car seat, keeping his head turned and avoiding eye contact, and giving low, mumbled responses, did not establish reasonable suspicion. In addition, Slocumb did not attempt to evade the officers; instead, Slocumb acknowledged them and was not noticeably nervous. Any suspicion the officer might have had when he first approached Slocumb was dispelled when Slocumb gave answers consistent with his actions. The court noted, at that point, there was no more reason to suspect that Slocumb was engaged in criminal activity than there was to believe his story as to what he and Lewis were doing.

In conclusion, the court cautioned the government "must do more than simply label behavior as 'suspicious' to make it so." Instead, the government must be able to "articulate why a particular behavior is suspicious" or logically demonstrate why the behavior is likely to be indicative of criminal activity that it might initially appear.

Click **HERE** for the court's opinion.

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United States v. Patiutka, 804 F.3d 684 (4th Cir. 2015)

A state trooper stopped Patiutka for failing to maintain his lane and suspected tint violations. The trooper approached the car and asked the driver, Patiutka, for his license. After Patiutka gave the trooper his license, the trooper asked Patiutka for his name and date of birth. Patiutka gave the trooper a date that differed by eight years from the date on driver's license. Although the trooper believed Patiutka was lying to him about his identity, which the trooper understood to be an arrestable offense, he did not ask any follow-up questions concerning Patiutka's suspected lie. Instead, the trooper ran the information provided by Patiutka through police databases and, after receiving no results, returned Patiutka's license, gave him a verbal warning, and told Patiutka that he was "free to go." As Patiutka began to walk back to his car, the trooper asked him if he would answer some questions. The trooper then asked for and received consent to search Patiutka's car. Several other officers who had arrived on scene began to search Patiutka's car. During their search, the officers found a credit card reader, and four new, unopened iPads inside a suitcase. At this point, Patiutka revoked his consent, and the officers stopped searching for a moment. The trooper then handcuffed Patiutka and took him back to his patrol car. The other officers resumed their search of Patiutka's car and found a credit card embosser, a credit card re-encoder and numerous blank credit cards. At the conclusion of the search, Patiutka was transported to the police station. Several months later, the government charged Patiutka with access device fraud and aggravated identity theft.

After the district court suppressed the evidence seized from Patiutka's car, the government appealed.

First, the government argued the evidence was seized incident to a lawful arrest. Specifically, the government claimed the trooper had probable cause to arrest Patiutka for the state offense of providing false identity.

The court disagreed. A search incident to arrest may occur prior to an arrest, and still be incident to that arrest. However, officers must have probable cause to arrest before beginning their search. Here, the court agreed with the district court, which concluded the trooper did not have probable cause to arrest Patiutka for providing a false identity when Patiutka revoked his consent to search. First, the video of the traffic stop showed the trooper did not ask Patiutka any follow-up questions regarding Patiutka's suspected lie as to his birthdate. Instead, the trooper handed the license back to Patiutka and told him he was "free to go." Second, the video showed that after the trooper obtained Patiutka's consent to search, he immediately stopped the search after Patiutka revoked his consent. The court found this suggested the only basis for the search of Patiutka's car was consent, and that it was not incident to arrest.

Second, the government argued the warrantless search of Patiutka's car was valid under the automobile exception to the warrant requirement.

Again, the court disagreed. Officers do not need a warrant to search an automobile if they have probable cause to believe it contains evidence of criminal activity. When the officers continued to search Patiutka's car after Patiutka revoked consent, the officers had already found a credit card reader and four new iPads. While the officers found the combination of these items and their locations in the car suspicious, they were items that Patiutka could legally possess. The court acknowledged the facts known to the officers would likely have established reasonable suspicion to detain Patiutka and investigate further. If the officers had questioned Patiutka further about these items, they might have been able to establish probable cause to support a further search of Patiutka's car. However, the trooper did not speak with Patiutka before placing him in handcuffs, nor did any of the other officers before resuming their search. Because the automobile exception requires probable cause, not just reasonable suspicion, the court held the exception did not apply here.

Click **HERE** for the court's opinion.

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United States v. Williams, 808 F.3d 238 (4th Cir. 2015)

At 12:37 a.m., two officers patrolling separately saw two vehicles traveling close together and speeding on I-85 near Charlotte, North Carolina. One officer stopped the lead vehicle, driven by Williams' brother. The other officer stopped the second vehicle, a rental car, driven by Williams. The officer issued Williams a written warning and returned Williams' driver's license and rental agreement at 12:54 a.m. As Williams was about to leave, the officer asked Williams for consent to search his car. Williams refused. The officer then told Williams he was not free to leave and that a dog-sniff would be

conducted on his car. After the drug-dog alerted to the presence of narcotics, the officers searched Williams' car and discovered crack cocaine in the trunk.

The government indicted Williams for possession with intent to distribute crack cocaine.

Williams claimed the officers violated the *Fourth Amendment* because they did not establish reasonable suspicion to extend the duration of the traffic stop after the officer issued him the written warning for speeding. As a result, Williams argued, the evidence discovered in the trunk of the rental car should have been suppressed.

The court agreed. The officers testified they established reasonable suspicion to extend the duration of the stop because Williams was traveling in a rental car, at 12:37 a.m., on a "known drug corridor." First, the court noted Williams' use of a rental car, by itself, was of minimal value to the reasonable suspicion analysis because neither officer explained why Williams' use of a rental car led them to believe he might be involved in criminal activity. For example, the officers did not testify that based on their training and experience drug traffickers often use rental cars to avoid asset forfeiture laws or for other reasons.

Second, while drug traffickers travel on interstate highways, so do many more innocent motorists. Because there is nothing inherently suspicious about driving at night on an interstate highway, officers must rely on their training and experience to link interstate-highway travel to more specific characteristics of drug trafficking. However, in this case, neither officer provided any testimony linking travel on an interstate highway with drug trafficking, nor did they claim that drug traffickers have some disproportionate tendency to travel late at night. As a result, the court concluded the officers failed to articulate why Williams' driving at 12:37 a.m., on an interstate highway created reasonable suspicion of criminal activity.

The officers also testified they thought it was suspicious that the rental agreement for Williams' car was set to expire later that day, requiring the car to be returned in New Jersey, but that Williams was traveling in the opposite direction. The court held the fact that Williams' travel plans were likely to exceed the initial duration of the rental agreement did not support reasonable suspicion that he was involved in criminal activity. When the officer mentioned the expiration of the rental agreement, Williams told the officer he planned to renew the agreement once he got to Charlotte, later that day. In addition, the officer knew the Williams' car was rented through Hertz, a well-known car rental business with locations nationwide.

Finally, the officers testified that when asked for his address, Williams told the officers he lived in both New York and New Jersey, and then gave the officers a post office box address that was different from the address on his New York driver's license,

The court concluded this factor did not support reasonable suspicion that Williams was involved in criminal activity because neither officer explained how using a post office box address or living in New York and New Jersey raised some suspicion of criminal activity.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca4/14-4049/14-4049-2015-12-14.pdf?ts=1450123231

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United States v. Stover, 808 F.3d 991 (4th Cir. 2015)

Two uniformed Prince Georges' County officers were on patrol in a marked police car in an area where several violent robberies had recently occurred. Around 1:00 a.m., the officers saw a vehicle double-parked in a parking lot of an apartment building. The officers saw a man in the driver's seat and a woman in the front passenger seat. The officers continued their patrol, but returned a few minutes later to check on the car. The officers saw the occupants were still in the car and noticed the car had Virginia license plates. The officers decided to investigate the occupants to see what was going on because of the car's out-of-state license plates, the area's high-crime reputation, the late hour and because the car was double parked. The officer parked the police car at a 45-degree angle, three feet behind Stover's car, blocking it in. The officer then activated the car's emergency lights and illuminated the side of Stover's car with a spotlight. At this point, Stover opened the driver's side door, got out of his car and opened the driver's side back seat door of his car. The officers ordered Stover to get back inside his car because they could not see what Stover was doing while he was standing between both open doors of his car. Instead of complying with the officers' commands, Stover walked toward the front of his car away from the officers. As one of the officers approached Stover from behind, he saw Stover throw a gun to the ground. The officer pointed his own gun at Stover and again ordered Stover to get back inside his car. Stover complied with the officer's command and got back into his car. The officers recovered a loaded handgun on the ground in front of Stover's car. The government indicted Stover for being a felon in possession of a firearm.

Stover filed a motion to suppress the handgun recovered by the officers.

Stover argued the officers seized him under the *Fourth Amendment* when they pulled their marked police car behind his car, blocking him in. Because the officers lacked reasonable suspicion to seize him at this point, Stover claimed the handgun the officers recovered from the ground in front of his car should have been suppressed as the fruit of an illegal seizure.

The government countered by arguing the officers did not seize Stover for *Fourth Amendment* purposes until after Stover threw the handgun on the ground; therefore, the handgun was lawfully recovered abandoned property.

One of the ways a *Fourth Amendment* seizure occurs is when a person submits to an officer's show of authority.

To determine whether an officer's show of authority is sufficient to trigger the *Fourth Amendment*, the court will examine the totality of the circumstances to see if a reasonable person would have felt free to terminate the encounter with the officer and leave. If the court concludes that a reasonable person would not feel free to terminate the encounter, the court must then determine when the person submitted to the officer's show of authority. It is only at this point that the person is seized under the *Fourth Amendment*.

In this case, the court found when the officers pulled their marked police car behind Stover's car, blocking it in, a reasonable person in Stover's position would not have felt he was free to terminate the encounter with the officers and leave.

However, when Stover exited his car, he ignored the officers' commands to get back inside his car and walked away from the officers. Only after Stover dropped his gun, did he comply with the officers' commands and submit to their show of authority by getting back inside his car. The court concluded it was at this point that Stover was seized for *Fourth Amendment* purposes.
As a result, because the officers did not seize Stover until after he discarded the handgun, the court held the handgun was admissible at trial.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca4/14-4283/14-4283-2015-12-18.pdf?ts=1450467075

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United States v. Rush, 808 F.3d 1007 (4th Cir. 2015)

Marquita Wills contacted local police officers and requested that they remove Kenneth Rush from her apartment. Wills told the officers that Rush, who had been staying with her for the previous two nights, was dealing drugs from her apartment. Wills told the officers she was afraid of Rush, but she did not indicate that Rush had committed any crime against her or threatened her in any way. Wills gave the officers the key to the apartment and signed a consent-to-search form.

The officers went to Wills' apartment, entered with the key and found Rush asleep in the master bedroom. When Rush asked the officers why they were in the apartment, one of the officers told Rush that they had a warrant to search the apartment, even though the officer knew this was not true. After telling Rush they had a warrant, the officers searched the apartment and found crack cocaine and digital scales. When questioned by the officers, Rush admitted the drugs belonged to him and that he had sold crack cocaine from the apartment. At the completion of the search, the officers left without arresting Rush, who agreed to meet with the officers later and provide them information about his supplier.

The government eventually charged Rush with possession with intent to distribute cocaine.

Rush filed a motion to suppress the evidence seized from Wills' apartment, arguing the officers warrantless search violated the *Fourth Amendment.*

Although the government agreed that Rush's *Fourth Amendment* rights were violated[1], the government argued the officer acted in good faith to protect Wills; therefore, the good faith exception the exclusionary rule should apply.

[1] Even though Wills consented to the search of her apartment, Rush had the right to object to the search because he was a present co-occupant of the apartment. See *Georgia v. Randolph*, 547 U.S. 103, 106 (2006). The officers unconstitutionally denied Rush the opportunity to object to the search by falsely stating that they had a warrant. See *Bumper v. North Carolina*, 391 U.S. 543, 548-50, (1968).

The court noted the United States Supreme Court had applied the good-faith exception to the exclusionary rule to certain cases involving isolated negligence by officers and in cases "when the police act with an objectively reasonable good-faith belief that their conduct is lawful."

However, the court held this case "bears no resemblance to the previous applications of the good-faith exception." First, the court found the search of the apartment was due to the intentional decision of one of the officers to lie to Rush about the existence of a search warrant. Second, the court held there could be no doubt that a reasonable officer would know that deliberately lying about the existence of a warrant would violate the *Fourth Amendment*, as courts since 1968 have taken a negative view of law enforcement officers misleading individuals about having valid warrants. Because the officer's lie to Rush about the existence of a search warrant was deliberate, contrary to long-standing case law and objectively unreasonable, the court concluded the good-faith exception to the exclusionary rule did not apply and that suppression of the evidence recovered from the apartment was warranted.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca4/14-4695/14-4695-2015-12-21.pdf?ts=1450728115

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Fifth Circuit

Trent v. Wade, 776 F.3d 368 (5th Cir. 2015)

At approximately 2 a.m. while on patrol, Officer Wade saw two all-terrain vehicles (ATVs) racing on a closed portion of a highway. Wade attempted to conduct a traffic stop, but the drivers of the ATVs fled. Wade pursued one of the ATVs to Trent's house. At Trent's house, the driver parked the ATV in the carport and fled into the house. Wade parked his patrol car next to the ATV, opened the unlocked door to Trent's house and entered the home without first knocking or announcing his presence. Inside the home, Wade eventually encountered Trent and discovered that Trent's son was the driver of the ATV. Wade arrested the son, and had the ATV towed from Trent's property and impounded.

Trent sued Wade under *42 U.S.C. § 1983* claiming Wade violated the *Fourth Amendment* by failing to knock and announce his presence before entering Trent's home. Wade argued that he lawfully entered Trent's house while in hot pursuit of Trent's son.

The court explained the hot pursuit exception gives an officer the authority to carry out a warrantless search or seizure in a home. However, the knock and announce rule, on the other hand, does not focus on the lawfulness of the search or seizure, but rather on the method of an officer's entry into a home. To justify a no-knock entry, an officer must have a reasonable suspicion that knocking and announcing would be dangerous or futile. Futility justifies a no-knock entry only when the officer has a reasonable suspicion that the occupants of the home are already aware of the officer's presence. In this case, while it was clear that Trent's son was aware of Wade's presence in the house, a question of fact remained as to whether Wade had reasonable suspicion to believe the other potential occupants of the home were aware of Wade's entry. Specifically, the court found a genuine issue of material fact existed as to whether "a reasonable officer would have taken into account that other residents could have been asleep at 2:00 a.m.," a circumstance that would necessitate "some manner of forewarning prior to entry." Consequently, the court denied Wade qualified immunity.

Trent also claimed Wade's warrantless seizure of the ATV from his carport violated the *Fourth Amendment*.

Under Texas law, Wade was authorized to seize the ATV as contraband property "used in the commission of a felony." In addition, Wade was lawfully on Trent's property when he seized the ATV. However, the court noted it remains an unresolved issue in the Fifth Circuit whether the *Fourth Amendment* allows the warrantless seizure of a vehicle from private property when state law designates that vehicle as forfeitable contraband. Because the law is not clearly established in this area, the court held Wade was entitled to qualified immunity for seizing Trent's ATV.

Click **HERE** for the court's opinion.

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United States v. Montgomery, 777 F.3d 269 (5th Cir. 2015)

An officer stopped Montgomery in front of his house for a traffic violation. During the stop, the officer attempted to frisk Montgomery, but Montgomery resisted by pushing the officer's hands away from his pockets. The officer eventually frisked Montgomery and felt a bulge in his pocket. The officer asked Montgomery what the bulge was, and Montgomery told the officer it was cocaine. The officer removed the cocaine, *Mirandized* Montgomery and arrested him.

Approximately thirty minutes after the stop, Montgomery consented to a search of his house. The search took approximately twenty-five minutes to complete, and during this time, officers allowed Montgomery to enter the house to obtain medicine. In addition, Montgomery repeatedly asked the officers for his cell phone so he could erase "naked pictures" that he did not want his father to see. An officer brought Montgomery his cell phone and agreed to help Montgomery erase the images from the phone. With Montgomery's consent, the officer pushed a button on the phone that caused an image to appear, which the officer believed was child pornography. The government indicted Montgomery for possession of child pornography.

Montgomery argued the evidence discovered on his cell phone should have been suppressed. Specifically, Montgomery claimed the seizure of the cocaine that led to his arrest was discovered after an unlawful *Terry* frisk, which tainted his consent to search his cell phone.

The court held the evidence discovered on Montgomery's cell phone was obtained with Montgomery's consent, which the officers obtained after several independent acts of freewill on Montgomery's part that purged the taint of any alleged *Fourth Amendment* violation. Without deciding the issue, the court held that even if the *Terry* frisk was unlawful, Montgomery repeatedly requested that the officers access his cell phone to remove images he wanted to conceal from his father. There was no evidence suggesting the officers requested to search the cell phone or that they were otherwise interested in its contents. In addition, Montgomery was *Mirandized* before his phone was searched, the officers knew Montgomery had a criminal history, and the officers allowed Montgomery to retrieve medicine from his house. The court concluded these facts supported the belief that Montgomery's consent to search his cell phone was sufficiently detached from his arrest to purge any taint. Finally, the court found the *Fourth Amendment* violation alleged by Montgomery was not flagrant.

Click **HERE** for the court's opinion.

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United States v. Wright, 777 F.3d 769 (5th Cir. 2015)

Officers executed a search warrant at Wright's home in connection with a child pornography investigation. When the officers located Wright, they allowed him to get dressed and then escorted him to an officer's unmarked police car, which was located in the parking lot of a church approximately thirty feet from Wright's home. While walking to the car, an officer told Wright that he was not under arrest, and that he was free to leave at any time. Wright sat in the front passenger seat of the car, and was not

handcuffed or otherwise restrained. At the beginning of the interview, an officer advised Wright of his *Miranda* warnings and again told Wright that he was not under arrest, and that he was free to leave. During the interview, Wright made numerous incriminating statements to the officers.

Wright moved to suppress his incriminating statements, arguing that on three occasions during interview, he had unambiguously requested his right to counsel.

First, for an individual to have a *Fifth Amendment* right to counsel under *Miranda*, that individual must be subject to a custodial interrogation. Second, a suspect is "in custody" for *Miranda* purposes when he is placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a "restraint on freedom of movement of the degree" associated with a formal arrest.

Here, the court never decided whether Wright ever unambiguously requested counsel under *Miranda* because the court held Wright was not in-custody for *Miranda* purposes when he made the incriminating statements to the officers. First, the interviewing officer on at least two occasions told Wright that he was not under arrest, and that he was free to leave. Second, there was no evidence that Wright was physically restrained during the interrogation, which took place near Wright's home, in a car subject to public scrutiny. Finally, the transcript of the interview, and the cooperative tone throughout it, indicated the conversation was as much an opportunity taken by Wright to tell his story to the officer as it was an opportunity for the officer to obtain information from Wright. Consequently, as he was not in custody for *Miranda* purposes, the court held Wright's statements to the interviewing officer were admissible against him.

Click **HERE** for the court's opinion.

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United States v. Ortiz, 781 F.3d 221 (5th Cir. 2015)

Ortiz went to a gun store and purchased a rifle and one box of ammunition for $2,100 in cash.
Ortiz completed the required ATF form 4473, which warned that it was illegal to purchase a firearm for another person, also known as a straw purchase. After buying the rifle, Ortiz asked Hernandez, the store employee, if the store had any more rifles similar to the one just purchased. After Hernandez showed Ortiz a second rifle, Ortiz left the store to get more cash from an ATM. Suspecting Ortiz was engaged in a straw purpose, Hernandez contacted an agent with the Bureau of Alcohol, Tobacco and Firearms, (ATF) and gave the agent a description of Ortiz's car and license plate number.

A short time later, Ortiz returned to the store and bought the second rifle, completing another ATF Form 4473. When Ortiz left the store, an ATF agent saw Ortiz place two rifle bags into his car. The agent followed Ortiz to a gas station, and along with a second agent who had joined the surveillance, pulled up next to Ortiz with guns drawn and ordered Ortiz out of his car. After seeing no immediate threats, the agents holstered their weapons and spoke to Ortiz. One of the agents told Ortiz that he was not under arrest and asked Ortiz questions about the rifles he had just purchased. Ortiz admitted he had purchased the rifles for someone else.

After several other agents arrived, one of the agents decided to frisk Ortiz. The agent handcuffed Ortiz, after telling Ortiz he was not under arrest and frisked him. After approximately ten-minutes, the handcuffs were removed and an agent asked Ortiz to get into the agent's car so they could talk. During the conversation, which lasted approximately twenty-minutes, Ortiz answered detailed questions concerning the purchases of the rifles. At no time did the agents provide Ortiz *Miranda* warnings. During this time, an agent seized the rifles from Ortiz's car based on Hernandez's tip and Ortiz's statements.

At trial, Ortiz argued the rifles seized from his car should have been suppressed because the officers did not have reasonable suspicion to stop him and there was no legal basis for the warrantless search of his car.

The court disagreed, holding there was reasonable suspicion of criminal activity based on Hernandez's tip to the ATF agent. First, Hernandez had worked at the gun store for almost two years and had received training on identifying straw purchases. Second, Hernandez believed it was suspicious for Ortiz to insist on paying cash for two rifles, not purchase sights, and only purchase one box of ammunition. Finally, there was no reason to suspect Hernandez had an ulterior motive for contacting the ATF, and the agents corroborated some of Hernandez's information. As a result, the agents were justified in stopping Ortiz.

The court concluded Ortiz's statements provided probable cause to believe his car contained two rifles unlawfully purchased for someone else. Consequently, the court held the warrantless search of Ortiz's car for the rifles was justified under the automobile exception to the *Fourth Amendment's* warrant requirement.

Ortiz also argued the incriminating statements he made to the agents should have been suppressed because they were the result of custodial interrogation, and he had not been provided *Miranda* warnings.

The court disagreed. The court held Ortiz was not in custody for *Miranda* purposes when he made his statements to the agents; therefore, no *Miranda* warnings were required. First, the agents told Ortiz he was not under arrest before questioning him. Second, the agents questioned Ortiz in a public location and the tone of the questioning was not accusatory. Third, the handcuffing was brief and did not occur until later in the encounter when an agent decided to frisk Ortiz and the handcuffs were removed before Ortiz spoke to the agents the second time.

Click **HERE** for the court's opinion.

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United States v. Alvarado-Zarza, 782 F.3d 246 (5th Cir. 2015)

An officer stopped Zarza for violating *Tex. Transp. Code Ann. § 545.104(b)* which requires drivers to signal 100 feet in advance of a turn. During the stop, the officer obtained consent to search and found cocaine in Zarza's car. The government charged Zarza with possession with intent to distribute cocaine.

Zarza moved to suppress the evidence of the cocaine. At the suppression hearing, the officer testified that he believed Zarza violated *§ 545.104(b)* by failing to signal 100 feet before making a lane change, and not when Zarza actually turned. Zarza claimed the stop was unlawful because *§ 545.104(b)* only applies to turns, not lane changes.

The court agreed with Zarza. First, the court found *§ 545.104(b)* is unambiguous, as its 100-foot requirement only applies to turns, not lane changes. Second, in other sections of the statute, there is a distinction made between turns and lane changes. Third, the Texas Driver's Handbook defines the distinction between turns and lane changes. Consequently, the court concluded that *§ 545.104(b)* by its plain terms, does not apply to lane changes.

Next, the court noted that seven months before Zarza's stop, the Texas Court of Criminal Appeals, in *Mahaffey v. State*, drew a clear distinction between turns and other movements, including lane changes. Because applicable case law pre-dated Zarza's stop and because *§ 545.104(b)* gave no support to the officer's interpretation of the 100-foot requirement, the court concluded the officer's mistake of the law was objectively unreasonable.

The court further held is was not objectively reasonable for the officer to believe Zarza failed to signal 100 feet before actually turning when credible expert witness testimony concluded Zarza signaled 300 feet before turning. The officer conceded that he acted quickly and could not "really be measuring" the exact signaling distance. In addition, the officer's estimations of distance related to the point where Zarza changed lanes and not the point where he turned. As a result, the court held the officer did not have reasonable suspicion to believe Zarza violated *§ 545.104(b)*; therefore, the evidence seized during the stop should have been suppressed.

Click **HERE** for the court's opinion.

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United States v. Conlan, 786 F.3d 380 (5th Cir. 2015)

Over a one-year period, Conlan sent a series of threatening emails and text messages to a woman he dated as a teenager. An arrest warrant was issued for Conlan for harassment, and officers learned that he was registered in a local motel. After the officers saw Conlan's vehicle in the parking lot, they had the motel manager call Conlan to the front desk where they arrested him. When an officer asked Conlan if he wished to get anything from his room before being taken to the police station, Conlan said yes. Officers accompanied Conlan to his room and retrieved his wallet. While in Conlan's room, the lead investigator saw a laptop computer and two cell phones lying on the bed and ordered another officer to seize them. A subsequent search revealed the cell phones had been used to call the victim's workplace and obtain directions to her house, and the laptop used to conduct Internet searches for the victim's name. The officers also searched Conlan's car, which was located in the motel parking lot and seized a loaded handgun and riot stick.

Conlan filed a motion to suppress the items seized from his motel room. By having the manager summon him to the front desk, Conlan argued the officers created the situation

where he would be without his effects and forced into requesting a return to his room. Conlan also argued the officers unlawfully searched his car without a warrant.

First, the court held that if the officers wanted access to Conlan's room, they could have executed the arrest warrant there. In addition, the court found there was no evidence to suggest the officers pressured Conlan into returning to his room. Finally, when Conlan told the officers he wanted to return to his room, the officers did not violate the *Fourth Amendment* by accompanying him there.

Next, the court held the officers made a lawful plain view seizure of Conlan's cell phones and laptop computer because the incriminating nature of these items was immediately apparent. The incriminating nature of an item is "immediately apparent" if an officer has probable cause to believe that the item is either evidence of a crime or contraband. Here, the lead investigator who ordered the seizure of Conlan's laptop and cell phones had first-hand knowledge of Conlan's harassing electronic communications; therefore, he had probable cause to believe these items constituted evidence of the crime of harassment.

Finally, the court held the warrantless search of Conlan's vehicle was lawful. Before locating Conlan at the motel, the officers knew that Conlan had recently driven his car past the victim's house. This act formed part of Conlan's course of criminal conduct and provided the officers with probable cause to believe the vehicle was evidence and an instrumentality of the crime of harassment. Consequently, the officers were entitled to impound and search Conlan's vehicle.

Click **HERE** for the court's opinion.

*****

De La Paz v. Coy, 786 F.3d 367 (5th Cir. 2015)

Customs and Border Patrol (CBP) agents took Frias and Garcia de la Paz into custody when, during separate traffic stops, the men admitted to being illegal aliens. Frias and Garcia filed *Bivens* lawsuits against the agents, claiming the agents violated the *Fourth Amendment* by stopping them only because they were Hispanic.

The court consolidated the cases and following the Ninth and Second Circuits held that *Bivens* actions are not available for claims that can be addressed in civil immigration and removal proceedings. The court found that the Immigration and Nationality Act (INA) and its amendments include provisions specifically designed to protect the rights of illegal aliens and provide remedies for violations of those rights. As a result, the court held that once the legislature had chosen a remedial scheme, the separation of powers doctrine prevents federal courts from supplementing it.

Click **HERE** for the court's opinion.

