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The Informer – June 2016

Article

The Use of Surveillance Camera Footage in Federal Criminal Prosecutions

By Edmund Zigmund Attorney-Advisor, United States Department of Homeland Security / Federal Law Enforcement Training Centers / Office of Chief Counsel / Legal Division, Glynco, Georgia.....4

Case Summaries

United States Supreme Court

Utah v. Strieff: Whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between an unlawful *Terry* stop and the seizure of evidence.....8

Birchfield v. North Dakota: 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.....9

Circuit Courts of Appeals

Second Circuit

United States v. Bohannon : Whether officers were required to obtain a search warrant before entering a third party’s dwelling to arrest the defendant pursuant to an arrest warrant before the government could use evidence seized in the dwelling against the defendant.....10

Third Circuit

United States v. Vasquez-Algarin: Whether the “reasonable belief” standard in *Payton v. New York* amounts to a probable cause standard, and whether officers established a reasonable belief that the subject of an arrest warrant lived in the defendant’s apartment before they entered to arrest him.....11

Fourth Circuit

United States v. Gardner: Whether an officer established reasonable suspicion to conduct a *Terry* stop, and whether the defendant was in custody for *Miranda* purposes during the stop.....12

United States v. Foster: Whether an officer established reasonable suspicion to conduct a *Terry* stop.....13

United States v. Lull: Whether an officer intentionally and/or recklessly omitted material information from a search warrant affidavit.....14

Sixth Circuit

United States v. Church: Whether an officer established probable cause to search the defendant’s apartment for evidence of possession with intent to distribute drugs.....15

Seventh Circuit

United States v. Sweeney: Whether the warrantless search of the common area in the basement of an apartment building violated the *Fourth Amendment*.....16

Becker v. Elfreich : Whether an officer was entitled to qualified immunity in a suit for excessive use of force after the plaintiff claimed the officer pulled him down a flight of steps and allowed his K-9 partner to bite him on the leg after he had surrendered to the officer.....16

Eighth Circuit

United States v. Laurita: Whether the defendant was in custody for *Miranda* purposes during an interview by officers at his workplace.....17

United States v. House: Whether a photographic line up presented to a witness was impermissibly suggestive.....18

United States v. Berger: Whether a forensic search of an external hard drive exceeded the scope of the defendant’s consent.....19

Tenth Circuit

United States v. Von Behren: Whether a condition of the defendant’s supervised release that required him to complete a sexual history polygraph violated the defendant’s *Fifth Amendment* right against self-incrimination.....20



Use of Force Crossword Puzzle.....21



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The Use of Surveillance Camera Footage in Federal Criminal Prosecutions

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Today, surveillance cameras are being widely used by public and private entities as part of their security efforts. These cameras may be installed at businesses, schools, churches, airports, subway stations, government buildings, private homes and other places. Even some law enforcement agencies have strategically installed surveillance cameras in parts of their jurisdictions. When a crime occurs, investigators will often canvass the area of the crime in an effort to locate surveillance cameras in the area. In some cases, a surveillance camera may be the only “eyewitness” to a crime. Surveillance camera footage is playing an important role in the investigation of the terrorist attacks in Paris, France¹ and Brussels, Belgium.²

Surveillance camera footage can be valuable evidence in a federal criminal investigation because it may contain images of suspects, accomplices, victims, witnesses, and other persons of interest. During the investigation of the 2013 Boston Marathon bombings, FBI agents utilized video surveillance footage to identify the bombers.³ Initially, two suspects were identified by their hats captured in surveillance images.⁴ Investigators later learned their true names - Dzhokhar and Tamerlan Tsarnaev. During the subsequent criminal trial of Dzhokhar Tsarnaev, federal prosecutors showed jurors a compilation of surveillance pictures and video footage depicting the men as they walked to the site of the deadly attacks carrying backpacks.⁵ Footage from an array of cameras at area businesses and institutions showed their departure from the area.⁶

