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A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW
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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 of the *The Informer* by visiting <https://leolaw.podbean.com/> and <https://www.fletc.gov/informer>.

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FLETC Informer Webinar Schedule – April 2021

1. DHS Office of General Counsel Leadership Book Review: Leaders Eat Last (1-hour)

Presented by Mike Davidson, Deputy Associate General Counsel, Office of General Counsel, Department of Homeland Security, and John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia.

As a component of the OGC Leadership Development Program, Mike and John will review the leadership principles found in noted scholar Simon Sinek's book, "Leaders Eat Last." Mike and John will share their experiences as DHS lawyers and compare Mr. Sinek's observations with their own.

Tuesday, April 13, 2021: 2:00 p.m. Eastern / 1:00 p.m. Central / 12:00 p.m. Mountain / 11:00 a.m. Pacific

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



2. Investigative Traffic Stops and Reasonable Suspicion (1-hour)

Presented by Mary M. Mara, Attorney Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

As we learned in Terry v. Ohio, 392 U.S. 1 (1968), the Fourth Amendment allows an officer to initiate a brief investigative seizure of an individual when he or she has reasonable suspicion that criminal activity is afoot. This webinar will closely examine the concept of "reasonable suspicion" within the context of motor vehicle stops. What kind – and how much – information must an officer have in order to justify an investigative stop of a motor vehicle under Terry? This webinar will examine a variety of cases on this topic with a special emphasis upon the Supreme Court's recent decision in Kansas v. Glover, 140, S.Ct. 1183 (2020).

Wednesday, April 21, 2021: 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12:00 p.m. Pacific

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FLETC Office of Chief Counsel Podcast Series

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

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

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

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

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

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

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CASE SUMMARIES

United States Supreme Court

Torres v. Madrid, 2021 U.S. LEXIS 1611 (Mar. 25, 2021)

At dawn on July 15, 2014, four New Mexico State Police officers went to an apartment complex in Albuquerque to execute an arrest warrant for a woman accused of white collar crimes, but also “suspected of having been involved in drug trafficking, murder, and other violent crimes.” When the officers arrived, they saw Roxanne Torres and another woman standing near a vehicle in the parking lot. As the officers approached, they determined that neither Torres nor the other person was the target of the warrant. At this point, Torres, who was experiencing methamphetamine withdrawal, got into the driver’s seat of the vehicle and the other person walked away. The officers attempted to speak to Torres, but she did not notice their presence until one of them tried to open the door of her car.

According to Torres, she thought the officers were carjackers trying to steal her car, even though they were wearing tactical vests marked with police identification. Although Torres claimed that neither officer stood in the path of her vehicle as she began to drive away, Officers Madrid and Williamson fired their service pistols to stop her. The officers fired 13 shots at Torres, striking her twice in the back temporarily paralyzing her left arm. Steering with her right arm, Torres accelerated through the fusillade of bullets, exited the apartment complex, drove a short distance, and stopped in a parking lot. After asking a bystander to report an attempted carjacking, Torres stole another vehicle that happened to be idling nearby and drove 75 miles to Grants, New Mexico. The hospital in Grants airlifted Torres to a hospital in Albuquerque where the police arrested her the next day. Torres eventually pleaded no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle.

Torres subsequently sued Officers Madrid and Williamson under 42 U.S.C. §1983, claiming that the officers unreasonably seized her in violation of the Fourth Amendment by shooting her. The district court disagreed and held that the officers were entitled to qualified immunity. The district court concluded that the officers had not seized Torres under the Fourth Amendment at the time of the shooting. As a result, the district court held there could be no Fourth Amendment violation without a seizure. Torres appealed.

The Tenth Circuit Court of Appeals affirmed the district court, holding that “a suspect’s continued flight after being shot by police negates a Fourth Amendment excessive-force claim.” The court relied on Circuit precedent, citing [Brooks v. Gaenzle](#), which provided that “no seizure can occur unless there is physical touch or a show of authority,” and that “such physical touch (or force) must terminate the suspect’s movement” or otherwise give rise to physical control over the suspect.