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United States v. Cervantes, 797 F.3d 326 (5th Cir. 2015)

At 8:30 a.m., two Border Patrol agents were on roving patrol on Interstate 20 when they saw an SUV heading eastbound toward Odessa, Texas. The agents saw the SUV had six occupants and was sagging in the rear. When the agents pulled their vehicle near the SUV, the driver, Cervantes, switched from the left lane to the right lane and began traveling behind a tractor-trailer that was being driven ten to fifteen miles per hour under the seventy-five-miles-per-hour speed limit. The agents considered this behavior odd because there were no vehicles in the left lane ahead of the SUV when it slowed down and pulled behind the tractor-trailer. The agents drove their vehicle parallel to the SUV and saw that the rear passengers were wearing dirty jackets and heavy clothing while the front passenger was wearing short sleeves and appeared to be clean. While driving next to the SUV, the agents honked the horn on their vehicle six times, but the occupants of the SUV ignored the agents' presence and continued to look forward. The agents conducted a traffic stop and when they approached the SUV, they saw burlap backpacks in the SUV. The agents saw small brick bundles wrapped with brown tape through a tear in one of the backpacks. The agents searched the SUV and recovered approximately 170 pounds of marijuana in the backpacks that had been transported across the border by the rear passengers.

Cervantes and all of the passengers were charged with aiding and abetting possession with intent to distribute marijuana.

Cervantes argued the marijuana evidence should have been suppressed because the agents did not have reasonable suspicion to conduct the traffic stop.

The court disagreed. Border Patrol agents on roving patrol may conduct vehicle stops if they have reasonable suspicion a vehicle is involved in criminal activity. First, even though the stop occurred approximately 200 miles from the border, the court found the location of the stop on Interstate 20, west of Odessa, was well known for its prevalence of drug and alien smuggling. Second, one of the agents testified that in his experience vehicles containing multiple occupants that also sag in the rear is an indication of narcotics smuggling. Third, the appearance and clothing worn by the rear passengers was, in the agents' experience, consistent with what he had previously observed on many occasions when he encountered undocumented aliens. Fourth, the agents testified that one of the rear passengers was in the cargo area of the SUV, and in their experience, this type of seating arrangement was consistent with smuggling. Finally, the agents found it suspicious that when Cervantes became aware of the agents' vehicle he switched lanes, and pulled behind a truck that was travelling well below the speed limit, then continued to look forward when the agents pulled next to him and honked their horn six times. Considering the totality of the circumstances, the court concluded the agents established reasonable suspicion to stop Cervantes.

Click **HERE** for the court's opinion.

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Sixth Circuit

United States v. Gatson, 776 F.3d 405 (6th Cir. 2015)

Byrd, a school bus driver, reported that she saw a man soliciting young girls near the bus depot. Byrd described the man as a black male with medium-toned skin and short hair. Byrd also stated the man was driving a black GMC SUV. A few minutes later, officers saw a dark grey GMC SUV with a black male with short hair and medium-brown skin sitting in the driver's seat, parked one block from the bus depot. The officers approached the SUV and spoke to the driver, Gatson, who admitted he had been talking to young girls. When one of the officers asked Gatson for identification, Gatson tried to push something between the driver's seat and the center console. The officers ordered Gatson out of the vehicle and recovered a pistol from the space between the driver's seat and center console. The government charged Gatson with two federal firearms offenses.

Gatson moved to suppress the pistol, arguing the stop, which led to the discovery of the pistol, violated the *Fourth Amendment*.

The court disagreed, finding the officers had reasonable suspicion to conduct a *Terry* stop. Even though the officers never spoke to Byrd, the officers knew her name and that she drove a school bus. These facts enhanced the credibility of Byrd's claim she had seen a man soliciting young girls. In addition, the officers saw a dark-colored GMC SUV less than a block from where Byrd had seen such a vehicle driven by a man matching the description given by Byrd. The court concluded these facts were enough to provide the officers reasonable suspicion Gatson had been engaged in criminal activity.

The court further held the officers did not exceed the scope of the *Terry* stop when they ordered Gatson out of his vehicle and searched it. The court ruled the district court did not improperly conclude that the officers' testimony was more credible than Gatson's testimony.

Click **HERE** for the court's opinion.

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Brown v. Lewis, 779 F.3d 401 (6th Cir. 2015)

A 911 operator dispatched officers to a house after receiving a call that a man inside was involved in criminal activity. As officers arrived, they saw a car drive away from the house. The officers followed the car and conducted a traffic stop. One of the officers opened the driver-side door and directed Kishna Brown, the female driver and sole occupant, to raise her hands and step out of the car. Brown raised her hands and began to step out of the car. However, before Brown's foot touched the ground, two officers, with guns drawn, grabbed Brown by her hooded sweatshirt, threw her to the ground and handcuffed her. The officers released Brown ten-minutes later after they learned that Brown had just dropped off a female friend at the house, and was not involved in any of the events that led to the 911 call.

Brown sued three officers, claiming the officers used excessive force against her in violation of the *Fourth Amendment*, along with state-law claims for false arrest and assault and battery.

The court held the officers were not entitled to qualified immunity. First, the court held the officers had reasonable suspicion to conduct the traffic stop on Brown. Based on what the officers knew at the time, the court concluded the officers could have reasonably believed the man, who was the subject of the 911 call, was driving the car. Second, however, the court held it was unconstitutional for the officers to continue to detain Brown once they determined the man referenced in the 911 call was not in her car. Here, the officers should have been aware of Brown's gender, and that she was alone in the car as soon as they opened her car door. In addition, the officers' use of guns and handcuffs on Brown was not supported by any facts that would have caused the officers to believe Brown was a risk to the officers. As a result, the court found when the officers threw Brown to the ground and handcuffed her that the stop was transformed into an arrest without probable cause. Finally, at the time of the incident, the court held it was clearly established that pulling a compliant detainee out of a car and throwing her to the ground constituted excessive force.

Click **HERE** for the court's opinion.

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Wesley v. Campbell, 779 F.3d 421 (6th Cir. 2015)

A seven-year old male student told Campbell that Wesley, a school counselor, had sexually assaulted him in Wesley's office. Campbell, a social worker, contacted Detective Rigby who initiated an investigation. Several weeks later, Campbell concluded the student's allegations were substantiated and drafted a "substantiated investigation notification letter," which affected Wesley's ability work as a teacher. Wesley filed an appeal to Campbell's administrative finding. After learning of Wesley's appeal, and approximately three months after the alleged incident, Detective Rigby drafted an affidavit and obtained a warrant for Wesley's arrest. Rigby based her affidavit entirely on allegations made by the student. After the student refused to cooperate with the prosecution's investigation, the government dismissed the charges against Wesley. One year later, an administrative hearing officer reversed Campbell's finding of substantiated abuse.

Wesley sued Detective Rigby for unlawful arrest, claiming the student's uncorroborated statements did not establish probable cause to arrest him. Wesley also sued Rigby for retaliatory arrest, claiming her decision to arrest him was in retaliation for his decision to appeal the social worker's finding of substantiated abuse.

The court held Officer Rigby was not entitled to qualified immunity because the student's uncorroborated allegations were legally insufficient to establish probable cause. Specifically, the court found Rigby waited almost three months after the student made his allegations before seeking a warrant for Wesley's arrest, then Rigby omitted from her arrest warrant affidavit a number of material facts, which she knew demonstrated the unreliability of the student's allegations. First, the student was seven-years old and

suffered from a history of serious psychological and emotional disturbances. Second, Wesley's office, where the alleged abuse occurred, was located at the center of the school's "administrative hub," within the line of sight of other adult staff members. Third, the student's accounts of the alleged abuse were inconsistent. Fourth, a medical examination of the student showed no evidence of sexual abuse. Finally, Rigby's investigation failed to uncover any evidence corroborating any aspect of the abuse claimed by the student. The court concluded Rigby's decision to withhold evidence of the student's unreliability demonstrated a "deliberate or reckless disregard for the truth" given that a reasonable officer would have recognized the importance of the child's reliability when deciding whether probable cause existed to arrest Wesley. The court further held it was clearly established that "police officers cannot, in good faith, rely on a judicial determination of probable cause when that determination was premised on an officer's own material misrepresentations to the court."

Click **HERE** for the court's opinion.

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Pollard v. City of Columbus, 780 F.3d 395 (6th Cir. 2015)

Officers knew a warrant had been issued for Bynum's arrest for forcible rape, assault with a deadly weapon, burglary, and kidnapping. While conducting surveillance, officers saw Bynum leave an apartment, get into a car and drive away. When officers attempted to conduct a traffic stop, Bynum refused to stop and led the officers on a high-speed chase on I-70 east. Bynum drove for some time before eventually crossing the median and driving against the traffic on I-70 west. Bynum drove his car head-on into a tractor-trailer and came to a stop. After the collision, the officers were informed over their radios that the driver of the car had a concealed-carry permit. When the officers surrounded Bynum's car, Bynum appeared to be unconscious. At some point, Bynum regained consciousness and reached toward the floorboard of his car. The officers ordered Bynum to show his hands, but instead, Bynum extended his arms, clasped his hands into a shooting posture and pointed at the officers. An officer yelled at Bynum to "drop it," however, Bynum responded by reaching down into the car again before assuming the same shooting posture. In response, two officers shot Bynum. After the three second volley, officers approached Bynum, who again reached down into the car and then pointed his hands at the officers in the same shooting posture. Officers fired a second volley of shots at Bynum, killing him. In total, the officers fired 80 shots at Bynum, of which, 23 struck him. No gun was recovered from Bynum's car.

Bynum's mother, Pollard, sued, claiming the officers' use of force was excessive.

The court disagreed, holding the officers were entitled to qualified immunity. The court found the totality of the circumstances gave the officers probable cause to believe Bynum posed a threat of death or serious injury to them. First, the officers knew an arrest warrant had been issued for Bynum concerning a number of violent offenses. Second, Bynum was so determined to avoid arrest that he led officers on a high-speed chase, which ended when Bynum seemed to intentionally drive head-on into a tractor trailer rather than surrender. Finally, the officers only shot Bynum after he made sudden gestures with his hands that suggested he was pointing a weapon at the officers. As a

result, the court held the use of deadly force against Bynum was objectively reasonable. That Bynum was unarmed and did not have a concealed-carry permit was not relevant because when the officers shot Bynum; neither of these facts was known to them.

Click **HERE** for the court's opinion.

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United States v. Winters, 782 F.3d 289 (6th Cir. 2015)

An officer stopped a rental car for speeding. When the officer spoke to the driver, Harris, she appeared to be nervous and trembled as she produced her license. The passenger, Winters, gave the officer the rental contract for the car. The officer noticed the car had been rented by a third party and that neither Harris nor Winters was an authorized driver. The officer spoke to Harris and Winters separately, and each gave the officer conflicting stories concerning their travel plans. After the officer issued Harris a warning ticket, he told the pair he was going to deploy his drug-sniffing dog around their car. Four minutes after issuing Harris the warning ticket, the dog alerted to the presence of drugs in the car. The officer searched the car and found one kilogram of heroin in Winters' bag which was located on the back seat. The government indicted Winters for possession with intent to distribute heroin.

Winters argued the officer violated the *Fourth Amendment* by unreasonably extending the duration of the traffic stop to conduct the dog sniff.

The court disagreed. When the officer issued Harris the warning ticket, the original purpose of stop was complete. However, by this time, the court concluded the officer had reasonable suspicion to detain the car for a dog sniff based on Harris' and Winters' nervousness, their inconsistent stories concerning their travel plans and the fact that neither individual was listed on the rental agreement. Consequently, the court held the four-minute delay to deploy the drug-sniffing dog, which was already on the scene, was reasonable. In addition, the court held once the dog alerted to the presence of drugs in the car, the officer was entitled to search the interior of the car, to include Winters' bag.

Click **HERE** for the court's opinion.

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Northrup v. City of Toledo Police Dep't., 785 F.3d 1128 (6th Cir. 2015)

An individual called 911 and reported that he saw a man, later identified as Northrup, walking down the street "carrying a gun out in the open." When Officer Bright responded, he saw Northrup and his family walking their dog and he noticed that Northrup had a handgun in a holster on his hip. Bright approached the group, asked Northrup to hand the dog's leash to his wife, and Northrup complied. At this point, according to Bright, Northrup pulled out his cell phone and moved his hands back toward his firearm, in what Bright believed to be a "furtive movement." Bright asked Northrup to turn around with his hands over his head, but rather than comply, Northrup asked Bright why he was there. Without answering, Bright unsnapped Northrup's holster and seized Northrup's firearm. After disarming Northrup, Bright demanded Northrup's

driver's license and concealed-carry permit. Northrup gave Bright his driver's license, but Northrup's wife told Bright to "look up the permit" himself. Suspecting Northrup had committed the offense of "inducing panic," Bright then placed Northrup in handcuffs and placed Northrup in his squad car. Bright conducted a record check and discovered Northrup possessed a valid concealed-carry permit, which made it legal for Northrup to carry the firearm on his hip. After approximately thirty minutes, another officer arrived and Bright released Northrup with a citation for "failure to disclose personal information," a charge, which was later dismissed.

Northrup sued Officer Bright and other member of the police department, alleging a number of constitutional violations as well as state law torts.

Officer Bright argued he was entitled to qualified immunity because he had reasonable suspicion to believe that Northrup was engaged in criminal activity by visibly carrying a firearm in his holster, and because he was responding to a 911 call. As a result, Bright claimed he was justified in disarming, detaining and issuing Northrup the citation.

The court disagreed. *Ohio Rev. Code § 9.68(C)(1)* clearly permits the open-carry of firearms. In addition to making the open-carry of firearms legal, Ohio law does not require gun owners to produce or even carry their licenses for inquiring police officers. In fact, the court found the Ohio Attorney General previously issued an opinion in which he stated, "The open-carry of firearms is a legal activity in Ohio." "If an officer engages in a conversation with a person who is carrying a gun openly, but otherwise is not committing a crime, the person cannot be required to produce identification." In addition, the court noted when an officer observes a person openly carrying a firearm in a place where it is legal, the officer cannot conduct a *Terry* stop to determine if the person legally possesses the firearm. In other words, in a place where it is lawful to possess a firearm, unlawful possession "is not the default status." The court concluded it was not reasonable for Officer Bright not to know the parameters of this unambiguous statute.

In addition, for a valid *Terry* frisk, clearly established law required Officer Bright to establish evidence that Northrup might be armed and dangerous. However, all Bright ever saw was that Northrup was legally armed. The court found that to allow *Terry* stops and frisks under the facts of this case would effectively eliminate *Fourth Amendment* protections for lawfully armed persons. While open-carry laws may put police officers in awkward situations, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets, and the Toledo Police Department has no authority to disregard this decision, nor the protections provided by the *Fourth Amendment* by detaining every person who lawfully possesses a firearm.

Finally, Northrup disputed Officer Bright's claim that Northrup made a "furtive movement" toward his firearm during the encounter. The court commented that only a jury could decide this disputed fact, and not the court.

Click **HERE** for the court's opinion.

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United States v. Lichtenberger, 786 F.3d 478 (6th Cir. 2015)

Officers arrested Lichtenberger at the home he shared with his girlfriend, Holmes, for failing to register as a sex offender. After his arrest, Holmes hacked into Lichtenberger's personal computer and discovered a number of images of child pornography. Holmes contacted the police, and when an officer arrived, he asked Holmes to boot up the laptop and show him what she had discovered. Holmes showed the officer several folders on Lichtenberger's laptop and then opened several of them to show the officer the images contained within. After the officer recognized the images to be child pornography, he asked Holmes to shut down the laptop. The officer then obtained a warrant for the laptop and its contents.

The government indicted Lichtenberger for receipt, possession and distribution of child pornography. Lichtenberger moved to suppress all evidence obtained pursuant to the officer's warrantless search of his laptop with Holmes.

First, the court recognized the *Fourth Amendment* only protects against "governmental action" and is does not apply to a search or seizure, even an unreasonable one, conducted by a private individual who is not acting as an agent of the government. Second, where a warrantless search by the government follows a private search, the scope of the warrantless government search cannot exceed the scope of the initial private search. Here, the court found the scope of the officer's warrantless search exceeded the scope of Holmes' private search conducted earlier that day. At the suppression hearing, Holmes testified that she could not recall if the images she showed the officer were the same images she had viewed during her earlier search. In addition, the officer testified that he may have asked Holmes to open files that were different than the ones she had previously viewed. Consequently, the court concluded there was no "virtual certainty" that the officer's warrantless search of Lichtenberger's laptop was limited to the files containing the images from Holmes earlier search. As a result, the court held the officer's warrantless search of Lichtenberger's laptop exceeded the scope of the private search, in violation of the *Fourth Amendment*, and ordered the laptop evidence and evidence obtained pursuant to the search warrant be suppressed.

The court added that the need to confirm the laptop's contents on-site was not immediate. First, Lichtenberger could not access the computer because he had been arrested. Second, the images on the computer were not in danger of being deleted, or altered. Finally, neither the computer nor its contents posed an immediate threat to the officer or others once it was seized.

Click **HERE** for the court's opinion.

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United States v. Lee, 793 F.3d 680 (6th Cir. 2015)

Lee was on parole, living in an apartment he shared with his girlfriend. One of the conditions of Lee's parole prohibited him from possessing any firearms. After receiving a tip that Lee had weapons in the apartment, his parole officer went to the apartment to investigate. Lee's girlfriend let the officer into the apartment where he found Lee asleep in the bedroom. The officer woke Lee up and walked him back to the living room where

he handcuffed and frisked Lee. After obtaining Lee's consent to search, the officer found a firearm and arrested Lee. The government indicted Lee for being a felon in possession of a firearm.

Lee argued the officer's failure to tell his girlfriend the reason for his visit to the apartment was a misrepresentation that rendered the girlfriend's consent to enter the apartment involuntary.

The court disagreed. The parole officer did not misrepresent any facts to Lee's girlfriend concerning his visit to the apartment. In addition, Lee's girlfriend, as a co-resident, was authorized to consent to the officer's entry into the apartment.

Lee further argued his consent to search the apartment was involuntary because he consented while he was handcuffed.

Again, the court disagreed. The court noted a suspect's consent to search is not automatically considered "involuntary" because the suspect is handcuffed when he gives consent. Here, there was no evidence the officer coerced Lee to obtain his consent, and the duration of Lee's detention and questioning was reasonable.

Click **HERE** for the court's opinion.

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Gradisher v. City of Akron, 794 F.3d 574 (6th Cir. 2015)

Gradisher, a white male, called 911 from his house and reported that a black male at a bar where he had been drinking had a handgun. Gradisher refused to give the 911 operator his name and hung up abruptly. When the 911 operator called back, Gradisher, who was obviously intoxicated, was verbally abusive to the operator. As a result, officers were dispatched to the bar to investigate the man with the gun as well as to the house traced to Gradisher by the 911 call.

At the bar, officers were told a white male and a black male had an argument and the white male claimed to have a gun in his van. As a result, the officers responding to Gradisher's house believed he might be armed with a handgun. Once at Gradisher's house, officers knocked on the front door and announced themselves. After the officers heard someone inside lock the deadbolt, they went to the back door. The officers saw a man exit the back door, but when they identified themselves, the man retreated into the house and slammed the door. The officers entered the house and eventually located Gradisher in the basement. Officer Craft deployed his taser against Gradisher after Craft claimed Gradisher refused to comply with his commands to show his hands. Gradisher claimed Officer Craft deployed his taser against him after he raised his hands in compliance with Craft's commands.

Gradisher sued the officers for violating his *Fourth Amendment* rights for entering his house without a warrant as well as Officer Craft for using excessive force for tasing him.

Without deciding whether the officers unlawfully entered Gradisher's house, the court held the officers did not violate any of Gradisher's clearly established rights by entering his house without a warrant. First, the officers knew someone inside the house had

placed several drunken and abusive calls to the 911 operator concerning a person at a bar who was in possession of a gun. Second, their investigation uncovered conflicting information as to who might have possessed a gun at the bar. Finally, Gradisher's erratic conduct at his house gave the officers reason to believe someone inside the house could be in danger. Because the court could not find any law that would have put the officers on notice their decision to enter Gradisher's house was unlawful, the court held they were entitled to qualified immunity.

However, the court held Officer Craft was not entitled to qualified immunity for deploying his taser against Gradisher. Gradisher and Officer Craft disputed whether Gradisher was resisting or refusing to be handcuffed when Craft tased him. Consequently, when there is a dispute concerning the facts in a case, the court stated the jury, not the judge must determine which party to believe.

Click **HERE** for the court's opinion.

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United States v. Bah, 794 F.3d 617 (6th Cir. 2015)

A police officer stopped a car for speeding. The officer discovered Bah driving and Harvey in the front passenger seat. Bah gave the officer his license and documentation on the car, which was a rental vehicle. While performing records checks, the officer saw Harvey "fumbling around" the passenger's side compartment as if he was trying to either conceal something or retrieve something. After the officer discovered Bah's license was suspended, he arrested Bah. Because Bah was the only driver listed on the rental agreement, the officer decided to tow the vehicle. The officer directed Harvey to exit the vehicle and frisked him for weapons. The officer then conducted an inventory search of the vehicle and found a damaged Blackberry cell phone, three other cell phones, and sixty-eight prepaid gift, credit and debit cards in the trunk in a plastic bag. In addition, the officer found four similar cards in the glove box, which was the same area where the officer saw Harvey "fumbling around." After finding the cards, the officer detained Harvey to investigate further and transported him to the police station in the back seat of his patrol car. At the station, the officer found more cards in both Bah's and Harvey's wallets as well as several cards in the back seat of the patrol car in which Harvey had been transported.

At the police station, an investigator searched the Blackberry cell phone without a warrant and found photographs that depicted a large amount of cash, marijuana, and a magnetic card reader or skimmer. In addition, without obtaining a warrant, the officer used a skimmer to read the information encoded on the magnetic strips of all of the seized cards. As a result, the officer discovered the magnetic strips on the vast majority of the cards had been re-encoded so the financial information they contained did not match the information printed on the front and backs of the cards. The officer also discovered the re-encoded account numbers had been either stolen or compromised, and a number of the associated accounts had already incurred fraudulent charges. The officer then arrested Harvey.

Based on this information, an investigator obtained a warrant to search the three cell phones that had not been searched and discovered evidence on them. However, in drafting the affidavit to support the warrant, the officer did not refer to any of the evidence discovered in the warrantless search of the Blackberry cell phone.

The government indicted Bah and Harvey for producing, using and trafficking in counterfeit access devices.

First, Harvey claimed the evidence seized from the vehicle should have been suppressed, arguing the officer did not conduct a valid inventory search.

The court noted that passengers with no possessory interest in a rental vehicle do not have standing to object to searches of the vehicle. As a result, because Bah was the only authorized driver of the rental car, the court held Harvey did not have standing to object to the inventory search.

Second, Harvey argued his detention, after Bah's arrest, was unreasonable. Although Harvey did not have standing to object to the inventory search of the vehicle, he did have standing to object to his seizure after Bah's arrest. As a result, Harvey argued the cards found in his wallet and in the back seat of the patrol car should have been suppressed.

The court disagreed. First, after arresting Bah, the officer lawfully ordered Harvey out of the car so he could conduct the inventory search. Second, the officer lawfully frisked Harvey after he exited the car because his "fumbling around" at the beginning of the stop provided the officer reasonable suspicion Harvey could be armed or trying to hide a weapon in the vehicle. Finally, once the officer discovered the cards in the glove box and trunk, he had probable cause to arrest Harvey on suspicion of identity theft.

Third, Bah and Harvey argued the warrantless examination of the magnetic strips on the cards constituted an unlawful *Fourth Amendment* search.

The court disagreed, holding the warrantless scans of the magnetic strips on the credit, debit, and gift cards did not constitute a search under the *Fourth Amendment*. First, when law enforcement officers lawfully possess credit, debit or gift cards, scanning the cards to read the virtual data contained on the magnetic strips does not involve a physical intrusion or trespass of a constitutionally space, as outlined in *U.S. v. Jones*.

Second, the court held neither Bah nor Harvey had a reasonable expectation of privacy in the magnetic strips, as the information on the strips, for the most part, is the same as the information provided on the front and back of a physical credit, debit or gift card. In addition, the magnetic strips are routinely read by third parties at gas stations, restaurants and grocery stores to facilitate financial transactions. While Bah and Harvey might subjectively expect privacy in the information contained in the magnetic strips, the court found that such an expectation of privacy is not one that society is prepared to consider reasonable.

Finally, Bah and Harvey argued the evidence discovered on the three cell phones should have been suppressed because the search warrant was tainted by the warrantless search of the Blackberry cell phone.

Again, the court disagreed. Although the government agreed the warrantless search of the Blackberry cell phone was unconstitutional, the investigator did not include any evidence discovered on the Blackberry when he drafted the affidavit in support of the warrant to search the other three cell phones. Consequently, the unlawful search of the Blackberry did not taint the subsequent search of the other cell phones.

Click **HERE** for the court's opinion.

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United States v. Brown, 801 F.3d 679 (6th Cir. 2015)

On March 8, 2011, federal and state police officers arrested Middleton, Brown and Woods for attempted delivery of heroin after conducting a traffic stop on Woods' vehicle. In response to standard booking questions, Brown provided a home address and possessed a driver's license that listed the same address as his residence.

The next day, officers obtained a warrant to search Middleton's house. When officers executed the warrant, they discovered a vehicle registered to Brown on the street in front of Middleton's house. The vehicle registration listed the same address Brown had given the officers as his home address the day before. In addition, a drug-detection dog alerted to the odor of narcotics inside Brown's vehicle. A few days later, an agent with the Drug Enforcement Administration (DEA) discovered Brown had a prior conviction for drug distribution, and had served time in federal prison.

On March 30, 2011, the DEA agent applied for a warrant to search Brown's house for evidence related to drug trafficking. A magistrate judge issued the warrant, which officers executed on March 31, 2011, twenty-two days after Brown's arrest. Pursuant to the warrant, the agents found drugs, firearms, and ammunition inside Brown's house.

The government charged Brown with a variety of drug and firearms offenses.

Brown moved to suppress the evidence seized from his house. First, Brown argued the information in the agent's search warrant affidavit failed to establish probable cause because it did not establish a connection between illegal drug activity and Brown's house. Second, Brown argued the information contained in the agent's affidavit was stale.

The court held the agent's affidavit established a sufficient connection or nexus between drug trafficking and Brown's house to support the issuance of the search warrant. While the affidavit contained no evidence indicating Brown distributed drugs from his house, that he stored drugs at his house, or that any suspicious activity had taken place there, the affidavit presented the magistrate judge with more than an uncorroborated suspicion Brown was a key drug dealer. First, the affidavit identified Brown as a previously convicted drug dealer and detailed the DEA's investigation of Brown's involvement in an ongoing drug trafficking ring. Second, the affidavit contained information concerning a drug-dog's detection of drug odor in a vehicle registered in Brown's name at the address where he lived. As a result, the court concluded the magistrate judge could reasonably infer from these facts that Brown had recently used the vehicle registered to his home address to transport drugs, and there would be a fair probability a search of his house would result in the seizure of contraband or evidence of a crime.

The court further held the information contained in the agent's search warrant affidavit was not stale. The court noted staleness is measured by the circumstances of the case, not by the passage of time alone. In this case, the court found the nature of the crime suggested a continuous and ongoing drug trafficking conspiracy of which Brown was a member. As a result, the court concluded the information known to the agent did not become stale in the 22 days between Brown's arrest on March 8 and the agent's application to search Brown's house on March 30.

Click **HERE** for the court's opinion.

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Mullins v. Cyranek, 805 F.3d 760 (6th Cir. 2015)

Officer Cyranek saw Mullins walking in downtown Cincinnati with two other individuals who were suspected of possessing firearms. Cyranek observed Mullins holding his right side, which led him to believe that Mullins possessed a gun. Cyranek followed Mullins who positioned the right side of his body away from Cyranek, making Cyranek more suspicious that Mullins had a gun. Cyranek approached Mullins, ordered him to stop and Mullins complied. When Cyranek grabbed Mullins' wrist to prevent him from pulling out a gun, Mullins resisted. Cyranek pushed Mullins to the ground, ending up on Mullins' back. During the struggle, Cyranek saw that Mullins had a pistol in his right hand, with a finger on the trigger. While drawing his firearm, Cyranek ordered Mullins to drop the pistol. Mullins threw his gun over Cyranek's shoulder as Cyranek rose from his crouched position and fired two shots at Mullins. One of Cyranek's shots struck Mullins in the torso killing him. Surveillance video of the incident showed that no more than five seconds elapsed between the time Mullins threw his gun and when Cyranek fired his second shot.

