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ARREST: Allowing Individual to Enter Their Home After Arrest

United States v. Reid, CA8, No. 12-3896, 10/20/14

Warnell Reid was living with his girlfriend, Earnestine Graham. Graham was serving a term of federal supervised release, and she had violated the conditions of her release. Several law enforcement officers, including deputy U.S. marshals and St. Louis police detectives, went to Graham's home around 6:30 a.m. on October 10, 2011, to execute an arrest warrant for Graham. The front door was cracked open, and a deputy pushed it open. He saw Graham about eight to ten feet from the doorway. She was dressed in her pajamas. The deputy asked Graham to approach the doorway and told her to turn around. He then handcuffed Graham and pulled her outside the door.

After arresting Graham, the officers asked her if anyone else was inside the home, and she told them only her minor children were inside. Officers then conducted what they described as a "security sweep" of the entire residence. When the sweep was completed, officers allowed Graham to reenter the home to dress. While accompanying Graham to her bedroom, an officer discovered in plain view an SKS assault rifle.

Graham told the officers the firearm belonged to her boyfriend, Warnell Reid, and that there were no other firearms in the home. Reid arrived shortly thereafter and parked his vehicle near the residence. After identifying Reid as Graham's boyfriend, officers detained Reid outside the residence.

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After advising Graham of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the officers asked Graham if she would consent to a search of the home. She agreed and signed a consent form. During a search of the home, officers discovered a shotgun on a windowsill in Graham's bedroom, a disassembled pistol, and ammunition.

A grand jury charged Reid with unlawful possession of a firearm as a previously convicted felon. He moved to suppress evidence found in the home, and the district court denied the motion. Reid proceeded to trial, and a jury found him guilty. At sentencing, the district court determined that Reid had sustained three prior convictions for violent felonies, and sentenced him to a term of 188 months' imprisonment.

Reid argues that the district court erred by not suppressing the evidence seized from the residence. He contends that the officers impermissibly entered the house when they found the SKS assault rifle in Graham's bedroom, and that the discovery of other evidence was a direct result of finding the first firearm.

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

"The officers did not have a search warrant for the house, so the question is whether they had a basis to enter without a warrant. The arrest of a person outside a home does not by itself justify a warrantless search of the residence. *United States v. DeBuse*, 289 F.3d 1072, 1074 (8th Cir. 2002). Here, however, Graham was clad only in pajamas, and the district court found that 'the deputies allowed Graham to reenter 712 Thrush to change her clothes.' When an arrestee chooses to reenter her home for her own convenience, it is reasonable for officers to accompany her and to monitor her movements. *Illinois v. McArthur*, 531 U.S. 326, 335 (2001); *Washington v. Chrisman*, 455 U.S. 1, 6-7 (1982); *DeBuse,* 289 F.3d at 1074-75. Officers permissibly accompanied Graham to her bedroom where she changed from pajamas into clothes, and a deputy observed the assault rifle in plain view in the bedroom. The seizure of the firearm was thus permissible under the Fourth Amendment.

"Reid argues that accompaniment of Graham did not justify the warrantless entry because Graham did not request to reenter her home. It is true that there is no testimony directly quoting Graham as making such a request. But the district court found that the deputies 'allowed' Graham to reenter, and this finding is best understood in ordinary usage as a grant of permission. A grant of permission implies a request. The district court likely would have used different language if the court had found that the officers ordered Graham back into the house.

"The record supports the inference that Graham wanted to get dressed and that the officers permitted her to reenter the home for that purpose. The lead deputy marshal testified that after arresting Graham, he was going 'to allow her to get clothes,' and that she was 'allowed' to go into her bedroom and change clothes. He explained that this was one of the 'courtesies' that he extended to Graham. We therefore conclude that our decision in *DeBuse* is controlling and deem it unnecessary to explore when police may bring an arrestee into a home to change clothes or to dress without a request by the

arrestee. Cf. *United States v. Gwinn*, 219 F.3d 326, 333 (4th Cir. 2000); *United States v. Butler*, 980 F.2d 619, 621 (10th Cir. 1992); *United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977).

"Once the officers located the assault rifle in plain view, they secured consent from Graham to search the house. Graham's consent was sufficient to justify a warrantless search, and the rest of the evidence seized pursuant to the consent search was properly admitted against Reid. See *Fernandez v. California*, 134 S. Ct. 1126, 1133-34 (2014). Because we conclude that the officers permissibly found and seized the disputed evidence while accompanying Graham to change her clothes or pursuant to Graham's later consent, we need not address whether the presence of minor children justified the 'protective sweep' that officers conducted without a warrant or consent.

CIVIL LIABILITY: Allegations in Civil Rights Pleadings

Jefferson v. City of Shelby
No. 13-1318, 11/10/14

Shelby, Mississippi police officers alleged that they were fired, not for deficient performance, but because they brought to light criminal activities of an alderman. The district court entered summary judgment, rejecting their due process claims for failure to invoke 42 U. S. C. 1983 in their complaint and pleadings in the case. The Fifth Circuit affirmed.

The United States Supreme Court reversed, finding in part as follows:

"Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not contemplate dismissal for imperfect statement of the legal theory asserted. No heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke section1983 expressly in order to state a claim. No qualified immunity analysis was implicated here, as the officers asserted a constitutional claim against the city only, not against any municipal officer. The complaint was not deficient in informing the city of the factual basis for the lawsuit.

"Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to §1983.

CIVIL LIABILITY: Justifiable Use of Deadly Force

Krause v. Jones, CA6, No. 13-2498, 9/3/14

U.S. Marshals arrived at Krause's Redford home on December 12, 2008, with a warrant for Krause's arrest for felony possession of more than 50 grams of cocaine. When Krause saw the Marshals, he slammed the door shut and ran into a bedroom. The Marshals followed. One entered the bedroom but left when he found Krause standing in

the corner pointing a handgun at him. As the others took up positions around the bedroom, they again announced themselves and explained they had a warrant for his arrest. Krause told them he had multiple guns and would kill anyone who tried to enter.

A negotiator began talking to Krause from the hallway outside the open bedroom door. They talked for about eight hours. Sometimes Krause yelled and screamed; sometimes he "got very quiet." Officers brought in Krause's father and girlfriend to talk to Krause, without success. Eventually, the officers used a "flash bang" device in an effort to stun Krause. In the seconds that followed, Krause fired a shot at the officers; an officer fatally shot Krause in response.

In a suit under 42 U.S.C. 1983, the district court granted qualified immunity to the officers. The Sixth Circuit affirmed. The decisions to use a flash bang and to shoot Krause were reasonable, not "reckless."

CIVIL LIABILITY: Knock and Talk; Entrance to Residence

Carroll v. Carman, No. 14-212, 11/10/14

On July 3, 2009, Pennsylvania State Police received a report that a man named Michael Zita had stolen a car and two loaded handguns. The report also said that Zita might have fled to the home of Andrew and Karen Carman. The department sent Officers Jeremy Carroll and Brian Roberts to the Carmans' home to investigate. Neither officer had been to the home before.

The officers arrived in separate patrol cars around 2:30 p.m. The Carmans' house sat on a corner lot—the front of the house faced a main street while the left (as viewed from the front) faced a side street. The officers initially drove to the front of the house, but after discovering that parking was not available there, turned right onto the side street. As they did so, they saw several cars parked side-by-side in a gravel parking area on the left side of the Carmans' property. The officers parked in the "first available spot," at "the far rear of the property." The officers exited their patrol cars. As they looked toward the house, the officers saw a small structure (either a carport or a shed) with its door open and a light on. Thinking someone might be inside, Officer Carroll walked over, poked his head in, and said "Pennsylvania State Police." No one was there, however, so the officers continued walking toward the house. As they approached, they saw a sliding glass door that opened onto a ground-level deck. Carroll thought the sliding glass door "looked like a customary entryway," so he and Officer Roberts decided to knock on it.

As the officers stepped onto the deck, a man came out of the house and belligerently and aggressively approached them. The officers identified themselves, explained they were looking for Michael Zita, and asked the man for his name. The man refused to answer. Instead, he turned away from the officers and appeared to reach for his waist. Carroll grabbed the man's right arm to make sure he was not reaching for a weapon. The man twisted away from Carroll, lost his balance, and fell into the yard.

At that point, a woman came out of the house and asked what was happening. The officers again explained that they were looking for Zita. The woman then identified herself as

Karen Carman, identified the man as her husband, Andrew Carman, and told the officers that Zita was not there. In response, the officers asked for permission to search the house for Zita. Karen Carman consented, and everyone went inside.

The officers searched the house, but did not find Zita. They then left. The Carmans were not charged with any crimes. The Carmans later sued Officer Carroll in Federal District Court under 42 U. S. C. §1983. Among other things, they alleged that Carroll unlawfully entered their property in violation of the Fourth Amendment when he went into their backyard and onto their deck without a warrant.