Again, Torres appealed. The Supreme Court agreed to hear case to resolve a split among the circuits.

The issue before the Court was:

Is an unsuccessful attempt to detain a suspect by use of physical force a “seizure” within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh

Circuits, and the New Mexico Supreme Court hold, or must physical force be successful in detaining a suspect to constitute a “seizure,” as the Tenth Circuit and the D.C. Court of Appeals hold?

The Court held that “the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.” The Court recognized that the Fourth Amendment “does not forbid all or even most seizures—only unreasonable ones,” and commented that “all we decide today is that the officers seized Torres by shooting her with intent to restrain her movement.” Consequently, the Court vacated the judgment of the Tenth Circuit Court of Appeals and remanded the case to the district court to resolve “any questions regarding the reasonableness of the seizure, the damages caused by the seizure, and the officers’ entitlement to qualified immunity.”

For the Court’s opinion: https://www.supremecourt.gov/opinions/20pdf/19-292_21p3.pdf

Circuit Courts of Appeals

First Circuit

United States v. Rivera, 988 F.3d 579 (1st Cir. 2021)

A Massachusetts State Police (MSP) trooper stopped Pablo Rivera for a traffic infraction. During the stop, the trooper discovered that Rivera was driving without a valid license. Rivera was the only occupant of the vehicle and could not legally drive it. Consequently, the trooper ordered the vehicle towed pursuant to the MSP impoundment policy that authorizes a trooper to have a vehicle removed from the side of a highway if there is no licensed occupant. The trooper told Rivera that he was not under arrest and that he could ride with the tow truck driver to the impound lot.

Before the tow truck driver arrived, the trooper told Rivera that he needed to inventory the vehicle before having it towed. The trooper then began to conduct an inventory search of the vehicle pursuant to the MSP inventory policy. The MSP inventory policy required an inventory search of any vehicle towed pursuant to the MSP impoundment policy.

While conducting the inventory search, the trooper discovered a brown, rock-like substance, which was later found to be heroin, and drug paraphernalia in a backpack located in the trunk of Rivera’s vehicle. The trooper arrested Rivera. Afterward, the trooper completed the inventory of the backpack and found a loaded firearm.

The government charged Rivera with firearm and drug offenses. Rivera filed a motion to suppress the evidence seized from his vehicle, arguing that the trooper’s inventory search violated the Fourth Amendment.

The district court found that consistent with the United State Supreme Court’s holding [South Dakota v. Opperman](#), the MSP inventory search policy has three stated purposes: 1) to protect the vehicle and its contents; 2) to protect the MSP and tow company against false claims of lost, stolen, or vandalized property; and, 3) to protect the members of the MSP and public from dangerous items that might be in the vehicle. However, in this case, the district court held that the search of Rivera’s vehicle did not serve any of these purposes. The district court reasoned

that officer safety was not compromised because Rivera was seated on a guardrail awaiting the tow truck and there was no risk to Rivera's property because Rivera planned to ride with the tow truck driver to the tow yard. As a result, the district court granted Rivera's motion to suppress the evidence seized pursuant to the inventory search. The government appealed.

The First Circuit Court of Appeals disagreed and reversed the holding of the district court. The court found that even if Rivera himself posed no danger to the trooper, the items in the vehicle might have. In addition, while Rivera might have been riding in the tow truck, given the late hour and the fact that Rivera could not legally operate the vehicle, there was a risk that the vehicle would not be recovered promptly. For these reasons, the court found that the trooper's search of Rivera's vehicle served the purposes of a valid inventory search under the Fourth Amendment.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/20-1340/20-1340-2021-02-22.pdf?ts=1614031206>

United States v. Rogers, 988 F.3d 106 (1st Cir. 2021)

Brian Rogers was convicted of possession of child pornography and sentenced to a term of imprisonment followed by a period of supervised release. Rogers was required to "participate and comply with the requirements of the Computer and Internet Monitoring Program" and to "fully participate in sex offender treatment as directed by the supervising officer" as special conditions of his release,

After being released, Rogers admitted to violating the two special conditions. As part of his sentence, Rogers was required to serve an additional eight years of supervised release with the same special conditions before. In addition, a new condition was added that required Rogers to "submit to periodic random polygraph examinations as directed by the probation officer to assist in treatment and/or case planning related to behaviors potentially associated with sex offense conduct." The condition provided that "[n]o violation proceedings will arise solely on the defendant's failure to pass a polygraph examination, or on the defendant's refusal to answer polygraph questions based on 5th amendment grounds," but it added that "[s]uch an event could, however, generate a separate investigation."