When surveillance camera footage is obtained, can a law enforcement officer, in an effort to obtain a positive identification of a suspect, show a person an image that depicts a single suspect? In *Stovall v. Denno*, the United States Supreme Court observed that the law enforcement practice of showing suspects singly to witnesses for the purpose of identification has been widely condemned.⁷ However, the Supreme Court held that it was constitutional for law enforcement officers to use a “show-up” procedure (where a single suspect is shown to a witness) because immediate action was needed to determine whether or not the suspect was the attacker.⁸ Following *Denno*, other federal courts have found “show-up” procedures to be constitutionally permissible because they are generally conducted near the scene of a crime shortly after its occurrence.⁹ However, with the passage of time, the law enforcement show-up procedure becomes less legally viable. During the subsequent investigation of a crime, showing the image of a single suspect to a witness for purposes of identifying the suspect as the perpetrator of the crime can violate the Due Process Clause of the Fifth Amendment.¹⁰ Such a procedure is wrought with the danger of impermissible suggestiveness because showing a single photograph to a witness, in effect, suggests to the witness that he or she should identify “this person” as the perpetrator of the crime.¹¹

However, showing a person an image that was captured by a surveillance camera at or around the time of a crime, that depicts the actual perpetrator of the crime, does not involve an attempt to identify a suspect from law enforcement “mug shot” files.¹² Instead, during an investigation, law enforcement is simply showing a potential witness a surveillance image in an attempt to learn the true identity of the perpetrator. In *United States v. Beck*, the Ninth Circuit Court of

Appeals observed that, during a photo identification procedure, little possibility of misidentification arises when law enforcement shows a witness a surveillance photograph that depicts the actual perpetrator of the crime.¹³ Some categories of potential witnesses who may be able to identify a suspect depicted in surveillance footage include: family members,¹⁴ girlfriends,¹⁵ former wives,¹⁶ former girlfriends,¹⁷ friends,¹⁸ acquaintances,¹⁹ former employers,²⁰ business acquaintances,²¹ probation officers,²² parole officers,²³ police officers,²⁴ bail bondsmen,²⁵ and former prison cellmates.²⁶

At trial, Federal Rules of Evidence 403²⁷ and 701²⁸ will govern the admissibility of any lay witness “opinion” testimony that identifies a defendant depicted in surveillance camera footage. Initially, using Federal Rule of Evidence 403, a trial judge will balance the competing interests of evidentiary need and the danger of unfair prejudice when deciding whether to admit such witness testimony.²⁹ Then, under Federal Rule of Evidence 701, the judge may allow a lay witness to give an opinion regarding the identity of a person depicted in an image if that witness has had sufficient contact with the person to achieve a level of familiarity that renders their lay opinion helpful to the trier of fact (a judge or jury).³⁰

When a law enforcement officer interviews a potential witness who may be able to identify a perpetrator depicted in a surveillance image, the officer should determine the witness’s level of familiarity with the suspect. Did the person know the suspect for a period of time and in a variety of circumstances,³¹ especially around the time of the crime?³² To make this determination, the officer should document: (i) the person’s relationship with the suspect;³³ (ii) the length of time of that relationship;³⁴ (iii) the frequency of contact between the person and the suspect during their relationship;³⁵ (iv) the circumstances surrounding their contact,³⁶ including whether the person lived with the suspect at any time;³⁷ (v) when and where the person saw the suspect wearing clothing depicted in a surveillance image;³⁸ (vi) the person’s prior observations of the suspect’s mannerisms - including walking and posture;³⁹ (vii) and any other circumstances that are serving as the basis for the person’s identification. At trial, federal prosecutors may use this information to lay a foundation for admission of this person’s lay witness opinion testimony.

