

2016
United States Supreme Court and Circuit Courts of Appeals
Case Summaries – By Subject

(As reported in 2Informer16 through 1Informer17, covering January – December 2016)

Table of Contents

Fourth Amendment	4
Border Searches.....	4
Community Caretaking Doctrine	4
Governmental Action / Private Searches.....	7
Reasonable Expectation of Privacy / Standing (In General).....	8
Abandonment	12
Covert Video Recordings	13
IP Addresses.....	14
Magnetic Strips – Credit / Debit / Gift Cards.....	16
Installation of Pole Camera	18
Use of Drug-Sniffing Dog.....	19
Search (<i>Jones</i> - trespass theory).....	20
Search – Moving Bicycle that is Impeding Traffic	22
Search – Drilling into Trunk After Discovery of Hidden Compartment.....	22
Seizure / Persons	23
Consensual Encounters / Knock and Talk.....	26
<i>Terry</i> Stops / Reasonable Suspicion.....	30
<i>Terry</i> Frisks - Person / Vehicle / Plain - Feel.....	42
Traffic Stops (Reasonable Suspicion / P.C.) / Duration / Detaining Vehicles / Occupants	49
Road Blocks / Traffic-Safety Checkpoints.....	64
Canine Sniffs.....	65
Arrest.....	66
Entering Suspect’s Home to Make an Arrest	66
Probable Cause.....	71
The Exclusionary Rule	73
Application to Removal Proceedings	73
Exceptions to the Exclusionary Rule.....	74
Attenuation Doctrine	74
Good Faith Exception	75
Search Warrants	75
Probable Cause / Nexus Requirement / Omission of Information from Affidavit.....	75

Disclosure of Method of Execution to the Issuing Judge.....	82
Stale Information.....	83
Automobile Exception (mobile conveyance exception).....	85
Computers / Electronic Devices / Wiretaps /Bugs	89
Stored Communications Act (SCA) / 18 U.S.C. § 2703(d)	89
Cell Site Location Information (CSLI) and 18 U.S.C. § 2703(d)	89
Warrantless Pinging of Suspect’s Cell Phone	90
Wiretaps (<i>18 U.S.C. § 2510</i>)	92
Consent Searches (Authority to Consent / Scope / Voluntariness)	93
Third Party Consent (Common Authority / Apparent Authority).....	100
Exigent Circumstances.....	102
Destruction of Evidence	102
Emergency.....	104
Inspections (Administrative Searches).....	107
Inventory Searches	108
Plain View Seizure.....	109
Probationers / Parolees (Warrantless Searches)	110
Protective Sweeps	114
Search Incident to Arrest (person).....	116
Requiring Motorists to Submit to Warrantless Blood or Breath Tests.....	116
Qualified Immunity / Absolute Immunity / Civil – Municipal - Supervisor Liability / <i>Bivens</i>	118
Failure to Intervene	118
Use of Force - (Detention / Arrest / Vehicle Pursuits / Search Warrant Execution)	119
Use of Force / Qualified Immunity – Use of Canines.....	128
Use of Force / Qualified Immunity – Electronic Control Devices (ECDs).....	130
Non-Use of Force Situations (Seizure of Property – Shooting Dogs During S.W. Execution)	135
Fifth Amendment	138
Due Process.....	138
Identification Procedure (Photo Array / Show-Ups).....	138
Right Against Self-Incrimination	142
Polygraph Examination as Condition of Supervised Release	142
<i>Miranda</i>	143
Custody	145
Interrogation – Functional Equivalent of Questioning.....	150
Routine Booking Questions	151
Right to Silence	153
Spontaneous / Volunteered Statements	156
<i>Kalkines / Garrity</i>	156

Waiver of <i>Miranda</i> (Knowing/Intelligent/Voluntary)	157
Voluntariness of Suspect’s Statement	159
Consent to Search Obtained After <i>Miranda</i> Violation.....	160
Public Safety Exception	160
Miscellaneous Criminal Law / Federal Statutes.....	162
<i>Title 18 U.S.C. § 111</i>	162
<i>Title 18 U.S.C § 922(g)(9)</i>	163
<i>Title 18 U.S.C. § 1344</i> (Bank Fraud).....	164
Miscellaneous Federal Rules of Criminal Procedure.....	166
<i>Federal Rule of Criminal Procedure 41</i>	166

Fourth Amendment

Border Searches

D.E. v. Doe, 834 F.3d 723 (6th Cir. 2016)

While driving in Michigan, nineteen-year old D.E. took a wrong turn and inadvertently ended up at the international border with Canada. When D.E. told the toll-booth operator of his mistake, the operator directed him to turn around, without crossing the border, and merge into a lane of traffic containing motorists arriving from Canada. The operator gave D.E. a laminated card to present at the Customs and Border Protection (CBP) booth, which indicated that D.E. was being allowed to turn around without entering Canada, and that D.E. was subject to inspection and search by a CBP official. At the primary inspection booth, D.E. presented the laminated card to a CBP officer and was directed to a secondary inspection area. At the secondary inspection area, two CBP officers searched D.E.'s car and found marijuana and drug paraphernalia. The CBP officers detained D.E. in a jail cell for approximately one-hour before a local police officer arrived to take him into custody.

D.E. filed a lawsuit against several CBP officers, claiming that they violated his *Fourth Amendment* rights by detaining him and searching his car. Specifically, D.E. argued that international travel is required for officers to conduct suspicionless searches at the border; therefore, because he never crossed the border, CBP officers unlawfully searched him and his car.

The court dismissed D.E.'s lawsuit, holding the CBP officers' actions were lawful under the border-search exception to the *Fourth Amendment's* warrant and probable cause requirements. First, the Supreme Court has held that routine searches at the border do not require a warrant or any level of suspicion, regardless of whether the motorist intends to cross the border or has mistakenly arrived at the border. Second, that D.E. subjectively did not intend to cross the border is irrelevant as well. There is no reliable way for the CBP officers to tell the difference between a motorist who has just crossed the border and a "turnaround" motorist who is at the border area by mistake. The court commented that it would be "dangerous and quite stupid" for CBP officers to assume that every traveler who claims to be at the border by mistake, or who presents an easily fabricated laminated card, is telling them the truth.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-2128/15-2128-2016-08-25.pdf?ts=1472144638>

Community Caretaking Doctrine

United States v. Smith, 820 F.3d 356 (8th Cir. 2016)

A resident of a half-way house called the police and requested a well-being check on Alexis Wallace, another resident of the half-way house. The caller reported she was concerned Wallace was being held against her will by her ex-boyfriend, Smith. The caller stated Wallace had gone to Smith's house to retrieve some of her personal belongings and that she had not returned to the half-way house as expected, nor had Wallace returned any of her phone calls or text messages. The caller also said she had heard Smith yelling at Wallace over the phone earlier that day. Finally,

the caller told police that a no-contact order existed between Smith and Wallace and that Smith was a known drug user with a bad temper.

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

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

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

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

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

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

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

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

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

United States v. Torres, 828 F.3d 1113 (9th Cir. 2016)

An officer arrested Torres for driving under the influence. The officer decided to impound Torres' car because it was located in the parking lot of a private apartment complex, and neither Torres nor his passenger lived in the complex. During the inventory search, another officer unlatched the lid of the engine's air filter compartment where he found a handgun. The government charged Torres with being a felon in possession of a firearm.

Torres filed a motion to suppress the handgun. Torres argued the officer's decision to impound his car was unreasonable under the *Fourth Amendment*.

The court disagreed, holding the officer's decision to impound Torres' car was reasonable under the *Fourth Amendment*, as it was consistent with Las Vegas Metropolitan Police Department (LVMPD) policy. In addition, the court held impounding Torres' car served the agency's legitimate community-caretaking function to promote other vehicles' convenient ingress and egress to the parking lot, and to safeguard Torres' car from vandalism or theft.

Torres also claimed the officer exceeded the scope of an inventory search by unlatching the lid of the air filter compartment.

Again, the court disagreed. First, once a vehicle has been legally impounded, officers may conduct an inventory search without a warrant. Officers conducting inventory searches must follow the standard procedures outlined by their agency. Although an inventory policy may give the searching officer significant discretion as to what areas should be searched, the policy cannot authorize officers to search for evidence of criminal activity under the pretext of conducting an inventory search.

Second, the court noted that the Supreme Court has repeatedly approved police policies that permit inventory searches of closed compartments within automobiles. Here, the LVMPD inventory policy clearly extends to the engine cabin of a vehicle, as the policy requires impounding officers to itemize personal property found during an inventory search on a standardized Vehicle Impound Report that lists the engine, battery, and radiator among the 51 area on a vehicle to be searched. In addition, the air filter compartment was large enough to hold a firearm, and could be opened by lifting the hood and releasing the latches on the box. Finally, the officer who conducted the inventory search testified that he commonly checks the air filter compartment because, based on his training and experience, individuals hide contraband there such as narcotics and weapons.

Based on these facts, the court held the LVMPD inventory policy is reasonably designed to produce uniformity in inventory searches that protects owners of impounded vehicles from officers conducting inventory searches as a pretext to search for evidence of criminal activity.

Consequently, the court held the officer acted within the guidelines of the LVMPD inventory policy when he unlatched the air filter compartment and discovered the firearm.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca9/14-10210/14-10210-2016-07-14.pdf?ts=1468515901>

Governmental Action / Private Searches

United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016)

Ackerman's internet service provider (ISP), AOL, uses an automated filter designed to prevent the transmission of child pornography. After AOL's filter identified one of four images attached to an email sent by Ackerman as child pornography, AOL forwarded a report to the National Center for Missing and Exploited Children (NCMEC) through an online cyber tip line as required by federal law. AOL's report included Ackerman's email and the four attached images. AOL did not open Ackerman's email or any of the attached images.

A NCMEC analyst opened Ackerman's email, viewed each of the attached images and confirmed that all four images appeared to be child pornography. NCMEC contacted law enforcement and the government subsequently charged Ackerman with possession and distribution of child pornography.

Ackerman argued the warrantless search of his email and attachments by the NCMEC analyst violated the *Fourth Amendment*.

The first issue before the court was whether the *Fourth Amendment* applied to NCMEC. The *Fourth Amendment* protects against unreasonable searches conducted by the government or its agents, not private parties.

The court held that NCMEC qualified as a governmental entity for *Fourth Amendment* purposes. Even though NCMEC is incorporated, its two primary authorizing statutes, *18 U.S.C. § 2258A* and *42 U.S.C. § 5773(b)*, mandate its collaboration with federal, state, and local law enforcement agencies in over a dozen different ways. For example, ISPs are required to forward emails suspected of containing child pornography to NCMEC, and NCMEC is required to maintain a CyberTipline to receive such emails. NCMEC is then allowed to review the emails and is required to report possible child sexual exploitation violations to the government.

Next, the court had to determine whether a *Fourth Amendment* search occurred. It was undisputed that NCMEC opened Ackerman's email and viewed each of the four attached images. However, the government argued NCMEC's warrantless search followed a lawful private search by AOL; therefore, any expectation of privacy Ackerman had in the email or attachments no longer existed.

The court disagreed. First, the court held the private-search doctrine did not apply. Here, AOL never opened Ackerman's email or any of the attached images. AOL's filter simply determined the hash value on one of the attached images matched the hash value of a known child pornography image. When NCMEC opened Ackerman's email and viewed all four attached images, it exceeded the scope of any search conducted by AOL. Second, the court questioned the continued viability

of the private-search doctrine in light of the United States Supreme Court decision in *United States v. Jones*.

Finally, the court noted the district court did not determine whether the third-party doctrine applied. The Supreme Court has held that individuals do not have a reasonable expectation of privacy in materials they share with third parties such as banks or telephone companies. However, lower courts have only begun to consider whether the third party doctrine should be extended to emails where the subscriber relies on a commercial ISP to deliver them. Consequently, the court remanded the case to the district court to determine if Ackerman had a reasonable expectation of privacy in emails he sent through AOL.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/14-3265/14-3265-2016-08-05.pdf?ts=1470420071>

Reasonable Expectation of Privacy / Standing (In General)

United States v. Contreras, 820 F.3d 255 (7th Cir. 2016)

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

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

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

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

First, the court held the officers' entry and search of Contreras' garage was reasonable. Once Contreras opened the garage door, the court concluded that he no longer had an expectation of privacy in the activities conducted inside it. As a result, the officers who were parked on a public

street lawfully observed what they reasonably believed to be a drug transaction. In addition, the officers' use of binoculars to improve their visibility of objects already in plain view has long been held to be constitutional.

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

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

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

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

United States v. Morgan, 842 F.3d 1070 (8th Cir. 2016)

A police officer discovered a computer that offered child pornography by peer-to-peer file sharing. Later that day, the officer identified the computer's internet protocol (IP) address. Twenty-four days later, the officer determined the IP address was assigned to Morgan. Over seven weeks later, a state judge issued a search warrant for Morgan's home, seventy-five days after the IP address was discovered and fifty-one days after the officer connected it to Morgan. Five days later, officers executed the warrant at Morgan's home. The officers also arrested Morgan on an unrelated, outstanding warrant. The arresting officer seized Morgan's cell phone, and while handcuffing him, saw a tattoo on Morgan's wrist.

At the police station, Morgan requested his cell phone so he could contact his employer and his sister, and an officer allowed Morgan to use it. As Morgan scrolled through the contact list, he did not object as the officer stood next to him and viewed the screen on his cell phone. In addition, Morgan spontaneously shared some facts about some of the contacts, and in response, the officer wrote down several names and phone numbers.

During this time, a different officer found images of child pornography on a computer seized from Morgan's home. One image showed a man with a tattooed arm touching a female child's genitalia. The officer who found the images asked Morgan to lift the sleeve of his shirt so that he could photograph his tattoos. Morgan agreed, and without objection, lifted his sleeve. The officer photographed Morgan's tattoos, which matched the tattoos in the images on his computer.

Officers later identified a child from one of the images found on Morgan's computer. Morgan's public Facebook profile led to the profile of a woman that an officer remembered was one of Morgan's cell-phone contacts. The woman's public Facebook profile included an image of her daughter, who resembled the child in the image from Morgan's computer.

The government charged Morgan with child pornography related offenses.

Morgan filed a motion to suppress the evidence discovered by the officers.

First, Morgan argued that the information in the search warrant affidavit was stale because the officers did not apply for the warrant until seventy-five days after identifying his IP address and fifty-one days after associating the IP address to him. As a result, Morgan claimed the officers did not establish probable cause to believe that evidence of a crime would be located in his home at the time of the search.

The court disagreed, finding that periods much longer than seventy-five days have not rendered information stale in computer-based child pornography cases. In addition, the affidavit in support of the warrant attested that collectors of child pornography tend to retain images and that computer programs that download these images often leave file logs, which would tend to show the possession, distribution, or origin of the files.

Second, Morgan argued that the officer violated the *Fourth Amendment* by observing the information on the screen of his cell phone while Morgan scrolled through his contact list.

Again, the court disagreed. A *Fourth Amendment* search occurs when the government intrudes upon an area where a person has a reasonable expectation of privacy. However, when a person knowingly exposes something to the public, there is no protection under the *Fourth Amendment*. Here, the court concluded that Morgan had no reasonable expectation of privacy in his cell phone screen once he made it visible to the public by displaying it in the presence of an officer. The officer allowed Morgan to use his cell phone and Morgan did not object when the officer looked at the screen while Morgan scrolled through the contact list. In addition, the court noted that while this was happening, Morgan spontaneously shared information about his contacts with the officer.

Finally, Morgan argued that the officer violated the *Fourth Amendment* by taking photographs of the tattoos on his arm without a warrant.

A warrantless search is valid if the person subject to the search knowingly and voluntarily consents to it. In this case, the district court found that the officer asked Morgan to move his shirtsleeve so he could photograph Morgan's tattoos, and that Morgan agreed to do so. Based on these facts, the district court concluded that Morgan voluntarily consented to the officer photographing his tattoos and the court of appeals agreed.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-1525/16-1525-2016-12-01.pdf?ts=1480609860>

United States v. Wright, 844 F.3d 759 (8th Cir. 2016)

Officers received information from a confidential informant (CI) that Wright and Victor Brown would be driving from Iowa to Chicago to purchase crack cocaine. Officers corroborated much of the information provided by the CI and conducted surveillance on Brown's residence around the time Brown and Wright were expected to return from Chicago. When Brown and Wright arrived, Brown exited Wright's SUV, and then Wright departed.

Officers followed Wright, who arrived at the parking lot of an apartment complex. A uniformed officer positioned his squad car behind Wright's SUV and shined a spotlight onto the back window. The officer and Wright exited their vehicles and engaged in conversation. During this time, the officer smelled burnt marijuana coming from Wright's person. After placing Wright in the back seat of a squad car, the officer walked around Wright's SUV. The officer saw a marijuana cigar on the front center console and smelled marijuana emanating from the vehicle. Officers searched the SUV and seized the marijuana cigar as well as crack cocaine from the glove compartment.

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

Wright argued the evidence seized from his SUV should have been suppressed because the officers did not have probable cause to enter the apartment complex's curtilage, reasonable suspicion to detain him, or probable cause to search his vehicle.

First, the court held that Wright did not have standing to challenge the officers' entry into the parking lot of the apartment complex because he did not have a reasonable expectation of privacy in that area. Wright did not own or live at the property, nor was he an overnight guest there. Consequently, the court concluded it did not have to determine whether the officers' entry into the parking lot was lawful.

Second, concerning the encounter in the parking lot, the court held the officer's act of shining the spotlight on Wright's car was not a *Fourth Amendment* seizure, and Wright did not claim that the officer seized him by blocking his SUV with his squad car. As a result, the court concluded no suspicion was required when Wright and the officer had their initial conversation. Once the officer smelled the odor of marijuana coming from Wright's person, the court concluded the officer had probable cause to arrest Wright. If the officer had probable cause to arrest Wright at the point, the court found that the officer clearly had reasonable suspicion to detain Wright for further investigation.

The court added that, in any event, the officers had reasonable suspicion to conduct a *Terry* stop on Wright. The CI provided detailed information concerning Brown and Wright, and the officers corroborated much of that information during their surveillance.

Finally, the court held the warrantless search of Wright's SUV was valid under the automobile exception to the warrant requirement. The officer smelled burnt marijuana and saw a marijuana cigar inside the SUV, which established probable cause that the vehicle contained drugs. Once the officer had probable cause to search the SUV for drugs, he had the right to search the glove compartment as a place where drugs could be concealed.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3237/15-3237-2016-12-23.pdf?ts=1482510657>

Abandonment

United States v. Nowak, 825 F.3d 946 (8th Cir. 2016)

Nowak asked his friend, Madsen, for a ride. When Nowak got into Madsen's car, he placed his backpack on the floor in front of him. A few minutes later, an officer stopped Madsen for a traffic violation. When Nowak got out of the car, the officer told Nowak to get back into Madsen's car, and Nowak complied. When the officer returned to his patrol car to contact dispatch, Nowak exited Madsen's car and ran from the scene. The officer did not pursue Nowak. Madsen gave the officer consent to search his car, and when the officer asked Madsen about the backpack, Madsen told the officer it belonged to Nowak. The officer searched the backpack and found a handgun. Other officers searched the area but did not locate Nowak who did not return to the scene during the 24-minute traffic stop.

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

Nowak filed a motion to suppress the firearm, arguing the warrantless search of his backpack violated the *Fourth Amendment*.

The court disagreed, holding Nowak had abandoned the backpack; therefore, he gave up any privacy interest he had in its contents. The test to determine whether property has been abandoned is based on the objective facts available to the investigating officers, not based on the owner's subjective intent. For example, it does not matter if an owner has a desire to reclaim his property later. In addition, the court considers whether the owner physically relinquished his property and whether he denied ownership of it. The court added that verbal denial of ownership is not necessary for a finding of abandonment.

In this case, Nowak did not deny ownership of the backpack but he physically relinquished it when he fled the scene of the traffic stop, leaving the backpack in Madsen's car. Even though Nowak left the backpack in Madsen's car, he did not ask Madsen to store or safeguard the backpack for him to ensure its contents would remain private. Instead, when expressly directed by the officer to remain in the car, Nowak got out of the car, ran from the scene, and left his backpack behind. Consequently, it was objectively reasonable for the officer to believe that Nowak abandoned the backpack, and it was lawful for the officer to search it without a warrant.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2576/15-2576-2016-06-17.pdf?ts=1466177474>

United States v. Camberos-Villapuda, 832 F.3d 948 (8th Cir. 2016)

Officers received a tip that someone would be delivering drugs to a home in a particular neighborhood. In response, officers conducted surveillance of the area. While walking down an alley in the neighborhood, an officer heard a grinding noise coming from the backyard of a residence. From the alley, the officer saw a man, later identified as Camberos, using a flashlight to work under a vehicle. The officer watched Camberos for approximately fifteen to twenty

minutes, as he appeared to be grinding on an area underneath the passenger side of the car. During this time, the officer saw Camberos enter the home briefly, and then return to work on the vehicle. Based on his training and experience, the officer suspected Camberos was constructing a hidden compartment in which drugs and firearms could be concealed.

The officer walked onto the property with three back-up officers and approached Camberos. When an officer asked Camberos what he was doing, Camberos denied that he was working on the vehicle. However, Camberos later claimed that he was repairing the vehicle's wheel bearings. Camberos also told the officers that he did not know who owned the vehicle. The officers checked the vehicle's license plates and determined that Camberos was not the registered owner. Camberos also told the officers that he had not been inside the house and did not know who lived there. Camberos then told the officers that no one was inside the house, but later said that other people were inside.

At that point, one of the officers looked underneath the vehicle and found a hidden compartment in the area where Camberos had been working. Also, because of Camberos' conflicting accounts as to whether or not other people were inside the house, the officers decided to secure the residence. The officers entered the house and saw methamphetamine and drug paraphernalia. After securing the house, the officers obtained a warrant to search the house and discovered firearms, methamphetamine, and a large amount of cash. The government charged Camberos with conspiracy to distribute methamphetamine.

Camberos argued that the officers violated the *Fourth Amendment* when they entered his property without a warrant, looked around and under his vehicle, and then entered his house.

The court disagreed. In order to claim a valid *Fourth Amendment* violation, a person must demonstrate that he possessed a legitimate expectation of privacy in the locations searched. When a person voluntarily abandons his interest in property, however, he relinquishes any expectation of privacy and may not challenge a search of that property based on an alleged violation of the *Fourth Amendment*.

In this case, the court held that Camberos voluntarily abandoned his interests in the vehicle and the house. Camberos denied owning the vehicle, told the officers he did not know who owned it, and offered conflicting accounts as to whether he was working on it. In addition, Camberos corroborated Camberos' statement about the vehicle by determining that it was registered to someone else. Concerning the house, Camberos told the officers he did not live there, he had not been inside, and did not know who lived there.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3313/15-3313-2016-08-12.pdf?ts=1471015903>

Covert Video Recordings

United States v. Thompson, 811 F.3d 944 (7th Cir. 2016)

A confidential informant (CI) working for a drug task force went to Thompson's apartment to purchase crack cocaine. The informant was equipped with two hidden audio-video recording

devices. When the CI arrived at the apartment, Thompson invited him inside. After the CI gave Thompson \$400, Thompson turned and walked across the room to what the CI thought was the bathroom. Thompson cracked open the door, reached inside, and a person inside the bathroom handed an item to Thompson. Thompson walked back to the CI and handed him a sandwich baggie, which Thompson said was “twelve.” The CI left the apartment and gave the baggie to the officers. The hidden audio-video recorders captured the transaction between the CI and Thompson.

The government charged Thompson with distribution of crack cocaine.

Thompson filed a motion to suppress the video recordings taken by the CI inside his apartment. First, under the trespass theory articulated by the United Supreme Court in *U.S. v. Jones*, Thompson argued the CI exceeded the scope of his license, or permission to be in the apartment as an invitee when he recorded videos of the encounter.

The court disagreed. The court commented that it is firmly established the government may use confidential informants, and that a CI’s failure to disclose his true identity does not render a defendant’s consent to the CI’s presence invalid. Similarly, when a CI discovers information from a location where he is lawfully entitled to be, the use of a recording device to accurately capture the events does not invalidate a defendant’s consent to the CI’s presence, or otherwise constitute an unlawful search. Here, Thompson invited the CI into the apartment to engage in a drug transaction. The fact that the CI recorded his observations on video did not transform this consensual encounter into a search for *Fourth Amendment* purposes.

Alternatively, Thompson argued that making the videos constituted a *Fourth Amendment* search because he had a reasonable expectation of privacy in the information captured by the recordings, and he had not voluntarily disclosed that information to the CI.

Again, the court disagreed. In agreeing with the 2nd, 5th, and 9th Circuits, the court held making a covert video recording does not violate a person’s reasonable expectation of privacy. The court reiterated the expectation of privacy does not extend to “what a person knowingly exposes to the public, even in his own home,” nor does a person have a privacy interest in what he voluntarily discloses to an informant. Consequently, once Thompson invited the CI into his apartment, he “forfeited his privacy interest in those activities that were exposed to the informant.” In conclusion, the court added in identical circumstances, an audio-only recording taking by the CI would not have transformed his actions into a search either.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-2008/15-2008-2016-02-01.pdf?ts=1454365852>

IP Addresses

United States v. Weast, 811 F.3d 743 (5th Cir. 2016)

A police officer used peer-to-peer file sharing software to search for computer users sharing child pornography. After the officer located an IP address whose user appeared to be sharing child pornography, the officer used the peer-to-peer software to download six files shared by the user. The files had been stored on a computer that the user had nicknamed “Chris.” The officer issued

a subpoena to the internet service provider (ISP) and discovered the IP address was registered to Larry Weast. Officers executed a search warrant at Weast's residence where they found his son, Chris. The officers seized a computer hard drive belonging to Chris Weast that contained child pornography. The government charged Weast with possession and receipt of child pornography.

Weast filed a motion to suppress the evidence found on his hard drive, arguing the officer violated the *Fourth Amendment* by using peer-to-peer software, without a warrant, to identify Weast's IP address, and to download files that Weast made available for sharing.

The court disagreed, holding that Weast did not have a reasonable expectation of privacy in his IP address. In a case of first impression, the court followed the 3rd, 4th, 8th and 10th circuits, which have held that subscriber information provided to an internet provider, including IP addresses, is not protected by the *Fourth Amendment's* privacy expectation because it is voluntarily conveyed to third parties.

The court further held that by making child pornography files publicly available by downloading them into a shared folder accessible through a peer-to-peer file-sharing network, Weast eliminated any reasonable expectation of privacy he might have had in those files. This holding is consistent with holdings in similar cases from the 6th, 8th and 9th circuits. For these reasons, the court concluded the officer did not violate the Fourth Amendment when he accessed Weast's IP address and shared files.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/14-11253/14-11253-2016-01-26.pdf?ts=1453833055>

United States v. Cairra, 833 F.3d 803 (7th Cir. 2016)

Over a three-month period, emails were sent from gslabs@hotmail.com to an email address associated with a foreign website that sold chemicals used to make the illegal drug, ecstasy. An agent with the Drug Enforcement Administration (DEA), who had been monitoring the website, sent an administrative subpoena to Microsoft Corporation, the owner of the web-based email service for @hotmail.com email addresses. The subpoena requested, among other things, the internet protocol (IP) address associated with the computer that accessed the gslabs@hotmail.com account. After Microsoft provided the requested information, the DEA learned the IP address associated with the Hotmail account was assigned to Anna Cairra, the defendant's wife. The DEA's investigation culminated with Frank Cairra being charged with a federal drug violation.

Cairra filed a motion to suppress the information obtained from the administrative subpoena, arguing that the DEA's request was a "search" under the *Fourth Amendment*, and that a warrant was required. Specifically, Cairra argued that IP addresses reveal information about a computer user's physical location, and people have a reasonable expectation of privacy in their physical location.

The court disagreed. In what has become known as the third-party doctrine, the Supreme Court has held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Here, the court noted that Cairra shared his IP address with a third party, Microsoft. Every time Cairra logged in to his email account he sent Microsoft his IP address so

that Microsoft could send back information to be displayed at Caira's physical location. Because Caira voluntarily shared his IP address with Microsoft, the court reasoned he had no reasonable expectation of privacy in it. Consequently, the DEA did not conduct a *Fourth Amendment* search when it subpoenaed information from Microsoft that included Caira's IP address.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/14-1003/14-1003-2016-08-17.pdf?ts=1471453445>

Magnetic Strips – Credit / Debit / Gift Cards

United States v. Turner, 839 F.3d 429 (5th Cir. 2016)

An officer stopped a car driven by Henderson for a traffic violation. During the stop, the officer discovered Turner, a passenger, had an outstanding warrant for his arrest. The officer ordered Turner to exit the car, and when he did, the officer saw an opaque plastic bag protruding from under the front passenger seat. The officer placed Turner in his patrol car and then asked Henderson what was inside the bag. Henderson handed the officer the bag, which contained over 100 gift cards. Henderson told the officer Turner bought the cards, but denied having a receipt for the purchase.

After the officer spoke with other officers about their experiences with stolen gift cards, the officer seized the cards as evidence of suspected criminal activity. A subsequent warrantless scan of the magnetic strips on the backs of the gift cards revealed that at least forty-three cards had been altered. Specifically, the numbers encoded on the magnetic strips did not match the numbers printed on the front of the cards.

The government charged Turner with aiding and abetting the possession of unauthorized access devices.

Turner filed a motion to suppress the gift cards.

First, Turner argued the warrantless seizure of the gift cards violated the *Fourth Amendment*.

The court disagreed. The court held that the officer conducted a valid plain view seizure of the gift cards. For a lawful plain view seizure, the officer must have lawful authority to be in the location from which he viewed the evidence, and the incriminating nature of the evidence must be "immediately apparent." The incriminating nature of an item is immediately apparent if the officer has probable cause to believe the item is either evidence of a crime or contraband.

The court held the officer had probable cause to believe the gift cards were contraband or evidence of a crime. First, the officer saw a plastic bag containing over 100 gift cards that appeared to have been concealed under the front passenger seat. Second, Henderson admitted to not having receipts for the gift cards, and told the officer that he and Turner had purchased the gift cards from an individual who sold them "for a profit." Finally, the officer conferred with other officers who had experience with large numbers of gift cards being associated with drug dealing, fraud, and theft.

Next, Turner argued that scanning the magnetic strips on the backs of the gift cards without first obtaining a search warrant violated the *Fourth Amendment*.

Again, the court disagreed. The court joined the other circuits that have considered this issue¹ and concluded that Turner did not have a reasonable expectation of privacy in the information encoded on the magnetic strips on the back of the gift cards. First, companies that issue gift cards and credit cards encode a small amount of information in the magnetic strip on the backs of the cards, which can only be altered by using a device not commonly possessed by most people. Second, the purpose of gift cards and credit cards is to facilitate commercial transactions. Finally, third parties, such as cashiers, will often do the same kind of “swiping” of the gift and credit cards as law enforcement did in this case.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca5/15-50788/15-50788-2016-10-13.pdf?ts=1476401433>

United States v. Briere de L'Isle, 825 F.3d 426 (8th Cir. 2016)

During a traffic stop, an officer lawfully seized a large stack of credit, debit, and gift cards located in a duffle bag in the trunk of the defendant’s car. Afterward, a federal agent scanned the seized cards and discovered the magnetic strips on the backs of the cards either contained no account information or contained stolen American Express credit card information.

The government charged the defendant with possession of fifteen or more counterfeit and unauthorized access devices.

The defendant filed a motion to suppress any evidence discovered when the agent scanned the magnetic strips on the seized cards. The defendant argued that scanning the magnetic strips on the backs of the cards, without a warrant, constituted an unlawful *Fourth Amendment* search.

The court disagreed. First, the court noted a physical intrusion or trespass by a government official constitutes a search under the *Fourth Amendment*. However, the court concluded that scanning the magnetic strips on the cards was not a physical intrusion into a protected area prohibited by the *Fourth Amendment*. The magnetic strips on the back of a debit or credit card is a type of external electronic storage device that is designed to record the same information that is embossed on the front of the card. Consequently, the information embossed on the front of the card and recorded in the magnetic strip will only be different if someone has tampered with the card. Credit card readers simply reveal whether the information in the magnetic strip on the back of the card matches the information on the front of the card. The court found the process of using a credit card reader “analogous to using an ultraviolet light to detect whether a treasury bill is authentic”, which is not considered a *Fourth Amendment* search. Therefore, the court held that because sliding a card through a scanner to read virtual data does not physically invade a person’s space or property, the agent did not conduct a search under the original trespass theory of the *Fourth Amendment*.

The court further held that scanning the magnetic strips on the cards did not violate any reasonable expectation of privacy the defendant might have had in the cards. First, the defendant could not subjectively expect privacy in the cards in which his name was embossed on the front. Second,

¹ See *U.S. v. Bah*, 794 F.3d 617, 633 (6th Cir. 2015), [8 Informer 15](#); *U.S. v. De L'Isle*, 825 F.3d 426, 432-33, (8th Cir. 2016), [7 Informer 16](#).

the defendant could not have had a subjective expectation of privacy in any of the other cards, in which his name was not embossed on the front, because the purpose of a credit, debit, or gift card is to enable the holder of the card to make purchases. When the holder uses the card, he knowingly discloses the information on the magnetic strip of the card to a third party. Consequently, the holder of the card cannot claim a reasonable expectation of privacy in this information.

Even if the defendant had an actual, subjective expectation of privacy in the information found in the magnetic strips on the backs of the cards, the court held this privacy interest is not one society if prepared to accept as reasonable. All of the information found in the magnetic strips on legitimate American Express cards is identical to the information in plain view on the front of the cards. If it is not reasonable to expect privacy in the information that is visible on the front of these cards, the court concluded the defendant could not reasonably expect privacy in information contained in the magnetic strip that is either non-existent or different from the information on the front of the card.

The court added that American Express cards with no information in the magnetic strips, and debit and gift cards that have been re-coded with new information in the magnetic strips are counterfeit cards, and therefore, considered contraband. Governmental conduct that only reveals the possession of contraband “compromises no legitimate privacy interest.” The court concluded that because scanning the magnetic strips on the cards was the government’s way of revealing the defendant’s possession of contraband, the counterfeit cards, there was no violation of a legitimate privacy interest, and no search within the meaning of the *Fourth Amendment*.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1316/15-1316-2016-06-08.pdf?ts=1465398085>

Installation of Pole Camera

United States v. Houston, 813 F.3d 282 (6th Cir. 2016)

A local Sheriff’s Department informed agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that Rocky Houston was a convicted felon who openly possessed firearms at his residence. Houston and his brother, Leon, lived on a family farm in a rural area. ATF agents first attempted to conduct drive-by surveillance; however, the rural nature of the area did not allow them to observe the farm for any length of time. As a result, at the direction of the ATF, and without a warrant, the utility company installed a surveillance camera on a public utility pole located approximately 200 yards from Leon’s trailer. The agents trained the camera primarily on Leon’s trailer and a nearby barn because they understood Houston spent most of his time in those areas. In addition, an agent testified that the view the camera captured was identical to what the agents would have observed if they had driven down the public roads surrounding the farm. The agents monitored the camera without a warrant for ten weeks. At Houston’s trial for being a felon in possession of a firearm, footage from the warrantless use of the camera was introduced to show Houston possessing firearms on seven dates during the ten-week surveillance.

Houston argued the video footage obtained from the pole camera should have been suppressed, as it was an unreasonable warrantless search under the *Fourth Amendment*.

The court disagreed. First, the court held there was no *Fourth Amendment* violation because Houston had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole that captured the same views that anyone could see when passing by on the public roads. The court reiterated the ATF agents only observed what Houston made public to any person traveling on the roads surrounding the farm. Second, the court held the use of the pole camera for ten-weeks did not violate the *Fourth Amendment* because in a situation like this the government is allowed to use technology to more effectively conduct its investigations. While the ATF could have stationed agents around-the-clock to observe Houston's farm in person, the fact they instead used a camera to conduct the surveillance did not make the surveillance unconstitutional. Finally, even if the ATF could not have conducted in-person surveillance for the full ten-weeks for logistical reasons, the length of time the agents used the camera was permissible because any member of the public driving on the roads bordering Houston's farm during the ten-weeks could have observed the same views captured by the camera.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/14-5800/14-5800-2016-02-08.pdf?ts=1454954476>

Use of Drug-Sniffing Dog

United States v. Whitaker, 820 F.3d 849 (7th Cir. 2016)

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

The government charged Whitaker with a variety of criminal offenses.

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

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

The court agreed, holding that the use of the drug-sniffing dog in the hallway violated Whitaker's reasonable expectation of privacy. In *Kyllo v. United States*, the United States Supreme Court held that "where the government uses a (thermal imaging) device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." The court concluded that the dog sniff conducted in this case fell within *Kyllo*, as a trained drug-sniffing

dog is a sophisticated sensing device not available to the general public. Here, Hunter detected the presence of drugs that the officers would not have known about unless they entered Whitaker's apartment. Just as police officers cannot stand on a person's front porch and look through a window with binoculars, or put a stethoscope to the door to listen, the court found that officers cannot bring a "super-sensitive" dog to detect objects or activities inside a home.

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

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

Search (*Jones* - trespass theory)

United States v. Thompson, 811 F.3d 944 (7th Cir. 2016)

A confidential informant (CI) working for a drug task force went to Thompson's apartment to purchase crack cocaine. The informant was equipped with two hidden audio-video recording devices. When the CI arrived at the apartment, Thompson invited him inside. After the CI gave Thompson \$400, Thompson turned and walked across the room to what the CI thought was the bathroom. Thompson cracked open the door, reached inside, and a person inside the bathroom handed an item to Thompson. Thompson walked back to the CI and handed him a sandwich baggie, which Thompson said was "twelve." The CI left the apartment and gave the baggie to the officers. The hidden audio-video recorders captured the transaction between the CI and Thompson.

The government charged Thompson with distribution of crack cocaine.

Thompson filed a motion to suppress the video recordings taken by the CI inside his apartment. First, under the trespass theory articulated by the United Supreme Court in *U.S. v. Jones*, Thompson argued the CI exceeded the scope of his license, or permission to be in the apartment as an invitee when he recorded videos of the encounter.

The court disagreed. The court commented that it is firmly established the government may use confidential informants, and that a CI's failure to disclose his true identity does not render a defendant's consent to the CI's presence invalid. Similarly, when a CI discovers information from a location where he is lawfully entitled to be, the use of a recording device to accurately capture the events does not invalidate a defendant's consent to the CI's presence, or otherwise constitute an unlawful search. Here, Thompson invited the CI into the apartment to engage in a drug transaction. The fact that the CI recorded his observations on video did not transform this consensual encounter into a search for *Fourth Amendment* purposes.

Alternatively, Thompson argued that making the videos constituted a *Fourth Amendment* search because he had a reasonable expectation of privacy in the information captured by the recordings, and he had not voluntarily disclosed that information to the CI.

Again, the court disagreed. In agreeing with the 2nd, 5th, and 9th Circuits, the court held making a covert video recording does not violate a person's reasonable expectation of privacy. The court reiterated the expectation of privacy does not extend to "what a person knowingly exposes to the public, even in his own home," nor does a person have a privacy interest in what he voluntarily discloses to an informant. Consequently, once Thompson invited the CI into his apartment, he "forfeited his privacy interest in those activities that were exposed to the informant." In conclusion, the court added in identical circumstances, an audio-only recording taking by the CI would not have transformed his actions into a search either.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-2008/15-2008-2016-02-01.pdf?ts=1454365852>

United States v. Sweeney, 821 F.3d 893 (7th Cir. 2016)

Officers suspected Sweeney in connection with an armed robbery and went to his apartment to arrest him. After arresting Sweeney, an officer searched the basement of Sweeney's apartment building. The basement was accessible through a common staircase, which led to a common area that contained water heaters for the various apartments. There was also a small crawl space underneath the stairs and a shared laundry facility for the building's tenants. The officer found a bag containing a handgun, magazine, and ammunition in the crawl space under the stairs. A witness later testified the handgun found by the officer looked like the one used in the armed robbery.

Sweeney filed a motion to suppress the handgun, arguing the warrantless search of the common area of the basement violated the *Fourth Amendment* because it was an unlawful trespass.

The court disagreed. In *United States v. Jones*, the United States Supreme Court held the government conducts a *Fourth Amendment* search when it "physically occupies private property for the purpose of obtaining information." Here, the court held Sweeney could not show any trespass on his property because he did not have exclusive control over the basement. The basement was a common space used by a number of residents, and Sweeney's lease gave him no exclusive property interest in any part of the area. Any trespass concerning the basement would be a trespass against the building owner, not against any individual tenant.

The court added that even if the officer committed a trespass against Sweeney by searching the basement, not all trespasses by law enforcement officers are violations of the *Fourth Amendment*. For a *Fourth Amendment* trespass violation to have occurred in this case, the basement would need to be within the curtilage of Sweeney's apartment. However, as the basement served primarily as a shared laundry facility and location for utilities for all tenants, the court concluded it was not within the curtilage of Sweeney's apartment.

The court further added that no *Fourth Amendment* violation occurred because Sweeney had no reasonable expectation of privacy in the shared basement area.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/14-3785/14-3785-2016-05-09.pdf?ts=1462899607>

Search – Moving Bicycle that is Impeding Traffic

United States v. Campos, 816 F.3d 1050 (8th Cir. 2016)

When officers responded to a call for a man in need of medical attention, they found Campos lying on the sidewalk next to a fallen bicycle. Campos told the officers he did not need medical attention; however, Campos was incoherent which caused the officers to suspect that he was under the influence of drugs. When one of the officers moved the bicycle to keep it from blocking the sidewalk, an unzipped bag that was attached to the handlebars fell open. Without touching the bag, the officer saw that it contained a gun. The officer removed the gun and found a second gun along with a digital scale with residue and a syringe containing residue and blood. After Campos told the officers his name, they discovered that he was a convicted felon. The officers arrested Campos for being a felon in possession of a firearm.

Campos filed a motion to suppress the evidence discovered in the bag attached to his bicycle. Campos argued the officer conducted an unlawful search when he moved the bicycle, which allowed the officer to see the contents of the bag.

The court disagreed, holding that the officer's movement of the bicycle did not constitute a search under the *Fourth Amendment*. The court found the officer needed to move Campos' bicycle because it was impeding pedestrian traffic in violation of a city ordinance. Although the officer incidentally caused the bag to move by picking up the bicycle, the officer did not touch, squeeze, or manipulate the bag in any way. Consequently, once the officer moved Campos' bicycle and the unzipped bag came open, the firearm it contained was in plain view.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1346/15-1346-2016-03-22.pdf?ts=1458660658>

Search – Drilling into Trunk After Discovery of Hidden Compartment

United States v. Zamora-Garcia, 831 F.3d 979 (8th Cir. 2016)

An officer stopped Garcia's car after he saw something dragging underneath it. When the officer told Garcia of the dragging part, the officer noticed Garcia was extremely nervous and that Garcia's hands shook when he gave the officer his driver's license. After verifying Garcia's license, the officer asked Garcia for consent to search the car, which Garcia granted. When the officer opened the trunk, he saw the carpet had been glued to the floor. As a former automobile mechanic, the officer knew that car manufacturers generally do not adhere carpets to a vehicle's trunk in this manner. Instead, the officer suspected that the car had been altered to contain a hidden compartment. The officer also saw a large sum of cash in a bag under the luggage in the trunk. The officer then crawled underneath Garcia's car and saw a metal box had been welded to the underbody of the car, spanning the car's entire width. Unable to find a trapdoor to gain entry into this compartment, the officer decided to move the search to police headquarters. Garcia responded, "Okay," and "That's fine." After asking which officer he should follow, as another officer had arrived on scene, Garcia drove his car to headquarters.

Upon arrival at headquarters, the officers continued to search for the compartment's trapdoor. The officers eventually drilled a hole through the floor of the trunk into the hidden compartment. When the officers removed the drill bit, it was covered with green cellophane and a white, crystal-like powder. The officers located the trapdoor a short time later, pried it open, and discovered fourteen one-pound cellophane bags of methamphetamine. The government charged Garcia with possession with intent to distribute methamphetamine.

Garcia argued that the officers exceeded the scope of his initial consent when they had him drive his car to police headquarters to continue their search.

The court noted that the district court found the officer requested, rather than demanded, that Garcia allow the officers to conduct a more thorough search at headquarters. When Garcia responded "Okay," and "That's fine," and then asked which officer he should follow, the court concluded that Garcia's consent to the continued search of his car at police headquarters was voluntary.