At trial, Carroll argued that his entry was lawful under the "knock and talk" exception to the warrant requirement. That exception, he contended, allows officers to knock on someone's door, so long as they stay on those portions of the property that the general public is allowed to go on. The Carmans responded that a normal visitor would have gone to their front door, rather than into their backyard or onto their deck. Thus, they argued, the "knock and talk" exception did not apply.

At the close of Carroll's case in chief, the parties each moved for judgment as a matter of law. The District Court denied both motions, and sent the case to a jury. As relevant here, the District Court instructed the jury that the "knock and talk" exception "allows officers without a warrant to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants, just as any private citizen might." The District Court further explained that officers should restrict their movements to walkways, driveways, porches and places where visitors could be expected to go. The jury then returned a verdict for Carroll.

The Carmans appealed, and the Court of Appeals for the Third Circuit reversed in relevant part, holding that Officer Carroll violated the Fourth Amendment as a matter of law because the "knock and talk" exception "requires that police officers begin their encounter at the front door, where they have an implied invitation to go." The court also held that Carroll was not entitled to qualified immunity because his actions violated clearly established law. The court therefore reversed the District Court and held that the Carmans were entitled to judgment as a matter of law.

Carroll petitioned for certiorari. The United States Supreme Court granted the petition and reversed the Third Circuit's determination that Carroll was not entitled to qualified immunity finding, in part, as follows:

"A government official sued under §1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. A right is clearly established only if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate. This doctrine 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.

"Here, the Third Circuit cited only a single case to support its decision that Carroll was not entitled to qualified immunity—*Estate of Smith v. Marasco,* 318 F. 3d 497 (CA3 2003). Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances, *Marasco* does not clearly establish that Carroll violated the Carmans' Fourth Amendment rights.

"In *Marasco*, two police officers went to Robert Smith's house and knocked on the front door. When he did not respond, the officers went into the backyard, and at least one entered the garage. The court acknowledged that the officers' entry into the curtilage after not receiving an answer at the front door might be reasonable. It held, however, that the District Court had not made the factual findings needed to decide that issue. In concluding that Officer Carroll violated clearly established law in this case, the Third Circuit relied exclusively on *Marasco*'s statement that entry into the curtilage after not receiving an answer at the front door might be reasonable. In the court's view, that statement clearly established that a 'knock and talk' must begin at the front door. But that conclusion does not follow. *Marasco* held that an unsuccessful 'knock and talk' at the front door does not automatically allow officers to go onto other parts of the property. It did not hold, however, that knocking on the front door is *required* before officers go onto other parts of the property that are open to visitors. Thus, *Marasco* simply did not answer the question whether a 'knock and talk' must begin at the front door when visitors may also go to the back door. Indeed, the house at issue seems not to have even had a back door, let alone one that visitors could use.

"Moreover, *Marasco* expressly stated that there was no indication of whether the officers followed a path or other apparently open route that would be suggestive of reasonableness. That makes *Marasco* wholly different from this case, where the jury necessarily decided that Carroll restricted his movements to walkways, driveways, porches and places where visitors could be expected to go.

"To the extent that *Marasco* says anything about this case, it arguably supports Carroll's view. In *Marasco*, the Third Circuit noted that officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may. The court also said that, when the police come on to private property and restrict their movements to places visitors could be expected to go (*e.g.,* walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment. Had Carroll read those statements before going to the Carmans' house, he may have concluded—quite reasonably—that he was allowed to knock on any door that was open to visitors.

"The Third Circuit's decision is even more perplexing in comparison to the decisions of other federal and state courts, which have rejected the rule the Third Circuit adopted here. For example, in *United States v. Titemore,* 437 F. 3d 251 (CA2 2006), a police officer approached a house that had two doors. The first was a traditional door that opened onto a driveway; the second was a sliding glass door that opened onto a small porch. The officer chose to knock on the latter. On appeal, the defendant argued that the officer had unlawfully entered his property

without a warrant in violation of the Fourth Amendment. But the Second Circuit rejected that argument. As the court explained, the sliding glass door was a primary entrance visible to and used by the public. Thus, because the officer approached a principal entrance to the home using a route that other visitors could be expected to take, the court held that he did not violate the Fourth Amendment.

"The Seventh Circuit's decision in *United States v. James*, 40 F. 3d 850 (1994), vacated on other grounds, 516 U. S. 1022 (1995), provides another example. There, police officers approached a duplex with multiple entrances. Bypassing the front door, the officers used a paved walkway along the side of the duplex leading to the rear side door. On appeal, the defendant argued that the officers violated his Fourth Amendment rights when they went to the rear side door. The Seventh Circuit rejected that argument, explaining that the rear side door was accessible to the general public and was commonly used for entering the duplex from the nearby alley. In situations where the back door of a residence is readily accessible to the general public, the court held, 'the Fourth Amendment is not implicated when police officers approach that door in the reasonable belief that it is a principal means of access to the dwelling.' See also, e.g., *United States v. Garcia,* 997 F. 2d 1273, 1279–1280 (CA9 1993) ('If the front and back of a residence are readily accessible from a public place, like the driveway and parking area here, the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling'); *State v. Domicz*, 188 N. J. 285, 302, 907 A. 2d 395, 405 (2006) ('when a law enforcement officer walks to a front or back door for the purpose of making contact with a resident and reasonably believes that the door is used by visitors, he is not unconstitutionally trespassing on to the property').

"We do not decide today whether those cases were correctly decided or whether a police officer may conduct a 'knock and talk' at any entrance that is open to visitors rather than only the front door. But whether or not the constitutional rule applied by the court below was correct, it was not beyond debate. The Third Circuit therefore erred when it held that Carroll was not entitled to qualified immunity.

CIVIL LIABILITY: Search Warrant; Police Procedure in Conducting the Search

Estate of Adam Brown v. Thomas
CA7, No. 14-1867, 11/13/14

Adam Brown, age 22, was at home with two friends in his ground-floor apartment in Green Bay, Wisconsin at 6:20 p.m. on a December evening, when there was a sudden knocking on his door and a yell of "police, search warrant!" As the police began to force open the front door when no occupant opened it, Brown ran upstairs to his bedroom and grabbed an unloaded shotgun that he kept there. Police followed. As they reached the top of the stairs they saw him standing in a corner of the bedroom pointing the shotgun at them. One of the officers, Secor, shot Brown dead with an automatic rifle, precipitating this suit under 42 U.S.C. § 1983 against Secor, another officer in the search party (Thomas, who has, however, since been dismissed from the case), and their employer, Brown County. The district

court granted summary judgment in favor of the defendants, precipitating this appeal by Brown's estate.

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

"Secor had no way of knowing that the shotgun was unloaded. Had it been loaded with buckshot a single shot at so close a range would have been fatal. The estate contends not that Secor shouldn't have pulled the trigger when he saw a shotgun was pointed at him but that the police search was executed in an unreasonable manner (see, e.g., *Terebesi v. Torreso*, 764 F.3d 217, 233–36 and n. 16 (2d Cir. 2014); cf. *Petkus v. Richland County*, 767 F.3d 647, 650–52 (7th Cir. 2014)), violating the Fourth Amendment and causing Secor mistakenly to think he had to kill Brown in self-defense. According to the estate's version of events, when Brown peered out of his front window in response to the knocking and the shout he found himself face to face with a man—it was Officer Secor—holding an automatic rifle, dressed in dark civilian clothes, with long hair, earrings, a goatee, and sideburns, and wearing a hoodie and a baseball cap. Brown turned away from the window, yelled "What the f&*k…we are getting robbed again" (recently the apartment had been robbed by a person pretending to be an acquaintance), and fled upstairs. One of Brown's friends yelled to him "Get the shotty!" as Brown streaked to the back of the apartment and up the stairs to his bedroom (the apartment was a duplex). Within seconds the police broke down the front door and entered—five in all, two others having gone around to the back of the house to stop anyone from leaving by the rear door.

"The officers had a valid search warrant; there was probable cause to believe that a burglar had hidden stolen property in Brown's apartment. The County's practice is for almost all searches to be executed by a drug task force trained in SWAT tactics and therefore heavily armed. In order to be sure that the search will indeed be of the building specified in the warrant, the team dispatches undercover officers to find the building and lead the team into it. Secor was one of the undercover officers, which was why he was accoutered as he was. The only indication that he was a police officer rather than a criminal was a badge he was wearing around his neck, and it's unclear whether Brown could have seen the badge in the dark when he looked through his window to see who was outside shouting. The officer standing behind Secor was wearing a jacket that said 'police,' as well as a badge, but was otherwise dressed in civilian clothes like Secor. The other three officers in the group that entered the apartment were wearing standard police uniforms but had been in the background, in darkness, when Brown peered outside.