Why can’t the trier of fact (judge or jury) just compare the surveillance image with the defendant and come to a conclusion as to whether the person depicted in the image is the defendant? Sometimes the judge or jury may be able to accurately make this comparison.⁴⁰ However, lay witness opinion testimony may be particularly helpful to a trier of fact when the surveillance photographs are less than clear,⁴¹ when the perpetrator disguised his or her appearance during the crime,⁴² or where the defendant’s appearance changed between the time of the crime and the defendant’s appearance at trial.⁴³

Further, as explained by the Fourth Circuit Court of Appeals, the testimony by persons who knew a defendant over a period of time and in a variety of circumstances offers to the jury a perspective it cannot acquire in its limited exposure to a defendant during a trial.⁴⁴ “Human features develop in the mind's eye over time.”⁴⁵ As such, witnesses who had the opportunity to interact with a defendant in ways the jury could not, and in natural settings, gives such witnesses a greater appreciation of a defendant’s normal appearance.⁴⁶ Thus, their testimony provides the jury with an opinion of someone whose exposure was not limited to a few days in a sterile courtroom setting.⁴⁷

As may be seen, witness testimony that identifies a defendant captured in surveillance camera footage can be critically important for the prosecution in a criminal trial. Therefore, when a surveillance camera captures the image of a perpetrator of a crime, law enforcement officers

should strive to locate potential witnesses: (1) who can accurately identify the perpetrator in the image; and (2) who possess sufficient familiarity with the perpetrator to meet the legal requirements for admission of their lay opinion identification testimony in a criminal trial. By so doing, this important evidence may ultimately bring the perpetrator of a crime to justice.

Endnotes

¹ BBC News, *Paris Attacks: Video Shows Ninth Attacker*, November 17, 2015. Retrieved from: <http://www.bbc.com/news/world-europe-34851943>

² Jason Silverstein, *Three Suspected ISIS Attackers Seen in Airport Surveillance Photo from Brussels Airport; One Remains At Large*, New York daily News, March 22, 2016. Retrieved from: <http://www.nydailynews.com/news/world/suspects-brussels-attacks-security-footage-article-1.2573190>

³ Federal Bureau of Investigation, *Updates on Investigation into Multiple Explosions in Boston*, April 15, 2013. Retrieved from: <https://www.fbi.gov/news/updates-on-investigation-into-multiple-explosions-in-boston/photos>

⁴ John Kamp, *Prosecutors Show Surveillance Images of Bombing Suspects at Boston Marathon*, The Wall Street Journal, March 9, 2015. Retrieved from: <http://www.wsj.com/articles/boston-marathon-bombing-survivor-takes-stand-at-trial-1425924292>

⁵ *Id.*

⁶ *Id.*

⁷ 388 U.S. 293, 302 (1967).

⁸ *Id.*

⁹ *United States v. Pickar*, 616 F.3d 821, 828 (8th Cir. 2010) (“Absent special elements of unfairness, prompt on-the-scene confrontations do not entail due process violations”); *See also, United States v. Martinez*, 462 F.3d 903, 910 (8th Cir. 2006) (“Police officers need not limit themselves to station house [identification procedures] when an opportunity for a quick, on-the-scene identification arises.”); *United States v. Sleet*, 54 F.3d 303, 309 (7th Cir. 1995) (“[I]mmediate showups may, at times, serve legitimate law-enforcement purposes, as they allow identification before the suspect has altered his appearance and while the witness' memory is fresh, and permit the quick release of innocent persons.”); *United States v. Bautista*, 23 F.3d 726, 730 (2d Cir. 1994) (A prompt showing of a detained suspect at the scene of arrest may prevent the mistaken arrest of innocent persons).

¹⁰ *See, Foster v. California*, 394 U.S. 440, 443 (1969) (suggestive elements of police identification procedure that violated due process of law included a one-to-one confrontation between the suspect and the witness); *See also, Simmons v. United States*, 390 U.S. 377, 383 (1968) (danger of a due process violation is increased when police show a witness only the picture of a single individual who generally resembles the person seen by the witness).

¹¹ *See, Foster*, 394 U.S. at 443 (suggestive elements in police identification procedure violate due process guarantees when it makes it all but inevitable that the witness will identify the suspect).