Mullins' mother sued Cyranek for several causes of action, claiming that Cyranek used excessive force in violation of the *Fourth Amendment* by firing two shots at her son, even though her son had already discarded his firearm.

The court held Cyranek was entitled to qualified immunity.

To determine whether Cyranek's use of deadly force was reasonable under the *Fourth Amendment*, the court considered: (1) The severity of the crime at issue; (2) Whether the suspect posed an immediate threat to the safety of the officer or others; and (3) Whether the suspect was actively resisting arrest or attempting to evade arrest by flight. In addition, the court recognized the reasonableness of the use of force must be judged from the perspective of a reasonable officer on the scene and not on 20/20 hindsight, as officers are often required to make split-second judgments under circumstances that are tense, uncertain and rapidly evolving.

First, the court held the severity of the crime and resistance factors weighed in Officer Cyranek's favor. At the outset, Cyranek only had probable cause to believe Mullins possessed a weapon, a misdemeanor under Ohio law. However, Mullins' removal of the pistol in Cyranek's presence without Cyranek's permission constituted a felony under

Ohio law. In addition, prior to the shooting, Mullins physically struggled with Cyranek for well over a minute.

Second, the court recognized the question of whether it was reasonable for Cyranek to believe that Mullins posed a significant threat at the time Cyranek shot him, was the main issue in the case.

Cyranek conceded that he shot Mullins after Mullins threw his pistol; however, Cyranek claimed the confrontation unfolded so rapidly that he did not have a chance to realize a potentially dangerous situation had evolved into a safe one.

The Sixth Circuit has previously held that "within a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the person threatened could have escaped unharmed." In this case, it was undisputed that within a five-second span, Mullins removed a previously concealed firearm without being ordered to do so, threw the weapon over Cyranek's shoulder after being ordered to drop it, and was then shot at twice and struck once by Cyranek. In addition, Mullins had his finger on the trigger of the firearm and the incident occurred in a populated city square. While Cyranek's decision to shoot Mullins after he threw his firearm might appear to be unreasonable in the "sanitized world of our imagination," the court concluded Cyranek was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable. In addition, the fact that Mullins was actually unarmed when he was shot was not relevant to the reasonableness inquiry. Instead, the court stated what mattered was the reasonableness of Officer's Cyranek's belief when he shot Mullins. Because only a few seconds elapsed between when Mullins drew his firearm and when Cyranek shot him, the court concluded a reasonable officer in the same situation could have fired with the belief that Mullins still had the gun in his hand.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/14-3817/14-3817-2015-11-09.pdf?ts=1447084848

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Bachynski v. Stewart, 2015 FED App. 0300P (6th Cir. 2015)

Officers arrested Bachynski for murder. After an officer read Bachynski her *Miranda* rights, she requested an attorney and the officers did not ask her any questions. Approximately two hours later, two different officers approached Bachynski in her cell and asked her if "she had been given an opportunity to use a phone to contact her attorney." Bachynski told the officers she did not have a phone, so one of the officers offered her a phone to call her family and a phone book to find and attorney. During this time, Bachynski told the officer, "I want to talk to you." The officer contacted the state prosecutor, obtained approval to speak to Bachynski and took her to an interview room. The officers read Bachynski her *Miranda* rights and asked her if she wanted to speak with them without an attorney present. Bachynski reiterated that she wanted to talk to the officers, acknowledging that she had initially requested an attorney, but that she had changed her mind and that she would rather talk to the officers than get an attorney.

Bachynski signed a waiver of her *Miranda* rights and confessed her involvement in three murders.

At trial in state court, Bachynski's confession was admitted against her and she was convicted. On appeal, Bachynski argued, among other things, that her confession should have been suppressed because the officers interrogated her after she invoked her right to counsel.

The Michigan Court of Appeals disagreed. The court held that the officer's communication with Bachynski in her holding cell was not an "interrogation" or the "functional equivalent of interrogation" because it solely involved helping her acquire an attorney. After that, it was Bachynski, not the officers, who insisted on speaking about the case. At that point, the court held Bachynski voluntarily, knowingly and intelligently waived her *Miranda* rights.

Bachynski filed a petition for a writ of habeas corpus in federal district court, claiming that the Michigan state courts unreasonably admitted her confession in violation of her *Fifth Amendment*. The district court agreed, and the State appealed.

The Sixth Circuit Court of Appeals reversed the district court, holding that the officers did not engage in "interrogation" or the "functional equivalent of interrogation" when they went to Bachynski's cell to provide her the tools to obtain an attorney. The court found that when a suspect invokes her right to counsel, there is nothing wrong with offering to get her an attorney or the tools to hire one, as such an offer facilitates the exercise of the right to counsel. Here, the officers had no reason to think Bachynski would say something incriminating or reconsider her invocation of counsel when they made this offer. Finally, the court noted it has previously held that an officer's questions "principally aimed at finding the suspect an attorney," did not constitute an "interrogation."

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/15-1442/15-1442-2015-12-23.pdf?ts=1450892932

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Seventh Circuit

United States v. Webster, 775 F.3d 897 (7th Cir. 2015)

Officers detained Webster and Jones in the caged back seat of a squad car while they sought a warrant to search a residence from which the men had just fled. An officer activated an internal video camera in the car to record all conversations in the squad car. While the officer was out of the car for approximately eight-minutes, Webster engaged in conversation with Jones and placed several phone calls, which were audible in the recording. At trial, the district court allowed the government to enter the eight-minute excerpt of the recording into evidence against Webster.

On appeal, Webster argued recording his conversation with Jones, and his phone calls while in the back of the squad car violated the *Fourth Amendment*.

The court disagreed. For Webster to prevail, the court noted Webster had to establish he had a reasonable expectation of privacy in the conversations that took place in the squad car. The court added, a reasonable expectation of privacy exists when the defendant manifests a subjective expectation of privacy and society recognizes that expectation to be reasonable. Here, the court assumed Webster exhibited a subjective expectation of privacy because he did not engage in any conversation while the officer was seated in the front of the squad car, but only spoke when the officer was not present. However, the court found Webster's expectation of privacy was not one that society was prepared to find reasonable. In a case of first impression, the court followed the 1st, 4th, 5th, 8th, 10th and 11th circuits and held there is no reasonable expectation of privacy in a conversation that occurs in a squad car. Given the nature of the vehicle, and the visible presence of electronics capable of transmitting any internal conversations, the expectation that a conversation within the vehicle is private is not an expectation society would recognize to be reasonable. As a result, the court held the officer did not violate the *Fourth Amendment* when he recorded Webster's conversations.

The court noted its ruling reflected the layout and equipment of a squad car, and expressed no opinion as to conversations that occur in other vehicles such as patrol wagons or squadrols, which contain separate compartments for prisoners that are physically separated from the front portion of the vehicle where the officers ride.

Click **HERE** for the court's opinion.

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United States v. Barta, 776 F.3d 931 (7th Cir. 2015)

Barta was convicted of conspiracy to commit bribery based on an undercover government sting operation that turned into an agreement between Barta and his co-defendants to bribe a fictional county official in California to obtain a government contract at a hospital.

The court reversed Barta's conviction, holding the government entrapped Barta.

Entrapment is a defense to criminal liability when the defendant is not predisposed to commit the charged crime, and the government's conduct induced the defendant to commit the crime. In this case, the government conceded Barta was not predisposed to commit the charged crime. Therefore, to overcome Barta's entrapment defense, the government had to establish there was no government inducement. Inducement means government solicitation of the crime plus some "other governmental conduct" that creates a risk that a person who would not commit the crime, if left alone, would do so only because of the government's efforts. Other governmental conduct includes, repeated attempts at persuasion, fraudulent representations, promises of reward beyond that inherent in the commission of the crime and pleas based on sympathy or friendship.

Here, the court found the cumulative effect of the government's tactics directed at Barta amounted to inducement. First, the government repeatedly attempted to persuade Barta by frequently emailing and calling him, even though Barta did not respond to these communications. Second, the government invented false deadlines for Barta to commit to the deal, and invented false problems with the hospital. Third, as the sting operation progressed, the government significantly "sweetened" what would have already been an attractive financial deal to Barta and his co-defendants. Finally, the government pressed Barta to make a deal that it had reason to believe Barta would be making primarily to benefit one of his less fortunate friends. The court concluded the presence of these factors established the government induced Barta to commit a crime the government conceded Barta was not predisposed to commit.

Click **HERE** for the court's opinion.

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United States v. Reichling, 781 F.3d 883 (7th Cir. 2015)

Officers began an investigation after a fourteen-year-old female victim ended a two-year online Facebook relationship with a man, later identified is Reichling. During this time, the victim sent Reichling over three hundred naked pictures of herself from her cell phone. When the victim tried to end the relationship, Reichling threatened to show the pictures he already possessed to others if she stopped. In addition, Reichling sent the victim threatening and harassing text messages from his cell phone.

Officers established the IP address associated with the Facebook account was linked to Reichling's parents' residence and the threatening text messages were sent from a cell phone number registered to Reichling. Further investigation revealed Reichling either lived in his parents' residence or in a trailer on an adjacent property owned by the defendant's brother. A state court judge issued a warrant to search both locations, for among other things, "images, photographs, videotapes or other recordings or visual depictions representing the possible exploitation, sexual assault and /or enticement of children," as well as all "computers, cell phones, cameras, and digital storage devices including hard drives, thumb drives and videotapes."

Reichling eventually pled guilty to producing "a visual depiction of a minor engaged in sexually explicit conduct onto a Maxell VHS tape."

Reichling argued the search warrant affidavit, which detailed a largely online relationship between himself and the victim, failed to establish probable cause to seize digital and non-digital storage devices, including the VHS tape found at his home.

The court disagreed. When issuing search warrants, the issuing judge is allowed to draw reasonable inferences concerning where the evidence referred to in the affidavit is likely to be kept, taking into account the nature of the evidence and the offense. In addition, a judge may consider what "is or should be common knowledge." When the search warrant was issued in this case, the court held it was or should have been common knowledge to judges that images sent via cell phone or Facebook accounts may be readily transferred to other storage devices such as hard drives, thumb drives or VHS videotapes. As a result, the court concluded the search warrant affidavit established probable cause to believe images of the victim, Facebook messages, and text messages would be found in Reichling's parents' residence and the adjacent trailer. Given the large number of images involved, the duration of Reichling's interest in the victim, and the way various storage media work together, it was reasonable for the issuing judge to authorize the officers to search any computer or storage device in which images might be found.

Click **HERE** for the court's opinion.

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United States v. Procknow, 784 F.3d 421 (7th Cir. 2015)

Officers arrested Procknow and his girlfriend, Van Krevelen, in the lobby of a hotel where the couple had been staying. After their arrests, the hotel manager told officers the couple's hotel stay was being terminated and asked the officers to collect the dog believed to be in their room. The officers entered Procknow's room and secured the couple's dog. While in the room, officers saw documents, financial forms and other evidence that caused them to believe Procknow was involved in identity theft. The officers secured the room, obtained a search warrant and seized evidence related to identity theft. At trial, Procknow moved to suppress all the evidence, arguing the officers' initial warrantless entry into his hotel room violated the *Fourth Amendment*.

The court disagreed. The court ruled the hotel's termination of Procknow's occupancy was justified under Minnesota law. Once the hotel terminated Procknow's occupancy, the court held Procknow lost any reasonable expectation of privacy he might have had in the hotel room. After this occurred, the authority to consent to the officers' entry into the room reverted to the hotel. As a result, the court held the officers' entry into the hotel room did not violate the *Fourth Amendment* and the evidence seized was admissible against Procknow.

Click **HERE** for the court's opinion.

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United States v. Ruiz, 785 F.3d 1134 (7th Cir. 2015)

While conducting surveillance on the target of a drug investigation, officers saw Ruiz get into the target's vehicle, which was parked at a local mall. Ruiz got out of the vehicle

after two or three minutes and got into a car that was parked nearby. Once inside the car, the officers saw the car's brake lights activate and Ruiz manipulate some of the driver controls in the vehicle such as those for the air conditioner, windshield wipers and the windows. The officers then saw Ruiz reach behind the seat and appear to put something in the rear passenger area of the car. One of the officers testified that based on his training and experience in drug investigations that hidden or trap compartments in vehicles can be opened by manipulating the controls of the vehicle as Ruiz had done.

The officers followed Ruiz after he drove away from the mall and requested a marked police car attempt to develop independent probable cause to stop Ruiz. During this time, the officers noticed that Ruiz's car had Wisconsin license plates but that Ruiz drove past the on-ramp for the interstate that led back to Wisconsin. Ruiz eventually parked in a residential driveway with a "for rent" sign in the yard without committing any traffic infractions and allowed the marked police car to drive past. Once the marked police car was out of sight, the original officers saw Ruiz manipulate the driver controls and reach around into the rear of his car as he had done in the mall parking lot. As Ruiz began to back out of the driveway, the officer in the marked police car drove back past Ruiz. Ruiz immediately stopped his car and shifted it into park.

At this point, the original officers, in plainclothes, approached Ruiz's car and identified themselves as police officers. Ruiz gave the officers his driver's license, which listed his address as a city in southern Texas. Ruiz told the officers he parked in the driveway because he was interested in the house as advertised as being for rent, and that he had previously been at the mall visiting a furniture store. In response to the officers' questions, Ruiz denied having drugs or hidden compartments in his car and consented to a search of it. After a ten-minute search revealed no drugs, the officers asked Ruiz if he would follow them to the nearby police station so the officers could have a drug-sniffing canine check his car. Ruiz agreed, and followed the officers to the police station in his car. Once at the station, the officers told Ruiz they thought they had seen him operating a trap door in his car while parked at the mall. In response, Ruiz admitted his car had two traps and opened them for the officers. Inside the traps, the officers recovered heroin. Afterward, Ruiz signed a written waiver of his *Miranda* rights and made incriminating statements to the officers.

After the government charged Ruiz with possession with intent to distribute heroin, he filed a motion to suppress the evidence discovered in his car.

First, Ruiz argued the officers violated the *Fourth Amendment* because the officers did not have reasonable suspicion to approach and detain him while he was parked in the residential driveway and that the duration of the stop was unreasonable.

The court disagreed, noting Ruiz's actions, when considered together, provided the officers with reasonable suspicion to believe Ruiz was involved in criminal activity. First, Ruiz had a brief encounter with the target of a drug investigation in the mall parking lot, and then Ruiz entered his car and manipulated the driver controls in a manner consistent with the operation of a trap. Second, Ruiz passed the on-ramp to the interstate, which would have taken him to Wisconsin. Third, Ruiz pulled into the residential driveway and repeated the same steps as he had done in the mall parking lot consistent with the operation of a trap. Finally, when Ruiz began backing out of the driveway, he

stopped and put his car into park. This behavior was consistent with the behavior of someone attempting to evade notice by the police, and not consistent with the behavior of a person looking at the house as a potential renter. The court further held the duration of the stop, thirty minutes, was reasonable as all of the officers' actions and questions were related to investigating Ruiz's potential involvement in illegal drug activity.

Second, Ruiz argued his initial encounter with the officers was custodial; therefore, all of the statements he made before receiving *Miranda* warnings at the police station should have been suppressed.

The court disagreed, holding that Ruiz was not in custody for *Miranda* purposes prior to receiving the *Miranda* warnings inside the police station. First, the encounter between the officers and Ruiz occurred in a public area, and the officers spoke to Ruiz in a calm, courteous manner. Second, the officers were in plainclothes and they did not display their weapons or use any force against Ruiz. Third, the officers' unmarked vehicles did not block the driveway where Ruiz had parked his car. Fourth, the officers let Ruiz drive his car to the police station, and allowed him to retain possession of his driver's license and cell phones. Finally, once at the police station, the officers allowed Ruiz to park in a public lot rather than a secure lot and then the officers spoke to Ruiz beside his car in the public lot.

Third, Ruiz argued that his consent to drive to the police station and then open the traps was not voluntary.

Again, the court disagreed, finding the officers used no physical coercion, they spoke to Ruiz in a calm conversational manner and Ruiz readily agreed to drive his car to the police station.

Click **HERE** for the court's opinion.

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United States v. Shields, 789 F.3d 733 (7th Cir. 2015)

Two police officers saw Shields' parked SUV partially blocking a crosswalk, in violation of the law. One of the officers approached Shields, who was sitting in the driver's seat of the SUV and asked for his driver's license. After handing the officer his license, Shields voluntarily exited the SUV and at the officer's request, walked toward the rear of the vehicle with the officer. When Shields reached the rear of the SUV, he did not stop to talk to the officers, but instead fled down the street. While chasing Shields on foot, one of the officers saw Shields pull a firearm out of his coat pocket. The officer caught Shields in an alley and pushed him to the ground. The officer handcuffed Shields and discovered a loaded revolver on the ground underneath him. The government charged Shields with being a felon in possession of a firearm.

Shields filed a motion to suppress the firearm, arguing the officers conducted an unlawful traffic stop.

First, the court held when the officers saw Shields' SUV blocking the crosswalk, they had reasonable suspicion to conduct a *Terry* stop to investigate the parking offense. Second,

Shields' decision to run from the officers constituted another violation because Shields was interfering with the performance of the officers' duty to investigate and, if appropriate, hold him accountable for the parking violation. Finally, once the officer saw Shields remove the firearm from his pocket he had probable cause to arrest Shields for unlawful carrying of a firearm. As a result, the court held the officer lawfully seized Shields when he tackled Shields in the alley and lawfully seized the firearm, which was in plain sight on the ground underneath Shields.

Click **HERE** for the court's opinion.

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United States v. Gary, 790 F.3d 704 (7th Cir. 2015)

An undercover officer saw Gary talking on a cell phone in the passenger seat of a car when the officer bought heroin from the driver of the car. During this time, the driver did not attempt to conceal the drug transaction from Gary. A short time later, uniformed officers conducted a traffic stop of the car at the request of narcotics officers. During the stop, officers discovered heroin on the driver of the car and arrested him. In addition, the officers handcuffed and transported Gary to the police station so his parole officer could speak to him. The government later indicted Gary for conspiracy to distribute heroin.

Gary argued the officers did not have probable cause to seize him and transport him to the police station because the arresting officer admitted the sole reason Gary was seized was to bring him to speak with his parole officer. Gary also argued his mere presence in the car with the driver who sold drugs to the undercover officer was not enough to establish probable cause to arrest him.

While conceding that Gary's seizure amounted to an arrest, the government argued Gary's arrest was supported by probable cause.

The court agreed with the government, holding the arresting officer's subjective intent in arresting Gary was irrelevant as long as there was objective probable cause for the arrest. Here, the court concluded there was probable cause for the undercover officer to believe Gary conspired with the driver of the car who sold him the heroin. First, Gary was sitting next to the driver when the driver sold the officer heroin without any attempt to conceal the transaction. In such close quarter, the court determined it was reasonable to infer that Gary and the driver were probably engaged in a common criminal enterprise. Given the reasonable inference that Gary was engaged in a common and unlawful enterprise with the driver, the officer did not arrest Gary because of his mere presence in the car.

Click **HERE** for the court's opinion.

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United States v. Harris, 791 F.3d 772 (7th Cir. 2015)

Watkins went inside a bank to obtain a cash advance while Harris waited outside in his truck. The credit card Watkins used had been issued on the account of another person. A bank employee called officers after becoming suspicious of the transaction. Officers responded and arrested Watkins. When the officers searched Watkins, they found

another credit card issued in someone else's name as well as a slip of paper containing personally identifiable information (PII) belonging to a different person. After the officers placed Watkins in a patrol car, she asked them to retrieve her personal belongings from Harris' truck. The officers seized a backpack, a notebook and a wallet from Harris' truck. The notebook contained PII belonging to fourteen people.

The government indicted Harris for conspiracy to commit identity theft and credit card fraud.

Harris filed a motion to suppress the notebook seized from his truck, arguing its removal from his truck violated the *Fourth Amendment*.

The court disagreed, holding the officers lawfully searched Harris' truck under the automobile exception to the *Fourth Amendment's* warrant requirement. Under the automobile exception, where there is probable cause to believe a vehicle contains contraband or evidence of a crime, officers may conduct a warrantless search of the vehicle. In this case, the court held the officers established probable cause Harris' truck contained evidence of identity theft. First, officers had just arrested Watkins and seized from her two credit cards not issued in her name as well as a slip of paper that contained the PII of another person. Second, Watkins arrived at the bank, to commit fraud with those credit cards, in Harris' truck. Consequently, the court concluded it was reasonable for the officers to believe there would be further evidence of the identity fraud located in Harris' truck.

Click **HERE** for the court's opinion.

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United States v. Leo, 792 F.3d 742 (7th Cir. 2015)

Two police officers stopped and handcuffed Leo and Aranda after they developed reasonable suspicion the men had just attempted a burglary, and that one of the men had a gun. One of the officers frisked Aranda, but found nothing. The other officer frisked Leo, but did not find a gun. The officer then opened and emptied Leo's backpack, which the officer had taken from Leo and placed on the ground. Inside Leo's backpack the officer found, among other things, a loaded revolver. The officers later discovered Leo had a felony conviction and arrested him for being a felon in possession of a firearm.

The sole issue on appeal was whether the officers lawfully searched Leo's backpack for weapons.

Leo conceded that under *Terry*, the officers lawfully could have patted down the backpack to search for weapons. However, Leo argued the officers' safety concerns did not justify opening and emptying the backpack because Leo was handcuffed and the backpack was out of his reach when the officers searched it.

The court agreed with Leo, holding the warrantless search of his backpack exceeded the scope of a *Terry* frisk. The court recognized a lawful *Terry* frisk of a person may include a pat-down of the suspect's effects, including a bag. The court further noted the reasonableness of such a search is evaluated on the basis of the facts as they existed at the

time of the search. Here, the court found at the time of the search, Leo's hands were cuffed behind his back, the officers already had frisked Leo and Aranda and found no weapons, and the officer was in control of the backpack. Consequently, the court held that when the officer unzipped and emptied the backpack, it was inconceivable that either Leo or Aranda would have been able to lunge for the bag, unzip it, and obtain the gun inside.

Click **HERE** for the court's opinion.

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United States v. Smith, 794 F.3d 681 (7th Cir. 2015)

Two uniformed officers were on bicycle patrol at 10:00 p.m. when they heard gunshots fired north of their location. The officers rode toward the area where they thought the shots originated, and saw Smith crossing the street. Smith had just left an alley on the east side of the street, and was preparing to enter an alley on the west side of the street. Smith was not running or engaging in any other suspicious behavior, nor was he coming from the direction where the shots were reportedly fired. The officers rode ahead of Smith into the alley, then made a U-turn to face Smith. The officers stopped approximately five feet in front of Smith, positioning their bicycles at 45-degree angles to face him. Neither officer identified himself as an officer or asked Smith for identification. Instead, one of the officers got off his bicycle, approached Smith with his hand on his gun and asked Smith if he had any guns, knives, weapons or anything illegal on him. Smith told the officer he had a gun, but that he did not have a concealed weapon permit. The officers handcuffed Smith, seized a handgun from his pocket and arrested him. The government indicted Smith for being a felon in possession of a firearm.

Smith filed a motion to suppress the handgun, arguing the officers violated the *Fourth Amendment* because they did not have reasonable suspicion to stop him in the alley.

The district court held the officers did not seize Smith for *Fourth Amendment* purposes when they confronted him in the alley; therefore, the handgun discovered on Smith was not subject to the exclusionary rule. Smith appealed.

The Seventh Circuit Court of Appeals reversed the district court. The court recognized that a *Fourth Amendment* seizure does not occur when an officer approaches an individual and asks him questions. Instead, the test to determine if an individual has been seized is whether taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not free to ignore the police presence and go about his business.

In this case, two police officers waited for Smith to enter the alley, rode past him and then made a U-turn to face him. When they were five-feet from Smith, the officers stopped and positioned their bicycles at an angle obstructing his intended path. One of the officers approached Smith with his hand on his gun and neither officer identified himself. Instead of asking Smith whether he had heard any gunshots, the officer asked Smith in an accusatory manner if he had any weapons on his person. Given these facts, the court concluded a reasonable person in Smith's situation would not have felt free to ignore the police presence and go about his business. As a result, the court held that

Smith was seized for *Fourth Amendment* purposes when the officers encountered him in the alley.

Because the government conceded at oral argument that the officers did not have reasonable suspicion to detain Smith, the court held the handgun recovered from Smith should have been suppressed.

Click **HERE** for the court's opinion.

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United States v. Bentley, 795 F.3d 630 (7th Cir. 2015)

An officer conducted a traffic stop after he saw the car Bentley was driving crossed the fog line in violation of Illinois law. During the stop, another officer brought his drug-detection dog, Lex, to the scene. After Lex alerted to the presence of drugs in the car, the officers searched it and found nearly fifteen kilograms of cocaine in a hidden compartment. The government charged Bentley with possession with intent to distribute cocaine.

Bentley argued the drugs discovered in the car should have been suppressed because the officer did not have reasonable suspicion to support the initial stop. Alternatively, Bentley argued that Lex's alert was not sufficiently reliable to support probable cause to justify the warrantless search of the car.

The court disagreed. First, the officer's testimony was supported by video from his patrol car that clearly showed Bentley's car cross the fog line, a violation of Illinois law. As a result, the court held this evidence provided the officer with probable cause for the traffic stop. Second, the court held the district court properly held the totality of the circumstances established Lex's alert was reliable enough to support probable cause to search Bentley's car. Although Lex only had a 59.5% field accuracy rate, the government introduced other evidence, to include, Lex's success rate in controlled settings, testimony from Lex's handler, as well as testimony from the founder of the training institute Lex attended, all of which Bentley's attorney was allowed to challenge on cross-examination. In addition, Bentley's attorney was allowed to introduce evidence from his own expert witness. The district judge then weighed all the evidence and credited the government's experts over Bentley's, concluding Lex's alert was reliable enough to support probable cause.

Click **HERE** for the court's opinion.

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United States v. Gregory, 795 F.3d 735 (7th Cir. 2015)

An anonymous informant contacted a federal agent and told him that Gregory and Cipra were maintaining an indoor marijuana-grow operation in the basements of two adjacent houses in which the men lived. The informant told the agent he had been in the basement of one of the houses within the last two months, and provided the agent with photographs depicting the marijuana plants growing in the basement. The informant told the agent there were similar marijuana plants growing in the basement of the adjacent residence. A

few weeks later, the informant told law enforcement officers that Gregory maintained the grow-operation while Cipra was the primary seller. The informant added that the men maintained a year-round harvest, and that he had seen both men in possession of firearms while in the residences. In addition, the informant provided officers with detailed descriptions of the vehicles owned by the men.

Officers verified much of the information provided by the informant. Specifically, the officers learned that Gregory and Cipra were the owners of the residences reported by the informant, that both men had valid Firearms Owners Identification Cards, and the men owned vehicles as described by the informant. Based on the information provided by the informant, as well as their own corroboration of that information, officers obtained warrants to search both residences. Officers executed the warrants and discovered a large-scale marijuana-grow operation in the basements of both residences. As a result, the government charged Gregory, Cipra and two other men with drug and weapon offenses.

Gregory and Cipra filed a motion to suppress the evidence seized during the execution of the warrants, arguing that the search warrants lacked probable cause.

