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AMERICANS WITH DISABILITIES ACT (ADA): Attention Deficit Hyperactivity Disorder

Weaving v. City of Hillsboro, CA9, No. 12-35726, 8/15/14

Matthew Weaving, a police officer, filed suit after he was terminated following severe interpersonal problems between him and other police officers. Weaving contended that these interpersonal problems resulted from his attention deficit hyperactivity disorder (ADHD) and that the police department discharged him based on his disability, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. The jury returned a general verdict for Weaving, finding that he was disabled and that the City had discharged him because of his disability. The Court of Appeals for the Ninth Circuit reversed, holding that, based on the evidence presented, the jury could not have found plaintiff disabled under the ADA:

"The evidence at trial showed that Weaving has experienced recurring interpersonal problems throughout his professional life. Those problems have had significant repercussions on his career as a police officer, resulting, most recently, in the termination of his employment with the Hillsboro Police Department. But Weaving's interpersonal problems do not amount to a substantial impairment of his ability to interact with others within the meaning of the ADA. Weaving's ADHD may well have limited his ability to *get along* with others. But that is not the same as a substantial limitation on the ability to *interact* with others. See *McAlindin,* 192 F.3d at 1235; see also *Jacques v. DiMarzio, Inc.,* 386 F.3d 192, 203 (2d Cir. 2004) (distinguishing

'getting along with others' (a normative or evaluative concept) and 'interacting with others' (which is essentially mechanical).

"Weaving was able to engage in normal social interactions. His interpersonal problems existed almost exclusively in his interactions with his peers and subordinates. He had little, if any, difficulty comporting himself appropriately with his supervisors. A case like Weaving's is what we described in *McAlindin* as not giving rise to a disability claim. 192 F.3d at 1235; see also *Weidow v. Scranton Sch. Dist.*, 460 F. App'x 181, 185–86 (3d. Cir. 2012) (stating that, assuming that interacting with others was a major life activity, a plaintiff who failed to show that her condition caused her to have trouble getting along with people in general was not disabled because she was not substantially limited in her ability to interact with others); *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1131 (10th Cir. 2003); *Steele*, 241 F.3d at 1255.

"As we wrote in *McAlindin,* a 'cantankerous person' who has 'mere trouble getting along with coworkers' is not disabled under the ADA. Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others. One who is able to communicate with others, though his communications may at times be offensive, 'inappropriate, ineffective, or unsuccessful.' is not substantially limited in his ability to interact with others within the meaning of the ADA. *Jacques,* 386 F.3d at 203. To hold otherwise would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues."

CIVIL LIABILITY: Deadly Force; Car Chase Threatening Officers

McGrath v. Tavares, CA1, No. 12-2277, 8/1/14

Denise McGrath filed suit under 42 U.S.C. 1983, alleging that police officers used excessive force when they shot and killed her sixteen-year-old son (Anthony). The officers responded to an activated burglar alarm at a liquor store, were involved in a car chase with Anthony, and when one of the officers exited his vehicle, Anthony drove towards him. The shots were fired at Anthony when he was driving towards one of the officers. The district court granted the police officers' motion for summary judgment and dismissed all claims.

The court concluded that a reasonable officer in the same circumstances would have believed that Anthony posed a threat of serious physical harm to the officer when the officer fired the shots. In any event, the officers were entitled to summary judgment based on qualified immunity because they did not violate clearly established law. McGrath failed to point to any case that clearly establishes the unconstitutionality of using deadly force to end a car chase that threatened the physical safety of the officers and others in the area. Accordingly, the court affirmed the judgment of the district court.

CIVIL LIABILITY: Deadly Force; Automobile Chase; Shooting Fleeing Suspect

Thompson v. Mercer
CA5, No. 13-10773, 8/7/14

This incident occurred on Sunday, December 18, 2011, from approximately 6:45 to 8:50 in the morning. It is undisputed that Keith Thompson stole a vehicle, kidnapped its sleeping occupant, and then fled for two hours at speeds in excess of 100 miles per hour. The kidnapping victim—who was later released—furtively dialed 911, allowing dispatchers to overhear Thompson state that he would "kill himself" when he "got to where he was going." The victim also revealed that there was a firearm in the vehicle. While in flight, Thompson ignored traffic laws, did not yield to law enforcement, and was at one point pursued by six vehicles representing four different law enforcement units. Officers made multiple attempts to disable Thompson's vehicle, all of which failed. Sheriff Mercer did not participate in the pursuit, but was kept apprised of developments and was aware of these facts.

It is equally uncontested that Sheriff Mercer laid in wait with a semi-automatic "AR-15" assault rifle on the shoulder of FM 4, a rural road running between the towns of Lone Camp and Santo, Texas. He did not position his cruiser as a barricade or employ any device that might have disabled Thompson's vehicle. When the vehicle came into view, Mercer fired into its hood, striking the radiator. Mercer believed he had hit the radiator, but the vehicle did not appear to slow down. Mercer then aimed directly into the windshield, striking Thompson three times in the head and neck after firing a total of twelve rounds. The vehicle passed within three or four yards of Mercer. Mercer concedes that there were no bystanders in the area, and that he had seen no traffic in the vicinity.

Upon review, the Fifth Circuit Court of Appeals found, in part, as follows:

"The Fourth Amendment guarantees the right to be free from 'unreasonable searches and seizures.' U.S. Const. amend. IV. It is undisputed that the apprehension of Keith Thompson by deadly force was a seizure. Therefore, to prevail on their excessive force claim, the Thompsons need only show that the use of deadly force was excessive, and that the excessiveness of the force was unreasonable. In making that argument, the Thompsons recognize that use of deadly force is not unreasonable when an officer would have reason to believe the suspect poses a threat of serious harm to the officer or others. They dispute whether the requisite threat of serious harm existed at the time Keith was killed. We find that it did.

"In *Scott v. Harris*, the Supreme Court addressed the extent of reasonable force in the context of law enforcement's need to curtail vehicular flight. Officer Scott ended a high-speed chase by using his police cruiser to bump the suspect's vehicle. The ensuing collision rendered that suspect a paraplegic. Even so, the Supreme Court ultimately rejected the suspect's allegations of excessive force, holding that 'a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing

motorist at risk of serious injury or death.' In so holding, the Court established the framework by which courts should evaluate the reasonableness of the force used:

> *In determining the reasonableness of the manner in which a seizure is effected, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."* ***United States v. Place****, 462 U.S. 696, 703 (1983)… [I]n judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate…We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.*

"This court has clarified that '*Scott* did not declare open season on suspects fleeing in motor vehicles' in that 'the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable.'

"Applying these standards to the facts at hand, it seems clear that Mercer's use of deadly force was justified. There is no doubt that firing the assault rifle directly into the truck created a significant—even certain—risk of critical injury to Thompson. Under these circumstances, however, the risk was outweighed by 'the extreme danger to human life posed by' reckless vehicular flight. *Scott*, 550 U.S. at 383. In fact, even the Thompsons concede that their son represented a grave risk when he reached speeds exceeding 100 miles per hour on the interstate, when he ran numerous stop signs, when he had recklessly driven on the wrong side of the road, and when he avoided some road spikes and took officers down Blue Flat Road where a horse was loose. Indeed, parts of the police camera footage might be mistaken for a video game reel, with Thompson disregarding every traffic law, passing other motorists on the left, on the right, on the shoulder, and on the median. He occasionally drove off the road altogether and used other abrupt maneuvers to try to lose his pursuers. The truck was airborne at least twice, with Thompson struggling to regain control of the vehicle. In short, Thompson showed a shocking disregard for the welfare of passersby and of the pursuing law enforcement officers.

"Upon reflection it seems that Thompson—who was in possession of a firearm and had committed multiple felonies over the course of two hours—posed a significantly greater threat than the *Scott* suspect, an unarmed driver suspected only of speeding in a pursuit that lasted less than six minutes. So if the *Scott* chase closely resembled a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury, the chase here

posed all the greater risk. Accordingly, after multiple other attempts to disable the vehicle failed, it was not unreasonable for Mercer to turn to deadly force to terminate the dangerous high-speed car chase.

"There is little merit in the Thompsons' assertion that law enforcement was constitutionally required to continue lesser efforts to disable the vehicle. Officers from three agencies had already tried to intercept and disable the vehicle four times. They tried to deploy stop sticks on the interstate, and a deputy later fired a shotgun at Thompson's tires. These attempts were unsuccessful in part because officers had to remain mindful of the welfare of the pursuing officers and other motorists. The record suggests that Sheriff Mercer was the last one who could intercept Thompson's vehicle before he headed into the town of Lone Camp, which the Thompsons describe as 'approximately a mile' away. It seems clear that law enforcement reasonably attempted alternate means of seizure before resorting to deadly force. Given the circumstances and the egregious nature of Keith Thompson's flight, there was no Fourth Amendment violation in that decision."

CIVIL LIABILITY: Exculpatory Evidence

Hawkins v. Gage County
CA8, No. 13-307, 7/22/14

Eliott Hawkins sued Gage County, Nebraska, and several deputy sheriffs and investigators for the county under 42 U.S.C. §1983. Hawkins, who was falsely accused of rape and jailed for seventeen days, alleged that the officers failed to account for certain evidence Hawkins claimed was exculpatory, both in investigating the claim and in drafting an affidavit used to obtain an arrest warrant.

The court concluded that the officers' decision to focus on other investigative leads rather than pursue tenuous, circumstantial, and potentially biased testimony from bar patrons neither shocks the conscience nor indicates recklessness. The court further found that the officers' reaction to the investigator's suspicion of the photos of the victim demonstrated the even-handedness of their investigation where they called in a forensic nurse and then confronted the victim. The court found Hawkins' remaining allegations of reckless failures on the part of the officers without merit. Further, Hawkins failed to show any omissions in the affidavit that demonstrated that the officers were reckless. Without a constitutional violation by the officers, there can be no liability for the county. Accordingly, the court affirmed the judgment of the district court, which found no genuine dispute of material fact as to whether the officers committed any constitutional violations.