¹² *See, United States v. Beck*, 418 F.3d 1008, 1013 (9th Cir. 2005).

¹³ *Beck*, 418 F.3d at 1013.

¹⁴ *See, United States v. Robinson*, 804 F.2d 280, 282 (4th Cir. 1986) (brother); *United States v. White*, 639 F.3d 331, 335-36 (7th Cir. 2011) (sister).

¹⁵ *See, United States v. Barrett*, 703 F.2d 1076, 1085-86 (9th Cir. 1983) (girlfriend); *United States v. Lucas*, 898 F.2d 606, 610-11 (8th Cir. 1990), *cert denied*, 498 U.S. 838 (1990) (girlfriend); *United States v. Perry*, 438 F.3d 642, 649-50 (6th Cir. 2006) (girlfriend).

¹⁶ *See, United States v. Young Buffalo*, 591 F.2d 506, 513 (9th Cir.), *cert. denied*, 441 U.S. 950 (1979) (estranged wife); *United States v. Jackman*, 48 F.3d 1, 11-12 (1st Cir. 1995) (ex-wife).

¹⁷ *See, United States v. Towns*, 913 F.2d 434, 445 (7th Cir. 1990) (former girlfriend); *White*, 639 F.3d at 335-36 (ex-girlfriend).

¹⁸ *See, United States v. Ingram*, 600 F.2d 260, 262 (10th Cir. 1979) (friends temporarily residing with suspect); *United States v. Stormer*, 938 F.2d 759, 761 (7th Cir. 1991) (three friends).

¹⁹ *See, United States v. Holmes*, 229 F.3d 782, 788-89 (9th Cir. 2000), *cert denied*, 531 U.S. 1175 (2001) (acquaintance); *Jackman*, 48 F.3d at 11-12 (two acquaintances).

²⁰ *See, United States v. Pierce*, 136 F.3d 770, 775-76 (11th Cir. 1998), *cert denied*, 525 U.S. 974 (1998) (former workplace supervisor); *Perry*, 438 F.3d at 649-50 (former employer).

²¹ *See, United States v. Farnsworth*, 729 F.2d 1158, 1160-61 (8th Cir. 1984) (used car salesman).

²² *See, Young Buffalo*, 591 F.2d at 513 (probation officer); *Pierce*, 136 F.3d at 775-76 (federal probation officer); *United States v. Contreras*, 536 F.3d 1167, 1169-70 (10th Cir. 2008), *cert denied*, 555 U.S. 1117 (2009) (state probation and parole officer); *Beck*, 418 F.3d at 1014-15 (federal probation officer).

