2017
United States Supreme Court and Circuit Courts of Appeals Case Summaries – By Subject

(As reported in 2Informer17 through 1Informer18, covering January – December 2017)

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Fourth Amendment

Community Caretaking Doctrine

United States v. Lewis, 869 F.3d 460 (6th Cir. 2017)

Police officers responded to reports that a woman was intoxicated in a Wal-Mart store. Officers found the woman, Carol Lakes, who told the officers she had been taking pain pills due to back trouble. Lakes told the officers that her boyfriend, Lewis, was outside in his truck and that he would drive her home.

The officers accompanied Lakes to the parking lot and located Lewis' truck. An officer looked through the window and saw Lewis asleep inside the truck. The officers decided to open the truck door to see if Lewis would be able to drive Lakes home. When one of the officers opened the door, the interior dome light went on, allowing the officers to see a clear plastic baggie on Lewis' lap that appeared to contain pills. Lewis woke up and tossed the baggie over the console onto the back floorboard. The officers opened the back door, inspected the baggie more closely, and determined that it contained pills. The officers seized the bag of pills, which was later tested and found to contain oxycodone and alprazolam tablets.

The government charged Lewis with various drug-related charges.

Lewis argued that the officers violated the Fourth Amendment by opening the door to his truck.

The court disagreed, holding that opening the door to Lewis' truck fell under the community-caretaker exception. The community-caretaker exception applies when the actions of the police are unrelated to the detection, investigation, or collection of evidence relating to a criminal offense. Here it was undisputed that the officers' sole purpose in opening the truck door was to determine if Lewis could provide Lakes a safe ride home. The court further held that any limited intrusion on Lewis' privacy from opening the truck door was minimal and that the officers were not required to knock on the window or attempt to speak with Lewis before opening the door.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/16-5181/16-5181-2017-08-25.pdf?ts=1503691261

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Reasonable Expectation of Privacy / Standing (In General)

Abandonment

See: United States v. Escamilla, 852 F.3d 474 (5th Cir. 2017)

United States v. Juszczyk, 844 F.3d 1213 (10th Cir. 2017)

Tina Giger gave Juszczyk permission to repair his motorcycle in her backyard. A concerned neighbor contacted the police who went to investigate. When officers responded, Juszczyk threw his backpack onto the roof of Giger's house. Officers retrieved the backpack and searched it. The backpack contained methamphetamine, a firearm, and documents bearing Juszczyk's name. Officers arrested Juszczyk.

Juszczyk argued that the warrantless search of his backpack violated the Fourth Amendment.

The court disagreed, holding that Juszczyk lost any reasonable expectation of property he had in the backpack when he threw it on the roof of Giger's house. As a result, the court found that the backpack was abandoned property; therefore, the officers did not violate the Fourth Amendment when they searched it.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-3323/15-3323-2017-01-03.pdf?ts=1483466500

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Arrestee Conversation in Back of Marked Police Van

United States v. Paxton, 848 F.3d 803 (7th Cir. 2017)

Paxton and four other men were arrested and placed inside the back of a marked police van for transport to a nearby Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) field office to be interviewed. The van's interior was divided into three compartments with the driver and passenger separated from the transport compartments by steel walls with plexiglass windows. During the drive, the defendants made incriminating statements that were captured by two recording devices that were concealed in the back of the van. The recording equipment also captured identifying information that each defendant was asked to provide before being seated in the van. The defendants' answers to the biographical questions were later used by the agents to identify who was speaking in the back of the van.

The defendants filed a motion to suppress their covertly recorded statements, claiming that they had a reasonable expectation of privacy in their conversation while in the back of the police van.

The court disagreed. The court emphasized that the police van was functioning as a mobile jail cell. The defendants had been arrested, placed in handcuffs, and were being transported to the ATF field office for processing and questioning. The court found that the arrest itself had already diminished the defendants' expectation of privacy, and as detainees, the defendants could not have reasonably believed the marked police van provided them a place to have a private conversation. The court added, the fact that the interior of the van was divided into separate, fully enclosed, compartments, did not change the nature of the vehicle. The metal dividing walls, with their thick plexiglass windows, were present to serve a security function rather than to provide an area for private conversations. Regardless of the particular layout, a police vehicle that is readily identifiable by its markings as such, and which is being used to transport detainees in restraints, does not support an objectively reasonable expectation of conversational privacy.

The court further held that the identification questions the agents asked the defendants as they entered the van, which were later used to identify the speakers in the recorded conversations, did not violate the Fifth Amendment. Although the defendants had not yet been given their Miranda warnings, the questions asked by the agents were similar to routine booking questions, which are not the type of questions that typically produce incriminating information.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-2913/14-2913-2017-02-17.pdf?ts=1487358046

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Businesses

United States v. Lewis, 864 F.3d 937 (8th Cir. 2017)

Two police officers went to a tattoo shop to look for a person of interest in an unrelated case. When the officers entered the shop no one was at the reception desk, but a customer was sitting in the common area. The officers rang a bell on the desk; however, no one answered. The customer told the officers that he was waiting while Lewis drew him a tattoo in the back of the shop. Behind the reception desk was an open doorway, with no door, that led to a work area with individual stations for tattooing customers. There were no signs telling people to stay out of the work area. The officers knocked on the doorframe for two to three minutes, identifying themselves, and asking if anyone was there. After receiving no response, the officers entered the work area and knocked on a closed door to a back room. Lewis answered the door and agreed to speak to the officers in the work area. At some point, one of the officers saw a handgun in a holster on a shelf in the work area. The officer grabbed the gun, removed it from the holster, and checked to see it if was loaded. Lewis then told the officers that he was a felon and did not need any "hassles." The officers did not know Lewis was a felon until he told them. The officers told Lewis they would keep the handgun and eventually left with it. In a subsequent interview, Lewis told the officers that he received the gun from a customer a year or two earlier.

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

Lewis filed a motion to suppress the handgun. First, Lewis argued that the officers violated the Fourth Amendment by entering the work area, which was not open to the public, without a warrant.

A government agent may enter a business in the same manner as a private person and an employee has no reasonable expectation of privacy in areas of the business where the public is invited to enter and transact business. While the work area in this case was not open to the public, as customers were welcome into the work area only if invited by an employee, that fact alone does not determine whether Lewis had an objectively reasonable expectation of privacy in the work area. Even if the public were not invited into the work area, Lewis' expectation of privacy would not be reasonable if he expected the public to enter the work area anyway.

In this case, when the officers entered the shop they found an unattended reception desk with a call bell. The officers first tried to get an employee's attention by ringing the bell and knocking on the doorframe to the work area. When that failed, the officers walked into the work area to knock on the door to the back room. The court concluded that a reasonable employee would expect members of the public to enter the work area as the officers did here. As a result, the court held that Lewis had no reasonable expectation of privacy in the work area.

Next, Lewis argued that the warrantless seizure of the handgun violated the Fourth Amendment.

The court agreed. When the officer grabbed the gun from the shelf, he did not have probable cause to associate it with a crime, as Lewis admitted to being a convicted felon after the officer had seized the gun. Because the incriminating nature of the gun was not immediately apparent when the officer seized it from the shelf, the seizure of the gun did not fall within the plain-view exception.

In addition, the court held that the officer's warrantless seizure of the gun was not justified by safety concerns. A police officer who discovers a weapon in plain view may temporarily seize

that weapon if a reasonable officer would believe based on specific and articulable facts, that the weapon poses an immediate threat to the officer or public safety. In this case, however, the court found that the officer's seizure of the gun was not justified because the officers did not suspect Lewis or the customer of wrongdoing, nor did Lewis or the customer behave in a manner that suggested that they posed a threat to the officers or anyone else.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3308/16-3308-2017-07-27.pdf?ts=1501169446

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Luggage Compartment (Commercial Bus)

See: United States v. Wise, 877 F.3d 209 (5th Cir. 2017)

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Magnetic Strips (Credit / Debit / Gift cards)

See: United States v. Ramdihall, 859 F. 3d 80 (1st Cir. 2017);
United States v. Hillaire, 857 F.3d 128 (1st Cir. 2017)

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Motel Room

United States v. Aiken, 877 F.3d 451 (1st Cir. 2017)

Police officers received a tip that the occupants of room 216 of a Super 8 Motel possessed illegal drugs. At approximately 9:00 a.m., officers went to room 216 and knocked on the door. No one from room 216 responded to the officers' repeated knocks; however, an unidentified man partially opened the door to room 218. Although room 218 smelled of marijuana, the officers told the man they were not there for him. A few minutes later, the door to room 218 opened again, and a man, later identified as Joshua Bonnett, stood by the door while another man, later identified as Marquis Aiken, stood five to ten feet behind him. One of the officers recognized Aiken, who was barefoot and only wearing shorts, from a recent heroin trafficking arrest. The officers also noticed that one of the beds looked like someone had slept in it. Suspecting that Bonnett and Aiken were involved in illegal drug activity, the officers entered room 218 and conducted a security sweep. During the sweep, officers saw what appeared to be a bag containing marijuana on one of the beds and a digital scale containing a white powdery residue on a nightstand between the beds. One of the officers opened the top drawer of the nightstand and found a bag containing a substance that appeared to be cocaine. The officers subsequently obtained a search warrant, and as a result of the evidence seized in the search, the government charged Bonnett and Aiken with several drug-related offenses.

Bonnett and Aiken filed a motion to suppress the evidence seized from room 218. The district court determined that Jahrael Browne and Joshua Bonnet had rented room 218 and that Aiken had stayed in the room with Bonnett's permission. Consequently, the district court held that Bonnett and Aiken had a reasonable expectation of privacy in room 218; therefore, they could challenge the search. The court further held that the search violated the Fourth Amendment and granted Bonnett and Aiken's motions to suppress.

The government appealed the district court's ruling that Aiken had a reasonable expectation of privacy in Room 218.

The First Circuit Court of Appeals recognized that an invitation to be present in a location does not automatically provide Fourth Amendment privacy protection. As a result, although Aiken was Bonnett's guest in room 218, and may have slept there, the court found these facts alone did not establish that Aiken had an objectively reasonable expectation of privacy in the room. The court further found that Aiken was not registered as a guest for room 218, he did not have a key to the room, and he did not have any possessions in the room besides the sneakers and t-shirt he was trying to put on when the officers entered. Based on these facts, the court could not determine what purpose Aiken had in room 218, how long he stayed in the room, how long he slept in the room, and how well he knew the other occupants. Consequently, the court held that sleeping in a motel room for "longer than a brief period of time," without more, is insufficient to provide Fourth Amendment protection; therefore, Aiken failed to establish that he had a reasonable expectation of privacy in room 218.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/17-1036/17-1036-2017-12-18.pdf?ts=1513634404

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United States v. Peoples, 854 F.3d 993 (8th Cir. 2017)

A police officer located a stolen car in the parking lot of a motel. While conducting surveillance on the car, the officer saw a man and a woman exit Room 114 and approach the stolen car. The couple had a brief conversation and then the woman got into the car and drove away. The officer followed the woman and eventually arrested her for possession of a stolen automobile. The woman told the officer that she had spent the night in Room 114 with a man named "Dusty."

In the meantime, another officer was dispatched to the motel to advise management of the criminal activity on the premises and to determine the identity of the man from Room 114. After arriving at the motel, the officer told the clerk on duty that a stolen car had been observed leaving the parking lot and that, while one person had been arrested, there was still a man associated with the vehicle inside Room 114. In response, the clerk handed the officer a key to Room 114 so the officer could evict the occupants.

The officer went to Room 114 accompanied by back-up officers and knocked on the door several times, announcing that he was with the police. After receiving no response, the officer used the key to enter the room and found Peoples lying on the bed. The officer also saw a loaded handgun magazine on the floor and narcotics on the nightstand. After the officers arrested Peoples, they obtained a warrant to search the room based on the evidence they had observed when they first entered the room. The officers subsequently found a loaded handgun and stolen electronics.

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

Peoples filed a motion to suppress all evidence obtained as a result of the initial police entry into the motel room. Peoples claimed that the officer's unlawful warrantless entry into Room 114 tainted the subsequent search with the warrant, which led to the seizure of the firearm.

The Fourth Amendment's protection against unreasonable searches and seizures extends to a person's privacy in temporary dwelling places such as hotel or motel rooms. However, once a guest has been "justifiably" expelled, the guest does not have standing to contest an officer's entry

into his hotel room under the Fourth Amendment. In addition, Missouri law (*Mo. Rev. Stat. § 315.075(3)*) allows a hotel to eject a person when the hotel operator reasonably believes that the person is using the premises for an unlawful purpose.

In this case, the court held that the motel clerk gave the officer the key to Room 114 to evict the occupants under *§ 315.075(3)*. The court further held the eviction was lawful under Missouri law because the clerk had a reasonable belief that the occupants of Room 114 were using motel premises for an unlawful purpose. Specifically, the officer told the clerk that the occupants of Room 114 had kept a stolen car in the motel parking lot, and that the woman who had exited Room 114 had been arrested for this offense. Consequently, the court concluded that the officers' entry into Room 114 was for the lawful purpose of effecting People's eviction; therefore, the evidence observed during this initial entry provided a valid basis for the subsequent search warrant.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-2044/16-2044-2017-04-24.pdf?ts=1493047848

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Rental Car / Borrowed Vehicle

United States v. Lyle, 856 F.3d 191 (2d Cir. 2017)

Police officers noticed a knife clipped to Lyle's pants as Lyle exited a car. When the officers asked Lyle about the knife, Lyle told them that he was legally permitted to carry the knife to perform his job. When the officers asked Lyle about the car, Lyle initially denied driving the car, but later admitted to the officers that he had been driving it. The officers asked Lyle for identification and Lyle produced a driver's license with the expiration date scratched off. The officers confirmed that Lyle's driver's license was suspended, that the vehicle Lyle was driving was a rental car, and that Lyle was not an authorized driver under the rental agreement. Lyle told the officers that his girlfriend had rented the car and given him permission to drive it. The officers arrested Lyle for driving with a suspended license and for possessing an illegal knife. The officers denied Lyle's request to allow his girlfriend to come and pick up the car and impounded it. At the police station, officers conducted an inventory search and found over one pound of methamphetamine and approximately $39,000 in cash in the trunk of the car.

The government charged Lyle with several drug-related offenses.

Lyle filed a motion to suppress the evidence discovered during the inventory search.

The court held that Lyle had no reasonable expectation of privacy in the rental car; therefore, he did not have standing to object to the inventory search.

First, the court noted that the Second Circuit has not addressed the issue of whether an unauthorized driver of a rental car has a reasonable expectation of privacy in the car. The majority of the circuits that have considered the issue have concluded that an unauthorized driver of a rental car lacks a legitimate expectation of privacy in the car, unless some extraordinary circumstances exist.[1] A minority of circuits have held that an unauthorized driver has a reasonable expectation

[1] 3rd, 4th, 5th and 10th Circuits.

of privacy in a rental car if the authorized driver gave him or her permission to use the car.[1] Finally, the Sixth Circuit has refused to adopt either position. Instead, the Sixth Circuit examines the totality of the circumstances to determine if an unauthorized driver has a reasonable expectation of privacy in a rental car.

Next, the court concluded that it did not need to decide the issue of whether Lyle had a reasonable expectation of privacy in the car. In addition to being an unauthorized driver, Lyle was also an unlicensed driver; therefore, Lyle should not have been driving any car because his license was suspended. A rental company that knew this fact would not have given Lyle permission to drive its car nor allowed another renter to do so. Under these circumstances, the court held that Lyle did not have a reasonable expectation of privacy in the rental car.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-958/15-958-2017-05-09.pdf?ts=1494340213.

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United States v. Long, 870 F.3d 792 (8th Cir. 2017)

Officers were called to remove a car that had been parked in a woman's yard without her permission. The officers discovered the car was a rental and after they were unable to contact the rental company, they called a tow truck to remove it. While waiting for the tow truck, Long approached the officers and told them that he had parked the car in the yard. Long told the officers that Latasha Philips had rented the car and that he had parked the car in the yard.

During the encounter, officers discovered that Long had outstanding warrants for his arrest and detained him in handcuffs. In the meantime, the tow truck driver arrived and opened the car door so that officers could conduct an inventory search. During the inventory search, officers discovered a bag containing a white powdery substance. The officers stopped the inventory search, arrested Long, and applied for a warrant to search the car.

After the obtaining the warrant, officers searched the car and discovered unlawful drugs as well as evidence that Long, a convicted felon, had been in possession of a firearm.

Long filed a motion to suppress the evidence discovered in the rental car, arguing that the inventory search conducted prior to towing the vehicle violated the Fourth Amendment. The government argued that Long did not have standing to object to the search of the rental car.

At the suppression hearing, Philips claimed that she rented the car for her friend Roger, but that she had failed to put Roger's name on the rental contract as an authorized driver. However, Philips testified she did not restrict what Roger could do with the car or to whom Roger could lend the car. Long claimed that Philips' testimony established that he had consensual possession of the car from Roger; therefore, he had standing to object to the inventory search.

The court disagreed. The court found the relationship between Philips, the authorized driver, and Long, an unauthorized driver was too attenuated to provide Long with a reasonable expectation of privacy in car. As a result, the court held that Long, an unauthorized-driver-once-removed with only indirect permission to drive the car from Philips, the authorized driver, did not have standing to object to the search.

[1] 8th and 9th Circuits.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1419/16-1419-2017-08-31.pdf?ts=1504191698

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United States v. Mosley, 878 F.3d 246 (8th Cir. 2017)

At approximately 2:35 p.m., two individuals robbed a bank. As the robbers were leaving the bank, a witness in a truck driving by the bank saw the robbers fleeing but eventually lost sight of them. As the truck circled around the block attempting to spot the robbers again, the witness called the bank. A bank employee called 911 and began relaying information about the robbery, including information the employee was getting from the witness on the other line. Although the witness could not locate the robbers, he reported that a gray/silver Ford Taurus was in the vicinity of the bank and was the only vehicle leaving the area moments after the robbery. The witness followed the Taurus and gave its location and direction of travel to the bank employee, who gave the information to 911 dispatch. When the witness got close enough to see inside the gray Taurus, he reported that he could only see one woman in the car, whereas he had seen two men running from the bank. At this point, the witness was no longer sure if the gray Taurus was involved in the bank robbery.

Around 2:40 p.m., a police officer received a radio dispatch that a gray Ford Taurus may have been involved in a bank robbery. A few minutes later, the officer saw a gray Taurus traveling in the direction indicated by the witness. The officer stopped the Taurus approximately 5.8 miles from the bank approximately eight minutes after the robbery occurred.

The officer determined that the Taurus was registered to Farrah Franklin but identified the driver as Katherine Pihl. The officer did not see anyone else inside the vehicle and was about to let Pihl go when another officer suggested that he check the trunk. The officer opened the trunk and found Stanley Mosley and Lance Monden, along with cash and masks. The officer arrested Pihl, Mosley, and Monden, and the government indicted them for bank robbery.

The defendants filed a motion to suppress evidence seized by the officers.

Among the issues raised by the defendants, Pihl and Monden argued that the officer violated the Fourth Amendment when he searched the trunk of the Taurus.

The court held that Pihl and Monden lacked standing to challenge the officer's search of the trunk because they did not have a reasonable expectation of privacy in the Taurus. The owner of the Taurus, Farrah Franklin, told officers that she did not know Mosley, Monden, or Pihl and had not given them permission to use her car. In addition, Franklin told the officers that she called the local police department on the day of the bank robbery to report the vehicle stolen. Even though Franklin's husband testified that he borrowed the Taurus with Franklin's permission and then loaned it to Monden without her consent, this did not establish a reasonable expectation of privacy in the Taurus for Monden.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-4489/16-4489-2017-12-21.pdf?ts=1513873829

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Search – Inserting Key into Door Lock

United States v. Bain, 874 F.3d 1 (1st Cir. 2017)

Police officers obtained a criminal complaint and arrested Bain for drug-related offenses after Bain walked out of a multi-family building and attempted to get into his car. During the search incident to arrest, the officers found a set of keys on Bain's person. The officers tried these keys on the front door of the multi-family building and on the doors to three apartments inside the building. The keys opened the main door to the multi-family building and to unit D, one of the apartments inside the building. The officers used this information in addition to other information to obtain a warrant to search the apartment. Inside the apartment, the officers found drugs, a firearm, and other evidence indicating that Bain was involved in drug trafficking.

The government charged Bain with drug and firearm-related offenses.

Bain filed a motion to suppress the evidence seized from his apartment. Bain argued that the officers conducted an unlawful search by turning his key in the locks to identify the unit to search, and that there was no probable cause to issue a warrant to search unit D without that identification.

The court agreed that the officers conducted an unlawful search by testing the key in the lock of Bain's apartment.

First, the court concluded that the inside of the front door lock to unit D was within the unit's curtilage; therefore, it was protected by the Fourth Amendment. Next, the court found that a physical intrusion into the curtilage to obtain information, in this case by putting the key in the lock to see if it fit, was a search that was not within the "implicit license" which allows a visitor to approach a home, knock on the front door and wait briefly to be received or not. Here, as long as the officers were lawfully in the building, they could approach the door and knock without being deemed to have conducted a search. However, the court held that walking up to the door of a home and trying keys on the lock constituted a Fourth Amendment search.

The court further held that the search by the officers in this case was not reasonable. The government offered no evidence that the officers considered other possible means of determining in which unit Bain resided. In addition, the government did not claim that evidence was being destroyed, an immediate danger existed, or that any other exigency was present that required the officers to turn the key in the lock of unit D.

Even though the court found that the officers violated the Fourth Amendment by conducting an unlawful search, the court held that the suppression of evidence seized from Bain's apartment was not warranted. The court noted that at the time of the incident, under Massachusetts case law, an officer only needed reasonable suspicion to conduct a search by turning a key in a lock. In this case, the court found that under this standard, the officers established reasonable suspicion to believe that turning the key in the lock of unit D would lead to evidence of Bain's drug dealing. Consequently, the court concluded that the officers relied in good faith on the search warrant for unit D issued by the magistrate judge based on the state of the law prior to this decision.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/16-1140/16-1140-2017-10-13.pdf?ts=1507924804

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Seizure / Persons

United States v. Belin, 868 F.3d 43 (1st Cir. 2017)

Police officers responded to a call that individuals were involved in a fight near a public park, which had been the site of multiple recent firearms incidents and arrests. When officers arrived, they saw a group of five men walking on a sidewalk near the park. As the officers exited their patrol car, one of the men, later identified as Belin, peeled away from the others and hurried away from the officers. One of the officers recognized Belin, as he had previously arrested Belin for a firearm offense and knew that Belin was listed as a gang member in a police database. The officer caught up to Belin and called his name. Belin stopped walking and turned to face the officer. The officer asked Belin if he "had anything on him." Belin became nervous and according to the officer, "he looked around as if searching for a means of escape." At this point, the officer grabbed one of Belin's arms with one hand and reached toward Belin's waist with the other to frisk his waistband. Belin moved both of his hands toward his waistband and a struggle ensued. Other officers quickly arrived, took Belin to the ground, and handcuffed him. An officer searched Belin and discovered a handgun, marijuana, and ammunition on his person.

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

Belin filed a motion to suppress the evidence seized during the search. Belin argued that he was unlawfully seized under the Fourth Amendment by the officer's show of authority when the officer approached him. Specifically, Belin claimed that the officer's actions caused him to stop and answer the officer's questions.

The court disagreed. In addition to being formally arrested, a person can be seized by a police officer if he submits to the officer's show of authority. Even though Belin stopped when the officer called his name, the court determined that approaching Belin, calling his name, and asking him a question did not amount to a Fourth Amendment seizure. The court concluded that the officer did not seize Belin until he grabbed Belin's arm.

The court further held that when the officer grabbed Belin's arm, he had reasonable suspicion to believe that Belin was involved in criminal activity, specifically, unlawful possession of a firearm. First, the officer knew Belin had previously possessed an unlawful firearm, and that Belin was listed as a gang member in a police database. Second, the location in which the officer encountered Belin was known for firearm-related offenses. Third, when the officers approached the men walking on the sidewalk, Belin separated himself from them and quickly walked away from the officers. Fourth, during the encounter, but before the stop and frisk, Belin became extremely nervous.

Finally, the court held that the officer's reasonable suspicion that Belin unlawfully possessed a firearm provided reasonable suspicion to believe that Belin was presently armed and dangerous, which justified frisking him for weapons.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-2192/15-2192-2017-08-22.pdf?ts=1503432005

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United States v. Huertas, 864 F.3d 214 (2d Cir. 2017)

A woman told a patrol officer that a man named "Branden" was down the street with a gun. The officer drove in the direction indicated by the woman looking for an armed man. A few minutes later, the officer saw Huertas standing on a street corner holding a black bag. As the officer approached, he turned on his cruiser's spotlight an illuminated Huertas. Through the cruiser's window, the officer asked Huertas a few questions. Huertas answered the officer's questions. After approximately thirty to sixty seconds, the officer exited his cruiser and Huertas ran away. A search of Huertas' route turned up a bag similar to the one Huertas had been holding, which contained a firearm. Other officers later found and arrested Huertas.

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

Huertas filed a motion to suppress the firearm. Huertas argued that he was unlawfully seized for Fourth Amendment purposes when he "submitted" to police authority by standing still as the officer approached in his cruiser and answering the officer's questions.

The court disagreed. A Fourth Amendment seizure requires either physical force or submission to the assertion of police authority. Because it was undisputed that the officer did not use physical force, Huertas could only be seized if he submitted to the officer's assertion of authority.

The court noted that if Huertas had run when he was illuminated by the officer's spotlight, he could have expected the officer to chase him. However, by staying and answering the officer's questions, Huertas had a chance to dispel the officer's suspicions and hope the officer would drive away after being satisfied with Huertas' answers to his questions. Under these circumstances, the court concluded that Huertas' behavior was "evasive," in that Huertas only answered the officer's questions because he was trying to maximize his chance of avoiding arrest. The court held that Huertas never submitted to the officer's assertion of authority; therefore, the officer never seized Huertas for Fourth Amendment purposes.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-4014/15-4014-2017-07-24.pdf?ts=1500906605

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United States v. Radford, 856 F.3d 1147 (7th Cir. 2017)

A uniformed police officer boarded an Amtrak train in Galesburg, Illinois to conduct a voluntary interview of Radford, whom he suspected might be transporting illegal drugs. The officer knocked on the door to Radford's roomette, which measured 3 ½ feet by 6 ½ feet, and Radford, without having to stand, opened the door. The officer identified himself and told Radford that he was doing "security checks" to "check for people transporting illegal narcotics on trains." The officer requested Radford's identification and train ticket. Radford handed the officer her identification and told him that she had an electronic train ticket, which was on her phone. After examining Radford's identification, the officer asked her a series of security questions and then asked Radford if she was transporting any illegal narcotics. After Radford replied, "no," the officer asked her if he could search her luggage. Radford told the officer, "I guess so. You're just doing your job." The officer asked Radford to step out of the roomette so he could search her luggage and Radford complied. The officer searched Radford's purse and makeup bag and found 707 grams of heroin.

The government charged Radford with possession with intent to distribute heroin. Radford filed a motion to suppress the evidence, arguing that the officer only discovered the heroin after he had unlawfully seized her. Radford claimed that she was intimidated by the officer because the roomette was small; the officer was in uniform and armed; the officer was white and she was black, and the officer did not tell Radford that she had a right to refuse to answer his questions or consent to a search of her bags.

The court disagreed. First, the officer did not enter the roomette until Radford consented to the search of her bags. Second, the officer's uniform and firearm established his identity as a police officer. Third, there cannot be a rule that a police officer is forbidden to speak to a person of another race. Finally, because the officer did not threaten to arrest Radford, there was no need to tell Radford that she did not have to answer his questions or consent to a search. As a result, the court held that the officer did not seize Radford when he questioned her.

Radford further argued that she did not voluntarily consent to a search of her bags.

Again, the court disagreed. The court concluded that Radford's response "I guess so," to the officer's request to search her bags was the same as answering, "yes." In addition, the court noted that there was no other evidence to indicate that Radford's response was not voluntary.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-3768/16-3768-2017-05-22.pdf?ts=1495467059

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Consensual Encounters / Knock and Talk / Bus Interdiction

Terry Stops / Reasonable Suspicion

United States v. Belin, 868 F.3d 43 (1st Cir. 2017)

Police officers responded to a call that individuals were involved in a fight near a public park, which had been the site of multiple recent firearms incidents and arrests. When officers arrived, they saw a group of five men walking on a sidewalk near the park. As the officers exited their patrol car, one of the men, later identified as Belin, peeled away from the others and hurried away from the officers. One of the officers recognized Belin, as he had previously arrested Belin for a firearm offense and knew that Belin was listed as a gang member in a police database. The officer caught up to Belin and called his name. Belin stopped walking and turned to face the officer. The officer asked Belin if he "had anything on him." Belin became nervous and according to the officer, "he looked around as if searching for a means of escape." At this point, the officer grabbed one of Belin's arms with one hand and reached toward Belin's waist with the other to frisk his waistband. Belin moved both of his hands toward his waistband and a struggle ensued. Other officers quickly arrived, took Belin to the ground, and handcuffed him. An officer searched Belin and discovered a handgun, marijuana, and ammunition on his person.

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

Belin filed a motion to suppress the evidence seized during the search. Belin argued that he was unlawfully seized under the Fourth Amendment by the officer's show of authority when the officer approached him. Specifically, Belin claimed that the officer's actions caused him to stop and answer the officer's questions.

The court disagreed. In addition to being formally arrested, a person can be seized by a police officer if he submits to the officer's show of authority. Even though Belin stopped when the officer called his name, the court determined that approaching Belin, calling his name, and asking him a question did not amount to a Fourth Amendment seizure. The court concluded that the officer did not seize Belin until he grabbed Belin's arm.

The court further held that when the officer grabbed Belin's arm, he had reasonable suspicion to believe that Belin was involved in criminal activity, specifically, unlawful possession of a firearm. First, the officer knew Belin had previously possessed an unlawful firearm, and that Belin was listed as a gang member in a police database. Second, the location in which the officer encountered Belin was known for firearm-related offenses. Third, when the officers approached the men walking on the sidewalk, Belin separated himself from them and quickly walked away from the officers. Fourth, during the encounter, but before the stop and frisk, Belin became extremely nervous.

Finally, the court held that the officer's reasonable suspicion that Belin unlawfully possessed a firearm provided reasonable suspicion to believe that Belin was presently armed and dangerous, which justified frisking him for weapons.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-2192/15-2192-2017-08-22.pdf?ts=1503432005

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United States v. Graves, 877 F.3d 494 (3d Cir. 2017)

An undercover police officer conducting surveillance in an unmarked vehicle, in a high-crime area, heard a radio dispatch about possible gunshots in an area near his location. The dispatch described two potential suspects wearing dark-colored hooded sweatshirts who were seen walking away from the location of the gunshots. Less than five minutes later, the officer saw two men in dark–colored hooded sweatshirts walking toward his vehicle. The officer noticed that one of the men, later identified as Graves, was walking with a "pronounced, labored" gait, which suggested that he might have concealed something heavy in his waistband or pocket on his right side. As Graves and the other man passed the officer's vehicle, Graves made eye contact with the officer and raised his hands over his head. Based on his experience the officer knew this behavior "was consistent with a drug dealer or someone who sells something illegal on the street." The officer drove one block ahead of the men and waited for them to approach his vehicle again. At this point, Graves left the other man and walked directly toward the officer's vehicle at a quickened pace. The officer exited his vehicle, identified himself as a police officer, and handcuffed Graves.

Believing that Graves might be armed, the officer conducted a frisk. During the frisk, the officer felt "multiple hard objects" in both of Graves' front pockets. The feel of these objects was consistent with that of crack cocaine. The officer removed the objects from Graves' pockets, which turned out to be multiple packets of the antidepressant Depakote and one live .22 caliber bullet. During questioning, Graves told the officer that he planned to sell the Depakote as crack cocaine and admitted that he had a loaded .380 pistol in his boot, where it had fallen from his waistband. The government charged Graves with several firearm-related offenses.

Graves filed a motion to suppress all physical evidence and statements obtained at the time of his arrest, arguing that the officer lacked reasonable suspicion to justify stopping and frisking him.

The court disagreed. First, the officer was parked in a high-crime area. Second, the officer saw Graves and another man dressed in similar clothing as the suspects described in the radio dispatch coming from the area where gunshots had been reported a few minutes earlier. Third, the officer saw Graves walking in a manner indicating, in the officer's experience, that Graves was armed. Fourth, Graves raised his arms over his head in a manner consistent that of an individual seeking to sell drugs or otherwise challenge the officer. Finally, Graves departed from the other man to approach the officer's vehicle at a quick pace. The court concluded that the combination of these facts gave the officer reasonable suspicion to believe that Graves was engaged in unlawful conduct which justified stopping and then frisking Graves.

Graves further argued that the officer exceeded the scope of a valid frisk. Specifically, Graves claimed that the officer was not permitted to conduct any further search of his person once the officer realized that the objects in his pockets were not weapons.

While the purpose of a frisk is to locate weapons and not evidence of a crime, the Supreme Court has held that an officer may seize contraband discovered during a lawful frisk under the "plain-feel doctrine." The plain-feel doctrine provides that when an officer conducting a lawful frisk feels something that is "immediately apparent" as contraband, the officer may lawfully seize the item. The term "immediately apparent" has been equated with probable cause, and the incriminating nature of the item must be immediately apparent to the officer the moment the officer touches it.

In this case, the officer testified that while frisking Graves' pockets, he knew the objects in Graves' pockets were consistent in feeling with crack cocaine. The court held that the feel of these objects, in light of the officer's experience with narcotics investigations, gave rise to probable cause justifying removal of the objects from Graves' pockets. In addition, the court held that because the officer had yet to determine whether Graves was armed at the time he felt the objects, the frisk was lawful. As a result, the court held that the officer did not exceed the scope of a valid frisk by removing the Depakote and bullet from Graves' pockets.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca3/16-3995/16-3995-2017-12-13.pdf?ts=1513188005

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United States v. Monsivais, 848 F.3d 353 (5th Cir. 2017)

While on patrol in a marked police car, two officers saw Monsivais walking on the side of an interstate highway away from an apparently disabled truck. The officer stopped the patrol car in front of Monsivais and activated the car's emergency lights, planning to ask Monsivais if he needed assistance. As Monsivais approached, he ignored the officers and walked past their patrol car. At this point, the officers exited their vehicle, and asked Monsivais where he was going, where he had been and if he needed any help. Monsivais told the officers where he was going, and while he appeared to be nervous, he responded politely to all of the officers' questions. After approximately four-minutes, one of the officers told Monsivais that he was going to pat Monsivais down for weapons "because of his behavior" and for "officer safety reasons." Monsivais then told the officer that he had a firearm in his waistband. The officer seized the firearm and the government subsequently charged Monsivais with possession of a firearm while being unlawfully present in the United States.

Monsivais filed a motion to suppress the firearm. Monsivais argued that the officer violated the Fourth Amendment because he did not have reasonable suspicion to believe Monsivais was involved in criminal activity when he detained him.

The court agreed. First, the court determined that the officer seized Monsivais for Fourth Amendment purposes when he told Monsivais that he was going to pat him down. At this point, the officer had converted an offer for roadside assistance into an investigative detention or Terry stop.

Second, the court noted that police officers may briefly detain a person for investigative purposes if they can point to "specific and articulable facts" that give rise to reasonable suspicion that the person has committed, is committing, or is about to commit a crime.

Third, the court concluded that while Monsivais' behavior might not have been typical of all stranded motorists, the officer could not point to any specific and articulable facts that Monsivais had committed, was committing, or was about to commit a crime before seizing him. The officer testified that he never suspected Monsivais was involved in criminal activity, but rather that Monsivais was acting "suspicious." As a result, the court found that the officer seized Monsivais without reasonable suspicion and that the firearm seized from Monsivais should have been suppressed.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/15-10357/15-10357-2017-02-02.pdf?ts=1486081834

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United States v. Wise, 877 F.3d 209 (5th Cir. 2017)

Police officers went to a Greyhound bus stop to conduct bus interdictions. After a bus stopped, the driver disembarked, and the officers approached him and asked for consent to search the bus's passenger cabin. After the driver gave consent, two plainclothes officers with narcotics interdiction experience boarded the bus. Without blocking the aisle, one officer walked to the back of the bus while the other officer remained at the front. The officer at the front of the bus noticed Wise, who was pretending to be asleep. The officer found this suspicious, because in his experience, criminals on buses often pretended to be asleep to avoid police contact. The officer walked past Wise and turned around. After Wise turned to look back at him, the officer approached Wise and asked to see his ticket. Wise gave the officer a bus ticket, which had the name "James Smith" on it. The officer's suspicions were aroused because it was a "very generic name" that he believed might be fake. The officer then asked Wise if he had any luggage. Wise said yes and motioned to the luggage rack above his head.

The officer saw a duffle bag and a backpack in the luggage rack above Wise's head, with no other bags nearby. Wise claimed the duffle bag and gave the officer consent to search it. After the officer found nothing of interest in the duffle bag, he asked Wise if the backpack belonged to him. Wise denied ownership of the backpack. After no other passengers on the bus claimed ownership of the backpack, the officers removed it at the driver's request.

Outside the bus, a canine officer directed his dog to sniff the backpack. After the dog alerted to the presence of narcotics, officers cut a small lock off the backpack, searched it, and found seven brick–type packages. The officers cut one of the packages open and discovered a white powder they believed to be cocaine.

After discovering the packages inside the backpack, the officer who initially spoke to Wise went back onto the bus and asked Wise if he would mind getting off the bus to speak to the officers. Wise complied and got off the bus. Once off the bus, the officer told Wise the backpack contained a substance believed to be cocaine and asked Wise if he had any weapons. After Wise denied that he had any weapons, the officer asked Wise to empty his pockets and Wise complied. Among other items, Wise gave the officer an identification card with the name "Morris Wise" and a lanyard with several keys attached. The officer used a key on the lanyard to activate the locking mechanism on the lock the officers had cut from the backpack. The officer arrested Wise, and the government charged him with several drug-related offenses.

Wise filed a motion to suppress the evidence the officers obtained after he was asked to exit the bus. Although neither Wise nor the government briefed the issue before the suppression hearing or raised it during hearing, the district court concluded that the officers' conduct constituted an unconstitutional checkpoint stop. In addition, the district court held that the bus driver did not voluntarily consent to the officers' search of the luggage compartment where the backpack was located. As a result, the district court suppressed all evidence the officers seized after the stop. The government appealed to the Fifth Circuit Court of Appeals.

First, the court held that the district court incorrectly characterized the officers' bus interdiction as an unconstitutional checkpoint. The court noted that the Supreme Court's cases involving checkpoints involve roadblocks or other types of conduct where the government initiates a stop to interact with motorists. In this case, the officers did not require the bus driver to stop at the station. Instead, the driver made the scheduled stop as required by his employer, Greyhound. In addition, the officers only approached the driver after he had disembarked from the bus, and the driver voluntarily agreed to speak with them. The court concluded that the interaction between the officers and the driver was better characterized as a "bus interdiction."

Second, although Wise had a reasonable expectation of privacy in his luggage, the court held that as a passenger, Wise did not have a reasonable expectation of privacy in the luggage compartment of the commercial bus. As a result, the court concluded that Wise had no standing to challenge the officers' search of that compartment, to which the bus driver consented.

Third, the court held that the officers did not seize Wise, within the meaning of the Fourth Amendment, when they approached him, asked to see his identification, and requested his consent to search his luggage. Instead, the court concluded that Wise's interaction with the officers was a consensual encounter because a reasonable person in Wise's position would have felt free to decline the officers' requests or otherwise terminate the encounter.

Finally, the court held that Wise voluntarily answered the officer's questions, voluntarily emptied his pockets, and voluntarily gave the officer his identification and keys.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca5/16-20808/16-20808-2017-12-06.pdf?ts=1512585038

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United States v. Dortch, 868 F.3d 674 (8th Cir. 2017)

In June 2015, police officers were on patrol near an apartment building where there had been recent reports of gun-related gang activity. The officers were aware that within the previous three

weeks there had been reports of shots fired in the area and that three people had been arrested for illegally possessing firearms.

When officers turned a street to drive past the apartment building, they saw a car and a minivan stopped side by side in the street facing them. The car was on the officers' left, in its proper lane, while the minivan was illegally parked on their right. As the officers approached, the car pulled in front of the minivan and stopped. At this point, the car and the minivan were illegally parked in the street. The officers saw Dortch, who was wearing a bulky coat, standing in the middle of the street, leaning into the minivan's passenger-side window. The officers stopped and got out of their cars. One officer walked toward Dortch while the other offers went to talk to the occupants of the car. As the officer approached, Dortch looked at him over his shoulder, made eye contact, looked back into the minivan, and put a cell phone on the passenger seat while keeping his body pressed against the minivan. When the officer asked Dortch why he was standing in the road, Dortch turned his head toward the officer, told the officer that he was talking to his girlfriend, and then turned back and continued his conversation. The officer asked Dortch if he had a gun, and Dortch told him no. The officer told Dortch that was going to frisk him anyway, and felt a heavy object in Dortch's coat pocket. Dortch told the officer, "it's in my pocket." The officer handcuffed Dortch, looked in his coat, and found a pistol.

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

Dortch filed a motion to suppress the pistol. First, Dortch claimed that the officer seized him without reasonable suspicion when the officer walked up to him and asked him what he was doing.

The court recognized that not all encounters between police officers and citizens constitute Fourth Amendment seizures. A person is seized under the Fourth Amendment when an officer, by means of physical force or show of authority has in some way has restrained a person's liberty. In this case, Dortch did not claim that prior to the frisk the officer used or threatened to use physical force when he approached. In addition, Dortch did not identify any show of authority made by the officer. The court concluded that the officer did not seize Dortch by simply walking up to him and asking him questions while Dortch stood in the street.

Second, Dortch claimed that the officer lacked reasonable suspicion to detain him.

The court disagreed. Although the scene the officers came upon in front of the apartment building gave them no reason to suspect Dortch of committing a traffic violation himself, the circumstances indicated that Dortch might be involved with the ongoing illegal parking they observed. Specifically, when the officers noticed Dortch, he was leaning into the minivan talking to the driver and he continued to do so during his initial interaction with the officer. Based on these facts, the court concluded that the officer was justified in briefly stopping Dortch to investigate what was happening with the vehicles and his involvement with them.

Finally, Dortch claimed that the officer lacked reasonable suspicion that he was armed and dangerous; therefore, the frisk was unlawful.

Again, the court disagreed. First, the location where the officer encountered Dortch was a specific area where gun-related gang activity had recently occurred. Second, Dortch was wearing a bulky coat, which was not appropriate for that time of year. The court found that this fact supported the officer's belief that Dortch might be wearing the coat to conceal a weapon. Third, as the officer approached, Dortch put down his phone, thereby freeing his hands to reach for any weapon he might be carrying. Finally, as the officer approached, Dortch pressed the front of his body against

the minivan, which supported a reasonable belief that Dortch might be attempting to conceal an object in his coat from the officer's view.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3178/16-3178-2017-08-18.pdf?ts=1503070243

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United States v. Cobo-Cobo, 873 F.3d 613 (8th Cir. 2017)

Federal agents arrested Mendoza-Marcos for being in the United States illegally. Mendoza-Marcos told the agents that he lived in an apartment with several roommates and allowed the agents to enter the apartment to retrieve some items to take with him to the immigration office. Once inside the apartment, the agents asked one of Mendoza-Marcos' roommates to gather everyone in the living room to speak to the agents. After the occupants could not provide government issued identifications, including Cobo-Cobo, and admitted to being in the country illegally, the agents arrested them. As a result of this incident, the government obtained Cobo-Cobo's employment identification card from his employer and placed it in Cobo-Cobo's "alien file."

Four years later, a deportation officer reviewed Cobo-Cobo's alien file and discovered that Cobo-Cobo had provided his employer a social security number that did not belong to him. The government charged Cobo-Cobo with misusing a social security number.

Cobo-Cobo filed a motion to suppress evidence obtained from his apartment.

First, Cobo-Cobo argued that Mendoza–Marcos did not voluntarily consent to the agents' entry into the apartment because he was under arrest, was not told that he could refuse consent, had not received Miranda warnings, and had no prior experience with law enforcement officers.

The court disagreed. The court found that none of the facts that Cobo-Cobo alleged automatically render a person's consent involuntary. In addition, officers are not required to provide Miranda warnings before requesting consent to search or tell arrestees of their right to refuse consent. Finally, the agents confronted Mendoza-Marcos in a public place and did not display their weapons, raise their voices, place restraints on him, or make promises to him before receiving his consent.

Cobo-Cobo further argued that the agents' suspicion that he was in the country illegally was based solely on his Hispanic heritage, which is prohibited.

Again, the court disagreed, finding that the agents' suspicion that Cobo-Cobo was in the country illegally was based on several considerations in addition to Cobo-Cobo's heritage. First, the court found that the agents, based on their experience, suspected that Cobo-Cobo was in the country illegally because it is common for unrelated illegal-alien males to live together. Second, when the agents seized Cobo-Cobo they had already arrested one of his unrelated male roommates for being an illegal alien. Third, none of the men in the apartment spoke English, which indicated that they had not been in the country for long. Finally, one of the agents testified that he had been to the same apartment several times and knew that the landlord rented to undocumented aliens. It was irrelevant that the agents also considered Cobo-Cobo's heritage in seizing him as heritage may be a "relevant factor," among others, in establishing reasonable suspicion.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-4097/16-4097-2017-10-12.pdf?ts=1507822263

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See: United States v. Job, 851 F.3d 889 (9th Cir. 2017)

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United States v. Hernandez, 847 F.3d 1257 (10th Cir. 2017)

Two uniformed police officers in a marked patrol car saw Hernandez, who was wearing two backpacks, walking next to a fenced construction site. It was dark out, the area was unlit, and the officers considered this part of town to be a high crime area. In addition, the officers noticed that Hernandez was dressed entirely in black clothing and was walking next to the construction site instead of on the sidewalk on the other side of the street. Finally, the officers were aware of recent thefts of materials from this particular construction site.

The officers pulled alongside Hernandez in their patrol car and one of the officers began to talk to Hernandez through the open window. Hernandez agreed to talk to the officers, but he continued to walk. The officers remained in their patrol car and continued driving in order to keep up with Hernandez during their conversation. After a few minutes, one of the officers asked Hernandez if he would stop so they could talk to him. Hernandez agreed and stopped walking. During this time, the officers discovered that Hernandez had an active warrant for his arrest. The officers exited their patrol car and approached Hernandez who began to walk away quickly. When Hernandez reached for his waistband, one of the officers asked Hernandez if he had a gun, and Hernandez replied, "Yes." When the officer grabbed Hernandez's arm, a black revolver fell to the ground, and the officers arrested Hernandez.

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

Hernandez filed a motion to suppress the firearm, arguing the officers did not have reasonable suspicion to detain him.

First, the district court determined that the officers seized Hernandez under the Fourth Amendment when Hernandez complied with the officer's request and stopped walking. The district court found that the officer's request that Hernandez stop walking was "a show of authority such that a reasonable person would not have felt free to decline the officer's request or terminate the encounter." To support its position, the district court noted that the officers were following Hernandez closely in a police car, in a dark area, outside the view of any other persons, and that the officers did not advise Hernandez that he had the right to terminate the encounter.

Second, the district court held that when the officers seized Hernandez, they did not have reasonable suspicion to believe that he was involved in criminal activity. As a result, the court granted Hernandez's motion and suppressed the firearm. The government appealed.

The Tenth Circuit Court of Appeals, in what it admitted was a "close case," agreed with the district court that the officers seized Hernandez when Hernandez complied with the officer's request and stopped to talk. The court added that a reasonable person would have believed that compliance with the officer's "request" was not optional.

The court also agreed with the district court's holding that when the officers seized Hernandez, they did not have reasonable suspicion to believe he was involved in criminal activity. While the construction site might have been the target of previous thefts, the court was not persuaded that Hernandez's all black clothing, two backpacks, or failure to use the sidewalk on the other side of the street established reasonable suspicion to believe that he was currently engaged in criminal activity.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-1116/15-1116-2017-02-09.pdf?ts=1486659668

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United States v. Windom, 863 F.3d 1322 (10th Cir. 2017)

At approximately 12:00 a.m., an employee of a bar called the police department and reported that a man had flashed a gun to other patrons and claimed to be a Crips gang member. The employee then stated the man had walked out of the bar and driven away in a blue Cadillac.

Police officers responding to the call saw a blue Cadillac in the vicinity of the bar and conducted a high-risk stop, in which the officers ordered the occupants out of the Cadillac at gunpoint. When Windom exited the car, the officers noticed that he fit the description of the suspect from the bar. An officer frisked Windom and found a revolver in his pocket. The officer seized the revolver and arrested Windom for disorderly conduct based on his actions at the bar.

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

Windom filed a motion to suppress the firearm. While Windom conceded that the officers had reasonable suspicion to support the stop, he argued that the stop was transformed into an unlawful arrest without probable cause when the officers drew their weapons and ordered him out of the car at gunpoint.

The court disagreed. The court commented that the use of guns does not automatically turn a Terry stop into an arrest. Instead, the court noted that the use of guns in connection with a Terry stop is "permissible where the police reasonably believe that they are necessary for their protection." In this case, the court found that the officers conducted a Terry stop in a high-crime area, around midnight, after receiving a tip that an occupant of the Cadillac had flashed a firearm in public while claiming membership in a notoriously dangerous street gang. Under those circumstances, the court concluded that it was reasonable for the officers to believe that Windom might be armed and dangerous. Consequently, the court concluded that ordering Windom out of the Cadillac at gunpoint was reasonable and did not transform a Terry stop into a de facto arrest, which would have required probable cause.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/16-1027/16-1027-2017-07-24.pdf?ts=1500924683

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United States v. Saulsberry, 878 F.3d 946 (10th Cir. 2017)

A restaurant employee called the police and reported that a person was smoking marijuana in a black Honda with Texas license plates located in the restaurant's parking lot. Within two minutes

of receiving this information, an officer located the vehicle and approached it. When Saulsberry opened the car door, the officer immediately detected the odor of burnt marijuana. While the officer spoke to Saulsberry about providing his driver's license and insurance information, he noticed that Saulsberry kept reaching over to a bag located on the passenger-side floorboard. The officer called for assistance, and after a backup officer arrived, the officer ordered Saulsberry to exit the car. After Saulsberry got out of the car, he gave the officer consent to search the vehicle for marijuana. The officer found a marijuana cigarette in the center console and arrested Saulsberry.

While the backup officer searched Saulsberry, the officer looked inside the bag on the passenger-side floorboard of the car. Inside the bag, the officer saw a stack of cards. The officer removed the cards from the bag, examined them, and discovered that they were all Capital One credit cards and that none of the cards had Saulsberry's name on them.

The government indicted Saulsberry on one count of possession of 15 or more counterfeit or unauthorized access devices with intent to defraud.

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

First, the court held that the tip from restaurant employee was reliable because it provided several details that were corroborated by the officer within a few minutes of receiving the call from dispatch. As a result, the court concluded that the officer had reasonable suspicion to detain Saulsberry to investigate the tip that someone was smoking marijuana in a car in the parking lot.

Second, the court held that the officer did not have probable cause to examine the stack of cards he found in the bag discovered in Saulsberry's vehicle. Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the vehicle contains contraband or evidence. The officer testified that he saw a "stack" of cards inside the bag. Even if the top card in the stack was a credit card, the court reasoned that the officer would need to examine each card to determine if the other cards were also credit cards rather than membership cards, library cards, gift cards, or insurance cards. The court also ruled that it would not be uncommon for someone to possess 15 plastic, wallet-sized cards. In addition, the court found it significant that the officer testified that it was only after he removed the cards from the bag and examined them that he felt "there was something . . . shady or something like that." The court concluded that a police officer's observation that a suspect possesses a number of cards, in this case 15, does not provide probable cause that the suspect has been or is committing a crime. Consequently, the court held that the government did not establish probable cause justifying the officer's examination of the cards; therefore, the evidence obtained from that examination should have been suppressed.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/16-6306/16-6306-2017-12-28.pdf?ts=1514484275

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Terry Frisks - Person / Vehicle / Plain - Feel

United States v. Orth, 873 F.3d 349 (1st Cir. 2017)

An officer stopped a vehicle after he suspected the driver was intoxicated. As the officer approached the vehicle, he saw that it contained three occupants. After the officer asked the driver

to produce his license and registration, he gave the officer his license but not the registration. When the officer asked the driver to check the glove box for the registration, he refused to do so. While speaking to the driver, the officer saw a "large black cylinder item" resting between the front passenger's leg and the center console. The officer asked the driver to identify the object, but he refused to answer the officer. When the officer repeated his question, the front- passenger, Orth, uttered profanity to the officer and held up the object to reveal that it was a large flashlight.

The officer requested back up, ordered the driver out of the vehicle, and told Orth to place his hands on the dashboard. Orth shouted profanity at the officer and finally placed his hands on the dashboard after the officer repeated his request several times. The officer frisked the driver and discovered a large utility knife that the driver said he used for construction work. In the meantime, Orth continued to yell at the officer and at one point, reached towards the floorboard of the vehicle.

When the backup officer arrived, the officer ordered the back-seat passenger and Orth out of the vehicle. After the officer frisked both men, he approached the vehicle to search it. In response, Orth tried to close the door and eventually pushed the officer in the chest. While the officers tried to handcuff Orth, the driver reached into the vehicle, grabbed a jacket from the floorboard near where Orth had been sitting, and fled. As the driver fled, he dropped the jacket. The officers recovered the jacket, which contained a loaded pistol, a digital scale, and heroin.

The government charged Orth with several drug and firearm related offenses.

Orth filed a motion to suppress the evidence seized from his jacket.

First, the court held that the officer reasonably extended the duration of the stop beyond its original purpose for drunk driving when he ordered the occupants out of the vehicle and frisked them for weapons.

Second, the court held that the officer established reasonable suspicion that the occupants were armed and dangerous; therefore, he was justified in frisking the men. Specifically, the court noted that the driver's reluctance to open the glove box and the presence of the large flashlight, among other factors, justified frisking him. In addition, the officer was justified in frisking Orth because of his argumentative behavior, use of profanity, refusal to keep his hands on the dashboard, and reaching to the floorboard area near his seat.

Finally, the court held that the officer was justified in attempting to search the car for weapons. The officer's reasonable suspicion that the occupants were armed and dangerous justified a search for weapons that could be easily accessed from the passenger compartment of the vehicle.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/16-1436/16-1436-2017-10-13.pdf?ts=1507924805

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United States v. Graves, 877 F.3d 494 (3d Cir. 2017)

An undercover police officer conducting surveillance in an unmarked vehicle, in a high-crime area, heard a radio dispatch about possible gunshots in an area near his location. The dispatch described two potential suspects wearing dark-colored hooded sweatshirts who were seen walking away from the location of the gunshots. Less than five minutes later, the officer saw two men in dark–colored hooded sweatshirts walking toward his vehicle. The officer noticed that one of the

men, later identified as Graves, was walking with a "pronounced, labored" gait, which suggested that he might have concealed something heavy in his waistband or pocket on his right side. As Graves and the other man passed the officer's vehicle, Graves made eye contact with the officer and raised his hands over his head. Based on his experience the officer knew this behavior "was consistent with a drug dealer or someone who sells something illegal on the street." The officer drove one block ahead of the men and waited for them to approach his vehicle again. At this point, Graves left the other man and walked directly toward the officer's vehicle at a quickened pace. The officer exited his vehicle, identified himself as a police officer, and handcuffed Graves.