CIVIL LIABILITY: Justifiable Use of Force

Wilson v. City of Chicago
CA7, No. 13-1279, 7/14/14

On the morning of February 28, 2007, Raul Adan Barriera barricaded himself in his bedroom. Barriera, who had been diagnosed with schizophrenia three years earlier, had not been taking his medicine regularly, and his mother feared he might harm himself. When the efforts of his mother, grandmother, and brother to convince him to leave his room were unsuccessful, his mother (Wilson) called 911 for assistance.

When paramedics and firefighters arrived, Wilson explained her fear that Barriera might be suicidal because he was not taking his medication. After unsuccessfully trying to coax Barriera out of his room, a firefighter attempted to open the bedroom door and found that something was blocking it; with some effort he was able to open it enough to observe Barriera holding a hunting knife and moving around the room. The firefighter called for police assistance and held the door closed until officers arrived.

Defendants Hurman and Cummens arrived a few minutes later. The parties disagree regarding how events unfolded next, but we must view the evidence in the light that supports the jury's verdict. *Common v. City of Chicago*, 661 F.3d 940, 942 (7th Cir. 2011) (citing *Matthews v. Wisconsin Energy Corp., Inc.*, 642 F.3d 565, 567 (7th Cir. 2011)). The officers worked for several minutes to persuade Barriera to leave his room, but were unsuccessful. A short time later, Jerome arrived. He deployed his taser through the partially open bedroom door, hitting Barriera as he stood about seven feet from the door. Barriera removed the taser prongs from his chest. About thirty seconds later, he lunged at the officers with the knife in his hand. Fearing for their lives, Jerome deployed the taser and Hurman fired two shots from his weapon. Barriera was struck by the taser prongs and both bullets. The officers entered the bedroom, knocked the knife from Barriera's hand, and handcuffed him so he could be transported to the hospital. Barriera later died from the injuries he sustained.

A jury rejected Wilson's claims against the officers under 42 U.S.C. 1983 for excessive force; for wrongful death against the officers under Illinois law; under the Illinois Survival Statute against the officers; and that the city was liable for the torts of the officers under the theory of respondeat superior. The Seventh Circuit affirmed.

CONSTITUTIONAL LAW:
Double Jeopardy

Martinez v. Illinois
Illinois Supreme Court, No. 13-5967, 5/27/14

Esteban Martinez was indicted in 2006 on charges of aggravated battery and mob action against the state. After significant delays, caused by both sides, his trial was set to begin on May 17, 2010. His counsel was ready; the prosecution was not because it was unable to locate its complaining witnesses. The court delayed swearing the jurors, but ultimately told the state that it could at that point either have the jury sworn or move to dismiss its case.

After several hours, the court swore in the jury and asked the state to present its first witness. It declined to present any evidence or participate in the trial. Martinez successfully moved for a directed not-guilty verdict. The court rejected a motion for a continuance, noting that the prosecution had named other witnesses and that the missing witnesses should have been relatively easy to locate.

The Illinois Supreme Court allowed the state's appeal, on the theory that jeopardy never attached because Martinez "was never at risk of conviction." The Supreme Court reversed, citing the "bright-line rule" that "jeopardy attaches when the jury is empaneled and sworn." Martinez may not be retried.

CONSTITUTIONAL LAW: Federal Jurisdiction; Local Crimes

Bond v. United States, No. 12-158, 6/2/14

Carol Anne Bond is a microbiologist from Lansdale, Pennsylvania. In 2006, Bond's closest friend, Myrlinda Haynes, announced that she was pregnant. When Bond discovered that her husband was the child's father, she sought revenge against Haynes. Bond stole a quantity of 10-chloro-10H-phenoxarsine (an arsenic-based compound) from her employer, a chemical manufacturer. She also ordered a vial of potassium dichromate (a chemical commonly used in printing photographs or cleaning laboratory equipment) on Amazon.com. Both chemicals are toxic to humans and, in high enough doses, potentially lethal. It is undisputed, however, that Bond did not intend to kill Haynes. She instead hoped that Haynes would touch the chemicals and develop an uncomfortable rash.

Between November 2006 and June 2007, Bond went to Haynes's home on at least 24 occasions and spread the chemicals on her car door, mailbox, and door knob. These attempted assaults were almost entirely unsuccessful. The chemicals that Bond used are easy to see, and Haynes was able to avoid them all but once. On that occasion, Haynes suffered a minor chemical burn on her thumb, which she treated by rinsing with water. Haynes repeatedly called the local police to report the suspicious substances, but they took no action. When Haynes found powder on her mailbox, she called the police again, who told her to call the post office. Haynes did so, and postal inspectors placed surveillance cameras around her home. The cameras caught Bond opening Haynes's mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes's car.

Federal prosecutors charged Bond with violating the Chemical Weapons Convention Implementation Act, which forbids any person knowingly to possess or use "any chemical weapon," 18 U.S.C. 229(a)(1). A chemical weapon is a toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter. A toxic chemical is any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere. Purposes not prohibited by this chapter is defined as any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity, and other specific purposes. Bond pleaded guilty but reserved the right to appeal. On remand, the Third Circuit rejected her Tenth Amendment argument and an argument that section 229 does not reach her conduct.

The Supreme Court reversed. Section 229 does not reach Bond's simple assault. Seeing no need to interpret the scope of the international Chemical Weapons Convention, the Court stated that Bond was prosecuted under a federal statute, which, unlike the treaty, must be read consistent with the principles of federalism. There is no indication that Congress intended to reach purely local crimes; an ordinary speaker would not describe Bond's feud-driven act of spreading irritating chemicals as involving

a chemical weapon. The chemicals at issue here bear little resemblance to those whose prohibition was the object of an international Convention. Pennsylvania's laws are sufficient to prosecute assaults like Bond's, and the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard.

EVIDENCE: Hearsay Exception; Excited Utterance

United States v. Graves
CA8, No. 13-2356, 6/25/14

Brian Gordon Graves and his fiancée L.K. were involved in an all-day argument. At some point during the day, Graves left their shared residence. He returned between 10:00 p.m. and 11:00 p.m., kicked in the front door, and confronted L.K. in the back bedroom of the home. During this confrontation, Graves held a loaded shotgun. After 10 to 15 minutes of arguing, Graves left the residence. As he departed, he fired the shotgun five times.

A neighbor called 911 to report the gun shots. Officer Dana Lyons responded. It took Officer Lyons approximately 20 minutes to travel to the residence after being dispatched. When he arrived, he knocked on the front door, and L.K. answered. Officer Lyons observed that L.K. was shaking and appeared to have been crying. Officer Lyons told L.K. that there had been a report of shots being fired and asked, "What's going on here?" L.K. responded by recalling the details of the fight she had with Graves, including the fact that Graves had pointed the shotgun at L.K. and threatened to shoot her in the head.

Graves was taken into custody. Several days later, he was interviewed by an agent with the Federal Bureau of Investigation where he described the argument he had with L.K., admitted taking the gun into the residence and waving it around, and stated that L.K. had pushed the barrel of the gun away. Graves denied, however, that he ever pointed the gun directly at L.K. or threatened to shoot her.

The government argued that L.K.'s statements to Officer Lyons, made immediately after Officer Lyons encountered L.K., should be admitted as an excited utterance. At an evidentiary hearing, Officer Lyons testified about the night of the incident, stating that he arrived at the residence approximately 30 minutes after the 911 call and that L.K. was shaking when she answered the door. Officer Lyons asked, "What's going on here?" In response, L.K. gave a rapid description of the incident including the statements that Graves had pointed the gun at her and threatened to shoot her. At trial, L.K. testified that she lied to Officer Lyons when she stated that Graves had pointed a gun at her and threatened her. The district court admitted L.K.'s statements made to Officer Lyons immediately after his arrival at the residence as an excited utterance pursuant to Federal Rule of Evidence 803(2), noting that L.K. was still under the stress of the incident and lacked time for reflection. Despite L.K.'s testimony that she lied to Officer Lyons because she was angry at Graves, the jury found Graves guilty of Assault with a Dangerous Weapon and Domestic Assault by an Habitual Offender. The district court sentenced Graves to 21 months imprisonment.

Graves appealed his conviction, arguing that the district court abused its discretion in admitting statements from the victim as an excited utterance because the alleged victim was not under the stress of the incident at the time she made the statements.

The Eighth Circuit Court of Appeals held that the district court did not abuse its discretion in admitting the statements as an excited utterance considering the 30 minute lapse of time between the incident and the statements, the victim was shaking and appeared to have been crying, and the statements were offered in response to the officer's general inquiry into what had happened. Further, while Graves may offer alternative explanations for the victim's appearance and behavior, those explanations did not undermine the district court's exercise of its discretion in determining that the victim's statements bore a "guarantee of trustworthiness" and were not subject to reflection and deliberation. Accordingly, the court affirmed the judgment of the district court.

FEDERAL FIREARMS LAWS:
"Straw Purchaser"

Abramski v. United States
No. 12-1493, 6/16/14

Bruce Abramski offered to purchase a gun for his uncle. Form 4473 asked whether he was the "actual transferee/buyer" of the gun and warned that a straw purchaser (buying a gun on behalf of another) was not the actual buyer. Abramski falsely answered that he was the actual buyer.

Abramski was convicted for knowingly making false statements "with respect to any fact material to the lawfulness of the sale" of a gun, 18 U.S.C. 922(a)(6), and for making a false statement "with respect to the information required…to be kept" in the gun dealer's records, section 924(a)(1)(A). The Fourth Circuit affirmed.

The Supreme Court affirmed, holding that the misrepresentation was material and rejecting Abramski's argument that federal gun laws are unconcerned with straw arrangements:

"While the law regulates licensed dealer's transactions with 'persons' or 'transferees' without specifying whether that language refers to the straw buyer or the actual purchaser, read in light of the statute's context, structure, and purpose, the language clearly refers to the true buyer rather than the straw. The law establishes an elaborate system of in-person identification and background checks to ensure that guns are kept out of the hands of felons and other prohibited purchasers and imposes record-keeping requirements to assist authorities in investigating serious crimes through the tracing of guns tor buyers. The provisions would mean little if they could be avoided simply by enlisting the aid of an intermediary to execute the paperwork. The statute's language is thus best read in context to refer to the actual rather than nominal buyer. While Abramski's uncle could, possibly, have legally bought a gun for himself, Abramski's false statement prevented the dealer from insisting that the true buyer appear in person, provide identifying information, show a photo ID, and submit to a background check. The dealer could not have lawfully sold the gun had it known that Abramski was not the true buyer, so the misstatement was material to the lawfulness of the sale."