During one polygraph examination, Rogers's negative responses to questions concerning whether he had viewed pornography on the internet were considered to be deceptive. Afterward, Rogers admitted to the examiner that he had viewed pornography on the internet. Prior to a follow-up polygraph examination, Rogers signed a consent form indicating that he "consent[ed] voluntarily" to the examination and understood that he did "not have to take this examination . . . and [he could] stop this examination at any time." Again, Rogers admitted to the examiner that he had viewed pornography on the internet and several of his answers to other pornography-related questions were deemed to be deceptive.

Based on Rogers's confessions, polygraph failures, and poor performance in sex offender treatment, his probation officer filed a petition to revoke his supervised release. After a hearing, the district court revoked Rogers's supervised release, sentencing him to prison and eight additional years of supervised release. The court based its judgment on Rogers's violations of the special conditions that he abide by the Computer and Internet Monitoring Program and that he fully participate in the sex offender treatment program.

Rogers appealed, claiming that the polygraph examination condition of his supervised release and the examinations themselves compelled him to make incriminating statements in violation of the Fifth Amendment.

First, the First Circuit Court of Appeals recognized that it is settled law in the First Circuit that a court can impose mandatory periodic polygraph examinations in connection with sex offender treatment programs as a condition of supervised release, where the condition prohibits basing any revocation in any way on the defendant's assertion of his Fifth Amendment privilege.

Second, the court noted that the general rule is for testimony to be considered "compelled" within the meaning of the Self Incrimination Clause of the Fifth Amendment, "the privilege must be claimed when self-incrimination is threatened." If a person does not invoke the privilege and chooses to speak, any testimony will not be considered to have been "compelled," but rather "voluntary."

Third, in accordance with this general rule, a probationer's "obligation to appear and answer questions truthfully" does not automatically make a probationer's statements "compelled," unless the probationer invokes the privilege but is nevertheless required to answer questions.

Fourth, there are several exceptions to the general rule that require an individual to invoke the privilege in order for any subsequent testimony will be considered compelled. One of these "self-executing" exceptions is called the "penalty exception." The penalty exception is triggered in situations where a person's right to invoke his Fifth Amendment privilege is penalized, such that he can be considered to have been deprived of a "free choice" between testifying and remaining silent. The Court recognized that one "classic penalty situation" is when the government, "either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation." In that situation, the exception would operate such that any testimony elicited from the probationer is "deemed compelled and inadmissible in a criminal prosecution."

Against this backdrop, the court held that Roger's Fifth Amendment privilege against self-incrimination was not violated because Rogers never asserted or attempted to assert the privilege. The court rejected Rogers's argument that it should create an exception to the general rule that the privilege should automatically apply to protect anyone undergoing a polygraph examination, on the grounds that such examinations inherently will elicit involuntary responses. The court found that Rogers's position was contradicted by First Circuit case law, which allows periodic polygraph examinations as a condition of supervised release, where the condition makes clear that the supervised releasee may invoke his Fifth Amendment privilege without penalty. In this case, the court noted that the polygraph condition of Rogers's supervised release included this language.

The court further held that the penalty exception did not apply. The court found the polygraph condition's qualifier that "[n]o violation proceedings will arise solely on the defendant's failure to pass a polygraph examination, or on the defendant's refusal to answer polygraph questions based on 5th Amendment grounds" was sufficient to defeat any notion that Rogers had that he would be penalized for asserting the privilege against self-incrimination.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/18-2097/18-2097-2021-02-19.pdf?ts=1613772005>

Fifth Circuit

United States v. Gratkowski, 964 F.3d 307 (5th Cir. 2020)

During the investigation of a child-pornography website, (the “Website”) federal investigators discovered that some users paid the Website in Bitcoin when downloading material. Bitcoin is a type of virtual currency and each Bitcoin user has at least one “address,” similar to a bank account number, that is a long string of letters and numbers. Bitcoin users send Bitcoin to other users through these addresses using a private key function that authorizes the payments. To conduct Bitcoin transactions, Bitcoin users must either download Bitcoin's specialized software or use a virtual currency exchange, such as the one used here, called Coinbase.

