
THE FEDERAL LAW ENFORCEMENT - INFORMER -

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW
ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer)*. The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting <https://www.fletc.gov/legal-resources>.

This edition of *The Informer* may be cited as 7 INFORMER 19.

Get **THE INFORMER** Free Every Month

Click [HERE](#) to Subscribe

THIS IS A SECURE SERVICE.

You will receive mailings from no one except the FLETC Legal Division.

The Informer – July 2019

Case Summaries

United States Supreme Court

Mitchell v. Wisconsin: Whether a police officer violated the Fourth Amendment by directing a medical professional to take a blood sample from an unconscious drunk-driving suspect without first obtaining a search warrant.....4

Circuit Courts of Appeals

Third Circuit

United States v. Greene: Whether an officer’s answer to the defendant’s question constituted the functional equivalent of interrogation and whether the officer lawfully seized a bag of marijuana from the defendant’s pocket during a Terry frisk.....5

Fifth Circuit

United States v. Arellano-Banuelos: Whether a prison inmate was in-custody for Miranda purposes during an interview with a federal agent.....6

Sixth Circuit

United States v. Potter: Whether the defendant validly invoked his right to counsel after he mentioned an attorney and then asked the officers if he needed one.....7

Seventh Circuit

United States v. Adair: Whether an officer established reasonable suspicion to conduct a Terry stop and a Terry frisk based on information provided by a 911 caller and his own observations.....8

United States v. Yancey: Whether officers had reasonable justification to extend a traffic stop after arresting the driver and placing her in the back of a patrol car.....9

Eighth Circuit

Thurairajah v. City of Fort Smith: Whether a police officer was entitled to qualified immunity in a lawsuit alleging an unlawful arrest in violation of the Fourth Amendment and retaliatory arrest in violation of the First Amendment after the officer arrested the plaintiff for shouting a two-word expletive at him from a moving vehicle.....10

Fischer v. Hoven: Whether a police officer’s use of an arm-bar take down constituted an excessive use of force in violation of the Fourth Amendment.....12

Smith v. Kilgore: Whether it was objectively reasonable for officers to shoot a suspect who fired a gun at one officer and then began to raise the gun towards two other officers.....13

United States v. Dunn: Whether officers were entitled to impound and inventory the defendant’s vehicle after the defendant had already made private towing arrangements.....14

United States v. White: Whether officers’ entry onto the defendant’s curtilage was lawful under the knock and talk exception to the Fourth Amendment’s warrant requirement.....15

[Ninth Circuit](#)

United States v. Brown: Whether an anonymous tip that the defendant had a gun provided reasonable suspicion to justify a Terry stop.....16

Cruz v. Barr: Whether evidence of an illegal immigrant’s alienage was subject to suppression at a removal hearing and whether the authority to detain occupants of a premises during the execution of a search under Michigan v. Summers applied.....17



FLETC Informer Webinar Schedule

United States Supreme Court Update (1-hour)

Presented by Henry McGowen, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

As we come to the close of the U.S. Supreme Court’s 2018-2019 session, it is a good time to see how the Court ruled on key criminal justice issues. This 1-hour webinar will review the Court’s opinions on cases which address key constitutional issues related to the work of law enforcement officers and prosecutors.

Wednesday August 28, 2019: 3p.m. Eastern / 2p.m. Central / 1p.m. Mountain / 12 p.m. Pacific

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



To Participate in a FLETC Informer Webinar

1. Click on the link to access the Homeland Security Information Network (HSIN).
2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account, click on the button next to “Enter as a Guest.”
4. Enter your name and click the “Enter” button.
5. You will now be in the meeting room and will be able to participate in the event.
6. Even though meeting rooms may be accessed before an event, there may be times when a meeting room is closed while an instructor is setting up the room.
7. **If you experience any technical issues / difficulties during the login process, please call our audio bridge line at (877) 446-3914 and enter participant passcode 232080 when prompted.**

CASE SUMMARIES

United States Supreme Court

Mitchell v. Wisconsin, 2019 U.S. LEXIS 4400 (June 27, 2019)

A police officer received a report that Gerald Mitchell was driving a vehicle while under the influence of alcohol. The officer eventually found Mitchell wandering near a lake. Stumbling and slurring his words, Mitchell had difficulty standing without the support of two officers. One of the officers gave Mitchell a preliminary breath test, which registered a blood alcohol concentration (BAC) of 0.24%, triple the legal limit for driving in Wisconsin. The officer arrested Mitchell for operating a vehicle while intoxicated and transported him to the police station for a more reliable breath test using better equipment.

When the officer reached the police station, Mitchell was too lethargic to be offered a breath test, so he was transported to the hospital for a blood test. On the way to the hospital, Mitchell lost consciousness and had to be wheeled inside. The officer then read aloud to a slumped Mitchell the standard statement giving drivers a chance to refuse BAC testing. After receiving no response from Mitchell, the officer asked hospital staff to draw a blood sample. Mitchell remained unconscious while the blood sample was taken. Analysis of Mitchell's blood sample showed that his BAC, approximately ninety minutes after his arrest, was 0.222%. Mitchell was charged with two related drunk-driving offenses.

Mitchell filed a motion to suppress the results of the blood test. Mitchell argued that the officer violated his Fourth Amendment right to be free from unreasonable searches when he directed hospital personnel to obtain a sample of his blood without a search warrant.

