# CJI Legal Briefs

**Volume 18, Issue 3** **Spring 2014**

**A Publication of the Criminal Justice Institute–University of Arkansas System**

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UNIVERSITY OF ARKANSAS SYSTEM
CRIMINAL JUSTICE INSTITUTE

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## CIVIL LIABILITY: Search of College Dormitory Room

*Medlock v. Trustees of Indiana University*
CA 7, No. 13-1900, 12/30/13

Zachary Medlock, an Indiana University (IU) sophomore, lived by choice in a dormitory, where he was required to allow inspections of his room by graduate students employed by IU. Medlock was given a week's notice by email that an inspection was going to take place. In addition, on the day of the inspection, an announcement was made by intercom.

On that day, a student inspector entered Medlock's unoccupied room and saw a clear tube on the desk. Based on his training, he believed that it contained marijuana. Another inspector concurred and called University Police Officer King. They also noticed burned candles, an ashtray containing ashes, and a rolled-up blanket at the bottom of the door. Smoking of any kind is forbidden in the dormitory, as are "open flame materials," such as candles.

Medlock's closet was ajar. Officer King saw that it contained a six-foot-high marijuana plant. He obtained a warrant. A further search revealed marijuana paraphernalia, a grow light, and 89 grams of marijuana.

Medlock was charged with felony possession of more than 30 grams of marijuana. For unexplained reasons, charges were dropped. The university suspended Medlock for one year, and

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after one year he obtained readmission to IU. The district court rejected his suit under 42 U.S.C. 1983, in which he sought destruction of the record of his expulsion, and damages from the student inspectors and King.

The Seventh Circuit affirmed, noting the "in-your-face" flagrancy of violations of university rules and of criminal law. The case is "near frivolous," suing the student inspectors "offensive," and "most surprising is the exceptional lenity." The court opined that the relation of students to universities is "essentially that of customer to seller."

### CIVIL LIABILITY: Firefighter's Rule

*Norwicki v. Pigue*, No. CV-12-1048
2013 Ark. 499, 12/5/13

The issue in this case was the Firefighter's Rule, which provides that a professional firefighter may not recover damages from a private party for injuries he or she sustained while putting out a fire even if the private party's negligence caused the fire and injury.

Deborah Norwicki, individually and as executrix of the estate of Robert H. Norwicki, and on behalf of Robert Norwicki's wrongful-death beneficiaries, filed a wrongful-death and survival claim against Kenny Pigue and others. Robert Norwicki, a roadside-assistance worker, had stopped to assist Pigue, whose truck was stalled on the interstate, when Norwicki was hit by another truck driving on the interstate.

The circuit court granted summary judgment for Pigue, concluding that the Rule precludes a professional rescuer from recovering for injuries inherent in the types of dangers "generally associated with that particular rescue activity." The Supreme Court affirmed, holding (1) the risk Norwicki undertook was part of his employment as a roadside assistance worker, and therefore, the Rule barred claims against Pigue; and (2) a genuine issue of material fact did not exist as to whether Pigue's running out of fuel constituted willful or wanton misconduct.

### CIVIL LIABILITY: Juvenile Detention Center Suspicionless Strip Search Policy

*T.S. v. Doe*, CA6, No. 12-5724, 2/5/14

Officers responding to a report of underage drinking in a home found a group celebrating eighth grade graduation. Police asked the teens to step outside individually for breathalyzer testing. Seven tested positive for alcohol. Police arrested them and notified their parents.

In the morning, a juvenile worker arrived at the police station and, after speaking with a judge, indicated that the children were to be detained for a court appearance the next day. At the regional juvenile detention center, the minors underwent routine fingerprinting, mug shots, and metal-detection screening. During a hygiene inspection and health screening, they were required to disrobe completely for visual inspection to detect "injuries, physical abnormalities, scars and body markings, ectoparasites, and general physical condition."

A same-sex youth worker observed the juveniles for several minutes from a distance of one to two feet, recording findings for review by an R.N. The minors were required

to shower with delousing shampoo. They were released the following day. The charges were dropped.

In a suit under 42 U.S.C. 1983, the district court granted partial summary judgment in favor of the juveniles, based on a "clearly established right for both adults and juveniles to be free from strip searches absent individualized suspicion" that negated a qualified immunity defense. The Sixth Circuit reversed, stating that no clearly established principle of constitutional law forbids a juvenile detention center from implementing a generally applicable, suspicionless strip-search policy upon intake into the facility.

### CIVIL LIABILITY: Qualified Immunity

*Hooker v. Pikeville City Police Department*
CA6, No. 13-5341, 12/17/13

Charles Hocker drank a six-pack of beer and drove to the home of his sometimes-girlfriend. A protective order directed Hocker not to go to her house. The woman called 911, reporting that Hocker was "highly intoxicated" and "suicidal" and that he had just left her home in a red Honda. Officers saw a red Honda with its headlights off speed past their police cruisers. They gave chase, using lights and sirens. Hocker denies seeing or hearing the officers during the seven-mile pursuit.

After Hocker pulled off the road into a gravel driveway and stopped, the officers exited their cruisers with guns drawn and ordered Hocker to show his hands and turn off his car. Hocker put his vehicle in reverse, accelerated, and rammed a cruiser, moving it 30 feet. The officers opened fire on Hocker's vehicle and forcibly removed a severely wounded Hocker from his car.

After pleading guilty to wanton endangerment, fleeing or evading police, and driving under the influence, Hocker sued the officers under 42 U.S.C. 1983, claiming excessive force. The district court rejected the claims on grounds of qualified immunity. The Sixth Circuit affirmed.

### DEATH SENTENCE:
**Defense Expert; Fifth Amendment**

*Kansas v. Cheever*, No. 12-609, 12/11/13

On the morning of January 19, 2005, Scott Cheever shot and killed Matthew Samuels, a sheriff of Greenwood County, Kansas, and shot at other local law enforcement officers. In the hours before the shooting, Cheever and his friends had cooked and smoked methamphetamine at a home near Hilltop, Kansas. Samuels and multiple deputies drove there to arrest Cheever on an unrelated outstanding warrant.

When one of Cheever's friends warned him that officers were en route, Cheever rushed outside and tried to drive away, but his car had a flat tire. He returned inside and hid with a friend in an upstairs bedroom, holding a loaded .44 caliber revolver. Cheever then heard footsteps on the stairs leading up to the room, and he stepped out and shot Samuels, who was climbing the stairs. After briefly returning to the bedroom, Cheever walked back to the staircase and shot Samuels again. He also shot at a deputy and a detective, as well as members of a local SWAT (special weapons and tactics) team that had since arrived. Only Samuels was hit.

The State charged Cheever with capital murder. But shortly thereafter, in an unrelated case, the Kansas Supreme Court found the State's death penalty scheme unconstitutional. *State v. Marsh,* 278 Kan. 520, 102 P. 3d 445 (2004). Rather than continuing to prosecute Cheever without any chance of a death sentence, state prosecutors dismissed their charges and allowed federal authorities to prosecute Cheever under the Federal Death Penalty Act of 1994, 18 U. S. C. § 3591*et seq.*

In the federal case, Cheever filed notice that he "intend[ed] to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events on January 19, 2005, which negated his ability to form specific intent, *e.g.,* malice aforethought, premeditation and deliberation." Pursuant to Federal Rule of Criminal Procedure 12.2(b), the District Court ordered Cheever to submit to a psychiatric evaluation by Michael Welner, a forensic psychiatrist, to assess how methamphetamine use had affected him when he shot Samuels. Welner interviewed Cheever for roughly five and a half hours.

The federal case proceeded to trial. Seven days into jury selection, however, defense counsel became unable to continue; the court suspended the proceedings and later dismissed the case without prejudice. Meanwhile, this Court had reversed the Kansas Supreme Court and held that the Kansas death penalty statute was constitutional. *Kansas v. Marsh,* 548 U. S. 163, 167 (2006). A second federal prosecution never commenced.

Kansas then brought a second state prosecution. At the state trial, Cheever presented a voluntary-intoxication defense, arguing that his methamphetamine use had rendered him incapable of premeditation. In support of this argument, Cheever offered testimony from Roswell Lee Evans, a specialist in psychiatric pharmacy and dean of the Auburn University School of Pharmacy. Evans opined that Cheever's long-term methamphetamine use had damaged his brain. Evans also testified that on the morning of the shooting, Cheever was acutely intoxicated. According to Evans, Cheever's actions were "very much influenced by" his use of methamphetamine.

After the defense rested, the State sought to present rebuttal testimony from Welner, the expert who had examined Cheever by order of the federal court. Defense counsel objected, arguing that because Welner's opinions were based in part on an examination to which Cheever had not voluntarily agreed, his testimony would violate the Fifth Amendment proscription against compelling an accused to testify against himself. The State countered that the testimony was necessary to rebut Cheever's voluntary-intoxication defense.

The trial court agreed with the State. The court allowed Welner's testimony for the purpose of showing that Cheever shot Samuels "because of his antisocial personality, not because his brain was impaired by methamphetamine."

The jury found Cheever guilty of murder and attempted murder. At the penalty phase, it unanimously voted to impose a sentence of death, and the trial court accepted that verdict.

On appeal to the Kansas Supreme Court, Cheever argued that the State had violated his Fifth Amendment rights when it introduced, through Welner's testimony, statements that he had made during the federal court-ordered mental examination. The court agreed, relying primarily on *Estelle v. Smith*, 451 U. S. 454 (1981), in which the U.S. Supreme Court held that a court-ordered psychiatric examination violated the defendant's Fifth Amendment rights when the defendant neither initiated the examination nor put his mental capacity in dispute at trial. 295 Kan. 229, 243-244, 284 P. 3d 1007, 1019-1020 (2012) (per curiam). The court acknowledged, id., at 244-245, 284 P. 3d, at 1020, the U.S. Supreme Court's holding that a State may introduce the results of a court-ordered mental examination for the limited purpose of rebutting a mental-status defense. *Buchanan v. Kentucky*, 483 U. S. 402, 423-424 (1987). But it distinguished Buchanan on the basis that under Kansas law, voluntary intoxication is not a "mental disease or defect." 295 Kan., at 250, 284 P. 3d, at 1023. Consequently, it vacated Cheever's conviction and sentence, holding that Cheever had not waived his Fifth Amendment privilege and that his federal court-ordered examination should not have been used against him at the state-court trial.

A unanimous United States Supreme Court vacated and remanded finding, in part, as follows:

"If a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state, the prosecution may present psychiatric evidence in rebuttal. The rule is not limited to situations where the evaluation was requested jointly by the defense and the prosecution, nor does it matter whether state law referred to extreme emotional disturbance as an affirmative defense.

"The Court rejected an argument that Cheever did not waive his Fifth Amendment privilege because voluntary intoxication is not a mental disease or defect under state law. Mental status, rather than 'mental disease or defect' is the salient issue. When a criminal defendant chooses to testify, the Fifth Amendment does not allow him to refuse to answer related cross-examination questions. Excluding the testimony would have undermined the core truth-seeking function of trial."

## EVIDENCE: Dash Camera Videos

*Lard v. State*, CR3-173, 2014 Ark. 1, 1/9/14

On the evening of April 12, 2011, Officer Jonathan Schmidt of the Trumann Police Department was killed in the line of duty after initiating a traffic stop. Jerry Lard, an occupant in the vehicle, was convicted of capital murder, attempted capital murder, and possession of a controlled substance in a jury trial.

Lard was subsequently sentenced to death for the capital murder conviction. The Arkansas Supreme Court affirmed Lard's convictions and sentences, holding that the Green County Circuit Court did not commit reversible error by (1) allowing the State to present evidence of bad acts and bad character; (2) admitting two photographs of a large tattoo on Lard's back; (3) permitting repeated showings of dash-camera videos depicting the crimes as they took place; (4) failing to sequester victim-impact witnesses during the guilt phase of trial; (5) overruling Lard's objection to a

comment the prosecuting attorney made at the sentencing phase of trial; and (6) denying Lard's motion to prohibit the State from seeking or imposing the death penalty.