When a Bitcoin user transfers Bitcoin to another address, the sender transmits a transaction announcement on Bitcoin’s public network, known as a blockchain. The Bitcoin blockchain contains only the sender’s address, the receiver’s address, and the amount of Bitcoin transferred. The owners of the addresses are anonymous on the Bitcoin blockchain, but it is possible to discover the owner of a Bitcoin address by analyzing the blockchain. For example, when an organization creates multiple Bitcoin addresses, it will often combine its Bitcoin addresses into a separate, central Bitcoin address (i.e., a “cluster”). It is possible to identify a “cluster” of Bitcoin addresses held by one organization by analyzing the Bitcoin blockchain’s transaction history. Open source tools and private software products can be used to analyze a transaction.

As part of their investigation, federal agents used an outside service to analyze the publicly viewable Bitcoin blockchain and identify a cluster of Bitcoin addresses controlled by the Website. Once they identified the Website’s Bitcoin addresses, agents served a grand jury subpoena on Coinbase. The subpoena directed Coinbase to provide all information on the Coinbase customers whose accounts had sent Bitcoin to any of the addresses in the Website’s cluster. Coinbase identified Richard Gratkowski as one of these customers. With this information, agents obtained a search warrant for Gratkowski’s house. At his house, agents found a hard drive containing child pornography, and Gratkowski admitted to being a Website customer.

The Government charged Gratkowski with one count of receiving child pornography and one count of accessing websites with intent to view child pornography. Gratkowski filed a motion to suppress the evidence obtained through the warrant, arguing that the subpoena to Coinbase and the blockchain analysis violated the Fourth Amendment. The district court disagreed and denied the motion. Gratkowski pleaded guilty to both counts, reserving the right to appeal the denial of his motion to suppress. On appeal, Gratkowski argued that he had a reasonable expectation of privacy in his information contained on the Bitcoin blockchain and in his Bitcoin Transactions on Coinbase.

For the government to violate a person’s Fourth Amendment right against unreasonable searches, the person must have had a “reasonable expectation of privacy” in the items at issue. Under the third-party doctrine, a person generally “has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” The Supreme Court has applied the third-party doctrine to bank records, finding that such records “contained only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.” The Court has also held that the third-party doctrine applies to telephone call logs. The Court reasoned that individuals have no privacy interest in telephone numbers they dial because they voluntarily convey the dialed numbers to the phone company by placing a call. However, in the context of cell phones, in Carpenter v. United States, the Court held that individuals had a privacy interest

in their cell phone location records, known as cell-site location information (“CSLI”), despite the records being held by a third party.

Under this framework, the Fifth Circuit Court of Appeals found that the information contained in Bitcoin’s blockchain was more closely related to bank records and telephone call logs than to CSLI. First, the Bitcoin blockchain only records a limited amount of information: 1) the amount of Bitcoin transferred; and, 2) the addresses of the sending and receiving parties. Second, using Bitcoin to conduct transactions is not a pervasive part of daily life, like using a cell phone. Third, transferring and receiving Bitcoin requires an affirmative act by the Bitcoin address holder. Fourth, while Bitcoin users enjoy a greater degree of privacy than those who use other money-transfer methods, it is well known that each Bitcoin transaction is recorded in a publicly available blockchain. Finally, every Bitcoin user has access to the public Bitcoin blockchain and can see every Bitcoin address and its respective transfers. Due to this publicity, it is possible to determine the identities of Bitcoin address holders by analyzing the blockchain. Based on these facts, the court held that Gratkowski did not have a reasonable expectation of privacy in his information on the Bitcoin blockchain.