The Court held that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine "almost always permits a blood test without a warrant." Under the exigent circumstances exception to the Fourth Amendment's warrant requirement, warrantless searches are permitted "to prevent the imminent destruction of evidence." While the natural dissipation of alcohol in a person's bloodstream will not automatically allow officers to obtain blood samples under this exception, the Court found that "unconscious driver cases" create a "compelling need" for officers to conduct warrantless blood tests. The Court noted that a driver's unconsciousness constitutes a medical emergency that, by itself, requires officers to conduct a number of important tasks that would reasonably require them to delay applying for a search warrant. Consequently, the Court held that "when a driver is unconscious, the general rule is that a warrant is not needed."

However, the Court added, "we do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." Because Mitchell did not have an opportunity to attempt to make this argument, the Court remanded the case to the Wisconsin state court to decide this issue.

For the Court's opinion: https://www.supremecourt.gov/opinions/18pdf/18-6210_2co3.pdf

Circuit Courts of Appeal

Third Circuit

United States v. Greene, 2019 U.S. App. LEXIS 18921 (3d Cir. PA June 25, 2019)

Tyrone Greene and his girlfriend, Jennifer Manley, were travelling in a vehicle without its lights on when a police officer stopped them. During the stop, the officer smelled the odor of marijuana emanating from the vehicle. In addition, Greene began acting suspiciously by repeatedly asking to leave the scene of the stop, by standing up and then sitting back down in the passenger seat when ordered out of the vehicle, and by reaching for his waistband as if he were trying to conceal something. Concerned that Greene might be armed, the officer conducted a Terry frisk. During the frisk, the officer felt a bulge in one of Greene's pockets. Based on his experience, the officer immediately recognized the bulge was plastic bag that contained marijuana. The officer removed the bag and arrested Greene.

The officer then searched the couple's vehicle incident to arrest and found ammunition in the glove box and in Manley's purse. While escorting Greene to his police car, the officer noticed Greene bending over and walking in an unusual way as if to conceal something. Another officer who had arrived on the scene searched Greene and discovered a loaded, stolen handgun in his pants.

During the booking process at the police station and before being advised of his Miranda rights, Greene asked the officer whether Manley would get in trouble. The officer replied that she would, for "headlight violations, no license, [and] marijuana." Greene then volunteered that he would "take the hit" for the gun and bullets.

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

Greene filed a motion to suppress his statement concerning the gun and bullets, arguing that the officers comment regarding the trouble Manley was facing "coerced" him into confessing.

In [Rhode Island v. Innis](#), the Supreme Court held that a suspect must be Mirandized before he is subjected to the functional equivalent of interrogation. The Court defined the functional equivalent of interrogation as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response."

The court found that the officer's response to Greene's question was a brief and accurate description of the charges Manley was facing. In addition, the court noted the charges Manley was facing were unrelated to the possession of the firearm and ammunition, to which Greene confessed. Consequently, the court held that the officer's answer to Greene's question did not constitute the functional equivalent of questioning because Greene's incriminating statement was not foreseeable but instead a "gratuitous" comment.

Greene further argued that the firearm and ammunition should have been suppressed as the fruit of an unlawful Terry frisk.

The court disagreed. In [Minnesota v. Dickerson](#), the Supreme Court held that under the "plain-feel doctrine," a police officer may seize contraband during a lawful Terry frisk if the contraband's

“contour or mass makes its identity immediately apparent.” However, if the identity of the object is not immediately apparent, the officer cannot squeeze or manipulate the object to determine its identity.

In this case, based on his extensive experience in drug investigations, the officer immediately recognized the bulge in Greene’s pocket as a bag of marijuana. The officer did not manipulate the bag to determine its contents but instead realized the bulge was a bag of marijuana based on its feel and texture.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca3/18-2923/18-2923-2019-06-25.pdf?ts=1561482005>

Fifth Circuit

United States v. Arellano-Banuelos, 2019 U.S. App. LEXIS 18110 (5th Cir. TX June 17, 2019)

Ignacio Arellano-Banuelos was serving a sentence of 15 months’ imprisonment on state offenses in Texas. Special Agent Cruz, a law enforcement officer with U.S. Immigration and Customs Enforcement (ICE) and two other agents traveled to the state prison to interview 23 inmates including Arellano. The inmates were escorted into an office in groups of five. A prison guard stood at the door of the office, which remained open. SA Cruz and another ICE agent conducted simultaneous interviews at separate table and a third agent photographed and fingerprinted the inmates at the conclusion of their interviews. Arellano’s interview took about 10 to 15 minutes.

SA Cruz interviewed Arellano about his immigration status and past deportation without providing complete Miranda warnings. During the interview, Arellano made incriminating statements concerning his prior removal and his lack of permission to reenter the United States.

Arellano-Banuelos was subsequently charged with illegal reentry into the United States.

Arellano filed a motion to suppress his incriminating statements to SA Cruz. Arellano argued that he was subjected to custodial interrogation without being advised of his Miranda rights. The district court denied Arellano’s motion and he appealed.

Under Miranda, an individual subjected to “in-custody interrogation” must first “be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed.” A person is in-custody for Miranda purposes when there is a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” Although Arellano was incarcerated at the time of the interview, the Supreme Court has held that “imprisonment alone” does not automatically constitute custody for Miranda purposes. While the prison setting may increase the likelihood that an inmate is in custody for Miranda purposes, the custody determination must “focus on all of the features of the interrogation,” including “the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.” The court added that the most important factor in the custody determination is whether the prisoner is told that he is free to end the questioning and return to his cell.

The Fifth Circuit Court of Appeals held that Arellano was not in-custody for Miranda purposes.