SEARCH AND SEIZURE:
Affidavits; Reliability of Informant

United States v. Glover
CA7, No. 13-2475, 6/18/14

Chicago Officer Brown submitted a probable cause affidavit, stating that confidential informant "Doe" had stated that a felon, known to Doe as "T.Y.," possessed a semiautomatic and a .38-caliber revolver; that Doe had seen the guns in T.Y's house the day before and many times during the last six weeks; that T.Y. needed the guns because he sold heroin; and that T.Y. was a member of a gang and part of a crew that robbed people. The affidavit described corroboration of the address and Does' identification of a police photograph of Glover as "T.Y." Glover had two felony convictions. Doe identified the house at Glover's address. The affidavit did not include any information on Doe, an informant for six years.

That evening, officers executed the warrant and found guns, ammunition, 14 grams of heroin, and drug paraphernalia. After the district court denied a motion to suppress, Glover entered a plea, reserving his right to appeal.

The Seventh Circuit reversed and remanded for a Franks hearing, stating, "The affidavit provided an insufficient basis for the warrant; it omitted all information regarding the informant's credibility. The affidavit was not so 'bare bones' that officers' good faith reliance on it was unreasonable, but that omission is sufficient to raise an inference of reckless disregard for the truth that could undermine the good faith exception."

SEARCH AND SEIZURE:
Assistance to Motorists; Seizure; Reasonable Suspicion; Remote Area

United States v. Salgado
CA8, No. 13-2480, 7/31/14

At approximately 1:40 a.m. on May 20, 2012, Trooper Justin Schmiedt observed a broken-down vehicle on the side of the road one to two miles outside Winner, South Dakota. Schmiedt parked behind the vehicle and exited his squad car to assist the motorists. As he approached, Salgado and another man immediately walked from the front of the disabled car to Schmiedt and told him several times that they needed no help. Schmiedt found this response to his presence unusual based on his experience aiding motorists. When he shined his flashlight on the back seat of the vehicle, Schmiedt noticed a third person and a jacket embroidered with a large marijuana leaf; the jacket was partially covering what appeared to be electronic devices.

Schmiedt asked the men who had been driving the vehicle, and Salgado said that he had been. Schmiedt asked Salgado for his driver's license, and Salgado responded that he did not have one. Schmiedt brought Salgado to the squad car to process him for operating a motor vehicle without a license. Schmiedt provided a dispatcher with the name and date of birth that Salgado gave him, but no records in the state databases of Minnesota and South Dakota matched the information. Schmiedt asked Salgado several questions about himself, his associates, and their points of travel. Salgado said they were traveling from Sioux Falls to Mission, South Dakota, and he was unable to identify either

of the two passengers, except for knowing one as "Homie."

At that point, at approximately 1:46 a.m., Schmiedt asked the dispatcher how far away the nearest on-duty drug-detection dog was, but he was told that none was nearby. Schmiedt testified in the suppression hearing that Salgado's general behavior in the interaction and his evasive answers to routine questions piqued Schmiedt's suspicion "that there was some type of criminal activity going on." He continued attempting to identify Salgado, and he asked Salgado several times for consent to search the vehicle for illegal drugs and other contraband, but Salgado refused to consent and insisted that there were no drugs in the vehicle. After Salgado refused, at approximately 1:55 a.m., Schmiedt called off-duty Trooper Brian Biehl, who was at his home approximately forty-five miles away, and asked him to bring a drug detection dog to the scene. Schmiedt also called a deputy for assistance and continued his efforts to obtain information about Salgado and his passengers.

Biehl arrived at approximately 2:45 a.m. with his drug-detection dog. The dog alerted at one location on the vehicle and indicated at another, and the officers conducted a search. As Biehl explained in the suppression hearing, an "alert" is a change in the dog's breathing pattern, while an "indication" is a more concrete signal that the dog has detected a particular odor. The officers recovered a cigarette box containing methamphetamine, a hat band containing trace amounts of marijuana, and a glass pipe. Schmiedt arrested Salgado and the two passengers.

Upon review, the Court of Appeals for the Eighth Circuit found, in part, as follows:

"Schmiedt pulled over behind Salgado's broken-down car and approached to offer his assistance. According to Schmiedt, he attempted to identify the driver so that he could relay the information to dispatch and establish a record that an officer had made contact with the stranded motorists. Police officers reasonably may engage in a community-caretaking function with respect to motor vehicles and traffic, *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), and Schmiedt's exercise of that function in approaching a disabled vehicle did not amount to a seizure requiring probable cause or reasonable suspicion of criminal activity. See *United States v. Smith*, 162 F.3d 1226, 1226 (8th Cir. 1998) (per curiam). We reject Salgado's contention that a reasonable person would not feel free to go about his business merely because Schmiedt did not leave the scene or return to his squad car once Salgado and his associate told him that they did not want his help. Salgado and his passengers were parked on the side of a public thoroughfare with a disabled vehicle. A reasonable person in Salgado's position would have understood that a state trooper had legitimate reasons to monitor the situation without seizing the motorist."

"Once Salgado identified himself as the driver and admitted that he did not have a driver's license, Schmiedt had probable cause to issue Salgado a citation for a traffic violation. Schmiedt was thus entitled to detain Salgado for the purposes of writing him a citation, confirming his identity, and checking his criminal history. *United States v. Fuse*, 391 F.3d 924, 927 (8th Cir. 2004). After Schmiedt

brought Salgado to the squad car, he asked the names of the passengers, where the men were going, where they had come from, and other general questions. These initial questions, even if they were not directly related to Salgado's traffic violation, only minimally prolonged the encounter and did not effect an unreasonable seizure. See *United States v. Olivera-Mendez*, 484 F.3d 505, 510-11 (8th Cir. 2007); *United States v. Childs*, 277 F.3d 947, 953-54 (7th Cir. 2002). By 1:46 a.m., only roughly six minutes after first encountering Salgado, Schmiedt inquired as to the availability of a drug-detection dog. Based on the totality of the circumstances, we conclude that Schmiedt then had reasonable suspicion that criminal activity was afoot.

"When Schmiedt first arrived at the scene, Salgado and his companion immediately and repeatedly told him that they did not need his help. Schmiedt did not act based merely on a refusal to consent to a search. Cf. *United States v. Green*, 52 F.3d 194, 200 (8th Cir. 1995). He reasonably found it suspicious, given his experience, for potentially stranded motorists so adamantly and immediately to express that his presence and assistance were unwelcome. Schmiedt also observed, as he approached the vehicle, the jacket embroidered with a large marijuana leaf in the back seat, and reasonably associated it with potential drug activity. At the squad car, Schmiedt was unable to match the name and date of birth that Salgado provided to the South Dakota and Minnesota databases, and provision of false identification is an indicator of criminal activity. *United States v. Sanchez*, 417F.3d 971, 976 (8th Cir. 2005). Salgado argues that he in fact provided the correct name and that Schmiedt mistook 'A-L-E-X' for 'A-L-E-S' due to Salgado's accent. But even if Salgado's explanation is correct, it does not negate the fact that Schmiedt—at the time of the encounter—reasonably believed that Salgado had provided a false identity.

"Finally, when Schmiedt asked Salgado about his passengers, Salgado was unable to identify them and knew one of them only as 'Homie.' This unfamiliarity with fellow travelers reasonably enhanced the trooper's suspicion that the threesome were not on an innocent journey. All of these facts, taken together, provided Schmiedt reasonable, articulable suspicion sufficient to justify an investigatory stop, including a dog sniff. Salgado's alternative argument that Schmiedt impermissibly extended Salgado's detention for the traffic violation until the dog's arrival without reasonable suspicion is thus founded on a faulty premise.

"Once this reasonable suspicion was developed, Schmiedt did not effect an unreasonable seizure by detaining Salgado until the time that Biehl arrived with the drug-detection dog. Schmiedt suspected criminal activity by roughly 1:46 a.m., when he first inquired as to the availability of a dog. After learning that no dog was nearby, and after attempting to obtain Salgado's consent to a search, Schmiedt called Biehl at approximately 1:55 a.m. Biehl, who lived roughly forty-five miles from Salgado's location, arrived with the drug-detection dog at approximately 2:45 a.m. Because Salgado's hour-long detention before the dog sniff was attributable to the remote location, not to any lack of diligence or unnecessary delay by law enforcement, we conclude that it was reasonable under the circumstances of this case. See *United States v. Maltais*, 403 F.3d 550, 556-58 (8th Cir. 2005)."

SEARCH AND SEIZURE:
Cellular Telephones

Riley v. California, No. 13-132, 6/25/14

This case raises the question, *"Can police, without a warrant, search digital information on a cell phone seized from an individual who has been arrested?"*

Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership.

Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, and Riley was convicted. The California Court of Appeals affirmed.

In *United States vs. Wurie,* Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from Wurie's person and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search.

Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion, and Wurie was convicted. The First Circuit reversed the denial of the motion to suppress and vacated the relevant convictions.

In a twenty-eight page opinion, the United States Supreme Court discussed three related precedents that govern the extent to which officers may search property found on or near an arrestee finding, in part, as follows:

"*Chimel v. California,* 395 U. S. 752, requires that a search incident to arrest be limited to the area within the arrestee's immediate control, where it is justified by the interests in officer safety and in preventing evidence destruction. In *United States v. Robinson*, 414 U. S. 218, the Court applied the *Chimel* analysis to a search of a cigarette pack found on the arrestee's person. It held that the risks identified in *Chimel* are present in all custodial arrests, 414 U. S., at 235, even when there is no specific concern about the loss of evidence or the threat to officers in a particular case, *id.,* at 236. The trilogy concludes with *Arizona v. Gant,* 556 U. S. 332, which permits searches of a car where the arrestee is unsecured and within reaching distance of the passenger compartment, or where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle.

