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## CIVIL RIGHTS: Entry of Property Without a Search Warrant; Minor Offense; Hot Pursuit

*Stanton v. Sims*, No. 12-1217, 11/4/13

Around one o'clock in the morning on May 27, 2008, Officer Mike Stanton and his partner responded to a call about an "unknown disturbance" involving a person with a baseball bat in La Mesa, California. Stanton was familiar with the neighborhood, known for violence associated with the area gangs. The officers—wearing uniforms and driving a marked police vehicle—approached the place where the disturbance had been reported and noticed three men walking in the street. Upon seeing the police car, two of the men turned into a nearby apartment complex. The third, Nicholas Patrick, crossed the street about 25 yards in front of Stanton's car and ran or quickly walked toward a residence. Nothing in the record shows that Stanton knew at the time whether that residence belonged to Patrick or someone else; in fact, it belonged to Drendolyn Sims.

Stanton did not see Patrick with a baseball bat, but he considered Patrick's behavior suspicious and decided to detain him in order to investigate. Stanton exited his patrol car, called out "police," and ordered Patrick to stop in a voice loud enough for all in the area to hear. But Patrick did not stop. Instead, he "looked directly at Stanton, ignored his lawful orders, and quickly went through the front gate" of a fence enclosing Sims' front yard. When the gate closed behind Patrick, the fence—which was more than six feet tall and made of wood—blocked Stanton's view of the yard.

Stanton believed that Patrick had committed a jailable misdemeanor under California Penal Code §148 by disobeying his order to stop; Stanton also "feared for his safety." He accordingly made the "split-second decision" to kick open the gate in pursuit of Patrick. Unfortunately, and unbeknownst to Stanton, Sims herself was standing behind the gate when it flew open. The swinging gate struck Sims, cutting her forehead and injuring her shoulder.

Sims filed suit against Stanton in Federal District Court under Rev. Stat. §1979, 42 U. S. C. §1983, alleging that Stanton unreasonably searched her home without a warrant in violation of the Fourth Amendment. The District Court granted summary judgment to Stanton, finding that: (1) Stanton's entry was justified by the potentially dangerous situation, by the need to pursue Patrick as he fled, and by Sims' lesser expectation of privacy in the curtilage of her home; and (2) even if a constitutional violation had occurred, Stanton was entitled to qualified immunity because no clearly established law put him on notice that his conduct was unconstitutional.

Sims appealed, and a panel of the Court of Appeals for the Ninth Circuit reversed. The court held that Stanton's warrantless entry into Sims' yard was unconstitutional because Sims was entitled to the same expectation of privacy in her curtilage as in her home itself, because there was no immediate danger, and because Patrick had committed only the minor offense of disobeying a police officer. The court also found the law to be clearly established that Stanton's pursuit of Patrick did not justify his warrantless entry, given that Patrick was suspected of only a misdemeanor. The court accordingly held that Stanton was not entitled to qualified immunity. The United States Supreme Court addressed only the latter holding and reversed the Ninth Circuit Court of Appeals, finding in part as follows:

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U. S. 223, 231 (2009). Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law. We do not require a case directly on point before concluding that the law is clearly established, but existing precedent must have placed the statutory or constitutional question beyond debate.

"There is no suggestion in this case that Officer Stanton knowingly violated the Constitution; the question is whether, in light of precedent existing at the time, he was 'plainly incompetent' in entering Sims' yard to pursue the fleeing Patrick. The Ninth Circuit concluded that he was. It did so despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect. Compare, e.g., *Middletown v. Flinchum*, 95 Ohio St. 3d 43, 45, 765 N. E. 2d 330, 332 (2002) ('We hold today that when officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to

avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor'), and *State v. Ricci*, 144 N. H. 241, 244, 739 A. 2d 404, 407 (1999) ('the facts of this case demonstrate that the police had probable cause to arrest the defendant for the misdemeanor offense of disobeying a police officer' where the defendant had fled into his home with police officers in hot pursuit), with *Mascorro v. Billings*, 656 F. 3d 1198, 1207 (CA10 2011) ('The warrantless entry based on hot pursuit was not justified' where 'the intended arrest was for a traffic misdemeanor committed by a minor, with whom the officer was well acquainted, who had fled into his family home from which there was only one exit'), and *Butler v. State,* 309 Ark. 211, 217, 829 S. W. 2d 412, 415 (1992) ('even though Officer Sudduth might have been under the impression that he was in continuous pursuit of Butler for what he considered to be the crime of disorderly conduct…since the crime is a minor offense, under these circumstances there is no exigent circumstance that would allow Officer Sudduth's warrantless entry into Butler's home for what is concededly, at most, a petty disturbance').

"Other courts have concluded that police are at least entitled to qualified immunity in these circumstances because the constitutional violation is not clearly established. E.g., *Grenier v. Champlin*, 27 F. 3d 1346, 1354 (CA8 1994) ('Putting firmly to one side the merits of whether the home arrests were constitutional, we cannot say that only a plainly incompetent policeman could have thought them permissible at the time,' where officers entered a home without a warrant in hot pursuit of misdemeanor suspects who had defied the officers' order to remain outside.

"Notwithstanding this basic disagreement, the Ninth Circuit below denied Stanton qualified immunity. In its one-paragraph analysis on the hot pursuit point, the panel relied on two cases, one from this Court, *Welsh v. Wisconsin*, 466 U. S. 740, 750 (1984), and one from its own, *United States v. Johnson*, 256 F. 3d 895, 908 (2001) (en banc) (*per curiam*). Neither case clearly establishes that Stanton violated Sims' Fourth Amendment rights.

"In *Welsh*, police officers learned from a witness that Edward Welsh had driven his car off the road and then left the scene, presumably because he was drunk. Acting on that tip, the officers went to Welsh's home without a warrant, entered without consent, and arrested him for driving while intoxicated—a nonjailable traffic offense under state law. 466 U. S., at 742–743. Our opinion first noted our precedent holding that hot pursuit of a fleeing felon justifies an officer's warrantless entry. (*United States v. Santana*, 427 U. S. 38, 42–43 (1976)). But we rejected the suggestion that the hot pursuit exception applied: there was no immediate or continuous pursuit of Welsh from the scene of a crime.

"We went on to conclude that the officers' entry violated the Fourth Amendment, finding it important that there was probable cause to believe that only a minor offense had been committed. In those circumstances, we said, application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned. But we did not lay down a categorical rule for all cases involving minor offenses, saying only that a warrant is usually required.

"In *Johnson*, police officers broke into Michael Johnson's fenced yard in search of another person (Steven Smith) whom they were attempting to apprehend on five misdemeanor arrest warrants. The Ninth Circuit was clear that this case, like *Welsh*, did not involve hot pursuit: the facts of this case simply are not covered by the 'hot pursuit' doctrine because Smith had escaped from the police 30 minutes prior and his whereabouts were unknown. The court held that the officers' entry required a warrant, in part because Smith was wanted for only misdemeanor offenses. Then, in a footnote, the court said: In situations where an officer is truly in hot pursuit and the underlying offense is a felony, the Fourth Amendment usually yields to law enforcement's interest in apprehending a fleeing suspect. However, in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment in all but the rarest cases.

"In concluding—as it must have—that Stanton was 'plainly incompetent,' the Ninth Circuit below read *Welsh* and the footnote in *Johnson* far too broadly. First, both of those cases cited *Santana* with approval, a case that *approved* an officer's warrantless entry while in hot pursuit. And though *Santana* involved a felony suspect, we did not expressly limit our holding based on that fact. Second, neither *Welsh* nor *Johnson* involved hot pursuit. Thus, despite our emphasis in *Welsh* on the fact that the crime at issue was minor—indeed, a mere nonjailable civil offense—nothing in the opinion establishes that the seriousness of the crime is equally important *in cases of hot pursuit.* Third, even in the portion of *Welsh* cited by the Ninth Circuit below, our opinion is equivocal: We held not that warrantless entry to arrest a misdemeanant is never justified, but only that such entry should be rare.

"That is in fact how two California state courts have read *Welsh.* In both *People v. Lloyd,* 216 Cal. App. 3d 1425, 7 Cite as: 571 U. S. ____ (2013) Per Curiam 1430, 265 Cal. Rptr. 422, 425 (1989), and *In re Lavoyne M.*, 221 Cal. App. 3d 154, 159, 270 Cal. Rptr. 394, 396(1990), the California Court of Appeal refused to limit the hot pursuit exception to felony suspects. The court stated in *Lloyd:* 'Where the pursuit into the home was based on an arrest set in motion in a public place, the fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant.' 216 Cal. App. 3d, at 1430, 265 Cal. Rptr., at 425. It is especially troubling that the Ninth Circuit would conclude that Stanton was plainly incompetent—and subject to personal liability for damages—based on actions that were lawful according to courts in the jurisdiction where he acted.

"Finally, our determination that *Welsh* and *Johnson* are insufficient to overcome Stanton's qualified immunity is bolstered by the fact that, even after *Johnson,* two different District Courts in the Ninth Circuit have granted qualified immunity precisely because the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established. See *Kolesnikov* v. *Sacramento County*, No. S–06–2155, 2008 WL 1806193, *7 (ED Cal., Apr. 22, 2008) ('since *Welsh*, it has not been clearly established that there can never be warrantless home arrests in the context of a hot pursuit of a suspect fleeing from the commission of misdemeanor

offenses'); *Garcia v. Imperial,* No. 08–2357, 2010 WL 3834020, *6, n. 4 (SD Cal., Sept. 28, 2010). In *Garcia,* a case with facts similar to those here, the District Court distinguished *Johnson* as a case where 'the officers were not in hot pursuit of the suspect, had not seen the suspect enter the neighbor's property, and had no real reason to think the suspect was there.' 2010 WL 3834020, *6, n. 4. Precisely the same facts distinguish this case from *Johnson*: Stanton *was* in hot pursuit of Patrick, he *did* see Patrick enter Sims' property, and he had every reason to believe that Patrick was just beyond Sims' gate.

"To summarize the law at the time Stanton made his split-second decision to enter Sims' yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided.

"We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not beyond debate. Stanton may have been mistaken in believing his actions were justified, but he was not "plainly incompetent.