Believing that Graves might be armed, the officer conducted a frisk. During the frisk, the officer felt "multiple hard objects" in both of Graves' front pockets. The feel of these objects was consistent with that of crack cocaine. The officer removed the objects from Graves' pockets, which turned out to be multiple packets of the antidepressant Depakote and one live .22 caliber bullet. During questioning, Graves told the officer that he planned to sell the Depakote as crack cocaine and admitted that he had a loaded .380 pistol in his boot, where it had fallen from his waistband. The government charged Graves with several firearm-related offenses.

Graves filed a motion to suppress all physical evidence and statements obtained at the time of his arrest, arguing that the officer lacked reasonable suspicion to justify stopping and frisking him.

The court disagreed. First, the officer was parked in a high-crime area. Second, the officer saw Graves and another man dressed in similar clothing as the suspects described in the radio dispatch coming from the area where gunshots had been reported a few minutes earlier. Third, the officer saw Graves walking in a manner indicating, in the officer's experience, that Graves was armed. Fourth, Graves raised his arms over his head in a manner consistent that of an individual seeking to sell drugs or otherwise challenge the officer. Finally, Graves departed from the other man to approach the officer's vehicle at a quick pace. The court concluded that the combination of these facts gave the officer reasonable suspicion to believe that Graves was engaged in unlawful conduct which justified stopping and then frisking Graves.

Graves further argued that the officer exceeded the scope of a valid frisk. Specifically, Graves claimed that the officer was not permitted to conduct any further search of his person once the officer realized that the objects in his pockets were not weapons.

While the purpose of a frisk is to locate weapons and not evidence of a crime, the Supreme Court has held that an officer may seize contraband discovered during a lawful frisk under the "plain-feel doctrine." The plain-feel doctrine provides that when an officer conducting a lawful frisk feels something that is "immediately apparent" as contraband, the officer may lawfully seize the item. The term "immediately apparent" has been equated with probable cause, and the incriminating nature of the item must be immediately apparent to the officer the moment the officer touches it.

In this case, the officer testified that while frisking Graves' pockets, he knew the objects in Graves' pockets were consistent in feeling with crack cocaine. The court held that the feel of these objects, in light of the officer's experience with narcotics investigations, gave rise to probable cause justifying removal of the objects from Graves' pockets. In addition, the court held that because the officer had yet to determine whether Graves was armed at the time he felt the objects, the frisk was lawful. As a result, the court held that the officer did not exceed the scope of a valid frisk by removing the Depakote and bullet from Graves' pockets.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca3/16-3995/16-3995-2017-12-13.pdf?ts=1513188005

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United States v. Robinson, 846 F.3d 694 (4th Cir. 2017)

Police officers received a tip that a man located in a parking lot known for drug activity had just loaded a firearm, concealed it in his pocket, and got into a car driven by a woman. An officer located the car and conducted a traffic stop after he saw that its occupants were not wearing seatbelts. The officer ordered Robinson, the passenger, to exit the car, and when he did, another officer frisked Robinson for weapons. The officer seized a loaded gun from the front pocket of Robinson's pants. Robinson was arrested for being a felon in possession of a firearm.

Robinson filed a motion to suppress the firearm, claiming the officer's frisk violated the Fourth Amendment. Robinson argued that to support a Terry frisk for weapons, an officer must reasonably suspect the person being frisked is both armed and dangerous. Here, while the officer might have suspected that he was carrying a loaded firearm, Robinson claimed the officer had no facts to support a belief that he was dangerous. At the time of the frisk, West Virginia residents could lawfully carry a concealed firearm if they had received a concealed carry license from the state. According to Robinson, as far as the officer knew, the state could have issued him a permit to lawfully carry a concealed firearm.

The court disagreed, noting the Supreme Court has repeatedly recognized that whenever police officers conduct a traditional Terry stop or a traffic stop, they subject themselves to a risk of harm. Consequently, established Supreme Court case law imposes two requirements before an officer may conduct a frisk. First, the stop must be lawful. Second, that during the valid but forced encounter, or stop, the officer must reasonably suspect that the person is armed. As the Supreme Court found in Terry v. Ohio, the officer reasonably suspected Terry was armed "and thus presented a threat to the officer's safety" while the officer was conducting his investigation. The Supreme Court deliberately linked "armed" and "dangerous," recognizing that frisks in subsequent cases were lawful where the stops were valid and the officer reasonably believed that the person stopped "was armed and thus" dangerous. The use of "and thus" recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed.

In this case, the court held that an officer who makes a lawful traffic stop, and who has a reasonable suspicion that one of the vehicle's occupants is armed, may frisk that person for the officer's protection and the safety of everyone on the scene.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca4/14-4902/14-4902-2017-01-23.pdf?ts=1485201616

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United States v. Ford, 872 F.3d 412 (7th Cir. 2017)

A police officer with the Moline, Illinois Police Department saw a car with three male occupants enter Moline from Rock Island, Illinois around 2:00 a.m. on December 4, 2015. The officer ran the license plate after all three occupants looked away as they passed his marked car. The license plate check revealed that the vehicle was registered to Tyler Mincks. The officer recalled Mincks' name from an officer safety advisory that the Rock Island Police Department had emailed to the

Moline Police Department on December 3. The advisory stated that a few days earlier, Bryan Brinker shot Cameron Hoefle after Hoefle had stolen marijuana from Brinker. The advisory noted that Hoefle did not cooperate with the Rock Island investigators, and neither did his friends Tyler Mincks and Michael Ford. Instead, the three men told the investigators they would "deal with the situation themselves." Consequently, the Rock Island Police Department sent the officer safety advisory to the Moline Police Department warning that Hoefle, Mincks, and Ford might go to Brinker's residence to retaliate.

The officer followed the car and conducted a stop when he observed a traffic violation. Mincks, Hoefle, and Ford were the occupants of the vehicle. After the officer removed an open beer bottle from the floor where Ford was sitting, he obtained identification from the men. A computer check revealed that Mincks, Hoefle, and Ford had extensive criminal histories as well as "alerts for gang activity, weapons, and drugs." The officer directed the men out of the car and frisked them. When the officer frisked Ford, he felt an object he recognized as a cell phone and an unknown object that felt like a handle. Because the feel of a handle "could be indicative of a firearm," the officer testified that he "scrunched" Ford's pocket two or three times before he "reached in and retrieved" a small pistol.

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

Ford filed a motion to suppress the firearm, arguing that the officer did not have reasonable suspicion to frisk him.

A police officer conducting a stop may frisk a suspect for weapons if the officer has an objectively reasonable suspicion that the suspect might be armed and dangerous. In this case, the court held that the officer had reasonable suspicion to believe Ford was armed and dangerous; therefore, the frisk was lawful. First, the officer had been warned via email that Ford and his companions might seek retaliation for the shooting of Hoefle two days earlier. Recent shootings, reports of discharged weapons, and indications of recent gang activity are factors that officers can use to support a finding of reasonable suspicion. Second, Ford and his companions likely had been drinking, as evidenced by the beer bottles found in the car. The court found that the consumption of alcohol gave the officer greater reason to be concerned that the men might be "unpredictable, unwise, and dangerous." Finally, the officer knew that Ford, Mincks, and Hoefle had extensive criminal histories.

Ford also argued that the officer exceeded the scope of the frisk by "scrunching" his pocket several times before removing the pistol. Ford claimed that it was unlawful for the officer to continue manipulating the object when its incriminating nature was not immediately apparent.

The court disagreed. The "immediately apparent" restriction does not apply until the officer determines that the object in question is not a weapon. When an officer feels a small, hard object during a frisk, he may have reasonable suspicion to believe the object is a weapon. In this case, the officer never concluded that the unknown object in Ford's pocket was not a weapon. Consequently, the court held that when the officer felt the "handle-like" object in Ford's pocket it was reasonable for him to believe the object was a weapon.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-3732/16-3732-2017-09-20.pdf?ts=1505937670

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

United States v. Ramdihall, 859 F. 3d 80 (1st Cir. 2017)
United States v. Hillaire, 857 F.3d 128 (1st Cir. 2017)

Ramdihall and Hillaire were convicted in federal court in the District of Maine for conspiracy to possess and use counterfeit access devices with intent to defraud. The government's case against the defendants was based upon evidence seized from their car during three different traffic stops. On appeal, the defendants challenged the district court's denial of their motion to suppress evidence discovered during two of the traffic stops.

The first stop occurred in Kittery, Maine. At approximately 1:30 a.m., an employee of a 7-Eleven told a police officer that he was concerned about people in the 7-Eleven who were buying thousands of dollars' worth of gift cards with other gift cards. The employee identified the car in the parking lot that belonged to the people buying the gift cards. The officer approached the car and asked the defendants if they knew the woman inside the store. Hillaire told the officer the woman was with them, but he denied knowing anything about using gift cards to purchase gift cards. Ramdihall also denied knowing anything about gift cards and told the officer they had stopped to get gas even though he could not explain why he was not parked at a gas pump. While talking to the defendants, the officer saw electronic devices in boxes in the car near Hillaire's feet.

When the woman returned to the car, she told the officer that she was using the gift cards to buy new gift cards so she could go shopping because the gift cards that she had sometimes did not work. When the officer asked about shopping, neither the woman nor the defendants could name the stores they had visited. At 1:55 a.m., the officer contacted a detective and called him to the scene because he suspected the defendants might be engaged in fraud. Sometime afterward, Ramdihall gave consent to search the trunk of the car. Inside the trunk, the officers found a large number of laptop computers and other electronic devices. The officers asked the three individuals to whom the equipment belonged. After no one claimed ownership, the officers seized the items and allowed Ramdihall, Hillaire, and the woman to leave at 3:17 a.m.

Ramdihall argued that the duration of the traffic stop was unreasonably long and became an unlawful seizure as it progressed.

The court disagreed. By 1:55 a.m., the officer had established reasonable suspicion to believe the defendant was involved in criminal activity. Although the 82-minute seizure was lengthy, the court held that Ramdihall could not show that this amount of time was longer than reasonably necessary for the officers to investigate the possible illegal activity in which they believed he was engaged.

The court further held that Ramdihall voluntarily consented to the search of the car. A person who is lawfully detained may still voluntarily give consent to a search. Here, the court noted that the officers did not handcuff Ramdihall nor did they display or draw their weapons, and the questioning that occurred was "mild" in nature.

The second stop occurred during a traffic stop on Interstate 70 in Ohio. A state trooper stopped Ramdihall for speeding. Hillaire was a passenger in the vehicle. When the trooper asked to see Ramdihall's license and registration, Ramdihall "surreptitiously" opened the center consoled then closed it very quickly, during which time the trooper saw a plastic baggie inside. Ramdihall told

the trooper that the bag contained tobacco. During this time, the trooper learned that the car was a rental that had been leased by an absent third party. The trooper also learned that Ramdihall and Hillaire were driving to Columbus, Ohio from New York, but there was no visible luggage in the car. Finally, Ramdihall told the trooper they planned to stay in Columbus for a few days and appeared to be surprised when the trooper told him that the rental agreement expired the next day.

When the trooper went back to his vehicle to write a speeding ticket, he called a K-9 unit to the scene. The trooper finished writing his ticket at 10:40 a.m., and the K-9 unit arrived at 10:46 a.m. At 10:49 a.m., the K-9 alerted to the presence of narcotics. The troopers searched the vehicle and found a bundle of seventeen credit cards in Hillaire's name under the spare tire cover in the trunk. The troopers swiped the credit cards' magnetic strips through a card reader. The troopers discovered that the information recorded on some of the cards' strips did not match the numbers and expiration dates on the front sides of those cards, indicating that those cards were counterfeit. The troopers later found tobacco in the baggie in the center console and a small amount of marijuana in the passenger's side of the car.

First, Ramdihall argued that after the trooper completed the traffic ticket at 10:40 a.m., the trooper detained him without reasonable suspicion until 10:46 a.m., to allow the K-9 unit to arrive.

The court agreed with the district court, which found that the trooper established reasonable suspicion to justify the additional six-minute delay after he completed the traffic ticket based on the following facts: (1) the trooper's observation of the plastic baggie in the center console; (2) the manner in which Ramdihall opened and closed the center console; (3) the fact that the car was a rental and the renter was not present, which the trooper testified was an indicator of drug trafficking; (4) the defendants' "dubious" explanation for why they were driving to Columbus; (5) the inconsistency between Ramdihall's claim that the defendants would be in Columbus for several days and the fact that the rental was due to expire the next day; and (6) the absence of visible luggage in the car, despite Ramdihall's claim that the men had been driving for several days.

Next, Ramdihall and Hillaire argued that the warrantless swiping of the credit cards through the credit card reader violated the Fourth Amendment.

Again, the court disagreed. The only evidence presented on the matter in the district court established that the magnetic strips on the back of credit cards contain only the card number and expiration date, which are routinely given to retailers and are visible on the front of the card. In a footnote, the court cited two cases in which the Sixth and Eighth Circuits have held that there is no reasonable expectation of privacy in the strips on the back of credit cards.[1]

For the court's opinions: http://cases.justia.com/federal/appellate-courts/ca1/15-1841/15-1841-2017-05-18.pdf?ts=1495134005 and http://cases.justia.com/federal/appellate-courts/ca1/15-1692/15-1692-2017-05-18.pdf?ts=1495134004

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United States v. Dion, 859 F.3d 114 (1st Cir. 2017)

A police officer pulled Dion over for speeding on Interstate 70 in Kansas. As the officer approached Dion's pickup truck, he noticed that it bore Colorado license plates. Dion gave the

[1] See United States v. Bah, (8 INFORMER 15) and United States v. DE L'Isle, (7 INFORMER 16).

officer an Arizona driver's license and told the officer that he was driving home to Arizona after meeting with his accountant in Pennsylvania. As Dion accompanied the officer back to his patrol car, he told the officer he could search his truck, without being asked, which the officer found unusual. The officer also noticed that Dion appeared to be extremely nervous. While the officer wrote Dion a warning ticket, he asked Dion about his trip, as the officer thought it was suspicious that Dion had travelled from Arizona to Pennsylvania to meet with an accountant. The officer also discovered that Dion had a prior criminal history that included charges related to marijuana and cocaine. After the officer gave Dion back his driver's license, he told Dion that the "stop was over," but that he would like to ask Dion some more questions. Dion agreed to talk to the officer and again gave the officer consent to search his truck.

The officer opened the tailgate and saw deteriorating boxes, road atlases, and a refrigerator. Based on his experience, the officer believed these items were a "cover load" to deliberately disguise contraband. When the officer asked Dion about the items, Dion told him the items had come from Boston. The officer thought it was suspicious that Dion had never mentioned that he had gone to Boston as part of his trip. After a back-up officer arrived, the officers began removing items from Dion's truck. After a few minutes, Dion revoked his consent and the officers stopped searching his truck. The officer then asked Dion if he could run a drug-dog around Dion's truck. Dion said, "Yeah," and the officer walked his dog around the truck. The dog detected the odor of narcotics emanating from Dion's truck. The officers searched the truck and found $830,000 cash. In addition, the officers found information connecting Dion to a self-storage center in Boston. The officers provided this information to law enforcement officers in Massachusetts who obtained a warrant to search Dion's storage unit. Inside the storage unit, officers found 160 pounds of marijuana, drug ledgers, and $11 million in cash.

The government charged Dion with a variety of drug-related offenses. Dion filed a motion to suppress the evidence against him, arguing that it was discovered in violation of the Fourth Amendment.

The court disagreed. First, the court held that the officer did not unreasonably prolong the duration of the stop. While the officer was writing the citation, he was allowed to ask Dion about his travel history and conduct a criminal records check. During this time, Dion was extremely nervous and without being prompted, gave the officer permission to search his truck. In addition, the officer was allowed to ask Dion questions about his prior drug arrests after learning that Dion had a criminal history. The court concluded that the officer's questions were reasonable and to the extent those questions extended the stop, did not violate the Fourth Amendment.

Second, the court held that Dion voluntarily consented to the initial search of his truck. Dion told the officer that he could search his truck at the beginning of the stop and again after the stop had concluded. In addition, the officer's failure to tell Dion that he was free to go, did not make Dion's consent involuntary. The officer clearly told Dion when the stop was over, which implied that Dion was no longer being detained for speeding. Instead of leaving, Dion decided to stay and voluntarily speak to the officer.

Finally, the court concluded that the officers established probable cause to believe Dion was trafficking contraband; therefore, the second search was valid under the automobile exception to the Fourth Amendment's warrant requirement. By the time Dion revoked his consent to search, the officers had established probable cause to search his truck the second time based upon, among other things: 1) Dion's unsolicited offers to search his truck; 2) Dion's extreme nervousness; 3)

Dion's explanation for his trip; 4) Dion's criminal history; 5) the discovery of items connected to Boston when Dion did not mention Boston as stop during his trip.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/16-1377/16-1377-2017-06-08.pdf?ts=1496952006

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United States v. Orth, 873 F.3d 349 (1st Cir. 2017)

An officer stopped a vehicle after he suspected the driver was intoxicated. As the officer approached the vehicle, he saw that it contained three occupants. After the officer asked the driver to produce his license and registration, he gave the officer his license but not the registration. When the officer asked the driver to check the glove box for the registration, he refused to do so. While speaking to the driver, the officer saw a "large black cylinder item" resting between the front passenger's leg and the center console. The officer asked the driver to identify the object, but he refused to answer the officer. When the officer repeated his question, the front- passenger, Orth, uttered profanity to the officer and held up the object to reveal that it was a large flashlight.

The officer requested back up, ordered the driver out of the vehicle, and told Orth to place his hands on the dashboard. Orth shouted profanity at the officer and finally placed his hands on the dashboard after the officer repeated his request several times. The officer frisked the driver and discovered a large utility knife that the driver said he used for construction work. In the meantime, Orth continued to yell at the officer and at one point, reached towards the floorboard of the vehicle.

When the backup officer arrived, the officer ordered the back-seat passenger and Orth out of the vehicle. After the officer frisked both men, he approached the vehicle to search it. In response, Orth tried to close the door and eventually pushed the officer in the chest. While the officers tried to handcuff Orth, the driver reached into the vehicle, grabbed a jacket from the floorboard near where Orth had been sitting, and fled. As the driver fled, he dropped the jacket. The officers recovered the jacket, which contained a loaded pistol, a digital scale, and heroin.

The government charged Orth with several drug and firearm related offenses.

Orth filed a motion to suppress the evidence seized from his jacket.

First, the court held that the officer reasonably extended the duration of the stop beyond its original purpose for drunk driving when he ordered the occupants out of the vehicle and frisked them for weapons.

Second, the court held that the officer established reasonable suspicion that the occupants were armed and dangerous; therefore, he was justified in frisking the men. Specifically, the court noted that the driver's reluctance to open the glove box and the presence of the large flashlight, among other factors, justified frisking him. In addition, the officer was justified in frisking Orth because of his argumentative behavior, use of profanity, refusal to keep his hands on the dashboard, and reaching to the floorboard area near his seat.

Finally, the court held that the officer was justified in attempting to search the car for weapons. The officer's reasonable suspicion that the occupants were armed and dangerous justified a search for weapons that could be easily accessed from the passenger compartment of the vehicle.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/16-1436/16-1436-2017-10-13.pdf?ts=1507924805

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United States v. Hill, 852 F.3d 377 (4th Cir. 2017)

Two officers patrolling in a marked police car stopped a car for speeding and for crossing the yellow, double-solid line marker in the center of the roadway. The driver gave Officer Taylor his identification, but the passenger, Hill, was only able to provide his name to the officer. Officer Taylor returned to the police car where he entered the names of the driver and Hill into the Department of Motor Vehicles (DMV) and the National Crime Information Center (NCIC) databases. After approximately three minutes, the NCIC database returned an "alert" which notified Officer Taylor that both men had been associated with drug trafficking and were "likely armed." Officer Taylor also discovered the driver had a suspended operator's license. At this point, Officer Taylor began writing two summonses for the driver, one for reckless driving and one for driving with a suspended operator's license. Officer Taylor also requested a K-9 unit be sent to the scene. Officer Taylor then interrupted writing the summonses and entered the men's names into an additional computer database known as PISTOL, which tracks every person who has had prior contacts with the Richmond police. Officer Taylor spent approximately three to five minutes reviewing the information from the PISTOL database and then resumed writing the two summonses.

During this time, Officer McClendon remained standing next to the car speaking with Hill. During their conversation, Hill told Officer McClendon that he possessed a firearm. Officer McClendon immediately shouted "gun," and Officer Taylor returned to the car and assisted Officer McClendon in securing Hill and recovering the firearm. In the meantime, the K-9 unit had arrived, but the officer and his drug-detection dog remained in their car. Approximately 20 minutes elapsed from the time the officers initiated the traffic stop until Officer McClendon shouted "gun."

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

Hill filed a motion to suppress the firearm and the statements he made during the traffic stop. Hill claimed that Officer Taylor's decisions to request a K-9 unit and to search the PISTOL database unlawfully extended the duration and scope of the traffic stop, in violation of the Fourth Amendment. In addition, Hill claimed that Officer McClendon's decision to talk with him and the driver, rather than to assist Officer Taylor with searching the databases and writing the summonses, contributed to the unlawful extension of the stop.

A traffic stop constitutes a Fourth Amendment seizure. To satisfy the reasonableness requirement of the Fourth Amendment, a traffic stop must be justified at its inception, and the officers' actions during the stop must be reasonably related to the reason for the stop. Because Hill conceded the initial stop was valid, the court focused on the reasonableness of the officers' actions once they encountered the driver and Hill.

The court recognized that an officer may engage in certain safety measures during a traffic stop, but generally must focus his attention on the initial reason for the stop. In addition, an officer may engage in "ordinary inquiries incident to the traffic stop," such as inspecting a driver's identification and license to operate a vehicle, verifying the registration of a vehicle and existing insurance coverage, and determining whether the driver is subject to outstanding warrants.

Finally, an officer may also engage in other investigative techniques unrelated to the reason for the traffic stop or the safety of the officers as long as these unrelated actions do not prolong the duration of the stop beyond the time necessary to deal with the traffic infraction.

Applying these principles, the court held that the officers did not unreasonably extend the duration of the traffic stop. Both officers testified that it usually takes about 10 minutes to write two summonses, and Officer Taylor testified that it took about 8 additional minutes to search the DMV, NCIC and PISTOL databases. While the court noted that Officer Taylor could have completed the summonses by relying solely on the DMV and NCIC databases, his decision to check the PISTOL database did not violate Hill's Fourth Amendment rights. Consequently, the court found that the officers directly accounted for 18 minutes of the 20-minute stop. The court added the 2-minute time difference between the estimated time required to complete the officers' activities and the total length of the stop did not support a finding that the officers unreasonably extended the duration of the stop.

In addition, the court noted that Officer Taylor had not yet finished writing the summonses when Officer McClendon yelled, "gun," and that the drug-detection dog was still in the K-9 officer's car at this time. As a result, the court found that the presence of the K-9 unit on the scene did not extend the duration of the stop.

Finally, the court held that Officer McClendon's decision to stand by the car and talk to Hill, instead of assisting Officer Taylor in the database searches was reasonable and did not extend the duration of the stop.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca4/15-4639/15-4639-2017-03-30.pdf?ts=1490898625

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United States v. Escamilla, 852 F.3d 474 (5th Cir. 2017)

Border Patrol agents patrolling a privately owned ranch, approximately 30 miles from the Mexican border, encountered two pickup trucks traveling in tandem that had activated a sensor designed to detect illegal entry into the ranch. The legitimate traffic traveling through the ranch primarily consisted of oil industry workers in company trucks, and the area where the sensor was activated was at a location where a vehicle should not be. In addition, the agents knew that smugglers commonly traveled in tandem and drove vehicles that resembled official oil company vehicles, commonly referred to as "clone vehicles."

When the agents activated their lights to stop the trucks, one stopped and the other sped away. Agents approached the stopped truck and encountered the driver, Escamilla, who was nervous and could not give a clear answer as to why he was driving across the ranch. The agents also noticed that Escamilla wore a shirt that looked similar to a work uniform, but it lacked oil company logos or decals, and Escamilla's truck was unusually clean and contained no tools or other objects that work trucks usually carry. Finally, the agents checked the truck's registration, which came back to a residential address, which was not common, as company trucks are usually registered to a business.

Escamilla consented to a search of his truck, but the agents did not find anything in the truck's fuel cell, which appeared to be inoperable and out of place. One of the agents then asked Escamilla for consent to search Escamilla's phone. Escamilla consented and handed his phone to the agent.

The agent examined the phone and saw that it was a simple flip phone containing only three numbers, two of which were saved under a single letter, rather than a proper name. After searching the phone, the agent handed it back to Escamilla because he was "done with it."

Escamilla then agreed to follow the agents to the ranch's main gate and allow a Border Patrol dog to sniff his truck. According to the handler, the dog "alerted, but nothing solid," which indicated that drugs may have been in the truck recently. In the meantime, the agents heard over their radios that the truck, which had been traveling in tandem with Escamilla, had rammed a gate and crashed. Agents searched that truck and found marijuana and heroin inside it. At this point, the agents arrested Escamilla, based on his connection to the other truck.

The agents transported Escamilla to a Border Patrol station where they met an agent with the Drug Enforcement Administration (DEA). The Border Patrol agents told the DEA agent that Escamilla had consented to a search of his phone, and then gave Escamilla's phone to the DEA agent. The DEA agent manually searched Escamilla's phone to determine its number so he could request its call records from AT&T. The agent eventually received the call records, which were later admitted into evidence against Escamilla at trial.

Before Escamilla was transported to jail, the DEA agent asked Escamilla to claim his property from the items the Border Patrol agents had taken from him. Escamilla claimed his driver's license and some jewelry. When an agent asked Escamilla about the cell phone that had been searched by the agents, Escamilla said the phone was not "his."

Several days later, the DEA agent used a forensic examination program to conduct a more thorough search of Escamilla's phone. This search confirmed the phone's contact number that the agent had already learned from his previous manual search.

After the government charged Escamilla with drug possession and conspiracy, Escamilla filed a motion to suppress the phone, its contact number, and all evidence recovered from it. Escamilla claimed the Border Patrol's initial stop was not justified; however, if the stop was ruled to be justified, Escamilla claimed that the agents unreasonably prolonged its duration. Finally, Escamilla claimed that the three warrantless searches of his phone violated the Fourth Amendment.

First, the court held that the Border Patrol agents lawfully stopped Escamilla because they had reasonable suspicion to believe that he was involved in criminal activity. Specifically, the stop occurred 30 miles from the Texas-Mexico border, Escamilla's truck was detected by sensors in an area not typically used by legitimate ranch traffic traveling in tandem with another truck, Escamilla's truck lacked the usual markings of an oil company vehicle, and the truck was registered to a residential address rather than a business.

Second, the court held that the officers did not unreasonably prolong the duration of the stop. After stopping Escamilla, the court commented that the agents "continued to amass suspicion that he was involved in smuggling."

Third, the court held that the first search of Escamilla's phone by the Border Patrol agent was lawful, because Escamilla voluntarily consented to its search. The uncontested evidence established that the agent asked Escamilla, "do you mind if I look through your phone?" and then Escamilla handed it to him.

Fourth, the court held that the DEA agent's manual search of Escamilla's phone at the Border Patrol station violated the Fourth Amendment. Escamilla consented to the first search of the phone when he handed it to the Border Patrol agent. However, after examining the phone, the agent gave the phone back to Escamilla upon "being done with it." The court concluded that a reasonable person in Escamilla's position would have believed that his consent to search the phone would have ended at this point. The DEA agent's search of Escamilla's phone, several hours after Escamilla had been arrested, was a second, distinct search. Consequently, the court held that agent was required to have a warrant, an exception, or consent from Escamilla again, before he could lawfully examine the phone. Because the agent did not have a warrant, an exception, or obtain Escamilla's consent, the court held that the evidence discovered by the agent as the result of this search should have been suppressed.[1]

Finally, the court held the DEA agent's warrantless forensic search of Escamilla's phone several days after his arrest was lawful. When Escamilla expressly disclaimed ownership of the phone, he effectively abandoned the phone and any reasonable expectation of privacy in it. As a result, the court found that Escamilla did not have standing to challenge the agent's forensic search of the phone.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-40333/16-40333-2017-03-29.pdf?ts=1490830233

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United States v. Henry, 853 F.3d 754 (5th Cir. 2017)

While on patrol, two Baton Rouge police officers noticed that Henry's license-plate frame obstructed the view of the expiration date on the plate's registration sticker. Believing that Henry's obstructed registration sticker violated *Louisiana Statutes Annotated § 32:53(A)(3)*, which provides that "[e]very permanent registration license plate . . . shall be maintained free from foreign materials and in a condition to be clearly legible," they conducted a traffic stop. During the stop, Henry consented to a search of his car. The officers searched Henry's car and found marijuana, a digital scale, and a loaded handgun.

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

Henry filed a motion to suppress the evidence seized from his car, claiming that the officers did not have reasonable suspicion to conduct the stop. Henry argued that *Section 32:53* does not apply to obstructed registration stickers, and the officers' interpretation of the statue was unreasonable. Instead, Henry claimed that *Section 32:53* only requires the letters and numbers on the plate itself be clearly legible.

The court declined to render an opinion on the proper interpretation of *Section 32:53* because it determined that Louisiana case law establishes that the officers' interpretation, even if mistaken, was objectively reasonable. In State v. Pena, the court held that a license-plate frame that obscured part of the plate violated the statute, even though the lettering and numbering on the plate was "clearly visible." Although Pena did not specifically address obscured registration stickers, the court concluded that its broad construction of the statute can reasonably be construed to apply to them. As a result, the court concluded that given Pena, the officers' belief that Henry's obstructed

[1] Although this evidence was admitted at trial, the court held the district court's error was "harmless," as the government had lawfully obtained the same evidence by other means.

registration sticker violated *Section 32:53*, even if mistaken, was objectively reasonable; therefore, they had reasonable suspicion to stop Henry.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-30731/16-30731-2017-04-10.pdf?ts=1491845446

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United States v. Broca-Martinez, 855 F.3d 675 (5th Cir. 2017)

While conducting surveillance, Homeland Security Investigations (HSI) agents saw a vehicle leave a residence suspected of harboring undocumented immigrants. The agents notified local police officers to be-on-the-lookout (BOLO) for the vehicle. While on patrol, an officer began to follow the defendant's vehicle because it matched the vehicle from the HSI agents' BOLO. While following the vehicle, the officer entered its license plate number into a computer database designed to return vehicle information such as insurance status. The computer indicated the insurance status was "unconfirmed." Based on his experience using this system, the officer concluded that the vehicle was likely uninsured, a violation of Texas law. The officer conducted a traffic stop and learned that the defendant was in the United States illegally. The officer issued the defendant citations for violating the insurance requirement and driving without a license while he waited for the HSI agents to arrive.

The government charged the defendant with conspiracy to harbor illegal aliens. The defendant argued that the "unconfirmed" insurance status obtained from the state computer database did not provide the officer reasonable suspicion to stop the defendant.

The court recognized that the Fifth Circuit had not yet addressed whether a state computer database indication of insurance status establishes reasonable suspicion. However, the court commented that the Sixth, Seventh, Eighth, and Tenth Circuits have found that such information may give rise to reasonable suspicion as long as there is either some evidence suggesting the database is reliable or at least an absence of evidence that it is unreliable. In this case, the court followed the other circuits that have decided this issue and held that a state computer database indication of insurance status may establish reasonable suspicion when the officer is familiar with the database and the system itself is reliable.

Here, the court found that the officer's testimony established the reliability of the database. First, the officer explained the process for inputting license plate information. Second, the officer described how records in the database are kept and stated that he was familiar with these records. Finally, the officer testified that based on his knowledge and experience as a police officer, he knows a suspect vehicle is uninsured when an "unconfirmed" status appears because the computer system will either return an "insurance confirmed," or "unconfirmed" response. As a result, the court held that the officer had reasonable suspicion to stop the defendant.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-40817/16-40817-2017-04-28.pdf?ts=1493400712

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United States v. Bams, 858 F.3d 937 (5th Cir. 2017)

A police officer stopped the car in which Henry Bams and Frederick Mitchell were travelling, for making an unsafe lane change. When the officer asked Bams for his driver's license, he noticed that Bams' hands were shaking and that he was nervous. The officer also saw that one of the rear quarter panels appeared to have been tampered with, that there was a single key in the ignition, and that there were energy drinks in the vehicle. After Bams gave the officer consent to search, the officer found ten kilograms of cocaine concealed within two false compartments in the rear quarter panels.

The government charged Bams and Mitchell with two drug offenses.

Bams filed a motion to suppress the drugs seized from his car. Bams argued the officer did not have reasonable suspicion to conduct the stop. Bams further argued that even if the stop was valid, the officer unreasonably prolonged its duration without reasonable suspicion; therefore, his consent to search was invalid.

The court held that the officer established reasonable suspicion that Bams violated *Ark. Code Ann. § 27-51-306* when he passed a tractor-trailer on the left side of the road and then returned to the right side when he was only fifty feet in front of the tractor-trailer. The court further held that the officer's observations once he stopped Bams established reasonable suspicion that Bams was engaged in criminal activity. First, while speaking to Bams, the officer noticed his hand was shaking and he was nervous. Second, the officer testified that based on his training and experience he knew drug traffickers often drove third-party vehicles; and therefore, would only have a single key. Third, the officer testified that based on his training and experience drug traffickers consumed energy drinks to help them drive to their destination without stopping. Finally, the court noted the most important fact was that the officer saw the apparently modified quarter panel on Bams' car. Considering all of those factors, the court held the officer established reasonable suspicion that Bams was engaged in drug trafficking. As a result, the court concluded that the officer did not unreasonably extend the duration of the stop; therefore, Bams' consent was valid.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-41197/16-41197-2017-06-01.pdf?ts=1496359835

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United States v. Fadiga, 858 F.3d 1061 (7th Cir. 2017)

A police officer stopped a car that had an expired license plate. The officer asked Mamadu Barry, the driver, for registration papers, but Barry did not have any. Barry told the officer he did not know who owned the car. The officer asked Fadiga, who was in the passenger seat, who owned the car and Fadiga replied, "A friend." Fadiga then gave the officer a rental agreement for the car. The car's return was past due under the agreement and neither Barry nor Fadiga was authorized to drive the car. When Barry opened his wallet to produce his driver's license, the officer saw a large bundle of plastic cards. The officer asked Barry and Fadiga for consent to search the car and both consented. The officer opened the trunk and found a bag full of gift cards. At this point, the officer contacted his dispatcher and requested someone with a card reader respond to his location to determine if the cards were legitimate. Approximately thirty minutes later another officer arrived with a card reader and the officers determined that the gift cards had been altered.

The government charged Fadiga with possession of access devices (gift cards) that had been fraudulently re-encoded.

Fadiga filed a motion to suppress the gift cards. Fadiga argued that the thirty-minute delay between the officer's request for the card reader and the card reader's arrival was unreasonable.

The court disagreed. First, Mamadu and Barry consented to a search of their car, which led to the officer's discovery of the large number of gift cards. This discovery, along with Barry's ignorance of the car's ownership, Fadiga's assertion that a friend owned the car, coupled with a rental contract that did not authorize either man to operate the car, justified the thirty-minute detention. The court added that whether or not the officer waited for a card reader, he was entitled to detain Fadiga and Barry until their authority to use the car had been determined. As result, the court held that extending the duration of the traffic stop was reasonable under the Fourth Amendment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-3870/16-3870-2017-06-01.pdf?ts=1496332864

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United States v. Murillo-Salgado, 854 F.3d 407 (8th Cir. 2017)

A state trooper saw a pickup truck traveling on an interstate highway in the left lane, but not passing other vehicles, and driving three miles-per-hour over the speed limit. The trooper conducted a traffic stop. As the trooper approached the stopped truck, which bore California license plates, he saw a driver and passenger in the front seats, as well as three packages of electrical wiring, a small ladder, a hard hat, and a toolbox in the open truck bed. The driver identified himself as Ramon Arredondo and gave the trooper a California driver's license. Arredondo told the trooper that he and his passenger, Salgado, were driving from California to North Carolina to complete a wiring job for a 15,000-square-foot residence. When asked why they were driving such a long distance instead of flying, Arredondo told the trooper they were transporting tools and all of the electrical wiring for the job. The trooper was suspicious of Arredondo's response because he did not believe that the quantity of wiring that he had seen in the truck bed was sufficient to complete the wiring job described by Arredondo. During the stop, the trooper discovered the name on the vehicle rental agreement did not match the name on Arredondo's license. In addition, the trooper noticed that the truck had only been rented for five days. At some point the trooper spoke with Salgado who confirmed Arredondo's claim that the men were traveling to North Carolina to wire a 15,000-square-foot house; however, the men gave the trooper conflicting answers about who was paying for the truck rental.

Approximately twenty-three minutes into the stop the trooper asked Arredondo for consent to search the truck. The trooper had not yet competed the tasks related with the traffic stop or issued Arredondo a ticket. After Arredondo gave the trooper consent to search, the trooper asked Arredondo if he owned everything in the truck. Arredondo told the trooper that he owned two bags in the back seat that contained his clothes, but he denied owning any of the tools or toolboxes.

When the trooper opened the rear passenger door to the truck, he saw an air compressor on the back seat. The trooper immediately identified the smell of fresh paint and saw some rough, jagged non-factory welding on the air tank. The trooper looked at the compressor more closely and noticed a square cut underneath the motor that looked like it had been recently painted. The

trooper eventually opened the air tank and discovered several packages of cocaine. Arredondo and Salgado were charged with possession with intent to distribute cocaine.

Salgado filed a motion to suppress the evidence seized from the truck. Salgado argued that the trooper prolonged the traffic stop beyond the time reasonably required to investigate the traffic violations; therefore, the evidence seized from the truck should have been suppressed.

The court disagreed. The trooper, who had received specific training in the trafficking of illegal drugs and had participated in "hundreds" of drug investigations, developed reasonable suspicion of drug-related activity while he was completing the routine tasks associated with the traffic stop. First, the trooper noticed a discrepancy between the name on Arredondo's driver's license and the name on the rental agreement. Second, the trooper noticed that the rental agreement was for a period of time that appeared insufficient to accomplish the stated purposes of the trip. Third, based on his admittedly limited electrical-wiring experience, the trooper believed that the quantity of electrical wiring in the bed of the truck was insufficient to complete work on a 15,000-square-foot house.

Next, Salgado argued that even if Arredondo had given valid consent to search the truck, Arredondo's consent to search did not extend to a search of the air compressor because Arredondo had specifically denied ownership of it.

Again, the court disagreed. Observations made by an officer during a consensual search of a vehicle may provide the officer with probable cause to expand the scope of the search under the automobile exception to the Fourth Amendment's warrant requirement. In this case, the trooper began his search after he obtained Arredondo's voluntary consent. Arredondo's consent allowed the trooper to search all areas of the truck, including the passenger compartment where the air compressor was located. When the trooper smelled the odor of fresh paint, then saw fresh paint on the compressor's tank along with the rough, jagged, non-factory welds, he had probable cause to believe that the tank contained contraband or evidence of a crime. As a result, the court concluded that the warrantless search of the air compressor was valid under the automobile exception.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1959/16-1959-2017-04-13.pdf?ts=1492097446

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United States v. Mosley, 878 F.3d 246 (8th Cir. 2017)

At approximately 2:35 p.m., two individuals robbed a bank. As the robbers were leaving the bank, a witness in a truck driving by the bank saw the robbers fleeing but eventually lost sight of them. As the truck circled around the block attempting to spot the robbers again, the witness called the bank. A bank employee called 911 and began relaying information about the robbery, including information the employee was getting from the witness on the other line. Although the witness could not locate the robbers, he reported that a gray/silver Ford Taurus was in the vicinity of the bank and was the only vehicle leaving the area moments after the robbery. The witness followed the Taurus and gave its location and direction of travel to the bank employee, who gave the information to 911 dispatch. When the witness got close enough to see inside the gray Taurus, he reported that he could only see one woman in the car, whereas he had seen two men running from the bank. At this point, the witness was no longer sure if the gray Taurus was involved in the bank robbery.

Around 2:40 p.m., a police officer received a radio dispatch that a gray Ford Taurus may have been involved in a bank robbery. A few minutes later, the officer saw a gray Taurus traveling in the direction indicated by the witness. The officer stopped the Taurus approximately 5.8 miles from the bank approximately eight minutes after the robbery occurred.

The officer determined that the Taurus was registered to Farrah Franklin but identified the driver as Katherine Pihl. The officer did not see anyone else inside the vehicle and was about to let Pihl go when another officer suggested that he check the trunk. The officer opened the trunk and found Stanley Mosley and Lance Monden, along with cash and masks. The officer arrested Pihl, Mosley, and Monden, and the government indicted them for bank robbery.

The defendants filed a motion to suppress evidence seized by the officers.

First, the defendants claimed the officer lacked reasonable suspicion to believe the Taurus was involved in the bank robbery; therefore, the stop violated the Fourth Amendment.

The court disagreed. Although the police were unsure of the exact role the gray Taurus may have played in the robbery, it was the only vehicle seen leaving the area right after the witness saw two hooded men flee the bank. In addition, the officer stopped the Taurus a short distance from the bank, a few minutes after the robbery, while it was traveling in the direction and on the road provided by the witness. Finally, while the driver of the Taurus did not match the description of the two men fleeing the scene of the bank robbery, it was reasonable for the officer to stop the Taurus because it matched the description of the vehicle the witness saw leave the area just after the robbery.

Second, the defendants argued that the officer lacked reasonable suspicion for the traffic stop because the tip from the witness was unreliable.

The court disagreed. Here, the witness claimed firsthand knowledge of the facts he was reporting, and he was able to predict the Taurus's direction of travel. In addition, the witness reported his observations within five minutes of the robbery and the bank employee promptly began relaying this information to a 911 operator. Finally, because the witness provided his name and telephone number, he could be held accountable for false reporting. As a result, the court concluded that the information provided by the witness gave the officer reasonable suspicion to stop the Taurus.

Third, the defendants argued that the officer unreasonably prolonged the duration of the stop after his initial conversation with Pihl. Specifically, the defendants claimed that any reasonable suspicion based on the witness's tip dissipated when the officer obtained Pihl's information and determined that she was alone in the passenger compartment of the vehicle.

The court held that reasonable suspicion did not automatically dissipate because Pihl did not match the description given by the witness or because the officer did not initially see two men inside the Taurus. The court commented that other facts corroborated the witness's tip, and there were reasonable explanations for the discrepancies concerning the number of occupants in the Taurus. Specifically, the court found it was foreseeable that bank robbers using getaway drivers would conceal themselves in the vehicle's trunk. The court concluded that the reason for the stop, to determine whether the Taurus was involved in the bank robbery, was ongoing throughout the officer's interaction with Pihl and that the officer did not unreasonably prolong the duration of the stop.

Finally, Pihl and Monden argued that the officer violated the Fourth Amendment when he searched the trunk of the Taurus.

The court held that Pihl and Monden lacked standing to challenge the officer's search of the trunk because they did not have a reasonable expectation of privacy in the Taurus. The owner of the Taurus, Farrah Franklin, told officers that she did not know Mosley, Monden, or Pihl and had not given them permission to use her car. In addition, Franklin told the officers that she called the local police department on the day of the bank robbery to report the vehicle stolen. Even though Franklin's husband testified that he borrowed the Taurus with Franklin's permission and then loaned it to Monden without her consent, this did not establish a reasonable expectation of privacy in the Taurus for Monden.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-4489/16-4489-2017-12-21.pdf?ts=1513873829

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United States v. Rowe, 878 F.3d 623 (8th Cir. 2017)

A confidential informant (CI) told officers that Houston Oliver was going to transport a large quantity of cocaine from Arizona to Minnesota in a gray BMW with Minnesota license plates on November 30. The CI provided the approximate arrival time but did not know the identity of the person transporting the cocaine. The CI had provided accurate, timely, and verifiable information to law enforcement for years. Officers conducted a records check and discovered that Oliver was the registered owner of a BMW with Minnesota license plates. Based on the CI's information, officers issued an alert about Oliver's BMW's possible involvement in drug trafficking.

On November 30, Minnesota State Trooper Thul conducted surveillance on Interstate 35 in an effort to intercept Oliver's BMW. After being advised that other officers had located the BMW and requested that she stop it, Trooper Thul located the BMW and pulled it over. Despite the information she received from dispatch, and her knowledge that the BMW would be impounded if located, Trooper Thul developed her own probable cause to stop the vehicle and pulled the BMW over for excessive window tint. Trooper Thul approached the BMW and spoke with Rowe, the sole occupant of the vehicle. After a brief conversation, Trooper Thul went back to her vehicle to perform routine computer checks.
While Trooper Thul was completing her routine checks and paperwork, other officers arrived, and a drug-sniffing dog alerted to the presence of narcotics in the BMW. Officers handcuffed Rowe, placed him in the back of a police car, and transported him to the police station. The officers impounded the BMW, searched it, and seized six packages of cocaine. The officers did not arrest Rowe that night, and Trooper Thul never issued him a citation for excessive window tint. The government subsequently indicted Rowe for conspiracy to distribute cocaine.

Rowe filed a motion to suppress the evidence seized from the BMW and statements he made in the police car. Rowe argued that the officers expanded the traffic stop beyond its initial purpose for the window tint violation, and that he was de facto arrested without probable cause.

The court disagreed. Despite Trooper Thul's explanation that she stopped the BMW because of the window tint violation, probable cause existed to believe that the BMW contained cocaine based on the information provided by the CI. As a result, the officers were authorized under the automobile exception to stop, search, and seize the BMW without a warrant. In addition, the court

found that the officers had probable cause to arrest Rowe, even though he was not arrested that night.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-4102/16-4102-2017-12-26.pdf?ts=1514305825

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United States v. Orozco, 858 F.3d 1204 (9th Cir. 2017)

A state trooper received a tip that a red truck, with a white box trailer and Michigan license plates would be transporting drugs through Nevada on a specific day. Troopers stationed themselves on the side of the roadway along the truck's suspected route, planning to stop it to determine if it was being used to transport drugs. When the troopers saw the red truck, they pulled out behind a different commercial truck, drove around it, and stopped the red truck. After the stop, the troopers spoke with the driver, Orozco, and went through the motions of performing an NAS Level III paperwork inspection.[1] Although the troopers discovered numerous violations of the commercial vehicle regulations, they did not issue a citation. Instead, the troopers obtained consent to search from Orozco. Inside the truck, the troopers found a duffel bag containing twenty-six pounds of methamphetamine and six pounds of heroin in the sleeper compartment.

The government charged Orozco with two counts of possession with intent to distribute a controlled substance. Orozco filed a motion to suppress the drugs seized from his truck, arguing that the NAS Level III violated the Fourth Amendment because it was an impermissible pretext for a stop to investigate criminal activity.

The court agreed. The court found that the laws and regulations, or "administrative scheme," that authorizes officers to stop commercial vehicles without reasonable suspicion or probable cause of criminal activity and conduct limited inspections is reasonable because their purpose is to ensure the safe operation of commercial vehicles, not to provide "cover" for a criminal investigation like drug interdiction.

However, in this case, the court held that the evidence clearly established that the only reason for the stop was the troopers' belief that Orozco was possibly transporting illegal drugs in his tractor-trailer. First, the manner in which the stop was conducted strongly suggested that it was entirely pretextual. After the troopers received the tip, they went to a location along the truck's suspected route. When Orozco's truck drove past, the troopers pulled out behind a different commercial truck, drove around it, and then stopped Orozco. The court noted that if the troopers had not received the tip, they would not have been in position to stop the truck. Second, one of the troopers involved in the stop testified that it was "common knowledge that if you suspect criminal activity, that you can use your administrative powers to make a stop." Based on these facts, the court concluded the only purpose of the stop was to investigate criminal activity and that any alleged

[1] Nevada law enforcement officers may make stops of commercial vehicles and conduct limited inspections without reasonable suspicion "to enforce the provisions of state and federal laws and regulations relating to motor carriers, the safety of their vehicles and equipment, and their transportation of hazardous material and other cargo." An NAS Level III inspection includes a stop of the vehicle and entry into the cab for a full view of the driver's papers. It is geared toward preventing and deterring dangerous driving, for example, reviewing the driver's log, which would reveal whether a driver had exceeded the maximum amount of time allowed on the road, among other possible safety violations.

administrative purpose for the stop was "only a charade to camouflage the real purpose of the stop."[2]

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/15-10385/15-10385-2017-06-01.pdf?ts=1496336536

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United States v. Gorman, 859 F.3d 706 (9th Cir. 2017)

A state trooper stopped Gorman for a minor traffic violation. The trooper obtained Gorman's driver's license and registration and requested a routine records check through his dispatcher. In addition, the trooper requested a drug-detection dog, because he suspected that Gorman might be transporting drug money. A short time later, dispatch told the trooper that Gorman had no prior arrests or outstanding warrants, and that a drug-detection dog was not available. The trooper then performed a non-routine records check and asked Gorman a series of questions, unrelated to the traffic violation, which prolonged the duration of the stop. In addition, the trooper asked Gorman for consent to search his vehicle, but Gorman refused. After approximately thirty minutes, the trooper allowed Gorman to leave without issuing him a citation.

After Gorman left, the trooper immediately contacted his dispatcher who provided county deputies with a description of Gorman's vehicle, adding "a canine unit might want to take a second look at the car." Following this exchange, a county deputy contacted the trooper, and the trooper gave the deputy an account of the stop and explained his suspicions concerning Gorman's vehicle. The deputy, with his drug-detection dog, located Gorman's vehicle and conducted a traffic stop after he saw the vehicle's tires cross onto the fog line three times.

The deputy obtained Gorman's driver's license and registration. While the deputy waited for his dispatcher to complete a routine records check, he walked his drug-detection dog around Gorman's vehicle. After the dog alerted, the deputy obtained a warrant and searched Gorman's vehicle. Inside Gorman's vehicle, the deputy found $167,070 in cash.

No criminal charges were brought against Gorman. Instead, the federal government pursued a civil forfeiture action against Gorman and the seized cash. Gorman filed a motion to suppress the cash, arguing that the deputy seized it in violation of the Fourth Amendment.

The district court agreed, holding that the two traffic stops were "inextricably connected," and that officers unreasonably prolonged Gorman's detention in violation of the Fourth Amendment. As a result, the district court granted Gorman's motion to suppress the seized cash and awarded him over $146,000 in attorneys' fees. The government appealed.

The Ninth Circuit Court of Appeals affirmed the district court. The government conceded that the trooper unreasonably prolonged the duration of Gorman's first stop in violation of the Fourth Amendment. After the trooper's initial records check returned a "clean" license and criminal history report, the trooper performed a non-routine record check and questioned Gorman about matters unrelated to the traffic infraction he committed.

The court then concluded that the information obtained by the trooper during Gorman's unlawful detention tainted the evidence obtained by the deputy during the second stop. Specifically, the

[2] The court did not determine if the tip established reasonable suspicion for the stop because the government failed to address the issue in its brief to the court.

information obtained by the trooper during Gorman's unlawful detention caused the deputy to be on the lookout for Gorman's vehicle, which led to the second stop, the dog sniff, and the discovery of the cash. Because the court concluded that the seized currency was inadmissible as "fruit of the poisonous tree," it did not consider whether the second stop, by itself, was unlawful.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/15-16600/15-16600-2017-06-12.pdf?ts=1497286982

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United States v. Lopez, 849 F.3d 921 (10th Cir. 2017)

Angela and Adrienne Lopez were stopped for speeding in Kansas. During the stop, the officer discovered the women had travelled from California the day before, driving a rental car that was due back in California the next day. The women stated that they were travelling to either Kansas City or Nebraska to rescue Adrienne's sister who was in an abusive relationship. When the officer looked into the backseat of the car, Adrienne said, "Don't look back there, it's a mess," although there were only a few bags and a blue cooler on the back seat. The officer noticed that throughout the encounter, Adrienne, rather than Angela, the driver, did almost all of the talking, which the officer believed to be a sign of nervousness.

After the officer issued Angela a warning and returned her paperwork, the officer told the women to have a safe trip and turned to walk away. The officer took a few steps, turned around and walked back to the women's car, and asked Angela if she would answer a few more questions. Angela consented. The officer eventually asked the women if they would consent to a search of their vehicle, telling the women that drugs were frequently trafficked on this particular highway and that he was suspicious of their two-day car rental. After the women refused to consent, the officer detained them for approximately twenty-minutes until another officer arrived with a drug dog. The dog sniffed around the exterior of the car, then jumped through the open front passenger window and alerted on Adrienne's purse. The officer searched the purse and found a small amount of marijuana. The officer then searched the rest of the car where he found approximately four pounds of methamphetamine inside the blue cooler.

The government charged the defendants with two drug offenses, and both defendants filed a motion to suppress the evidence seized from their car. The defendants did not challenge the initial stop, and the government did not contest that the officer extended the stop beyond its initial purpose, enforcing traffic laws, without the defendant's consent. The sole issue before the court was whether the officer had reasonable suspicion to detain the defendants after completing the stop to wait for the drug dog to arrive.

The court held that the officer did not have reasonable suspicion to prolong the traffic stop to await the arrival of the drug dog. First, while Adrienne might have appeared to be nervous, the Tenth Circuit has consistently held that a person's nervousness is given little significance as it is very subjective and innocent people can vary widely in how they respond to an encounter with the police. The court added that only a person's "extreme" nervousness could substantially contribute to reasonable suspicion.

Second, the court held that Adrienne's comment about the backseat did little to support a finding of reasonable suspicion. In hindsight, the comment was significant, as the methamphetamine was concealed inside the blue cooler; however, the court found that at the time Adrienne made the

comment, there was nothing incriminating in view on the backseat. In addition, her comment did not prevent the officer from talking a closer look through the back window.

Finally, the court concluded that the defendant's implausible travel plans did not establish reasonable suspicion to prolong the duration of the stop. The court stated that it has been reluctant to give weight in the reasonable suspicion analysis to unusual travel plans, unless an officer discovers a lie or some inconsistency. Here, the court concluded that the defendants' travel plans were consistent with the trip's purported purpose of rescuing Adrienne's sister who was in danger.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-3130/15-3130-2017-02-27.pdf?ts=1488214859

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United States v. Morgan, 855 F.3d 1122 (10th Cir. 2017)

At approximately 10:30 p.m., a police officer stopped a man for riding a bicycle against traffic and not using a bicycle headlight. As the officer approached the man, he saw the man move his hands towards his pants pockets. The officer ordered the man to keep his hands out of his pockets and asked him for identification. The man told the officer that he had done nothing wrong and had no identification. The man eventually told the officer that his name was Stanford Wallace, and gave the officer a birthdate and social security number. During this time, the officer noticed that as the man sat on his bicycle he kept his head and body straight forward, not making eye contact.

After the officer ran the man's information through police databases, he received back a "no result" response. A "no result" response means that no match exists for the information entered, which caused the officer to believe that the man had lied about his identity. The officer called for backup, reapproached the man, and asked him to step off his bicycle. The man refused to get off his bicycle and after backup officers arrived, he refused a second request to get off the bicycle, reaching for his front pants pocket instead. Believing that the man might be grabbing for a concealed weapon, the officers tackled him to the ground. Once on the ground, the man concealed his arms under his stomach, preventing the officers from handcuffing him. After the man refused to show his hands, one of the officers deployed his taser against him. The officers then handcuffed and frisked the man, finding a loaded handgun in his front pants pocket. The officers transported the man to the station where they identified him by his fingerprints as Philip Morgan.

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

Morgan filed a motion to suppress the firearm, arguing the officer exceeded the scope of the traffic stop by asking him for identification, then ordering him off his bicycle, and finally by taking him to the ground and deploying his taser against him.