Next, the court held that Gratkowski did not have a reasonable expectation of privacy in his Bitcoin transactions on Coinbase. The court reiterated that, like blockchain, the Coinbase records were more closely related to bank records than CSLI: first, Coinbase is a financial institution subject to federal regulations; second, Coinbase records are limited to information concerning a person’s virtual currency transactions; and, finally, transacting Bitcoin through Coinbase requires an affirmative act on the part of the user.

The court noted that only two federal district courts, and no circuit courts have addressed the issue of whether an individual has a privacy interest in the records of their Bitcoin transactions on a virtual currency exchange. In each case, the district court held that the defendant did not have a privacy interest in their Bitcoin transaction records because the transactions were shared with a third party, the virtual currency exchange. (See <https://casetext.com/case/zietzke-v-united-states-1> and <https://casetext.com/case/zietzke-v-united-states>)

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca5/19-50492/19-50492-2020-06-30.pdf?ts=1593559812>

Sixth Circuit

Jordan v. Howard, 987 F.3d 537 (6th Cir. 2021)

Shortly before 5:30 a.m., police officers were dispatched to a noise complaint at an apartment complex. When they arrived, the officers located a vehicle in the parking lot that had loud music blaring from it. The officers approached the vehicle and saw the driver, later identified as Jamarco McShann, asleep in the driver’s seat. McShann’s left hand was behind his head. McShann’s right hand was resting on a handgun that was lying flat on his right thigh, with the muzzle facing the driver-side door.

Officer Knight attempted to wake McShann by rapping his heavy flashlight against the glass of the driver-door window. After five to ten seconds of Officer Knight banging his flashlight against the window, McShann woke up. The officers shouted to McShann, “show me your hands.” McShann initially moved his right hand away from the gun. However, after looking around at the

officers for a few seconds, McShann reached down, grabbed the handgun, and swung the muzzle toward the driver-side door where Officer Knight and another officer were standing. At this point, Officer Knight and Officer Howard, who had positioned himself at the rear of the vehicle, shot McShann. McShann died as a result of his injuries.

Sabrina Jordan, (Plaintiff) as the administrator of McShann's estate, sued the officers under 42 U.S.C. § 1983 for excessive force in violation of the Fourth Amendment's prohibition on unreasonable seizures and for several related state-law tort claims.

The district court granted the officers qualified immunity. The district court found that the officers acted reasonably because there was no dispute that "McShann was point a gun at Knight at the time he was shot." The plaintiff appealed.

The Sixth Circuit Court of Appeals affirmed the judgment of the district court, agreeing that the officers were entitled to qualified immunity. It was undisputed that Officers Knight and Howard "seized" McShann for Fourth Amendment purposes when they shot him. In [Graham v. Connor](#), the Supreme Court outlined three factors for a court to consider when determining whether a seizure under these circumstances is reasonable under the Fourth Amendment.

In this case, the court focused on the second [Graham](#) factor, whether the suspect poses an immediate threat to the safety of the officer or others because, "an officer's use of deadly force is objectively reasonable if the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others."

Here, the court found that the officers' use of deadly force was objectively reasonable. First, three of the four officers surrounding McShann's vehicle testified that when McShann awoke, he was compliant or mostly compliant with their order that he put his hands up. However, after looking back and forth at the officers surrounding the vehicle for a few seconds, all four officers testified that McShann grabbed his gun. At this point, Officer Howard perceived a serious and deadly threat to himself and his fellow officers and took aim at McShann's "center mass." While that process was playing out, the other three officers agree that McShann "swung" the gun towards Officer Knight at the driver-side window. Once this occurred, the officers shot McShann. Given these facts, the court concluded that both Officers Howard and Knight acted reasonably to stop a serious threat of deadly force, and the district court correctly granted them qualified immunity. The court recognized that "when an initially compliant suspect stops following officer commands and instead grabs a readily accessible firearm, an officer "need not wait for [the] suspect to open fire on him . . . before the officer may fire back."