"The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion."

## CIVIL RIGHTS:
### In Home Arrest Without Warrant

*Mitchell v. Shearrer,* CA8, No. 12-2058, 9/10/13

Charles Mitchell filed suit under 42 U.S.C. § 1983 alleging that Farmington, Missouri, Police Officer Josh Shearrer violated Mitchell's constitutional rights by arresting him in his home without first obtaining a warrant to do so. The court concluded that Mitchell demonstrated sufficient facts to show a violation of his Fourth Amendment right to be free from unreasonable searches and seizures. A reasonable officer would have known that at the time Mitchell tried to close the door, he stood within his home and thus could not be pulled from it and placed under arrest in the absence of exigent circumstances. The court then affirmed the district court's order denying qualified immunity to Officer Shearer.

## CIVIL RIGHTS: Innocent Mistake

*Balthazar v. City of Chicago*
CA7, No. 12-3378, 11/8/13

Sharron Balthazar lived in one of two apartments on the third floor. Police had a warrant to search the other apartment. Both had rear doors about opening on a common landing. The officers climbed the stairs to the landing and used a battering ram on the door of Balthazar's apartment. According to Balthazar, they entered the apartment screaming profanities and pointing guns; handcuffed Balthazar and her cousin; ransacked the apartment, dumping food on the floor, opening drawers, flipping mattresses, and throwing clothing; and left

after about 15 minutes when another officer appeared and said they were in the wrong apartment. The officers claim that, while they did hit the wrong door, they immediately realized the mistake and none of them entered Balthazar's apartment.

Balthazar's attorney later claimed that even looking inside the apartment constituted an illegal search. Neither a claims adjuster who visited the apartment the day of the incident, nor the Independent Police Review Authority employee who took a report, noted complaints about anything other than damage to the door. A jury rejected Balthazar's claims under 42 U.S.C. 1983. The Seventh Circuit affirmed.

"A search resulting from an innocent mistake is not unreasonable and does not violate the Fourth Amendment. Even accepting Balthazar's alternative theory, simply looking inside does not always constitute a search."

### CIVIL RIGHTS: Lack of Involvement

*Burley v. Gogacki*, CA6, No. 12-1820, 9/6/13

Masked law enforcement agents, dressed in black, with guns drawn, broke into a Detroit home and allegedly assaulted and terrorized the plaintiffs. The agents were part of a multi-agency effort targeting drug trafficking and other crimes in the "8 Mile Corridor." When the plaintiffs asked the intruders to identify themselves, the agents refused, responding instead that they were "Team 11."

In an action under 42 U.S.C. 1983, the district court entered summary judgment in favor of state and local officials and, after the close of plaintiffs' evidence, granted the federal agents judgment as a matter of law. Undisputed testimony indicated that the state and local defendants were not part of the entry team but provided only perimeter security. The Sixth Circuit affirmed with respect to state and local defendants, but reversed with respect to the federal agents: "Genuine issues of material fact exist with respect to the personal involvement of the federal officers in the raid and their alleged conduct in violating plaintiffs' constitutional rights. The circumstances of this case, which include an intentional concealment of identity, coupled with an 'I wasn't there' defense, warrants shifting the burden of production onto the federal agents to establish their lack of involvement."

### FIRST AMENDMENT: Facebook Threats

*United States v. Elonis*
CA3, No. 12-3798, 9/19/13

In May 2010, Elonis's wife of seven years moved out of their home with their two young children. Following this separation, Elonis began experiencing trouble at work. Elonis worked at Dorney Park & Wildwater Kingdom amusement park as an operations supervisor and a communications technician. After his wife left, supervisors observed Elonis with his head down on his desk crying, and he was sent home on several occasions because he was too upset to work.

One of the employees Elonis supervised, Amber Morrissey, made five sexual harassment reports against him. According to Morrissey, Elonis came into the office where

she was working alone late at night, and began to undress in front of her. She left the building after he removed his shirt. Morrissey also reported another incident where Elonis made a minor female employee uncomfortable when he placed himself close to her and told her to stick out her tongue. On October 17, 2010, Elonis posted on his Facebook page a photograph taken for the Dorney Park Halloween Haunt. The photograph showed Elonis in costume holding a knife to Morrissey's neck. Elonis added the caption "I wish" under the photograph. Elonis's supervisor saw the Facebook posting and fired Elonis that same day.

Two days after he was fired, Elonis began posting violent statements on his Facebook page. One post regarding Dorney Park stated:

> *Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the f*#%#*g gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so f*#%#*g scary?*

Elonis also began posting statements about his estranged wife, Tara Elonis, including the following:

> *If I only knew then what I know now, I would have smothered you're a** with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder.*

Several of the posts about Tara Elonis were in response to her sister's status updates on Facebook. For example, Tara Elonis's sister posted her status update as: "*Halloween costume shopping with my niece and nephew should be interesting.*" Elonis commented on this status update, writing: "*Tell [their son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [Tara Elonis's] head on a stick?"*

Based on statements such as these, a state court issued Tara Elonis a Protection from Abuse Order against Elonis on November 4, 2010. Following the issuance of the order, Elonis posted several statements on Facebook expressing intent to harm his wife.

On November 7, he wrote:

> *Did you know that it's illegal for me to say I want to kill my wife?*
> *It's illegal.*
> *It's indirect criminal contempt.*
> *It's one of the only sentences that I'm not allowed to say.*
> *Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.*
> *I'm not actually saying it.*
> *I'm just letting you know that it's illegal for me to say that.*
> *It's kind of like a public service.*
> *I'm letting you know so that you don't accidently go out and say something like that Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.*
> *That's illegal.*
> *Very, very illegal.*
> *But not illegal to say with a mortar launcher.*

*Because that's its own sentence.*
*It's an incomplete sentence but it may have nothing to do with the sentence before that.*
*So that's perfectly fine.*
*Perfectly legal.*
*I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.*
*Insanely illegal.*
*Ridiculously, wrecklessly, insanely illegal.*
*Yet even more illegal to show an illustrated diagram.*
*===[ __ ] =====house*
*: : : : : : : ^ : : : : : : : : : : :cornfield*
*: : : : : : : : : : : : : : : : : : : :*
*: : : : : : : : : : : : : : : : : : : :*
*: : : : : : : : : : : : : : : : : : : :*
*####################getaway road*
*Insanely illegal.*
*Ridiculously, horribly felonious.*
*Cause they will come to my house in the middle of the night and they will lock me up.*
*Extremely against the law.*
*Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.*

Tara Elonis testified at trial that she took these statements seriously, saying, "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives." Ms. Elonis further testified that Elonis rarely listened to rap music, and that she had never seen Elonis write rap lyrics during their seven years of marriage. She explained that the lyric form of the statements did not make her take the threats any less seriously.

On November 15, Elonis posted on his Facebook page:

*Fold up your PFA and put it in your pocket*
*Is it thick enough to stop a bullet?*
*Try to enforce an Order*
*That was improperly granted in the first place*
*Me thinks the judge needs an education on true threat jurisprudence*
*And prison time will add zeroes to my settlement…*
*And if worse comes to worse*
*I've got enough explosives to take care of the state police and the sheriff's department*

This statement was the basis both of Count 2, threats to Elonis's wife, and Count 3, threats to local law enforcement. A post the following day, on November 16 involving an elementary school, was the basis of Count 4:

*That's it, I've had about enough*
*I'm checking out and making a name for myself*
*Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined*
*And hell hath no fury like a crazy man in a kindergarten class*
*The only question is…which one?*

By this point, FBI Agent Denise Stevens was monitoring Elonis's public Facebook postings, because Dorney Park contacted the FBI claiming Elonis had posted threats against Dorney Park and its employees on his Facebook page. After reading these and other Facebook posts by Elonis, Agent Stevens and another FBI agent went to Elonis's house to interview him. When the agents knocked on his door, Elonis's father answered and told

the agents Elonis was sleeping. The agents waited several minutes until Elonis came to the door wearing a t-shirt, jeans, and no shoes.

Elonis asked the agents if they were law enforcement and asked if he was free to go. After the agents identified themselves and told him he was free to go, Elonis went inside and closed the door. Later that day, Elonis posted the following on Facebook:

> *You know your shit's ridiculous*
> *when you have the FBI knockin' at yo' door*
> *Little Agent Lady stood so close*
> *Took all the strength I had not to turn the bitch ghost*
> *Pull my knife, flick my wrist,*
> *and slit her throat*
> *Leave her bleedin' from her jugular in the arms of her partner*
>
> *[laughter]*
>
> *So the next time you knock, you best be serving a warrant*
> *And bring yo' SWAT and an explosives expert while you're at it*
> *Cause little did y'all know,*
> *I was strapped wit' a bomb*
> *Why do you think it took me so long to get dressed with no shoes on?*
> *I was jus' waitin' for y'all to handcuff me and pat me down*
> *Touch the detonator in my pocket*
> *and we're all goin'*
>
> *[BOOM!]*

These statements were the basis of Count 5 of the indictment. After she observed this post on Elonis's Facebook page, Agent Stevens contacted the U.S. Attorney's Office. Elonis was indicted for transmitting in interstate commerce communications containing a threat to injure the person of another, 18 U.S.C. 875(c). This case presented the question whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats.

Elonis moved to dismiss the indictments against him, contending the Supreme Court held in *Virginia v. Black*, 538 U.S. 343, 347-48 (2003) that a subjective intent to threaten was required under the true threat exception to the First Amendment and that his statements were not threats but were protected speech.

The Third Circuit affirmed Elonis' conviction, rejecting an argument that he did not subjectively intend his Facebook posts to be threatening. The Court stated "the prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from the fear of violence and the disruption that fear engenders, because it would protect speech that a reasonable speaker would understand to be threatening."