While there were several issues argued in this case, the showing of dash-camera video during the trial is of interest to law enforcement. The Arkansas Supreme Court found, in part, as follows:

"Lard argues that the circuit court erred by allowing the State to play the two videos recorded from the dash cameras mounted on both Officer Schmidt's and Sergeant Overstreet's cruisers. In addition, Lard claims error because the circuit court permitted the State to play different versions of the videos, which included a compilation or side-by-side view of both videos; the video from Officer Schmidt's vehicle in slow motion starting at the first shot without audio; the video from Sergeant Overstreet's vehicle in slow motion beginning at the first shot without audio; and a slow-motion compilation or side-by-side view from both vehicles starting at the first shot without audio. Lard contends that the videos were prejudicial, cumulative, and unnecessary because there were eyewitnesses who observed the events and because he did not dispute that he killed Officer Schmidt while Schmidt was acting in the line of duty. He maintains that the videos were offered for no other purpose than to arouse the passions of the jurors.

"As a general matter, all relevant evidence is admissible. Ark. R. Evid. 402. Relevant evidence is evidence that has a 'tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.' Ark. R. Evid. 401. Evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. 19 Evid. 403.

"Video evidence is admissible 'if it is relevant, helpful to the jury, and not prejudicial.' *Hickson v. State*, 312 Ark. 171, 176, 847 S.W.2d 691, 694 (1993). The same requirements for the admission of photographs apply to the admission of video evidence. *Williams v. State,* 374 Ark. 282, 287 S.W.3d 559 (2008). We have held that the admission of photographs is a matter left to the sound discretion of the circuit court, and we will not reverse absent an abuse of that discretion. *Breeden v. State,* 2013 Ark. 145, ___ S.W.3d ___. When photographs are helpful to explain testimony, they are ordinarily admissible. *Blanchard v. State,* 2009 Ark. 335, 321 S.W.3d 250. Moreover, the mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. *Sweet v. State*, 2011 Ark. 20, 370 S.W.3d 510. Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. *Decay v. State,* 2009 Ark.566, 352 S.W.3d 319.

"Yet, we have rejected a carte blanche approach to the admission of photographs. *Robertson v. State*, 2011 Ark. 196; *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003). We have cautioned against 'promoting a general

rule of admissibility which essentially allows automatic acceptance of all the photographs of the victim and crime scene the prosecution can offer.' *Berry v. State*, 290 Ark. 223, 228, 718 S.W.2d 447, 450 (1986). We require the trial court to consider whether such evidence, although relevant, creates a danger of unfair prejudice, and then to determine whether the danger of unfair prejudice substantially outweighs its probative value. *Camargo v. State,* 327 Ark. 631, 940 S.W.2d 464 (1997).

"We find no abuse of discretion in the circuit court's decision that the probative value of the various video recordings substantially outweighed the danger of unfair prejudice. Typically, the commission of a crime is not video recorded, as was the case here. Although there were witnesses to the events, the recordings represent an objective portrayal of what occurred during the traffic stop and served both to corroborate and to explain the eyewitnesses' testimony. From our review of the videos, the footage of the actual shootings lasts less than fifty seconds. Because the incident unfolded so quickly, showing the events as they transpired from different perspectives and at slowed speeds allowed the actions of all involved to be clarified and placed in context. Although Lard did not deny committing the offenses, this court has repeatedly held that a defendant cannot prevent the admission of evidence simply by conceding to the facts of the crime. *Holloway v. State,* 363 Ark. 254, 213 S.W.3d 633 (2005); *Garcia v. State,* 363 Ark. 319, 214 S.W.3d 260 (2005); *Smart v. State,* 352 Ark. 522, 104 S.W.3d 386 (2003). More specifically, we have held that photographic evidence is not inadmissible on grounds that it is cumulative or unnecessary due to admitted or proven facts. *Watson v. State,* 308 Ark. 643, 826 S.W.2d 281 (1992); *Cotton v. State*, 276 Ark. 282, 634 S.W.2d 127 (1982). Equally as clear, the State is entitled to prove its case as conclusively as it can. *Davis v. State,* 368 Ark. 401, 246 S.W.3d 862 (2007); *Jones v. State,* 349 Ark. 331, 78 S.W.3d 104 (2002). Here, the circuit court exercised its discretion to disallow a portion of the recordings that it deemed overly inflammatory. Undeniably, there is a degree of prejudice attached to showing the videos, but we cannot conclude that the prejudice was unfair."

## FORFEITURE: Default Judgment

*Green v. State*, No. CV-12-87
2014 Ark. 60, 2/13/14

The State filed a forfeiture complaint alleging that a drug task force had seized property—$1,427 in U.S. currency—from Ronald Green in connection with felony violations of the Uniform Controlled Substances Act and ordered the currency forfeited to the prosecuting attorney's office. The circuit court granted the State's motion for default judgment based on Green's failure to respond to the complaint and order.

More than one year later, Green filed a motion for return of the seized property on the basis that the currency was not being used for evidentiary purposes because the charges filed against him had been dismissed. The circuit court denied the motion, finding it without merit and untimely and that Green had stated no valid reason for setting aside the default judgment. The Supreme Court affirmed, holding that Green failed to show any reason for setting aside the default judgment.

## GPS TRACKING: Good Faith Exception

*United States v. Aguiar*, CA2, No. 5266-cr(L)

Acting without a warrant, an agent from the Drug Enforcement Agency ("DEA") placed a global positioning system device ("GPS") on a Subaru Impreza driven by Stephen Aguiar. The data gathered by the GPS aided law enforcement in identifying avenues of investigation, supported applications for wiretap warrants, and led investigators to other evidence collected and introduced at trial. Aguiar and appellants Corey Whitcomb and William Murray sought to suppress the evidence gathered with the aid of GPS data, arguing that the placement and tracking violated the Fourth Amendment.

The United States District Court for the District of Vermont denied the motion. Aguiar, Whitcomb, and Murray were convicted on multiple counts flowing from a conspiracy to possess and distribute cocaine and heroin.

Subsequently, the Supreme Court handed down *United States v. Jones,* which held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search for Fourth Amendment purposes. 132 S. Ct. 945, 949 (2012). *Jones* left open the question of whether the warrantless use of GPS devices would be "reasonable—and thus lawful—under the Fourth Amendment where officers have reasonable suspicion, and indeed probable cause" to conduct such a search. *Id*. at 954

Upon appeal, the Second Circuit Court of Appeals stated, "As we find the government's actions in this case fall within the good-faith exception to the exclusionary rule set forth in *Davis v. United States,* 131 S. Ct. 2419 (2011), we decline to reach the issue of whether the search was unconstitutional."

## GPS TRACKING:
### Standing; Expectation of Privacy

*Wilson v. State,* No. CR-13-488
2014 Ark. 8, 1/16/14

In this case, the Arkansas Supreme Court considered whether Raymond Wilson has standing to challenge the search of a rented vehicle and the seizure of cocaine. Wilson asserts that he has standing to contest the placement of the GPS tracking device on the car because Billie Williams gave him permission to use the vehicle. While conceding that "the contract prohibited other drivers than Ms. Williams," he argues that the contract between Williams and Enterprise did not control his constitutionally granted rights under the Fourth Amendment.

Upon review, the Arkansas Supreme Court found, in part, as follows:

"In *United States v. Jones*, ___ U.S. ___, 132 S.Ct. 945 (2012) the United States Supreme Court held that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search. *Jones*, however, did not turn on the issue of standing. In *Jones*, even though the vehicle was registered in Jones's wife's name, the government did not challenge Jones's assertion that he was the exclusive driver.

"Before a defendant can challenge a search on Fourth Amendment grounds, he must have standing, and it's the defendant's burden of proving not only that the search of the car was illegal, but also that he had a legitimate expectation of privacy in the vehicle. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). The test for standing to assert one's Fourth Amendment rights requires that the driver at least show he gained possession from the owner or someone with authority to grant possession. *State v. Barter,* 310 Ark. 94, 833 S.W.2d 372 (1992).

"In *Barter,* the defendant was stopped while driving a rental car contracted to another person. When the defendant failed to show that he lawfully possessed the car, this court held that he failed to establish a legitimate expectation of privacy in the car searched by the police. Similarly, in *Fernandez v. State*, 303 Ark. 230, 795 S.W.2d 52 (1990), we held that the defendant failed to show that he had a legitimate expectation of privacy in a car when he could not show that either he or his passenger owned or lawfully possessed the car in which the search was conducted. In *Littlepage,* the defendant failed to establish that he had a legitimate expectation of privacy in the search automobile and lacked standing, as he was driving a car that was rented to a third party who was not present at the time of the arrest and who was the only authorized driver in the rental agreement.

"In this case, the renter of record, Williams, testified that she had rented the car for Wilson, and while the original agreement had expired, Enterprise officials testified that it 'must have been renewed.' At the time of the traffic stop, however, Wilson had in his possession a rental agreement that showed Williams as the only authorized driver of the rental vehicle. Williams's grant of permission to Wilson to use the rental car was not effective because the contract did not allow for other drivers to use the vehicle. Thus, Wilson had no legitimate expectation of privacy in the vehicle and no standing to challenge the search of the rental car. Accordingly, we do not consider Wilson's argument that planting the GPS device was an unreasonable search under *Jones*."

### INFORMANTS: Past Criminal History; Outrageous Government Conduct

*United States v. Hullaby*
CA9, No. 11-10170, 12/4/13

In this case, Brandon Hullaby appealed his conviction for conspiracy to possess with intent to distribute more than five kilograms of cocaine and possession of a firearm in furtherance of the conspiracy. Hullaby argued that the government's conduct was outrageous, insofar as the government collaborated with an informant with a criminal history.

Hullaby's outrageous conduct claim hinges on the character of a government informant named Pablo Cortina. Several years before the government investigation that led to Hullaby's arrest, Cortina belonged to a group of criminals who perpetrated a series of home invasions. The group dressed in law enforcement uniforms when raiding homes, and used a stolen law enforcement battering ram to break down locked front doors. Carrying AK-47s, shotguns, and other weapons, they would subdue and bind any occupants present, and then abscond with their possessions.

Cortina was named in a 115-count indictment, and he knew that he faced the possibility of spending the rest of his life in prison. In hope of reducing his sentence, Cortina informed on his associates. Due to his cooperation, he was allowed to plead guilty to only one felony, and was sentenced to four years of probation and released from jail.

Less than a month after his release, Cortina began to steal merchandise from his employer. A supervisor discovered Cortina's theft and called the police, at which point Cortina fled. Fearful that his probation violation would send him to prison for an extended period, and that he could face his old associates there, he contacted the detective with whom he had worked previously and offered to disclose more information about new home invasions in the area.

After meeting with him, and over the objection of Cortina's probation officer, agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) registered Cortina as a confidential informant. The ATF then used Cortina in the "reverse sting" operation in Phoenix, Arizona that caught Hullaby. In this operation, undercover ATF agents, working with Cortina, met with Hullaby and others to plan and carry out a robbery of a fictional cocaine stash house. Hullaby's part in the plan was to enter the stash house, along with three others, and subdue the guards that the ATF agents said would be present.

On the appointed day, the ATF agents, Cortina, and the other conspirators met in a parking lot from which they were supposed to proceed to the stash house. As the participants prepared to leave, one of the agents gave a signal and ATF personnel arrested the conspirators.