Next, the court recognized that Garcia's general consent to search his car did not allow the officers to drill through the floor of the trunk. The court found that "cutting" or "destroying" an object during a search requires either explicit consent for the destructive search or probable cause. In this case, because Garcia did not explicitly consent to drilling into the car's trunk, the officers had to establish probable cause to drill into the trunk to reach the hidden compartment. Probable cause to search exists when a reasonable person believes that contraband or evidence of a crime is present in the place to be searched.

The court held the officers established probable cause to believe that contraband would be present in the hidden compartment. First, the existence of the welded metal compartment, itself suggested the car was used for some illegal activity. Second, the officer drew from his twenty-eight years of patrol experience and his prior work as an automobile mechanic to conclude that the compartment served no lawful purpose. Third, the Eighth Circuit has repeatedly cited the existence of a hidden compartment in a vehicle as a significant factor supporting probable cause to conduct a destructive search. Fourth, the officer observed that Garcia was extremely nervous and his hands shook as he retrieved his driver's license from his wallet. Finally, the officer found a large sum of money in the trunk of Garcia's car.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2994/15-2994-2016-08-02.pdf?ts=1470150073>

Seizure / Persons

United States v. Mays, 819 F.3d 951 (7th Cir. 2016)

While on patrol in a high-crime area an officer saw three people fighting, while a fourth person, later identified as Mays, watched. As the officer approached, Mays began to walk away. The officer ordered Mays to stop, but Mays continued to walk away. A back-up officer arrived and followed Mays on foot. The officer ordered Mays to stop and identify himself, but Mays continued to walk away from the officer and utter profanity at the officer. When the officer ordered Mays to remove his hands from his pants pockets, Mays only removed his left hand, while keeping his right

hand in his pocket while angling his right side away from the officer as he continued to walk. Mays eventually stopped walking, but turned his body in a way that kept his right side away from the officer. The officer placed his left hand on Mays' right shoulder to keep Mays from turning around and to create distance between the two men. The officer again ordered Mays to remove his hand from his pocket, but Mays refused, cursed and then turned towards the officer. When Mays turned, the officer saw that he had a pistol in his right hand. The officer deployed his taser, striking Mays in the chest. Mays dropped his pistol and was arrested.

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

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

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

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

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

United States v. Cook, 842 F.3d 597 (8th Cir. 2016)

In the early morning hours, police officers on routine patrol saw an idling car parked in a high crime area. The officers could not determine if the car was occupied, and were concerned the car could be a target for a thief. The officers drove around the block, and as they approached the car a second time, they saw it contained two individuals. The officers parked behind the idling car, activated the "wig wag" setting for their vehicle's emergency lights, and got out of their vehicle. As the officers approached the car, Cook rolled down the driver's side window. The officers smelled marijuana and removed Cook from the car. The officers eventually arrested Cook and discovered marijuana and crack cocaine in the backseat of his vehicle. Subsequently, the officers obtained a warrant and found a firearm hidden in the car's center console.

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

Cook filed a motion to suppress the firearm, arguing that the officers discovered the firearm after illegally seizing him.

The court disagreed. A *Fourth Amendment* seizure occurs when an officer uses "physical force or a show of authority" to restrain a person's freedom of movement. The critical question is whether

an officer's actions would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." In this case, the court concluded there was no *Fourth Amendment* seizure until the officers removed Cook from his car. By this time, Cook had voluntarily opened his window and the officers smelled marijuana coming from inside his car.

The court noted that the wig wag lights activated by the officers are different from the full light bar which is used to notify motorists in moving vehicles that they are required to stop. Here, the officers activated the wig wag lights in order to identify themselves as police officers. Consequently, the court found that a reasonable person seeing the wig wag lights under these circumstances would have thought that he was still free to ignore the police presence and go about his business.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3651/15-3651-2016-11-22.pdf?ts=1479832258>

United States v. Wright, 844 F.3d 759 (8th Cir. 2016)

Officers received information from a confidential informant (CI) that Wright and Victor Brown would be driving from Iowa to Chicago to purchase crack cocaine. Officers corroborated much of the information provided by the CI and conducted surveillance on Brown's residence around the time Brown and Wright were expected to return from Chicago. When Brown and Wright arrived, Brown exited Wright's SUV, and then Wright departed.

Officers followed Wright, who arrived at the parking lot of an apartment complex. A uniformed officer positioned his squad car behind Wright's SUV and shined a spotlight onto the back window. The officer and Wright exited their vehicles and engaged in conversation. During this time, the officer smelled burnt marijuana coming from Wright's person. After placing Wright in the back seat of a squad car, the officer walked around Wright's SUV. The officer saw a marijuana cigar on the front center console and smelled marijuana emanating from the vehicle. Officers searched the SUV and seized the marijuana cigar as well as crack cocaine from the glove compartment.

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

Wright argued the evidence seized from his SUV should have been suppressed because the officers did not have probable cause to enter the apartment complex's curtilage, reasonable suspicion to detain him, or probable cause to search his vehicle.

First, the court held that Wright did not have standing to challenge the officers' entry into the parking lot of the apartment complex because he did not have a reasonable expectation of privacy in that area. Wright did not own or live at the property, nor was he an overnight guest there. Consequently, the court concluded it did not have to determine whether the officers' entry into the parking lot was lawful.

Second, concerning the encounter in the parking lot, the court held the officer's act of shining the spotlight on Wright's car was not a *Fourth Amendment* seizure, and Wright did not claim that the officer seized him by blocking his SUV with his squad car. As a result, the court concluded no

suspicion was required when Wright and the officer had their initial conversation. Once the officer smelled the odor of marijuana coming from Wright's person, the court concluded the officer had probable cause to arrest Wright. If the officer had probable cause to arrest Wright at the point, the court found that the officer clearly had reasonable suspicion to detain Wright for further investigation.

The court added that, in any event, the officers had reasonable suspicion to conduct a *Terry* stop on Wright. The CI provided detailed information concerning Brown and Wright, and the officers corroborated much of that information during their surveillance.

Finally, the court held the warrantless search of Wright's SUV was valid under the automobile exception to the warrant requirement. The officer smelled burnt marijuana and saw a marijuana cigar inside the SUV, which established probable cause that the vehicle contained drugs. Once the officer had probable cause to search the SUV for drugs, he had the right to search the glove compartment as a place where drugs could be concealed.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3237/15-3237-2016-12-23.pdf?ts=1482510657>

Consensual Encounters / Knock and Talk

United States v. Danhach, 815 F.3d 228 (5th Cir. 2016)

The Houston Police Department (HPD) and the Federal Bureau of Investigation (FBI) suspected Danhach and Kheir were involved in an organized retail theft operation. During their investigation the agents discovered a warehouse where they believed Danhach and Kheir were storing stolen property. After agents surveilling the warehouse saw Kheir and another man enter the warehouse, the agents approached and knocked on the door in an attempt to gain entry. Kheir opened the door and allowed the agents to enter the warehouse. Once the agents were inside the warehouse Kheir gave them permission to walk back to the main warehouse area to locate the unidentified worker that Kheir had indicated was there. When the agents entered the main warehouse area, they saw what immediately appeared to be stolen property and other items consistent with an organized retail theft operation. The agents then asked for and received Kheir's oral consent to search the entire warehouse. Sometime later, the agents obtained a warrant to search the warehouse and seized evidence that tied Danhach and Kheir to the stolen property operation.

The government indicted Danhach and Kheir for a variety of federal criminal offenses.

Danhach argued the evidence seized from the warehouse should have been suppressed. Danhach claimed the agents' observations, which established probable cause to obtain the search warrant, occurred after the agents unlawfully entered the warehouse.

The court disagreed. First, the agents' initial entry into the warehouse was lawful because the agents utilized the "knock and talk" technique. The court noted this technique is a reasonable investigative tool when officers seek an occupant's consent to search or when officers reasonably suspect criminal activity. Here, one of the agents testified they received Kheir's permission before they entered the warehouse, and this testimony was supported by surveillance video. Second, it was uncontested that once inside the building, Kheir gave the agents permission to walk back to

the main warehouse area. Consequently, the court concluded the agents were lawfully inside the warehouse when they saw evidence of stolen property and other evidence of a stolen property operation, which they used to establish probable cause to obtain the search warrant. Alternatively, the court added the agents' observations were lawful because Kheir voluntarily consented to a full search of the warehouse. It was undisputed that Kheir was in charge of the warehouse, and while Kheir declined to sign a consent-to-search form, the court noted this refusal did not automatically withdraw Kheir's previous oral consent.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/14-20339/14-20339-2016-03-09.pdf?ts=1457569834>

United States v. Lundin, 817 F.3d 1151 (9th Cir. 2016)

A woman told an officer that Lundin had come to her home earlier that evening and abducted her at gunpoint. After a short time, the woman stated Lundin brought her home and warned her not to call the police. After corroborating some of the woman's story, the investigating officer believed he had probable cause to arrest Lundin for burglary, false imprisonment, kidnapping, and several other crimes. The officer issued a be-on-the-lookout (BOLO) and an arrest request for Lundin just before 2:00 am.

Upon receiving the BOLO, an officer from another law enforcement agency went to Lundin's home. The officer saw a vehicle matching the description of Lundin's truck parked in the driveway and saw that lights were on inside the house. The officer called for backup, and two other officers arrived just before 4:00 a.m. With the intent to arrest Lundin, the officers approached Lundin's front door without a warrant. While standing on the porch the officers knocked loudly, waited thirty seconds for an answer, and then knocked more loudly. After the second knock, the officers heard several loud crashing noises coming from the back of the house. The officer ran to the back of the house and found Lundin. The officers handcuffed Lundin and placed him in the back of a patrol car. The officers went back and searched the patio area where they found two handguns lying among several five-gallon buckets that had been knocked over.

The government indicted Lundin on a variety of criminal offenses.

Lundin filed a motion to suppress, among other things, the two handguns the officers seized from the patio. The district court granted Lundin's motion, and the government appealed.

The government argued the officers were entitled to stand on Lundin's front porch and knock on the door under the "knock and talk" exception to the warrant requirement. The government then argued that the crashing noises the officers heard in the back yard created exigent circumstances, which allowed the officers to enter and search the back patio area of Ludin's house. The government further argued the warrantless search of the back patio area was a valid protective sweep.

The court disagreed. The "knock and talk" exception to the warrant requirement allows officers to "encroach upon the curtilage of a home for the purpose of asking questions of the occupants." This exception is based upon an implied license in which a homeowner consents for others, to include law enforcement officers, to approach their home, knock promptly, wait briefly to be

received and then leave unless invited to enter. Here the court concluded the officers exceeded the scope of the “customary license” to approach a home and knock.

First, the court found that unexpected visitors are customarily expected to knock on the front door of a home during normal waking hours. While officers might have a reason for knocking that a resident would consider important enough to justify an early morning disturbance in some circumstances, that was not the case here. Instead, the officers knocked on Lundin’s door around 4:00 a.m. without evidence that he generally accepted visitors at that hour, and without a reason that a resident would ordinarily accept as sufficient to justify the disturbance, specifically to arrest the resident. Second, the scope of the implied license to approach a home and knock is generally limited to the “purpose of asking questions of the occupants,” and officers who knock on the door of a home for other purposes generally exceed the scope of the customary license and do not qualify for the “knock and talk” exception. As a result, the court held the “knock and talk” exception to the warrant requirement does not apply when officers encroach upon the curtilage of a home with the intent to arrest the occupant.

The court pointed out that it was not prohibiting officers from conducting “knock and talks” when the officers have probable cause to arrest a resident, but do not have an arrest warrant. The court stated an officer would not violate the *Fourth Amendment* by approaching a home at a reasonable hour and knocking on the front door with the intent to merely ask the resident questions, even if the officer had probable cause to arrest the resident.

The court then held that exigent circumstances did not justify the officers’ entry and search of the patio area. Exigent circumstances cannot justify a warrantless search when the officers “create the exigency by engaging . . . in conduct that violates the *Fourth Amendment*.” First, the officers had no reason other than hearing the crashing noises coming from the backyard to believe there was an exigency that allowed them to enter and search the patio area. Second, it was the officers’ knock on the door that caused Lundin to make the crashing noises. Consequently, as the officers were in violation of the *Fourth Amendment* when they knocked on Lundin’s door, the court concluded the officers created the exigency which led to the seizure of the handguns.

Finally, the court held the warrantless search of the patio area was not justified as a protective sweep as Lundin had already been handcuffed and placed in a police car and the officers had no reason to believe there was anyone else present who posed a threat to them.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca9/14-10365/14-10365-2016-03-22.pdf?ts=1458666156>

United States v. Carloss, 818 F.3d 988 (10th Cir. 2016)

Officers received information that Carloss, a convicted felon, possessed a machine gun and was selling methamphetamine. Two officers went to the home where Carloss was living in an attempt to interview him. Carloss lived in a single-family dwelling, and while there was no fence or other barriers around the house or yard, there were several “No Trespassing” signs placed in the yard and on the front door. In response to their knocks on the front door, a woman, Heather Wilson, exited the back door of the house and met the officers in the side yard. A few minutes later Carloss exited the house, and joined the officers and Wilson in the side yard. The officers told Carloss

why they were there and asked if they could search the house. Carloss told the officers they would have to ask the owner of the house, Earnest Dry, if they could search it. When the officers asked Carloss if they could go into the house to speak to Dry, he replied, “sure.” At no time did Carloss or Wilson point out the “No Trespassing” signs or ask the officers to leave. Once inside the house, the officers waited in Carloss’ room while Carloss went to get Dry. While in Carloss’ room, the officers saw drug paraphernalia and a white powdery substance that appeared to be methamphetamine. After Dry refused to give the officers consent to search, the officers left. However, based on the drug paraphernalia the officers saw in Carloss’ room, they obtained a warrant to search Dry’s house. During the search pursuant to the warrant, officers seized drugs, firearms and ammunition. The government indicted Carloss and Dry on a variety of drug and weapons offenses.

Carloss argued that the search of his home pursuant to the warrant was unlawful because the officers obtained the warrant based on information that they obtained in violation of the *Fourth Amendment* when they trespassed onto the curtilage of his home to knock on the front door.

The court disagreed. First, law enforcement officers, like any member of the public, have an implied license to enter a home’s curtilage to knock on the front door, in an attempt to speak with a home’s occupants. Second, the court found the United States Supreme Court holding in *Florida v. Jardines* did not prohibit law enforcement officers from conducting knock and talk interviews. Instead, *Jardines* held that the license to approach a home and knock on the front door does not allow officers to perform a search of the interior of the house from the porch with the enhanced sensory ability of a trained dog. The court concluded that *Jardines* did not apply in this case, as the officers did not attempt to gather information about what was occurring inside the house from the front porch by using a trained dog or any other means. The officers simply went to the front door and knocked, seeking to speak consensually with Carloss.

Third, the court noted that it is well established that “No Trespassing” signs do not prohibit law enforcement officers from entering privately owned “open fields.” As a result, the officers were entitled to enter any part of the yard that might be considered “open fields.” Concerning the “No Trespassing” sign that was on the front door of the home, the court could not find any authority supporting Carloss’ claim that a resident can revoke the implied license to approach his home and knock on the front door by posting a “No Trespassing” sign on it. As a result, the court held the presence of a “No Trespassing” sign, by itself, cannot convey to an objectively reasonable officer, or a member of the public, that he cannot go the front door and knock, seeking to speak consensually to an occupant.

Finally, the court held that Carloss voluntarily consented to the officers following him into the house. The officers were dressed in plainclothes, never drew their weapons and they never touched or threatened Carloss in any way. In addition, Carloss was aware that he could refuse the officers’ request because he had just declined to give the officers broader general consent to search the house when he told the officers they would have to ask Dry for permission to do that.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca10/13-7082/13-7082-2016-03-11.pdf?ts=1457719342>

Terry Stops / Reasonable Suspicion

United States v. Sanchez, 817 F.3d 38 (1st Cir. 2016)

A confidential informant (CI) called Officer Templeman and reported that an Hispanic male standing near a green Ford Taurus on the corner of Main and Calhoun Streets had a black semiautomatic handgun in his waistband and crack cocaine in his pocket. The CI described the man as being approximately 5'5" tall, and wearing a white t-shirt and black cargo-style pants. When Officer Templeman asked the CI how he knew about the gun and the crack, the CI replied that he had personally "seen" them. The CI had given Officer Templeman reliable information in the past that had led to arrests and convictions for drug and firearms related crimes. In addition, Officer Templeman knew the CI's name, phone number and address, and as far as Templeman knew, the CI had never given him false information.

After receiving the tip, Officer Templeman and other officers immediately went to the location indicated by the CI. Once there, the officers saw a green Ford Taurus and a man matching the description provided by the CI. Officer Templeman recognized the man as Sanchez, a suspected gang member with a known felony conviction for a drug offense. After conducting surveillance for ten minutes, Officer Templeman saw Sanchez touch his waistband in a way that reminded Templeman how he checks his own waistband when he carries a concealed handgun. In addition, Templeman saw the outline of an object under Sanchez's shirt near his waistband. Based on these observations as well as his training and experience, Officer Templeman directed the other officers to detain and frisk Sanchez. One of the officers frisked Sanchez and found a handgun in Sanchez's waistband. The officer then arrested Sanchez and discovered crack cocaine in Sanchez's pocket during the search incident to arrest. The total time from the CI's call to Sanchez's arrest was approximately 15 minutes.

Sanchez was charged with several criminal offenses.

Sanchez argued information provided by the CI did not provide the officers reasonable suspicion to detain and then frisk him.

The court disagreed. Reasonable suspicion can be established by an informant's tip if the tip possesses sufficient indicia of reliability. Here, Officer Templeman knew the informant's identity, contact information, and that the informant's tips had proven reliable in the past. In addition, the CI gave detailed information concerning Sanchez's physical appearance, location, gun and drug possession, which the CI stated he had personally observed. Finally, while conducting surveillance, Officer Templeman saw Sanchez touch his waistband in a manner consistent with checking for a concealed gun, and he knew that Sanchez's felony conviction prohibited him from lawfully possessing any firearms. Based on these facts, the court concluded the officers established reasonable suspicion to conduct a *Terry* stop and a *Terry* frisk on Sanchez.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-1107/15-1107-2016-03-23.pdf?ts=1458763208>

United States v. Foster, 824 F.3d 84 (4th Cir. 2016)

Around 12:39 a.m., a police dispatcher received a 911 hang-up call reporting a gunshot near a jogging trail in an area known for theft, vandalism, and the production of methamphetamine. A few minutes later, two officers arrived in the area and saw Foster standing in an alley between two closed businesses. Foster was the only person the officers encountered once they arrived. The officers told Foster they were investigating a report of a shot fired in the area and asked Foster if he had any weapons. Instead of answering, Foster began to place his right hand in his right front pocket. The officers interpreted this as a “security check,” an instinctual movement in which, upon being asked if they are carrying any weapons, suspects reach to ensure that a concealed weapon is secure. The officers then told Foster to keep his hands out of his pockets, and Foster complied. One officer patted the outside of Foster’s right pocket, touching an object that felt like a firearm. The officers eventually discovered that Foster possessed three guns.

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

Foster filed a motion to suppress the evidence recovered by the officers, arguing the officers did not have reasonable suspicion to stop him.

The court disagreed. First, the court determined the officers seized Foster for *Fourth Amendment* purposes when they stopped Foster from reaching into his right front pocket.

Next, the court held the officers had reasonable suspicion to believe Foster committed a crime associated with discharging a firearm when he attempted to reach into his front pocket. When the officers saw Foster, he was the only person near a high-crime area where a gunshot had been reported. While the court noted these factors by themselves would not have been enough to establish reasonable suspicion, Foster’s attempt to reach into his pocket and conduct a “security check” when the officers asked if he was carrying a weapon tied all of the factors together to give the officers reasonable suspicion to stop Foster. Specifically, by performing a “security check,” which suggested he might be armed, Foster gave the officers further cause to suspect that he was the source of the gunshot and additional reason to trust the information provided by the 911 caller.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca4/15-4319/15-4319-2016-05-24.pdf?ts=1464116415>

United States v. Hill, 818 F.3d 289 (7th Cir. 2016)

Hill robbed a bank and got away with \$134,000 in cash. However, as Hill fled, a red dye pack exploded in the bag containing the cash. As a result, most of the bills were stained red. Several days later, Hill went into a casino with a backpack and a Santa hat filled with thousands of dollars of dye-stained bills. Hill went to a slot machine and fed the bills into the machine. A casino employee thought it was strange that Hill was not playing the slot machine. Instead, Hill was cashing out and receiving vouchers for the amount of money he had put into the slot machine. The employee also noticed that the bills Hill was feeding into the slot machine were stained red. The employee notified a supervisor who contacted a police officer who was working as a security officer at the casino. The officer approached Hill and saw him holding red-stained bills, still wrapped in bank bands. The officer asked Hill why his bills were red and where he had gotten the

money. Hill told the officer he had found the money while changing a tire near a lake. The officer found Hill's story suspicious. In addition, the officer knew from his law enforcement experience that bank employees often attempt to hide red-dye packs among stolen money during robberies. The officer then led Hill away, along with his bag and Santa hat to an interview room. The officer questioned Hill and eventually searched Hill's bag and Santa hat, recovering a large quantity of dye-stained bills.

The government indicted Hill for money laundering, bank robbery and transporting stolen money in interstate commerce.

Hill filed a motion to suppress his arrest, the searches of his backpack and Santa hat, as well as his initial statements to the officer at the cash-out area. Specifically, Hill argued the officer's initial conversation with Hill was an arrest for which the officer did not have probable cause. Alternatively, even if the initial encounter was not an arrest, Hill argued the officer did not have reasonable suspicion to perform a *Terry* stop. Finally, Hill argued the officer did not have probable cause to remove Hill to the interview room where the remainder of the stolen bills were discovered.

First, the court held the officer's initial encounter with Hill at the cash-out area was a valid *Terry* stop. When the officer approached Hill, he knew that a casino employee had seen Hill placing red-stained bills into a slot machine that he was not playing, but instead cashing out and receiving vouchers. In addition, the officer knew from experience that dye packs are often used to mark stolen currency and it was suspicious to have a person using a slot machine as a "change machine." Based on these facts, the court concluded the officer had reasonable suspicion to approach Hill and conduct a *Terry* stop.

Next, the court held that by the time the officer escorted Hill to the interview room, he had established probable cause to arrest Hill. When the officer approached Hill in the cash-out line, he saw that Hill was holding a stack of bills stained with red dye and wrapped in bank bands. When the officer asked Hill about the stained bills, Hill told the officer an unlikely story about how he supposedly obtained the bills. These new facts, combined with the facts the officer already knew when he approached Hill established probable cause to believe that Hill had committed or was committing a crime.

Finally, the court held the searches of Hill's backpack and Santa hat were lawful. A search incident to arrest is valid if it does not extend beyond "the arrestee's person and the area within his immediate control." Here, when he was detained, Hill was holding the bag containing the dye-stained bills and was exercising immediate control over it. Consequently, the court concluded the officer's search of those items was valid incident to Hill's arrest.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/14-2019/14-2019-2016-03-21.pdf?ts=1458577869>

United States v. Mays, 819 F.3d 951 (7th Cir. 2016)

While on patrol in a high-crime area an officer saw three people fighting, while a fourth person, later identified as Mays, watched. As the officer approached, Mays began to walk away. The officer ordered Mays to stop, but Mays continued to walk away. A back-up officer arrived and

followed Mays on foot. The officer ordered Mays to stop and identify himself, but Mays continued to walk away from the officer and utter profanity at the officer. When the officer ordered Mays to remove his hands from his pants pockets, Mays only removed his left hand, while keeping his right hand in his pocket while angling his right side away from the officer as he continued to walk. Mays eventually stopped walking, but turned his body in a way that kept his right side away from the officer. The officer placed his left hand on Mays' right shoulder to keep Mays from turning around and to create distance between the two men. The officer again ordered Mays to remove his hand from his pocket, but Mays refused, cursed and then turned towards the officer. When Mays turned, the officer saw that he had a pistol in his right hand. The officer deployed his taser, striking Mays in the chest. Mays dropped his pistol and was arrested.

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

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

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

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

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

United States v. Thompson, 842 F.3d 1002 (7th Cir. 2016)

As part of an investigation into a drug trafficking organization, federal agents were conducting surveillance on Marvin Bausley, whom they believed had approximately ten kilograms of cocaine in his car. The agents followed Bausley to an apartment building where they saw him park his car. A man later identified as Thompson, came out of the building wearing a black backpack and got into Bausley's car. Bausley drove once around the block and again stopped outside the apartment building. Thompson exited the car and entered the apartment building.

One of the agents entered the building shortly after Thompson, but did not see anyone in the lobby. The agent remembered that an apartment on the ninth floor had been of interest in their investigation, so the agent took the elevator to the ninth floor. When the agent exited the elevator, he saw Thompson and a woman waiting for the elevator. The agent had not seen Thompson earlier

and did not recognize him as the man that had been in Bausley's car. Thompson and the woman got in the elevator and went down to the lobby. When Thompson exited the elevator in the lobby, other agents notified the agent on the ninth floor that the man who was in Bausley's car was now in the lobby.

The agent from the ninth floor went back to the lobby where he saw Thompson; however, Thompson did not have the backpack he had been wearing earlier. The agent detained Thompson and asked Thompson if he lived in the building. Thompson denied living in the building. Instead, Thompson told the agent he was there to visit a friend on the fourth floor. The agent then asked Thompson if he had just been on the ninth floor. Thompson told the officer that he not been on the ninth floor. The agent told Thompson that he was not under arrest and that he did not need to speak to the agents. The agent then frisked Thompson for weapons. The agent did not find any weapons, but he discovered a key ring, which held Thompson's apartment key, and an electronic fob used to access the building's elevators. Again, the agent asked Thompson if he lived in the building and if he had just been on the ninth floor. Thompson answered "no" to both questions.

At this point, the agent asked Thompson if he would speak to the agents on the ninth floor, and Thompson agreed. Using the fob on the key ring, the agent accessed the elevator and Thompson and the agents went to the ninth floor. Thompson did not ask for his keys back and the agents did not handcuff him.

Once on the ninth floor, the agents asked Thompson if he lived in unit 902. After Thompson replied "no," the agent inserted Thompson's key into the lock of unit 902 and the door opened. The agent asked Thompson if anyone was inside the apartment, but Thompson did not respond. Two agents performed a sweep of the apartment, which lasted approximately 30-45 seconds. Finding no one in the apartment, the agents returned to the hallway. The agent then asked Thompson if they could speak inside the apartment, and Thompson agreed.

Inside the apartment, the agent again told Thompson he was not under arrest and that he did not have to talk to the agents. The agent then asked Thompson for consent to search the apartment. Thompson consented and signed a consent-to-search form. After signing the form, Thompson told the agents where cocaine, cash, and a gun were located in the apartment.

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

Thompson filed a motion to suppress the evidence seized from his apartment, claiming the agents committed a variety of *Fourth Amendment* violations.

First, Thompson argued that when he stepped out of the elevator in the lobby, the agent detained him without reasonable suspicion to believe he was involved in criminal activity.

The court held the agent had ample reason to believe that Thompson was engaged in criminal activity when he encountered Thompson in the lobby. First, agents saw Thompson get into a car with Bausley, whom they had reason to believe had just picked up a large amount of cocaine. Next, the agents saw Thompson enter the car wearing a backpack, circle the block with Bausley, go back into the apartment building, and then return to the lobby without the backpack. The court concluded these facts established reasonable suspicion to justify the *Terry* stop of Thompson in the lobby.

Second, Thompson argued the agent unlawfully frisked him in the lobby. An officer conducting a lawful *Terry* stop, may not automatically frisk the subject of the stop. A *Terry* frisk is lawful only if the officer can establish reasonable suspicion that the subject might be armed and dangerous.

The court held that when the agent encountered Thompson, he clearly had reason to believe that Thompson was participating in a drug trafficking operation. Based on that belief, it was reasonable for the agent to suspect that Thompson was armed because guns are known tool of the drug trade.

Third, Thompson argued that by taking his keys and accompanying him to the ninth floor, the agent unlawfully seized him and converted the *Terry* stop into an unlawful arrest without probable cause.

The court disagreed. Prior to taking his keys, the agent told Thompson that he was not under arrest and that he did not have to speak to the agent. In addition, Thompson never asked for his keys back and he voluntarily went with the agent to the ninth floor.

Fourth, Thompson argued that the agent violated the *Fourth Amendment* by putting the key in the lock of unit 902 and performing a sweep of the apartment before obtaining Thompson's consent to search.

The court recognized that placing the key in the lock of unit 902 constituted a *Fourth Amendment* search. However, because the privacy interest in the information held by the lock (*i.e.* verification of the key holder's address) is so small, officers do not need a warrant or probable cause to perform such a search.

The court further held the sweep of Thompson's apartment was lawful. The agents were involved in a long-term investigation of a large-scale drug trafficking organization. As the door was opening, the agent asked Thompson if anyone was inside and received no response. As Thompson had already lied to the agent about being on the ninth floor and about living in the building, the agents were justified in taking reasonable precautions to ensure their safety. In addition, the sweep of Thompson's apartment lasted only 30-45 seconds, and upon completing the sweep, the agents exited the apartment and obtained Thompson's consent to perform a full search.

Finally, Thomson argued that he did not voluntarily consent to the agents' search of his apartment.

The court held that Thompson's consent to search his apartment was voluntary. After being told he was not under arrest, Thompson accompanied the agents to the ninth floor and signed a consent-to-search form after the agents completed their sweep. The agents did not threaten or coerce Thompson into signing the consent form, and Thomson voluntarily directed the agents to the locations of the contraband inside the apartment.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/16-1105/16-1105-2016-11-22.pdf?ts=1479857447>

United States v. Quinn, 812 F.3d 694 (8th Cir. 2016)

Around 2:30 a.m., officers responded to a report of a wreck involving a stolen car. Several men fled the scene, but one man was captured shortly afterward. The man told the officers that one of the other suspects might have a handgun. The other suspects were described as white males, with one wearing a blue hooded sweatshirt, and the other wearing a white t-shirt and having a long ponytail. In addition, the officers found ammunition in the wrecked car.

An officer responding to the radio call to look for the suspects positioned himself in the area that was in the suspects' direction of flight. Approximately forty-minutes later, the officer saw a man emerge from an alley who began to walk in a direction away from where the stolen car had been recovered. The man was in his mid-twenties, wearing a dark t-shirt, and he constantly looked over his shoulder toward the officer's police car. The officer approached the man, later identified as Quinn, and detained him in handcuffs. While the officer waited for one of the officers who had witnessed the suspects flee to arrive, and possibly identify Quinn, the officer discovered Quinn had an outstanding arrest warrant for a probation violation. The officer arrested Quinn and discovered a handgun during the search incident to arrest.

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

Quinn filed a motion to suppress the handgun, arguing the officer did not have reasonable suspicion to stop him; therefore, the handgun was discovered during an unlawful seizure.

The court disagreed, arguing the officer established reasonable suspicion to support a *Terry* stop of Quinn. First, the officer stopped Quinn a few blocks from the location where the stolen car was recovered approximately forty-minutes after the officers saw suspects flee the crime scene. Second, Quinn partially matched the description of one of the suspects whom officers had observed fleeing toward the location where Quinn was detained. Third, the officer saw Quinn emerge from an alley and walk away from the direction of the crime scene. Fourth, the stopped occurred late at night when few pedestrians were around. Finally, Quinn acted suspiciously when he saw the officer by constantly looking over his shoulder toward the officer's direction. The court concluded these factors, when taken together, gave the officer reasonable suspicion to stop Quinn.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1750/15-1750-2016-02-04.pdf?ts=1454601667>

United States v. Sanford, 813 F.3d 708 (8th Cir. 2016)

In the early morning hours, an employee of a nightclub called the police department and reported a patron at the bar threatened "to do something to somebody" when the bar closed. The caller did not give further information about the threat, but described the patron as a black male with dreadlocks who was wearing a white shirt and blue shorts. Officers knew the nightclub was located in a high crime area, and that officers had responded to a high volume of calls at the nightclub in the past for fights, stabbings, and shootings.

When an officer arrived, he saw a black male with dreadlocks, wearing a white shirt and blue shorts walking towards a parked car in an alley halfway down the block from the nightclub. The officer saw the man, later identified as Sanford, walk around the parked car and open the

passenger's side door. The officer called out to Sanford, but Sanford leaned into the car. As he approached the car, the officer saw Sanford reaching for the console with his left hand while concealing an item below the seat in his right hand. The officer drew his firearm and ordered Sanford to show his hands and exit the car. After Sanford complied, the officer recognized Sanford from previous encounters. Based on these previous encounters, the officer knew Sanford had a criminal history that included criminal convictions for burglary and weapons charges. The officer handcuffed Sanford and frisked him for weapons. After finding no weapons on Sanford, the officer searched the passenger compartment of the car where he found a loaded handgun under the passenger seat.

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

Sanford filed a motion to suppress the handgun recovered from the car. Sanford argued the officer exceeded the scope of a valid *Terry* stop; therefore, turning his detention into a de facto arrest that was lacking probable cause.

The court disagreed. A de facto arrest occurs when an officer's conduct is more intrusive than necessary to achieve the purpose of a *Terry* stop. For example, a *Terry* stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if the officer's use of force is unreasonable under the circumstances. In this case, the court held the scope and means of the officer's *Terry* stop was not more intrusive than necessary; therefore, the stop did not amount to a de facto arrest. First, it was reasonable for the officer to search for a weapon based on the time, location, and circumstances surrounding the report of the incident at the nightclub. Second, Sanford's concealment of an unknown object under the seat of the car supported the officer's decision to order Sanford out of the car. Third, after Sanford exited the car, the officer recognized Sanford from prior encounters and chose to detain Sanford in handcuffs while he searched the car for weapons. The court concluded this was reasonable under the circumstances, as the officer knew Sanford's criminal history that included weapons charges. In addition, if he were released, Sanford would have been able to return to the car and gain access to the object he concealed under the seat.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1501/15-1501-2016-02-16.pdf?ts=1455640248>

United States v. Diriye, 818 F.3d 767 (8th Cir. 2016)

Officers responded to a report of a suspicious vehicle in a parking lot, which matched the description and license plate of a vehicle connected to an armed home invasion and robbery three days earlier. When the officers arrived, they removed two people they discovered sleeping in the vehicle. Approximately fifteen minutes later, while the officers were awaiting the arrival of a supervisor for instructions to search the vehicle, Diriye walked up to the suspect vehicle and got inside it. The officers immediately approached the vehicle, ordered Diriye out and handcuffed him. While standing outside the car, Diriye shifted his body to keep his right side away from the officers. Suspecting that Diriye was armed, one of the officers frisked him and recovered a loaded handgun from Diriye's right pants pocket. Diriye was charged with being a felon in possession of a firearm.

Diriye filed a motion to suppress the handgun, arguing the officers only discovered it after conducting an unlawful *Terry* stop.

The court disagreed, holding the officers had reasonable suspicion to conduct a *Terry* stop on Diriye. First, Diriye bypassed an active crime scene and entered a suspect vehicle that had not yet been secured or searched by law enforcement officers. Second, the suspect vehicle matched the description of a vehicle connected to an armed home invasion and robbery three days prior. Based on the totality of the circumstances, the court concluded the officers had reasonable suspicion to believe criminal activity was afoot by Diriye's blatant disregard for the active crime scene by siting in the suspect vehicle connected to recent criminal activity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2385/15-2385-2016-03-16.pdf?ts=1458142252>

United States v. Roelandt, 827 F.3d 746 (8th Cir. 2016)

A plainclothes officer saw Roelandt walking quickly through a high-crime area at night. The officer noticed Roelandt was continually looking around, and he appeared to be extremely nervous. The officer knew Roelandt was a convicted felon and a "hard core" member of a local street gang. In addition, a confidential informant (CI) told the officer three month earlier that Roelandt was known to carrying a gun. Finally, the officer knew that an hour or two before he saw Roelandt that evening, another member of Roelandt's gang sustained a gunshot wound and was admitted to the hospital. The plainclothes officer directed a uniformed officer to stop Roelandt. The officer stopped Roelandt and frisked him. The officer felt a hard object in Roelandt's pocket and removed a loaded 9mm pistol.

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

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

The court disagreed, holding the totality of the circumstances supported the officer's reasonable suspicion that Roelandt was engaged in the criminal activity of possessing a firearm. Roelandt was a known felon and gang member who was walking quickly through a high-crime area and suspiciously looking around as he walked. The officer had received a past report from a CI that Roelandt had possessed a gun, and the officer knew a fellow gang-member, and friend of Roelandt's had been admitted to the hospital hours earlier with a gunshot wound. Although the officer did not know the details of the shooting, he knew from his experience that gang members often engaged in retaliatory shootings. Each aspect of Roelandt's behavior was largely consistent with innocent behavior when considered by itself; however, when considered together, the court concluded the officer had reasonable suspicion to stop Roelandt.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2590/15-2590-2016-06-30.pdf?ts=1467300658>

United States v. Montgomery, 828 F.3d 741 (8th Cir. 2016)

Officers patrolling a high-crime neighborhood saw a van parked in the unfenced backyard of a house. The officers approached the van and saw Montgomery and another person asleep inside. Two weeks earlier, the officers had arrested a man dismantling a stolen car in the same backyard. Concerned that the van was stolen and soon to be processed for salvage, the officers investigated. After determining that the van was not stolen, the officers looked into the van through the windows and saw a large quantity of copper pipes. The officers detained Montgomery and obtained his identification. The officers contacted their dispatch who informed them that Montgomery had two outstanding arrest warrants. The officers arrested Montgomery and during the search incident to arrest discovered a firearm in his pants pocket. The government charged Montgomery with being a felon in possession of a firearm.

Montgomery filed a motion to suppress the firearm, arguing that the officers did not have reasonable suspicion to detain him while their dispatcher conducted the warrant check.

The court disagreed, finding the officers had reasonable suspicion to believe the copper pipes in the back of Montgomery's van were stolen property. First, the area was known for scrap-metal theft, and the officers had recently arrested a man in the same backyard for dismantling a stolen car in order to sell the parts and scrap metal. Second, the van bore no markings of a plumbing or construction business. The court noted the absence of such markings suggested the copper pipes were potential scrap and not part of a legitimate business. Finally, the fact that Montgomery was using the van and the backyard for sleeping also raised suspicion of unlawful activity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2206/15-2206-2016-07-11.pdf?ts=1468251047>

United States v. Fields, 832 F.3d 831 (8th Cir. 2016)

Officers were conducting surveillance at the funeral of the victim of an unsolved homicide at the request of the victim's family. After the funeral ended, a plainclothes officer saw four men get out of vehicle and enter the funeral home. The men exited after a few minutes and walked back to the parked vehicle. A few minutes later, Fields and one of the men walked back to the funeral home and went inside again. Fields and the man exited after a few minutes and stood on opposite sides of the doorway, outside the funeral home, for approximately fifteen minutes. A funeral home employee telephoned one of the officers and told the officer that the family did not know the two men and were afraid for their safety. In response, a uniformed officer approached Fields and saw a bulge on Field's right hip consistent with a gun. The officer asked Fields if he was armed and Fields responded, "Yes" and nodded in the direction of the bulge. The officer handcuffed Fields, frisked him, and seized a loaded handgun from his waistband. The government charged Fields with being a felon in possession of a firearm.

Fields argued the firearm should have been suppressed. Fields claimed the officer did not have reasonable suspicion he was engaged in criminal activity to justify the *Terry* stop which led to the discovery of the firearm in his waistband.

The court disagreed. The court found the actions of the four men suspicious, especially at a funeral for the victim of an unsolved homicide where the victim's family requested a police presence and the family did not know the identities of the men. In addition, when the officer approached Fields, he saw a bulge on Field's hip consistent with a concealed firearm. Under these circumstances, the court held the officer had reasonable suspicion to conduct a *Terry* stop of Fields. After Fields admitted to the officer that he was armed, the court held it was reasonable for the officer to frisk Fields to retrieve the firearm.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2276/15-2276-2016-08-09.pdf?ts=1470756650>

United States v. Williams, 837 F.3d 1016 (9th Cir. 2016)

A man called a police hotline and reported that another man was sleeping inside a grey Ford, which was located in an apartment complex parking lot. The caller stated the man was a known drug dealer and did not live in the apartment complex. The caller provided his name, address and phone number. Two uniformed officers in a marked police car responded and saw the grey Ford in the parking lot. The officers turned on their patrol car's overhead lights, shining them inside the Ford. After the officers turned on their lights, a man, later identified as Williams, sat up in the driver's seat inside the Ford. Williams started the car, placed it in reverse and then quickly shifted the car back into park. By this time, both officers were approaching the Ford on foot. The officers ordered Williams out of the car and Williams complied. When the officers got within a few feet of Williams, he ran away from them. The officers chased Williams who fell down and remained on the ground. One of the officers conducted a pat down of Williams' backside, handcuffed him, and then helped Williams to his feet. The officers brought Williams back to their patrol car and conducted a pat down of Williams' front side. An officer then reached into all of Williams' pockets. The officer found a plastic bag containing individually wrapped pieces of crack cocaine in Williams' right front pocket and over \$1,000 in cash in small denominations in Williams' left front pocket.

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

The government charged Williams with drug and firearm offenses.

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

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

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

increased when Williams started the car and shifted it into reverse after the officers shined their lights on his car.

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

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

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

United States v. Castle, 825 F.3d 625 (D.C. Cir. 2016)

On a very cold night in February, officers on patrol in an un-marked pick-up truck saw a man walking quickly away from the direction of an apartment complex outside of which PCP was known to be sold. The man crossed the street and entered an alley where the officers saw him lean over near a parked U-Haul truck. The officers then saw the man walk back across the street with his hands in his pockets. The officers approached the man and recognized him as Harold Castle. The officers knew Castle had been arrested previously for PCP-related offenses and conducted a *Terry* stop. After ordering Castle to sit down on the curb, the officers saw Castle place a small vial on the ground and try to conceal it. Based on the vial's appearance and smell, the officers believed it contained PCP. The officers arrested Castle.

Castle argued the vial should have been suppressed because the officers did not have reasonable suspicion to conduct a *Terry* stop.

The government claimed the officers patrolled the area so regularly that "people in the neighborhood" had come to recognize the un-marked pick-up truck as a police vehicle. As a result, the government argued when Castle saw the truck he recognized it as a police vehicle, and his subsequent behavior allowed the officers to believe he was involved in criminal activity.

The court disagreed. First, the court noted the government failed to put any evidence into the record that would support a reasonable officer's belief that Castle saw the officer's truck before he crossed the street and entered the alley. When the truck turned onto the street, Castle and the truck

were at opposite ends of a long city block, and the truck's headlights were on and pointed in Castle's direction. Second, even if Castle saw the truck, the court found that no matter how widely and readily recognizable the truck may have been known in the neighborhood as a police vehicle, there was no evidence to show that Castle knew it was a police vehicle. Finally, the court held that walking quickly on a very cold evening into an alley is common. The fact that Castle was doing these things in a neighborhood known for drug use did not establish reasonable suspicion that he was involved in criminal activity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/cadc/14-3073/14-3073-2016-06-14.pdf?ts=1465916542>

Terry Frisks - Person / Vehicle / Plain - Feel

See: [United States v. Sanchez](#), 817 F.3d 38 (1st Cir. 2016)

United States v. Cardona-Vicente, 817 F.3d 823 (1st Cir. 2016)

A police officer conducted a traffic stop after he saw the driver of a Jeep was not wearing a seatbelt, a violation of Puerto Rico law. The officer received the vehicle's registration from the driver; however, the driver could not produce a driver's license. When the officer went around to the back of the Jeep to check the registration sticker, he saw Cardona, the passenger, grabbing at a fanny pack that was around his waist. Based on his experience, the manner in which Cardona grabbed the fanny pack led the officer to believe it contained a gun. In addition, Cardona appeared to be nervous. The officer asked Cardona if he had a license to carry a firearm. Cardona did not reply, but he looked down and acknowledged non-verbally that he did not have a license to carry a firearm. The officer then ordered Cardona out of the vehicle, touched the fanny pack and felt a gun. The officer unzipped the fanny pack and found a loaded handgun, ammunition, cash and fourteen baggies of cocaine. Cardona was arrested and charged with drug and firearm offenses.

While he conceded the traffic stop was lawful, Cardona claimed the evidence seized from the fanny pack should have been suppressed because the officer lacked reasonable suspicion to conduct a *Terry* frisk.