The court disagreed. First, there was no dispute that the officer lawfully stopped Morgan after he saw Morgan violate the traffic laws by riding his bicycle against traffic and failing to use a headlight in the dark.

Second, as part of the lawful stop, the court held that the officer was authorized to request Morgan's identification even though Morgan was not required to have a driver's license to ride his bicycle. In addition, when Morgan gave the officer a false name, he delayed the officer's ability to learn his true identity. As a result, the officer could not immediately write a citation and

complete the stop. The court concluded that Morgan was responsible for extending the duration of the stop, not the officer.

Third, the court held that the officer did not violate the Fourth Amendment by ordering Morgan to get off his bicycle. The court saw little difference between the officer ordering Morgan off his bicycle and when an officer orders a driver to step out of an automobile during a traffic stop, which is allowed under the Fourth Amendment.

Fourth, the court held that after Morgan disobeyed earlier commands not to reach inside his pants pocket, it was reasonable for the officers to tackle him to the ground to protect their own safety.

Finally, once on the ground, the court found that the officers were justified in deploying a taser against Morgan after he refused their commands to remove his hand from beneath himself.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/16-5015/16-5015-2017-05-02.pdf?ts=1493740858

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United States v. Cone, 868 F.3d 1150 (10th Cir. 2017)

A police officer stopped Cone for driving a vehicle without a functioning license plate light, a violation of Oklahoma law. The stop occurred in the parking lot of a hotel where the officer had made numerous arrests for drug trafficking and firearms offenses. The officer asked Cone for his driver's license and told him that his car's tag light was not working. The officer also asked Cone, if he had "ever been in trouble before." When Cone replied, "yes," the officer asked him if he had ever "been to prison before." Again, Cone replied, "yes." Cone then falsely told the officer that he had been to prison for money laundering. The officer stated that the vast majority of time he would question those he pulled over to determine if they had any violent history in their past that might pose a safety risk to him. The officer also asked Cone what he was doing at the hotel, about which the officer and Cone spoke very briefly.

The officer directed Cone to exit his vehicle while he ran a warrant check and status check of Cone's license. As Cone got out of his vehicle, the officer saw the butt of a pistol protruding from under the vehicle's center console. When the officer told Cone to get on the ground, Cone tried to flee, but was quickly apprehended by the officer. A back up officer arrived and seized the pistol from Cone's vehicle. While she was securing the pistol, the officer smelled the odor of marijuana emanating from the passenger side of Cone's vehicle. The officer found a backpack in the vehicle that contained marijuana, methamphetamine, and drug paraphernalia.

The government charged Cone with drug and firearm offenses.

Cone filed a motion to suppress the evidence seized from his vehicle. Cone argued that the officer's questions about his criminal history and travel plans violated the Fourth Amendment because they were unrelated to the reason for the stop and they unreasonably prolonged the duration of the stop.

The court disagreed. The court recognized that an officer's mission during a stop in not limited to determining whether to issue a ticket. Because traffic stops are potentially dangerous, the Supreme Court has held that officers may run computer checks for warrants and a motorist's criminal history. The court reasoned that if running a computer check of a driver's criminal

history is justified, then simply asking the driver about that history is not unreasonable under the Fourth Amendment. Here, the court concluded that the information requested by the officer did not exceed the scope of what a computer check would have revealed. The court added that a drivers' answer may not be as reliable as a computer check but the time involved is much shorter.

The court further held that the officer's questions concerning Cone's reason for being at the hotel did not violate the Fourth Amendment. The court found that Cone failed to show a connection between the questions and the discovery of contraband inside his vehicle. The officer saw the pistol in plain view as Cone exited his vehicle. The court concluded that lawful seizure of the pistol then led to the discovery of the other evidence in Cone's vehicle.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/16-5125/16-5125-2017-08-24.pdf?ts=1503590465

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United States v. Vargas, 848 F.3d 971 (11th Cir. 2017)

A police officer stopped a vehicle for tailgating and failure to maintain its lane. The driver, Castro, immediately told the officer that he did not have a valid driver's license. After speaking with Castro for approximately three-minutes, the officer told Castro that he was going to issue Castro a warning ticket. After filling out the warning ticket, the officer asked Vargas, the passenger, if he could legally operate the vehicle. Vargas told the officer that he did not have a driver's license either. For approximately the next twelve minutes, the officer worked with Castro and Vargas in an attempt to determine how to legally move the vehicle, as the officer could not lawfully allow either man to drive the vehicle without a valid driver's license. Approximately fifteen minutes after telling Castro that he was going to issue a warning ticket, the officer asked Castro for consent to search the vehicle. Castro consented and the officer discovered cocaine and methamphetamine hidden in the vehicle.

The government charged Vargas with two drug-related offenses.

Vargas filed a motion to suppress the evidence, arguing that the officer violated the Fourth Amendment by unlawfully extending the duration of the stop after the officer told Castro that he was issuing him a warning.

The court disagreed. The court recognized a traffic stop that exceeds the time needed to handle the matter for which the stop was made constitutes an unreasonable Fourth Amendment seizure. However, in this case, the court concluded that the officer did not complete his duties related to the traffic stop before Castro consented to the search of the vehicle. The fact that the officer had earlier told Castro that he was issuing a warning was irrelevant. Under state law, the officer had a duty not to allow Castro or Vargas, who were not licensed, to drive the vehicle. The court noted that preventing Castro and Vargas from driving without a license was valid enforcement of the law, not an unlawful detention. The court found that what prolonged the duration of the stop was the fact that neither Castro nor Vargas could lawfully drive the vehicle, not the officer's desire to search it. Consequently, the court held that the duration of the traffic stop was reasonable.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/16-14714/16-14714-2017-02-16.pdf?ts=1487277057

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Traffic Stops – Delay in Conducting Stop / Collective Knowledge Doctrine

United States v. Zuniga, 860 F.3d 276 (5th Cir. 2017)

Police suspected that Zuniga was transporting methamphetamine in his vehicle and followed it. After an officer witnessed a turn-signal violation, he immediately informed other officers in the area that they had grounds to stop the vehicle. Approximately fifteen minutes later, an officer who had not witnessed the turn-signal violation, stopped the vehicle. During the stop, the officer encountered Zuniga and his girlfriend, who was driving the vehicle. The officer arrested Zuniga on two outstanding warrants and his girlfriend because she did not have a valid driver's license. The officer searched Zuniga incident to arrest and found methamphetamine on his person. The officer searched Zuniga's car and found a backpack containing methamphetamine, a handgun, and other evidence related to drug trafficking.

The government charged Zuniga with several drug-related crimes.

Zuniga filed a motion to suppress the evidence seized during the stop. Zuniga argued that the fifteen-minute delay in conducting the stop for the turn-signal violation rendered the information provided by the officer who observed the violation stale.

The court disagreed, holding that the delay in conducting the stop was not enough to render the information stale or the stop unlawful. The court did not state a specific time limitation to which officers must adhere when conducting a traffic stop. Instead, the court stressed that stops following traffic violations must be reasonable in light of the circumstances. In this case, the court found that the fifteen-minute delay was reasonable. As soon as the officer observed the turn-signal violation, he immediately relayed this information to other officers, although none of those officers were in position to stop the vehicle at that time.

The court further held that the collective knowledge doctrine allowed the officer to lawfully stop the vehicle even though he did not personally observe the turn-signal violation. The collective knowledge doctrine allows an officer, who does not observe a violation, to conduct a stop when the officer is acting at the request of another officer who has observed the violation. Here, the officer who observed the turn-signal violation communicated this information to the officer who eventually stopped the vehicle; therefore, the first officer's knowledge transferred to the officer who conducted the stop.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/14-11304/14-11304-2017-06-14.pdf?ts=1497483031

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Arrest

Entering Suspect's Home to Make an Arrest

United States v. Williams, 871 F.3d 1197 (11th Cir. 2017)

The government charged Williams and 24 other individuals with a variety of criminal offenses including conspiracy to distribute controlled substances, and a warrant was issued for Williams' arrest. The agents confirmed that Williams' residence consisted of a single-family, ranch-style house, with an outbuilding approximately twenty feet away in the back yard. The outbuilding

resembled a guesthouse or mother-in-law-suite as it had a front and back door, several windows, and a garage door. During a pre-arrest operational meeting, the agents did not know whether Williams lived in the main house or the outbuilding. As a result, the agents planned to make simultaneous entries of both buildings. When agents performed a drive-by of Williams' residence, they saw Williams' car and two other vehicles parked in the driveway. Based on this observation the agents believed that Williams was possibly inside the residence with multiple other subjects.

The agents arrived at Williams' residence at approximately 6:00 a.m. and entered the main house and the outbuilding. One team of agents arrested Williams in the main house while a second team of agents entered the outbuilding. Inside the outbuilding the agents saw a white powdery residue and razor blades on a table, and a drug press sitting in the corner of the room. After the agents cleared the main house and outbuilding they obtained a warrant to search those areas based on their observations from the initial entry. During the search pursuant to the warrant, the agents seized cocaine, heroin, drug paraphernalia, and weapons.

Williams argued that the agents unlawfully entered the outbuilding because it was unreasonable to believe that he lived there or would be inside it. As a result, Williams claimed that the items the agents saw in the outbuilding could not provide a basis to obtain the search warrant.

The court disagreed. The court concluded that it was reasonable for the agents to enter the main house and the outbuilding pursuant to the arrest warrant. First, the agents confirmed that Williams owned the property through a public records check and had seen Williams on the property during previous surveillance. Second, it was reasonable for the agents to believe Williams was present when they executed the warrant as the agents confirmed that Williams' car was in the driveway and the arrest occurred in the early morning. Finally, both buildings were possible living spaces, which made it reasonable for the agents to believe that Williams might be living or present in either structure.

Alternatively, the court held that the agents' entry into the outbuilding qualified as a valid protective sweep.

To ensure their safety during an arrest, officers may conduct a protective sweep by searching areas immediately adjoining the place of arrest where a person might be found. However, to search areas beyond those adjoining the place of arrest, officers must have reasonable suspicion that the area to be swept contains an individual posing a danger to those on the arrest scene. In this case, the court concluded that the close proximity of the outbuilding to the main house, the belief that drug distribution activities were occurring on the property, and the fact that there were three cars parked in the driveway suggested there might be other people besides Williams on the premises who could pose a threat to the agents' safety. As a result, once the agents lawfully swept the outbuilding, any evidence observed in plain view could be used to obtain a search warrant.

Williams also argued that evidence found in the outbuilding should have been suppressed because the agents executed the arrest warrant at approximately 6:00 a.m., which rendered the warrant invalid.

The court disagreed. The court noted that the Fourth Amendment does not contain any time limitations on reasonable searches and seizures. However, Federal Rule of Criminal Procedure 41 provides that warrants are to be executed "during the daytime," unless the issuing judge for good cause shown expressly authorizes another time. Daytime is defined as "the hours between

6:00 a.m. and 10:00 p.m. local time." Assuming for the sake of argument that agents entered Williams' residence a minute or two before 6:00 a.m., the court held that suppression of evidence was not proper because there was no evidence that the agents did so deliberately or that Williams' arrest would not have otherwise occurred.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/16-16444/16-16444-2017-09-20.pdf?ts=1505939508

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Probable Cause

United States v. Schreiber, 866 F.3d 776 (7th Cir. 2017)

Police officers arrested Schreiber for armed robbery and a state grand jury indicted him one month later. While Schreiber was awaiting trial for armed robbery, state officials collected a sample of Schreiber's DNA, which was entered into the Illinois DNA indexing system. The DNA sample ultimately connected Schreiber to a 2010 bank robbery and a federal grand jury indicted Schreiber for that crime. Several months later, the armed robbery charge against Schreiber was dismissed after a judge ruled that the officers had not established probable cause to arrest Schreiber.

Schreiber filed a motion to suppress the DNA evidence recovered by the state officials. Schreiber argued that the DNA evidence was obtained as the result of his unlawful arrest for armed robbery; therefore, the federal government should have been precluded from admitting it against him in his prosecution for bank robbery.

The court disagreed. In Kaley v. United States, the United States Supreme Court held that "an indictment returned by a properly constituted grand jury . . . conclusively determines the existence of probable cause to believe the defendant perpetrated the offense alleged." In this case, the court held that the state grand jury indictment, which occurred before the state officials collected Schreiber's DNA sample, conclusively established that there was probable cause to believe Schreiber robbed the liquor store. As a result, the state official who obtained Schreiber's DNA sample was entitled to rely upon this finding of probable cause and the federal government was entitled to rely on the fact of the state grand jury indictment in choosing to use the DNA evidence in prosecuting Schreiber. While not relevant to the court's holding, the court commented that it was uncertain as to how the state court reached its conclusion that the officers did not establish probable cause to arrest Schreiber for armed robbery.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-3847/16-3847-2017-08-07.pdf?ts=1502137895

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United States v. Paige, 870 F.3d 693 (7th Cir. 2017)

Around midnight, an employee of a McDonald's restaurant called 911, reported that a vehicle had been sitting in the drive-through lane for approximately one-hour, and expressed concern that the driver might be sick or injured. When a police officer arrived, she saw Paige standing outside the open driver's door of the vehicle talking to a firefighter who had also responded. As the officer approached, she smelled a strong odor of fresh marijuana coming from Paige. The firefighter told the officer that he had found Paige asleep in the driver's seat of the vehicle, and had awakened

Paige by knocking on the vehicle's window. Paige told the officer that he had just fallen asleep and was "ok." Skeptical of Paige's story, the officer decided to detain Paige in her police car before she continued her investigation. Before placing Paige in her vehicle the officer frisked him for weapons and found a loaded handgun in Paige's waistband. The officer arrested Paige and placed him in her vehicle.

The officer walked over to Paige's vehicle, saw a bottle of alcohol on the driver's seat, and smelled a strong odor of marijuana coming from inside the vehicle. The officer searched the vehicle and found crack cocaine and marijuana inside the console.

The government charged Paige with possession of a firearm by a convicted felon, and possession with intent to distribute crack cocaine and marijuana.

Paige filed a motion to suppress the firearm seized from his waistband and the drugs seized from his vehicle.

First, the court held that the officer had probable cause to arrest Paige for possession of marijuana and operating a vehicle under the influence because she smelled marijuana emanating from Paige's body, knew that Paige had been sleeping in his car for approximately one-hour in an open McDonald's drive-through, and believed that Paige was not answering her questions truthfully.

Second, after the officer established probable cause to arrest, she was allowed to search Paige incident to arrest without any additional justification. As a result, the court concluded that the officer lawfully seized the firearm from Paige's waistband incident to arrest.

Third, the court held that the officer lawfully searched Paige's vehicle incident to his arrest. An officer may search a vehicle incident to an arrest when it is reasonable to believe that the vehicle contains evidence of the offense for which the suspect was arrested. Here, the court concluded that the officer reasonably believed that Paige's vehicle contained evidence related to the offenses of possession of marijuana, and driving while impaired, because as the officer approached the vehicle she smelled the strong odor of marijuana emanating from the interior. The court added that this fact also provided the officer probable cause to believe that Paige's vehicle contained marijuana and supported a warrantless search under the automobile exception.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-4128/16-4128-2017-09-01.pdf?ts=1504285424

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United States v. Evans, 851 F.3d 830 (8th Cir. 2017)

A woman contacted the police department and reported that she had been raped the previous evening and that she was sitting in a car outside the apartment building where the rape occurred. Before officers arrived at her location, the victim called the police department back and reported that her attacker had just exited a bus and was now sitting at a bus stop near her location. While the victim stated the man at the bus stop resembled her attacker, at various times during the call, the victim expressed some uncertainty concerning the identification.

When the officers arrived, the victim told them she met the attacker online the day before, exchanged some text messages, and then later arranged to see him in-person to "hang out." The victim told the officers her attacker identified himself to her as Octavio or Octovi, and that they met inside the front door of his apartment building. The attacker told the victim they could not

go to his apartment, because he was married, so the couple instead went to a stairwell where he frequently went to smoke. The victim told the officers that when they got to the stairwell, the attacker raped her. The victim told the officers she could not see the attacker's face very well, but that she saw a scar on his abdomen above his navel. The victim also told the officers that the attacker had tattoos in his neck and possibly on his hands, but she was unable to see them clearly because the lighting was poor and the attacker's hands were covered by clothing.

In the meantime, other officers detained the man at the bus stop, later identified as Evans, who denied raping the victim. Evans denied having a scar on his abdomen, and allowed an officer to examine him. According to the officer, he observed a vertical scar on Evans' abdomen. Evans told the officer the mark on his abdomen was a healed insect bite, but the officer did not believe him. In addition, it was undisputed that Evans had no tattoos on his hands or neck. The officers eventually arrested Evans for rape. During the search incident to arrest, the officers found a handgun in Evans' jacket pocket along with two keys.

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

Evans filed a motion to suppress the evidence seized by the officers, which was granted by the district court. The district court held the officers lacked probable cause to arrest Evans for rape; therefore, the evidence seized during the search incident to arrest should be suppressed. Significantly, the district court found that the mark on Evans' abdomen, which the officers described as a scar, was slight skin discoloration and that the small mark above his navel might be several hair follicles instead of a scar. The district court also found that the officers' concerns about the victim's credibility indicated a lack of probable cause.

The government appealed to the Eighth Circuit Court of Appeals.

The court held that the district court did not err in finding that the officers lacked probable cause to arrest Evans for rape. First, the victim's identification of Evans as the perpetrator was not sufficient to establish probable cause. While the fact that Evans matched the victim's description of her attacker's height, build, and shoes may have provided some evidence to support a finding of probable cause, Evans presence near the location of the rape twelve hours later, while waiting for a bus transfer, did not by itself, incriminate him. Second, Evans' responses to the officers' questions were not incriminating or suspicion-raising in nature. Third, the fact that Evans did not have a scar on his abdomen or tattoos on his hands or neck constituted significant evidence to establish that Evans was not the attacker. Fourth, the officers did not check whether Evans had a phone matching the number believed by the victim to be her attacker's. Finally, the officers did not check whether Evans' keys would open the door to the apartment building where the rape occurred, nor did they ask the manager of the apartment building whether anyone named Octavio or Octovi lived there. As a result, the court affirmed the district court's suppression of the firearm evidence on the grounds that the officers lacked probable cause to arrest Evans. The court expressed no opinion on the question of whether a rape had occurred.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1485/16-1485-2017-03-23.pdf?ts=1490283049

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Public Place

United States v. Diaz, 854 F.3d 197 (2d Cir. 2017)

New York City Police Department Officers Aybar and Espinal entered a private apartment building to conduct a floor-by-floor patrol. The officers had received consent from the owners of the building to patrol the common areas to deter drug dealing and trespassing offenses. When the officers entered the building they immediately smelled marijuana. The officers went up the stairs where they encountered Diaz and two other men on the third-floor landing. Diaz was sitting next to a bottle of vodka and holding a red plastic cup. As Officer Aybar approached Diaz, she saw clear liquid in the cup and smelled what seemed to be alcohol. Officer Aybar initially planned to issue Diaz a summons for violating New York's open-container law, which prohibited among other things, possession with the intent to consume an alcoholic beverage from an open container in a public place. Officer Aybar had received training on the open-container law and had issued approximately fifty summonses for open-container violations, often in apartment buildings.

Because Officer Aybar did not feel safe confronting Diaz while he was seated, she ordered him to stand against the wall and produce his identification. Diaz stood, fumbled with his hands in his jacket pocket, and rearranged his waistband. Believing that Diaz might be armed, Officer Aybar frisked Diaz and felt a bulge in his jacket. Officer Aybar removed a loaded handgun from Diaz's jacket pocket and handcuffed him. Diaz was transported to the police station where Officer Aybar issued him a summons for the open-container violation.

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

Diaz filed a motion to suppress the firearm, arguing that the apartment-building stairwell where he was found with an open container of alcohol did not constitute a "public place" under the open-container law.

The court disagreed. The court noted the issue was not whether the common-area stairwell in an apartment building constituted a public place under the open-container law, but whether Officer Aybar reasonably believed that it did. The court held that Officer Aybar's belief that the apartment building stairwell qualified as a public place within the meaning of the open-container law was reasonable. The court found that the New York Court of Appeals has not yet addressed whether a common area inside an apartment building is "public place" under the open-container law, and the other New York courts that have done so have reached conflicting conclusions. As a result, the court concluded that at the time of the search, Officer Aybar had probable cause to arrest Diaz for a violation of New York's open-container law based on a reasonable belief that an apartment-building stairwell is a public place under that law.

Diaz also argued that Officer Aybar's search was not a lawful search incident to arrest because when Officer Aybar searched Diaz, she did not intend to arrest him. Diaz claimed that Officer Aybar decided to arrest him only after she discovered the handgun.

Again, the court disagreed. The court concluded that when an officer has probable cause to believe that a person has committed a crime, the officer may search that person pursuant to the search-incident-to-arrest doctrine, provided that a "formal arrest follows quickly on the heels of the frisk." The court found that it was irrelevant whether, at the time of the search, Officer Aybar intended to arrest Diaz or just issue him a citation for the open container violation.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-3776/15-3776-2017-04-18.pdf?ts=1492527606

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United States v. Council, 860 F.3d 604 (8th Cir. 2017)

Officers received a report that Council had been involved in a road-rage incident where he pointed a sawed-off shotgun at Melanie Miller, a friend with whom he desired a more serious relationship. The officers knew Council from previous criminal complaints made against him, some of which involved violent behavior. Officers went to Council's camper, where he lived, to interview him about the incident. Officers knocked on the door to the camper, identified themselves, and told Council to come to the door. Council opened the door dressed only in his underwear. Council stood in the doorway and agreed to speak to the officers. Behind Council was a blanket hanging from the ceiling, which obstructed the officers' view into the camper. When the officers explained why they were there, Council denied involvement in the incident. Upon hearing who had made the accusation against him, Council called Miller a liar, cursed, and said he would "beat her half to death" the next time he saw her.

At this point, the officers decided to arrest Council. One of the officers grabbed Council's arm and ordered him to step out of the camper. Council resisted and tried to retreat behind the blanket back into the camper. While still holding Council's arm, and believing that Council had access to a shotgun, the officer crossed the threshold of the camper and tore down the blanket to see what was behind it. After a brief struggle, the officers handcuffed Council and while removing him from the camper they saw what appeared to be a black-taped handle of a gun wedged between the bed and a laundry basket.

As he was being escorted to the police car, Council asked if he could go back into his camper and get dressed. The officers denied this request but offered to go back into the camper themselves and get Council some clothes. Council agreed and when the one of the officers entered the camper to get Council a pair of pants, he confirmed the object he had seen was a shotgun with its handle wrapped in black tape. Based in part on this observation, the officers obtained a warrant to search the camper and seized a sawed-off shotgun.

The government charged Council with being a felon in possession of a firearm and possession of an unregistered sawed-off shotgun.

Council filed a motion to suppress the shotgun seized from his camper.

First, the court held that the officers had probable cause to arrest Council based on the information provided by the witnesses of the road-rage incident.

Second, the court found that Council was voluntarily in a "public place" when the officers arrested him. Under the Fourth Amendment, searches and seizures inside a home, without a warrant are presumed to be unreasonable. However, the warrantless arrest of a person in a public place based upon probable cause does not violate the Fourth Amendment. In this case, the court determined that Council was voluntarily in a public place when the officers arrested him. Council answered the door without coercion or deceit and stood in the doorway speaking to the officers. During this time, the court concluded that Council was exposed to public view as if he had been standing

completely outside his camper. As a result, the officers were entitled to arrest him without first obtaining a warrant.

Finally, the court held that the officers' warrantless entry into the camper, which allowed them to initially see the shotgun, was justified by exigent circumstances. First, the underlying incident involved a firearm and the officers knew Council had previously exhibited violent behavior. Second, Council was uncooperative and made a threat toward Miller when the officers were discussing the road-rage incident with him. Third, Council resisted arrest and attempted to retreat behind a blanket, escalating an already tense situation. Under these circumstances, the court concluded that it was reasonable for the officers to believe a gun might be within Council's reach; therefore, it was reasonable for the officers to enter the camper to complete the arrest and ensure their safety.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1472/16-1472-2017-06-19.pdf?ts=1497886240

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Exceptions to the Exclusionary Rule

Attenuation Doctrine

United States v. Yorgensen, 845 F.3d 908 (8th Cir. 2017)

A police officer obtained a warrant to search Yorgensen's apartment for drugs and drug paraphernalia. In his affidavit, the officer stated that in an encounter with Yorgensen earlier that evening, he smelled a strong odor of marijuana coming from "inside the residence and off Mr. Yorgensen." Officers searched Yorgensen's apartment, discovered drugs, and arrested Yorgensen.

Two days later, a state narcotics agent, who was working on a federal drug investigation in which Yorgensen was a suspect, interviewed Yorgensen at the jail, at Yorgensen's request. After the agent advised Yorgensen of his Miranda rights, Yorgensen waived his rights and made incriminating statements concerning the federal investigation against him.

A federal grand jury indicted Yorgensen on several drug related charges.

Yorgensen filed a motion to suppress the physical evidence seized from his home as well as his statements to the agent two days later.

The district court found that the officer's statement concerning the odor of marijuana coming from inside Yorgensen's apartment was untrue and made with reckless disregard for the truth, in violation of the Fourth Amendment. As a result, the court suppressed the physical evidence seized from Yorgensen's apartment as well as the statements he made to the narcotics agent two days later. On appeal, the government challenged the district court's suppression of Yorgensen's statements to the narcotics agent.

The Supreme Court created an exception to the exclusionary rule called the attenuation doctrine. The attenuation doctrine provides that evidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or had been interrupted by some intervening circumstance. To determine whether the connection between incriminating statements and a Fourth Amendment violation has been broken a court must consider four factors:

(1) whether Miranda warnings were provided; (2) the amount of time that passed between the Fourth Amendment violation and the incriminating statements; (3) any intervening circumstances; and (4) the purpose and flagrancy of the officer's misconduct.

In this case, the Eighth Circuit Court of Appeals held that all four factors weighted in favor of not suppressing Yorgensen's statements made to the narcotics agent.

First, at the beginning of the interview, the agent advised Yorgensen of his Miranda rights and Yorgensen provided a written waiver of those rights. Second, more than two days passed between Yorgensen's arrest and the interview by the narcotics agent. The fact that Yorgensen was in custody was not especially relevant, as Yorgensen knew that he was a suspect in a pre-existing federal investigation and Yorgensen requested the interview with the agent. Third, the narcotics agent was from a different agency than the officer that drafted the search warrant affidavit, and neither the agent nor his agency were involved in the initial Fourth Amendment violation. In addition, the video of the interview clearly showed that Yorgensen understood the difference between the federal investigation and the warrant search of his home. Finally, the only untrue statement in the affidavit was when the officer stated that he had smelled the odor of marijuana coming directly from Yorgensen's apartment. Instead, the officer should have stated that he smelled the dissipating odor of marijuana on or around Yorgensen, which the officer believed came from Yorgensen's apartment. The court concluded that the officer's error was unintentional, and did not rise to the level of purposeful or flagrant misconduct.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1109/16-1109-2017-01-12.pdf?ts=1484238652

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Good Faith Exception

United States v. Bain, 874 F.3d 1 (1st Cir. 2017)

Police officers obtained a criminal complaint and arrested Bain for drug-related offenses after Bain walked out of a multi-family building and attempted to get into his car. During the search incident to arrest, the officers found a set of keys on Bain's person. The officers tried these keys on the front door of the multi-family building and on the doors to three apartments inside the building. The keys opened the main door to the multi-family building and to unit D, one of the apartments inside the building. The officers used this information in addition to other information to obtain a warrant to search the apartment. Inside the apartment, the officers found drugs, a firearm, and other evidence indicating that Bain was involved in drug trafficking.

The government charged Bain with drug and firearm-related offenses.

Bain filed a motion to suppress the evidence seized from his apartment. Bain argued that the officers conducted an unlawful search by turning his key in the locks to identify the unit to search, and that there was no probable cause to issue a warrant to search unit D without that identification.

The court agreed that the officers conducted an unlawful search by testing the key in the lock of Bain's apartment.

First, the court concluded that the inside of the front door lock to unit D was within the unit's curtilage; therefore, it was protected by the Fourth Amendment. Next, the court found that a

physical intrusion into the curtilage to obtain information, in this case by putting the key in the lock to see if it fit, was a search that was not within the "implicit license" which allows a visitor to approach a home, knock on the front door and wait briefly to be received or not. Here, as long as the officers were lawfully in the building, they could approach the door and knock without being deemed to have conducted a search. However, the court held that walking up to the door of a home and trying keys on the lock constituted a Fourth Amendment search.

The court further held that the search by the officers in this case was not reasonable. The government offered no evidence that the officers considered other possible means of determining in which unit Bain resided. In addition, the government did not claim that evidence was being destroyed, an immediate danger existed, or that any other exigency was present that required the officers to turn the key in the lock of unit D.

Even though the court found that the officers violated the Fourth Amendment by conducting an unlawful search, the court held that the suppression of evidence seized from Bain's apartment was not warranted. The court noted that at the time of the incident, under Massachusetts case law, an officer only needed reasonable suspicion to conduct a search by turning a key in a lock. In this case, the court found that under this standard, the officers established reasonable suspicion to believe that turning the key in the lock of unit D would lead to evidence of Bain's drug dealing. Consequently, the court concluded that the officers relied in good faith on the search warrant for unit D issued by the magistrate judge based on the state of the law prior to this decision.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/16-1140/16-1140-2017-10-13.pdf?ts=1507924804

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Inevitable Discovery

See: United States v. Babilonia, 854 F.3d 163 (2d Cir. 2017)

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See: United States v. Jones, 861 F.3d 638 (7th Cir. 2017)

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Search Warrants

Particularity Requirement

United States v. Ulbricht, 858 F.3d 71 (2d Cir. 2017)

A jury convicted Ulbricht a/k/a Dread Pirate Roberts (DPR) of drug trafficking and other crimes related to his creation and operation of Silk Road, an online marketplace whose users primarily purchased and sold illegal goods and services. On appeal, Ulbricht argued, among other things, that evidence introduced against him at trial should have been suppressed because the government obtained it in violation of the Fourth Amendment.

After Ulbricht became a primary suspect in the government's investigation of Silk Road, the government obtained five "pen/trap" orders under *Title 18 U.S.C. §§ 3121-3127*. The orders authorized the government to collect internet protocol (IP) address data for Internet traffic to and from Ulbricht's home wireless router and other devices that regularly connected to Ulbricht's

home router. In each order, the government specified that it did not seek to obtain the contents of any communications. Instead, the government sought to collect only "dialing, routing, addressing, and signaling information" that was similar to data captured by "traditional telephonic pen registers and trap and trace devices." Ulbricht claimed that the pen/trap orders violated the Fourth Amendment because he had a reasonable expectation of privacy in the IP address routing information that the orders allowed the government to collect.

The court joined the other circuits that have considered this issue and held that collecting IP address information, without content, is "constitutionally indistinguishable" from the use of pen registers and trap and trace devices to collect telephone dialing information.[1] As a result, the court held that the pen register and trap and trace orders did not violate the Fourth Amendment.

Ulbricht also argued that the warrants authorizing the search and seizure of his laptop computer as well as his Facebook and Google accounts violated the Fourth Amendment's particularity requirement.

To satisfy the Fourth Amendment's particularity requirement, a warrant must:

1. Identify the specific offense for which the government has established probable cause;

2. Describe the place to be searched; and

3. Specify the items to be seized by their connection or nexus to the crimes for which the government has established probable cause.

The court held that the warrants authorizing the government to search the defendant's laptop computer as well as his electronic media accounts did not violate the Fourth Amendment's particularity requirement. First, the warrants explicitly incorporated by reference an affidavit listing the crimes charged, which included narcotics trafficking, computer hacking, money laundering, and murder-for-hire offenses. The affidavit also described the workings of Silk Road, the role of DPR in operating the site, and included information that established probable cause to believe that Ulbricht and DPR were the same person. Second, the warrants described the places to be searched. Third, the warrants listed the information to be seized and described how this information was connected to the offenses for which Ulbricht was charged.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-1815/15-1815-2017-05-31.pdf?ts=1496241010

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Probable Cause / Nexus Requirement / Omission of Information from Affidavit

United States v. Dunning, 857 F.3d 342 (6th Cir. 2017)

A police officer used a computer program that is part of a law enforcement software package known as the Child Protection System (CPS), to search for internet protocol (IP) addresses that had recently shared child pornography on a peer-to-peer (P2P) file-sharing network. The CPS software locates specified files on public P2P networks and records the IP addresses that have downloaded and made available for sharing files containing child pornography. When the

[1] 3rd, 4th, 6th, 8th, and 9th Circuits.

software finds shared materials on these public networks, it logs the date, time hash values, file name, and IP address. After the officer received a CPS report, he obtained a warrant to search Dunning's residence for evidence of child pornography. During the search, officers seized numerous electronic devices, which contained thousands of images of child pornography.

The government indicted Dunning for knowingly receiving and possessing child pornography.

Dunning filed a motion to suppress the evidence seized by the officers. Dunning argued that the search warrant application was not supported by probable cause because the officer did not have the source code for the CPS software, which rendered any information in the CPS report unreliable.

The court disagreed. First, the court reiterated that along with the First Circuit, it has rejected the argument that a higher degree of certainty is required when the government uses software to locate IP addresses. Second, the officer established that he was trained to use, and had previously used software to investigate child pornography crimes. Third, the officer identified and confirmed that the files containing child pornography had been shared by Dunning's IP address on various dates. Finally, the court noted that the CPS software merely records information it finds on public P2P networks, automating law enforcement's task of searching those public networks, a task that could be done in real-time using publicly available tools.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/16-5164/16-5164-2017-05-18.pdf?ts=1495134052

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United States v. Johnson, 848 F.3d 872 (8th Cir. 2017)

In September 2010, fifteen-year old girl, Jane Doe, wrote her mother a letter in which she stated that her mother's boyfriend, Johnson, had sexually abused her on multiple occasions at Doe's home. Doe's mother contacted law enforcement officers who interviewed Doe in November 2010. Doe told the officers that Johnson had sexually abused her on at least four occasions, beginning in December 2009. In addition, Doe told the officers that Johnson took pictures of her naked, which he downloaded onto his computers located at his mother's house in Woodbury, Minnesota.

A few days after Doe's interview, officers obtained a warrant to search the Woodbury residence that Johnson shared with his mother. During the search, the officers seized Johnson's computers, which contained a video file of Johnson sexually assaulting Doe.

The government charged Johnson with production of child pornography.

Johnson argued that the evidence discovered on his computers should have been suppressed because the information in the search warrant affidavit was based on stale evidence, and that it did not establish a nexus with his residence in Woodbury.

The court disagreed. A warrant becomes stale if so much time has elapsed between the information provided in the supporting affidavit and the subsequent search that probable cause does not exist at the time of the search. Factors to consider in determining whether probable cause no longer exists at the time of the search include, the lapse of time since the warrant was issued, the nature of the criminal activity, and the kind of property subject to the search. The court noted

that a lapse in time is least important when the suspected criminal activity is continuing in nature and when the property is not likely to be destroyed.

In this case, the court concluded that the information used to establish probable cause to obtain the warrant to search Johnson's residence was not stale. First, the search warrant affidavit alleged a number of very detailed instances of sexual assault against a minor over a period of time with specific details regarding photographs. Second, the search warrant was issued approximately eleven months after the last sexual assault, and at most, three months after Doe told her mother about the sexual assaults. Given the nature of the crime and the type of evidence sought, the court held that the execution of the warrant in November 2010 did not render the warrant deficient based on stale information.

The court further held that there was a sufficient nexus between the sexual assaults, which allegedly occurred at Doe's home, and the search of Johnson's residence in Woodbury. The affidavit supporting the search warrant specifically included information that Johnson had taken nude pictures of Doe and then downloaded those pictures to his computer that was located at his mother's house in Woodbury. The court found these facts provided a substantial basis for the judge who issued the search warrant to conclude that there was a reasonable likelihood evidence of Johnson's sexual assault of Doe would be found in Johnson's Woodbury residence.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-2355/16-2355-2017-02-17.pdf?ts=1487349047

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See: United States v. Job, 851 F.3d 889 (9th Cir. 2017)

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Probable Cause / X-Rays / CT Scans (Body Packing)

United States v. Pabon, 871 F.3d 164 (2d Cir. 2017)

Officers suspected that Jaiden Paige transported narcotics from Connecticut to Maine. The officers also had information that indicated Paige would not carry the narcotics himself, but would instead have another person body-pack the narcotics during the drive. After receiving a tip that Jaiden Paige was transporting narcotics on a particular day, officers conducted a traffic stop when Paige committed a traffic violation. After Paige consented to a search of his vehicle, the officers directed Paige and his passenger, Pabon, to exit the vehicle. The officers conducted a canine sniff on the vehicle and the canine alerted on the exterior passenger-side front door. The officers transported Paige, Pabon, and their vehicle to the police station.

Officers subsequently obtained a search warrant that authorized the officers to direct medical personnel take x-rays of Pabon's lower abdomen.

At the hospital, Pabon's x-rays were taken and two doctors examined the images. The images revealed several shaded masses in Pabon's pelvic area but in their written reports, the doctors concluded that the x-rays did not provide specific "evidence of a foreign body" or of any "rectal foreign body." However, one of the doctors told the officers that x-rays are not the best way to determine if a person is body-packing narcotics. The doctor explained that it was possible there could be some type of "rectal packing . . . not identifiable in the x-ray image." The doctor added

that the lack of body-packing evidence on the x-ray did not mean that a foreign body was not present.

The hospital discharged Pabon, and the officers took him back to the police station. Several hours later, the officers obtained a search warrant, which authorized medical personnel to perform a CT scan of Pabon's lower abdomen. The CT scan images revealed evidence that Pabon was body-packing narcotics. A few hours later, Pabon passed three packages containing narcotics. Pabon continued to pass packages over the next several days that contained cocaine and heroin. Approximately 63 hours after his arrest, a state court judge determined that there was probable cause to detain Pabon.

The government charged Pabon with possession with intent to distribute cocaine and heroin.

Pabon filed a motion to suppress the narcotics evidence. Pabon argued that after the doctors determined the x-ray images did not reveal evidence of body-packing, the officers no longer had probable cause to believe he was involved in criminal activity. As a result, Pabon claimed that the officers should have released him after his discharge from the hospital.

The court disagreed. While the doctors' written reports reflected their view that the x-ray images did not reveal positive evidence of any foreign objects in Pabon's system, one of the doctors told the officers that an x-ray examination is of limited value in determining if a person is body-packing narcotics. The doctor explained to the officers that an x-ray image will not necessarily capture evidence of body-packing even if someone is carrying narcotics because narcotics can have density similar to organic material in a person's body. The court concluded that it was clear to the officers that while the x-ray did not reveal the presence of narcotics in Pabon's body it did not mean that he was not body-packing. Consequently, the court found that probable cause to believe that Pabon was transporting narcotics had not dissipated, even taking into account the x-ray examination results.

Pabon also argued that the narcotics evidence and CT scan results should have been suppressed because the officers violated the Fourth Amendment by not bringing him before a state court judge within 48 hours of arrest for a probable cause determination.

Without deciding whether a violation of the 48-hour rule requires suppression of evidence, the court noted that the evidence Pabon sought to suppress was obtained within 24 hours of Pabon's arrest. As a result, the court held that there was no connection between any alleged violation of the 48-hour rule and the discovery of this evidence.

Finally, even if suppression was not warranted for a violation of the 48-hour rule, Pabon argued that after arresting him the officers unreasonably delayed his probable cause hearing so they could obtain additional evidence to support his arrest.

The court held that the officers did not delay Pabon's probable cause hearing while they attempted to obtain evidence to justify Pabon's arrest. The court noted that the officers had probable cause to detain Pabon when they arrested him immediately after the traffic stop. The court reiterated that probable cause continued to exist after the officers received inconclusive results from the x-ray examination and throughout the remainder of his detention.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca2/16-1754/16-1754-2017-09-11.pdf?ts=1505140215

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Stale Information

United States v. Perry, 864 F.3d 412 (6th Cir. 2017)

In October 2014, an officer received several complaints that Perry was selling drugs from his apartment. From October 15 to December 3, 2014, the officer intermittently conducted surveillance of Perry's apartment. During this surveillance, the officer observed heavy car and foot traffic into Perry's apartment, with visitors typically leaving within one to two minutes. On one occasion, the officer saw Perry exchange money and packages, which appeared to contain marijuana. On another occasion, the officer saw a man exit Perry's apartment, remove from his pants pocket a clear plastic bag, remove a package of marijuana from the plastic bag, give the marijuana to a person in a car, and then go back into Perry's apartment. Based on these observations, among others, the officer obtained a warrant to search Perry's apartment for evidence related to drug distribution on December 5, 2014. The officer executed the warrant on Perry's apartment four days later. The government subsequently charged Perry with several drug-related offenses.

Perry filed a motion to suppress the evidence seized from his apartment. Perry argued that the officer's observations over the seven-week period before the judge issued the warrant constituted stale evidence because the officer did not provide the individual dates when he conducted surveillance. In addition, Perry argued that the officer's observations did not establish continuous criminal activity in his apartment; therefore, the search warrant was not supported by probable cause.

The court disagreed. Even though the officer did not specify in his affidavit the dates on which he observed particular transactions, and while "stale" information cannot be used to establish probable cause, the court concluded that the officer's observations were not stale. First, the officer stated that his observations occurred between October 15 and December 3, a period of two to fifty one days before the judge issued the search warrant. The court held that evidence of drug sales two to fifty one days before the issuance of the search warrant provided probable cause to believe that Perry's apartment contained evidence related to drug distribution. Second, the officer's observations of heavy car and foot traffic along with the various transactions he witnessed, suggested that Perry's apartment was home to an ongoing drug business. While the court held that the officer's observations were sufficient to establish probable cause, the court noted that it would have been preferable for the officer to indicate the specific dates of his observations in his affidavit.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/16-6285/16-6285-2017-07-19.pdf?ts=1500485535

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United States v. Johnson, 848 F.3d 872 (8th Cir. 2017)

In September 2010, fifteen-year old girl, Jane Doe, wrote her mother a letter in which she stated that her mother's boyfriend, Johnson, had sexually abused her on multiple occasions at Doe's home. Doe's mother contacted law enforcement officers who interviewed Doe in November 2010. Doe told the officers that Johnson had sexually abused her on at least four occasions, beginning in December 2009. In addition, Doe told the officers that Johnson took pictures of her

naked, which he downloaded onto his computers located at his mother's house in Woodbury, Minnesota.

A few days after Doe's interview, officers obtained a warrant to search the Woodbury residence that Johnson shared with his mother. During the search, the officers seized Johnson's computers, which contained a video file of Johnson sexually assaulting Doe.

The government charged Johnson with production of child pornography.

Johnson argued that the evidence discovered on his computers should have been suppressed because the information in the search warrant affidavit was based on stale evidence, and that it did not establish a nexus with his residence in Woodbury.

The court disagreed. A warrant becomes stale if so much time has elapsed between the information provided in the supporting affidavit and the subsequent search that probable cause does not exist at the time of the search. Factors to consider in determining whether probable cause no longer exists at the time of the search include, the lapse of time since the warrant was issued, the nature of the criminal activity, and the kind of property subject to the search. The court noted that a lapse in time is least important when the suspected criminal activity is continuing in nature and when the property is not likely to be destroyed.

In this case, the court concluded that the information used to establish probable cause to obtain the warrant to search Johnson's residence was not stale. First, the search warrant affidavit alleged a number of very detailed instances of sexual assault against a minor over a period of time with specific details regarding photographs. Second, the search warrant was issued approximately eleven months after the last sexual assault, and at most, three months after Doe told her mother about the sexual assaults. Given the nature of the crime and the type of evidence sought, the court held that the execution of the warrant in November 2010 did not render the warrant deficient based on stale information.

The court further held that there was a sufficient nexus between the sexual assaults, which allegedly occurred at Doe's home, and the search of Johnson's residence in Woodbury. The affidavit supporting the search warrant specifically included information that Johnson had taken nude pictures of Doe and then downloaded those pictures to his computer that was located at his mother's house in Woodbury. The court found these facts provided a substantial basis for the judge who issued the search warrant to conclude that there was a reasonable likelihood evidence of Johnson's sexual assault of Doe would be found in Johnson's Woodbury residence.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-2355/16-2355-2017-02-17.pdf?ts=1487349047

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United States v. Huyck, 849 F.3d 432 (8th Cir. 2017)

In November 2012, agents with the Federal Bureau of Investigation (FBI) controlled and monitored computer servers that hosted the child pornography website, Pedoboard, on the Tor network.[1] On November 21, 2012, an Internet Protocol (IP) address associated to Huyck's

[1] The Tor network is designed to allow users to surf the Internet anonymously and access otherwise hidden websites, including illegal websites like "Pedoboard," which was strictly devoted to child pornography. To access the Tor network, a user downloads special software that obscures a user's Internet Protocol ("IP") address, thereby evading

residence accessed the Tor network and browsed Pedoboard for at least nine minutes. No child pornography was downloaded during this visit.

On April 9, 2013, more than four months after the Pedoboard access date, agents obtained a warrant and searched Huyck's house. The agents seized a variety of computers, external hard drives, and thumb drives. A forensic analysis of the evidence seized from Huyck's house revealed images of child pornography. Based on this evidence, the government charged Huyck with several child-pornography-related offenses.

Huyck filed a motion to suppress the evidence seized by the agents, arguing the information contained in the search warrant affidavit was stale. Specifically, Huyck claimed the search warrant affidavit did not establish probable cause because briefly browsing a child pornography website is not sufficiently likely to result in evidence of child pornography possession four and one half months later.

The court disagreed. The court found that Huyck did not "simply and accidentally" navigate to Pedoboard for a few "meaningless" minutes. Instead, the evidence showed that Huyck accessed Pedoboard after taking several intermediate steps that indicated his knowledge that Pedoboard trafficked in child pornography. First, Pedoboard was not some random website that any Internet user could randomly stumble upon by chance. Pedoboard was located on the Tor network, and Huyck had to download specific software to access the Tor network. Second, accessing Pedoboard required knowledge of Pedoboard's exact Tor web address. According to the warrant affidavit, that Tor web address was not common information; users could only obtain the Pedoboard web address directly from other users or from Internet postings detailing the child pornography content available. Coupled with the fact that child pornographers generally retain their pornography for extended periods, the court concluded the agents established probable cause to believe that Huyck's home contained child pornography as well as evidence related to his visit to Pedoboard on November 21, 2012, when they obtained the search warrant.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3652/15-3652-2017-02-22.pdf?ts=1487781050

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Automobile Exception (mobile conveyance exception)

United States v. Gonsalves, 859 F.3d 95 (1st Cir. 2017)

A confidential informant (CI) told officers that Joshua Gonsalves and his girlfriend, Katelyn Shaw, were driving Gonsalves' black Cadillac to the "New Bedford area" at approximately 4:30 p.m. that day to purchase 2,000 oxycodone pills from a known supplier. The CI claimed that he

traditional law enforcement IP identification techniques. Once on the Tor network, users must have a unique, sixteen-character web address to access the Pedoboard website. Unlike traditional web addresses, a Tor web address does not indicate the services or content available on the site. Thus, a Pedoboard user must obtain the web address from other users or from Internet postings describing Pedoboard's content. The most common way to find Pedoboard's web address was to access the "Hidden Wiki"-a directory of Tor hidden services providing the name of the hidden service, a description of its content, and the Tor web address. To identify people accessing Pedoboard, the FBI installed Network Investigative Technique ("NIT") software on the website, which revealed the true IP addresses of people accessing the site, the date and time the user accessed the content, and the user's computer operating system.

regularly bought oxycodone from Gonsalves, knew when Gonsalves' supply was running low, and knew when Gonsalves planned to restock. In addition, the CI had twice provided officers reliable information concerning Gonsalves, and his drug operation and earlier that month had made a controlled purchase of oxycodone from Gonsalves and Shaw.

Officers conducting surveillance followed Gonsalves, Shaw, and a woman later identified as Tavares, as they drove a black Cadillac to a town that bordered New Bedford. Gonsalves parked next to a car the officers knew belonged to the supplier. The officers saw Gonsalves, Shaw, and Tavares enter the house where the supplier's car was parked, where they remained for two hours.

After Gonsalves, Shaw, and Tavares left, the officers followed them and conducted a traffic stop. Officers frisked Gonsalves and found over $6,000 in his pocket. After the officers called for a drug-sniffing dog, Shaw pulled a bag of oxycodone pills from her bra and threw it into the woods. The officers recovered the pills and arrested Gonsalves, Shaw, and Tavares. In a post-arrest search the officers found over $16,000, a digital scale in the Cadillac, and additional oxycodone pills in Shaw's bra.

The government charged Gonsalves with a variety of criminal offenses related to his involvement in an oxycodone trafficking ring.

Gonsalves filed a motion to suppress the evidence seized during the traffic stop. Gonsalves argued that the traffic stop and subsequent searches violated the Fourth Amendment because the officers did not have reasonable suspicion to believe he committed a crime.

The court disagreed, holding that the officers had probable cause to stop Gonsalves and search his car under the automobile exception to the Fourth Amendment's warrant requirement. First, the court noted that the CI had a track record of supplying reliable information to the police. Second, the CI had firsthand knowledge of Gonsalves' operation that bolstered his credibility. Third, the CI's information included details of Gonsalves' future activities and almost all of these details were corroborated by police surveillance before the officers stopped Gonsalves. Finally, the officers assessed and understood the significance of the CI's information in the context of the larger investigation into Gonsalves' drug trafficking ring.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-1194/15-1194-2017-06-07.pdf?ts=1496867404

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United States v. Dion, 859 F.3d 114 (1st Cir. 2017)

A police officer pulled Dion over for speeding on Interstate 70 in Kansas. As the officer approached Dion's pickup truck, he noticed that it bore Colorado license plates. Dion gave the officer an Arizona driver's license and told the officer that he was driving home to Arizona after meeting with his accountant in Pennsylvania. As Dion accompanied the officer back to his patrol car, he told the officer he could search his truck, without being asked, which the officer found unusual. The officer also noticed that Dion appeared to be extremely nervous. While the officer wrote Dion a warning ticket, he asked Dion about his trip, as the officer thought it was suspicious that Dion had travelled from Arizona to Pennsylvania to meet with an accountant. The officer also discovered that Dion had a prior criminal history that included charges related to marijuana and cocaine. After the officer gave Dion back his driver's license, he told Dion that the "stop was

over," but that he would like to ask Dion some more questions. Dion agreed to talk to the officer and again gave the officer consent to search his truck.

The officer opened the tailgate and saw deteriorating boxes, road atlases, and a refrigerator. Based on his experience, the officer believed these items were a "cover load" to deliberately disguise contraband. When the officer asked Dion about the items, Dion told him the items had come from Boston. The officer thought it was suspicious that Dion had never mentioned that he had gone to Boston as part of his trip. After a back-up officer arrived, the officers began removing items from Dion's truck. After a few minutes, Dion revoked his consent and the officers stopped searching his truck. The officer then asked Dion if he could run a drug-dog around Dion's truck. Dion said, "Yeah," and the officer walked his dog around the truck. The dog detected the odor of narcotics emanating from Dion's truck. The officers searched the truck and found $830,000 cash. In addition, the officers found information connecting Dion to a self-storage center in Boston. The officers provided this information to law enforcement officers in Massachusetts who obtained a warrant to search Dion's storage unit. Inside the storage unit, officers found 160 pounds of marijuana, drug ledgers, and $11 million in cash.

The government charged Dion with a variety of drug-related offenses. Dion filed a motion to suppress the evidence against him, arguing that it was discovered in violation of the Fourth Amendment.

The court disagreed. First, the court held that the officer did not unreasonably prolong the duration of the stop. While the officer was writing the citation, he was allowed to ask Dion about his travel history and conduct a criminal records check. During this time, Dion was extremely nervous and without being prompted, gave the officer permission to search his truck. In addition, the officer was allowed to ask Dion questions about his prior drug arrests after learning that Dion had a criminal history. The court concluded that the officer's questions were reasonable and to the extent those questions extended the stop, did not violate the Fourth Amendment.

Second, the court held that Dion voluntarily consented to the initial search of his truck. Dion told the officer that he could search his truck at the beginning of the stop and again after the stop had concluded. In addition, the officer's failure to tell Dion that he was free to go, did not make Dion's consent involuntary. The officer clearly told Dion when the stop was over, which implied that Dion was no longer being detained for speeding. Instead of leaving, Dion decided to stay and voluntarily speak to the officer.

Finally, the court concluded that the officers established probable cause to believe Dion was trafficking contraband; therefore, the second search was valid under the automobile exception to the Fourth Amendment's warrant requirement. By the time Dion revoked his consent to search, the officers had established probable cause to search his truck the second time based upon, among other things: 1) Dion's unsolicited offers to search his truck; 2) Dion's extreme nervousness; 3) Dion's explanation for his trip; 4) Dion's criminal history; 5) the discovery of items connected to Boston when Dion did not mention Boston as stop during his trip.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/16-1377/16-1377-2017-06-08.pdf?ts=1496952006

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United States v. Babilonia, 854 F.3d 163 (2d Cir. 2017)

The government was investigating several individuals for being part of a drug trafficking operation and for their involvement in a murder-for-hire plot that targeted a rival drug dealer. Based on information provided by a confidential informant, officers conducted surveillance on Roger Key. The officers saw Key park a minivan, which had no front license plate, across the street from an apartment building. The officers saw Key get out of the minivan and look up and down the street repeatedly, even though there was no traffic on the street. Based on his experience, one of the officers believed that Key was checking for police or other observers in the area. Key then entered the apartment building, and reappeared a few minutes later holding a green plastic bag with a weighted, brick-shaped object inside. Key got into his minivan and drove away. Based on their observations and experience, the officers suspected that the bag contained either drugs or drug proceeds.

The officers followed Key for a short distance in their vehicles and then conducted a traffic stop. After the officers activated their lights and sirens, Key refused to pull over. Instead, Key led the officers on a high-speed pursuit that lasted five to eight minutes. During this time, the officers saw Key using a cell phone while he was driving. Key eventually stopped and the officers arrested him. Inside Key's minivan, the officers saw the green plastic bag, which contained a rectangular shaped object, wedged between the two front seats. The officers searched the bag and discovered $10,000 in cash bundled with rubber bands. The officers searched the rest of the minivan and found several cell phones, receipts for other cell phones, and a New York license plate in the rear storage area. In an effort not to raise Key's suspicions about the larger ongoing investigation, the officers decided not to prosecute Key for the driving offense. In addition, the officers decided not to seize any evidence from Key's minivan other than the green plastic bag and the $10,000 cash.

Approximately one month later, officers went to Key's apartment to arrest him for his involvement in the drug trafficking operation and the murder-for-hire plot. When Key answered the door, he was wearing boxer shorts and an undershirt, holding a cell phone. The officers pulled Key into the hallway, and handcuffed him. After the officers cleared the apartment, they brought Key back inside to get dressed. When the officers brought Key into the living room, one of the officers saw several cell phones on a table. At the time, the officer knew that Key was being investigated for narcotics trafficking and a murder-for-hire conspiracy that involved cell phones. In addition, the officer was aware of a wiretap investigation into Key's drug trafficking activities in which cell phones were involved. The officer asked Key if there were any firearms or drugs in the apartment. Key said there were not, and then gave the officer verbal consent to search the apartment for firearms and drugs. The officers searched the apartment and seized several cell phones, an iPad, and an address book. The officers later obtained a warrant to search the cell phones and iPad.

First, Key argued that the warrantless search of his vehicle violated the Fourth Amendment.