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- ²³ See, *United States v. Langford*, 802 F.2d 1176, 1178-80 (9th Cir. 1986) (parole officer); *United States v. Wright*, 904 F.2d 403, 404-05 (8th Cir. 1990) (parole officer); *Farnsworth*, 729 F.2d at 1160-61 (two parole officers).
- ²⁴ See, *Stormer*, 938 F.2d at 762-63 (four police officers); *United States v. Kornegay*, 410 F.3d 89, 94-96 (1st Cir. 2005) (police detective); *Wright*, 904 F.2d at 404-05 (two county deputy sheriffs; two local police officers)
- ²⁵ See, *Wright*, 904 F.2d at 404-05 (bail bondsman).
- ²⁶ *Kornegay*, 410 F.3d at 92 (former prison cellmate).
- ²⁷ Fed. R. Evid. 403.
- ²⁸ Fed. R. Evid. 701.
- ²⁹ See, *Beck*, 418 F.3d at 1013-14.
- ³⁰ *Beck*, 418 F.3d at 1014.
- ³¹ *Beck*, 418 F.3d at 1015.
- ³² *Jackman*, 48 F.3d at 5.
- ³³ See, *Robinson*, 804 F.2d at 282 (brother); *White*, 639 F.3d at 335 (sister; ex-girlfriend); *Barrett*, 703 F.2d at 1085 (girlfriend); *Lucas*, 898 F.2d at 608 (girlfriend); *Perry*, 438 F.3d at 649 (former employer); *Towns*, 913 F.2d at 445 (former girlfriend); *Young Buffalo*, 591 F.2d at 513 (probation/parole officer; estranged wife); *Jackman*, 48 F.3d at 2 (ex-wife; two acquaintances); *Ingram*, 600 F.2d at 262 (friends temporarily residing with suspect); *Pierce*, 136 F.3d at 773 (federal probation officer; workplace supervisor); *Holmes*, 229 F.3d at 784-85 (acquaintance); *Contreras*, 536 F.3d at 1169 (state probation and parole officer); *Beck*, 418 F.3d at 1011 (federal probation officer); *Langford*, 802 F.2d at 1178-79 (cousin; parole officer); *Wright*, 904 F.2d at 404-05 (parole officer; two county deputy sheriffs; bail bondsman; two local police officers); *Farnsworth*, 729 F.2d at 1160-61 (two parole officers; used car salesman); *Stormer*, 938 F.2d at 761 (three friends; four police officers); *Kornegay*, 410 F.3d at 92 (police detective; prison cellmate).
- ³⁴ See, *Wright*, 904 F.2d at 404 (three witnesses knew defendant for approximately 2 years; one witness for 13 years); *Pierce*, 136 F.3d at 775 (witness met with defendant during 7 month period; another witness supervised defendant at work for 5-6 month period); *Farnsworth*, 729 F.2d at 1160 (one witness knew the defendant for approximately two years; the other witness knew the defendant for one year); *Beck*, 418 F.3d at 1015 (witness met with defendant over 2 month period)
- ³⁵ See, *Langford*, 802 F.2d at 1178-79 (one witness met with defendant approximately 50 times; the other witness knew defendant most of his life); *Wright*, 904 F.2d at 404 (multiple witnesses had seen the defendant numerous times over an extended period of time); *Pierce*, 136 F.3d at 773 (witness met with defendant 10 times during 7 month period); *Holmes*, 229 F.3d at 788 (witness met defendant at least 6 times for approximately 30 minutes each); *Farnsworth*, 729 F.2d at 1160 (one witness met with the defendant approximately 75 times anywhere from 2-25 minutes at his office and 10-15 fifteen times outside his office; the other witness met the defendant 20 times for periods lasting up to 45 minutes); *Contreras*, 536 F.3d at 1171 (witness met with defendant on multiple occasions between 5-10 minutes each time); *Beck*, 418 F.3d at 1015 (witness met with defendant four times for a total of more than seventy minutes.)
- ³⁶ *Robinson*, 804 F.2d at 281-82 (witness's close association with defendant over the years);
- ³⁷ *Ingram*, 600 F.2d at 262 (defendant was temporarily residing with witnesses at time of crime); *Barrett*, 703 F.2d 1076 (witness intimate acquaintance through living with defendant at time of crime); *Holmes*, 229 F.3d at 788 (defendant spent the night with witness); *Lucas*, 898 F.2d at 610 (witness had lived with defendant for a period of time).
- ³⁸ *Beck*, 418 F.3d at 1015; See, *Young Buffalo*, 591 F.2d at 513 (witnesses previously saw defendant wearing similar coat); *Jackman*, 48 F.3d at 12 (three witnesses previously saw defendant wearing a baseball cap; two witnesses saw defendant wearing the coat worn by the suspect).
- ³⁹ See, *Jackman*, 48 F.3d at 12 (all three witnesses were familiar with the defendant's carriage and posture).
- ⁴⁰ See, *Jackman*, 48 F.3d at 4-5 (testimony of identification witness may be inadmissible if photographs are so clear that the witness is no better-suited than the jury to make the identification).
- ⁴¹ See, *Stormer*, 938 F.2d at 762.
- ⁴² See, *Robinson*, 804 F.2d at 281-82; *Wright*, 904 F.2d at 405; *Towns*, 913 F.2d at 445; *Stormer*, 938 F.2d at 762; *Farnsworth*, 729 F.2d at 1160.
- ⁴³ See, *Barrett*, 703 F.2d at 1085-86; *Wright*, 904 F.2d at 405; *Towns*, 913 F.2d at 445; *Farnsworth*, 729 F.2d at 1160.
- ⁴⁴ *United States v. Allen*, 787 F.2d 933, 936 (4th Cir. 1986), *vacated on the grounds*, 479 U.S. 1077 (1987).
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*