First, the interview lasted only 10 to 15 minutes. Second, multiple people were present in the interview, including other prisoners, and Arellano was not isolated with SA Cruz. Third, the ICE agents were not armed and the prison guard did not have a firearm. Fourth, SA Cruz did not raise his voice during the interview, use a sharp tone of voice, or use profanity. Fifth, Arellano was not restrained during the interview. Finally, even though SA Cruz never explicitly told Arellano that he was free to leave the interview room, SA Cruz told Arellano that his statement had to be voluntary and that the interview would terminate if Arellano chose not to speak with him. The court concluded it was clearly implied that if Arellano had chosen to terminate the interview he would have been allowed to leave the office and return to his ordinary prison life.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/17-11490/17-11490-2019-06-17.pdf?ts=1560814212>

Sixth Circuit

United States v. Potter, 2019 U.S. App. LEXIS 17384 (6th Cir. TN June 11, 2019)

Police officers arrested Michael Potter. After Potter told the officers he did not wish to speak with them, the officers honored his request and did not attempt to interview Potter. The next day, Potter changed his mind and initiated a conversation with the officers. Before questioning him, the officers advised Potter of his [Miranda](#) rights. Potter then signed a waiver stating that he understood his rights and was “willing to make a statement and answer questions without a lawyer present.” During this questioning, Potter admitted he had purchased 10 pounds of methamphetamine from a drug supplier in Georgia that he later sold in Tennessee.

After the government charged Potter with drug-related offenses, he filed a motion to suppress his statements to the officers concerning the purchase and sale of methamphetamine. Potter claimed that during the interview, he had asked for a lawyer several times but the officers ignored his requests and continued to question him. The officers disputed Potter's account. The officers testified that Potter mentioned a lawyer and “may have” asked whether he needed one, but the officers claimed that Potter never requested any attorney or attempted to stop the interrogation.

The magistrate judge found Potter's testimony not credible, held that Potter's statements about an attorney did not require the officers to end their questioning, and recommended that the district court deny Potter's motion. The district court agreed, adopted the magistrate's recommendation, and denied Potter's motion to suppress his statements. Potter appealed.

In [Edwards v. Arizona](#), the Supreme Court held that police officers must immediately cease questioning if an individual invokes his right to an attorney after being provided [Miranda](#) warnings. Subsequently, in [Davis v. United States](#), the Supreme Court held that a “suspect must unambiguously request counsel” to put “reasonable officers on notice that the interrogation must stop.” In [Davis](#), the Court held that a suspect who said, “maybe I should talk to a lawyer” did not unambiguously invoke his right to counsel; therefore, the officers did not have to stop questioning him.

The Sixth Circuit stated that following [Davis](#), it decided three cases in which the following comments by suspects concerning attorneys were not valid invocations of the right to counsel: (1) “I think I should talk to a lawyer, what do you think?”, (2) “it would be nice to have an attorney,” and (3) “I really should have a lawyer, huh?” The court added that the 1st, 2nd, 4th, 8th, and 10th

circuits have also ruled that similar suspect statements have not constituted a valid invocation of the right to counsel. In contrast, the court found that it had found requests for an attorney valid when a suspect told the police that he wanted to be left alone “until I can see my attorney” and in another case where the suspect directed the police to “call his attorney’s phone number.”

In this case, the court found that while Potter may have mentioned an attorney and may have asked if he needed one, he never requested to actually have an attorney present and he never told the officers that he wanted to stop the interview to wait for an attorney to arrive. As neither of Potter’s comments established that he unambiguously requested a lawyer, the court held that Potter did not validly invoke his right to counsel and the officers were not required to stop questioning him.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca6/18-5830/18-5830-2019-06-11.pdf?ts=1560279651>

Seventh Circuit

United States v. Adair, 2019 U.S. App. LEXIS 16594 (7th Cir. IL June 3, 2019)

While on patrol at approximately 10:45 p.m., a police officer received an emergency notification from a 911 operator. The message, transmitted to the computer in the officer’s patrol car indicated that a woman called 911, provided her first name and phone number, and stated that she had just been outside her apartment where she saw several individuals smoking, drinking, and engaged in “very suspicious activity.” The caller added that she did not know any of the individuals but she had walked past a short black male wearing a hoodie and saw that he had a black gun in his front pocket. While driving to the apartment complex, the officer spoke to the 911 operator and confirmed this information. The officer, a seven-year veteran of the department, had responded to the area many times to address reports of thefts, burglaries, fights, and gunfire. In addition, the officer knew that local gangs had a presence at the complex.

The officer arrived at the complex within two-minutes of receiving the message from 911. Upon exiting his car, the officer saw approximately 10 people standing outside as reported by the 911 caller. The officer focused his attention on Herman Adair because he was relatively short and he was the only person wearing clothing resembling the 911 caller’s description. Although he was not wearing a hoodie, Adair was the only person wearing long sleeves on an unusually warm night while everyone else was wearing t-shirts and tank tops. In addition, the officer recognized Adair from previous encounters with him, knew that Adair did not live at the complex, and knew that Adair was a convicted felon.

As the officer approached, Adair was standing near the middle of the larger group. As the officer got closer, Adair began to move away, weaving through the group, putting other people between himself and the officer. The officer believed Adair was trying to avoid him. When the officer got close to Adair, he saw a conspicuous, large bulge in the front pocket of Adair’s pants, which was consistent with the information reported by the 911 caller. The officer stopped Adair, frisked him for weapons, and felt a hard object that he immediately recognized as a gun in Adair’s front pocket. The officer removed a loaded handgun from Adair’s pocket and arrested him.