"The estate's case begins with the contention that the police had no need to conduct the search after dark (it is dark at 6:20 p.m. in December in Green Bay—sunset was at 4:14 p.m. the day of the search). There was no urgency. It was not like the search of a stash house, which might contain large quantities of drugs and money. The police were looking for some loot of modest value (a video game system, a couple of video games, and a few other small items) plus the burglar who had stolen it, whom the police correctly believed to be in Brown's apartment. Brown himself was not the suspect. In these circumstances, the estate argues, the search didn't have to

be conducted by a heavily armed SWAT team, let alone a team led by an undercover police officer who looked like an armed thug. It was especially dangerous, the argument continues, for him to be the first officer whom an occupant of the apartment would see, because home invasions by criminals pretending to be police are apparently common, though remember that the previous break-in to Brown's apartment had been by someone pretending to be an acquaintance rather than a cop.

"If the search was conducted in an unreasonable manner and therefore violated the Fourth Amendment—more precisely the principles of the Fourth Amendment, deemed applicable by interpretation of the due process clause of the Fourteenth Amendment to state and local searches—and Brown would not have been killed had the search been conducted in a reasonable manner, then his estate has a valid claim against Officer Secor and maybe (as we'll see) against Brown County as well.

"The police had considered whether to conduct so forceful a search, and had decided to do so mainly because they thought that the burglar who had stashed the loot in the apartment was an escapee from jail, where he was serving time for robbery, and might put up a struggle. (He didn't.) The police also had 'word' that Brown and his girlfriend (who lived with him but was not in the house at the time) were always in 'trouble.' What type of trouble was not further specified but the fact that Brown turned out to possess illegal shotguns (he had two, only one of which he brandished) suggests that their suspicion may have been justified.

"The judge ruled that the search was reasonable, although nighttime searches, especially of a residence (which unlike a store or an office building is likely to be occupied at night), are risky undertakings, and disfavored. Although there is a difference between a search late at night, when the residents are likely to be asleep, and a search in late afternoon or early evening, there doesn't seem to have been any reason not to postpone the search of Brown's apartment till daylight. Indeed since it was dark and the police could not be clearly identified until they entered, the decision to search before daybreak seems to have been foolish. The defendants say that the police were heavily armed because they anticipated several occupants, one a "robber" who had escaped from jail and two others who were regarded as 'trouble.' But the robber (the burglar) was not an escapee in the traditional sense. A participant in a work-release program at the county jail, he had been authorized to go to work in the morning but required to return in the evening—which he'd failed to do at some point before the search took place.

"The defendants don't argue that the police had to be heavily armed because the occupants might be armed; they didn't know about the shotguns in the apartment, or any other weapons. Putting the suspicious-looking undercover officer at the front of the police team has not been explained. True, the undercover officer is the member of the team who knows the address and is therefore least likely to knock on the wrong door, cf. *Balthazar v. City of Chicago*, 735 F.3d 634 (7th Cir. 2013), but Secor could have told one of the officers with him 'that's the door,' and having done so stepped back so as not to be visible from the doorway or a window.

But who knocked is not important. What is important is that when Brown, alarmed by the knocking, peered out of the window, there in plain view was ominous-looking, no-uniform Secor. No doubt the undercover officer, having superior knowledge of the suspects, maybe of the interior of the residence, and so forth, should be part of the search team; the question is whether he should be at the very front of the team, hence the person most likely to be seen by an occupant of the residence.

"The appendix to the estate's brief contains a formidable expert report by William T. Gaut, holder of several degrees, including a Ph.D. in Criminal Justice, and a police officer for 24 years who attained high rank in the Birmingham, Alabama police department and has also been employed by private security firms. His report emphasizes the difference between drug searches and searches for stolen property, and the need to utilize the kind of methods used in the search of Brown's apartment when one is searching for illegal drugs—but not otherwise—because drug dealers tend to be heavily armed and drugs often can easily be disposed of. Although it was the drug task force that conducted the search of Brown's apartment, it was not looking for drugs; and Gaut argues in his report that when searching merely for stolen property (unless of course the property consists of illegal drugs), the search 'should be conducted during daylight hours' and 'an easily identifiable police officer shall knock and notify persons inside' in order 'to reduce or eliminate the possibility of misidentification. It is well known that perpetrators of a home invasion, for the purpose of gaining entry, sometimes impersonate police officers' but rarely 'have the complete visual identity including clothing with the word 'POLICE' prominently written on both the front and back.' The report also notes that there was a lot of confused shouting by the officers as they piled into Brown's apartment; apparently one officer shouted 'Get down, m#&*$@r!" which might have made the occupants including Brown further suspect that the intruders weren't really cops.

"Gaut's report concludes that the search of the apartment was a 'gross deviation from accepted police practices and procedures by the Brown County Sheriff's Office,' a deviation that rose 'to the level of substantial, deliberate indifference for the rights and safety of Brown.'

"But even if Gaut's report is 100 percent on the mark, it can't justify imposing liability on Secor. Secor did not devise the search policy adopted by Brown County. He was doing what he was told to do when, accoutered as he was, he led the search of Brown's apartment. Of course if one is told by one's superiors to do something that is obviously illegal, it is no defense that one was just obeying orders; that was a defense conclusively rejected at the Nuremberg trials of Nazi war criminals. But the situation in this case was not that extreme. There were as we mentioned reasons for having the undercover officer, who needs a goatee, sideburns, etc. in his undercover work, lead the search. There was no compelling reason for him to be the one to knock on the door, but it wasn't because of that, but because he was visible through the window, that Brown saw him and commenced his fatal flight.

"Even if we thought Secor may have been exceeding constitutional bounds in leading the search given his appearance, he would still be entitled to qualified immunity, thus defeating the estate's claim against him. As explained in *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014), a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.' In addition, 'we have repeatedly told courts not to define clearly established law at a high level of generality,' since doing so avoids the question whether the official acted reasonably in the circumstances that he or she faced.

"Gaut's report is, however, evidence that the County—the other remaining defendant—may have failed, through reckless indifference to the safety of persons who find themselves in premises subjected to a police search, to teach its police how to conduct a competent search. It's true that a suit under section 1983 is not governed by the common law doctrine of respondeat superior; liability for a police officer's violation of constitutional rights while acting within the scope of his employment is not automatically imposed on his employer, in this case Brown County. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464, 469 (7th Cir. 2001). But if the violation stems more or less directly from acts of the employer, as it did in this case if indeed the County prescribed an unconstitutional search protocol for its police to follow, the employer is liable.

"Gaut's report severely criticizing the County's search policy might, if admissible (compare *Florek v. Village of Mundelein*, 649 F.3d 594, 601–03 (7th Cir. 2011)), entitle the estate to a trial, were it not for a fatal procedural error by its lawyer: failing to authenticate Gaut's expert report. It was filed with the district court but could not be admitted into evidence without an affidavit attesting to its truthfulness. There was no affidavit. Nor did the plaintiff's lawyer cite Gaut's report in opposing the defendants' motion for summary judgment. On appeal he made the convoluted argument that it was the defendants' burden to depose Gaut and that having failed to do that they admitted that everything in his report was true. Not so. Deposing a witness is optional. Anyway the report could not be used to oppose summary judgment because it was inadmissible. Without the report there is insufficient evidence to justify imposing liability on the County."

DRIVING WHILE INTOXICATED:
Field Sobriety Tests

Tiller v. State
No. CR 14-16, 2014 Ark. App. 431, 8/27/14

Springdale, Arkansas Police Officer Rusty Boyd testified that on October 23, 2012, he was on patrol during the evening shift when he observed a white Nissan Maxima cross the center line of the road several times. Officer Boyd signaled to the driver of the vehicle to pull over, at which time the officer made contact with Tiller. The officer testified that Tiller's eyes were bloodshot and watery; her actions were lethargic and exaggerated; and her speech was slow and deliberate. He said

that although she produced her license, she was not able to produce her proof of insurance or registration; however, he found the documents in her glove box. While Tiller denied that she had been drinking alcohol, she stated that she had taken a Celexa for depression about an hour prior to the stop. The officer testified that Celexa fell under the "CNS depressant category," and that a person can be intoxicated on a CNS depressant.

Based on Tiller's movements, speech, and consumption of a CNS depressant, Officer Boyd asked her to step out of her vehicle and advised her that he was going to administer three Field Sobriety Tests (FST). He testified that Tiller demonstrated six of six indicators of impairment during the first test; six of eight indicators of impairment during the second test; and three of four indicators of impairment during the third test. Officer Boyd stated that based on his observations of Tiller before the testing and her failure of the tests, he believed that she was intoxicated and not able to safely operate her vehicle, which he concluded constituted probable cause sufficient to support her arrest for DWI. Officer Boyd transported Tiller to jail, where he read her the implied-consent form. Although she initialed the form, she refused to take the breath test. She was charged with first-offense DWI and violation of implied consent, and she was cited for driving left of center.