Upon review, the Court of Appeals for the Ninth Circuit explained that neither the fact that a government informant had previously committed crimes, nor that the informant was trying to reduce his future criminal liability, satisfies the defendant's burden of showing that the government's use of the informant was so outrageous as to violate the universal sense of justice. The Court found, in part, as follows:

"For a due process dismissal, the government's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice. This is an extremely high standard. Indeed, as we have recently observed, there are only two reported decisions in which federal appellate courts have reversed convictions under this doctrine. *United States v. Black*, — F.3d —, 2013 WL 5734381, at 5 (9th Cir. Oct. 23, 2013) (citing *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) and *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971)). Here, Hullaby contends that the government's conduct was outrageous, insofar as the government collaborated with a repeat violent home invader whose motivation in spurring the government to create this fictional offense was to continue to avoid accountability for his own heinous crimes.

"In *United States v. Simpson*, 813 F.2d 1462 (9th Cir. 1987), we considered a similar argument. In that case, a confidential informant, while working to help the police, was also engaging in prostitution and using heroin. The confidential informant had also been arrested on 'numerous' previous occasions. The

district court had dismissed the indictment, in part because the government knew about these activities and arrests and nonetheless continued to use the informant.

"We held that this state of affairs did not raise due process concerns, because it is unrealistic to expect law enforcement officers to ferret out criminals without the help of unsavory characters. Thus, we concluded that the mere fact that a confidential informant continued to use heroin and engage in prostitution during an investigation" did not oblige the government to stop using her as an informant.

"Likewise, here, the fact that Cortina had engaged in past crimes does not raise due process concerns about the government's use of him as a confidential informant in its investigation. Nor does the nature of Cortina's past crimes render the government's conduct 'outrageous.' Indeed, it was precisely because of his past experience as a criminal that he was useful to the ATF in its efforts to minimize the risks inherent in apprehending groups who were engaging in home invasions. We do not require the government to enlist a person with no criminal experience to help with the apprehension of a group of hardened criminals.

"Similarly, it is not shocking that Cortina was cooperating out of self-interest. (It is 'common practice for the government to reduce or drop charges against persons who cooperate with law enforcement officials in the prosecution of others.') We do not require the government to recruit solely informants who will work in a spirit of altruism for the good of mankind.

"It may be surprising that Cortina was given only four years of probation by the state court after being charged with very serious crimes. However, we are not reviewing his state court sentence for 'outrageousness' here. Rather, we consider whether the government's use of Cortina in Hullaby's case was so outrageous as to 'violate the universal sense of justice.' *Smith*, 924 F.2d at 897. Neither the fact that Cortina had previously committed crimes, nor that he was trying to reduce his future criminal liability, satisfies that heavy burden.

"In sum, we reiterate our conclusion in *Simpson* that the due process clause does not give the federal judiciary a chancellor's foot veto over law enforcement practices of which it does not approve. Rather, our Constitution leaves it to the political branches of government to decide whether to regulate law enforcement conduct which may offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically, but which is not antithetical to fundamental notions of due process."

## JAILS AND PRISONS:

### Gender Identity Disorder

*Kosilek v. Spencer*, CA1, No. 12-2194, 1/17/14

Sixty-four-year-old Michelle Kosilek was born anatomically male but suffered from severe gender identity disorder. In 1992, Kosilek was convicted of murder and sentenced to life imprisonment.

In 2000, Kosilek filed a complaint against the Massachusetts Department of Correction (DOC), alleging that the DOC was denying her adequate medical care by not providing her with sex reassignment surgery. The

district court subsequently issued an order requiring the Commissioner of the DOC to provide Kosilek with sex reassignment surgery, finding that the DOC's failure to provide the surgery violated Kosilek's Eighth Amendment rights.

The DOC appealed. The First Circuit Court of Appeals affirmed, holding that the district court did not err in finding that Kosilek had a serious medical need for sex reassignment surgery and that the DOC refused to meet that need for pretextual reasons unsupported by legitimate penological considerations in violation of Kosilek's Eighth Amendment rights.

### MIRANDA: Incapacitation

*United States v. Taylor*
CA2, No. 11-2201, 12/4/13

On Christmas Eve 2008, Samuel Vasquez drove Curtis Taylor and Antonio Rosario from the Bronx to midtown Manhattan to rob a pharmacy. With them was Luana Miller, a drug addict from Mississippi with an extensive criminal history.

En route, Miller called the pharmacy and asked them to stay open for a few minutes past 5:00 PM, so that she could pick up a prescription. At the pharmacy, Miller went in first, posing as a customer. As she spoke with the pharmacist, Rosario burst in the door brandishing a gun, screaming that it was a robbery, and demanding OxyContin: a powerful opioid for pain that is often resold illegally.

The two took more than $12,000 of controlled substances, as well as cash and subway cards, while Taylor stood lookout at the front door and Vasquez waited in the getaway car. The crew then drove back to the Bronx. Cell phone records for Taylor, Rosario, and Vasquez show that they were in the Bronx that afternoon, traveled to midtown Manhattan just before 5:00 PM, stayed near the pharmacy until just after the robbery, and then returned to the Bronx.

While executing a warrant at the home of Miller's boyfriend in January 2009, police arrested her on outstanding warrants. Fearing extradition to Mississippi, she offered to cooperate with the government's investigation of the pharmacy robbery, and led police to Taylor, Rosario, and Vasquez.

Around 6:00 AM on April 9, 2009, over 25 NYPD and FBI agents came to Taylor's apartment to effect his arrest. Taylor claims that, amid the ensuing chaos, he attempted suicide by taking a bottle-full of Xanax pills. Taylor's daughter testified that her mother (who died before trial) reported the overdose to an officer who dismissed her and told her to "shut up." Still, the record is less than clear as to whether Taylor actually took the pills, and as to whether officers were told of his overdose.

Around 9:30 that morning, Taylor was interviewed at FBI headquarters in downtown Manhattan by New York City Police Department Detective Ralph Burch, a member of an FBI/New York health care fraud task force. Taylor signed a form waiving his *Miranda* rights, and went on to give a lengthy statement confessing his involvement in the robbery.

Taylor argues that he was falling asleep and was at times unconscious during the interview. Detective Burch said that it seemed like Taylor's body was "somewhat shutting down" during the two- to three-hour interview. On the other hand, Burch testified that, though Taylor nodded off at times, he was "coherent" and "fluid" when he was awake and speaking:

> *Mr. Taylor at times was nodding off during the interview. When we asked Mr. Taylor to listen up, that we were asking him questions, he would respond that he knew what he was being asked and he would repeat the questions back to us to show that he was understanding what was being asked of him and knew what was going on.*

Curtis Taylor appeals his convictions, arguing that he was incapacitated when he incriminated himself post-arrest and the admission of his statements violated his rights under *Miranda v. Arizona.* The court concluded that Taylor's post-arrest statements were not voluntary and admitting the statements into evidence was not harmless. The court vacated and remanded for a new trial.

Upon appeal, the Court of Appeals for the Second Circuit found, in part, as follows:

"Even assuming that Taylor's initial waiver of his *Miranda* rights was knowing and voluntary, Taylor was largely stupefied when he made his post-arrest statements, as confirmed by the testimony of the law enforcement agents and the pretrial services officer who interviewed him, and by the evaluations of staff psychologists at the Metropolitan Correctional Center. The agents and officer testified that Taylor fell asleep repeatedly during questioning and was only intermittently alert. Although their testimony also suggests—and the district court found—that Taylor's incriminating statements were made in relatively lucid intervals, Taylor was impaired throughout, and his interrogators took undue advantage of that impairment by continuing to question him. We therefore conclude that Taylor's post-arrest statements were not voluntary."

## MIRANDA: Juveniles; Totality of the Circumstances

*Gray v. Norman,* CA8, No. 12-3471, 1/10/14

Around noon on October 27, 1999, Kenneth Gray, then sixteen, walked to his neighbor's house. Finding no one home, he used a brick to break a window and entered the house. When the neighbor returned home unexpectedly, Gray hid behind a couch. Upon discovering the broken window, the neighbor called both his landlord and a friend. As the neighbor prepared to call the sheriff's office, Gray emerged from hiding, pointed a handgun at the neighbor, and asked him not to make the call. When the neighbor proceeded to call the sheriff, Gray shot and killed him.

The neighbor's friends discovered his body later that evening and called the police. As part of their investigation, the officers contacted people in the neighborhood, including Gray. Around 10 p.m., officers talked with Gray for approximately thirty minutes in their patrol car, which was parked in front of the house where Gray lived with his mother and stepfather. Gray said that he had been around the neighbor's house

between 10 a.m. and noon that day, but that he had neither seen nor talked with the neighbor. Gray ended the interview, telling officers, "I think this interview is over."

At 11:45 that evening, officers returned to Gray's house and asked Gray and his mother to accompany them to the sheriff's office to discuss the homicide. Gray and his mother agreed and were transported to the office in separate vehicles. Upon arriving at the sheriff's office, officers informed Gray that he was not under arrest and that he could leave at any time. Gray was given a "juvenile" version of the warnings prescribed by *Miranda v. Arizona,* 384 U.S. 436 (1966). The precise warning does not appear in the record, but Gray does not dispute that he was advised of the right to have a parent, guardian, or custodian present during questioning. Officers asked whether Gray wanted his mother present; Gray responded that he did not. Gray signed a *Miranda* form, and officers questioned him for approximately 50 minutes, at which point Gray requested his mother. Questioning ceased until his mother arrived, but then resumed for an hour and a half. During this period, Gray refused to submit to a gunshot residue test. Questioning ended at 2:30 a.m. Officers returned Gray and his mother to their home.

At 11 o'clock the next morning, officers arrived at Gray's home with search warrants that authorized seizure of Gray's hair, blood, and fingernail scrapings. Officers took Gray to a hospital for the blood sample. Officers then took Gray to the highway-patrol-zone office for questioning, arriving shortly after 2 p.m. Gray was again given a juvenile *Miranda* warning. Questioning continued for roughly two hours.

Around 5:15 p.m., another officer began to question Gray. Shortly thereafter, Gray confessed to breaking into his neighbor's house armed with a handgun, and to shooting the neighbor. Gray then agreed to have his confession videotaped. Officers again gave Gray the juvenile *Miranda* warning. Gray acknowledged orally that he understood his rights and wanted to give a statement. He also signed a waiver form. He then repeated his confession.

On February 14, 2000, a Missouri juvenile court certified Gray to stand trial as an adult. The court denied Gray's motion to remand his case to the juvenile court. Gray then moved to suppress his confession. After discovery and a hearing, the trial court denied Gray's motion to suppress. Gray was convicted as an adult in the State of Missouri of second-degree murder, first-degree burglary, and armed criminal action. On appeal, Gray challenges the admissibility of his confession.

Upon review, the Court of Appeals for the Eighth Circuit found, in part, as follows: "A 'totality-of-the-circumstances approach' applies 'to determine whether there has been a waiver even where interrogation of juveniles is involved.' *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). This approach includes evaluation of the juvenile's age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

"Gray acknowledged in state court that the State made 'a *prima facie* case of voluntariness by showing that at all stages of interrogation [Gray] was advised of his constitutional rights

and no physical force, threats, or coercive tactics were used to obtain the confession.' He argues, however, that the state courts unreasonably applied clearly established law by determining that his confession was voluntary. He contends that proper consideration of his youth, the influence of his medication, his inability to speak with his mother during interrogation, and the presence of fear and duress lead inexorably to the conclusion that his confession was the product of an overborne will.

"The Missouri court applied *Fare*'s totality-of-the-circumstances test and considered each of the circumstances cited by Gray. The court acknowledged Gray's youth, but properly weighed minority along with other factors, such as Gray's familiarity with the criminal justice system and his invocation of his rights, refusal to consent to the gunpowder residue test, and his assertion of control over the interview process. The court addressed Gray's claim that his medication impaired his ability to act voluntarily, but found that Gray presented no evidence from any source, including his own testimony, that his medications had side effects or that taking them impaired his ability to make an intelligent, understanding, and voluntary waiver. The court concluded, rather, that the evidence supports a finding that Gray's medicines aided him in making an intelligent understanding, and voluntary waiver of his constitutional rights, rather than impairing his ability to do so. The Missouri court determined that Gray's claim about his inability to speak with his mother 'rings hollow,' because Gray successfully requested his mother's presence during the first interrogation and enjoyed ample time to confer with her between the interrogations.