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/20-3274/20-3274-2021-02-03.pdf?ts=1612375230>

Seventh Circuit

Estate of Davis v. Ortiz, 987 F.3d 635 (7th Cir. 2021)

Police officers conducted an undercover "sting" operation in which they planned to use a confidential informant (CI) to lure Roberto Juarez-Nieves into delivering cocaine to him at a local restaurant. Nieves arrived in a Pontiac Bonneville, along with Christopher Davis and Jose Lara, who was driving. Lara parked the Bonneville in the crowded restaurant lot, next to an empty

Grand Marquis. Just as the police arrived in their marked squad car and started to park behind the Grand Marquis, Lara began slowly to pull out of his parking spot and an officer had to step aside to avoid the car. As Lara headed for the exit, Deputy Juan Ortiz, who was standing 50 feet away, fired four shots into the car. One of those shots hit Davis in the head. Lara kept driving for a brief time, but he crashed the car. The police apprehended both Lara and Nieves as they fled on foot, and medical personnel pronounced Davis dead.

Davis's estate sued Deputy Ortiz under 42 U.S.C. § 1983, alleging that the officer unreasonably seized Davis in violation of the Fourth Amendment by shooting him in the head. Deputy Ortiz responded by claiming that he was entitled to qualified immunity. The district court held that Deputy Ortiz was not entitled to qualified immunity because there were material facts concerning the incident that the parties disputed, which had to be resolved by a jury. Deputy Ortiz appealed.

The Seventh Circuit Court of Appeals agreed that genuine issues of material facts remained to be resolved; therefore, the district court properly denied Deputy Ortiz qualified immunity. Deputy Ortiz testified that when he discharged his firearm, his "intent was to stop the threat that was coming at [him]," and he agreed that "firing into the vehicle was the way to stop that threat[.]" Based on this testimony, the district court found that Deputy Ortiz's statements were not enough to establish as a matter of law that he was aiming exclusively for the driver. Instead, the district court found, "a jury could conclude that Ortiz was shooting at the car *generally* to make it stop, rather than at the driver or any other particular area of the vehicle." The district court also found that a reasonable jury could conclude that deadly force was excessive in the circumstances presented, if one were to accept the Estate's evidence over that of Deputy Ortiz.

In dismissing Deputy Ortiz's appeal, the court noted that his intent for shooting at the vehicle was irrelevant. Instead, the court stated that "the pertinent question is whether a jury could find that Ortiz's actions – firing repeatedly at a moving vehicle as it was leaving the parking lot – were objectively unreasonable under all the circumstances, and thus amount to a Fourth Amendment violation." The court added that there was evidence to support a finding that Deputy Ortiz was aiming at the car as a whole and specifically at the driver. However, at trial, the court commented that Deputy Ortiz would have the opportunity to convince a jury that his actions were objectively reasonable.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/19-3355/19-3355-2021-02-05.pdf?ts=1612549879>

Eighth Circuit

United States v. Zephier, 2021 U.S. App. LEXIS 5584 (8th Cir. Feb. 25, 2021)

Xavier Zephier was arrested for committing a sexual assault on the Yankton Sioux Reservation in South Dakota. Before traveling to the jail to interview Zephier, FBI Special Agent Robert Mertz obtained a search warrant authorizing him to swab Zephier's inner cheek for a DNA sample.

At the jail, Agent Mertz was joined by Yankton Sioux Tribe Criminal Investigator Lander Saunsoci. Agent Mertz provided Miranda warnings to Zephier, who then signed a form confirming that he had been advised of his rights. After first saying that he would like to provide a written statement, Zephier changed his mind and told the officers he would rather speak to them. Agent Mertz then told him, "[o]kay, whatever's good for you. . . . It's completely voluntary but

obviously there's two sides to every story, and that's why I am not dragging you out of here right now. I want to get your side of this story[.]”

When the officers told Zephier that they were ready for him to begin, he started to hesitate, wondering out loud “if [he] want[ed] a lawyer or if it'd be better just to do a statement.” The officers replied that it was “totally [his] decision.” Zephier then asked whether he could call his father for advice, but after checking with jail staff, Investigator Saunsoci informed him that he could not make a call until after his arraignment. Eventually, after being reminded that it was solely his decision whether to make a statement, Zephier said, “alright I want to do a statement, but I'd rather, rather just wait 'til I see a lawyer, if anything.” Investigator Saunsoci replied that all was “well and good” and suggested that they could arrange another meeting once Zephier had an attorney. At that point, the following exchange took place:

Agent Mertz: We've got one more order of business here. This is your copy. But I have a search warrant for ya. So, what it is, is, just basically two q-tips taking uh swabs of your cheeks.