"The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody. Robinson focused primarily on the first of those rationales. Put simply, a patdown of Robinson's clothing and an inspection of the cigarette pack found in his pocket constituted only minor additional intrusions compared to the substantial government authority exercised in taking Robinson into custody. The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search is acceptable solely because a person is in custody.

"Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so.

"The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

"Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cellphone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smartphone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell

phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

"We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost. Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is an important working part of our machinery of government, not merely an inconvenience to be somehow weighed against the claims of police efficiency.

"Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. (There are jurisdictions where police officers can e-mail warrant requests to judges' iPads and judges have signed such warrants and e-mailed them back to officers in less than 15 minutes).

"Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. One well-recognized exception applies when 'the exigencies of the situation' make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.

"In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone. The defendants here recognize—indeed, they stress—that such fact-specific threats may justify a warrantless search of cell phone data. The critical point is that, unlike the search incident to arrest excep¬tion, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.

"Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—**get a warrant.**"

SEARCH AND SEIZURE:
Consent; Authority to Consent

United States v. Iraheta
CA5, No. 13-30545, 8/19/14

On October 27, 2012, around 2:45 a.m., Deputy Seth Cox of the Ouachita Parish Sheriff's Office entered I-20 eastbound at the Camp Road on-ramp. While he was entering the highway, a vehicle in front of him immediately applied its brakes. As he entered behind the vehicle, he observed it cross the center line and come back into its lane of travel. He believed that the driver may have been falling asleep or intoxicated. He wrote down the vehicle's license plate information, which was from California, and planned to initiate a stop. When he radioed headquarters he learned that the vehicle's registration had been suspended as of October 8, 2012.

Cox waited to initiate the traffic stop until the Thomas Road exit where other officers were nearby and he called for assistance due to the number of occupants in the vehicle. Two deputies, Honey and Waggoner, arrived separately to assist Cox. As the driver approached the Thomas Road exit, he activated his right turn signal and began to slow-down but then deactivated the signal and accelerated. Cox then initiated the traffic stop just after the Thomas Road exit for illegal lane usage and operating a vehicle with a suspended registration.

After initiating the stop, Cox talked to William Iraheta, the driver of the vehicle. Iraheta gave Cox his driver's license and vehicle registration. Iraheta stated that he was tired and looking for a place to stop to rest. Cox then called in the vehicle identification number (VIN) and dispatch told him that the vehicle's registration was suspended and Iraheta's driver's license was also suspended.

At this point, Cox asked Iraheta to exit the vehicle and took Iraheta back to the trunk of the car, just in front of where Cox's patrol vehicle was parked. Cox asked Iraheta about Iraheta and the passengers' itinerary and relationship to each other. He also asked the front seat passenger, Christian Miguel Gonzalez, about their itinerary. Both Iraheta and Gonzalez explained that they were traveling from California to Miami for a birthday party, but Iraheta stated that the passengers were "cousins" and Gonzalez disclaimed any familial relation. Cox noted that Gonzalez was giving short, vague answers and looking to the passenger in the back seat, Rodolfo Meraz-Garcia, before answering the questions. When confronted with the conflicting stories about their relationship, Iraheta stated that what he meant was they were "like family."

Deputy Cox also asked Iraheta if there was any contraband in the car, which Iraheta denied. Cox explained that they were looking for narcotics and asked permission to search the car; Iraheta consented. The deputies agree that no one explained to any of the Defendants that they could limit or refuse consent to the search. Additionally, it is clear from the record that the passengers, Gonzalez and Meraz-Garcia, remained in the car with the windows up and could not hear the exchange between Cox and Iraheta. Prior to the search, but after obtaining consent, the deputies asked Gonzalez and MerazGarcia to exit the vehicle and patted them down for officer safety.

Iraheta asked to and was allowed to retrieve his jacket from the trunk. He left the trunk open and rejoined the other passengers next to Cox's vehicle. Waggoner remained with the passengers on the side of the interstate near Cox's vehicle, which was positioned behind Iraheta's. He watched Iraheta, Gonzalez, and Meraz-Garcia (collectively Defendants) as Cox and Honey searched the vehicle.

Cox searched the front of the vehicle and proceeded to the trunk while Honey searched the passenger area. Cox observed several bags in the trunk. No bags were marked in a way that identified an owner and none of the occupants of the car objected to the search or claimed ownership of the bags. Cox noticed that one bag, a large black duffel bag, was heavier than the others. He proceeded to open it and he discovered shrink wrapped packages of suspected cocaine and methamphetamine. Cox did not ask for consent to search the bags.

Defendants were placed in handcuffs, advised of their Miranda rights, and transported to the Metro Narcotics Unit for further investigation. Each Defendant consented to being interviewed without an attorney. Iraheta stated that he did not know who put the black duffel bag in the car but that MerazGarcia and Gonzalez placed the bags in the trunk. Meraz-Garcia stated that Gonzalez put the black duffel bag in the trunk and that his bag was blue. Gonzalez stated that he only put his bag, an Adidas bag, in the trunk. When confronted with the conflicting stories, Meraz-Garcia "stated that he did not know who put the bag in the vehicle."

Defendants were charged in a four-count indictment with conspiracy to possess with intent to distribute cocaine, methamphetamine, and a mix of methamphetamine; and knowing possession with intent to distribute the same drugs. Each Defendant filed a motion to suppress the drugs. Defendants argued that the initial stop was unjustified and made additional arguments regarding Iraheta's consent and the length of the detention. The Government responded that the initial stop was valid and the subsequent detention was supported by reasonable suspicion. The Government also argued that Iraheta's consent was voluntary and the scope of this consent included the bags in the trunk of the vehicle. Moreover, the Government argued that no one objected to the search at that time. The pretrial matter was referred to the Magistrate Judge (MJ) for a report and recommendation. See 28 U.S.C. § 636(b)(1).

The Court of Appeals for the Fifth Circuit concluded that the district court properly granted defendants' motion to suppress where, although defendants did not object to the search nor claim ownership of the luggage searched, that is not decisive under these facts. "It is undisputed that defendants did not hear the driver (a co-defendant) of the vehicle give consent to the search nor were they ever informed of the driver's consent by the officers. Under these circumstances, the onus was on the officers to act reasonably. All of the facts indicated a likelihood that the luggage did not belong to the driver, and therefore, it was not reasonable to rely on the driver's consent alone in searching the bag."

The search was unconstitutional and the court affirmed the district court's grant of the motions to suppress.

SEARCH AND SEIZURE:
Consensual Encounter

United States v. Hayden
CA8, No. 13-2991, 7/16/14

On December 20, 2011, St. Louis Officers Nicholas Martorano and Michael Kegel observed Julius Eric Hayden and James Crocket standing near a vacant house in a high-crime area. Although the officers had no information connecting Hayden or Crockett to any criminal activity, the officers were told, in preparation for their shift, that there had been a noticeable increase in burglaries and robberies involving weapons in the vicinity. Ultimately, the officers stopped and frisked Hayden and found a firearm in his pocket.

According to Martorano, as the two men began walking down the sidewalk, Kegel pulled the vehicle alongside the men, and Martorano exited the car, shined a flashlight on the men, and yelled "Police!" Hayden turned away from the light and put his right hand into his right jacket pocket. Martorano ordered Hayden to remove his hand from his pocket. Hayden complied. Martorano then frisked Hayden, finding a loaded .22 caliber revolver in Hayden's right jacket pocket.

The issue in this case was the moment of seizure. The defendant contends that the officers seized him when Martorano exited the vehicle, shined his flashlight on them and yelled "Police!" At that point, the officers would not have reasonable suspicion that Hayden was committing a burglary, so the seizure was unconstitutional.

Upon review, the Court of Appeals for the Eighth Circuit agreed with the district court on the key legal issue that Hayden was not seized when Officer Martorano shined the flashlight on him and said "Police." The Court stated, in part, as follows:

"A seizure does not occur simply because a police officer approaches an individual and asks a few questions. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required.

"The district court found that the officers pulled their vehicle alongside Hayden and Crockett, shined a flashlight on the subjects, clearly identified themselves as police, and approached the men. The officers did not block the ability of Hayden and Crockett to cross the street, did not touch the men, and did not display weapons. Merely identifying oneself as 'Police' does not effect a seizure of a citizen who stops to listen or talk, because self-identification is not a command in the nature of 'Police, halt!' or 'Stop, in the name of the law!' See *Florida v. Royer,* 460 U.S. 491, 497 (1983); *United States v. Perdoma*, 621 F.3d 745, 749 (8th Cir. 2010). Likewise, shining a flashlight to illuminate a person in the darkness is not a coercive act that communicates an official order to stop or comply. See *United States v. Mabery,* 686 F.3d 591, 597 (8th Cir. 2012); *United States v. Douglass,* 467 F.3d 621, 624 (7th Cir. 2006). During the initial approach of the police officers, the encounter was consensual.

"Hayden eventually was seized when he turned his body away from Officer Martorano, reached his hand into his jacket pocket, and complied with Martorano's

command that he remove his hand from his pocket. That seizure, however, was justified under the Fourth Amendment by reasonable suspicion that criminal activity was afoot. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The patrolling officers knew that there had been an increase in burglaries in the area. It was late at night, and the officers knew from experience that it was unusual to find people on the street after dark in this high-crime area. Hayden and Crockett appeared to be casing a house for a burglary: They looked up and down the street; one of the men crossed a fence to get near the residence and looked into the window of the house; as officers approached, Hayden turned away from the officers and put his hand into his pocket as though reaching for a weapon. The totality of the circumstances gave the officers reasonable suspicion to conclude that a crime of burglary was in the offing. See *United States v. Morgan*, 729 F.3d 1086, 1090 (8th Cir. 2013). Consequently, the seizure of Hayden did not violate the Fourth Amendment, and the district court properly denied his motion to suppress the firearm obtained during the stop."