At the conclusion of Officer Boyd's testimony, counsel for Tiller moved to suppress the results of the FST, arguing that Tiller's Fourth Amendment rights had been violated because the officer conducted a warrantless seizure without her consent. Without the FST results, argued Tiller's counsel, there was a lack of probable cause to support the DWI arrest. The trial court denied the motion to suppress.

The Washington County Circuit Court found Courtney Tiller guilty of first offense driving while intoxicated (DWI). On appeal, Tiller argues that the trial court erred in denying her motions to suppress the results of three field sobriety tests (FST) and evidence of her refusal to take a breath test. The Arkansas Court of Appeals affirmed, finding in part as follows:

"Tiller's first point on appeal—based on a Fourth Amendment violation—is that the trial court erred in denying her motion to suppress evidence of the FST results because the officer had no warrant to administer the tests and he failed to obtain her consent to testing. In *Frette v. City of Springdale*, our supreme court held that an officer's actions in ordering the defendant out of his parked truck to investigate a DWI, which included FST, constituted a 'seizure' under the Fourth Amendment. 331 Ark. 103, 108–09, 959 S.W.2d 734, 736 (1998) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). However, our supreme court further held that such a warrantless intrusion is permitted when the officer has reasonable suspicion under Rule 3.1 of the Arkansas Rules of Criminal Procedure to suspect that the occupant of a parked vehicle is about to commit a DWI. *Frette,* 331 Ark. at 109, 959 S.W.2d at 736–37. Rule 3.1 provides that

> *[a] law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of*

appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Ark. R. Crim. P. 3.1 (2012). 'Reasonable suspicion' means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; i.e., a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. *Frette,* 331 Ark. At 109–10, 959 S.W.2d at 737 (citing Ark. R. Crim. P. 2.1). The justification for an investigative stop pursuant to these rules depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. *Frette*, 331 Ark. at 110, 959 S.W.2d at 737.

"In *Fisher*, 2013 Ark. App. 301, at 4, 427 S.W.3d at 746, the defendant moved to suppress evidence of FST (including a portable-breath test), administered at a sobriety checkpoint, contending it was seized from him without a warrant and without his consent. The trial court denied the motion to suppress. Our court affirmed on appeal, holding that before the officer administered the FST, he had reasonable suspicion that the defendant had been driving while intoxicated because the defendant had bloodshot and watery eyes, smelled of intoxicants, had been driving, and admitted that he had been drinking.

"Likewise, in the case at bar, based on Rules 2.1 and 3.1, along with our holding in *Fisher*, we hold that there was no Fourth Amendment violation because Officer Boyd's warrantless seizure (commanding Tiller to perform the FST) was based on his reasonable suspicion that she had committed the offense of DWI. The officer witnessed Tiller repeatedly cross the center line in violation of Arkansas Code Annotated section 27-51-301 (Repl. 2010). He observed that her eyes were bloodshot and watery; her actions were lethargic and exaggerated; and her speech was slow and deliberate. She was unable to produce her insurance or registration documentation, which he found in the glove box. Finally, Tiller admitted that she had taken a CNS depressant an hour prior to the stop, which, according to Officer Boyd, can intoxicate a person. Because Officer Boyd's warrantless seizure was authorized under Rules 2.1 and 3.1, it was lawful and Tiller's consent was not required. Accordingly, we affirm on this point. Furthermore, we hold that Officer Boyd had probable cause to arrest Tiller without consideration of the FST. A law-enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed the offense of driving a vehicle while under the influence of an intoxicating liquor or drug. *Stewart v. State,* 2010 Ark. App. 9, at 6, 373 S.W.3d 387, 391 (citing *State v. Lester*, 343 Ark. 662, 668, 38 S.W.3d 313, 316–17 (2001); Ark. R. Crim. P. 4.1(a)(ii)(C) (2009)4). Reasonable or probable cause for a warrantless arrest exists when the facts and circumstances within an officer's

knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person to be arrested. *Stewart*, 2010 Ark. App. 9, at 6–7, 373 S.W.3d at 391.

"The testimony of Officer Boyd, wherein he described his observations of Tiller leading up to the FST gave rise to probable cause that she was driving while intoxicated See also Fisher, 2013 Ark. App. 301, at 8, 427 S.W.3d at 749 (holding that an arrest was supported by probable cause where the officer testified that the defendant had been observed driving, had bloodshot, watery eyes, smelled of intoxicants, and admitted that he had been drinking); Hilton v. State, 80 Ark. App. 401, 406, 96 S.W.3d 757, 761 (2003) (holding that the smell of alcohol, bloodshot eyes, the admission of drinking, and the refusal to take PBT established probable cause). Because Tiller's arrest was supported by probable cause, it was lawful, and consent for FST was not required."

EVIDENCE: Portable Breath Tests

Buckley v. State, CR-13-641,
2014 Ark. App. 516, 10/1/14

Joel Buckley was charged with two counts of failure to appear and one count of driving while intoxicated (fourth offense). Prior to trial, the State issued a subpoena to Buckley's former attorney, Autumn Tolbert, directing her to testify at trial. Buckley filed a motion to quash the subpoena, which was denied by the trial court. Buckley's trial for the driving while-intoxicated offense and a separate failure-to-appear charge, which had been set for July 15, 2012, was continued until September 19, 2012. Buckley did not appear on September 19, 2012.

At trial, Ms. Tolbert testified that the practice in the trial court before which Buckley was tried was for attorneys to advise their clients of a new trial date when a new date was issued. She advised Buckley of the September 19, 2012 court date by telephone. Officer Garrett Levine, who arrested Buckley on suspicion of driving while intoxicated, testified at trial that he pulled Buckley over because the license plate on his pickup truck was registered to a sports-utility vehicle. He noticed that Buckley's speech was slurred and his eyes were bloodshot and glassy. Officer Levine testified that he administered a horizontal gaze nystagmus (HGN) test to Buckley prior to his arrest.

According to Officer Levine, Buckley declined the other field-sobriety tests due to gout. Buckley was taken to the hospital after complaining of low blood sugar and refused to take either a breath or blood test. Officer Levine also testified, over Buckley's objection, that he administered a portable breath test to appellant and concluded that Buckley was intoxicated based on the results.

The jury found Buckley guilty of two counts of failure to appear and one count of driving while intoxicated (fourth offense). Buckley argues on appeal that the trial court erred by allowing his former attorney to testify regarding a conversation between her and Buckley and by allowing testimony at trial regarding a portable breath test administered by police. The Arkansas Court of Appeals affirmed the trial court's sentencing order in part and reversed and remanded in part, finding as follows:

"As a general rule, portable breath tests are valid evidence only to support an arrest, which Buckley did not contest, and not as substantive evidence absent proof of reliability. *Gazaway v. State*, 2010 Ark. App. 776. However, on cross-examination, Buckley asked Officer Levine if the HGN test was the only test given to Buckley. The testimony regarding the portable breath test was given in response to this questioning, so it was relevant. Also, Buckley was not prejudiced by this testimony because he opened the door to it by asking about other tests administered by Officer Levine. An appellant suffers no prejudice from the admission of the testimony where he or she opens the door to the line of questioning. *Gilliland v. State,* 2012 Ark. 175 (citing *Edwards v. Stills,* 335 Ark. 470, 503, 984 S.W.2d 366, 383 (1998))."

SEARCH AND SEIZURE: Administrative Inspection

Berry v. Leslie, CA11, No. 13-14092, 9/16/14

Officers of the Orange County Sheriff's Office (OCSO) and representatives from the Florida Department of Business and Professional Regulation (DBPR) conducted an unannounced, warrantless inspection of a barbershop with the intent of discovering violations of state licensing laws. Plaintiffs, who were subject to the "administrative inspection," filed suit alleging that the officers violated their Fourth Amendment rights to be free from unreasonable searches and seizures.

The Court of Appeals for the Eleventh Circuit stated it was a scene right out of a Hollywood movie. On August 21, 2010, after more than a month of planning, teams from the Orange County Sheriff's Office descended on multiple target locations. They blocked the entrances and exits to the parking lots so no one could leave and no one could enter. With some team members dressed in ballistic vests and masks, and with guns drawn, the deputies rushed into their target destinations, handcuffed the stunned occupants—and demanded to see their barbers' licenses. The Orange County Sheriff's Office was providing muscle for the Florida Department of Business and Professional Regulation's administrative inspection of barbershops to discover licensing violations.

At issue was whether the district court's conclusion that two certain government officials were not entitled to qualified immunity. The court affirmed the judgment of the district court where it has long been clearly established that a warrantless administrative inspection must be narrowly tailored to the administrative need that justifies it. In this case, the manner in which the inspection was undertaken was unreasonable from its inception and was, in fact, a search.