The court disagreed. The court noted several facts that became apparent to the officer as the traffic stop progressed which were sufficient to establish reasonable suspicion that there was a gun in Cardona's fanny pack. First, the driver of the Jeep could not produce a driver's license, suggesting the vehicle may have been stolen. Second, Cardona appeared nervous during the stop. Third, the officer saw Cardona was clutching the fanny pack in a manner that, based on his experience, was consistent with there being a gun inside it. Finally, with his suspicions aroused, the officer asked Cardona if he had a license to carry a firearm. Cardona increased the officer's suspicions when he evasively looked down and then non-verbally gesturing with his head, admitting that he did not have a license. The court concluded this sequence of events was sufficient to establish Cardona was armed and dangerous; therefore, the officer was justified in ordering him out of the vehicle and touching the fanny pack.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-1188/15-1188-2016-03-29.pdf?ts=1459267204>

United States v. Cunningham, 835 F.3d 307 (2d Cir. 2016)

Two officers in an unmarked police car conducted a traffic stop after they saw a car illegally run a stop sign. As the car pulled over, the officers saw the driver's arm move up and down in the middle console area. When the officer approached the car, he saw the driver, Cunningham, holding a cell phone in his right hand to the side of his head. The officer ordered Cunningham to put down the phone, but Cunningham did not immediately comply. The officer then asked Cunningham to produce his driver's license and registration, and again, Cunningham failed to comply immediately. When Cunningham fumbled around the center console, then reached for the glove compartment, the officer ordered Cunningham out of the car. Cunningham immediately exited the car, and the officer asked him if he had any weapons. Cunningham told the officer he had a knife in his pocket. The officer frisked Cunningham and seized a legal pocketknife from Cunningham's pocket.

In the meantime, as the other officer approached the car, he saw Cunningham pick up the cell phone from the console area. However, the officer noticed that the passenger, Scott, was sitting in an unnatural position that he felt was designed to obstruct the officer's view into the car. The officer then ordered Scott out of the car, frisked him, but did not discover any weapons. The first officer then returned to Cunningham's car, searched the passenger compartment, and found a firearm. The officers arrested Cunningham and Scott.

Cunningham filed a motion to suppress the firearm, arguing the officer's warrantless search of his car violated the *Fourth Amendment*.

The court agreed. Police officers are allowed to search the passenger compartment of an automobile, limited to those areas where a weapon might be located, if the officers have reasonable suspicion to believe the suspect is dangerous and might gain immediate control of a weapon. Here, the court found it was not reasonable for the officers to believe that Cunningham and Scott posed an immediate danger to them. First, although the officers saw Cunningham reach toward the center console area, when they encountered him, they saw that Cunningham was holding a cell phone. Second, Cunningham's failure to immediately comply with the officer's initial commands, by itself, did not establish that he or Scott were dangerous. Finally, when asked, Cunningham admitted he had a knife in his pocket, and the officer retrieved a lawful folding pocketknife from him. The court concluded the totality of the circumstances did not support a finding that Cunningham and Scott were dangerous; therefore, the warrantless search of their car violated the *Fourth Amendment*.

Click for the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/14-4425/14-4425-2016-08-31.pdf?ts=1472653811>

United States v. Murray, 821 F.3d 386 (3d Cir. 2016)

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

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

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

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

The government charged Murray with a variety of criminal offenses.

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

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

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

United States v. Robinson, 814 F.3d 201 (4th Cir. 2016)

A police department received an anonymous phone call reporting that a black male had loaded a gun in a 7-Eleven parking lot and then concealed the gun in his pocket before leaving in a car. A few minutes later, an officer stopped a car matching the description of the vehicle from the anonymous tip. Robinson, a black male, was a passenger in the car. The officer ordered Robinson out of the car, frisked him, and discovered a pistol in the pocket of Robinson's pants. The officer subsequently learned Robinson had a felony conviction and the government charged Robinson with being a felon in possession of a firearm.

Robinson filed a motion to suppress the gun, arguing the frisk was unlawful.

To conduct a lawful *Terry* frisk, an officer must have reasonable suspicion that a person is both armed and presently dangerous. While both sides agreed the anonymous tip established Robinson was armed, the court concluded that fact by itself did not automatically create reasonable suspicion of dangerousness sufficient to justify a *Terry* frisk.

The government conceded none of the conduct reported in the anonymous tip, specifically that a man had loaded a gun in the parking lot of a 7-Eleven parking lot and then concealed it in his pocket before leaving in a car, was illegal under West Virginia law. On the contrary, it is legal to carry a gun in public under *W. Va. Code § 61-7-3*, and it is legal to carry a concealed firearm with a permit under *W. Va. Code § 61-7-4*. Further, the court noted it is relatively easy to obtain a concealed carry permit under this provision. As result, the court concluded that in West Virginia “there is no reason to think that public gun possession is unusual, or that a person carrying or concealing a weapon during a traffic stop is anything but a law-abiding citizen who poses no danger to the authorities.” As a result, the court held in states like West Virginia, which broadly allow the possession of firearms in public, reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that a person is dangerous for *Terry* purposes. Where the state legislature has made it lawful for individuals to carry firearms on public streets, “we may not make the contrary assumption that those firearms inherently pose a danger justifying their seizure by law enforcement officers without consent.” While the court recognized recent legal developments regarding gun possession have made police-work more difficult and dangerous, several states, but not West Virginia, have enacted “duty to inform” laws which require individuals carrying concealed weapons to disclose that fact to the police if they are stopped.

Next, the court noted that even if reasonable suspicion that a person is armed does not automatically justify a *Terry* frisk, officers are allowed to consider this fact along with the other surrounding circumstances to determine if a frisk is justified. However, in this case, the court held that there were no other circumstances, when combined with the fact that Robinson was armed, that would have caused the officer to believe Robinson was dangerous and justify the frisk in which the gun was discovered.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca4/14-4902/14-4902-2016-02-23.pdf?ts=1456255820>

United States v. Pacheco, 841 F.3d 384 (6th Cir. 2016)

An officer received a tip from a confidential informant (CI) that two Hispanic men in a silver Lincoln Navigator were moving narcotics from a specific apartment complex that evening. The apartment complex was located in an area known for drug trafficking, gun violence and gang activity. The officer set up surveillance in an unmarked police car, and within forty-five minutes, he saw a silver SUV exit the apartment complex parking lot. The officer followed the SUV, verified that it was a silver Lincoln Navigator, and that it contained two Hispanic male occupants. After the SUV failed to properly signal a turn, the officer requested an officer in a marked patrol car conduct a traffic stop.

A marked police car, with two uniformed officers followed the SUV and conducted a traffic stop after the SUV briefly crossed the double-yellow line. During the stop, one of the officers approached the SUV and encountered Pacheco, who was in the front passenger seat. The officer asked Pacheco for identification, but Pacheco did not respond. Instead, Pacheco rummaged through the glove compartment, ruffling papers, but removed nothing. The officer noticed that Pacheco was extremely nervous, would not make eye contact with him, and that Pacheco kept glancing over at his left leg, near the center console. Knowing the glove box, the floorboard area, and the center console are all often used to conceal weapons, the officer asked Pacheco to exit the vehicle. Pacheco did not respond or comply with this order. The officer asked Pacheco to exit the vehicle a second time, and opened the door for him. Pacheco got out of the vehicle and the officer immediately conducted a *Terry* frisk. On Pacheco's right side, the officer felt a large "chunk of money on his right cargo pocket. When the officer went to frisk Pacheco's left side, he saw the top of a brick-like object, wrapped in brown paper and tape, protruding approximately one inch out of the top of Pacheco's left cargo pocket. As the officer patted this area down, he could feel that the object in the cargo pocket was "like a solid brick," and was approximately six to eight inches long. Based on these observations and his experience, the officer believed the object in Pacheco's pocket was brick cocaine. The officer seized the suspected brick cocaine and the currency.

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

Pacheco filed a motion to suppress the cocaine and currency seized from him during the stop.

First, the court held the officers conducted a lawful stop of the SUV. The officers received information from another officer that the driver of the SUV failed to properly signal a turn and they also saw the driver briefly cross the double-yellow line. Even if the uniformed officers' motivation for stopping the SUV was to assist in the investigation of a drug case, the two traffic violations justified the officers in stopping the SUV.

Second, the court noted that during a traffic stop, it is well established that an officer may order passengers out of the vehicle pending the completion of the stop.

Third, the court held the officer established reasonable suspicion that Pacheco might be armed and dangerous; therefore, he was entitled to conduct a *Terry* frisk. The court concluded that Pacheco's extreme nervousness, his failure to acknowledge the officer's presence, his failure to obey the officer's commands to produce identification and exit the car, as well as the time of day and the high-crime nature of the neighborhood supported the officer's belief that Pacheco might be armed.

Fourth, the court held the seizure of the cocaine and currency from Pacheco's pockets was lawful. During a *Terry* frisk for weapons, an officer may seize objects believed to be contraband as long as:

- (1) The officer is in a lawful position from which he views or feels the object;
- (2) the object's incriminating nature is immediately apparent; and
- (3) the officer has lawful right of access to the object.

Here, because of the traffic stop, Pacheco's removal from the vehicle, and *Terry* frisk of his person were lawful, the court held that the officer was in a lawful position to view and then feel the contraband. In addition, the officer had a lawful right to access the contraband, as it was discovered before the *Terry* frisk was completed. Finally, the court found that the incriminating nature of the seized items was immediately apparent to the officer. After removing the large "chunk of money" from Pacheco's right cargo pocket, the officer noticed a brick-like object partially sticking out of his left cargo pocket. The officer saw the object was wrapped in brown paper and bound together with tape. When the officer frisked the pocket, he discovered the brick was solid and around six to eight inches long. Combining his sight and his touch with his training and experience, the officer concluded "within seconds" that the object in Pacheco's left cargo pocket was probably brick cocaine.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/16-3376/16-3376-2016-10-28.pdf?ts=1477693836>

See: **[United States v. Thompson](#)**, 842 F.3d 1002 (7th Cir. 2016)

[United States v. Craddock](#), 841 F.3d 756 (8th Cir. 2016)

While stopped at a stop sign, a police officer saw a green Pontiac enter the intersection and slow down as if to turn in his direction. Instead, the Pontiac hesitated for a moment, and drove straight through the intersection. Finding this behavior suspicious, the officer called in the Pontiac's license plate number and discovered that the vehicle was stolen. The officer followed the Pontiac but lost sight of it when it turned down a side street. The officer drove up and down nearby streets looking for the Pontiac. Approximately six-minutes later, the officer saw a man, later identified as Craddock, walking down the sidewalk. After passing Craddock, the officer saw the stolen Pontiac parked on the side of the street. The officer turned around and saw Craddock standing in the front yard of a residence approximately fifty-feet from the stolen Pontiac.

The officer approached Craddock and asked him what he was doing. Craddock appeared nervous and told the officer he was going home, but he could not provide the officer with his address. Believing that Craddock had just exited the stolen Pontiac, the officer handcuffed Craddock and frisked him for weapons. The frisk did not reveal a weapon, but the officer did feel what he believed to be a key fob in Craddock's pants pocket. The officer removed the key fob from the pocket and, after noticing that it had a Pontiac emblem, used it to unlock the stolen Pontiac. The officer searched the Pontiac and found a handgun on the floor next to the driver's seat. The government charged Craddock with being a felon in possession of a firearm.

Craddock filed a motion to suppress the evidence seized as a result of the frisk and the removal of the key fob from his pocket.

The court held that Craddock's proximity to the stolen vehicle and his demeanor when the officer approached him gave the officer reasonable suspicion to frisk Craddock for weapons. However, to seize items other than weapons, the officer conducting the frisk must have probable cause to believe that the item in "plain touch" is incriminating evidence. The item felt by the officer does not have to be contraband, but the incriminating character of the item must be immediately apparent.

Here, the court held the key fob's incriminating character was not immediately apparent by the officer upon plain feel. The officer testified that he was not able to see the person driving the Pontiac, or even identify if the person was male or female. The officer did not see Craddock exit the vehicle and Craddock did not flee when the officer approached him. Even though Craddock was relatively close to the stolen car and behaving nervously, feeling an unidentified key fob in Craddock's pocket did not provide the officer with probable cause to believe that the key fob belonged to the stolen Pontiac. The court commented that key fobs are extremely common items carried by many people every day. As a result, without more information, the court concluded the officer could not have reasonably associated the key fob with the stolen Pontiac at that point. It was not until the officer removed the key fob from Craddock's pocket and saw the Pontiac emblem that he connected the key fob with the stolen car.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3705/15-3705-2016-11-08.pdf?ts=1478620875>

United States v. Fager, 811 F.3d 995 (10th Cir. 2016)

An officer stopped Fager's car around 8:00 p.m. for a turn signal violation near an apartment complex in a high-crime area. The officer approached the passenger-side of the car and encountered Fager, the driver, and Walls, who was in the front passenger's seat. The officer noticed Fager's eyes were watery, his speech was soft, and an unopened can of beer sat in the center console of the vehicle. In addition, Walls continually leaned forward in a way that he made the officer believe that he was trying to obstruct the officer's view of Fager. After the officer received identification from both men, he discovered that Walls had several outstanding arrest warrants, but he was not told the nature of the warrants. After a back-up officer arrived, the original officer directed Fager to exit his vehicle. After the officer determined Fager was not impaired, he asked Fager for consent to search his vehicle. Fager consented. Because it was cold, the officer gave Fager the option to sit inside the officer's patrol car instead of standing outside. Fager agreed. The officer then told Fager he wanted to pat him down to make sure Fager did not possess any weapons. Fager did not say anything, but he positioned himself for a pat-down. The officer conducted a pat-down search and found a firearm in the waistband of Fager's pants. The officer arrested Fager, who was charged with being a felon in possession of a firearm.

Fager filed a motion to suppress the firearm, arguing the officer's pat-down was not supported by reasonable suspicion that Fager was armed and dangerous.

The court disagreed, holding the totality of the circumstances supported reasonable suspicion for the officer to believe Fager might be armed and dangerous. First, while conducting their search of Fager's car, the officers would have had to turn their backs on Fager. The court noted that Eight Circuit case law had held that when an officer must "turn his or her back to a defendant," little is required beyond this concern to support the officer's reasonable suspicion. Second, Walls, a man with several outstanding arrest warrants was still at the scene, and it was reasonable for the officer to believe that Fager and Wall could have mounted a joint attack against the officers. Third, Walls had been acting suspiciously when the officer initially approached the vehicle by blocking his view of Fager. Finally, the stop occurred in a high-crime area at nighttime. Under these circumstances, the court concluded the officer was justified in frisking Fager.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/15-3104/15-3104-2016-01-21.pdf?ts=1453395655>

Traffic Stops (Reasonable Suspicion / P.C.) / Duration / Detaining Vehicles / Occupants

United States v. Compton, 830 F.3d 55 (2d Cir. 2016)

United States Border Patrol agents set up an immigration checkpoint on a public road near the Canadian border. Approximately one-half mile before the checkpoint, there was a vegetable stand. A Border Patrol agent parked his marked police vehicle between the checkpoint and the vegetable stand. From this location, the agent saw an SUV come over the crest of a hill and abruptly turn into the driveway of the vegetable stand, as the driver apparently saw the sign indicating the presence of the checkpoint. The agent then received a phone call from an agent at the checkpoint who reported that a motorist entering the checkpoint told him that the SUV had passed her vehicle, and then immediately slowed down upon reaching the crest of the hill. The agent drove up to the vegetable stand and parked behind the SUV. The SUV was unoccupied, but the agent saw Compton and his brother walking away from the vegetable stand, approximately fifteen to twenty feet from one another. The agent saw each man was holding a container of peppers. The agent ordered Compton and his brother back to the SUV. As the agent passed the rear of the SUV, he saw a blanket in the back that appeared to be concealing something. Suspecting the blanket was concealing humans or narcotics, the agent requested canine unit to his location. Approximately one-minute later, another agent arrived with his canine, Tiko. Within five minutes, Tiko alerted to the presence of narcotics. The agents searched the SUV and found 145 pound of marijuana in four duffel bags. The government charged Compton and his brother with two drug offenses.

Compton filed a motion to suppress the evidence seized from the SUV. Compton argued the agent did not have reasonable suspicion to detain him, and that the agent had unreasonably prolonged the duration of the detention to conduct the canine sniff.

The court disagreed. The court held the agent established reasonable suspicion to detain Compton due to the combination of the brothers' avoidance of the checkpoint, the proximity of the checkpoint to the border, and the brothers' peculiar attempt to conceal their avoidance of the checkpoint by purchasing containers of peppers at the vegetable stand.

In addition, after detaining the brothers, the court held the agent conducted his investigation with reasonable promptness. After ordering the brothers back to the SUV, the agent saw a blanket that appeared to be concealing objects in the back of the vehicle. The agent immediately requested a canine unit, and the canine sniff that confirmed the presence of narcotics took no more than five minutes. The court added that the fact the agents placed the brothers in separate police vehicles and handcuffed them during the brief canine sniff was irrelevant, as the agents would have found the marijuana even if Compton and his brother had not been handcuffed and placed in separate vehicles.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/15-942/15-942-2016-07-19.pdf?ts=1468936807>

United States v. Palmer, 820 F.3d 640 (4th Cir. 2016)

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

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

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

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

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

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

Again, the court disagreed. Before smelling the marijuana, the officer obtained Palmer's documentation and checked among other things, a criminal history check, which is allowed during a traffic stop. At this point, the court concluded that Palmer's criminal history, the presence of multiple air fresheners, gang affiliation, and the location of the stop provided the officer with reasonable suspicion to believe Palmer was engaged in criminal activity.

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

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

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

United States v. Gardner, 823 F.3d 793 (4th Cir. 2016)

A confidential informant (CI) called a local police officer and reported that Gardner, a convicted felon who possessed a firearm, was driving a white Lincoln Town Car. In addition, the CI told the officer that Gardner was presently located at a particular house in the community. The CI had worked with the officer in the past and had consistently provided accurate information.

The officer drove to the house identified by the CI and saw a white Lincoln Town car parked nearby. The officer drove around the block and confirmed that Gardner was the registered owner of the vehicle. As the officer approached the house again, he saw Gardner had entered the Lincoln and was driving away. When the officer activated his blue lights to initiate a traffic stop, he saw Gardner's right shoulder disappear as if he was either reaching for something or putting something underneath the seat. After Gardner stopped, the officer directed him to step out of the vehicle and confirmed Gardner's identity by examining his driver's license. During this time, Gardner appeared to be nervous and kept looking in the direction of his vehicle's floor. The officer asked Gardner if he had any weapons on his person, and Gardner replied that he did not. The officer frisked Gardner, but did not find any weapons. The officer then told Gardner that he had received information that Gardner had a firearm in his possession. After initially denying that he had anything illegal in his car, Gardner eventually told the officer, "I have a gun." When the officer asked Gardner if he was allowed to possess a firearm, Gardner told the officer that he was not, and he was a convicted felon. The officer searched Gardner's vehicle and found a handgun underneath the driver's seat. At that point, the officer placed Gardner in handcuffs and transported him to the police station.

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

Gardner filed a motion to suppress the firearm, arguing the information provided by the CI did not establish reasonable suspicion to support the stop of his vehicle.

The court disagreed. While the information provided by the CI, by itself, might have supported a finding of reasonable suspicion, after the officer corroborated some of the information, the court found he lawfully stopped Gardner. Specifically, the officer confirmed the presence of a white Lincoln Town Car at the location provided by the informant, and he confirmed Gardner was the registered owner of that vehicle. Even though the officer did not confirm that Gardner was a

convicted felon before stopping him, the court noted an officer does not need to verify every detail provided by a CI before conducting a stop. Consequently, the court held the officer had reasonable suspicion to stop Gardner.

Gardner also claimed when the officer detained him at the rear of his vehicle, he was “in custody” for *Miranda* purposes. As a result, Gardner argued his incriminating statements concerning the firearm should have been suppressed because the officer did not *Mirandize* him.

Again, the court disagreed. The Supreme Court has held that a person is not “in custody” for *Miranda* purposes when an officer detains him to ask “a moderate number of questions . . . to try to obtain information confirming or dispelling the officer’s suspicions.” Here, the officer asked Gardner questions directly related to his reasonable suspicion that Gardner had a firearm in his possession. The fact that Gardner did not feel free to leave did not convert this brief period of questioning into the functional equivalent of a “stationhouse interrogation” that would require *Miranda* warnings.

Finally, the court held Gardner’s statements concerning the firearm, the information provided by the CI, and Gardner’s furtive behavior before the stop, provided the officer probable cause for the officer to search Gardner’s vehicle under the automobile exception to the *Fourth Amendment’s* warrant requirement.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca4/14-4533/14-4533-2016-05-18.pdf?ts=1463596227>

United States v. Ramirez, 839 F.3d 437 (5th Cir. 2016)

At 9:30 p.m. on a Wednesday, Border Patrol agent Espinel was sitting in his patrol car in the median of U.S. Highway 77 approximately forty-five miles north of the Mexican border, several miles south of the Sarita immigration checkpoint. Agent Espinel had been an agent for six years and had been patrolling this stretch of Highway 77 near Raymondville, Texas for more than nine months. Highway 77 is a known smuggling route and Agent Espinel had made over 150 alien arrests in this area. In addition, Agent Espinel knew that Tuesday, Wednesday, and Thursday nights saw the most smuggling activity, with smugglers dropping off aliens south of the Sarita checkpoint, typically using SUVs or pickup trucks.

Agent Espinel saw Ramirez drive past in a Ford F-150 pickup truck, and noticed that Ramirez appeared to “duck down” as he passed. Agent Espinel also saw three or four passengers in the back of the truck who “ducked down” when they saw him. Agent pulled behind Ramirez and saw heads in the back of Ramirez’s truck “popping up and down.” Agent Espinel activated his emergency lights and pulled Ramirez over. As he was stopping, Agent Espinel saw two passengers get out of the truck and run away. Agent Espinel detained Ramirez and the four remaining passengers, two of whom turned out to be illegal aliens.

The government charged Ramirez with transporting illegal aliens.

Ramirez argued that Agent Espinel did not have reasonable suspicion to stop him.

The court disagreed. A roving Border Patrol agent may stop a vehicle if he has reasonable suspicion to believe the vehicle is involved in illegal activity. Here, Agent Espinel was an experienced officer who had been patrolling Highway 77 near Raymondville for almost one year. Next, Agent Espinel saw Ramirez's truck forty-five miles north of the border, well south of the Sarita checkpoint. Agent Espinel saw Ramirez and his passengers acting as if they were very nervous when they saw him. Finally, Ramirez was driving a type of vehicle known to be popular among smugglers, on a highway, and on a day of the week popular among them. Based on these factors, the court held that Agent Espinel had reasonable suspicion to stop Ramirez.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/15-40887/15-40887-2016-10-14.pdf?ts=1476487832>

See: [United States v. Calvetti](#), 838 F.3d 654 (6th Cir. 2016)

United States v. Pacheco, 841 F.3d 384 (6th Cir. 2016)

An officer received a tip from a confidential informant (CI) that two Hispanic men in a silver Lincoln Navigator were moving narcotics from a specific apartment complex that evening. The apartment complex was located in an area known for drug trafficking, gun violence and gang activity. The officer set up surveillance in an unmarked police car, and within forty-five minutes, he saw a silver SUV exit the apartment complex parking lot. The officer followed the SUV, verified that it was a silver Lincoln Navigator, and that it contained two Hispanic male occupants. After the SUV failed to properly signal a turn, the officer requested an officer in a marked patrol car conduct a traffic stop.

A marked police car, with two uniformed officers followed the SUV and conducted a traffic stop after the SUV briefly crossed the double-yellow line. During the stop, one of the officers approached the SUV and encountered Pacheco, who was in the front passenger seat. The officer asked Pacheco for identification, but Pacheco did not respond. Instead, Pacheco rummaged through the glove compartment, ruffling papers, but removed nothing. The officer noticed that Pacheco was extremely nervous, would not make eye contact with him, and that Pacheco kept glancing over at his left leg, near the center console. Knowing the glove box, the floorboard area, and the center console are all often used to conceal weapons, the officer asked Pacheco to exit the vehicle. Pacheco did not respond or comply with this order. The officer asked Pacheco to exit the vehicle a second time, and opened the door for him. Pacheco got out of the vehicle and the officer immediately conducted a *Terry* frisk. On Pacheco's right side, the officer felt a large "chunk of money on his right cargo pocket. When the officer went to frisk Pacheco's left side, he saw the top of a brick-like object, wrapped in brown paper and tape, protruding approximately one inch out of the top of Pacheco's left cargo pocket. As the officer patted this area down, he could feel that the object in the cargo pocket was "like a solid brick," and was approximately six to eight inches long. Based on these observations and his experience, the officer believed the object in Pacheco's pocket was brick cocaine. The officer seized the suspected brick cocaine and the currency.

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

Pacheco filed a motion to suppress the cocaine and currency seized from him during the stop.

First, the court held the officers conducted a lawful stop of the SUV. The officers received information from another officer that the driver of the SUV failed to properly signal a turn and they also saw the driver briefly cross the double-yellow line. Even if the uniformed officers' motivation for stopping the SUV was to assist in the investigation of a drug case, the two traffic violations justified the officers in stopping the SUV.

Second, the court noted that during a traffic stop, it is well established that an officer may order passengers out of the vehicle pending the completion of the stop.

Third, the court held the officer established reasonable suspicion that Pacheco might be armed and dangerous; therefore, he was entitled to conduct a *Terry* frisk. The court concluded that Pacheco's extreme nervousness, his failure to acknowledge the officer's presence, his failure to obey the officer's commands to produce identification and exit the car, as well as the time of day and the high-crime nature of the neighborhood supported the officer's belief that Pacheco might be armed.

Fourth, the court held the seizure of the cocaine and currency from Pacheco's pockets was lawful. During a *Terry* frisk for weapons, an officer may seize objects believed to be contraband as long as:

- (1) The officer is in a lawful position from which he views or feels the object; (2) the object's incriminating nature is immediately apparent; and (3) the officer has lawful right of access to the object.

Here, because of the traffic stop, Pacheco's removal from the vehicle, and *Terry* frisk of his person were lawful, the court held that the officer was in a lawful position to view and then feel the contraband. In addition, the officer had a lawful right to access the contraband, as it was discovered before the *Terry* frisk was completed. Finally, the court found that the incriminating nature of the seized items was immediately apparent to the officer. After removing the large "chunk of money" from Pacheco's right cargo pocket, the officer noticed a brick-like object partially sticking out of his left cargo pocket. The officer saw the object was wrapped in brown paper and bound together with tape. When the officer frisked the pocket, he discovered the brick was solid and around six to eight inches long. Combining his sight and his touch with his training and experience, the officer concluded "within seconds" that the object in Pacheco's left cargo pocket was probably brick cocaine.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/16-3376/16-3376-2016-10-28.pdf?ts=1477693836>

United States v. Paniagua-Garcia, 813 F.3d 1013 (7th Cir. 2016)

While traveling on an interstate highway, an officer passed a car driven by Paniagua. The officer saw Paniagua holding a cell phone in his right hand with his head bent toward the phone. Believing Paniagua was "texting" while driving, a violation of Indiana state law, the officer stopped Paniagua. Paniagua told the officer he had not been texting while driving, but rather searching for music on his phone. Paniagua eventually consented to a search of his car and the officer discovered

five pounds of heroin concealed in the spare tire in the car's trunk. An examination of Paniagua's cell phone revealed it had not been used to send a text message when the officer saw him holding it just before the stop.

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

Paniagua argued the heroin should have been suppressed because the officer only discovered it after an illegal stop. Specifically, Paniagua argued the government failed to establish the officer had probable cause or reasonable suspicion to believe he was violating the "no-texting" law when the officer stopped him.

The court agreed. *Indiana Code § 9-21-59(a)* prohibits sending or receiving text messages or emails while operating a motor vehicle. However, the court noted all other uses of cellphones by drivers in Indiana are lawful, such as making and receiving phone calls, inputting addresses, reading driving directions and maps with GPS applications, reading news and weather programs, surfing the internet, playing video games, and playing music or audio books. Here, the officer failed to explain what created the appearance Paniagua was texting while driving as opposed to using his cellphone for any one of the multiple other lawful uses of a cell phone by a driver.

The court commented that § 9-21-59(a) is nearly impossible to enforce because of the difficulty in distinguishing texting from other lawful uses of cellphones by drivers when officers glance into the driver's side of a moving automobile. The court contrasted § 9-21-59(a) with the Illinois "hands-free" law, 625 ILCS 5/12-610.2 which prohibits drivers from using cell phones, without the use of some type of hands-free device or technology, and its more realistic enforceability.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-2540/15-2540-2016-02-18.pdf?ts=1455836446>

United States v. Guidry, 817 F.3d 997 (7th Cir. 2016)

An officer stopped a car driving without license plates. When the officer approached the car, he recognized Guidry, the driver from a previous traffic stop. The officer also knew Guidry was a suspected drug user and dealer. During the stop, the officer smelled a faint odor of marijuana, but he did not believe he had probable cause to search Guidry's car. Instead, the officer obtained Guidry's driver's license and vehicle information. The officer went back to his car where he called for a drug-detection canine unit. The canine officer arrived with her drug-detection dog, Bud, five-minutes later, while the officer was still preparing Guidry's citation. The canine officer directed Guidry to exit his car, and Guidry stepped out, but he left the driver's side door open. As soon as Bud passed the open car door, he alerted and then indicated the presence of drugs by sitting down in front of the door. Bud then got up, approached the car and put his head into the car through the open door. Guidry told the officers he had smoked marijuana at home immediately before the traffic stop and that he had some marijuana in his car. The officers searched Guidry's car and found marijuana as well as heroin, powder cocaine, and crack cocaine, individually packaged in clear plastic baggies.

Based on Guidry's statements during the stop, the evidence seized from his car, and the testimony of two confidential informants (CIs) who admitted to purchasing drugs from Guidry at his house, officers obtained a warrant to search Guidry's residence.

Officers searched Guidry's residence and seized heroin, powder cocaine, crack cocaine, and marijuana. A woman present at Guidry's residence told the officers that Guidry maintained another residence where Guidry had drugs and prostituted women. The officers obtained a warrant to search Guidry's second residence based on the woman's statements and the evidence seized at his first residence.

The government charged Guidry with several drug and prostitution related offenses.

Guidry filed motions to suppress the evidence seized from his car and residences.

First, Guidry argued the officers violated the *Fourth Amendment* by unlawfully prolonging the duration of the traffic stop and then by allowing the drug-detection dog to search the interior of his car.

The court disagreed. The court held the dog sniff did not prolong the traffic stop. The canine officer arrived with Bud five minutes after being called, and when she arrived, the officer was still preparing Guidry's traffic citation. Even if the traffic stop had been prolonged by the dog sniff, the court found the officer had established reasonable suspicion to believe Guidry had drugs in the car when he smelled the faint odor of marijuana when he first encountered Guidry. As a result, the officer would have been justified in extending the duration of the stop for a reasonable time to confirm or dispel his suspicions with the dog's assistance. Next, the court held dog the sniff of Guidry's car was lawful. When Guidry got out of the car, he left the door open. In addition, the canine officer kept Bud on his leash and did not allow Bud to jump into Guidry's car. Finally, by the time Bud's head entered Guidry's car, the officers had probable cause to search the interior as Bud indicated the car contained drugs while sniffing outside the car.

Second, Guidry argued the officers did not establish probable cause to search his residences.

Again, the court disagreed. In both instances, the court found that the CIs' information was reliable as they were known to the officers, they obtained their information through first-hand observations, and some of their information was corroborated through other sources.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-1345/15-1345-2016-03-22.pdf?ts=1458678651>

United States v. Miranda-Sotolongo, 827 F.3d 663 (7th Cir. 2016)

A police officer saw Miranda driving on an interstate highway and noticed the Indiana temporary vehicle tag on Miranda's car looked "odd." The officer checked the registration number from the tag in a database, but found no record of the registration. The officer then had a police dispatcher run a check on the tag in the same database. Like the officer, the dispatcher could not find a record of the car's registration in the database. After receiving this information from the dispatcher, the officer conducted a traffic stop to investigate whether the tag on Miranda's car might be a forgery designed to hide a stolen or otherwise unregistered vehicle.

When the officer asked Miranda for his driver's license, Miranda told the officer he was driving on a suspended license. The officer arrested Miranda. During an inventory search of Miranda's car, the officer found two firearms. The government charged Miranda with being a felon in possession of a firearm.

Miranda argued the firearms seized from his car should have been suppressed because the officer did not have reasonable suspicion to conduct the traffic stop.

The court disagreed. The officer stopped Miranda after two computer checks failed to verify Miranda's car was temporarily registered as the tag indicated. First, the court concluded the officer's observing and recording the registration number from the tag on Miranda's car was not a *Fourth Amendment* search. Second, it was not a search when the officer used the registration tag number, in which Miranda had no reasonable expectation of privacy, to retrieve the registration information from the law enforcement database. As a result, after the officer and the dispatcher both checked the relevant database and found no record of the car's registration in Indiana, the court held the officer had reasonable suspicion to justify the stop.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/14-2753/14-2753-2016-06-28.pdf?ts=1467140586>

United States v. Walton, 827 F.3d 682 (7th Cir. 2016)

A police officer pulled over a Chevrolet Suburban for several minor traffic violations. The Suburban contained two people; Smoot, the driver, and Walton, the passenger. After the officer told Smoot that he planned to issue a written warning, Walton told the officer that they had been stopped in Kansas the previous evening and had received a written warning for using an improper signal. Walton gave the officer a copy of the written warning issued in Kansas, which indicated Walton was driving at the time, and that he had a suspended driver's license. Walton then stated the officers in Kansas had detained them for two hours and had searched the Suburban, which was a rental vehicle. When the officer asked Walton why he had rented such a large vehicle, Walton told him that it was the only vehicle available, which the officer found implausible. Walton gave the officer a copy of the rental agreement, which indicated the Suburban had been rented at the Denver International Airport, that the rental fee was almost \$1,000, and that Smoot was not an authorized driver.

The officer asked Smoot to accompany him to his squad car while he prepared the written warning. When the officer asked Smoot why Walton had rented such a large expensive vehicle, she told him, "guys like trucks." When the officer asked Smoot about the encounter with the police in Kansas the previous evening, Smoot told him the stop did not last two hours, and the officers did not search the Suburban. The officer also learned that Smoot and Walton were driving back to their home in Ohio. Finally, during the stop, the officer learned from his dispatcher that Walton had a criminal history that included a drug trafficking arrest.

After issuing Smoot the written warning, the officer asked Walton some follow-up questions concerning the trip, as well as the rental car. The officer then asked Walton for consent to search the Suburban. Walton denied the officer's request to search inside the Suburban; however, Smoot consented to a search of her bag. After Walton refused, the officer told him that he was calling a

canine unit to conduct a sniff around the exterior of the Suburban, as the officer believed he had established reasonable suspicion that Smoot and Walton were involved in criminal activity. After searching Smoot's bag, finding only a change of clothing, the officer contacted dispatch and requested a canine unit. Approximately 14 minutes elapsed from when the officer issued Smoot the written warning until he requested the canine unit.

When the canine unit arrived, the officer walked his dog around the Suburban, and the dog alerted to the presence of drugs in the vehicle. The officers searched the Suburban, found cocaine concealed in bags hidden in a void within the rear driver's side quarter panel, and arrested Smoot and Walton.

Walton filed a motion to suppress the cocaine, arguing the officer did not have reasonable suspicion to detain him after issuing the written warning to Smoot.

The court disagreed. First, within three to four minutes of pulling over Walton and Smoot, the officer saw there were only two individuals with one bag of luggage in a large Suburban, which seated seven to eight passengers. The officer testified that in his experience criminals often rent large luxury vehicles for the larger areas available to conceal contraband. Second, the officer learned the Suburban was rented solely for the purpose of driving two people from Colorado to Ohio at a rental cost of almost \$1,000. The officer knew the pair could have rented a smaller vehicle that accomplished the same goal for around \$100 or \$200. Third, by the time the officer issued the written warning, he had heard conflicting stories from Walton and Smoot regarding how long the Kansas police officers had detained them the previous evening, and whether the car was searched during that time. Fourth, Smoot and Walton gave the officer different stories as to why Walton rented the Suburban. Fifth, prior to issuing the written warning, the officer discovered that neither Smoot nor Walton was legally entitled to drive the Suburban, as Smoot was not authorized under the rental agreement, and Walton had a suspended driver's license. Consequently, the court found the officer could have towed the Suburban and conducted an inventory search. Finally, before he completed the written warning, the dispatcher told the officer of Walton's lengthy criminal history, which included a drug trafficking offense. Based on the totality of the circumstances, the court held the officer had reasonable suspicion to detain Walton after he issued Smoot the written warning.

Walton further argued that the officer unreasonably prolonged the duration of the stop by failing to diligently request a canine unit to search the Suburban after issuing Smoot the written warning.

Again, the court disagreed. The court noted that after issuing the written warning to Smoot, the officer asked Walton some brief follow-up questions, requested consent to search the Suburban, which was denied, and searched Smoot's bag, with her consent. The court concluded that nothing in this 14-minute timeline suggested that the officer did not act diligently in requesting the canine unit.

For the court's opinion: <http://law.justia.com/cases/federal/appellate-courts/ca7/15-3626/15-3626-2016-06-30.html>

United States v. Tamayo-Baez, 820 F.3d 308 (8th Cir. 2016)

In 2014, Immigration and Customs Enforcement agents were investigating the fraudulent use of social security numbers by illegal immigrants by checking vehicle registrations at worksites in Iowa. During their investigation, agents found a black Jeep Cherokee registered to Baez’s wife with a Hampton, Iowa address. The agents performed a computer check and discovered that Baez’s name was associated with that address. The agents then conducted a criminal history check on Baez and discovered that he was convicted of domestic abuse assault in 2009. However, the agents also discovered that Baez had been ordered removed by an Immigration Judge on March 9, 2004, and that Baez had been removed to Mexico one week later. Finally, a social media inquiry revealed a photograph of Baez in front of a black Jeep Cherokee. Based on these facts, the agents believed Baez had unlawfully reentered the United States, and went to the house in Hampton where they believe he was living.

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

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

The court disagreed, holding that the agent had reasonable suspicion to perform the traffic stop.

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

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

United States v. Dillard, 825 F.3d 472 (8th Cir. 2016)

Two officers patrolling in a marked squad car in an area known for, among other things, auto thefts, saw three individuals standing near a parked car. As a different squad car passed by the parked car, all three individuals moved away from the vehicle. After the squad car passed, one of the men, Dillard, walked back to the driver’s side door of the parked car. When the two original officers drove past the parked car to obtain its license plate number, Dillard again walked away from the car. Believing Dillard’s activities to be suspicious, the officers decided to conduct a “pedestrian check” or a “car check.” The officers suspected Dillard was attempting to break into the parked car, had previously stolen the car, or possibly was hiding something in the car. By the

time the officers turned around however, the car was gone from its parking spot and no longer visible to the officers. The officers knew the car must have been travelling in excess of the 25 miles-per-hour speed limit, as it would not have been possible to travel out of their view in the time it took them to turn around. The officers radioed for assistance locating the car. Another officer located and stopped Dillard. During the stop, officers found a loaded firearm in Dillard's car.

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

Dillard filed a motion to suppress the firearm, arguing the officers did not have reasonable suspicion to justify the traffic stop.

The court disagreed. While patrolling a high-crime area, two officers saw Dillard acting suspiciously by moving away then returning to the parked car as another squad car drove past. Then, when the officers drove past the parked car, Dillard repeated the same behavior. Finally, when the officers decided to conduct a "pedestrian check," or "car check" because they suspected Dillard might be involved in criminal activity, they discovered the car was gone, and likely had fled at a high rate of speed. At this point, the court concluded the officers were justified in stopping the fleeing car to investigate whether Dillard was involved in criminal activity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1668/15-1668-2016-06-09.pdf?ts=1465486278>

United States v. Woods, 829 F.3d 675 (8th Cir. 2016)

An officer saw Woods and a passenger driving in a Cadillac with heavily tinted windows. The officer knew Woods to be a drug trafficker and that Woods' vehicle contained hidden compartments that Woods used to hide narcotics. After he saw Woods throw a piece of paper out the window onto the street, the officer conducted a traffic stop. The officer told Woods that he stopped him because the windows on the Cadillac appeared to be tinted too darkly and that Woods had thrown litter on a public roadway. Inside Wood's vehicle, the officer saw a fake iPhone that appeared to be a set of digital scales, and he smelled the odor of marijuana. At some point, the officer spoke to the passenger, who gave the officer a conflicting account as to where he and Woods were traveling.

After issuing Woods traffic citations, the officer requested a canine unit. Approximately twenty-minutes later, the canine officer arrived, and the drug-sniffing dog alerted to the presence of narcotics inside Woods' vehicle. The officers impounded the Cadillac and transported Woods to the police station for questioning. An officer searched the Cadillac and found a hidden compartment that contained marijuana, methamphetamine, cocaine, and a firearm.

Other officers interviewed Woods. Before the interview, an officer read Woods his *Miranda* rights from a form. Woods refused to sign the form to acknowledge that he was waiving his *Miranda* rights. However, Woods told the officers he was willing to speak with them, and he admitted the drugs and firearm found in the Cadillac belonged to him, not his passenger. During the interview, Woods never refused to answer questions, invoked his right to counsel, or told the officers that he did not want to speak with them any longer.

Two days later, a federal agent interviewed Woods, and after waiving his *Miranda* rights, Woods admitted the evidence found in the Cadillac belonged to him.

The government charged Woods with drug and firearm offenses.

Woods filed a motion to suppress the evidence seized from his Cadillac. After the officer issued Woods the citations, Woods argued the officer violated the *Fourth Amendment* by unreasonably extending the duration of the traffic stop to allow the canine officer to arrive.

The court disagreed. The court held the officer established reasonable suspicion that Woods was involved in drug trafficking; therefore, the officer was justified in extending the duration of the stop for twenty-minutes until the canine officer arrived. First, the officer smelled the odor of marijuana in Woods' car. Second, the officer saw digital scales disguised as an iPhone in Woods' car. Third, the officer had received information that Woods was a drug trafficker and that his car contained hidden compartments used to store narcotics. Finally, Woods and his passenger gave the officer conflicting stories concerning their travel plans.

Woods also claimed his incriminating statements should have been suppressed. Woods argued his refusal to sign the *Miranda*-rights waiver form constituted an invocation of his *Miranda* rights.

Again, the court disagreed. First, to establish a valid *Miranda* waiver, the government must establish the waiver was voluntary, intelligent, and knowing. Second, a person can validly waive *Miranda* rights orally or in writing. Third, the court commented that a person's refusal to sign a written waiver form does not automatically require suppression of his subsequent statements.

In this case, officers read Woods his *Miranda* rights before questioning him. In both instances, Woods acknowledged that he understood his rights, agreed to speak with the officers, and stated that the drugs and firearm in his vehicle belonged to him. Finally, Woods did not refuse to answer questions or tell the officers that he no longer wished to speak with them at any point during either interview.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2837/15-2837-2016-07-15.pdf?ts=1468596677>

United States v. Walker, 840 F.3d 477 (8th Cir. 2016)

Two officers on patrol stopped Walker's car after they saw that it had a cracked windshield they believed obstructed the driver's vision, in violation of *Minnesota Statutes § 169.71(a)(1)*. The officers approached the car, and when Walker rolled down the windows, the officers smelled the odor of fresh, unburned marijuana. The officers searched the car and found a glass pipe, along with a rock-like substance they believed to be cocaine, underneath the driver's seat. The officers arrested Walker, and then continued to search his car. In the trunk, the officers found a 12-gauge shotgun, a box containing shotgun shells, and a high-capacity rifle magazine filled with ammunition.

The government charged Walker with being a felon in possession of a firearm and ammunition.

Walker filed a motion to suppress the evidence seized from his car. First, Walker argued the windshield was not cracked to the extent that it impeded the driver's view; therefore, the officers did not conduct a lawful traffic stop.

The court disagreed. The court noted that the district court found the officer's testimony that he believed the crack in the car's windshield obstructed the driver's view, to be credible. Even if the officer was mistaken, the court held the officer's observations regarding the severity of the crack provided a reasonable basis to believe that Walker was violating § 169.71(a)(1).

Walker further argued the officers impermissibly extended the duration of the stop beyond the time necessary to investigate the cracked windshield.