SEARCH AND SEIZURE:
Drug Dog Sniff; Apartment Door

United States v. Givens
CA8, No. 13-2713, 8/15/14

Cedar Rapids Officer Christopher Bieber took his canine partner to Gregory Givens' apartment. Officer Beiber was acting on information from two anonymous calls to the department alleging the presence of drug activity in the apartment building. Officer Bieber was admitted into the building after buzzing one of the tenants and identifying himself as a police officer. Upon entering the building, Officer Bieber unleashed his canine and walked the canine through the hallways of the building. The canine sniffed around each of the apartment doors and eventually alerted at Givens' apartment. A search warrant was obtained based on the canine's alert, and a search pursuant to the warrant revealed crack cocaine in the apartment.

A jury found Givens guilty of being a felon in possession of ammunition and possessing with the intent to distribute crack cocaine after having been previously convicted of one or more felony drug offenses. Prior to trial, Givens filed a motion to suppress the evidence obtained during a traffic stop of his vehicle on October 7, 2010 and the evidence obtained during a search of his apartment on December 21, 2010. The district court denied the motion, and Givens appealed.

Upon review, the Court of Appeals for the Eighth Circuit found, in part, as follows:

"The district court did not err in denying the motion to suppress evidence recovered from the apartment. Givens argues that the Supreme Court's recent decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013) controls this case. In *Jardines,* the Court held that the officers' use of a drug-sniffing dog while on the front porch of a home constituted a search because the officers trespassed on the constitutionally protected curtilage of the home.

"We need not determine whether *Jardines* controls the facts of this case. *Jardines* was decided in March of 2013, approximately two years after the dog sniff at issue here.

Accordingly, even assuming *Jardines* calls into question previous cases involving the use of a dog in the hallway of an apartment building to sniff around the door of an apartment, exclusion of the evidence would not be appropriate because, at the time of the dog sniff, Officer Bieber was objectively reasonable in relying on binding circuit precedent. *Davis v. United States*, 131 S. Ct. 2419, 2428 (2011); see also *United States v. Holleman*, 743 F.3d 1152, 1159 (8th Cir. 2014) (holding that even if Jardines prohibited the officers' action, the search in question occurred prior to the Jardines decision, and thus, officers were entitled to 'objective reasonable reliance on existing judicial precedent'). At the time of the dog sniff, our circuit had determined that the use of a dog in the hallway of an apartment building to sniff around the door of an apartment was not a search. *United States v. Scott,* 610 F.3d 1009, 1016 (8th Cir. 2010). Accordingly, even if *Jardines* casts doubt on our holding in *Scott*, Officer Bieber objectively and reasonably relied on our decision in *Scott* in the use of his canine, and the exclusionary rule, therefore, does not apply under these circumstances. *United States v. Davis,* ___ F.3d ___, ___, 2014 WL 3719097, at *4 (8th Cir. July 29, 2014) (determining that the officers objectively and reasonably relied on the decision in Scott in conducting a dog sniff of the apartment door frame and noting that nothing in the Supreme Court's "opinion in *Davis* suggested that its good faith exception is limited to longstanding judicial precedent)."

EDITOR'S NOTE: In *United States v. Givens*, CA8, No. 13-2285, 7/29/14, a search warrant was based in part on a drug dogs sniff outside an apartment door. The district court assumed that *Jardines* invalidated the dog sniff and therefore the search warrant but nonetheless denied the motion to suppress, concluding that "the Leon good-faith exception applies" because the officers executing the warrant "could have reasonably believed that the dog sniff at the door to Apartment 5 was lawful in light of the Eighth Circuit's decision in *United States v. Scott,* 610 F.3d 1009 (8th Cir. 2010)," cert. denied, 131 S. Ct. 964 (2011).

The Court of Appeals for the Eighth Circuit held that because the officers reasonably relied on binding circuit precedent in conducting a dog sniff outside the door to Apartment 5, the exclusionary rule did not apply to preclude use of that evidence in the search warrant application. Therefore, the warrant was valid, and Davis's motion to suppress was properly denied.

Federal Appellate decisions have upheld the use of a drug dog sniff when law enforcement officers were lawfully present in a common apartment hallway. The same results have been achieved when law enforcement officers used a drug detection dog in a hotel corridor. The impact of the decision in *Florida v. Jardines* on this investigative techniques is now unclear.

SEARCH AND SEIZURE:
Entry into Curtilage of a Home to Make an Arrest; Emergency Search

United States v. Meidel
CA8, No. 13-3251, 8/21/14

In early July 2012, Missouri Highway Patrol (MSHP) Sergeant Jason Clark received several complaints from Joseph Meidel's neighbors that he had been firing

guns in the direction of nearby houses. Sergeant Clark conducted a background check, which revealed Meidel was a convicted felon. During his investigation, Sergeant Clark also learned Meidel's girlfriend had purchased a gun at a nearby convenience store and Meidel had bought 9mm ammunition on two separate occasions; the convenience store manager identified Meidel from a photo lineup.

Another convenience store employee described an incident where Meidel, after confronting the employee, lifted up his shirt to display the handle of a pistol. On July 30, 2012, Sergeant Clark and MSHP Sergeant Eric Eidson were in Meidel's neighborhood looking into a suspicious vehicle observed in the area. While canvassing the neighborhood, the sergeants approached Meidel to ask if he had seen the vehicle. He and his girlfriend were in their front yard, which was surrounded by a chain link fence. Sergeant Clark testified he advanced cautiously given his ongoing investigation and reports that Meidel often carried a gun. The two sergeants identified themselves as law enforcement officers. At the time of the conversation, Meidel was standing approximately 3–5 feet from the fence, near a large dumpster. The sergeants were standing near the roadway, on the public side of the fence. Meidel was polite and forthcoming during the conversation, explaining he had in fact seen the vehicle in the neighborhood.

After the conversation ended, Meidel turned around and walked toward the house. The two officers saw what appeared to be a semi-automatic handgun tucked partially into Meidel's pants in the small of his back. Sergeant Eidson asked Meidel if he had a gun; he responded it was a pellet gun. Sergeant Eidson testified that as soon as he asked about the gun, Meidel's demeanor changed. Meidel also continued moving toward the house, which would have placed him behind the dumpster. As Sergeant Eidson explained, Meidel "could have used that dumpster for excellent cover," while the sergeants "were out in the middle of nowhere." Sergeant Clark asked if he was Joseph Meidel; Meidel confirmed he was. Sergeant Eidson then informed Meidel that he was under arrest.

According to the sergeants, Meidel continued walking away. He then reached around his back toward his firearm. In response, the sergeants unholstered their weapons and ordered Meidel to the ground. Meidel did not comply, and Sergeant Eidson jumped the fence. Sergeant Clark followed, brought Meidel to his knees, and handcuffed him. Sergeant Eidson recovered a semi-automatic handgun from Meidel's waistband. Based on the gun and Sergeant Clark's prior investigation, Sergeant Clark obtained a search warrant for Meidel's home. Inside, law enforcement found 9mm bullets and a magazine containing additional ammunition.

On August 29, 2012, Meidel was indicted on one count of being a felon in possession of a firearm. Meidel moved to suppress the evidence, including the gun and ammunition, obtained from his person and his residence. He argued the evidence was the fruit of an unconstitutional search and seizure.

Upon review, the Eighth Circuit Court of Appeals found, in part, as follows:

"It is a basic principle of Fourth Amendment law that searches and seizures inside a

home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). The Fourth Amendment has drawn a firm line at the entrance to the house. The Supreme Court has further clarified that such Fourth Amendment protection 'would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity.' *Florida v. Jardines,* 133 S. Ct. 1409, 1414 (2013). We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes.

"We assume, without deciding, that Meidel's fenced-in front yard constituted curtilage subject to Fourth Amendment protection. Regardless of such constitutional protection, however, an exception to the warrant requirement permits an officer to enter a home if he or she acts with probable cause in the presence of exigent circumstances. *United States v. Schmidt,* 403 F.3d 1009, 1013 (8th Cir. 2005). This is an objective inquiry, which asks what an objectively reasonable officer on the scene could have believed. No one disputes that the MSHP sergeants had probable cause in this case: they were speaking to someone who confirmed he was Meidel; given Sergeant Clark's ongoing investigation, he knew Meidel was a convicted felon; and both sergeants saw what looked like a gun tucked into his waistband. Meidel's dishonest assertion that it was a pellet gun did not undermine the sergeants' probable cause.

"The only question on appeal then is whether there were exigent circumstances permitting the sergeants to enter the curtilage of Meidel's home without a warrant. Exigent circumstances, such as the safety of officers and others, may justify a warrantless arrest in one's home. See *United States v. Kuenstler,* 325 F.3d 1015, 1021 (8th Cir. 2003) (Exigent circumstances exist where law enforcement officers have a legitimate concern for the safety of themselves or others.

"Under the totality of the circumstances, it was reasonable for the sergeants to believe Meidel posed a danger—both to themselves and to others—that could be neutralized by entering the premises to secure both Meidel and the gun. Meidel, a convicted felon, was in possession of what looked like a gun. More than that, here the officers had made their presence and suspicion of Meidel's illegal possession known. They asked about the gun and confirmed his identity. Although both sergeants acknowledged Meidel was initially cordial when speaking to them, Sergeant Eidson explained Meidel's demeanor changed as soon as he asked about the gun. Meidel continued to move toward the dumpster, which would have shielded him from direct view. Sergeant Clark had also received several reports that Meidel had discharged a weapon near his home, which would have heightened concern that Meidel would use the gun in his possession. A reasonable officer, when faced with these circumstances, would have had legitimate concerns for his safety and the safety of others to justify entering Meidel's yard to arrest him and secure the gun. See *United States v. Ball,* 90 F.3d 260, 263 (8th Cir. 1996) ('It would be reasonable for an officer to believe that the presence of an armed suspect inside the house presented a threat to the lives of the officer's outside.')

"Before Sergeant Eidson told Meidel he was under arrest, the sergeants reasonably

believed Meidel was a felon with a gun on his person and made their suspicions known to Meidel. Neighbors had previously reported Meidel discharging a gun, and he was near a dumpster that could provide cover should he begin shooting. Consequently, the district court did not err in finding exigent circumstances justified the sergeants' warrantless entry onto Meidel's property."