"The court rejected Gray's claim of actual coercion because Gray explicitly acknowledged that no physical forces, threats, or coercive tactics were used to obtain his confession, and the court found no basis in the record for concluding that the interrogation length, or the number of officers involved, or the procedure followed, were significant circumstances that support Gray's claim of involuntariness.

"The Missouri court applied the correct legal standard and reached a reasonable conclusion under the circumstances. That the weighing of factors was debatable, or that a contrary conclusion might also have been reasonable, is not a sufficient basis to set aside the judgment of the state courts."

## MIRANDA: Public Safety Exception

*Holt v. State*, CR13-258
2014 Ark. App.74, 1/29/14

On December 31, 2009, State Trooper Heath Nelson testified that he became involved in a situation involving Timothy Lee Holt. According to Trooper Nelson, he was patrolling Shackleford Road around Mara Lynn Road in Little Rock when he heard on the police scanner that Little Rock had a home invasion, the suspect was possibly armed, and the suspect was in the same area that Trooper Nelson was patrolling. He said that he traveled north to the area around Terry Elementary School and saw a suspect matching the description that had been given on the scanner—white male, dark clothing, on foot. Trooper Nelson said it was a clear bright day; when the suspect saw him, the suspect tried to lie down; he put his car in park and exited his vehicle; the suspect

began to flee; he pursued the suspect on foot; no other officers were on the scene yet; he saw the suspect reach for his waistline and figured he was trying to get rid of something; the suspect tried to jump a fence but was not able to do so; and he apprehended the suspect, put handcuffs on him, and did a quick pat-down.

Trooper Nelson explained that he did not find anything during the pat-down and that he was concerned because the dispatcher had said that the suspect had a weapon. He testified they were close to an elementary school, which his own son attended, and he felt he had to find that gun. He said that he waited until the Little Rock police officers arrived, which was about five minutes from the time he first made contact with the suspect, caught up to him, and put the handcuffs on him.

After waiting for more assistance, Trooper Nelson then led the suspect out of the woods, acknowledging that the suspect was in custody at that time. Because he did not work for the Little Rock Police Department, Trooper Nelson stated he did not know the names of the Little Rock officers who came to the scene. With regard to what was said to Holt about the gun, Trooper Nelson reported, "I believe all we said was, 'Hey, we know you had a gun. We're by a school. You know, we wouldn't want any kids to get it. Where's the gun?' He acknowledged that Holt's *Miranda* rights were not read to Holt before Holt showed them where the gun was. Trooper Nelson confirmed that he never heard Holt state that he wanted an attorney.

Holt contends that because he was in custody but was not *Mirandized* before he led the officers to the gun, he was not adequately informed of his Fifth and Sixth Amendment rights under the Constitution, *i.e.*, his rights against self-incrimination and his right to counsel. He acknowledges the "public-safety" exception to the *Miranda* rule, but contends that it was not properly applied to this situation.

The Arkansas Court of Appeals disagreed, finding in part as follows:

"The United States Supreme Court in *New York v. Quarles*, 467 U.S. 649 (1984) held that there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence. The Court observed as follows:

> *The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.*

"The Court held as follows:

> *We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers in the untenable position of having to consider, often in a matter of*

*seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them."*

The Arkansas Court of Appeals stated they found no appreciable differences between the circumstances confronting Trooper Nelson in the instant case and those presenting the officers in Quarles. "Therefore, we find no error in the trial court's application of the public-safety exception in this case and its denial of Holt's motion to suppress."

### MIRANDA: Unambiguous and Unequivocal Invocation of the Right to Remain Silent

*Fritts v. State,* No. CR-12-935
2013 Ark. 505, 12/12/13

On January 3, 2012, a person called the Fort Smith Police Department to report seeing a dead body in an alley near South 17th and Q streets. Police responded and discovered the body of Jamie Lee Czeck, who had been shot multiple times. Police also discovered the victim's cell phone and several 9 mm shell casings in the immediate area of the body.

During the course of the investigation, police questioned Brandon Clark Fritts as a possible witness because he was one of the last people seen with Czeck. This interview occurred on January 5, 2012, and Fritts denied knowing anything about the death of the victim and stated that the last time he saw him, Czeck was alive and well. Later that same day, police again questioned Fritts after cell-phone records obtained by authorities contradicted statements made by Fritts.

As the investigation continued, authorities developed Fritts as a suspect. At that time, Fritts and his girlfriend, Charitie Clawson, were being held in the Sequoyah County jail in Oklahoma on drug charges. Officers from the Fort Smith Police Department traveled to Oklahoma to interview Clawson and Fritts. Clawson led police to the murder weapon and made statements implicating Fritts. During a subsequent interview with Fort Smith detectives, Fritts admitted that he shot Czeck. According to the affidavit for warrant of arrest completed by Fort Smith Police Detective Jeff Carter, Fritts stated that Czeck "would not shut up and would not stay where he was supposed to stay." Fritts admitted that he shot Czeck one time in the face, several times in the chest, and one last time in the back of the head "for good measure."

Fort Smith police subsequently issued a warrant for Fritts's arrest, and Fritts was returned to Arkansas. During his transport from Sequoyah County to Fort Smith, Fritts began talking to the officers about the murder, insisting that it was just a personal matter. During a subsequent formal interview at the Fort Smith Police Department, Fritts, after being advised of his *Miranda* rights, again confessed to the murder.

Fritts sole argument on appeal is that the circuit court erred in denying his motion to suppress a statement he made to officers on January 30, 2012, while he was being held

in the Sequoyah County jail in Oklahoma. According to Fritts, Detective Carter came to the jail to question him, and Fritts' response that he had already told him everything he knew was a clear indication that he had nothing further to say. Thus, when Detective Carter then showed him the murder weapon, prompting Fritts to say he would talk to police if he were allowed to first smoke a cigarette, this was the functional equivalent of Carter further questioning him after Fritts invoked his right to remain silent. The State counters that the circuit court properly denied the motion to suppress.

Upon review, the Court found, in part, as follows:

"This court reviews a circuit court's decision denying a defendant's motion to suppress a confession by making an independent determination based on the totality of the circumstances, and the ruling will be reversed only if it is clearly against the preponderance of the evidence. *Williamson v. State,* 2013 Ark. 347, ___ S.W.3d ___. Conflicts in testimony at a suppression hearing about the circumstances surrounding a defendant's in-custody statement are for the trial judge to resolve. A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily. *Bryant v. State*, 2010 Ark. 7, 377 S.W.3d 152. A person subject to a custodial interrogation must first be informed of his right to remain silent and right to counsel pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966). A defendant may cut off questioning at any time by unequivocally invoking his right to remain silent. *Michigan v. Mosley,* 423 U.S. 96 (1975); *see also Whitaker v. State,* 348 Ark. 90, 71 S.W.3d 567 (2002). Our criminal rules similarly provide that a police officer shall not question an arrested person if that person indicates 'in any manner' that he does not wish to be questioned. Ark. R. Crim. P. 4.5 (2013). The Supreme Court further explained that "interrogation" not only includes express questioning, but also its functional equivalent. *Rhode Island v. Innis,* 446 U.S. 291 (1980). According to the Court, the functional equivalent of questioning is any statement or conduct which the police should know is "reasonably likely to elicit an incriminating response from the suspect."

"When the right to remain silent is invoked, it must be 'scrupulously honored.' *Miranda,* 384 U.S. at 479; *Whitaker,* 348 Ark. at 95, 71 S.W.3d at 570; see also *Robinson v. State,* 373 Ark. 305, 309, 283 S.W.3d 558, 561 (2008). The meaning of 'scrupulously honored' was discussed in *James v. Arizona,* 469 U.S. 990, 992–93 (1984):

> *To ensure that officials scrupulously honor this right, we have established in* ***Edwards v. Arizona,*** *451 U.S. 477 (1981), and* ***Oregon v. Bradshaw,*** *462 U.S. 1039 (1983), the stringent rule that an accused who has invoked his Fifth Amendment right to assistance of counsel cannot be subject to official custodial interrogation unless and until the accused (1) 'initiates' further discussions relating to the investigation, and (2) makes a knowing and intelligent waiver of the right to counsel under the standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and its progeny. See Solem v. Stumes, 465 U.S. 638 (1984).*

"Since the decision in *Miranda,* the United States Supreme Court has held that when invoking a *Miranda* right, the accused must

be unambiguous and unequivocal. *Davis v. United States,* 512 U.S. 452 (1994). With regard to a suspect invoking the right to counsel, the Court has said:

> *He must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, the law does not require that the officers stop questioning the suspect.*

"This court has held that there is no distinction between the right to counsel and the right to remain silent with respect to the manner in which they are effected. *Standridge v. State,* 329 Ark. 473, 951 S.W.2d 299 (1997); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995). Both must be unambiguously and unequivocally invoked. *Whitaker*, 348 Ark. 90, 71 S.W.3d 567. This court has held, however, that the right to remain silent must be made unequivocally, but answering questions following a statement that attempts to invoke the right to remain silent may waive that right by implication. *Bowen,* 322 Ark. 483, 911 S.W.2d 555. In other words, an accused may change his mind and decide to talk to law enforcement officials. *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995) (citing *Michigan v. Jackson*, 475 U.S. 625 (1986)).

"More recently, the Supreme Court has addressed this issue of whether a person's silence constitutes an unequivocal invocation of his *Miranda* rights, and explained as follows:

> *The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel at issue in Davis. Both protect the privilege against compulsory self-incrimination, by requiring an interrogation to cease when either right is invoked.*

"There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong.

"Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights 'might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation.' But 'as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.' *Berghuis v. Thompkins*, 560 U.S. 370 (2010). Thus, the Court concluded that where the suspect did not say that he wanted to remain silent or that he did not want to talk with the police, there

was no unequivocal invocation of his *Miranda* right. Thus, both our court and the United States Supreme Court have made clear that an invocation of a right to remain silent must be unequivocal and unambiguous.

"With this in mind, we turn to Fritts' argument that his statement was an unequivocal invocation of his right to remain silent and that his rights were violated when Detective Carter subsequently engaged in the functional equivalent of questioning him by showing him the murder weapon. The record reflects that Detective Carter visited Fritts in the Sequoyah County jail after officers retrieved the gun, which Charitie Clawson stated was the murder weapon. Detective Carter testified at the suppression hearing that he informed Fritts that the police knew the truth about the murder of Czeck and wanted to get his side of the story. His testimony further revealed that Fritts responded that he had told Detective Carter all he knew on January the 5th. It is this statement that Fritts claims was his unequivocal invocation of his right to remain silent. We simply cannot agree.

"This court has held that a suspect's series of 'no's' followed by an '[h]uh-uh' and a subsequent statement that 'I don't want to talk about it,' in response to attempted police questioning evidenced her unequivocal invocation of the right to remain silent. *Whitaker*, 348 Ark. at 96–97, 71 S.W.3d at 571. In so ruling, this court explained that the word 'no' certainly demonstrated a desire not to speak and was in no way an equivocal answer. This decision may be contrasted with the court's decision in *Standridge*, 329 Ark. at 478, 951 S.W.2d at 301, where this court held that a suspect's statement that 'I ain't ready to talk' was not an unequivocal invocation of his right to remain silent when the defendant continued to talk and answer questions. Likewise, this court held in *Bowen*, 322 Ark. at 504, 911 S.W.2d at 564, that the statement that the accused wanted to 'think about' whether to waive his rights and make a statement was not sufficiently definite. This court also rejected the notion that a suspect's statement that 'Okay, then we're through with this interview then' was an unequivocal invocation of the right to remain silent. *Bryant*, 2010 Ark. 7, at 15, 377 S.W.3d at 161. Finally, in *Sykes v. State*, 2009 Ark. 522, 357 S.W.3d 882, this court held that comments such as, 'I don't feel like that I need to be discussing this at all,' 'I think it's really plumb ignorant to answer any questions right now,' and 'the best thing I can do is, for myself, is to shut the hell up and not talk about this without first talking to a lawyer' did not unambiguously and unequivocally indicate a right to remain silent or a right to counsel. In so ruling, this court noted as follows:

> *In reviewing the entire conversation, it is clear that appellant was conscious of his Miranda rights and that he continued to talk to the officer and answer his questions even though he knew it was against his best interest. In fact, after each statement regarding counsel or whether appellant should be discussing the details of what happened, appellant continued the conversation. A reasonable officer in the situation would not have understood that appellant was clearly and unequivocally invoking his right to remain silent or his right to an attorney.*

"Here, like the aforementioned cases, we simply cannot say that Fritts' statement

that he had already told officers all that he knew was an unambiguous and unequivocal invocation of his right to remain silent. A statement that you had already told officers everything you know in no way indicated an unwillingness to answer further questions. At best, it put the officers on notice that Fritts had no new information to share with them.