A search warrant affidavit establishes probable cause "when it sets forth facts sufficient to induce a reasonably prudent person to believe that a search will uncover evidence of a crime." When an application for a search warrant is supported by an informant's tip, courts consider the totality of the circumstances to determine whether that information establishes probable cause for the search, including: (1) the extent to which the police have corroborated the informant's statements; (2) the degree to which the informant has acquired firsthand knowledge of the events; (3) the amount of detail provided; (4) the amount of time between the date of the events and the application for the search warrant; and (5) whether the informant personally appeared before the judge issuing the warrant.

Here, the court held the informant's detailed information was largely corroborated by the officers, which demonstrated the informant's first-hand knowledge of the marijuana-grow operation. For example, the informant provided accurate information about where Gregory and Cipra lived, what cars they drove and that they owned firearms. In addition, the informant supplied the officers with photographs of the marijuana plants as well as details concerning each man's specific role in the operation. Although the informant has not been in either residence for two months, the court found that factor was not significant given the ongoing continuous criminal activity involved. In addition, the court was not concerned that the informant's failure to appear in person to testify when the court issuing the search warrant made its probable cause determination. The court concluded the informant's specific first-hand information, which was corroborated by the officers established probable cause to search the residences.

Click **HERE** for the court's opinion.

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United States v. Sturdivant, 796 F.3d 690(7th Cir. 2015)

After officers arrested Sturdivant for several armed robberies, he agreed to be interviewed. At the beginning of the interview, the officers learned that Sturdivant was an insulin-dependent diabetic; however, Sturdivant did not exhibit any symptoms of suffering from low blood sugar. During the interview, an officer told Sturdivant they had recovered DNA evidence that linked him to one of the crime scenes; however, the officer knew no such DNA evidence existed. After Sturdivant denied any involvement in the robberies, the officers stopped questioning for the evening.

The next day, Sturdivant agreed to be interviewed again. After waiving his *Miranda* rights, Sturdivant confessed to the robberies, and then took the officers to the location where he had discarded the firearm he had used. Afterward, Sturdivant asked the officers if he could see his mother, and the officers drove him to his home and allowed his mother to sit with him for approximately twenty minutes in the back of the police car. While speaking with his mother, Sturdivant told the officers he was not feeling well and vomited on the ground outside the car. The officers then transported Sturdivant back to the police station where they gave him a meal and asked him if he would be willing to be interviewed again on video. Sturdivant agreed. At the beginning of the interview, an officer confirmed that Sturdivant was diabetic, and when asked how he was feeling, Sturdivant answered, "I am feeling alright." Sturdivant answered all of the officers' questions clearly and confessed, for a second time, to his involvement in the robberies.

Sturdivant argued his two confessions to the officers should have been suppressed because he gave them involuntarily. First, Sturdivant claimed the officers' indifference to his diabetic condition and the physical distress it caused him, amounted to coercion. Second, Sturdivant claimed he was coerced to confess by the officerss' false representation that they had recovered his DNA from the crime scene.

Concerning Sturdivant's first confession, which occurred before he vomited, the court noted that Sturdivant did not tell the officers he was suffering from the effects of diabetes or ask for his insulin. In addition, the officers, who were familiar with the symptoms exhibited by a diabetic with low blood sugar, did not observe any signs that Sturdivant was suffering from the effects of diabetes.

As for his second confession, Sturdivant confirmed on video that he was "feeling alright," he was attentive, he appeared to understand what was going on, and he did not exhibit any signs that he was suffering from the effects of diabetes. Consequently, the court held there was no basis to conclude that Sturdivant's diabetes or the officers' indifference to his condition caused him to involuntarily confess.

The court further held the officer's false statements concerning the DNA evidence did not overcome Sturdivant's freewill and cause him to confess. The court noted that "a lie that related to the suspect's connection to a crime is the least likely to render a confession involuntary." In addition, when confronted with the false DNA evidence, Sturdivant continued to deny his involvement in the robberies until the next day.

Click **HERE** for the court's opinion.

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United States v. Reaves, 796 F.3d 738 (7th Cir. 2015)

Officers suspected Reaves was involved in heroin trafficking in Peoria. An informant told officers that Reaves drove to Detroit in a white Chrysler Pacifica to get his heroin supply. After confirming that Reaves owned a white Chrysler Pacifica, the informant picked Reaves out of a line up, and then made four controlled heroin buys from him. After the fourth buy, officers obtained a warrant to attach a GPS tracker on Reaves' Pacifica. When information from the GPS tracker indicated that Reaves' Pacifica was driving back to Peoria from Detroit, officers got behind him on the highway. After an officer saw the Pacifica illegally drift into a different lane without signaling, he conducted a traffic stop. Officers searched Reaves' car and found heroin.

The government charged Reaves with possession with intent to distribute heroin.

Reaves argued the evidence seized from his car should have been suppressed, claiming the officer did not have probable cause to conduct the traffic stop and that the warrantless search of his car was unlawful.

The court disagreed.

First, the court held the officer conducted a lawful traffic stop after he saw Reave's car drift over the traffic line on the highway.

Next, the court held the officers lawfully searched Reaves' car under the automobile exception to the *Fourth Amendment's* warrant requirement. Under the automobile exception, officers do not need a warrant to search a vehicle when they have probable cause to believe it contains evidence of a crime. Probable cause to search a suspect's vehicle under the automobile exception can be based, in part, on information provided by an informant. Here, the informant told the officers that Reaves would drive his white Chrysler Pacifica to Detroit to receive his heroin supply and then return to Peoria. The officers confirmed this information by monitoring Reaves' movements through the use of the GPS tracker. As a result, the court concluded a reasonable officer would have probable cause to believe Reaves' car contained evidence of drug trafficking, which would support the warrantless search of his car.

Click **HERE** for the court's opinion.

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United States v. Witzlib, 796 F.3d 799 (7th Cir. 2015)

After officers received information that Witzlib was manufacturing M-80s in the basement of his grandmother's house, they contacted an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives. The officers and the agent went to the grandmother's house and obtained her consent to search the basement for fireworks where they found approximately one thousand M-80s. Witzlib was arrested and charged with unlawful manufacturing of explosive materials.

Although his grandmother owned the house, Witzlib argued the officers were also required to obtain his consent before they could lawfully search the basement.

The court disagreed. Even though Witzlib lived in the house, his grandmother, as owner of the house, had authority to consent to a search of the common areas, such as the basement. As a result, Witzlib could not reasonably believe that just because some of his possessions, the M-80s, were located in the basement, that his grandmother could not authorize a search of it.

Click **HERE** for the court's opinion.

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United States v. Flores, 798 F.3d 645 (7th Cir. 2015)

A state trooper stopped Flores for improper display of a license plate after he saw that the license plate frame on Flores' car partially covered some of the letters on the plate. Although the license plate frame partially covered some of the letters, when the trooper pulled behind Flores, the letters on the plate were clearly visible and legible to the trooper. While the trooper was writing Flores a ticket, another officer and his canine partner conducted a free-air sniff around the car. After the dog alerted, the officers searched Flores' car and found over five kilograms of heroin in a compartment in the engine. Flores was arrested, and after being read his *Miranda* rights, he confessed that he had been paid to transport the heroin from Mexico to Ohio.

Flores argued the evidence seized from his vehicle and his statements should have been suppressed because it was unreasonable for the trooper to believe Flores violated the plate-display statute. Flores claimed the statute only prohibits license plate obstructions that interfere with an officer's ability to read the information on the license plate.

The court agreed, holding it was not reasonable for the officer to believe the license plate frame on Flores' vehicle violated the statute. The court noted that Illinois courts have long held the plate-display statute requires only the plate's information be clearly visible and legible. In this case, even though the frame covered a portion of some letters, the trooper testified that as he got close to Flores' vehicle, he could read the letters on Flores' license plate. The court concluded if the frame does not impede a reasonable officer from reading a plate, then it is not reasonable to believe that the plate's information is not clearly visible and legible. As a result, the court held the traffic stop was unlawful and the drugs seized and Flores' confession should have been suppressed.

Click **HERE** for the court's opinion.

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Gustafson v. Adkins, 803 F.3d 883 (7th Cir. 2015)

Adkins, a detective at a Department of Veterans Affairs Medical Center, installed a hidden surveillance camera in the ceiling of an office used by female police officers as a changing area. Gustafson, a police supervisor, learned the camera had captured images of her changing from early 2007 through April 2009, and sued Adkins. Gustafson claimed Adkins violated the *Fourth Amendment* by subjecting her to an unreasonable search.

Adkins argued he was entitled to qualified immunity, claiming his actions did not violate a clearly established constitutional right of which a reasonable law enforcement officer in his position would have known.

The court disagreed. In 1987, the United States Supreme Court decided *O'Connor v. Ortega*, holding that an employer's workplace search must be reasonable. The Court found the reasonableness of a search depends upon the circumstances presented in a given situation, and upon balancing the public, governmental, and private interests at stake.

In a case that presented a "flagrant *Fourth Amendment* violation," the court concluded the Supreme Court had clearly established the right of employees to be free from unreasonable employer searches by the time Adkins installed the hidden surveillance equipment in 2007.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/15-1055/15-1055-2015-10-16.pdf?ts=1445023844

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United States v. Sands, 815 F.3d 1057 (7th Cir. 2015)

A confidential informant told Officer Williams that Sands was selling narcotics out of a car at a specific location in Chicago. Officer Williams drove to the location and conducted surveillance. During this time, Officer Williams saw Sands engage in a hand-to-hand transaction through the driver's side window with another individual. Based on his training and experience, Officer Williams believed he had just observed a narcotics transaction. Officer Williams relayed this information to Officer Kilroy who was in a police cruiser, which was parked out of sight of Sands' car, and ordered Officer Kilroy to arrest Sands. Officer Kilroy drove his police cruiser to where Sands was located, and parked two or three feet from the front bumper of Sands' car. When Officer Kilroy got out of his cruiser, he saw Sands holding a firearm in his right hand. Officer Kilroy then saw Sands place the firearm in the center console. Officer Kilroy drew his firearm and ordered Sands out of his car. When Sands did not comply, Officer Kilroy opened the driver's side door and physically removed Sands from the vehicle. After securing Sands, Officer Kilroy searched Sands' car and found a firearm and marijuana under a false floor in the center console.

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

Sands moved to suppress the evidence seized from his car. First, Sands argued he was arrested when Officer Kilroy parked his police cruiser in front of his car, and that Officer Kilroy did not have probable cause to arrest him at that time. As a result, Sands claimed Officer Kilroy's observations and the evidence seized from his car should have been suppressed.

The court disagreed.

First, the court held Officer Kilroy's parking his police cruiser in front of Sands' car, without lights, sirens or guns drawn did not constitute an arrest. The court explained an

arrest occurs once the suspect has submitted to an officer's show of authority. In this case, Sands did not initially comply with Officer Kilroy's order to get out of his car. Consequently, the court found Sands was not arrested until Officer Kilroy physically removed Sands from his car.

Second, the court held there was probable cause to arrest Sands when Officer Kilroy removed Sands from his car. Officer Williams received information from an informant who had provided reliable information for over six years. After receiving this information, Officer Williams corroborated the information through surveillance, and then he saw Sands engage in a hand-to-hand transaction, that based on his training and experience, was a narcotics transaction. As a result, the court concluded Officer Williams established probable cause to arrest Sands.

Third, the court held the information known by Officer Williams, which established probable cause to arrest Sands, was imputed to Officer Kilroy under the collective knowledge doctrine. The collective knowledge doctrine allows an officer to conduct a stop or effect an arrest at the direction of another officer, even if the officer conducting the stop or arrest does not have firsthand knowledge of the facts that established the reasonable suspicion or probable cause.

Finally, the court held the warrantless search of Sands' car was lawful. After Officer Kilroy parked his police cruiser in front of Sands' car, he saw Sands place a firearm in the center console. Based on this observation and the information provided by Officer Williams that Sands had just engaged in a narcotics transaction in his car, Officer Kilroy had probable cause to believe Sands' car contained contraband or evidence of a crime. As a result, the search of Sands' car was lawful under the automobile exception to the warrant requirement.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-3409/14-3409-2015-11-04.pdf?ts=1446669054

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United States v. Rahman, 805 F.3d 822 (7th Cir. 2015)

In the early morning hours of January 19, 2010, firefighters responded to a fire in a building that housed a business belonging to Rahman. The building was comprised of a first and second floors and a basement. Later that morning, fire investigators obtained Rahman's written consent to search the building to look for the "origin and cause" of the fire. On January 20, an investigator viewed surveillance video from another building that indicated the fire originated above the basement. On January 21, investigators believed the fire started somewhere between the first and second floors and not in the basement. On January 22, investigators searched the basement looking for the remains of valuable items in the ashes. According to investigators, the lack of the remains of valuable items can be evidence of criminality, as thieves sometimes commit arson to hide evidence of burglary. After searching through the rubble in the basement, investigators found neither a safe nor a laptop computer that Rahman previously told the investigators were in the basement. However, during their search, the investigators seized two doors from the basement, which they sent a laboratory to determine if any ignitable liquid was present.

At the conclusion of the investigation, the government charged Rahman with arson and several other federal offenses.

Rahman argued the investigators' observations concerning the absence of the computer and safe, as well as the two doors seized from the basement should have been suppressed. Rahman claimed his written consent to search the building for the fire's "origin and cause" did not include consent to search for evidence of arson.

The court agreed. First, the court held an objectively reasonable person would conclude that when investigators asked Rahman for consent to search the building to determine the "origin and cause" of the fire, that person would understand the request to be for consent to determine where the fire started and what started it, not a search for evidence of arson. Second, by January 21, the investigators had ruled out the basement as the origin of the fire. Finally, an investigator testified the primary reason he searched the basement on January 22 was to find evidence of criminal activity. As a result, the court held the investigators search on January 22 exceeded the scope of Rahman's consent to search because the investigators had already ruled out the basement as the origin of the fire when they conducted their search, and that Rahman's consent did not include a search for evidence of arson.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/13-1586/13-1586-2015-11-09.pdf?ts=1447086650

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United States v. Sanford, 806 F.3d 954 (7th Cir. 2015)

A state trooper stopped a car for speeding on I-55. During the stop, the trooper learned the car had been rented earlier that day, but neither the driver nor either of the two passengers had rented it nor was authorized by the rental contract to drive the car. The trooper asked the occupants for identification and ran a criminal history check. The check revealed Sanford and the other passenger were affiliated with a notorious street gang, that Sanford had a record of 19 arrests for a variety of offenses including drug offenses, and that the other passenger had a recent drug arrest. The trooper requested a drug-detection dog, which arrived and alerted to the presence of drugs approximately 26 or 27 minutes into the stop. The troopers searched the car and found 1.5 kilograms of cocaine in the trunk.

The government charged Sanford with possession with intent to distribute cocaine.

Sanford argued the cocaine should have been suppressed. Sanford claimed it was unlawful for the trooper to prolong a traffic stop for speeding by looking up his criminal history as well as the criminal history of the other passenger.

The court disagreed. First, the court recognized that officers are allowed to check the criminal histories of a vehicle's occupants during traffic stops without any additional suspicion of criminal activity.

Second, the court did not determine whether Sanford had standing to object to the search of the car by virtue of being a mere passenger in the car. Instead, the court held Sanford

had standing to object to the seizure of his person that occurred when the trooper stopped the car for speeding, and then the right to challenge any search that occurred because of that seizure.

Third, while Sanford had standing to object to the traffic stop, the court held the trooper did not unreasonably prolong the duration of the stop to wait for the drug-dog to arrive. The trooper testified his suspicions were aroused by a combination of facts he knew or quickly learned when he stopped the car. For example, the trooper knew I-55 is a drug corridor, and that drug couriers often use cars rented by third parties. In addition, during the stop the trooper testified the occupants were nervous and evasive, reluctant to speak, and made poor eye contact with him. Finally, the criminal histories the trooper discovered made it reasonable to wait for a few more minutes for the drug dog to arrive.

The court added that while the trooper did not do so, he could have extended the duration of the stop by calling the car rental agency to see if it wanted him to impound the car. The rental contract prohibited anyone from driving the car whom the contract did not authorize to drive it, and none of the three persons in the car was authorized.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-2860/14-2860-2015-11-25.pdf?ts=1448474713

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Eighth Circuit

United States v. Gunnell, 775 F.3d 1079 (8th Cir. 2015)

Federal agents suspected Gunnell was a methamphetamine dealer. After the agents saw Gunnell riding a motorcycle, they contacted a local officer and asked him to "develop probable cause" to stop Gunnell so officers could search Gunnell and his motorcycle.

Later that day, the officer saw Gunnell leave an apartment building with a blue bag that he placed in the right saddlebag on his motorcycle. Gunnell got on the motorcycle and drove down the street, followed by the officer. The officer stopped Gunnell for speeding after he observed Gunnell driving ten miles per hour over the speed limit. Gunnell did not have his driver's license with him, so the officer took Gunnell's information verbally to conduct a record check. Approximately five minutes later, a K-9 officer arrived with his drug dog, Raider, who alerted to the right rear area of the motorcycle where Gunnell had placed the blue bag. Officers searched Gunnell's motorcycle and found the blue bag, which contained one pound of methamphetamine and drug paraphernalia. The government charged Gunnell with possession with intent to distribute methamphetamine.

Gunnell argued the traffic stop initiated by the officer violated the *Fourth Amendment*.

The court disagreed. Even if the officer's primary intent was to stop Gunnell in order to further a drug investigation, the traffic violation provided probable cause to support the stop. The court added, "any ulterior motivation" on the officer's part "is irrelevant."

The court further held the officer did not unlawfully extend the duration of the stop while waiting for the K-9 officer to arrive. There was undisputed testimony that it took the K-9 officer approximately five minutes to arrive once his presence was requested. In addition, when the K-9 officer arrived, the officer was still running Gunnell's information through the computer and had yet to complete tasks related to the purpose of the original stop.

Finally, the court held Raider's alert on Gunnell's motorcycle was reliable even though the K-9 officer and Raider had not undergone drug detection training as a pair, but rather, received certification individually before being paired to work in the field. In this case, the K-9 officer and Raider had each undergone a 13-week training program before receiving their certifications to work as a drug-detection team. Once paired together, they had additional training every week, and they had been working as a team for approximately six-weeks before Gunnell's traffic stop.

Click **HERE** for the court's opinion.

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United States v. Patrick, 776 F.3d 951 (8th Cir. 2015)

Federal agents had an outstanding warrant to arrest Barefield, but could not locate him. A confidential informant (CI) contacted the agents and agreed to arrange a meeting with a person the CI believed was Barefield. The CI told the agents Barefield would be driving a gold colored car with a dented passenger-side door, and would have a plastic water

bottle containing drugs. At the appointed time, a gold colored car with a dented passenger-side door arrived at the meeting location and parked near the CI. A few minutes later, the car drove away; however, the agents were not able to positively identify the driver as Barefield. The agents contacted a local officer who conducted a traffic stop on the car. When the officer removed the driver from the car, he saw a clear water bottle in the center console, which appeared to have a leafy substance floating in it. After the driver was secured in the officer's patrol car, the agents arrived and searched the car for drugs. The agents saw the water bottle in the center console and discovered the top of the bottle could be removed to access packages of marijuana and fake cocaine inside. The agents also seized a digital scale from the glove box. The agents eventually discovered the driver of the car was Broderick Patrick, not Barefield. The government indicted Patrick for possession with intent to distribute marijuana.

Patrick moved to suppress the evidence seized during the stop, arguing the traffic stop and search of his car violated the *Fourth Amendment*.

The court disagreed. Even though the CI mistakenly identified the driver as Barefield, the court found the CI's willingness to arrange the meeting, and his accurate description of the car and water bottle, supported a reasonable belief that his information was credible. Even disregarding the misidentification of the driver, the court concluded the other information provided by the CI established probable cause to believe the driver of the car, whoever it might be, had committed a crime. Therefore, the court held the officer was justified in conducting a traffic stop on the gold colored car.

The court further held the search of Patrick's car was lawful because when the officer removed Patrick from the car, he saw what appeared to be drugs in the water bottle located in the center console. In addition, the officers were entitled to search Patrick's car incident to his arrest, as it was reasonable for the officers to believe the car contained evidence related to Patrick's arrest for possession of marijuana.

Click **HERE** for the court's opinion.

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United States v. Williams, 777 F.3d 1013 (8th Cir. 2015)

An officer conducted a traffic stop and arrested Williams for theft. During the arrest, Williams refused verbal commands and resisted attempts to handcuff him. Officers then used physical force to eventually handcuff and control Williams. Pursuant to department policy, the arresting officer conducted an inventory search of Williams' car. In the trunk of the car, an officer found a duffel bag that contained a loaded AK-47 rifle. Williams later admitted to the officers that he had stolen the firearm. The government indicted Williams for a variety of federal firearms offenses.

Williams moved to suppress the rifle, arguing the officer's decision to impound his vehicle which led to the search and seizure of the rifle violated the *Fourth Amendment*.

The court disagreed. It is well-settled law that an officer, after lawfully taking custody of an automobile, may conduct a warrantless inventory search to secure and protect the vehicle and its contents. Here, the department's tow policy left it up to an officer's

discretion whether to tow a vehicle after an arrest. The court commented that the *Fourth Amendment* allows the exercise of such discretion as long as that discretion is exercised according to standard criteria, and not based on the desire to search a vehicle for evidence of criminal activity.

Here, the court concluded the inventory search was lawful because it was conducted pursuant to department policy, and not as punitive action toward Williams, or as a search for additional criminal evidence. First, the officer decided to tow Williams' vehicle because the officer did not want to leave it in a high-crime neighborhood when he knew Williams might not be able to bond out of jail to retrieve it for some time. Second, if the officer had decided to leave the vehicle, per agency policy, he would have needed to get written permission from Williams. As Williams had just resisted arrest, the officer did not want to release Williams from handcuffs so Williams could sign the "Authorization Not to Tow" form. Finally, Williams was alone, and he was the only registered owner of the car, so there was no other licensed driver at the scene to whom the vehicle could be released.

The court further held the officer's failure to inventory all of the loose items of minimal value located in William's car did not render the entire search invalid.

Click **HERE** for the court's opinion.

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United States v. Corrales-Portillo, 779 F.3d 823 (8th Cir. 2015)

After officers with the Des Moines, Iowa Police Department arrested an individual on drug charges, the man agreed to cooperate with the officers as a confidential informant (CI) with an ongoing narcotics investigation. The CI, who had not previously cooperated with the department, provided detailed information about his drug supplier, later identified as Jose Corrales-Portillo. Specifically, the informant told the officers Jose obtained drugs in Arizona, transported them to a location in Nebraska, and then brought the drugs to Des Moines. This information corroborated information the officers had discovered earlier in the investigation. A short time later, the CI, in the presence of officers, made a recorded call and texted the defendant to arrange the purchase of three pounds of methamphetamine.

The following week, the CI told the officers Jose was in Nebraska and that he would deliver the drugs to Des Moines later that day. The CI contacted officers throughout the day, forwarding Jose's text messages to them, as well as telling the officers the time and place of the meeting with Jose. In addition, the CI told the officers he expected Jose to be driving a blue truck with Arizona or Nebraska license plates and that the drugs would be located in the truck's gas tank.

The officers conducted surveillance of the meeting location and saw Jose arrive in a blue truck with Nebraska license plates. After a brief conversation in which Jose introduced his brother Ismael to the CI, the brothers agreed to follow the CI to another location to unload the drugs. As the brothers drove away, officers conducted a traffic stop. Once stopped, a drug-sniffing dog alerted to the presence of drugs in the truck. Officers conducted a warrantless search and found three pounds of methamphetamine and eleven

pounds of heroin hidden in the truck's gas tank. The government charged the brothers with three federal drug offenses.

Ismael appealed the district court's denial of his motion to suppress the drugs, arguing the officers lacked reasonable suspicion to conduct the traffic stop because the CI had no prior track record at the department and the officers failed to corroborate independently the information the CI provided.

The court disagreed, holding the totality of the circumstances sufficiently established the CI's reliability and provided the officers reasonable suspicion to stop the truck. By the time the officers made the stop, they were aware of the CI's basis of knowledge and had corroborated the vast majority of the information he had provided. First, the initial information provided by the CI matched information already known to the officers. Second, the CI allowed the officers to record the telephone call to his supplier, which set up the drug buy. Third, on the day the drugs arrived, the CI frequently updated the officers with details about the meeting, including the time, location and method of exchange. Fourth, the CI forwarded Jose's text messages and other instructions directly to the officers. Fifth, the CI accurately predicted Jose would be driving a blue truck with either Nebraska or Arizona license plates. Finally, the drugs were located in the truck's gas tank, as stated by the CI.

Click **HERE** for the court's opinion.

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United States v. Bearden, 780 F.3d 887 (8th Cir. 2015)

Officers were attempting to locate an address in a rural area in connection with an identity theft investigation; however, the sparsely populated and heavily wooded area made it difficult to see houses from the road. Unable to locate the address, the officers drove down a driveway through a wooded area to request assistance from the homeowner. The officers followed the circular driveway around the house and parked near the front entrance of the house. When the officers got out of their car, they smelled a strong odor of marijuana and encountered the homeowner, White. After White told the officers he did not know any of his neighbors, the officers left.

Later that day, officers returned to White's house to conduct a knock and talk interview concerning the odor of marijuana the officers had previously smelled on the property. After no one answered the front door, the officers decided to apply for a search warrant. Approximately thirty-minutes later, two officers who had remained at White's property to secure it, saw a man, later identified as Bearden, drive out of the woods from behind White's house on an all-terrain vehicle (ATV). Bearden told the officers he rented the adjoining property from White, and he was returning White's ATV, which he had borrowed. The officers detained Bearden in handcuffs after they saw a large knife on his belt. The officers also noticed Bearden smelled strongly of mothballs. Bearden consented to a search, and in his pocket an officer found a note containing directions about water and fertilizer, an empty gallon-sized zip baggie and keys to an outbuilding. The officers detained Bearden, who told the officers he had "personal use" marijuana at his house. After Bearden gave the officers consent to search his house, they found a

small amount of marijuana and drug paraphernalia there. The officers eventually obtained warrants to search Bearden's and White's property, where they found hundreds of marijuana plants growing in two outbuildings. Bearden and White were then arrested.

First, Bearden argued the officers violated the *Fourth Amendment* when they entered White's property; therefore, any evidence obtained on White's property could not be admissible against him.

The court held Bearden did not have standing to challenge any evidence seized from White's property, as Bearden presented no evidence to establish he had an expectation of privacy in White's property. Instead, when the officers first questioned White, he denied knowing Bearden, and when the officers questioned Bearden, he characterized White only as his landlord.

Second, even if Bearden had standing, the court held on both occasions the officers lawfully drove up White's driveway and entered White's curtilage without a warrant. Officers are allowed to enter private property to make contact with a homeowner as long as they restrict their movements to those areas generally made accessible to visitors, such as driveways and walkways. In this case, on their first visit, the officers drove up White's driveway and talked with White while remaining on the driveway. On the officer's second visit, they drove up White's driveway and went to the front door of White's house to conduct a knock and talk interview.

Bearden further argued the officers detained him without reasonable suspicion to believe he was involved in criminal activity.

The court disagreed. When the officers encountered Bearden on White's property, they were in the process of requesting a search warrant for the property, which they believed was being used to cultivate marijuana. Bearden arrived from the back of the property, where the officers suspected the marijuana grow operation was located and Bearden smelled strongly of mothballs and had a large knife hanging off his belt. In addition, the officers found a suspicious note in Bearden's pocket regarding fertilizer, indicating Bearden might be involved in the suspected grow operation. As a result, the court concluded the officers had a reasonable, articulable suspicion that Bearden was involved in criminal activity and his detention was lawful.