SEARCH AND SEIZURE:
Location Information from Cell Phones

United States v. Davis
CA11, No. 12-12928, 6/11/14

Quartavis Davis and five co-defendants were charged in the southern district of Florida with violations of the Anti-Racketeering statute, conspiracy to violate the Hobbs Act, and federal firearms charges growing out of their participation in numerous armed robberies. While Davis raised numerous issues on appeals, his principal claims are that the government obtained electronic location information "without a warrant," and that the obtaining of that evidence violated his Fourth Amendment rights.

Upon review, the Eleventh Circuit Court of Appeals found, in part, as follows:

"Davis's Fourth Amendment argument raises issues of first impression in this circuit, and not definitively decided elsewhere in the country. The evidence at issue consists of records obtained from cell phone service providers pursuant to the Stored Communications Act (SCA), 18 U.S.C. §§ 2703(c) and (d). Under that Act, the government can obtain from providers of electronic communication service records of subscriber services when the government has obtained either a warrant, § 2703(c)(A), or, as occurred in this case, a court order under subsection (d), see § 2703(c)(B). The order under subsection (d) does not require the government to show probable cause.

"The evidence obtained under the order and presented against Davis in the district court consisted of so-called 'cell site location information.' That location information includes a record of calls made by the providers' customer, in this case Davis, and reveals which cell tower carried the call to or from the customer. The cell tower in use will normally be the cell tower closest to the customer. The cell site location information will also reflect the direction of the user from the tower. It is therefore possible to extrapolate the location of the cell phone user at the time and date reflected in the call record. All parties agree that the location of the user will not be determined with pinpoint precision, but the information is sufficiently specific that the prosecutor expressly relied on it in summing up to the jury in arguing the strength of the government's case for Davis's presence at the crime scenes. Indeed, it is not overstatement to say that the prosecutor stressed that evidence and the fact that the information reflected Davis's use of cell phone towers proximate to six of the seven crime scenes at or about the time of the Hobbs Act robberies.

"Davis contends that the obtaining of the evidence required a warrant upon probable cause. The government argues that the evidence is not covered by the Fourth Amendment and was properly obtained under a court order.

"In *United States v. Jones*, 132 S.Ct. 945 (2012), the United States Supreme Court concluded that the warrantless gathering of the GPS location information from Jones vehicle violated Jones's Fourth Amendment rights.

"As the United States rightly points out, in the controversy before us there was no GPS device, no placement, and no physical trespass. Therefore, although *Jones* clearly removes all doubt as to whether electronically transmitted location information can be protected by the Fourth Amendment, it is not determinative as to whether the information in this case is so protected. The answer to that question is tied up with the emergence of the privacy theory of Fourth Amendment jurisprudence. While *Jones* is not controlling, we reiterate that it is instructive.

"The government argues that the gathering of cell site location information is factually distinguishable from the GPS data at issue in *Jones.* We agree that it is distinguishable; however, we believe the distinctions operate against the government's case rather than in favor of it. *Jones,* as we noted, involved the movements of the defendant's automobile on the public streets and highways. Indeed, the district court allowed the defendant's motion to suppress information obtained when the automobile was not in public places. The circuit opinion and the separate opinions in the Supreme Court concluded that a reasonable expectation of privacy had been established by the aggregation of the points of data, not by the obtaining of individual points. Such a mosaic theory is not necessary to establish the invasion of privacy in the case of cell site location data.

"One's car, when it is not garaged in a private place, is visible to the public, and it is only the aggregation of many instances of the public seeing it that make it particularly invasive of privacy to secure GPS evidence of its location. As the circuit and some justices reasoned, the car owner can reasonably expect that although his individual movements may be observed, there will not be a 'tiny constable' hiding in his vehicle to maintain a log of his movements. In contrast, even on a person's first visit to a gynecologist, a psychiatrist, a bookie, or a priest, one may assume that the visit is private if it was not conducted in a public way. One's cell phone, unlike an automobile, can accompany its owner anywhere. Thus, the exposure of the cell site location information can convert what would otherwise be a private event into a public one. When one's whereabouts are not public, then one may have a reasonable expectation of privacy in those whereabouts. Therefore, while it may be the case that even in light of the *Jones* opinion, GPS location information on an automobile would be protected only in the case of aggregated data, even one point of cell site location data can be within a reasonable expectation of privacy. In that sense, cell site data is more like communications data than it is like GPS information. That is, it is private in nature rather than being public data that warrants privacy protection only when its collection creates a sufficient mosaic to expose that which would otherwise be private.

"The United States further argues that cell site location information is less protected than GPS data because it is less precise. We are not sure why this should be significant. We do not doubt that there may be a difference in precision, but that is not to say that the difference in precision has constitutional

significance. While it is perhaps possible that information could be sufficiently vague as to escape the zone of reasonable expectation of privacy, which does not appear to be the case here. The prosecutor at trial stressed how the cell phone use of the defendant established that he was near each of six crime scenes. While committing a crime is certainly not within a legitimate expectation of privacy, if the cell site location data could place him near those scenes, it could place him near any other scene. There is a reasonable privacy interest in being near the home of a lover, or a dispensary of medication, or a place of worship, or a house of ill repute. Again, we do not see the factual distinction as taking Davis's location outside his expectation of privacy. That information obtained by an invasion of privacy may not be entirely precise does not change the calculus as to whether obtaining it was in fact an invasion of privacy.

"Finally, the government argues that Davis did not have a reasonable expectation of privacy because he had theretofore surrendered that expectation by exposing his cell site location to his service provider when he placed the call. The government correctly notes that 'the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities…' *United States v. Miller*, 425 U.S. 435, 443 (1976). In *Smith v. Maryland*, 442 U.S. 735 (1979), at the request of law enforcement authorities, a telephone company installed a pen register to record numbers dialed from the defendant's telephone. The *Smith* Court held that telephone users had no subjective expectation of privacy in dialed telephone numbers contained in telephone companies' records. While the government's position is not without persuasive force, it does not ultimately prevail.

"The reasoning in *Smith* depended on the proposition that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. A cell phone customer has not voluntarily shared his location information with a cellular provider in any meaningful way. It is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information. When a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed, and there is no indication to the user that making that call will also locate the caller. Even more persuasively, when a cell phone user receives a call, he hasn't voluntarily exposed anything at all.

"Supportive of this proposition is the argument made by the United States to the jury. The prosecutor stated to the jury that obviously Willie Smith, like Davis, probably had no idea that by bringing their cell phones with them to these robberies, they were allowing their cell service provider and now all of you to follow their movements on the days and at the times of the robberies.

"Davis hasn't voluntarily disclosed his cell site location information to the provider in such a fashion as to lose his reasonable expectation of privacy. In short, we hold that cell site location information is within the subscriber's reasonable expectation of privacy. The obtaining of that data without a warrant is a Fourth Amendment violation. Nonetheless, for reasons set forth in the next

section of this opinion, we do not conclude that the district court committed a reversible error.

"The United States contends that even if we conclude, as we have, that the gathering of the cell site location data without a warrant violated the constitutional rights of the defendant, we should nonetheless hold that the district court did not commit reversible error in denying appellant's motion to exclude the fruits of that electronic search and seizure under the 'good faith' exception to the exclusionary rule recognized in *United States v. Leon*, 468 U.S. 897 (1984). We agree. The only differences between *Leon* and the present case are semantic ones. The officers here acted in good faith reliance on an order rather than a warrant, but, as in *Leon*, there was a 'judicial mandate' to the officers to conduct such search and seizure as was contemplated by the court order. As in *Leon*, the officers had a sworn duty to carry out the provisions of the order. Therefore, even if there was a defect in the issuance of the mandate, there is no foundation for the application of the exclusionary rule.

"We further add that *Leon* speaks in terms of the 'magistrate's' error. Here, the law enforcement officers, the prosecution, and the judicial officer issuing the order, all acted in scrupulous obedience to a federal statute, the Stored Communications Act, 18 U.S.C. § 2703. At that time, there was no governing authority affecting the constitutionality of the Act. There is not even allegation that any actor in the process evidenced anything other than good faith. We therefore conclude that under the *Leon* exception, the trial court's denial of the motions to suppress did not constitute reversible error."

SEARCH AND SEIZURE:
Mobile Tracking Software

United States v. Stanley
CA3, No. 13-1910, 6/11/14

Corporal Robert Erdely with the Computer Crime Unit of the Pennsylvania State Police was investigating online distribution of child pornography when he discovered a computer on a peer-to-peer network sharing 77 files that he suspected contained child pornography. With information available to anyone, he found the Internet protocol address (IP address) through which it connected to the internet. Searching publicly available records, Erdely determined that the IP Address was registered to a Comcast subscriber and obtained a court order.

Comcast gave Erdely the Neighbor's name and Pittsburgh address. Erdely executed a warrant. None of the Neighbor's computers contained child pornography or the file-sharing software; his wireless router was not password-protected. Erdely deduced that the computer sharing child pornography was connecting without the Neighbor's knowledge. With the Neighbor's permission, Erdely connected a computer to the router for remote access. Later, while working in Harrisburg, Erdely learned that the computer was again sharing child pornography on the Neighbor's IP address. Erdely determined the mooching computer's IP address and MAC address, which belonged to an Apple wireless card. Erdely had not discovered any Apple wireless devices in the Neighbor's home, so he decided to use a "MoocherHunter" mobile tracking software tool, which can be used by anyone with a directional antenna.

Not knowing which residence the signal was coming from, Erdely proceeded without a warrant.

From the sidewalk, the MoocherHunter's readings were strongest when aimed at Stanley's apartment. Erdely obtained a warrant for Stanley's home. When officers arrived, Stanley fled, but returned and confessed that he had connected to the Neighbor's router to download child pornography. Erdely seized Stanley's Apple laptop and recovered 144 images and video files depicting child pornography. Stanley was charged with possession of child pornography, 18 U.S.C. 2252(a). The district court denied a motion to suppress. The Third Circuit affirmed. Use of the MoocherHunter was not a search under the Fourth Amendment.