The government charged Adair with unlawful possession of a firearm by a convicted felon.

Adair filed a motion to suppress the firearm, arguing that the officer lacked reasonable suspicion to stop and frisk him.

In Terry v. Ohio, the Supreme Court held that a law enforcement officer may conduct a brief investigative stop or detention when the officer establishes reasonable suspicion that person is engaged in criminal activity.

Here, the court held that the officer had reasonable suspicion to stop Adair because: (1) the officer arrived within two-minutes of receiving the message from the 911 operator at a location known for criminal activity, (2) the officer saw a relatively short man wearing long sleeves, clothing that stood out from what others were wearing and which most closely matched the 911 caller's description, (3) the officer knew that Adair was a convicted felon who did not live at the apartment complex, and (4) Adair reacted by attempting to evade the officer. While the 911 caller's information did not match exactly with what the officer saw upon arriving, the court noted that reasonable suspicion to justify a Terry stop does not require "perfection."

The court further held that after stopping Adair, it was reasonable for the officer to frisk Adair for weapons. In Terry, the Supreme Court held that during a valid investigative detention, an officer may conduct a pat-down or frisk for weapons if the officer establishes reasonable suspicion that the person is presently armed and dangerous. While the court stated that not every Terry stop will automatically permit the officer to conduct a frisk for weapons, in this case the court held that upon arrival at the apartment complex it was reasonable for the officer to believe that Adair might be the armed man described by the 911 caller. In addition to the information provided by the 911 caller, the officer saw the bulge in Adair's front pocket. At that point, the court held that it was reasonable for the officer to believe that Adair was armed and dangerous and justified a Terry frisk for weapons.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/18-2796/18-2796-2019-06-03.pdf?ts=1559595613>

United States v. Yancey, 2019 U.S. App. LEXIS 19229 (7th Cir. IL June 27, 2019)

Officer Costas conducted a traffic stop after he confirmed the driver of a vehicle had outstanding warrants for her arrest. During the stop, Officer Costas recognized the passenger in the vehicle, Parris Yancey. Officer Costas recalled two incidents in recent months in which Yancey was very confrontational with police officers. Officer Costas also believed that Yancey was on parole for a weapons offense. Finally, Officer Costas had seen a police contact sheet concerning Yancey that advised officers to use caution when dealing with Yancey, as he was known to be armed. The contact sheet had been issued a month earlier and read to officers at roll call every day.

A few minutes later, Officer Zier arrived to assist with the stop. Officer Zier began speaking to Yancey to keep him occupied while Officer Costas arrested the driver. Officer Zier recognized Yancey from a prior burglary investigation and was familiar with the contact sheet concerning Yancey.

After Officer Costas placed the driver in the backseat of his patrol car, she told him that she wanted Yancey to take possession of her car. Officer Costas told her that was acceptable as long as Yancey had a valid driver's license. By this time, Yancey had twice asked Officer Zier if he could leave, but Officer Zier told him no. While waiting for dispatch to tell the officers whether Yancey

had a valid driver's license, Officer Costas began to inventory the contents of the driver's purse pursuant to departmental policy and Officer Zier asked Yancey to step out of the vehicle so he could conduct a Terry frisk. Although Yancey verbally objected to Officer Zier about being frisked, he stepped out of the vehicle. Before Officer Zier could frisk him, Yancey attempted to run away. Both officers chased Yancey tackled him to the ground and handcuffed him. As they rolled Yancey onto his side, Officer Costas saw a handgun in Yancey's waistband.

The government charged Yancey with possession of a firearm by a convicted felon.

Yancey filed a motion to suppress the handgun. Yancey argued that the officers violated the Fourth Amendment when they prevented him from leaving the scene of the traffic stop after Officer Costas arrested the driver. Specifically, Yancey claimed that the officers' justification for detaining him during the traffic stop ended once the driver was handcuffed and placed in Officer Costas' patrol car.

The court disagreed. The court recognized that an officer may detain the passengers as well as the driver while a traffic stop is ongoing. In this case, the court held that the arrest of the driver did not constitute the end of the traffic stop. First, after arresting the driver and placing her in patrol car, Officer Costas was required by departmental policy to conduct an inventory search of the driver's purse. When Yancey fled, Officer Costas had not yet completed the inventory. Second, having decided not to impound the driver's vehicle, the officers had not yet determined whether Yancey possessed a valid driver's license and could therefore take possession of the car as requested by the driver. The court noted that two minutes elapsed from the time the driver was arrested until Yancey fled and that this was a reasonable amount of time for the officers to be handling these unresolved issues. Consequently, the court concluded that the traffic stop was ongoing when Yancey attempted to flee the scene and that the officers had legal justification to continue to detain him, which included stopping Yancey when he tried to run away.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/18-2935/18-2935-2019-06-27.pdf?ts=1561663835>

Eighth Circuit

Thurairajah v. City of Fort Smith, 2019 U.S. App. LEXIS 16573 (8th Cir. AR June 3, 2019)

While an Arkansas state trooper was performing a traffic stop on a van occupied by a mother and her two small children, he heard another motorist who was driving by yell "f**ck you!" out of his car window. The motorist, later identified as Eric Thurairajah, was driving approximately 35 miles-per-hour on the far lane of the road moving in the opposite direction. The trooper observed the two children in the van react to the comment. The trooper ended the traffic stop and pursued Thurairajah. The officer stopped Thurairajah and arrested him for disorderly conduct. The trooper believed the shout constituted "unreasonable or excessive noise" under Ark. Code Ann. § 5-71-207(a)(2).