The court disagreed, holding that the search of Key's minivan was justified under the automobile exception to the Fourth Amendment's warrant requirement. The automobile exception allows law enforcement officers to conduct warrantless searches of "readily mobile vehicles" when the officers have probable cause to believe that the vehicle contains contraband. Here, the court concluded there was ample evidence for the officers to believe that Key was transporting drugs in his vehicle. First, the officers were conducting surveillance as part of a larger drug trafficking investigation when they saw Key emerge from a minivan without a front license plate and look up and down the block a number of times over a period of minutes, even though there was no street traffic at the time. Second, the officers saw Key enter an apartment building and return

minutes later with a green plastic bag weighted down by a brick-shaped object, hurrying back to the minivan. Third, after the officers attempted to conduct a traffic stop, Key failed to pull over and continued driving at high speeds with the officers in pursuit for five to eight minutes. The court noted that Key's efforts to escape caused the officers to believe that Key had something to hide, and in the Second Circuit, flight is an appropriate factor supporting a finding of probable cause to search a vehicle after it is stopped.

Key also argued that the officers' testimony concerning the items they saw in the rear storage area of his minivan during the traffic stop should have been suppressed because the officers only saw those items after the unlawful search of the front part of the vehicle.

Again, the court disagreed. Even though the officers did not seize the items observed in the rear of Key's vehicle, the court concluded that evidence would have been inevitably discovered in an inventory search of the vehicle, which would have been conducted if Key's vehicle had been impounded.

Finally, Key argued that the officers' warrantless seizure of the cell phones, iPad and address book from his apartment violated the Fourth Amendment. However, the district court held that the officers lawfully seized these items under the plain view doctrine. Under the plain view doctrine, and officer may seize evidence without a warrant if: (1) the officer is lawfully in a position from which the officer views an object, (2) the incriminating nature of the object is immediately apparent and, (3) the officer has a lawful right of access to the object.

Key's sole challenge on appeal was that the plain view doctrine did not apply because the incriminating nature of the phones, iPad and address book were not immediately apparent to the officers.

The court disagreed. When the officers arrested him, Key had been the target of an investigation for several months. The investigation had revealed the murder-for-hire conspiracy involved the use of multiple cell phones, and a separate wiretap investigation established that Key and his coconspirators used cell phones to conduct drug-related activity. The investigation also revealed that officers had analyzed Key's use of numerous cell phones in connection with his suspected criminal activity. Finally, in their experience, officers testified that address books usually contained contact information for associates. Based on these facts, the court concluded that the incriminating nature of the items was immediately apparent to the officers when they seized them, particularly as the officers did not search the electronic devices until after they had obtained a warrant.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/14-3739/14-3739-2017-04-17.pdf?ts=1492439406

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See: United States v. Murillo-Salgado, 854 F.3d 407 (8th Cir. 2017)

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See: United States v. Job, 851 F.3d 889 (9th Cir. 2017)

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United States v. Pickel, 863 F.3d 1240 (10th Cir. 2017)

Police officers in Kansas developed probable cause to believe that Pickel was involved in a drug distribution network that obtained marijuana in California and distributed it in Kansas. While following Pickel's truck on Interstate 80, Kansas officers realized that Pickel deviated from the route they expected him to take. As a result, as it began to get dark, the Kansas officers became worried that they would lose sight of Pickel's truck, so they requested the Nebraska Highway Patrol to stop Pickel based on independent suspicion to avoid revealing the ongoing drug investigation. When a Nebraska state trooper saw Pickel commit a traffic violation, he conducted a traffic stop. During the stop, another officer walked his drug-sniffing dog around Pickel's truck. After the dog alerted to the presence of drugs, the Nebraska officers searched Pickel's truck and found 37 pounds of marijuana hidden in a false fuel tank.

The government charged Pickel with two drug-related offenses.

Pickel filed a motion to suppress the evidence seized from his truck, arguing that the warrantless search of his truck violated the Fourth Amendment.

The court disagreed. Police officers may stop and search a vehicle without a warrant under the automobile exception to the Fourth Amendment's warrant requirement if they have probable cause to believe the vehicle is carrying contraband or other evidence that is subject to seizure under the law.

First, the court held that the Kansas police officers developed probable cause to believe that Pickel was transporting marijuana in his truck based on information obtained from monitored telephone calls and their surveillance of Pickel's truck.

The court further held that the probable cause developed by the Kansas police officers was imputed to the Nebraska state trooper under the collective knowledge doctrine. The collective knowledge doctrine provides that an officer who makes a stop or conducts a search does not need to be the one who developed the reasonable suspicion or probable cause. Instead, the reasonable suspicion or probable cause developed by another officer is imputed to the officer conducting the stop or search. In this case, when the Kansas police officers requested the Nebraska Highway Patrol to stop Pickel, the Kansas officers had probable cause to stop and search his truck. Consequently, the Kansas officers' request imputed that probable cause to the Nebraska Highway Patrol officer under the collective knowledge doctrine; therefore, the court held that the Nebraska trooper's search of Pickel's truck did not violate the Fourth Amendment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/16-3041/16-3041-2017-07-18.pdf?ts=1500395478

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United States v. Mirabal, 876 F.3d 1029 (10th Cir. 2017)

A police officer stopped Mirabal for a traffic violation after receiving a report that Mirabal, a convicted felon, had placed an assault rifle in the trunk of his car. When the officer opened the trunk to Mirabal's car, he could not see the back of the trunk because of a long speaker box that was blocking his view. To see into the trunk better, the officer entered Mirabal's car and pulled down an armrest in the backseat. When the officer pulled the armrest down, he saw a package that contained cocaine. The officer did not find any weapons in Mirabal's car.

The government charged Mirabal with several criminal offenses based on his involvement in a drug distribution ring.

Mirabal filed a motion to suppress the cocaine. Mirabal conceded that the officer had probable cause to believe there was an assault rifle in the trunk. However, Mirabel argued that the officer acted unreasonably by entering the back seat of his car and pulling the armrest down to access the trunk.

The court disagreed, holding that it was reasonable for the officer to enter the backseat and pull the armrest down. The officer testified that when he opened the trunk he could only see the front part of the trunk because a speaker box ran nearly the entire width of the trunk. The officer further testified that he could not see the space behind the speaker box, which was big enough to contain a rifle. At this point, once the officer determined that the speaker box would not move, he went into the backseat to see if he could access the trunk by folding the seats down.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/16-2188/16-2188-2017-11-29.pdf?ts=1511974856

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United States v. Saulsberry, 878 F.3d 946 (10th Cir. 2017)

A restaurant employee called the police and reported that a person was smoking marijuana in a black Honda with Texas license plates located in the restaurant's parking lot. Within two minutes of receiving this information, an officer located the vehicle and approached it. When Saulsberry opened the car door, the officer immediately detected the odor of burnt marijuana. While the officer spoke to Saulsberry about providing his driver's license and insurance information, he noticed that Saulsberry kept reaching over to a bag located on the passenger-side floorboard. The officer called for assistance, and after a backup officer arrived, the officer ordered Saulsberry to exit the car. After Saulsberry got out of the car, he gave the officer consent to search the vehicle for marijuana. The officer found a marijuana cigarette in the center console and arrested Saulsberry.

While the backup officer searched Saulsberry, the officer looked inside the bag on the passenger-side floorboard of the car. Inside the bag, the officer saw a stack of cards. The officer removed the cards from the bag, examined them, and discovered that they were all Capital One credit cards and that none of the cards had Saulsberry's name on them.

The government indicted Saulsberry on one count of possession of 15 or more counterfeit or unauthorized access devices with intent to defraud.

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

First, the court held that the tip from restaurant employee was reliable because it provided several details that were corroborated by the officer within a few minutes of receiving the call from dispatch. As a result, the court concluded that the officer had reasonable suspicion to detain Saulsberry to investigate the tip that someone was smoking marijuana in a car in the parking lot.

Second, the court held that the officer did not have probable cause to examine the stack of cards he found in the bag discovered in Saulsberry's vehicle. Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the vehicle

contains contraband or evidence. The officer testified that he saw a "stack" of cards inside the bag. Even if the top card in the stack was a credit card, the court reasoned that the officer would need to examine each card to determine if the other cards were also credit cards rather than membership cards, library cards, gift cards, or insurance cards. The court also ruled that it would not be uncommon for someone to possess 15 plastic, wallet-sized cards. In addition, the court found it significant that the officer testified that it was only after he removed the cards from the bag and examined them that he felt "there was something . . . shady or something like that." The court concluded that a police officer's observation that a suspect possesses a number of cards, in this case 15, does not provide probable cause that the suspect has been or is committing a crime. Consequently, the court held that the government did not establish probable cause justifying the officer's examination of the cards; therefore, the evidence obtained from that examination should have been suppressed.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/16-6306/16-6306-2017-12-28.pdf?ts=1514484275

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United States v. Eshetu, 863 F.3d 946 (D.C. Cir. 2017)

Eshetu and two other men met with undercover police officers and formulated a plan to rob a storage unit that was being used as a drug "stash house." Prior to the robbery, Eshetu and the other men told the officers that they had access to weapons, stating that they would be armed with firearms and a machete for the robbery.

The day of the robbery, Eshetu and the other men arrived at the storage unit in a Kia where they met the officers, who had arrived in a different vehicle. When asked about placing their weapons in the officers' vehicle, the men stated they planned to leave their weapons in the trunk of the Kia because they might need to use two vehicles in the robbery. A short time later, the officers arrested Eshetu and the other men, disclosing that the "stash house" was fictitious.

After the arrests, an officer drove the Kia to the police stations, searched the passenger compartment, and seized a bag and some black clothing. The Kia was later driven to another law enforcement facility where it was secured until a warrant could be obtained for a more thorough search.

Eshetu filed a motion to suppress the evidence seized by the officer pursuant to his warrantless search of the Kia.

The court held that the warrantless search was lawful under the automobile exception to the Fourth Amendment's warrant requirement. Officers may conduct a warrantless search under this exception when the automobile is "readily mobile," and the officers have probable cause to believe that it contains contraband.

For an automobile to be "readily mobile," it must be readily capable of being driven. Here, the court concluded that the Kia was "readily mobile," as Eshetu and the other men had driven the Kia to previous meetings with the undercover officers, and then drove the Kia to the storage facility on the day of the planned robbery.

The court then held that the officers had probable cause to search the Kia for weapons. First, Eshetu and the other men made it clear to the officers in previous meetings that they were going

to be armed on the day of the robbery. Second, on the day of the robbery, the men told the officers that they planned to leave their weapons in the Kia.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/cadc/15-3020/15-3020-2017-07-25.pdf?ts=1500993102

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Computers / Electronic Devices / Wiretaps /Bugs

Network Investigative Technique (NIT) warrants

United States v. Levin, 874 F.3d 316 (1st Cir. 2017)

In September 2014, the Federal Bureau of Investigation (FBI) began investigating an internet forum named "Playpen" for sharing child pornography hosted on "The Onion Router" (Tor). Tor, along with similar networks, collectively known as the Dark Web, exists to provide anonymity to Internet users by masking user data and hiding information by funneling it through a series of interconnected computers.

In January 2015, FBI agents gained access to Playpen servers and relocated the website content to servers in a secure government facility in the Eastern District of Virginia. The agents assumed administrative control of the site. Although FBI investigators could monitor Playpen traffic, it could not determine who was accessing Playpen because of the Tor encryption technology.

In February 2015, the FBI applied for a warrant in the Eastern District of Virginia to search computers that accessed Playpen by using a Network Investigative Technique (NIT). The warrant described the application of the NIT, which sent computer code to Playpen users' computers that instructed the computers to transmit certain information back to the government. The information sent to the government included the computer's Internet Protocol (IP) address, operating system information, operating system username, and its Media Access Control (MAC) address, which is a unique number assigned to each network modem. Although Playpen was hosted in the Eastern District of Virginia, the warrant explained that, "the NIT may cause [a defendant's] computer--wherever located--to send to a computer controlled by or known to the government, network level messages containing information that may assist in identifying the computer." A United States magistrate judge signed the warrant, and the FBI began collecting the personal data of Playpen users.

During the warrant period, Levin accessed Playpen and the FBI located him in Massachusetts through information obtained from the NIT. The FBI subsequently obtained a warrant in the District of Massachusetts to search Levin's computer. When the agents searched Levin's computer, they found eight media files containing child pornography.

The government charged Levin with possession of child pornography.

Levin filed a motion to suppress the evidence obtained through the NIT.

The district court suppressed the evidence obtained through the NIT, holding that the magistrate judge in the Eastern District of Virginia exceeded her statutory authority by issuing the NIT warrant beyond her district court's jurisdictional boundaries. The government appealed.

The exclusionary rule was designed to deter misconduct by police officers. As a result, when the police exhibit "deliberate, reckless, or grossly negligent" disregard for Fourth Amendment rights, the exclusion of evidence is warranted. However, when police officers act with an objectively reasonable good-faith belief that their conduct is lawful, exclusion of evidence is not appropriate, as there is no bad conduct to deter.

In this case, the government presented the magistrate judge with a request for a warrant, containing a detailed affidavit from an experienced officer, describing in detail its investigation, including how the NIT works, which places were to be searched , and which information was to be seized. To the extent that a mistake was made in issuing the warrant, it was made by the magistrate judge and not by the executing officers. In addition, the executing officers had no reason to suspect that a mistake had been made and the warrant was invalid, as this was the first time the issue of NIT warrants and their scope had been challenged. Consequently, the court concluded there was no law enforcement conduct to deter and vacated the judgment of the district court suppressing the evidence discovered pursuant to the NIT warrant and the warrant authorizing the search of Levins' computer. Instead, the court stated that such conduct should be encouraged because it "leaves it to the courts to resolve novel legal issues," such as the one faced by the agents and the magistrate judge in this case.

The court added that recently the Eight and Tenth Circuits reached similar results in cases involving the execution of the same NIT warrants as issue in this case. (See: United States v. Horton, 863 F.3d 1041 (8th Cir. 2017) and United States v. Workman, 863 F.3d 1313 (10th Cir. 2017). In addition, on December 1, 2016, *Federal Rule of Criminal Procedure 41(b)(6)* was added to provide an additional exception to the magistrate's jurisdictional limitation by allowing warrants for programs like the NIT. See https://www.law.cornell.edu/rules/frcrmp/rule_41.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/16-1567/16-1567-2017-10-27.pdf?ts=1509132604

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United States v. Horton; United States v. Croghan, 863 F.3d 1041 (8th Cir. 2017)

In September 2014, the Federal Bureau of Investigation (FBI) began investigating an internet forum for sharing child pornography hosted on the Tor[1] network called "Playpen," which had more than 150,000 registered accounts. In January 2015, FBI agents gained access to Playpen servers and relocated the website content to servers in a secure government facility in the Eastern District of Virginia. The agents assumed administrative control of the site. Although FBI investigators could monitor Playpen traffic, it could not determine who was accessing Playpen because of the Tor encryption technology.

In February 2015, the FBI applied for a warrant in the Eastern District of Virginia to search computers that accessed Playpen by using a Network Investigative Technique (NIT). The warrant described the application of the NIT, which sent computer code to Playpen users' computers that instructed the computers to transmit certain information back to the government. The information sent to the government included the computer's Internet Protocol (IP) address, operating system information, operating system username, and its Media Access Control (MAC) address, which is a unique number assigned to each network modem. Although Playpen was hosted in the Eastern

[1] The Onion Router ("Tor") network exists to provide anonymity to Internet users by masking user data, hiding information by funneling it through a series of interconnected computers.

District of Virginia, the warrant explained that, "the NIT may cause [a defendant's] computer--wherever located--to send to a computer controlled by or known to the government, network level messages containing information that may assist in identifying the computer." A United States magistrate judge signed the warrant, and the FBI began collecting the personal data of Playpen users.

During the warrant period, Horton and Croghan accessed Playpen and the FBI located them in Iowa through information from the NIT. The government charged Horton and Croghan with child-pornography related offenses.

The defendants filed a motion to suppress the evidence obtained through the NIT.

The district court suppressed the evidence obtained through the NIT, holding that the magistrate judge in the Eastern District of Virginia exceeded her statutory authority by issuing the NIT warrant beyond her district court's jurisdictional boundaries. The government appealed.

First, the Eighth Circuit Court of Appeals held that the execution of the NIT in this case required a warrant. The FBI sent computer code to the defendants' computers that searched those computers for specific information and sent that information back to law enforcement. Even if a defendant has no reasonable expectation of privacy in his IP address, he has a reasonable expectation of privacy in the contents of his computer.

Next, when the NIT warrant was issued in this case, *Federal Rule of Criminal Procedure 41* authorized a magistrate judge "to issue a warrant to search for and seize a person or property located within the district." Even though *Rule 41* provides exceptions to this jurisdictional limitation[2], the court concluded that none of these exceptions expressly allowed a magistrate judge in one jurisdiction to authorize a search of a computer in a different jurisdiction.[3]

Finally, the court held that while the search warrant was defective, the good-faith exception to the exclusionary rule applied. Consequently, the court reversed the district court's grant of suppression.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3976/16-3976-2017-07-24.pdf?ts=1500910259

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United States v. Workman, 863 F.3d 1313 (10th Cir. 2017)

In September 2014, the Federal Bureau of Investigation (FBI) began investigating an internet forum for sharing child pornography hosted on the Tor network called "Playpen," which had more than 150,000 registered accounts. In January 2015, FBI agents gained access to Playpen servers and relocated the website content to servers in a secure government facility in the Eastern District of Virginia. The agents assumed administrative control of the site. Although FBI investigators

[2] A magistrate may issue a warrant for property moved outside of the jurisdiction, for domestic and international terrorism, for the installation of a tracking device, and for property located outside of a federal district.

[3] On December 1, 2016, *Federal Rule of Criminal Procedure 41(b)(6)* was added to provide an additional exception to the magistrate's jurisdictional limitation by allowing warrants for programs like the NIT. See https://www.law.cornell.edu/rules/frcrmp/rule_41.

could monitor Playpen traffic, it could not determine who was accessing Playpen because of the Tor encryption technology.

In February 2015, the FBI applied for a warrant in the Eastern District of Virginia to search computers that accessed Playpen by using a Network Investigative Technique (NIT). The warrant described the application of the NIT, which sent computer code to Playpen users' computers that instructed the computers to transmit certain information back to the government. The information sent to the government included the computer's Internet Protocol (IP) address, operating system information, operating system username, and its Media Access Control (MAC) address, which is a unique number assigned to each network modem. Although Playpen was hosted in the Eastern District of Virginia, the warrant explained that, "the NIT may cause [a defendant's] computer--wherever located--to send to a computer controlled by or known to the government, network level messages containing information that may assist in identifying the computer." A United States magistrate judge signed the warrant, and the FBI began collecting the personal data of Playpen users.

During the warrant period, Workman accessed Playpen and the FBI located him in Colorado through information from the NIT. The FBI subsequently obtained a warrant in the District of Colorado to search Workman's computer. When the FBI executed the warrant, agents found Workman at home in the act of downloading child pornography onto his computer.

The government charged Workman with receiving and possessing child pornography.

Workman filed a motion to suppress the evidence obtained through the NIT.

The district court suppressed the evidence obtained through the NIT, holding that the magistrate judge in the Eastern District of Virginia exceeded her statutory authority by issuing the NIT warrant beyond her district court's jurisdictional boundaries. The government appealed.

Even if the magistrate judge in the Eastern District of Virginia lacked the authority to issue the warrant to search Workman's computer[1], the Tenth Circuit Court of Appeals held that the good-faith exception to the exclusionary rule applied. In this case, the court found that the agents executing the warrant could reasonably rely on the magistrate judge's authority to issue a warrant authorizing installation of software and retrieval of information in the Eastern District of Virginia. The court added that if the agents executing the search warrant had "sophisticated legal training, they might have recognized the geographic constraints that had escaped the notice of the magistrate judge."

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/16-1401/16-1401-2017-07-21.pdf?ts=1500654692

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[1] On December 1, 2016, *Federal Rule of Criminal Procedure 41(b)(6)* was added to provide an exception to the magistrate's jurisdictional limitation by allowing warrants for programs like the NIT. See https://www.law.cornell.edu/rules/frcrmp/rule_41.

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

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

United States v. Stimler, 864 F.3d 253 (3d Cir. 2017)

The government charged three Orthodox Jewish rabbis, Stimler, Goldstein and Epstein, with various kidnapping-related offenses. The charges stemmed from their involvement in a scheme in which they, along with others, sought to assist Orthodox Jewish women to obtain divorces from uncooperative husbands.

Prior to trial, the government obtained a court order pursuant to *Section 2703(d) of the Stored Communications Act (SCA)*, compelling AT&T to provide historic cell site location information (CSLI) generated by Goldstein's phone. While not as accurate as traditional GPS systems, historic CSLI records can generate an approximate profile of a person's movements based on the phone calls that person makes over a period of time. The *2703(d)* order obtained by the government covered fifty-seven days of Goldstein's location history.

Goldstein filed a motion to suppress the CSLI provided by AT&T. Goldstein argued that cell phone users have a reasonable expectation of privacy in their historical CSLI; therefore, *§ 2703 (d)* violates the Fourth Amendment because it authorizes the government to obtain this information without first obtaining a warrant.

The court disagreed. The government can obtain an order pursuant to § *2703 (d)* of the *SCA* upon a showing that there are "reasonable grounds to believe" that records, such as historical CSLI, "are relevant and material to an ongoing criminal investigation." The court noted that this "reasonable grounds" requirement is a lesser burden than the "probable cause" requirement of the Fourth Amendment. However, the court concluded that *§ 2703 (d)* did not violate the Fourth Amendment because individuals do not have a reasonable expectation of privacy in their historic CSLI.

The court further held that the government established reasonable grounds to believe that Goldstein's CSLI were relevant and material to an ongoing criminal investigation. First, the government provided information about the kidnapping ring, the charged kidnappings, and the alleged involvement of each defendant. Second, the government stated that a co-conspirator had implicated the defendants in statements that he provided to investigators. Finally, the government explained that its request was limited to CSLI records during the periods when kidnappings occurred in an attempt to identify the location of the alleged participants.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca3/15-4053/15-4053-2017-07-17-0.pdf?ts=1500332405

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United States v. Wallace, 857 F.3d 685 (5th Cir. 2017)

A confidential informant (CI) told a police officer that Wallace, a wanted fugitive, was living in Austin. The CI also gave the officer Wallace's cell phone number. After the officer confirmed that Wallace had an outstanding arrest warrant, he obtained a Ping Order for Wallace's cell phone under the federal pen-trap statute, *Section 2703(d) of the Stored Communications Act*, and state law. The Ping Order allowed officers to obtain real-time GPS location (prospective cell site data)

of Wallace's cell phone from AT&T. The officers used this information to locate and arrest Wallace. When the officers arrested Wallace, they found a pistol and ammunition on the ground near him, as well as ammunition in his pocket.

The Government charged Wallace with being a felon in possession of a firearm.

Wallace filed a motion to suppress the evidence. First, Wallace argued that the Ping Order was invalid because the government failed to show that it sought an order to obtain information relevant to an "ongoing criminal investigation," as required by the federal pen-trap statute and the Texas Code of Criminal Procedure. Wallace claimed that the phrase "ongoing criminal activity" implied "new criminal activity," and did not cover the arrest warrant for his probation violation.

The court concluded that even if the Ping Order was issued in violation of the pen-trap statute or state law, Wallace was not entitled to suppression of the evidence as neither the pen-trap statute nor the Texas Code of Criminal Procedure provides for suppression of evidence as a remedy for a violation.

Wallace also argued that the government violated the Fourth Amendment by obtaining his prospective cell site data by obtaining a *§2703(d)* court order based upon "specific articulable facts," instead of a search warrant based upon probable cause.

The court disagreed. The court found little distinction between historical cell site data and prospective cell site data. In this case, the court held that the information the government requested was, in fact, a stored historical record because it was received by the cell phone service provider and stored, if only momentarily, before being forwarded to the officers. The court then concluded that like historical cell site information, prospective cell site data is not covered by the Fourth Amendment.[1] Consequently, the court concluded that it is constitutional to authorize the collection of prospective or historical cell site information under *§2703(d)* if an application meets the lesser "specific and articulable facts" standard, rather than the Fourth Amendment's probable cause standard.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-40702/16-40702-2017-05-22.pdf?ts=1495495848

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United States v. Riley, 858 F.3d 1012 (6th Cir. 2017)

Police officers in Michigan obtained a warrant to arrest Riley for armed robbery. Two days later, Riley's girlfriend gave officers Riley's cell phone number. The next day, officers obtained a court order under *18 U.S.C. §§ 2703, 3123* and *3124* compelling AT&T to provide the government with a record of Riley's cell-site location information, a record of all inbound and outbound phone calls, as well as real-time GPS tracking of Riley's cell phone. Within hours of obtaining the court order, officers received real-time GPS data indicating that Riley's phone was located at the Airport Inn in Memphis, Tennessee.

[1] In U.S. v. Skinner, the Sixth Circuit, the only appellate court to address the issue to date, held that obtaining prospective cell site data is not a Fourth Amendment search. The court reasoned that when a person voluntarily uses a cell phone, he has no reasonable expectation of privacy in the GPS data and location of his cell phone. See: 9 INFORMER 12.

Officers went to the Airport Inn and showed the front-desk clerk a picture of Riley. The clerk told the officers that the man in the photograph had checked in under a different name and was in Room 314. The officers went to Room 314, knocked on the door, and arrested Riley after he opened the door. While arresting Riley, the officers saw a handgun in plain view on the bed.

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

Riley filed a motion to suppress the handgun. Riley argued that the government was required to obtain a warrant based on probable cause to obtain his cell phone records and conduct real-time GPS tracking of his cell phone's location.

The court recognized that a criminal suspect has no reasonable expectation of privacy in his location while moving along public thoroughfares. However, the court noted that the use of a tracking device to obtain information from inside a dwelling that could not otherwise be observed by visible surveillance constitutes a Fourth Amendment search. In this case, the real-time GPS tracking revealed only that Riley had traveled to the Airport Inn. The tracking did not reveal which room, if any, the phone was in at the time of the tracking. When the officers arrived at the Airport Inn, they learned that Riley was in Room 314 after questioning the front-desk clerk. The government learned no more about Riley's whereabouts from tracking his cell phone GPS data than what Riley exposed to public view by traveling to the motel lobby "along public thoroughfares." Consequently, the court held that the government did not conduct a search under the Fourth Amendment when it tracked the real-time GPS coordinates of Riley's cell phone.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/16-6149/16-6149-2017-06-05.pdf?ts=1496683874

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United States v. Thompson, 866 F.3d 1149 (10th Cir. 2017)

Thompson and several co-defendants were convicted of a variety of federal drug offenses. Before trial, the district court admitted cell-service location information (CSLI) the government obtained with a court order pursuant to *§ 2703(d)* of the *Stored Communications Act* (*SCA*).

Thompson filed a motion to suppress the CSLI, arguing that a cell phone user's location is protected by the Fourth Amendment; therefore, to obtain his CSLI, the government was required to obtain a warrant supported by probable cause.

The court disagreed. The court held that cell-phone users lack a reasonable expectation of privacy in their historical CSLI because they voluntarily convey CSLI to third parties who create records of that information for their own business purposes. In so ruling, the court followed the Fourth, Fifth, Sixth and Eleventh Circuits, which have already held that CSLI is a business record created by a third party, the cell phone service providers, from information that cell-phone users turn over voluntarily. The court noted that until the Supreme Court instructs the lower courts otherwise, it was bound to follow the Fourth Amendment's "third-party" doctrine. The court added that the Supreme Court recently granted certiorari in United States v. Carpenter, a Sixth Circuit case, to address whether the Fourth Amendment permits the warrantless seizure and search of CSLI.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-3313/15-3313-2017-08-08.pdf?ts=1502208063

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Monitoring GPS Tracking Device Out-of-State

United States v. Castetter, 865 F.3d 977 (7th Cir. 2017)

Police officers in Michigan were investigating Mark Holst for his participation in a methamphetamine distribution ring. Officers in Michigan obtained a warrant and installed a GPS tracking device on a car owned by Holst. The officers tracked Holst's car to Cory Castetter's home, which was located across the Michigan state border in Indiana. A confidential informant told the officers that Holst had traveled to Indiana to purchase methamphetamine. Officers stopped Holst's car as he was driving home and seized methamphetamine from him. The Michigan officers relayed this information to officers in Indiana who obtained a warrant to search Castetter's house. When officers executed the search warrant, they discovered methamphetamine, other drugs, and a large amount of cash.

The government charged Castetter with several drug offenses.

Castetter filed a motion to suppress the evidence seized from his house. Castetter argued that the Michigan officers lacked the authority to monitor the location of Holst's car while it traveled outside the state of Michigan. As a result, Castetter claimed that the Michigan officers were prohibited from giving the Indiana officers information concerning Holst's travels in Indiana, which established probable cause to obtain the warrant to search his house.

The court disagreed. The Fourth Amendment requires that a search warrant be supported by probable cause, an oath, and particularity. While states may decide as a matter of state law not to authorize their police departments to acquire information from out-of-state sources, federal courts do not use the exclusionary rule to enforce state-law doctrine. In this case, the Indiana judge determined that there was no problem, as a matter of Indiana law, in using information provided by the Michigan officers.

In addition, the court found that all the officers learned by monitoring the GPS device was the location of Holst's car, and that Castetter had no reasonable expectation of privacy in that location. The court added that no constitutional violation occurs if, by executing a warrant to search one person, such as Holst, officers learn incriminating information about another person, such as Castetter.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/17-1327/17-1327-2017-08-04.pdf?ts=1501866276

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Pen / Trap Orders / 18 U.S.C. § 3121-3127

United States v. Ulbricht, 858 F.3d 71 (2d Cir. 2017)

A jury convicted Ulbricht a/k/a Dread Pirate Roberts (DPR) of drug trafficking and other crimes related to his creation and operation of Silk Road, an online marketplace whose users primarily purchased and sold illegal goods and services. On appeal, Ulbricht argued, among other things, that evidence introduced against him at trial should have been suppressed because the government obtained it in violation of the Fourth Amendment.

After Ulbricht became a primary suspect in the government's investigation of Silk Road, the government obtained five "pen/trap" orders under *Title 18 U.S.C. §§ 3121-3127*. The orders authorized the government to collect internet protocol (IP) address data for Internet traffic to and from Ulbricht's home wireless router and other devices that regularly connected to Ulbricht's home router. In each order, the government specified that it did not seek to obtain the contents of any communications. Instead, the government sought to collect only "dialing, routing, addressing, and signaling information" that was similar to data captured by "traditional telephonic pen registers and trap and trace devices." Ulbricht claimed that the pen/trap orders violated the Fourth Amendment because he had a reasonable expectation of privacy in the IP address routing information that the orders allowed the government to collect.

The court joined the other circuits that have considered this issue and held that collecting IP address information, without content, is "constitutionally indistinguishable" from the use of pen registers and trap and trace devices to collect telephone dialing information.[1] As a result, the court held that the pen register and trap and trace orders did not violate the Fourth Amendment.

Ulbricht also argued that the warrants authorizing the search and seizure of his laptop computer as well as his Facebook and Google accounts violated the Fourth Amendment's particularity requirement.

To satisfy the Fourth Amendment's particularity requirement, a warrant must:

1. Identify the specific offense for which the government has established probable cause;

2. Describe the place to be searched; and

3. Specify the items to be seized by their connection or nexus to the crimes for which the government has established probable cause.

The court held that the warrants authorizing the government to search the defendant's laptop computer as well as his electronic media accounts did not violate the Fourth Amendment's particularity requirement. First, the warrants explicitly incorporated by reference an affidavit listing the crimes charged, which included narcotics trafficking, computer hacking, money laundering, and murder-for-hire offenses. The affidavit also described the workings of Silk Road, the role of DPR in operating the site, and included information that established probable cause to believe that Ulbricht and DPR were the same person. Second, the warrants described the places to be searched. Third, the warrants listed the information to be seized and described how this information was connected to the offenses for which Ulbricht was charged.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-1815/15-1815-2017-05-31.pdf?ts=1496241010

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[1] 3rd, 4th, 6th, 8th, and 9th Circuits.

Wiretaps (*18 U.S.C. § 2510*) (Particularity / Necessity / Minimization Requirements

United States v. Gordon, 871 F.3d 35 (1st Cir. 2017)

In September 2012, the Drug Enforcement Administration (DEA) began investigating a drug-distribution ring based in Lewiston, Maine. Despite using a variety of investigative techniques, the DEA was unable to determine the identity or location of the drug ring's suppliers or determine the ring's organizational structure. As a result, the DEA obtained court orders to conduct wiretaps, pursuant to *18 U.S.C. §§ 2510-2522* (Title III), on several telephones connected to members of the ring. The government eventually charged Gordon and eleven other co-defendants with drug-related criminal offenses.

Gordon filed a motion to suppress the evidence obtained through the wiretaps.

First, Gordon argued that the wiretap orders failed to comply with Title III's particularity requirement because the orders were not limited to the phone numbers being used by the defendants when the judge issued the orders. Instead, the wiretap orders included phone numbers "subsequently assigned to or used by the instruments bearing the same" electronic serial number (ESN) or International Mobile Equipment Identity (IMEI) number as the original tapped telephone. For example, if a defendant changed the ten-digit telephone number assigned to a particular cell phone, the wiretap order would automatically cover the new ten-digit number, and the government would not have to seek a new wiretap order every time that number changed.

The court held that Title III's particularity requirement does not require limiting a wiretap order to a specific telephone number rather than a specific ESN or IMEI number reasonably believed to be used by the target. In this case, the affidavit submitted by the government outlined several convincing reasons for tracking telephones by ESN or IMEI numbers, such as the fact that drug traffickers change telephone numbers frequently in an attempt to avoid detection and they do not typically associate their names with telephone numbers. In addition, the court noted that the wiretap orders restricted interception to the specific serial numbers associated with the targets' cell phones.

The court further held that the wiretap orders satisfied Title III's particularity requirement because the government listed specific criminal statutes, which identified the offenses to which the sought-after communications related.

Finally, the court held that the wiretap orders were sufficiently particular in describing the DEA as "the agency authorized" to conduct the wiretapping.

Second, Gordon argued that the government failed to establish that is was necessary to conduct the wiretapping. To protect a person's right to privacy, Title III requires the government establish "necessity" as a prerequisite for obtaining a wiretap order.

The court disagreed. To satisfy the necessity requirement, a wiretap application must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear unlikely to succeed if tried, or to be too dangerous." In this case, the government did not apply for wiretap orders until eighteen months into its investigation. At that point, the DEA already had employed a variety of investigative techniques, including the use of confidential informants, physical surveillance, controlled buys, analysis of telephone data and public records, and the issuance of subpoenas. The government's application included this information as well as why other investigative techniques, such as obtaining cell-

site location information and vehicle tracking, were not plausible. The court concluded that the government established that its investigation had reached a point where wiretapping was reasonably necessary.

Third, Gordon argued that the government violated Title III's "minimization" requirement. Title III requires that wiretaps must "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception."

The court concluded that the wiretap orders in this case satisfied this requirement, as the orders directed the monitors to stop listening and/or recording when it became apparent that a conversation was not related to the criminal investigation. In addition, the government distributed a "minimization memorandum" to the wiretap monitors, which contained a similar warning.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/15-2087/15-2087-2017-09-08.pdf?ts=1504902604

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Consent Searches (Authority to Consent / Scope / Voluntariness)

See: United States v. Ramdihall, 859 F. 3d 80 (1st Cir. 2017);
United States v. Hillaire, 857 F.3d 128 (1st Cir. 2017)

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United States v. Dion, 859 F.3d 114 (1st Cir. 2017)

A police officer pulled Dion over for speeding on Interstate 70 in Kansas. As the officer approached Dion's pickup truck, he noticed that it bore Colorado license plates. Dion gave the officer an Arizona driver's license and told the officer that he was driving home to Arizona after meeting with his accountant in Pennsylvania. As Dion accompanied the officer back to his patrol car, he told the officer he could search his truck, without being asked, which the officer found unusual. The officer also noticed that Dion appeared to be extremely nervous. While the officer wrote Dion a warning ticket, he asked Dion about his trip, as the officer thought it was suspicious that Dion had travelled from Arizona to Pennsylvania to meet with an accountant. The officer also discovered that Dion had a prior criminal history that included charges related to marijuana and cocaine. After the officer gave Dion back his driver's license, he told Dion that the "stop was over," but that he would like to ask Dion some more questions. Dion agreed to talk to the officer and again gave the officer consent to search his truck.

The officer opened the tailgate and saw deteriorating boxes, road atlases, and a refrigerator. Based on his experience, the officer believed these items were a "cover load" to deliberately disguise contraband. When the officer asked Dion about the items, Dion told him the items had come from Boston. The officer thought it was suspicious that Dion had never mentioned that he had gone to Boston as part of his trip. After a back-up officer arrived, the officers began removing items from Dion's truck. After a few minutes, Dion revoked his consent and the officers stopped searching his truck. The officer then asked Dion if he could run a drug-dog around Dion's truck. Dion said, "Yeah," and the officer walked his dog around the truck. The dog detected the odor of narcotics emanating from Dion's truck. The officers searched the truck and found $830,000 cash. In addition, the officers found information connecting Dion to a self-storage center in Boston.

The officers provided this information to law enforcement officers in Massachusetts who obtained a warrant to search Dion's storage unit. Inside the storage unit, officers found 160 pounds of marijuana, drug ledgers, and $11 million in cash.

The government charged Dion with a variety of drug-related offenses. Dion filed a motion to suppress the evidence against him, arguing that it was discovered in violation of the Fourth Amendment.

The court disagreed. First, the court held that the officer did not unreasonably prolong the duration of the stop. While the officer was writing the citation, he was allowed to ask Dion about his travel history and conduct a criminal records check. During this time, Dion was extremely nervous and without being prompted, gave the officer permission to search his truck. In addition, the officer was allowed to ask Dion questions about his prior drug arrests after learning that Dion had a criminal history. The court concluded that the officer's questions were reasonable and to the extent those questions extended the stop, did not violate the Fourth Amendment.

Second, the court held that Dion voluntarily consented to the initial search of his truck. Dion told the officer that he could search his truck at the beginning of the stop and again after the stop had concluded. In addition, the officer's failure to tell Dion that he was free to go, did not make Dion's consent involuntary. The officer clearly told Dion when the stop was over, which implied that Dion was no longer being detained for speeding. Instead of leaving, Dion decided to stay and voluntarily speak to the officer.

Finally, the court concluded that the officers established probable cause to believe Dion was trafficking contraband; therefore, the second search was valid under the automobile exception to the Fourth Amendment's warrant requirement. By the time Dion revoked his consent to search, the officers had established probable cause to search his truck the second time based upon, among other things: 1) Dion's unsolicited offers to search his truck; 2) Dion's extreme nervousness; 3) Dion's explanation for his trip; 4) Dion's criminal history; 5) the discovery of items connected to Boston when Dion did not mention Boston as stop during his trip.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/16-1377/16-1377-2017-06-08.pdf?ts=1496952006

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United States v. Escamilla, 852 F.3d 474 (5th Cir. 2017)

Border Patrol agents patrolling a privately owned ranch, approximately 30 miles from the Mexican border, encountered two pickup trucks traveling in tandem that had activated a sensor designed to detect illegal entry into the ranch. The legitimate traffic traveling through the ranch primarily consisted of oil industry workers in company trucks, and the area where the sensor was activated was at a location where a vehicle should not be. In addition, the agents knew that smugglers commonly traveled in tandem and drove vehicles that resembled official oil company vehicles, commonly referred to as "clone vehicles."

When the agents activated their lights to stop the trucks, one stopped and the other sped away. Agents approached the stopped truck and encountered the driver, Escamilla, who was nervous and could not give a clear answer as to why he was driving across the ranch. The agents also noticed that Escamilla wore a shirt that looked similar to a work uniform, but it lacked oil company logos or decals, and Escamilla's truck was unusually clean and contained no tools or other objects that

work trucks usually carry. Finally, the agents checked the truck's registration, which came back to a residential address, which was not common, as company trucks are usually registered to a business.

Escamilla consented to a search of his truck, but the agents did not find anything in the truck's fuel cell, which appeared to be inoperable and out of place. One of the agents then asked Escamilla for consent to search Escamilla's phone. Escamilla consented and handed his phone to the agent. The agent examined the phone and saw that it was a simple flip phone containing only three numbers, two of which were saved under a single letter, rather than a proper name. After searching the phone, the agent handed it back to Escamilla because he was "done with it."

Escamilla then agreed to follow the agents to the ranch's main gate and allow a Border Patrol dog to sniff his truck. According to the handler, the dog "alerted, but nothing solid," which indicated that drugs may have been in the truck recently. In the meantime, the agents heard over their radios that the truck, which had been traveling in tandem with Escamilla, had rammed a gate and crashed. Agents searched that truck and found marijuana and heroin inside it. At this point, the agents arrested Escamilla, based on his connection to the other truck.

The agents transported Escamilla to a Border Patrol station where they met an agent with the Drug Enforcement Administration (DEA). The Border Patrol agents told the DEA agent that Escamilla had consented to a search of his phone, and then gave Escamilla's phone to the DEA agent. The DEA agent manually searched Escamilla's phone to determine its number so he could request its call records from AT&T. The agent eventually received the call records, which were later admitted into evidence against Escamilla at trial.

Before Escamilla was transported to jail, the DEA agent asked Escamilla to claim his property from the items the Border Patrol agents had taken from him. Escamilla claimed his driver's license and some jewelry. When an agent asked Escamilla about the cell phone that had been searched by the agents, Escamilla said the phone was not "his."

Several days later, the DEA agent used a forensic examination program to conduct a more thorough search of Escamilla's phone. This search confirmed the phone's contact number that the agent had already learned from his previous manual search.

After the government charged Escamilla with drug possession and conspiracy, Escamilla filed a motion to suppress the phone, its contact number, and all evidence recovered from it. Escamilla claimed the Border Patrol's initial stop was not justified; however, if the stop was ruled to be justified, Escamilla claimed that the agents unreasonably prolonged its duration. Finally, Escamilla claimed that the three warrantless searches of his phone violated the Fourth Amendment.

First, the court held that the Border Patrol agents lawfully stopped Escamilla because they had reasonable suspicion to believe that he was involved in criminal activity. Specifically, the stop occurred 30 miles from the Texas-Mexico border, Escamilla's truck was detected by sensors in an area not typically used by legitimate ranch traffic traveling in tandem with another truck, Escamilla's truck lacked the usual markings of an oil company vehicle, and the truck was registered to a residential address rather than a business.

Second, the court held that the officers did not unreasonably prolong the duration of the stop. After stopping Escamilla, the court commented that the agents "continued to amass suspicion that he was involved in smuggling."

Third, the court held that the first search of Escamilla's phone by the Border Patrol agent was lawful, because Escamilla voluntarily consented to its search. The uncontested evidence established that the agent asked Escamilla, "do you mind if I look through your phone?" and then Escamilla handed it to him.

Fourth, the court held that the DEA agent's manual search of Escamilla's phone at the Border Patrol station violated the Fourth Amendment. Escamilla consented to the first search of the phone when he handed it to the Border Patrol agent. However, after examining the phone, the agent gave the phone back to Escamilla upon "being done with it." The court concluded that a reasonable person in Escamilla's position would have believed that his consent to search the phone would have ended at this point. The DEA agent's search of Escamilla's phone, several hours after Escamilla had been arrested, was a second, distinct search. Consequently, the court held that agent was required to have a warrant, an exception, or consent from Escamilla again, before he could lawfully examine the phone. Because the agent did not have a warrant, an exception, or obtain Escamilla's consent, the court held that the evidence discovered by the agent as the result of this search should have been suppressed.[1]

Finally, the court held the DEA agent's warrantless forensic search of Escamilla's phone several days after his arrest was lawful. When Escamilla expressly disclaimed ownership of the phone, he effectively abandoned the phone and any reasonable expectation of privacy in it. As a result, the court found that Escamilla did not have standing to challenge the agent's forensic search of the phone.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-40333/16-40333-2017-03-29.pdf?ts=1490830233

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United States v. Radford, 856 F.3d 1147 (7th Cir. 2017)

A uniformed police officer boarded an Amtrak train in Galesburg, Illinois to conduct a voluntary interview of Radford, whom he suspected might be transporting illegal drugs. The officer knocked on the door to Radford's roomette, which measured 3 ½ feet by 6 ½ feet, and Radford, without having to stand, opened the door. The officer identified himself and told Radford that he was doing "security checks" to "check for people transporting illegal narcotics on trains." The officer requested Radford's identification and train ticket. Radford handed the officer her identification and told him that she had an electronic train ticket, which was on her phone. After examining Radford's identification, the officer asked her a series of security questions and then asked Radford if she was transporting any illegal narcotics. After Radford replied, "no," the officer asked her if he could search her luggage. Radford told the officer, "I guess so. You're just doing your job." The officer asked Radford to step out of the roomette so he could search her luggage and Radford complied. The officer searched Radford's purse and makeup bag and found 707 grams of heroin.

[1] Although this evidence was admitted at trial, the court held the district court's error was "harmless," as the government had lawfully obtained the same evidence by other means.

The government charged Radford with possession with intent to distribute heroin. Radford filed a motion to suppress the evidence, arguing that the officer only discovered the heroin after he had unlawfully seized her. Radford claimed that she was intimidated by the officer because the roomette was small; the officer was in uniform and armed; the officer was white and she was black, and the officer did not tell Radford that she had a right to refuse to answer his questions or consent to a search of her bags.

The court disagreed. First, the officer did not enter the roomette until Radford consented to the search of her bags. Second, the officer's uniform and firearm established his identity as a police officer. Third, there cannot be a rule that a police officer is forbidden to speak to a person of another race. Finally, because the officer did not threaten to arrest Radford, there was no need to tell Radford that she did not have to answer his questions or consent to a search. As a result, the court held that the officer did not seize Radford when he questioned her.

Radford further argued that she did not voluntarily consent to a search of her bags.

Again, the court disagreed. The court concluded that Radford's response "I guess so," to the officer's request to search her bags was the same as answering, "yes." In addition, the court noted that there was no other evidence to indicate that Radford's response was not voluntary.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-3768/16-3768-2017-05-22.pdf?ts=1495467059

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United States v. Ortega-Montalvo, 850 F.3d 429 (8th Cir. 2017)

Federal agents received information that Ortega, a Mexican citizen, had illegally re-entered the United States after having been convicted of aggravated assault for shooting a police officer. The agents determined that Ortega was living in an apartment and went there to arrest him. When the agents knocked on the apartment door, an Hispanic male, later identified as Maldonado, answered the door. The agents identified themselves and displayed their badges. After the agents discovered that Maldonado did not speak English, an agent fluent in Spanish asked for consent to enter the apartment. Maldonado consented. When asked if anyone else was present in the apartment, Maldonado told the agents that his friend was there and pointed to the back of the apartment. With guns drawn, the agents conducted a protective sweep and knocked on a locked bedroom door. A man opened the door, and the agents immediately recognized the man as Ortega. The agents handcuffed and arrested Ortega. After completing their sweep, the agents obtained Ortega's consent to search his bedroom. In Ortega's bedroom, the agents seized three identification documents.

The government charged Ortega with illegally re-entering the United States.

Ortega filed a motion to suppress the evidence seized from his bedroom.

First, Ortega argued that Maldonado did not voluntarily consent to the agents' entry into the apartment.

The court disagreed. When the agents encountered Maldonado, they introduced themselves, showed Maldonado their badges, and requested in Spanish to enter the apartment. The agents' guns remained holstered, and they did not raise their voices. In addition, the agents did not

threaten Maldonado or make any promises or misrepresentations to obtain his consent. Consequently, the court held that Maldonado voluntarily consented to the agents' entry into the apartment.

Second, Ortega argued that even if Maldonado's consent to enter the apartment was voluntarily, the agents' protective sweep exceeded the scope of his consent.

Again, the court disagreed. Protective sweeps are allowed under the Fourth Amendment when an officer has facts that would warrant a reasonable officer in believing that "the area to be swept harbors an individual posing a danger to those on the arrest scene." The court also recognized that protective sweeps need not always occur in conjunction with an arrest where "a reasonable officer could conclude that it was necessary for his safety to secure the premises before obtaining a warrant." In this case, the court held that articulable facts warranted the agents' protective sweep. Agents went to Ortega's apartment after discovering he was in the country illegally. From their briefing, the agents knew Ortega had a prior conviction for aggravated assault on a police officer. Finally, the agents learned from Maldonado that Ortega might be present in the apartment. The court concluded that these facts were "sufficient to alert the agents as to the possibility that the apartment harbored dangerous individuals."

Third, Ortega argued that he did not voluntarily consent to the search of his bedroom.

Although he was under arrest, the court held there was no evidence that Ortega was threatened, coerced, or promised anything by the agents to obtain his consent. The court further held that the agents' failure to tell Ortega he had the right to refuse consent to the search did not make Ortega's consent involuntary. As a result, the court found that Ortega voluntarily consented to the search of his bedroom.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1899/16-1899-2017-03-08.pdf?ts=1488990646

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United States v. LeBeau, 867 F.3d 960 (8th Cir. 2017)

While executing a search warrant at a hotel room, federal agents learned that a woman connected to the occupant of that room had been seen entering a different room occupied by LeBeau. The agents went to LeBeau's room in an attempt to locate the woman. The agents asked hotel staff to telephone LeBeau and ask him to step outside to speak to the manager. When LeBeau opened the door, agents asked him to step outside, handcuffed him, and frisked him. The agents told LeBeau they needed to speak to the woman in his room and LeBeau indicated that the agents could enter the room. The agents pushed the door open, which was slightly ajar, and went inside. One of the agents encountered the woman and requested her identification. In the meantime, the other agents conducted a brief sweep to see if anyone else was present. While conducting the sweep, agents saw a baggie of white powder in plain view on a counter by the sink.

After completing the sweep, the agents brought LeBeau into the room and moved the handcuffs to the front of his body. The agents also told LeBeau that he was not under arrest, that he did not have to speak to them, and that they were there to identify the woman in the room. During their conversation, LeBeau gave the agents consent to search the hotel room and his car. The agents discovered syringes and a small amount of cocaine in LeBeau's hotel room and four ounces of

cocaine in his car. The agents arrested LeBeau and the government charged him with several drug-related offenses.

LeBeau filed a motion to suppress the evidence discovered in his hotel room and car. LeBeau argued that his consent to search was not voluntary because he was handcuffed and in custody when he consented and he had not been given Miranda warnings.

A court determines if a person has voluntarily consented to a search based on the totality of the circumstances. Even though the fact that LeBeau was handcuffed and was not given Miranda warnings weighted in his favor, the court concluded that other factors supported a finding of voluntariness. First, the agents did not threaten or intimidate LeBeau. Second, the agents told LeBeau that he was not under arrest and that they wanted to ask him questions about the woman in his room. Third, the agents told LeBeau that he did not have to speak with them. Fourth, LeBeau was cooperative with the agents and engaged them in conversation. Finally, LeBeau had prior experience with the legal system.

LeBeau further argued that the evidence discovered in his hotel room and car should have been suppressed because he did not voluntarily consent to the agents' initial entry into his hotel room.

First, the court noted that at trial, the government only introduced evidence discovered in LeBeau's car and did not introduce evidence obtained from the hotel room. As a result, the court concluded that even if the agents' initial entry was unlawful, the evidence discovered in the hotel room did not adversely affect LeBeau.

Next, without deciding the issue, the court assumed that LeBeau did not voluntarily consent to the agents' initial entry into his hotel room. However, the court determined that LeBeau's subsequent voluntary consent to search his car purged the taint of the agents' unlawful entry into his hotel room. First, forty minutes elapsed between the agents' entry and LeBeau's consent to search. Second, several events occurred between the agents' initial entry and LeBeau's consent to search the car which gave LeBeau time to reflect on his options. Specifically, the agents moved LeBeau's handcuffs from the back to the front, told him that he was not under arrest and did not have to talk to them, told him that they wanted to ask him questions about the woman in his hotel room, asked him for consent to search his hotel room, and finally searched the hotel room after he gave written consent. Finally, the agents did not use force, threats, or intimidation to enter LeBeau's room.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3653/15-3653-2017-08-14.pdf?ts=1502724676

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United States v. Cobo-Cobo, 873 F.3d 613 (8th Cir. 2017)

Federal agents arrested Mendoza-Marcos for being in the United States illegally. Mendoza-Marcos told the agents that he lived in an apartment with several roommates and allowed the agents to enter the apartment to retrieve some items to take with him to the immigration office. Once inside the apartment, the agents asked one of Mendoza-Marcos' roommates to gather everyone in the living room to speak to the agents. After the occupants could not provide government issued identifications, including Cobo-Cobo, and admitted to being in the country illegally, the agents arrested them. As a result of this incident, the government obtained Cobo-

Cobo's employment identification card from his employer and placed it in Cobo-Cobo's "alien file."

Four years later, a deportation officer reviewed Cobo-Cobo's alien file and discovered that Cobo-Cobo had provided his employer a social security number that did not belong to him. The government charged Cobo-Cobo with misusing a social security number.

Cobo-Cobo filed a motion to suppress evidence obtained from his apartment.

First, Cobo-Cobo argued that Mendoza–Marcos did not voluntarily consent to the agents' entry into the apartment because he was under arrest, was not told that he could refuse consent, had not received Miranda warnings, and had no prior experience with law enforcement officers.

The court disagreed. The court found that none of the facts that Cobo-Cobo alleged automatically render a person's consent involuntary. In addition, officers are not required to provide Miranda warnings before requesting consent to search or tell arrestees of their right to refuse consent. Finally, the agents confronted Mendoza-Marcos in a public place and did not display their weapons, raise their voices, place restraints on him, or make promises to him before receiving his consent.

Cobo-Cobo further argued that the agents' suspicion that he was in the country illegally was based solely on his Hispanic heritage, which is prohibited.

Again, the court disagreed, finding that the agents' suspicion that Cobo-Cobo was in the country illegally was based on several considerations in addition to Cobo-Cobo's heritage. First, the court found that the agents, based on their experience, suspected that Cobo-Cobo was in the country illegally because it is common for unrelated illegal-alien males to live together. Second, when the agents seized Cobo-Cobo they had already arrested one of his unrelated male roommates for being an illegal alien. Third, none of the men in the apartment spoke English, which indicated that they had not been in the country for long. Finally, one of the agents testified that he had been to the same apartment several times and knew that the landlord rented to undocumented aliens. It was irrelevant that the agents also considered Cobo-Cobo's heritage in seizing him as heritage may be a "relevant factor," among others, in establishing reasonable suspicion.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-4097/16-4097-2017-10-12.pdf?ts=1507822263

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United States v. Spivey, 861 F.3d 1207 (11th Cir. 2017)

Chenequa Austin and Eric Spivey had their apartment burglarized. Afterward, they reported the crime to the police and installed a security system. When the burglar broke in the couple's apartment a second time, officers responded to the audible alarm and arrested Caleb Hunt. Hunt told the officers that the apartment was the site of a substantial credit-card fraud operation, and that he had burglarized it twice because it contained so much "high-end" merchandise.

Based on Hunt's information, two officers assigned to a fraud task force went to the apartment on the pretext of following up on the two burglaries, which was a legitimate reason for being there; however, but the officers' main reason was to investigate the suspected fraud.