**Editor's Note:** ***Virginia v. Black.*** *538 U.S. 343 (2003) was a First Amendment case decided by the United States Supreme Court. In that case, three defendants were convicted in two separate cases of violating a Virginia statute against cross burning. In the case, the Court struck down the statute to the extent that it considered cross burning as* ***prima facie*** *evidence of intent to intimidate. The Court stated that Virginia's statute was unconstitutional because it placed the burden of proof on the defendant to demonstrate that he or she did not intent the cross burning as intimidation. The Court noted that cross burning can be a criminal offense if the intent to intimidate is proven.*

## MIRANDA: Express Questioning

*United States v. Cash*
CA10, No. 12-7072, 11/4/13

Michael Lynn Cash was pulled over after police observed him commit a traffic violation. During the stop, police saw in plain view an artificial bladder device. Police also learned that Cash was on the way to take a drug test for his federal probation officer. Suspecting that Cash was planning on using the device to defeat a urine drug test, police detained him until another officer arrived at the scene.

Shortly after the second officer arrived, police observed a firearm in plain view in the back seat of Cash's car. A scuffle ensued in an effort to take Cash into custody and to render the firearm safe. Cash was eventually subdued and placed in the back of the police cruiser. He was not given *Miranda* warnings. Officers conducted an inventory search of Cash's vehicle and found methamphetamine, Lortab, and used syringes.

A federal grand jury ultimately indicted Cash on three counts: possession with intent to distribute methamphetamine, possession of a firearm in furtherance of a drug trafficking crime, and as a felon in possession of firearm. Cash moved to suppress both (1) the physical evidence obtained from the search and (2) his statements to the officers while he was seated in the back of the police cruiser. The district court denied both motions, holding that neither Cash's Fourth nor Fifth Amendment rights were violated. A jury convicted Cash on all counts. He appealed the district court's denial of both motions to suppress.

After concluding that the search of the vehicle was valid, the Court of Appeals for the Tenth Circuit dealt with the motion to suppress statements made by Cash, finding in part as follows:

"No person…shall be compelled in any criminal case to be a witness against himself. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Thus, any confession obtained during a 'custodial interrogation' may not be used by the prosecution against the defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the Fifth Amendment privilege against self-incrimination.

"For *Miranda*'s protections to apply, custodial interrogation must be imminent or presently occurring. *Miranda* is therefore only applicable when (1) the suspect is in

'custody,' and (2) any questioning meets the legal definition of interrogation. To be in custody, a person must be under formal arrest or have his freedom of action curtailed to a degree associated with formal arrest. The fact that a defendant is in custody, however, does not automatically render an exchange an interrogation. Rather, 'interrogation' refers to either express questioning or its functional equivalent—i.e., 'words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

"The Supreme Court has not since elaborated on the meaning of 'express questioning,' and the Tenth Circuit has refused to read the term literally. Rather, we have determined that interrogation extends only to words or actions that the officers should have known were reasonably likely to elicit an incriminating response. Other circuits have adopted similar positions. This approach is consistent with both *Miranda* and *Innis*, which stated that interrogation must reflect a measure of compulsion above and beyond that inherent in custody itself. Not every sentence punctuated by a question mark constitutes an interrogation. Express questioning cannot sweep so broadly.

"Asking 'how's it going?' is a far cry from 'where were you on the night of the murder?' Indeed, a definition of interrogation that included any question posed by a police officer would be broader than that required to implement the policy of *Miranda* itself. Thus, although asking a question is relevant to determining whether an interrogation has occurred, it is neither sufficient nor necessary. Instead, we must inquire whether law enforcement officials should have known that their words or actions—whether framed as a question or not—were reasonably likely to elicit an incriminating statement. This inquiry is an objective one, and we focus on the perceptions of a reasonable person in the suspect's position rather than the intent of the investigating officer.

"Mr. Cash argues that his unwarned statements in response to Officer Brittingham's questions should be inadmissible under *Miranda*. We disagree. Although the Government concedes that Mr. Cash was in custody when he was subdued in the back of the police cruiser, the conversation between Mr. Cash and Officer Brittingham did not meet the legal definition of interrogation.

"First, their initial exchange did not constitute interrogation. Mr. Cash began the conversation when he beckoned Officer Brittingham to the squad car. By its plain terms, *Miranda* only applies to 'questioning *initiated by law enforcement officers* after a person has been taken into custody.' *Miranda,* 384 U.S. at 444. In response to Mr. Cash's request to see him, Officer Brittingham asked 'what was going on?' Although phrased as a question, this was merely an innocuous attempt to understand why Mr. Cash wanted to speak with him. Mr. Cash's answer—'You've got to help me. They're going to kill me.' was therefore not the product of interrogation, and *Miranda* does not forbid its admission against Mr. Cash.

"Second, Officer Brittingham's follow up question—'what's the deal?'—did not elevate the brief encounter into an interrogation.

Rather, this question was simply an attempt to clarify Mr. Cash's dramatic statement about threats to kill him. Although he phrased it as a question, Officer Brittingham was following up in response to Mr. Cash's spontaneous statement and was not engaged in interrogation. Officer Brittingham was merely responding to an abstract statement about people wanting to harm him. Although an incriminating response to 'what's the deal?' was possible, the question was not so likely to produce an incriminating response that *Miranda* warnings were required. The interaction unfolded quickly and spontaneously at Mr. Cash's behest, and we cannot say that Officer Brittingham 'should have known' that his follow up question would have elicited an incriminating response. Thus, *Miranda* does not prohibit the admission of Mr. Cash's statement.

### PROBABLE CAUSE: Valid Traffic Stop

*Robinson v. State*
CR-12-784, 2013 Ark. App. 464, 9/4/13

Donnie Robinson was arrested for DWI on June 4, 2011. He was also charged with refusing to submit to a chemical test, having a broken windshield, and having a broken taillight. On May 7, 2012, Robinson filed a motion to suppress evidence obtained as a result of his traffic stop, alleging that there was no probable cause for the stop.

At the suppression hearing, Trooper David Outlaw of the Arkansas State Police testified that he pulled Robinson over on June 4, 2011, after seeing that the passenger taillight on Robinson's truck was broken. Outlaw said that the taillight was still burning and showing a white light instead of red. On cross-examination, he clarified that part of the taillight was not broken and was still showing red.

The trial court denied the motion to suppress, finding that there was cause to believe Robinson had committed a traffic offense in violation of Arkansas Code Annotated sections 27-36-215 to -216. After a jury trial, Robinson was acquitted of DWI and convicted of refusal to submit to a chemical test. The trial court dismissed the charges of broken windshield and defective equipment. Robinson was sentenced to twelve months' suspended imposition of sentence. He filed a timely notice of appeal.

"In order to make a valid traffic stop, a police officer must have probable cause to believe that a traffic law has been violated. *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005). Probable cause is defined as facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected.

"Robinson argues that there was no probable cause for Outlaw to conduct a traffic stop because there is no statute prohibiting a cracked taillight lens. He notes that the statute on taillights, Arkansas Code Annotated section 27-36-215(a) (Repl. 2008), requires only that taillights 'emit a red light plainly visible from a distance of five hundred feet (500') to the rear.' Robinson attempts to distinguish this case from *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997), where the Arkansas Supreme Court held that testimony that the defendant's taillight was partially broken and shining white instead of red

provided probable cause. Robinson notes that his taillight was shining white and red, and he urges this court to adopt the holding of a Texas case that 'a cracked taillight emitting white light is not a violation.' See *Vicknair v. State*, 751 S.W.2d 180 (Tex. Crim. App. 1986).

"The State argues that Outlaw had probable cause to stop Robinson's truck because the broken taillight was cause for him to believe that the vehicle had safety defects pursuant to Arkansas Code Annotated section 27-32-101 (Repl. 2008). This statute provides, in part:

> *(a)(1) No person shall drive or move any vehicle subject to registration on any highway in this state unless the equipment on the vehicle is in good working order and adjustment as required for the vehicle's safe operation and unless the vehicle is in safe mechanical condition as not to endanger the driver, other occupants of the vehicle, or any other person.*
>
> *(2)(A) Any law enforcement officer having reason to believe that a vehicle may have safety defects shall have cause to stop the vehicle and inspect for safety defects.*

"In *Villanueva v. State*, 2013 Ark. 70, --- S.W.3d ---, the Arkansas Supreme Court held that a large windshield crack was the type of 'safety defect' contemplated by section 27-32-101(a)(2)(A) despite Robinson's argument that no Arkansas law made it illegal to operate a vehicle with a cracked windshield. Here, the testimony established that Robinson's vehicle's equipment was not in 'good working order,' which provided probable cause for the officer to stop the vehicle. The trial court did not clearly err in finding that the traffic stop was proper."

## SEARCH AND SEIZURE:

### Consent Search; Destructive Search

*United States v. Guevara*
CA8, No. 13-1340, 10/3/13

Susana Guevara was stopped by Trooper Russell Lewis of the Nebraska State Patrol on May 11, 2011. Guevara was driving a 1996 Jeep Cherokee eastbound in the left lane of I-80 going sixty-eight miles per hour in a seventy-five mile-per-hour zone. Trooper Lewis first noticed the Jeep slowly passing a semi because a line of cars had built up behind the Jeep. When the Jeep finally passed the semi, the Jeep did not move over to the right lane. Instead, the Jeep continued in the left lane for another five miles, forcing cars behind it to pass on the right. Trooper Lewis followed the Jeep and attempted to signal the Jeep to move over to the right lane. Eventually, Trooper Lewis stopped the Jeep.

Trooper Lewis told Guevara that he pulled her over because she was "impeding traffic." He said that she could stay in the left lane to pass, but that she then needed to get over to the right lane to allow faster moving cars to pass as well. Trooper Lewis asked Guevara to accompany him back to his car. While processing Guevara's information, Trooper Lewis asked Guevara where she was headed. Guevara stated she was going to Minneapolis to visit her aunt. Guevara was not sure where her aunt lived but said she had written it down on a piece of paper in her car. Guevara later suggested that she needed to call her aunt for the information but had not yet been able to reach her. Trooper Lewis testified that he knew it was common for drug smugglers to know the city, but not the specific address, of their destination. Trooper Lewis also asked

if she owned the Jeep, and Guevara said no. Guevara said a friend had helped her borrow the vehicle from its owner, whom Guevara did not know very well. Trooper Lewis noted that the vehicle had an open title, meaning the owner of the vehicle had signed the seller's portion of the title but had left the buyer's portion blank. Trooper Lewis testified that he knew from his experience that smugglers will often use a third-party vehicle or a vehicle with an open title.