"Accordingly, we cannot say that the circuit court erred in denying Fritts' motion to suppress. Having so determined, it is unnecessary for us to consider Fritts' contention that Detective Carter's showing him the murder weapon was the functional equivalent of continued questioning."

### SEARCH AND SEIZURE: Affidavits; Anticipatory Search Warrants; Detention of Package

*United States v. Golson*
CA3, No. 13-1416, 2/11/14

A postal inspector intercepted a parcel on suspicion of narcotics trafficking because the return address was fictitious. The inspector knew that drug traffickers often bring narcotics from Mexico into Arizona and mail them to the east coast. A trained narcotics canine detected the presence of narcotics in the parcel. Agents gathered information about the recipient address and obtained a warrant. The parcel contained 20 pounds of marijuana. The agents held the parcel for four days and planned a controlled delivery of a reconstructed parcel, containing a GPS locator.

Corey Golson identified himself by the false name given on the parcel's address and accepted the package. After receiving a signal that the package had been opened, agents conducted a search of the house pursuant to an anticipatory search warrant and found several guns and ammunition, 704 packets of heroin packaged for distribution, 40 grams of raw heroin, a cutting agent, packaging material consistent with drug distribution, a heat sealer, heat sealable bags, a scale, rubber examination gloves, and masks.

The district court rejected a motion to suppress. The Third Circuit affirmed, finding that there was probable cause for the anticipatory warrant and that the delay was reasonable.

### SEARCH AND SEIZURE: Affidavits; Informant Information

*United States v. Sutton*
CA7, No. 13-1298, 2/10/14

This investigation began when Special Agent Kristopher Lombardi of the Kankakee Metropolitan Enforcement Group (KAMEG) received a tip from a confidential informant (CI) that he had seen an individual known as "Cap" in possession of an ounce of cocaine and provided the address of an apartment where he had seen "Cap." The CI was familiar with cocaine and its distribution because he had previously been involved in the sale of narcotics. In an effort to obtain leniency on pending drug charges, the CI was working with KAMEG. In fact, within a six month period prior to this search, he had provided information that had led to another cocaine seizure and arrest.

Acting on the CI's information, Lombardi searched the name "Cap" in a law enforcement database containing aliases

of arrestees and suspects. Todd Sutton was listed as a match for the alias "Cap." Lombardi then obtained a booking photo of Sutton and showed it to the CI, who confirmed that the man he identified as "Cap" was Sutton. Lombardi then drove the CI past the address where the CI claimed to have witnessed Sutton in possession of the cocaine. The CI confirmed the location. The CI further informed Lombardi that the apartment's tenant was Nikiya Foster, whom the CI believed to be Sutton's girlfriend. A law enforcement database confirmed that Foster was indeed the apartment's tenant; however, Lombardi later discovered that she was actually Sutton's cousin.

That same day, Lombardi took the CI before a Kankakee County judge when the CI signed a "John Doe" affidavit in support of a search warrant. That affidavit read in relevant part as follows:

> *Within the past 10 days from May 2nd, 2010 I have seen approximately one ounce of cocaine inside the residence located at 1525 West Station St. Apt. 1W, Kankakee, IL. I am familiar with cocaine and the way it is packaged for sale because I have sold cocaine in the past. I am not currently under the influence of alcohol or drugs. At this time, I am a Confidential Informant Source for KAMEG. I am using an assumed name for fear that I may receive bodily harm for the information that I have provided for KAMEG.*

Lombardi filed his own affidavit in support of the warrant reiterating the CI's information, detailing certain corroboration and describing Lombardi's previous experience with the CI. The county judge issued the warrant, and officers executed it that same evening. During the search, agents found: 63 grams of crack cocaine in a bedroom closet; male clothing and shoes in the same closet; a digital scale with white powder residue and other items frequently used to cook crack cocaine in the kitchen; a handwritten letter on the kitchen table referring to "Cap;" and a computer, on which agents viewed a video depicting Sutton in the apartment.

Following Sutton's arrest, agents discovered that Foster was Sutton's cousin, not his girlfriend; that Sutton was the only person in possession of keys to the apartment besides her; and that she rarely entered the bedroom where the cocaine was found.

Sutton was indicted and subsequently filed a motion to suppress the evidence on the bases that the CI's information was baseless and uncorrorobated.

Because the facts indicate that probable cause existed for the search warrant, the Court of Appeals for the Seventh Circuit affirmed, finding in part as follows:

"This warrant was supported by probable cause. 'Probable cause is established when, considering the totality of the circumstances, there is sufficient evidence to cause a reasonably prudent person to believe that a search will uncover evidence of a crime.' *United States v. Harris,* 464 F.3d 733, 738 (7th Cir. 2006) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). When a search is authorized by a warrant, deference is owed to the issuing judge's conclusion that there is probable cause. *United States v. Sims*, 551 F.3d 640, 644 (7th Cir. 2008). Courts should defer to the issuing judge's initial probable cause finding

if there is 'substantial evidence in the record' that supports his decision. Id. (citing *United States v. Koerth*, 312 F.3d 862, 865 (7th Cir. 2002)). However, a judge may not rely solely on 'conclusory allegations' or a 'bare bones' affidavit.

"When probable cause is supported by information supplied by an informant, we particularly look to several factors: (1) the degree to which the informant has acquired knowledge of the events through firsthand observation, (2) the amount of detail provided, (3) the extent to which the police have corroborated the informant's statements, and (4) the interval between the date of the events and the police officer's application for the search warrant. *United States v. Searcy*, 664 F.3d 1119, 1122 (7th Cir. 2011). It is also significant if an informant appears before the magistrate in person and files his or her own supportive affidavit; doing so affords the magistrate a greater opportunity to assess credibility. *Sims*, 551 F.3d at 640 (citing *United States v. Lloyd*, 71 F.3d 1256, 1263 (7th Cir. 1995)). Taken as a whole, these factors support the initial finding of probable cause by the Kankakee County judge.

"Sutton challenges every prong of this analysis. However, there is no real issue regarding the CI's firsthand knowledge. There is no dispute that the CI swore he had firsthand knowledge of Sutton's possession of cocaine in Foster's apartment, details about the amount of cocaine in Sutton's possession, the location of the apartment and the relationship between Sutton and Foster. Every piece of relevant evidence in the affidavit came from the CI's firsthand knowledge.

### Specificity

"Likewise, Sutton's argument regarding the second factor, specificity of the supporting affidavits, fails. The affidavits clearly establish that Sutton was in possession of an ounce of cocaine in the apartment and on a specific date. The CI further established a connection between Sutton and the apartment by describing a close, personal relationship between Sutton and Foster. While an ideal affidavit might contain more information and not mistake a girlfriend for a cousin, the information here is sufficiently specific to satisfy this prong. Indeed, much less specific affidavits have been properly used to support warrants.

### Corroboration

"In his challenge to the third factor, Sutton argues that none of the CI's observations were corroborated. Despite this bald assertion, Lombardi did take sufficient steps to corroborate the CI's information: Lombardi confirmed that Sutton was 'Cap' by searching law enforcement databases; Lombardi confirmed the CI's identification of Sutton by showing the CI a mugshot of Sutton; Lombardi drove past the address the CI identified as the location where he observed Sutton with the cocaine; and Lombardi verified that Foster was the tenant of the apartment after the CI informed Lombardi of the relationship between Foster and Sutton. Ultimately, Lombardi took reasonable steps to ensure that the CI's information was accurate—we see no reason why we should find this corroboration insufficient.

### Staleness

"Sutton focuses much of his appeal on staleness. He argues that the one to ten day period between the time the CI witnessed

Sutton in the apartment with cocaine and the execution of the search warrant is enough to render the warrant stale. First, we point out that we do not actually know how many days elapsed between the CI's observation of Sutton and the search. Due to the sensitive nature of the CI's information a range was used to conceal the CI's identity, rather than revealing on precisely which day the CI was in the apartment. Thus, the information could have been as much as ten days old at the time of the search, but could have been as recent as one day old.

"Sutton points out that the government has not cited any case where a warrant has been substantiated on the basis of a single occurrence of criminal activity outside a 72-hour window. Sutton may be correct in his assertion, but the absence of such precedent does not create a 72-hour rule. Indeed, there is no bright line rule for determining staleness. *United States v. Pappas,* 592 F.3d 799, 803 (7th Cir. 2010). Instead of setting a time limit for staleness, we consider the age of the CI's information in conjunction with the rest of the factors. See e.g., *United States v. Pless,* 982 F.2d 1118, 1125–26 (7th Cir. 1992). To the extent that ten days is a lengthier interval than usual, it is not so long as to completely dispel any belief that a search would be fruitful—particularly in light of the fact that the CI had previously provided reliable information to law enforcement resulting in arrest and seizure of drugs.

### Credibility

"In addition to challenging these four factors, Sutton challenges the CI's reliability on the grounds that he (1) erred in identifying the nature of Sutton and Foster's relationship; (2) provided reliable information on only one prior occasion, six months removed; and (3) provided information to obtain leniency on his own drug charges, making him inherently unreliable. None of these arguments are availing. First, the mistake concerning the nature of Sutton and Foster's relationship was, as the district court determined, minimal. Despite the mistake, the CI still accurately described a close personal relationship between Foster and Sutton. For substantiating the warrant, the existence of a relationship is far more material than what exactly the relationship was. Second, the fact that the CI provided accurate information leading to an earlier arrest and drug seizure weighs in favor of credibility—the fact that he did this only once is not indicative of a lack of credibility. In fact, our case law suggests that a CI's prior cooperation with police, if accurate, can compensate for an affidavit's lack of specificity. Third, this court has rejected the argument that a CI's cooperation for leniency is inherently unreliable. See *United States v. Olson*, 408 F.3d 366, 371 (7th Cir. 2005). Finally, the CI personally appeared and presented his affidavit to the county judge, allowing the judge to evaluate his knowledge and credibility. Given the deference we give to the judge's finding of probable cause, this weighs significantly in favor of the CI's credibility.

"In light of the foregoing, it was reasonable for the issuing judge to conclude that a search would uncover illegal drugs. Therefore, Sutton's arguments are insufficient to justify reversing the district court's denial of Sutton's motion to suppress."

## SEARCH AND SEIZURE:
### Exigent Circumstances; Plain View; Domestic Violence

*United States v. Gordon*
CA10, No. 12-4170, 1/27/14

On June 5, 2011, Brandi Thaxton called 911 to report an incident of domestic violence that had occurred two days earlier. Thaxton told the police dispatcher she was in the basement of the home she shared with her boyfriend, Shawn Gordon, and another male roommate, who had outstanding warrants for his arrest. Thaxton was upset and crying. Her voice was lowered so as not to be heard by Gordon, who was upstairs. Thaxton said she and Gordon had been arguing two days before when he pushed her against the wall, causing her to fall, hurt her arm and neck, and break her glasses. Gordon then grabbed a samurai sword and swung it at her. She told the dispatcher her neck continued to be painful and she needed to see a doctor, but did not clearly respond when the dispatcher asked if she needed an ambulance. She said she and Gordon had fought earlier that day about getting her help, but she thought she could get herself to a doctor.