When Austin saw the officers approaching, she went inside the apartment and told Spivey to hide the credit card reader/writer in the oven, which he did. After the officers told Austin that they were there to follow up on the burglary, she invited them inside the apartment. While in the apartment, one of the officers told Austin that he was a crime-scene technician and pretended to brush for latent fingerprints. Afterward, Spivey showed the officers home-surveillance video of the burglary, which was later used in prosecuting Hunt. During this time, the officers saw evidence of fraud, including a card-embossing machine, stacks of credit cards and gift cards, and large quantities of expensive merchandise such as designer shoes and iPads. Austin and Spivey separately told the officer that the embossing machine had been left in the apartment before they moved in. After the officers arrested Austin on an unrelated warrant and removed her from the apartment, they ended their ruse and told Spivey that they were fraud investigators. Spivey cooperated with the officers who seized among other things, an embossing machine, the credit card reader/writer from the oven, and seventy-five counterfeit cards.

The government charged Austin and Spivey with a variety of criminal offenses.

Austin and Spivey filed a motion to suppress the evidence seized from their apartment, arguing that Austin's consent was not obtained voluntarily because the officers' lied to them about their true reason for being at the apartment.

The Fourth Amendment allows some police deception as long as the suspect's will is not overborne. The Supreme Court has recognized that not all deception prevents a person from making an "essentially free and unconstrained choice." For example, when an undercover officer asks to enter a home to buy drugs, the consent is voluntary despite the officer's misrepresentations about his identity and motivation. The subjective motivation or intent of the officers is irrelevant, as consent is determined from the perspective of the suspect, not what the police intend.

In this case, Austin invited the officers into the apartment and volunteered to show them video footage of the burglary. Although one of the officers misrepresented himself as a crime-scene technician, the officer's exact position within his agency was not material to obtaining Austin's consent to enter the apartment.

In addition, the court noted that Austin and Spivey engaged in intentional, strategic behavior, which strongly suggested voluntariness. The couple reported the burglaries to the police and sought assistance from law enforcement to recover property, which they had stolen. Austin and Spivey voluntarily risked exposure to credit-card fraud prosecution to get this property back. Before allowing the officers into the apartment, they hid the credit card reader/writer in the oven and gave the officers a rehearsed story concerning the embossing machine. The court found that this prior planning established that Austin and Spivey understood that asking for the officers' assistance came with the risk that their own crimes would be discovered.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/15-15023/15-15023-2017-06-28.pdf?ts=1498660259

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Consent Searches – Lawful Removal of Potentially Objecting Party

United States v. Jones, 861 F.3d 638 (7th Cir. 2017)

Jones lived with his girlfriend, Kelley, and her three children in a mobile home. Kelley called the police and reported that Jones had sexually assaulted her daughter. Kelley also stated that Jones was a convicted felon and that he had guns in a safe in their shared bedroom. Officers ran a criminal history check, which confirmed that Jones was a convicted felon.

Officers went to the mobile home, where Jones opened the door and greeted the officers. The officers saw knives on a counter and told Jones that he needed to vacate the premises. When Jones stepped outside the mobile home, an officer handcuffed him and escorted him to a picnic table approximately ten to twenty feet away. While two officers remained with Jones, Kelley consented to a warrantless search of the residence. When an officer searched the bedroom shared by Jones and Kelley, he saw a large gun safe, a smaller gun safe that was partially open, boxes of ammunition, and an empty gun holster. Inside the smaller gun safe, the officer saw several guns. After seeing the guns inside the small gun safe, officers stopped their search, contacted a state prosecutor, and obtained a search warrant. The officers then conducted a full search of the mobile home and seized twelve firearms, ammunition, and other firearm-related paraphernalia.

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

Jones filed a motion to suppress the evidence seized from his residence. Jones claimed that Kelley's consent, by itself, was not valid because the officers did not ask him for consent, but rather, they removed him so he could not object to the search. As a result, Jones argued that information discovered during the unlawful consent search tainted the subsequent search conducted pursuant to the warrant.

Officers may search a home without a warrant when an occupant gives the officers voluntary consent. However, the consent of one person who has authority over the place to be searched is not valid if another party with authority is physically present and expressly refuses to give consent for the search. In addition, officers may not remove a potentially non-consenting party to avoid a possible objection to a search. The removal of a potential objector must be objectively reasonable, such as an objector who is absent due to a lawful detention or arrest.

First, without deciding the issue, the court assumed, that the officers had "removed" Jones. Second, the court held that Jones' removal was objectively reasonable under the circumstances. Before the officers searched the mobile home, Kelley told them that Jones was a convicted felon, with violent tendencies, who had several guns in the residence. The officers conducted a criminal history check and confirmed Jones' status as a convicted felon. When the officers arrived at the mobile home, they saw knives on a counter near where they initially encountered Jones. Under these circumstances, the court concluded that it was objectively reasonable to remove Jones for the officers' safety and because they had probable cause to arrest him. Consequently, the court held that Kelley's consent to search the mobile home was valid; therefore, the officers conducted a lawful warrantless search of the premises.

Jones further argued that even if Kelley gave valid consent to search the mobile home, she did not have the authority to grant the officers consent to search the gun safes, which the government conceded.

First, for the purposes of argument, the court assumed that the gun safes were closed; therefore, the officers could not have observed the guns in plain view. Nevertheless, the court held that the evidence discovered in the safes would have been admissible under the inevitable discovery exception to the exclusionary rule.

The inevitable discovery doctrine provides that unlawfully obtained evidence will not be suppressed if the government can establish that the officers would have inevitably discovered the evidence in question by lawful means. First, before entering the mobile home, Kelley told the officers that Jones kept guns in a gun safe in the bedroom, and that he was a convicted felon, a fact confirmed by the officers. Second, the officers lawfully entered the premises with Kelley's consent. Third, the officers saw the gun safes in the bedroom, along with an empty holster, and ammunition. At this point, the court concluded that the officers established probable cause to obtain a warrant to search the gun safes; therefore, they would have inevitably discovered the guns by "lawful means."

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-4254/16-4254-2017-06-28.pdf?ts=1498685444

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Third Party Consent (Common Authority / Apparent Authority)

United States v. Mojica, 863 F.3d 727 (7th Cir. 2017)

Federal agents went to Mojica's house and arrested him for several drug-related offenses. After arresting Mojica agents placed him in police car, which was parked in front of the house. In the meantime, other agents executed a search warrant for Mojica's house. During the search, the agents interviewed Mojica's wife, Sonia, and learned that Mojica possessed the only keys to the detached garage located near the rear of the property. After agents obtained the keys to the garage from Mojica, Sonia gave the agents consent to search the detached garage. Inside the garage, the agents found evidence related to drug distribution.

Mojica filed a motion to suppress, arguing that Sonia lacked the authority to consent to the search of the garage.

Consent may be obtained from a person whose property is searched, a third party who shares common authority over the property, or a co-occupant who possesses apparent authority. Apparent authority exists if the facts known to an officer at the time of the search would allow a reasonable person to believe that the consenting party had authority over the property to be searched.

Mojica argued that Sonia lacked apparent authority because the facts known to the agents at the time of the search would not have led a reasonable person to believe that Sonia had authority over the detached garage. Specifically, Mojica claimed that the agents' belief that Sonia had authority over the garage was unreasonable because she told agents that she did not have a key and that she had not been in the garage for a month and a half.

The court disagreed. Sonia told the agents that she had been married to Mojica for twenty-one years and that they have been living at their current residence for ten years. Even though the agents knew that Sonia rarely entered the garage, they could reasonably believe that she, as a

spouse, had access to the garage but chose not to enter regularly. In addition, while Sonia did not possess a key to the garage, neither she nor Mojica told the agents that she was denied access to it. Instead, after the agents obtained the keys from Mojica, Sonia signed the consent form to allow the agents to search the garage. Without information to the contrary, the court concluded that the agents reasonably relied on Sonia's apparent authority to consent to a search of the garage.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-2985/16-2985-2017-07-14.pdf?ts=1500067843

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Exigent Circumstances

United States v. Delva, 858 F.3d 135 (2d Cir. 2017)

Police officers obtained a warrant to arrest Gregory Accilien for kidnapping, robbery, and drug-related offenses and went to his apartment to arrest him. At the apartment, the officers encountered Accilien, a woman, two children, and three other men, including Delva. While conducting their protective sweep, the officers located Delva in the bedroom and handcuffed him. While in the bedroom, the officers saw drugs and a handgun on the floor of the closet. After the officers arrested Accilien and completed their protective sweep, they brought Accilien into the bedroom to ask him who the other individuals were and to whom the items found in the closet belonged. The officers brought Accilien into the bedroom because the apartment was approximately 500 square feet and the other individuals were being detained in the kitchen and living room. While in the bedroom, officers saw some envelopes lying on top of a cabinet addressed to Accilien that had been sent by another suspect in the same robbery and kidnapping case. The officers also saw a cell phone lying on a television stand and a cell phone on the bed. The officers seized the envelopes and cell phones. Sometime later, the officers discovered that one of the cell phones belonged to Delva. At the time of Accilien's arrest, Delva was not a suspect in the kidnapping and robbery; however, after reviewing the letters inside the envelopes and the cell phones seized from the bedroom, officers discovered that Delva had been involved with Accilien in the robbery and kidnapping case.

The government charged Delva with kidnapping, robbery, and drug-related offenses.

Delva argued that the warrantless search of the bedroom and subsequent seizure of the letters and cell phones violated the Fourth Amendment.

The court disagreed. The court held that the officers' warrantless re-entry into the bedroom did not violate the Fourth Amendment because it was justified by exigent circumstances. First, the officers lawfully entered Accilien's apartment where they saw drugs and a gun in plain view during their lawful protective sweep. Second, the court found that the officers needed to remain in the apartment long enough to determine who owned these items, as whoever owned them was subject to immediate arrest. Third, given that there were four men in the small apartment, the court concluded that the officers had probable cause to believe that one of the men owned these items. Finally, the court held that it was reasonable for the officers to question Accilien in the bedroom, outside the presence of the other men, to facilitate Accilien's candor and reduce the possibility of intimidation by the owner. The court concluded that under the circumstances, it was objectively reasonable for the officers to re-enter the bedroom to question Accilien in order to determine whom to arrest for possession of the drugs and gun.

The court further held that after the officers re-entered the bedroom to interview Accilien, the officers lawfully seized the envelopes and cell phones under the plain view doctrine. Officers may lawfully seize objects under the plain view doctrine if:

1) The officers are lawfully in a position from which they view the object;
2) The incriminating nature of the object is immediately apparent; and
3) The officers have a lawful right to access the object.

First, the officers were lawfully in the apartment with a valid warrant for Accilien's arrest. In addition, Accilien told the officers that he occupied the bedroom in which the letters and cell phones were found. Second, the letters addressed to Accilien were sent from another suspect in the robbery and kidnapping case. The court found that it was reasonable for the officers to believe the letters contained post-kidnapping/robbery communications between Accilien and the other suspect. Third, the court found the seizure of the cell phones was reasonable because the officers knew that one or more cell phones had been used during the kidnapping and robbery. The court added that even if it the officers believed that the cell phones belonged to Delva, their warrantless seizure would have been reasonable because Delva was detained in the bedroom where drugs were found and the association between drug trafficking and cell phones is well established.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-683/15-683-2017-06-01.pdf?ts=1496327406

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United States v. Council, 860 F.3d 604 (8th Cir. 2017)

Officers received a report that Council had been involved in a road-rage incident where he pointed a sawed-off shotgun at Melanie Miller, a friend with whom he desired a more serious relationship. The officers knew Council from previous criminal complaints made against him, some of which involved violent behavior. Officers went to Council's camper, where he lived, to interview him about the incident. Officers knocked on the door to the camper, identified themselves, and told Council to come to the door. Council opened the door dressed only in his underwear. Council stood in the doorway and agreed to speak to the officers. Behind Council was a blanket hanging from the ceiling, which obstructed the officers' view into the camper. When the officers explained why they were there, Council denied involvement in the incident. Upon hearing who had made the accusation against him, Council called Miller a liar, cursed, and said he would "beat her half to death" the next time he saw her.

At this point, the officers decided to arrest Council. One of the officers grabbed Council's arm and ordered him to step out of the camper. Council resisted and tried to retreat behind the blanket back into the camper. While still holding Council's arm, and believing that Council had access to a shotgun, the officer crossed the threshold of the camper and tore down the blanket to see what was behind it. After a brief struggle, the officers handcuffed Council and while removing him from the camper they saw what appeared to be a black-taped handle of a gun wedged between the bed and a laundry basket.

As he was being escorted to the police car, Council asked if he could go back into his camper and get dressed. The officers denied this request but offered to go back into the camper themselves and get Council some clothes. Council agreed and when the one of the officers entered the camper to get Council a pair of pants, he confirmed the object he had seen was a shotgun with its handle

wrapped in black tape. Based in part on this observation, the officers obtained a warrant to search the camper and seized a sawed-off shotgun.

The government charged Council with being a felon in possession of a firearm and possession of an unregistered sawed-off shotgun.

Council filed a motion to suppress the shotgun seized from his camper.

First, the court held that the officers had probable cause to arrest Council based on the information provided by the witnesses of the road-rage incident.

Second, the court found that Council was voluntarily in a "public place" when the officers arrested him. Under the Fourth Amendment, searches and seizures inside a home, without a warrant are presumed to be unreasonable. However, the warrantless arrest of a person in a public place based upon probable cause does not violate the Fourth Amendment. In this case, the court determined that Council was voluntarily in a public place when the officers arrested him. Council answered the door without coercion or deceit and stood in the doorway speaking to the officers. During this time, the court concluded that Council was exposed to public view as if he had been standing completely outside his camper. As a result, the officers were entitled to arrest him without first obtaining a warrant.

Finally, the court held that the officers' warrantless entry into the camper, which allowed them to initially see the shotgun, was justified by exigent circumstances. First, the underlying incident involved a firearm and the officers knew Council had previously exhibited violent behavior. Second, Council was uncooperative and made a threat toward Miller when the officers were discussing the road-rage incident with him. Third, Council resisted arrest and attempted to retreat behind a blanket, escalating an already tense situation. Under these circumstances, the court concluded that it was reasonable for the officers to believe a gun might be within Council's reach; therefore, it was reasonable for the officers to enter the camper to complete the arrest and ensure their safety.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1472/16-1472-2017-06-19.pdf?ts=1497886240

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Destruction of Evidence

United States v. Almonte-Báez, 857 F.3d 57 (1st Cir. 2017)

While investigating a drug trafficking ring, officers learned that two members of the ring planned to rob Medina because Medina received bulk drug shipments every week. The officers knew that Medina had a prior conviction for a drug offense and that he had sold heroin to a confidential informant a few months earlier. In an effort to prevent the robbery, the officers attempted to locate Medina.

While conducting surveillance, officers saw Medina leave an apartment building on Cedar Street carrying a large trash bag and get into a car. The officers followed Medina and stopped him after he committed a traffic violation. During the stop, the agents searched the car and found over $370,000 in the trash bag. When questioned, Median could not explain why he was transporting such a large amount of cash.

The officers went back to the building on Cedar Street and confirmed that Medina rented an apartment there. The officers went to Medina's apartment, knocked on the front door, and announced their identity. The officers heard the sound of someone inside the apartment running toward the back of the apartment. Concerned that the person inside the apartment was trying to escape or destroy evidence, the officers decided to enter the apartment. When the officers noticed that the front door was sealed shut, they moved to a side door, broke it down, and entered the apartment. Inside the apartment, the officers detained Baez, who was attempting to flee out the back door. While conducting a protective sweep, the officers saw heroin, packaging material, and scales in plain view. Based on these observations, the agents obtained a warrant to search the apartment and seized approximately 20 kilograms of heroin.

The government charged Baez with two drug offenses. Baez filed a motion to suppress the evidence seized from the apartment. Baez argued that the officers' warrantless entry into the apartment violated the Fourth Amendment; therefore, the evidence observed in plain view should have been suppressed, along with the evidence seized under the search warrant.

In affirming the district court, the court held that exigent circumstances justified the officers' warrantless entry into the apartment. The exigent circumstances exception to the Fourth Amendment's warrant requirement requires law enforcement officers to:

1. Establish probable cause that contraband or evidence of a crime will be found on the premises; and

2. To show that an exigency, such as the imminent loss of evidence, existed.

In this case, the court held that the officers established probable cause that contraband or evidence of a crime would be located in the apartment. First, the officers knew that Medina rented the apartment and reasonably suspected that he received weekly heroin shipments at that address. Second, earlier that day officers saw Medina carrying a large trash bag that contained hundreds of thousands of dollars out of the apartment. Third, Medina could not explain to the officers why he was transporting such a large quantity of cash. Fourth, the officers knew that Medina had a prior conviction for a drug offense and that he had sold heroin to a confidential informant a few months earlier.

Next, the court held that the officers established the potential for the destruction of evidence located inside the apartment. First, when the officers knocked on the door and identified themselves, they heard someone inside the apartment running away from the door. Second, the officers saw that the front door was sealed shut. Third, the officers knew that drugs can be flushed down a toilet or washed down a drain. Given what the officers knew and what they reasonably suspected, the court held that the officers had reason to believe that the person inside the apartment was trying to destroy evidence.

Because the officers' warrantless entry to the apartment was supported by exigent circumstances, the court held that the evidence observed in plain view along with the evidence seized pursuant to the search warrant was admissible at trial.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-2367/15-2367-2017-05-12.pdf?ts=1494621004

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Emergency

United States v. Tepiew, 859 F.3d 452 (7th Cir. 2017)

A seven-year-old child went to school and gave a counselor a drawing. Beneath the drawing, the student had written that she was sad because her mom "got hit in the ribs and has a black eye," and she "is hurting." The student told the counselor that her mother's boyfriend had beat her mom up, and that the boyfriend "hurts" her one-year-old brother, who had sustained a head injury. The counselor contacted the Menominee Tribal Police Department and an officer interviewed the counselor, who repeated what the student had reported.

After interviewing the counselor, the officer drove to the health department and asked a child protective safety worker to accompany him to the child's home to conduct a welfare check on the one-year-old child. While en route, the officer requested a backup officer meet him at the child's house.

Once the officer arrived, he approached the front door where he could hear the television from inside the house. The officer knocked on the door and announced his presence. After knocking, the officer heard fast-paced walking inside the home and saw a curtain move. The officer knocked again, and then heard someone lock the door. In the meantime, the backup officer had gone to the back door. The backup officer heard movement from inside the house, and then he heard someone lock the back door.

Based on these facts, the officer believed that whoever was in the house did not want to speak to the police. The officer also knew that it would take an hour and a half to two hours to obtain a warrant to enter the house. Concerned that the mother and one-year-old child were in the house, seriously hurt, and possibly being prevented from seeking medical attention, the officer contacted the tribal prosecutor, who informed the officer that he did not need a warrant to enter the home. Once again, the officer knocked on the front door, announced his presence, and warned whomever was inside that he was going to knock down the door. After waiting fifteen seconds and receiving no response, the officer kicked down the door and entered the house.

Inside the house, the officers found the seven-year-old child's mother, Tepiew, her one-year old brother, and Tepiew's boyfriend. It was later determined the one-year-old child had numerous injuries, to include a fractured skull. Although Tepiew was initially considered a victim of domestic violence, she later admitted to inflicting the injuries on her one-year old son.

The government charged Tepiew with assault resulting in serious bodily injury to her infant child.

Tepiew filed a motion to suppress all evidence obtained as a result of the warrantless entry into her home, including her confession.

The court held that the officers' actions were reasonable and their warrantless entry into Tepiew's home was justified by the emergency aid doctrine. The emergency aid doctrine allows officers to enter a house without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. In this case, the court found that it was objectively reasonable for the officers to believe that their entry was necessary to render emergency aid to the one-year-old child. First, the officer was given a drawing, which stated in the present tense, that the seven-year-old child's mother was "hurting," and that the one-year old child had sustained a head injury. Second, when the officers arrived at the house, they encountered someone within the house who actively trying to avoid speaking with the officers by not responding to their inquiries and was

locking the doors. Finally, the officer testified that it would have taken one and a half to two hours to obtain a warrant, as the Menominee Nation's Constitution does not explicitly permit warrants to be obtained telephonically.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-2543/16-2543-2017-06-12.pdf?ts=1497301241

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United States v. Quarterman, 877 F.3d 794 (8th Cir. 2017)

At 7:16 a.m., Carol Bak called 911 and reported that she was helping her daughter, Christina move out of Quarterman's apartment. Bak stated that she had a "heated" argument with Quarterman, who was Christina's boyfriend, and that Quarterman "had a gun on his waist." After the argument, Bak left, leaving her daughter inside the apartment.

Dispatch radioed a "domestic with a weapon involved" and three officers responded to Quarterman's apartment. The officers met Bak outside and she repeated what she told the 911 operator. Bak also told the officers that Quarterman was "making Christina get out" of his apartment.

When the officers knocked, Christina answered the door. Through the open door, one of the officers saw Quarterman sitting on the couch, moving his hands as if he was reaching for something. The officer told Quarterman not to move and asked Christina about the presence of a gun. Christina did not respond and Quarterman denied having a gun. At that point, the officers entered the apartment, approached Quarterman, and ordered him to stand up and turn around. The officers saw a handgun in a holster on Quarterman's right side and seized it. One of the officers told Quarterman they would return the handgun once they were finished talking. However, after the officers discovered the handgun was stolen, they arrested Quarterman. The government charged Quarterman with being a felon in possession of a firearm.

Quarterman filed a motion to suppress the handgun, arguing that the officers' warrantless entry into his apartment violated the Fourth Amendment. The district court agreed. The government appealed to the Eighth Circuit Court of Appeals.

The court reversed the district court, holding that the warrantless entry into Quarterman's apartment was justified by a legitimate and objectively reasonable concern for the safety of Christina as well as the officers. The officers had information that Quarterman was making Christina move out, that he was armed, and that he had been in a heated verbal altercation with Christina's mother that morning. In addition, after Christina opened the door, Quarterman made quick movements as if reaching towards the couch or getting up. Unable to see a gun from the doorway and aware that domestic disputes can turn violent, the court concluded that it was reasonable for the officers to enter the apartment and control the situation.

The court further held that once lawfully inside the apartment the exigencies of the situation justified ordering Quarterman to stand up and turn around. Although Quarterman denied having a gun, the court found that the officers were reasonable in not believing him, as Carol Bak told them the gun was on Quarterman's hip and because of Quarterman's reaction to the presence of the officers.

Finally, when the officers saw the gun on Quarterman's waist, the court held that it was reasonable for the officers to temporarily seize it.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-4519/16-4519-2017-12-12.pdf?ts=1513096226

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United States v. Scott, 876 F.3d 1140 (8th Cir. 2017)

Police officers responded to multiple security alarms at a residence in a rural area. After the officers drove down a long driveway and stopped at a gate, a truck pulled up on the other side of the gate, and Scott got out. Scott, who had blood on his clothes and was visibly shaken, told the officers that his wife had run him over with the truck, shot at him, and thrown the gun in the yard. Scott also told the officers that he was concerned for the safety of his young children, who were still with his wife, whom he claimed was under the influence of drugs. At this point, the officers considered Scott to be the potential victim of a domestic dispute. The officers left Scott at the gate and drove to the house.

At the house, the officers saw a woman sitting in a chair at, or just inside the threshold of an open garage. The woman was smoking, using her cell phone, and did not appear armed or threatening. As the officer approached, two little boys entered the garage from the house. The officers went into the garage and talked to the woman who identified herself as Scott's wife, Stacy. She told the officers that earlier when she tried to drive away, Scott fired four shots at her truck, ripped off the side mirror, and then jumped into the bed of the truck and broke the rear window. Stacy told the officers that she and her children got out of the truck and ran inside the house and that Scott eventually threw the gun into the yard. Several officer searched the yard, but they did not find a gun. Stacy told the officers there were other guns inside the house, and she gave the officers consent to search the house. The officers seized several firearms from the house. The government charged Scott with being a felon in possession of a firearm.

Scott filed a motion to suppress the firearms seized from his house.

The court held that exigent circumstances justified the officers' warrantless entry into the garage. When the officers approached the garage, they had just been told about a violent domestic dispute involving a firearm, by an individual covered with blood, who told them that children were present at the residence. The officers had legitimate concerns that someone might be armed and that children might be injured or in danger, so went into the garage to speak to the only person they saw. In addition, the court held that Stacy validly consented to the officers' entry into the house. Consequently, the court concluded that the officers' subsequent discovery of the firearms inside the house did not violate the Fourth Amendment.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-4052/16-4052-2017-12-13.pdf?ts=1513180885

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Plain View Seizure

See: United States v. Babilonia, 854 F.3d 163 (2d Cir. 2017)

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United States v. Delva, 858 F.3d 135 (2d Cir. 2017)

Police officers obtained a warrant to arrest Gregory Accilien for kidnapping, robbery, and drug-related offenses and went to his apartment to arrest him. At the apartment, the officers encountered Accilien, a woman, two children, and three other men, including Delva. While conducting their protective sweep, the officers located Delva in the bedroom and handcuffed him. While in the bedroom, the officers saw drugs and a handgun on the floor of the closet. After the officers arrested Accilien and completed their protective sweep, they brought Accilien into the bedroom to ask him who the other individuals were and to whom the items found in the closet belonged. The officers brought Accilien into the bedroom because the apartment was approximately 500 square feet and the other individuals were being detained in the kitchen and living room. While in the bedroom, officers saw some envelopes lying on top of a cabinet addressed to Accilien that had been sent by another suspect in the same robbery and kidnapping case. The officers also saw a cell phone lying on a television stand and a cell phone on the bed. The officers seized the envelopes and cell phones. Sometime later, the officers discovered that one of the cell phones belonged to Delva. At the time of Accilien's arrest, Delva was not a suspect in the kidnapping and robbery; however, after reviewing the letters inside the envelopes and the cell phones seized from the bedroom, officers discovered that Delva had been involved with Accilien in the robbery and kidnapping case.

The government charged Delva with kidnapping, robbery, and drug-related offenses.

Delva argued that the warrantless search of the bedroom and subsequent seizure of the letters and cell phones violated the Fourth Amendment.

The court disagreed. The court held that the officers' warrantless re-entry into the bedroom did not violate the Fourth Amendment because it was justified by exigent circumstances. First, the officers lawfully entered Accilien's apartment where they saw drugs and a gun in plain view during their lawful protective sweep. Second, the court found that the officers needed to remain in the apartment long enough to determine who owned these items, as whoever owned them was subject to immediate arrest. Third, given that there were four men in the small apartment, the court concluded that the officers had probable cause to believe that one of the men owned these items. Finally, the court held that it was reasonable for the officers to question Accilien in the bedroom, outside the presence of the other men, to facilitate Accilien's candor and reduce the possibility of intimidation by the owner. The court concluded that under the circumstances, it was objectively reasonable for the officers to re-enter the bedroom to question Accilien in order to determine whom to arrest for possession of the drugs and gun.

The court further held that after the officers re-entered the bedroom to interview Accilien, the officers lawfully seized the envelopes and cell phones under the plain view doctrine. Officers may lawfully seize objects under the plain view doctrine if:

1) The officers are lawfully in a position from which they view the object;
2) The incriminating nature of the object is immediately apparent; and

3) The officers have a lawful right to access the object.

First, the officers were lawfully in the apartment with a valid warrant for Accilien's arrest. In addition, Accilien told the officers that he occupied the bedroom in which the letters and cell phones were found. Second, the letters addressed to Accilien were sent from another suspect in the robbery and kidnapping case. The court found that it was reasonable for the officers to believe the letters contained post-kidnapping/robbery communications between Accilien and the other suspect. Third, the court found the seizure of the cell phones was reasonable because the officers knew that one or more cell phones had been used during the kidnapping and robbery. The court added that even if it the officers believed that the cell phones belonged to Delva, their warrantless seizure would have been reasonable because Delva was detained in the bedroom where drugs were found and the association between drug trafficking and cell phones is well established.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-683/15-683-2017-06-01.pdf?ts=1496327406

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United States v. Lewis, 864 F.3d 937 (8th Cir. 2017)

Two police officers went to a tattoo shop to look for a person of interest in an unrelated case. When the officers entered the shop no one was at the reception desk, but a customer was sitting in the common area. The officers rang a bell on the desk; however, no one answered. The customer told the officers that he was waiting while Lewis drew him a tattoo in the back of the shop. Behind the reception desk was an open doorway, with no door, that led to a work area with individual stations for tattooing customers. There were no signs telling people to stay out of the work area. The officers knocked on the doorframe for two to three minutes, identifying themselves, and asking if anyone was there. After receiving no response, the officers entered the work area and knocked on a closed door to a back room. Lewis answered the door and agreed to speak to the officers in the work area. At some point, one of the officers saw a handgun in a holster on a shelf in the work area. The officer grabbed the gun, removed it from the holster, and checked to see it if was loaded. Lewis then told the officers that he was a felon and did not need any "hassles." The officers did not know Lewis was a felon until he told them. The officers told Lewis they would keep the handgun and eventually left with it. In a subsequent interview, Lewis told the officers that he received the gun from a customer a year or two earlier.

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

Lewis filed a motion to suppress the handgun. First, Lewis argued that the officers violated the Fourth Amendment by entering the work area, which was not open to the public, without a warrant.

A government agent may enter a business in the same manner as a private person and an employee has no reasonable expectation of privacy in areas of the business where the public is invited to enter and transact business. While the work area in this case was not open to the public, as customers were welcome into the work area only if invited by an employee, that fact alone does not determine whether Lewis had an objectively reasonable expectation of privacy in the work area. Even if the public were not invited into the work area, Lewis' expectation of privacy would not be reasonable if he expected the public to enter the work area anyway.

In this case, when the officers entered the shop they found an unattended reception desk with a call bell. The officers first tried to get an employee's attention by ringing the bell and knocking on the doorframe to the work area. When that failed, the officers walked into the work area to knock on the door to the back room. The court concluded that a reasonable employee would expect members of the public to enter the work area as the officers did here. As a result, the court held that Lewis had no reasonable expectation of privacy in the work area.

Next, Lewis argued that the warrantless seizure of the handgun violated the Fourth Amendment.

The court agreed. When the officer grabbed the gun from the shelf, he did not have probable cause to associate it with a crime, as Lewis admitted to being a convicted felon after the officer had seized the gun. Because the incriminating nature of the gun was not immediately apparent when the officer seized it from the shelf, the seizure of the gun did not fall within the plain-view exception.

In addition, the court held that the officer's warrantless seizure of the gun was not justified by safety concerns. A police officer who discovers a weapon in plain view may temporarily seize that weapon if a reasonable officer would believe based on specific and articulable facts, that the weapon poses an immediate threat to the officer or public safety. In this case, however, the court found that the officer's seizure of the gun was not justified because the officers did not suspect Lewis or the customer of wrongdoing, nor did Lewis or the customer behave in a manner that suggested that they posed a threat to the officers or anyone else.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3308/16-3308-2017-07-27.pdf?ts=1501169446

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Probationers / Parolees / Supervised Release (Warrantless Searches)

Smith v. Anderson, 874 F.3d 966 (7th Cir. 2017)

Following a term of incarceration, Smith, a registered offender, was scheduled to begin a term of parole for one year. However, before releasing Smith on parole, Illinois law required that the Illinois Department of Corrections approve a host site. On his release date, Smith submitted two host sites; however, the Department had not investigated or approved either site. Instead of releasing Smith, his parole officer, Anderson, issued a parole violation report that contained incorrect information concerning the Department's attempt to place Smith at a host site. Smith spent another six months in custody before the Department released him on good-time credit.

Smith sued Anderson under *42 U.S.C. § 1983*, claiming that Anderson's parole violation report caused the Department to hold him beyond his release date in violation of the Fourth Amendment.

The court disagreed and held that Anderson was entitled to qualified immunity, finding that no court has held that the Fourth Amendment compels the release of sex offenders who lack lawful and approved living arrangements. As a result, the court concluded that when sex offenders lack these arrangements, their continued detention does not violate clearly established rights. The court further held that Anderson's incorrect statements in his parole violation report were irrelevant and could not form the basis for a cause of action under *§ 1983*.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-2333/16-2333-2017-10-31.pdf?ts=1509465641

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United States v. McCoy, 847 F.3d 601 (8th Cir. 2017)

McCoy was convicted of transporting obscene matters, in violation of *18 U.S.C. § 1462*, and sentenced to 18 months' imprisonment and two years' supervised release. By conditions of release, U.S. Probation Officers inspected McCoy's house. One of the officers, who was a specialist in computer-related cases, observed a suspicious amount of computer equipment, including multiple hard drives and at least two custom-built computers. In addition, one of the computers had five hard drives, three configured in a Redundant Array of Independent Disks (RAID). According to the officer, it was unusual for a personal computer user to have a computer with multiple hard drives and especially to use a RAID system. Due to the large amount of equipment, the officers did not examine the computers. However, based on her suspicions, the officer received permission from the district court to seize and review any computer equipment in plain sight or voluntarily provided by McCoy.

The officers seized McCoy's computers and USB drives. A preliminary examination of McCoy's computers revealed child pornography. Officers then obtained a warrant for a complete forensic examination of the hard drives and discovered child pornography videos that had been downloaded after McCoy's date of conviction.

The government charged McCoy with possession of child pornography. At trial, the government introduced recorded calls McCoy made in prison in which he claimed to have removed "everything" from his computer. The jury convicted McCoy, and he appealed, arguing that the warrantless search and seizure of his computers and USB drives was unreasonable under the Fourth Amendment.

The court disagreed. First, the court held that McCoy's conditions of release expressly authorized random inspections of his computer's internet and email usage history by the Pre-Trial Services officers. Second, the search of McCoy's computers did not exceed the scope of the search authorized by the conditions of his release. The officer testified that it was not possible to evaluate McCoy's Internet activity based solely on web-browser activity; therefore, a more thorough examination was necessary. Finally, the court concluded the officers had reasonable suspicion to believe McCoy was engaged in criminal activity. When an officer has reasonable suspicion that a probationer subject to a search condition is involved in criminal activity, an intrusion on the probationer's already diminished privacy interest is reasonable. Here, the court concluded that the officers had reasonable suspicion to seize and search McCoy's computer equipment based on his: (1) prior criminal history; (2) computer sophistication; (3) unusually large number of electronic storage devices; (4) sophisticated RAID array; and (5) statements about erasing pornography from his computers.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1853/16-1853-2017-01-31.pdf?ts=1485880251

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United States v. Jackson, 866 F.3d 982 (8th Cir. 2017)

Jackson was convicted of failure to register as a sex offender and sentenced to 21 months' imprisonment followed by five years of supervised release. When Jackson began his term of supervised release at the Fort Des Moines Community Correctional Facility, a residential reentry program, Jackson was told several times that possession of cell phones in the Facility was prohibited. In addition, Jackson was notified that all property brought into the Facility was subject to search.

A few weeks later, a Facility staff member confiscated a cell phone that belonged to Jackson. Officials searched the phone and found pornographic images on it and "inappropriate sites" on Jackson's Internet history. In an interview, Jackson admitted that another person had sent him images of child pornography, which he claimed to have deleted. The government obtained a warrant to search Jackson's cell phone and a forensic examination discovered thirty-seven images of child pornography.

The government charged Jackson with possession of child pornography.

Jackson filed a motion to suppress the images discovered on his cell phone, arguing that the warrantless search of his phone violated the Fourth Amendment.

The court disagreed. First, the court found that Jackson had a reduced expectation of privacy while he served his term of supervised release. Second, the court held that Jackson was on notice that his cell phone was subject to search. Two unambiguous rules of the Facility, expressed to Jackson on multiple occasions were that residents could not possess cell phones inside the facility and that any property possessed inside the facility was subject to search. Consequently, the court concluded that Jackson did not have a reasonable expectation of privacy in his cell phone.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3807/16-3807-2017-08-10.pdf?ts=1502379048

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United States v. Job, 851 F.3d 889 (9th Cir. 2017)

In October 2012, two officers went to a residence looking for Richard Elliott. When the officers arrived at the home, they saw two men open the garage door. Both men looked very surprised to see the officers and appeared to be nervous. In addition, one of the men, later identified as Job, was wearing a baggy shirt, which concealed his waistband and baggy cargo shorts, with the pockets appearing "to be full of items." Concerned for their safety, one of the officers handcuffed and frisked Job. During the frisk, the officer felt a hard tube-like object with a bulbous end in Job's left cargo pocket. Based on his experience, the officer recognized the object as an illegal glass pipe. The officer removed the pipe, which "contained a burnt white residue." The officer also found $1,450 in cash and Job's car keys in his pockets. The officer arrested Job for possession of narcotics paraphernalia.

After arresting Job, the officers searched his car, which was located in the driveway. Inside Job's car, the officers found methamphetamine and drug paraphernalia. At some point during the

encounter, the officers discovered that Job was currently on probation with a Fourth Amendment waiver.[1]

In December 2012, officers obtained a search warrant for Job's residence, based in part on intercepts from a wiretap of another individual, whom the officers suspected was a drug trafficker. While executing the warrant, the officers seized methamphetamine, marijuana, and drug paraphernalia. The government subsequently charged Job with drug-related offenses.

Job filed a motion to suppress the evidence found on his person and in his car in October. The district court held that Job's Fourth Amendment search waiver provided a justification for these searches and denied Job's motion. Job appealed.

The Ninth Circuit Court of Appeals reversed the district court. First, the court noted it was undisputed that the officers were unaware of Job's Fourth Amendment search waiver when they stopped him and frisked him. While the district court did not determine when the officers became aware of the search waiver, the district court based its decision solely on the fact that Job was subject to a Fourth Amendment search waiver at the time of the searches. The Ninth Circuit Court of Appeals held this was in error. Ninth Circuit case law requires police officers to know about the existence of a probationer's Fourth Amendment search waiver before they can use such a waiver to justify a warrantless search of a probationer. Even if the officers were aware of Job's Fourth Amendment search waiver, the court added that such waivers are limited to individuals on probation for violent felonies. While the parties disputed whether Job was on probation for a felony or a misdemeanor, it was irrelevant, as it was undisputed that Job was on probation for a nonviolent offense.

On appeal, the government argued for the first time that the officers had other lawful reasons to justify stopping and frisking Job, independent of the Fourth Amendment search waiver. First, the government claimed the officers conducted a valid Terry stop.

The court disagreed. The fact that Job's pants appeared to be "full of items" and he appeared to be nervous did not support the conclusion that Job was engaged in criminal activity.

Next the government argued that the stop and frisk were valid as a protective sweep. Again, the court disagreed. A protective sweep is a quick and limited search of premises, incident to an arrest, conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. In this case, the government did not establish that the officers were at the home pursuant to an arrest warrant, or that this was Richard Elliot's home. In addition, the protective sweep would have been limited to a visual inspection for persons and would not have allowed the officers to frisk Job.

Because the government failed to establish a justification for the warrantless stop and subsequent frisk, the court concluded that the search of Job's person was unlawful. As a result, the court held that the evidence discovered during the frisk should have been suppressed.

The court held that the warrantless search of Job's car under the Fourth Amendment search waiver was not justified for the same reasons the stop and frisk were not justified. On appeal, the

[1] While on probation for a state drug offense, Job was required to "submit person, property, place of residence, vehicle, [and] personal effects to search at any time with or without a warrant, and with or without reasonable cause, when required by a probation officer or other law enforcement officer." It is unclear when, if ever, the officers learned the precise scope of Job's search waiver.

government argued for the first time that the search of Job's car was justified under the automobile exception to the warrant requirement.

The court disagreed. The automobile exception allows the police to conduct a warrantless search of a vehicle if there is probable cause to believe the vehicle contains evidence of a crime. However, the only evidence that supported probable cause to believe Job's car contained contraband was the glass pipe that was seized from Job's person. Because the court held that the glass pipe was unlawfully seized, the court concluded the glass pipe could not provide the probable cause to justify the warrantless search of Job's car.

Job also filed a motion to suppress the evidence sized during the search of his house in December.

The court held the search warrant obtained by the officers was supported by probable cause; therefore, the search of Job's home and the seizure of the drug evidence in December was lawful. Although the search warrant affidavit did not specifically claim that Job was trafficking in drugs, the affidavit provided facts sufficient to support the conclusion that Job was in the business of "buying and selling" methamphetamine.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/14-50472/14-50472-2017-03-14.pdf?ts=1489510942

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United States v. Cervantes, 859 F.3d 1175 (9th Cir. 2017)

Cervantes was convicted of counterfeiting and drug offenses in California state court. Cervantes received a "divided" or "split" sentence of three years in county jail. The court divided the sentence into two years of imprisonment followed by one year of mandatory supervision. One of the conditions of Cervantes' mandatory supervision required him to submit to warrantless, suspicionless searches of his person and property, including any residence or premises under his control at any time of the day or night by any law enforcement officer. . . with or without a warrant, probable cause or reasonable suspicion.

While serving his term of mandatory supervision, Cervantes and his girlfriend, Farish, were stopped by a police officer in Huntington Beach, California, for jaywalking. During the stop, Cervantes told the officer that he was on "probation" and subject to a search condition. The officer obtained Cervantes' identification and confirmed that he was on mandatory supervision and subject to a search condition. The officer searched Cervantes and found a room key for a local hotel in his pocket. Cervantes told the officer that he and Farish were renting a room at the hotel and that his personal belongings were in the room. Nothing that occurred during the stop gave the officer reason to believe Cervantes was engaged in criminal activity and he allowed Cervantes and Farish to go, without citing them for jaywalking.

Believing that he had the authority to conduct a warrantless, suspicionless search under the terms of Cervantes' search condition, the officer and two of his colleagues went to Cervantes' hotel room. After the officers obtained entry from a hotel employee, they searched Cervantes' room and its contents, except for any items that appeared to belong to a woman. The officers saw counterfeit currency and the equipment used to make it in plain view. The officers subsequently located Cervantes and arrested him.

The government charged Cervantes with unlawfully possessing counterfeit currency and images of counterfeit currency.

Cervantes filed a motion to suppress the evidence seized from his hotel room, arguing that the warrantless, suspicionless search of the room violated the Fourth Amendment.

The court disagreed. The court recognized that for Fourth Amendment purposes, the Supreme Court has divided offenders subject to search conditions into two categories: those on probation and those on parole. In general, parolees are entitled to less protection under the Fourth Amendment than probationers. However, the court found that mandatory supervision, under California law, is neither probation nor parole, but instead, it fell somewhere in between on the continuum of punishments. The court then concluded that mandatory supervision under California law is more closely related to parole than probation; therefore, the rules applicable to parolees should apply to offenders serving terms of mandatory supervision. The court added that California courts concur with this reasoning.

Against this backdrop, the court held that the search of Cervantes' hotel room was authorized by the search condition of his mandatory supervision. Although the hotel room was not Cervantes' residence, it qualified as "premises" under the warrantless search condition. In addition, the court concluded that the officers established probable cause to believe that Cervantes had control over the room. First, Cervantes told the officers that he and Farish were sharing the room. Second, Cervantes had a key to the room in his pocket. Finally, Cervantes told the officers that his belongings were inside the room.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/15-50459/15-50459-2017-06-19.pdf?ts=1497891713

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United States v. Johnson, 875 F.3d 1265 (9th Cir. 2017)

On February 2, 2014, Johnson's ex-girlfriend called 911 and reported that Johnson had threatened to kill himself with a gun. The girlfriend told the dispatcher Johnson was at his aunt's apartment and that the aunt, Luana McAlpine, had called her stating Johnson had shot himself. While on the way to McAlpine's apartment, officers discovered that Johnson was a suspect in a recent armed robbery. In addition, the officers learned that Johnson was currently on mandatory parole supervision and had prior arrests for murder, attempted murder, assault, kidnapping, false imprisonment, domestic violence, carjacking, and robbery.

When the officers arrived at McAlpine's apartment, they discovered that Johnson was alive and unharmed. While speaking to Johnson and McAlpine outside, the officers obtained McAlpine's consent to search her apartment. Inside the apartment, officers found a pistol in a bedroom used by McAlpine's daughter, Norrisha Rivers. Inside the bedroom, the officers also found Johnson's clothing, mail, and three prescription bottles in his name.

Officers arrested Johnson and during an interview Johnson told the officers to check the call logs and text messages on his cell phone to prove that he had not contacted his ex-girlfriend or threatened to kill himself. An officer verified that no calls were made from Johnson's phone around the time of the 911 call. The officer then gave Johnson's phone to another officer for forensic analysis.

Three days later, after the forensics unit was unable to make a digital copy of the phone's contents, an officer manually scrolled through text messages sent from Johnson's phone. During this search, the officer found an incriminating text message related to the pistol seized from McAlpine's apartment.

On February 2, 2015, after Johnson had been indicted for being a felon in possession of a firearm but before trial, the government obtained a warrant to search Johnson's phone.

Before trial, Johnson filed a motion to suppress the handgun and the text messages the officers discovered on his cell phone.

First, Johnson argued that the warrantless searches of his cell phone violated the Fourth Amendment.

The court disagreed. The court held that because Johnson was a parolee, subject to warrantless search conditions under *Cal. Penal Code § 3067(b)(3)*, and under the Fourth Amendment, he had a reduced expectation of privacy. Consequently, the court held that the searches of his cell phone did not violate the Fourth Amendment.

Second, Johnson argued that his Fourth Amendment rights were violated because the cell phone searches conducted on February 5, 2014, and February 2, 2015, unreasonably prolonged the seizure of his phone.

Again, the court disagreed, holding that the delays in searching Johnson's phone were reasonable. The court reiterated Johnson's reduced privacy interests in his phone given his parolee status, and added that Johnson never requested the government return his phone. In addition, the court found that the government obtained Johnson's phone lawfully and did not engage in intentional delay-tactics.

Finally, Johnson argued that the handgun should have been suppressed because McAlpine did not give valid consent to search the apartment.

The court held that the record supported the district court's finding that McAlpine gave the officers valid verbal consent to search her apartment

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/16-10184/16-10184-2017-11-27.pdf?ts=1511805686

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Smith v. City of Santa Clara, 876 F.3d 987 (9th Cir. 2017)

Police officers established probable cause to believe that Justine Smith had been involved in a theft of an automobile and a carjacking. The officers discovered that Justine was on probation and that the terms of her probation allowed the government to conduct warrantless searches of her residence. When the officers went to the house that Justine had reported as her residence, Josephine Smith, Justine's mother answered the door. The officers, who did not have a warrant, told Josephine that they were there to conduct a probation search for Justine. Josephine refused to allow the officers into the home without a warrant. Despite Josephine's objections, the officers entered the home to search for Justine but did not find her.

Josephine Smith sued several police officers and the City of Santa Clara under *42 U.S.C. § 1983*,

claiming that the warrantless entry into her home to search for Justine violated her rights under the Fourth Amendment. Josephine also alleged that the officers violated *Cal. Civ. Code § 52.1(a)-(b)* (the Bane Act), which provides a cause of action for individuals whose "rights secured by" federal or California law have been interfered with "by threat, intimidation, or coercion."

The officers filed a motion for summary judgment based on qualified immunity, claiming that the warrantless search of Josephine's home was lawful. The officers argued that the Supreme Court has held that officers may search a probationer's residence without a warrant if they have reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity.

Josephine argued that the Supreme Court's 2006 decision in Georgia v. Randolph created an exception to the probation-search rule. In Randolph, the Court held that a warrantless search of a residence based on the consent of an occupant is unreasonable as to a co-occupant when that co-occupant is physically present and objects to the search. Josephine claimed that, under Randolph, because she was present and objected to the search of her home, that the officers' search of her home was unreasonable.

The district court held that the officers were entitled to qualified immunity on Josephine's Fourth Amendment claim under *§ 1983*. The court concluded that it was not clearly established that Randolph created an exception to the probation-search rule. However, the court denied the officers qualified immunity on the Bane Act claim. The court held that "qualified immunity of the kind applied to *§ 1983* claims does not apply to actions brought under the Bane Act." The case went to trial and the jury returned a verdict in favor of the officers on all claims.

Josephine appealed to the Ninth Circuit Court of Appeals arguing that under Randolph, her objection to the search required the officers to obtain a warrant before conducting a probation search for Justine.

The court disagreed. The court found that the Supreme Court's cases concerning probation searches are not analyzed as consent searches. Consequently, the court held that Randolph, which created an exception to the consent rule, did not apply to the search in this case. Instead, the court noted that the question is whether a warrantless probation search that affects the rights of a third party is reasonable under the totality of the circumstances.

In this case, it was undisputed that the officers knew, at the time of the search, that Justine was serving a felony probation term for a serious offense. In addition, the officers had probable cause to believe that Justine had just been involved in the theft of a car and a stabbing, and that she was still at large. Under these circumstances, the court concluded that the officers' need to protect the public from Justine outweighed Josephine's privacy interest in the home they shared. As a result, the court held that the warrantless search of the home over Josephine's objection was reasonable.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/14-15103/14-15103-2017-11-30.pdf?ts=1512065014

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Protective Sweeps

United States v. Dent, 867 F.3d 37 (1st Cir. 2017)

Federal agents engaged in a drug trafficking investigation suspected that crack cocaine was located in Dent's apartment. While agents applied for a warrant to search the apartment, three police officers went to Dent's apartment to secure the location and preserve evidence in anticipation of the search warrant. When the officers knocked on the door, Dent's girlfriend, Jackson, opened it. Jackson immediately tried to slam the door shut but the officers pushed their way into the apartment and handcuffed her. During this time, the officers heard music that had been playing elsewhere in the apartment decrease in volume, which led them to believe that another individual was present. The officers began to "clear" every room in the apartment and when they reached the final room to be cleared, they saw a man, later identified as Banyan, attempting to stuff something under an air mattress. The officers placed Banyan in handcuffs, looked underneath the air mattress, and saw a baggie of what they believed to be drugs. The officers left the baggie in place, finished their sweep of the apartment, and waited for the arrival of the agents with the search warrant. After agents arrived with the warrant, they searched Dent's apartment and seized cocaine, heroin, a firearm, and drug paraphernalia.

The government charged Dent with several drug offenses. Dent filed a motion to suppress the evidence seized from his apartment pursuant to the warrant.

The court denied Dent's motion. The court held that there was no evidence that either the warrant or the decision to seek the warrant was based on anything the officers discovered during their warrantless entry and protective sweep of the apartment. The court found that the process of applying for the search warrant had already been initiated based on other independent sources of information and that the drugs observed under the air mattress were not included in the search warrant affidavit.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/16-2005/16-2005-2017-08-08.pdf?ts=1502218808

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United States v. Delgado-Pérez, 867 F.3d 244 (1st Cir. 2017)

Police officers went to Delgado's house to arrest him on an outstanding New York state warrant for trafficking cocaine through the United States mail. When the officers arrived outside Delgado's house and announced their presence, there was initially no answer. When the officers began to open a rebar gate outside, Delgado opened a window and told the officers that he would come outside. Once Delgado was outside on the front porch, the officers conducted a protective sweep of Delgado's house and saw a firearm magazine on top of a dresser in a room off an interior hallway. The officers then asked Delgado if there were any firearms in the house. After Delgado told the officers that he kept a firearm in a dresser drawer, the officers went back into Delgado's house and seized it.

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

Delgado claimed that the firearm seized from his house should have been suppressed because the officers discovered it after conducting an unlawful protective sweep of his house.

The court recognized that when officers arrest a suspect outside his home, they may perform a protective sweep of the home if they have a reasonable belief that "the area to be swept harbors an individual posing a danger to those on the arrest scene."

However, in this case, the court held that when the officers arrested Delgado, there was no evidence to support a belief that another person might be inside the home. First, the pre-arrest intelligence gathered by the officers did not provide any reason to believe multiple persons were present in Delgado's home. Second, the officers had no specific reason to believe that Delgado was armed and dangerous, beside the general fact that his alleged offense involved drug trafficking. The court added that when a person is arrested for drug trafficking, that fact alone does not automatically provide a reason to believe that there might be another person in the home who poses a danger to officer safety. Finally, Delgado's immediate, voluntary surrender on the porch could not provide a basis to believe there were other individuals inside Delgado's house. As a result, the court concluded that the officers conducted an unlawful protective sweep and the evidence seized from Delgado's home should have been suppressed.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-2247/15-2247-2017-08-16.pdf?ts=1502917204

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United States v. Ortega-Montalvo, 850 F.3d 429 (8th Cir. 2017)

Federal agents received information that Ortega, a Mexican citizen, had illegally re-entered the United States after having been convicted of aggravated assault for shooting a police officer. The agents determined that Ortega was living in an apartment and went there to arrest him. When the agents knocked on the apartment door, an Hispanic male, later identified as Maldonado, answered the door. The agents identified themselves and displayed their badges. After the agents discovered that Maldonado did not speak English, an agent fluent in Spanish asked for consent to enter the apartment. Maldonado consented. When asked if anyone else was present in the apartment, Maldonado told the agents that his friend was there and pointed to the back of the apartment. With guns drawn, the agents conducted a protective sweep and knocked on a locked bedroom door. A man opened the door, and the agents immediately recognized the man as Ortega. The agents handcuffed and arrested Ortega. After completing their sweep, the agents obtained Ortega's consent to search his bedroom. In Ortega's bedroom, the agents seized three identification documents.

The government charged Ortega with illegally re-entering the United States.

Ortega filed a motion to suppress the evidence seized from his bedroom.

First, Ortega argued that Maldonado did not voluntarily consent to the agents' entry into the apartment.

The court disagreed. When the agents encountered Maldonado, they introduced themselves, showed Maldonado their badges, and requested in Spanish to enter the apartment. The agents' guns remained holstered, and they did not raise their voices. In addition, the agents did not threaten Maldonado or make any promises or misrepresentations to obtain his consent. Consequently, the court held that Maldonado voluntarily consented to the agents' entry into the apartment.

Second, Ortega argued that even if Maldonado's consent to enter the apartment was voluntarily, the agents' protective sweep exceeded the scope of his consent.

Again, the court disagreed. Protective sweeps are allowed under the Fourth Amendment when an officer has facts that would warrant a reasonable officer in believing that "the area to be swept harbors an individual posing a danger to those on the arrest scene." The court also recognized that protective sweeps need not always occur in conjunction with an arrest where "a reasonable officer could conclude that it was necessary for his safety to secure the premises before obtaining a warrant." In this case, the court held that articulable facts warranted the agents' protective sweep. Agents went to Ortega's apartment after discovering he was in the country illegally. From their briefing, the agents knew Ortega had a prior conviction for aggravated assault on a police officer. Finally, the agents learned from Maldonado that Ortega might be present in the apartment. The court concluded that these facts were "sufficient to alert the agents as to the possibility that the apartment harbored dangerous individuals."

Third, Ortega argued that he did not voluntarily consent to the search of his bedroom.

Although he was under arrest, the court held there was no evidence that Ortega was threatened, coerced, or promised anything by the agents to obtain his consent. The court further held that the agents' failure to tell Ortega he had the right to refuse consent to the search did not make Ortega's consent involuntary. As a result, the court found that Ortega voluntarily consented to the search of his bedroom.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1899/16-1899-2017-03-08.pdf?ts=1488990646

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United States v. Alatorre, 863 F.3d 810 (8th Cir. 2017)

Police officers obtained an arrest warrant for Alatorre for assaulting a person with a baton and planned to go to his house to arrest him. At a pre-arrest briefing, officers were informed that Alatorre's past criminal history included carrying and concealing firearms.

When the officers arrived at Alatorre's house, they knocked on the front door. Although no one answered the door, the officers heard movement from inside the house as well as voices, which suggested that more than one person was present. The officers knocked again and announced, "Police with a warrant. Come to your door." When no one responded, the officers knocked and announced their presence two more times. Finally, Alatorre opened the front door and the officers placed him in handcuffs and removed him to the front porch. When asked if anyone else was inside, Alatorre said, 'My girlfriend." After an officer yelled for anyone inside the house to come to the door, Alatorre's girlfriend came out of the kitchen and to the front door. The officers pulled Alatorre's girlfriend onto the porch and asked her if anyone else was inside the house. She told the officers there was no one else in the house. Because the officers had experience with prior arrestees lying to them about the presence of others inside houses, they decided to conduct a protective sweep to locate anyone else inside who could harm them. The officers checked the living area and two adjacent rooms. The officers then entered the kitchen where they saw two guns in plain view on a shelf along with ammunition and drugs. Finding no one inside, the sweep ended after approximately two minutes, and the officers left the house.