Thurairajah spent several hours in jail and all charges against him were eventually dismissed. Thurairajah filed suit under 42 U.S.C. § 1983 against the trooper claiming the trooper violated his Fourth Amendment right to be free from unreasonable seizure and his First Amendment right to be free from retaliatory arrest.

The trooper claimed that he was entitled to qualified immunity because he had either: 1) probable cause to arrest Thurairajah for disorderly conduct or 2) arguable probable cause to arrest Thurairajah for disorderly conduct. Alternatively, the trooper claimed that it was not clearly established that arresting Thurairajah for disorderly conduct under the circumstances of this violated the Fourth Amendment.

The district court denied the trooper qualified immunity and he appealed to the Eighth Circuit Court of Appeals.

The court noted that probable cause for a warrantless arrest exists “when the totality of the circumstances at the time of the arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense.” The court added that arguable probable cause exists if the arrest “was based on an objectively reasonable, even if mistaken belief, that the arrest was based on probable cause.” In this case, the court affirmed the district court’s denial of qualified immunity and held that the trooper did not have probable cause or arguable probable cause to arrest Thurairajah.

The disorderly conduct statute, Ark. Code Ann. § 5-71-207(a)(2), provides:

"A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she makes unreasonable or excessive noise."

The court stated that Ark. Code Ann. § 5-71-207(a)(2) does not penalize offensive speech but only unreasonable noise. The court determined that while shouting can form the basis of a disorderly conduct charge, those cases in which shouting supported a finding of disorderly conduct involved extended loud shouting and disruptive behavior or amplified sound. The court found that in no case had a two-word unamplified outburst constituted disorderly conduct. The court added that in a 2011 case, the Arkansas Court of Appeals held that 20 seconds of public shouting involving foul language did not establish disorderly conduct.

In this case, Thurairajah’s shout was unamplified and fleeting, no crowd gathered because of it, traffic was not affected, no complaints were lodged by anyone in the community, business was not interrupted, nor were an officer’s orders disobeyed. Although Thurairajah’s conduct may have been offensive, it did not constitute unreasonable or excessive noise under the disorderly conduct statute. Consequently, the court held that the trooper lacked probable case or arguable probable cause for an arrest; therefore, he violated Thurairajah’s Fourth Amendment right to be free from unreasonable seizure, which was clearly established at the time of the incident.

The court further held that Thurairajah’s profane shout was protected speech under the First Amendment. In addition, according to the trooper’s affidavit, Thurairajah’s arrest was motivated in part by the content of the language in his shout at the trooper. Consequently, the court held that arresting Thurairajah for the content of his speech constituted retaliation and would cause others to refrain from exercising their First Amendment rights in the future.

Finally, the court concluded that Thurairajah’s right to be free from retaliation was clearly established at the time of his arrest. The court recognized that that criticism of law enforcement officers, even with profanity, has been found to be protected speech.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-3419/17-3419-2019-06-03.pdf?ts=1559575832>

Fischer v. Hoven, 2019 U.S. App. LEXIS 16572 (8th Cir. S.D. June 3, 2019)

Kathy Fischer and Susan Clynick went to a bar where they became intoxicated after consuming approximately three bottles of wine. When the bar owner asked the women to leave, they refused, so he called the police to have them removed.

When Deputy Hoven arrived, he convinced both women to exit the bar. However, when they got outside, Fischer yelled at Deputy Hoven that the women had the right to be in the bar, then she went back inside to complain to the owner. Returning inside, Deputy Hoven told Fischer the owner wanted her to leave. Fischer yelled that she would not leave and walked outside to the bar patio. Deputy Hoven followed, requesting a second time that Fischer leave. After Fischer refused to leave, Deputy Hoven grabbed Fischer's arm and put her in an escort position and walked her outside toward his vehicle. Fischer continued to yell but she did not physically resist.

Once outside, Fischer and Clynick began walking away from the bar. Fischer then turned around and approached Deputy Hoven "flailing" her arms and yelling at him about being removed from the bar. Fischer stopped in front of Deputy Hoven and placed her left hand on his right shoulder. Deputy Hoven grabbed Fischer's left arm, placed her in an escort position against his vehicle, and told her that she was under arrest for disorderly conduct. As Fischer continued to yell at Deputy Hoven, Clynick came toward him. Deputy Hoven stepped toward Clynick with his right hand extended into her shoulder, knocking her to the ground. When this occurred, Deputy Hoven had his left hand on Fischer's wrist with her arm behind her back. When Deputy Hoven reached for his handcuffs, Fischer turned to her left toward him. Deputy Hoven executed an arm-bar takedown, putting his right hand on Fischer's triceps above the elbow and below the shoulder. Fischer landed face-first on the ground, suffering a facial cut, broken nose, broken tooth, and broken bones in her right arm and hand.

Fischer sued Deputy Hoven under 42 U.S.C. § 1983 for excessive use of force in violation of the Fourth Amendment. Specifically, Fischer claimed that Deputy Hoven's use of force was excessive because she was not resisting arrest or attempting to flee, she did not commit a violent or serious crime, and she did not pose a threat to the safety of Deputy Hoven or others.

After the district court granted Deputy Hoven qualified immunity, Fischer appealed.

The Eighth Circuit Court of Appeals agreed that Deputy Hoven was entitled to qualified immunity, concluding that his use of force was objectively reasonable.