Before using the MoocherHunter, Erdely contacted an Assistant United States Attorney in the Western District of Pennsylvania to discuss the propriety of obtaining a search warrant. Erdely and the AUSA had a "lengthy discussion" in which they decided that the MoocherHunter was "completely different" from the infrared technology used in *Kyllo v. United States,* 537 U.S. 27 (2001). J.A. 271. They also discussed the practical impossibility of obtaining a search warrant without knowing which one of the many nearby residences the signal was being transmitted from. Ultimately, Erdely determined that he needed to proceed without a warrant.

Stanley filed a motion to suppress his statements to Erdely and the evidence obtained from his home and computer. His primary argument was that Erdely conducted a warrantless search under *Kyllo v. United States*, 533 U.S. 27 (2001), when he used the MoocherHunter to obtain information about the interior of his home that was unavailable through visual surveillance.

Upon review, the Court of Appeals for the Third Circuit found, in part, as follows:

"In *Kyllo*, police officers suspected that the defendant was growing marijuana inside of his home. 533 U.S. at 29. Without obtaining a warrant, these officers parked across the street and scanned the defendant's home using a thermal imager. This device revealed that certain portions of the home's exterior were unusually warm, leading police to believe that the defendant was using high-powered halide lamps inside. The Supreme Court held that this scan was a search, and established a rule that 'obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search'—at least where, as here, the technology in question is not in general public use.

"Critical to *Kyllo*'s holding, however, was the fact that the defendant sought to confine his activities to the interior of his home. He justifiably relied on the privacy protections of the home to shield these activities from public observation. Stanley made no effort to confine his conduct to the interior of his home. In fact, his conduct—sharing child pornography with other Internet users via a stranger's Internet connection—was deliberately projected *outside* of his home, as it required interactions with persons and objects beyond the threshold of his residence. In effect, Stanley opened his window and

extended an invisible, virtual arm across the street to the Neighbor's router so that he could exploit his Internet connection. In so doing, Stanley deliberately ventured beyond the privacy protections of the home, and thus, beyond the safe harbor provided by *Kyllo.*

"Here, the presence of Stanley's unauthorized signal was itself 'wrongful.' When Stanley deliberately connected to the Neighbor's unsecured wireless network, he essentially hijacked the Neighbor's router, forcing it to relay data to Comcast's modem and back to his computer, all without either the Neighbor's or Comcast's knowledge or consent. Stanley was, in effect, a virtual trespasser. As such, he can claim no 'legitimate' expectation of privacy in the signal he used to effectuate this trespass—at least where, as here, the MoocherHunter revealed only the path of this signal and not its contents."

The Court of Appeals for the Third Circuit concluded that Stanley lacked a reasonable, legitimate expectation of privacy in the wireless signal. The unauthorized nature of his connection to the Neighbor's router eliminates the possibility that society would recognize his privacy expectations as legitimate.

SEARCH AND SEIZURE: Non-Law Enforcement Personnel Assisting in Search

Petkus v. Richland County
CA7, No. 13-3700, 8/19/14

Jennifer Petkus owns a property that she operated as an animal sanctuary until 2009, when an investigation by the American Society for the Prevention of Cruelty to Animals (ASPCA) resulted in a search of her property, termination of her employment as Richland County dogcatcher, her arrest and prosecution for animal neglect, and a sentence to three years of probation.

As authorized by Wis. Stat. 173.10, the ASPCA investigator procured a warrant to search Petkus's property. The warrant directed law enforcement officers to enlist in the search veterinarians or any "other persons or agencies authorized by the Richland County District Attorney." The veterinary and 40-50 animal-rights volunteers who accompanied deputy sheriffs conducted the search. They had not been deputized. The deputy sheriffs' role was not to participate in the search but simply to "keep the peace." Petkus sued, alleging negligence in failing to train or supervise the amateur searchers and that the search was unreasonable under the Fourth Amendment. Petkus won an award of damages in the amount of $133,480. The Seventh Circuit affirmed, noting needless damage to Petkus's property and that the "incompetence of the amateur searchers is apparent from the reports of the deputy sheriffs."

Part of their finding is as follows:

"As authorized by Wis. Stat. § 173.10, the ASPCA investigator procured a warrant to search to search Petkus's property. The warrant directed law enforcement officers to enlist in the search veterinarians or any 'other persons or agencies authorized by the Richland County District Attorney.' The Supreme Court had held in *Wilson v. Layne,* 526 U.S. 603, 611 (1999), that police actions in execution of a warrant must be related to

the objectives of the authorized intrusion and therefore that the police in that case should not have brought reporters into the house they were searching because their presence in the home was not in aid of the execution of the warrant. In contrast, the veterinary and animal-rights people who accompanied the two or three deputy sheriffs assigned to the search of Petkus's property were more than merely helpful in executing the warrant—they were its executors; they conducted the search. They *were* some 40 to 50 volunteers from animal-rights organizations such as the ASPCA. They had not been deputized.

"Richland County's brief states that the deputy sheriffs' role was not to participate in the search but simply to 'keep the peace.'

"The Court of Appeals for the Seventh Circuit had no basis for disturbing either the jury's finding of negligence or its finding that the search was unreasonable. The search warrant was valid, but the conduct of the search unreasonable, making the search unreasonable within the meaning of the Fourth Amendment. See *United States v. Ramirez*, 523 U.S. 65, 71 (1998); *Tarpley v. Greene*, 684 F.2d 1, 8–9 (D.C. Cir. 1982). Police can't be permitted, merely by virtue of having obtained a search warrant, to allow an untrained, unsupervised mob (however well-intentioned, as we may assume the animal-rights activists who conducted the search to have been) to conduct a search likely to result in gratuitous destruction of private property because of the mob's lack of training and supervision. What the police could not have done lawfully had they conducted the search themselves they could not authorize private persons to do in their stead. *Blum v. Yaretsky*, 457 U.S. 991, 1003–05 (1982); *United States v. Shahid*, 117 F.3d 322, 325, 327–28 (7th Cir. 1997); *United States v. Feffer*, 831 F.2d 734, 737 (7th Cir. 1987); *United States v. Momoh*, 427 F.3d 137, 140–41 (1st Cir. 2005); *United States v. Parker*, 32 F.3d 395, 398–99 (8th Cir. 1994). Police cannot hire the Hell's Angels to conduct highway patrol and, though failing to train or supervise them, shuck off responsibility when one of the Angels beats a speeder into a bloody pulp with a tire iron.

"The County argues that it can't be responsible for the damage to Petkus's property because the sheriff's deputies did not supervise the animal-rights activists who conducted the search and who therefore inflicted the damage. The argument—which amounts to saying the greater the County's negligence the less its culpability—is frivolous. If accepted, it would shred respondeat superior, the applicability of which in this case the County has failed to challenge. Employers would be off the hook just by letting their employees run wild."

SEARCH AND SEIZURE:
Probable Cause; False Assertions

United States v. Saafir
CA4, No. 13-4049, 6/11/14

Dawud Ali Saafir appealed his conviction for being a felon in possession of a firearm. The court held that the law enforcement officer's search of Saafir's car was unreasonable within the meaning of the Fourth Amendment because the probable cause on which the search was based was tainted. Saafir's discriminatory statements that gave rise to probable cause to search the car were elicited in response to the officer's manifestly false assertion that he

had probable cause to search the car and his suggestion that, with our without Saafir's consent, he would proceed with the search. Accordingly, the court reversed the district court's order denying the suppression motion, vacated Saafir's conviction, and remanded for further proceedings.

SEARCH AND SEIZURE: Stop and Frisk; 911 Call; Investigatory Stop with Weapons Drawn

United States v. Edwards
CA9, No. 13-50165, 7/31/14

On May 3, 2012, at 7:40 p.m., the Inglewood Police Department received a 911 call from an unidentified male reporting that a "young black male" at the corner of West Boulevard and Hyde Park Boulevard was shooting at passing cars, including the caller's. The caller provided additional details about the suspect during the five-minute call, telling the 911 dispatcher that the shooter was between 5 feet 7 inches and 5 feet 9 inches in height and "maybe 19, 20" years old. The caller initially said that the shooter was wearing "all black" but later clarified that he was wearing a black shirt and gray khaki pants. The caller also reported that the shooter had a black handgun and, after shooting, was entering "Penny Pincher's Liquor" store.

Police officers Ryan Green and Julian Baksh began receiving information about the call from the dispatcher at 7:42 p.m. The dispatcher requested that officers "respond to shots fired in the area of Hyde Park and West" and told officers that, according to a reporting party, a black man, "approximately 5'7" to 5'9" wearing a black sweatshirt and gray khaki pants," was "walking around shooting at passing vehicles" and was now possibly inside Penny Pincher's Liquor.

Green and Baksh arrived on the scene at around 7:45 p.m. and parked two blocks from the shooter's reported location. After leaving their vehicle, Green and Baksh observed Edwards walking eastbound approximately 75 feet from the liquor store. Green testified that Edwards matched the description of the suspect reported in the anonymous call. Edwards is African-American, was 5 feet 11 inches and 26 years old at the time, and was wearing a black, long-sleeve shirt and gray pants. Green also testified that "there was only one other individual in the area, a male Hispanic, wearing a black and green heavy jacket and blue jeans."

Green notified other police units of Edwards' location, and officers John Ausmus and Landon Poirier quickly responded. Ausmus and Poirier detained Edwards as well as the "male Hispanic," while Green and Baksh covered them. All four officers had their weapons drawn as they approached the two men. Ausmus commanded both men to kneel on the pavement. Ausmus handcuffed Edwards while he was on his knees, and then stood Edwards up and had him spread his legs. Ausmus began patting down Edwards and felt a hard object above Edwards' right knee, inside the pant leg. Ausmus pulled on the pants to jiggle the item out, and a silver .22-caliber revolver fell out of Edwards' pants and onto the pavement beside Edwards' feet. The 911 dispatcher had a call-back number for the reporting party, and the officers at the scene requested the dispatcher to call back the reporting party. The anonymous caller had already left the scene, however, and did not

want to be involved with the case. Thereafter, the officers transported Edwards to the police station.

Edwards challenges the district court's determination that his detention leading to the discovery of the gun was merely an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968), and not an arrest requiring probable cause.