SEARCH AND SEIZURE: Affidavit; Probable Cause

United States v. O'Dell
CA8, No. 13-2381, 9/9/14

O'Dell, a supervisor at a YMCA camp in Wakonda, Missouri, posed online as a young girl named Hannah. Using this identity, he convinced teenage boys that Hannah wanted to meet them. O'Dell would then meet the boys, claiming to be Hannah's cousin. When Hannah failed to show up—or while they awaited Hannah's arrival—he either attempted to have sex with the boys or

engaged in sexual activity with them. A boy who had been solicited by O'Dell reported O'Dell to the Springfield, Missouri, police department. A patrol officer took the boy's statement, and Detective Reece was assigned to investigate.

On July 31, 2009, Detective Reece submitted an application for a search warrant to search O'Dell's room at the YMCA camp. In his affidavit, Detective Reece stated he had been assigned to follow up on an allegation of child molestation "described in Springfield Police Report 09-32897." Reece summarized the police report in the affidavit as follows:

> *The victim, T.H., stated that he began communicating with a white female named "Hannah," while he was online on MySpace.com. He began to have online chats with Hannah and eventually started to text message her. The phone "Hannah" was using belonged to Matthew O'Dell, an adult. O'Dell stated that he was Hannah's cousin. O'Dell told T.H. that he worked at YMCA Camp Wakonda as a Supervisor.*
>
> *During this time, O'Dell invited T.H. to come to Camp Wakonda to meet Hannah. T.H. and O'Dell went to the camp and spent the night, but T.H. did not meet Hannah during this trip. O'Dell stated that Hannah was not able to make it to the camp that night. Later on, O'Dell again asked T.H. to go to Camp Wakonda to meet with Hannah. Again, T.H. agreed to go to the camp. O'Dell picked him up, but O'Dell said that he had to do a live radio broadcast with a local radio station and they needed to stay the night in Springfield, MO. They stayed in the Days Inn, located on N. Glenstone Avenue. During the stay there, O'Dell touched T.H. [sic] genitals and tried to get T.H. to have anal sex with him. T.H. was able to look at O'Dell's phone and realized that Hannah was actually O'Dell. T.H. left the apartment at that time.*
>
> *T.H. was later interviewed and stated that he knew O'Dell had two other cell phones that he used to communicate.*

The affidavit further stated:

> *On July, 29, 2009, I was contacted by Renee Wehmeier of the Greene County Children's Division. Wehmeier stated she had spoke [sic] with three other families whose teenage boys had been talking to "Hannah" online. One of the boys, "Dillion," had also spent the night with O'Dell while waiting to meet Hannah. Dillion stated that O'Dell had several computers in his house along with a total of three cell phones.*
>
> *On July 31, 2009, I responded to 1073 S. Campbell #B103 to contact O'Dell. The apartment was empty and being remodeled. I then contacted Camp Wakonda and they stated O'Dell had been living in a room at the camp. O'Dell had been fired on July 31, 2009, but his personal items, including a computer were still in the room. Matt Shroyer, the Director of Camp Wakonda, stated that O'Dell had been living at the camp for several weeks.*

In the affidavit, Detective Reece also stated his belief, based on his training and experience, that evidence showing O'Dell communicating with juveniles, using the persona of "Hannah," would be located on computers and cell phones in O'Dell's room at Camp Wakonda. The warrant was issued

by a Lawrence County Associate Court Judge and authorized a search for, inter alia, photographs, graphic images in either printed or electronic form, and video tapes depicting child pornography.

O'Dell plead guilty conditionally reserving the right to appeal the denial of his motion to suppress.

O'Dell asserts the affidavit submitted in support of the issuance of the search warrant to search his room at Camp Wakonda lacks probable cause because it relies primarily on two unidentified persons—"T.H." and "Dillion"—with no statement as to their individual reliability. He further contends the information T.H. and Dillion provided, such as O'Dell contacting them through MySpace and O'Dell having multiple cell phones, was easy to confirm. O'Dell argues Detective Reece's failure to verify this information showed a "reckless disregard for the truth." He further asserts the statements are so unreliable they should be removed from the affidavit, and once removed, he contends the affidavit does not provide probable cause.

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

"When the issuing judge relied solely upon the supporting affidavit to issue the search warrant, only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause. The core question in assessing probable cause based upon information supplied by an informant is whether the information is reliable. *United States v. Williams,* 10 F.3d 590, 593 (8th Cir. 1993). Information may be sufficiently reliable to support a probable cause finding if the person supplying the information has a track record of supplying reliable information, or if it is corroborated by independent evidence. If information from an informant is shown to be reliable because of independent corroboration, then it is a permissible inference that the informant is reliable and that therefore other information that the informant provides, though uncorroborated, is also reliable. *United States v. Keys,* 721 F.3d 512, 518 (8th Cir. 2013).

"We agree with the district court that the information contained in the affidavit provided sufficient probable cause to issue the warrant to search O'Dell's room at the YMCA camp. According to the affidavit, T.H., the alleged victim of attempted sexual abuse, identified himself to officers and voluntarily provided a detailed statement regarding how O'Dell approached him and the attempted sexual abuse.

"Law enforcement officers are entitled to rely on information supplied by the victim of a crime, absent some indication the information is not reasonably trustworthy or reliable. *United States v. Wallace,* 550 F.3d 729, 734 (8th Cir. 2008). In addition, we have long accorded known informants more credence than anonymous or confidential informants: for one thing, they can be held responsible if the allegations turn out to be fabricated. See *United States v. Stevens,* 530 F.3d 714, 718–19 (8th Cir. 2008). While T.H. was not identified by name in the affidavit, his identity was known to law enforcement at the time the affidavit was prepared.

"The affidavit also included similar information that Detective Reece had received

from Renee Wehmeier, a County Children's Division employee: reports from three families whose teenage boys had likewise talked to 'Hannah' online. One of the boys spent the night with O'Dell while waiting to meet Hannah and stated O'Dell had several computers in his house and three cell phones. Although neither source had a prior history of providing information to law enforcement, the receipt of consistent information from two separate sources is a form of corroboration.

"In addition, some of the information provided by T.H. and Dillion was corroborated by Detective Reece's independent investigation. It is well established that even the corroboration of minor, innocent details can suffice to establish probable cause. First, Detective Reece stopped by an apartment he believed to be rented by O'Dell and found it empty. Next, Detective Reece verified that O'Dell had been employed by Camp Wakonda and had been living there for several weeks. He was told O'Dell had left the camp that morning, but his personal belongings, including a computer, were still in the room. Given that Detective Reece had gone to an apartment he believed to be rented by O'Dell and found it empty, there was a fair probability that contraband or evidence of a crime would be found" in O'Dell's room at the camp. Accordingly, we affirm.

SEARCH AND SEIZURE: Automobile Exception

United States v. Donahue
CA3, No. 13-4767, 8/22/14

In this case, the Court of Appeals for the Third Circuit stated in light of the "automobile exception" to the usual search warrant requirement, it is difficult to pick a worse place to conceal evidence of a crime than an automobile. The Supreme Court has interpreted—and reinterpreted—the automobile exception so expansively that the Court essentially has obviated the requirement that the government obtain a warrant to search a vehicle provided it has probable cause to believe that the vehicle contains evidence of a crime. Nevertheless, appellee Joseph Donahue made a successful challenge in the District Court to the warrantless search of a vehicle that he had been driving but did not own because the Court accepted his contention that the government did not have probable cause for the search. The government appeals from the suppression order entered on November 19, 2013.

Donahue enticed individuals to engage in his business ventures so that he could appropriate their identities and make unauthorized purchases using their credit. This scheme led to his conviction for 16 counts of bank fraud, money laundering, accessing an unauthorized device, and making false statements. On December 3, 2010, the District Court sentenced Donahue to a 121-month custodial term and ordered him to pay $325,414 in restitution. The Court directed Donahue to surrender by January 4, 2011, at his place of confinement at Fort

Dix, New Jersey. Donahue, however, did not surrender as ordered, and consequently the District Court issued a warrant for his arrest on January 5, 2011.

Instead of surrendering, Donahue drove across the country in his son's red Ford Mustang to Las Cruces in an attempt to avoid imprisonment. This attempt came to naught when United States marshals in Scranton, Pennsylvania, in the Middle District of Pennsylvania, became aware that Donahue might be in Las Cruces and notified authorities there of that information. Two weeks after Donahue should have surrendered, United States marshals in Las Cruces, assisted by New Mexico State University police, arrested him near the campus when they saw him exit a hotel in which he had registered under an alias and enter his son's Mustang. United States Marshal Steven Archuleta and other officers ordered Donahue to exit the Mustang and he did so without incident. Archuleta then arrested and searched him, finding about $2,500 in cash.

After Archuleta handcuffed Donahue and took him to his patrol car, he looked into the Mustang and saw a "very messy" interior, containing, among other items, various maps in plain view. Following instructions from his supervisor and a deputy United States marshal in Scranton, Archuleta seized the Mustang—a step that he acknowledged he "probably" would not have taken without those orders inasmuch as Archuleta did not know exactly what evidence was needed.