Again, the court disagreed. Here, the officers smelled unburned marijuana immediately after Walker lowered the car's windows. This information provided the officers a reason to detain Walker that was independent of the cracked windshield. In addition, smelling the unburned marijuana provided the officers probable cause to conduct a warrantless search of Walker's car under the automobile exception to the *Fourth Amendment's* warrant requirement. Consequently, the court held the officers lawfully detained Walker and searched his car after the initial traffic stop.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2921/15-2921-2016-10-18.pdf?ts=1476804646>

United States v. Fuehrer, 844 F.3d 767 (8th Cir. 2016)

Officers suspected that Fuehrer was transporting illegal drugs in his vehicle. A uniformed officer stopped Fuehrer after the officer's radar indicated that Fuehrer was driving 66 miles per hour in an area where the speed limit was 65 miles per hour. During the stop, Fuehrer could not provide a driver's license, and the officer asked Fuehrer to sit in his patrol car while he completed the paperwork for the traffic violation. During this time, another officer arrived with a drug-sniffing K-9, which alerted to the presence of drugs in Fuehrer's vehicle. After the first officer completed the tasks related to the stop, the officers searched Fuehrer's vehicle and found methamphetamine.

The government charged Fuehrer with possession with intent to distribute a controlled substance.

Fuehrer argued the evidence seized from his car should have been suppressed because the traffic stop was a pretext stop in violation of the *Fourth Amendment*.

The court disagreed. Once an officer establishes probable cause, a traffic stop is objectively reasonable, and the officer's ulterior motivation for the stop is not relevant. In addition, if an officer observes a traffic violation, no matter how minor, there is probable cause to stop the vehicle. Here, the officer established probable cause to believe Fuehrer was speeding. It was not relevant that the officer's subjective intent was to stop Fuehrer so the drug dog could conduct a sniff around Fuehrer's vehicle.

Fuehrer further argued that the officer unlawfully extended the duration of the stop while the K-9 officer directed his dog sniff the exterior of his car.

The court disagreed. As long as a traffic stop is not extended to allow officers to conduct a dog sniff, the dog sniff is lawful. Here, the K-9 officer arrived within two-minutes of the stop. Because Fuehrer did not have a driver's license, the first officer asked Fuehrer to sit in his patrol car while he completed the paperwork. The officer completed the tasks related to the stop and wrote Fuehrer a warning ticket after the dog sniff was completed and the dog had alerted to the presence of narcotics. There was no evidence that the dog sniff unlawfully prolonged the stop beyond what was necessary to complete the stop for the initial speeding offense.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-1248/16-1248-2016-12-28.pdf?ts=1482942655>

United States v. Mendoza, 817 F.3d 695 (10th Cir. 2016)

A state trooper stopped Mendoza for speeding. Mendoza drove a half mile before pulling over, and the trooper noticed food and trash in the passenger seat, suggesting that Mendoza had been trying to avoid stopping on the way to his destination. In addition, Mendoza appeared to be nervous and was visibly shaking when he handed his driver's license to the trooper. After the trooper recognized the car was a rental, he asked Mendoza for the rental agreement, but Mendoza mistakenly gave him his insurance document before handing him the rental agreement. When the trooper asked Mendoza about his travel plans, he realized what Mendoza told him was inconsistent with information contained in the rental agreement. The trooper issued Mendoza a written warning, and as Mendoza was preparing to leave, the trooper asked him, "Can I ask you a question?" Mendoza agreed to speak with the trooper and eventually gave the trooper consent to search his car. The trooper asked Mendoza to wait in his patrol car and told him to honk the horn if he wanted the trooper to stop the search. In the meantime, a second trooper arrived to assist with the search.

The troopers found two ice chests in Mendoza's car, one in the trunk and one in the back seat. They opened the ice chest from the trunk and found that it contained wrapped fish and shrimp. The troopers also noticed the chest showed signs of tampering. First, one of the hinges was broken and the lip of the inner lining was partially separated from the outer shell. Second, one screw was missing while several others looked as if they had been taken in and out multiple times. In addition, the troopers knew that smugglers sometimes use seafood to mask the presence of drugs. After removing the seafood and placing it on the ground, one of the troopers used an upholstery tool to pry the inner and outer liners farther apart. As he separated the liners, the trooper saw that the lining contained spray foam that did not originally come with the ice chest. When he pried the lining farther apart, the trooper saw the corner of a black, taped bundle. The trooper had encountered similar bundles in the past containing drugs. The trooper tore open the outer lining of the chest and found 13 bundles containing marijuana. The trooper then dismantled the second ice chest in a similar manner and found two bundles containing methamphetamine. Mendoza did not honk the horn at any time during the search.

The government charged Mendoza with possession with intent to distribute methamphetamine and marijuana.

Mendoza argued the evidence seized from the ice chests should have been suppressed.

First, Mendoza argued his consent to search was not valid because it was obtained after the trooper unlawfully prolonged the duration of the traffic stop.

The court disagreed. The court found the trooper established reasonable suspicion during the stop to believe that Mendoza might be involved in criminal activity. Among other things, the court noted that Mendoza drove for a half mile before pulling over, he was extremely nervous during the stop, and his travel plans did were not consistent with information on the car's rental agreement. As a result, the court held Mendoza's detention up to the consent search was lawful.

Second, Mendoza argued the trooper exceeded the scope of his consent by removing the packaged seafood from the first ice chest and prying open the lining.

Again, the court disagreed. A general consent to search a car includes closed containers located within the vehicle. Here, Mendoza consented to a general search of his car without any limitations or restrictions. In addition, Mendoza had been told that he could stop the troopers' search at any time by honking the horn in the patrol car, and although he had a clear view of the troopers' actions, he never did. Finally, the trooper's further separation of the already separated inner and outer lining of the ice chest did not permanently damage it. Once the trooper saw the black bundle in the lining of the first ice chest, he had probable cause to search the chest regardless of the scope of Mendoza's consent.

Third, Mendoza argue the troopers violated the *Fourth Amendment* by destroying the second ice chest during the search without probable cause that it contained evidence.

The court disagreed, holding that it was reasonable for the troopers to dismantle the second ice chest after they had found drugs in the modified lining of the first ice chest.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/15-7042/15-7042-2016-03-25.pdf?ts=1458921668>

Road Blocks / Traffic-Safety Checkpoints

United States v. Arnold, 835 F.3d 833 (8th Cir. 2016)

Police officers developed reasonable suspicion that Johnson, a suspect in two armed bank robberies, was fleeing from the second robbery in gray Ford Taurus. Officers located the Taurus and followed the vehicle as it exited an interstate highway. At the same time, other officers blocked the road in front of the Taurus with marked police cars. The Taurus and a black Honda that had been travelling in front of the Taurus were stopped at the roadblock. The officers confronted Johnson who told them that the occupants of the black Honda were also involved in the bank robbery. The Honda contained two occupants, a female driver and the defendant, Arnold.

Within five or six minutes of stopping the black Honda, the officers suspected Arnold and the female driver were involved in the second robbery with Johnson. In addition, the officers discovered that Arnold had an outstanding arrest warrant. The officers arrested Johnson, Arnold, and the female driver. The officers later searched the female and discovered she had \$3,200 in her possession.

The government charged Arnold and Johnson with conspiracy to commit bank robbery.

Arnold filed a motion to suppress the cash found on the female driver of the Honda and statements he made to the officers after his arrest. Arnold argued the officers violated the *Fourth Amendment* because they did not have reasonable suspicion or probable cause to stop the black Honda.

The court held the police roadblock was reasonable under the *Fourth Amendment*, even when at the time of the stop, the officers did not have individualized suspicion the occupants of the black Honda were involved in criminal activity. First, the officers had reliable information that implicated Johnson in two armed bank robberies, indicating that he was fleeing from the second robbery. Second, the officers knew the roadblock was likely to be effective because they had a description of Johnson's vehicle and knew the route he was travelling. Third, the public interest advanced by the roadblock outweighed Arnold's individual *Fourth Amendment* interests. Finally, only five or six minutes elapsed from the time Arnold was stopped at the roadblock until the officers identified him as a suspect in the second bank robbery and discovered the existence of an outstanding warrant for his arrest.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3697/15-3697-2016-08-31.pdf?ts=1472657460>

Canine Sniffs

See: [United States v. Guidry](#), 817 F.3d 997 (7th Cir. 2016)

United States v. Whitaker, 820 F.3d 849 (7th Cir. 2016)

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

The government charged Whitaker with a variety of criminal offenses.

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

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

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

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

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

See: [United States v. Jackson](#), 811 F.3d 1049 (8th Cir. 2016)

Arrest

Entering Suspect's Home to Make an Arrest

United States v. Hamilton, 819 F.3d 503 (1st Cir. 2016)

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

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

Although there were a number of issues raised in the district court, the sole issue on appeal was whether the officers had a reasonable belief that Tommy Smith lived at and would be present at 16 Harrow Street when the officers entered the residence.²

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

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

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

United States v. Young, 835 F.3d 13 (1st Cir. 2016)

Officers obtained an arrest warrant for Young. The officers went to three different residences, but did not locate Young. The officers then obtained information from an informant who stated if Young was not at any of the three residences already checked, then "he had to be back with his former girlfriend." The officers determined Young's former girlfriend was named "Jen," who lived in an apartment located on Walnut Street.

The officers went to the apartment building on Walnut Street and saw a car parked outside that they knew belonged to Jennifer Coleman. The officers knew Coleman previously lived with Young at a different location. Two officers entered the building, went to Coleman's apartment, and knocked on the door. When Coleman's daughter opened the door, the officers asked to speak to her mother. When Coleman got to the door, the officers had, without consent, stepped inside the apartment. After Coleman told the officers that Young was present, the officers walked past Coleman, without her consent, and entered a bedroom where they saw Young. The officers arrested Young and eventually seized cocaine and a firearm located in the bedroom.

Young argued the officers' initial entry into Coleman's apartment violated the *Fourth Amendment* because the officers did not have a reasonable belief that he resided at Coleman's apartment and that he was present when they entered it.

The court agreed. In *Payton v. New York* the United States Supreme Court held that police officers attempting to execute an arrest warrant have limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is inside the dwelling. In this case, the

² For example, the government did not argue that the entry of 16 Harrow Street was justified by the arrest warrant for Hamilton. Instead, the government argued that the entry of 16 Harrow Street was lawful based on the arrest warrant for Smith. In addition, Hamilton did not argue that the execution of the arrest warrant for Smith was a pretext used to gain unlawful entry of 16 Harrow Street to arrest him.

court concluded the officers did not establish a reasonable belief that Young resided at Coleman's apartment. The information obtained from the informant that Young "had to be back with his former girlfriend" was insufficient to support a reasonable suspicion that Young was living with Coleman, as it was not based on any actual, present knowledge of Young's whereabouts.

Even if the officers had a reasonable belief that Young resided at Coleman's apartment, the court found there was nothing to indicate that the officers reasonably believed Young was present when they entered the apartment. The presence of Coleman's car in front of the apartment building indicated that Coleman might be inside the apartment, not Young. In addition, the officers did nothing to confirm Young's presence such as conducting surveillance or placing a telephone call to the apartment. As a result, the court held the evidence seized from Coleman's apartment should have been suppressed.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-1495/15-1495-2016-08-19.pdf?ts=1471636806>

United States v. Allen, 813 F.3d 76 (2d Cir. 2016)

Police officers established probable cause that Allen had assaulted an individual two days earlier, and without first obtaining an arrest warrant, went to Allen's apartment to arrest him. The officers knocked on the apartment door and Allen answered it, speaking to the officers for five or six minutes. During this time, Allen remained inside the threshold of his apartment while the officers stood outside on the sidewalk. The officers eventually told Allen that he was under arrest and that he had to accompany them to the police station to be processed for the assault. Allen asked the officers if he could put on a pair of shoes first, and tell his daughter that he would be leaving with the officers. The officers told Allen he could do so, but only if the officers accompanied him, which they did. Once inside Allen's apartment, the officers saw drug paraphernalia in plain view and Allen gave the officers several bags of marijuana that he had in his pocket. Based on these facts, the officers obtained a warrant to search Allen's apartment. While executing the warrant, officers found a handgun. The government later charged Allen with being a felon in possession of a firearm.

Allen filed a motion to suppress the handgun and statements he made to the officers inside his apartment. Allen argued the officers violated the *Fourth Amendment* when they arrested him inside his home without an arrest warrant.

In *Payton v. New York*, the United States Supreme Court held that police officers violated the *Fourth Amendment* by physically entering a home without a warrant to effect an arrest. Since *Payton*, it has been well-settled that police officers may only physically enter a home to effect a warrantless arrest with either valid consent or exigent circumstances.

However, the 5th, 7th and 11th Circuits have interpreted *Payton* narrowly, concluding there is no *Payton* violation unless police officers physically cross the threshold and enter the home. In contrast, the 6th, 9th and 10th Circuits have held that police officers may violate *Payton* without physically entering the home. In those cases, the courts held that it is the location of the arrested person, not the arresting officers that determines whether an arrest occurs within a home. The courts recognized that police officers could remain outside the home while engaging in conduct

that would amount to “constructive” or “coercive” entry. Those courts reasoned that when officers engage in actions to coerce the occupant outside of the home, they accomplish the same effect as an actual entry into the home, which would trigger the requirements of *Payton*.

It was against this backdrop that the 2nd Circuit had to decide whether *Payton* permitted warrantless “across the threshold” arrests where the police officers summoned the suspect to the front door of his home.

The court concluded that where police officers have summoned a suspect to the door of his home, and the suspect remains inside the home, the officers may not effect a warrantless “across the threshold” arrest unless exigent circumstances are present.

Here, it was undisputed that the officers told Allen he was under arrest while he was inside his home. The officers then took control of Allen’s subsequent movements, further asserting their power over him inside his home. Although Allen had no obligation to open the door to speak to the officers, the court held that it was reasonable for him to do so, and it did not mean that Allen had forfeited the *Fourth Amendment* protections of the home.

In addition, the court noted the officers established probable cause to arrest Allen two days before they went to his home, which was ample time to obtain an arrest warrant. The court concluded any problems in effecting the arrest were caused by the officers failing to obtain a warrant and instead going to Allen’s home planning to arrest him without a warrant.

For the Court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca2/13-3333/13-3333-2016-01-29.pdf?ts=1454079606>

United States v. Bohannon, 824 F.3d 242 (2d Cir. 2016)

After law enforcement officers obtained an arrest warrant for Bohannon, they planned to go to Bohannon’s house to arrest him. When officers conducting surveillance on Bohannon’s house concluded that Bohannon was not there, they suspected Bohannon was at Dickson’s apartment. The officers went to Dickson’s apartment, entered through an unlocked back door, and arrested Bohannon in Dickson’s bedroom. The officers seized crack cocaine from under the bed and a large quantity of cash from Bohannon’s pants pocket. The government filed a criminal charge against Bohannon based on the drugs seized under the bed.

In *Payton v. New York*, the United States Supreme Court held that an arrest warrant based on probable cause “implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe³ the suspect is within.” In these circumstances, officers are not required to obtain a search warrant before entering the suspect’s dwelling to arrest him.

However, in *Steagald v. United States*, the United States Supreme Court held the *Payton* rule does not apply to a person who is prosecuted based on evidence seized from his dwelling during the

³ There is a circuit split as to the showing necessary to satisfy *Payton*’s “reason to believe standard.” The 2nd, 10th and D.C. Circuits hold that “reason to believe” under *Payton* requires lesser showing than probable cause, while the 3d, 5th, 6th, 7th and 9th Circuits have construed *Payton*’s reasonable belief standard as equivalent to probable cause.

execution of an arrest warrant for another person thought to be on the premises. Instead, the court concluded that officers needed to obtain a warrant to search the third party's dwelling for the suspect before the government could use any evidence discovered inside the dwelling against the third-party homeowner.

Against this backdrop, Bohannon filed a motion to suppress the crack cocaine discovered under the bed and the cash seized from his pants pocket. Even though the officers had a warrant to arrest him, Bohannon argued the officers were required under *Steagald* to obtain a search warrant to enter Dickson's apartment before they could lawfully enter the apartment and arrest him.

The court disagreed. First, under *Steagald*, it was undisputed that the officers' entry into Dickson's apartment without a search warrant was unlawful as to Dickson. However, it was not Dickson who challenged the officers' entry into the apartment, but rather Bohannon, the subject of the arrest warrant.

Second, if the officers had reason to believe Bohannon was in his own home, under *Payton*, the officers would have been justified in entering and arresting him without having to obtain a search warrant. The court concluded that requiring the government to obtain a search warrant to enter a third party dwelling to arrest a suspect on a warrant would have provided Bohannon greater rights in Dickson's apartment than he would have enjoyed in his own home under *Payton*. As a result, the court followed eight other federal circuits, which have held that the subject of an arrest warrant has no greater right to privacy in another person's home than he does in his own home⁴. Therefore, the court found that Bohannon's arrest pursuant to a valid warrant and any search incident to the arrest was valid.

Having found that *Payton*, not *Steagald*, provided the proper standard for analyzing Bohannon's *Fourth Amendment* challenge, the court further held the officers satisfied *Payton*, as the officers had reason to believe Bohannon was inside Dickson's apartment before they entered to arrest him. First, the investigation linked Bohannon and Dickson to each other, and Dickson to the apartment. Second, Bohannon's cell phone activity and the cell-site location information prior to the phone's last use placed Bohannon near Dickson's apartment. Finally, Dickson's apartment was the only location within the relevant cell phone sector to have figured into the investigation.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/14-4679/14-4679-2016-05-31.pdf?ts=1464708605>

United States v. Vasquez-Algarin, 821 F.3d 467 (3d Cir. 2016)

Law enforcement officers obtained an arrest warrant for Rivera. After receiving information from other officers and informants that Rivera was living in a specific apartment, officers with a fugitive task force went to the apartment to arrest Rivera. When the officers knocked on the door, they received no answer, but the officers heard movement from inside the apartment as well as a ringing telephone and a barking dog. After the phone rang once or twice and then stopped, and the dog stopped barking, the officers believed someone inside the apartment manually silenced the phone and muzzled the dog. The officers then forcibly entered the apartment. The officers did not find

⁴ 3d, 4th, 6th, 7th, 8th, 9th, 11th and D.C., Circuits.

Rivera, whom they later discovered did not live in the apartment. Instead, the officers encountered Vasquez, and during their protective sweep, the officers seized powder cocaine. The officers later obtained warrants to conduct a complete search of the apartment, and the government charged Vasquez and his two brothers with whom he shared the apartment with drug offenses.

Vasquez filed a motion to suppress the evidence seized from his apartment, arguing the officers' forced entry into his apartment violated the *Fourth Amendment*.

The court agreed. Following the United States Supreme Court decision in *Payton v. New York*, to enter a dwelling to execute an arrest warrant, officers must have a "reasonable belief" the arrestee resides at the dwelling and the arrestee is present at the time of entry. As an initial matter, the court joined the Fifth, Sixth, Seventh and Ninth Circuits in holding that *Payton's* "reason to believe" standard amounts to a probable cause standard.

Next, the court held the officers did not establish probable cause to believe Rivera lived in the apartment. An officer testified that the task force relied entirely on informant tips and information provided by another officer when it determined Rivera lived in the apartment. However, the officer did not identify the number of informants, their reliability based on prior interactions he may have had with them, or the specific information they provided him. In addition, the officer did not specifically describe the information provided by the other officer, or the basis of that officer's knowledge of the information he provided. Finally, the officer's own testimony suggested the task force not only had a limited basis to believe Rivera resided at the apartment, but also possessed evidence that gave them significant doubt.

Finally, the court found the officers failed to establish Rivera was present based on the suspicious sounds the officers heard coming from inside the apartment. The court noted, "mere signs of life inside, even if suspicious, could not establish probable cause to believe" Rivera was present and could not justify the officers' entry into Vasquez's apartment.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca3/15-1941/15-1941-2016-05-02.pdf?ts=1462208405>

Probable Cause

See: [United States v. Hill](#), 818 F.3d 289 (7th Cir. 2016)

United States v. Jackson, 811 F.3d 1049 (8th Cir. 2016)

Jackson's small aircraft diverted from its original flight plan and landed at the downtown airport in Kansas City. Homeland Security agents, finding this suspicious, contacted the Airport Police who brought a drug-detection dog to conduct a sniff around Jackson's plane. After the dog alerted to the presence of narcotics near both wings of Jackson's aircraft, agents began to draft an affidavit for a search warrant.

In the meantime, Drug Enforcement Administration (DEA) agents located Jackson at a nearby hotel. The agents knocked on Jackson's door, but received no answer. The agents then called

Jackson's room. Jackson answered, saying he would come to the door, but he never did. Several hours later, the agents arrested Jackson as he attempted to leave his room and transported him back to the airport.

A few hours later, agents at the airport obtained the search warrant and found marijuana concealed in Jackson's plane.

First, Jackson filed a motion to suppress the marijuana, arguing the drug dog's alert did not establish probable cause to search his aircraft.

The court disagreed. In *Florida v. Harris*, the United States Supreme Court held that evidence of a drug-dog's satisfactory performance in a certification or training program can by itself, "provide sufficient reason to trust" the dog's alert." Here, the court found the search warrant affidavit provided sufficient facts to establish the dog's reliability. First, the affidavit stated an established company trained the dog alongside her handler. Second, the dog's training lasted four-weeks, including operations in buildings, lockers, luggage, automobiles, and open areas. Finally, the affidavit noted that the dog was certified with a 97 percent accuracy rate in detecting illegal drugs. As a result, the court held the drug-detection dog was reliable, and that her alert, by itself, established probable cause to believe Jackson's plane contained illegal drugs.

In addition, the court found that other facts supported a finding of probable cause. For example, Jackson was a licensed pilot for less than one month, and he had purchased his aircraft only months before. Jackson had flown a non-commercial aircraft a long distance at night and he deviated from his flight plan, which the court found suspicious for a new pilot. Finally, Jackson's evasive behavior when the agents encountered him at the hotel supported a finding of probable cause.

Jackson also claimed that his arrest in the hotel room and his subsequent detention awaiting the search warrant were illegal; therefore, the marijuana seized from his aircraft should have been suppressed as the "poisonous fruit" of his arrest.

The court disagreed. The court held the marijuana discovered in Jackson's aircraft was seized because of the search warrant, which was based on information obtained before Jackson's arrest and detention.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/14-3756/14-3756-2016-01-28.pdf?ts=1453998656>

See: [United States v. Guidry](#), 817 F.3d 997 (7th Cir. 2016)

United States v. Phillips, 834 F.3d 1176 (11th Cir. 2016)

A Florida court issued a civil writ of bodily attachment against Phillips for unpaid child support that ordered the police to take Phillips into custody and "confine him in the county jail." Two days later an officer saw Phillips on a street corner. As the officer approached Phillips to arrest him, Phillips reached down toward his waistband. The officer immediately grabbed Phillips' hand and

felt a metal bulge in his waistband. The officer searched Phillips and removed a loaded handgun from his waistband. The government indicted Phillips for being a felon in possession of a firearm.

Phillips filed a motion to suppress the firearm. Phillips claimed the officer had no authority to conduct the search incident to arrest, which led to the discovery of the firearm. Specifically, Phillips argued that a civil writ of bodily attachment is not equivalent to a criminal arrest warrant for purposes of the *Fourth Amendment*.

The court disagreed. The *Fourth Amendment* does not require warrants to be based on probable cause of a crime, as opposed to a civil offense. As a result, the court concluded that a writ of bodily attachment is a “warrant” for *Fourth Amendment* purposes; therefore, the officer could arrest Phillips based solely on the civil writ of bodily attachment for unpaid child support. Because the officer legally arrested Phillips, he could seize the firearm from Phillips’ waistband as part of a search incident to arrest.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca11/14-14660/14-14660-2016-08-23.pdf?ts=1471966290>

The Exclusionary Rule

Application to Removal Proceedings

Corado-Arriaza v. Lynch, 844 F. 3d 74 (1st Cir. 2016)

Immigration and Customs Enforcement (ICE) agents went to a restaurant to apprehend Gustavo Gomez. While searching for Gomez, the agents encountered the defendant, whom they believed to be Gomez. The defendant gave the agents a Guatemalan driver’s license that instead identified him as Gustavo Corado-Arriaza. The agents handcuffed the defendant while they questioned him about his identify. The agents also searched the defendant’s pockets and his wallet. When the agents asked the defendant whether he had a green card, the defendant answered, “No.” At some point, the defendant told the agents his passport was in his jacket. After the agents retrieved the jacket, they asked the defendant how he had come to the United States. The defendant told the agents he had arrived on a visa. The agents eventually learned the defendant had overstayed his visa and arrested him.

The Department of Homeland Security (DHS) served the defendant with a Notice to Appear that charged him with removability on the basis that he had remained in the United States beyond the six months permitted by his B-2 visa. The government submitted a copy of the defendant’s passport and an Arrival/Departure Form (Form I-94), to support its position.

The defendant filed a motion to suppress his passport and the Form I-94, claiming that the ICE agents subjected him to an unlawful arrest, search, and interrogation when they encountered him at the restaurant.

The Immigration Judge (IJ) denied the defendant’s motion to suppress. After the Board of Immigration Appeals (BIA) affirmed the IJ’s ruling, the defendant appealed to the First Circuit Court of Appeals.

The Supreme Court has held that the exclusionary rule generally does not apply in removal proceedings unless the alien can show “egregious violations of the *Fourth Amendment*.” In this case, without deciding whether the ICE agents violated the *Fourth Amendment*, the court noted that even if they had, the agents’ conduct was not “egregious.” The court agreed with the BIA, which rejected the defendant’s argument that he had established egregiousness because he felt intimidated, not free to leave, and the agents were visibly armed. The court did not articulate the precise conduct that would rise to the level of an egregious violation, but explained the agents’ conduct in this case fell short of that standard.

The court also rejected the defendant’s argument that suppression was warranted because the ICE agents allegedly violated two DHS regulations when they arrested him. As before, while not deciding whether the agents violated the regulations, even if they had, the court concluded that such regulatory violations do not provide aliens a right to suppress evidence in removal proceedings.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-2227/15-2227-2016-12-19.pdf?ts=1482181209>

Exceptions to the Exclusionary Rule

Attenuation Doctrine

Utah v. Strieff, 579 U.S. ____ (2016), 136 S. Ct. 2056

After receiving an anonymous tip concerning narcotics activity at a particular house, a police officer conducted surveillance. During this time, the officer saw numerous visitors arrive at the house and then depart after being there for only a few minutes. Based on these observations, the officer believed the occupants of the house were dealing drugs. When one of the visitors, later identified as Strieff, exited the house, the officer detained Strieff and asked him what he was doing at the house. During the stop, the officer requested Strieff’s identification and conducted a record check through his dispatcher. The dispatcher told the officer that Strieff had an outstanding arrest warrant for a traffic violation. The officer arrested Strieff, and during the search incident to arrest found a bag of methamphetamine and drug paraphernalia.

The State charged Strieff with possession of methamphetamine and drug paraphernalia.

Strieff filed a motion to suppress the contraband, arguing that the evidence was not admissible because the officer discovered it during an unlawful *Terry* stop.

Even though the prosecutor conceded the officer lacked reasonable suspicion to stop Strieff, he argued the evidence seized from Strieff should not be suppressed because the existence of the valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The issue before the Court was whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence seized by the officer.

In a 5-3 opinion, the Court held that the evidence seized from Strieff was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. The attenuation doctrine provides that evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote, or has been interrupted by some intervening circumstance, so that “the interest protected by the constitutional guarantee that has been violated,” (the right to be free from unreasonable seizures) “would not be served by suppression of the evidence obtained.”

First, the court determined the short amount of time between the unlawful stop and the search favored suppressing the evidence, as the officer discovered the contraband on Strieff’s person only minutes after the stop.

Second, the court held the officer’s discovery of the valid arrest warrant was a critical intervening circumstance that was completely independent of the unlawful stop, which favored the State.

Finally, the court found that the officer’s unlawful stop of Strieff was, at most, negligent, and not a flagrant act of police misconduct.

For the court’s opinion: http://www.supremecourt.gov/opinions/15pdf/14-1373_83i7.pdf

Good Faith Exception

See: [United States v. Brown](#), 828 F.3d 375 (6th Cir. 2016)

Search Warrants

Probable Cause / Nexus Requirement / Omission of Information from Affidavit

United States v. Rivera, 825 F.3d 59 (1st Cir. 2016)

A confidential informant (CI) called Rivera to arrange the purchase of crack cocaine. Approximately three minutes later, officers conducting surveillance of Rivera’s residence saw Rivera’s car drive away. A few minutes later, officers saw Rivera’s car parked outside a location they suspected Rivera used as a drug stash-house. The officers followed Rivera’s car from the stash-house to a Walgreens parking lot. The officers saw the CI get out of his car and into Rivera’s car. The CI purchased crack cocaine from Rivera, got out of Rivera’s car and left the area. The officers followed Rivera, who drove back to the stash house.

Based on information from the monitored phone call between Rivera and the CI, the purchase of crack cocaine from Rivera, and observations from their surveillance, the officers obtained warrants to search Rivera’s stash-house as well as his residence. At Rivera’s residence, officers seized among other things, a loaded 9mm handgun.

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

Rivera filed a motion to suppress the firearm seized from his residence. Rivera argued the search warrant affidavit provided no nexus, or connection, between his residence and his alleged drug dealing; therefore, the officers failed to establish probable cause to search his residence.

The court disagreed. A search warrant application must establish probable cause to believe that a crime has occurred and that evidence of the crime will be at the location to be searched, also known as the nexus element. To establish probable cause the government has to establish there is a “fair probability” that contraband or evidence of a crime will be found at the place to be searched. In this case, while the search warrant affidavit provided no information showing that Rivera sold drugs out of his residence, the government established he was likely at home when he participated in the drug-related phone call with the CI. In addition, the judge that issued the search warrant was entitled to rely on the officer’s affidavit statement, that in his training and experience drug dealers often kept evidence related to their crime, such as cash, firearms, and records, in their homes. Consequently, the court held that the government established probable cause to believe evidence connected to Rivera’s illegal sale of drugs would be found in his residence.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-1349/15-1349-2016-06-09.pdf?ts=1465504207>

United States v. Lull, 824 F.3d 109 (4th Cir. 2016)

A confidential informant (CI) told officers he had previously purchased illegal drugs from Lull. An officer arranged for the CI to purchase cocaine from Lull during a controlled buy at Lull’s house. After the CI returned from the controlled buy, he gave the officer cocaine he claimed to have purchased from Lull, as well as \$40 of the remaining buy money. However, the CI should have returned \$60 to the officer. When the officer asked the CI about the missing \$20, the CI said he gave the money to Lull. The officer then searched the CI and found the missing \$20 hidden in the CI’s underwear. The officer immediately determined the CI was not reliable and arrested him on a felony charge of obtaining property under false pretenses.

Following this incident, the officer drafted an affidavit in support of an application for a warrant to search Lull’s house. However, in his affidavit, the officer failed to disclose the CI’s theft and arrest to the state court magistrate. The magistrate issued the warrant, and a search of Lull’s house later that evening led to the seizure of drugs, firearms, and U.S. currency.

The government indicted Lull on a variety of drug and firearm offenses.

Lull filed a motion to suppress the evidence seized from his house, claiming the officer intentionally and/or recklessly omitted material information, specifically the CI’s theft and arrest, from the search warrant affidavit. If this material information had been included in the affidavit, Lull argued the magistrate would have refused to issue the warrant because it would have lacked probable cause.

The government claimed the CI’s theft was not material in determining probable cause to search Lull’s house for drugs, arguing the theft and controlled buy were separate incidents.

The court agreed with Lull. The court held the CI’s theft was not separate from the controlled buy, and that the informant had demonstrated his unreliability during the course of the entire transaction. In addition, the court noted the egregious nature of the CI’s actions were clear, as the CI was deemed unreliable and then immediately arrested and charged with a felony. Finally, the court found that omitting the information concerning the CI’s arrest was material because much of

the information in the officer's affidavit came solely from the CI. As a result, the court concluded Lull's motion to suppress the evidence seized from his house should have been granted.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca4/15-4216/15-4216-2016-05-25.pdf?ts=1464202823>

United States v. Church, 823 F.3d 351 (6th Cir. 2016)

Officers went to Church's house to serve him with a warrant for violating his probation. Church arrived home a few minutes later carrying a bag of fast food. After the officers arrested him, Church asked that he be allowed into his house to eat his food and call his girlfriend. The officers agreed and accompanied Church inside with his consent. Inside the house the officers smelled burnt marijuana. Church told the officers he had recently smoked marijuana in the house and showed them a marijuana blunt. After Church's girlfriend arrived, she told the officers Church regularly smoked marijuana at the house.

While one of the officers remained at the house with Church, the other officer obtained a warrant to search Church's house for evidence of possession with intent to distribute drugs in violation of *Tenn. Code Ann. § 417*. The officers executed the warrant and found marijuana, dilaudid pills, and a safe in a closet. When Church refused to give the officers the combination to the safe, they used a prying ram to open it. Inside the safe, the officers found a large quantity of dilaudid pills, a handgun, and ammunition.

The government charged Church with drug and firearm offenses.

Church filed a motion to suppress the evidence seized from his house. First, Church argued the search warrant authorized a search for evidence of possession with intent to distribute drugs in violation of *Tenn. Code Ann. § 417*; however, the officer's affidavit only established probable cause to search his house for evidence of simple possession of drugs in violation of *Tenn. Code Ann. § 418*.

The court held that a valid warrant to search for illegal drugs only has to establish "a fair probability that drugs will be found" in the place to be searched. Because drugs are contraband and the police have a right to seize them pursuant to a search warrant wherever they might be found, the court concluded it did not matter whether the officers suspected that Church possessed marijuana, dealt marijuana, or committed some other crime. What mattered here was that there was a "fair probability" that marijuana was in Church's house, and the officer's affidavit left no doubt of that probability.

Second, Church argued the affidavit failed to establish probable cause because its contents were "stale."

The court disagreed, finding that the officer's affidavit provided every reason for the magistrate to think there were drugs in Church's house when he issued the warrant.

Finally, Church argued the officers acted unreasonably, in violation of the *Fourth Amendment*, when they used a prying ram to open his safe, thereby destroying it.

Again, the court disagreed. Here, the officers had the right to open the safe because they had probable cause to believe it contained drugs. After Church refused to provide the combination, the officers had no choice but to open the safe by force, which was reasonable.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-5362/15-5362-2016-05-17.pdf?ts=1463502659>

United States v. Brown, 828 F.3d 375 (6th Cir. 2016)

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 firearm offenses.

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

The court agreed.⁵ An affidavit supporting a search warrant application must demonstrate a nexus, or connection between the evidence sought and the place to be searched. In this case, the court found the search warrant affidavit contained no evidence that Brown distributed narcotics from his home, stored narcotics in his home, or that any suspicious activity occurred in Brown's home.

In addition, even though a drug-dog alerted to the presence of narcotics in Brown's car while it was parked in front of Middleton's house, this fact only supported a search of Brown's car. The alert by the drug-dog did not support a fair probability that evidence of drug trafficking would be found at Brown's house. The court noted a more direct connection was required, such as surveillance indicating Brown had used the car to transport drugs from his house to Middleton's house on the day in question.

⁵ The court issued an opinion in the case on September 11, 2015, in which it denied Brown's motion to suppress the evidence seized from his residence before issuing this amended opinion. (See 801 F.3d 679 (6th Cir. 2015) and [10 Informer 15](#)).

Finally, although the affidavit characterized Brown as a known “drug dealer,” based on his prior criminal history, the court held a suspect’s “status as a drug dealer, standing alone,” cannot give rise to a “fair probability that drugs will be found in his home.” Instead, the government is required to provide some reliable evidence connecting the known drug dealer’s ongoing criminal activity to his home, such as an informant who observed drug deals or drug paraphernalia in or around the suspect’s home.

The court further held the good-faith exception to the exclusionary rule did not apply to the evidence seized from Brown’s house. For the good-faith exception to apply, the court noted the affidavit was required to contain a minimal nexus between the illegal activity and the place to be searched. Except for a passing reference to Brown’s car registration, the affidavit failed to provide any facts establishing a nexus between Brown’s alleged drug dealing activity and his house.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca6/13-1761/13-1761-2016-06-27.pdf?ts=1467066637>

United States v. Abernathy, 843 F.3d 243 (6th Cir. 2016)

Officers went to Abernathy’s house and searched the trashcans outside the residence looking for evidence connecting Abernathy and his girlfriend to drug trafficking. Inside the trashcans, the officers found several marijuana roaches with marijuana residue and several plastic vacuum packed heat-sealed bags consistent with those used to package marijuana. The plastic bags contained marijuana residue and were marked “T2,” a known strain of marijuana.

After discovering this evidence, an officer applied for a warrant to search Abernathy’s house. In the affidavit in support of the warrant, the officer referenced the evidence discovered in the trash pull. The officer also included a statement claiming he had received information that Abernathy and his girlfriend were currently engaged in illegal drug activity. Based on the facts presented in the officer’s affidavit, a state judge issued the search warrant.

Officers searched Abernathy’s house and seized large quantities of marijuana, cocaine, firearms and cash.

The grand jury subsequently indicted Abernathy on drug and weapons charges.

Abernathy filed a motion to suppress the evidence seized from his home.

After a hearing, the district court held that the statement in the officer’s affidavit claiming that the officer had received information that Abernathy and his girlfriend were engaged in drug activity was inaccurate and misleading. As result, the district court omitted that statement from the officer’s affidavit. The district court nonetheless upheld the search warrant, finding that the evidence discovered from the trash pull, by itself, established probable cause to search Abernathy’s house. Abernathy appealed.

First, Abernathy argued that the warrant was overbroad because the affidavit only showed evidence suggesting he possessed marijuana, while the warrant was issued to find evidence of drug trafficking.

The Sixth Circuit Court of Appeals disagreed. It does not matter whether an affidavit establishes probable cause for marijuana possession or marijuana trafficking, as long as the affidavit shows there is a fair probability that marijuana will be found in the place to be searched. Consequently, the court held that the warrant in this case was not overbroad.

Second, Abernathy argued that the warrant was not supported by probable cause. Abernathy claimed the marijuana roaches and T2-laced plastic bags recovered by the officers from the trash pull were insufficient to create a fair probability that drugs would be found in his house.

The court agreed. After the district court omitted a portion of the search warrant affidavit because it contained misleading and inaccurate information, the only evidence the affidavit contained supporting probable cause were “several” marijuana roaches and T2-laced plastic bags the officers recovered from the trash pull at Abernathy’s house.

In the Sixth Circuit, it is well established that drug paraphernalia recovered from a trash pull establishes probable cause to search a home when combined with other evidence of the resident’s involvement in drug crimes. However, the court had not previously considered whether and under what circumstances trash pull evidence, standing alone, can establish probable cause to search a home. The court concluded that the evidence recovered from the trash pull, by itself, did not create a fair probability that drugs would be found in Abernathy’s home.

First, the trash pull evidence suggested that a small quantity of marijuana might have recently been in Abernathy’s house. However, the court found that there was no way of knowing with certainty whether the trash pull evidence came from Abernathy’s house at all, and if it did, whether it was recently inside the house. In addition, although the officer who drafted the affidavit knew that Abernathy had been involved in past drug crimes, he did not include those facts in the affidavit. As a result, the judge who issued the search warrant could not consider that information when making his probable cause determination.

Second, the court held that the connection between the small quantity of marijuana paraphernalia recovered from Abernathy’s trash and his house was too attenuated to create a fair probability that more drugs were inside the house. Although the trash pull evidence suggested that someone in the residence had smoked marijuana recently, that fact alone does not create an inference that the house contained additional drugs. The court commented that drugs by their nature are usually sold and consumed promptly, so the more probable inference when finding drug refuse in a trash pull is that whatever drugs were previously in the house have been consumed and discarded. Furthermore, it was impossible to tell when the marijuana roaches and plastic bags were discarded. Depending on the household, the trash pull evidence could have been put in the garbage anywhere from one day to several weeks earlier. The inability to tell when drugs were last within Abernathy’s house diminished any inference that drugs were still inside.

Finally, the court held the good-faith exception to the exclusionary rule did not apply because the officer’s affidavit contained information that was found to be inaccurate and misleading by the district court.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca6/16-5314/16-5314-2016-12-08.pdf?ts=1481216436>

United States v. Mshihiri, 816 F.3d 997 (8th Cir. 2016)

After Mshihiri became a suspect in a mortgage fraud investigation, federal agents applied for warrants to search his residence and laptop computer. The affidavit in support of the search warrant included information provided by a confidential informant (CI) who claimed that he participated in the mortgage fraud scheme with Mshihiri. The affidavit also included information from bank and real estate records that corroborated information provided by the CI.

The agents coordinated with Customs and Border Protection (CBP) officers to interview Mshihiri and to execute a search of his laptop computer upon Mshihiri's return from Tanzania. When Mshihiri arrived at the Minneapolis-St. Paul International Airport, a CBP officer intercepted him at the immigration entry point, led him to baggage claim, and then escorted him to a reception area. At the reception area, the agents identified themselves and presented their credentials to Mshihiri. The agents asked Mshihiri if he would be willing to speak to them, explaining to Mshihiri that he was not under arrest or obligated to answer questions. Mshihiri agreed to be interviewed and voluntarily accompanied the agents to an interview room. The agents sat across the table from Mshihiri who sat in a chair next to the door. Speaking in a normal tone and volume, the agents asked Mshihiri several questions about the suspected mortgage fraud. During the forty-five minute interview, Mshihiri did not request a break, try to use his cell phone, ask to consult an attorney, or call his wife so that she could call an attorney for him. The agents abruptly ended the interview after one of the agents changed his tone of voice and accused Mshihiri of lying. The agents left the interview room and Mshihiri went back through the passport control area in the main terminal.

The government charged Mshihiri with a variety of offenses including bank fraud, mail fraud, and wire fraud.

Mshihiri filed a motion to suppress evidence seized as a result of the search warrants and the statements he made during his interview with the agents. Mshihiri argued the affidavit in support of the search warrants failed to establish probable cause and that the interview with the agents constituted a custodial interrogation in which he was not first advised of his *Miranda* rights.

The court disagreed. First, the court held the affidavit in support of the search warrants established probable cause. The court concluded that the CI's first-hand knowledge of Mshihiri's involvement in the mortgage fraud scheme established the CI's reliability and basis of knowledge for the information he provided the agents. In addition, the court noted the CI's information was corroborated by a variety of independent financial documents.

Second, the court held Mshihiri was not in custody for *Miranda* purposes during the interview with the agents. In agreeing with the district court, the court found that the agents told Mshihiri that he was not under arrest; Mshihiri entered the interview room voluntarily and was seated next to the door throughout the questioning; the agents were dressed in casual clothing and did not display their weapons; most of the forty-five minute interview was calm and conversational, and Mshihiri was never handcuffed or placed under arrest.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/14-3802/14-3802-2016-03-14.pdf?ts=1457969484>

Disclosure of Method of Execution to the Issuing Judge

United States v. Patrick, 842 F.3d 540 (7th Cir. 2016)

Police officers obtained a warrant to arrest Patrick for a parole violation. The officers then obtained a second warrant, which authorized them to locate Patrick using cell phone data. The officers subsequently located Patrick sitting in a car on a public street after they used information obtained from a cell –site simulator.⁶ The officers arrested Patrick and seized a firearm from him. The government later charged Patrick with possession of a firearm by a convicted felon.

Patrick filed a motion to suppress the firearm. Patrick argued the officers violated the *Fourth Amendment* by misleading the judge who issued the second warrant by not disclosing that the officers planned to use a cell-site simulator to locate him. Instead, Patrick claimed the officers implied to the judge that they planned to locate Patrick by using information provided by his cell phone service provider.

The court disagreed. The *Fourth Amendment* requires that warrants be based “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the property or things to be seized.” The court noted that officers are not required to state the “precise manner” in which warrants are executed. The manner of the search is subject only later to judicial review to determine its reasonableness. In addition, courts cannot limit or attempt to regulate how a search must be conducted. The court added that in this case the officers could have sought a warrant authorizing them to locate Patrick’s cell phone without disclosing to the judge how they would do it.

Finally, the court recognized that there were other *Fourth Amendment* issues and concerns surrounding the use of cell-site simulators by law enforcement, which the court was not required to decide to resolve this case.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-2443/15-2443-2016-11-23.pdf?ts=1479934846>

United States v. Merrell, 842 F.3d 577 (8th Cir. 2016)

Law enforcement officers found photographs containing child pornography on computers that belonged to Travis Guenther. In some of the photographs, a woman’s hands are visible touching a minor girl inappropriately. Guenther told officers Merrell had sent him the photographs of the minor girl and that Merrell had produced them at his request.