Trooper Lewis left Guevara in his car and went to talk to the passenger of the Jeep, Guevara's sister. Trooper Lewis asked the passenger for her identification. While running the passenger's information, Trooper Lewis asked Guevara for her consent to search the Jeep. He told her that because she was the driver of the vehicle and in possession of the vehicle, she could consent to the search. Guevara asked if she had to consent, and Trooper Lewis said she did not. He asked again whether Guevara would consent to a search, and she ultimately consented. Trooper Lewis then asked for the passenger's consent. The passenger limited her consent to a search of her luggage.

Trooper Lewis radioed for assistance with his search but started to conduct his search alone, with Guevara's passenger still in the passenger seat. Trooper Lewis began by searching the passenger cabin and the luggage. At one point, Trooper Lewis returned to his squad car, and Guevara objected to the search of her luggage. Trooper Lewis informed her that he had already opened her luggage and that he had not disturbed the contents. Shortly thereafter, Trooper Pelster arrived to assist Trooper Lewis. Trooper Pelster moved Guevara's passenger from the passenger seat of the Jeep to his squad car. When Trooper Pelster later engaged the passenger in conversation, he noted that the sisters gave inconsistent stories regarding whom they were going to visit. Guevara stated they were going to see their aunt, while Guevara's sister stated they were going to see their mother. When asked, Guevara said her mother lived in California, not in Minnesota.

After searching the passenger cabin and underside of the car, the troopers began to search the engine compartment. The troopers testified that, on this type of vehicle, the air intake manifold was one spot where smugglers commonly build a compartment. The troopers found that the engine was very clean for such an old vehicle, and they noticed what they thought could be evidence of tampering. In particular, it appeared that the air intake manifold bolts were "tooled," showing wear from being opened and put back together. They also noticed fingerprints and smudge marks that suggested someone had handled or touched the area. Trooper Lewis got a wrench and removed the bolt securing the air intake manifold cover; this cover, or hose, came off very easily. Trooper Lewis inserted the wrench through a hole in the manifold to check for a hidden compartment. The wrench went in about two inches and abruptly struck a piece of metal. In an unmodified vehicle, the wrench should have gone in six to eight inches. Peering into the hole, the troopers noticed that the inside had been painted black. The troopers could see scratches in the paint from the wrench and paint flakes on the wrench.

Trooper Lewis then drilled a small hole in the metal of the compartment. Through the

hole, the troopers could see the compartment contained cardboard. They enlarged the hole to about the size of a dime, which revealed cardboard and plastic. Seeing something inside the compartment, the troopers decided to detain the women and move the car to a mechanic's garage where the engine could be disassembled.

Trooper Pelster told Guevara's passenger, who was in his squad car, that she was being detained. Meanwhile, Trooper Lewis told Guevara she was under arrest. Before significant time had passed, the troopers realized they had given the women inconsistent information. After discussing the matter with Trooper Pelster, Trooper Lewis informed Guevara that she was not under arrest but was simply being detained while the Jeep was towed to a garage. At the garage, methamphetamine was found inside the hidden compartment.

Susana Guevara and her sister were transported to the Nebraska State Patrol office, where Guevara made incriminating statements. In her motion to suppress, Guevara challenged the constitutionality of the traffic stop, the destructive search of her vehicle, her subsequent detention, and the use of her statements at trial. The district court adopted the magistrate judge's report and recommendation with little modification and denied the motion to suppress. Upon review, the Court of Appeals for the Eighth Circuit found, in part, as follows:

"Guevara challenges the constitutionality of the traffic stop. A traffic stop is considered a seizure for Fourth Amendment purposes. *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). In order to justify the seizure, the stop must be 'supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred.' *United States v. Washington*, 455 F.3d 824, 826 (8th Cir. 2006).

"In this case, the district court found that Trooper Lewis had a reasonable suspicion that a traffic violation had occurred at the time he stopped the vehicle. *United States v. Guevara*, No. 11-00135, 2012 WL 553356, at *3 (D. Neb. Feb. 21, 2012). The district court found that all that was required in this case was a reasonable suspicion that some traffic violation occurred. The court held that the trooper did not need to be correct that a law had been broken, or even correct about which law had been broken, provided his mistake in law or fact was objectively reasonable.

"The district court suggested that if Trooper Lewis did make a mistake in using the phrase 'impeding traffic,' it was an objectively reasonable one. The court found that 'Trooper Lewis did not testify to a specific statute as the basis for the traffic stop, and he is not required to do so.' The district court noted that Trooper Lewis clearly described conduct prohibited by Nebraska statute. The district court ultimately concluded that 'Trooper Lewis had an objectively reasonable belief that a traffic violation had occurred, and a reasonable suspicion to stop the Jeep.'

"Guevara argues that the district court's opinion relied on a different statute than the one Trooper Lewis cited to Guevara when he pulled her over. Even if that were true, it does not necessarily answer the question of whether Trooper Lewis had the probable cause or reasonable suspicion necessary to

make the stop. An arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (citing *Whren v. United States*, 517 U.S. 806, 812–13 (1996)). That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. The record shows that Trooper Lewis observed Guevara driving in the left lane and failing to move over to the right lane for faster moving cars. Trooper Lewis even told Guevara that she could not simply drive slowly in the left lane, forcing cars to pass her on the right. Under *Devenpeck* and *Whren*, Trooper Lewis had the probable cause necessary to make the traffic stop for improperly driving in the left lane, a reason he did articulate to Guevara at the time of the stop.

"The district court found that Guevara voluntarily consented to the search of the Jeep. On appeal, Guevara does not contest that she initially consented to the search. Instead, Guevara argues that her consent was invalidated, or not voluntary, because she was deprived of an opportunity to withdraw or limit her consent by being placed in the trooper's car during the search.

"A warrantless search of an automobile for contraband is allowed under the Fourth Amendment if an officer has probable cause to justify the search. See generally *United States v. Ross*, 456 U.S. 98 (1982) (discussing an automobile exception, which permits a warrantless search of a vehicle based on probable cause); *Carroll v. United States*, 267 U.S. 132 (1925) (finding an automobile exception). Even without probable cause, if an officer has obtained voluntary consent to search, then the officer is free to search the vehicle provided the search stays within the scope of the consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ('It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.')

"We have not, to date, found that officers have a duty to ensure that an individual has an opportunity to withdraw or limit consent. See, e.g., *United States v. Gallardo*, 495 F.3d 982, 990 (8th Cir. 2007). Even assuming officers do have a duty to allow such an opportunity, however, the evidence supports the finding that Guevara failed to make an effort to withdraw or limit her consent in a timely manner. A person is at least obligated to make some effort to communicate an intent to withdraw his consent before a court will entertain a claim of lack of opportunity to withdraw consent. Also see *United States v. Braiske*, No. 09-0073, 2010 WL 299482, at *4 (N.D. Iowa Jan. 21, 2010), aff'd sub nom. *United States v. Mayo*, 627 F.3d 709 (8th Cir. 2010) (noting that defendant was in a position to communicate with officers and never attempted to do so).

"As Guevara points out, she did object to the search of her luggage, thus demonstrating that she knew how to limit her consent and was capable of doing so. Guevara maintains, however, that she later knocked on the window in order to speak with Trooper Lewis and to object to the search of the engine compartment. The squad car video of the traffic stop shows Guevara's hand briefly moving in front of the camera toward the front windshield. The video does not make

clear exactly what she is doing, but Guevara asserts this was a knock. What the record lacks, however, is any additional evidence to support the conclusion that (1) Guevara was knocking in an attempt to get the troopers' attention; or (2) Guevara's purpose for getting the troopers' attention was to withdraw or limit her consent. The district court found that Guevara did not object during the search, and that the evidence does not show that Guevara revoked her consent, or that she limited the scope of her consent, at any time before or during the search. Given the state of the record, we cannot say the district court's finding that Guevara made no effort to withdraw her consent is clearly erroneous.

"Even if we could find that Guevara was knocking, and that she was knocking in an effort to withdraw or limit her consent, the record shows the knock came too late. According to the squad car video, the troopers discovered the hidden compartment at least five or six minutes before Guevara claims to have knocked. The district court found that probable cause to conduct the destructive search existed from the point the troopers discovered the hidden compartment. We agree. Because the troopers no longer needed Guevara's consent to continue the search once they discovered the compartment, any effort to withdraw or limit her consent at that point would have been fruitless.

"Next, Guevara argues the troopers lacked the probable cause necessary for a destructive search of the engine. A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). It is a practical and common-sensical standard based on the totality of the circumstances. All that is required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act. Particularly with respect to automobile searches:

> *A police officer may draw inferences based on his own experience in deciding whether probable cause exists. See, e.g.,* ***United States v. Ortiz,*** *422 U.S. 891, 897 (1975). To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel. An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable.*

*Ornelas v. United States*, 517 U.S. 690, 700 (1996). Consensual searches generally cannot be destructive. *United States v. Santana–Aguirre*, 537 F.3d 929, 932 (8th Cir. 2008) (citing *United States v. Alverez*, 235 F.3d 1086, 1088–89 (8th Cir. 2000)). Cutting or destroying an object during a search requires either explicit consent for the destructive search or articulable suspicion that supports a finding that probable cause exists to do the destructive search.

"The district court held that once the troopers discovered the hidden compartment, they had probable cause to search the vehicle in a destructive way. We agree. After finding the compartment, the troopers had more than enough information such that a reasonable person, particularly with their training and experience, would believe there was a 'fair

probability' that drugs were hidden in the engine compartment. First, Guevara and her sister gave inconsistent answers about which relative they were going to visit, and neither of them knew the address of their final destination. The vehicle also had an open title and had been loaned to them by a third party for the trip. Second, the troopers noticed the engine compartment was particularly clean, with visible evidence that someone had touched or handled the area. Bolts in the area of the air intake manifold looked 'tooled,' and the hose covering the air intake manifold came off very easily, suggesting it had been on and off several times or had not been replaced properly. Finally, the location of the hidden compartment in the air intake manifold was, in the experience of the officers, typical of drug smuggling in a vehicle of this type. Upon finding a hidden compartment in the engine, the troopers had more than a suspicion that the Jeep was being used for smuggling.