Zephier: Oh, okay.

Agent Mertz: Okay, so. This, unfortunately, this is not optional. I have to do it, I have a warrant, so

Zephier: Alright, well, I'll, I'll do a statement, then.

Agent Mertz: Well, no I don't want this to influence you giving a statement, so if, if you want to give the statement, that's fine.

Zephier: I mean, yeah I'd rather, I'd rather just do the statement now.

Agent Mertz: Well, one way or the . . . I need to execute this because I'm ordered to by law, so do you want to do [the swabs] now, or do you want to give me a statement first?

Zephier: I'll do the statement first.

Zephier then told the officers what happened the night of the alleged sexual assault and added that he had previously been accused of rape.

Zephier filed a motion to suppress his statements to the officers, claiming that once he unambiguously invoked his right to counsel, the officers should have ended the interview. The district court denied Zephier's motion and he appealed.

The general rule is that, if a suspect who is in custody unambiguously invokes the right to counsel, law enforcement must end all questioning until an attorney is present or the suspect reinitiates the discussion. As the government conceded that Zephier was in custody and that he unambiguously invoked his right to counsel, only issue was whether Agent Mertz's statement that he intended to take a buccal swab amounted to interrogation.

The Supreme Court has held that interrogation includes both “express questioning” and “its functional equivalent,” including “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.” However, even if a suspect invokes the right to counsel, officers may continue to make “limited and focused inquiries . . . attendant to [a] legitimate police procedure” if they are “not likely to be perceived as calling for any incriminating response.”

In this case, the court concluded that Agent Mertz's statement fell into this category. The court found that Agent Mertz presented the search warrant to Zephier and told him what it allowed him to do, which constituted "a statement of fact" about a legitimate police procedure. The court added that there was no reason to believe that Agent Mertz's statement was a "psychological ploy" to get Zephier to talk. On the contrary, the court agreed with the magistrate judge who found that the officers ceased all questioning after Zephier invoked his right to counsel and "took great pains to explain" that "the search warrant had nothing to do with [his] decision [about] whether to make a statement." The "possibility" that Zephier would respond by incriminating himself did not transform Agent Mertz's words and actions into interrogation.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/19-2262/19-2262-2021-02-25.pdf?ts=1614270614>

Tenth Circuit

United States v. Mora, 2021 U.S. App. LEXIS 5426 (10th Cir. Feb. 24, 2021)

Police officers responded to a 911 call reporting that dozens of people exited the back of a tractor trailer behind a supermarket. When officers arrived at the scene a few minutes later, the tractor trailer was gone. However, the officers found fourteen people lacking identification, some of whom admitted that a driver smuggled them across the border in the back of a tractor trailer. None of the captured passengers suggested that the driver, or anyone else, took any passengers to another location.

A short time later, officers discovered a tractor trailer matching the 911 caller's description in a nearby Walmart parking lot. Officers opened the tractor trailer's rear doors to find it empty, except for a bottle apparently containing urine and the smell of body odor. Officers did not open the locked cab door. Video footage revealed that the tractor trailer entered the Walmart parking lot about ten minutes after it left the supermarket, indicating that the driver, later identified as Mathias Mora, drove directly between the two stores. The tractor trailer did not move, nor did anyone besides Mora exit the tractor trailer once it arrived at Walmart. After parking, Mora entered Walmart, made purchases, and left in a different car driven by a woman, later identified as his wife.