The officers obtained a warrant for the search of “the person of Roxanne Merrell, specifically body views and photographs of her hands.” Officers then took Merrell to the police station and recorded 47 photographs of her hands.

⁶ A cell-site simulator, often called a Stingray, the trademark of one brand, “pretends to be a cell-phone access point and, by emitting an especially strong signal, induces nearby cell phones to connect and reveal their direction relative to the device.

The government charged Merrell with production of child pornography.

Merrell filed a motion to suppress the 47 photographs of her hands taken during the execution of the search warrant. Merrell argued that the officers violated the *Fourth Amendment* because they exceeded the scope of the search warrant.

The court disagreed. While Merrell was correct that the *Fourth Amendment* requires a warrant to describe with particularity “the things to be seized,” the court stated that officers are not required to explain the precise manner in which search warrants are to be executed. Courts generally leave the “details of how best to proceed” with the execution of a search warrant to the judgment of the officers responsible for the search. Here, the warrant authorized the officers to search “the person of Roxanne Merrell, specifically body views and photographs of her hands.” The court concluded the manner in which the officers carried out the search did not exceed the scope of the warrant.

Merrell further argued that the photography process violated the *Fourth Amendment* because it was not reasonable for the officers to transport her to the police station or to touch her, in order to obtain the photographs.

Again, the court disagreed. Based on the totality of the circumstances, the court concluded the manner in which the officers executed the search warrant was reasonable. Even though the officers could have taken the photographs at Merrell’s house, it was reasonable for the officers to transport her to the police station to take them. In addition, the limited physical touching of Merrell was limited to her hands during a twenty minute period.

Finally, Merrell argued that photographing her hands constituted an unduly suggestive identification procedure that violated her due process rights.

The court held that the photographing of Merrell’s hands did not amount to an identification procedure because the photographs were not presented to an eyewitness for the purpose of identifying an alleged criminal perpetrator. Instead, the photographs were evidence obtained during the execution of a valid search warrant, and did not violate Merrell’s due process rights.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3211/15-3211-2016-11-18.pdf?ts=1479486669>

Stale Information

See [United States v. Church](#), 823 F.3d 351 (6th Cir. 2016)

United States v. Morgan, 842 F.3d 1070 (8th Cir. 2016)

A police officer discovered a computer that offered child pornography by peer-to-peer file sharing. Later that day, the officer identified the computer’s internet protocol (IP) address. Twenty-four days later, the officer determined the IP address was assigned to Morgan. Over seven weeks later, a state judge issued a search warrant for Morgan’s home, seventy-five days after the IP address was discovered and fifty-one days after the officer connected it to Morgan. Five days later, officers

executed the warrant at Morgan's home. The officers also arrested Morgan on an unrelated, outstanding warrant. The arresting officer seized Morgan's cell phone, and while handcuffing him, saw a tattoo on Morgan's wrist.

At the police station, Morgan requested his cell phone so he could contact his employer and his sister, and an officer allowed Morgan to use it. As Morgan scrolled through the contact list, he did not object as the officer stood next to him and viewed the screen on his cell phone. In addition, Morgan spontaneously shared some facts about some of the contacts, and in response, the officer wrote down several names and phone numbers.

During this time, a different officer found images of child pornography on a computer seized from Morgan's home. One image showed a man with a tattooed arm touching a female child's genitalia. The officer who found the images asked Morgan to lift the sleeve of his shirt so that he could photograph his tattoos. Morgan agreed, and without objection, lifted his sleeve. The officer photographed Morgan's tattoos, which matched the tattoos in the images on his computer.

Officers later identified a child from one of the images found on Morgan's computer. Morgan's public Facebook profile led to the profile of a woman that an officer remembered was one of Morgan's cell-phone contacts. The woman's public Facebook profile included an image of her daughter, who resembled the child in the image from Morgan's computer.

The government charged Morgan with child pornography related offenses.

Morgan filed a motion to suppress the evidence discovered by the officers.

First, Morgan argued that the information in the search warrant affidavit was stale because the officers did not apply for the warrant until seventy-five days after identifying his IP address and fifty-one days after associating the IP address to him. As a result, Morgan claimed the officers did not establish probable cause to believe that evidence of a crime would be located in his home at the time of the search.

The court disagreed, finding that periods much longer than seventy-five days have not rendered information stale in computer-based child pornography cases. In addition, the affidavit in support of the warrant attested that collectors of child pornography tend to retain images and that computer programs that download these images often leave file logs, which would tend to show the possession, distribution, or origin of the files.

Second, Morgan argued that the officer violated the *Fourth Amendment* by observing the information on the screen of his cell phone while Morgan scrolled through his contact list.

Again, the court disagreed. A *Fourth Amendment* search occurs when the government intrudes upon an area where a person has a reasonable expectation of privacy. However, when a person knowingly exposes something to the public, there is no protection under the *Fourth Amendment*. Here, the court concluded that Morgan had no reasonable expectation of privacy in his cell phone screen once he made it visible to the public by displaying it in the presence of an officer. The officer allowed Morgan to use his cell phone and Morgan did not object when the officer looked at the screen while Morgan scrolled through the contact list. In addition, the court noted that while this was happening, Morgan spontaneously shared information about his contacts with the officer.

Finally, Morgan argued that the officer violated the *Fourth Amendment* by taking photographs of the tattoos on his arm without a warrant.

A warrantless search is valid if the person subject to the search knowingly and voluntarily consents to it. In this case, the district court found that the officer asked Morgan to move his shirtsleeve so he could photograph Morgan's tattoos, and that Morgan agreed to do so. Based on these facts, the district court concluded that Morgan voluntarily consented to the officer photographing his tattoos and the court of appeals agreed.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-1525/16-1525-2016-12-01.pdf?ts=1480609860>

Automobile Exception (mobile conveyance exception)

United States v. Daniel, 809 F.3d 447 (8th Cir. 2016)

Two patrol officers saw a man standing outside a vehicle engage in what appeared to be a hand-to-hand drug transaction with a man sitting in the back of the vehicle in a location the officers considered a "high narcotics" area. The officers drove around the corner and ran a computer check on the vehicle's license plate. The check revealed that the vehicle was registered to Brian Daniel, a man for whom there were two outstanding arrest warrants. In addition, the physical description of Daniel matched the man sitting inside the vehicle. The officers returned and approached Daniel as he was walking away from the vehicle. After Daniel gave the officers his name and date of birth, the officers confirmed this information matched the two outstanding arrest warrants. As the officers prepared to arrest Daniel, he threw a plastic baggie to the ground. The officers recovered the baggie, which contained illegal drugs. After handcuffing Daniel, the officers smelled the odor of fresh marijuana emanating from Daniel's vehicle. The officers searched the vehicle and recovered a loaded handgun, marijuana and drug paraphernalia. The government charged Daniel with being a felon in possession of a firearm.

Daniel argued the evidence seized from his vehicle should have been suppressed because the officers did not establish probable cause to support a warrantless search under the automobile exception to the *Fourth Amendment's* warrant requirement.

The court disagreed. First, the officers saw Daniel engage in what appeared to be a hand-to-hand drug transaction from inside his vehicle. Second, the officers then recovered a baggie of drugs that Daniel discarded outside the vehicle. Finally, the officers smelled the odor of marijuana emanating from Daniel's vehicle. The court concluded these facts gave the officers probable cause to believe the vehicle contained marijuana or other evidence of drug-related activity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1135/15-1135-2016-01-05.pdf?ts=1452014714>

United States v. Shackelford, 830 F.3d 751 (8th Cir. 2016)

Two patrol officers received information that a man named “Javon,” driving a red Chevrolet Monte Carlo, might be coming to “shoot up” a nearby residence. This information came from another officer who had interviewed Kimberly Farley. Farley reported that Javon Shackelford had assaulted her the day before, that she had seen Shackelford with a gun a few weeks earlier, and that Shackelford and his friend Quentin Fantroy were looking for her. In addition, another officer had spoken with Farley’s sister, who confirmed that Shackelford had assaulted Farley the day before, and that Shackelford was going to Farley’s house to cause another disturbance.

When the patrol officers saw a red Monte Carlo, they checked the license plate number and discovered Shackelford owned the vehicle. The officers conducted a traffic stop, ordered Shackelford out of the vehicle, and frisked him without finding a firearm. After the officers learned that Farley wished to prosecute the assault from the day before, they arrested Shackelford.

During this time, Fantroy and a woman approached the officers. Shackelford asked the officers to release his vehicle to the woman, so it would not be towed. The officers refused, searched Shackelford’s vehicle and found a loaded handgun in the glove compartment.

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

Shackelford claimed the firearm should have been suppressed, arguing the warrantless search of his vehicle violated the *Fourth Amendment*.

The court disagreed, holding the warrantless search of Shackelford’s vehicle was valid under the automobile exception to *Fourth Amendment’s* warrant requirement. The automobile exception allows officers to conduct warrantless searches when the officers have probable cause to believe an automobile contains contraband or evidence of criminal activity. Here, the patrol officers based their decision to stop Shackelford and search his vehicle on information they received from other officers. The other officers received their information concerning Shackelford directly from Farley, the assault victim, and from Farley’s sister, both of whom were deemed reliable. In addition, during the stop, the officers frisked Shackelford, without finding a firearm. Almost immediately afterward, Shackelford asked the officers to release his vehicle to the woman who appeared on the scene within minutes of the stop. The court concluded these facts provided the officers with probable cause to believe Shackelford’s car contained a firearm, and justified the warrantless search of the vehicle.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2603/15-2603-2016-07-27.pdf?ts=1469633456>

United States v. Wright, 844 F.3d 759 (8th Cir. 2016)

Officers received information from a confidential informant (CI) that Wright and Victor Brown would be driving from Iowa to Chicago to purchase crack cocaine. Officers corroborated much of the information provided by the CI and conducted surveillance on Brown’s residence around the time Brown and Wright were expected to return from Chicago. When Brown and Wright arrived, Brown exited Wright’s SUV, and then Wright departed.

Officers followed Wright, who arrived at the parking lot of an apartment complex. A uniformed officer positioned his squad car behind Wright's SUV and shined a spotlight onto the back window. The officer and Wright exited their vehicles and engaged in conversation. During this time, the officer smelled burnt marijuana coming from Wright's person. After placing Wright in the back seat of a squad car, the officer walked around Wright's SUV. The officer saw a marijuana cigar on the front center console and smelled marijuana emanating from the vehicle. Officers searched the SUV and seized the marijuana cigar as well as crack cocaine from the glove compartment.

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

Wright argued the evidence seized from his SUV should have been suppressed because the officers did not have probable cause to enter the apartment complex's curtilage, reasonable suspicion to detain him, or probable cause to search his vehicle.

First, the court held that Wright did not have standing to challenge the officers' entry into the parking lot of the apartment complex because he did not have a reasonable expectation of privacy in that area. Wright did not own or live at the property, nor was he an overnight guest there. Consequently, the court concluded it did not have to determine whether the officers' entry into the parking lot was lawful.

Second, concerning the encounter in the parking lot, the court held the officer's act of shining the spotlight on Wright's car was not a *Fourth Amendment* seizure, and Wright did not claim that the officer seized him by blocking his SUV with his squad car. As a result, the court concluded no suspicion was required when Wright and the officer had their initial conversation. Once the officer smelled the odor of marijuana coming from Wright's person, the court concluded the officer had probable cause to arrest Wright. If the officer had probable cause to arrest Wright at the point, the court found that the officer clearly had reasonable suspicion to detain Wright for further investigation.

The court added that, in any event, the officers had reasonable suspicion to conduct a *Terry* stop on Wright. The CI provided detailed information concerning Brown and Wright, and the officers corroborated much of that information during their surveillance.

Finally, the court held the warrantless search of Wright's SUV was valid under the automobile exception to the warrant requirement. The officer smelled burnt marijuana and saw a marijuana cigar inside the SUV, which established probable cause that the vehicle contained drugs. Once the officer had probable cause to search the SUV for drugs, he had the right to search the glove compartment as a place where drugs could be concealed.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3237/15-3237-2016-12-23.pdf?ts=1482510657>

United States v. Williams, 837 F.3d 1016 (9th Cir. 2016)

A man called a police hotline and reported that another man was sleeping inside a grey Ford, which was located in an apartment complex parking lot. The caller stated the man was a known drug dealer and did not live in the apartment complex. The caller provided his name, address and phone

number. Two uniformed officers in a marked police car responded and saw the grey Ford in the parking lot. The officers turned on their patrol car's overhead lights, shining them inside the Ford. After the officers turned on their lights, a man, later identified as Williams, sat up in the driver's seat inside the Ford. Williams started the car, placed it in reverse and then quickly shifted the car back into park. By this time, both officers were approaching the Ford on foot. The officers ordered Williams out of the car and Williams complied. When the officers got within a few feet of Williams, he ran away from them. The officers chased Williams who fell down and remained on the ground. One of the officers conducted a pat down of Williams' backside, handcuffed him, and then helped Williams to his feet. The officers brought Williams back to their patrol car and conducted a pat down of Williams' front side. An officer then reached into all of Williams' pockets. The officer found a plastic bag containing individually wrapped pieces of crack cocaine in Williams' right front pocket and over \$1,000 in cash in small denominations in Williams' left front pocket.

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

The government charged Williams with drug and firearm offenses.

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

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

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

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

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

Williams, the court held the officers had probable cause to believe that Williams' car contained further contraband or other evidence of drug dealing.

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

Computers / Electronic Devices / Wiretaps / Bugs

Stored Communications Act (SCA) / 18 U.S.C. § 2703(d)

Microsoft Corp. v. United States (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.), 829 F.3d 197 (2d Cir. 2016)

The government obtained a warrant issued under § 2703 of the Stored Communications Act (SCA) that directed Microsoft to seize and produce the contents of an email account that it maintained for a customer who used the company's electronic communications services. The government then served the warrant on Microsoft at its headquarters in Redmond, Washington.

Microsoft provided the government the customer's non-content related information that was located on a server in the United States. However, Microsoft determined that to comply fully with the warrant, it would need to access customer content stored and maintained on a server located in Ireland. Microsoft refused to provide the government this data and filed a motion to quash the warrant. Microsoft argued that a warrant issued under the SCA could not require it to produce data that was stored on servers located outside the United States.

The government argued Microsoft was required to produce the data, pursuant to the warrant, no matter where the data was located, as long as Microsoft had custody and control of the data.

The court held § 2703 of the SCA does not authorize a United States court to issue and enforce an SCA warrant, even against a United States-based service provider, for the contents of a customer's electronic communications stored on servers located outside the United States. Consequently, the court held the SCA warrant in this case could not lawfully compel Microsoft to produce the contents of a customer's email account stored on servers located in Ireland.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/14-2985/14-2985-2016-07-14.pdf?ts=1468508412>

Cell Site Location Information (CSLI) and 18 U.S.C. § 2703(d)

United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016)

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

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

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

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

Warrantless Pinging of Suspect's Cell Phone

United States v. Caraballo, 831 F.3d 91 (2d Cir. 2016)

Officers arrested Melissa Barratt for distribution of drugs. At the time, Barratt told the arresting officers she was extremely afraid of Caraballo, with whom she worked dealing drugs. Barratt told the officers Caraballo would "kill her" if he knew she cooperated with the officers and that Caraballo was a violent person with access to firearms. Even though the officers attempted to have Barratt cooperate with them in their ongoing investigation against Caraballo, she refused.

Two months later, officers discovered Barratt's deceased body in a wooded area with a single gunshot wound to the back of her head. The officers suspected Caraballo in Barratt's homicide. In addition, the officers were concerned for the safety of undercover officers and confidential informants who had infiltrated Caraballo's organization within the last two months. Consequently, the officers believed it was necessary to locate Caraballo immediately.

The officers knew Caraballo's cell phone numbers and considered applying for a warrant to have Sprint, the cell phone provider, "ping" or track Caraballo's location through the global positioning system (GPS) of his two phones. While the officers believed they could obtain a warrant within a matter of hours, the officers knew, based on experience, that it could take Sprint several days or weeks to provide the GPS information requested in the warrant. Believing an emergency existed that involved a serious threat of death or serious bodily injury, the officers consulted with the county's state attorney who agreed. As a result, the officers requested Sprint ping Caraballo's cell phones without first obtaining a warrant.

Sprint pinged Caraballo's phones and relayed location information obtained from one of the phones to the officers. Over the next ninety minutes, Sprint pinged Caraballo's phone several times, allowing the officers to locate Caraballo as he drove in his car. After locating Caraballo, the officers conducted a brief visual surveillance before they initiated a traffic stop and arrested him.

Caraballo filed a motion to suppress evidence recovered following his arrest. Caraballo argued that the pinging of his cell phone constituted a warrantless *Fourth Amendment* search.

Without deciding whether the warrantless pinging of Caraballo's cell phone constituted a *Fourth Amendment* search, the court concluded that exigent circumstances justified the officers in pinging Caraballo's cell phone to determine his location.

First, when officers arrested Barratt, she told the officers she was afraid of Caraballo and feared that he would kill her if she cooperated with the officers. Barratt also told the officers Caraballo had violent tendencies and access to firearms. Consequently, when Barratt was found dead with a gunshot wound to the head, it was reasonable for the officers to link Caraballo to Barratt's death. Second, Barratt's death suggested that the officers' investigation of Caraballo's drug operation had been discovered, and the safety of undercover officers and confidential informants could be in jeopardy. Third, the officers did not have a reasonable opportunity to obtain a warrant for the search. Finally, the degree of intrusion into Caraballo's privacy was very slight. The pinging of Caraballo's cell phone occurred for less than two-hours, and when the officers located and identified Caraballo, the pinging immediately stopped.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/12-3839/12-3839-2016-08-01.pdf?ts=1470061805>

United States v. Gilliam, 842 F.3d 801 (2d Cir. 2016)

Jasmin, a sixteen-year old minor, worked for Gilliam as a prostitute in Maryland. Jasmin traveled with Gilliam to New York City to work as a prostitute after Gilliam threatened to require her fifteen-year old sister to work as a prostitute if Jasmin refused.

When Jasmin did not return home, her foster mother reported her missing to the police in Maryland. An investigator interviewed Jasmin's social worker who expressed concern that Jasmin was being forced into prostitution by Gilliam. The social worker based her concern on conversations with Jasmin's biological mother. The investigator then spoke with Jasmin's biological mother who told the investigator she had recently communicated with Gilliam. According to Jasmin's biological mother, Gilliam told her that he was planning to take Jasmin to New York City to work as a prostitute.

Later that day, the investigator contacted Sprint, Gilliam's cell phone service provider. The investigator told Sprint that he was investigating a missing child who was being prostituted and requested GPS location information for Gilliam's cell phone. Sprint complied with the investigator's request and provided real-time GPS location on Gilliam to the investigator. The investigator passed this information on to law enforcement officers in New York City who located and arrested Gilliam while he was walking down the street with Jasmin.

The government charged Gilliam with sex trafficking and prostitution-related offenses.

Gilliam argued that the law enforcement officers violated the *Stored Communications Act (SCA)*, 18 U.S.C. § 2702(c)(4) by obtaining his GPS location information without a warrant.

The court disagreed, holding that exigent circumstances existed that allowed the investigator to obtain Gilliam’s GPS location information without a warrant. *Section 2702(c)(4)* provides:

A provider . . . may divulge a record or other information pertaining to a subscriber . . . (not including the contents of communications covered by other subsections);

(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.

First, the court held that Sprint’s disclosure of Gilliam’s GPS location information constituted “other information” within the meaning of § 2702(c)(4).

Second, the court held it was reasonable for the Maryland investigator to obtain Gilliam’s cell phone location information without a warrant because exigent circumstances existed. Based on the investigator’s discussions with Jasmin’s foster mother, social worker, and biological mother, the investigator had a substantial basis to believe that Gilliam had compelled Jasmin to travel to New York City to work as a prostitute. The court cited several cases from various federal circuits, which have held that exploitation of a minor for prostitution poses a significant risk of serious bodily injury.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca2/15-387/15-387-2016-12-01.pdf?ts=1480606210>

Wiretaps (18 U.S.C. § 2510)

United States v. Scurry, 821 F.3d 1 (D.C. Cir. 2016)

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

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

The court held that a wiretap order is “insufficient on its face” where it fails to identify the Justice Department official who approved the underlying application, as required by Title III *Section 2518*

(4)(d). As a result, the court suppressed evidence from wiretaps on the phones belonging to Hudson and Johnson.

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

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

Consent Searches (Authority to Consent / Scope / Voluntariness)

United States v. Murray, 821 F.3d 386 (3d Cir. 2016)

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

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

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

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

The government charged Murray with a variety of criminal offenses.

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

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

Alternatively, the court found that Burns possessed apparent authority over the room. When a person possesses only apparent, rather than actual common authority, consent to enter is still valid if the officers reasonably believe the person granting consent has common authority over the area, but later learn that the person did not. Here, the facts known to the officers when they entered Room 302 warranted a reasonable belief that Burns was a prostitute who had access and control over the room for most purposes.

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

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

See: [United States v. Calvetti](#), 838 F.3d 654 (6th Cir. 2016)

See: [United States v. Contreras](#), 820 F.3d 255 (7th Cir. 2016)

United States v. Leiva, 821 F.3d 808 (7th Cir. 2016)

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

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

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

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

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

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

See: [United States v. Thompson](#), 842 F.3d 1002 (7th Cir. 2016)

United States v. Berger, 823 F.3d 1174 (8th Cir. 2016)

Berger was on federal supervised release. One special condition of supervision prohibited Berger from accessing the internet without prior written approval from a United States Probation Officer. Along with this special condition, the standard conditions of supervised release required Berger to "permit a probation officer to visit him . . . at any time at home or elsewhere" and "permit confiscation of any contraband observed in plain view of the probation officer."

Probation officers went to Berger's residence to conduct a home visit because they suspected he had been using the internet to maintain a Facebook account. While inside Berger's house, the officers saw a computer tower and monitor in plain view in a spare bedroom. The officers also saw a hot tub in plain view in the back yard. Without being questioned by the officers, Berger volunteered he had recently obtained the hot tub from the website, Craigslist. One of the officers then asked Berger if he would consent to a search of his house and presented him with a consent-to-search form. The officer told Berger that he was not required to sign the form, and he could withdraw his consent at any time, but that anything found as a result of the search could be used against him. Berger told the officers he understood he could refuse consent, and signed the form. The officer then told Berger she had reason to believe Berger was using the internet to maintain a Facebook account. Berger admitted to the officer that he had been accessing the internet for the last three to four years.

During their search, the officers found an external computer hard drive, numerous USB drives, and various CDs. After completing the search, the officer told Berger she planned to file a violation report, but she would recommend the court delay any revocation hearing until the confiscated devices could be examined, which Berger indicated he understood. A forensic examination revealed multiple video files and images of child pornography on the external hard drive. The government charged Berger with possession of child pornography.

Berger argued the evidence discovered on the external hard drive should have been suppressed because the forensic examination of the hard drive exceeded the scope of his consent to search.

The court disagreed, holding the scope of Berger's consent to search his home extended to the forensic examination of the external hard drive. While the consent-to-search form did not specifically mention a computer or hard drive, the form clearly authorized the officer to "conduct a complete search of the property herein described" and informed Berger that any evidence found as a result of the search could be used against him. In addition, the court concluded a reasonable person would have understood that consent to search the "premises" for evidence of violations of the conditions of supervised release, including internet usage, extended to a forensic examination of any device found in the search. Finally, Berger's failure to object or limit his consent after the officer informed him of the need for a forensic examination of the hard drive prior to any revocation hearing was strong evidence of Berger's understanding of the scope of his consent.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/14-3426/14-3426-2016-05-26.pdf?ts=1464274866>

United States v. Zamora-Garcia, 831 F.3d 979 (8th Cir. 2016)

An officer stopped Garcia's car after he saw something dragging underneath it. When the officer told Garcia of the dragging part, the officer noticed Garcia was extremely nervous and that Garcia's hands shook when he gave the officer his driver's license. After verifying Garcia's license, the officer asked Garcia for consent to search the car, which Garcia granted. When the officer opened the trunk, he saw the carpet had been glued to the floor. As a former automobile mechanic, the officer knew that car manufacturers generally do not adhere carpets to a vehicle's trunk in this manner. Instead, the officer suspected that the car had been altered to contain a hidden compartment. The officer also saw a large sum of cash in a bag under the luggage in the trunk. The officer then crawled underneath Garcia's car and saw a metal box had been welded to the underbody of the car, spanning the car's entire width. Unable to find a trapdoor to gain entry into this compartment, the officer decided to move the search to police headquarters. Garcia responded, "Okay," and "That's fine." After asking which officer he should follow, as another officer had arrived on scene, Garcia drove his car to headquarters.

Upon arrival at headquarters, the officers continued to search for the compartment's trapdoor. The officers eventually drilled a hole through the floor of the trunk into the hidden compartment. When the officers removed the drill bit, it was covered with green cellophane and a white, crystal-like powder. The officers located the trapdoor a short time later, pried it open, and discovered fourteen one-pound cellophane bags of methamphetamine. The government charged Garcia with possession with intent to distribute methamphetamine.

Garcia argued that the officers exceeded the scope of his initial consent when they had him drive his car to police headquarters to continue their search.

The court noted that the district court found the officer requested, rather than demanded, that Garcia allow the officers to conduct a more thorough search at headquarters. When Garcia responded "Okay," and "That's fine," and then asked which officer he should follow, the court

concluded that Garcia's consent to the continued search of his car at police headquarters was voluntary.

Next, the court recognized that Garcia's general consent to search his car did not allow the officers to drill through the floor of the trunk. The court found that "cutting" or "destroying" an object during a search requires either explicit consent for the destructive search or probable cause. In this case, because Garcia did not explicitly consent to drilling into the car's trunk, the officers had to establish probable cause to drill into the trunk to reach the hidden compartment. Probable cause to search exists when a reasonable person believes that contraband or evidence of a crime is present in the place to be searched.

The court held the officers established probable cause to believe that contraband would be present in the hidden compartment. First, the existence of the welded metal compartment, itself suggested the car was used for some illegal activity. Second, the officer drew from his twenty-eight years of patrol experience and his prior work as an automobile mechanic to conclude that the compartment served no lawful purpose. Third, the Eighth Circuit has repeatedly cited the existence of a hidden compartment in a vehicle as a significant factor supporting probable cause to conduct a destructive search. Fourth, the officer observed that Garcia was extremely nervous and his hands shook as he retrieved his driver's license from his wallet. Finally, the officer found a large sum of money in the trunk of Garcia's car.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2994/15-2994-2016-08-02.pdf?ts=1470150073>

United States v. Faler, 832 F.3d 849 (8th Cir. 2016)

The manager of an apartment complex called 911 and requested that police remove Faler from the complex because he was not a registered resident, and because the manager believed him to be a danger to the children in the complex. After verifying the manager's information from the 911 call and discovering that Faler was a registered sex offender, officers went to the apartment where Faler was living with Michael Parks.

An officer knocked on the door and Parks answered. Parks initially denied that Faler was in the apartment. However, as the officers continued talking with Parks, Faler stepped out from a back room and into view of the officers. One of the officers then asked Parks, "Mind if we come in?" In response, Parks opened the door wider, and moved out of the way. The officers entered the apartment where they interviewed Faler. The officers arrested Faler after they determined he was in violation of his sex offender registration requirements. As the officers were escorting Faler to their patrol car, Faler asked the officers to retrieve his medication from a backpack in the apartment. Inside the backpack, officers found pictures of Faler with little boys in "compromising positions," and a thumb drive. Officers obtained a warrant, searched the thumb drive, and discovered videos and images of Faler sexually abusing children.

The government charged Faler with production of child pornography.

Faler filed a motion to suppress the evidence found in his backpack, claiming the officers violated the *Fourth Amendment* by entering the apartment without Parks' consent. Faler argued it was only

because of this unlawful entry that the officers arrested him and eventually discovered evidence in his backpack.

The court disagreed. Officers may enter a residence if they receive voluntary consent from a person, such as Parks, who has authority over the residence. In addition, voluntary consent may be express or implied. To determine if a person has impliedly consented, the court must determine if a person's actions would have caused a reasonable person to believe that he consented. In this case, when Faler came out of a back room and into the officers' view, Parks motioned toward Faler and stepped aside so the officers could enter the apartment. The court noted that in other cases the Eighth Circuit has held that gestures and actions like those made by Parks in response to the officer's request constituted implied consent. Consequently, the court concluded the officer's entry into the apartment was lawful, as was the discovery of the evidence in the backpack.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3725/15-3725-2016-08-09.pdf?ts=1470756655>

United States v. Rodriguez, 834 F.3d 937 (8th Cir. 2016)

Officers went to Rodriguez's house to conduct a knock and talk interview because they suspected he was growing marijuana inside the house. When the officers knocked on the front door, Rodriguez opened the door and stepped outside onto the porch. One of the officers introduced himself and asked Rodriguez if they could step inside the house so the officers could ask him some questions. When Rodriguez asked the officer what he wanted to discuss, the officer told Rodriguez they were conducting an investigation related to the manufacturing of marijuana and that if nothing was going on inside the house, the officers would leave. Rodriguez did not verbally respond to the officer's comments, but instead immediately turned and entered the house. The officers followed Rodriguez inside, and Rodriguez did not object to their entry. Once inside the house the officers smelled the overwhelming odor of marijuana. When the officers conducted a protective sweep of the house, they saw marijuana plants, bags of marijuana, and an AK-47. The officers then obtained a warrant to search Rodriguez's house and seized over twenty firearms and evidence of a marijuana-growing operation. The government charged Rodriguez with a variety of firearm and drug offenses.

Rodriguez filed a motion to suppress the evidence seized from his house. Rodriguez argued he did not consent to the officers' warrantless entry and there was no lawful justification for the protective sweep.

The district court agreed and suppressed the evidence, concluding that Rodriguez did not consent to the officers' entry. Consequently, the court did not determine whether the protective sweep was lawful. The government appealed.

The Court of Appeals reversed the district court concerning issue of Rodriguez's consent. First, the court noted that a person may give valid consent to search as long as the consent is given voluntarily. In addition, consent may be expressly given or implied by the person's words, gestures, or conduct. Here, the court held it was reasonable for the officers to believe Rodriguez consented to their entry based on his behavior. Although Rodriguez did not expressly consent to the officers' entry, verbally or non-verbally, he did not try to close the front door or protest when

the officers followed him into the house. In addition, when the officer asked Rodriguez if they could step inside the house to speak, Rodriguez immediately opened the door wider with one hand and walked inside with his back to the officers. The court concluded an objectively reasonable officer could interpret that series of actions as an invitation to enter.

Because the district court never determined whether the protective sweep was lawful, the Court of Appeals remanded the case for the district court to decide that issue.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2723/15-2723-2016-08-25.pdf?ts=1472139060>

United States v. Morgan, 842 F.3d 1070 (8th Cir. 2016)

A police officer discovered a computer that offered child pornography by peer-to-peer file sharing. Later that day, the officer identified the computer's internet protocol (IP) address. Twenty-four days later, the officer determined the IP address was assigned to Morgan. Over seven weeks later, a state judge issued a search warrant for Morgan's home, seventy-five days after the IP address was discovered and fifty-one days after the officer connected it to Morgan. Five days later, officers executed the warrant at Morgan's home. The officers also arrested Morgan on an unrelated, outstanding warrant. The arresting officer seized Morgan's cell phone, and while handcuffing him, saw a tattoo on Morgan's wrist.

At the police station, Morgan requested his cell phone so he could contact his employer and his sister, and an officer allowed Morgan to use it. As Morgan scrolled through the contact list, he did not object as the officer stood next to him and viewed the screen on his cell phone. In addition, Morgan spontaneously shared some facts about some of the contacts, and in response, the officer wrote down several names and phone numbers.

During this time, a different officer found images of child pornography on a computer seized from Morgan's home. One image showed a man with a tattooed arm touching a female child's genitalia. The officer who found the images asked Morgan to lift the sleeve of his shirt so that he could photograph his tattoos. Morgan agreed, and without objection, lifted his sleeve. The officer photographed Morgan's tattoos, which matched the tattoos in the images on his computer.

Officers later identified a child from one of the images found on Morgan's computer. Morgan's public Facebook profile led to the profile of a woman that an officer remembered was one of Morgan's cell-phone contacts. The woman's public Facebook profile included an image of her daughter, who resembled the child in the image from Morgan's computer.

The government charged Morgan with child pornography related offenses.

Morgan filed a motion to suppress the evidence discovered by the officers.

First, Morgan argued that the information in the search warrant affidavit was stale because the officers did not apply for the warrant until seventy-five days after identifying his IP address and fifty-one days after associating the IP address to him. As a result, Morgan claimed the officers did not establish probable cause to believe that evidence of a crime would be located in his home at the time of the search.

The court disagreed, finding that periods much longer than seventy-five days have not rendered information stale in computer-based child pornography cases. In addition, the affidavit in support of the warrant attested that collectors of child pornography tend to retain images and that computer programs that download these images often leave file logs, which would tend to show the possession, distribution, or origin of the files.

Second, Morgan argued that the officer violated the *Fourth Amendment* by observing the information on the screen of his cell phone while Morgan scrolled through his contact list.

Again, the court disagreed. A *Fourth Amendment* search occurs when the government intrudes upon an area where a person has a reasonable expectation of privacy. However, when a person knowingly exposes something to the public, there is no protection under the *Fourth Amendment*. Here, the court concluded that Morgan had no reasonable expectation of privacy in his cell phone screen once he made it visible to the public by displaying it in the presence of an officer. The officer allowed Morgan to use his cell phone and Morgan did not object when the officer looked at the screen while Morgan scrolled through the contact list. In addition, the court noted that while this was happening, Morgan spontaneously shared information about his contacts with the officer.

Finally, Morgan argued that the officer violated the *Fourth Amendment* by taking photographs of the tattoos on his arm without a warrant.

A warrantless search is valid if the person subject to the search knowingly and voluntarily consents to it. In this case, the district court found that the officer asked Morgan to move his shirtsleeve so he could photograph Morgan's tattoos, and that Morgan agreed to do so. Based on these facts, the district court concluded that Morgan voluntarily consented to the officer photographing his tattoos and the court of appeals agreed.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-1525/16-1525-2016-12-01.pdf?ts=1480609860>

See: [United States v. Mendoza](#), 817 F.3d 695 (10th Cir. 2016)

Third Party Consent (Common Authority / Apparent Authority)

United States v. Casey, 825 F. 3d 1 (1st Cir. 2016)

Officers arrested Casey in connection with the death of an undercover police officer during a drug buy. While Casey was in custody, officers went to Casey's grandparents' house with whom he lived. Casey's grandfather, Rivera, told the officers Casey lived in the residence because Casey could not afford to live on his own. Rivera told the officers that he and his wife provided Casey's lodging and food for free, and that both had free access to Casey's unlocked room at all times. Casey's grandparents fully cooperated with the officers and readily gave both oral and written consent to search their home, to include Casey's bedroom. Inside Casey's bedroom, officers found evidence that connected Casey to the death of the undercover officer.

Casey filed a motion to suppress the evidence seized from his bedroom arguing that his grandparents lacked the authority to consent to the search.

The court disagreed. Without deciding whether Casey's grandparents had actual common authority to consent to a search of the bedroom, the court concluded the grandparents had apparent authority to consent to a search of Casey's bedroom. Apparent authority exists when the person giving consent does not have actual authority, but the officer reasonably believes that the person has actual authority to consent to the search.

Here, when the officers arrived, the door to Casey's bedroom was open and unlocked. In addition, Rivera told the officers Casey did not contribute to rent or food, and that he and his wife both had free access to Casey's bedroom. The court concluded it was reasonable for the officers to rely on Rivera's representation that he and his wife had actual common authority over Casey's bedroom, and therefore could consent to its search.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/13-1839/13-1839-2016-06-03.pdf?ts=1464976805>

United States v. Wright, 838 F.3d 880 (7th Cir. 2016)

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

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

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

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

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

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

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

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

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

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

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

Exigent Circumstances

Destruction of Evidence

United States v. Rivera, 817 F.3d 339 (7th Cir. 2016)

A confidential informant (CI) arranged to purchase cocaine from Duenas. The CI drove to Duenas' house, parked outside, went into the garage and discussed the transaction with Duenas and Rivera. After a short meeting, the CI went back outside to get the money for the purchase of the cocaine. However, instead of going back into the garage, the CI got into his car and drove away. The CI phoned the agents who were monitoring his movements and told them there was cocaine in Rivera's truck, which was parked inside Duenas' garage. The agents immediately went to Duenas' house where they arrested Duenas outside the open garage and Rivera inside it. The agents then searched the garage and seized two kilograms of cocaine from Rivera's truck. Between the CI's departure from the garage and the agents' arrival, approximately three minutes had elapsed.

The government charged Duenas and Rivera with conspiracy to possess and distribute cocaine.

The defendants filed a motion to suppress the evidence seized from Rivera's truck, arguing the agents' warrantless searches of Duenas' garage and Rivera's truck violated the *Fourth Amendment*.

The court disagreed. Once the CI told the agents that there was cocaine in Duenas' garage, the court found the agents had probable cause to search the garage. The agents then could have obtained a warrant to search the garage by including this information in their search warrant application to the magistrate judge. However, the court concluded exigent circumstances existed which made the agents' warrantless entry into Duenas's garage and subsequent search of the garage and Rivera's truck reasonable. Specifically, the court found the delay caused by the agents drafting the search warrant application and presenting it to a magistrate judge might have prompted Duenas and Rivera to move the drugs to another location once they realized the CI might not be returning to complete the transaction. The court stated, "The important point is that had time permitted, the agents would without question *have* obtained a warrant."

It is significant to note that the court rejected the agents' warrantless entry and search under the consent-once-removed doctrine upon which the district court relied to deny the defendants' motion to suppress the evidence. Under the consent-once-removed doctrine,

"If an informant is invited to a place by someone who has authority to invite him and who thus consents to his presence, and the informant while on the premises discovers probable cause to make an arrest or search and immediately summons help from law enforcement officers, the occupant of the place to which they are summoned is deemed to have consented to their presence."

The court added,

"At first glance the doctrine of "consent once removed" is absurd. If one thing is certain it's that Duenas and Rivera would never have consented to the entry of federal drug agents into Duenas's garage, where the drugs to be bought by the informant were stored. The doctrine thus cannot, despite its name, be based on consent."

Although the court considered the term "consent-once-removed" to be misnamed, the court recognized the doctrine to have some validity even though the agents' entry and searches here were valid under the doctrine of exigent circumstances. However, the court could not find a case that mentioned "consent-once-removed" in which the decision in favor of the government could not have been supported on other grounds such as actual consent, exigent circumstances, or inevitable discovery. In light of these decisions, the court was "inclined to think that the term 'consent-once-removed' is not only opaque, but expendable."

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-1740/15-1740-2016-03-16.pdf?ts=1458158466>

See: [United States v. Contreras](#), 820 F.3d 255 (7th Cir. 2016)

Emergency

United States v. Caraballo, 831 F.3d 91 (2d Cir. 2016)

Officers arrested Melissa Barratt for distribution of drugs. At the time, Barratt told the arresting officers she was extremely afraid of Caraballo, with whom she worked dealing drugs. Barratt told the officers Caraballo would “kill her” if he knew she cooperated with the officers and that Caraballo was a violent person with access to firearms. Even though the officers attempted to have Barratt cooperate with them in their ongoing investigation against Caraballo, she refused.

Two months later, officers discovered Barratt’s deceased body in a wooded area with a single gunshot wound to the back of her head. The officers suspected Caraballo in Barratt’s homicide. In addition, the officers were concerned for the safety of undercover officers and confidential informants who had infiltrated Caraballo’s organization within the last two months. Consequently, the officers believed it was necessary to locate Caraballo immediately.

The officers knew Caraballo’s cell phone numbers and considered applying for a warrant to have Sprint, the cell phone provider, “ping” or track Caraballo’s location through the global positioning system (GPS) of his two phones. While the officers believed they could obtain a warrant within a matter of hours, the officers knew, based on experience, that it could take Sprint several days or weeks to provide the GPS information requested in the warrant. Believing an emergency existed that involved a serious threat of death or serious bodily injury, the officers consulted with the county’s state attorney who agreed. As a result, the officers requested Sprint ping Caraballo’s cell phones without first obtaining a warrant.

Sprint pinged Caraballo’s phones and relayed location information obtained from one of the phones to the officers. Over the next ninety minutes, Sprint pinged Caraballo’s phone several times, allowing the officers to locate Caraballo as he drove in his car. After locating Caraballo, the officers conducted a brief visual surveillance before they initiated a traffic stop and arrested him.

Caraballo filed a motion to suppress evidence recovered following his arrest. Caraballo argued that the pinging of his cell phone constituted a warrantless *Fourth Amendment* search.

Without deciding whether the warrantless pinging of Caraballo’s cell phone constituted a *Fourth Amendment* search, the court concluded that exigent circumstances justified the officers in pinging Caraballo’s cell phone to determine his location.

First, when officers arrested Barratt, she told the officers she was afraid of Caraballo and feared that he would kill her if she cooperated with the officers. Barratt also told the officers Caraballo had violent tendencies and access to firearms. Consequently, when Barratt was found dead with a gunshot wound to the head, it was reasonable for the officers to link Caraballo to Barratt’s death. Second, Barratt’s death suggested that the officers’ investigation of Caraballo’s drug operation had been discovered, and the safety of undercover officers and confidential informants could be in jeopardy. Third, the officers did not have a reasonable opportunity to obtain a warrant for the search. Finally, the degree of intrusion into Caraballo’s privacy was very slight. The pinging of

Caraballo's cell phone occurred for less than two-hours, and when the officers located and identified Caraballo, the pinging immediately stopped.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/12-3839/12-3839-2016-08-01.pdf?ts=1470061805>

United States v. Toussaint, 838 F.3d 503 (5th Cir. 2016)

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

The government charged Toussaint with drug and firearm violations.

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

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

The court then held that the emergency-aid exception applied in this case; therefore, the officers were justified in stopping Toussaint. Here, the officers received what all parties agreed was a credible threat against a specific individual, who was located within a specific area of the city and was driving a specific vehicle. The court held that it was reasonable for the officers to believe the threat on Toussaint's life had not ended within the forty-five minutes it took to locate him; therefore, the emergency still existed that justified the traffic stop.

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

United States v. Roberts, 824 F.3d 1145 (8th Cir. 2016)

Police officers went to an apartment to locate a suspect involved in a deadly shooting the day before. When an officer knocked on the door and announced “police officers,” the door unexpectedly swung open. Rather than stand in the open doorway, providing easy targets, the officers entered the apartment. Inside the apartment, the officers found Roberts, sitting on a couch. The officers smelled the odor of burning marijuana and saw something green and leafy smoldering in an ashtray. The officers also saw a handgun on the couch.

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

Roberts argued the evidence seized from the apartment should have been suppressed because the officers’ warrantless entry into his apartment violated the *Fourth Amendment*.

The court disagreed. When the door opened unexpectedly after a hard “police knock,” the officers found themselves caught off-guard, isolated, and framed in an open doorway to an apartment they thought might contain an armed gunman. While the court commented that it had not previously considered an exigent circumstances case with facts similar to these, it concluded the officers’ concern for their safety when the apartment door opened was reasonable. Facing a split-second decision between entry and retreat, the court refused to hold the officers only reasonable response was to retreat.

Click for the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2642/15-2642-2016-06-08.pdf?ts=1465398087>

United States v. Conerd, 828 F.3d 1009 (8th Cir. 2016)

Police dispatch received a report that Conerd had just assaulted Travis Norton and that he was in the process of assaulting Megan Owens in the basement of his residence. The responding officer had arrested Norton in the past for drug-related offenses. The officer also knew that Owens, who was once romantically involved with Conerd, had reported multiple domestic-assault incidents over the prior year involving Conerd that occurred at his residence. In addition, the officer had received information from multiple informants and from another officer that Conerd might be in possession of a firearm. Finally, the officer believed Conerd had a closed-circuit camera system installed at his residence and that one of the cameras was aimed at the front door.

The officer arrived at Conerd’s residence at 11:30 p.m., and the only light the officer could see in was coming from a basement window, where Conerd was reportedly assaulting Owens. As the officer approached, he did not see or hear anything to indicate an assault taking place inside. However, the officer remained concerned for the safety of Norton and Owens, as well as for his own safety, because of Conerd’s history of domestic assaults and the possibility that Conerd possessed a firearm. In addition, the officer was concerned about the presence of a closed-circuit camera trained on the front door. Consequently, instead of knocking on the front door, the officer approached the basement window, and from a distance of approximately five or six feet, the officer saw into Conerd’s residence. The officer saw Conerd and Norton standing together in the basement and Norton raising a glass pipe to his mouth to ingest what the officer believed to be

illegal drugs. The officer went back to the police station and obtained a warrant to search Conerd's residence.