"Based on the totality of the circumstances, they had a reasonable belief they would find drugs in the compartment. See *Harris*, 133 S. Ct. at 1055. Therefore, we affirm the district court's finding that after the troopers discovered the hidden compartment, they had probable cause to continue the search. See *Alverez*, 235 F.3d at 1088–89 (finding a destructive search of a vehicle is allowed where officers have probable cause).

"Finally, Guevara contends that she was placed under arrest by Trooper Lewis at a time when the troopers merely suspected she possessed contraband but lacked probable cause. There is no bright line of demarcation between investigative stops and arrests. *United States v. Miller*, 974 F.2d 953, 957 (8th Cir. 1992) (citing *United States v. Sharpe*, 470 U.S. 675, 685–86 (1985)). A *Terry* stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if officers use unreasonable force. *United States v. Smith*, 648 F.3d 654, 660 (8th Cir. 2011) (quoting *United States v. Newell*, 596 F.3d 876, 879 (8th Cir. 2010)). Guevara contends that she was in fact under arrest at least from the time she was handcuffed, which is before she gave incriminating statements. The district court accepted the magistrate judge's finding that Guevara was merely detained and not arrested.

"This is not the case to wrestle with the boundaries of detentions and arrests. While the circumstances of this case suggest something more than an investigative detention, we find there was probable cause to support an arrest. Thus, any arrest that might have allegedly occurred was not unlawful. *United States v. Martinez*, 462 F.3d 903, 907, 910 (8th Cir. 2006) (finding in the alternative that even if a detention was converted into an arrest by handcuffing the suspect, because there was probable cause, the arrest was not unlawful). We will assume without deciding, therefore, that Guevara's detention was an arrest.

"Guevara argues that the discovery of a hidden compartment containing cardboard and plastic was insufficient to give the troopers probable cause to arrest. Guevara maintains that because the troopers did not know with any degree of certainty that there were drugs hidden in the compartment, they lacked probable cause to arrest her. We disagree.

"Whether officers make a formal arrest or a detention ripens into an arrest, a warrantless arrest is consistent with the Fourth Amendment if it is supported by probable cause. *Ulrich v. Pope Cnty.*, 715 F.3d 1054, 1059 (8th Cir. 2013) (quoting *Borgman v. Kedley,* 646 F.3d 518, 522–23 (8th Cir. 2011)); see also *Martinez*, 462 F.3d at 907, 910 (holding in the alternative that even if handcuffing a suspect did convert the detention into an arrest, the arrest was justified by probable cause). Probable cause to make a warrantless arrest exists when the totality of the circumstances at the time of the arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense. *Ulrich*, 715 F.3d at 1059 (quoting *Borgman,* 646 F.3d at 523).

"Guevara points to *United States v. Tovar–Valdivia*, 193 F.3d 1025 (8th Cir. 1999), and *United States v. Jones*, 254 F.3d 692 (8th Cir. 2001), which held that the mere observation of a non-anatomical bulge on someone's person was, without additional information, insufficient to provide probable cause that contraband would be found in the bulge. Guevara argues that a hidden compartment, the contents of which are unknown, is logically indistinguishable from a non-anatomical bulge. *Tovar* and *Jones* are distinguishable from the present case in two important respects. First, there is a significant difference between searching a person and searching a vehicle. The court in *Tovar* stressed that the bulge might contain anything—there were many conceivable and likely legal possibilities. 'The bulges could have been bandages about his body, a money belt worn about his ribs, or any number of non-contraband items.' *Tovar*, 193 F.3d at 1028. In contrast, we think a hidden compartment in a car, particularly one hidden inside an engine, is far less likely to contain non-contraband or have a non-illegal purpose than a miscellaneous bulge in someone's clothing. Thus, the location and nature of the compartment, irrespective of the drilling or opening of the compartment, provide some clue about its contents.

"Second, in other concealed bulge cases, we have upheld a finding of probable cause where the officer had additional information about what was in the bulge. See *United States v. Aquino*, 674 F.3d 918, 924–25 (8th Cir. 2012) (discussing concealed bulge cases and noting a difference where the touching of the bulge leads to a belief about what is inside the bulge); see also *United States v. Favela*, 247 F.3d 838, 839 (8th Cir. 2001). We have found that an officer does not have to actually see the contraband inside the bulge. *Aquino,* 674 F.3d at 924–25. Instead, the officer has to form a reasonable belief about what is in the bulge, based on something other than simply observing the exterior of the bulge. In the bulge cases, the officer may achieve this through a permissible touching of the bulge; if the officer believes she feels drugs or a weapon, the officer may have probable cause to arrest.

"Applying the rule from *Aquino*, the troopers formed a belief about the contents of the hidden compartment based on something other than observing the exterior of the compartment. Drilling into the compartment provided the additional information necessary to buttress the troopers' initial observations. After looking into the compartment and seeing something other than metal, particularly cardboard and plastic, a prudent person would believe

the compartment contained contraband and an offense was being committed. Thus, the troopers had probable cause to justify an arrest once it was clear that the engine compartment was not empty and the holes were drilled into the compartment. As an arrest, the officers were permitted to handcuff Guevara and transport her to the mechanic's garage in the police car. Because Guevara was read her Miranda rights, any statements she made at the garage or later at the Nebraska State Patrol office are admissible.

"For the reasons stated above, we affirm the district court."

## SEARCH AND SEIZURE:

### Consent Search; Scope of Consent

*United States v. Lopez-Cruz*
CA9, No. 11-50551, 9/12/13

Andres Lopez-Cruz gave a border patrol agent permission to "look in" or "search" two cell phones he had with him but the agent did not ask him whether he would also consent to the agent's answering any incoming calls. When one of the phones rang while the agent was conducting his search, the agent answered it, passing himself off as Lopez-Cruz. By answering the call, the agent obtained information leading to Lopez-Cruz 's arrest and felony charges of conspiracy to transport illegal aliens.

Upon review, the Ninth Circuit Court of Appeals found that "the agent's impersonation of the intended recipient constituted a meaningful difference in the method and scope of the search in contrast to merely pushing a button in order to view a text message. The consent to search a cell phone was insufficient to allow an agent to answer that phone. In this situation, specific consent to answer was necessary."

## SEARCH AND SEIZURE:

### Consent Search; Third Party Consent

*United States v. Arreguin*
CA9, No. 12-50484, 11/22/13

On August 16, 2008, nine law enforcement officers, including DEA Agents John Rubio and Paul McQuay, conducted a "knock and talk" investigation at a Riverside, California home. Present inside the home were its three primary residents, Omar Arreguin, his wife Maria Ledesma-Olivares, and their baby. One houseguest, Elias Valencia, Jr., was also on the premises. The residence's front porch and entry door are located approximately 20–25 feet from the nearest sidewalk. Just behind the front door is a foyer that extends seven or eight feet into the residence. Just beyond the foyer there are a living room and a family room. Beyond the foyer and further into the residence is a master bedroom.

Inside the master bedroom, there are two additional doors. Passing through the first of the doors leads, unremarkably, into the attached master bathroom. But passing through the second door leads, somewhat surprisingly, into the residence's garage.

Nothing in the record suggests that the DEA Agents had any preexisting knowledge of the residence's somewhat unique floor plan when they began their "knock and talk" investigation. To the contrary, the record reveals that the agents did not know much at all about the premises.

In his initial live testimony, for example, Rubio stated that he and his fellow agents did not even "know exactly who resided" at the residence, and that they planned to find out during the course of the "knock and talk." He later acknowledged once again that when he approached the house, he did not know who was inside. Although the residence was searched by local law enforcement "several months prior," neither Rubio nor McQuay made any mention of the DEA's involvement in that prior search. For his part, McQuay affirmatively acknowledged that he did not participate in the prior search.

At approximately 11:00 a.m. on August 16, 2008, Agents Rubio, McQuay, Chad Corbin, and two other officers approached the residence from the street. Rubio was one of the first two or three agents to approach the front porch area, alongside Group Supervisor Daniel Neill. After Rubio knocked on the entry door between three and seven times, a sleepy-looking Valencia opened the door, and the two began talking.

With the door open, both Rubio and McQuay (who was standing six feet behind Rubio) could see into and slightly beyond the entry area. From his vantage point on the porch, Rubio was able to see Ledesma-Olivares standing just beyond the foyer, holding an infant, and he was able to see Arreguin standing several feet inside the residence, holding a shoebox. McQuay also noticed Arreguin and the shoe box, and he then observed Arreguin disappearing and reappearing from view "about four times" behind Valencia. Eventually, Arreguin briefly disappeared from McQuay's field of vision while moving to McQuay's right; when Arreguin reappeared, McQuay realized that he was no longer holding the shoebox. Meanwhile, Rubio had a brief conversation with Valencia, while Ledesma-Olivares and Arreguin looked on. Rubio explained that "we're here from the DEA" and "we know this house. There was drug-related activity before. We would like to come in and look around. Can we come in?"

Valencia said yes and stepped back towards the rear of the foyer. Neither Arreguin nor Ledesma-Olivares voiced any objections. Very quickly thereafter, the agents made entry into the residence. At that time, Rubio observed Arreguin walking swiftly toward the master bedroom of the residence, down a hallway, and out of sight. McQuay and Corbin followed Arreguin, stopped at the hallway, and called for him to return to the main entrance area. Within 30 seconds, he did so, and the Agents followed him back to the foyer.

At that point, Rubio and Arreguin began talking in a family room, while McQuay and Corbin headed further into the residence, ostensibly performing a "cursory safety sweep."

McQuay and Corbin moved past Valencia through the entry area of the home and proceeded to their right, because that was where McQuay had last seen Arreguin moving with the box. Within a matter of 30 seconds, McQuay proceeded further into the residence, turned left, and found himself in the master bedroom area. The door to the attached master bathroom was open, and McQuay was able to observe the cabinet underneath the bathroom sink. He saw a blue shoebox in the cabinet, with its cover removed, and noticed a white powdery

substance inside the box. The box and the white substance were seized.

After finding the shoebox, McQuay entered the garage through the second door in the master suite. Inside the garage, McQuay observed a parked Toyota Corolla and approached the window. From that vantage point, McQuay explained, he could see multiple bundles of cash in a Gucci bag. The bag and the cash were seized, and agents subsequently discovered that the cash amounted to $176,990.