CASE SUMMARIES

United States Supreme Court

Utah v. Strieff, 2016 U.S. LEXIS 3926 (U.S. June 20, 2016)

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

Birchfield v. North Dakota, 2016 U.S. LEXIS 4058 (U.S. June 23, 2016)

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

Circuit Courts of Appeal

Second Circuit

United States v. Bohannon, 2016 U.S. App. LEXIS 9789 (2d Cir. Conn. May 31, 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 believe¹ 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 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.

¹ 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.

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 home². 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>

Third Circuit

United States v. Vasquez-Algarin, 2016 U.S. App. LEXIS 7889 (3d Cir. Pa. May 2, 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 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.

² 3d, 4th, 6th, 7th, 8th, 9th, 11th and D.C, Circuits.

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>

Fourth Circuit

United States v. Gardner, 2016 U.S. App. LEXIS 9066 (4th Cir. N.C. May 18, 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. Foster, 2016 U.S. App. LEXIS 9502 (4th Cir. W. Va. May 24, 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. Lull, 2016 U.S. App. LEXIS 9569 (4th Cir. N.C. May 25, 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>

Sixth Circuit

United States v. Church, 2016 U.S. App. LEXIS 8982 (6th Cir. Tenn. May 17, 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>

Seventh Circuit

United States v. Sweeney, 2016 U.S. App. LEXIS 8534 (7th Cir. Wis. May 9, 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>

Becker v. Elfreich, 2016 U.S. App. LEXIS 8703 (7th Cir. Ind. May 12, 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>

Eighth Circuit

United States v. Laurita, 2016 U.S. App. LEXIS 8134 (8th Cir. Neb. May 4, 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>

United States v. House, 2016 U.S. App. LEXIS 9360 (8th Cir. S.D. May 23, 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. Berger, 2016 U.S. App. LEXIS 9629 (8th Cir. Ark. May 26, 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>

Tenth Circuit

United States v. Von Behren, 2016 U.S. App. LEXIS 8567 (10th Cir. Colo. May 10, 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.