Officers searched Conerd's residence and seized a box of assorted ammunition. The government charged Conerd with being a felon and unlawful drug user in possession of ammunition.

Conerd filed a motion to suppress the evidence seized from his residence. Conerd argued the officer's warrantless entry onto the curtilage of his residence to look through the basement window violated the *Fourth Amendment*.

The court disagreed. The emergency-aid exception to the *Fourth Amendment's* warrant requirement allows an officer to enter a residence, to include the curtilage, without a warrant when the officer has a reasonable belief that an occupant is imminently threatened with serious injury.

Here, before he arrived, the officer was told that Conerd had assaulted Norton and was in the process of assaulting Owens in the basement of his residence. In addition, the officer was aware of Conerd's history of committing domestic violence assaults at his residence, and that Conerd might be in possession of a firearm. The officer was also aware that Conerd likely had a closed-circuit camera trained on the front door. Finally, when the officer arrived at Conerd's residence, the only light was coming from the basement, where Owens was supposedly being assaulted. Based on these facts, the court concluded it was objectively reasonable for the officer to believe that someone inside Conerd's residence was threatened with serious injury. Consequently, the court held the emergency-aid exception justified the officer's warrantless entry onto the curtilage of Conerd's residence and looking through the basement window.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3566/15-3566-2016-07-18.pdf?ts=1468855864>

Inspections (Administrative Searches)

United States v. Hamad, 809 F.3d 898 (7th Cir. 2016)

Cook County Department of Revenue agents used an intern to make an undercover purchase of cigarettes from Hamad's convenience store. At the time, a properly-taxed pack of cigarettes in Chicago cost \$8 or \$9; however, the intern purchased a pack of cigarettes for \$6. When the agents examined the pack of cigarettes they determined it did not bear the required Cook County tax stamp. Pursuant to a county ordinance that taxes and regulates the sale of cigarettes, the agents and the intern then entered Hamad's store, identified themselves and went behind the counter to examine the cigarette inventory to determine if there were additional unstamped packs. Behind the counter, the agents found approximately 1,500 loose hydrocodone pills in a candy jar and a handgun concealed in a velvet bag. After Hamad was arrested, he made several incriminating statements. The government charged Hamad with being a felon in possession of a firearm.

Hamad argued that the sale of an unstamped pack of cigarettes was insufficient justification for the warrantless search of his convenience store by the agents.

The court disagreed. Business owners have a reasonable expectation of privacy in commercial property with respect to traditional police searches as well as administrative inspections designed to enforce regulatory statutes. However, in this case, the county cigarette ordinance authorized the warrantless administrative search of Hamad's store. In addition, Hamad's store was subject to the administrative search exception to the *Fourth Amendment's* warrant requirement because his store sold cigarettes, whose sale has been closely regulated in Chicago for over 100 years. Finally, the county cigarette ordinance provided a constitutionally adequate substitute for a warrant because it limited the time of an inspection to regular business hours, and it limited the inspections to cigarettes, their packaging, and the tax stamps. The court noted the inspection of Hamad's store occurred during regular business hours and immediately after the purchase of a pack of unstamped cigarettes.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/14-3813/14-3813-2016-01-04.pdf?ts=1451941239>

Inventory Searches

United States v. Torres, 828 F.3d 1113 (9th Cir. 2016)

An officer arrested Torres for driving under the influence. The officer decided to impound Torres' car because it was located in the parking lot of a private apartment complex, and neither Torres nor his passenger lived in the complex. During the inventory search, another officer unlatched the lid of the engine's air filter compartment where he found a handgun. The government charged Torres with being a felon in possession of a firearm.

Torres filed a motion to suppress the handgun. Torres argued the officer's decision to impound his car was unreasonable under the *Fourth Amendment*.

The court disagreed, holding the officer's decision to impound Torres' car was reasonable under the *Fourth Amendment*, as it was consistent with Las Vegas Metropolitan Police Department (LVMPD) policy. In addition, the court held impounding Torres' car served the agency's legitimate community-caretaking function to promote other vehicles' convenient ingress and egress to the parking lot, and to safeguard Torres' car from vandalism or theft.

Torres also claimed the officer exceeded the scope of an inventory search by unlatching the lid of the air filter compartment.

Again, the court disagreed. First, once a vehicle has been legally impounded, officers may conduct an inventory search without a warrant. Officers conducting inventory searches must follow the standard procedures outlined by their agency. Although an inventory policy may give the searching officer significant discretion as to what areas should be searched, the policy cannot authorize officers to search for evidence of criminal activity under the pretext of conducting an inventory search.

Second, the court noted that the Supreme Court has repeatedly approved police policies that permit inventory searches of closed compartments within automobiles. Here, the LVMPD inventory policy clearly extends to the engine cabin of a vehicle, as the policy requires impounding officers to itemize personal property found during an inventory search on a standardized Vehicle Impound

Report that lists the engine, battery, and radiator among the 51 area on a vehicle to be searched. In addition, the air filter compartment was large enough to hold a firearm, and could be opened by lifting the hood and releasing the latches on the box. Finally, the officer who conducted the inventory search testified that he commonly checks the air filter compartment because, based on his training and experience, individuals hide contraband there such as narcotics and weapons.

Based on these facts, the court held the LVMPD inventory policy is reasonably designed to produce uniformity in inventory searches that protects owners of impounded vehicles from officers conducting inventory searches as a pretext to search for evidence of criminal activity. Consequently, the court held the officer acted within the guidelines of the LVMPD inventory policy when he unlatched the air filter compartment and discovered the firearm.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca9/14-10210/14-10210-2016-07-14.pdf?ts=1468515901>

Plain View Seizure

United States v. Turner, 839 F.3d 429 (5th Cir. 2016)

An officer stopped a car driven by Henderson for a traffic violation. During the stop, the officer discovered Turner, a passenger, had an outstanding warrant for his arrest. The officer ordered Turner to exit the car, and when he did, the officer saw an opaque plastic bag protruding from under the front passenger seat. The officer placed Turner in his patrol car and then asked Henderson what was inside the bag. Henderson handed the officer the bag, which contained over 100 gift cards. Henderson told the officer Turner bought the cards, but denied having a receipt for the purchase.

After the officer spoke with other officers about their experiences with stolen gift cards, the officer seized the cards as evidence of suspected criminal activity. A subsequent warrantless scan of the magnetic strips on the backs of the gift cards revealed that at least forty-three cards had been altered. Specifically, the numbers encoded on the magnetic strips did not match the numbers printed on the front of the cards.

The government charged Turner with aiding and abetting the possession of unauthorized access devices.

Turner filed a motion to suppress the gift cards.

First, Turner argued the warrantless seizure of the gift cards violated the *Fourth Amendment*.

The court disagreed. The court held that the officer conducted a valid plain view seizure of the gift cards. For a lawful plain view seizure, the officer must have lawful authority to be in the location from which he viewed the evidence, and the incriminating nature of the evidence must be "immediately apparent." The incriminating nature of an item is immediately apparent if the officer has probable cause to believe the item is either evidence of a crime or contraband.

The court held the officer had probable cause to believe the gift cards were contraband or evidence of a crime. First, the officer saw a plastic bag containing over 100 gift cards that appeared to have

been concealed under the front passenger seat. Second, Henderson admitted to not having receipts for the gift cards, and told the officer that he and Turner had purchased the gift cards from an individual who sold them “for a profit.” Finally, the officer conferred with other officers who had experience with large numbers of gift cards being associated with drug dealing, fraud, and theft.

Next, Turner argued that scanning the magnetic strips on the backs of the gift cards without first obtaining a search warrant violated the *Fourth Amendment*.

Again, the court disagreed. The court joined the other circuits that have considered this issue⁷ and concluded that Turner did not have a reasonable expectation of privacy in the information encoded on the magnetic strips on the back of the gift cards. First, companies that issue gift cards and credit cards encode a small amount of information in the magnetic strip on the backs of the cards, which can only be altered by using a device not commonly possessed by most people. Second, the purpose of gift cards and credit cards is to facilitate commercial transactions. Finally, third parties, such as cashiers, will often do the same kind of “swiping” of the gift and credit cards as law enforcement did in this case.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca5/15-50788/15-50788-2016-10-13.pdf?ts=1476401433>

Probationers / Parolees (Warrantless Searches)

United States v. Tessier, 814 F.3d 432 (6th Cir. 2016)

Tessier was on probation for a 2011 Tennessee felony conviction for sexual exploitation of a minor. Tessier’s probation order contained, among other things, the following “standard” search condition that applies to all probationers in Tennessee: “I agree to a search, without a warrant, of my person, vehicle, property, or places of residence by any Probation/Parole officer or law enforcement officer at any time.” In addition, Tessier signed the probation order immediately below the following, bolded language, “**I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME.**”

As part of a general sweep called “Operation Sonic Boom,” local police officers searched all residences of known sex offenders in the county. Without any suspicion that Tessier was engaged in criminal activity, officers entered Tessier’s residence without a warrant and seized his laptop computer. An officer then searched the laptop and found child pornography.

The government charged Tessier with possession of child pornography.

Tessier argued the search of his residence and computer violated the *Fourth Amendment*. Although Tessier signed the probation order in which he agreed to the warrantless search provision, he claimed the government needed to establish reasonable suspicion before subjecting him to a warrantless search under the order.

⁷ See *U.S. v. Bah*, 794 F.3d 617, 633 (6th Cir. 2015), [8 Informer 15](#); *U.S. v. De L’Isle*, 825 F.3d 426, 432-33, (8th Cir. 2016), [7 Informer 16](#).

The court disagreed, holding that a probationer whose probation order contains a search condition may be subjected to a search without reasonable suspicion of criminal activity. The court adopted the district court's finding that it was reasonable to conclude the search conditions in the probation order would further two primary goals of probation - rehabilitation and the protection of society from future criminal violations. In addition, the court agreed with the district court that the State's interest in protecting its young was paramount, and that child pornography was a serious crime.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-5284/15-5284-2016-02-18.pdf?ts=1455811279>

United States v. Doxey, 833 F.3d 692 (6th Cir. 2016)

Doxey was on parole for a drug offense. As a parolee in Michigan, Doxey was subject to a warrantless search if an officer had reasonable suspicion to believe that Doxey was violating the terms and conditions of his parole.

After receiving a tip from a confidential informant (CI) that Doxey was dealing heroin, officers conducted surveillance on him. During this time, officers saw Doxey engage in an apparent hand-to-hand drug transaction from his vehicle. The officers also knew Doxey had a suspended driver's license and could not lawfully drive a vehicle. The officers stopped Doxey and interviewed him. Based on Doxey's behavior during the encounter, the officers suspected Doxey was hiding drugs in his rectum.

The officers transported Doxey to the police station for a search. Doxey voluntarily pulled his pants and underwear down, but became combative when the officers tried to examine him. After the officers restrained Doxey they saw the corner of a clear plastic baggie protruding from Doxey's buttocks. One of the officers then "flicked" the baggie out from in-between Doxey's buttocks. It was later confirmed that the baggie contained eight grams of heroin.

Doxey filed a motion to suppress the heroin, arguing the warrantless invasive search by the officers violated the *Fourth Amendment*.

The court disagreed, holding the officers established reasonable suspicion that Doxey was violating the terms and conditions of his parole; therefore, he was subject to a warrantless search. First, the officers received information from a CI that Doxey was dealing heroin. The officers corroborated that information by conducting surveillance of Doxey, where they saw him engage in an apparent hand-to-hand narcotic transaction with another person. Second, after the transaction, the officers saw Doxey violate the law by driving with a suspended license.

Next, the court held the manner in which the officers conducted the search was reasonable. Even though the officer's flicking the baggie from in-between Doxey's buttocks was an invasion of privacy beyond that caused by a visual search, the court noted the baggie was removed from in-between Doxey's buttocks without any intrusion into his anal cavity, and without any injury, harm or pain to Doxey in a private environment.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/14-2600/14-2600-2016-08-18.pdf?ts=1471548637>

United States v. Makeeff, 820 F.3d 995 (8th Cir. 2016)

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

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

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

The government charged Makeeff with possession of child pornography.

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

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

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

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

United States v. Lara, 815 F.3d 605 (9th Cir. 2016)

Lara was placed on probation after being convicted of possession for sale and transportation of methamphetamine in violation of California law. Two probation officers arrived unannounced at Lara's home after he failed to report for an appointment with one of the officers. Lara's probation agreement required him "to submit [his] person and property, including any residence, premises container or vehicle under [his] control, to search and seizure at any time of the day or night by any law enforcement officer, probation officer, or mandatory supervision officer, with or without a warrant, probable cause, or reasonable suspicion." After announcing that they were at the house to conduct a probation search, one of the officers ordered Lara to sit on the couch while the other officer examined a cell phone he saw on a table next to the couch. The officer stated that it was his department's policy to search probationers' cell phones during home visits. The officer reviewed several text messages on Lara's phone and discovered messages containing three photographs of a handgun lying on a bed. The text messages suggested that Lara was attempting to sell the handgun to another individual. The officers searched Lara's house but they did not find the gun; however, the officers found a folding knife, the possession of which violated the terms of Lara's probation. The officers arrested Lara for possessing the knife and seized his cell phone. The officers submitted Lara's cell phone for forensic testing which revealed GPS coordinates embedded in the photographs of the gun. The officers eventually seized a loaded handgun that resembled the gun depicted in the photographs from Lara's mother's home.

The government charged Lara with being a felon in possession of a firearm and ammunition.

Lara filed a motion to suppress the gun and ammunition on the ground that it had been seized as the result of the illegal searches of his cell phone by the probation officer and the forensic lab.

The court agreed. Probationers do not completely waive their *Fourth Amendment* rights by agreeing as a condition of their probation to submit their person and property to search at any time upon request by a law enforcement officer. Specifically, any search made pursuant to a condition of probation must still meet the *Fourth Amendment's* reasonableness requirement. Consequently, the court concluded the issue was not solely whether Lara accepted the cell phone search as a condition of his probation, but whether the search that he accepted was reasonable.

First, because Lara was on probation, he had a reduced expectation of privacy concerning searches of his person and his property. Second, although Lara had a reduced expectation of privacy in these areas, Lara still had a substantial privacy interest in his cell phone and the data it contained. Third, Lara's probation agreement did not clearly authorize cell phone searches, and the terms "container" or "property" could not be interpreted so broadly to include Lara's cell phone and the information it contained. Finally, even though probationary searches support the government's interests in combating recidivism and integrating probationers back into the community, in this case, Lara's privacy interest in his cell phone and its data was greater.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca9/14-50120/14-50120-2016-03-03.pdf?ts=1457028170>

Protective Sweeps

United States v. Garcia-Lopez, 809 F.3d 834 (5th Cir. 2016)

Two police officers went to Garcia-Lopez's home to serve an arrest warrant on his son, Yonari. Garcia-Lopez told the officers that Yonari was not at home and then consented to the officers' request to search the residence for him. As the officers entered the home, they saw a light in a distant room and then the door shut. When the officers asked if anyone else was in the home, Garcia-Lopez told the officers that his other son, Ivan, was home. The officers went to Ivan's bedroom, and found the door locked. The officers ordered Ivan to open the door, which he did, and the officers entered. Ivan asked the officers if he could sit back down on his bed and finish his dinner, which had been interrupted. The officers allowed Ivan to do so and began to walk around the room. The officers saw two bullet-proof vests on Ivan's bed, which was comprised of a mattress and box spring sitting flush to the floor. Knowing that Ivan was a convicted felon, the officers arrested him for being a felon in possession of body armor in violation of 18 U.S.C. § (g)(1). The officers then resumed their search for Yonari and lifted the mattress from Ivan's bed, finding a short barrel shotgun and two rifles. The government indicted Ivan for several counts of being a felon in possession of a firearm.

Ivan argued the sawed off shot gun and rifles should have been suppressed because it was unreasonable for the officers to lift the mattress from his bed without consent or probable cause.

The court disagreed, holding the protective sweep exception supported the warrantless mattress search. A protective sweep is limited to a visual inspection of those places in which a person might be hiding and can last no longer than necessary to dispel the reasonable suspicion of danger, or no longer than it takes to complete the arrest and depart the premises.

Here, it was undisputed the officers were lawfully in Ivan's bedroom with a valid warrant for his brother's arrest. Once inside the bedroom, the officers testified they became suspicious after Ivan immediately requested to sit back down on his bed. As a result, the court concluded it was reasonable for the officers to believe that Yonari might have concealed himself beneath the mattress in a hollowed out box spring. Once the officers lifted the mattress, and dispelled their suspicion that Yonari was concealed underneath it, they made a lawful plain view seizure of the firearms.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/14-41392/14-41392-2016-01-11.pdf?ts=1452558630>

See: [United States v. Contreras](#), 820 F.3d 255 (7th Cir. 2016)

See: [United States v. Thompson](#), 842 F.3d 1002 (7th Cir. 2016)

United States v. Pile, 820 F.3d 314 (8th Cir. 2016)

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

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

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

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

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

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

Search Incident to Arrest (person)

See: [United States v. Hill](#), 818 F.3d 289 (7th Cir. 2016)

Requiring Motorists to Submit to Warrantless Blood or Breath Tests

Birchfield v. North Dakota, 579 U.S. ____ (2016), 136 S. Ct. 2160

In this opinion, the Court consolidated three separate cases in which the defendants, Birchfield, Bernard, and Beylund were arrested on drunk-driving charges.

Birchfield was arrested by a state trooper and advised of his obligation under North Dakota law to undergo blood alcohol concentration (BAC) testing. The trooper told Birchfield that if he refused to submit to a blood test, he could be charged with a separate criminal offense. Birchfield refused to let his blood be drawn, and the State charged him with a violation of the State refusal statute, a misdemeanor.

Bernard was arrested and transported to the police station. There, officers read him Minnesota's implied consent advisory, which stated that it was a crime to refuse to submit to a breath test to determine his BAC. Bernard refused to take a breath test and was charged with a violation of the State refusal statute.

On appeal, Birchfield and Bernard argued the State refusal statutes violated the *Fourth Amendment*.

Beylund was arrested and taken to a hospital. The officer read him North Dakota's implied consent advisory, informing him that if he refused to submit to a blood test he could be charged with a separate crime under the State refusal statute. Under these circumstances, Beylund consented to have his blood drawn. The test revealed a BAC of more than three times the legal limit.

On appeal, Beylund argued his consent to the blood test was coerced after the officer informed him that refusal to submit to the blood test could result in his being charged under the State refusal statute.

The Court accepted the cases and consolidated them for argument. The issue before the Court was whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.

Because breath tests are significantly less intrusive than blood tests, and in most cases amply serve law enforcement interests, the court concluded that a breath test, but not a blood test may be administered as a search incident to a lawful arrest for drunk driving. The court added that as in all cases involving reasonable searches incident to arrest, a warrant is not required in this situation.

The court then applied this rationale to the three cases. First, Birchfield was prosecuted for refusing a warrantless blood draw; therefore, the court held the search he refused could not be justified as a search incident to his arrest, or on the basis of the implied consent. As a result, the court held Birchfield had been threatened with an unlawful search and reversed his conviction.

Second, Bernard was criminally prosecuted for refusing a warrantless breath test. That test was a permissible search incident to Bernard's arrest for drunk driving. Consequently, the *Fourth*

Amendment did not require officers to obtain a warrant before demanding the test, and Bernard had no right to refuse it.

Finally, Beylund was not prosecuted for refusing a test. He submitted to a blood test after the officer told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could lawfully compel both blood and breath tests. The Court remanded Beylund's case to the state court to reevaluate the voluntariness of Beylund's consent given the partial inaccuracy of the officer's advisory to him.

For the court's opinion: http://www.supremecourt.gov/opinions/15pdf/14-1468_8n59.pdf

Qualified Immunity / Absolute Immunity / Civil – Municipal - Supervisor Liability / *Bivens*

Failure to Intervene

Kent v. Oakland County, 810 F.3d 384 (6th Cir. 2016)

Michael Kent, a physician, was caring for his father who suffered from a number of serious health problems. On September 1, 2013, Kent checked on his father and discovered that his father was no longer breathing, he had no pulse and that his pupils were fixed and dilated. Kent's wife called the non-emergency dispatch and reported the natural death of Kent's father. Approximately twenty-minutes later, Deputy Lopez and Firefighter-EMT Oryszczak arrived at Kent's house and were directed to an upstairs bedroom. EMT Oryszczak told Kent that in the absence of proper do-not-resuscitate paperwork, his emergency responder's protocol required him to attach an Automated External Defibrillator (AED) "to determine if there were signs of life" and "do everything they could for the patient." At this point, Kent began to yell at EMT Oryszczak and Deputy Lopez, telling them that they were not going to assault his dead father. Kent also told them that his mother, as the medical proxy for his father, could tell them what his father's wishes were. Deputy Maher arrived around this time and saw that Kent was gesturing with his hands and flailing his arms in the air. As the situation deteriorated, the deputies asked Kent to go downstairs and talk with them, but Kent refused, and demanded that the deputies leave his house. Deputy Lopez then pulled out his taser and told Kent that if he did not calm down, Lopez would tase him. Kent, who was standing with his hands raised in the air and his back to the wall told Deputy Lopez, "Go ahead and tase me, then." Deputy Lopez deployed his taser in dart-mode, striking Kent in the stomach and chest. Kent fell to the floor, and after the five-second tase cycle, Deputy Maher ordered Kent to present his hands for handcuffing. Kent complied. Although the deputies told Kent that he was not under arrest, Kent remained handcuffed, with the taser probes still attached, during fifteen to twenty minutes of questioning by another deputy who had arrived. EMTs then removed the probes, dressed Kent's wounds and Deputy Maher removed the handcuffs. During this time, an EMT conducted an AED assessment on Kent's father and pronounced him dead.

Kent sued Deputies Lopez and Maher under 42 U.S.C. § 1983, claiming the deputies violated his *Fourth Amendment* rights and under state law for assault and battery. Specifically, Kent claimed that Deputy Lopez's use of the taser constituted excessive force, and that Deputy Maher failed to intervene and prevent Deputy Lopez's use of excessive force.

The court held Deputy Lopez was not entitled to qualified immunity. The court found that Kent's actions did not constitute an immediate threat to the officer's safety that justified Deputy Lopez's deployment of the taser against him. While Kent might have prevented the EMT from fulfilling his perceived duties and refused the deputies' orders to calm down, it was undisputed that Kent was unarmed, and he made no evasive movements to suggest that he had a weapon. In addition, Deputy Lopez tased Kent while Kent had his hands raised in the air and his back against the bedroom wall. As a result, the court concluded Deputy Lopez's deployment of his taser against Kent was objectively unreasonable under the circumstances.

The court further held in September 2013 it was clearly established that to tase an individual who refused to comply with officers' commands to calm down and yelled at emergency responders, but

was never told he was under arrest, never demonstrated physical violence, and had his arms in the air and his back to the wall when tased, constituted excessive use of force.

Concerning Deputy Maher, the court concluded she was not entitled to qualified immunity. The court found that Deputy Maher was in the bedroom for the majority of the incident, she communicated with Deputy Lopez at the situation developed, and she was facing Kent when she heard Deputy Lopez warn Kent that he would use the taser. Consequently, the court concluded Deputy Maher had the “opportunity and the means to prevent” Deputy Lopez from deploying his taser against Kent.

Finally, the court denied Deputies Lopez and Maher qualified immunity on Kent’s state law assault and battery claims.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca6/14-2519/14-2519-2016-01-06.pdf?ts=1452101438>

Use of Force - (Detention / Arrest / Vehicle Pursuits / Search Warrant Execution)

White v. Pauly, 580 U.S. ___, 137 S. Ct. 538 (2017)

Two police officers went to Daniel Pauly’s house to investigate a road-rage incident that had occurred earlier that night. The officers made verbal contact with Daniel Pauly and his brother, Samuel, who remained inside the house. A third officer, Ray White, arrived at Pauly’s house several minutes later. As Officer White approached the house, someone from inside yelled, “We have guns,” and then Daniel Pauly stepped out the back door and fired two shotgun blasts. A few seconds later, Samuel Pauly opened a window and pointed a handgun in Officer White’s direction. Officer White shot and killed Samuel Pauly.

Pauly’s estate filed a lawsuit against the officers, claiming the officers violated the *Fourth Amendment* by using excessive force against him.

The District Court and the Tenth Circuit Court of Appeals denied the officers qualified immunity. The officers appealed to the United States Supreme Court.

The Court, which decided the case without oral arguments from the parties, vacated the Tenth Circuit Court of Appeals’ judgment and remanded the case.

First, the court noted that qualified immunity is appropriate when an officer’s conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. Qualified immunity was designed to protect “all but the plainly incompetent or those who knowingly violate the law.” Second, the court reiterated that “clearly established law” should not be defined “at a high level of generality,” but instead it must be “particularized” to the facts of the case. Third, the Court stated that the lower court failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the *Fourth Amendment*. Instead, the Court found that the lower court relied upon *Graham v. Connor*, *Tennessee v. Garner*, and other use of force cases, which only outline excessive force principles at a general level. The court added that this was not a case where it was obvious that there was a violation of clearly established law under *Garner* and *Graham*. Finally, the court found that Officer

White arrived to scene late, and it was not clearly established that the *Fourth Amendment* requires an officer to second-guess the earlier steps already taken by fellow officers in situations like the one Officer White faced here.

While the Court vacated the Tenth Circuit's judgment, the Court recognized that Pauly's estate could still prevail after the case was remanded. Specifically, the Court commented that Pauly's estate could claim that Officer White witnessed deficient performance by the other officers and should have realized that corrective action was necessary before he used deadly force. The Court took no position on this potential claim, as neither the District Court nor the Tenth Circuit had addressed the issue.

For the Court's opinion: https://www.supremecourt.gov/opinions/16pdf/16-67_2c8f.pdf

Stamps v. Town of Framingham, 813 F. 3d 27 (1st Cir. 2016)

Officers obtained a warrant to search an apartment where Stamps lived with his wife; his stepson; Joseph Bushfan, and another man named Dwayne Barrett. The warrant was issued on probable cause that Bushfan and Barrett were selling crack cocaine out of the apartment. The officers also suspected a third man, known to be an associate of Bushfan and Barrett, might be in the apartment. The officers believed all three men had ties to Boston gangs and their collective criminal histories included armed robberies, armed assaults and cocaine related charges. Prior to the execution of the warrant the SWAT officers received a briefing in which they were told that Stamps was likely to be in the apartment, that he was 68 years old, and that his criminal record only consisted of "motor vehicle" charges. Stamps was not suspected of being involved in any criminal activity at the apartment, nor any other crime and had no history of possessing a weapon. The officers were told Stamps posed no known threat to the officers executing the warrant.

Just after midnight on January 5, 2011, eleven SWAT team members entered Stamps' apartment to execute the search warrant. Two officers encountered Stamps in a hallway and ordered him to "get down." Stamps complied by lying down on his stomach with his hands raised near his head. At this point, Officer Duncan was directed to assume control of Stamps while the initial officers continued to search and clear the apartment. Duncan pointed his rifle at Stamps' head while Stamps remained prostrate on the hallway floor. During this time, the rifle's safety was off and Duncan had his finger on the trigger. While Stamps remained lying on his stomach, unarmed and fully compliant, Duncan accidentally pulled the trigger of his rifle and shot Stamps in the head. Stamps was transported to the hospital and pronounced dead.

Stamps' wife and son sued Duncan under 42 U.S.C. § 1983, claiming Duncan violated the *Fourth Amendment* by using excessive force to unreasonably seize Stamps when he shot Stamps in the back of the head.

Duncan argued he was entitled to qualified immunity. First, Duncan claimed that an accidental or unintentional shooting does not violate the *Fourth Amendment*. Second, even if his actions violated the *Fourth Amendment*, Duncan claimed the law was not clearly established that pointing a loaded rifle at another person's head with the safety off and his finger on the trigger violated the *Fourth Amendment*.

The court disagreed. To prevail on an excessive force claim, a plaintiff must first establish a *Fourth Amendment* seizure occurred and then show the seizure was unreasonable. Here, both parties agreed Stamps was seized under the *Fourth Amendment* when he complied with the officers' commands to get down on the floor in the hallway and remained lying on his stomach while Duncan pointed his rifle at Stamps' head. The court noted that even if Duncan shot Stamps accidentally, the unintentional or accidental use of deadly force after a person has been seized may violate the *Fourth Amendment* if the officer's actions that resulted in the injury were objectively unreasonable. In this case, the court concluded a reasonable jury could find Duncan's actions leading up to the shooting were objectively unreasonable and that Duncan used excessive force in violation of the *Fourth Amendment*.

Next, the court held that at the time of the shooting the state of the law was clear such that a reasonable officer in Duncan's position would have understood that pointing his loaded rifle at the head of a prone, non-resistant individual, with the safety off and a finger on the trigger, constituted excessive force in violation of the *Fourth Amendment*. Consequently, the court denied Duncan qualified immunity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-1141/15-1141-2016-02-05.pdf?ts=1454702411>

Johnson v. City of Philadelphia, 847 F.3d (3d Cir. 2016)

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

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

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

more than two inches, fired two shots into Newsuan's chest. Newsuan attempted to reach for the gun, and Dempsey shot him again in the chest. Still grappling, Newsuan reached for the gun again, and Dempsey shot him again. Newsuan collapsed face down and died.

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

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

First, the court concluded that once Newsuan began reaching for Dempsey's gun, Dempsey was justified in using deadly force to defend himself. Three witnesses to the altercation testified that Newsuan rushed at Dempsey, began violently grappling with him, and slammed Dempsey into multiple cars. All three witnesses agreed that Newsuan then attempted to grab Dempsey's gun out of its holster. At this point, there was a serious risk that Newsuan would kill Dempsey, and no reasonable juror could conclude that it was unreasonable for Dempsey to shoot Newsuan.

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

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

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

The court disagreed. First, the court did not reject the plaintiff's argument that official police department policies may be considered when determining the reasonableness of an officer's use of force.⁸ Second, the court noted that the totality of the circumstances analysis should include whether the officer's own reckless or deliberate conduct unreasonably created the need to use deadly force.

⁸ The court recognized that the federal circuit courts of appeal are split on the question of whether police department policies may be used to assess whether a seizure is reasonable under the *Fourth Amendment*.

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

While the court held that Officer Dempsey did not violate the *Fourth Amendment* during his encounter with Newsuan, it is worth noting the court's concluding comments.⁹

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

D.E. v. Doe, 834 F.3d 723 (6th Cir. 2016)

While driving in Michigan, nineteen-year old D.E. took a wrong turn and inadvertently ended up at the international border with Canada. When D.E. told the toll-booth operator of his mistake, the operator directed him to turn around, without crossing the border, and merge into a lane of traffic containing motorists arriving from Canada. The operator gave D.E. a laminated card to present at the Customs and Border Protection (CBP) booth, which indicated that D.E. was being allowed to turn around without entering Canada, and that D.E. was subject to inspection and search by a CBP official. At the primary inspection booth, D.E. presented the laminated card to a CBP officer and was directed to a secondary inspection area. At the secondary inspection area, two CBP officers searched D.E.'s car and found marijuana and drug paraphernalia. The CBP officers detained D.E. in a jail cell for approximately one-hour before a local police officer arrived to take him into custody.

⁹ The question of proximate causation in this case is made straightforward by the exceptional circumstances presented—namely, a sudden, unexpected attack that instantly forced the officer into a defensive fight for his life. As discussed above, that rupture in the chain of events, coupled with the extraordinary violence of Newsuan's assault, makes the *Fourth Amendment* reasonableness analysis similarly straightforward. Given the extreme facts of this case, our opinion should not be misread to broadly immunize police officers from *Fourth Amendment* liability whenever a mentally disturbed person threatens an officer's physical safety. Depending on the severity and immediacy of the threat and any potential risk to public safety posed by an officer's delayed action, it may be appropriate for an officer to retreat or await backup when encountering a mentally disturbed individual. It may also be appropriate for the officer to attempt to de-escalate an encounter to eliminate the need for force or to reduce the amount of force necessary to control an individual. Nor should it be assumed that mentally disturbed persons are so inherently unpredictable that their reactions will always sever the chain of causation between an officer's initial actions and a subsequent use of force. If a plaintiff produces competent evidence that persons who have certain illnesses or who are under the influence of certain substances are likely to respond to particular police actions in a particular way that may be sufficient to create a jury issue on causation. And of course, nothing we say today should discourage police departments and municipalities from devising and rigorously enforcing policies to make tragic events like this one less likely. The facts of this case, however, are extraordinary. Whatever the *Fourth Amendment* requires of officers encountering emotionally or mentally disturbed individuals, it does not oblige an officer to passively endure a life-threatening physical assault, regardless of the assailant's mental state.

D.E. filed a lawsuit against several CBP officers, claiming that they violated his *Fourth Amendment* rights by detaining him and searching his car. Specifically, D.E. argued that international travel is required for officers to conduct suspicionless searches at the border; therefore, because he never crossed the border, CBP officers unlawfully searched him and his car.

The court dismissed D.E.'s lawsuit, holding the CBP officers' actions were lawful under the border-search exception to the *Fourth Amendment's* warrant and probable cause requirements. First, the Supreme Court has held that routine searches at the border do not require a warrant or any level of suspicion, regardless of whether the motorist intends to cross the border or has mistakenly arrived at the border. Second, that D.E. subjectively did not intend to cross the border is irrelevant as well. There is no reliable way for the CBP officers to tell the difference between a motorist who has just crossed the border and a "turnaround" motorist who is at the border area by mistake. The court commented that it would be "dangerous and quite stupid" for CBP officers to assume that every traveler who claims to be at the border by mistake, or who presents an easily fabricated laminated card, is telling them the truth.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-2128/15-2128-2016-08-25.pdf?ts=1472144638>

Becker v. Elfreich, 821 F.3d 930 (7th Cir. 2016)

Police officers went to Brina Becker's home to arrest her son, Jamie Becker. Brina called to her son, who was upstairs, and told him to come downstairs, but he did not respond. The officers then summoned K-9 Officer Elfreich and his German Sheppard, Axel. After waiting 30 seconds without seeing nor hearing Becker, Elfreich released Axel and directed the dog to "find him." Axel encountered Becker as Becker reached a landing on the stairs and bit Becker's left ankle. Approximately two-seconds later, Elfreich saw Axel had bitten Becker, who had his hands on his head. Elfreich pulled Becker down the remaining three steps, placed his knee in Becker's back, and handcuffed him. Once Becker was handcuffed, Elfreich ordered Axel to release his grip. Becker was transported to the hospital and treated for injuries related to the dog bite.

Becker filed suit against Officer Elfreich, claiming Elfreich violated the *Fourth Amendment* by using excessive force to arrest him. Specifically, Becker argued that after he had surrendered with his hands on his head, Elfreich used excessive force by pulling him down the steps and placing his knee on his back while allowing Axel to continue to bite him.

Officer Elfreich argued he was entitled to qualified immunity.

The court held Officer Elfreich was not entitled to qualified immunity. The court found Elfreich's initial release of Axel to find Becker might have been justified because the officers believed Becker was concealing himself in the house. However, within two-seconds of releasing Axel, Elfreich saw Becker coming down the stairs to surrender with his hand above his head. Nonetheless, the court noted Elfreich continued to allow Axel to bite Becker, while pulling Becker down three steps and placing his knee on Becker's back and handcuffing him. The court concluded that once it became clear that Becker was not concealing himself, but was near the bottom of the staircase, it was unreasonable for Elfreich to pull Becker down the three steps and place a knee in his back while allowing Axel to bite Becker's leg.

The court further held that at the time of the incident it was clearly established that it was unreasonable for police officers to use significant force on a non-resisting or passively resisting suspect.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-1363/15-1363-2016-05-12.pdf?ts=1463065289>

Davis v. Clifford, 825 F.3d 1131 (10th Cir. 2016)

Officer Clifford decided to conduct a traffic stop after he discovered Davis had an active warrant for driving with a suspended license due to a failure to provide proof of insurance. After he activated his emergency lights, Clifford called for back-up assistance, and three other officers responded that they were en route. Davis pulled into a parking lot and turned off her car, and the other officers soon arrived, blocking Davis' car from all directions.

According to Davis, after being surrounded by police cars, she heard batons banging on her car. Fearing for her safety, Davis locked her doors and rolled up her window. Officer Clifford and Officer Fahlsing approached the driver's side door, and Clifford told Davis to step out of the car. Through a gap in the window, Davis asked why she had been pulled over and offered to show Clifford her license, insurance, and registration information. Davis then alleged Clifford told her, "You know why," and commanded her to "step the fuck out of the car." After the officers told Davis she was under arrest, and again ordered her to exit her car, Davis responded that she would get out of the car if the officers promised not to hurt her. When she did not immediately exit her car, Davis claimed Fahlsing shattered the driver's side window with his baton. Davis claimed that Clifford and Fahlsing then grabbed her by her hair and arms, pulled her through the shattered window, pinned her face-down on the broken glass outside the car, and handcuffed her.

Davis sued Officers Clifford and Fahlsing, claiming they used excessive force when they arrested her.

While recognizing that many of the material facts alleged by Davis were disputed by the officers, the court commented that it was required to view the facts in the light most favorable to Davis. Consequently, the court concluded the facts as alleged by Davis demonstrated that Clifford and Fahlsing used excessive force; therefore, they were not entitled to qualified immunity.

The court took the facts alleged by Davis and applied them to the factors outlined by the United States Supreme Court in *Graham v. Connor* to determine whether the officers' use of force was objectively reasonable. In *Graham*, to determine the objective reasonableness of an officer's use of force, the court found the following factors must be considered: 1) the severity of the crime, 2) whether the suspect poses an immediate threat to the safety of the officer or others, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The court concluded the severity of Davis' crime weighed against the use of anything more than minimal force because the charge underlying her arrest for a minor driving offense was a misdemeanor. Davis claimed that the officers shattered her car window and dragged her through

the broken glass by her arms and hair. The court found that this degree of substantial force was not proportional to the misdemeanor offense suspected.

The court found the second factor, whether Davis posed an immediate threat to the safety of the officers or others, weighed against Clifford and Fahlsing. The court noted there was no evidence that Davis had access to a weapon or that she threatened to harm herself or others.

The court held the third factor, whether Davis actively resisted or attempted to evade arrest, weighted slightly against Clifford and Fahlsing. Even though Davis did not immediately obey the officers' commands to exit her car, police cars surrounded Davis' car on all sides, so she could not have driven away. In addition, there was no evidence presented that Davis actually attempted to flee.

The court further held at the time of the incident it was clearly established that the use of disproportionate force to arrest an individual who had not committed a serious crime and who poses no threat to herself or others, constitutes excessive force.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/15-1329/15-1329-2016-06-13.pdf?ts=1465833689>

Vasquez v. Lewis, 834 F.3d 1132 (10th Cir. 2016)

Officers in Kansas stopped Vasquez's car because they could not read Vasquez's temporary tag, which was taped to the inside of the car's tinted rear window. After issuing Vasquez a warning, the officers requested consent to search Vasquez's car. When Vasquez refused, the officers detained Vasquez for approximately fifteen minutes until an officer with a drug dog arrived. The officers eventually searched Vasquez's car but did not discover any illegal items.

Vasquez filed a lawsuit against the officers arguing they violated his *Fourth Amendment* rights by detaining him and searching his car after he refused consent to search.

The officers filed a motion for summary judgment based on qualified immunity. The district court granted the officers' motion, holding that the officers did not violate clearly established law. Vasquez appealed.

The Tenth Circuit Court of Appeals reversed the district court. First, the court stated that it has repeatedly admonished law enforcement that once an officer has been assured that a temporary tag is valid, he should explain to the driver the reason for the initial stop and allow the driver to continue on his way without requiring the driver to produce his license and registration.

Second, the court noted the officers argued the following factors justified their warrantless search of Vasquez's car:

- (1) Vasquez was driving alone late at night;
- (2) he was travelling on I-70, "a known drug corridor";
- (3) he was from Colorado and was driving from Aurora, Colorado, "a drug source area";
- (4) the back seat did not contain items the officers expected to see in the car of someone moving across the country;
- (5) the items in his back seat were covered and obscured from view;
- (6) he had a blanket and pillow in his

car; (7) he was driving an older car, despite having insurance for a newer one; (8) there were fresh fingerprints on his trunk; and (9) he seemed nervous.

The court found it troubling that the officers relied heavily on Vasquez's status as a resident of Colorado, because Colorado is known to be home to medical marijuana dispensaries, to establish justification for the search. The court agreed with other circuits that have concluded the state of residence of a detained motorist is an "extremely weak factor at best because interstate motorists have a better than equal chance of traveling from a source state to a demand state." In addition, the court cautioned officers that:

It is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists, and time to stop the practice of detention of motorists for nothing more than an out-of-state license plate.

Finally, the court held that Vasquez's conduct and the circumstances surrounding the stop did not create reasonable suspicion, and the officers violated the Fourth Amendment when they searched Vasquez's car.

The court further held that at the time of the incident it was clearly established that the officers' conduct violated the *Fourth Amendment*. In 1997, the court ruled that officers under very similar circumstances did not have reasonable suspicion to detain a motorist after issuing a warning. In fact, the court commented that one of the officers sued in the 1997 case was one of the officers in the present case.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/14-3278/14-3278-2016-08-23.pdf?ts=1471968062>

Fish v. Brown, 838 F.3d 1153 (11th Cir. 2016)

Anthony Fish and Margo Riesco were involved in a relationship for approximately two years. After Fish ended the relationship, Riesco told Fish that she wanted to retrieve her personal belongings from Fish's house. Before going to Fish's house, Riesco stopped at the local sheriff's office and requested a law enforcement escort because she "feared for her safety." As a result, Deputy Harrison and Deputy Loucks were separately directed by a supervisor to meet Riesco at Fish's house.

The deputies met Riesco and followed her as she drove her car to the rear of Fish's house. Riesco parked next to Fish's vehicle, exited her car and walked up to a glass door that opened into a sunroom. The deputies followed Riesco as she opened the unlocked glass door and walked into the sunroom. Riesco then knocked on an interior wooden door and called out to Fish. Fish opened the wooden door, where he saw the deputies standing behind Riesco. Riesco greeted Fish and told him that she brought the deputies with her "to watch so I don't steal nothing of yours, okay?" Fish responded, "all right," and allowed Riesco and the deputies to enter his house. One of the deputies asked Fish what personal items Riesco had in his house, and Fish replied that everything Riesco left was in a drawer in a bedroom that adjoined the living room and kitchen area in which the parties were standing. From the kitchen area, Deputy Harrison saw a large revolver hanging in its holster from one of the bedposts through the open bedroom door. Deputy Harrison also saw a

number of other long guns under the bed. Deputy Harrison knew that Fish was prohibited from possessing firearms by the terms of a domestic violence injunction entered by a state court judge a month earlier. Deputy Harrison arrested Fish for possessing firearms in violation of the domestic violence injunction.

The criminal charges against Fish were eventually dismissed, and he filed a lawsuit against Deputies Harrison and Loucks. Among other things, Fish claimed the deputies violated the *Fourth Amendment* by entering his house without a warrant or consent.

The district court held that Deputies Harrison and Loucks were entitled to qualified immunity, and Fish appealed.

The Court of Appeals agreed with the district court and held the deputies were entitled to qualified immunity. The deputies followed Riesco around to the back of Fish's house where she parked next to Fish's vehicle. Riesco entered the sunroom through an unlocked door to the interior wood door and knocked. Consequently, the deputies reasonably could have believed that the sunroom was "impliedly open to use by the public" for the purpose of gaining access to the interior areas of the house.

Next, the Court of Appeals agreed with the district court, which found that Fish consented to the deputies entry into the interior of his house from the sunroom. Fish responded by saying "all right," when Riesco told him that she brought the deputies with her so she could make sure she did not steal anything from his house. By affirmatively responding to Riesco's introduction of the deputies, fish gave what any reasonable person would have considered explicit verbal consent for the officers to enter his house. In addition, neither deputy invoked his authority as a law enforcement officer by demanding entry or brandishing a weapon to obtain Fish's consent to enter. Instead, the deputies just followed Riesco into the house after Fish said it was "all right."