As McQuay proceeded through the master bedroom and garage, Rubio started to speak with Arreguin in Spanish inside the residence's family room. Arreguin informed Rubio that he and his wife and infant lived at the residence, and that Ledesma-Olivares was an illegal alien in the United States.

But a minute into this conversation, McQuay interrupted Rubio and told him that the shoebox, the Gucci bag, and the cash had been found. Rubio and the other agents switched gears.

Soon, agents isolated Arreguin in a rear bedroom and informed him that it would be beneficial to him if he cooperated with them. Rubio also informed Arreguin that he "would not refer Ledesma-Olivares's case to Immigration" if Arreguin cooperated. When agents presented a written consent-to-search form, Arreguin signed it and led them to the garage, where he opened a secret compartment inside the Corolla and revealed five individual duct-tape-wrapped bricks of suspected methamphetamine. The methamphetamine packages were seized.

After he had finished his conversation with Arreguin, Rubio interviewed Valencia again in the residence's kitchen area, approximately five minutes after his first conversation with Valencia in the entry area. Valencia presented identification from Atlanta, Georgia, and Rubio then learned that Valencia was a mere guest at the residence.

Omar Arreguin plead guilty to charges under 21 U.S.C. 841. On appeal, he challenged the district court's denial of his motion to suppress the fruits of a home search. The court concluded that it was not objectively reasonable for agents to conclude that a houseguest had authority to consent to a search of the master bedroom and bathroom; it was not objectively reasonable for the agents to conclude that the houseguest had authority to consent to a search of the area beyond the door inside the master bedroom; the government's protective sweep fallback argument was waived; and the plain view doctrine did not apply. Accordingly, the court reversed and remanded with instructions to the district court.

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

"The Fourth Amendment provides that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' U.S. CONST. amend. IV. Therefore, it is 'a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.' *LaLonde v. Cnty. of Riverside,* 204 F.3d 947, 954 (9th Cir. 2000) (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980). Evidence recovered following an

illegal entry of the home is inadmissible and must be suppressed. *United States v. Shaibu,* 920 F.2d 1423, 1425 (9th Cir. 1990).

"Although 'consent is a recognized exception to the Fourth Amendment's protection,' *United States v. Russell,* 664 F.3d 1279, 1281 (9th Cir. 2012), the government has the burden of establishing the effectiveness of a third party's consent to a search of a defendant's property. 'The existence of consent to a search is not lightly to be inferred.' *United States v. Reid,* 226 F.3d 1020, 1025 (9th Cir. 2000). The government may meet its burden to show consent by demonstrating that: (1) a third party had shared use and joint access to or control over a searched area; or (2) the owner of the property to be searched has expressly authorized a third party to give consent to the search. *United States v. Welch*, 4 F.3d at 76 (9th Cir. 1993). Or, if the government cannot present proof a party's 'actual authority,' the government may establish consent by means of the 'apparent authority doctrine.'

"Under the apparent authority doctrine, a search is valid if the government proves that the officers who conducted it reasonably believed that the person from whom they obtained consent had the actual authority to grant that consent. 'Apparent authority is measured by an objective standard of reasonableness, and requires an examination of the actual consent as well as the surrounding circumstances.' *United States v. Ruiz,* 428 F.3d 877, 881 (9th Cir. 2005). Thus, in assessing whether an officer's belief was objectively reasonable, the court considers 'the facts available to the officer at the moment.' *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

"The government has the burden of establishing apparent authority to consent to each specific area searched, not just authority to consent to a generalized search of a residence. see *Dearing,* 9 F.3d at 1430; *Davis,* 332 F.3d at 1170 (third party sharing apartment with defendant did not have actual or apparent authority to consent to search of defendant's belongings, located inside apartment); *Fultz,* 146 F.3d at 1106 (homeowner did not have apparent authority to consent to search of defendant's boxes, located inside home); *Welch*, 4 F.3d at 765 (third party who consented to search of car did not have apparent authority to consent to search of purse, located in trunk of car).

"In addition, the Supreme Court teaches that a mere invitation to enter a particular premises is not itself adequate for apparent-authority purposes. 'Even when the invitation to search is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry.' *Rodriguez,* 497 U.S. at 188. Similarly, Ninth Circuit law provides that the 'mere fact of' a third party's access to an area, without more, does not indicate that the access was authorized and that the third party had authority to consent to a search of the area. *Reid,* 226 F.3d at 1025.

"With the very limited set of facts available, a reasonable person would not presume, without further inquiry, that Valencia had joint use, access, or control over the master bedroom and master bathroom area. *Reid*, 226 F.3d at 1025. The failure to inquire properly weighs against the government, not Arreguin, because the police are simply 'not allowed to proceed on the theory that ignorance is bliss.' *Dearing*, 9 F.3d at 1430."

## SEARCH AND SEIZURE:

### Consent Search; Withdrawal of Consent

*United States v. $304,980.00 in United States Currency, et al.*, CA7, No. 13-1710, 10/17/13

Randy Davis was driving his tractor-trailer on I-70 through Illinois toward St. Louis. The sleeping compartment had a hidden compartment in which Davis was hiding $304,980 in cash. Davis passed an unmarked police vehicle containing officers assigned to a DEA drug interdiction task force. The officers followed him until they observed Davis following another truck too closely and initiated a traffic stop. Preparing to issue a warning, the officers examined Davis's log-book and became suspicious because Davis had gone without work for long periods, but had expensive aftermarket parts on his truck. The officers then learned that Davis's truck had previously been used in criminal activity. After Davis orally consented to a search, an officer handed Davis a written consent form to read and sign. Davis used his remote to unlock the truck for the officers, who began searching. Davis became agitated, but responded to the officers' question of whether they still had consent, by scrawling something on the form and handing it over. After discovering the hidden cash, the officers found that Davis had scrawled "under protest." Davis was released, but the government sought forfeiture of the truck and money. The district court denied a motion to suppress, finding that Davis consented to the search. The Seventh Circuit affirmed, holding that the district court did not clearly err in finding the search consensual, finding in part as follows:

"When Officer Thebeau asked for his consent, Davis readily gave it, saying something to the effect of 'yes, go ahead.' Then, he attempted to open the passenger door for Officer Thebeau, only to find it locked. When Officer Thebeau decided to walk around to the driver's side, Davis used his remote to unlock the truck for him. Under these circumstances, a reasonable officer would have believed that Davis consented to the search of his truck. Moreover, Davis does not contend that his consent was involuntary. Therefore, the search was reasonable and complied with the Fourth Amendment so long as it remained within the scope of Davis's general, oral consent and so long as he did not subsequently limit that scope or withdraw his consent altogether.

"Like the question whether consent was given at all, the question whether the suspect subsequently withdrew or limited the scope of his consent is a question of fact that we review for clear error. See *United States v. Maldonado*, 38 F.3d 936, 941–42 (7th Cir. 1994). In this case, Davis argues that by writing 'UNDER PROTEST' on the consent form, he withdrew or limited the scope of his oral consent.

"With respect to scope, Davis's argument is far from clear. He seems to suggest that

by rejecting the form he refused to expand the scope of his oral consent to include hidden compartments. However, his general, oral consent already included hidden compartments, so such an expansion was unnecessary. He also seems to suggest that by rejecting the form, he revoked his consent to search those specific areas listed in the form that were also covered by his general, oral consent. But his conduct was insufficient to withdraw his consent either generally or in relation to specific areas. Therefore, Davis never limited the scope of his consent.

"The government relies on case law from the Eighth Circuit for the proposition that 'a defendant must make an unequivocal act or statement to indicate that consent is being withdrawn.' *United States v. Parker,* 412 F.3d 1000, 1002 (8th Cir. 2005). While our cases have not explicitly required as much, they are consistent with this approach. See, e.g., *United States v. Hardin,* 710 F.2d 1231, 1236–37 (7th Cir. 1983) (holding that the defendant's act of placing his hand over the officer's 'was at best ambiguous, and given his general cooperative attitude during the search, wholly ineffective to communicate an intention to rescind or narrow his consent'). Moreover, we find support for the rule in the Supreme Court's admonition that the ultimate touchstone of the Fourth Amendment is 'reasonableness.' *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). If a suspect's attempt to withdraw consent is equivocal, 'police officers may reasonably continue their search in the premises entered pursuant to the initial grant of authority.' *United States v. McMullin,* 576 F.3d 810, 815 (8th Cir. 2009). Put another way, police officers do not act unreasonably by failing to halt their search every time a consenting suspect equivocates.

"In this case, Davis never unequivocally withdrew his consent. Indeed, the very act he relies upon would have led a reasonable officer to believe that he was affirming, rather than withdrawing, his consent. When asked whether he still consented to the search, Davis grabbed the consent form from Officer Hoelscher, wrote something on it, and gave it back without saying a word. This act would have led an objective observer to believe that Davis had signed the form and affirmed his consent.

"Davis argues that the officers chose the means by which he could communicate his consent (i.e., through the consent form); therefore, he should not have been required to object to the search in any other way, and the officers were unreasonable in failing to closely scrutinize the form to ensure that he had in fact signed it. However, the officers did not communicate with Davis exclusively or even primarily in writing. They asked him whether he consented, and Officer Thebeau relied upon his oral consent and began the search before Davis even read the form. Moreover, Officer Hoelscher did look at the form, and seeing two words written on the signature line, believed Davis had signed it. We have examined the form and find Officer Hoelscher's belief to be a reasonable one. An officer who was unfamiliar with Davis's signature and who had no reason to believe that Davis would have written anything but his signature on the signature line could not reasonably have been expected to do more.

"Finally, we note that Davis's conduct after he signed the form was wholly consistent with his consent and inconsistent with revocation or limitation of that consent. He engaged Officer Hoelscher in casual conversation and

even volunteered that he had been in trouble with the law in the past. Thus Davis's conduct was at best ambiguous, and given his general cooperative attitude during the search, wholly ineffective to communicate an intention to rescind or narrow his consent."