When the dispatcher asked about the location of the sword, Thaxton said it was in the basement with several others and there were weapons all over the house. The dispatcher asked if she could answer the door when the police arrived. Thaxton responded, "I guess, if he doesn't kill me first." She said Gordon had previously been abusive and threatened her, he was on probation, and if he and the roommate discovered she had called police, "Seriously, they are going to hurt me."

Officer Barney arrived with two other officers and entered without Gordon's consent. Barney went directly to the basement while the other officers stayed upstairs with Gordon. When Barney arrived in the basement hallway, Thaxton immediately ran toward him. According to Barney:

> *She looked absolutely terrified, the deer in the headlight look. Her eyes were red and puffy. It was obvious she had been crying. And her first statement to me was, "He's going to kill me for calling you." She repeated that several times.*

Barney tried to calm her and told her a medical team was on its way. Thaxton started telling Barney what happened. She was upset about her glasses and wanted to show them to him. As she led him down the hall to the bedroom, Barney noticed an unstrung crossbow and, near the bedroom door, an unzipped gun case with the stock of a gun protruding from it. For safety reasons, he took possession of what turned out to be a loaded shotgun. He did not take the crossbow. As they returned from the bedroom, Thaxton showed him three swords hanging on a tiered holder in the hallway at the bottom of the stairs. Because she could not remember which one Gordon had used to threaten her, Barney seized all of the swords. Medical personnel arrived shortly thereafter and Barney removed the shotgun and swords from the home. Barney then asked Gordon about Thaxton's statements. Gordon said he and Thaxton had argued two days before but nothing else happened. Barney arrested Gordon for aggravated assault while Thaxton was being evaluated by the medical team in the basement. After Thaxton was taken to the hospital, Barney locked the house and

transported Gordon to the county jail. The officers retained possession of the shotgun. While en route to the jail, Barney learned of Gordon's prior felony conviction, which prohibited him from possessing a firearm.

Gordon was charged in a one-count indictment of being a felon in possession of a firearm. He moved to suppress the evidence found during the warrantless search of his home, most specifically the shotgun. After the motion was denied, Gordon pled guilty but reserved the right to appeal from the denial of his motion to suppress.

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

"This interesting case calls upon us to decide whether, incident to an arrest for aggravated assault, police may seize a shotgun from a home when the weapon was not involved in any apparent criminal offense, the crime scene had been secured, and there was no immediate danger to any individual. Our answer to that question–NO–begs another. Does a *de minimis* (very small or trifling matters) violation of a defendant's property rights make a seizure constitutionally unreasonable and thereby justify suppressing evidence, particularly when suppression is highly unlikely to deter improper police behavior? Our answer, on the unique facts of this case, is, again, no.

"The Fourth Amendment prohibits unreasonable searches and seizures. A search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.' *Coolidge v. New Hampshire*, 403 U.S. 443, (1971). When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable. *Illinois v. McArthur,* 531 U.S. 326, 330 (2001). In other words, the Fourth Amendment does not prevent a warrantless government search of one's home, but it does guarantee that no such search will occur that is unreasonable. *Illinois v. Rodriguez,* 497 U.S. 177, (1990).

"'Officers do not need probable cause if they face exigent circumstances in an emergency.' *Armijo ex rel Armijo Sanchez v. Peterson,* 601 F.3d 1065, 1075 (10th Cir. 2010). One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. *Brigham City, Utah v. Stuart*, 547 U.S. 398, (2006). In determining whether the risk of personal danger creates exigent circumstances, we use a two-part test: whether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable. *United States v. Najar,* 451 F.3d 710, 718 (10th Cir. 2006). To determine whether officers had an objectively reasonable basis, we evaluate whether the officers were confronted with reasonable grounds to believe there was an immediate need guided by the realities of the situation from the viewpoint of 'prudent, cautious, and trained officers.'

"Barney's initial entry was reasonable due to exigent circumstances. Although the actual violence had occurred two days previously,

at the time Barney entered the home, dispatch had, correctly, reported several things to the responding officers: Thaxton was too frightened to leave the basement; she was upset, crying, and afraid she would be seriously harmed when Gordon discovered she had contacted the police. Any officer could reasonably believe an unprotected victim in that situation was in imminent danger of serious harm. But that does not end the reasonableness debate because a search must be reasonable not only in its inception but also in its execution.

"Gordon says Barney exceeded the reasonable scope of his search when he followed Thaxton into the bedroom to view her broken glasses. He maintains that once the officers secured him upstairs, and Barney had contacted Thaxton in the basement, the exigency ceased and further intrusion into the home was unreasonable. Not on these facts. At the point Barney accompanied Thaxton into her bedroom to retrieve her glasses, he had been told she was in fear for her life, and there were weapons throughout the house. Moreover, Barney had no information as to the whereabouts of the roommate, whether there was outside access to the basement, or the stability of the situation upstairs. It was not unreasonable to accompany Thaxton while she retrieved her glasses, which she was determined to do. Also, there was good reason to remain in the basement, away from Gordon, while waiting for the medical team.

"If the entry into the home and the bedroom did not violate the Fourth Amendment, was the seizure of the gun justified by the 'plain view' doctrine? The government says yes; Gordon says no. We agree with the government, but, as we explain, only partially. If an officer is lawfully positioned in a place from which an object can be plainly viewed, the officer is permitted to notice whatever is put on display and the observation of the article is generally not considered a search. *Horton,* 496 U.S. at 134. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy.

"However, the seizure of an object would obviously invade the owner's possessory interest. As a result, an object in plain view may be seized only where the incriminating character of the object is 'immediately apparent' to the officer and the officer has a lawful right of access to the object itself. An officer may not expand a warrantless search beyond the exigencies which justify its initiation.

"If the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object, then its incriminating nature is not immediately apparent and the plain-view doctrine cannot justify its seizure. *Minnesota v. Dickerson*, 508 U.S. 366, (1993). Before Barney obtained the records check (while transporting Gordon to jail), he had no reason to believe the gun was incriminating so it could not be indefinitely seized, even though it was in plain view.

"But this does not mean Barney could not temporarily seize it for safety reasons. Temporary seizures of persons or objects may be permissible when reasonably connected to the safety of officers, *United States v. Maddox,* 388 F.3d 1356, 1362 (10th Cir. 2004), or the protection of others.

"We do not question the reasonableness of Barney's temporary seizure of the shotgun. But the government seeks to extend the meaning of 'temporary seizure' to a time beyond that necessary to stabilize the situation and eliminate the risk of immediate harm. It first emphasizes that Barney discovered Gordon was a felon only a short time after driving away from Gordon's secured home. It next states the obvious: when Barney learned of the prior conviction, the incriminating nature of the temporarily seized shotgun became known—it was contraband and subject to seizure as an illegal weapon possessed by a felon. The problem with this argument is that Barney did not realize the gun was contraband until Thaxton was safely off the premises en route to the hospital, Gordon was in custody en route to jail, and the house was secured. That makes Gordon's argument technically correct.

"Prior to learning of Gordon's felony conviction, Barney had no reason to continue the temporary seizure. He should have returned the gun to its place in the home before leaving. Had the gun been returned and Barney later became aware of Gordon's felony conviction, what would have occurred? Barney would then have had probable cause to again seize it, but there were no exigent circumstances, at least not as this record stands. He could not re-enter the house without a warrant.

"Distilled to its essence, the government's argument comes down to this: the police can always seize and indefinitely keep any weapon they find when responding to a family violence complaint. We cannot agree. In *United States v. Davis*, 290 F.3d 1239 (10th Cir. 2002) we declined to blindly apply the emergency assistance exception to every domestic violence situation. The permissible parameters justifying a seizure, particularly a seizure from a home, are well-established. None justify the rule suggested by the government's arguments. We do not retreat from the view expressed in *Davis*: there is no per se exception to constitutional constraints in 911 cases. Structured analysis is always necessary. That said, our work is not done.

"We must determine if Barney's intrusion on Gordon's possessory interest in the gun was unreasonable. The Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable, at their inception or in their execution. Many courts have held *de minimis* intrusions into a person's possessory interest in property, and even liberty interests, are not constitutionally unreasonable. An example is *United States v. Jacobsen*, 466 U.S. 109 (1984). There, in addition to deciding other issues, the Court considered whether the field test of a powder, which exceeded the scope of a proper private search, constituted an unlawful search or, seizure under the Fourth Amendment. It concluded, to the extent that a protected possessory interest was infringed, the infringement was *de minimis* and constitutionally reasonable.

"To assess the reasonableness of the officer's conduct, we 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. As we have explained, Barney was justified in temporarily seizing the gun. Barney's only error was in not returning it before securing the house (a decision that might, debatably, be justifiable

under slightly different circumstances). This record does not reveal whether the omission was oversight or calculated, but on these facts it does not matter. What matters is that Gordon was improperly deprived of his property for only a few minutes–the elapsed time between locking the house and discovering Gordon was a convicted felon–and while he was legitimately in custody. The extended seizure was a *de minimis* intrusion on Gordon's rights and cannot justify suppression of the shotgun as evidence, particularly when the error was seemingly benign and the curative remedy of inevitable discovery is palpably present (even though it was not raised). Under these circumstances, the safeguards of a warrant would only minimally advance Fourth Amendment interests."

## SEARCH AND SEIZURE:

### Inevitable Discovery

*United States v. Christy*
CA 10, No. 12-2127, 1/3/14

Edward Christy met a sixteen-year-old girl ("K.Y.") on AgeMatch.com, a dating website, and the two exchanged sexually explicit emails and photographs. Believing that her father was abusive, Christy arranged to pick K.Y. up from her home in Westminster, California, and bring her to his home in Albuquerque, which he did.

On November 8, 2009, K.Y.'s parents reported her missing. K.Y's father gained access to her email account and found sexually explicit exchanges with Christy. FBI Task Force Officers Carvo and Fletes investigated K.Y.'s disappearance. Using K.Y.'s telephone records, they found that she received three calls from Christy around the time of her disappearance and obtained Christy's address and other information from his cellular provider. Using Christy's cell phone usage data, the agents determined that he traveled to California and back to Albuquerque.

On November 9, 2009, the officers contacted the Bernalillo County Sheriff's Office ("BCSO") and told them what they had found. As a result, BCSO deputies Littlefield and McKinney were dispatched to Christy's residence to conduct a welfare check on K.Y. One of the deputies walked to the rear of the house and noticed a crack in the blinds covering a window. He peered through the window and saw K.Y. wearing a brassiere and underwear, smiling and holding a rope. Concerned for K.Y.'s safety, the deputy asked his sergeant for permission to force entry into the house and for backup. He looked again through the window and saw K.Y. no longer wearing a brassiere and bound by the rope, and observed camera flashes.

When backup arrived, the deputies forced entry into the house and arrested Christy. They conducted a protective sweep and found pornographic materials. Christy was given *Miranda* warnings and told the deputies he had picked K.Y. up from California. He was taken to a law enforcement center and interviewed by Detective Proctor. Christy told the detective about his relationship with K.Y., how he drove her from California to Albuquerque, and that they had sex.

Based in part on the BCSO deputies' observations at Christy's residence and Christy's post-arrest statements, the detective prepared and obtained warrants to search Christy's residence, cell phone, vehicle,

computer, and person. Pursuant to the warrants, BCSO deputies obtained used condoms, sexual devices, and computer files later determined to contain child pornography, including pictures of K.Y.