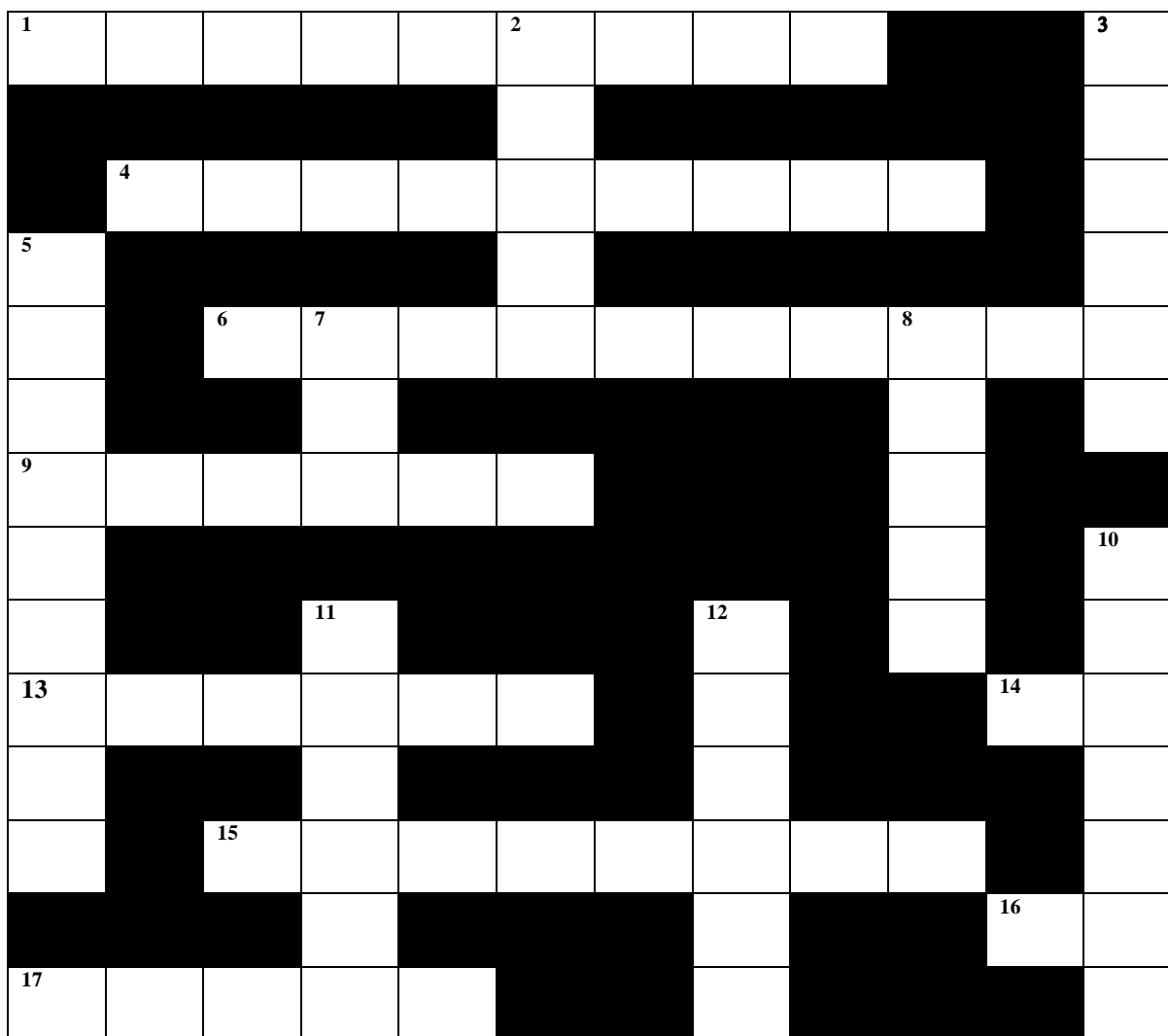
First, the court held that answering questions during a polygraph examination involves a communicative act, which is testimonial.

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>

Use of Force Crossword Puzzle



ACROSS

1. An officer's defense to standing trial for a constitutional tort is often described this way.
4. A test that examines the facts, not subjective beliefs.
6. The facts are viewed through the lens of this type of officer.
9. This type of force requires an immediate threat of serious bodily harm.
13. The name of one of the parties in the Supreme Court decision that describes the test for judging police officers accused of using excessive force.
14. After taking a seriously injured suspect into custody, an officer may have a duty to take him here. (Abbr.)
15. One of the *Graham* factors is the _____ of the crime.
16. Officers have a duty to decontaminate a suspect after using this type of intermediate weapon. (Abbr.)
17. The name of one of the parties in the 2007 Supreme Court decision that describes the relationship between *Graham v. Connor* and *Tennessee v. Garner*.

DOWN

2. Things that were seen, heard, smelled, (etc., etc.,) that should be in a use of force report.
3. The name of one of the parties in the 1985 Supreme Court decision that provides examples as to when deadly force is reasonable.
5. Officers are not judged based on this.
7. An intermediate weapon that causes neuromuscular incapacitation. (Abbr.)
8. An intermediate weapon that may be used to stop an immediate threat.
10. These types of answers are unlikely in situations where officers have to use force.
11. The most important factor to consider in using force.
12. Whether good or bad, this is not relevant under an objective test.

Send suggestions to:

Tim Miller, Federal Law Enforcement Training Center / Legal Division at Tim.Miller@dhs.gov

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