In a lawsuit claiming excessive use of force, the amount of force used by the law enforcement officer must be objectively reasonable under the circumstances. Citing the Supreme Court's decision in [Graham v. Connor](#), the court added that objective reasonableness is "judged from the perspective of a reasonable officer on the scene," in light of the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether [s]he is actively resisting arrest or attempting to evade arrest by flight."

Here, the court held that a reasonable officer in Deputy Hoven's position could have believed that Fischer was resisting arrest and that she posed a threat to officer safety. First, as the only officer on the scene, Deputy Hoven faced a tense, unpredictable situation with two hostile, intoxicated

individuals. Second, Fischer ignored Deputy Hoven's orders to leave the bar and yelled at him several times. Third, after she walked away, Fischer turned around, approached Deputy Hoven, and touched his shoulder. Fourth, after putting Fischer into an escort position and telling her that she was under arrest, Clynick approached Deputy Hoven and Fischer turned toward him. Based on these facts, the court concluded that it was reasonable for Deputy Hoven to use some amount of force against Fischer.

The court further held that while Deputy Hoven could have used less force to secure Fischer, the use of the arm-bar takedown was objectively reasonable under the circumstances. The court recognized that it was required to view Deputy Hoven's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," noting that "officers are often forced to make split-second judgments" concerning the amount of force to use in situations that are often "tense, uncertain, and rapidly evolving." Because a reasonable officer could have perceived Fischer as a resistant arrestee who threatened his safety, the court concluded that Deputy Hoven's use of the arm-bar takedown was objectively reasonable.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-2061/18-2061-2019-06-03.pdf?ts=1559575834>

Smith v. Kilgore, 2019 U.S. App. LEXIS 17391 (8th Cir. MO June 11, 2019)

Officers Abidovic and Keller were dispatched to a report of suspicious activity in a park. Officer Abidovic saw two people that closely fit the dispatcher's description and approached them. Upon seeing Officer Abidovic, the individuals, one later identified as Raymond Smith, began to walk away. When Officer Abidovic yelled for the pair to stop, Smith ran away and exited the park. In the meantime, Officer Keller radioed dispatch about the pursuit and Officers Krueger and Taylor were dispatched to assist.

Officer Abidovic chased Smith into a parking lot and saw a gun in Smith's hand. Officer Abidovic announced over his radio, "He's armed," and then pointed his gun at Smith, shouting, "Drop the gun!" As Smith was climbing over a chain-link fence, he fired a shot at Officer Abidovic. Officer Abidovic then fired three shots at Smith. Officer Keller radioed dispatch, "Shots fired." From their patrol car, Officers Krueger and Taylor located Smith on the other side of the fence. As the officers saw Smith begin to raise his gun in their direction, Officer Krueger fired five shots at Smith, who fell to the ground. Officer Abidovic called for an ambulance; however, Smith died from the gunshot wounds.

Smith's mother sued the chief of police, members of the Board of Police Commissioners, and the officers alleging that Officers Abidovic and Krueger used excessive deadly force against her son in violation of the Fourth Amendment.

The district court dismissed Smith's claims against the chief of police and members of the Board of Police Commissioners and granted the officers qualified immunity. Smith appealed.

The Eighth Circuit Court of Appeals held that the district court correctly ruled that Officers Abidovic and Krueger used reasonable force. Citing the Supreme Court's decision in [Tennessee v. Garner](#), the court noted, "the use of deadly force is objectively reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others. In addition, previous cases decided by the Eight Circuit Court of Appeals have held that

an officer's use of deadly force is objectively reasonable against armed suspects who point their guns toward officers.

Here, the court concluded that Smith posed a significant threat of death or serious physical injury to Officer Abidovic when he fired at him and to Officers Kruger and Taylor when he began to raise his gun in their direction. Based on these facts, the court held that it was objectively reasonable for Officer Abidovic and then Officer Krueger to use deadly force under the circumstances.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-1040/18-1040-2019-06-11.pdf?ts=1560267035>

United States v. Dunn, 2019 U.S. App. LEXIS 18923 (8th Cir. MN June 25, 2019)

Kalil Dunn fell asleep while driving his car and ran into three parked cars before coming to a stop in the middle of the street. Dunn's car sustained heavy front-end damage, which rendered it inoperable. Police officers arrived and found Dunn's car in the street, facing the wrong direction, and blocking traffic. The officers observed the vehicle's condition and location and, pursuant to department policy, chose to tow and impound it, despite the fact that Dunn had already contacted a private tow truck. Pursuant to department policy, the officers conducted an inventory search of Dunn's car before towing it. During the search, the officers found two pistols, two baggies containing crack cocaine, and two digital scales.

The government charged Dunn with several criminal offenses based on the evidence seized during the inventory search of his car as well as evidence that officers seized in unrelated traffic stop that occurred several months later.

Dunn filed a motion to suppress the evidence seized during the inventory search of his vehicle. Dunn argued that the search was unreasonable because the officers should have waited and deferred to his private towing arrangements rather than impounding his vehicle.