Finally, the Court of Appeals agreed with the district court, which held that the deputies made a plain view seizure of the firearms from Fish's house. After lawfully entering Fish's house, Deputy Harrison saw the firearms through an open bedroom door. The incriminating nature of the firearms was immediately apparent to Deputy Harrison, as he knew of the existence of the domestic violence injunction against Fish and that such injunctions prohibited the possession of firearms.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca11/15-12348/15-12348-2016-10-03.pdf?ts=1475512283>

Use of Force / Qualified Immunity – Use of Canines

Cooper v. Brown, 844 F.3d 517 (5th Cir. 2016)

An officer stopped Cooper on suspicion of driving under the influence (DUI). During the stop, Cooper fled on foot into a residential neighborhood. The officer did not pursue Cooper because there was a passenger in his patrol car, and because DUI is a misdemeanor offense. Instead, the officer requested backup, provided Cooper's description, and explained that Cooper was a DUI suspect on foot.

A short time later, Officer Brown arrived with his police dog, Sunny, a Belgian Malinois. Sunny quickly located Cooper hiding between two houses. Although the parties disputed whether Sunny initiated the attack on his own, or whether Officer Brown directed Sunny to attack Cooper, the following facts were not disputed after Sunny initially bit Cooper: Sunny continued biting Cooper for one to two minutes. During that time, Cooper did not attempt to flee or to strike Sunny. Officer Brown ordered Cooper to show his hands and to submit to him. When Officer Brown issued that order, Cooper's hands were on Sunny's head. Officer Brown saw Cooper's hands and knew that Cooper had no weapon. Officer Brown then ordered Cooper to roll onto his stomach, and Cooper complied. However, Officer Brown did not order Sunny to release the bite until after he had finished handcuffing Cooper. As a result of the bite, Cooper suffered severe injuries to his lower leg.

Cooper sued Officer Brown claiming that Brown's use of force was objectively unreasonable under the *Fourth Amendment*.

Officer Brown argued that he was entitled to qualified immunity, claiming his application of force against Cooper was objectively reasonable under the circumstances.

The court applied the factors outlined in *Graham v. Connor* to the facts in this case and held that it was objectively unreasonable for Officer Brown to allow Sunny to continue biting Cooper because Cooper was a compliant, non-threatening arrestee.

In *Graham*, the U.S. Supreme Court concluded the reasonableness of an officer's use of force depends upon the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

While the court found that DUI is a serious offense, which favored Officer Brown, the court held that the other factors weighted heavily in Cooper's favor.

First, no reasonable officer could conclude that Cooper posed an immediate threat to Officer Brown or others. Cooper was not suspected of committing a violent offense, and Officer Brown testified that the original officer, when calling for backup, had not warned that Cooper might be violent. In addition, Officer Brown could see Cooper's hands and knew he had no weapon. Finally, Brown's own expert testified that there was no evidence that would have led a reasonable officer to believe that Cooper was a threat.

Second, Cooper was not actively resisting arrest, attempting to flee, or trying to strike Sunny. The only act of "resistance" that Officer Brown identified was Cooper's failure to show his hands. However, at the time, Cooper's hands were visible to Officer Cooper on Sunny's head. Given that Sunny was still latched onto Cooper's leg at the time, Cooper's failure to raise his hands could not be characterized as "active resistance." The court added that even if Brown offered any resistance, it ended quickly, when Officer Brown ordered Cooper to roll onto his stomach, and Cooper complied with that order. At that point, no reasonable officer could believe that Cooper was actively resisting arrest; to the contrary, Cooper was actively complying, and Brown still did not command Sunny to release the bite. Finally, Officer Brown's own expert conceded that there was no reason for Officer Brown to permit Sunny to continue attacking once Cooper was on his stomach.

The court concluded that at the time of the incident it was clearly established that it was objectively unreasonable to subject a compliant, non-threatening arrestee to a lengthy dog attack.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/16-60042/16-60042-2016-12-27.pdf?ts=1482885035>

Use of Force / Qualified Immunity – Electronic Control Devices (ECDs)

Estate of Armstrong v. Village of Pinehurst, 810 F.3d 892 (4th Cir. 2016)

Police officers were dispatched to execute an involuntary commitment order that was in the process of being completed, and return Armstrong to the hospital after Armstrong walked out during a mental health evaluation. Three officers located Armstrong near an intersection outside the entrance to the hospital, approached him and engaged in a conversation with him. As soon as the officers learned the commitment order was complete, they surrounded Armstrong and approached him. Armstrong immediately sat down on the ground and wrapped himself around a four-by-four post that was supporting a stop sign. The officers tried to pry Armstrong's arms and legs off the post, but he was wrapped too tightly and the officers could not move him. The officers told Armstrong they had a commitment order and that if he did not let go of the post, he would be tased. After Armstrong refused to let go of the post, one of the officers deployed his taser in drive-stun mode five separate times over a period of approximately two minutes against Armstrong. Instead of having the desired effect; however, the tasing increased Armstrong's resistance. At this point, two hospital security officers arrived and assisted the three police officers in pulling Armstrong off the post and laying him face down on the ground. The officers cuffed Armstrong's hands behind his back and then placed him in leg shackles after he continued to kick at the officers. Once Armstrong was restrained, the officers left him face down in the grass while they collected themselves. Armstrong's sister, who witnessed the incident asked the officers to check on Armstrong after she noticed he was not moving. The officers immediately checked Armstrong, who did not appear to be breathing. The officers performed CPR and had Armstrong transported to the hospital where he later died.

Representatives of Armstrong's estate sued the officers pursuant to 42 U.S.C. § 1983, claiming the officers used excessive force when they seized Armstrong while attempting to execute the involuntary commitment order.

First, the court concluded the officers used unreasonably excessive force, in violation of the *Fourth Amendment*, when they removed Armstrong from the post.

While the court recognized that non-compliance with a police officer's lawful order justifies some use of force, the level of force that is justified depends on the risk posed by the non-compliant individual. In addition, the court noted that deploying a taser is a serious use of force, and that Fourth Circuit case law makes it clear that tasers are proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser. Finally, the court stated that "even non-compliance with police directives and non-violent physical resistance do not necessarily create a continuing threat to the officers' safety."

Applying these principles as well as the factors outlined in *Graham v. Connor* to the facts of the case, the court concluded the officers' use of force was not objectively reasonable. Specifically, the court found that Armstrong was not suspected of any criminal activity, he was stationary, non-violent and surrounded by police officers. Even though Armstrong would not allow the officers to pull his arms from around the post and refused to comply with orders to let go, a reasonable officer would have perceived a "static stalemate," and not immediate danger justifying the deployment of a taser. Consequently, the court held that immediately tasing a non-criminal, mentally ill individual, who seconds before had been conversational, was not a proportional response to Armstrong's degree of resistance.

Second, while "the officers were treading close to the constitutional line," the court held they were entitled to qualified immunity because Armstrong's right not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly established at the time of the incident. At the time, case law held that it was unreasonable to tase suspects after they had been secured, but in this case the officers did not tase Armstrong after he was secured.

Nevertheless, the court took the opportunity to clarify when the deployment of a taser constitutes excessive use of force, stating,

A taser, like "a gun, a baton, . . . or other weapon," is expected to inflict pain or injury when deployed. It, therefore, may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser. The subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance -- even when that resistance includes physically preventing an officer's manipulations of his body. Erratic behavior and mental illness do not necessarily create a safety risk either. To the contrary, when a seizure is intended solely to prevent a mentally ill individual from harming himself, the officer effecting the seizure has a lessened interest in deploying potentially harmful force.

Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser in the face of stationary and non-violent resistance to being handcuffed, those officers use unreasonably excessive force. While qualified immunity shields the officers in this case from liability, law enforcement officers should now be on notice that such taser use violates the *Fourth Amendment*.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca4/15-1191/15-1191-2016-01-11.pdf?ts=1452542430>

Kent v. Oakland County, 810 F.3d 384 (6th Cir. 2016)

Michael Kent, a physician, was caring for his father who suffered from a number of serious health problems. On September 1, 2013, Kent checked on his father and discovered that his father was no longer breathing, he had no pulse and that his pupils were fixed and dilated. Kent's wife called the non-emergency dispatch and reported the natural death of Kent's father. Approximately twenty-minutes later, Deputy Lopez and Firefighter-EMT Oryszczak arrived at Kent's house and

were directed to an upstairs bedroom. EMT Oryszczak told Kent that in the absence of proper do-not-resuscitate paperwork, his emergency responder's protocol required him to attach an Automated External Defibrillator (AED) "to determine if there were signs of life" and "do everything they could for the patient." At this point, Kent began to yell at EMT Oryszczak and Deputy Lopez, telling them that they were not going to assault his dead father. Kent also told them that his mother, as the medical proxy for his father, could tell them what his father's wishes were. Deputy Maher arrived around this time and saw that Kent was gesturing with his hands and flailing his arms in the air. As the situation deteriorated, the deputies asked Kent to go downstairs and talk with them, but Kent refused, and demanded that the deputies leave his house. Deputy Lopez then pulled out his taser and told Kent that if he did not calm down, Lopez would tase him. Kent, who was standing with his hands raised in the air and his back to the wall told Deputy Lopez, "Go ahead and tase me, then." Deputy Lopez deployed his taser in dart-mode, striking Kent in the stomach and chest. Kent fell to the floor, and after the five-second tase cycle, Deputy Maher ordered Kent to present his hands for handcuffing. Kent complied. Although the deputies told Kent that he was not under arrest, Kent remained handcuffed, with the taser probes still attached, during fifteen to twenty minutes of questioning by another deputy who had arrived. EMTs then removed the probes, dressed Kent's wounds and Deputy Maher removed the handcuffs. During this time, an EMT conducted an AED assessment on Kent's father and pronounced him dead.

Kent sued Deputies Lopez and Maher under 42 U.S.C. § 1983, claiming the deputies violated his *Fourth Amendment* rights and under state law for assault and battery. Specifically, Kent claimed that Deputy Lopez's use of the taser constituted excessive force, and that Deputy Maher failed to intervene and prevent Deputy Lopez's use of excessive force.

The court held Deputy Lopez was not entitled to qualified immunity. The court found that Kent's actions did not constitute an immediate threat to the officer's safety that justified Deputy Lopez's deployment of the taser against him. While Kent might have prevented the EMT from fulfilling his perceived duties and refused the deputies' orders to calm down, it was undisputed that Kent was unarmed, and he made no evasive movements to suggest that he had a weapon. In addition, Deputy Lopez tased Kent while Kent had his hands raised in the air and his back against the bedroom wall. As a result, the court concluded Deputy Lopez's deployment of his taser against Kent was objectively unreasonable under the circumstances.

The court further held in September 2013 it was clearly established that to tase an individual who refused to comply with officers' commands to calm down and yelled at emergency responders, but was never told he was under arrest, never demonstrated physical violence, and had his arms in the air and his back to the wall when tased, constituted excessive use of force.

Concerning Deputy Maher, the court concluded she was not entitled to qualified immunity. The court found that Deputy Maher was in the bedroom for the majority of the incident, she communicated with Deputy Lopez at the situation developed, and she was facing Kent when she heard Deputy Lopez warn Kent that he would use the taser. Consequently, the court concluded Deputy Maher had the "opportunity and the means to prevent" Deputy Lopez from deploying his taser against Kent.

Finally, the court denied Deputies Lopez and Maher qualified immunity on Kent's state law assault and battery claims.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/14-2519/14-2519-2016-01-06.pdf?ts=1452101438>

Perea v. Baca, 817 F.3d 1198 (10th Cir. 2016)

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

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

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

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

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

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

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

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

Wate v. Kubler, 839 F.3d 1012 (11th Cir. 2016)

James Barnes and his aunt, Paula Yount, went to the beach to conduct a baptismal ritual. While in the water, Barnes, who was 5 feet 10 inches tall and weighed 290 pounds, began acting erratically by flailing his arms and yelling loudly about a demon. Officer Tactuk responded to the disturbance and spoke with Yount about the situation. Officer Tactuk ordered Barnes out of the water, believing that he had probable cause to arrest Barnes for battery on Yount. Barnes refused, and a violent struggle ensued between Officer Tactuk and Barnes. After approximately five-minutes, Officer Tactuk pulled Barnes from the water, and with assistance from three bystanders, secured Barnes in handcuffs. Officer Tactuk radioed for assistance, stating that he had a violent, mentally ill person in custody. Although handcuffed, Barnes continued to struggle, and Officer Tactuk deployed pepper spray into Barnes' face.

A short time later, Officer Kubler arrived. At this point, Barnes was lying on his back, screaming, yelling and struggling with Officer Tactuk, who was straddling him. Officers Kubler and Tactuk rolled Barnes onto his stomach so they could re-position the handcuffs. Barnes continued to resist by kicking the officers and biting Officer Tactuk's hand. Officer Kubler warned Barnes to stop resisting, or he was going to tase Barnes. Barnes ignored Officer Kubler and continued to resist. Officer Kubler issued Barnes a second warning, which he ignored. Officer Kubler then deployed his Taser against Barnes. Officer Kubler activated his Taser against Barnes five times for 5, 3, 5, 4, and 5 seconds respectively, over a two-minute period. By this time, Barnes had stopped moving and did not appear to be breathing. The officers removed the handcuffs and began to administer CPR on Barnes. Barnes was transported to the hospital where he died two days later.

Barnes personal representative, Wate, filed a lawsuit against Officers Kubler, Tactuk and their respective agencies. Wate claimed the officers violated the *Fourth Amendment* by using excessive force against Barnes. After the state agencies and Officer Tactuk settled with Wate, those claims were dismissed. Officer Kubler filed a motion for summary judgment, claiming that he was entitled to qualified immunity.

The district court held that Officer Kubler was not entitled to qualified immunity, and Kubler appealed.

To prevail against an officer's motion for summary judgment based on qualified immunity, a plaintiff must allege the officer's conduct was unconstitutional, and that the law was clearly established so as to provide the officer fair warning that such conduct was unconstitutional. In addition, the court is bound to consider the facts as alleged by the plaintiff to be true. The court does not weigh the evidence presented by the parties, nor does it determine which witnesses to believe if conflicting accounts of an incident are provided, as those are both functions of the jury.

Against this backdrop, the Court of Appeals agreed with the district court that Officer Kubler was not entitled to qualified immunity. The court noted that the critical period to determine whether Officer Kubler's use of the Taser on Barnes constituted excessive force spanned two minutes, from just before Kubler deployed the Taser until the time of the fifth activation. While witness accounts varied, several witnesses testified that Barnes had stopped resisting and had become still during this period. However, Officers Kubler and Tactuk testified that Barnes continued to resist violently throughout all activations of the Taser. Considering the evidence as alleged by the plaintiff to be true, the record in the district court established that while the first or second Taser deployment might have been reasonable, there was competent unambiguous evidence presented that by the third tasing, Barnes was handcuffed, immobile and no longer resisting. Consequently, a reasonable officer in Kubler's position would conclude that Barnes did not pose a threat to the officers and further shocks were unnecessary. The court found that if the jury credited this version of events, it could find that Officer Kubler's continued deployment of his Taser against Barnes constituted an unreasonable use of force.

The court further held that at the time of the incident, it was clearly established law that it was unreasonable to repeatedly deploy a Taser against a handcuffed, non-resisting person.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca11/15-15611/15-15611-2016-10-12.pdf?ts=1476280884>

Non-Use of Force Situations (Seizure of Property – Shooting Dogs During S.W. Execution)

Brown v. Battle Creek Police Dep't., 844 F.3d 556 (6th Cir. 2016)

Officers obtained a warrant to search Danielle Nesbitt's residence for drugs and drug-related evidence. In the search warrant affidavit, the officer stated he had received information indicating that Vincent Jones, the father of Nesbitt's child lived at the residence and was distributing controlled substances from inside the residence. Nesbitt owned the home and allowed her mother, Cheryl Brown, and Mark Brown to stay in the basement of the residence.

Later that day, officers and members of the city's Emergency Response Team (ERT), conducted a briefing prior to executing the search warrant. At the briefing, the officers discussed Jones' extensive criminal history, which included drug, firearm, and gang-related offenses. The officers knew that Jones was a member of a close-knit, violent gang, and that Jones was rarely by himself. During the briefing, the officers had no information concerning the presence of dogs at Nesbitt's residence.

After the briefing, officers and members of the ERT went to Nesbitt's residence. On the way, the officers discovered that other officers had detained Jones at another location. When the officers arrived at Nesbitt's residence, they encountered Mark Brown in the front yard and detained him. During this time, other officers went to the front door, where they saw two dogs through the front window standing on a couch. One dog was a large brown pit bull, weighing approximately 97 pounds, and the second dog was a smaller white pit bull, weighting approximately 53 pounds. One of the officers testified that the dogs were barking aggressively, digging, pawing, and jumping up at the window. After the officers breached the front door with a ram, the brown pit bull jumped off

the couch and lunged at an officer, while the white pit bull went down the stairs into the basement. The officer shot the brown pit bull, which then retreated down the stairs to the basement. The officer went down the stairs into the basement and shot the brown pit bull as the dog stood at the bottom of the staircase, barking at the officers. The officer then shot the white pit bull while it was standing in the basement barking at the officers. After being shot, the white pit bull ran into the back corner of the basement, where another officer shot it because it started to move out of the corner in his direction. After being shot by the officers, the dog ran behind the furnace. One of the officers stated that because of the “numerous holes in the dog,” and because he did not want to see it suffer, he fired one last shot to put the dog out of its misery.

The Browns sued the officers, claiming that the officers violated the *Fourth Amendment* by unlawfully killing their dogs.

First, the court held that a dog is property, and the unreasonable seizure of that property is a violation of the *Fourth Amendment*.

Second, the court held that at the time of the incident, it was clearly established that unreasonably killing a person’s dog was an unconstitutional seizure of property under the *Fourth Amendment*.

Third, the court held that a police officer’s use of deadly force against a dog while executing a warrant to search a home for illegal drug activity is reasonable under the *Fourth Amendment* when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer’s safety. After applying this standard to the facts of the case, the court concluded that the two pit bulls posed an imminent threat to the officers; therefore, the officers acted reasonably in shooting and killing the dogs. The officer shot the first dog after it lunged at the officer after he breached the front door. Afterward, the dog went into the basement where it prevented the officers from safely sweeping the basement for any individuals that might be hiding there. The officers shot the second pit bull while it was standing in the middle of the basement, barking at the officers. The court concluded that like the first dog, the second dog prevented the officers from safely sweeping the basement for anyone that might be hiding there. In addition, the court found that Vincent Jones posed a serious threat to the officers’ safety given his criminal history, known gang affiliations, possession and use of firearms, and the fact that he was known to be actively distributing cocaine and heroin from the residence. Although the officers discovered that Jones had been detained as they were en route to the residence, the officers knew it was highly likely that other members of the gang could be in the residence at the time of the search warrant execution.

The Browns also claimed the City was liable for damages because it failed to adequately train officers on how to recognize whether a dog is dangerous and how to use non-deadly methods to restrain dogs during search warrant executions.

The court disagreed. First, the court commented the Brown’s claim could not succeed because the officers lawfully seized the dogs during the execution of the search warrant. Second, the Browns failed to provide any evidence demonstrating prior instances of unconstitutional dog shootings by the City’s police officers, or that the City knew about, sanctioned, or encouraged an unofficial “tally system” among the officers concerning dog shootings.

Finally, the Browns claimed the officers acted unreasonably by breaching the front door with a ram when Mark Brown was present, and offered the front door key to the officers prior to the breach.

Again, the court disagreed. Although Vincent Jones had already been detained, the officers did not know what other gang members might be inside the residence. In addition, the officers were not required to use keys provided by Brown because the officers would have no way of knowing if they were the correct keys. If Brown had given officers the wrong keys, the resulting delay could have given someone inside the house the opportunity to destroy evidence or time to prepare an attack on the officers.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/16-1575/16-1575-2016-12-19.pdf?ts=1482166836>

Fifth Amendment

Due Process

Identification Procedure (Photo Array / Show-Ups)

United States v. Constant, 814 F.3d 570 (1st Cir. 2016)

After Adam Dennis was involved in an argument with a man outside his sister's apartment, someone discharged a firearm into the apartment. Officers interviewed Dennis, who described the individual with whom he had argued as a "black guy" with "dreadlocks" who was wearing a baseball hat and jewelry. After receiving information from other witnesses, officers suspected Constant might be the shooter. The officers located Constant, a black male with long dreadlocks, and arrested him on an outstanding warrant on an unrelated matter. Constant denied shooting into the apartment, but admitted holding the firearm for another person.

An officer later met with Dennis who agreed to view a photo array in an attempt to identify the person who shot into the apartment. Just before Dennis viewed the array, the officer removed Constant's photograph from one folder and placed it without apparent concealment into a second folder as Dennis watched closely. The officer then removed six photographs from the second folder, placing them on a table, and centering Constant's photograph directly in front of Dennis. Dennis viewed the array for a few seconds, then singled out Constant's photograph and stated, "I'm guessing it's him, that would be the one I'd be putting my money on, either him or him," as he pointed to another photograph. The officer tapped Constant's photograph with his finger and asked Dennis, "So you think it's him right here?" Dennis replied, "Yeah." The officer had Dennis sign and date Constant's photograph, and told Dennis the person he chose was the suspect the officers had in custody. The officer had videotaped the entire photo array process and interview with Dennis.

The government indicted Constant for being a felon in possession of a firearm.

Constant moved to suppress Dennis' in-court identification of Constant as the man with whom he had argued on the night of the shooting. Constant claimed the officer's photo array procedure violated Constants' right to due process.

The court disagreed. While it was undisputed the identification procedure used in this case was impermissibly suggestive, the United States Supreme Court has held witness identifications that follow impermissibly suggestive police conduct are not automatically suppressed. Whether the identification evidence must be suppressed is determined by the reliability of the identification, notwithstanding the suggestive actions of the police. The Court outlined five factors to be considered when trying to determine the reliability of such an identification following impermissibly suggestive police conduct: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

In this case, the court concluded Dennis' identification of Constant was reliable, and the admission of this identification evidence did not violate Constant's due process rights. First, the court noted Dennis had a significant, face-to-face, five to ten minute conversation with the suspect less than

twenty-four hours before he viewed the array, which included Constant's photograph. Next, the court recognized that Dennis clearly hesitated to pick Constant as the person with whom he had argued, even with the officer's impermissibly suggestive behavior. However, the court found it significant the entire photo array procedure containing all of the suggestive conduct had been recorded and viewed by the jury. As a result, the court concluded the jurors' ability to see for themselves the entire identification procedure, including the officer's suggestive conduct allowed them to assess Dennis' reliability.

Finally, the court found the evidence in the case, other than Dennis' identification, strongly implicated Constant, and Constant's motive to falsely admit possession of the firearm was "thin."

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/14-1066/14-1066-2016-03-03.pdf?ts=1457015405>

United States v. Casey, 825 F. 3d 1 (1st Cir. 2016)

Officers arrested Casey in connection with the death of an undercover police officer during a drug buy.

Casey claimed a photo-array identification made by a witness was unduly suggestive; therefore, it should have been suppressed. Specifically, Casey argued that he was the darkest-skinned, black, non-Latino man in the array and the only individual pictured with a distinct, long, thin, facial structure.

The court disagreed, holding the circumstances surrounding the photo array identification were not unduly suggestive. First, the array contained six black and white photographs. Second, while Casey had the darkest complexion among them, each individual could have been described as black, and they shared relatively similar facial features, a near-identical haircut, and groomed eyebrows. In addition, the array displayed no names and bore a disclaimer in Spanish and English stating that the person the witness saw may or may not appear among the presented photographs.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/13-1839/13-1839-2016-06-03.pdf?ts=1464976805>

United States v. Robinson, 844 F.3d 137 (3d Cir. 2016)

A police officer prepared a photo array¹⁰ that included Robinson's photograph and showed it to the victim of an armed robbery. The witness identified Robinson from the photo array, and the government charged Robinson with robbery.

Robinson argued the photo array that was used to identify him violated the *Due Process Clause* of the *Fifth Amendment* because it was unduly suggestive. Specifically, Robinson claimed that his

¹⁰ On January 6, 2017, the United States Department of Justice, Office of the Deputy Attorney General issued a memorandum entitled, Eyewitness Identification: Procedures for Conducting Photo Arrays. For the DOJ memo: <https://www.justice.gov/opa/press-release/file/923201/download>

photograph was noticeably lighter than the others, and that he was the only one wearing a shirt with a collar.

The suggestiveness of a photo array depends on several factors, to include whether the defendant's photograph is so different from the other photographs that it suggests the defendant is the one who committed the crime. The Court of Appeals agreed with the District Court, which held that the differences in the photographs were "slight," and were not unduly suggestive. The court found that the difference in lighting was "within the range of variation of all the photographs, some of which are darker than the others," while the presence of a collar did not stand out among the "variation in necklines of the shirts" in the array's other photographs.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca3/15-1402/15-1402-2016-12-19.pdf?ts=1482175812>

United States v. House, 823 F.3d 482 (8th Cir. 2016)

Police officers arrested House after several witnesses reported that he had pointed a handgun at another man near a school. After the officers arrested House, Taylor Hruska approached the officers and identified House as the man she saw pointing the gun. At the time, House was handcuffed and sitting in the back of the officers' patrol car.

Afterward, a federal agent developed a photographic lineup to show Hruska. The agent used a computer program that compared House's booking photograph to photographs of other individuals booked into the same jail. The agent entered House's physical characteristics into the program to find individuals with similar features and created a photographic lineup that contained color booking photographs of six individuals. When the agent showed Hruska the photographic lineup, she immediately identified House's photograph as the man she saw pointing the gun.

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

House filed a motion to suppress Hruska's identification of him, arguing that because he was the only individual in the photographic lineup with long hair and a ponytail, the lineup was impermissibly suggestive.

The court disagreed. The photographic lineup displayed six photographs of men wearing black and white striped jail clothing. The photographs were all proportional in size, and the background color and lighting was consistent.

The court noted all of the photographs depicted men that appeared to be approximately the same age and looked similar, as they all had brown eyes, darker complexions, and dark brown hair. Although their hair varied in length, with two having short hair, three having "afro-style" hair, and one man, House, appearing to have a ponytail, the court added that reasonable variations in hair length or style do not automatically render a photographic lineup impermissibly suggestive. In this case, while the ponytail was noticeable in House's photograph, it was not prominently displayed and even appeared as though it could be a shadow. Consequently, the court concluded the fact that House was the only individual pictured with a ponytail did not render the photographic lineup unduly suggestive.

House also argued that Hruska's identification of him while handcuffed in the back of the officer's patrol car was impermissibly suggestive.

Again, the court disagreed. The court found that Hruska had ample opportunity to view House at the time of the crime, and Hruska largely devoted her attention to observing House until the officers arrested him a short time later. As a result, the court concluded Hruska's identification of House shortly after the crime was not impermissibly suggestive.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1175/15-1175-2016-05-23.pdf?ts=1464015803>

United States v. Merrell, 842 F.3d 577 (8th Cir. 2016)

Law enforcement officers found photographs containing child pornography on computers that belonged to Travis Guenther. In some of the photographs, a woman's hands are visible touching a minor girl inappropriately. Guenther told officers Merrell had sent him the photographs of the minor girl and that Merrell had produced them at his request.

The officers obtained a warrant for the search of "the person of Roxanne Merrell, specifically body views and photographs of her hands." Officers then took Merrell to the police station and recorded 47 photographs of her hands.

The government charged Merrell with production of child pornography.

Merrell filed a motion to suppress the 47 photographs of her hands taken during the execution of the search warrant. Merrell argued that the officers violated the *Fourth Amendment* because they exceeded the scope of the search warrant.

The court disagreed. While Merrell was correct that the *Fourth Amendment* requires a warrant to describe with particularity "the things to be seized," the court stated that officers are not required to explain the precise manner in which search warrants are to be executed. Courts generally leave the "details of how best to proceed" with the execution of a search warrant to the judgment of the officers responsible for the search. Here, the warrant authorized the officers to search "the person of Roxanne Merrell, specifically body views and photographs of her hands." The court concluded the manner in which the officers carried out the search did not exceed the scope of the warrant.

Merrell further argued that the photography process violated the *Fourth Amendment* because it was not reasonable for the officers to transport her to the police station or to touch her, in order to obtain the photographs.

Again, the court disagreed. Based on the totality of the circumstances, the court concluded the manner in which the officers executed the search warrant was reasonable. Even though the officers could have taken the photographs at Merrell's house, it was reasonable for the officers to transport her to the police station to take them. In addition, the limited physical touching of Merrell was limited to her hands during a twenty minute period.

Finally, Merrell argued that photographing her hands constituted an unduly suggestive identification procedure that violated her due process rights.

The court held that the photographing of Merrell's hands did not amount to an identification procedure because the photographs were not presented to an eyewitness for the purpose of identifying an alleged criminal perpetrator. Instead, the photographs were evidence obtained during the execution of a valid search warrant, and did not violate Merrell's due process rights.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3211/15-3211-2016-11-18.pdf?ts=1479486669>

Right Against Self-Incrimination

Polygraph Examination as Condition of Supervised Release

United States v. Von Behren, 822 F.3d 1139 (10th Cir. 2016)

Von Behren was serving a term of supervised release stemming from a conviction for distribution of child pornography. One of the conditions of his supervised release required Von Behren to successfully complete a sex offender treatment program. Part of the treatment program required Von Behren to submit to a sexual history polygraph, which required him to answer four questions regarding whether he had committed any new sexual crimes. Von Behren was informed that failure to complete the sexual history polygraph would result in removal from the program and revocation of his probation. Finally, Von Behren was required to sign an agreement instructing the treatment provider to report any newly discovered sexual crimes to law enforcement.

Von Behren argued the condition of supervised release which required him to complete a sexual history polygraph violated his *Fifth Amendment* right / privilege against self-incrimination.

The court agreed. The *Fifth Amendment's* privilege against self-incrimination applies not only to persons who refuse to testify against themselves at a criminal trial in which they are the defendant, but also allows persons to refuse to answer "official questions" asked to them in any other proceeding, where their answers might incriminate them in future criminal proceedings. To qualify for the *Fifth Amendment* privilege, a communication must be testimonial, incriminating, and compelled.

First, the court held that answering questions during a polygraph examination involves a communicative act, which is testimonial.

Next, the court found that Von Behren's answers to the four mandatory questions were "incriminating," within the meaning of the *Fifth Amendment*. The court stated an affirmative answer to any of the questions could focus an investigation, otherwise ignorant of Von Behren's past sex crimes on him. In addition, an affirmative answer to any of the questions could potentially be used against Von Behren if he were ever charged with a sex crime.

Finally, the court held the government's threat to terminate Von Behren from the treatment program, revoke his supervised release, and then seek his remand to prison if he refused to answer incriminating polygraph questions constituted "compulsion" within the meaning of the *Fifth Amendment*.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/15-1033/15-1033-2016-05-10.pdf?ts=1462899596>

Miranda

United States v. Crumpton, 824 F.3d 593 (6th Cir. 2016)

Police executed a search warrant at Crumpton's residence for evidence related to drug and firearm violations. At this time, a federal agent read Crumpton his *Miranda* rights. The agent recited and Crumpton confirmed his understanding of the following:

(1) "the right to remain silent"; (2) that "anything you say can be used against you **in court**"; (3) "the right to consult with an attorney and have them present during questioning" and (4) that "if you cannot afford an attorney, one will be appointed to represent you prior to questioning."

Crumpton then told the agent "there may be some old bullets laying around." (First Statement)

The agent conducted a second interview with Crumpton sometime later during the execution of the search warrant. The agent advised Crumpton of his *Miranda* rights again; however, the agent added a fifth warning, and told Crumpton "if you decide to answer any questions now without a lawyer present, you have the right to stop answering questions at any time."

Crumpton asked the agent, "Will we be going to court?" The agent told Crumpton, "No, I'm just saying, in general. Anything you say can be used against you in court. That's, these are your rights."

Crumpton eventually made an additional incriminating statement concerning his knowledge of ammunition in his residence. (Second Statement)

Crumpton filed a motion to suppress both statements he made to the agent. Crumpton argued his first statement should be suppressed because the agent violated *Miranda* by failing to advise him he had the right to stop answering questions, as the agent had done when he advised Crumpton of his *Miranda* rights the second time.

The district court agreed and suppressed Crumpton's first statement on its belief that *Miranda* requires that a suspect be advised of his right to stop answering questions at any time during a custodial interview. The government appealed.

The Court of Appeals reversed the district court. The Court held the district court misread *Miranda* to require that a suspect be advised of his right to stop answering questions at any time during a custodial interrogation. The court added *Miranda* requires that a suspect undergoing custodial interrogation be informed of four particular rights:

(1) "that he has a right to remain silent"; (2) "that any statement he does make may be used as evidence against him"; (3) "that he has a right to the presence of an attorney"; and (4) that the attorney may be "either retained or appointed."

The court noted that subsequent Supreme Court decisions have reiterated these four, and only four required warnings.¹¹ In addition, the Sixth Circuit and other circuits have made clear that "a defendant need not be informed of a right to stop questioning after it has begun."

The district court suppressed Crumpton's second statement. When Crumpton asked the agent, "Will we be going to court?" and the agent replied, "No," and the court held that the agent misled Crumpton into believing he would never go to court in connection with statements he might give to law enforcement; therefore, nullifying the *Miranda* warning that anything Crumpton said could be used against him "in court."

The government appealed, and again, the Court of Appeals reversed the district court. In *Miranda*, the Supreme Court mandated that four warnings be given to inform a suspect in police custody of certain rights in order to protect the privilege against self-incrimination. One such warning was phrased in the opening section of the Court's opinion as notice "that any statement he does make may be used as evidence against him." At two later points in the opinion, the Court suggested that the warning would use the phrase "in court" after the suspect was told that anything he said could be used against him. However, the Court has never dictated the words in which the essential information from *Miranda* must be conveyed to the suspect. The *Miranda* court stated the warnings seeks to convey "the consequences of forgoing [the privilege of self-incrimination]" and "to make the individual more acutely aware that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest." In keeping with this purpose, the Sixth Circuit along with two other Circuits have specifically held that a warning that omits the "in-court" language does not violate *Miranda*.¹² Consequently, a suspect who is informed of his right to remain silent and the fact that failing to do so will result in his statements being used "against him" is sufficiently informed of the key information the warning seeks to provide. In this case, the agent was not required to add the words "in court" to his warning to Crumpton.

In addition, the court found the agent did not undermine or contradict the point of the warning by answering, "No" when Crumpton asked, "Will we be going to court?" Instead, the court found when taking the agent's entire answer in context, the agent was informing Crumpton of his rights and the consequences of waiving them, not telling Crumpton specifically what would happen the next day.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-1299/15-1299-2016-06-02.pdf?ts=1464879644>

¹¹ *Florida v. Powell*, 559 U.S. 50, 59-60 (2010), *Colorado v. Spring*, 479 U.S. 564, 567 (1987), *United States v. Lares-Valdez*, 939 F.2d 688, 689 (9th Cir.), *United States v. Davis*, 459 F.2d 167, 168-169 (6th Cir. 1972), *United States v. Ellis*, 125 F. App'x 691, 699 (6th Cir. 2005).

¹² *United States v. Castro-Higuero*, 473 F.3d 880, 886 (8th Cir. 2007), *Evans v Swenson*, 455 F.2d 291, 295-96 (8th Cir. 1972), *United States v. Franklin*, 83 F.3d 79, 82 (4th Cir. 1996)

Custody

United States v. Swan, 842 F.3d 28 (1st Cir. 2016)

Police officers suspected Swan, a local, elected official, was involved in a scheme to receive a kick-back from a businessman. After an undercover sting operation, two officers confronted Swan after she exited her car in a Laundromat parking lot. The officers asked Swan if she would be willing to talk to them about the case at the police station. Swan agreed, and accompanied by one of the officers, drove herself to the police station. At some point during the encounter, one of the officers came into possession of Swan's cell phone.

At the police station, the officers directed Swan to an interview room and shut the door. The officers told Swan that she was not under arrest, she was free to leave at any point, and it was "fine" if she did not want to have a conversation with them. Swan agreed to stay and speak with the officers, but when Swan asked whether she could have her cell phone back, the officers told her that they were only keeping the phone so Swan would not get distracted. A short time later, Swan's phone rang and as she reached to answer it, one of the officers told Swan he was just going to send the call to voicemail. Swan responded, "All right." Over the next ninety-minutes, Swan made incriminating statements to the officers. Near the end of the interview, Swan told the officers that she needed to call her husband. The officers returned Swan's phone and allowed her to call her husband. After finishing her call, Swan resumed her interview with the officers, retaining possession of her phone for the rest of the interview.

The government subsequently charged Swan with several counts of Hobbs Act extortion.

Swan filed a motion to suppress her incriminating statements. Swan argued the officers failed to advise her of her *Miranda* warnings before they interviewed her.

Police officers are required to provide *Miranda* warnings before conducting a custodial interrogation of a suspect. In this context, custody for *Miranda* purposes occurs when "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave."

In this case, Swan argued that she was in custody for *Miranda* purposes during her initial encounter with the officers in the parking lot. Without deciding this issue, the court noted that even if the confrontation in the parking lot was custodial, Swan was not entitled to a *Miranda* warning unless she remained in custody at the police station when she made the incriminating statements.

The court then concluded that Swan was not in custody for *Miranda* purposes at the police station. First, before questioning Swan, the officers told her that she was "not under arrest," that she was free to leave "at any point," and that it was "fine" if she did not "want to have a conversation" with them. The court found that these unambiguous statements would have led a reasonable person in Swan's position to understand that she was not in custody, regardless of what had occurred previously in the parking lot. In addition, the duration of the interview was relatively short, the number of officers present was not overwhelming, the officers never handcuffed Swan, and the officers closed the interview room door simply to ensure privacy.

Finally, even though the officers were holding Swan's phone, the officers told her it would be returned at the end of the interview and allowed Swan to use the phone to call her husband when

she requested it. The court concluded that the officers' temporary possession of Swan's phone was not sufficient to render the interview custodial.

After considering these factors, the court concluded that a reasonable person in Swan's position would have felt free to terminate the interview and leave the police station. As a result, the court held that Swan was not subjected to a custodial interrogation; therefore, the officers were not required to provide her with *Miranda* warnings.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/14-1672/14-1672-2016-11-21.pdf?ts=1479762005>

United States v. Faux, 828 F.3d 130 (2d Cir. 2016)

Federal agents went to Faux's home to execute a search warrant in connection with a health care fraud investigation. As the agents arrived, Faux and her husband were in the process of leaving for vacation. Two agents, dressed in business attire, questioned Faux in the dining room. During the two-hour interview, Faux made incriminating statements to the agents. The agents did not arrest Faux at the conclusion of the interview. The government later indicted Faux for a variety of criminal offenses.

Faux filed a motion to suppress the statements she made during the execution of the search warrant. Faux claimed the agents subjected her to a custodial interrogation without first advising her of her *Miranda* rights.

The court disagreed. Statements made during a custodial interrogation are generally inadmissible unless a person has first been advised of his or her *Miranda* rights. It was undisputed the questions posed by the agents constituted interrogation, and that Faux was never advised of her *Miranda* rights. The only issue was whether Faux was "in custody" when the agents questioned her. A person is in custody for *Miranda* purposes if his or her "freedom of action" is curtailed to a degree associated with a formal arrest.

In this case, twenty-minutes into the interview, the agents told Faux that she was not under arrest. Second, the tone of the conversation was conversational, and there was no indication the agents raised their voices while questioning Faux. Third, while Faux's movements were monitored by an agent when she used the bathroom and retrieved a sweater from a closet, the agent did not restrict Faux's movements to the degree of a person under formal arrest. Fourth, the agents questioned Faux in the familiar surroundings of her home. Fifth, although the agents never told Faux that she was not free to leave, Faux did not attempt to end the encounter, leave the house, or join her husband, who was being questioned in another room. Sixth, the agents did not display their weapons, or otherwise threaten or use any physical force against Faux. Finally, the agents did not handcuff Faux during the interview and she was not arrested at its conclusion. Consequently, the court concluded the agents did not curtail Faux's freedom to the level associated with a formal arrest; therefore, Faux was not in custody for *Miranda* purposes.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/15-1282/15-1282-2016-07-08.pdf?ts=1467988209>

United States v. Gardner, 823 F.3d 793 (4th Cir. 2016)

A confidential informant (CI) called a local police officer and reported that Gardner, a convicted felon who possessed a firearm, was driving a white Lincoln Town Car. In addition, the CI told the officer that Gardner was presently located at a particular house in the community. The CI had worked with the officer in the past and had consistently provided accurate information.

The officer drove to the house identified by the CI and saw a white Lincoln Town car parked nearby. The officer drove around the block and confirmed that Gardner was the registered owner of the vehicle. As the officer approached the house again, he saw Gardner had entered the Lincoln and was driving away. When the officer activated his blue lights to initiate a traffic stop, he saw Gardner's right shoulder disappear as if he was either reaching for something or putting something underneath the seat. After Gardner stopped, the officer directed him to step out of the vehicle and confirmed Gardner's identity by examining his driver's license. During this time, Gardner appeared to be nervous and kept looking in the direction of his vehicle's floor. The officer asked Gardner if he had any weapons on his person, and Gardner replied that he did not. The officer frisked Gardner, but did not find any weapons. The officer then told Gardner that he had received information that Gardner had a firearm in his possession. After initially denying that he had anything illegal in his car, Gardner eventually told the officer, "I have a gun." When the officer asked Gardner if he was allowed to possess a firearm, Gardner told the officer that he was not, and he was a convicted felon. The officer searched Gardner's vehicle and found a handgun underneath the driver's seat. At that point, the officer placed Gardner in handcuffs and transported him to the police station.

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

Gardner claimed when the officer detained him at the rear of his vehicle, he was "in custody" for *Miranda* purposes. As a result, Gardner argued his incriminating statements concerning the firearm should have been suppressed because the officer did not *Mirandize* him.

The court disagreed. The Supreme Court has held that a person is not "in custody" for *Miranda* purposes when an officer detains him to ask "a moderate number of questions . . . to try to obtain information confirming or dispelling the officer's suspicions." Here, the officer asked Gardner questions directly related to his reasonable suspicion that Gardner had a firearm in his possession. The fact that Gardner did not feel free to leave did not convert this brief period of questioning into the functional equivalent of a "stationhouse interrogation" that would require *Miranda* warnings.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca4/14-4533/14-4533-2016-05-18.pdf?ts=1463596227>

United States v. Patterson, 826 F.3d 450 (7th Cir. 2016)

Federal agents suspected that Patterson committed a bank robbery. Two agents drove separately to a residence connected to Patterson where they saw him standing outside in the driveway. The agents approached Patterson, identified themselves, and told Patterson two or three times to show his hands. After Patterson complied, the agents told Patterson they wanted to talk to him about a

bank robbery. When Patterson asked the agents some questions about the case, the agents told Patterson they did not want to discuss the details in the driveway. The agents asked Patterson if he would be willing to go to their office to discuss the case and “clear his name.” Patterson agreed to accompany the agents to their office. Before Patterson got into the agent’s vehicle, he allowed one of the agents to frisk him for weapons. After completing the frisk, the agent asked Patterson, “I just want to make sure you’re voluntarily coming with us, correct?” Patterson responded affirmatively.

The agent drove Patterson to the public garage for his building, parked, and took the public elevator to the agents’ office. Once inside, the agents took Patterson to a conference room, allowing Patterson to sit closest to the door. When asked about the bank robbery, Patterson denied any involvement. The agents accused Patterson of being involved, and told Patterson that he could speak freely, as he was not going to be arrested that day. Patterson then confessed to his involvement in the robbery. At the end of the interview, the agents told Patterson an arrest warrant would likely be issued in a week or two and gave him a ride back to his house.

Patterson filed a motion to suppress his incriminating statements, arguing that he was “in custody” at the time of the interview; therefore, the agents should have advised him of his *Miranda* rights before questioning him.

A person is “in custody” for *Miranda* purposes if there is a formal arrest or a restraint on the person’s freedom of movement of the degree associated with a formal arrest. Because the agents did not formally arrest Patterson, the court had to determine whether a reasonable person in Patterson’s position would have believed he was free to leave.

The court concluded that Patterson was not “in custody” for *Miranda* purposes because the agents did not restrain Patterson’s movement to the degree associated with a formal arrest. First, Patterson went to the agents’ office voluntarily. The agents told Patterson they wanted to talk to him about their investigation, while truthfully implying that his name might not be “clear.” In addition, the agents double-checked by asking Patterson if he was voluntarily going with them before he got into the agents’ car.