The court further held Bearden's consent to search his home was obtained voluntarily. Even though Bearden had been handcuffed for fifteen minutes, and had not been provided *Miranda* rights, the officers testified Bearden was not threatened, punished, intimidated, or promised anything for his consent to search his house. In addition, the court noted Bearden had four prior felony convictions, which suggested his familiarity with legal procedure, *Miranda* warnings, and his right to refuse consent.

Click **HERE** for the court's opinion.

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United States v. Turner, 781 F.3d 374 (8th Cir. 2015)

During the investigation of a drug-distribution conspiracy involving Corey and Donald Turner, the government obtained multiple Title III wiretap orders for some of the defendants' phones, as well as separate traditional warrants for Precise Locator Information (PLI) for cell phones used by J.L. Turner and Woods. In this case, PLI was referred to as the physical location of a phone based on longitude and latitude or some other points of reference. In addition, on one occasion the government applied for both a Title III wiretap order and a traditional warrant for the seizure of PLI from Corey Turner's phone using the same application.

First, Corey Turner moved to suppress the evidence obtained from J.L. Turner's and Woods' cell phones obtained from the PLI warrants. The court held Turner did not have standing to object to the seizure of this PLI evidence because he did not own, use or possess these cell phones. Without establishing that he had a reasonable expectation of privacy in these phones or their locations, Turner could not challenge the seizure of the PLI obtained from them.

Second, Donald Turner moved to suppress all evidence seized as a result of the Title III wiretap orders issued during the investigation. Turner argued the government failed to meet the "necessity" requirement to justify the issuance of the orders.

Every application for a wiretap under Title III requires the government to include a "full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or too dangerous."

In this case, the court found the affidavits in support of the application for each Title III wiretap orders outlined the investigative techniques law enforcement had used to obtain evidence to include: interviews with confidential sources, use of confidential informants to make controlled buys of drug from members of the conspiracy, physical surveillance and the limited use of pole cameras and GPS devices.

The court also found the affidavits also described techniques unlikely to be successful or too dangerous to undertake under the circumstances. For example, the affidavit explained that the use of undercover agents would not likely "further the objectives of the investigation" and might place an undercover agent in danger, because those involved in the conspiracy were either part of the Turner family or close friends, making it difficult to infiltrate the organization. In addition, the affidavits also explained that those involved in the conspiracy were closely monitoring their surroundings and were possibly using surveillance cameras of their own; therefore, the agents could not obtain desired information through physical surveillance, trash searches and the use of additional pole cameras. Finally, the affidavits stated members of the conspiracy had taken to driving rental or borrowed vehicles when purchasing drugs to avoid being tracked, which hampered the ability to obtain information by attaching GPS devices to their vehicles. Consequently, the court concluded the information included in the government's affidavits satisfied the "necessity" requirement to obtain the Title III orders.

Third, Corey Turner argued that the combined Title III wiretap order and PLI warrant that used a joint application was unlawful because it did not meet the procedural requirements of *Federal Rule of Criminal Procedure 41*. As a result, Turner argued any PLI evidence seized from his cell phone under this "combination order" should have been suppressed.

The court disagreed. First, the court noted that a request for a Title III wiretap order and a request for a traditional warrant could be included in the same application. Next, the court concluded that a substantial number of *Rule 41's* procedural requirements for preparing, executing, and returning a warrant for a tracking device were not followed with respect to the seizure of PLI from Turner's cell phone. However, because Turner did not claim that the government acted in reckless disregard of *Rule 41* when it failed to seek a separate warrant or follow the execution and return requirements of *Rule 41*, the court held suppression of the PLI evidence was not the proper remedy.

Click **HERE** for the court's opinion.

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United States v. Evans, 781 F.3d 433 (8th Cir. 2015)

Crime scene investigators recovered an identification card bearing the name Acie Evans on the ground by a broken window where a sexual assault suspect had entered a house. A short time later, officers at the crime scene saw a man matching the photograph on the identification card slowly drive past the house. Officers followed the car to an apartment complex and made contact with the driver, who had entered one of the apartments. The officers identified the man as Acie Evans and discovered that Evans' driver's license had been suspended. The officers then arrested Evans for driving without a license.

After Evans' arrest, the manager of the apartment complex told the officers she wanted Evans' car removed from the property. Officers towed Evans' car to the police station and conducted an inventory search of the vehicle pursuant to department's policy. During the search, an officer found a loaded pistol in the center console. During subsequent questioning about the pistol, Evans made incriminating statements regarding his ownership of the weapon. The government indicted Evans for being a felon in possession of a firearm.

Evans argued the pistol and his statements should have been suppressed because the officers did not follow the department's towing policy and because the officers conducted the inventory search with an investigatory motive or as a pretextual search for criminal evidence in the sexual assault case.

The court disagreed. First, the court held the decision to tow Evans' car was consistent with the department towing policy because the car was parked on private property, Evans was under arrest, and the apartment manager requested the officers remove the car from the property. Second, an investigatory motive does not render an inventory search invalid unless that motive is the only reason for conducting the search. In this case, the court held the officers followed standardized procedure when conducting the inventory search and that Evans provided no evidence to establish the inventory search was a pretext for further investigation of the sexual assault case.

Click **HERE** for the court's opinion.

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United States v. Gonzalez, 781 F.3d 422 (8th Cir. 2015)

On March 19, after being alerted by a driver, a United Parcel Service (UPS) employee opened a suspicious package sent by Tony Young, addressed to Cesar Gonzalez. Inside the package, the UPS employee found a large stack of cash wrapped in foil. After consulting a local police officer, UPS sent the package to its intended recipient, Gonzalez.

On March 22, at the same UPS facility, the same employee saw a package from Gonzalez addressed to Young. The employee contacted an officer, who told the employee to hold the package while he arranged for a drug detection dog to conduct a sniff of the package. The dog handler told the UPS employee to place Gonzalez's package in a line with three similar packages, without telling him or the other officer which one came from Gonzalez. The drug detection dog alerted on the fourth package, which was the package sent by Gonzalez. The officers obtained a warrant, searched the package and discovered over seven ounces of methamphetamine. The government indicted Gonzalez for conspiracy to distribute methamphetamine.

Gonzalez argued the March 19 package search and the March 22 package seizure violated the *Fourth Amendment*, and the alert by the drug detection dog did not establish probable cause to obtain a warrant to search the second package.

The court disagreed. The *Fourth Amendment* protects against unreasonable searches and seizures conducted by the government. In this case, the search on March 19 was conducted by a UPS employee acting as a private person. The police did not direct the UPS employee to open Young's package on March 19 and inspect its contents. The UPS employee only contacted the police after making the independent decision to search the contents of the package. As a result, the private search by the UPS employee did not implicate the *Fourth Amendment*.

The court further held the seizure of Gonzalez's package on March 22 was reasonable. The UPS employee removed the package from the ordinary delivery stream at 7:00 a.m., and by 10:30 a.m., the dog sniff was complete. The court concluded the three and one half hour detention of the package did not violate the *Fourth Amendment*.

Finally, the court held the alert by the drug detection dog established probable cause to obtain a warrant to search the package. The government presented a comprehensive list of the dog's qualifications to include its initial certification, recertification and in-service training completed by the dog and its handler. In addition, the court found the dog' alert was reliable because a UPS employee created the package line up outside the presence of the dog and its handler and the dog consistently alerted on only one package.

Click **HERE** for the court's opinion.

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United States v. Cotton, 782 F.3d 392 (8th Cir. 2015)

Officers were on patrol at an apartment complex when they saw a person throw a set of keys off a third floor balcony to two men who were standing on the ground below. The officers knew the property manager had instructed residents of the complex not to throw their keys off their balconies to people waiting below, as this behavior compromised the security of the building. In addition, one of the officers had patrolled the area for over eight years and described the location around the complex as a violent area plagued with narcotics activity, robberies and shootings. Immediately after the keys hit the ground, the officers told the men they were not allowed to take the keys. One of the men ignored the officers, grabbed the keys and entered an apartment. As the man was entering the apartment, the officers ordered him to stop; however, the man did not comply. During this time, the other man, who had a nervous look on his face, did not move. When the officers approached the man, later identified as Cotton, he reached for his waistband. Believing that Cotton was reaching for a weapon, the officers grabbed Cotton's arms and handcuffed him. The officers frisked Cotton and seized a pistol from his waistband. The government indicted Cotton for being a felon in possession of a firearm.

Cotton moved to suppress the pistol, arguing the officers did not have reasonable suspicion to initially stop him and then to frisk him.

The court disagreed. First, the officers encountered Cotton and another man in an area known for violence. Second, the unidentified man failed to comply with the officers' commands not to pick up the keys, and when the man picked up the keys, he fled. As a result, the court concluded Cotton's location in relation to the other man and the keys, combined with the violation of the apartment complex's rules, gave the officers reasonable suspicion to conduct a *Terry* stop of Cotton.

The court further held the officers established reasonable suspicion to believe Cotton was armed and dangerous. The encounter occurred in a known violent area, and as the officers approached Cotton, he reached for his waistband with a nervous look on his face. Consequently, the court held it was reasonable for the officers to detain Cotton to conduct a *Terry* frisk.

Click **HERE** for the court's opinion.

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United States v. Thurmond, 782 F.3d 1042 (8th Cir. 2015)

An informant told officers that a man and a woman were selling crack cocaine from a specific residence. Officers went to the address and conducted a trash-pull. Inside one of the trash bags, officers found two marijuana "roaches" with green plant material inside that looked and smelled like marijuana, as well as "blunt" material and a piece of mail addressed to Thurmond at that address. A field test of the suspected marijuana tested positive for THC. The next day, officers conducted surveillance on the residence, but did not observe activity consistent with the sale of illegal drugs. The officers also discovered that Thurmond had been arrested one month prior for possession of a controlled substance and that he had a juvenile record, which included possession of a controlled substance. The following day, officers executed a search warrant on the residence and

seized a sawed-off shotgun, marijuana and drug paraphernalia. The government indicted Thurmond for possession of an unregistered sawed-off shotgun.

Thurmond argued the weapon should have been suppressed because the officers' discovery of a *de minimis* amount of discarded marijuana in his trash did not establish probable cause to obtain the warrant to search his house.

The court disagreed. Based on the totality of the circumstances, to include Thurmond's history with controlled substances and the contraband obtained from the trash pull, the court held the officers established probable cause to believe contraband would be found in Thurmond's residence. In addition, the court held the two-day delay in seeking the warrant following the trash-pull did not diminish the probable cause. The officers conducted the trash-pull and then reasonably conducted surveillance on the residence the next day, which did not yield any results. The court concluded that obtaining the warrant the following day did nothing to lessen the probable cause determination.

Click **HERE** for the court's opinion.

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United States v. Hurd, 785 F.3d 311 (8th Cir. 2015)

In the early morning hours, in a high-crime area, two patrol officers saw a car stopped in the middle of the street with Hurd standing outside the car next to the driver's side window. Based on the high-crime location, the darkness of the area where the car was parked, the cold temperature, and the absence of houses or buildings on the block, the officers suspected a drug transaction was taking place. After the officers pulled their vehicle behind the parked car, Hurd approached the officers with his hands in his jacket pocket. The officers exited their vehicle and ordered Hurd to remove his hands from his pockets. Hurd initially took out his hands, but then put them back in his pockets a few seconds later. Hurd continued to approach the officers with his hands in his pockets, despite continued orders by the officers to remove them. The officers then grabbed Hurd and placed him over the hood of their vehicle. When Hurd continued to refuse to take his hands out of his pockets, one of the officers reached into Hurd's pocket and removed a loaded, cocked, .45-caliber pistol. The officers arrested Hurd, who was indicted for being a felon in possession of a firearm.

Hurd moved to suppress the pistol, arguing the officers lacked reasonable suspicion to support a *Terry* stop and lacked reasonable suspicion to believe he was armed and dangerous to justify a *Terry* frisk.

The court disagreed. The officers saw a car parked on a dark road, in the middle of the night, in a high-crime area, with no houses or businesses around with Hurd standing next to the driver's side window. Based on these facts, along with the officers' experience, the court held the officers had reasonable suspicion to believe criminal activity was afoot; therefore, the *Terry* stop of Hurd was lawful.

The court further held that Hurds' placement of his hands in his pockets and his refusal to remove them as he walked toward the officers provided reasonable suspicion to believe

Hurd was armed and dangerous; therefore, the officers were justified in conducting the *Terry* frisk.

Click **HERE** for the court's opinion.

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Grider v. Bowling, 785 F.3d 1248 (8th Cir. 2015)

Officer Bowling responded to a disturbance at a fast-food restaurant between Grider and another person. When he arrived, Bowling saw Grider, who had walked across the street from the restaurant to eat his meal in his car. Bowling approached Grider, who was wearing a knife on his hip, and asked Grider to exit his vehicle. After Grider refused, Bowling forcibly removed Grider from the car, placed him on the ground with his knee on his back, and handcuffed him. While Grider was held on the ground, Officer Reece arrived. Reece ran toward Bowling and Grider, and without saying anything to Bowling, kicked Grider in the head. The officers later found an open bottle of whiskey in Grider's car.

Grider sued, claiming that the officers, among other things, used excessive force in violation of the *Fourth Amendment* when they arrested him. Grider also claimed that Officer Bowling was liable for the injuries he suffered after being kicked in the head by Officer Reece, arguing that Bowling had a reasonable opportunity to intervene

The court held that Officer Bowling was entitled to qualified immunity.

First, the court recognized that police officers have the right to use some degree of physical force to effect a lawful arrest and that reasonable applications of force may cause pain or minor injuries with some frequency. Here, the court held it was objectively reasonable for Officer Bowling to forcibly remove Grider from his vehicle and put him on the ground after Grider refused to exit his vehicle while in possession of a knife.

Second, the court held while it is clearly established that an officer who fails to intervene to prevent the unconstitutional use of force by another officer may be held liable for violating the *Fourth Amendment*, there was no evidence to show that Officer Bowling was aware of Officer Reece's kick before it occurred. Consequently, because Bowling was not involved in the allegedly unconstitutional acts of Reece, he could not have violated Grider's constitutional rights based on Reece's use of excessive force.

Click **HERE** for the court's opinion.

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United States v. Beckmann, 786 F.3d 672 (8th Cir. 2015)

Two officers went to Beckmann's house to verify his address and to ensure that Beckmann was complying with the conditions related to his status as a convicted sex offender. While in Beckmann's house, one of the officers saw a computer tower and two external hard drives underneath a desk. The officer asked Beckmann if he could search the computer and Beckmann consented. The officer noticed that both external hard drives were connected to the tower, but the power cord to one of them was unplugged

from the wall. The officer plugged the power cord to the unplugged external hard drive back into the wall and began to search the computer and the two external hard drives. During his search, the officer discovered file names suggesting child pornography. The officers seized the computer tower as well as both external hard drives and applied for a warrant to search all of the items.

The government obtained the search warrant on August 15, 2011. Under the terms of the warrant, the government was required to search the computer and external hard drives on or before August 29, 2011. Execution of the warrant required a forensic analyst to copy and search existing and deleted computer files. The forensic analyst began analyzing the seized computer in November 2011 and the external hard drives in January 2012. The analyst located over 2,000 images of child pornography on the external hard drive that the officer had plugged into the wall.

In July 2013, the government indicted Beckmann for possession of child pornography.

The officer subsequently filed the search warrant return of inventory with the district court in November 2013. The officer stated that he did not intend to prejudice Beckmann or delay the proceedings, but that he had just forgotten to file the return of inventory.

Beckmann filed a motion to suppress the evidence discovered on the external hard drive. Beckmann argued that it was unreasonable for the officer to believe that the scope of Beckmann's consent to search his computer extended to a search of the unplugged external hard drive.

The court disagreed, holding that it was reasonable for the officer to believe that Beckmann's consent to search the computer tower included consent to search the connected but unplugged external hard drive. The officer's belief was reasonable based on the common understanding that the term "computer" encompasses the collection of component parts involved in a computer's operation, and the fact that the external hard drive was attached to the computer tower. In addition, Beckmann did not explicitly limit the scope of his consent to search his computer tower, nor did he object when the officer plugged the external hard drive into the electrical outlet and began searching.

Beckmann also moved to suppress the evidence discovered on the external hard drive, arguing the government violated *Federal Rule of Criminal Procedure 41*. *Rule 41* states, in part, that a "warrant must command the officer to . . . execute the warrant within a specified time no longer than 14 days" and the "officer executing the warrant must promptly return it." Beckmann argued that the government failed to satisfy the requirements of *Rule 41* because there was a two to five month delay in executing the warrant and a two-year delay in filing the return of inventory.

The court found that the government violated *Rule 41*; however, it held that suppression of evidence was not the proper remedy unless Beckmann established the government acted in reckless disregard of the rule, or if he suffered some prejudice because of the violation. The court concluded the government did not exhibit reckless disregard of *Rule 41* because of the length of time typically required to conduct computer analysis in child pornography cases. However, the court added, the best practice would have been for the government to file a motion seeking additional time to execute the warrant. The court

further held Beckmann suffered no prejudice, as probable cause continued to exist and the evidence located on the computer did not become stale or deteriorate.

Finally, the court held the officer's two-year delay in filing the return of inventory was due to inadvertence rather than deliberate and intentional disregard for the rules.

Click **HERE** for the court's opinion.

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Peters v. Risdal, 786 F.3d 1095 (8th Cir. 2015)

Officers arrested Shannon Peters for violating a "no-contact" order and transported her to jail. At the booking counter, Peters became agitated, shouted at the officers and refused to answer several medical screening questions designed to determine whether she presented a risk of suicide.

The officers decided to terminate the booking process because of Peters' behavior and escorted her to a holding cell. Once at the holding cell, Officer Michelle Risdal determined Peters presented a risk of harm to herself. Specifically, Officer Risdal was concerned that Peters could harm herself with the strings of her swimsuit, which she was wearing under a shirt and sweatpants. Officer Risdal then ordered Peters to remove her clothing. When Peters refused, two male officers entered the holding cell and told Peters to follow Officer Risdal's commands. After Peters continued to refuse, the officers placed a paper jumpsuit over Peters and Officer Risdal removed Peters' clothing. After Officer Risdal removed Peters' clothing, Peters was left in the cell with the paper jumpsuit.

Peters sued the officers, claiming they violated the *Fourth Amendment* when they forcibly removed her clothing in the holding cell.

The court disagreed. Concern for a detainee's safety can justify requiring a detainee to undress and change into a paper jumpsuit. Here, the officers knew that Peters was visibly upset, and that she refused to respond to medical screening questions designed to determine whether she posed a threat of harm to herself. The court concluded that under these circumstances, it was objectively reasonable for the officers to believe that Peters presented a risk of harm to herself if she was permitted to retain the strings on her swimsuit.

The court further held the manner in which the officers removed Peters' clothing was reasonable. First, the officers gave Peters the chance to change into the paper jumpsuit, in a holding cell, away from public view, with a female officer alone. When Peters refused to comply with Officer Risdal's instruction to remove here clothing, she was given a second opportunity to change on her own. Finally, after Peters' non-compliance, the officers covered her with the paper jumpsuit while Officer Risdal removed Peters' clothing. The court held the officers' conduct reasonably limited the extent to which Peters' body was exposed to the officers.

Click **HERE** for the court's opinion.

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United States v. Omar, 786 F.3d 1104 (8th Cir. 2015)

The government suspected Omar was involved in helping others travel from Minnesota to Somalia to receive training by al Shabaab, a terrorist organization. As part of the investigation, agents with the Federal Bureau of Investigation (FBI) interviewed three witnesses who identified Omar from photographs as the person known to them as "Shariff" who organized their trips to Somalia.

An FBI agent showed the first witness eighty-five photographs, one at a time. After displaying each photograph, the agent asked the witness whether he knew the person in the photograph. When the agent showed the witness Omar's photograph, the witness identified Omar, without hesitation, as the person he knew as "Shariff." Omar's photograph was the eighty-third photograph shown to the witness.

During a second interview approximately fourteen-months later, an agent showed the same witness twenty-nine photographs following the same procedure as before. When the agent displayed Omar's photograph, the witness again identified Omar as the person he knew as "Shariff" without hesitation.

During a third interview with the same witness approximately seventeen-months later, after the witness mentioned the name "Shariff," an agent showed the witness a photograph of Omar, which the witness identified as the person he knew as "Shariff."

FBI agents interviewed with two other witnesses and conducted similar photographic identification procedures with those witnesses. Both witnesses identified photographs of Omar as the person they knew as "Shariff."

After a federal grand jury indicted Omar on several terrorism-related offenses, Omar moved to suppress the identification evidence, arguing that the pre-trial identification procedure by which the witnesses identified him violated the *Fifth Amendment Due Process Clause*.

The court held the pre-trial identifications of Omar that occurred during the interviews with the three witnesses did not violate Omar's right to due process. The agents showed the witnesses a series of photographs, one at a time, and after each photograph was displayed, the agents asked the witnesses an open-ended question about whether the witness knew the person in the photograph. This identification procedure did not imply that Omar was the person in the photograph nor did it impermissibly suggest that Omar had engaged in criminal activity. Omar's photograph was one in a series of photographs about which the witnesses were asked a non-suggestive question. The court concluded such an identification procedure was not impermissibly suggestive in violation of the *Due Process Clause*.

The court further held it was not improper for the agent to show the first witness Omar's photograph during his third interview after the witness mentioned the name "Shariff." The court concluded that by this point the witness had already identified Omar as "Shariff" without hesitation under circumstances that were not unduly suggestive.

Click **HERE** for the court's opinion.

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United States v. Trogdon, 789 F.3d 907 8th Cir. 2015)

At approximately 1:00 a.m., officers in a marked squad car were patrolling an area near a commercial building where a shooting had recently occurred as well as other violent crimes and criminal activity. When the officers saw five individuals loitering near the building, which was closed for business, they decided to investigate whether or not the group was trespassing. The officers knew one of the occupants of the building had posted "No Trespassing" signs on the property and had filed a letter of trespass with the city, requesting police assistance in keeping the property free of trespassers. When the officers got close to the group, the officers recognized that one of the individuals was a gang member who was also a suspect in a murder investigation. Upon seeing the squad car, the group began to walk briskly away from the approaching officers down a blocked-off street. As the group walked away, officers saw Trogdon place something on the ground. The officers ordered Trogdon to stop, and when he did, an officer grabbed Trogdon's arm and attempted to frisk him. When Trogdon pulled away from the officer, another officer took him to the ground and handcuffed him. Trogdon then told the officers he had a firearm, and the officers found a handgun concealed in the waistband of his pants. Trogdon was charged with being a felon in possession of a firearm.

Trogdon argued the handgun should have been suppressed because the officers did not have reasonable suspicion to stop and frisk him.

The court disagreed. First, the officers saw Trogdon loitering late at night near a commercial building, which was located in a high-crime area. Second, the officers knew one of the building's occupants had posted "No Trespassing" signs and had requested police assistance in removing trespassers. Third, because it was late at night, the officers knew the businesses in the building were closed and there did not appear to be a legitimate reason for Trogdon and the others to be on the property. Based on these facts, the court concluded the officers established reasonable suspicion that Trogdon and the others were trespassing; therefore, they were entitled to conduct a *Terry* stop.

The court further held the officers were entitled to conduct a *Terry* frisk because they established reasonable suspicion that Trogdon was armed and dangerous. First, the officers knew that one of the members of the group was a murder suspect. As a result, the officers were entitled to take Trogdon's association with this person into account in determining whether Trogdon might also be armed. Second, after noticing the officers, the group immediately began to walk away from the officers down a blocked-off street where it would be difficult for a police car to follow. Finally, the officers saw Trogdon place something on the ground as he walked away, suggesting that he was trying to hide something from the officers.

Click **HERE** for the court's opinion.

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United States v. Smith, 789 F.3d 923 (8th Cir. 2015)

An officer stopped Smith for speeding. While speaking with Smith, the officer noticed a "slight odor of marijuana" coming from within Smith's car. After Smith denied consent to search, the officer requested a K-9 to conduct a dog sniff of Smith's car. As the K-9 unit approached, Smith sped away from the scene. After a brief vehicle pursuit, Smith abandoned his car and fled on foot. Smith escaped; however, the officers searched his car and found two kilograms of cocaine, a large sum of currency and a loaded handgun. Officers later arrested and charged him with drug and weapons offenses.

Smith argued the evidence seized from his car should have been suppressed because the faint smell of marijuana detected by the officer did not justify extending the duration of the traffic stop for speeding.

The court disagreed. The Eighth Circuit has held numerous times that the smell of marijuana, whether faint or strong, coming from a vehicle during a lawful traffic stop, gives an officer probable cause to search the vehicle for drugs. Here, the officer testified he had been trained in the detection of controlled substances, including the odor of marijuana. As a result, the officer had probable cause to search Smith's car once he smelled the odor of marijuana, even though he took the less intrusive approach by calling the K-9 unit to conduct a sniff of Smith's car first.

In addition, the court held the evidence seized from Smith's car was admissible as Smith gave up any reasonable expectation of privacy in his car and its contents when he abandoned it on side of the road after leading the officers on a high-speed chase.

Click **HERE** for the court's opinion.

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Ransom v. Grisafe, 790 F.3d 804 (8th Cir. 2015)

Ransom was driving home from work on a dark, raining night. When his van began to backfire, Ransom pulled over to the side of the road. Someone who heard the sounds from Ransom's van called 911 and reported that gunshots had been fired from or near the van. Two patrol officers responded and pulled up behind Ransom's van. Seconds later, the van backfired again, and the driver's-side door opened. One of the officers yelled at Ransom to get back into the van, but Ransom, appearing not to hear the command, stepped out. At that time, both officers fired a total of eight shots at Ransom. Ransom did not react as if he had been shot, nor did he appear to notice the officers had fired at him. The officers ordered Ransom to lie on the ground and he complied. When the officers asked Ransom about the gunshots, Ransom told them his van was backfiring. The officers told Ransom his van could not be backfiring because one of the windows on their patrol car had been shot out. When other officers arrived on the scene, a sergeant directed two detectives to transport Ransom to the police station to be interviewed. The detectives transported Ransom to the station where they spoke to him for approximately thirty-five minutes before releasing him. The investigation revealed that Ransom's van had been backfiring, and that ricocheting bullets fired from the officers' guns had caused the damage to their patrol car.

Ransom sued the patrol officers, claiming the officers seized him in violation of the *Fourth Amendment* by shooting at him and then by ordering him to lie and the ground and handcuffing him.

The court disagreed. First, it was undisputed that none of the officers' rounds hit Ransom. However, assuming Ransom was grazed by bullet or piece of broken glass, the court held that any seizure that resulted was reasonable. First, the officers responded to a 911 call of shots fired from a van. Second, when the officers arrived, Ransom's van backfired; a sound that both sides agreed could have been mistaken for a gunshot. Third, Ransom then got out of the van and appeared to disregard the officer's commands to get back inside. As a result, the officers were justified in firing their guns at Ransom to neutralize what they reasonably believed to be a threat to themselves.

The court further held it was reasonable for the officers to order Ransom to the ground and handcuff him while they determined if there might be another person firing a gun at them. After detaining Ransom, the officers saw that one of their windows was shot out. Although it was later determined that a ricochet from one of the officers' bullets caused the damage to the patrol car, at the time, it was reasonable for the officers to believe there might be another person firing at them. Consequently, the court held the patrol officers were entitled to qualified immunity.

Ransom also sued the detectives, arguing they violated the *Fourth Amendment* by detaining him at the police station.

Again, the court disagreed. When the detectives arrived on the scene, the sergeant provided them with the facts that were known at the time. At that point, the court held it was objectively reasonable for the detectives to detain Ransom and drive him to the police station for an interview to determine if he had fired a gun at the patrol officers.

Finally, Ransom sued the sergeant, claiming the sergeant violated the *Fourth Amendment* rights by directing the detectives to obtain a statement from him at the police station.