The government subsequently transferred the Mustang to a marshals' facility in Las Cruces, where the marshals searched it pursuant to their inventory policy. Archuleta and two other deputy marshals photographed the vehicle "without essentially moving anything around," searched its trunk and cabin (including the glove box and other compartments), and removed loose items. This process revealed non-incriminating items and closed bags, which at that time the marshals did not open. The marshals then transferred the vehicle to a public garage and placed the bags and other items that they removed in a secure holding area.

The next day, again under instructions from Scranton—this time from an FBI regional office—an FBI agent in New Mexico, Amy Willeke, retrieved the Mustang and drove it to an FBI facility. When Willeke reached the FBI facility, she made a second inventory search of the Mustang during which she discovered a Glock .40 caliber magazine behind the driver's seat.

After logging her discovery into evidence and having the car x-rayed, Willeke directed another agent to obtain Donahue's loose items that the Marshals still possessed so that FBI agents could inventory the items and transfer them to Scranton. On January 25, 2011, five days after Donahue's arrest, Archuleta and an FBI agent opened and searched the previously seized bags and found a Glock semi-automatic pistol.

The government contends that it had probable cause to search the Mustang because it was reasonable to believe that Donahue would be in possession of items that could help him avoid detection and that the possession of those items would support a charge that he knowingly failed to surrender to serve his sentence.

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

"The 'automobile exception' permits vehicle searches without a warrant if there is probable cause to believe that the vehicle contains evidence of a crime. The government bears the burden of establishing the applicability of the exception, by a preponderance of the evidence.

"Although 'the scope of the warrantless search authorized by the automobile exception is no broader and no narrower than a magistrate could legitimately authorize by warrant,' the automobile exception includes two important elements specific to that exception: First, if probable cause justifies the search, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. Second, probable cause does not dissipate after the automobile is immobilized because the exception does not include an exigency component. *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S.Ct. 2013, 2014 (1999). As a result, the government can search an impounded vehicle without a warrant even though it has secured the vehicle against the loss of evidence and it has the opportunity to obtain a warrant for the search. See *Michigan v. Thomas*, 458 U.S. 259, 261, 102 S.Ct. 3079, 3080-81 (1982); see also *United States v. Johns*, 469 U.S. 478, 486-87, 105 S.Ct. 881, 886 (1985) (extending the rule to closed packages seized from vehicles).

"The broad sweep of the automobile exception is of controlling significance in this case because if we determine, as in fact we do, that the government had probable cause to seize and search the Mustang, two more conclusions will follow from that determination. First, the government was justified in opening the bag found in the Mustang's trunk containing the pistol. See, e.g., *United States v. Alexander*, 573 F.3d 465, 475 (7th Cir. 2009) (Under the automobile exception to the warrant requirement, the police officers were authorized to open the bag and seize the handgun. Second, the delay between the time that the government seized the Mustang and the time of the search that uncovered the weapon—five days after the government impounded the vehicle—was immaterial. See *Johns*, 469 U.S. at 487-88, 105 S.Ct. at 887 (holding that warrantless search of containers seized from a vehicle already impounded for three days 'was reasonable and consistent with our precedent involving searches of impounded vehicles'); *United States v. Gastiaburo*, 16 F.3d 582, 586 (4th Cir. 1994) (upholding warrantless search of a vehicle 38 days after it was impounded); *United States v. McHugh*, 769 F.2d 860, 865-66 (1st Cir. 1985) (approving search seven days after truck's seizure because the Supreme Court declined to impose an 'arbitrary temporal restriction' on the automobile exception).

"As a related matter, our analysis does not distinguish among the government's searches starting with Archuleta's search, followed by Willeke's search, and concluding with the opening of the closed bags. We see nothing in the Supreme Court's jurisprudence to indicate that the automobile exception may justify only a single search of a seized vehicle. To the contrary, the Court has based its reasoning allowing warrantless searches of vehicles in part on the diminished expectation of privacy in a vehicle, and thus the Court's reasoning supports the conclusion that so long as the government maintains continuous control

over the vehicle it needs probable cause only for its initial search and seizure and that subsequent searches should be viewed as part of an ongoing process. *United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484 (1977) One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. It travels public thoroughfares where both its occupants and its contents are in plain view. The degree of expectation of privacy does not expand during the time that the government possesses the vehicle. Indeed, if anything, the seizure may lessen it.

"Thus, the validity of the search in this case depends entirely on whether the government had probable cause when it seized the Mustang to believe that it contained evidence of a crime. The probable cause inquiry is 'commonsense,' 'practical,' and 'nontechnical;' it is based on the totality of the circumstances and is judged by the standard of 'reasonable and prudent men.' *Illinois v. Gates*, 462 U.S. 213, 230-31, 103 S.Ct. 2317, 2328 (1983) We evaluate 'the events which occurred leading up to the search, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.' *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 1661-62 (1996).

"At bottom, we deal with probabilities. If there was a 'fair probability that contraband or evidence of a crime' would have been found, there was probable cause for the search. To that end, we conclude that it was reasonable to believe that the Mustang contained items showing that Donahue 'knowingly' failed to surrender in violation of 18 U.S.C. § 3146(a) (2). After all, the government agents knew that Donahue had failed to surrender as ordered, and Archuleta explained that, based on his extensive experience with fugitives, they are likely to have false identification documents, which commonly are found in places where items are 'ready and available to gather up and leave quickly,' such as their cars.

"Accordingly, though it is clear from the record that the government had compelling evidence that Donahue had committed the crime of failing to surrender before its agents searched his vehicle, indeed even before its agents arrested him, and such evidence might have lessened the need for a search, the search was lawful."

SEARCH AND SEIZURE:
Automobile Exception; Safe in Minivan

State v. Carter
No. CR-14-345, 2014 Ark. 443, 10/30/14

On October 25, 2012, law enforcement officers in Calhoun County arrested Robert Martin after discovering a large quantity of methamphetamine in his vehicle incident to a traffic stop on the parking lot of an Arkansas Game and Fish Commission facility. Martin told officers that another individual, Stephen Crane, had arranged to purchase $5,000 worth of methamphetamine from him in the next hour, and Martin allowed officers to view text messages that Crane had sent him. After Crane sent a text message to Martin to arrange a meeting, officers using Martin's phone responded to Crane via text message and told him to come to a location in Calhoun County "to do the deal."

Crane arrived at the agreed-upon location, exited his minivan, and walked to the front of Martin's vehicle. Shortly thereafter, officers asked, "What's your name?" When Crane answered, "Steve Crane," officers took custody of him and conducted a pat-down search of his person that resulted in the discovery of methamphetamine in his pocket. Officers then arrested Crane and searched his minivan, which led to the discovery of a safe containing $5,000, drug paraphernalia, a small baggie of suspected methamphetamine, and a .32-caliber Smith and Wesson pistol.

On November 30, 2012, the State charged Crane with possession of methamphetamine with the purpose to deliver, possession of drug paraphernalia, unlawful use of a communication device, and simultaneous possession of drugs and a firearm. Crane filed a motion to suppress and an amended motion to suppress, arguing that all items discovered during the search of his person and his minivan should be excluded. The State responded, and the circuit court held a hearing on the motion. Darrell Sells, an agent with the Thirteenth Judicial Drug Task Force, was the sole witness at the hearing. According to Sells, "[o]nce we arrived [at the scene], I believe it was Officer Houston Bradshaw [who] patted him down. The wildlife officer advised me he's got meth in his pocket." Sells stated that he observed the "pat down" of Crane, that he saw what appeared to be methamphetamine removed from Crane's person, and that the discovery of the suspected methamphetamine gave officers probable cause to search Crane's minivan. Further, Sells stated that, "in a sense," the minivan was searched for the safety of officers because "[a]ny time you're dealing with methamphetamine there is a chance you could have chemicals of different types." At the conclusion of the hearing, the circuit court ordered further briefing.

Meanwhile, Martin, who had also been charged with drug offenses, filed a motion to suppress, arguing that all evidence seized and statements made by him before and after his arrest on October 25, 2012, should be suppressed. The circuit court entered an order granting Martin's motion to suppress statements and denying his motion to suppress evidence. Thereafter, the circuit court entered an order granting Crane's motion to suppress, finding that all evidence seized or statements made by Crane based on information received from Martin should be suppressed under the doctrine of the fruit of the poisonous tree. The State requested reconsideration, and in a supplemental order granting Crane's motion to suppress, the circuit court stated that, although it agreed with the State that Crane was "without standing, under the current state of our law, to rely on the failures of law enforcement in [Martin's] case, suppression of the contents of the safe found in [Crane's] vehicle and the evidence seized as a result of an alleged 'pat down' must still be the result" because there were no exigent circumstances to justify the warrantless search of the safe and there was "no valid or tangible evidence that the 'pat down' of Crane was legal or appropriate."