Christy was indicted by a federal grand jury, charged with one count of transportation with intent to engage in criminal sexual activity, and three counts of possession of matter containing visual depictions of minors engaged in sexually explicit conduct. He moved to suppress all evidence obtained as a result of the warrantless search of his house, including his statements to the detective and all evidence obtained pursuant to the search warrants. The district court found that the deputies violated the Fourth Amendment when they entered Christy's house without a warrant, and granted the motion to suppress. The government moved for reconsideration, which the court granted to consider whether the illegally seized evidence was nonetheless admissible under the inevitable discovery doctrine. The court determined that, absent the illegal search, Officer Carvo would have legally obtained a warrant and discovered the evidence, thus, the court denied Christy's motion to suppress. Upon review, the Tenth Circuit concluded that the district court did not abuse its discretion in granting the motion to reconsider and correctly applied the inevitable discovery doctrine, finding in part as follows:

"Subject to a few exceptions, evidence obtained in violation of the Fourth Amendment will be suppressed under the exclusionary rule; the inevitable discovery doctrine is one such exception. *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005). Under it, illegally obtained evidence may be admitted if it 'ultimately or inevitably would have been discovered by lawful means.' *Nix v. Williams,* 467 U.S. 431, 444 (1984). The government bears the burden of proving by a preponderance of the evidence that the evidence would have been discovered without the Fourth Amendment violation. *Cunningham*, 413 F.3d at 1203.

"Mr. Christy makes three arguments as to why the inevitable discovery doctrine does not apply: (1) there was no 'independent investigation' that would have lawfully discovered the evidence; (2) the court misapplied the factors set forth in *United States v. Souza,* 223 F.3d 1197 (10th Cir. 2000); and (3) the officers in this case took no preliminary steps to obtain a warrant before conducting the illegal search.

"We cannot agree with Mr. Christy's interpretation of our inevitable discovery cases. We have said that the doctrine 'permits evidence to be admitted if an independent, lawful police investigation inevitably would have discovered it.' *Cunningham,* 413 F.3d at 1203 (quoting *United States v. Owens,* 782 F.2d 146, 152 (10th Cir. 1986)). In Owens, we relied on 'the necessity of an *independent* investigation' in refusing to apply inevitable discovery to a warrantless search of a closed container in the defendant's hotel room. While we noted that the illegal search 'tainted the only police investigation that was ongoing,' we have since held that 'neither the majority opinion in Nix nor our cases limit the inevitable discovery exception to lines of investigation that were already underway.' *United States v. Larsen*, 127 F.3d 984, 987 (10th Cir. 1997).

"In *Cunningham* and *Souza* we applied inevitable discovery to situations like the one here—where there was 'one line of investigation that would have led inevitably to the obtaining of a search warrant by independent lawful means but was halted prematurely by a search subsequently contended to be illegal.' In *Cunningham,* police searched the defendant's home after getting his consent. The defendant later contested the search, claiming his consent was coerced. We held that even if the search was illegal, the evidence was admissible because the officers 'would have obtained a search warrant' if the search had not occurred. In Souza, police illegally opened a UPS package that contained drugs. We held the evidence admissible under inevitable discovery because the officers 'would have obtained a warrant' had the illegal search not occurred.

"Thus, our case law does not require a second investigation when the first (and only) investigation would inevitably have discovered the contested evidence by lawful means. This comports with the Supreme Court's treatment of inevitable discovery. When the Court approved of the doctrine in *Nix,* it did not limit its application to scenarios with a second, independent investigation, even though the facts of that case involved one. The Court instructed only that evidence is admissible if it would be discovered 'by lawful means' or 'without reference to the police error or misconduct.' And in *Murray v. United States,* 487 U.S. 533, 541-44 (1988), the Court applied the related independent source rule to admit evidence discovered during an illegal search but subsequently seized by the same officers pursuant to a valid warrant. The determinative factor in that case was that the warrant and eventual seizure were not tainted by the initial illegality—not that the evidence was discovered by a second, unrelated investigation.

Thus, lest there be any doubt, we reaffirm the notion that inevitable discovery requires only that the lawful means of discovery be independent of the constitutional violation, and conclude that a second investigation is not required. In this case, and as discussed more fully below, Officer Carvo had sufficient probable cause to obtain a warrant based on the information he had before the BCSO deputies searched Mr. Christy's residence. The warrant he would have inevitably obtained would thus have been independent of the constitutional violation.

### The *Souza* Factors

"Next, Mr. Christy argues that the district court misapplied the factors set forth in Souza in finding that the evidence would have been inevitably discovered. In cases like this one, where the theory of inevitable discovery is that a warrant would have been obtained but for the illegal search, the district court must determine 'how likely it is that a warrant would have been issued and that the evidence would have been found pursuant to the warrant.' In Souza, we adopted four factors from the Second Circuit to aid in this determination:

*1.) the extent to which the warrant process has been completed at the time those seeking the warrant learn of the search;*

*2.) the strength of the showing of probable cause at the time the search occurred;*

*3.) whether a warrant ultimately was obtained, albeit after the illegal entry; and*

*4.) evidence that law enforcement agents 'jumped the gun' because they lacked confidence in their showing of probable cause and wanted to force the issue by creating a fait accompli. (fait accompli – an accomplished fact; a thing already done.)*

"The court must examine each contingency that would need to have been resolved in favor of the government and apply the inevitable discovery doctrine 'only when it has a high level of confidence' that the warrant would have been issued and the evidence obtained. Mr. Christy challenges the court's treatment of factors (2) and (4)—the strength of probable cause and whether the officers 'jumped the gun' to sidestep the warrant requirement. Factors (1) and (3) are undisputed—the government concedes that the officers took no steps to obtain a warrant before the search, and Mr. Christy concedes that a warrant was ultimately obtained, albeit after the illegal entry. As to factor (2), the district court concluded that Officer Carvo had strong probable cause that Mr. Christy committed the California crime of unlawful sexual intercourse and the federal crime of coercion or enticement. The California crime consists of sexual intercourse with a minor under the age of 18, Cal. Penal Code § 261.5(a), (c), and the federal crime consists of persuading or enticing someone to cross state lines to engage in any sexual activity for which any person can be charged with a criminal offense, 18 U.S.C. § 2422(a).

"The district court found that Officer Carvo knew that K.Y. was a minor, there was a large age difference between her and Mr. Christy, the two exchanged sexually explicit pictures, and that Mr. Christy traveled across state lines with K.Y. Given those factual findings, it is a reasonable inference that a sexual relationship existed between Mr. Christy and K.Y. Officer Carvo also knew that K.Y. was potentially suicidal, had left her depression medication behind, and ran away from home with Mr. Christy. Based on that knowledge, Officer Carvo's belief that K.Y. was at risk for sexual victimization and assault was reasonable. Thus, Officer Carvo had reasonable grounds to believe that Mr. Christy engaged in sexual activity in violation of California law and coerced or enticed K.Y. to travel across state lines to engage in criminal sexual activity in violation of federal law. The district court was correct in weighing this factor in favor of applying inevitable discovery.

"Next, Mr. Christy argues that the deputies 'jumped the gun' by forcing entry into his home due to their lack of confidence about probable cause. Yet as the district court found, no evidence supports the theory that the deputies forced entry for that reason. Instead, the deputies forced entry because they believed K.Y. was in danger. Mr. Christy argues that the search was not in fact justified by exigent circumstances. The record fully supports the reasonableness of the deputies' assessment of danger. The district court was correct in weighing this factor in favor of the government. Thus the court did not err in applying the *Souza* factors.

### Steps to Obtain a Warrant

"Finally, Mr. Christy argues that inevitable discovery is inappropriate because the officers in this case took no steps to obtain a warrant before the illegal search. He asserts that evidence of steps to obtain a warrant—the first *Souza* factor—is a prerequisite to applying inevitable discovery rather than a factor for the court to consider. We disagree.

"While we have referred to preliminary steps to obtain a warrant as a prerequisite, and a requirement, these descriptions are likely dicta. A close reading of *Souza* and its underpinnings indicates that an effort to obtain a warrant is but one factor of the inevitable discovery doctrine in this circuit.

"The ultimate question when applying inevitable discovery to factual situations like the one here is 'how likely it is that a warrant would have been issued' and the evidence found. In *Souza,* we stated that inevitable discovery does not apply when the government's only argument is that it had probable cause at the time of the search, but may apply where police have taken steps in an attempt to obtain a search warrant. We relied upon the Fourth Circuit in stating that the government must show that 'the police would have obtained the necessary warrant absent the illegal search,' and that this *'might* include proof that the police took steps to obtain a warrant' before the search. We quoted the Seventh Circuit in stating that inevitable discovery requires 'probable cause plus a chain of events that would have led to a warrant.' *United States v. Brown,* 64 F.3d 1083, 1085 (7th Cir.1995)).

"Thus, evidence of steps to obtain a warrant is one way the government might meet its burden of showing that a warrant would have ultimately been obtained, but not the only way. The district court's conclusion that Officer Carvo would have successfully obtained a warrant independent of the illegal search is supported by the record, even though no steps to obtain a warrant had been initiated at the time of the search. Officer Carvo had strong probable cause to suspect Mr. Christy of at least two crimes, and was cross-designated to obtain state and federal search warrants. He would have been authorized to obtain a federal search warrant for the California crime if evidence of it was in New Mexico. The district court credited testimony that officers had easily obtained similar warrants in the past. Thus, Officer Carvo would in fact have obtained a search warrant, and the evidence in question would have been discovered legally, had the illegal search not discovered it first."

## SEARCH AND SEIZURE: Inventory Search; Items Lawfully in Custody of Law Enforcement

*Wade v. State,* CR 12-463
2014 Ark. App. 2, 1/8/14

Detective Robert Moser was investigating an armed robbery that took place in Batesville on February 15, 2011. The victims told the detective that two white men armed with black guns came into their residence and awakened them in their bedrooms with verbal threats, pointed pistols, and demands for valuables. The two men who committed the robbery were described in detail during a subsequent interview; one man was described as wearing a brown jacket and a brown ball cap with two chrome-colored metal spikes on each side, while the other man was wearing a white ball cap and a shirt with horizontal stripes of blue and white.

Detective Moser then contacted the owner of a convenience store near the robbery scene and asked to view the store's surveillance video for the night in question. Two white males attired in clothing matching the description given by the victims were seen entering the store, making transactions, and leaving together in a white Cadillac. Thereafter, Detective Moser

received information that a Cadillac matching the one seen in the surveillance video had been abandoned in Batesville. The vehicle was impounded and searched pursuant to a warrant. It was found to contain Shane Donovan Wade's wallet and identification, along with a blue-and-white striped shirt that matched the victim's description of the shirt worn by the robber and seen in the surveillance video.

Detective Moser learned that Wade had a few hours earlier been incarcerated on unrelated outstanding warrants. Detective Moser went to the property room of the jail, where Wade's clothing had been removed and stored when he was outfitted with prison garb per police procedure at the time of his arrest. Detective Moser found and seized Wade's white ball cap and shoes from the property room and photographed them. Wade argues that this was an illegal search and seizure and that the evidence should have been suppressed.

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

"In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Supreme Court noted that inventory procedures developed in response to three distinct needs on the part of police departments: 1) the protection of the owner's property while it remains in police custody; 2) the protection of the police against claims or disputes over lost or stolen property; and 3) the protection of the police from potential danger. See also *Henderson v. State*, 16 Ark. App. 225, 699 S.W.2d 419 (1985).

"When conducted pursuant to standard procedure, and where aimed at securing or protecting the owner's property, the Court has consistently sustained inventories as exceptions to the search-warrant requirement. Under similar circumstances, the Arkansas Supreme Court has held that seizure of clothing lawfully taken and inventoried, that was still in the possession of police, did not offend the Fourth Amendment's proscription against unreasonable searches and seizures.

"We think that the record sufficiently demonstrates that the clothing in question was inventoried pursuant to standard procedure for reasons consistent with those stated in *South Dakota v. Opperman*, and we affirm."