The court held that even if the detectives had violated Ransom's *Fourth Amendment* rights by detaining him, the sergeant could not be held liable for a seizure effected by other officers.

Click **HERE** for the court's opinion.

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Robinson v. Payton, 791 F.3d 824 (8th Cir. 2015)

Officer Payton detained Robinson and his mother, Eva, in the back of his patrol car during a *Terry* stop. When Officer Payton directed them to get out of the car, Eva complied, but Robinson refused. After Robinson's refusal, Officer Payton tased Robinson in drive-stun mode and a struggle between the two men ensued. In the meantime, Trooper Condley was attempting to control Eva, who was standing on the other side of the patrol car. Eva, who thought Officer Payton was shooting Robinson with a handgun, broke away from Trooper Condley and ran toward Robinson and Officer Payton. Trooper Condley grabbed Eva and maintained control over her while Officer

Payton eventually subdued Robinson by tasing him several more times. During this time, Eva was screaming for her husband and she told Trooper Condley that she would give her life for her son.

Robinson filed a lawsuit in which he alleged Trooper Condley violated his *Fourth Amendment* rights by failing to intervene while the other officer used excessive force against him.

The court held Trooper Condley was entitled to qualified immunity. A police officer may be liable if he does not intervene to prevent the excessive use of force by another officer against a suspect. However, the officer must observe excessive force being used and have the opportunity and the means to prevent harm to the suspect. Here, the court concluded Trooper Condley's duty to intervene was not clearly established. Specifically, the court found a reasonable police officer in Trooper Condley's position would not know that restraining a hysterical individual and then deciding to leave her unattended to intervene violated clearly established law. First, Eva became hysterical after she thought the officer had shot Robinson with his gun. Second, Eva broke away from Trooper Condley and attempted to join the altercation between Officer Payton and Robinson. Finally, Eva continued to scream for her husband and she told Trooper Condley that she was willing to give her life to protect Robinson. If Trooper Condley had left Eva, she would have likely joined the altercation, possibly causing harm to herself and others.

Click **HERE** for the court's opinion.

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United States v. Anguiano, 795 F.3d 873 (8th Cir. 2015)

A state trooper stopped a car for speeding and a window-tint violation. When he approached the car, the trooper saw three men inside. The trooper also immediately noticed that the front dash and center console appeared to be very shiny and clean while the rest of the car appeared messy and "lived in," with food and beverage trash and clothing on the floor and backseat. The officer spoke with the driver, Gomez, who was extremely nervous, breathing heavily with a rapid pulse, and not looking at the trooper while speaking. The trooper then spoke with Anguiano, who like Gomez was extremely nervous, had a high pulse and avoided eye contact with the trooper. The trooper's suspicions were aroused after Gomez and Anguiano gave conflicting stories as to the owner of the car and the purpose of their trip. When the trooper spoke to Boswell, the back-seat passenger, Boswell claimed he did not know Gomez, identified Anguiano as "Albert," but did not know his last name despite claiming he had known Anguiano since seventh grade, and was unsure as to where they were travelling.

After the trooper issued Gomez a warning ticket and returned his documents, he asked Gomez if he could ask him a few more questions. Gomez agreed, and a short time later, he gave the trooper consent to search the car. The trooper searched the car and found a can with a false bottom, which contained a substance that appeared to be marijuana and a pipe for smoking methamphetamine. Finally, the trooper removed the panel in the center console area and found a bag containing two pounds of methamphetamine. The trooper did not damage the car while removing the panel, which took about two seconds to

remove and replace. Gomez, Anguiano and Boswell were charged with possession with intent to distribute methamphetamine.

Anguiano filed a motion to suppress the evidence found in the car. First, Anguiano argued the trooper unreasonably extended the duration of the traffic stop beyond the time necessary to complete purpose of the stop.

The court disagreed, holding the extension of the traffic stop was supported by reasonable suspicion of criminal activity. First, the trooper's suspicions were immediately aroused by the appearance of the car's interior when he initially encountered Gomez and Anguiano. Specifically, the trooper noticed that the car's dash and center console were shiny and clean, while the rest of the interior was messy and littered with trash and clothing. Second, Gomez and Anguiano were extremely nervous throughout the encounter, exhibiting high pulse rates and heavy breathing while avoiding eye contact with the trooper. Finally, Gomez, Anguiano and Boswell provided inconsistent stories and were not able to answer simple questions posed by the trooper concerning their travel plans or ownership of the car.

Next, Anguiano argued the troopers' search of the center console area went beyond the scope of Gomez's consent. Anguiano was not an owner, registered user, or driver of the car when it was stopped; instead, he was a mere passenger. Generally, the court found that a mere passenger does not have standing to challenge a vehicle search where he has "neither a property nor possessory interest in the automobile." Consequently, without deciding the issue, the court held Anguiano did not have standing to object to the trooper's search of the car as a mere passenger.

Click **HERE** for the court's opinion.

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United States v. Williams, 796 F.3d 951 (8th Cir. 2015)

A police officer was driving her patrol car when its license plate recognition (LPR) system gave an alert concerning a nearby car. The LPR system scans the license plates of cars that are within range of cameras mounted on the patrol car and generates an alert if a scanned car is connected to a wanted person. The LPR alert indicated that a man named Hicks was associated with a nearby car and wanted by a neighboring police department for domestic assault. The alert also stated that Hicks might be armed and dangerous, but it did not explain how or when Hicks was associated with the car. The officer conducted a traffic stop, identifying the driver as Hicks and the front-seat passenger as Williams. When a back-up officer directed Williams out of the car, Williams patted at his waistband twice, and appeared to be nervous. The officer frisked Williams and recovered a handgun from his waistband. The government indicted Williams for being a felon in possession of a firearm.

Williams filed a motion to suppress the firearm, arguing the LPR alert did not provide the officer reasonable suspicion to conduct the traffic stop.

The court disagreed. First, the court recognized there were no reported federal decisions that specifically dealt with the use of an LPR system in the *Fourth Amendment* context.

However, courts have held that if a flyer or bulletin has been issued concerning a wanted person, then an officer may rely on that flyer or bulletin to conduct a *Terry* stop in an attempt to obtain further information. Here, the court failed to see how the mechanism through which an officer receives notice from another department, such as through the LPR system, matters for *Fourth Amendment* purposes. The court found that the LPR system merely automates what could otherwise be accomplished by checking the license plate number against a "hot sheet" of numbers, inputting a given number into a patrol car's computer, or "calling in" the number to the police station. As a result, the court concluded the officer was entitled to rely upon the information she received concerning Hicks obtained through the LPR system when she decided to conduct the traffic stop.

The court further held it was reasonable for the officer to conduct the stop even though she could not identify the driver until after she stopped the car. The court noted that common sense dictates that police officers will often be unable to confirm the race or gender of a driver before initiating a traffic stop.

Finally, the court held the traffic stop was reasonable even though the officer had no information concerning the time frame of when Hicks had been associated with the car.

Click **HERE** for the court's opinion.

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United States v. Thunderhawk, 799 F.3d 1203 (8th Cir. 2015)

After federal agents received a report that Thunderhawk had sexually abused a child, the agents approached Thunderhawk who agreed to be interviewed. One of the agents told Thunderhawk he could end the interview and leave at any time, that he was not under arrest, and that he would not be arrested at the end of the interview, no matter what he told the agents. The agents interviewed Thunderhawk for approximately twenty minutes. Thunderhawk initially denied the allegations, but eventually admitted getting into bed with the victim. At the end of the interview, the agents allowed Thunderhawk to return home.

Thunderhawk was later arrested and charged with abusive sexual contact with a child under 12 years of age.

Thunderhawk filed a motion to suppress his statements to the agents. Thunderhawk argued the agent's misleading assurance that he would not be arrested rendered his statements involuntary because this assurance was made to "coerce" Thunderhawk into making a statement.

The court disagreed. The agent truthfully told Thunderhawk he would not be arrested at the end of interview, regardless of what he said, not that he would never be arrested or prosecuted. The court added that a promise made by an officer not to arrest or prosecute does not render a confession involuntary. Instead, a court must determine whether or not an officer overbore the suspect's freewill. Here, the court held there was no coercive police activity that overbore Thunderhawk's will; rather, Thunderhawk voluntarily made incriminating statements after twenty or twenty-five minutes of non-coercive questioning.

Click **HERE** for the court's opinion.

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United States v. Ball, 804 F.3d 1238 (8th Cir. 2015)

A state police officer impounded the car in which Ball had been a passenger, and conducted an inventory search.[2] Department policy restricted inventory searches to those areas where an owner or operator would ordinarily place or store property or equipment, including the trunk and engine compartments. When the officer opened the hood of the car, he saw fresh fingerprints on the air filter box. The officer opened the cover of the box and found two packages of cocaine. The government indicted Ball, who was already the target of an unrelated investigation, on a variety of drug charges.

Ball filed a motion to suppress the drugs, arguing that opening the air filter box went beyond the scope of an inventory search, as the air filter box was not an area where an owner or operator would ordinarily place or store property or equipment."

The court disagreed. First, the state police inventory policy explicitly states that one area in the vehicle that should be searched is the engine compartment. Second, the court noted it has previously held that as part of an inventory search, it is reasonable to search the engine compartment. Third, the officer testified that he had conducted over one-thousand inventory searches of vehicles, that he always searches the engine compartment and that at least 90% of the time he also checks the air filter box for property where he has previously found narcotics and currency. Finally, opening the cover of the air filter box in Ball's car only required him to unsnap two small tabs, not to remove any screws or panels.

Click **HERE** for the court's opinion.

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United States v. Vinson, 805 F.3d 1150 (8th Cir. 2015)

An officer received a report of a shooting near her location by a suspect driving a white Buick. While the officer drove toward the scene of the shooting, the dispatcher reported the suspect's vehicle was a white SUV. A few minutes later, the officer saw a white SUV driving towards her. The officer made a U-turn and stopped the white SUV. After the three occupants of the SUV were placed in handcuffs, another officer crouched down and looked into the SUV through the rear passenger door that had been left open by the occupants. While remaining outside the SUV, the officer saw a handgun underneath the front passenger seat. The officers arrested the three occupants, searched the SUV, and seized the handgun from under the seat as well as a second handgun that was tucked into the back seat cushions.

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

[2] The court assumed with deciding that Ball had a sufficient expectation of privacy in the car to assert a *Fourth Amendment* claim regarding the inventory search.

Vinson argued the officer did not have reasonable suspicion to support the stop because the dispatcher initially reported the suspect vehicle was a white Buick.

The court disagreed. Although the original description of the suspect vehicle was a white Buick, the vehicle in which Vinson was travelling matched the second police radio description of the suspect's vehicle, a white SUV, which the officer saw driving away from the shooting scene three minutes after the initial report. Consequently, the court concluded the officer's personal observation of the white SUV provided her with reasonable suspicion to support the stop.

Additionally, the court agreed with the district court, which held the officer did not violate the *Fourth Amendment* by bending down from outside the SUV's rear door to look inside after all of the occupants had exited. Once the officer saw the firearm from that vantage point, the court held the officer lawfully seized it under the plain view exception to the warrant requirement.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-1363/15-1363-2015-11-18.pdf?ts=1447864287

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United States v. Burston, 806 F.3d 1123 (8th Cir. 2015)

Two officers received information regarding potential illegal drug use in the apartment building where Burston lived. The officers went to the apartment building and one of the officers released his drug dog, Marco, off-leash, to sniff the air alongside the front exterior wall of the west wing of the building. The building's west wing contained four exterior apartment doors, including Apartment 4 where Burston lived. Burston's apartment had a private entrance and a window. A walkway led to Burston's door from the sidewalk, but the walkway did not go directly to or by his window. Instead, Burston's window was approximately six-feet from the walkway. A bush covered part of his window, and there was a space between the bush and the walkway where Burston kept a cooking grill. Marco went past the bush and alerted to presence of drugs by sitting down six to ten inches from the window of Burton's apartment. Later that day, the officers obtained a warrant to search Burston's apartment based on Marco's alert and Burston's criminal record. Pursuant to the warrant, officers seized rifles, ammunition and marijuana residue from the apartment and arrestee Burston. During a post-arrest interview, Burston made incriminating statements to the officers.

Burston argued the dog-sniff violated the *Fourth Amendment* because the officer allowed Marco to intrude upon the curtilage of his apartment without a warrant. As a result, Burston claimed the evidence seized from his apartment and his post-arrest statements should have been suppressed.

The court agreed.

In *Florida v. Jardines*, the United States Supreme Court held an officer's use of a drug-sniffing dog to investigate a home and its immediate surroundings constituted a "search" under the *Fourth Amendment*. In *Oliver v. United States*, the Court held the area "immediately surrounding and associated with the home," or curtilage, is considered part

of the home for *Fourth Amendment* purposes. Finally, in *United States v. Dunn*, the Court outlined four factors a court should consider to determine whether a particular area around a home should be considered the curtilage. The factors the Court articulated in *Dunn* are (1) the proximity of the area claimed to be the curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by.

Here, the court concluded the factors articulated in *Dunn* supported a finding that Marco's sniff occurred within the curtilage of Burston's apartment; therefore, it constituted a *Fourth Amendment* search under *Jardines*. First, the area Marco sniffed was in close proximity to Burston's apartment, as it occurred six to ten inches from the window. Second, the evidence established Burston made personal use of the area by setting up a cooking grill between the door and his window. Third, there was a bush planted in the area in front of the window, which partially covered the window, and one function of the bush was likely to prevent close inspection of Burston's window by passersby. Finally, while the area was not surrounded by an enclosure, the court found the bush served as a barrier to the area where Marco sniffed.

The court also recognized that not all warrantless governmental intrusions onto curtilage violate the *Fourth Amendment*. For example, when officers walk up to the front door of a house to make contact with the homeowner, courts have held the homeowner grants implicit license or permission for the officers to do so, just like any other member of the public. However, in this case, the court held the officers did not have implicit license or permission to allow Marco to sniff six to ten inches from the window in front of Burston's apartment. Consequently, because the officers had no license to intrude upon the curtilage of Burston's apartment, and the area where Marco sniffed was within the curtilage, the court held Marco's sniff was an unlawful search and violated Burston's *Fourth Amendment* rights.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/14-3213/14-3213-2015-11-23.pdf?ts=1448294506

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United States v. Davison, 808 F.3d 325 (8th Cir. 2015)

The owners of a store reported to police that two occupants of a pick-up truck had been doing "donuts" in their parking lot, then parked the truck and in their lot and walked north on Tracy Street. Police dispatch discovered the truck had been reported stolen and relayed this information to officers in the area. An officer drove to the store and obtained a description of the two suspects from the owners. After conducting a brief surveillance of the truck to see if the two occupants would return, the officer decided to drive around the neighborhood to see if he could locate anyone matching their descriptions. While driving north on Tracy Street, the officer saw two individuals, later identified as Eric Davison and Kelly Hall, who matched the store owners' description. When Davison and Hall saw the officer, they avoided eye contact and changed their route, walking west on Eighth Street. Although somewhat suspicious of the pair, the officer decided to canvass the area, looking for others who matched the description of the individuals provided by

the storeowner. After the officer drove around the neighborhood without seeing anyone who matched the storeowners' description, the officer turned south onto a street one block east of Tracy Street where he again saw Davison and Hall walking north. Curious as to why the pair seemed to be walking in a circle, the officer drove around the block twice more to observe their behavior. After the officer saw Davison and Hall walk through the yard of a residence that he knew was a "drug house," he decided to stop and question them about the stolen vehicle.

The officer stopped Davison and Hall and immediately frisked Davison for weapons. When the officer felt an object consistent with a firearm in the right breast pocket of Davison's coat, Davison said, "I'm so stupid." The officer asked Davison if he was a convicted felon, and Davison admitted that he had been released from prison four months earlier. The officer arrested Davison and found a loaded handgun, ammunition, methamphetamine and a syringe on Davison during the search incident to arrest.

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

Davison claimed the firearm should have been suppressed because the officer did not have reasonable suspicion to first conduct a *Terry* stop and then to conduct a *Terry* frisk for weapons.

The court disagreed. First, the court found that the officer conducted substantial surveillance before he decided to stop and question Davison and Hall, the only individuals in the area who matched the storeowners' description of the occupants of the stolen truck. Second, Davison and Hall appeared to be walking a circle, near the stolen truck, in an area known to the officer for high amount of crime. Third, Davison and Hall avoided eye contact with the officer and attempted to evade the officer by walking through the yard of a known drug-house. Based on these facts, the court concluded the officer established reasonable suspicion to conduct a *Terry* stop to question Davison and Hall about the stolen truck.

Next, the court held the officer conducted a valid *Terry* frisk because he established reasonable suspicion to believe Davison might be armed and dangerous. First, the officer reasonably suspected that Davison had stolen the truck. In the Eighth Circuit, when officers encounter suspected car thieves, they also may reasonably suspect that those individuals might possess weapons. Second, the officer stopped Davison and Hall after observing them walk through the yard of a known drug-house in a high-crime area where recent shootings had occurred, including one that targeted police officers.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-1292/15-1292-2015-12-08.pdf?ts=1449592254

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Ninth Circuit

United States v. Zaragoza-Moreira, 780 F.3d 971 (9th Cir. 2015)

A Customs and Border Protection (CBP) officer found two packages of drugs taped to the defendant's body at port of entry during a secondary inspection. Following her arrest, a Homeland Security Investigations (HSI) agent interviewed the defendant. The defendant told the agent she had been coerced by individuals belonging to a drug cartel to smuggle the drugs into the United States. The defendant told the agent that during the 40-minutes she waited in the pedestrian line, she attempted to make herself "obvious" and draw attention to herself, so CBP officers would notice there was something wrong with her. Following the interview, the agent drafted a criminal complaint charging the defendant with smuggling drugs into the United States. In her probable cause statement, the agent stated the defendant admitted to attempting to smuggle drugs into the United States; however, the agent did not mention the defendant's claims of coercion or the defendant's alleged conduct while waiting in the pedestrian line. Five days later, the defendant's attorney sent a letter to the Assistant United States Attorney (AUSA) requesting the government preserve all videotape evidence from the port of entry relating to the defendant's arrest.

After the government indicted the defendant 11 weeks later, the defendant's attorney filed a motion to compel discovery and preserve the video recordings from the port of entry on the date of the defendant's arrest. The government informed the court that the requested video footage had been destroyed after it had been automatically recorded over approximately 30-45 days after the defendant's arrest. The defendant argued the government's failure to preserve the video footage violated the defendant's due process right to present a complete defense to the charges against her. As a result, the defendant claimed the indictment should have been dismissed.

The court agreed. First, the court found the video footage was potentially useful evidence to support the defendant's claim that she only attempted to smuggle the drugs into the United States because she was coerced and under duress. Duress is a defense that allows a jury to excuse the defendant's conduct even though the government proves the defendant violated the law. Here, the court determined the destroyed video footage might have shown the defendant's behavior and supported her claim that she tried to make herself "obvious" to the CBP inspectors while waiting in line at the port of entry.

Second, the court held the HSI agent who interviewed the defendant was aware of the existence of the video footage and its possible usefulness to support the defendant's claim of duress. Throughout the interview, the defendant repeatedly told the agent she had been coerced to smuggle the drugs and that she had repeatedly tried to get the attention of the CBP officers. In addition, the agent admitted she was aware that a defendant who is threatened or coerced to commit a crime has a possible defense to that crime, and that she had the ability to review and preserve the video footage from the port of entry, but failed to do so.

Finally, the court was disturbed by the fact that the agent's probable cause statement supporting the criminal complaint, which she presented to the magistrate judge, did not include any reference to the defendant's claims of duress.

The court concluded the agent knew of the potential usefulness of the video footage and acted in bad faith by failing to preserve it. As a result, the court held the defendant's due process rights were violated and ordered dismissal of the indictment.

While the AUSA's failure to notify HSI of the defendant's letter requesting to preserve the video was not addressed by the district court, the Ninth Circuit Court of Appeals stated that it should have been. The court cautioned when the government fails to comply with preservation requests and allows evidence to be destroyed; it likely violates the discovery disclosure requirements under *Fed. R. Crim. P. 16*. The court found the government's failure to take action in response to defense counsel's preservation letter "particularly disturbing."

Click **HERE** for the court's opinion.

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United States v. Cook, 808 F.3d 1195 (9th Cir. 2015)

Undercover officers arranged to buy drugs from Lambert and Edmonds. While conducting surveillance on Lambert's house before the sale, officers saw Cook enter the house carrying a backpack. When Cook left fifteen minutes later, the backpack appeared to be less full and lighter. Later that day, officers arrested Lambert and Edmonds for distribution of drugs. During an interview, Edmonds told the officers Cook was his supplier and agreed to place a monitored phone call to Cook, requesting that Cook return to Lambert's house. While waiting at Lambert's house, the officers conducted a search and found two firearms. When Cook eventually arrived, he was carrying the same backpack the officers had seen on him during their earlier surveillance. As Cook approached the front porch, officers ordered him to the ground and placed him in handcuffs. While Cook was still on the ground and within one or two minutes of his arrest, an officer picked up the backpack, which was right next to Cook, and performed a twenty or thirty second cursory search for weapons or contraband. After finding no weapons, the officers quickly moved Cook and the backpack to a more secure location a few blocks away because a crowd had started to gather outside Lambert's house. The officers then conducted a more thorough search of Cooks' backpack and found marijuana, MDMA and LSD.

The government indicted Cook for several drug offenses.

Cook filed a motion to suppress the evidence found in his backpack. Cook argued the initial search of his backpack was not valid incident to arrest because he was handcuffed at the time of the search; therefore, there was no reasonable concern for officer safety or destruction of evidence.[3]

[3] Although the evidence Cook sought to suppress was found during the second search of his backpack, he only challenged the first search that occurred at the scene of his arrest. Cook recognized that if the first

The court disagreed. A search incident to arrest is an exception to the *Fourth Amendment's* warrant requirement, which allows an officer to search an arrestee's person and the area within the arrestee's immediate control. An area of immediate control is the area from which an arrestee might gain possession of a weapon or destructible evidence. The immediate control requirement ensures the scope of a search incident to arrest is limited to protecting the arresting officers and safeguarding any evidence that an arrestee might conceal or destroy.

In this case, even though Cook was face down on the ground and handcuffed when the officer searched his backpack, the search occurred immediately after Cook was arrested while the backpack was located on the ground next to Cook. In addition, the court found the officers' safety concerns were reasonable. First, the officers believed Cooked used the same backpack earlier that day to transport drugs. Second, the officers had already recovered two firearms from the house associated with Lambert, Cook's co-conspirator. Third, Cook's arrest occurred in front of the same house where a crowd had gathered that could have contained someone who might interfere with the arrest. Finally, as soon as the officer determined the backpack contained no weapons, he immediately stopped the search. As a result, the court held the brief and limited nature of the search, its immediacy to the time of arrest and the location of the backpack ensured the search was conducted to protect the arresting officers and prevent the destruction of evidence.

Click **HERE** for the court's opinion.

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United States v. Fowlkes, 804 F.3d 954 (9th Cir. 2015)

On September 4, 2006, officers intercepted several phone calls that caused them to believe Fowlkes was planning to destroy or remove drugs and other evidence from his apartment. Within an hour of the last phone call, officers arrived at the apartment, entered without a warrant, handcuffed Fowlkes and conducted a protective sweep. During this time, the officers saw a handgun. The officers then obtained a warrant to search the apartment and seized crack cocaine, a digital scale and the handgun. At the conclusion of the search, the officers released Fowlkes.

On September 13, 2006, officers arrested Fowlkes for felony drug possession after witnessing what appeared to be a drug transaction, and transported him to the jail for processing. During intake, officers strip searched Fowlkes. After Fowlkes removed his clothing, officers saw him make a quick movement to his buttocks area with his hand in what appeared to be an attempt to push something into his rectum. One of the officers deployed his taser against Fowlkes while other officers handcuffed him. Once Fowlkes was secured, the officers saw a plastic bag partially protruding from Fowlkes' rectum. One of the officers forcibly removed the plastic bag in what was described as a "difficult, abrasive procedure." The officers discovered cocaine inside the plastic bag.
At trial, Fowlkes argued, among other things, the warrantless entry into his apartment on September 6 was unreasonable, and the subsequent search warrant was not supported by probable cause.

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search was valid, then the second search was allowed as long as the backpack remained in the "legitimate uninterrupted possession of the police." *United States v. Burnette*, 698 F.2d 1038, 1049 (9th Cir. 1983)

The court disagreed, holding exigent circumstances justified the warrantless entry into Fowlkes' apartment. Officers intercepted phone calls that suggested the presence of drugs and other evidence in Fowlkes' apartment, and that Fowlkes ordered its removal so the police could not seize it. As a result, the court concluded a reasonable police officer could have believed it was necessary to enter and secure Fowlkes' apartment to prevent Fowlkes from destroying evidence. In addition, the court found the one-hour lapse between the last intercepted call and the officers' entry into the apartment did not undermine the exigency of the situation, and that the warrant issued by the magistrate judge was supported by probable cause.

Fowlkes also argued the warrantless seizure of the plastic bag from within his body was unreasonable; therefore, the evidence the officers discovered inside the bag should have been suppressed.

The court agreed. First, the court held the warrantless visual strip search of Fowlkes during the jail intake process was reasonable. The court recognized the government's interest in preventing contraband from entering its prisons and jails, and that it would be impractical to require officers to obtain a warrant before conducting each individual visual search.

Second, the court did not determine whether the officers were required to obtain a warrant before retrieving the object from Fowlkes' rectum. However, assuming it would have been reasonable for the officers to seize the object without first obtaining a warrant, the court recognized the manner in which the officers removed the object still had to be reasonable.

Reviewing the totality of the circumstances, the court concluded the manner in which the officers removed the object from Fowlkes' rectum was unreasonable. First, the officers violated the jail's written policy for body cavity searches by failing to remove the evidence "under sanitary conditions," and by not using a "Physician, Nurse Practitioner, Registered Nurse, Licensed Vocational Nurse, or Emergency Medical Technician." Second, there was no evidence any of the officers had medical or any other relevant training on how to safely remove suspicious objects from an arrestee's rectum, or how to evaluate whether such removal could cause serious physical harm or death. Third, the officers did not offer Fowlkes options for removing the contraband or attempt to secure his compliance beforehand. The court noted the undisputed testimony by the officers established Fowlkes posed no threat to the officers, that was he was not flight risk, and there was no concern about the destruction of the evidence, as Fowlkes was handcuffed, tased and surrounded by five officers. In addition, there was no evidence a medical emergency existed that would have justified the immediate removal of the plastic bag from Fowlkes' rectum. Consequently, the court concluded the manner in which the officers seized the plastic bag from Fowlkes' rectum was unreasonable; therefore, the cocaine discovered inside it should have been suppressed.

Click **HERE** for the court's opinion.

*****

Tenth Circuit

United States v. Gilmore, 776 F.3d 765 (10th Cir. 2015)

On a January day, in Denver, Colorado, a parking lot attendant reported that a man staggered into the lot who appeared to be extremely intoxicated. Officers arrived and encountered the man, later identified as Gilmore. Gilmore was unsteady on his feet, staring blankly into the air, and having difficulty focusing on the officers. When the officers asked Gilmore what he was doing in the parking lot, Gilmore mumbled an incoherent answer. The officers believed Gilmore was a candidate for protective custody under Colorado's Emergency Commitment statute due to his apparent level of intoxication. Before placing Gilmore in a police car for transport, one of the officers frisked Gilmore and felt the butt of a handgun under Gilmore's coat. The officer lifted the coat, saw a pistol, and seized it from Gilmore's waistband. The officers arrested Gilmore who was indicted for being a felon in possession of a firearm.