Based on their observations of guns and drugs in plain view during the protective sweep, officers secured Alatorre's house and obtained a search warrant. Officers seized the items seen during the protective sweep as well as a handgun located under a couch.

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

Alatorre filed a motion to suppress the evidence seized from his house. Alatorre argued that the officers' protective sweep was not justified because he had already been arrested and secured on the front porch. As a result, Alatorre claimed that the arresting officers could not reasonably believe there was anyone inside the house that could harm them.

A protective sweep is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers and others. The sweep is limited to a visual inspection of those places in which a person might be hiding. The Fourth Amendment allows officers to conduct a protective sweep if they have a reasonable belief based on specific and articulable facts, along with rational inferences from those facts, that the area to be swept harbors an individual posing a danger to the officer or others.

In this case, the court noted that protection of officers conducting an arrest near a defendant's home is a priority recognized by the courts and several federal circuits have upheld protective sweeps after an arrest outside of a residence.[1] In this case, the court held that the protective sweep of Alatorre's house was justified by several facts that supported the officers' reasonable belief that someone else could be inside posing a danger to them during or after the arrest.

First, Alatorre's girlfriend lingered in the kitchen out of the officers' sight until she was specifically called to the door, indicating that it was easy for someone to hide just out of the officers' view in a position from which an attack could be launched. Second, guns or other dangerous weapons were conceivably inside the house given Alatorre's criminal history and the alleged baton assault for which Alatorre was charged. Third, the audible movements and sounds from behind the front door after the officers knocked along with the delay in answering the door, created a reasonable uncertainty as to how many people were inside the house and their intentions toward the officers. Finally, the officers on the front porch dealing with Alatorre and his girlfriend were vulnerable to attack from someone inside the house. Even though hindsight established that the officers had already encountered the only two individuals in Alatorre's house, the officers were justified in conducting the protective sweep before removing Alatorre from the porch.

The court further held that the protective sweep was reasonable in scope and duration. The sweep lasted only two minutes and the officers only examined places large enough to conceal a person, while incidentally noticing guns and drugs in plain view.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-4184/16-4184-2017-07-12.pdf?ts=1499873450

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See: United States v. Job, 851 F.3d 889 (9th Cir. 2017)

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[1] 8th, 9th and 10th Circuits.

United States v. Williams, 871 F.3d 1197 (11th Cir. 2017)

The government charged Williams and 24 other individuals with a variety of criminal offenses including conspiracy to distribute controlled substances, and a warrant was issued for Williams' arrest. The agents confirmed that Williams' residence consisted of a single-family, ranch-style house, with an outbuilding approximately twenty feet away in the back yard. The outbuilding resembled a guesthouse or mother-in-law-suite as it had a front and back door, several windows, and a garage door. During a pre-arrest operational meeting, the agents did not know whether Williams lived in the main house or the outbuilding. As a result, the agents planned to make simultaneous entries of both buildings. When agents performed a drive-by of Williams' residence, they saw Williams' car and two other vehicles parked in the driveway. Based on this observation the agents believed that Williams was possibly inside the residence with multiple other subjects.

The agents arrived at Williams' residence at approximately 6:00 a.m. and entered the main house and the outbuilding. One team of agents arrested Williams in the main house while a second team of agents entered the outbuilding. Inside the outbuilding the agents saw a white powdery residue and razor blades on a table, and a drug press sitting in the corner of the room. After the agents cleared the main house and outbuilding they obtained a warrant to search those areas based on their observations from the initial entry. During the search pursuant to the warrant, the agents seized cocaine, heroin, drug paraphernalia, and weapons.

Williams argued that the agents unlawfully entered the outbuilding because it was unreasonable to believe that he lived there or would be inside it. As a result, Williams claimed that the items the agents saw in the outbuilding could not provide a basis to obtain the search warrant.

The court disagreed. The court concluded that it was reasonable for the agents to enter the main house and the outbuilding pursuant to the arrest warrant. First, the agents confirmed that Williams owned the property through a public records check and had seen Williams on the property during previous surveillance. Second, it was reasonable for the agents to believe Williams was present when they executed the warrant as the agents confirmed that Williams' car was in the driveway and the arrest occurred in the early morning. Finally, both buildings were possible living spaces, which made it reasonable for the agents to believe that Williams might be living or present in either structure.

Alternatively, the court held that the agents' entry into the outbuilding qualified as a valid protective sweep.

To ensure their safety during an arrest, officers may conduct a protective sweep by searching areas immediately adjoining the place of arrest where a person might be found. However, to search areas beyond those adjoining the place of arrest, officers must have reasonable suspicion that the area to be swept contains an individual posing a danger to those on the arrest scene. In this case, the court concluded that the close proximity of the outbuilding to the main house, the belief that drug distribution activities were occurring on the property, and the fact that there were three cars parked in the driveway suggested there might be other people besides Williams on the premises who could pose a threat to the agents' safety. As a result, once the agents lawfully swept the outbuilding, any evidence observed in plain view could be used to obtain a search warrant.

Williams also argued that evidence found in the outbuilding should have been suppressed because the agents executed the arrest warrant at approximately 6:00 a.m., which rendered the warrant invalid.

The court disagreed. The court noted that the Fourth Amendment does not contain any time limitations on reasonable searches and seizures. However, Federal Rule of Criminal Procedure 41 provides that warrants are to be executed "during the daytime," unless the issuing judge for good cause shown expressly authorizes another time. Daytime is defined as "the hours between 6:00 a.m. and 10:00 p.m. local time." Assuming for the sake of argument that agents entered Williams' residence a minute or two before 6:00 a.m., the court held that suppression of evidence was not proper because there was no evidence that the agents did so deliberately or that Williams' arrest would not have otherwise occurred.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/16-16444/16-16444-2017-09-20.pdf?ts=1505939508

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United States v. Bagley, 877 F.3d 1151 (10th Cir. 2017)

The government obtained an arrest warrant for Bagley, a convicted felon, for violating the terms of his supervised release. To execute the arrest warrant, Deputy United States Marshals obtained a search warrant that allowed them to enter a house solely to locate and arrest Bagley. When the marshals arrived, Bagley was in the southeast bedroom, although he eventually surrendered and was handcuffed near the front door. The marshals then conducted a protective sweep of the entire house. In the southeast bedroom, the marshals found two rounds of ammunition and a substance that appeared to be marijuana.

Based on this discovery, the marshals obtained a second warrant to search the entire house for firearms, ammunition, and controlled substances. While executing the second search warrant, the marshals found a firearm, ammunition, marijuana, and drug paraphernalia.

After the district court denied Bagley's motion to suppress evidence seized by the marshals pursuant to the second search warrant, he appealed. Bagley argued that after he surrendered, the marshals violated the Fourth Amendment by searching the house. The government claimed that after the marshals arrested Bagley they were allowed to conduct a protective sweep of the house, to include the southeast bedroom. The government argued that during the lawful protective sweep the marshals found evidence that established probable cause to support the second search warrant.

The Tenth Circuit Court of Appeals recognized that in Maryland v. Buie the Supreme Court held that law enforcement officers are allowed to conduct protective sweeps in two situations. In the first situation, officers can look in "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." In the second situation, officers can look elsewhere in the house upon "specific, articulable facts supporting a reasonable belief that someone dangerous remains in the house."

The court held that the protective sweep in this case did not fall within the first situation outlined in Buie. First, the court commented that while the record from the district court provided some relevant information, it left sizeable gaps concerning Bagley's specific location when the marshals arrested him. Based on this limited record, the court found that Bagley was "near the front door when he was handcuffed" and that the marshals did not start the protective sweep until after they

handcuffed him. Based on these facts, the court concluded that it lacked enough information in the record to characterize the southeast bedroom and the area near the front door as "adjacent."

Next, the court held that even though Bagley announced his surrender to the marshals while he was located in the southeast bedroom, he was not "arrested" until the marshals handcuffed him near the front door. Consequently, the court concluded that in the context of Buie's first situation, the place of arrest was "near the front" door rather than the southeast bedroom.

The court further held that the protective sweep did not fall within the second situation outlined in Buie. When the marshals conducted the protective sweep of the southeast bedroom, Bagley, his girlfriend, and her children had already left the house. While the marshals did not know whether anyone else was in the house, the court stated that this "lack of knowledge cannot constitute the specific, articulable facts required by Buie." Specifically, the court concluded that if officers lack any information about whether someone remains inside a house, they do not have the specific, articulable facts required for a protective sweep beyond the adjacent area.

Finally, the court held that because the marshals exceeded the scope of a protective sweep, the government could not use the ammunition or suspected marijuana discovered during the sweep to justify the second search warrant. Consequently, the court concluded that the evidence discovered during the execution of the second search warrant should have been suppressed.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/16-3305/16-3305-2017-12-18.pdf?ts=1513616436

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Search Incident to Arrest (person)

See: United States v. Diaz, 854 F.3d 197 (2d Cir. 2017)

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Search Incident to Arrest (vehicle)

United States v. Paige, 870 F.3d 693 (7th Cir. 2017)

Around midnight, an employee of a McDonald's restaurant called 911, reported that a vehicle had been sitting in the drive-through lane for approximately one-hour, and expressed concern that the driver might be sick or injured. When a police officer arrived, she saw Paige standing outside the open driver's door of the vehicle talking to a firefighter who had also responded. As the officer approached, she smelled a strong odor of fresh marijuana coming from Paige. The firefighter told the officer that he had found Paige asleep in the driver's seat of the vehicle, and had awakened Paige by knocking on the vehicle's window. Paige told the officer that he had just fallen asleep and was "ok." Skeptical of Paige's story, the officer decided to detain Paige in her police car before she continued her investigation. Before placing Paige in her vehicle the officer frisked him for weapons and found a loaded handgun in Paige's waistband. The officer arrested Paige and placed him in her vehicle.

The officer walked over to Paige's vehicle, saw a bottle of alcohol on the driver's seat, and smelled a strong odor of marijuana coming from inside the vehicle. The officer searched the vehicle and found crack cocaine and marijuana inside the console.

The government charged Paige with possession of a firearm by a convicted felon, and possession with intent to distribute crack cocaine and marijuana.

Paige filed a motion to suppress the firearm seized from his waistband and the drugs seized from his vehicle.

First, the court held that the officer had probable cause to arrest Paige for possession of marijuana and operating a vehicle under the influence because she smelled marijuana emanating from Paige's body, knew that Paige had been sleeping in his car for approximately one-hour in an open McDonald's drive-through, and believed that Paige was not answering her questions truthfully.

Second, after the officer established probable cause to arrest, she was allowed to search Paige incident to arrest without any additional justification. As a result, the court concluded that the officer lawfully seized the firearm from Paige's waistband incident to arrest.

Third, the court held that the officer lawfully searched Paige's vehicle incident to his arrest. An officer may search a vehicle incident to an arrest when it is reasonable to believe that the vehicle contains evidence of the offense for which the suspect was arrested. Here, the court concluded that the officer reasonably believed that Paige's vehicle contained evidence related to the offenses of possession of marijuana, and driving while impaired, because as the officer approached the vehicle she smelled the strong odor of marijuana emanating from the interior. The court added that this fact also provided the officer probable cause to believe that Paige's vehicle contained marijuana and supported a warrantless search under the automobile exception.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-4128/16-4128-2017-09-01.pdf?ts=1504285424

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United States v. Stegall, 850 F.3d 981 (8th Cir. 2017)

Officers responded to a 911 call regarding a road rage incident where the driver of a silver sport utility vehicle (SUV) pulling a jet ski brandished a gun at the 911 caller. Officers located the SUV parked and unoccupied in the parking lot of a shopping center. While the officers searched the parking lot for the driver, a witness told the officers that she saw the driver get out of the SUV, go to the rear of the vehicle, and put something in the back of it. The officers eventually located Stegall, who admitted he was the driver of the SUV, and that he was involved in a road rage incident earlier that day. Stegall denied that he brandished a gun at the 911 caller; however, he told the officers he "probably" had a firearm in his vehicle. The officers detained Stegall and contacted the 911 caller who came to the scene. The caller immediately identified Stegall as the driver of the SUV who brandished a firearm at him. The officers arrested Stegall for making a terroristic threat, a violation of state law. The officers handcuffed Stegall and placed him in the back of a patrol car.

With Stegall in custody, the officers searched his SUV. In the rear hatch area of the vehicle, officers found a handgun lodged between the back row of seats and the rear cargo floorboard. The officers also found an AR-15 rifle with an unusually short barrel. The government later charged Stegall with possession of an unregistered short-barreled rifle in violation of federal law.

Stegall filed a motion of suppress the evidence the officers seized from his vehicle.

The district court denied Stegall's motion. The court held the warrantless search of Stegall's SUV constituted a valid search incident to arrest because the officers had a reasonable basis to believe the vehicle contained evidence relevant to the crime of arrest, making a terroristic threat. Stegall appealed.

In Arizona v. Gant, the Supreme Court held that officers may search a vehicle incident to arrest only if: (1) the arrestee is unrestrained and within reaching distance of the passenger compartment when the search begins, or (2) if it is reasonable to believe the vehicle contains evidence of the crime for which the suspect was arrested.

Here, the court held the warrantless search of Stegall's SUV was reasonable under the second part of Gant because the officers had a reasonable basis to believe that Stegall's SUV contained evidence relevant to the crime for which he was arrested. First, Stegall confirmed that he was the driver of the SUV involved in an earlier road rage incident. Second, Stegall told the officers he "probably" had a firearm in his vehicle. Third, the 911 caller positively identified Stegall as the driver who brandished a gun at him. Fourth, a witness saw Stegall concealing something in the rear hatch of his SUV.

Stegall also claimed that the hatchback area of his SUV was functionally the same as the trunk of car; therefore, the officers could not search that area incident to his arrest.

Again, the court disagreed. Even if searches under the second part of Gant are limited to the passenger compartment, the court held that the hatchback or rear hatch area of a vehicle is part of the passenger compartment.[1]

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-2549/16-2549-2017-03-13.pdf?ts=1489419045

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[1] In addition to the 8th Circuit, the 1st, 6th, 9th, and 10th Circuits have held that the "passenger compartment" includes the rear hatch area of an SUV.

Qualified Immunity / Absolute Immunity / Civil – Municipal - Supervisor Liability / *Bivens*

Hernandez v. Mesa, 582 U.S. ___ (2017); 137 S. Ct. 2003

A United States Border Patrol Agent, Jesus Mesa, Jr., standing in the United States, shot and killed Sergio Hernandez Guereca, a fifteen-year old Mexican citizen, standing in Mexico. Hernandez's parents (plaintiffs) filed a lawsuit against Agent Mesa under Bivens, alleging that Agent Mesa violated their son's rights under the Fourth and Fifth Amendments. Specifically, the plaintiffs alleged that Agent Mesa violated the Fourth Amendment by using excessive force against Hernandez, and the Fifth Amendment by depriving Hernandez of due process.

The Fifth Circuit Court of Appeals, sitting en banc, without deciding the issue, assumed that the plaintiffs could sue Agent Mesa under Bivens. However, the court then held that the plaintiffs failed to state a claim for a violation of the Fourth Amendment because Hernandez was a Mexican citizen who had no "significant voluntary connection to the United States" and "was on Mexican soil at the time he was shot." Consequently, the court dismissed the plaintiff's Fourth Amendment excessive force claim.

The court further held that Agent Mesa was entitled to qualified immunity on the plaintiffs' Fifth Amendment due process claim. Again, the court did not decide whether the plaintiffs could sue Agent Mesa under Bivens. Instead, the court granted Agent Mesa qualified immunity, finding that at the time of the shooting it was not clearly established that shooting across the United States border into Mexico and injuring someone with no significant connection to the United States was unlawful.

Significantly, the Fifth Circuit Court of Appeals dismissed the lawsuit without deciding whether the plaintiffs had stated a valid constitutional claim under the Fourth or Fifth Amendments and whether they could sue Agent Mesa under Bivens.

The Supreme Court vacated the Fifth Circuit Court of Appeal's judgment and remanded the case. First, the Court found that the Fifth Circuit should determine whether the plaintiffs can sue Agent Mesa for the alleged Fourth and Fifth Amendment violations under Bivens. In Ziglar v. Abbasi, decided on June 19, 2017 the Supreme Court provided guidance on how the lower courts should determine whether a plaintiff can bring a lawsuit under Bivens. The Court suggested that the Fifth Circuit might be able to resolve the Bivens questions in this case in light of the guidance provided in Abbasi.

The court further held that the Fifth Circuit Court of Appeals erred in granting Agent Mesa qualified immunity on the plaintiffs' Fifth Amendment claim. The Fifth Circuit held that at the time of the shooting, Hernandez was "an alien who had no significant voluntary connection to . . . the United States." However, the Court found that it was undisputed that Hernandez's nationality and the extent of his ties to the United States were unknown to Agent Mesa at the time of the shooting. As a result, the Court concluded it was not proper to grant Agent Mesa qualified immunity based on those facts.

For the Court's opinion: https://www.supremecourt.gov/opinions/16pdf/15-118_97bf.pdf

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Failure to Intervene

See: Jones v. Fransen, 857 F.3d 843 (11th Cir. 2017)

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Federal Officer Removal Statute / Supremacy Clause

Texas v. Kleinert, 855 F.3d 305 (5th Cir. 2017)

Officer Kleinert, an Austin, Texas police officer, was specially deputized by the Federal Bureau of Investigation (FBI) under Titles 21 and 28 of the United States Code. After his deputations, Kleinert worked as a full-time FBI bank robbery task force officer. As such, Kleinert reported to work each day at an FBI office, received a security clearance from the federal government, was supervised by an FBI agent, and used FBI issued equipment.

In July 2013, Officer Kleinert went to a bank that had been robbed earlier in the day to obtain surveillance footage and interview bank employees. Although it was normal business hours, a sign on the front door indicated the bank was temporarily closed. While Kleinert was discussing the robbery with two employees, a man, later identified as Larry Jackson, pulled on the bank's locked front door. When one of the bank employees went out tell Jackson the bank was closed, Jackson identified himself as "William Majors," and told the bank employee that he needed to withdraw funds from his account. The bank employee knew that Jackson was not William Majors because she personally knew Majors. Uncomfortable with Jackson's representations, the bank employee asked Officer Kleinert to talk to Jackson.

Jackson told Officer Kleinert that he was not William Majors, but rather Mr. Majors' brother. Jackson told Kleinert that he needed to get money out of the bank to cover the costs of a tow truck and rental car because he had been involved in a traffic accident. Jackson held up his phone to his face and pretended to be engaged in a conversation with someone about the accident. After this exchange Jackson fled, and Officer Kleinert chased him.

Officer Kleinert caught up to Jackson on a rocky incline that led to a traffic bridge. Kleinert drew his firearm and ordered Jackson to the ground. Jackson stopped briefly, ignored Kleinert's command, and continued to run. Kleinert caught up to Jackson and grabbed Jackson with his left hand while holding his firearm in his right hand. Jackson continued to run with Kleinert holding on to the back of his shirt. As Jackson tried to go up the rock incline, Kleinert struck Jackson twice in the lower back with the "meaty part" of his right hand, while still holding his firearm. When Kleinert tried to strike Jackson a third time, Jackson fell back towards Kleinert and knocked him down. As they fell, Kleinert accidentally pulled the trigger of his firearm, firing one bullet into Jackson's neck, killing him.

In 2014, a Travis County, Texas state grand jury indicted Kleinert for manslaughter. The indictment charged that Kleinert "recklessly caused" Jackson's death by striking and attempting to strike Jackson while holding a loaded firearm and for attempting to seize Jackson without maintaining a distance between himself and Jackson that was sufficient to holster his firearm.

Officer Kleinert filed a motion in federal district court to remove the state prosecution to federal court under *28 U.S.C. § 1442*, the "federal-officer-removal" statute. After the federal district court determined that removal was proper, Kleinert asked the district court to dismiss the indictment. Kleinert argued that under the *Supremacy Clause* of the *United States Constitution* he was immune

from prosecution by the local district attorney for conduct that he undertook as a federal officer. The district court agreed and dismissed the indictment. The State appealed to the Fifth Circuit Court of Appeals arguing that the district court improperly removed the case to federal court.

The court disagreed. To remove a case to federal court under the federal-officer-removal statute[1], the defendant / officer must:

1) Be "an officer . . . of the United States" or of a federal agency;

2) Show that the state prosecution arose out of an act done by the officer under the color of federal authority and in enforcement of federal law;

3) Raise a "colorable" or plausible federal defense" to the prosecution by the state.

The court noted that the State did not dispute that Officer Kleinert was a "federal officer" for the purposes of the removal statute; therefore, the first element was satisfied.

Next, Officer Kleinert was a specially deputized federal agent who investigated bank robberies for the FBI's local task force. When Officer Kleinert encountered Jackson, he was investigating a bank robbery, and during their interaction Kleinert developed probable cause to believe that Jackson was trying to rob or defraud the same bank, also federal offenses. According to Kleinert, federal law authorized him to arrest Jackson based on probable cause and the State's prosecution was based on Kleinert's striking Jackson during the arrest. As a result, the court found that Officer Kleinert satisfied the second element of the federal-officer-removal statute.

Finally, the court held that Officer Kleinert satisfied the third element because he plausibly claimed that he was acting as a federal officer at the time of the shooting. As a result, the court concluded that Kleinert, asserted a "colorable" defense of *Supremacy Clause* immunity from state prosecution.

Even if the district court properly removed the case to federal court, the State argued that the district court improperly granted Officer Kleinert immunity under the *Supremacy Clause*.

Again, the court disagreed. The *Supremacy Clause* of the *United States Constitution* protects federal officers, acting within their federal authority from liability under state law. The *Supremacy Clause* prohibits a state from punishing, whether by local prosecution or private lawsuit under state law,

1) A federal officer;

2) Authorized by federal law to perform an act;

3) Who, in performing the authorized act, did no more than what the officer subjectively believed was necessary and proper (this subjective element depends on an officer's "honest belief that his actions are reasonable and necessary to the exercise of his authority");

[1] *Title 28 U.S.C. § 1442(a)(1)*, the federal-officer-removal statute, provides that: "any officer . . . of the United States or of any agency thereof" prosecuted "for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals" may remove the action to federal court. Although not explicit in the text of the statute, the officer must also allege "a colorable federal defense" to satisfy Article III's "arising under" requirement for subject matter jurisdiction.

4) And that belief was objectively reasonable under the circumstances.

As before, the State conceded that Officer Kleinert was a federal officer in this case. Second, the court ruled that when Officer Kleinert attempted to arrest Jackson, he had probable cause to arrest Jackson for bank robbery and bank fraud.

Third, the court found Officer Kleinert's testimony credible that once he drew his firearm he could not safely re-holster it before going "hands-on" with Jackson because, to do so, he would have to take his eyes off Jackson. According to Officer Kleinert, taking eyes off a suspect before apprehending him is dangerous and re-holstering his firearm would have been difficult because of his plain clothes, including a baggy, untucked shirt. In addition, Officer Kleinert explained that he used "hammer fist" strikes, a technique he learned from police training, to gain compliance. The court noted that Jackson had run away from Officer Kleinert twice already and continued to resist even after Kleinert physically held on to Jackson's shirt. After the shooting, Kleinert immediately called dispatch to report the incident and seemed concerned that EMS and other officers were not arriving quickly enough.

Fourth, a Lieutenant with the Austin Police Department testified that he and other officers "have gone hands on" with suspects while holding their firearms. In addition, a training instructor testified that the department teaches its officers to perform hammer-fist strikes while holding a weapon, although not necessarily a firearm. The State presented little evidence to the contrary. Consequently, the court concluded that Officer Kleinert's actions were objectively reasonable under the circumstances because he reacted on a "split-second basis" and accidentally discharged his firearm, in what the State's own expert called a "sympathetic" or involuntary discharge.

In conclusion, the court reminded officers that "even if a federal officer satisfies every element of the immunity standard, the *Supremacy Clause* cannot shield the officer from *federal* consequences, such as prosecution by federal authorities or civil liability under federal law."

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/15-51077/15-51077-2017-04-20.pdf?ts=1492731034

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Use of Force - (Detention / Arrest / Search Warrant Execution / Other Entries)

Cty. of Los Angeles v. Mendez, 581 U.S. ___ (2017); 137 S. Ct. 1539

Los Angeles County Deputies Conley and Pederson were part of a team of police officers that went to a residence owned by Paula Hughes to search for Ronnie O'Dell, a wanted parolee. Deputies Conley and Pederson were assigned to clear the rear of Hughes' property and cover the back door of Hughes' residence. The deputies were told that a man named Mendez lived in the backyard of Hughes' residence with Jennifer Garcia. Deputies Conley and Pederson went through a gate and entered the backyard where they saw a small plywood shack. The deputies entered the shack without a search warrant, and without knocking and announcing their presence. Inside the shack, the deputies saw the silhouette of a man pointing, what appeared to be a rifle, at them. Deputies Conley and Pederson fired fifteen shots at the man, later identified as Mendez. Mendez and Garcia both sustained gunshot wounds. The deputies later discovered that Mendez had been pointing a BB gun that he kept by his bed to shoot rats inside the shack.

Mendez and Garcia (Mendez) sued Conley, Pederson and the Los Angeles County Sheriff's Department under *42 U.S.C. § 1983* alleging that the deputies committed three violations of the Fourth Amendment. First, Mendez claimed that the deputies executed an unreasonable search by entering the shack without a warrant (the "warrantless entry claim"). Second, Mendez claimed that the deputies performed an unreasonable search because they failed to announce their presence before entering the shack (the "knock and announce claim"). Finally, Mendez claimed that the deputies used excessive force by discharging their firearms after entering the shack (the "excessive force claim").

The district court found Deputy Conley liable on the warrantless entry claim, concluding that entry into the shack was not supported by exigent circumstances or another exception to the warrant requirement. The court found both deputies liable on the knock and announce claim. Finally, the court held that the deputies did not use excessive force in violation of the Fourth Amendment, as it was reasonable for the deputies to mistakenly believe Mendez's BB gun was a rifle. Nonetheless, the court held that the deputies were liable for the shooting under the Ninth Circuit's provocation rule and awarded approximately four million dollars in damages. The provocation rule states,

> "Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."

The district court held that because the officers violated the Fourth Amendment by entering the shack without a warrant, which proximately caused the injuries to Mendez and his wife, it was proper to hold the officers liable for their injuries under the provocation rule.

On appeal, the Ninth Circuit Court of Appeals reversed the district court and held that the deputies were entitled to qualified immunity on the knock and announce claim. However, the court agreed with the district court and held that the warrantless entry of the shack violated clearly established law, but was attributable to both deputies. Finally, the court applied the provocation rule and held the deputies liable for their use of force finding that the officers had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law.

Los Angeles County and the deputies appealed, and the United States Supreme Court agreed to hear the case. The issue before the Court was whether the Ninth Circuit's provocation rule was in conflict with Graham v. Connor regarding the manner in which a claim of excessive force against a police officer should be determined under *42 U.S.C. § 1983*.

The Supreme Court held that the Fourth Amendment provides no basis for the provocation rule. The Court stated that a different Fourth Amendment violation, such as the unlawful entry into the shack, could not transform a later, reasonable use of force into an unreasonable seizure. The Court noted that the provocation rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist. The Court emphasized the exclusive framework for analyzing excessive force claims is set out in Graham. If there is no excessive force claim under Graham, there is no excessive force claim at all. Once a use of force is deemed reasonable under Graham, it may not be found unreasonable by reference to some separate constitutional violation.

The Court added that to the extent a plaintiff has other Fourth Amendment claims, such as Mendez's claim that the deputies violated the Fourth Amendment by unlawfully entering his shack, those claims should be analyzed separately. The Court remanded the case to the Ninth Circuit Court of Appeals suggesting that the court "revisit the question whether proximate cause permits respondents" (Mendez) "to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset."

For the Court's opinion: https://www.supremecourt.gov/opinions/16pdf/16-369_09m1.pdf

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District of Columbia v. Wesby, 583 U.S. ___ (2018); 199 L. Ed.2d 453

District of Columbia police officers responded to a complaint about loud music and illegal activities in a vacant house. When the officers entered the house they smelled marijuana and saw beer bottles and cups of liquor on the floor. The officers found a makeshift strip club in the living room, and a naked woman and several men in an upstairs bedroom. Many of the individuals ran when they saw the officers; however, those that remained gave the officers inconsistent stories. Two women identified "Peaches" as the house's tenant and told the officers that she had invited them to a party at the house. Peaches was not at the house, but the officers were able to contact her by phone. Peaches initially told the officers she was renting the house and that she had given the others permission to be there. Peaches eventually told the officers that she did not have permission to use the house. The officers contacted the homeowner who confirmed that he had not given anyone permission to be in his house. The officers arrested everyone in the house for unlawful entry.

Sixteen arrestees sued the officers for false arrest. The district court found that the officers lacked probable cause to arrest the partygoers for unlawful entry. The District of Columbia Circuit Court of Appeals affirmed the district court. The officers appealed to the United States Supreme Court.

The Court held that the officers had probable cause to arrest the partygoers for unlawful entry. First, multiple neighbors told the officers that the house had been vacant for several months, and the house had no furniture except for a few padded metal chairs and a bare mattress. Second, when the officers arrived after 1:00 a.m., the officers could hear loud music coming from inside the house. Third, after the officers entered the house, they smelled marijuana and discovered the living room had been converted into a makeshift strip club. Fourth, when the officers entered the house many partygoers fled while one hid in a closet and another in a bathroom. Finally, when the officers asked who had given them permission to be in the house, the partygoers gave the officers vague and implausible responses. Based on the totality of the circumstances, the Court found that the officers made an "entirely reasonable inference" that the partygoers were knowingly taking advantage of a vacant house as a venue to their late-night party and did not have permission to be in the house. Consequently, the Court held that a reasonable officer could conclude that there was probable cause to arrest the partygoers for unlawful entry.

The Court further held that even if the officers lacked probable cause to arrest the partygoers, they were still entitled to qualified immunity. The Court concluded that existing circuit precedent did not require the officers to accept the partygoers' belief that they had permission to be inside the house before they could be arrested for unlawful entry. Instead, the court found that a reasonable officer could have interpreted the law as permitting the arrests under the circumstances faced by the officers.

For the Court's opinion: https://www.supremecourt.gov/opinions/17pdf/15-1485_new_8n59.pdf

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Alfano v. Lynch, 847 F.3d 71 (1st Cir. 2017)

Alfano and his friends approached a security checkpoint at the entrance to a concert venue. Prior to approaching the checkpoint, Alfano consumed between six to eight beers over a span of four to six hours. Believing that Alfano might be incapacitated, the security guards removed Alfano from the line, escorted him to a holding area, and contacted a police officer who was working a security detail at the concert. To evaluate whether Alfano was incapacitated, the officer asked Alfano to perform a series of field sobriety tests. After conducting the field sobriety tests, the officer asked Alfano to take a Breathalyzer test. After Alfano refused, the officer handcuffed Alfano and placed him in protective custody. Alfano was shackled to a bench, and eventually transported to the police station, where he was detained in a holding cell. Approximately five hours, later Alfano was released.

Alfano sued the officer under *42 U.S.C. § 1983*, claiming that the officer violated the Fourth Amendment by taking him into protective custody without probable cause. The officer filed a motion for summary judgment based on qualified immunity.

The court held that the officer was not entitled to qualified immunity. First, the court found that at the time of the incident, it was clearly established that officers acting under a civil protection statute had to establish probable cause before taking an individual into custody that resembled an arrest.

Second, the court concluded it was not reasonable for the officer to believe that he had probable cause to take Alfano into protective custody under the Massachusetts statute. Massachusetts law allows police officers to take "incapacitated" persons into civil protective custody. The law provides in part, that an "incapacitated" person is one who is both intoxicated, and "by reason of the consumption of intoxicating liquor is . . . likely to suffer or cause physical harm or damage property."

To establish probable cause to take Alfano into protective custody, the officer needed to reasonably believe that Alfano was both intoxicated and likely to harm himself, someone else, or to damage property. However, the officer only had reason to believe that Alfano had been drinking and was under the influence of alcohol. There were no facts indicating that Alfano was likely to harm himself, injure another person, or damage property. Consequently, the officer's reasons for placing Alfano into protective custody did not extend beyond probable cause to think that Alfano was intoxicated, and intoxication, by itself, is not sufficient to support a finding of incapacitation.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/16-1914/16-1914-2017-02-01.pdf?ts=1485982804

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Morse v. Cloutier, 869 F.3d 16 (1st Cir. 2017)

Police officers responded to a residence after receiving a call that a man was hiding in the woods throwing rocks and bottles at individuals in their back yard. When officers arrived, the victims

told the officers that their neighbor, Charles Morse, was the perpetrator and that he might be armed. The officers knew Morse from a previous encounter where he threatened a man with a firearm.

Officers went to Morse's house and knocked on the door. Morse opened the interior door; however, he locked the screen door that separated him from the officers. When the officers asked Morse to step outside to answer some questions, he refused. The officers then told Morse that he was under arrest. Morse told the officers to return with a warrant and shut the interior door. The officers ordered Morse to open the door and when he refused, the officers kicked through the screen door and the wooden interior door. The officers entered Morse's house and arrested him. The officers charged Morse with a variety of offenses, which were later dismissed.

Morse sued the officers under *42 U.S.C. § 1983* claiming that the officers' warrantless entry and subsequent arrest violated the Fourth Amendment.

The officers filed a motion for summary judgment based on qualified immunity arguing that the warrantless entry into Morse's house was justified by exigent circumstances.

The court agreed with the district court, which held that while the officers had probable cause to arrest Morse, there was a factual dispute between Morse's version and the officers' version of the encounter. As the district court was bound to accept Morse's version of the encounter as true, it concluded that a reasonable juror could find that the circumstances were not sufficiently exigent to allow the warrantless entry in Morse's house and his warrantless arrest.

Alternatively, the officers argued that they were entitled to qualified immunity because they arrested Morse in his doorway; therefore, they did not need a warrant. In United States v. Santana, the Supreme Court held that officers could arrest a suspect insider her home without a warrant when the defendant voluntarily stood in her doorway. The court reasoned that by standing in her doorway, the defendant had voluntarily placed herself in public view, and was, for all intents and purposes, in a public space. The officers argued that when Morse opened his door, he exposed himself to public view and was therefore in a public space where he could be arrested without a warrant.

The court disagreed. First, the court noted that Morse came to his doorway only after the officers knocked; therefore, he was in public view only because the officers summoned him to his door. Second, unlike the suspect in Santana, Morse was not standing directly in his doorway. Instead, even after Morse opened the interior door, he stood behind the locked screen door. Because of these significant distinctions, the court held that Morse's arrest was not a valid "doorway" arrest under Santana.

The court further held that when Morse closed the interior door to his home the law was clearly established such that a reasonable police officer should have realized that forcibly breaking into the house without a warrant or an exigency would violate the Fourth Amendment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-2043/15-2043-2017-08-25.pdf?ts=1503689404

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Brown v. City of New York, 862 F.3d 182 (2d Cir. 2017)

Two police officers attempted to arrest Imani Brown for disorderly conduct. After Brown refused to place her hands behind her back to be handcuffed, one of the officers kicked Brown's legs out from under her, causing her to fall to the ground. While Brown was on the ground, one of the officers used his hand to push Brown's face onto the pavement as she continued to struggle with the officers. After the officer twice administered a burst of pepper spray directly into Brown's face, the officers were able to handcuff Brown. The officer warned Brown before each application of the pepper spray.

Brown sued the officers, claiming that they used excessive force in violation of the Fourth Amendment.

The court disagreed, holding that the officers were entitled to qualified immunity. Qualified immunity protects government officials from civil liability unless the official violated a statutory or constitutional right that was clearly established. To be clearly established, a right must be sufficiently clear that any reasonable official would have known that what he is doing violates that right. In addition, the Supreme Court has held that lower courts are "not to define clearly established law at a high level of generality." Instead, the courts must consider the particular circumstances in which the force was applied. In this case, the officers' use of force against Brown occurred after Brown repeatedly refused to follow the officers' instructions to place her hands behind her back for handcuffing. Following the guidance provided by the Supreme Court, the court held that no precedential decision of the Supreme Court or the Second Circuit Court of Appeals clearly established that the officers' use of force, viewed in the circumstances in which they were taken, violated the Fourth Amendment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/16-1258/16-1258-2017-07-05.pdf?ts=1499265006

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Hensley v. Price, 876 F.3d 573 (4th Cir. 2017)

Around 6:15 a.m., two deputies went to Hensley's house after Hensley's mother-in-law called 911 and reported a domestic disturbance. The deputies were told that Hensley was on the porch yelling and screaming at someone inside the house and that he might be under the influence of drugs. As the deputies approached Hensley's house in separate vehicles, a man flagged down one of the deputies and stated that Hensley "had kept the neighborhood up all night." In the meantime, the 911 dispatcher told the deputies that Hensley may have injured his granddaughters.

When the deputies pulled into Hensley's driveway, they saw Hensley, his older daughter, Rachelle, and his minor daughter, H.H. come out of the house onto the front porch. Both deputies saw Hensley holding a handgun and one of the deputies radioed dispatch, stating, "It's a gun! Gotta gun!" The officers then saw Hensley briefly struggle with Rachelle and H.H., striking Rachelle with the handgun. After that altercation, Hensley descended the porch stairs and walked toward the deputies, holding the handgun with its muzzle pointed at the ground. During this time, Hensley and the deputies did not acknowledge each other's presence. Hensley never raised the gun toward the deputies or made any overt threats toward them and the deputies did not order Hensley to stop, to drop the gun, or issue any type of warning. The deputies exited their patrol cars and shot Hensley, who was approximately thirty feet away, walking toward them with the gun in his hand. The dispatcher's audio log indicated that less than fifteen seconds elapsed from

the time the deputy stated, "It's a gun! Gotta gun!" to the time the deputies shot Hensley. Hensley died from his injuries.

The plaintiffs, Hensley's wife and two daughters, sued the deputies under *42 U.S.C. § 1983* claiming, among other things, that the deputies use of deadly force against Hensley violated the Fourth Amendment. The deputies filed a motion for summary judgment based on qualified immunity arguing that they acted reasonably in using deadly force against Hensley.

The Fourth Circuit Court of Appeals agreed with the district court, with two of the three judges on the appellate panel holding that the deputies were not entitled to qualified immunity.

The court explained that in reviewing a denial of summary judgment based on qualified immunity, it was bound to consider only whether the undisputed facts, considered "in the light most favorable to the plaintiff," established that the defendants violated clearly established law. At this stage, the court noted that it could not consider the defendants' version of events or resolve any factual disputes between the parties.

Against this backdrop, based on the plaintiffs' version of the incident, the court held that Hensley did not pose a threat of serious physical harm to the deputies or his daughters when the deputies shot him; therefore, the officers seized him in violation of the Fourth Amendment.

The court found that if a jury believed the plaintiffs' version of the incident, it could conclude that the deputies shot Hensley only because he was holding a gun, even though he never raised the gun to threaten the deputies. The court commented that Hensley never pointed the gun at anyone and concluded that the deputies had ample time to warn Hensley to drop his gun or stop before shooting him.

The court further held that the deputies' use of deadly force was not necessary to protect Rachelle from serious physical injury because when the deputies shot Hensley, his physical conflict with her had ended. The court found that the short struggle between Hensley and Rachelle "had little bearing on whether Hensley was prepared to take the substantial step of escalating a domestic disturbance into a potentially deadly confrontation with two armed police officers."

Finally, even if the deputies reasonably could have believed that Hensley posed a threat of serious physical harm, their failure to warn him or order him to drop the gun before shooting him was unreasonable. Before an officer may use deadly force he should give a warning if it is feasible. The court stated this means, "an officer should give a warning before using deadly force unless there is an immediate threatened danger." Here the court held that a jury could find that the deputies were not in any immediate danger when they shot Hensley.

In conclusion, the court did not consider whether fatally shooting Hensley under these circumstances violated clearly established law. The court explained that because the officer failed to raise this issue, they waived any argument that their use of deadly force against Hensley did not violate clearly established law.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca4/16-1294/16-1294-2017-11-17.pdf?ts=1510947026

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Brown v. Elliott, 876 F.3d 637 (4th Cir. 2017)

Deputies received a tip that Melvin Lawhorn would be transporting a large quantity of cocaine in a truck on a specific route through Kershaw County, South Carolina. In response, several deputies set up a perimeter along the route. When Deputy Elliott saw the truck, he initiated a traffic stop after he determined the truck was speeding and had crossed the centerline. Deputy Elliott approached the truck from the passenger side, where Lawhorn was sitting with his window halfway down. Another deputy approached the truck from the driver's side and noticed the driver, Darryl Herbert, had his foot on top of the gas pedal and that the truck's engine was still running.

When Deputy Elliott arrived at the passenger door, Lawhorn lunged toward the driver's seat, put his left foot on top of the driver's foot, which was still on the gas pedal, and attempted to shift the truck into drive. The deputies shouted "freeze" and "don't move." Deputy Elliott leaned inside the passenger-side window to grab Lawhorn, however; Lawhorn successfully shifted the truck into drive, and the truck began to move forward. Deputy Elliott fired one shot into the truck, which struck Lawhorn in the back and killed him.

Lawhorn's personal representative, Arlean Brown, sued Deputy Elliott under *42 U.S.C. § 1983* for using excessive force against Lawhorn in violation of the Fourth Amendment.

The district court held that Deputy Elliott was entitled to qualified immunity. Even viewing the evidence "in the light most favorable to Ms. Brown," the court concluded that Deputy Elliott did not violate clearly established law. Brown appealed.

Without deciding whether Deputy Elliott's use of force was reasonable under the Fourth Amendment, the Fourth Circuit Court of Appeals held that existing law did not clearly establish that Deputy Elliott violated the Fourth Amendment in his use of deadly force against Lawhorn under the circumstances. First, the court found that it was undisputed that Lawhorn put Deputy Elliott in danger by placing the truck in motion while Elliott was leaning in through the passenger window. Next, the court found that it was undisputed that Deputy Elliott's torso was inside the truck when he shot Lawhorn. Third, the court held there was no case law that put Deputy Elliott on notice that using deadly force under these circumstances violated the Fourth Amendment. Finally, the court held that Deputy Elliott's conduct was not so extreme that he should have known that his conduct violated established law.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca4/16-2214/16-2214-2017-11-21.pdf?ts=1511294454

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Hamilton v. Kindred, 845 F.3d 659 (5th Cir. 2017)

Brandy Hamilton and Alexandria Randle were pulled over by Officer Turner for speeding. After Officer Turner smelled marijuana, he ordered the women to exit their vehicle. Hamilton was wearing a bikini bathing suit, and Randle was similarly dressed. Officer Turner handcuffed the women and searched their vehicle. During this time, Officers Ron Kinard and Amanda Bui arrived. After Officer Turner searched the vehicle, he asked Officer Bui to search Hamilton and Randle. Officer Bui conducted a body cavity search on both women while on the side of the road.

Hamilton and Randle subsequently filed a lawsuit against the three officers under *42 U.S.C. § 1983* claiming the invasive cavity searches violated their Fourth Amendment rights to be free from unreasonable searches and seizures. Officers Turner and Bui reached settlement agreements

with Hamilton and Randle. Officer Kindred argued that Hamilton and Randle failed to adequately allege that an excessive use of force occurred. In addition, Officer Kindred argued that he could not be liable under *42 U.S.C. § 1983* as a bystander for not intervening to prevent the body cavity searches; therefore, he was entitled to qualified immunity.

The district court denied Officer Kindred qualified immunity. The court found that Hamilton and Randle had adequately alleged a claim of excessive force. The court also held it was clearly established at the time of the incident that bystander liability applied. In addition, the court concluded that there was a serious dispute as to material facts in the case regarding the objective reasonableness of Officer Kindred's actions. Officer Kindred appealed to the Fifth Circuit Court of Appeals.

First, to bring a *§ 1983* excessive force claim under the Fourth Amendment, a plaintiff must show that she was seized. Here, the court of appeals found that Hamilton and Randle clearly alleged in their complaint that they were seized during the traffic stop when they were handcuffed and placed in the officers' patrol cars. In addition, the women alleged that they were detained for over thirty-minutes and subjected to invasive body cavity searches in violation of the Fourth Amendment.

Second, the court held that Officer Bui's insertion of her fingers into the plaintiffs' body cavities constituted a use of force, which the plaintiffs allege occurred during their seizure. Third, at the time of the incident, it was clearly established that it was not reasonable to conduct a roadside body cavity search, unless there were exigent circumstances that required the search to be conducted on the roadside rather than at a medical facility. Consequently, the court found that Hamilton and Randle alleged facts showing that they were subjected to an unreasonable use of force "excessive to its need."

The court further held, at the time of the incident, it was clearly established in the Fifth Circuit that an officer could be liable as a bystander in a case involving excessive force if he knew a constitutional violation was taking place and he had a reasonable opportunity to prevent the harm. However, because there were serious disputes as to material facts regarding Officer Kindred's potential liability as a bystander, the court of appeals lacked jurisdiction to hear this portion of the case and dismissed Officer Kindred's appeal.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-40611/16-40611-2017-01-12.pdf?ts=1484267434

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Surratt v. McClarin, 851 F.3d 389 (5th Cir. 2017)

Officers arrested Surratt for a traffic violation, and placed her in the back of a patrol car. The officers also arrested Garza, a passenger in Surratt's car, on outstanding traffic warrants, and seated her in the back of the patrol car next to Surratt. Both women were handcuffed and secured in the patrol car with seatbelts. Prior to the stop, the officers had reason to believe that Surratt was in possession of narcotics.

The officers returned to Surratt's vehicle to retrieve the women's personal belongings, briefly leaving Surratt and Garza alone and unsupervised in the back of the patrol car. During this time, Surratt freed her right hand from her handcuffs, pulled a small baggie of narcotics from underneath her skirt, and placed it in her mouth.

When the officers returned to the patrol car a few minutes later, they suspected that Surratt was concealing something in her mouth. After Surratt refused an order to open her mouth, one of the officers pressed his forearm against Surratt's left jawline and neck while the other officer pressed his thumb into the back of her right jawline to try to force Surratt to open her mouth. Surratt struggled with the officers and refused their repeated commands to open her mouth. It took the officers nearly a minute to release Surratt from her seatbelt, pull her over Garza, and get her completely outside the patrol car. By this time, Surratt was unresponsive and having a seizure. The officers saw that Surratt had stopped breathing and called for an ambulance. Eventually, a first responder arrived and used forceps to remove the plastic baggie from Surratt's throat. Surratt was transported to the hospital and placed on life support. Surratt died thirteen days later as a "result of complications of asphyxia due to airway obstruction by plastic bag."

Surratt's sister sued the officers, and the City of Sherman for, among other things, excessive use of force in violation of the Fourth Amendment.

Courts use a two-prong analysis to determine whether a defendant is entitled to qualified immunity. The court must decide whether the plaintiff has alleged a violation of a constitutional right and whether the defendant, police officer, acted objectively unreasonably in light of "clearly established" law at the time of the incident.

In this case the court assumed, without deciding the issue, that the officers' conduct violated Surratt's constitutional rights. However, the court also held that Surratt's sister failed to demonstrate that the officers acted objectively unreasonably in light of clearly established law at the time of the incident. The court noted that the plaintiff failed to cite any Fifth Circuit case where a similarly situated officer was found to have violated the Fourth Amendment. Rather, the court found that Fifth Circuit precedent supported the officers' use of force against Surratt. In a previous case, the court found that officers acted reasonably when they applied pressure against a suspect's jaw and nose in an attempt to pry his mouth open to keep the suspect from swallowing narcotics. Finally, the court recognized that "previous law has provided no guidance regarding what is precisely reasonable and what is unreasonable regarding the use of force to an individual's throat where the individual appears to be concealing something in their mouth." As a result, the court concluded that the officers were entitled to qualified immunity.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-40486/16-40486-2017-03-14.pdf?ts=1489534235

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Hanks v. Rogers, 853 F.3d 738 (5th Cir. 2017)

Officer Rogers saw Hanks driving a vehicle with its hazard lights engaged, approximately 20 miles-per-hour under the speed limit on an interstate highway. Officer Rogers stopped Hanks. Hanks told Officer Rogers that he was trying to locate his cell phone, which he had inadvertently left on top of his car at the outset of his trip. Officer Rogers asked Hanks to produce his driver's license and proof of insurance. Hanks gave Officer Rogers his driver's license, but he could not locate an insurance card for the vehicle, which he had borrowed with permission from a relative. Officer Rogers ordered Hanks to exit his vehicle, but instead of getting out of his vehicle, Hanks questioned the basis for Officer Rogers' order. Officer Rogers repeated his command six times before Hanks exited his vehicle.

Once outside the vehicle, Officer Rogers ordered Hanks to place his hands on the rear of Hanks' vehicle. Hanks initially leaned back against the rear of his vehicle, but eventually complied after Officer Rogers repeated his command and drew his taser. Officer Rogers then ordered Hanks to "go to [Hanks'] knees." Hanks replied by asking Officer Rogers if he was under arrest. A few seconds later, Officer Rogers repeated his command, and Hanks asked again if he was under arrest. Officer Rogers ordered Hanks to his knees again. When Hanks made a small lateral step with his left foot, Officer Rogers rushed up behind Hanks and administered a blow, referred to as a "half spear," to Hanks' upper back. The blow forced Hanks' upper body onto the trunk of his vehicle. Officer Rogers eventually got Hanks onto the ground and handcuffed him. When Hanks took the small step to his left, his empty hands remained "surrendered" behind his back, and Hanks offered no resistance while Officer Rogers handcuffed him. After Officer Rogers issued Hanks a traffic citation, medics transported Hanks to the hospital.

Hanks sued Officers Rogers under 42 U.S.C. § 1983, claiming that Officer Rogers used excessive force against him in violation of the Fourth Amendment. The district court granted Officer Rogers qualified immunity and dismissed the case. The district court concluded that Hanks did not establish that Officer Rogers' use of force was objectively unreasonable. Hanks appealed to the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals reversed the district court. The court concluded that under the circumstances documented in the recording[1] in this case, a reasonable officer on the scene would have known that suddenly resorting to physical force as Officer Rogers did would be clearly excessive and unreasonable.

In Graham v. Connor, the Supreme Court outlined several factors that a court should consider to determine if an officer's use of force was reasonable. Factors to consider include: 1) the severity of the crime at issue, 2) whether the suspect poses an immediate threat to the safety of the officer or others, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

First, the court found the fact that Hanks was driving 20 miles-per-hour below the speed limit and he was unable to produce proof of insurance constituted minor traffic violations.

Second, the court perceived "little basis in the recording from which Officer Rogers could have reasonably viewed Hanks as an immediate threat" to his safety or others when Officer Rogers applied the "half spear." The recording showed that for approximately the last thirty seconds before the blow, more than half of the total time between when Hanks exited his vehicle and when Officer Rogers took him to the ground, Hanks stood facing away from Officer Rogers. Throughout that time, Hanks displayed his empty hands on the trunk of his car, on the back of his head, and then behind his back. During those last thirty seconds, Officer Rogers kept his taser at the ready, trained on Hanks' back. Hanks' resistance "was, at most, passive," and consisted primarily of remaining on his feet for about twenty seconds after Officer Rogers first order to kneel, during which time Hanks twice asked whether he was under arrest. Consequently, the court concluded that a reasonable officer under these circumstances would not have believed that Hanks posed an "immediate threat" warranting a physical takedown.

[1] The record on appeal contained an audiovisual recording of the encounter captured by a camera in Officer Rogers' police vehicle and may be accessed via the following link: http://www.ca5.uscourts.gov/opinions/pub/15/15-11295.mp4

Finally, as previously mentioned, the court found that Hanks displayed, at most, passive resistance and made no attempt to flee. Although Hanks took a small lateral step with his left foot, it was clear that Hanks' step was not accompanied by any obvious signs of violence or flight. Under the circumstances captured in the recording, the court concluded that a reasonable officer would not have perceived this movement as active resistance or an attempt to flee.

The court further held that at the time of the incident it was clearly established that an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation.

It should be noted that after the incident, the Grand Prairie Police Department conducted an investigation that led to Officer Rogers' indefinite suspension. The department's investigation concluded that Officer Rogers' "half spear . . . was not objectively reasonable to bring the incident under control . . . based on Mr. Hanks' lack of resistance." While the court mentioned the department's disciplinary action in its opinion, the court did not take this disciplinary action into consideration when determining reasonableness of Officer Rogers' actions.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/15-11295/15-11295-2017-04-05.pdf?ts=1491435032

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Melton v. Phillips, 875 F.3d 256 (5th Cir. 2017)

In June 2009, Deputy Phillips interviewed an assault victim and filled out an incident report identifying the alleged assailant by the name "Michael David Melton." After Deputy Phillips submitted the report, an investigator with the Sheriff's Office began investigating the assault. One year later, the victim provided the investigator with a sworn affidavit identifying the alleged assailant as "Mike Melton." The County Attorney's Office then filed a complaint against "Michael Melton," and four days later, a County judge issued a *capias* warrant identifying the assailant "Michael Melton." In May 2012, Melton was arrested on assault charges and detained for sixteen days before being released on bond. The assault charges against Melton were eventually dismissed for insufficient evidence.

Melton then sued Deputy Phillips under *42 U.S.C. § 1983*, claiming that he was arrested for an assault committed by another man with the same first and last names. Melton further claimed that Deputy Phillips was responsible for his arrest because Deputy Phillips included false information in his incident report.

Deputy Phillips filed a motion for summary judgment based on qualified immunity.

For an officer to be subject to liability, the court recognized that an officer "must have assisted in the preparation of, or otherwise presented or signed a warrant application." It was undisputed that Deputy Phillips' involvement in the chain of events that led to Melton's arrest in 2012 ended with the incident report in 2009 and that Deputy Phillips did not present or sign the complaint upon which the *capias* warrant was issued. In addition, the court found there was no evidence of a policy or practice at the County Sheriff's office that would have allowed Deputy Phillips to anticipate that the incident report would be used to obtain a warrant. Instead, the court noted that unchecked boxes at the end of the incident report showed that Deputy Phillips chose not to file

the report with a justice of the peace, a county attorney, or a district attorney. As a result, the court held that Deputy Phillips was entitled to qualified immunity because he had not assisted in preparing, presented, or signed the complaint, which led to the issuance of the *capias* warrant.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca5/15-10604/15-10604-2017-11-13.pdf?ts=1510619411

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Green v. Newport, 868 F.3d 629 (7th Cir. 2017)

Officer Newport responded to a suspicious person complaint made by an employee of an auto parts store. The employee reported that a person in a Mercury Marquis drove around the store's parking lot approximately five times before parking in front of the store. Officer Newport believed that this behavior was consistent with casing a business in preparation for a robbery. In addition, Officer Newport knew that the auto part store had been robbed at gunpoint within the last two months and that the store closed in thirty minutes and would soon be empty.

When Officer Newport arrived, he saw a Mercury Marquis parked next to a Chevrolet Malibu in front of the store. The Malibu was driven by Davin Green. Officer Newport saw Joe Lindsey, the driver of the Marquis, standing next to the Malibu. The officer observed Lindsey lean into the front passenger window of the Malibu and then stand back up. Suspecting that Lindsey had concealed a weapon inside the Malibu, Officer Newport stopped behind the parked vehicles and ordered the two men to raise their hands. Officer Newport then ordered Green to exit the Malibu, frisked him, and seized a handgun from his waistband.