## SEARCH AND SEIZURE: Stop and Frisk; Protective Search of Vehicle

*United States v. Morgan*
CA8, No. 12-4043, 9/10/13

On April 17, 2012, at approximately 12:45 a.m., Officers Aram Normandin and Josh Downs of the Omaha Police Department were patrolling 24-hour businesses in response to robberies in the area. In their patrol car, the officers observed a vehicle with tinted windows parked at the far corner of a grocery store parking lot. Normandin testified that the occupants of the vehicle were "ducked down," so he and Downs "decided to get out and see what was going on." As the officers approached the vehicle, the person in the driver's seat sat up and reached under his seat with both hands.

Normandin and Downs pointed their service weapons at the occupants of the parked vehicle and ordered them to show their hands. The driver, Morgan, initially kept his hands under his seat, but he complied with a second command to raise his hands. The officers then removed Morgan and the other two occupants from the vehicle. By that time, two more police officers had arrived at the scene.

The officers handcuffed all three occupants and seated them on a curb away from the car. Normandin testified that he was concerned that there was a weapon under Morgan's seat, so he immediately searched the vehicle. When he reached under the driver's seat of the vehicle, Normandin felt a lockbox that was large enough to conceal a handgun. Normandin said that he removed the lockbox from the car and asked Morgan, "What is this?" Morgan replied, "There's meth in there, and I'm a dealer."

Based on this response, the officers advised Morgan of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Normandin opened the lockbox and found methamphetamine and a container with a white powdery substance. Morgan then told the officers that he was a drug dealer from Fremont, Nebraska, and that the methamphetamine in the lockbox was for a drug deal in Omaha. When Normandin asked Morgan what was the white powdery substance, Morgan replied that it was cocaine. After the substances in the lockbox field-tested positive for methamphetamine and cocaine, Normandin arrested Morgan. In addition to the drugs, the officers retrieved $1,780 in cash.

The district court suppressed the physical evidence and Morgan's postwarning statements to law enforcement. The court concluded that the officers exceeded the permissible scope of an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968), and that Morgan's unlawful arrest led directly to the seizure of the physical evidence and the making of the inculpatory statements. Upon review, the Court of Appeals for the Eighth Circuit found, in part, as follows:

"A law enforcement officer may detain a person for investigation without probable cause to arrest when the officer 'has a

reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.' *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting Terry, 392 U.S. at 30). Whether the particular facts known to the officer amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances. *United States v. Garcia*, 23 F.3d 1331, 1334 (8th Cir. 1994). Once reasonable suspicion is established, law enforcement officers may conduct a protective search of a vehicle's interior, whether or not the occupants have been removed from the vehicle, because 'if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside.' *Michigan v. Long*, 463 U.S. 1032, 1052 (1983). While *Arizona v. Gant,* 556 U.S. 332 (2009), clarified the limits of an officer's authority to search a vehicle incident to arrest after the arrestee has been secured, *Gant* expressly recognized the continuing vitality of *Michigan v. Long*, and identified protective searches of a vehicle based on reasonable suspicion of dangerousness as an 'established exception to the warrant requirement.'

"The officers had reasonable suspicion to detain Morgan under *Terry*. While patrolling a 24-hour grocery store in an area where there had been recent robberies of 24-hour businesses, the officers observed a vehicle with tinted windows that was parked far away from the store entrance. It was late at night, and they noticed that the occupants of the vehicle were attempting to conceal themselves. As Normandin approached the vehicle, Morgan made furtive gestures under his seat with both hands. And Morgan refused to remove his hands from under the seat when Normandin first ordered him to do so. Taken together, these factors amount to reasonable suspicion that Morgan was engaged in criminal activity, and a reasonable belief that Morgan was dangerous. See *United States v. Martinez-Cortes*, 566 F.3d 767, 771 (8th Cir. 2009) (where occupants of vehicle did not promptly comply with police command to show their hands, and driver moved his arms as if to hide something, 'these furtive actions gave the officers reason to suspect that criminal activity was afoot, and that the occupants might be a risk to officer safety unless detained.'

"The principle announced in *Terry* has been extended to include vehicle searches. *Long*, 463 U.S. at 1049. Morgan's furtive gestures under his seat as the officers approached the vehicle gave them reason to believe that there was a weapon in the vehicle that Morgan might access when the *Terry* stop ended and he was permitted to return to the vehicle. This objectively reasonable concern for officer safety justified Normandin's immediate protective sweep under the driver's seat of the vehicle. *United States v. Smith*, 645 F.3d 998, 1002 (8th Cir. 2011). Because reasonable suspicion was established, the officers' search of the vehicle's interior was permitted even though the occupants had been removed from the vehicle. *Long*, 463 U.S. at 1052. Normandin also was authorized to search the lockbox he found in the vehicle, which was large enough to conceal a weapon, because a valid search under *Long* extends to closed containers found in the vehicle's passenger compartment.

"The scope of a *Terry* stop is limited, and an investigatory detention 'may turn into an arrest if it lasts for an unreasonably long time

or if officers use unreasonable force.' *United States v. Donnelly*, 475 F.3d 946, 953 (8th Cir. 2007). In determining whether a detention is too long to be justified as a *Terry* stop, we consider whether the officers 'diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.' *United States v. Sharpe*, 470 U.S. 675, 686 (1985). There is no bright line rule; instead, 'common sense and ordinary human experience must govern over rigid criteria.' see *United States v. Place*, 462 U.S. 696, 709 (1983).

"While officers should employ the least intrusive means reasonably available to verify or dispel their suspicions, see *Florida v. Royer*, 460 U.S. 491, 500 (1983), they may take any additional steps that are 'reasonably necessary to protect their personal safety during the course of the stop.' *United States v. Hensley*, 469 U.S. 221, 235 (1985). Police officers reasonably may handcuff a suspect during the course of a *Terry* stop to protect their personal safety.

"In the circumstances of this case, the limits of a *Terry* stop were not exceeded when Morgan was removed from the vehicle and handcuffed, and Normandin conducted a protective sweep of the vehicle. The officers had established reasonable suspicion and had reason to believe that Morgan was dangerous, and Normandin searched the vehicle for weapons immediately after securing Morgan. The officers did not use unreasonable force and did not hold Morgan for an unreasonably long time.

"A *Terry* stop involves a police investigation 'at close range,' *Terry*, 392 U.S. at 24, and it is reasonable for officers to fear for their safety—even when a suspect is secured—because the suspect will be permitted to return to his vehicle and to access any weapons inside at the end of the investigation. *Long*, 463 U.S. at 1051-52. The officers were 'acting in a swiftly developing situation,' *Sharpe*, 470 U.S. at 686, and were authorized to take reasonable steps to protect their safety during and immediately after the *Terry* stop. *Hensley*, 469 U.S. at 235.

"The Court stated that the next question on appeal is whether the physical evidence and Morgan's statements later in the encounter—that he was a drug dealer in Fremont, Nebraska, that the methamphetamine was for a drug deal in Omaha, and that the white substance was cocaine—are admissible.

"The government did not challenge the district court's suppression of the statement Morgan made before the officers advised him of his *Miranda* rights—i.e., that there was methamphetamine in the lockbox and that Morgan was a dealer. The question then arises whether the physical evidence and later statements must be suppressed as the fruits of a conceded *Miranda* violation. In *United States v. Patane*, 542 U.S. 630 (2004), the Supreme Court ruled that a violation of the *Miranda* rule does not justify the suppression of physical evidence that is the fruit of custodial interrogation conducted without *Miranda* warnings. Therefore, the methamphetamine and cocaine Normandin found in the lockbox, and the $1,780 in cash the officers retrieved, should not be suppressed.

"Warned statements elicited after an initial *Miranda* violation may be admissible, so long as officers do not purposefully elicit an unwarned confession from a suspect in an

effort to circumvent *Miranda* requirements. *Missouri v. Seibert*, 542 U.S. 600, 604 (2004). When officers have made no such calculated effort to elicit a confession, *Seibert* is not implicated, and the admissibility of postwarning statements is governed by the principles of *Oregon v. Elstad,* 470 U.S. 298 (1985). Here, Morgan does not argue that Normandin's question about the lockbox was 'a designed, deliberate, intentional, or calculated circumvention of *Miranda,' United States v. Black Bear,* 422 F.3d 658, 664 (8th Cir. 2005), and there is no significant evidence that the officer deployed such a strategy. So Morgan's warned statements are admissible if his waiver of rights was voluntary, knowing, and intelligent. *Elstad,* 470 U.S. at 318.

"After the officers read Morgan his *Miranda* rights, Morgan volunteered that he was a drug dealer from Fremont who sold drugs in Omaha. Normandin then asked Morgan what was the white powdery substance in the lockbox, and Morgan replied that it was cocaine. 'There is no contention that Morgan did not understand his rights; and from this it follows that he knew what he gave up when he spoke.' *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010). No evidence suggests that these postwarning statements were coerced, compelled, or otherwise involuntary. We therefore conclude that Morgan's postwarning statements are admissible.

## SEARCH AND SEIZURE:

### Stop and Frisk; Reasonable Suspicion

*United States v. George*
CA4, No. 12-5043, 10/16/13

At 3:30 a.m. on Sunday, November 27, 2011, Officer Daniel Roehrig, while patrolling Wilmington District Two, which he characterized as "one of the highest crime areas in the city," observed a dark-colored station wagon closely and aggressively following another vehicle—within a car's length—as if in a chase.

As the two vehicles made a right turn, they ran a red light at the "fairly high rate of speed" of approximately 20 to 25 miles per hour such that their tires screeched. As Officer Roehrig pulled behind the vehicles following the turn, the station wagon, which had accelerated to approximately 45 miles per hour, slowed to 25 miles per hour and broke off the chase, making a left turn. Officer Roehrig followed the station wagon as it made three more successive left turns, which Officer Roehrig interpreted as an effort by the driver to determine whether he was following the vehicle. When Officer Roehrig decided to stop the vehicle for its aggressive driving and red light violation, he called for backup, which was answered by K9 Officer Poelling. With Officer Poelling nearby, Officer Roehrig then effected the stop in a parking lot.