After learning that the tractor trailer was registered to Mora at a local address, the officers went to the address, which turned out to be Mora's home. Mora and his wife arrived a few minutes after the officers. The officers recognized Mora and his wife from the Walmart video and arrested them outside the home. Officers searched the couple and seized a cell phone and keys from both of them. In response to a question, Mrs. Mora told an officer that her son was the only person inside the home. An officer then opened the home's unlocked front door and called for the son to come outside, which he did. A few minutes later, officers questioned Mrs. Mora in the foyer of the home. She denied the officers permission to search the home and refused to allow them to go past the foyer. From their vantage point, officers could see into the living room, the kitchen, and up the stairwell. Officers did not observe any signs of other people in the home.

After consulting with the U.S. Attorney's Office, officers conducted a protective sweep of the home "to ensure the safety of agents" and "the safety of other potential undocumented immigrants." Although they did not find any people, officers noticed what they believed to be a

gun safe and ammunition containers. Officers also learned that Mora was a felon, which would make it unlawful for him to possess firearms or ammunition. Later that day, the officers obtained a warrant to search Mora's home for evidence of alien smuggling as well as firearms and ammunition. During the subsequent search, officers found firearms and ammunition.

The government charged Mora with alien smuggling and being a felon in possession of a firearm. Mora filed a motion to suppress the evidence seized from his home. Mora claimed that the officers' warrantless entry into his home to conduct a protective sweep violated the Fourth Amendment; therefore, the information officers discovered concerning firearms and ammunition was unlawfully obtained. As such, Mora argued that any firearms information should have been omitted from the search warrant affidavit and that doing so would have rendered the affidavit insufficient to establish probable cause to search his home.

This district court disagreed and denied Mora's motion. Mora pleaded guilty to two counts of alien smuggling and one count of being a felon in possession of a firearm. Upon conviction, Mora appealed the denial of his suppression motion, which related only to his felon-in-possession conviction.

The Fourth Amendment generally requires a warrant for officers to search a person's home. However, the Supreme Court has held that the Fourth Amendment allows police officer to make warrantless entries and searches of homes when they reasonably believe that a person is in need of immediate aid.

In this case, the Tenth Circuit Court of Appeals held that the officers had no reason to believe that anyone was in the home when they entered without Mora's permission or a warrant. First, the officers arrived at Mora's home before Mora and his wife returned, so they had ample opportunity to observe the home and did not see any signs of danger. Second, from the timeline of events, officers knew that Mora lacked a chance to return to the home and deposit aliens after he released them from his tractor trailer behind the supermarket. Third, Mrs. Mora told officers that no one was in the home when they arrived except her son, who exited the home in compliance with an officer's command. In addition, no one else responded to the officers' calls, nor did officers hear any sounds from the home. Finally, the officers questioned Mrs. Mora inside the foyer of the home, from which they could see several rooms before conducting their warrantless search. Again, no officer noticed any signs of other people from inside the home. Without evidence suggesting anyone was in the home, let alone in need of aid, the court concluded that the officers failed to meet their burden of identifying exigent circumstances to justify their warrantless search of the home. In addition, the court found that the officers did not have a legitimate officer safety justification to enter the home because they arrested Mora and his wife outside the home. Consequently, the court found that once the unlawfully obtained firearms information was omitted from the affidavit, the officers did not have probable cause to search Mora's home for evidence of a felon-in-possession violation.

Next, the court held that the search warrant affidavit did not establish probable cause to believe that Mora's home contained evidence of alien smuggling. In order to establish probable cause to search, "a nexus must exist between the suspected criminal activity and the place to be searched." Here, the only object that the affidavit linked to Mora's illegal activity was his tractor trailer. However, when the officers sought the search warrant, they knew the tractor trailer was parked at Walmart and that Mora had not brought home any items from it. The officers arrested Mora and his wife outside their home. When officers searched the couple, they seized their cell phones and keys. Based on these facts, the court concluded that Mora did not have a chance to hide any

evidence related to alien smuggling inside his home that he might have brought home with him. Although the totality of the circumstances established probable cause to believe that Mora engaged in alien smuggling, the court held that the government failed to articulate how evidence of alien smuggling would be located in Mora's home. Consequently, the court held that the evidence seized from Mora's house should have been suppressed because the officers did not establish probable cause to search it.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/19-2097/19-2097-2021-02-24.pdf?ts=1614186068>