The court disagreed. An inventory search is considered reasonable if it "is conducted according to standardized police procedures . . ." Here, it was undisputed that: 1) department policy allows officers to tow and impound vehicles that are impeding traffic when the owner cannot immediately remove the vehicle on his own; 2) officers must conduct an inventory search before impounding a vehicle; and 3) department policy does not require officers to ask vehicle owners if they wish to make private towing arrangements before the officers tow and impound a vehicle. The court added that Dunn cited no legal authority supporting his position nor any legal authority showing that the department's towing policy was unreasonable but instead admitted that the officers followed departmental policy when they impounded and inventoried his car. As a result, the court concluded that the decision to impound and inventory Dunn's car was reasonable because the officers followed their departmental policy.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-2393/18-2393-2019-06-25.pdf?ts=1561476638>

United States v. White, 2019 U.S. App. LEXIS 19446 (8th Cir. MO June 28, 2019)

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

Later that day, officers returned to White's house to conduct a knock and talk interview with White concerning the odor of marijuana they had previously smelled on the property. The officers knocked on the front door and after no one answered, they decided to apply for a search warrant. Three officers remained on the property to secure the area while awaiting the warrant. During this time, the officers encountered Anthony Bearden as he emerged from the woods behind White's house. Bearden told the officers that he was White's neighbor. When questioned by the officers, Bearden admitted to possessing marijuana at his residence and allowed officers to enter his property where the officers smelled a strong odor of green marijuana. Based on these observations and Bearden's statements, the officers applied for a warrant to search Bearden's property as well. After obtaining both warrants, officers found hundreds of marijuana plants growing in a building on White's property and inside a shed on Bearden's property.

The government charged White and Bearden with manufacturing marijuana.

Bearden and White filed a motion to suppress the evidence seized from their properties, claiming that the officers committed a variety of constitutional violations. After the district court denied their motions, both men appealed. In 2015, the Eighth Circuit Court of Appeals affirmed the district court's denial of Bearden's motion to suppress. (See: [4 Informer 15](https://cases.justia.com/federal/appellate-courts/ca8/14-1659/14-1659-2015-03-17.pdf?ts=1426617126) and <https://cases.justia.com/federal/appellate-courts/ca8/14-1659/14-1659-2015-03-17.pdf?ts=1426617126>).

Concerning White, he argued on appeal that the officers' second entry onto his property violated the Fourth Amendment. White claimed that the officers' second entry "went beyond" the scope of a permissible knock and talk because the officers wanted to follow up on the odor of green marijuana they smelled during their first entry onto his property.

The knock and talk exception to the Fourth Amendment's warrant requirement permits law enforcement officers to approach a home and knock on the door to attempt to contact the homeowner. The knock and talk exception is based on the "implicit license" that individuals enjoy, including law enforcement officers, to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."

In this case, the court found that the officers entered the curtilage of White's property and knocked on his front door in order to establish contact with him again. The court held that this conduct fell "squarely within the scope of the knock and talk exception." The court added that the officers' motivation for conducting the knock and talk, i.e. following up on the odor of green marijuana detected on their first entry, was not relevant because the officers conduct stayed within the bounds of the knock and talk exception.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-3097/17-3097-2019-06-28.pdf?ts=1561735822>

Ninth Circuit

United States v. Brown, 2019 U.S. App. LEXIS 16886 (9th Cir. WA June 5, 2019)

Police officers received an anonymous tip that a young black man of medium build with dreadlocks, a camouflage jacket, and red shoes was carrying a gun. A police officer spotted Brown, who was on foot and matched the 911 description. The officer followed Brown in his patrol car, driving behind him slowly for several blocks before turning on his patrol lights and driving the wrong direction down a one-way street to follow Brown. Seeing the lights and patrol car coming from behind him, Brown ran. The officer called his partner and both officers pursued Brown for one block before stopping him and ordering him to the ground at gunpoint. The officers placed Brown in handcuffs, frisked him, and found a firearm in his waistband. A further search revealed drugs and cash on Brown's person.

Brown filed a motion to suppress the evidence from the searches, arguing that the officers lacked reasonable suspicion to stop him under [Terry v. Ohio](#). The district court disagreed and denied Brown's motion. Brown appealed.

The Ninth Circuit Court of Appeals reversed the district court, holding that the officers did not have reasonable suspicion to justify a [Terry](#) stop of Brown.

A police officer may conduct a brief investigatory stop when the officer has "a reasonable, articulable suspicion that criminal activity is afoot." Anonymous tips that identify an individual but otherwise lack some "indicia of reliability" do not provide support for a finding of reasonable suspicion.

In this case, the court found that the officers did not articulate what crime they suspected Brown of committing and there was no evidence to establish the reliability of the tip. At the suppression hearing, the officers stated only that they believed that Brown had a firearm. The court added that this was significant because in Washington State, it is presumptively lawful to carry a gun. While carrying a concealed pistol without a license is a misdemeanor offense, Washington is a "shall issue state," meaning that local law enforcement must issue a concealed weapons license if the applicant meets certain qualifications.

The court also considered Brown's flight from the officers. While it was undisputed that Brown fled after the officers activated their patrol car lights, the Supreme Court has never endorsed a per se rule that flight establishes reasonable suspicion. Instead, the Court has treated flight as just one factor in the reasonable suspicion analysis.

Here, the officers did not communicate with Brown, use their speaker to talk with him, or tell him to stop before they flashed their lights and detained him at gunpoint. In addition, there was no evidence that the location of the stop was known for drug or gun crimes or otherwise considered a "high crime" area.

The court held that the officers took an anonymous tip that a young black man "had a gun," which is presumptively lawful in Washington, and jumped to an unreasonable conclusion that Brown's later flight indicated criminal activity. The court stated that the officers had nothing more than an unsupported hunch that Brown was involved in criminal activity, which was not enough to support a [Terry](#) stop.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/17-30191/17-30191-2019-06-05.pdf?ts=1559754137>

Cruz v. Barr, 2019 U.S. App. LEXIS 17674 (9th Cir. CA June 13, 2019)

In March 2006, Immigration and Customs Enforcement (ICE) agents received an anonymous tip that a Los Angeles company employed 200 to 300 undocumented immigrants. In February 2008, ICE agents obtained a search warrant for employment-related documents located at the company's factory as well as arrest warrants for eight employees.