On the issue raised by the State that the circuit court erred as a matter of law when it found that a warrant was required to search the locked safe discovered in Crane's minivan, the Arkansas Supreme Court found, in part, as follows:

"A search is invalid absent a warrant to search. See *Jackson*, 2013 Ark. 201, at 8, 427 S.W.3d at 613. But in *Carroll v. United States*, 267 U.S. 132 (1925), the Supreme Court of the United States established the 'automobile exception' to the warrant requirement, recognizing that the mobile nature of automobiles justifies a search, based on probable cause, even when a warrant has not been obtained. Moreover, the Court has made clear that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. *United States v. Ross,* 456 U.S. 798, 825 (1982); see also *California v. Acevedo,* 500 U.S. 565, 580 (1991) (The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.)

"In *Maryland v. Dyson*, 527 U.S. 465 (1999), the Court granted a petition for certiorari of the judgment of the Maryland Court of Special Appeals, in which the Maryland court held that, in order for the automobile exception to the warrant requirement to apply, there must not only be probable cause to believe that evidence of a crime is contained in the automobile, but also a separate finding of exigency precluding the police from obtaining a warrant.

"The United States Supreme Court reversed, holding that the 'automobile exception' has no separate exigency requirement; rather, it requires only a finding of probable cause. The Court explained,

> *The Fourth Amendment generally requires police to secure a warrant before conducting a search.* ***California v. Carney****, 471 U.S. 386, 390–391 (1985). As we recognized nearly 75 years ago in* ***Carroll v. United States****, 267 U.S. 132, 153 (1925), there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear in* ***United States v. Ross****, 456 U.S. 798, 809 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car),* ***Pennsylvania v. Labron,*** *518 U.S. 938 (1996) (per curiam), we repeated that the automobile exception does not have a separate exigency requirement: If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.*

"In this case, the Court of Special Appeals found that there was 'abundant probable cause' that the car contained contraband. This finding alone satisfies the automobile exception to the Fourth Amendment's warrant requirement, a conclusion correctly reached by the trial court when it denied respondent's motion to suppress. The holding of the Court of Special Appeals that the 'automobile exception' requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings in *Ross* and *Labron*.

"The Arkansas Supreme Court held that, in the instant case, the circuit court erred as a

matter of law in finding that, absent exigent circumstances, a warrant was required to search the safe in Crane's minivan; therefore, we reverse and remand on the State's second point on appeal."

SEARCH AND SEIZURE: Body Cavity Search

United States v. Fowleks
CA9, No. 11-50273, 8/25/14

The Court of Appeals for the Ninth Circuit held that the forcible removal of drugs from the defendant's rectum during a body cavity search at the Long Beach Jail, without medical training or a warrant, violated the defendant's Fourth Amendment rights, and the evidence obtained from this "brutal and physically invasive search" should have been suppressed.

SEARCH AND SEIZURE: Emergency Search; Abatement of Exigency

United States v. Mallory
CA3, No. 13-2025, 9/3/14

Mallory and Ismail, employed as emergency medical technicians, were visiting the Philadelphia home of Delaine, their mother. At about 2:30 a.m. they were standing with friends in front of a neighbor's home. Officer Enders approached, shined a spotlight, and ordered them to disperse. Although they complied, Ismail cursed Enders, who detained Ismail for a few minutes before releasing him. Ismail walked back toward Delaine's house, seeing police cruisers out front. Officers Hough and Lynch had received a dispatch that there was a group of men outside the address and that a black male wearing a brown leather jacket over a black hooded sweatshirt, had a gun. Delaine approached the second cruiser and asked whether they had arrested Ismail. As they were speaking, Hough noticed that Mallory, standing nearby, matched the description. As Mallory spoke with the officers, his jacket lifted to reveal a revolver in his waistband. Hough exclaimed "gun!" exited the vehicle and ordered Mallory to stop. Mallory ran into Delaine's house, shutting the door. The officers gave chase; pushed aside Delaine's daughter; and kicked the door open. They entered the dark house, weapons drawn; searched the house; pried open a locked bathroom door; found Mallory; arrested and handcuffed him. As the officers proceeded through the house with Mallory they recovered a revolver from under umbrellas behind the front door, which had swung open into the house.

Charged with possession of a firearm by a convicted felon, Mallory successfully moved to suppress the gun. The Third Circuit affirmed, stating that it would not: "underplay the dangers that police officers may face when pursuing a suspect into an unfamiliar building. Nonetheless, once the officers had secured the premises and apprehended Mallory, the exigencies of the moment abated and the warrant requirement reattached."

SEARCH AND SEIZURE: Private Person Searching at Request of Law Enforcement

People v. Evans, CACA,
No. A138712, 10/3/14

On September 27, 2011, Michael Shawn Evans brought his computer to Sage's Computer in Fort Bragg for servicing. In the course of working on the computer, Sage Statham viewed images on the computer of what appeared to him "to be underage girls engaged in sexual activity." Statham felt it appropriate to call the Fort Bragg Police Department to inquire whether these materials were "something that they should be looking at." Officer Brian Clark, who responded to the phone call and viewed the files at Statham's computer repair shop, stated that although the girls in the photos he viewed were posing in a sexual manner, none of them were nude or "engaging in sexual activity or simulating any sexual activity."

Indicating he did not consider the images pornographic, Clark asked Statham whether he "could search through and look at" anything else in the computer. After further examining Evans' computer files, Statham found video files he had not previously noticed. When directed by Officer Clark to open these files, Statham tried to but was unable to do so. Statham was, however, able to put the video files on a USB flash drive, which he gave to Officer Clark. Officer Clark took the flash drive to the Fort Bragg Police Department. When he was unable to open the files on his own computer, Clark gave the flash drive to Sergeant Lee, who was able to open and view the videos it contained. Lee informed Clark that he considered the videos "juvenile pornographic material." Clark, who also viewed the videos, described them as depicting "female juveniles engaged in sexual activity." The next day Evans' computer was seized by Officer Lopez.

The sole issue presented is whether, as Evan claims, the trial court erred in denying his motion to suppress video files found in a search of his computer because the warrantless search conducted by the police exceeded the scope of a prior private search and therefore violated "a subjective expectation of privacy that society recognizes as reasonable."

The California Court of Appeals found, in part, as follows:

"It is well-settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now non-private information. The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.

"Prior to contacting police, Statham saw photographic images on Evans' computer that Officer Clark determined were not pornographic. In addition, Statham did not examine the materials he placed on

the flash drive at any time prior to or after contacting the police. A warrantless police search certainly cannot be undertaken under the Fourth Amendment where, as here, the private searcher had *not* determined the illicit character of any images and, further, was unable to view the materials stored in a computer even after police directed him to open those files and to place them on a USB flash drive. Accordingly, the subsequent search of the flash drive by Officers Clark and Lee clearly exceeded Statham's prior private search.

"The record reflects and the trial court found that Statham did not view the materials he placed in the flash drive before he was 'directed' by Officer Clark to conduct a more thorough search than the one that led him to contact the police. In placing the video files in the flash drive, Statham unquestionably 'intended to assist law enforcement' and Officer Clark 'knew of and acquiesced in' the private search Statham undertook at Clark's direction."

SEARCH AND SEIZURE:
Protective Sweep

United States v. Schmitt
CA7, No. 13-2894, 10/20/14

In December 2010, Evansville Police Department Detective Georgen received a tip from his informant, Kenneth Hutchinson, that Kenneth Schmitt had recently acquired an AR-15 semi-automatic assault rifle in exchange for $200 and two grams of methamphetamine. How did Hutchinson know this? Because he was the middleman who set up the deal between Schmitt and the seller of the auto-matic rifle. And Hutchinson, who was Schmitt's neighbor, told Det. Georgen that Schmitt was keeping it at home. Det. Georgen and other officers followed up on the tip by watching Schmitt's residence. They saw Schmitt come to the front door and several other people enter and exit the home.

Armed with a warrant to arrest Schmitt, several SWAT officers entered Schmitt's residence the next day and within five minutes the officers found Schmitt and Jason Wyatt. They also found, in plain view, marijuana, methamphetamine, and pills containing controlled substances. Less than five minutes after entering the house, SWAT Officer Craig Pierce went into the basement and saw an AR-15 semiautomatic rifle and two fully loaded magazines in a black gun case. Det. Georgen then obtained a search warrant to seize the drugs, firearm, and related evidence found while executing the arrest warrant.

Schmitt was indicted for possessing a firearm while being a felon, in violation of 18 U.S.C. § 922(g)(1). He filed a pretrial motion to suppress evidence related to the rifle, but the district judge found that it was seen in plain view during a protective sweep and denied the motion. Schmitt appeals both the ruling and his conviction.