Second, Patterson was not “in custody” for *Miranda* purposes during the initial encounter with the agents in the driveway. At most, the initial contact, from the driveway to getting into the agents’ car was a *Terry* stop. The court noted that the temporary and relatively non-threatening detention involved in a *Terry* stop does not constitute *Miranda* custody. In addition, in the Seventh Circuit, it has been repeatedly held that a *Terry* frisk does not establish custody for *Miranda* purposes.

Third, during the drive to the agents’ office, Patterson never requested that the agents stop the car so he could get out or do anything to indicate that he did not want to speak with the agents.

Fourth, while the agents were armed, they never used their weapons or restrained Patterson in any way.

Finally, at the end of the interview, the agents told Patterson he was not going to be arrested that day, and was allowed to leave so he could get his affairs in order.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-3022/15-3022-2016-06-14.pdf?ts=1465932663>

United States v. Mshihiri, 816 F.3d 997 (8th Cir. 2016)

After Mshihiri became a suspect in a mortgage fraud investigation, federal agents applied for warrants to search his residence and laptop computer. The affidavit in support of the search warrant included information provided by a confidential informant (CI) who claimed that he participated in the mortgage fraud scheme with Mshihiri. The affidavit also included information from bank and real estate records that corroborated information provided by the CI.

The agents coordinated with Customs and Border Protection (CBP) officers to interview Mshihiri and to execute a search of his laptop computer upon Mshihiri's return from Tanzania. When Mshihiri arrived at the Minneapolis-St. Paul International Airport, a CBP officer intercepted him at the immigration entry point, led him to baggage claim, and then escorted him to a reception area. At the reception area, the agents identified themselves and presented their credentials to Mshihiri. The agents asked Mshihiri if he would be willing to speak to them, explaining to Mshihiri that he was not under arrest or obligated to answer questions. Mshihiri agreed to be interviewed and voluntarily accompanied the agents to an interview room. The agents sat across the table from Mshihiri who sat in a chair next to the door. Speaking in a normal tone and volume, the agents asked Mshihiri several questions about the suspected mortgage fraud. During the forty-five minute interview, Mshihiri did not request a break, try to use his cell phone, ask to consult an attorney, or call his wife so that she could call an attorney for him. The agents abruptly ended the interview after one of the agents changed his tone of voice and accused Mshihiri of lying. The agents left the interview room and Mshihiri went back through the passport control area in the main terminal.

The government charged Mshihiri with a variety of offenses including bank fraud, mail fraud, and wire fraud.

Mshihiri filed a motion to suppress evidence seized as a result of the search warrants and the statements he made during his interview with the agents. Mshihiri argued the affidavit in support of the search warrants failed to establish probable cause and that the interview with the agents constituted a custodial interrogation in which he was not first advised of his *Miranda* rights.

The court disagreed. First, the court held the affidavit in support of the search warrants established probable cause. The court concluded that the CI's first-hand knowledge of Mshihiri's involvement in the mortgage fraud scheme established the CI's reliability and basis of knowledge for the information he provided the agents. In addition, the court noted the CI's information was corroborated by a variety of independent financial documents.

Second, the court held Mshihiri was not in custody for *Miranda* purposes during the interview with the agents. In agreeing with the district court, the court found that the agents told Mshihiri that he was not under arrest; Mshihiri entered the interview room voluntarily and was seated next to the door throughout the questioning; the agents were dressed in casual clothing and did not display their weapons; most of the forty-five minute interview was calm and conversational, and Mshihiri was never handcuffed or placed under arrest.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/14-3802/14-3802-2016-03-14.pdf?ts=1457969484>

United States v. Laurita, 821 F.3d 1020 (8th Cir. 2016)

As part of a child pornography investigation, federal agents executed a search warrant at the home where Laurita lived with his grandmother and seized a computer. After completing their search, two agents went to Laurita's place of employment to interview him. Without disclosing the nature of their investigation, the agents asked Laurita's supervisor if they could talk to Laurita. Laurita's supervisor approached Laurita, told Laurita to come with him, and escorted Laurita to a conference room. Once in the conference room the agents closed the door and told Laurita they would "just like to talk to him," and they would "only need maybe 10 or 15 minutes." After the agents told Laurita about the execution of the search warrant at his grandmother's home, Laurita told the agents he had viewed child pornography on a computer in the home for the past year. After talking with Laurita for approximately twenty-minutes, the agents gave Laurita their business cards, allowed him to leave the conference room, and he returned to work.

Approximately six-months later, the government indicted Laurita on child pornography charges.

Laurita filed a motion to suppress his statements to the agents. Laurita claimed the agents subjected him to a custodial interview without first advising him of his *Miranda* rights.

The court disagreed, finding Laurita was not in custody for *Miranda* purposes because a reasonable person in Laurita's position would have felt free to terminate or leave the interview with the agents. Although the agents never told Laurita his participation was voluntary or that he was free to leave, nothing about the circumstances or the agents' behavior indicated otherwise. In addition, the agents did not handcuff or otherwise restrain Laurita, and the agents' tone was conversational during the interview. Finally, the interview lasted no more than twenty-minutes, and when the interview was over the agents did not arrest Laurita, but allowed him to return to work.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1137/15-1137-2016-05-04.pdf?ts=1462375866>

Interrogation – Functional Equivalent of Questioning

United States v. Bailey, 831 F.3d 1035 (8th Cir. 2016)

An officer stopped the car in which Bailey was a passenger after he saw Bailey was not wearing a seatbelt. When the officer approached the car, Bailey got out and ran. The officer chased Bailey who had jumped over a fence into a yard. The officer eventually arrested Bailey after he found Bailey hiding behind a garage. The officer placed Bailey in the back of his patrol car, which was equipped with an internal audio-video recording device that recorded Bailey's actions and words.

While Bailey and the officer sat in the patrol car, a man approached the officer and told him that his grandchildren had just found a gun in his yard. The officer went with the man and realized the yard where the children found the gun was the same yard through which he had chased Bailey. After the officer exited the patrol car, the recording device captured Bailey saying, "Damn, they found that gun" and several other incriminating statements.

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

Bailey filed a motion to suppress the statements he made while in the patrol car after the officer left the vehicle. First, Bailey argued his statements were inadmissible because the officer did not advise him of his *Miranda* rights before he made the statements.

The court disagreed. *Miranda* warnings are required only when police interrogate a defendant that is in custody. Interrogation occurs when there is express police questioning or the functional equivalent of question. The functional equivalent of questioning are words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. Here, Bailey made the incriminating statements after the man told the officer about the gun found in his yard. The court held there was no evidence that the man was acting in concert with the officer in an attempt to engage in the functional equivalent of questioning of Bailey. As a result, the court concluded the man's statement to the officer was not an interrogation of Bailey; therefore, Bailey was not entitled to *Miranda* warnings.

Next, Bailey argued that the officer sought to elicit incriminating statements by leaving him alone in the patrol car near the crime scene, with the audio-video recording device turned on.

Again, the court disagreed. Even though the officer might have expected that Bailey might say something if left alone, the court found the officer's act of leaving Bailey alone in the back of the patrol car did not constitute interrogation.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3591/15-3591-2016-08-05.pdf?ts=1470411082>

See: [United States v. Jones](#), 842 F.3d 1077 (8th Cir. 2016)

Routine Booking Questions

United States v. Sanchez, 817 F.3d 38 (1st Cir. 2016)

Sanchez was arrested and transported to jail. During the intake process, the booking officer asked Sanchez a series of standard biographical questions. In addition to asking Sanchez his name, date of birth, social security number, height and weight, the booking officer asked Sanchez if he was employed. Sanchez told the booking officer that he was a "drug dealer." The booking officer did not ask any follow-up questions concerning this remark and completed the booking process.

Sanchez argued that his "drug dealer" statement should have been suppressed because the officers had not advised him of his *Miranda* warnings before questioning him during booking process.

The court disagreed. *Miranda* warnings must be provided when a person is subjected to custodial interrogation. Here, neither side disputed that Sanchez was in custody at the time of booking. However, the court noted it is well-settled that routine booking questions seeking background information are not considered "interrogation" for *Miranda* purposes. The booking questions exception is driven by the premise that questions concerning an arrestee's name, date of birth,

social security number and employment status “rarely elicit an incriminating response, even when asked after arrest.” In this case, the booking officer only asked Sanchez routine questions to complete the booking process, not to strengthen the government’s case against Sanchez, as the booking officer did not ask any follow-up questions when Sanchez told him that he was employed as a drug dealer.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-1107/15-1107-2016-03-23.pdf?ts=1458763208>

United States v. Williams, 842 F.3d 1143 (9th Cir. 2016)

Antonio Gilton was arrested for murder, conspiracy to commit murder, discharge of a firearm at an occupied motor vehicle, and possession of a firearm by a convicted felon. After a San Francisco homicide inspector advised Gilton of his *Miranda* rights, Gilton invoked his right to counsel. The inspector stopped questioning Gilton and transported him to county jail, where Gilton was placed in a holding cell. Several hours later, another officer removed Gilton from the cell and asked Gilton whether he was a gang member. Gilton told the officer that he was affiliated with a local gang. Based on Gilton’s statement, the officer classified him as a gang member on two jail intake forms. In classifying Gilton as a gang member, the officer also relied on Gilton’s arrest record, which contained gang-related offenses and police intelligence, indicating Gilton was a gang member.

Gilton was initially charged in state court; however, a federal grand jury later indicted Gilton and several co-defendants on a variety of federal criminal offenses. One of the offenses for which Gilton was charged, included gang membership as an element of the offense.

Gilton subsequently filed a motion to suppress the statements he made to the officer at the jail concerning his gang affiliation.

The district court granted Gilton’s motion, holding that the booking-questions exception to *Miranda* did not apply because asking about Gilton’s gang affiliation was reasonably likely to elicit an incriminating response. The government appealed.

The booking-questions exception to the *Miranda* requirement allows officers to obtain biographical data necessary to complete the booking process or pre-trial services. Because booking questions rarely elicit an incriminating response, routine gathering of biographical data does not constitute “interrogation” under *Miranda*. However, when a police officer has reason to know that a suspect’s answer may incriminate him, routine-booking questions may constitute “interrogation” for purposes of *Miranda*.

In this case, the Ninth Circuit Court of Appeals agreed with the district court and held that the booking-questions exception to *Miranda* did not apply. The court recognized that a defendant charged with a violent crime in California, who is also a gang member, is subject to additional criminal charges or enhanced penalties under state and federal law that non-gang members do not have to face. When the officer asked Gilton about his gang membership, the officer knew that Gilton had been charged with several violent crimes. The court concluded that questions about

Gilton's gang affiliation therefore were likely to elicit an incriminating response, even if the federal charges had not yet been filed.

The court added that the public-safety exception to *Miranda* did not apply. When there is an objectively reasonable need to protect the officers or others from immediate danger, officers may conduct a custodial interrogation without first advising the suspect of his *Miranda* rights. Even though the officer's questions may have been asked in the general interest of inmate safety, the court concluded that there was no urgent need to protect the officer or others against immediate danger, as Gilton had already been in jail for several hours before the officer questioned him.

In affirming the district court's suppression order, the court emphasized it was only holding that when a defendant charged with murder invokes his *Miranda* rights, the government may not in its case-in chief at trial admit the defendant's unadmonished responses about gang affiliation. The court did not prohibit jail or prison officials from inquiring about a prisoner's gang membership in the interests of inmate safety or for the purposes of inmate housing.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca9/15-10475/15-10475-2016-12-05.pdf?ts=1480960960>

Right to Silence

United States v. Calvetti, 838 F.3d 654 (6th Cir. 2016)

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

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

The government charged Cortez and Calvetti with two drug offenses.

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

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

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

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

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

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

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

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

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

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

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

United States v. Adams, 820 F.3d 317 (8th Cir. 2016)

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

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

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

Approximately six minutes into the interview, Adams stated:

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

AGENT: Okay, so you were—

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

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

ADAMS: **I mean**—

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

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

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

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

AGENT: Okay.

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

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

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

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

The court disagreed. A person may expressly waive his right to remain silent, or his waiver may be inferred from his actions and words. When the government establishes that *Miranda* warnings

were given and understood by the suspect, the suspect's subsequent uncoerced statements establish an implied waiver of the right to remain silent.

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

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

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

Spontaneous / Volunteered Statements

See: [United States v. Jones](#), 842 F.3d 1077 (8th Cir. 2016)

Kalkines / Garrity

United States v. Smith, 821 F.3d 1293 (11th Cir. 2016)

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

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

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

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

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

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

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

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

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

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

Waiver of *Miranda* (Knowing/Intelligent/Voluntary)

United States v. Woods, 829 F.3d 675 (8th Cir. 2016)

An officer saw Woods and a passenger driving in a Cadillac with heavily tinted windows. The officer knew Woods to be a drug trafficker and that Woods' vehicle contained hidden compartments that Woods used to hide narcotics. After he saw Woods throw a piece of paper out the window onto the street, the officer conducted a traffic stop. The officer told Woods that he stopped him because the windows on the Cadillac appeared to be tinted too darkly and that Woods

had thrown litter on a public roadway. Inside Wood's vehicle, the officer saw a fake iPhone that appeared to be a set of digital scales, and he smelled the odor of marijuana. At some point, the officer spoke to the passenger, who gave the officer a conflicting account as to where he and Woods were traveling.

After issuing Woods traffic citations, the officer requested a canine unit. Approximately twenty-minutes later, the canine officer arrived, and the drug-sniffing dog alerted to the presence of narcotics inside Woods' vehicle. The officers impounded the Cadillac and transported Woods to the police station for questioning. An officer searched the Cadillac and found a hidden compartment that contained marijuana, methamphetamine, cocaine, and a firearm.

Other officers interviewed Woods. Before the interview, an officer read Woods his *Miranda* rights from a form. Woods refused to sign the form to acknowledge that he was waiving his *Miranda* rights. However, Woods told the officers he was willing to speak with them, and he admitted the drugs and firearm found in the Cadillac belonged to him, not his passenger. During the interview, Woods never refused to answer questions, invoked his right to counsel, or told the officers that he did not want to speak with them any longer.

Two days later, a federal agent interviewed Woods, and after waiving his *Miranda* rights, Woods admitted the evidence found in the Cadillac belonged to him.

The government charged Woods with drug and firearm offenses.

Woods filed a motion to suppress the evidence seized from his Cadillac. After the officer issued Woods the citations, Woods argued the officer violated the *Fourth Amendment* by unreasonably extending the duration of the traffic stop to allow the canine officer to arrive.

The court disagreed. The court held the officer established reasonable suspicion that Woods was involved in drug trafficking; therefore, the officer was justified in extending the duration of the stop for twenty-minutes until the canine officer arrived. First, the officer smelled the odor of marijuana in Woods' car. Second, the officer saw digital scales disguised as an iPhone in Woods' car. Third, the officer had received information that Woods was a drug trafficker and that his car contained hidden compartments used to store narcotics. Finally, Woods and his passenger gave the officer conflicting stories concerning their travel plans.

Woods also claimed his incriminating statements should have been suppressed. Woods argued his refusal to sign the *Miranda*-rights waiver form constituted an invocation of his *Miranda* rights.

Again, the court disagreed. First, to establish a valid *Miranda* waiver, the government must establish the waiver was voluntary, intelligent, and knowing. Second, a person can validly waive *Miranda* rights orally or in writing. Third, the court commented that a person's refusal to sign a written waiver form does not automatically require suppression of his subsequent statements.

In this case, officers read Woods his *Miranda* rights before questioning him. In both instances, Woods acknowledged that he understood his rights, agreed to speak with the officers, and stated that the drugs and firearm in his vehicle belonged to him. Finally, Woods did not refuse to answer questions or tell the officers that he no longer wished to speak with them at any point during either interview.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-2837/15-2837-2016-07-15.pdf?ts=1468596677>

Voluntariness of Suspect's Statement

See: [United States v. Adams](#), 820 F.3d 317 (8th Cir. 2016)

United States v. Jones, 842 F.3d 1077 (8th Cir. 2016)

Police officers responded to a fire at a house where Shalonda Clark and Charles Jones lived together on the White Earth Indian Reservation. After the fire started, Jones walked to a neighbor's house. When an officer went to the neighbor's house, he spoke with Jones who was covered in soot, smelled of smoke, and his clothes appeared to be burned. The officer asked Jones where Clark was, as she had not yet been located. Jones told the officer that Clark was on the couch. After the officer asked how the fire started, Jones said, "I started it." Another officer handcuffed Jones, and while escorting him to a police car, Jones told the officer, "You finally got me." After the officer asked Jones what he meant, Jones replied, "That's all you're getting. I hope I get the max." Although Jones appeared to be under the influence of drugs, he was alert and answered the officers' questions coherently.

The next day, an officer attempted to question Jones after advising him of his *Miranda* rights. The officer told Jones that Clark was dead and they needed to talk. Jones told the officer he had nothing to say and that he wanted to end the interview. The officer told Jones he would take him back to his cell if he did not want to talk. Jones said, "Okay," then added, "She's a wicked bitch and that's it."

After a jury convicted him of second-degree murder, Jones appealed the district court's refusal to suppress the incriminating statements he made to the officers.

First, the court found the district court properly admitted Jones' initial statements to the officer under the public safety exception to the *Miranda* rule. The public safety exception allows a defendant's answer to a question to be admitted into evidence even if he has not first been provided *Miranda* rights as long as the officer's question was to ensure public safety and not merely to elicit testimonial evidence. Here, officer's initial questions served two public safety purposes. First, Clark was still missing when the officer asked Jones where she was. Second, the fire was still burning when the officer asked Jones how it started. As a result, the court concluded the officer's questions addressed public safety concerns, and were not designed to obtain testimonial evidence against Jones.

Second, the court held the district court properly admitted the statements Jones made after the officer handcuffed him. Jones' first statement, "You finally got me," was admissible because it was not made in response to an officer's question. Jones' subsequent statements, "That's all you're going to get. I hope I get the max." were admissible because an officer's request for clarification of a spontaneous statement generally does not amount to interrogation under *Miranda*.

Third, the court held the district court properly found that, even though Jones was intoxicated, the officers had not overborne his will; therefore, Jones' statements were voluntary. Intoxication does not automatically render a confession involuntary. Instead, the test is whether the intoxication caused the defendant's will to be overborne by the officers. In the audio recording of his interview, Jones spoke slowly and appeared to answer some questions unresponsively; however, officers testified that Jones had been coherent for the entire interview.

Finally, the court held the district court properly ruled that Jones' statement, the day after his arrest were admissible because they were spontaneous and unprovoked. After the officer advised Jones of his *Miranda* rights, Jones told the officer he had nothing to say to the officer. The officer stopped his questioning as soon as Jones clearly stated that he wanted to end the interview. Jones' subsequent comment, "She's a wicked bitch and that's it," was spontaneous, not a result of the interrogation by the officer.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-3647/15-3647-2016-12-02.pdf?ts=1480696280>

Consent to Search Obtained After *Miranda* Violation

See: [United States v. Calvetti](#), 838 F.3d 654 (6th Cir. 2016)

Public Safety Exception

See: [United States v. Jones](#), 842 F.3d 1077 (8th Cir. 2016)

United States v. Williams, 842 F.3d 1143 (9th Cir. 2016)

Antonio Gilton was arrested for murder, conspiracy to commit murder, discharge of a firearm at an occupied motor vehicle, and possession of a firearm by a convicted felon. After a San Francisco homicide inspector advised Gilton of his *Miranda* rights, Gilton invoked his right to counsel. The inspector stopped questioning Gilton and transported him to county jail, where Gilton was placed in a holding cell. Several hours later, another officer removed Gilton from the cell and asked Gilton whether he was a gang member. Gilton told the officer that he was affiliated with a local gang. Based on Gilton's statement, the officer classified him as a gang member on two jail intake forms. In classifying Gilton as a gang member, the officer also relied on Gilton's arrest record, which contained gang-related offenses and police intelligence, indicating Gilton was a gang member.

Gilton was initially charged in state court; however, a federal grand jury later indicted Gilton and several co-defendants on a variety of federal criminal offenses. One of the offenses for which Gilton was charged, included gang membership as an element of the offense.

Gilton subsequently filed a motion to suppress the statements he made to the officer at the jail concerning his gang affiliation.

The district court granted Gilton's motion, holding that the booking-questions exception to *Miranda* did not apply because asking about Gilton's gang affiliation was reasonably likely to elicit an incriminating response. The government appealed.

The booking-questions exception to the *Miranda* requirement allows officers to obtain biographical data necessary to complete the booking process or pre-trial services. Because booking questions rarely elicit an incriminating response, routine gathering of biographical data does not constitute "interrogation" under *Miranda*. However, when a police officer has reason to know that a suspect's answer may incriminate him, routine-booking questions may constitute "interrogation" for purposes of *Miranda*.

In this case, the Ninth Circuit Court of Appeals agreed with the district court and held that the booking-questions exception to *Miranda* did not apply. The court recognized that a defendant charged with a violent crime in California, who is also a gang member, is subject to additional criminal charges or enhanced penalties under state and federal law that non-gang members do not have to face. When the officer asked Gilton about his gang membership, the officer knew that Gilton had been charged with several violent crimes. The court concluded that questions about Gilton's gang affiliation therefore were likely to elicit an incriminating response, even if the federal charges had not yet been filed.

The court added that the public-safety exception to *Miranda* did not apply. When there is an objectively reasonable need to protect the officers or others from immediate danger, officers may conduct a custodial interrogation without first advising the suspect of his *Miranda* rights. Even though the officer's questions may have been asked in the general interest of inmate safety, the court concluded that there was no urgent need to protect the officer or others against immediate danger, as Gilton had already been in jail for several hours before the officer questioned him.

In affirming the district court's suppression order, the court emphasized it was only holding that when a defendant charged with murder invokes his *Miranda* rights, the government may not in its case-in chief at trial admit the defendant's unadmonished responses about gang affiliation. The court did not prohibit jail or prison officials from inquiring about a prisoner's gang membership in the interests of inmate safety or for the purposes of inmate housing.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca9/15-10475/15-10475-2016-12-05.pdf?ts=1480960960>

Miscellaneous Criminal Law / Federal Statutes

Title 18 U.S.C. § 111

United States v. Janis, 810 F.3d 595 (8th Cir. 2016)

Officer Mousseau, an officer of the Oglala Sioux Tribe (OST) Department of Public Safety (DPS), responded to a report that individuals, including Janis, were consuming alcohol at a home on the Pine Ridge Indian Reservation. At the time, tribal law prohibited alcohol consumption on the Pine Ridge Reservation. An altercation ensued, and Janis was eventually arrested after he repeatedly pushed, hit and attempted to kick Officer Mousseau. The government charged Janis with assault on a federal officer, in violation of *18 U.S.C. § 111*.

Janis appealed his conviction, arguing that the trial court improperly ruled that OST public safety officers, such as Mousseau, are “federal officers” under *18 U.S.C. § 111* when these officers are enforcing tribal laws.

The court disagreed. The Indian Law Enforcement Reform Act provides the Secretary of the Interior, acting through the Bureau of Indian Affairs (BIA), “shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian country.” The statute permits the BIA to enter into agreements with tribal agencies that allow those agencies to “aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe that has authorized the secretary to enforce tribal laws.” When acting under the authority of such an agreement, “a person who is not otherwise a Federal employee shall be considered to be . . . an employee of the Department of the Interior only for purposes of . . . section 111 . . . of Title 18.” In addition, the Eighth Circuit Court of Appeals has held the plain meaning of these provisions is that tribal officers are afforded the same protections under *18 U.S.C. § 111* that Congress has afforded BIA employees, regardless of whether the officer is enforcing tribal, state or federal law.

Here, the court held the agreement between the OST DPS and BIA required the OST DPS “to provide for the protection of lives, and property for persons visiting or residing within the . . . Pine Ridge Indian Reservation. The agreement also required the OST DPS “to assist the BIA and other federal, tribal and state law enforcement official in the investigation of tribal, state or federal offenses.” In return, the BIA agreed to reimburse the OST DPS for the expenses it incurred. Consequently, because OST public safety officers operated pursuant to this agreement, the district court correctly concluded those officers are afforded the same protection under *18 U.S.C. § 111* that Congress has afforded BIA employees.

Janis also claimed the district court improperly determined as a matter of law that Officer Mousseau was a federal officer at the time of the incident with Janis.

The court agreed, holding the jury should have determined whether Officer Mousseau was employed as a public safety officer and whether she was acting in that capacity at the time of the incident. However, overwhelming evidence admitted at trial, including a stipulation by Janis, demonstrated that Mousseau was in fact an OST public safety officer, and therefore a federal officer. The court concluded in light of this overwhelming evidence that a rational jury still would have found Janis guilty.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/14-3888/14-3888-2016-01-15.pdf?ts=1452875464>

Title 18 U.S.C § 922(g)(9)

Voisine v. United States, 579 U.S. ____ (2016), 136 S. Ct. 2272

Voisine pled guilty to assaulting his girlfriend in violation of § 207 of the Maine Criminal Code, which makes it a misdemeanor to “intentionally, knowingly, or recklessly cause bodily injury or offensive physical contact to another person.” Several years later, law enforcement officers investigated Voisine for killing a bald eagle and discovered that he owned a rifle. The government subsequently charged Voisine with possession of a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of *18 U.S.C. § 922(g)(9)*.

Armstrong pled guilty to assaulting his wife in violation of § 207 of the Maine Criminal Code. A few years later, law enforcement officers found six guns and a large quantity of ammunition when they searched Armstrong's home as part of a narcotics investigation. Like Voisine, the government charged Armstrong under § 922(g)(9) for unlawfully possessing firearms.

Voisine and Armstrong argued they were not prohibited from possessing firearms under § 922(g)(9) because their prior convictions under § 207 of the Maine Criminal Code could have been based on reckless, rather than knowing or intentional conduct, and therefore did not qualify as misdemeanor crimes of domestic violence.

Title 18 U.S.C. § 922 (g)(9) prohibits persons convicted of a “misdemeanor crime of domestic violence” from possessing firearms. A “misdemeanor crime of domestic violence” is defined to include any misdemeanor committed against a domestic relation that necessarily involves the “use . . . of physical force.” In *United States v. Castleman*, the United States Supreme Court held a knowing or intentional assault against a domestic relation qualified as a “misdemeanor crime of domestic violence.” Here, the issue before the Court was whether a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies a person from possessing a firearm under 18 U.S.C. § 922 (g)(9).

In resolving a split between the circuits, the Court held a conviction for a “reckless” domestic assault qualifies as a “misdemeanor crime of domestic violence” under 18 U.S.C. § 922 (g)(9). Congress' definition of a “misdemeanor crime of domestic violence” contains no exclusion for convictions based on reckless behavior. In addition, the court noted a person who assaults another recklessly, *i.e.*, with conscious disregard of a substantial risk of harm, uses force no less than one who carries out that same assault knowingly or intentionally.

For the court's opinion: http://www.supremecourt.gov/opinions/15pdf/14-10154_19m1.pdf

Title 18 U.S.C. § 1344 (Bank Fraud)

Shaw v. United States, 580 U.S. ____ 2016), 137 S. Ct. 462

Shaw had access to Stanley Hsu's bank statements, which contained Hsu's personal information. Using Hsu's personal information, Shaw opened an email account in Hsu's name, and then used this email account to open a PayPal account. Shaw "linked" the PayPal account to Hsu's account with Bank of America. Shaw subsequently transferred money out of Hsu's Bank of America account into the PayPal account he controlled.

The government charged Shaw with Bank Fraud under *18 U.S.C. § 1344(1)*.

The Bank Fraud Statute, *18 U.S.C. § 1344(1)*, makes it a crime to knowingly execute a scheme to defraud a financial institution.

Shaw argued that a prosecution under *§ 1344(1)* required the government to prove the defendant intended the bank to be the primary financial victim of his fraud, not a bank customer such as Hsu. The district court disagreed, as did the Ninth Circuit Court of Appeals, which affirmed Shaw's conviction. Shaw appealed the United States Supreme Court.

First, Shaw argued the bank fraud statute did not cover schemes to deprive a bank of customer deposits.

The Court disagreed. When a customer deposits funds, the bank ordinarily becomes the owner of the funds even though the customer retains the right to withdraw those funds. The bank then has the right to use those funds as a source of loans that help the bank earn profits. Consequently, a scheme to fraudulently obtain funds from a bank depositor's account normally is also a scheme to fraudulently obtain property from a financial institution under *18 U.S.C. § 1344(1)*, where, as here, Shaw knew the bank held the funds in Hsu's account and he misled the bank in order to obtain those funds.

Second, even though the bank did not incur a financial loss, the Court held that *§ 1344(1)* only requires proof of a scheme to defraud, not proof of actual financial loss or that the defendant intended to cause a financial loss.

Third, the Court held the government was not required to prove that Shaw knew the bank had a property interest in Hsu's account to establish that he intended to defraud a financial institution. The court noted it was enough for the government to show that Shaw knew the bank possessed Hsu's account, and that he made false statements to the bank, which caused the bank to release the funds unlawfully to Shaw.

Fourth, Shaw argued that the bank fraud statute requires the government to prove more than his simple knowledge that he would likely harm the bank's property interest. Shaw claimed the government was required to prove that he intended to harm the bank's property interest.

The Court rejected this argument. The Court held that, on its face, *18 U.S.C. § 1344(1)* clearly makes criminal the "knowing execution of a scheme to defraud."

Finally, while rejecting Shaw's positions regarding the interpretation § 1344(1), the Court nonetheless vacated Shaw's conviction and remanded the case to the Ninth Circuit to determine whether one of the trial court's jury instructions was improper.

For the court's opinion: https://www.supremecourt.gov/opinions/16pdf/15-5991_8m59.pdf

Miscellaneous Federal Rules of Criminal Procedure

Federal Rule of Criminal Procedure 41

United States v. Welch, 628 Fed. Appx. 758 (8th Cir. 2016 - unpublished)

The FBI began an investigation into a computer server in Nebraska that was hosting child-pornography websites. One of the websites, PedoBook, operated on a clandestine network, accessible only with special software and designed to obscure a user's identity. This prevented FBI agents from discovering the Internet Protocol (IP) addresses of PedoBook users. Instead of shutting the server down, the FBI sought to install software on the server that would circumvent this network, providing agents with information about any user who accessed certain content on PedoBook. This information included the user's IP address, the date and time the user accessed the content, and his or her computer's operating system. The FBI obtained a Network Investigative Technique (NIT) warrant to install its software on the server in November 2012, and kept the website in operation for approximately three weeks, collecting information on several PedoBook users. Based on this information, the FBI obtained Welch's IP address. In December 2012, the FBI received subscriber information for that IP address from an ISP, revealing Welch's name and address in Florida. The FBI obtained a warrant to search that address which they executed on April 9, 2013. At that time, the agents arrested Welch and provided him notice of the NIT warrant shortly thereafter.

Welch filed a motion to suppress evidence obtained as a result of the NIT warrant. Welch argued that the failure of the agents to provide a copy of the NIT warrant to him within the time allowed under *Federal Rule of Criminal Procedure 41(f)(1)(C)* violated his rights under the *Fourth Amendment*.

Federal Rule of Criminal Procedure 41(f) requires that a copy of an executed search warrant be provided to the owner of the property seized. However, *Rule 41 (f)(3)* allows a delay in providing the warrant if authorized by statute. *Title 18 U.S.C. § 3103a(b)* allows a delay in providing the warrant under certain circumstances for thirty days or to a later date, and officers may seek extensions. The NIT warrant provided that because immediate notification might have an adverse impact on the investigation, notice to Welch could be delayed by thirty days.

Welch argued that the thirty-day period began to run from the date the government received the subscriber information for Welch's IP address from his ISP in December 2012. Because Welch did not receive notice of the NIT warrant until April 2013, he argues the delay of approximately 122 days was well past the 30 days provided for in the warrant.

The government argued that *Rule 41(f)(1)(C)* did not apply to the NIT warrant because it merely collected information and did not seize property in which Welch had a possessory interest. The government also argued that Welch had no reasonable expectation of privacy in his subscriber information.

First, the court assumed with deciding, that *Rule 41* applied to the NIT warrant. Second, the court held that *18 U.S.C. § 3103a(b)* clearly states that the delay in notification of the warrant runs from the date of the execution of the warrant. Third, the FBI executed the NIT in November 2012, but did not notify Welch until April 2013, more than thirty-days later. Fourth, the FBI did not request

permission from the magistrate judge to delay notice to Welch beyond thirty-days. As a result, the court concluded the government failed to provide Welch proper notice of the NIT warrant under *Rule 41*.

However, the court explained that a procedural rule violation does not automatically render a search and seizure unreasonable under the *Fourth Amendment*. For Welch to prevail, in addition to the *Rule 41* violation, Welch was required to show he was prejudiced by the violation or that the investigators recklessly disregarded proper procedure.

The court found the NIT warrant indicated that a thirty-day delay in notice had been granted, but the warrant did not specify whether that period ran from the execution of the warrant or from identification of an individual. Because the warrant application specifically requested delayed notification until an individual was identified, it appeared to the court that the government's delay was a good-faith application of the warrant, rather than a deliberate violation of *Rule 41*. The court further held there was no evidence that the *Rule 41* violation prejudiced Welch because the government could have easily obtained extensions to delay notice if it had requested them.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1993/15-1993-2016-01-21.pdf?ts=1453393843>

Table of Cases

Becker v. Elfreich, 821 F.3d 930 (7th Cir. 2016)	124
Birchfield v. North Dakota, 579 U.S. ____ (2016), 136 S. Ct. 2160.....	116
Brown v. Battle Creek Police Dep't., 844 F.3d 556 (6th Cir. 2016)	135
Cooper v. Brown, 844 F.3d 517 (5th Cir. 2016).....	128
Corado-Arriaza v. Lynch, 844 F. 3d 74 (1st Cir. 2016).....	73
D.E. v. Doe, 834 F.3d 723 (6th Cir. 2016)	4, 123
Davis v. Clifford, 825 F.3d 1131 (10th Cir. 2016)	125
Estate of Armstrong v. Village of Pinehurst, 810 F.3d 892 (4th Cir. 2016)	130
Fish v. Brown, 838 F.3d 1153 (11th Cir. 2016).....	127
Johnson v. City of Philadelphia, 847 F.3d (3d Cir. 2016)	121
Kent v. Oakland County, 810 F.3d 384 (6th Cir. 2016)	118, 131
Microsoft Corp. v. United States (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.), 829 F.3d 197 (2d Cir. 2016)	89
Perea v. Baca, 817 F.3d 1198 (10th Cir. 2016).....	133
Shaw v. United States, 580 U.S. ____ 2016), 137 S. Ct. 462.....	164
Stamps v. Town of Framingham, 813 F. 3d 27 (1st Cir. 2016)	120
United States v. Abernathy, 843 F.3d 243 (6th Cir. 2016)	79
United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016)	7
United States v. Adams, 820 F.3d 317 (8th Cir. 2016).....	154, 159
United States v. Allen, 813 F.3d 76 (2d Cir. 2016)	68
United States v. Arnold, 835 F.3d 833 (8th Cir. 2016).....	64
United States v. Bailey, 831 F.3d 1035 (8th Cir. 2016).....	150
United States v. Berger, 823 F.3d 1174 (8th Cir. 2016).....	95
United States v. Bohannon, 824 F.3d 242 (2d Cir. 2016).....	69
United States v. Briere de L'Isle, 825 F.3d 426 (8th Cir. 2016)	17
United States v. Brown, 828 F.3d 375 (6th Cir. 2016)	75, 78
United States v. Caira, 833 F.3d 803 (7th Cir. 2016)	15
United States v. Calvetti, 838 F.3d 654 (6th Cir. 2016)	53, 94, 153, 160
United States v. Camberos-Villapuda, 832 F.3d 948 (8th Cir. 2016).....	12
United States v. Campos, 816 F.3d 1050 (8th Cir. 2016).....	22
United States v. Caraballo, 831 F.3d 91 (2d Cir. 2016).....	90, 104
United States v. Cardona-Vicente, 817 F.3d 823 (1st Cir. 2016)	42
United States v. Carlross, 818 F.3d 988 (10th Cir. 2016)	28
United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016)	89
United States v. Casey, 825 F. 3d 1 (1st Cir. 2016).....	100, 139
United States v. Castle, 825 F.3d 625 (D.C. Cir. 2016).....	41
United States v. Church, 823 F.3d 351 (6th Cir. 2016)	77, 83
United States v. Compton, 830 F.3d 55 (2d Cir. 2016)	49
United States v. Conerd, 828 F.3d 1009 (8th Cir. 2016)	106
United States v. Constant, 814 F.3d 570 (1st Cir. 2016)	138
United States v. Contreras, 820 F.3d 255 (7th Cir. 2016).....	8, 94, 104, 114
United States v. Cook, 842 F.3d 597 (8th Cir. 2016)	24
United States v. Craddock, 841 F.3d 756 (8th Cir. 2016).....	47
United States v. Crumpton, 824 F.3d 593 (6th Cir. 2016).....	143
United States v. Cunningham, 835 F.3d 307 (2d Cir. 2016).....	43
United States v. Danhach, 815 F.3d 228 (5th Cir. 2016).....	26
United States v. Daniel, 809 F.3d 447 (8th Cir. 2016)	85
United States v. Dillard, 825 F.3d 472 (8th Cir. 2016).....	59
United States v. Diriye, 818 F.3d 767 (8th Cir. 2016).....	37
United States v. Doxey, 833 F.3d 692 (6th Cir. 2016)	111
United States v. Fager, 811 F.3d 995 (10th Cir. 2016).....	48
United States v. Faler, 832 F.3d 849 (8th Cir. 2016).....	97
United States v. Faux, 828 F.3d 130 (2d Cir. 2016)	146
United States v. Fields, 832 F.3d 831 (8th Cir. 2016)	39

United States v. Foster, 824 F.3d 84 (4th Cir. 2016).....	31
United States v. Fuehrer, 844 F.3d 767 (8th Cir. 2016).....	62
United States v. Garcia-Lopez, 809 F.3d 834 (5th Cir. 2016).....	114
United States v. Gardner, 823 F.3d 793 (4th Cir. 2016).....	51, 147
United States v. Gilliam, 842 F.3d 801 (2d Cir. 2016).....	91
United States v. Guidry, 817 F.3d 997 (7th Cir. 2016).....	55, 65, 72
United States v. Hamad, 809 F.3d 898 (7th Cir. 2016).....	107
United States v. Hamilton, 819 F.3d 503 (1st Cir. 2016).....	66
United States v. Hill, 818 F.3d 289 (7th Cir. 2016).....	31, 71, 116
United States v. House, 823 F.3d 482 (8th Cir. 2016).....	140
United States v. Houston, 813 F.3d 282 (6th Cir. 2016).....	18
United States v. Jackson, 811 F.3d 1049 (8th Cir. 2016).....	66, 71
United States v. Janis, 810 F.3d 595 (8th Cir. 2016).....	162
United States v. Jones, 842 F.3d 1077 (8th Cir. 2016).....	151, 156, 159, 160
United States v. Lara, 815 F.3d 605 (9th Cir. 2016).....	113
United States v. Laurita, 821 F.3d 1020 (8th Cir. 2016).....	150
United States v. Leiva, 821 F.3d 808 (7th Cir. 2016).....	94
United States v. Lull, 824 F.3d 109 (4th Cir. 2016).....	76
United States v. Lundin, 817 F.3d 1151 (9th Cir. 2016).....	27
United States v. Makeeff, 820 F.3d 995 (8th Cir. 2016).....	112
United States v. Mays, 819 F.3d 951 (7th Cir. 2016).....	23, 32
United States v. Mendoza, 817 F.3d 695 (10th Cir. 2016).....	63, 100
United States v. Merrell, 842 F.3d 577 (8th Cir. 2016).....	82, 141
United States v. Miranda-Sotolongo, 827 F.3d 663 (7th Cir. 2016).....	56
United States v. Montgomery, 828 F.3d 741 (8th Cir. 2016).....	39
United States v. Morgan, 842 F.3d 1070 (8th Cir. 2016).....	9, 83, 99
United States v. Mshihiri, 816 F.3d 997 (8th Cir. 2016).....	81, 149
United States v. Murray, 821 F.3d 386 (3d Cir. 2016).....	44, 93
United States v. Nowak, 825 F.3d 946 (8th Cir. 2016).....	12
United States v. Pacheco, 841 F.3d 384 (6th Cir. 2016).....	46, 53
United States v. Palmer, 820 F.3d 640 (4th Cir. 2016).....	50
United States v. Paniagua-Garcia, 813 F.3d 1013 (7th Cir. 2016).....	54
United States v. Patrick, 842 F.3d 540 (7th Cir. 2016).....	82
United States v. Patterson, 826 F.3d 450 (7th Cir. 2016).....	147
United States v. Phillips, 834 F.3d 1176 (11th Cir. 2016).....	72
United States v. Pile, 820 F.3d 314 (8th Cir. 2016).....	115
United States v. Quinn, 812 F.3d 694 (8th Cir. 2016).....	36
United States v. Ramirez, 839 F.3d 437 (5th Cir. 2016).....	52
United States v. Rivera, 817 F.3d 339 (7th Cir. 2016).....	102
United States v. Rivera, 825 F.3d 59 (1st Cir. 2016).....	75
United States v. Roberts, 824 F.3d 1145 (8th Cir. 2016).....	106
United States v. Robinson, 814 F.3d 201 (4th Cir. 2016).....	45
United States v. Robinson, 844 F.3d 137 (3d Cir. 2016).....	139
United States v. Rodriguez, 834 F.3d 937 (8th Cir. 2016).....	98
United States v. Roelandt, 827 F.3d 746 (8th Cir. 2016).....	38
United States v. Sanchez, 817 F.3d 38 (1st Cir. 2016).....	30, 42, 151
United States v. Sanford, 813 F.3d 708 (8th Cir. 2016).....	36
United States v. Scurry, 821 F.3d 1 (D.C. Cir. 2016).....	92
United States v. Shackelford, 830 F.3d 751 (8th Cir. 2016).....	86
United States v. Smith, 820 F.3d 356 (8th Cir. 2016).....	4
United States v. Smith, 821 F.3d 1293 (11th Cir. 2016).....	156
United States v. Swan, 842 F.3d 28 (1st Cir. 2016).....	145
United States v. Sweeney, 821 F.3d 893 (7th Cir. 2016).....	21
United States v. Tamayo-Baez, 820 F.3d 308 (8th Cir. 2016).....	59
United States v. Tessier, 814 F.3d 432 (6th Cir. 2016).....	110
United States v. Thompson, 811 F.3d 944 (7th Cir. 2016).....	13, 20

United States v. Thompson, 842 F.3d 1002 (7th Cir. 2016)	33, 47, 95, 114
United States v. Torres, 828 F.3d 1113 (9th Cir. 2016)	6, 108
United States v. Toussaint, 838 F.3d 503 (5th Cir. 2016)	105
United States v. Turner, 839 F.3d 429 (5th Cir. 2016)	16, 109
United States v. Vasquez-Algarin, 821 F.3d 467 (3d Cir. 2016)	70
United States v. Von Behren, 822 F.3d 1139 (10th Cir. 2016)	142
United States v. Walker, 840 F.3d 477 (8th Cir. 2016)	61
United States v. Walton, 827 F.3d 682 (7th Cir. 2016)	57
United States v. Weast, 811 F.3d 743 (5th Cir. 2016)	14
United States v. Welch, 628 Fed. Appx. 758 (8th Cir. 2016 - unpublished)	166
United States v. Whitaker, 820 F.3d 849 (7th Cir. 2016)	19, 65
United States v. Williams, 837 F.3d 1016 (9th Cir. 2016)	40, 87
United States v. Williams, 842 F.3d 1143 (9th Cir. 2016)	152, 160
United States v. Woods, 829 F.3d 675 (8th Cir. 2016)	60, 157
United States v. Wright, 838 F.3d 880 (7th Cir. 2016)	101
United States v. Wright, 844 F.3d 759 (8th Cir. 2016)	11, 25, 86
United States v. Young, 835 F.3d 13 (1st Cir. 2016)	67
United States v. Zamora-Garcia, 831 F.3d 979 (8th Cir. 2016)	22, 96
Utah v. Strieff, 579 U.S. ____ (2016), 136 S. Ct. 2056	74
Vasquez v. Lewis, 834 F.3d 1132 (10th Cir. 2016)	126
Voisine v. United States, 579 U.S. ____ (2016), 136 S. Ct. 2272	163
Wate v. Kubler, 839 F.3d 1012 (11th Cir. 2016)	134
White v. Pauly, 580 U.S. ____, 137 S. Ct. 538 (2017)	119