An internal memorandum issued before the operation stated that ICE "would be conducting a search warrant and expects to make 150-200 arrests." The memorandum also noted that ICE would have "2 buses and 5 vans" ready to transport potential detainees from the factory and "200 detention beds available to support the operation." Another planning document indicated that ICE "anticipated executing a federal criminal search warrant" at the factory in order to administratively arrest as many as 100 unauthorized workers."

Two days after the warrants were obtained, approximately 100 armed and uniformed ICE agents went to the factory. The agents ordered all employees to stop working and then stated that no one was permitted to leave. Gregorio Perez Cruz was one of the detained employees. The agents handcuffed Cruz, frisked him, and took his wallet. While handcuffed, the agents asked him his name, his nationality, his date of birth, and the length of time he had worked at the factory. An agent then escorted Cruz and other detained workers into another area, where he was questioned again. At some point during his detention, Cruz provided statements to the agents indicating that he lacked lawful immigration status. Cruz was taken to a detention facility and released the next day. According to a subsequent ICE press release, Cruz was one of 130 workers arrested at the factory for immigration violations.

About one month later, Cruz received notice to appear for a removal hearing. The notice charged Cruz as removable for entry without inspection. Based on the statements Cruz provided during his detention, ICE agents prepared a Form I-213 alleging that Cruz had admitted that he was brought illegally into the United States as a child. In addition to the Form I-213, the government produced Cruz's birth certificate, obtained by an ICE agent in Mexico based on the statements Cruz made while detained during the factory raid.

Cruz filed a motion to terminate the proceedings, arguing that his arrest and interrogation violated federal regulations as well as the Fourth and Fifth Amendments. The immigration judge (IJ) granted Cruz's motion to terminate the proceedings against him. The IJ found that ICE's initial detention of Cruz violated "ICE's own regulation" and that because Cruz was prejudiced by this regulatory violation, termination of the removal proceedings against him was warranted. Accordingly, the IJ did not issue an opinion regarding Cruz's Fourth and Fifth Amendment claims. The government appealed.

The Board of Immigration Appeals (BIA) reversed the IJ's ruling. The BIA relied on [Michigan v. Summers](#), in which the Supreme Court held that it was lawful to detain residents of a home where a search warrant was being executed. Because law enforcement officers are permitted to "secure the premises both for purposes of their own safety and in order to prevent the destruction of evidence" during the execution of a warrant under [Summers](#), the BIA reasoned that the ICE

agents did not violate the Fourth Amendment nor the ICE regulation by detaining the employees and asking them to self-identify their immigration or citizenship status. The BIA further held that even if Cruz's detention was unlawful, the evidence introduced by the government was offered to prove only Cruz's identity and therefore could not be suppressed. Consequently, on remand from the BIA, the IJ entered a removal order against Cruz. Cruz appealed to the Ninth Circuit Court of Appeals.

First, the court addressed the government's argument that even if Cruz were otherwise entitled to suppression of the evidence obtained as a result of his detention and arrest, Cruz's statements as represented on the Form I-213 and his birth certificate constituted evidence only of his identity, which is not subject to suppression.

While the court agreed that the identity of an alien in a removal proceeding is never "suppressible as fruit of an unlawful arrest," evidence pertaining to alienage is subject to suppression. In this case, the court held that the government relied on alienage evidence included on the Form I-213 at Cruz's removal hearing. Cruz claimed this alienage evidence, to include his birthplace as well as his birth certificate was obtained by the government based on his statements to the agents while unlawfully detained. As a result, the court held that if Cruz could demonstrate that his alienage information was obtained as a result of "impermissible government action," then the court could suppress this evidence.

Second, the court held that the rationale for detaining the occupants of a premises during the execution of a search warrant was not applicable in this case; therefore, the Summers doctrine did not apply. In Summers, the Supreme Court held that it was reasonable to detain occupants of a premises without reasonable suspicion to believe they are involved in criminal activity during the execution of a search warrant in order to: (1) ensure officer safety, (2) facilitate the completion of the search, and (3) prevent flight. Significantly, the Court added that Summers does not authorize the detention of an occupant without "any individualized suspicion" of criminal activity where the officers' primary purpose is not conducting a "safe and efficient search" pursuant to a warrant.

In this case, the court found that the ICE agents' focus was not on conducting a safe and efficient search but on engaging in a preplanned investigation and detention of a large number of individuals located on the premises where the search was authorized. The court held that the authority to detain individuals under Summers did not justify ICE agents using the execution of a search warrant for documents as means to "target" certain persons for detention, interrogation, nor to arrest busloads of people who could not otherwise be detained lawfully.

Third, the court held that in addition to violating the Fourth Amendment, the ICE agents violated an ICE regulation 8 C.F.R § 287.8(b)(2) by detaining and questioning Cruz without "reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States." Because the agents violated 8 C.F.R § 287.8(b)(2), the court concluded that Cruz was entitled to suppression of the evidence obtained as a result of that violation. Consequently, as the government did not offer any other evidence of Cruz's alienage beyond the Form I-213 and his birth certificate, i.e. fruits of the regulatory violation, the court concluded that the removal proceedings against Cruz should be terminated.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/15-70530/15-70530-2019-06-13.pdf?ts=1560445358>