As Officer Roehrig approached the vehicle, he observed four males in it, including Decarlos George, who was sitting behind the driver's seat. George was holding up his I.D. card with his left hand, while turning his head away from the officer. His right hand was on the

seat next to his leg and was concealed from view by his thigh. Roehrig instructed George to place both of his hands on the headrest of the driver's seat in front of him, but George placed only his left hand on the headrest. This caused Officer Roehrig concern, as he "didn't know what [George] had in his right hand, [but it] could easily have been a weapon." Officer Roehrig directed George again to place both hands on the headrest. As Officer Roehrig testified, "I had to give [George] several more requests to move his hand. Probably I asked four or five times. It was actually getting to the point that I was getting worried about what he had in his right hand." George ultimately complied, but he still never made eye contact with Officer Roehrig.

Once Officer Roehrig observed that George did not have a weapon in his right hand, he proceeded to speak with Weldon Moore, the driver of the vehicle. Moore denied running the red light and claimed he was not chasing anyone. When Officer Roehrig informed Moore that he had observed Moore chasing the other vehicle and going through a red light, Moore adjusted his story, now saying that his girlfriend was in the front vehicle and that he was following her home. Roehrig found this story inconsistent with Moore's aggressive chase of the other vehicle and the abandonment of that chase when the police were spotted. He found Moore's driving to be more consistent with hostile criminal activity, and he questioned the passengers in the car about recent gang violence.

Officer Roehrig then consulted with Officer Poelling, and the two decided to remove all four passengers from the car and interview them separately. Because the officers were outnumbered, they called for more backup. When backup officers arrived, Officer Poelling removed the right rear passenger of the vehicle and conducted a protective frisk. Officer Roehrig then directed George to step out of the vehicle. As George was doing so, he dropped his wallet and cell phone onto the ground. As George bent over to pick the items up, Officer Roehrig stopped him by holding onto George's shirt, fearing that letting George bend over to the ground would create an increased risk of escape. Officer Roehrig turned George around, had him place his hands on the car, and conducted a protective frisk. During the pat down, Roehrig felt an object in George's right front pocket that he "immediately recognized as a handgun." After announcing the gun to the other officers, Roehrig pressed George against the car and placed him in handcuffs, as a second officer removed the gun from George's pocket.

After the gun was seized, Officer Roehrig secured George in the back of his patrol car and issued Moore a written warning for failing to stop at a red light. Upon checking George's criminal history, Officer Roehrig discovered that George was a convicted felon and that the serial number on the gun indicated that it had been stolen. George was charged and pleaded guilty to possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

Before pleading guilty, George filed a motion to suppress the evidence of the gun on the ground that it resulted from an unlawful frisk, in violation of his Fourth Amendment right to be free from unreasonable searches and seizures.

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

"To conduct a lawful frisk of a passenger during a traffic stop, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous. *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The reasonable suspicion standard is an objective one, and the officer's subjective state of mind is not considered. *United States v. Powell*, 666 F.3d 180, 186 (4th Cir. 2011).

"In determining whether such reasonable suspicion exists, we examine the totality of the circumstances to determine if the officer had a 'particularized and objective basis' for believing that the detained suspect might be armed and dangerous. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981) (internal quotation marks omitted)); see also *United States v. Hernandez-Mendez*, 626 F.3d 203, 211 (4th Cir. 2010) (Courts have relied on a standard of objective reasonableness for assessing whether a frisk is justified); *United States v. Mayo*, 361 F.3d 802, 808 (4th Cir. 2004) (evaluating a frisk by the totality of the circumstances).

"A host of factors can contribute to a basis for reasonable suspicion, including the context of the stop, the crime rate in the area, and the nervous or evasive behavior of the suspect. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). A suspect's suspicious movements can also be taken to suggest that the suspect may have a weapon. See, e.g., *United States v. Raymond*, 152 F.3d 309, 312 (4th Cir. 1998). And multiple factors may be taken together to create a reasonable suspicion even where each factor, taken alone, would be insufficient. See *United States v. Branch*, 537 F.3d 328, 339 (4th Cir. 2008). Thus, we will not find reasonable suspicion lacking based merely on a piecemeal refutation of each individual fact and inference.

"In this case, we conclude from the totality of the circumstances that Officer Roehrig's frisk of George was supported by objective and particularized facts sufficient to give rise to a reasonable suspicion that George was armed and dangerous.

"First, the stop occurred late at night (at 3:30 a.m.) in a high-crime area. Officer Roehrig testified that he had patrolled the area of the stop for his five-and-a-half year tenure with the Wilmington Police Department and that, based on his experience, it had one of the highest crime rates in the city and was characterized by violence and narcotics. While George argues that such conclusory testimony given by an officer should not be given much weight, as the government could have employed crime statistics to make the point, George himself acknowledged in testimony that it was a 'drug-related area.' And although general evidence that a stop occurred in a high-crime area, standing alone, may not be sufficiently particularized to give rise to reasonable suspicion, it can be a contributing factor. See *Wardlow*, 528 U.S. at 124; *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1996). Likewise, that the stop occurred late at night may alert a reasonable officer to the possibility of danger. See *United States v. Foster*, 634 F.3d 243, 247 (4th Cir. 2011) (noting that the encounter occurred 'in the middle of the day' in explaining why the

officer lacked reasonable suspicion); *United States v. Clarkson*, 551 F.3d 1196, 1202 (10th Cir. 2009) (Time of night is a factor in determining the existence of reasonable suspicion).

"Second, the circumstances of the stop suggested that the vehicle's occupants might well be dangerous. Officer Roehrig observed the vehicle aggressively chasing the vehicle in front of it, following by less than one car length. He also observed the two vehicles turn right through a red light at 20 to 25 miles per hour, which was a speed sufficient to cause the vehicles' tires to screech. But when Officer Roehrig began to follow the vehicles, the rear vehicle slowed down and ended its pursuit of the vehicle in front of it. Officer Roehrig concluded that the chase was consistent with the individuals in the rear vehicle 'engaging in some type of crime against the people in the first vehicle,' as it indicated hostility between the two vehicles. This suspicion, which we conclude was objectively reasonable in the circumstances, was reinforced when the second vehicle disengaged from its pursuit of the first vehicle upon seeing law enforcement.

"Third, the vehicle that Officer Roehrig stopped was occupied by four males, increasing the risk of making a traffic stop at 3:30 a.m. in a high-crime area. 'The danger from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car.' *Wilson,* 519 U.S. at 414.

"Fourth, George acted nervously when Officer Roehrig approached the vehicle. Without request, George held up his I.D. card while at the same time pointing his head away from Officer Roehrig. Moreover, even after Officer Roehrig gave George a direct order to put his hands on the headrest in front of him, George failed to comply and continued not to make eye contact with Officer Roehrig. Such conduct can contribute to reasonable suspicion. See *Wardlow*, 528 U.S. at 124; *Branch*, 537 F.3d at 338; *Mayo*, 361 F.3d at 808. To be sure, while the failure of a suspect to make eye contact, standing alone, is an ambiguous indicator, see *United States v. Massenburg*, 654 F.3d 480, 489 (4th Cir. 2011), the evidence may still contribute to a finding of reasonable suspicion.

"Fifth, the driver of the vehicle made arguably misleading statements and presented Officer Roehrig with an implausible explanation for his aggressive driving. He initially claimed that he did not run the red light and that he was not chasing anyone. After Officer Roehrig confronted him with the fact that he had personally observed the chase and the red light violation, the driver stated that he had been following his girlfriend. But even that explanation was inconsistent with the driver's conduct in breaking off the chase. If the driver's girlfriend had been in the front car, it would not have been logical for the vehicles to suddenly part ways when a marked police car showed up. Such implausible and misleading statements contribute to the establishment of reasonable suspicion. See *Powell*, 666 F.3d at 188-89.

"Sixth and most importantly, George's movements indicated that he may have been carrying a weapon. When Officer Roehrig initially approached the stopped vehicle, George's right hand was on the seat next to his right leg and was concealed by his thigh. When Officer Roehrig ordered George to put his hands on the headrest, George placed his left hand on the headrest, but not his right hand, which he kept next to his thigh. Officer Roehrig had to repeat his order four or five

times: 'It was…getting to the point that I was getting worried about what he had in his right hand.' As Roehrig explained, he 'didn't know what George had in his right hand, but it could easily have been a weapon.' Although Officer Roehrig's subjective impressions are not dispositive, we conclude that his concern in this instance was objectively reasonable.

"Seventh and finally, after Officer Roehrig ordered George to step out of the vehicle, George dropped his wallet and his cell phone onto the ground as he got out of the car. When George bent over to pick the items up, Officer Roehrig stopped him. George's actions could have created an opportunity for him to reach for a weapon or to escape. Officers in such circumstances are not required to 'take unnecessary risks in the performance of their duties.' *Terry*, 392 U.S. at 23. Taking these facts together in their totality, we are satisfied that Officer Roehrig had a 'particularized and objective basis' for believing that George might be armed and dangerous. See *Arvizu*, 534 U.S. at 273. As such, he had a right to frisk George for weapons to protect himself and his fellow officers during the lawful stop. *Adams v. Williams*, 407 U.S. 143, 146 (1972)."

## SEARCH AND SEIZURE:

### Stop and Frisk; Reasonable Suspicion

United States v. Lyons
CA7, No. 12-2905, 10/28/13

In this case, patrolling officers spotted a car driven by James White, with Anthony Lyons as a passenger. Officer Dodd recognized White from previous encounters, some of which involved attempts to flee arrest. Officer Dodd knew that White's license had been suspended and activated the squad's emergency lights. White accelerated, drove two blocks, and ran a red light before pulling over. Officers Dodd and Officer Burns suspected an attempt to conceal contraband, retrieve a weapon, or get a head start in a foot chase. While others frisked White, Officer Burns observed Lyons, whose hands were shaking and who avoided eye contact. Lyons stated that he did not have any weapons; Burns announced that he intended to frisk Lyons, who then said, "I have a gun." Burns handcuffed Lyons; Dodd lifted Lyons's shirt, revealing a loaded firearm in his waistband. Lyons was charged with possession of a firearm as a felon.

Denying a motion to suppress, the district court found reasonable suspicion that Lyons illegally possessed a firearm or other dangerous item, triggered by his appearing nervous, his being in a car driven by someone with a suspended license, who attempted to flee, and his association with White. The Seventh Circuit affirmed the conviction.