Gilmore argued the frisk was unlawful because the officers did not have reasonable suspicion to believe he was armed and dangerous.

Under the community caretaking exception to the *Fourth Amendment's* warrant requirement, officers may seize a person without a warrant to ensure the safety of the public and /or the individual, regardless of any suspected criminal activity. The Tenth Circuit has recognized the community caretaking exception allows officers to perform investigatory seizures of intoxicated persons. To justify a seizure of a person for intoxication by alcohol, an officer must have probable cause to believe an intoxicated person is a danger to himself or others.

In this case, the court concluded the totality of the circumstances could have led a reasonable officer to conclude Gilmore was a danger to himself because he appeared to be severely intoxicated to the point of impairment. In addition, the court found the neighborhoods surrounding the parking lot had a high concentration of gang members and that officers had made numerous contacts with individuals possessing illegal weapons in those neighborhoods. As a result, the court concluded a reasonable officer could have believed Gilmore might be harmed if he wandered disoriented into one of these neighborhoods. Finally, while the court determined Gilmore was dressed appropriately, the court found the officers could have reasonably believed that if Gilmore were to become unconscious in a remote area or fail to find shelter when the temperature dropped that evening, he might suffer serious injury or death.

Once the officers established probable cause to believe Gilmore was a danger to himself, the court held the officers were allowed to conduct a frisk before taking Gilmore into protective custody.

Click **HERE** for the court's opinion.

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United States v. Paetsch, 782 F.3d 1162 (10th Cir. 2015)

After an armed bank robbery, officers learned that one of the stacks of stolen money contained a Global Positioning System (GPS) tracking device. Approximately fourteen minutes after the robbery, officers isolated the GPS signal to a general area and barricaded an intersection, which prevented a group of 20 cars containing 29 people from leaving. Approximately thirty-minutes later, officers ordered Paetsch out of his car and handcuffed him after he kept shifting in his seat and failed to keep his hands outside his car as ordered. After the officers cleared all 20 cars, they began a secondary search by looking through the cars' windows to ensure no one was hiding inside them. Inside Paetsch's car, officers saw a money band and a slip of colored paper that banks use to wrap stacks of money. Approximately one-hour later, the officers isolated the GPS signal to Paetsch's car. The officers arrested Paetsch, searched his car and recovered stolen cash, the GPS tracking device, two handguns and other evidence related to the bank robbery.

Paetsch moved to suppress statements he made to the officers as well as the physical evidence seized from his car. Paetsch argued the police barricade violated the *Fourth Amendment* because the officers lacked individualized suspicion that any particular person stopped at the intersection had committed the bank robbery.

The court disagreed. The court held Paetsch's initial thirty-minute seizure at the barricade did not violate the *Fourth Amendment* because the public interest in apprehending an armed bank robber outweighed the minimal intrusion on Paetsch's liberty. The court further held that when the officers directed Paetsch out of his car and handcuffed him, they had established reasonable suspicion to believe Paetsch was involved in the robbery. As a result, the court concluded Paetsch's additional one-hour detention was reasonable until the officers confirmed the GPS tracking device was located inside Paetsch's car and arrested him.

Click **HERE** for the court's opinion.

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United States v. Pettit, 785 F.3d 1374 (10th Cir. 2015)

A Utah Highway Patrol Trooper conducted a traffic stop after he saw Pettit drive across the fog line multiple times. Pettit told the trooper he was not the owner of the vehicle. Pettit explained that he had flown to California to pick up his friend's car, which he was driving back to Kansas. During the encounter, Pettit was extremely nervous, with his whole arm shaking when he handed the trooper a Missouri driver's license, which was labeled "Nondriver." Pettit also gave the trooper a California driver's license. When the trooper ran a check on the licenses, he discovered that both were suspended. The trooper then obtained Pettit's consent to search his car, but he did not find any contraband during a cursory inspection of some luggage located in the trunk. Approximately eleven minutes into the stop, the trooper completed his paperwork and wrote a ticket; however, the trooper did not return Pettit's driver's licenses or hand him the ticket. Instead, the trooper questioned Pettit further about his travel plans and his relationship with the owner of the car. The trooper then obtained Pettit's consent to search the entire car and found $2,000

in a suitcase in the trunk. The trooper also discovered from his dispatch that Pettit had multiple arrests for felonies and other drug offenses. Fifteen minutes after the trooper completed Pettit's original traffic ticket, two canine officers arrived, and their drug-sniffing dog alerted on Pettit's vehicle. A further search revealed over two kilograms of cocaine hidden in a spare tire in the trunk.

The government indicted Pettit for possession with intent to distribute cocaine.

Pettit moved to suppress the cocaine, arguing the officer violated the *Fourth Amendment* by unreasonably prolonging the duration of the traffic stop without reasonable suspicion to believe Pettit was involved in criminal activity.

The court disagreed. The court concluded the trooper's justification for the stop ended when the trooper completed his paperwork and wrote Pettit's ticket, approximately eleven-minutes into the stop. However, the court found during this time, the trooper established reasonable suspicion to believe that Pettit was engaged in criminal activity, which allowed the trooper to extend the duration of the initial stop to conduct his investigation. The court noted that Pettit's abnormal nervousness, unusual travel plans, and multiple suspended driver's licenses, by themselves might not provide reasonable suspicion; however, when taken together they established reasonable suspicion to support Pettit's extended detention.

Click **HERE** for the court's opinion.

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United States v. Snyder, 793 F.3d 1241 (10th Cir. 2015)

An officer stopped Snyder for a traffic violation. While standing outside Snyder's car, the officer smelled burnt marijuana emanating from inside the car. The officer searched the car and while he did not find any marijuana, he found a firearm under the driver's seat. The officer arrested Snyder for being a felon in possession of a firearm.

Snyder filed a motion to suppress the firearm, arguing the officer's warrantless search of his car violated the *Fourth Amendment*.

The court disagreed. When an officer establishes probable cause a car contains contraband, the *Fourth Amendment* does not require him to obtain a warrant before searching the car and seizing the contraband. In addition, Tenth Circuit case law provides, "the smell of burnt marijuana alone establishes probable cause to search a vehicle for the illegal substance." Consequently, once the officer smelled the odor of burnt marijuana emanating from Snyder's car, he was entitled to conduct a warrantless search of the car in an attempt to locate marijuana.

Click **HERE** for the court's opinion.

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United States v. Moore, 795 F.3d 1224 (10th Cir. 2015)

An Oklahoma Highway Patrol Trooper stopped Moore for speeding. While talking with Moore, the trooper noticed Moore seemed extremely nervous, as his hands were shaking when he gave the trooper his driver's license, he rarely made eye contact, he kept fidgeting, and he immediately asked the trooper if he could smoke a cigarette. When the trooper asked Moore why the car he was driving was registered to both Moore and a female with a different last name, Moore told the trooper he had known the female for several years and that his name had been added to the registration a week earlier. Throughout this conversation, the trooper noticed Moore still seemed to be nervous, even after the trooper told Moore he was only going to issue him a warning ticket. The trooper completed the warning ticket, returned all of Moore's documents, and told Moore to have a good day.

The trooper then asked Moore if he could speak to him for a little while longer. After Moore agreed, the trooper asked Moore if he had ever been in any trouble before. Moore told the trooper he had, but that he did not wish to talk about it. When the trooper asked Moore if he had anything illegal in his car, such as weapons or drugs, Moore said no. Finally, when the officer asked Moore for consent to search his car, Moore refused. The trooper then told Moore he was going to detain him to conduct a dog sniff of his car.

A few minutes later, another trooper arrived with his certified narcotics-detection dog, Jester. While the trooper and Jester were walking around the rear of Moore's car, Jester alerted by snapping his head around and returning to the front of Moore's car where he jumped through the driver's side window, which Moore had left open. The trooper saw Jester had his nose on the center console and that he was wagging his tail. The troopers searched Moore's car but they did not find any drugs; however, they discovered a sawed-off shotgun and ammunition in the trunk.
The government indicted Moore for three firearms related offenses based on the evidence seized from the trunk of Moore's car.

Moore argued the evidence seized during the traffic stop should have been suppressed because the trooper unlawfully detained him without reasonable suspicion after the traffic stop had ended. Moore also argued Jester's entry into his car constituted an unlawful search.

The court disagreed. Both sides agreed the purpose of the traffic stop, to issue Moore a warning for speeding, was completed as soon as the trooper returned Moore's license, gave him a copy of the warning ticket, and told him to have a good day. However, by this time, the court held the trooper established reasonable suspicion to believe Moore was involved in criminal activity. The court found Moore's extreme nervousness, his prior criminal history and the fact that Moore's name had recently been added to the car's registration, when considered together, justified Moore's further detention and dog sniff of his car.

The court further held Jester's entry into Moore's car did not constitute an illegal search. First, Jester properly alerted outside Moore's car before he jumped into it through a window Moore left rolled down when he exited his car. Therefore, as soon as Jester alerted outside Moore's car, the court held the officers had probable cause to search it.

Second, the fact that Jester gave an "alert" and not his trained "indication" was of no consequence. The Tenth Circuit has held that an alert, or change in a dog's behavior in reaction to the odor of drugs is sufficient to establish probable cause to search a vehicle, and that a final indication is not necessary. Consequently, even though Jester did not provide his final indication by sitting and staring at the source of the odor, Jester's positive alert was, by itself, enough to provide the troopers probable cause to search Moore's car.

Click **HERE** for the court's opinion.

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United States v. Sanders, 796 F.3d 1241 (10th Cir. 2015)

Police officers in Aurora, Colorado arrested Sanders on an outstanding warrant after she and her friend, Hussey, exited a store and walked toward her car in the parking lot. Sanders gave permission for a third party to pick up her car and Hussey offered to contact someone to pick up Sanders' car. However, the officers decided to impound Sanders' car and conducted an inventory search before having it removed from the lot. The officers found methamphetamine, Ecstasy and drug paraphernalia in Sanders' car. The government indicted Sanders for possession with intent to distribute controlled substances.

Sanders moved to suppress the drugs found in her car, arguing the officers violated the *Fourth Amendment* by unlawfully impounding her car from private property.

The court agreed. The court held that impoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community caretaking rationale.

First, the court found that Sanders' car was legally parked in a private lot and there was no evidence that it was either impeding traffic or posing a risk to public safety.

Second, while Aurora's municipal code explicitly authorizes the impoundment of vehicles from public property under certain circumstances, it does not mention the impoundment of vehicles from private lots. As a result, the court concluded that Aurora Municipal Code does not authorize the impoundment of vehicles from private lots. The court noted that while Aurora policy allowed the officers to offer Sanders the options of releasing them from potential liability if her car was left in the lot or having the car towed by a private company, there was no evidence the officers offered Sanders either of these options, or why they failed to do so.

Third, the court held the impoundment was not justified by a reasonable, non-pretextual community caretaking rationale. Sanders' car was legally parked on private property, and there was no evidence that the officers contacted the owners of the parking lot about leaving her car parked there. In addition, the officers impounded Sanders' car without offering her the opportunity to make alternative arrangements, even though she said she was willing to have someone pick up the vehicle on her behalf and Hussey offered to find someone to pick up the car for her.

Click **HERE** for the court's opinion.

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United States v. Padilla-Esparza, 798 F.3d 993 (10th Cir. 2015)

On September 10, 2013, United States Customs and Border Protection Officer Aguilera issued a "Be on the Lookout" (BOLO) for Padilla and his truck for suspected bulk cash or drug smuggling. Officer Padilla based the BOLO on information he obtained regarding Padilla and his truck from the Treasury Enforcement Communications System (TECS) concerning an encounter on February 25, 2013 as well as information he obtained from Padilla during an interview on September 7, 2013.

On September 13, 2013, Border Patrol Agents stopped Padilla based on the BOLO issued by Officer Aguilera. However, almost immediately after the stop, the agents allowed Padilla to leave after they mistakenly received information that they had stopped the wrong vehicle. As Padilla was driving away, the agents discovered they had pulled over the correct vehicle and began to pursue Padilla again. A few minutes later, the agents stopped Padilla for a second time. During the stop, Padilla consented to a search of his truck after a drug-detection dog alerted to the presence of narcotics. The agents later found sixteen kilograms of cocaine in a non-factory compartment in Padilla's truck.

The government indicted Padilla for possession with intent to distribute cocaine.

Padilla filed a motion to suppress the evidence discovered in his truck. Padilla argued the first stop violated the *Fourth Amendment* because Officer Aguilera did not have reasonable suspicion to issue the BOLO.

The court disagreed. First, based on information obtained from the TECS, Officer Aguilera knew a drug-detection dog had alerted to a hidden, non-factory compartment in Padilla's truck on February 25, 2013. Based on his experience as a 16-year veteran of the CBP, Officer Aguilera knew such compartments often are used to hide contraband, and that the dog alert suggested the compartment may have been used to store currency or narcotics.

Second, Officer Aguilera knew that on September 7, 2013, Padilla initially failed to declare $2,000 dollars he had hidden in his camera case and that currency or drug smugglers often do not declare the full amount of cash they carry across the border.

Third, Officer Aguilera knew that on September 7, 2013, Padilla had receipts for $1,300 in clothing purchases from outlet malls. He detected inconsistencies between these purchases and Padilla's inability to offer any details about how he made money, including the identity of his most recent landscaping clients or how much he was paid for each job.

Finally, Officer Aguilera knew Padilla had frequently traveled through the Las Cruces and Alamogordo checkpoints in the past six months, which was consistent with bulk cash or drug smuggling. As a result, the court held Officer Aguilera had reasonable suspicion Padilla was involved in criminal activity when he issued the BOLO on September 10, 2013.

Padilla also argued the second stop violated the *Fourth Amendment* because any reasonable suspicion dissipated after the first stop, and the agents did not acquire any new information before the second stop to re-establish reasonable suspicion.

The court disagreed, holding the agents' reasonable suspicion was not dissipated after the first stop; therefore, the second stop was reasonable. Successive *Terry* stops are not prohibited; however, a second stop violates the *Fourth Amendment* when an officer's suspicions are dispelled during the first stop, and then offered again to justify the second stop. In this case, the court held the agents' initial stop of Padilla did not dispel reasonable suspicion. After obtaining Mr. Padilla's identification, the agents quickly aborted the stop based upon the erroneous belief they had pulled over the wrong vehicle. The agents did not question Padilla or search his truck. When dispatch confirmed the agents had released the correct suspect, reasonable suspicion based on the BOLO remained, and the agents were justified in stopping Padilla a second time.

Click **HERE** for the court's opinion.

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United States v. Hill, 805 F.3d 935 (10th Cir. 2015)

Hill boarded an Amtrak train in Los Angeles. When the train stopped in Albuquerque, New Mexico, an agent with the Drug Enforcement Administration (DEA) boarded to conduct drug interdiction activities. The agent went to a common area where passengers stored large pieces of unchecked luggage where he saw a suitcase with no nametag. The agent removed the suitcase from the luggage area, carried it to the passenger area, and rolled it down the center aisle, asking each passenger if the suitcase belonged to him. All of the passengers, including Hill, denied ownership of the suitcase. The agent determined the suitcase was abandoned and searched it. Inside the suitcase, the agent found a large quantity of cocaine as well as items of clothing linking the suitcase to Hill.

The government charged Hill with possession with intent to distribute cocaine.

Hill argued the agent's taking the suitcase from the common storage area and rolling it down the aisle of the passenger area constituted an illegal seizure which rendered Hill's subsequent abandonment of the bag invalid.

A traveler's luggage is one of the many "effects" the *Fourth Amendment* protects against unreasonable seizures. A *Fourth Amendment* seizure occurs when there is some meaningful interference with an individual's possessory interest in his property. However, the court recognized there is very little Supreme Court precedent addressing the parameters of the *Fourth Amendment's* "meaningful interference" test as applied to seizures of property, let alone, seizures of luggage. Courts have routinely held that taking luggage from the direct possession of a traveler amounts to a seizure. Alternatively, courts have consistently held that a brief detention of checked luggage that does not delay the luggage from reaching its intended destination does not amount to a seizure. With this in mind, the court noted Hill's possessory interest in the suitcase fell in the area between luggage in his direct possession and luggage checked with Amtrak. As such, the court concluded that Hill could reasonably expect that other passengers or Amtrak officials might briefly move or reposition his suitcase within the common storage area. However,

the court also found that because Hill retained responsibility for the suitcase instead of checking it with Amtrak officials, he could reasonably expect that he could access the suitcase in the common storage area at any time.

Applying the facts of the case within this legal framework, the court held the agent's actions in taking the suitcase into his own dominion and control for the purpose of finding its owner and conducting narcotics interdiction, deviated significantly from a reasonable traveler's expectations as to how his bag would be treated in the common storage area. In addition, the court held the agent's actions deprived Hill of is possessory interest in being able to access his luggage on his own schedule. Consequently, the court concluded the agent's actions amounted to a seizure of Hills's luggage. Because the government conceded the agent seized Hill's luggage without reasonable suspicion, the existence of an exigency or a warrant, the court held it was a violation of the *Fourth Amendment*.

The court added the fact that Hill's suitcase was not marked with a baggage tag did not diminish his possessory interest in it. Although Hill might have deviated from Amtrak's baggage policy, it was undisputed that Amtrak allowed Hill to board the train with untagged luggage and place it in the common storage area without any indication that his bag could possibly be removed under this policy.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/14-2206/14-2206-2015-11-09.pdf?ts=1447088469

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Mocek v. City of Albuquerque, 813 F.3d 912 (10th Cir. 2015)

In November 2009, Mocek, who had a practice of refusing to show his photo identification at airport security checkpoints, arrived at the Albuquerque airport for a flight to Seattle. Mocek gave his driver's license to a travel companion, who then went through security. At the security checkpoint, Mocek gave the Transportation Security Administration (TSA) agent his boarding pass, but told the agent he did not have identification. The TSA agent directed Mocek to a different line where another TSA agent began an alternative identification procedure. After Mocek refused to offer other proof of identity, such as a credit card, the TSA agent told Mocek that if his identity could not be verified, he would not be allowed through the checkpoint. At this point, Mocek began to film the encounter with a camera. The TSA agent ordered Mocek to stop filming, and when Mocek refused, the agent requested assistance from the Albuquerque Aviation Police Department (AAPD). While waiting for AAPD officers, other TSA agents arrived and ordered Mocek to stop filming, with one agent attempting to grab the camera out of Mocek's hand. Mocek remained calm, continued to record and would not identify himself. When AAPD officers arrived, the TSA agent told them Mocek was "causing a disturbance," would not put down the camera, and was "taking pictures" of all the agents. As one of the officers began to escort Mocek out of the airport, the officer asked Mocek for his identification. Mocek told the officer he did not have any identification on him. The officer then told Mocek he was under investigation for disturbing the peace and was required to present identification. Mocek told the officer he wished to remain silent and wanted to speak to an attorney. The officer

arrested Mocek. At some point, Mocek's camera was seized by officers who deleted the video recordings.

Mocek was ultimately charged with disorderly conduct, concealing name or identity, resisting an officer's lawful commands and criminal trespass. At trial, Mocek introduced the video recordings of the incident, which he recovered using forensic software, and was acquitted on all counts.

Mocek sued several TSA agents and AAPD officers, claiming among other things, that the agents and officers violated the *Fourth Amendment* by arresting him without probable cause to believe he had committed a crime.

The court disagreed, holding the TSA agents and AAPD officers were entitled to qualified immunity.

The court recognized the "uniquely sensitive setting" involved in this case while stating that "order and security are of obvious importance at an airport security checkpoint." Against this backdrop, the court found that under New Mexico law, the officer initially had reasonable suspicion to detain Mocek for disorderly conduct. Although Mocek claimed he was calm the entire time, the AAPD officer was entitled to rely on the TSA agents' statements to him that Mocek was "causing a disturbance" and that he refused to stop filming the agents. In addition, the officer saw that at least three TSA agents had left behind other duties to deal with Mocek, which the court noted was especially problematic in this setting. Finally, the court found that a reasonable officer could have believed that Mocek's filming invaded the privacy of other travelers, or posed a security threat.

Next, once the officer established reasonable suspicion to investigate Mocek for disorderly conduct, the court concluded the officer was justified in asking Mocek to identify himself. However, when Mocek refused, the court had to determine if the officer then had probable cause to arrest Mocek for concealing his name or identity under *N.M. Stat. Ann. § 30.22.3*.

The court found that New Mexico courts have not precisely defined what it means to furnish "identity" under *§ 30.22.3* and that the courts have not specified what identifying information might be appropriate in all situations.

While the Tenth Circuit doubted that Mocek's failure to produce identification during a stop for suspicion of disorderly conduct violated *§ 30.22.3*, the court noted that it was unclear as to what type of identification a person would need to show an officer during such a stop. As a result, the court concluded that any mistake the officer might have made in believing that Mocek's failure to produce identification established probable cause to arrest was a reasonable one, which entitled the officer to qualified immunity.

Mocek's suit also claimed the officer arrested him in retaliation for exercising his alleged *First Amendment* right to film at a security checkpoint. Without deciding whether Mocek actually had a *First Amendment* right to film at the airport security checkpoint, the court held the officer was entitled to qualified immunity. Regardless of any subjective motivation the officer might have had for arresting Mocek, the court concluded the officer could have reasonably believed that he was entitled to arrest Mocek as long as he established probable cause of a criminal violation. As previously discussed, the court

found the officer could have reasonably believed he had probable cause to arrest Mocek for violating *N.M. Stat. Ann. § 30.22.3*.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/14-2063/14-2063-2015-12-22.pdf?ts=1450807559

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Eleventh Circuit

United States v. Holt, 777 F.3d 1234 (11th Cir. 2015)

Holt and several co-defendants were convicted of several drug-related crimes. At trial, the government introduced into evidence large amounts of cash that had been seized from Holt's vehicle during two different traffic stops, as well as evidence obtained from a GPS tracker.

The first stop occurred when an officer pulled Holt over for speeding. During the stop, the officer recognized Holt from when the officer worked in the narcotics unit. In addition, when the officer requested Holt's driver's license, the officer noticed Holt was nervous, breathing heavily, sweating profusely and failed to maintain eye contact. Based on Holt's behavior, the officer requested a canine unit to respond to the scene. While the officer was completing the paperwork associated with the stop, the canine unit arrived. After the canine alerted on the front passenger door of Holt's car, the officer search the glove box and found over $45,000 in cash, which he seized.

The second stop occurred when an officer pulled Holt over because his tag lights were not working properly. During the stop, the officer spoke with Holt and his passenger separately concerning their travel plans. After both men gave the officer different accounts of their plans, the officer requested a canine unit. While the officer was completing his paperwork associated with the stop, the canine unit arrived. The canine alerted to the car's driver's side door, where the officer found over $31,000 in cash, which he seized.

Holt argued the district court should have suppressed the currency seized during the traffic stops because the officers unreasonably prolonged those stops to allow time for the canine units to arrive.

The court disagreed. In both stops, the canine units arrived while the officers were still conducting routine records checks and preparing the traffic citations. Therefore, the court concluded the use of the canines to sniff the exterior of the vehicles during the stops did not violate the *Fourth Amendment*.

The court further held that in both stops, the officers had developed reasonable suspicion to believe Holt might be transporting illegal drugs or currency by the time the canine units arrived.

Finally, the court held the evidence obtained from the warrantless installation and monitoring of a GPS tracker was admissible. In this case, the warrantless use of a GPS tracker occurred in September 2011, several months before the United States Supreme Court ruled in *U.S. v Jones* that the warrantless use of a GPS tracker constituted a *Fourth Amendment* search. As a result, even if *Jones* applied, the court held the officers acted in good faith reliance on pre-*Jones* case law that allowed the warrantless installation and monitoring of a tracking device.

Click **HERE** for the court's opinion.

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United States v. Barber, 777 F.3d 1301 (11th Cir. 2015)

Officers stopped a car in which Barber was a passenger. After the driver, Robinson, consented to a search of the car, officers directed Barber to exit the car. During the search, an officer saw a bag on the passenger-side floorboard. The officer looked inside the bag and saw a handgun, Barber's business cards and a photograph of Barber. After Barber admitted the handgun belonged to him, the officers arrested him for being a felon in possession of a firearm.

Barber argued the firearm should have been suppressed because Robinson lacked the authority to consent to a search of his bag.

First, the court held Barber had standing to challenge the search because he had a reasonable expectation of privacy in the bag.

Second, the court held Robinson had apparent authority to consent to a search of the bag, even though the officers later learned the bag belonged to Barber. A third party has apparent authority to consent to a search if the officer could have reasonably believed the third party has authority over the area to be searched. Here, the court concluded the bag's placement on the passenger-side floorboard, within easy reach of Robinson, coupled with Barber's silence during the search, made it reasonable for the officer to believe Robinson had common authority over the bag. In addition, the court recognized that drivers do not usually place their bags on the driver-side floorboard, but drivers sometimes use the passenger-side floorboard to store their belongings. As a result, the officers could have reasonably believed Robinson had common authority over the bag; therefore, he could consent to its search.

Click **HERE** for the court's opinion.

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United States v. Hollis, 780 F.3d 1064 (11th Cir. 2015)

Officers were searching for Hollis based on an outstanding arrest warrant for a parole violation. After the officers learned Hollis might be located in an apartment, which was a known "drug house," the officers approached the front door and knocked. When Hollis looked out a window, the officers recognized him, then identified themselves and ordered Hollis to open the door. After waiting for a brief period, the officers used a battering ram to open the door, entered the apartment and arrested Hollis. Once inside the apartment, officers conducted a protective sweep and found marijuana on a dresser in the bedroom and on the kitchen counter as well as loaded firearms under a bed. The officers then obtained a warrant to search the apartment and discovered large quantities of cocaine, marijuana, cash and scales. A federal grand jury indicted Hollis on a variety of drug and firearm offenses.

Hollis moved to suppress the evidence found in the apartment, arguing the officers conducted an illegal warrantless search of the apartment in violation of the *Fourth Amendment*.

The court disagreed. An arrest warrant implicitly carries with it the limited authority to enter a dwelling in which the suspect lives to effect an arrest when there is reason to believe the suspect is inside. Although the officers did not believe the apartment was Hollis' dwelling, that fact was irrelevant as Hollis could have no greater right of privacy in another's home than in his own. In addition, while it is possible for officers to violate the *Fourth Amendment* rights of a third party when they execute an arrest warrant for another person in the third party's home, Hollis, the subject of the arrest warrant cannot challenge the execution of that warrant and the later discovery of evidence in the third party's home.

The court further held the marijuana found on the dresser and kitchen counter and the firearms located under the bed were seized in plain view during a valid protective sweep of the apartment. The court held the officers were entitled to sweep the apartment to ensure it did not contain anyone who could harm them, as the apartment was a known drug house with a high level of activity at all hours of the day.

Click **HERE** for the court's opinion.

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Valderrama v. Rousseau, 780 F.3d 1108 (11th Cir. 2015)

Office Rousseau stopped Garcia's car after he saw a pedestrian approach the car and hand the passenger, Valderrama a metallic object that appeared to be a weapon. Officer Smith arrived to provide back up and as she approached Garcia's car, she saw Valderrama throw what appeared to be a crack pipe out the window. Officer Rousseau approached the car with his firearm drawn and directed Garcia and Valderrama to show their hands. Garcia complied and raised his hands while Valderrama's hands remained "on his knees or against his stomach." Rousseau then fired a shot at Valderrama, striking him in the groin. When Officer Smith heard the gunshot, she directed Valderrama to get out of the car, which he did. Smith and Rousseau spoke about the shooting and discussed that Valderrama was bleeding. Rousseau began to search Garcia's car, but he found no weapons. Smith called police dispatch three and one half minutes after the shooting and requested an ambulance. Instead of reporting a gunshot wound, Smith reported Valderrama's injury as a laceration. As a result, given the relatively minor injuries associated with lacerations, the fire and rescue dispatch assigned the call the lowest priority. The ambulance arrived eleven minutes later. If Smith had reported Valderrama's injury as a gunshot wound, the ambulance request would have received the highest priority, and an ambulance would have arrived within four minutes of Smith's call.