## SEARCH AND SEIZURE: Protective Sweep

*United States v. Starnes*
CA7, No. 13-1148, 12/23/13

After receiving citizen complaints of drug trafficking, the Rockford Police Department arranged an undercover controlled purchase of crack cocaine from a lower level apartment in Rockford, Illinois. Three days later, the police secured a warrant to search "922 N. Church Street lower apartment, Rockford Illinois." The warrant described the premises to be searched as a "two story, two-family dwelling, white with black trim, located on the west side of street with the numbers '922' appearing on the front of the residence with lower apartment being located on the ground floor." The lower apartment was actually the lower level of a two-story house that had been converted from a single family residence into a two-flat.

The police knew that they would be facing two obstacles when they executed the search. The first was that mere hours before the planned raid, a shooting occurred at the

residence. Police officers conducting raids assume that drug dealers are armed (and the assumption is generally correct, as weapons are a necessary tool of the drug trade. *United States v. Gulley,* 722 F.3d 901, 908 (7th Cir. 2013)), but the recent shooting increased the risk that the weapons were loaded and ready and the possessors of those weapons were agitated and on high alert. The police officers also knew that two aggressive pit bulls lived on the premises.

After knocking on the front door of the house and receiving no response, investigators forced their way into the building. The first officer to enter the house found himself in a small foyer with two open doors. One door led to the first floor apartment. The other door led to an initial set of ascending stairs, four or five of which were visible before they turned at a landing. The officer immediately encountered a pit bull who initially turned and ran away from the officer, through the open door to the stairway, and up a few steps toward the upper apartment, before altering course and charging toward the officer. The officer shot and killed the dog on the first landing and then proceeded up those same stairs to perform a protective sweep of the upper apartment. As he ran through the kitchen of the upper apartment, he noticed on the counter various mixing bowls, several large chunks of an off-white substance, some scales and rubber gloves. In the bedroom he discovered the defendant, Fernell Starnes, and a woman in bed. The officer detained Starnes and the woman and escorted them downstairs. Other officers then left to seek a second warrant to search the upstairs apartment, leaving one officer behind at the bottom of the stairs to prevent anyone from entering the apartment.

While some officers were seeking the second warrant, other detectives searched the lower apartment (for which they already had a warrant) and seized two semi-automatic rifles, two loaded ammunition magazines, a loaded .45 caliber semiautomatic hand gun, and drug trafficking paraphernalia.

After executing the search warrant on the second floor, the officers seized Starnes' photo identification cards, approximately 290 grams of cocaine, 72.5 grams of cocaine base, $36,186 in cash, and more drug trafficking paraphernalia.

The court declined to suppress evidence from the second floor; Starnes entered a conditional plea to possession with intent to distribute cocaine, possessing a firearm as a felon, and possessing a firearm in furtherance of a drug trafficking offense but reserved his right to appeal. The Seventh Circuit affirmed the conviction, finding in part as follows:

"A protective sweep is a quick and limited search of premises conducted to protect the safety of police officers or others. *Maryland v. Buie*, 494 U.S. 325, 327 (1990). Under certain circumstances such a sweep is permissible because legitimate governmental interests outweigh an individual's interest in the protection of the Fourth Amendment. *Id.* at 331. In general, the Fourth Amendment permits a protective sweep if the searching officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others.

"The sweep must also be justified by more than a 'mere inchoate and unparticularized suspicion or hunch,' regarding the danger. *Buie,* 494 U.S. at 332. The search must be cursory, lasting no longer than is necessary to dispel the reasonable suspicion of danger. *Buie,* 494 U.S. at 335–36. It must also be limited to a cursory visual inspection of places where a person might be hiding. *Buie,* 494 U.S. at 327.

"The inquiry is an exceptionally fact-intensive one in which we must analyze myriad factors including, among other considerations, the configuration of the dwelling, the general surroundings, and the opportunities for ambush. *United States v. Burrows,* 48 F.3d 1011, 1016 (7th Cir. 1995). An ambush in a confined setting of unknown configuration is just such a situation in which an officer might need to perform a protective sweep. *Buie,* 494 U.S. at 333, *Tapia*, 610 F.3d at 511.

"In this case there were many other substantial, particularized factors that would allow a reasonable officer to conclude that he, his fellow officers, or another bystander might face danger. First, the officers had reliable information that drugs were being sold from the lower unit of the house and that a shooting had occurred on the premises just a few hours prior. The officers had also been informed that there were two aggressive pit bulls on the premises and that only one had been subdued. The doors to both the second floor and first floor apartments were open, and the two apartments had been carved out of a former single family home. In fact, it appeared to some of the officers as though the home might be being used as one unit (and indeed, it turns out that it was).

"Moreover, the police could not have known for certain whether there were other points of access between the two units, such as a back staircase or a fire escape, and whether, therefore, a dangerous dog or person might be moving between the two units. In fact, the aggressive dog initially ran toward the upstairs apartment indicating that the dog might be protecting someone on the upstairs floor. Finally, because one of the detectives was forced to fire multiple shots at an attacking dog immediately after entering the house, the officers knew that any occupants quickly would have been alerted to their presence by the gunfire.

"Furthermore, the search itself appears to have been short, cursory, and limited to only those places that a person might be hiding. *See Buie,* 494 U.S. at 335–36. The sweeping officer ran through the apartment looking briefly into the bathroom, the kitchen, and the bedroom. He did not need to open any cabinets or drawers or touch anything to see the suspicious looking white substance and drug-selling paraphernalia on the kitchen counter. Once the police discovered Starnes and his companion, they secured and removed them immediately and vacated the upper unit. In the meantime, all police officers remained outside of the second-floor apartment until the court issued a warrant. One police officer was stationed at the landing of the ascending stairs to ensure that no one entered.

"A bevy of facts supports the conclusion that this sweep was reasonable and prudent. The district court found credible the detective's explanation that he swept the upper apartment for potential threats and that the search constituted a protective sweep. The judgment of the district court is affirmed."

## SEARCH AND SEIZURE:

### Search Warrants; Particularity Requirement

*United States v. Dargan*
CA4, No. 13-4171, 12/24/13

On March 30, 2011, three men robbed a jewelry store in Columbia, Maryland. Police subsequently arrested several people in connection with the robbery, including Deontaye Harvey (Harvey) and Aaron Pratt (Pratt). The police investigation also implicated another person nicknamed "Little Reggie," who was not yet in custody. Reginald Dargan was arrested two months later. Police suspected Dargan was Little Reggie.

Investigators obtained a search warrant for Reginald Duane Dargan, Jr.'s residence. Attachment A to the warrant enumerated items subject to seizure, including, among other things, "indicia of occupancy." During the search, officers seized a purchase receipt for a Louis Vuitton belt. The receipt was found in a bag located on top of a dresser in Dargan's bedroom. It indicated that the belt cost $461.10 and that the buyer, who identified himself as "Regg Raxx," purchased the belt with cash the day after the robbery.

A federal grand jury indicted Dargan, Harvey, and Pratt on October 26, 2011. Dargan moved to suppress the receipt for the belt prior to trial. Though the district court concluded that the receipt did not fall under Attachment A's terms, the court found that the plain-view exception to the warrant requirement justified the seizure. On appeal, Dargan argued that the seizure of the receipt violated the Fourth Amendment, as the receipt did not fall under any of Attachment A's enumerated items.

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

"The last clause of the Fourth Amendment contains a 'particularity requirement,' which 'is fulfilled when the warrant identifies the items to be seized by their relation to designated crimes and when the description of the items leaves nothing to the discretion of the officer executing the warrant.' *United States v. Williams,* 592 F.3d 511, 519 (4th Cir. 2010). The Framers included this provision in order to end the practice, 'abhorred by the colonists,' of issuing general warrants. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The requirement is designed to preclude broadly-phrased warrants from authorizing officers to conduct 'exploratory rummaging in a person's belongings.' *Andresen v. Maryland,* 427 U.S. 463, 480 (1976). Thus, when executing a warrant, officers are limited by its terms. *Williams,* 592 F.3d at 519. Nevertheless, a warrant is not intended to impose a constitutional strait jacket on investigating officers. *United States v. Dornhofer,* 859 F.2d 1195, 1198 (4th Cir. 1988). Courts must refrain from interpreting warrant terms in a 'hypertechnical' manner, and should instead employ a 'commonsense and realistic' approach. This rule of construction strikes a middle ground by ensuring that warrants serve their central purpose—precluding officers from conducting fishing expeditions into the private affairs of other—while simultaneously preserving the flexibility of law enforcement to adapt to the unforeseen circumstances that necessarily arise in an investigation predicated on incomplete information.

"Interpreting warrants in a commonsense manner serves the further, significant purpose of encouraging officers to obtain judicial approval prior to conducting a search. *United States v. Phillips*, 588 F.3d 218, 223 (4th Cir. 2009). This court, along with many others, has stated a strong preference for officers to obtain a warrant prior to intruding on constitutionally protected domains. *United States v. Srivastava,* 540 F.3d 277, 288 (4th Cir. 2008). A warrant cabins executive discretion, gives the imprimatur of lawful authority to potentially intrusive police conduct, and helps to ensure that valuable evidence is not later excluded as a result of an illicit search. See *Gates,* 462 U.S. at 236. A 'grudging or negative attitude by reviewing courts towards warrants' is inconsistent with this approach.

"An overly stringent rule of construction would encourage warrantless searches by reducing the benefits a warrant provides. Officers are motivated to secure judicial approval in part because of the safe harbor it represents. The sense of confidence a warrant affords, however, is diminished to the extent that its terms are subject to an excessively narrow interpretation. Faced with such an interpretation, 'police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search.' Courts can help to head off this eventuality by consistently adopting a commonsense reading of a warrant's scope.

"Here, Attachment A to the warrant, which enumerated the items subject to seizure, relevantly included 'indicia of occupancy, residency, of the premises including but not limited to, utility and telephone bills, and canceled envelopes.' The officers conducting the search could plausibly have thought that the occupant of the premises was also the purchaser identified on the belt receipt discovered in the bedroom. The receipt, which listed the buyer as 'Regg Raxx,' therefore constituted at least some indication of occupancy and fell within the terms of Attachment A.

"This conclusion is corroborated by the warrant's inclusive language: Attachment A states that 'indicia of occupancy' 'includes' but is 'not limited to' certain listed items ('utility and telephone bills, and canceled envelopes'). This 'broad and inclusive language' cautions against a miserly construction. *Phillips,* 588 F.3d at 225. The fact that the warrant does not explicitly mention receipts is not determinative: 'law enforcement officers may seize an item pursuant to a warrant even if the warrant does not expressly mention and painstakingly describe it.' Indeed, a warrant need not—and in most cases, cannot—scrupulously list and delineate each and every item to be seized.

"Here, the officers were lawfully in the residence pursuant to the search warrant. Furthermore, they were justified in opening the bag on top of the dresser in Dargan's bedroom to determine whether its contents matched any of the items they were authorized by the warrant to seize. Attachment A, for example, lists 'any and all diaries, journals, or notes.' These documents—as well as a host of other physically diminutive objects described in the attachment—could easily have been placed in the retail bag. Contrary to Dargan's contention, the officers were not required to assume that the retail bag contained only retail items. People put all kinds of things

in bags for reasons of convenience, carry, or concealment.

"The facts of this case underscore the fallacy of Dargan's contention that only items listed by name may be seized during the execution of a search warrant. That would require officers possessed of incomplete knowledge to identify every item of evidence that will be relevant and the precise form that it will take—a plainly unrealistic expectation. The officers in the instant case may not have foreseen that indicia of occupancy located at the residence would take the form of a sales receipt but, once faced with precisely that scenario, they were entitled to seize the receipt under a commonsense reading of the warrant's terms. In no way could the search and seizure of the receipt be characterized as an 'exploratory rummaging.' The central value animating the particularity requirement was therefore preserved. See *United States v. Robinson*, 275 F.3d 371, 381 (4th Cir. 2001)."