Upon review, the Ninth Circuit Court of Appeals found, in part, as follows:

"Here, there is no doubt that the police were intrusive in stopping Edwards. Four officers pointed their weapons toward him, and he was forced to kneel and was handcuffed before being patted down. See, e.g., *Lambert*, 98 F.3d at 1188 ('If the police draw their guns it greatly increases the seriousness of the stop.'); *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982) ('Handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical *Terry* stop.') The officers used aggressive methods and restricted Edwards' liberty.

"However, as we have repeatedly explained, 'because we consider both the inherent danger of the situation and the intrusiveness of the police action, pointing a weapon at a suspect and handcuffing him, or ordering him to lie on the ground, or placing him in a police car will not *automatically* convert an investigatory stop into an arrest that requires probable cause.' *Lambert*, 98 F.3d at 1186.

"In *Miles*, officers responded to a report that a black man wearing an oversized jacket and riding a bicycle had fired a gun at a residence. See 247 F.3d at 1010–11. When they found a suspect fitting the description approximately six blocks from the residence and standing in the immediate vicinity of a bicycle, the officers approached the suspect with their guns drawn, ordered him to kneel and handcuffed him. We concluded these actions were reasonable and this initial stop did not amount to an arrest, given that the officers 'had a report of gunfire and had legitimate safety concerns' and 'made an on-the-spot assessment of the restraint necessary to control the situation.'

"Particularly relevant here, we noted that we have permitted the use of intrusive means to effect a stop where the police have information that the suspect is currently armed or the stop closely follows a violent crime. Under such circumstances, holding a suspect at gunpoint, requiring him to go to his knees or lie down on the ground, and/or handcuffing him will not amount to an arrest.

"Here, as in *Miles*, the officers' aggressive conduct was reasonable and did not convert Edwards' detention into an arrest. Edwards was the only person in the vicinity of the liquor store who fairly matched the description of a man who reportedly had been shooting at passing cars just minutes before police arrived. The officers had sufficiently detailed information from the 911 call to reasonably believe that Edwards could be the shooter and therefore could be armed and dangerous, possibly having just committed a violent crime. The officers' legitimate safety concerns justified their on-the-spot decision to use intrusive measures to stabilize the situation before investigating further.

"Edwards also disputes that the anonymous 911 call provided the officers with enough information to give them reasonable suspicion to support the investigatory stop. The Fourth Amendment permits brief investigative stops when an officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity. *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014). Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause. Reasonable suspicion is dependent upon both the content of information possessed by police and its degree of reliability, and the standard takes into account the totality of the circumstances—the whole picture.

"The Supreme Court, in addressing the issue of telephone tips and investigatory stops, has focused on whether the tips 'exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' *Alabama v. White*, 496 U.S. 325, 326–27 (1990). In *White,* an anonymous caller telephoned a police department reporting that a woman named Vanessa White would be leaving a specific apartment in a specific car at a specific time, on her way to a particular motel and in possession of cocaine. Officers followed White as she drove in the specified car from the apartment to the motel, and when they stopped her they found marijuana and cocaine. The Court held that the anonymous tip exhibited sufficient indicia of reliability to justify the stop, because the caller was able to accurately predict White's future behavior and officers were able to sufficiently corroborate the details of the tip.

"In contrast, the Court in *Florida v. J.L.*, 529 U.S. 266, 268 (2000), dealt with an anonymous caller who told the police 'that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.' Police proceeded to the bus stop, frisked J.L.—who was black and was wearing a plaid shirt—and seized a gun from his pocket. The Court held this tip insufficient to justify the investigatory stop. It lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case because the anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. The Court explained that the tip leading to J.L.'s arrest was an accurate description of a subject's readily observable location and appearance but did not show that the tipster had knowledge of concealed criminal activity. Reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. The Court also declined to speculate about situations in which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability, such as a report of a Person carrying a bomb.

"With *J.L.* in mind, we focused our attention in *United States v. Terry-Crespo,* 356 F.3d 1170 (9th Cir. 2004). In *Terry-Crespo*, a man called 911, identified himself and his general location, and then described in detail a man he said threatened him with a .45-caliber gun three minutes earlier. An officer stopped Ariel Terry-Crespo as a suspect and found that he had a .45-caliber gun. We held that the 911 call supported reasonable suspicion justifying the investigatory stop for four main reasons: (1) the call was not anonymous and therefore was

entitled to greater reliability; (2) an emergency 911 call is entitled to greater reliability than an anonymous tip concerning general criminality; (3) merely calling 911 and having a recorded telephone conversation risks the possibility that the police could trace the call or identify the caller by his voice, so the caller risked any anonymity he might have enjoyed and exposed himself to legal sanction; and (4) the police could place additional reliability on the caller's tip because his call evidenced first-hand information from a crime victim laboring under the stress of recent excitement.

"The Supreme Court has weighed in on this issue once again, this time addressing an anonymous call about an emergency situation. See *Navarette v. California,* 134 S. Ct. 1683 (2014). In *Navarette,* a 911 caller—assumed by the Court to be anonymous—reported that a vehicle ran her off the road.

"After a dispatcher relayed the tip, which included the nature of the incident and the location and a specific description of the offending vehicle, officers pulled the vehicle over and found 30 pounds of marijuana. The Court held that the anonymous call provided reasonable suspicion to justify this investigatory stop emphasizing four points: (1) the caller claimed eyewitness knowledge of the alleged dangerous activity, lending significant support to the tip's reliability; (2) the caller made a statement about an event 'soon after perceiving that event,' which is 'especially trustworthy;' (3) the caller used 911, which has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity; and (4) the caller created reasonable suspicion of an ongoing and dangerous crime—drunk driving—rather than an isolated episode of past recklessness. The Court distinguished the anonymous call in *Navarette* from the 'bare-bones tip' in *J.L.*, where the tip provided no basis for concluding that the tipster had actually seen the gun and where there was no indication that the tip was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event.

"In this case, the tip was an anonymous 911 call from an eyewitness reporting an ongoing and dangerous situation and providing a detailed description of a suspect. In light of *Navarette,* we conclude that the anonymous call leading to Edwards' detention exhibited sufficient indicia of reliability to provide the officers with reasonable suspicion. There are several circumstances that lead us to this conclusion.

"First, even though we gave weight to the caller's self-identification in *Terry-Crespo*, the Supreme Court's decision in *Navarette* makes explicitly clear that the principles underlying *Terry* stops and reasonable suspicion apply with full force to investigative stops based on information from *anonymous* tips. It is now clearly established that under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make an investigative stop.

"Second, the anonymous caller here reported an ongoing emergency situation even more dangerous than the suspected drunk driving in *Navarette.* She alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving

to be dismissed as an isolated example of recklessness. The call was not simply one concerning general criminality. Rather, the caller said right at the outset of his call that someone was '*shooting* at cars as they are going down the street,' implying that the shooting was still taking place as he called 911. Such a dire situation distinguishes this case from J.L., which merely involved a report of general criminality, namely, a minor's possession of a firearm in violation of Florida law.

"Third, the reporting party here had eyewitness knowledge of the shooting. When asked by the emergency dispatcher whether the shooter hit any vehicles, the caller described part of what he witnessed, explaining that 'he didn't hit any vehicles because when he got to mine, it looked like the gun might have jammed but I heard the pow, pow pow.' Additionally, at one point during the call, he exclaimed: 'Oh, my god.' Thus, there are indications that the call also was a 'statement relating to a startling event' which was 'made while the declarant was under the stress of excitement that it caused,' lending further credibility to the allegations.

"Fourth, the caller, although anonymous, used the 911 emergency system, also lending further credibility to his allegations. See *Navarette,* 134 S. Ct. at 1689–90 ('A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity. Given the foregoing technological and regulatory developments a reasonable officer could conclude that a false tipster would think twice before using such a system.')

"Applying *Navarette* and *Terry-Crespo,* we hold that the officers in this case reasonably relied on the anonymous call in stopping Edwards. The district court properly determined that the officers' conduct did not convert Edwards' detention into an arrest and that they had reasonable suspicion based on the anonymous 911 call to stop Edwards."

SEARCH AND SEIZURE:
Stop of Vehicle; Reasonable Suspicion

United States v. Burgess
CA7, No. 3-3571, 7/17/14

Late on a Sunday night, gunshots were fired in a northwest Chicago neighborhood. Numerous 911 callers reported from 5 to 9 shots. A dispatcher told officers to check the intersections at Wabansia and Karlov and at Armitage and Kildare, roughly a half-mile apart. Less than two minutes later, based on additional calls, the dispatcher added that shots were fired from a black car traveling south on Karlov near Wabansia. Officers driving south on Kostner Avenue, parallel to and a few streets west of Karlov, passed a black car headed north, and stopped the car.

Burgess was a passenger and the officers found a revolver on his seat, five of its six rounds spent. Just over four minutes had passed from the initial dispatch to the officers' report that Burgess was in custody. Having a 2001 conviction for second-degree murder, Burgess was indicted under 18 U.S.C. 922(g)(1) for possessing the gun as a convicted felon. He unsuccessfully moved to suppress on the theory that the officers lacked reasonable suspicion to justify stopping the car.

The court found that, based on what the officers observed regarding the light traffic at that hour and what they knew from the dispatches, and the seriousness of the reported crime, reasonable suspicion justified the stop. The Seventh Circuit affirmed. All told, the circumstances provided ample justification for stopping Burgess's car. "Reasonable, articulable, particularized suspicion is not a matter of certainty."

SEARCH AND SEIZURE:
Stop of Vehicle; Fog Line

United States v. Salas
CA10, N0. 13-7036, 7/1/14

Michael Salas was pulled over for erratic driving and consented to a search of his car, which yielded over 20 pounds of methamphetamine. He pleaded guilty to one count of possession with intent to distribute. On appeal, he challenged the district court's denial of his motion to suppress the drug evidence, arguing the court erred in finding that the police officer had reasonable suspicion to stop his car based on a violation of an Oklahoma fog line statute that requires driving "as nearly as practicable entirely within a single lane." Finding no reversible error, the Tenth Circuit affirmed the district court's decisions.