Green sued Officer Newport under *42 U.S.C. § 1983*, claiming that Officer Newport violated the Fourth Amendment by stopping and frisking him without reasonable suspicion. The district court agreed and denied Officer Newport qualified immunity. Officer Newport appealed.

The court of appeals held that the facts known to Officer Newport when he stopped Green established reasonable suspicion to believe that Green was involved in criminal activity. Specifically, when Officer Newport confronted Green he knew that the store had recently been robbed as well as the "casing" behavior reportedly carried out by Lindsey, which occurred near the time the store was closing. As a result, the court reversed the district court, holding that Officer Newport was entitled to qualified immunity.

The court further held that Officer Newport was entitled to qualified immunity for frisking Green. The court concluded that once Officer Newport established reasonable suspicion to stop Green for armed robbery, the nature of that crime established reasonable suspicion to believe that Green was armed and dangerous.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-1536/16-1536-2017-08-22.pdf?ts=1503433847

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United States v. Brown, 871 F.3d 532 (7th Cir. 2017)

Two Chicago police officers, Also Brown and George Stacker, went to a convenience store to investigate a tip that drugs were being sold there. After searching the store, Officer Brown

directed Howard, a store employee, to lift his shirt to show his waistband. While Howard held his shirt, Officer Brown punched him in the face and then grabbed Howard by the neck, holding him against a large refrigerator. At Officer Brown's direction, Howard removed a small bag of marijuana from his back pocket and gave it to Officer Brown. Without provocation, Officer Brown punched Howard in the ribs and pulled him down an aisle toward the back of the store where he forced him to lie on the floor on his back. When Howard tried to sit up, Officer Brown hit him in the face again and forced him back to the ground on his stomach. Officer Brown then handcuffed Howard, searched his back pocket, and found a handgun. Officer Brown seized the handgun, walked to the front of the store to show it to Officer Stacker, and then returned to kick Howard in the ribs before arresting him. Surveillance cameras inside the store captured the incident.

The government charged Officer Brown with, among other things, depriving another of a federal right under color of law under *18 U.S.C. § 242*. Specifically, the *§ 242* count alleged that Officer Brown used excessive force against Howard, depriving him of his right to be free from unreasonable seizure.

At trial, Officer Brown planned to call a former Chicago police officer as an expert witness who would describe how the Chicago Police Department's "Use of Force Model" applied to Officer Brown's confrontation with Howard. The expert witness also planned to offer his conclusions that Officer Brown's actions were consistent with departmental policy and that his response was appropriate under the circumstances.

The government filed a motion to exclude this expert witness testimony, which the district court granted.

The jury convicted Officer Brown of willfully violating Howard's Fourth Amendment right to be free from excessive force. Officer Brown appealed, arguing that the district court improperly excluded his expert witness.

The court of appeals disagreed. First, the Fourth Amendment requires that seizures of persons be reasonable. As a result, it is a violation of the Fourth Amendment for police officers to use excessive force to effect an arrest. When an officer is accused of using excessive force, the issue that a court must determine is whether the officer's conduct was objectively reasonable under the circumstances.

Second, the issue of whether an officer used excessive force is governed by constitutional principles, not police-department policy. An officer's compliance with or deviation from departmental policy does not determine whether the officer used excessive force. Police department policies are not the same across the country. The court reasoned that if compliance with departmental policy were the standard, the Fourth Amendment's reasonableness requirement would vary from place to place and the police department would have the final say as to what constituted a reasonable seizure, "a prospect that would have horrified those responsible for the Amendment's ratification."

Third, the court noted that expert testimony concerning police policy is not categorically barred. Specifically, the court found that evidence of police policy or procedure in some cases might be relevant to determine whether an officer's actions were objectively reasonable. Even though jurors can understand the concept of objective reasonableness, in some cases they may not fully grasp particular techniques or equipment used by police officers. In those cases, the court reasoned that expert testimony of this type may be relevant where specialized knowledge of law

enforcement custom or training would assist the jury in understanding the facts, or resolving a contested issue.

Fourth, the court held that this case provided a "textbook example of easily comprehensible facts." Officer Brown was indicted for punching and kicking Howard. Officer Brown did not use a sophisticated tool or technique. He hit a motionless man in the face with his fist and continued to beat and kick him before placing him under arrest. The court concluded that an expert witness' explanation of the Chicago Police Department's Use of Force Model would have added nothing that the jurors could not ascertain on their own by viewing the surveillance video and applying their everyday common sense. Consequently, the court held that the district court properly excluded the expert witness' testimony about departmental use of force standards.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-1603/16-1603-2017-09-08.pdf?ts=1504899066

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Smith v. Anderson, 874 F.3d 966 (7th Cir. 2017)

Following a term of incarceration, Smith, a registered offender, was scheduled to begin a term of parole for one year. However, before releasing Smith on parole, Illinois law required that the Illinois Department of Corrections approve a host site. On his release date, Smith submitted two host sites; however, the Department had not investigated or approved either site. Instead of releasing Smith, his parole officer, Anderson, issued a parole violation report that contained incorrect information concerning the Department's attempt to place Smith at a host site. Smith spent another six months in custody before the Department released him on good-time credit.

Smith sued Anderson under *42 U.S.C. § 1983*, claiming that Anderson's parole violation report caused the Department to hold him beyond his release date in violation of the Fourth Amendment.

The court disagreed and held that Anderson was entitled to qualified immunity, finding that no court has held that the Fourth Amendment compels the release of sex offenders who lack lawful and approved living arrangements. As a result, the court concluded that when sex offenders lack these arrangements, their continued detention does not violate clearly established rights. The court further held that Anderson's incorrect statements in his parole violation report were irrelevant and could not form the basis for a cause of action under *§ 1983*.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-2333/16-2333-2017-10-31.pdf?ts=1509465641

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Vester v. Hallock, 864 F.3d 884 (8th Cir. 2017)

Officer Hallock was dispatched to a bar in response to a report that a man had threatened to stab several patrons with a knife. The dispatcher told Hallock that the suspect had been disarmed but warned that the suspect had threatened to get another knife from his car, described as a black Chevy Camaro.

A few minutes later, Hallock arrived and saw a man matching the suspect's description, later identified as Vester, sitting in a black Camaro outside the bar. Hallock ordered Vester to get out

of the vehicle five times before Vester complied. Hallock then issued three separate commands for Vester to get either on the ground or on his knees. Vester ignored these commands and instead turned his back on Hallock and placed his hands on the car. Concerned that Vester might have a weapon, Hallock wanted to get him to the ground, because based on his experience, Hallock knew it would be safer to disarm Vester in a prone position. Hallock then approached Vester from behind, grabbed his right arm, and used the arm-bar technique to take Vester quickly to the ground. Vester was unable to brace his fall and landed face-first on the ground, sustaining contusions, abrasions, and lacerations to his head and hand.

Vester sued Officer Hallock under *42 U.S.C. § 1983* claiming that Hallock used excessive force in violation of the Fourth Amendment to arrest him.

The court held that Officer Hallock was entitled to qualified immunity. Although Vester did not visibly possess a weapon or attempt to resist arrest prior to the takedown, the court held that other factors Officer Hallock faced when he confronted Vester made his use of the arm-bar technique objectively reasonable. First, Vester previously threatened to stab bar patrons and he refused to comply with Officer Hallock's repeated commands. Second, after exiting the vehicle, it was possible that Vester had a concealed knife on his person. Finally, Officer Hallock arrested Vester without any backup officers.

The court further held that even if it assumed that Officer Hallock's use of the arm-bar technique constituted excessive force, at the time of the incident it was not clearly established that such force under these circumstances violated the Fourth Amendment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3389/16-3389-2017-07-25.pdf?ts=1500996676

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Hosea v. City of St. Paul, 867 F.3d 949 (8th Cir. 2017)

David Hosea was arguing with his girlfriend Jennifer Steines in their home. The argument escalated and Hosea dialed 911 but hung up before speaking to an operator. Police dispatch sent two uniformed officers to investigate and as they exited their vehicle, they heard yelling from inside the residence. When the officers entered, they saw Hosea standing over Steines from approximately three feet away as Steines sat on the couch crying. The officers noticed that Hosea seem agitated, addressed the officers in a loud voice, appeared to be ready to fight, and displayed indicators of aggression , including a "bladed" stance, clenched fists, and flared nostrils. According to Hosea, he saw the officers but claimed that he did not initially recognize them as police officers, so he did not comply with their two requests to get down on the ground. At this point, Hosea's son entered the room and told Hosea that the men were police officers. Hosea claimed that as he began to lower himself to the ground, one of the officers jumped on his back and forced him to the ground. The officers handcuffed Hosea and brought him outside to their patrol car.

Afterward, the officers discovered that the argument between Hosea and Steines had gone from verbal to physical when Steines hit Hosea in the face with a slipper. The officers also learned that Steines had actually never been afraid of Hosea. The officers arrested Hosea, who had suffered a fractured hand during the encounter. The charges against Hosea were eventually dismissed.

Hosea sued the City of St. Paul and the officers claiming that the officers violated the Fourth Amendment by arresting him without probable cause and by using excessive force against him.

The court held that the officers were entitled to qualified immunity on Hosea's unlawful arrest claim because the officers had arguable probable cause to arrest Hosea for, among other things, domestic assault. Even without knowing why Steines was crying, the court held that a reasonable officer could have concluded that she placed the 911 call and was crying because Hosea made her fearful of imminent physical harm. In addition, the court explained that arguable probable cause is determined at the time of arrest, and any after acquired facts, such as that Steines was not in fear of immediate harm, are not relevant.

The court further held that the officers were entitled to qualified immunity on Hosea's excessive force claim because their use of force against Hosea was objectively reasonable. The court held that a reasonable officer on the scene could have concluded that Hosea had committed or was committing domestic assault, a crime that threatens the safety of another individual. In addition, the court found that even if the officers mistakenly believed that Hosea was resisting arrest after he began to lower himself to the ground, their use of force was objectively reasonable because a reasonable officer on the scene could have concluded that Hosea still posed a threat to Steines safety.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3613/16-3613-2017-08-14.pdf?ts=1502724679

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S. B. v. County of San Diego, 864 F.3d 1010 (9th Cir. 2017)

On August 24, 2013, three deputies went to David Brown's residence after family members reported that Brown, who had mental health issues, had been acting aggressively that day, and had warned that "someone was gonna get hurt" if he did not get alcohol. The deputies discovered that Brown was under the influence of Valium and had been drinking and taking medications all day. When Deputies Moses and Vories entered the house, they did not see Brown, but heard cabinets and drawers in the kitchen area opening and closing. After announcing their presence, Deputies Moses and Vories entered the kitchen from different sides of the wall that separated the kitchen and the living room. At this point, the deputies saw Brown, who had kitchen knives sticking out of his pockets. Deputy Moses pointed his gun at Brown and ordered him to raise his hands. Although Brown appeared to be under the influence, he eventually raised his hands to his shoulders, and complied when Deputy Moses ordered him to drop to his knees.

While Deputy Moses covered Brown at gunpoint, Deputy Vories and Deputy Billieux, who had now entered the kitchen, moved towards Brown to handcuff him. According to Deputy Moses, as soon as this occurred, Brown looked at Deputy Vories, lowered his arm, and told Deputy Vories to get away from him. Brown reached back, produced a knife with a six-to-eight-inch blade, moved as if he were going to get up, and pointed the knife at Deputy Vories. Believing that Deputy Vories was in imminent danger, Deputy Moses shot Brown three or four times, less than one second after Brown grabbed the knife, killing him.

The plaintiffs sued Deputy Moses and the County of San Diego claiming that Deputy Moses used excessive force in violation of the Fourth Amendment when he shot and killed Brown.

Deputy Moses filed a motion for summary judgment based on qualified immunity, which the district court denied after a hearing, which included testimony from Deputies Moses, Vories, and Billieux. Specifically, the district court found three material factual inconsistencies in the deputies' testimony, which it concluded needed to be resolved by a jury. First, whether Brown was on his knees or attempting to stand when he grabbed the knife and was shot. Second, whether Deputy Moses could see the other deputies clearly when he fired his weapon. Finally, whether Deputy Vories was three to five feet or six to eight feet from Brown when Brown grabbed the knife. Depending on how a jury resolved these inconsistencies, the district court held that a reasonable juror could conclude that Deputy Moses used excessive force when he shot Brown. Deputy Moses appealed.

The Ninth Circuit Court of Appeals reversed the district court, holding that Deputy Moses was entitled to qualified immunity. To determine whether an officer is entitled to qualified immunity, the court considers: (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct.

First, the court agreed with the district court that a reasonable juror could find a Fourth Amendment violation based on the inconsistencies from the deputies' testimony.

However, the court disagreed with the district court and held that it was not clearly established on August 24, 2013 that using deadly force in this situation, even viewed in the light most favorable to the plaintiffs, would constitute excessive force under the Fourth Amendment. The court noted that the general use of force principles outlined in Graham v. Connor and Tennessee v. Garner do not by themselves create clearly established law outside an obvious case. Instead, a court must "identify a case where an officer acting under similar circumstances as [Moses] was held to have violated the Fourth Amendment." Here the court could not find such a case, and this case did not involve an "obvious" or "run-of-the-mill" violation of the Fourth Amendment under Graham and Garner.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/15-56848/15-56848-2017-05-12.pdf?ts=1494608643

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Sharp v. Cty. of Orange, 871 F.3d 901 (9th Cir. 2017)

Merritt Sharp III (Sharp III) and his wife were home when police officers arrived to execute an arrest warrant for their son, Merritt Sharp IV (Sharp IV), whom the officers believed lived with his parents. The officers mistakenly arrested Sharp III instead of his son. During the course of the arrest officers forcefully restrained Sharp III and searched him. After the officers discovered their mistake, the officers kept Sharp III handcuffed and locked in a patrol car for approximately twenty minutes while they continued to search the house for Sharp IV. Sharp III was furious and adamantly protested his detention, loudly swearing at the officers and threatening to sue them. In response, one of the officers told Sharp III, "If you weren't being so argumentative, I'd probably just put you on the curb."

Sharp III subsequently sued the officers under *42 U.S.C. § 1983*. Sharp III alleged several Fourth Amendment violations based on the seizure of his person to include the initial mistaken arrest, the continuing detention in the patrol car, and the use of excessive force against him. Sharp III also alleged Fourth Amendment violations based on the search of his person and his house. In addition,

Sharp III brought a First Amendment retaliation claim based on the officers' refusal to release him on account of his "argumentative" demeanor.

The court held that the officers were entitled to qualified immunity on Sharp III's Fourth Amendment claims. Although the court found that much of the officer's conduct was unconstitutional, their actions were not prohibited by clearly established case law.

However, the court held that the officers were not entitled to qualified immunity on Sharp III's First Amendment retaliation claim. The officer told Sharp III, "If you weren't being so argumentative, I'd probably just put you on the curb." The court concluded that this statement constituted unconstitutional retaliation because the officer was essentially telling Sharp III, "If you weren't [exercising your First Amendment rights], I'd probably [change the current conditions of your detention]." The court added that at the time of the incident Ninth Circuit Court of Appeals case law clearly established that this type of conduct was unconstitutional.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/15-56146/15-56146-2017-09-19.pdf?ts=1505840584

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Smith v. City of Santa Clara, 876 F.3d 987 (9th Cir. 2017)

Police officers established probable cause to believe that Justine Smith had been involved in a theft of an automobile and a carjacking. The officers discovered that Justine was on probation and that the terms of her probation allowed the government to conduct warrantless searches of her residence. When the officers went to the house that Justine had reported as her residence, Josephine Smith, Justine's mother answered the door. The officers, who did not have a warrant, told Josephine that they were there to conduct a probation search for Justine. Josephine refused to allow the officers into the home without a warrant. Despite Josephine's objections, the officers entered the home to search for Justine but did not find her.

Josephine Smith sued several police officers and the City of Santa Clara under *42 U.S.C. § 1983*, claiming that the warrantless entry into her home to search for Justine violated her rights under the Fourth Amendment. Josephine also alleged that the officers violated *Cal. Civ. Code § 52.1(a)-(b)* (the Bane Act), which provides a cause of action for individuals whose "rights secured by" federal or California law have been interfered with "by threat, intimidation, or coercion."

The officers filed a motion for summary judgment based on qualified immunity, claiming that the warrantless search of Josephine's home was lawful. The officers argued that the Supreme Court has held that officers may search a probationer's residence without a warrant if they have reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity.

Josephine argued that the Supreme Court's 2006 decision in Georgia v. Randolph created an exception to the probation-search rule. In Randolph, the Court held that a warrantless search of a residence based on the consent of an occupant is unreasonable as to a co-occupant when that co-occupant is physically present and objects to the search. Josephine claimed that, under Randolph, because she was present and objected to the search of her home, that the officers' search of her home was unreasonable.

The district court held that the officers were entitled to qualified immunity on Josephine's Fourth Amendment claim under *§ 1983*. The court concluded that it was not clearly established that Randolph created an exception to the probation-search rule. However, the court denied the officers qualified immunity on the Bane Act claim. The court held that "qualified immunity of the kind applied to *§ 1983* claims does not apply to actions brought under the Bane Act." The case went to trial and the jury returned a verdict in favor of the officers on all claims.

Josephine appealed to the Ninth Circuit Court of Appeals arguing that under Randolph, her objection to the search required the officers to obtain a warrant before conducting a probation search for Justine.

The court disagreed. The court found that the Supreme Court's cases concerning probation searches are not analyzed as consent searches. Consequently, the court held that Randolph, which created an exception to the consent rule, did not apply to the search in this case. Instead, the court noted that the question is whether a warrantless probation search that affects the rights of a third party is reasonable under the totality of the circumstances.

In this case, it was undisputed that the officers knew, at the time of the search, that Justine was serving a felony probation term for a serious offense. In addition, the officers had probable cause to believe that Justine had just been involved in the theft of a car and a stabbing, and that she was still at large. Under these circumstances, the court concluded that the officers' need to protect the public from Justine outweighed Josephine's privacy interest in the home they shared. As a result, the court held that the warrantless search of the home over Josephine's objection was reasonable.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/14-15103/14-15103-2017-11-30.pdf?ts=1512065014

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Estate of Redd v. Love, 848 F.3d 899 (10th Cir. 2017)

Agents with the Federal Bureau of Investigation (FBI) and Bureau of Land Management (BLM) began an investigation into the taking of Native American artifacts from federal lands in southern Utah. As part of their investigation, the two agencies arranged controlled sales of illegally taken artifacts. With Agent Love serving as the lead BLM agent for the operation, the agents eventually obtained several arrest warrants as well as warrants to search twelve properties for artifacts. The warrants included arrest warrants for Dr. and Mrs. Redd and a warrant to search their house.

Twelve teams of BLM and FBI agents simultaneously executed the multiple search warrants. Each team was comprised of between eight and twenty-one federal agents and at least one cultural specialist. Upon completing their searches, agents reported to other search locations to help as needed. In addition, FBI and BLM policy required agents to wear soft body armor and to carry a firearm when executing warrants or when confronting potentially dangerous situations. Team members were concerned for their safety because some local citizens had previously acted hostilely toward federal officials.

Upon arrival at Dr. Redd's house, the agents arrested Mrs. Redd. Dr. Redd was not present, but when he arrived home at 6:55 a.m., agents arrested him in his driveway and detained him in the garage until 10:34 a.m., when the agents drove the Redds to jail. The Redds were released on bond and returned home at 5:00 p.m. The next day, Dr. Redd committed suicide.

Dr. Redd's Estate sued sixteen named FBI and BLM agents and twenty-one unnamed agents under Bivens, claiming that the agents violated Dr. Redd's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The district court dismissed all of the Estate's claims and granted Agent Love qualified immunity on the Estate's Fourth Amendment excessive use of force claim. The Estate appealed, arguing that Agent Love was not entitled to qualified immunity.

The Estate claimed that Agent Love violated Dr. Redd's Fourth Amendment rights by using excessive force in executing his arrest warrant. Specifically, the Estate argued that Agent Love used excessive force by deploying more than fifty agents wearing bulletproof vests and carrying guns to execute the warrants.

The Tenth Circuit Court of Appeals disagreed. First, the court found that the Estate offered no proof that Dr. Redd saw fifty agents before being transported to jail. Second, the Estate did not claim that the agents used excessive force by physically abusing Dr. Redd or pointing firearms at him. Instead, everyone agreed that when Dr. Redd arrived home at 6:55 a.m., he was arrested in his driveway and taken to the garage. During this time, there were twelve agents and a cultural specialist at Dr. Redd's residence; however, Dr. Redd encountered fewer than twelve agents, as some of the agents were already inside the house when Dr. Redd arrived home. Third, the sign-in log maintained by the agents revealed that there were no more than twenty-two agents at the residence between 6:55 am and 10:34 a.m. While the court left open the possibility that sending a large number of agents to execute a search warrant and arrest for a nonviolent crime might amount to excessive force, that was not the case here. The court concluded that the need to search an expansive home for small artifacts, as well as legitimate concern for officer safety justified the number of agents executing the search and arrest warrants at the Redd's house.

The court further held that Agent Love did not act with excessive force toward Dr. Redd in deploying the agents in SWAT-like gear. First, this decision rested outside Agent Love's authority, as BLM and FBI policy required the agents to carry a firearm and wear soft body armor when executing warrants such as the ones executed in this case. Consequently, the court held that Agent Love's conduct, deploying twenty-two agents, wearing soft body armor and carrying firearms in compliance with agency policy, was objectively reasonable under the circumstances.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/16-4010/16-4010-2017-02-13.pdf?ts=1487005256

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Farrell v. Montoya, 878 F.3d 933 (10th Cir. 2017)

Farrell was driving a minivan with her five children when a police officer stopped her for speeding. During the stop, the officer told Farrell to turn off her engine; however, Farrell pulled onto the road and drove away.

The officer pursued Farrell, who pulled over a short distance down the road. The officer ordered Farrell to exit the vehicle as he reached into the minivan in an attempt to remove Farrell from the vehicle. At this point, Farrell's children began screaming at the officer, and one of the children exited the vehicle to confront the officer. As the situation escalated, the officer called for backup.

Before additional officers arrived, Farrell agreed to exit her vehicle and talk to the officer. Farrell walked with the officer to the back of the minivan, but she refused the officer's command to turn

around to face the vehicle. Farrell then walked back to the driver's side of the minivan and attempted to get in. When the officer grabbed Farrell's wrist, her children screamed at the officer, and one of the children exited the van and tried to pull the officer's hand off his mother.

When backup officers arrived, Farrell and her children were inside the minivan. The original officer struck the rear passenger window with his baton as Officer Montoya stood behind the minivan with his firearm drawn. Just after the officer's baton struck the window a fourth time, breaking it, Farrell began to drive away at a moderate speed. Officer Montoya fired three shots at the minivan as it drove away. The minivan did not slow down or stop as Officer Montoya fired the shots and no bullet hit the minivan or anyone inside it.

After a four-minute chase, Farrell drove into a hotel parking lot and surrendered. During the chase, one of Farrell's children called 911 and told the operator they were looking for a police station in which to pull over because they were afraid of the three officers pursuing them.

The Farrells filed suit against Officer Montoya and the other officers under *42 U.S.C. § 1983*. Concerning Officer Montoya, the Farrells claim that Officer Montoya violated the Fourth Amendment by using excessive force against them by firing three shots at their vehicle. The district court denied Office Montoya qualified immunity. Officer Montoya appealed.

The Tenth Circuit Court of Appeals stated that to establish a claim of excessive force, the Farrells "must show both that a 'seizure' occurred and that the seizure was unreasonable.'" The Supreme Court has held that a fleeing suspect is not "seized" under the Fourth Amendment until the suspect submits to the officer's show of authority. In addition, the Tenth Circuit previously held that a fleeing suspect was not "seized" even though he was struck by an officer's bullet because the suspect continued to flee and did not submit to the officers pursuing him.

In this case, the Farrells were fleeing when Officer Montoya fired his gun at their vehicle. The court concluded that the Farrells were not seized because they continued to flee and did not submit to Officer Montoya or the other officers. Because the Farrells were not seized when Officer Montoya fired his gun, the court held that there could be no excessive force claim; therefore, the district court improperly denied Officer Montoya qualified immunity.

The Farrells also argued that they submitted to the original officer when they pulled over twice before Officer Montoya arrived, creating a seizure that continued at least until Officer Montoya fired his gun.

The court declined to adopt the concept of an "ongoing seizure" under which once a person is seized, the seizure is deemed to continue even after the individual takes flight. The court noted that no other court has adopted this concept.

Finally, the Farrells argued that even if ongoing submission is required for a seizure, they continued to submit as they fled the three officers by calling 911 and looking for a police station at which to pull over.

A submission to a show of authority requires that a suspect "manifest compliance" with police orders. The court found that when the Farrells drove away from the three officers and led them on a high-speed chase they were not manifesting compliance with the officers.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/16-2216/16-2216-2017-12-27.pdf?ts=1514394043

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Use of Force – Medical Emergency

Estate of Hill v. Miracle, 853 F.3d 306 (6th Cir. 2017)

In June 2013, Corey Hill suffered a diabetic emergency in his home due to his low blood-sugar level. When paramedics arrived, Hill was agitated and combative; however, the paramedics managed to measure Hill's blood-sugar level, and discovered that it was dangerously low. Deputy Miracle arrived at Hill's home at some point after the paramedics had measured Hill's blood-sugar level. Deputy Miracle's duties included responding to calls for emergency medical services, and he had encountered over a dozen diabetic emergencies. In addition, Deputy Miracle was aware that persons suffering from low blood-sugar levels are often disoriented and unaware of their surroundings.

Because the paramedics considered Hill's low blood-sugar level a "medical emergency," they inserted a catheter into his arm to intravenously administer dextrose in order to raise his blood-sugar level. In response, Hill became increasingly combative, swinging his fists, kicking, and swearing at the paramedics. At some point, a completely disoriented Hill ripped the catheter from his arm. Hill continued to kick, swing, and swear at the paramedics as they tried to hold him down and re-insert the catheter into his arm. Deputy Miracle, who at that point had not joined in the attempt to physically restrain Hill, ordered Hill to "relax." After Hill continued to kick and swing, Deputy Miracle told Hill that he was going to use his taser. Deputy Miracle then deployed his taser in drive-stun mode directly to Hill's right thigh. After Deputy Miracle held the taser against Hill's thigh for a few seconds, Hill calmed down long enough for a paramedic to re-establish the intravenous catheter. Eventually Hill's blood-sugar level reached a normal level and Hill was transported to the hospital without incident. Medical records from the hospital noted a taser puncture wound on Hill's right thigh and that the wound did not require treatment.

Hill sued Deputy Miracle under *42 U.S.C. § 1983*, claiming that Miracle used excessive force in violation of the Fourth Amendment when he deployed his taser against Hill. Hill alleged that he suffered burns on his right thigh and that his diabetes worsened because of the incident. The district court found that Deputy Miracle violated Hill's clearly established rights in deploying his taser and denied Miracle qualified immunity. Deputy Miracle appealed to the Sixth Circuit Court of Appeals.

To determine whether an officer used excessive force in violation of the Fourth Amendment the court considers whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him. In Graham v. Connor, the Supreme Court established a three-factor test to assist lower courts in assessing objective reasonableness in the typical situation of a law enforcement officer accused in a civil suit of using excessive force. The factors set out in Graham are: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officer or others, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The court of appeals appreciated the fact that the district court had to apply the Graham factors to a medical emergency where there was no crime, no resisting of an arrest, and no direct threat to the officer. In addition, the court recognized that because Hill had not committed a crime and was not resisting arrest, two of the three Graham factors automatically weighted against Deputy Miracle from the beginning. Finally, the court noted that no appellate courts have provided any

guidance on how to assess objective reasonableness when a law enforcement officer is presented with a medical emergency. The court found that most of the cases dealing with excessive force and taser use have ruled that an officer does not use excessive force by tasing a person who is actively resisting arrest, but does use excessive force if that person is not resisting. Rather than continuing to struggle with this dilemma, the court suggested that a "more tailored" set of factors be considered in the medical-emergency context to determine if an officer's actions were objectively reasonable. Where a situation does not fit within the Graham test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?

2) Was some degree of force reasonably necessary to ameliorate the immediate threat?

3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?

The court added, "if the answers to the first two questions are "yes," and the answer to the third question is "no," then the officer is entitled to qualified immunity."

Applying the factors outlined above to this case, the court concluded that Deputy Miracle did not use excessive force against Hill when Deputy Miracle deployed his taser in drive-stun mode. First, Hill was experiencing a medical emergency because of his hypoglycemic episode when Deputy Miracle encountered him, and Hill's combative actions placed the paramedics in immediate physical danger.

Second, the court found that some degree of force was necessary to ameliorate the immediate threat to the paramedics and to Hill. Hill was violently resisting the paramedics' attempts to render him lifesaving assistance, and the paramedics were unable to gain control over Hill.

Third, the court held that Deputy Miracle's use of his taser in drive stun mode was objectively reasonable to gain control over Hill. Four paramedics were not able to physically restrain Hill, whose health was rapidly deteriorating and who was unresponsive to Deputy Miracle's command to "relax." As a result, the court concluded that a reasonable officer on the scene without the benefit of 20/20 hindsight would be justified in taking the same actions as Deputy Miracle.

The court further held that at the time of the incident Hill's Fourth Amendment right was not clearly established. Specifically, "at the time of the alleged violation, no reasonable officer would have known that using a taser on an individual who was undergoing a medical emergency, posed a risk to the responders' safety, and needed to be subdued in order for medical personnel to render life-saving assistance violated that person's constitutional rights."

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/16-1818/16-1818-2017-04-04.pdf?ts=1491832850

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Use of Force / Qualified Immunity – Use of Flashbangs

Dukes v. Deaton, 852 F.3d 1035 (11th Cir. 2017)

During the execution of a search warrant for drugs, Officer Deaton threw a noise/flash diversionary device, or flashbang, through a window into the bedroom where Jason Ward and Treneshia Dukes were sleeping. The flashbang landed on Dukes' right leg and exploded. As a result, Dukes suffered severe burns across both of her legs and her right arm.

Dukes filed suit against Officer Deaton under *42 U.S.C. § 1983* for using excessive force in violation of the Fourth Amendment and for the state law tort of assault and battery. Dukes also brought a claim against Commander Branham in his capacity as Officer Deaton's supervisor for failing to train Officer Deaton in the proper use of flashbangs.

Officer Deaton and Commander Branham filed a motion for summary judgment based on qualified immunity.

The court held that Officer Deaton's deployment of the flashbang constituted excessive force in violation of the Fourth Amendment. First, Officer Deaton's conduct posed a significant risk of harm, as flashbangs can generate heat in excess of 2,000 degrees Celsius, and Officer Deaton threw a flashbang into a dark room in which the occupants were asleep. Second, Officer Deaton failed to inspect the room, as he was trained to do, to determine whether bystanders, such as Dukes, occupied the room or if other hazards existed. Third, there was a minimal need for Officer Deaton to deploy a flashbang under the circumstances. Among other things, the court found that the earlier deployment of two flashbangs by other officers pursuant to the operational plan, sufficiently diverted the attention of Ward and Dukes before Officer Deaton deployed his flashbang. The court commented that the use of the first two flashbangs made Officer Deaton's use of his flashbang appear gratuitous. Finally, the court recognized that the Sixth, Seventh, and Ninth Circuits have held that an officer's failure to perform a visual inspection before throwing a flashbang into an area "weighs against reasonableness."

However, the court concluded that it was not clearly established that Officer Deaton's conduct was unconstitutional in the Eleventh Circuit when he threw the flashbang through the window. First, the operational plan contemplated the use of flashbangs to disorient the residents and there was no evidence that Officer Deaton intended to use his flashbang for any other purpose. Second, the application in support of the search warrant stated, "drug dealers," such as Ward, "commonly utilize weapons, dogs, and barricades to hinder law enforcement in the execution of their duties." The application also stated that an informant had told law enforcement that Ward carried a handgun "on his person." While Officer Deaton should have followed his training and checked the bedroom before he threw the flashbang, the court held that his conduct was not so lacking in justification that a reasonable officer would know that what he did constituted excessive force. As a result, the court found that Officer Deaton was entitled to qualified immunity.

The court further held that Officer Deaton was entitled to official immunity for the state law tort of assault and battery because Dukes offered no proof that Officer Deaton intended to injure her.

Finally, the court held that Commander Branham was entitled to qualified immunity because Officer Deaton's conduct was not a clearly established violation of the Fourth Amendment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/15-14373/15-14373-2017-01-26.pdf?ts=1485442862

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Use of Force / Qualified Immunity – First Amendment Retaliation - Videotaping Police Officers

Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017)

In September 2012, Amanda Geraci, a member of a police watchdog group, attended an anti-fracking protest at the Philadelphia Convention Center. Approximately thirty minutes into the protest, police officers arrested a protestor. Geraci moved to a better vantage point to record the arrest with her camera and did so without interfering with the officers. An officer then pushed Geraci and pinned her against a pillar for one to three minutes, which prevented Geraci from observing or recording the arrest. The officer did not arrest or cite Geraci.

In September 2013, Richard Fields was on a public sidewalk where he observed police officers breaking up a party at a house across the street.

The nearest officer was fifteen feet away from him. Fields took a photograph of the scene with his cell phone. An officer saw Fields taking the photograph and ordered him to leave. After Fields refused, the officer detained Fields and seized his phone. The officer searched Fields' phone and opened several videos and other photographs. The officer eventually released Fields after he issued him a citation for "Obstructing Highway or Other Public Passages."

Geraci and Fields brought *42 U.S.C. § 1983* claims against the City of Philadelphia and several police officers. The plaintiffs alleged that the officers illegally retaliated against them for exercising their First Amendment right to record public police activity.[1]

The court consolidated the cases, holding that the First Amendment's right to access to information gives the public the right to photograph, film, or audio record police officers conducting official police activity in public places.[2] While the right to record police is not absolute, the officers offered no reasons to justify their actions in either case. In the first instance, Geraci moved to a vantage point where she could record a protestor's arrest, but did so without getting in the officers' way, whereas Fields took a photograph across the street from where the police were breaking up a party.

Although the court held that the public has the right to record officers conducting official police activity in public areas, the court held the officers were nonetheless entitled to qualified immunity. The court concluded that at the time of the incidents in 2012 and 2013 the right to record public activity was not clearly established in the Third Circuit.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca3/16-1650/16-1650-2017-07-07.pdf?ts=1499446805

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[1] The plaintiffs pointed out that in 2011 the Philadelphia Police Department published a memorandum advising officers not to interfere with a private citizen's recording of police activities because it was protected by the First Amendment. In 2012, the Department published an official directive reiterating that this right existed. In 2014, the Department instituted a formal training program to ensure that officers ceased retaliating against bystanders who record their activities.

[2] Every Circuit Court of Appeals to address this issue (First, Fifth, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public.

Turner v. Driver, 848 F.3d 678 (5th Cir. 2017)

In September 2015, Turner was videotaping the Fort Worth Police Station from a public sidewalk across the street from the station. During this time, Fort Worth Police Officers Grinalds and Dyess pulled up in their patrol car and approached Turner. Officer Grinalds asked Turner if he had identification, but Turner continued videotaping. When Turner asked the officers if he was being detained, Officer Grinalds told Turner that he was being detained for investigation because the officers were concerned about who was videotaping their building. After Turner refused Officer Grinalds' continued request for identification, the officers handcuffed Turner, took his video camera, and placed Turner in their patrol car.

A short time later a supervisor, Lieutenant Driver, arrived and spoke briefly with Turner as well as Officers Grinalds and Dyess. After Lieutenant Driver left, the officers went back to their patrol car, released Turner, and returned his video camera to him.

Turner sued Lieutenant Driver and Officers Grinalds and Dyess under *42 U.S.C. § 1983* claiming that they violated his rights under the First and Fourth Amendments. The officers filed a motion to dismiss Turner's suit, claiming they were entitled to qualified immunity.

First, the court found that at the time of the incident, in the Fifth Circuit[1], there was no clearly established First Amendment right to record the police[2]. As a result, the court held that all three officers were entitled to qualified immunity as to Turner's First Amendment claim.

Although the right was not clearly established at the time of Turner's activities, the court held that going forward in the Fifth Circuit, a First Amendment right to record the police exists subject only to reasonable time, place, and manner restrictions. The court did not determine which specific time, place, and manner restrictions would be reasonable, but stated that restrictions must be "narrowly tailored to serve a significant governmental interest."

Concerning Turner's Fourth Amendment claims, the court held that the officers' initial questioning and detention of Turner, before he was handcuffed and placed in the patrol car was reasonable. The court noted that an objectively reasonable person in Officer Grinalds' or Dyess' position could have suspected that Turner was casing the station for an attack or stalking an officer. As a result, the officers could have found Turner's videotaping of the station sufficiently suspicious to warrant questioning and a brief detention.

However, the court held that Officers Grinalds and Dyess were not entitled to qualified immunity on Turner's claim that handcuffing him and placing him in the officers' patrol car amounted to an unlawful arrest. The court found that a reasonable person in Turner's position would have understood the officers' actions constituted a restraint on his freedom of movement to the degree associated with a formal arrest. The court commented that the officer's actions in this regard were disproportionate to any potential threat that Turner posed or to the investigative needs of the

[1] The First and Eleventh Circuits have held that the First Amendment protects the rights of individuals to videotape police officers performing their duties.

[2] While no circuit has held that the First Amendment does not extend to the video recording of police activity, the Third, Fourth and Tenth Circuits have held that the law in their circuits is not clearly established, without specifically determining whether such a right exists under the First Amendment.

officers. Consequently, the court concluded that handcuffing Turner and placing him in the patrol car was not reasonable under the circumstances.

Finally, the court held that Lieutenant Driver was entitled to qualified immunity as to Turner's Fourth Amendment claims. First, under §1983, supervisors are not liable for the direct actions of their subordinates. Second, by the time Lieutenant Driver arrived, Turner had already been handcuffed and placed in the officers' patrol car. Third, after Lieutenant Driver arrived, he immediately investigated the situation by talking with Officers Grinalds and Dyess as well as Turner, and he then promptly ordered Turner's release.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-10312/16-10312-2017-02-16.pdf?ts=1487291433

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Use of Force / Qualified Immunity – Use of Canines

Jones v. Fransen, 857 F.3d 843 (11th Cir. 2017)

Jones' ex-girlfriend called 911 and reported that Jones had broken into her apartment and was carrying a television to his car, which was parked at her apartment complex. Officers Towler and Ross responded as well as Officer Fransen and his police-canine, Draco. Once on scene, the officers believed that Jones had fled down a ravine into an area with heavy vegetation. Officer Fransen issued a "canine warning" and after receiving no response, entered the ravine with Draco to find Jones. Officers Ross and Towler provided backup. At some point Officer Fransen released Draco who located Jones. When Officer Fransen reached Jones, Draco was attached to Jones' arm. According to Jones, Draco attacked him while he was lying motionless on the ground, and Draco refused to release his bite when Officer Fransen tried to pull him from Jones' arm. Jones also claimed the other officers did nothing to protect him from Draco's attack. As a result of this incident, Jones claimed that he suffered significant injury to his arm.

Jones sued Officers Fransen, Ross, Towler, Canine Draco, Gwinett County, and the Gwinett County Sheriff in his official and personal capacities.

First, Jones sued Officer Fransen under *42 U.S.C. § 1983* alleging an excessive use of force, in violation of the Fourth Amendment, and Officers Ross and Towler under *§ 1983* for failing to intervene and stop the canine attack.

The court held that the officers were entitled to qualified immunity. Without deciding whether the officers violated Jones' constitutional rights, the court held that at the time of the incident it was not clearly established that the officers' conduct violated the Fourth Amendment. Although there is case law in the Eleventh Circuit concerning police-canine bites, the court found that none of the cases involved a factual scenario that was similar enough to this case to have put the officers on notice that their actions violated a clearly established right.

In addition, the court held that the officers' actions in this case were not so obviously unconstitutional that it would have been readily apparent that their conduct was unlawful, even in the absence of case law. When Jones fled, he led the officers into physically challenging terrain and he did not respond to Officer Fransen's K-9 warnings. Consequently, a reasonable officer faced with this situation could have been concerned, at the time Draco was released, about entering the heavy brush to apprehend Jones and being met by a potential ambush.

Second, Jones sued Gwinnett County and the Gwinnett County Sheriff, in his official capacity, for negligence. The court held that the defendants were entitled to sovereign immunity, and dismissed this claim.

Third, Jones sued Officers Fransen, Towler, Ross and the sheriff, in their personal capacities, for negligence. The court held that the defendants were entitled to official immunity as provided in the Georgia constitution because Jones set forth no facts suggesting that the officers "acted maliciously or with an actual intent to cause harm." As a result, the court dismissed this claim.

Finally, Jones sued "Officer K-9 Draco" for negligence in his individual capacity. The court dismissed this claim because under Georgia law only a "person" may be held liable for negligence, and as defined in the negligence statute, the word "person" does not include dogs.[1]

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/16-10715/16-10715-2017-05-19.pdf?ts=1495222278

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Non-Use of Force Situations (Use of Compelled Statements)

Vogt v. City of Hays, 844 F.3d 1235 (10th Cir. 2017)

Vogt was employed as a police officer with the City of Hays. Vogt applied for a position with the City of Haysville's police department. During Haysville's hiring process, Vogt disclosed that he had kept a knife obtained in the course of his work as a Hays police officer.

Haysville offered Vogt a job on the condition that Vogt report his acquisition of the knife to the Hays police Department. Vogt complied with this request and submitted a brief report concerning his possession of the knife. Vogt then provided the City of Hays with a two-week notice of resignation, planning to accept the new job with Haysville.

In the meantime, the Hays police chief began an internal investigation into Vogt's possession of the knife. In addition, Vogt was required by the Hays Police Department to give a more detailed statement concerning the knife in order to keep his job. Vogt complied, and the Hays police department used Vogt's statement to obtain additional evidence.

Based on Vogt's statements and the additional evidence, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal investigation. The criminal investigation caused the Haysville Police Department to withdraw its job offer to Vogt.

Vogt was later charged in Kansas state court with two felony counts related to his possession of the knife. Following a probable cause hearing, the state district court determined that probable cause was lacking and dismissed the charges.

Vogt filed a lawsuit under *42 U.S.C. § 1983* against the City of Hays, the City of Haysville and four police officers. Vogt claimed that the use of his compelled statements: (1) to start an investigation leading to the discovery of additional evidence concerning the knife, (2) to initiate a criminal investigation, (3) to bring criminal charges, and (4) to support the prosecution during the probable cause hearing violated his Fifth Amendment right against self-incrimination.

[1] Similarly, the Seventh Circuit rejected the idea that a dog could be sued under *42 U.S.C. § 1983*.

The Fifth Amendment, which applies to the states through incorporation of the Fourteenth Amendment, protects individuals from being compelled to incriminate themselves in any criminal case. This amendment prohibits the government from compelling law enforcement officers to make incriminating statements in the course of their employment. As a law enforcement officer, Vogt was protected under the Fifth Amendment against the use of his compelled statements in a criminal case.

First, the district court held that Vogt had not stated a valid claim under the Fifth Amendment because the incriminating statements were never used against him at trial. While the United States Supreme Court has not conclusively defined the scope of a "criminal case" under the Fifth Amendment, the Tenth Circuit Court of Appeals disagreed and held that the phrase "criminal case" includes probable cause hearings as well as trials.[1] As a result, the court concluded that Vogt had adequately alleged a Fifth Amendment violation consisting of the use of his compelled statements in a criminal case.

Second, the court held that the four police officers were entitled to qualified immunity. Until its holding in this case, the court noted that it was not clearly established in the Tenth Circuit if the term "criminal case" included pre-trial proceedings such as probable cause hearings. Consequently, when the police officers acted, they could not have known that the Fifth Amendment would be violated by the eventual use of Vogt's compelled statements to develop investigatory leads, initiate a criminal investigation, bring charges, or support the prosecution in a probable cause hearing.

Third, the court affirmed the district court's dismissal of Vogt's claim against Haysville. Vogt claimed that Haysville offered him a job, but only if he told the Hays police department about the acquisition of the knife. Vogt argued that this condition compelled him to make incriminating statements to the City of Hays.

The court disagreed, holding that the condition on the job offer to Vogt was not coercive and did not compel Vogt to make incriminating statement to the City of Hays. Vogt was never an employee of Haysville, and his conditional job offer did not threaten the loss of livelihood or an existing job. If Vogt had not wanted to incriminate himself, the court reasoned that Vogt could have declined the job offer and continued working for the Hays police department.

Fourth, the court disagreed with the district court and held that Vogt had adequately alleged in his complaint the City of Hays used his compelled statements to cause a criminal investigation to be launched against him.

Finally, the court held that Vogt adequately alleged in his complaint that the Hays chief of police was the final policy making authority for the city concerning employee discipline within the police department. As a result, the court concluded that the City of Hays could be found liable for the actions of the police chief in this case.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-3266/15-3266-2017-01-04.pdf?ts=1483556466 **(The United States Supreme Court granted certiorari in this case.)**

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[1] With this decision, the Tenth Circuit joins the Second, Seventh, and Ninth Circuits, concluding that the right against self-incrimination is more than a trial right.

Fifth Amendment

Due Process

Identification Procedure (Photo Array / Show-Ups)

United States v. Jones, 872 F.3d 483 (7th Cir. 2017)

Based on information provided by a confidential informant (CI), the government suspected that Jones was the leader of a drug-distribution operation. After federal agents arrested one of Jones' drug dealers, Jones engaged in an effort to locate and kill the CI. To achieve this goal, Jones went to an apartment building and fired a gun through a door to the apartment where he believed the (CI) lived. However, instead of shooting the CI, who lived in the same building, but in the unit on the floor below, Jones shot Kensha Barlow.

A few days later, Barlow went to the local police station where Detective Taylor assembled a photo arrays based on information he received from the federal agents investigating Jones. Although Jones' photograph appeared in the array, Barlow denied recognizing anyone in the array as the person who shot him.

Two months later, Barlow was arrested on unrelated drug charges. While being interviewed by Special Agent Labno, Barlow mentioned that the person who shot him had been depicted in the photo array assembled by Detective Taylor. Barlow said that he denied any recognition of the shooter because he feared for his safety. At that point, Agent Labno left and printed large-scale pictures of the six individuals from Detective Taylor's photo array, intending to display the photos for Barlow in the same order as the previous array.

When Agent Labno re-entered the interview room, he held the six photos in the same order as the previous array, however, the top three photos, which included Jones' photo, were more prominently displayed than the other photos in the stack. Before Agent Labno could put the photos on the table, Barlow identified the person that shot him as the person depicted in Jones' photo. Agent Barlow then placed the photos on the table in the same order as the previous array, as he initially planned to do, and Barlow identified Jones again.

The government subsequently charged Jones with a variety of criminal offenses. Prior to trial, Jones filed a motion to suppress Barlow's identification of him on several grounds. The district court denied his motion and after he was convicted, Jones appealed.

First, Jones claimed that the identification procedure was unduly suggestive because Agent Labno showed Barlow the same arrest photo of Jones that was contained in the array first administered by Detective Taylor.

The court disagreed. The court found that "there is nothing per se impermissible about placing the same suspect in two different identification procedures," as the "danger to be avoided in identification procedures is that . . . of orchestrating the procedure so that the procedure implicitly suggests to the witness that 'this is the man.'" Here, the agent showed Barlow the same arrest photo of Jones as well as the same arrest photos of the five other individuals. Given that the six photos were the same in both identification procedures, the court concluded that the use of the same arrest photo did not implicitly suggested that Jones was the shooter.

Second, Jones claimed that when Agent Labno entered the room where Barlow was waiting, it was unduly suggestive to have his photo more prominently displayed than the other photos.

Again, the court disagreed. When Agent Labno walked into the room, Jones' photo was one of three photos that was more prominently displayed than the others were. However, the court found that Jones' photo was no more prominently displayed than the other two photos. In addition, Jones' photo, like the other two, was previously viewed at the initial identification procedure.

Finally, Jones argued that the identification procedure was unduly suggestive because two months elapsed between the first identification procedure and the second identification procedure.

The court noted that in a previous case it held that a two-month period between identification procedures did not make the second identification procedure unduly suggestive; therefore, the second identification procedure in this case was not unduly suggestive.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-2208/16-2208-2017-09-20.pdf?ts=1505939447

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Right Against Self-Incrimination

Compelled Testimony by Foreign Government – Admissibility in U.S. Criminal Prosecution

United States v. Conti, 864 F.3d 63 (2d Cir. 2017)

Law enforcement officers in the United Kingdom (U.K.) interviewed Anthony Conti and Anthony Allen, each of whom was a U.K. citizen and resident. During these interviews, Conti and Allen were compelled to give testimony. Although Conti and Allen were provided limited immunity from criminal prosecution, under U.K. law, their refusal to testify could have resulted in imprisonment.

The United States government subsequently charged Conti and Allen with wire fraud and bank fraud. At trial, the government used Conti and Allen's previous compelled testimony against them. The issue before the court was whether testimony compelled by a foreign government, which is later used in a criminal prosecution in the United States, is prohibited by the Fifth Amendment.

The right to be free from self-incrimination, guaranteed by the Fifth Amendment, is a personal trial right of the accused in any American criminal prosecution. A violation of that right occurs when a compelled statement is offered at trial against the defendant, even when the statement was compelled by a foreign government in accordance with its own law. In this case, the court found that there was no question that the defendants' statements were compelled by law enforcement officers in the U.K. As a result, the court concluded that the Fifth Amendment prohibited the government from using the defendants' compelled statements against them at trial in the United States.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/16-898/16-898-2017-07-19.pdf?ts=1500471007

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Compelling Unencrypted Data Encryption Codes / Passwords – Foregone Conclusion Doctrine

United States v. Apple Mac Pro Computer, 851 F.3d 238 (3d Cir. 2017)

The Fifth Amendment and Compelling Unencrypted Data Encryption Codes, and/or Passwords - Case Law Update

By Robert Cauthen, Assistant Division Chief, Office of Chief Counsel/Legal Division, Federal Law Enforcement Training Centers, Glynco, Georgia

On March 20, 2017, the United States Court of Appeals for the Third Circuit became the second federal circuit to weigh in on when and how the government can compel a suspect/defendant to provide an encryption code or password, or provide an unencrypted version of lawfully seized digital data. *United States of America v. Apple Mac Pro Computer, John Doe, et.al*, 851 F.3d 238.[1]

The March[2] and April[3] 2016 editions of *The Informer* included a two-part article on this issue. Part 1 examined the Fifth Amendment Self-Incrimination Clause and three United States Supreme Court decisions that form the underpinnings the legal analysis concerning documents and data on electronic devices. Part 2 discussed federal case law analyzing and applying the principles specifically to compelling a password, encryption code, and/or an unencrypted version of data already lawfully in the government's possession.

FACTS

During an investigation into Doe's access to child pornography over the internet, the Delaware County, Pennsylvania, Criminal Investigations Unit executed a valid search warrant at Doe's residence and seized an Apple iPhone 5S and an Apple Mac Pro Computer with two attached Western Digital External Hard Drives, all of which had been protected with encryption software. Police subsequently seized a password-protected Apple iPhone 6 Plus as well.

Agents from the Department of Homeland Security then applied for a federal search warrant to examine the seized devices. Doe voluntarily provided the password for the Apple iPhone 5S, but refused to provide the passwords to decrypt the Apple Mac Pro computer or the external hard drives. Despite Doe's refusal, forensic analysts discovered the password to decrypt the Mac Pro Computer, but could not decrypt the external hard drives. Forensic examination of the Mac Pro revealed an image of a pubescent girl in a sexually provocative position and logs showing that the Mac Pro had been used to visit sites with titles common in child exploitation. The Forensic examination also disclosed that Doe had downloaded thousands of files known by their "hash" values to be child pornography, which had been stored on the encrypted external hard drives. Doe provided the password to access the iPhone 6 Plus, but did not grant access to an application on

[1] The court's decision may be found at http://law.justia.com/cases/federal/appellate-courts/ca3/15-3537/15-3537-2017-03-20.html?utm_source=summary-newsletters&utm_medium=email&utm_content=seoreportad&utm_campaign=20170321-u-s-court-of-appeals-for-the-third-circuit-3455075830

[2] https://www.fletc.gov/sites/default/files/3Informer16.pdf

[3] https://www.fletc.gov/sites/default/files/4Informer16.pdf

the phone which contained additional encrypted information. Forensic analysts concluded that the phone's encrypted database contained approximately 2,015 image and video files.

Doe's sister, who had lived with Doe during 2015, told investigators that that Doe had shown her hundreds of images of child pornography, including "videos of children who were nude and engaged in sex acts with other children," on the encrypted external hard drives.

A federal magistrate judge issued an order pursuant to the All Writs Act requiring Doe to produce his iPhone 6 Plus, his Mac Pro computer, and his two attached external hard drives in a fully unencrypted state (the "Decryption Order"). Doe did not appeal the Decryption Order. Instead, he filed with the magistrate judge a motion to quash the Government's application to compel decryption, arguing that his act of decrypting the devices would violate his Fifth Amendment privilege against self-incrimination.

The magistrate judge denied Doe's Motion to Quash and directed Doe to fully comply with the Decryption Order, acknowledging Doe's Fifth Amendment objection but holding that, because the Government possessed Doe's devices and knew that their contents included child pornography, the act of decrypting the devices would not be testimonial for purposes of the Fifth Amendment privilege against self-incrimination. (Essentially, the magistrate judge concluded that the Government had established the "foregone conclusion" doctrine.) Doe did not appeal the Magistrate Judge's denial order.

Approximately one week later, Doe produced the Apple iPhone 6 Plus, including the files on the secret application, in a fully unencrypted state by entering three separate passwords on the device. The phone contained adult pornography, a video of Doe's four-year-old niece in which she was wearing only her underwear, and approximately twenty photographs, which focused on the genitals of Doe's six-year-old niece. Doe, however, stated that he could not remember the passwords necessary to decrypt the hard drives and entered several incorrect passwords during the forensic examination. The Government remains unable to view the decrypted content of the hard drives without his assistance.

The magistrate judge granted the Government's Motion for Order to Show Cause Why Doe Should Not Be Held in Contempt, finding that Doe willfully disobeyed and resisted the Decryption Order. Based on the evidence presented at the hearing, the magistrate judge found that Doe remembered the passwords needed to decrypt the hard drives but chose not to reveal them because of the devices' contents. The magistrate judge ordered Doe to appear before the District Court to show cause as to why he should not be held in civil contempt.

The district court granted the Government's motion to hold Doe in civil contempt and remanded Doe to the custody of the United States Marshals to be incarcerated until he fully complies with the Decryption Order. Doe appealed the district court's order.

On appeal, Doe challenged the government's use of the All Writs Acts to enforce its search warrant and contended that the Decryption Order violated his Fifth Amendment privilege against self-incrimination.

HOLDING

The Third Circuit affirmed the District Court's civil contempt order and incarceration of Doe until he decrypts the data on the hard drives.

1. The All Writs Act.

The Third Circuit held that "the Magistrate Judge had subject matter jurisdiction under Federal Rule of Criminal Procedure 41 to issue a search warrant and therefore had jurisdiction to issue an order under the All Writs Act that sought 'to effectuate and prevent the frustration' of that warrant." "When law enforcement could not decrypt the contents of those devices, and Doe refused to comply, the Magistrate Judge issued the Decryption Order pursuant to the All Writs Act. The Decryption Order required Doe to 'assist the Government in the execution of the…search warrant' by producing his devices in 'a fully unencrypted state.' … the Decryption Order here was a necessary and appropriate means of effectuating the original search warrant."