Officer Gonzalez arrived on the scene two to three minutes after the shooting and contacted Rousseau's supervisor shortly before Smith called dispatch to request the ambulance. At some point after the shooting, Rousseau went back to his patrol car to speak with Timothy Burney. Rousseau had arrested Burney earlier in the evening and Burney was seated in the backseat of Rousseau's car. Burney claimed that Rousseau offered to drop the charges against him if Burney would say that he saw Valderrama holding a shiny object when Rousseau shot him.

Valderrama filed suit against Rousseau, Smith and Gonzalez alleging excessive use of force, and unlawful arrest in violation of the *Fourth Amendment*, as well as deliberate indifference to his serious medical need, in violation of the *Fourteenth Amendment*.

The district court denied Rousseau's request for qualified immunity on Valderrama's excessive use of force claim, which Rousseau did not appeal.

The district court also denied Rousseau's and Smith's requests for qualified immunity on Valderrama's claim for false arrest. However, on appeal, the court reversed, finding there was undisputed evidence the officers had probable cause to arrest Valderrama for possession of drug paraphernalia. Officer Smith stated she saw Valderrama throw a small glass pipe out of the car window as she approached and Valderrama later admitted he had thrown a crack pipe out of the passenger side window of the car. Once the officers established probable cause, the court found there could be no violation of the *Fourth Amendment* for unlawful arrest.

Finally, the district court denied Rousseau's, Smith's and Gonzalez's requests for qualified immunity on Valderrama's claim that the officers violated the *Fourteenth Amendment* by acting deliberately indifferent to his serious medical need.

The court agreed in part, holding a reasonable jury could find that Rousseau and Smith were deliberately indifferent to Valderrama's serious medical need. First, both officers knew Valderrama had suffered a gunshot wound. Second, after the shooting, Rousseau admitted that instead of immediately calling an ambulance, he and Smith stopped to talk about the shooting and the extent of Valderrama's injuries. Third, Smith falsely reported Valderrama's injury as a laceration instead of a gunshot wound, which delayed the arrival of the ambulance by seven minutes. Finally, after the shooting, Rousseau searched Garcia's car in violation of agency policy and offered to drop criminal charges against Burney in exchange for his cooperation. Consequently, the court held a reasonable jury could conclude that Rousseau and Smith delayed seeking medical care for Valderrama while they attempted to come up with a story to justify Rousseau's use of deadly force against Valderrama.

The court further held at the time of the incident it was clearly established that intentionally delaying medical care for an arrestee that has an urgent medical condition constituted deliberate indifference

Finally, regarding Officer Gonzalez, the court reversed the district court, and held that he was entitled to qualified immunity. First, Gonzalez did not arrive until after the shooting. Second, there was no evidence to suggest Gonzalez was aware that Rousseau and Smith had failed to immediately report the incident as a shooting. Third, there was no evidence that Gonzalez knew Smith lied about Valderrama's injuries when requesting the ambulance causing the delay in Valderrama's medical care.

Click **HERE** for the court's opinion.

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Mobley v. Palm Beach Cnty. Sheriff Dep't., 783 F.3d 1347 (11th Cir. 2015)

Mobley was seated in his parked truck preparing to smoke crack cocaine when a police officer approached and asked Mobley, "What are you doing?" When Mobley started his truck, the officer reached through the open driver's side window and tried to open the door. Mobley backed his truck out of the parking space and dragged the officer approximately twenty-feet across the parking lot before the officer fell clear of the truck. After Mobley fled, the officer radioed a bulletin that included a description of Mobley and his truck, and the fact that Mobley struck him with the truck and had tried to run him over. A short time later, other officers located Mobley and began a vehicle pursuit. During the pursuit, Mobley drove recklessly at high speeds in an attempt to evade the officers. After Mobley struck a tree, he exited his damaged truck and waded into the middle of an adjacent retention pond. Mobley eventually walked out of the pond and the officers shoved him to the ground. While on the ground, officers struck, kicked and tased Mobley repeatedly after Mobley refused the officers' commands to place his hands behind his back to be handcuffed. As a result, Mobley suffered a broken nose, teeth and a broken dental plate.

Mobley sued nine police officers under *42 U.S.C. § 1983* claiming the officers had used excessive force when they arrested him.

The court held the officers were entitled to qualified immunity. First, the officers who participated in Mobley's arrest knew that Mobley was a fleeing suspect who had had struck an officer with his truck and then led officers on a reckless, high-speed chase. Second, the officers saw Mobley wade into the middle of a pond in what they reasonably assumed was a continuing attempt to avoid arrest. Finally, Mobley refused to allow the officers to handcuff him despite the application of escalating force and repeated use of a taser. The court concluded, under those circumstances, striking, kicking and tasing the resisting and presumably dangerous suspect in order to arrest him were reasonable uses of force and did not violate Mobley's constitutional rights.

Click **HERE** for the court's opinion.

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United States v. Davis, 785 F.3d 498 (11th Cir. 2015)

A jury convicted Davis on seven counts of robbery. At trial, the government introduced cell site location information obtained from Davis' cell phone service provider. The cell site location information included a record of Davis' calls and revealed which cell towers carried the calls. The government argued the cell site location information established that Davis placed and received cell phone calls near the locations of the robberies around the same time the robberies were committed. The government obtained Davis' cell site location information after obtaining a court order pursuant to *18 U.S.C. § 2703(d)*. To obtain a court order under *§2703(d)*, the government was not required to establish probable cause.

On appeal, Davis claimed the government violated the *Fourth Amendment*, arguing the government was required to obtain a warrant based on probable cause to obtain his cell site location information. The government argued the cell site location information was

not covered by the *Fourth Amendment* and was properly obtained under the *§ 2703(d)* court order.

A three-judge panel with the Eleventh Circuit Court of Appeals held that Davis had a reasonable expectation of privacy in the cell site location information and the government violated the *Fourth Amendment* when it obtained that information without a warrant. However, the court further held the cell site location information did not need to be suppressed because the officers acted in good faith reliance on *§2703(d)* order. Specifically, the court concluded the police officers, prosecutors and judge who issued the order followed the requirements of *18 U.S.C. § 2703* and had no reason to believe it was unconstitutional as written. The government appealed the panel's ruling on the *Fourth Amendment* issue and the Eleventh Circuit Court of Appeals agreed to a rehearing *en banc*, or in front of eleven judges.

The full Eleventh Circuit Court of Appeals reversed the three judge panel, and held that the government did not violate the *Fourth Amendment* by obtaining Davis' cell site location information through the use of a *§2703(d)* court order. The court concluded Davis had no reasonable expectation of privacy in these business records, which were maintained by the cell phone service provider. As a result, the government's obtaining a *§2703 (d)* court order for the production of the cell phone provider's business records at issue did not constitute a search under the *Fourth Amendment*.

Click **HERE** for the court's opinion.

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Moore v. Pederson, 806 F.3d 1036 (11th Cir. 2015)

Deputy Pederson was dispatched to an apartment complex after a resident reported that a man and two women had been arguing in the parking lot. When Pederson arrived, the resident told him the man and one of the women had gone into Moore's apartment. As Pederson approached the apartment he heard what sounded like an argument and loud music coming from inside. Pederson knocked on the door, and when Moore opened the door, he was wearing a towel wrapped at the waist. Pederson saw two women inside the apartment, and while neither asked for assistance, one of the women appeared visibly upset. Not knowing if a domestic violence situation existed, Pederson began to interview Moore to determine Moore's involvement in the parking lot dispute. Moore stated he knew nothing about the earlier dispute and when Pederson requested Moore's name and identification, Moore refused to provide them. After Moore's multiple refusals to provide identification, Pederson took out his handcuffs and directed Moore, who was standing inside the doorway of the apartment, to turn around and put his hands behind his back. Moore complied. Pederson then reached into the apartment, handcuffed Moore and arrested him for resisting a police officer without violence. The charges against Moore were eventually dismissed.

Moore sued, claiming Pederson violated the *Fourth Amendment* by entering his apartment without a warrant and arresting him without probable cause based solely on his refusal to provide Pederson his name and identification.

Pederson argued he established probable cause to arrest Moore for resisting an officer after Moore refused to identify himself during a lawful *Terry* stop. Pederson further argued exigent circumstances allowed him to enter Moore's apartment without a warrant to effect the arrest. Alternatively, Pederson argued Moore impliedly consented to his entry into the apartment when Moore turned around and put his hands behind his back so Pederson could arrest him.

The court held that unless exigent circumstances exist, the government may not conduct the equivalent of a *Terry* stop inside a person's home. Here, the court concluded that exigent circumstances did not exist. The court found even if Pederson had reasonable suspicion to investigate the parking lot dispute when he approached Moore's door, that reasonable suspicion never developed into probable cause during his encounter with Moore. First, before knocking on Moore's door, all Pederson knew was that a neighbor had complained of a non-violent argument in the parking lot and Pederson heard what he believed was arguing and music coming from inside the apartment. Second, when Moore opened the door, nothing Pederson saw established that anyone's life or health was at risk, as no one appeared to be injured. Third, Pederson did not see any furniture or other items strewn around. Finally, Pederson did not identify any behavior or conduct that suggested any of the apartment's occupants contemplated violence in any way. Because Pederson was not conducting a lawful *Terry* stop while Moore remained inside his apartment, Moore was free to refuse Pederson's requests to identify himself. As a result, Pederson could not have probable cause to arrest Moore for resisting or obstructing an officer.

The court further held that a person does not consent to entry into his home by an officer standing outside by following an officer's instructions to turn around and be handcuffed, while the person remains inside his home. Consequently, the court concluded Pederson violated Moore's *Fourth Amendment* right to be from unreasonable seizures.

Although Pederson violated Moore's *Fourth Amendment* rights, the court determined Pederson was entitled to qualified immunity because at the time of the incident the law was not clearly established that a *Terry*-like stop could not be conducted in a home without exigent circumstances.

The court further held at the time of the incident the law was not clearly established that an officer could not conduct a warrantless arrest without both probable cause and either exigent circumstances or consent. Consequently, Pederson the court concluded Pederson was entitled to qualified immunity regarding Moore's arrest.

Click **HERE** for the court's opinion.

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United States v. Johnson, 806 F.3d 1323 (11th Cir. 2015)

Robert Johnson and Jennifer Sparks mistakenly left their cell phone in a Wal-Mart store. Linda Vo, a store employee found the phone. Sparks sent a text message to phone, requesting its return. Vo called the number indicated on the text message and made arrangements with Sparks to return the phone. After speaking with Sparks, Vo looked at

the digital photographs stored in a photo album on the phone, in an attempt to identify the woman to whom she was planning to return the phone. In the photo album, Vo saw pictures of a young female who was nude in some of the photographs, as well as one video of a young girl eating ice cream.

Instead of meeting Sparks to return the phone, Vo showed the images on the cell phone to her fiancé, David Widner. Afterward, Widner took the phone to the police department, where he told two civilian employees at the front booth that he wanted to file a report about cell-phone images that he believed to be child pornography. Widner scrolled through the entire photo album he had previously viewed with Vo to show the employees the photographs and one video he believed were child pornography. The employees gave the phone to Detective O'Reilly who looked at only those images contained within the same photo album that Widner had viewed. However, O'Reilly viewed the video of the young girl eating ice cream as well as a second video that neither Vo nor Widner had previously viewed. After concluding the phone contained child pornography, O'Reilly turned the phone off and submitted it to evidence.

Twenty-three days later, the officer who was assigned to the child pornography task force, applied for a warrant to search the cell phone. In her supporting affidavit, the officer did not attach any images from the phone, but instead included Detective O'Reilly's descriptions of the images that he had viewed on the cell phone. The judge found probable cause and issued the warrant. Later that day, a forensic examination of the phone revealed over 1,000 images and 45 sexually explicit videos that constituted child pornography.

Based on the evidence recovered from the cell phone, officers obtained a warrant to search Johnson's home. During the execution of the warrant, Johnson confirmed that he had lost the cell phone at Wal-Mart. Johnson also told the officers that within three days of having lost the phone, he filed an insurance claim with the phone company and received a replacement phone, which he gave to Sparks. In addition, Johnson told the officers he had already purchased another phone for himself.

The government charged Johnson and Sparks with possession of child pornography and production of child pornography.

First, Johnson and Sparks argued Detective O'Reilly's warrantless search of the cell phone violated the *Fourth Amendment*. Specifically, they argued that the government failed to establish that the images and videos observed by O'Reilly, which formed the basis for and led to the issuance of the search warrants, were within the scope of the prior search conducted by Vo and Widner.

O'Reilly testified that he looked only at those photographs contained in a single photo album, and his descriptions of the photographs contained in that album matched the contents of the album that Widner had viewed. Because O'Reilly's search of the photographs on the phone did not exceed the scope of the search conducted by Vo and Widner, the court found there was no *Fourth Amendment* violation. However, the court held the second video that O'Reilly viewed, which had not been viewed by Vo or Widner, exceeded the scope of their private search. Nevertheless, the court concluded because the search warrant affidavit only described the photographs and the first video,

which Vo and Widner had viewed, suppression of the evidence from the phone and Johnson's house was not warranted.

Second, Johnson and Sparks argued that the officer's 23-day delay in obtaining the warrant to search the cell phone unreasonably interfered with their possessory interest in the cell phone.

The court refused to decide this issue. Instead, the court held that Johnson and Sparks lost standing to contest the length of the 23-day delay because they abandoned their possessory interest in the phone three days after they lost it. In addition, the court found that the delay in obtaining the warrant to search the phone during this three-day period was reasonable.

While the court recognized that the loss of one's property, by itself, it not the same as abandonment, the court found that three days after losing their cell phone, Johnson and Sparks completely abandoned their efforts to recover it. First, when Vo failed to appear at the Wal-Mart to meet Sparks, the couple did nothing. For example, Johnson and Sparks did not ask anyone at Wal-Mart for assistance in locating it, nor did they complain to Wal-Mart management that one of its employees had found their phone and refused to return it. Finally, the couple did not file a report with the police complaining about Vo's failure to return the phone. In addition, Johnson and Sparks demonstrated their intent to abandon their phone by purchasing a replacement phone within a few days and filing an insurance claim for the phone they abandoned. Because Johnson and Sparks abandoned their possessory interest in the cell phone, the court held they lacked standing to claim that the officer's delay in obtaining the warrant to search the contents of the phone was unreasonable.

Finally, Johnson and Sparks argued that the evidence obtained from the cell phone and Johnson's house should have been suppressed because the officer did not attach actual images to the search warrant affidavit, but instead relied upon O'Reilly's descriptions of the photographs.

The court disagreed. A judge issuing a search warrant does not need to personally view photographs or images, which are alleged to be contraband, such as child pornography, if a reasonably specific affidavit describing the contents can provide an adequate basis to establish probable cause. In this case, the court held the descriptions provided in the officer's affidavit were not vague conclusions that the cell phone contained images of child pornography. Instead, the court found the affidavit objectively and specifically stated the contents of the photographs, and the officer swore to these descriptions under oath.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/14-12143/14-12143-2015-12-01.pdf?ts=1448998302

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District of Columbia Circuit

Fenwick v. Pudimott, 778 F.3d 133 (D.C. Cir. 2015)

In January 2007, three law enforcement officers suspected Fenwick was about to get into a stolen car and drive away. When the officers, who were standing across the parking lot, called to Fenwick and ask to speak to him, Fenwick ignored them, got into the car, and began to back up. The officers surrounded Fenwick's car with guns drawn, and ordered Fenwick to stop. Fenwick ignored the officers and drove forward toward the parking lot exit, striking Pudimott with the car's driver-side mirror. Fearing for their safety and the safety of pedestrians and vehicles the officers had seen in the area, Pudimott and one of the other officers opened fire, striking Fenwick.

After Fenwick recovered from his wounds, he was convicted in the District of Columbia Superior Court of armed assault on a police officer. The Superior Court found Fenwick endangered Pudimott by accelerating forward while Pudimott was near the front of the car.

Several months later, Fenwick sued the three officers, claiming that shooting him constituted excessive use of force in violation of the *Fourth Amendment*.

The court held the officers were entitled to qualified immunity because at the time of the shooting, the officers did not violate clearly established law.

In 2004, the United States Supreme Court decided *Brosseau v. Haugen*. In *Brosseau*, an officer fired through the rear driver-side window of the suspect's car as he accelerated forward, away from the officer. The officer testified that she shot the suspect out of fear for the safety of "other officers on foot" who, she believed were close by, and for "occupied vehicles" in the suspect's path, and for anyone else who "might be in the area." The suspect survived and was later convicted of a felony in which he admitted he drove his vehicle in a manner indicating "a wanton or willful disregard for the lives of others." In the lawsuit that followed, the Supreme Court held the officer was entitled to qualified immunity.

In this case the court held Fenwick failed to show the officers' conduct was materially different from the officer's conduct in *Brosseau*. Specifically, at Fenwick's criminal trial, the District of Columbia Superior Court determined that moments before the shooting, Fenwick's driving posed a "grave risk of causing significant bodily injury" to an officer. Because Fenwick operated his car in a way that endangered an officer, in an area recently occupied by pedestrians and other vehicles, the D.C. Circuit Court of Appeals held it was not clearly established that the officers violated the *Fourth Amendment* by using deadly force to stop Fenwick.

In addition, Fenwick was not able to establish that between the *Brosseau* decision in 2004 and the shooting in this case, which occurred in 2007, that the law in this area had changed.

Click **HERE** for the court's opinion.

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United States v. Gross, 784 F.3d 784 (D.C. Cir. 2015)

Four officers with the D.C. Metropolitan Police Department's Gun Recovery Unit were riding together in a police car in an attempt to recover guns. The officers' car was unmarked, but each officer wore a tactical vest that said "police" in large letters on the front and back. When the officers first saw Gross, he was walking on the sidewalk to the left side of their car. When the officers reached an intersection, they turned left and watched as Gross also turned left and continued to travel in the same direction as the officers. Officer Bagshaw slowed the car as it moved next to Gross and shined a flashlight on Gross to get his attention. Officer Bagshaw then called out to Gross from the car, "Hey, it is the police, how are you doing? Do you have a gun?" Gross stopped, but did not reply. Officer Bagshaw stopped the car parallel to Gross and asked him, "Can I see your waistband?" Gross did not reply; however, he lifted his jacket to show his left side. Suspicious of Gross, Officer Katz exited the car and asked Gross, "Can I check you out for a gun?" Gross turned around and fled, with Officer Katz in pursuit. During the chase, Officer Katz saw Gross patting his right side with his hand, which caused Officer Katz to believe that Gross might be trying to hold a gun in his waistband. After Officer Katz apprehended Gross, he performed a *Terry* frisk and recovered a handgun from Gross' waistband. The government indicted Gross for unlawful possession of a firearm by a convicted felon.

Gross moved to suppress the handgun, arguing that he was unlawfully seized when Officer Bagshaw, speaking to him from the police car, asked Gross if he was carrying a gun and would expose his waistband.

The court disagreed. A *Fourth Amendment* seizure occurs only when an officer, "by means of physical force or show of authority, has in some way restrained the liberty" of a person. The court noted that the presence of multiple officers wearing police gear does not automatically mean that a person has been seized. In this case, all four officers remained in a car separated from Gross by one lane of traffic during Officer Bagshaw's questioning. In addition, while the officers carried weapons, there was no indication that the weapons were visible to Gross from the sidewalk. The court further found that Officer Bagshaw's questions, "Do you have a gun?" and "Can I see your waistband?" did not accuse Gross of possessing a gun or committing a crime. Instead, Officer Bagshaw simply asked Gross two questions. Consequently, the court concluded that Officer Bagshaw's questioning of Gross did not constitute a *Fourth Amendment* seizure. Gross did not appeal the denial of his suppression motion regarding Officer Katz's question or the subsequent foot-chase and *Terry* frisk.

Click **HERE** for the court's opinion.

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United States v. Weaver, 808 F.3d 26 (D.C. Cir. 2015)

Federal agents went to Weaver's apartment with a warrant for his arrest. After arriving at Weaver's building, the agents knocked on the apartment door twice. No one answered the door; however, the agents heard movement from inside the apartment. The agents

were not concerned that Weaver would flee out a window, as the apartment was on a high floor. Less than a minute later, the agents announced "police" and immediately used a key they had obtained from the building manager to unlock the door and enter the apartment. The agents did not announce they had a warrant to arrest Weaver. Once inside the apartment, the agents subdued Weaver after a brief struggle and removed him from the apartment. While arresting Weaver, the agents smelled marijuana and saw what appeared to be bags of marijuana on the kitchen counter. Based on these observations, the agents obtained a warrant to search Weaver's apartment and found among other things, several kilograms of marijuana. As a result, the government indicted Weaver for three additional criminal offenses.

Weaver argued the agents were not legally in his apartment when they made the observations that supported their search warrant application because they had violated the knock-and-announce rule; therefore, the evidence seized from his apartment should have been suppressed.

While the government conceded the agents violated the knock-and-announce rule by failing to state their purpose before entering Weaver's apartment, the government claimed suppression of the evidence seized from the apartment was not the appropriate remedy. The government relied on ***Hudson v. Michigan***, where the United States Supreme Court held when officers violate the knock-and-announce rule in executing a search warrant, the exclusionary rule does not apply to any evidence they discover. The government argued the decision in *Hudson* held the exclusionary rule did not apply to a violation of the knock-and-announce rule, whether the violation occurred during the execution of a search warrant or an arrest warrant.

The court disagreed, holding that suppression of evidence was the appropriate remedy where agents executing an arrest for Weaver violated the knock-and-announce rule, which then led to the discovery of evidence in Weaver's apartment.

The court noted search warrants and arrest warrants authorize law enforcement officers to take different actions. For example, officers with a search warrant may enter a home and search for the items described in the warrant anywhere in the home those items might be located. The court reasoned that a violation of the knock-and-and announce rule in the execution of a search warrant would not expand or otherwise increase the search authority conferred on the officers by the warrant. As a result, suppression for a knock-and-announce rule violation was not an appropriate remedy.

In contrast, the officers' authority under an arrest warrant to enter and search a home is limited. First, officers with an arrest warrant may enter a person's home only when they have reason to believe the arrestee is there. Second, once inside the home, the officers may only look in places where a person might reasonably be found, and the officers must stop searching once they locate the arrestee. Third, the court concluded an arrestee's location inside the home at the time of arrest is likely to depend on whether officers comply with the knock-and-announce rule. Because the requirements for search warrants and arrest warrants protect distinct privacy interests, and the two types of warrants authorize officers to take different actions, the court concluded the protections afforded by the knock-and-announce rule are different as well. As a result, the court found in the context of an arrest warrant, the knock-and-announce rule protects an arrestee's privacy

in his home in a way it does not with a search warrant. Therefore, the court held the exclusionary rule was the appropriate remedy for a violation of the knock-and-announce rule committed during the execution of an arrest warrant.

Click **HERE** for the court's opinion.

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United States Court of Appeals for the Armed Forces

United States v. Keefauver, 74 M.J. 230 (C.A.A.F. 2015)

Postal inspectors discovered a heavily taped box that smelled of marijuana. Because the box was addressed to a house within Fort Campbell, Kentucky, the postal inspectors contacted a special agent with Criminal Investigation Command (CID) office's Drug Suppression team. The CID agent transported the box to Fort Campbell and obtained verbal authorization from the military magistrate to conduct a controlled delivery. The military magistrate authorized the agents to enter the house after the box was taken inside, seize the box and then search the room or immediate area in which the box was found.

Before conducting the controlled delivery, the agents discovered Keefauver, his wife, his sixteen-year old stepson, and his thirteen-year old son lived in the house. In addition, the agents learned that no one at the house had a firearm registered in his or her name. Before conducting the controlled delivery, the agents maintained surveillance on the house for one-hour, but during that time, they did not see anyone enter or exit. After one-hour, a postal inspector knocked on the front door, and when no one answered, he left the box on the front porch. The box remained on the porch until Keefauver's sixteen-year old stepson arrived home approximately one-hour later and took the box inside. At that point, CID agents and postal inspectors knocked on the door, and when the stepson answered it, they told him they would be conducting a search. After the stepson became verbally abusive, the agents handcuffed him and seated him outside the house next to the garage. The lead CID agent entered the house and found the box in the hallway, ten-feet from the door. After the agent noticed a strong odor of marijuana in the house, he decided to conduct a "security sweep" of the entire house. While sweeping the kitchen, the agent saw drug paraphernalia on the counter. On the second floor, the agent saw in plain view, marijuana and drug paraphernalia in the stepson's room, rifles in an unlocked walk-in closet off the hallway, and suspicious boxes in the master bedroom. Based on a misunderstanding of the verbal search authorization, the agents then conducted a second, full search of the home with military working dogs (MWDs).

Keefauver was convicted of wrongfully possessing marijuana, drug paraphernalia, and unregistered weapons on post as well as child endangerment in violation of several Articles of the Uniform Code of Military Justice.

Keefauver filed a motion to suppress all evidence, other than the original that contained marijuana, arguing, agents exceeded the scope of the military magistrate's search authorization by conducting a full sweep of his house. Specifically, Keefauver claimed the search authorization limited the agents to locating the box after the controlled delivery and searching the immediate area around the box.

The Court of Appeals for the Armed Forces agreed. In *Maryland v. Buie*, the United States Supreme Court created the "protective sweep" exception to the *Fourth Amendment's* warrant requirement. In *Buie*, the court authorized two types of protective sweeps. In the first type of sweep, officers may search only spaces immediately adjoining the place of arrest from which "an attack could be immediately launched," during or after an arrest. Officers may conduct this type of sweep as a precautionary

measure, without reasonable suspicion or probable cause. The second, more extensive sweep authorized in *Buie* allows officers to make a protective sweep of areas beyond those immediately adjoining the place of arrest. To conduct this type of sweep, officers must establish reasonable suspicion that the area to be swept harbors an individual who poses a threat to the officers. This type of sweep does not allow officers to conduct a full search of the premises, but rather only a search of areas or spaces where a person may be found. While *Buie* addressed the issue of protective sweeps in the context of arrests, a majority of federal circuits have held that officers who lawfully enter a home for reasons other than effecting an arrest, may make a protective sweep, as long as the *Buie* criteria are met.[4]

In this case, the court held the extensive protective sweep conducted of the entire house was unlawful, as the lead agent did not testify that he believed anyone was in the house after the stepson was taken outside. Instead, the agent testified the sweep of the entire house was "standard procedure." The court emphasized this practice was in "perfect opposition" to the criteria from *Buie*, which requires reasonable suspicion to believe the area to be swept harbors an individual that poses a threat to the officers.

Even if the agent had testified he believed there was someone else in the house after the stepson was removed, the court concluded the facts presented would not have supported this conclusion. First, the agents conducted surveillance of the house for one-hour, during which time they did not see anyone enter or exit the house. Second, when the postal inspector knocked on the door to conduct the controlled delivery, no one answered the door. Third, after the postal inspector left the box on the porch, it remained there for approximately one-hour until the stepson arrived home and took the box inside. Fourth, when the agents entered the house, they handcuffed the stepson and detained him outside. Finally, one of the agents testified that before the stepson arrived at the house, the agent believed that "nobody was home."

Click **HERE** for the court's opinion.

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[4] Only the Tenth Circuit and one panel of the Ninth Circuit have read *Buie* so narrowly as to limit the scope of a protective sweep to in-home arrests only.

Table of Cases