2. The Fifth Amendment Self-Incrimination Clause.

In *Fisher v. United States*, 425 U.S. 391 (1976), the Court stated that "[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced." 425 U.S. at 410. The act of production may, therefore, be testimonial and protected by the Fifth Amendment. In *Fisher*, the Court also articulated the "foregone conclusion" rule, which acts as an exception to the otherwise applicable act-of-production doctrine. Under this rule, the Fifth Amendment does not protect an act of production when any potentially testimonial component of the act of production—such as the existence, custody, and authenticity of evidence—is a "foregone conclusion" that "adds little or nothing to the sum total of the Government's information." 425 U.S. at 411. For the rule to apply, the Government must be able to "describe with reasonable particularity" the documents or evidence it seeks to compel. *United States v. Hubbell*, 530 U.S. 27, 30 (2000).

The Third Circuit concluded that the Government had provided evidence amply supported by the record sufficient to establish the "foregone conclusion" doctrine.

a. The Government had lawful custody of the devices which were seized pursuant to a valid search warrant.

b. Prior to the seizure, Doe possessed, accessed, and owned all of the devices.
   1) Doe did not dispute their existence or his ownership of the devices.

   2) Doe's sister stated that he had in her presence opened the devices, accessed the data by entering passwords from memory, and shown her images.

   3) Doe had provided the Government with access to the data on some of the devices by entering multiple passwords from memory.

c. There are images on the devices that constitute child pornography.

   1) The investigation led to the identification of Doe as a user of an internet file sharing network that was used to access child pornography.

   2) Forensic analysis showed that the Mac Pro had been used to visit sites common in child exploitation.

   3) Doe's sister stated that he had shown her hundreds of pictures and videos child pornography images from the devices.

   4) Forensic analysis showed that Doe had downloaded thousands of files known by their "hash" values to be child pornography.

Based on that record, the Third Circuit held that since the act of producing the decrypted data would not be protected testimonial evidence, the Decryption Order did not violate Doe's Fifth Amendment privilege against self-incrimination.

TAKE-AWAYS

The Third Circuit is only the second federal circuit court to address this issue. It is the first to uphold the use of the All Writs Act to compel unencrypted data and the first to apply the "foregone conclusion" doctrine to overcome a defendant's assertion of "act of production" privilege under the Fifth Amendment.[4]

For criminal investigators, this decision demonstrates and emphasizes the critical importance of establishing the "foregone conclusion" doctrine by gathering facts that establish the suspect's ownership of, possession of, access to, and/or use of the device, knowledge of the contents on the device, knowledge that the data is password protected or encrypted, and the ability to decrypt the contents. The court must be convinced to a reasonable certainty that the act of production protection will add nothing to what the government already knows and can prove.

For the Court's opinion: http://cases.justia.com/federal/appellate-courts/ca3/15-3537/15-3537-2017-03-20.pdf?ts=1490029205

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In a Criminal Case

Vogt v. City of Hays, 844 F.3d 1235 (10th Cir. 2017)

Vogt was employed as a police officer with the City of Hays. Vogt applied for a position with the City of Haysville's police department. During Haysville's hiring process, Vogt disclosed that he had kept a knife obtained in the course of his work as a Hays police officer.

Haysville offered Vogt a job on the condition that Vogt report his acquisition of the knife to the Hays police Department. Vogt complied with this request and submitted a brief report concerning his possession of the knife. Vogt then provided the City of Hays with a two-week notice of resignation, planning to accept the new job with Haysville.

In the meantime, the Hays police chief began an internal investigation into Vogt's possession of the knife. In addition, Vogt was required by the Hays Police Department to give a more detailed statement concerning the knife in order to keep his job. Vogt complied, and the Hays police department used Vogt's statement to obtain additional evidence.

Based on Vogt's statements and the additional evidence, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal investigation. The criminal investigation caused the Haysville Police Department to withdraw its job offer to Vogt.

[4] In *In re: Grand Jury Subpoena Duces Tecum Dated March 25, 2011: U.S. v. John Doe*, 670 F.3d 1335 (11th Cir. 2012), the government used a grand jury subpoena to compel the defendant to provide the unencrypted data. The district court held Doe in civil contempt and ordered him incarcerated. The Eleventh Circuit reversed the order. It adopted the "foregone conclusion" analysis but concluded that the government had failed to establish it and, therefore, the act of producing the unencrypted data was protected by the Fifth Amendment privilege.

Vogt was later charged in Kansas state court with two felony counts related to his possession of the knife. Following a probable cause hearing, the state district court determined that probable cause was lacking and dismissed the charges.

Vogt filed a lawsuit under *42 U.S.C. § 1983* against the City of Hays, the City of Haysville and four police officers. Vogt claimed that the use of his compelled statements: (1) to start an investigation leading to the discovery of additional evidence concerning the knife, (2) to initiate a criminal investigation, (3) to bring criminal charges, and (4) to support the prosecution during the probable cause hearing violated his Fifth Amendment right against self-incrimination.

The Fifth Amendment, which applies to the states through incorporation of the Fourteenth Amendment, protects individuals from being compelled to incriminate themselves in any criminal case. This amendment prohibits the government from compelling law enforcement officers to make incriminating statements in the course of their employment. As a law enforcement officer, Vogt was protected under the Fifth Amendment against the use of his compelled statements in a criminal case.

First, the district court held that Vogt had not stated a valid claim under the Fifth Amendment because the incriminating statements were never used against him at trial. While the United States Supreme Court has not conclusively defined the scope of a "criminal case" under the Fifth Amendment, the Tenth Circuit Court of Appeals disagreed and held that the phrase "criminal case" includes probable cause hearings as well as trials.[1] As a result, the court concluded that Vogt had adequately alleged a Fifth Amendment violation consisting of the use of his compelled statements in a criminal case.

Second, the court held that the four police officers were entitled to qualified immunity. Until its holding in this case, the court noted that it was not clearly established in the Tenth Circuit if the term "criminal case" included pre-trial proceedings such as probable cause hearings. Consequently, when the police officers acted, they could not have known that the Fifth Amendment would be violated by the eventual use of Vogt's compelled statements to develop investigatory leads, initiate a criminal investigation, bring charges, or support the prosecution in a probable cause hearing.

Third, the court affirmed the district court's dismissal of Vogt's claim against Haysville. Vogt claimed that Haysville offered him a job, but only if he told the Hays police department about the acquisition of the knife. Vogt argued that this condition compelled him to make incriminating statements to the City of Hays.

The court disagreed, holding that the condition on the job offer to Vogt was not coercive and did not compel Vogt to make incriminating statement to the City of Hays. Vogt was never an employee of Haysville, and his conditional job offer did not threaten the loss of livelihood or an existing job. If Vogt had not wanted to incriminate himself, the court reasoned that Vogt could have declined the job offer and continued working for the Hays police department.

Fourth, the court disagreed with the district court and held that Vogt had adequately alleged in his complaint the City of Hays used his compelled statements to cause a criminal investigation to be launched against him.

[1] With this decision, the Tenth Circuit joins the Second, Seventh, and Ninth Circuits, concluding that the right against self-incrimination is more than a trial right.

Finally, the court held that Vogt adequately alleged in his complaint that the Hays chief of police was the final policy making authority for the city concerning employee discipline within the police department. As a result, the court concluded that the City of Hays could be found liable for the actions of the police chief in this case.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-3266/15-3266-2017-01-04.pdf?ts=1483556466 **(The United States Supreme Court granted certiorari in this case.)**

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Miranda

Applicability to Grand Jury Witnesses

United States v. Williston, 862 F.3d 1023 (10th Cir. 2017)

An FBI agent served a grand jury subpoena on Williston in the county jail. Williston was being held in the jail on state charges unrelated to the crime that the federal grand jury was investigating. The agent also gave Williston a target letter, which informed Williston that he was the target of a federal grand jury murder investigation concerning the death of Payton Cockrell, his girlfriend's two-and-a-half-year-old daughter. The target letter also advised Williston that he could "refuse to answer any question if a truthful answer to the question would tend to incriminate you." The agent read the target letter verbatim to Williston and reiterated that Williston was the target of the investigation.

Approximately one week later, while still incarcerated, Williston appeared before the grand jury. Before the prosecutor asked Williston any questions, he confirmed on the record that Williston had received and understood the target letter. The prosecutor then reviewed the target letter with Williston, again advising Williston that he could "refuse to answer questions if a truthful answer to the question would tend to incriminate you." The prosecutor also told Williston that he had the right to counsel. After Williston indicated that he understood his rights, the prosecutor asked substantive questions related to the death of Payton Cockrell. Williston then gave his account of Cockrell's death.

Six months after Williston's testimony, the grand jury indicted him for Cockrell's murder. Williston filed a motion to suppress his grand jury testimony, some of which was introduced against him at trial.

In U.S. v. Mandujano, the Supreme Court held that grand jury witnesses are not "in custody" while testifying, and that grand jury questioning is not "interrogation;" therefore, Miranda warnings are not required. However, Williston claimed that because he was incarcerated on unrelated criminal charges, he was not merely a grand jury witness, but a person in custody being interrogated. As a result, Williston argued that the government violated his Fifth Amendment right against self-incrimination by not providing him a Miranda warning before his grand jury testimony.

The court disagreed. The court held that the rule in Mandujano, which made Miranda inapplicable to grand jury witnesses, extends to persons who are incarcerated for unrelated reasons when they are subpoenaed to appear before a grand jury.

The Fifth Amendment provides that, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The court noted that this protection limits a grand jury's authority to investigate criminal matters and that the government's treatment of Williston during its investigation of Cockrell's murder more than complied with this protection. First, government representatives told Williston three times that he could refuse to answer any grand jury question if he felt the answer would incriminate him. Second, the target letter, which the FBI agent read to Williston verbatim, informed Williston that he could "refuse to answer any question if a truthful answer to the question would tend to incriminate you." Finally, the prosecutor reviewed the target letter with Williston on the record before Williston's grand jury testimony and advised Williston that he could refuse to answer any question if the truthful answer would incriminate him. The court added that a full Miranda warning requirement would be contrary to the Supreme Court's holding in Mandujano that grand jury witnesses are not in custody while testifying, and that grand jury questioning is not interrogation.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-7080/15-7080-2017-07-05.pdf?ts=1499276021

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Custody

United States v. Schaffer, 851 F.3d 166 (2d Cir. 2017)

Schaffer sexually assaulted a fifteen-year-old girl during a job interview. Several days after the assault, a counselor from the girl's school notified the police department about the incident. As part of the investigation, law enforcement officers used the girl's email account to arrange for another meeting between Schaffer and the girl. However, on the day of the meeting, nine federal agents arrived at Schaffer's office building with a warrant to conduct a search of the premises.

When the agents encountered Schaffer, they did not handcuff him or draw their firearms, and Schaffer agreed to speak with the agents. Two agents interviewed Schaffer who was allowed to drink coffee and smoke cigarettes freely. At one point, Schaffer asked the agents if he should have an attorney present. The agents told Schaffer that he had a right to have an attorney present, but told him that he would have to decide for himself whether or not to exercise that right. At no point afterward, did Schaffer request an attorney. However, Schaffer asked the agents twice during the interview if he could leave to collect some money from an attorney located down the street. Schaffer claimed he needed the money to purchase medication, but he ever claimed that there was medical emergency, which required him to purchase the medicine. In addition, Schaffer never claimed that the attorney represented him. The agents denied both requests, telling Schaffer that it would create a security issue because the agents conducting the search had placed boxes of evidence on the floor by the threshold of the doorway. During the course of an approximately one-hour interview, Schaffer made incriminating statements to the agents.

At the end of the interview, after consulting with the United States Attorney's Office, the agents arrested Schaffer.

Prior to trial, Schaffer filed a motion to suppress the statements he made to the agents during the interview. Schaffer claimed that he made the statements during a custodial interrogation without having first been advised of his Miranda rights. Specifically, Schaffer argued that he was in custody for Miranda purposes because the agents twice denied his requests to leave the office.

The court noted that a suspect is in "custody" for Miranda purposes if two conditions are met. First, a reasonable person must believe that he is not free to terminate the encounter with the police. Second, a reasonable person must believe that his freedom of movement has been "curtailed to a degree associated with a formal arrest." The court emphasized that while the first condition, a seizure, is necessary for a suspect to be in custody, not every seizure constitutes custody for Miranda purposes.

In this case, the court found that Schaffer was not in custody when the agents interviewed him; therefore, the agents were not required to advise Schaffer of his Miranda rights. When the agents initially encountered Schaffer, they did not handcuff him or have their weapons drawn. The agents told Schaffer that he was not under arrest and Schaffer voluntarily agreed to speak with the agents. Two agents then interviewed Schaffer for approximately one-hour, in the familiar surroundings of his office, and allowed Schaffer to drink coffee and smoke cigarettes during the interview. In addition, there was no evidence that Schaffer asked for an attorney or that the agents denied a request for an attorney. Most significantly, the court held that the agents' denial of Schaffer's requests to leave the office did not create a custodial situation, as a reasonable person in Schaffer's position would not have believed that being prohibited from leaving his office during an ongoing search was equivalent to a formal arrest. Instead, the court found that a Schaffer would have considered the restriction on his freedom of movement to be a "sensible precaution" designed to protect the integrity of an ongoing search.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-2516/15-2516-2017-03-15.pdf?ts=1489588205

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United States v. Familetti, 878 F.3d 53 (2d Cir. 2017)

Familetti participated in online chat sessions with Thompson, an undercover federal agent. During these sessions, Familetti sent Agent Thompson child pornography videos and expressed an interest in having a sexual experience with a minor. In response, Agent Thompson offered to arrange an encounter with an eleven-year-old. A different undercover agent, posing as Agent Thompson's online persona, met with Familetti in person, and the agent agreed to deliver a child to Familetti's apartment for $500. At the conclusion of the meeting, Familetti gave the agent $100 as a down payment. However, at the agreed time, Agent Thompson and eight other federal agents went to Familetti's apartment and executed a search warrant.

As the agents entered his apartment, Familetti suffered an extreme panic attack, and two agents pushed Familetti against a wall and handcuffed him. The agents brought Familetti a glass of water and waited for him to calm down. Agent Thompson told Familetti that he was not under arrest and was free to leave, but that the agents had a warrant to search the apartment. When Familetti's panic subsided, the handcuffs were removed, and Familetti was led into his bedroom where he was told again that he was not under arrest. Agent Thompson told Familetti the agents' main goal was to find people who were "raping children" and making child pornography videos. Agent Thompson asked for Familetti's help with the investigation, and Familetti immediately agreed to cooperate. Agent Thompson then advised Familetti of his Miranda rights orally and in writing. Familetti waived his rights and confessed to using an online account to trade child pornography, storing child pornography on an SD card hidden in his apartment, and giving the undercover agent a $100 down payment for sex with a minor.

The government charged Familetti with sex trafficking of a minor and the possession, distribution, and transportation of child pornography. Familetti argued that his pre-Miranda statement concerning his willingness to cooperate with the investigation was inadmissible because it was the result of a custodial interrogation. Familetti further argued that his subsequent Miranda waiver and confession was invalid because of the initial Miranda violation.

A person must both be "in custody" and subject to "interrogation" before law enforcement officers are required to inform him of his Miranda rights. An interrogation occurs when a person "is subjected to express questioning or its functional equivalent," and his statements are "the product of words or actions on the part of the police" that "were reasonably likely to elicit an incriminating response."

Here, after entering Familetti's apartment to execute a search warrant, the agents told him that they were looking for perpetrators of child pornography, and asked Familetti for information. The court found the agents left no doubt that Familetti was suspected of criminal involvement and that his response would more than likely confirm the agents' suspicions. As a result, the court held that the agent's request for Familetti to help them investigate child pornography constituted interrogation.

However, the court further held that Familetti was not in custody during this pre-Miranda interrogation. A person is in custody for Miranda purposes after he is formally arrested or if police officers restrain his freedom of movement to "the degree associated with a formal arrest." First, Familetti had not been placed under arrest when he made the pre-Miranda statements concerning his willingness to cooperate. Second, the court found that the agents did not restrain Familetti comparable to that of a formal arrest.

To evaluate whether the degree of restraint rises to the level of that associated with a formal arrest, the court has to determine "whether a reasonable person in the suspect's shoes would not have felt free to leave under the circumstances." Here, after Familetti recovered from his initial distress, two agents spoke to him in a non-confrontational tone after removing his handcuffs. The agents never drew their weapons, and they told Familetti several times that he was not under arrest and was free to leave. Finally, Familetti was in the familiar surroundings of his own home and the interrogation lasted, at most, only several minutes.

Because Familetti was not subjected to custodial interrogation before the agents advised him of his Miranda warnings, the court found it unnecessary to address Familetti's challenge to his Miranda waiver and subsequent confession.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca2/16-2334/16-2334-2017-12-20.pdf?ts=1513783811

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United States v. Giddins, 858 F.3d 870 (4th Cir. 2017)

Police officers arrested three women for committing two separate bank robberies and seized their getaway car, which belonged to Giddins. During an interview one of the women told the officers that Giddins had been involved in a third, unrelated, bank robbery. Based on these statements and other evidence, Det. Taylor obtained a warrant to arrest Giddins for bank robbery.

A few days later, officers contacted Giddins and told him that his car had been used in a bank robbery. When Giddins went to the police station to retrieve his car, Det. Morano took him to an interview room. Giddins was seated at a table, with a door directly behind him, which was locked. Det. Morano sat across the table from Giddins, near an unlocked, second door. Det. Morano asked Giddins to whom he lent his car, and other questions related to one of the women charged with bank robbery. At some point, Giddins asked Det. Morano, "Am I in trouble?" to which Det. Morano replied, "No, you're here getting your car, right?" Det. Morano told Giddins that he needed to obtain this information to include in his report because Giddins' car had been used in a crime. A few minutes later, Det. Morano left the room and Det. Taylor entered. Det. Taylor, without telling Giddins that he had a warrant for his arrest, told Giddins that he would be taking over the interview.

During the interview, Det. Taylor allowed Giddins to answer a call on his cell phone; however, when he was done, Det. Taylor asked Giddins to put his phone on the table and moved it away from Giddins. A few minutes later, Giddins' phone rang. Det. Taylor handed Giddins his phone but told him to turn it off, and Giddins complied. A few minutes later, Det. Taylor produced a Miranda-waiver form and told Giddins that he had to read him his rights because his car was involved in a crime. After Giddins indicated that he understood his rights, he asked Det. Taylor, "Is this the procedure for me to get my car back?" Det. Taylor told him that it was because Giddins' car had been used in a crime and he wanted to find out how the women had obtained Giddins' car. Giddins asked Det. Taylor, "But do I still get my car?" Det. Taylor replied, "Before I release the car to you, I would like to know some answers." Giddins then asked Det. Taylor, "I'm not in trouble or anything, am I?" Det. Taylor answered, "Not at this point, no." Giddins then signed the Miranda-waiver form. During the next fifteen minutes, Det. Taylor questioned Giddins. Some of Det. Taylor's questions required Giddins to look at his phone, and after each time Giddins finished, Det. Taylor instructed Giddins to put his phone down and move it away. Giddins eventually invoked his Fifth Amendment right to counsel and Det. Taylor stopped questioning him. Det. Taylor told Giddins that he was under arrest for bank robbery and had him transported to the jail.

The government charged Giddins with several bank-robbery related offenses.

Giddins filed a motion to suppress his statements to Det. Morano and Det. Taylor.

As an initial matter, the court held that Giddins was in custody for Miranda purposes prior to his formal arrest. First, the door behind Giddins was locked, so to leave the room, Giddins would have had to walk past Det. Taylor. In addition, twice during the interrogation, Det. Taylor moved Giddins' phone away from him. Based on these facts, the court concluded that a reasonable person would have felt unable to stop the interrogation and leave the room; therefore, giving up the opportunity to get his car back. As a result, the court found that, Miranda warnings were required before any of Giddins' statements concerning his car or his relationship to the three women who had borrowed his car could be admitted against him at trial.

Next, the court held that Giddins' waiver of his Miranda rights and subsequent statements were the result of police coercion. The court found that the detectives made it appear that if Giddins did not answer their questions, he would not be able to get his car back. When Giddins asked whether filling out the Miranda-waiver form and answering the officers' robbery-related questions was the normal procedure for obtaining his car, Det. Taylor told him that it was. The court concluded that a reasonable person in Giddins' position would have believed that it was necessary to sign the Miranda-waiver form and answer Det. Taylor's questions in order to get his car back.

In addition, the court added that the detectives engaged in coercive behavior when they lied to Giddins after Giddins asked them if he was "in trouble". The court had "no doubt" that Giddins was "in trouble," when he entered the police station, as a warrant existed for his arrest and the detectives affirmatively misled Giddins as to the true nature of the investigation by failing to inform him that he was the subject of the investigation.

Finally, the court held that the police coercion was sufficient to rise to the level such that Giddins' will was overborne. Consequently, the court concluded that Giddins' Miranda waiver and statements were made involuntarily.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca4/15-4039/15-4039-2017-06-06.pdf?ts=1496775631

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United States v. Luck, 852 F.3d 615 (6th Cir. 2017)

Federal agents obtained a warrant to search Luck's home for evidence of child pornography. At the time, Luck was 21 years old and lived with his parents. When the agents arrived, they told Luck and his parents they were free to leave while the agents executed the warrant, but that they would like to ask them some questions. Luck and his parents agreed to answer the agents' questions. After answering some general questions, Luck admitted he had used a peer-to-peer network, which agents knew was a type of computer program that had been used to download and share pornographic material from the house. When the agents heard this, they asked to speak with Luck privately, offering to spare Luck from having to answer embarrassing questions in front of his parents. Luck and his parents agreed, and he and two agents went into a nearby bedroom.

Once the questioning resumed, Luck eventually told the agents he had downloaded and viewed child pornography. Luck then agreed to dictate a statement to the agents, which included the same incriminating statements. Before Luck dictated his statement, the agents told Luck that any statement he made was voluntary and that he did not have to give a statement. After Luck reviewed the agent's transcription of his statement for accuracy, Luck signed the statement.

The government charged Luck with offenses related to the distribution and possession of child pornography.

Luck filed a motion to suppress his statements to the agents, claiming that he was subject to custodial interrogation without first being advised of his Miranda rights. Luck also claimed that his statements were involuntary under the Due Process Clause.

The court disagreed. Law enforcement officers are required to advise a person of his Miranda rights before engaging in "custodial interrogation." A person is in custody for Miranda purposes if his freedom of movement is restrained to the degree associated with a formal arrest. Here, the court concluded that Luck was not in custody for Miranda purposes. First, the agents questioned Luck in his own home. Second, the interview only lasted one hour. Third, during the interview, the agents spoke to Luck in a calm, conversational manner, never becoming aggressive or brandishing their weapons. Fourth, Luck voluntarily accompanied the agents to the bedroom for the interview. Fifth, during the interview the agents kept the door open and did not block the exit. Finally, although the agents did not tell Luck he was free to leave, the agents did inform Luck that he did not have to provide a statement. Taken together, the court found that nothing about the

objective circumstances of the interview indicate that a reasonable person in Luck's position would have believed that he was under arrest or otherwise not free to leave.

The court further held that Luck's statement to the agents was voluntary. Luck claimed that he was under the influence of sleep medications during the interview, which rendered him vulnerable to the agents' questions and created a coercive environment. However, the agents testified that Luck did not appear to be under the influence of any drugs, alcohol or medication, as he provided clear statements and spoke in complete sentences. Even if Luck had suffered some degree of impairment, the court noted that impairment, by itself, is never enough to render a confession involuntary under the Due Process Clause; some element of police coercion is always necessary. Here, the court found that the agents spoke in conversational tones, did not threaten Luck, and told Luck that he did not have to provide a statement if he did not want to.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/15-5746/15-5746-2017-03-31.pdf?ts=1490985087

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United States v. Jackson, 852 F.3d 764 (8th Cir. 2017)

Jackson stabbed Smith to death during an argument. After the stabbing, Jackson went to his girlfriend's apartment, where a friend then braided and cut Jackson's long hair. As is tradition in his culture, Jackson then gave the braid to his brother to give to their mother. A short time later, police arrived at the apartment and arrested Jackson. The officers arrested Jackson on federal warrants for violations of his supervised release from a 2011conviction as well as on tribal charges. A tribal officer read Jackson his Miranda warnings and transported him to jail.

Approximately 4 ½ hours later, two agents with the Federal Bureau of Investigation (FBI) and an agent with the Bureau of Indian Affairs (BIA) interviewed Jackson. One of the agents asked Jackson for information about his family, address, and date of birth, which Jackson provided. When one of the other agents then asked Jackson about the stabbing, Jackson told the agent that he would prefer to have an attorney present to discuss the matter. According to the agent, Jackson then "voluntarily blurted out" that he had been "slamming meth," that he had been up for several days since his birthday, and that the only sleep he had was in the jail just prior to the interview.

Following these statements, Jackson pulled his knees to his chest and clutched his arms around them. In an attempt to determine Jackson's mental and physical state, the agents asked Jackson about medications and allergies and asked Jackson to rate his well-being on a scale of one to ten. Jackson told the agents that he was not taking any prescription medications, had no allergies, and rated his well-being at a level three. One of the agents asked Jackson when he last cut his hair. Jackson told the agent that he did not know.[1] The agent claimed he asked this question because Jackson's shirt had a substantial amount of hair on it, and the agents were trying to determine if Jackson knew the date. Near the end of the interview, the conversation turned to the outstanding

[1] The haircut question and Jackson's answer were brought out several times at trial: during the agent's direct examination, Jackson's cross examination, and the government's closing argument. At closing, the government relied on this exchange to challenge the "credibility of the defendant's testimony" at trial, arguing that if Jackson was "that lacking in memory" on the night of the incident such that he could not remember a haircut that occurred hours earlier, then "you have reason to question how a year-and-a-half later, when he's on the witness stand, he's able to give you all of those details."

federal warrants, and Jackson told the agents that he wanted an attorney. The agents stopped questioning Jackson.

Jackson filed a motion to suppress his statements to the agents. Jackson claimed the agents' questions at the jail constituted interrogation after he had invoked his right to counsel, in violation of Miranda.

First, the district court held that Jackson's statements concerning his drug use and lack of sleep were volunteered. Volunteered statements are not considered interrogation; therefore, the court held these statements were not obtained in violation of Miranda. The court of appeals found that the district court committed no error in crediting the agent's testimony over Jackson's testimony that he did not volunteer these statements.

Next, the court held the that agents' questions concerning prescription medications, allergies, and well-being were not interrogation, under Miranda. First, the court found that these questions were not reasonably likely to elicit incriminating responses. Second, because Jackson had already voluntarily disclosed that he had been awake for several days and using drugs, the agents' follow-up questions did not constitute interrogation, as such limited questioning relating to concerns about Jackson's health were not an attempt to get Jackson to incriminate himself.

Finally, the court held that the agent's question regarding Jackson's last haircut crossed the line into improper interrogation. The agent testified that prior to interviewing Jackson, he had gone to the apartment where Jackson was arrested. At the apartment, the agent stated there was "discussion about recently cut hair," and the agents learned that the murder suspect had received a haircut that evening at the apartment. Because the agents had prior knowledge about the murder suspect having recently cut his hair, they should have known that the question regarding Jackson's last haircut "was reasonably likely to elicit an incriminating response" from Jackson regarding the murder.

Although the court held that the district court improperly admitted Jackson's response to the agent's question regarding the last time he cut his hair, the error was harmless as there was substantial other evidence that suggested Jackson's memory of the incident was unreliable.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-2433/16-2433-2017-03-27.pdf?ts=1490628650

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United States v. Giboney, 863 F.3d 1022 (8th Cir. 2017)

Police officers obtained a warrant to search Giboney's residence for evidence related to the receipt and possession of child pornography. While five officers searched the residence, another officer interviewed Giboney. The officer told Giboney that he was not under arrest and was free to leave. The officer did not place Giboney in handcuffs or otherwise physically restrain him, and no weapon was drawn against him. During the interview, Giboney asked to use the restroom. The officer allowed Giboney to use the restroom; however, the officer told Giboney that he needed to accompany him because the other officers were still searching the residence. Afterward, the officer accompanied Giboney to the garage where Giboney was allowed to smoke a cigarette. During this time, the officer confirmed that Giboney was still willing to talk to him. At some

point, Giboney attempted to leave the residence but the officer arrested him, telling Giboney that he had developed new information during the execution of the search warrant.

At the police station, the officer conducted a video-recorded interview of Giboney. Before the interview, the officer read Giboney his Miranda rights from a form. Giboney initialed each right after the officer read the right to him out loud. In addition, Giboney verbally acknowledged that he understood each right as it was read to him and "jokingly" asked the officer, "So does it stop now if I want to get an attorney?" The officer told Giboney that he could stop the interview at any time.

The officer then asked Giboney to read the section of the form titled, "Waiver" out loud. Giboney complied, but Giboney stated that he would not initial the waiver because the waiver stated, "I do not want a lawyer at this time." Seeking clarification, the officer asked Giboney some follow up questions. After a short discussion, the officer believed that Giboney wanted an attorney to represent him in the criminal case, but that Giboney did not want an attorney present during the interview. When the officer asked Giboney, "So are you saying that you want a lawyer at this time?" Giboney replied, "Oh, at this time. Alright...Sorry." Giboney then initialed the wavier section of the form and verbally agreed to be interviewed. During the interview, Giboney told the officer that he had been viewing child pornography for fifteen years.

The government charged Giboney with receipt and possession of child pornography.

Giboney filed a motion to suppress his pre-arrest statements, arguing that he was in custody for Miranda purposes when the officer interviewed him.

A person is in "custody" for Miranda purposes when there is a formal arrest or a restraint on the person's freedom of movement to the degree associated with a formal arrest. In this case, the court held that Giboney was not in custody for Miranda purposes during the interview prior to his arrest. First, the officer repeatedly told Giboney that he was not under arrest, that he could end the interview whenever he wanted, and that he was free to leave. Second, the officer did not restrain Giboney's movements to the degree associated with a formal arrest by joining Giboney as he moved about the house. The officer told Giboney that he could not walk around the house because of the ongoing execution of the search warrant. In addition, Giboney was not handcuffed or otherwise restrained from moving around and Giboney did not object when the officer accompanied him. Third, Giboney voluntarily agreed to speak to the officer and he understood that it was his choice to be interviewed or not. Fourth, although there were five other officers present, the officer who interviewed Giboney did not use "strong-arm" tactics during the interview. Finally, while the officer arrested Giboney at the end of the interview, this fact, by itself, does not establish that the interview was custodial.

Giboney also filed a motion to suppress his post-arrest statements, arguing that the officer continued to interview him after he had invoked his Fifth Amendment right to counsel.

To validly invoke the right to counsel, a defendant must articulate the desire to have counsel present sufficiently clearly that a reasonable police officer would understand the statement to be a request for an attorney. The court held that Giboney did not clearly and unequivocally assert his right to counsel in his post-arrest interview. First, Giboney did not validly invoke his right to counsel by asking whether the interview would end if he wanted an attorney, because, by Giboney's express admission, he was "kidding." Second, the remaining conversation between Giboney and the officer does not establish that Giboney wanted an attorney present during the interview. Instead, Giboney made it clear that he only wanted an attorney present if he was

charged with a crime. Once Giboney realized that waiving his right to counsel only applied during the interview, he apologized for his confusion, stated that he would talk to the officer, and initialed the waiver. The court found that Giboney's statements were, at best, ambiguous as to whether he wanted to have an attorney present for the interview. As a result, Giboney failed to sufficiently invoke his right to counsel and the officer was not required to stop questioning him.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3294/16-3294-2017-07-21.pdf?ts=1500651046

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Interrogation – Functional Equivalent of Questioning

Routine Booking Questions

United States v. Paxton, 848 F.3d 803 (7th Cir. 2017)

Paxton and four other men were arrested and placed inside the back of a marked police van for transport to a nearby Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) field office to be interviewed. The van's interior was divided into three compartments with the driver and passenger separated from the transport compartments by steel walls with plexiglass windows. During the drive, the defendants made incriminating statements that were captured by two recording devices that were concealed in the back of the van. The recording equipment also captured identifying information that each defendant was asked to provide before being seated in the van. The defendants' answers to the biographical questions were later used by the agents to identify who was speaking in the back of the van.

The defendants filed a motion to suppress their covertly recorded statements, claiming that they had a reasonable expectation of privacy in their conversation while in the back of the police van.

The court disagreed. The court emphasized that the police van was functioning as a mobile jail cell. The defendants had been arrested, placed in handcuffs, and were being transported to the ATF field office for processing and questioning. The court found that the arrest itself had already diminished the defendants' expectation of privacy, and as detainees, the defendants could not have reasonably believed the marked police van provided them a place to have a private conversation. The court added, the fact that the interior of the van was divided into separate, fully enclosed, compartments, did not change the nature of the vehicle. The metal dividing walls, with their thick plexiglass windows, were present to serve a security function rather than to provide an area for private conversations. Regardless of the particular layout, a police vehicle that is readily identifiable by its markings as such, and which is being used to transport detainees in restraints, does not support an objectively reasonable expectation of conversational privacy.

The court further held that the identification questions the agents asked the defendants as they entered the van, which were later used to identify the speakers in the recorded conversations, did not violate the Fifth Amendment. Although the defendants had not yet been given their Miranda warnings, the questions asked by the agents were similar to routine booking questions, which are not the type of questions that typically produce incriminating information.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-2913/14-2913-2017-02-17.pdf?ts=1487358046

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Right to Counsel

United States v. Giboney, 863 F.3d 1022 (8th Cir. 2017)

Police officers obtained a warrant to search Giboney's residence for evidence related to the receipt and possession of child pornography. While five officers searched the residence, another officer interviewed Giboney. The officer told Giboney that he was not under arrest and was free to leave. The officer did not place Giboney in handcuffs or otherwise physically restrain him, and no weapon was drawn against him. During the interview, Giboney asked to use the restroom. The officer allowed Giboney to use the restroom; however, the officer told Giboney that he needed to accompany him because the other officers were still searching the residence. Afterward, the officer accompanied Giboney to the garage where Giboney was allowed to smoke a cigarette. During this time, the officer confirmed that Giboney was still willing to talk to him. At some point, Giboney attempted to leave the residence but the officer arrested him, telling Giboney that he had developed new information during the execution of the search warrant.

At the police station, the officer conducted a video-recorded interview of Giboney. Before the interview, the officer read Giboney his Miranda rights from a form. Giboney initialed each right after the officer read the right to him out loud. In addition, Giboney verbally acknowledged that he understood each right as it was read to him and "jokingly" asked the officer, "So does it stop now if I want to get an attorney?" The officer told Giboney that he could stop the interview at any time.

The officer then asked Giboney to read the section of the form titled, "Waiver" out loud. Giboney complied, but Giboney stated that he would not initial the waiver because the waiver stated, "I do not want a lawyer at this time." Seeking clarification, the officer asked Giboney some follow up questions. After a short discussion, the officer believed that Giboney wanted an attorney to represent him in the criminal case, but that Giboney did not want an attorney present during the interview. When the officer asked Giboney, "So are you saying that you want a lawyer at this time?" Giboney replied, "Oh, at this time. Alright...Sorry." Giboney then initialed the wavier section of the form and verbally agreed to be interviewed. During the interview, Giboney told the officer that he had been viewing child pornography for fifteen years.

The government charged Giboney with receipt and possession of child pornography.

Giboney filed a motion to suppress his pre-arrest statements, arguing that he was in custody for Miranda purposes when the officer interviewed him.

A person is in "custody" for Miranda purposes when there is a formal arrest or a restraint on the person's freedom of movement to the degree associated with a formal arrest. In this case, the court held that Giboney was not in custody for Miranda purposes during the interview prior to his arrest. First, the officer repeatedly told Giboney that he was not under arrest, that he could end the interview whenever he wanted, and that he was free to leave. Second, the officer did not restrain Giboney's movements to the degree associated with a formal arrest by joining Giboney as he moved about the house. The officer told Giboney that he could not walk around the house because of the ongoing execution of the search warrant. In addition, Giboney was not handcuffed or otherwise restrained from moving around and Giboney did not object when the officer accompanied him. Third, Giboney voluntarily agreed to speak to the officer and he understood that it was his choice to be interviewed or not. Fourth, although there were five other officers

present, the officer who interviewed Giboney did not use "strong-arm" tactics during the interview. Finally, while the officer arrested Giboney at the end of the interview, this fact, by itself, does not establish that the interview was custodial.

Giboney also filed a motion to suppress his post-arrest statements, arguing that the officer continued to interview him after he had invoked his Fifth Amendment right to counsel.

To validly invoke the right to counsel, a defendant must articulate the desire to have counsel present sufficiently clearly that a reasonable police officer would understand the statement to be a request for an attorney. The court held that Giboney did not clearly and unequivocally assert his right to counsel in his post-arrest interview. First, Giboney did not validly invoke his right to counsel by asking whether the interview would end if he wanted an attorney, because, by Giboney's express admission, he was "kidding." Second, the remaining conversation between Giboney and the officer does not establish that Giboney wanted an attorney present during the interview. Instead, Giboney made it clear that he only wanted an attorney present if he was charged with a crime. Once Giboney realized that waiving his right to counsel only applied during the interview, he apologized for his confusion, stated that he would talk to the officer, and initialed the waiver. The court found that Giboney's statements were, at best, ambiguous as to whether he wanted to have an attorney present for the interview. As a result, Giboney failed to sufficiently invoke his right to counsel and the officer was not required to stop questioning him.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-3294/16-3294-2017-07-21.pdf?ts=1500651046

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United States v. Zapien, 861 F.3d 971 (9th Cir. 2017)

Zapien was arrested and transported to the local jail on drug-related charges. An officer read Zapien his Miranda rights, which Zapien stated that he understood, and agreed to speak to the officer without an attorney being present. During the interview, Zapien explicitly invoked his right to counsel and all questioning about drug trafficking stopped.

After Zapien invoked his right to counsel, the officer asked Zapien certain biographical information such as his name, birthdate, address, as well as the names of his wife, parents, and children. The officer told Zapien that he needed this information to fill out the DEA Form 202 and that he was not going to ask Zapien anything about the case. At some point while giving the officer answers to the officer's biographical questions, Zapien told the officer that he wanted to give the officer a statement regarding drug trafficking. The officer reminded Zapien of his constitutional rights and told Zapien that he did not want to question him because of Zapien's previous request for an attorney. Zapien told the officer he understood his rights, and that he wanted to waive them and talk to the officer without an attorney. Zapien then made incriminating statements to the officer.

Prior to trial, Zapien filed a motion to suppress his statements, arguing that the officer violated Miranda by questioning him after he invoked his right to counsel.

The court disagreed. When a person invokes his right to counsel during a custodial interrogation, officers must stop their interrogation. The term "interrogation" means any words or actions that the police should know are reasonably likely to elicit an incriminating response. However, under

the booking exception to Miranda, questions that require a person to provide biographical information such as identity, age, and address, usually do not constitute "interrogation." In addition, the booking exception can apply even after a person has invoked his right to counsel.

Here, the court concluded that the officer's questions, after Zapien invoked his right to counsel, did not constitute "interrogation" because they were not reasonably likely to elicit Zapien's incriminating response. The court found that the biographical questions did not reference the crime for which Zapien had been arrested. In addition, the officer testified that he regularly asks DEA Form 202 questions to gather emergency contact information to provide to the Marshals.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/14-10224/14-10224-2017-07-03.pdf?ts=1499101318

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Spontaneous / Volunteered Statements

United States v. Yepa, 862 F.3d 1252 (10th Cir. 2017)

Officers arrested Yepa for murder and advised him of his Miranda rights. After Yepa told the officers that he wanted a lawyer, the officers transported him to the police station. In the meantime, other officers obtained a warrant to search Yepa's house and his body. The warrant authorized officers to photograph the defendant, seize his clothing for analysis, take a blood sample, and swab areas of his body for DNA analysis. While officers photographed Yepa and performed the other task authorized by the warrant, Yepa made several incriminating statements.

Prior to trial, Yepa filed a motion to suppress his statements. Yepa argued that during the search of his body, the officers unlawfully interrogated him after he had invoked his right to counsel.

First, the court noted that when an individual who is subjected to custodial police interrogation requests an attorney, the interrogation must stop until an attorney is present. However, the court recognized that not every exchange between police officers and that individual constitutes "interrogation."

Against this backdrop, the court first held that the search of Yepa's body was not "interrogation." Second, the court found that the officers were focused on executing the warrant and did nothing to "draw out" Yepa regarding the death of the victim. Third, the court held that Yepa's statements were spontaneous, not the result of police interrogation. The court further held that the only questions the officers asked Yepa during this time were to clarify spontaneous statements he made.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/16-2060/16-2060-2017-07-17.pdf?ts=1500312710

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Waiver of *Miranda* (Knowing/Intelligent/Voluntary)

See: United States v. Giddins, 858 F.3d 870 (4th Cir. 2017)

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United States v. Quiroz, 874 F.3d 562 (7th Cir. 2017)

Federal agents arrested Quiroz outside his mother's house and placed him in the back of a police car while the agents conducted a protective sweep of the house. After completing the sweep, one of the agents advised Quiroz of his Miranda rights. When the agent asked Quiroz if he understood his rights, Quiroz replied, "I did nothing." The agents then explained the investigation and told Quiroz about some of the evidence they had obtained. At that point, Quiroz made incriminating statements to the agents. The agents transported Quiroz to their office where Quiroz told the agents that he would not sign a Miranda waiver; however, he continued to speak with the agents and made more incriminating statements.

Quiroz filed a motion to suppress his statements to the agents. The district court denied Quiroz's motion, finding that Miranda warnings were given and that Quiroz voluntarily waived his rights. Quiroz appealed.

A defendant's wavier of Miranda rights must be voluntary, knowing, and intelligent. In addition, a suspect can implicitly waive his Miranda rights. To establish that an implicit waiver was valid, the government must show that: (1) Miranda warnings were given; (2) the suspect made an uncoerced statement; and (3) the suspect understood his rights.

Quiroz argued that his statements should have been suppressed because he did not understand his Miranda rights.

The court disagreed. First, the court found that during the proceedings Quiroz used words and sentences "consistent with the intelligence a person would need to understand the words read to him by the agent relating to his Miranda rights." In addition, the court credited the agent's testimony that Quiroz "seemed to understand everything" the agents were telling him.

Second, Quiroz's action indicated that he had "at least some knowledge of the system." For example, Quiroz told the agents that he would not sign anything but continued talking freely, telling them that he could help them but he would need to be on the street to do so.

As a result, the court held that Quiroz understood his rights and that his uncoerced statements after he was read his Miranda rights constituted a valid implicit wavier.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-3518/16-3518-2017-10-26.pdf?ts=1509051628

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Voluntariness of Suspect's Statement

United States v. Diaz-Rosado, 857 F.3d 116 (1st Cir. 2017)

Officer Mendez arrested Diaz for carjacking and transported him to the police station where he advised Diaz of his Miranda rights verbally and in writing. After Diaz signed the Miranda-rights form, he told Officer Mendez that he wanted to tell him something. Officer Mendez told Diaz that if he had anything to say that he should write it on the reverse side of the Miranda-rights form. Diaz subsequently wrote and signed a statement in which he confessed to the carjacking.

Prior to trial, Diaz filed a motion to suppress his written confession. Diaz argued that his confession was not voluntary because he was under the influence of controlled substances when he made it.

For a suspect's confession to be found involuntary, there must be some coercive police activity, even if only in the form of a custodial interrogation. In this case, Diaz never claimed that Officer Mendez subjected him to a custodial interrogation or otherwise coerced him into confessing. Instead, Diaz told Officer Mendez that he wanted to tell him something, and Officer Mendez simply told Diaz that if he had something to say, to write it down on the back of the Miranda-rights form. In addition, the court commented that Diaz cited no case law that requires the suppression of a volunteered confession solely because the suspect was under the influence of a controlled substance at the time of the confession. Instead of arguing for suppression, the court noted that Diaz could have argued to the jury that his confession was not credible because he made it while under the influence of controlled substances.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-1010/15-1010-2017-05-18.pdf?ts=1495134004

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See: United States v. Giddins, 858 F.3d 870 (4th Cir. 2017)

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See: United States v. Luck, 852 F.3d 615 (6th Cir. 2017)

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United States v. McNeal, 862 F.3d 1057 (10th Cir. 2017)

Ann McNeal was arrested for obstructing police officers during a confrontation with officers who were arresting her son, Phinehas, for shoplifting items from a sporting-goods store. At the police station, the officers obtained information that caused them to believe that McNeal had previously purchased a pistol, which she later gave to Phinehas, who was a convicted felon.

An officer advised McNeal of her Miranda rights and then questioned her about unlawfully purchasing a firearm for her son. McNeal admitted that she had purchased a pistol, but denied that she had given it to her son. Suspecting that McNeal was covering for her son, the officer stepped out of the room and returned a few minutes later with his sergeant. The sergeant told McNeal that she was "doing the right thing" by talking to the officer, but that she could be charged with a felony, attempting to influence a public official, if she tried "to take the fall for her son." McNeal eventually admitted that she had purchased the pistol for Phinehas and that he had access to it.

The government charged McNeal under *18 U.S.C. § 922(d)(1)* for disposing of a firearm to a convicted felon.

McNeal filed a motion to suppress her statements to the officer. McNeal argued that the sergeant improperly coerced her to make incriminating statements by threatening her with a felony prosecution if she did not make truthful statements to the interviewing officer.

The court noted that to establish that a suspect's statements were coerced, the suspect must show that he was subject to threats of "illegitimate action." The court added that it is not per se coercion

when an officer presents a suspect with correct information from which the suspect can make a reasoned decision.[1] Because McNeal did not dispute that she could have been charged with a felony if she lied to the interviewing officer, the court held the sergeant's truthful statements to McNeal about facing felony charges, if she lied, did not constitute coercion.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/16-1054/16-1054-2017-07-10.pdf?ts=1499707895

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[1] The 4th, 5th, 8th, 9th, 10th, and 11th circuits have similarly held that officers' truthful statements to suspects about the potential consequences of making false statements to law enforcement officers during interviews does not constitute coercive police conduct.

Miscellaneous Criminal Law / Federal Statutes

Title 18 U.S.C. § 111

Title 18 U.S.C. § 853

Honeycutt v. United States, 581 U.S. ___ (2017); 137 S. Ct. 1626

Terry Honeycutt managed sales and inventory for a hardware store owned by his brother, Tony Honeycutt. After observing several "edgy looking folks" purchasing an iodine-based water-purification product known as Polar Pure, Terry Honeycutt contacted the local police department to inquire whether the iodine crystals in the product could be used to manufacture methamphetamine. An officer confirmed that individuals were using Polar Pure for this purpose and advised Honeycutt to cease selling it if the sales made Honeycutt "uncomfortable." Notwithstanding the officer's advice, the store continued to sell large quantities of Polar Pure. Although each bottle of Polar Pure contained enough iodine to purify 500 gallons of water, and despite the fact that most people have no legitimate use for the product in large quantities, the brothers sold as many as 12 bottles in a single transaction to a single customer. Over a 3-year period, the store grossed roughly $400,000 from the sale of more than 20,000 bottles of Polar Pure.

Following an investigation, a federal grand jury indicted the Honeycutt brothers for various offenses relating to their sale of iodine while knowing or having reason to believe it would be used to manufacture methamphetamine. In addition, the government sought forfeiture money judgments against each brother pursuant to *21 U.S.C. §853(a)(1)* in the amount of $269,751.98, which represented the hardware store's profits from the sale of Polar Pure. *Title 21 U. S. C. §853(a)(1)*, mandates forfeiture of "any proceeds the person obtained, directly or indirectly, as the result of" drug distribution.

Tony Honeycutt pleaded guilty and agreed to forfeit $200,000 under *§853(a)(1)*. Terry Honeycutt went to trial and was convicted of conspiracy to distribute iodine knowing that it would be used to manufacture methamphetamine.

Although the government conceded that Terry Honeycutt had no controlling interest in the store and did not personally benefit from the sales of Polar Pure, the government asked the district court to hold him jointly and severally liable for the profits from the illegal sales of Polar Pure. Consequently, the government sought a money judgment of $69,751.98, against Terry Honeycutt, the amount of the conspiracy profits outstanding after Tony Honeycutt's forfeiture payment.

The district court declined to enter a forfeiture judgment, finding that Terry Honeycutt was a salaried employee who had not personally received any profits from sale of Polar Pure. The government appealed.

The Sixth Circuit Court of Appeals reversed. The court held, as co-conspirators, the brothers were "jointly and severally liable for any proceeds of the conspiracy." As a result, the court concluded that each brother bore full responsibility for the entire forfeiture judgment. Terry Honeycutt appealed and the United States Supreme Court agreed to hear the case to resolve a disagreement among the Courts of Appeals regarding whether joint and several liability applied under *21 U.S.C. §853*.

The Supreme Court held that forfeiture pursuant to *Title 21 U.S.C. §853(a)(1)* is limited to property the defendant, himself, actually acquired as the result of the crime. In this case, the government conceded that Terry Honeycutt had no ownership interest in his brother's store and did not personally benefit from the Polar Pure sales. Consequently, because Terry Honeycutt never obtained tainted property as a result of the crimes for which he was convicted, he could not be ordered to forfeit any money under *§853(a)(1)*.

For the Court's opinion: https://www.supremecourt.gov/opinions/16pdf/16-142_7l48.pdf

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Title 18 U.S.C. § 1546(a) (False Statement / Immigration Matter)

United States v. Samuels, 874 F.3d 1032 (8th Cir. 2017)

Tamie Marie Samuels married her fourth husband, Randell Samuels, a citizen of Jamaica, on February 3, 2015, two days after he entered the United States on a non-immigrant visa. On March 12, 2015, Samuels filed an alien relative visa petition (Form I-130) for the benefit of Randell, and Randell filed a Form I-485 application for adjustment of status. On the Form I-130, Samuels stated that she had never previously filed a petition for any other alien.

A few months later, a United States Citizenship and Immigration Services (USCIS) officer interviewed Samuels and Randell as part of the Form I-130 decision process. At the interview, Samuels told the officer that she had never filed a Form I-130 petition for any other relative. Two days after the interview, the USCIS officer approved Samuels' I-130 petition.

In an unrelated investigation into suspected passport fraud by Samuels' third husband, a Homeland Security Investigations (HSI) special agent reviewed a Form I-130 filed by Samuels in 1997. On September 11, 2015, two HSI agents interviewed Samuels, who stated that she had filed a Form I-130 in 1997 on behalf of her second husband, Lobaton, but believed she had cancelled the petition.

The government charged Samuels with knowingly making a false statement with respect to a material fact in an immigration matter in violation of *18 U.S.C. § 1546(a)*.

Samuels appealed her conviction, arguing that the government failed to produce sufficient evidence to establish that she knowingly made a false statement concerning the Form I-130 submitted in 2015. Samuels also argued that there was insufficient evidence to establish that her alleged false statement was made with respect to a material fact.

The court disagreed. First, the court found that two witnesses testified that Samuels admitted during the September 2015 interview that she had previously filed an I-130 on behalf of Lobaton. The court concluded that based on this admission "which occurred shortly after her submission of the 2015 Form I-130, the jury could reasonably conclude that she remembered her previous filing of the 1997 Form I-130 at the time she stated that she had never filed a prior petition." In addition to Samuels' admission, the government submitted evidence that no one had cancelled or attempted to cancel the 1997 Form I-130.

Next, the court held that Samuels' false statement on the 2015 Form I-130 was material to the activities or decisions of the USCIS. The court found that the investigation of prior marriages and

Form I-130 petitions is capable of influencing USCIS decisions because it may raise an inference of immigration abuse that leads to the denial of the current petition, even if a prior Form I-130 petition was approved and the marriage never challenged as fraudulent.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-3871/16-3871-2017-11-06.pdf?ts=1509985852

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Miscellaneous Federal Rules of Criminal Procedure

Federal Rule of Criminal Procedure 41

United States v. Williams, 871 F.3d 1197 (11th Cir. 2017)

The government charged Williams and 24 other individuals with a variety of criminal offenses including conspiracy to distribute controlled substances, and a warrant was issued for Williams' arrest. The agents confirmed that Williams' residence consisted of a single-family, ranch-style house, with an outbuilding approximately twenty feet away in the back yard. The outbuilding resembled a guesthouse or mother-in-law-suite as it had a front and back door, several windows, and a garage door. During a pre-arrest operational meeting, the agents did not know whether Williams lived in the main house or the outbuilding. As a result, the agents planned to make simultaneous entries of both buildings. When agents performed a drive-by of Williams' residence, they saw Williams' car and two other vehicles parked in the driveway. Based on this observation the agents believed that Williams was possibly inside the residence with multiple other subjects.

The agents arrived at Williams' residence at approximately 6:00 a.m. and entered the main house and the outbuilding. One team of agents arrested Williams in the main house while a second team of agents entered the outbuilding. Inside the outbuilding the agents saw a white powdery residue and razor blades on a table, and a drug press sitting in the corner of the room. After the agents cleared the main house and outbuilding they obtained a warrant to search those areas based on their observations from the initial entry. During the search pursuant to the warrant, the agents seized cocaine, heroin, drug paraphernalia, and weapons.

Williams argued that the agents unlawfully entered the outbuilding because it was unreasonable to believe that he lived there or would be inside it. As a result, Williams claimed that the items the agents saw in the outbuilding could not provide a basis to obtain the search warrant.

The court disagreed. The court concluded that it was reasonable for the agents to enter the main house and the outbuilding pursuant to the arrest warrant. First, the agents confirmed that Williams owned the property through a public records check and had seen Williams on the property during previous surveillance. Second, it was reasonable for the agents to believe Williams was present when they executed the warrant as the agents confirmed that Williams' car was in the driveway and the arrest occurred in the early morning. Finally, both buildings were possible living spaces, which made it reasonable for the agents to believe that Williams might be living or present in either structure.

Alternatively, the court held that the agents' entry into the outbuilding qualified as a valid protective sweep.

To ensure their safety during an arrest, officers may conduct a protective sweep by searching areas immediately adjoining the place of arrest where a person might be found. However, to search areas beyond those adjoining the place of arrest, officers must have reasonable suspicion that the area to be swept contains an individual posing a danger to those on the arrest scene. In this case, the court concluded that the close proximity of the outbuilding to the main house, the belief that drug distribution activities were occurring on the property, and the fact that there were three cars parked in the driveway suggested there might be other people besides Williams on the premises

who could pose a threat to the agents' safety. As a result, once the agents lawfully swept the outbuilding, any evidence observed in plain view could be used to obtain a search warrant.

Williams also argued that evidence found in the outbuilding should have been suppressed because the agents executed the arrest warrant at approximately 6:00 a.m., which rendered the warrant invalid.

The court disagreed. The court noted that the Fourth Amendment does not contain any time limitations on reasonable searches and seizures. However, Federal Rule of Criminal Procedure 41 provides that warrants are to be executed "during the daytime," unless the issuing judge for good cause shown expressly authorizes another time. Daytime is defined as "the hours between 6:00 a.m. and 10:00 p.m. local time." Assuming for the sake of argument that agents entered Williams' residence a minute or two before 6:00 a.m., the court held that suppression of evidence was not proper because there was no evidence that the agents did so deliberately or that Williams' arrest would not have otherwise occurred.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/16-16444/16-16444-2017-09-20.pdf?ts=1505939508

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Table of Cases