Schmitt's position is that the officers had to stop their search once they apprehended Schmitt because they only possessed an arrest warrant. But the district court found that Officer Pierce's search of the basement, which Schmitt argues occurred after the officers apprehended him and Wyatt, was permissible as a protective sweep. Schmitt now asserts that the protective sweep doctrine

did not give Officer Pierce the authority to open the locked basement door and search the basement, where the firearm was found in its case in plain view, because the door locked from the outside and anyone inside the basement could not get out to harm the officers, and so officer safety was not a legitimate concern.

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

"*Maryland v. Buie*, 494 U.S. 325 (1990), and its progeny foreclose Schmitt's arguments. A 'protective sweep' is a quick and limited search of premises, incident to an arrest, and can be conducted without a search warrant if the purpose of the search is to protect the safety of police officers or others. In light of the doctrine's focus on safety, this exception to the Fourth Amendment's warrant requirement 'is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.' *Buie,* 494 U.S. at 327. Therefore, officers may, without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. But in order to search beyond the immediate area, the officer must have articulable facts which would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. Whether the exception applies depends on whether the search was reasonable under the circumstances.

"The dozen or so officers who entered Schmitt's residence fanned out to search for Schmitt and to ensure each other's safety.

"Officer Pierce testified that he entered the basement with the same goal in mind—to ensure officers' safety, or in the words of the officer in *Buie*, in case there was someone else down there. We do not have to decide whether the basement immediately adjoined the place of Schmitt's arrest, since the officers had reason to believe that danger lurked behind the basement door. Specifically, officers observing Schmitt's house the previous day saw several people enter Schmitt's home. They knew Schmitt had a violent criminal history, including arrests for resisting law enforcement, pointing a firearm, and battery by means of a deadly weapon. And they had information that a firearm was present in the house. A reasonably prudent law enforcement official faced with this combination of facts would be concerned about his safety when entering the home.

"Schmitt's contention that he and Wyatt were arrested before Officer Pierce went into the basement does not change our conclusion. There is no evidence on the record, other than Schmitt's word, to establish that he was arrested before the sweep of his basement. Even if we assume that Schmitt is right, we cannot say that the officers had identified Schmitt, or that Officer Pierce was aware that Schmitt had been apprehended before proceeding to the basement. Nor does the fact that the basement door was locked alter the analysis. A locked door would not protect the officers if a person with a gun decided to kick the door down or shoot through it.

"Law enforcement officers' interest in ensuring their safety justifies their ensuring that the dwelling does not harbor another person who is dangerous and who unexpectedly could launch an attack. Given

that several people were seen in the house the previous day, the officers were faced with the possibility that someone else was in the residence who presented a threat to them.

"Moreover, the officers' right to sweep the premises does not end the moment the targeted individual is arrested. See *Buie*, 494 U.S. at 336 (holding that the authority to conduct a protective sweep persists as long as it takes to reasonably complete the arrest and depart the premises. Officers have the right to ensure their safety and the safety of everyone else in the area not only during the arrest itself but also during the remainder of the time that they are legally on the premises and its environs. Here, Schmitt does not dispute that the entire incident—the entry, arrest, sweep, and exit—occurred within five minutes, and there is no evidence that the officers delayed the arrest and exit process to further efforts to uncover contraband. The officers' quick sweep of Schmitt's home and basement was permissible as a protective sweep because it was conducted to apprehend the suspect and to ensure the officers' safety, and lasted no longer than reasonably necessary.

"As the search was reasonable and the gun was found in plain view, the district court did not err in denying Schmitt's motion to suppress the firearm."

SEARCH AND SEIZURE: Search Warrant; Mistake as to Apartment Layout

United States v. Kelly
CA7, No. 14-1015, 11/26/14

On April 4, 2012, Detective Mark Jimenez of the Rockford Police Department applied for a warrant to search the "upper apartment" of a "multiple family residence" located at 1522 Clifton Avenue in Rockford, Illinois, for cocaine and a wide variety of narcotics paraphernalia. Detective Jimenez, an investigator in the Narcotics Unit, submitted a supporting affidavit representing that he had been an officer with the Rockford Police Department for twenty-one years, during which time he had been involved in the execution of over 700 narcotics search warrants.

Jimenez's affidavit contained the following relevant information suggestive of criminal activity at 1522 Clifton:

First, on February 9, 2012, a "concerned citizen" contacted the Rockford Narcotics Unit and complained that "the residence located at 1522 Clifton Avenue is dealing drugs on a daily basis." Approximately six weeks later, on March 28, 2012, the police department received a welfare check complaint from a woman named Patsy Ibarra. Ibarra advised Officer Amy Kennedy that Ibarra's daughter, Precious Love, "was possibly being held against her will" at the upper apartment of 1522 Clifton by a black male named "Eric." According to Ibarra, her granddaughter, Sherona Barnes, had knocked on the rear door of the building in search of Love. Kelly, holding a 9mm handgun, answered her knock and yelled, "You almost

got yourself shot!" With Love standing behind him, Kelly slammed the door in Barnes's face and warned, "Go ahead and call the police, I'll shoot them too."

Ibarra's complaint prompted Officer Kennedy to visit the residence. Love greeted Kennedy at the building's rear door—which was outfitted with surveillance cameras—and denied that she was being held against her will. Officer Kennedy saw Love descend a set of interior stairs to reach the rear door, leading Kennedy to conclude that Love had come from the upper apartment. Days later, Jimenez used a confidential informant to make a controlled purchase of crack cocaine from 1522 Clifton, "upper apartment." The informant—who had previously aided the police department in securing several drug convictions—called Kelly at his listed telephone number to arrange a purchase of crack cocaine, but when he met Kelly at the rear door of the building, Kelly told the informant that he would not sell drugs from inside the apartment. They later arranged to make the exchange down the street from 1522 Clifton.

Officers observed Kelly walk from behind 1522 Clifton; enter a blue Buick, which was registered to him at a different address; and drive to the agreed-upon location. The informant entered the Buick, remained inside for less than a minute, and immediately returned to Jimenez's undercover vehicle. There, the informant revealed his purchase—a small plastic bag containing a rocklike substance that field tested positive for cocaine.

Jimenez asserted that, taken together, this information established probable cause that evidence of drug-related criminal activity would be found at the upper apartment of 1522 Clifton Avenue. Jimenez's supporting affidavit described the precise location to be searched as:

> *1522 Clifton Avenue, upper apartment, Rockford, Illinois, a two story, white with red siding and red trim, multiple family residence, located on the east side of Clifton Avenue, with the numbers "1522" located on the front of the residence, and the upper apartment is located on the second floor of this building.*

Associate Judge Ronald J. White of the Circuit Court of Winnebago County promptly issued a search warrant. On April 6, 2012, Detective Jimenez and a team of Rockford police officers forcibly entered 1522 Clifton through the building's rear door. Once inside the outer door, the officers encountered two staircases—one leading up to an upper interior door and the other leading down to a lower interior door, which opened into the basement. They climbed to the upper door, announced their presence, and forced the door open. They were then standing inside Kelly's apartment, where they observed Kelly at the top of another internal staircase, walking quickly from the apartment's north bedroom to the south bedroom. Upon Jimenez's order, Kelly exited the south bedroom and surrendered to the officers. According to Jimenez, it was at that moment that he realized that Kelly lived not in an "upper apartment" but rather, in a two-story unit at the rear of 1522 Clifton. Although the officers had correctly surmised that the building was divided into two apartments, they learned that it was in fact bisected into front and rear multi-story units—not upper

and lower single-story units, as Jimenez had asserted in the warrant application.

Despite this realization, the officers continued their search of Kelly's apartment. In the north bedroom, Jimenez noticed that a vent cover had been removed from the wall, exposing a heating duct. The officer took apart a portion of the ductwork and recovered a 9mm handgun and two bags of crack cocaine. In addition to the items retrieved from the heating duct, the officers discovered marijuana, crack cocaine, and extensive drug paraphernalia on the first and second floors of Kelly's apartment.

Kelly moved to suppress all evidence the officers recovered, arguing that the search of 1522 Clifton exceeded the scope of the warrant, which only authorized a search of the nonexistent "upper apartment."

Kelly argues that the warrant fails for want of particularity. Upon review, the Seventh Circuit Court of Appeals found, in part, as follows:

"The Fourth Amendment requires that a warrant 'particularly describe the place to be searched.' U.S. Const. Amend. IV. Kelly argues that because the warrant identified that place as the 'upper apartment' of 1522 Clifton, which (as it turns out) does not exist, the warrant was invalid from the moment it was issued. However, the particularity requirement was not intended to protect against the error at issue here—that is, where a warrant supported by probable cause fails to reflect the precise floor plan of the premises to be searched. Rather, the 'manifest purpose' of the requirement is to prevent 'the wide-ranging exploratory searches' that the Framers faced and to limit each search 'to the specific areas and things for which there is probable cause.' *Maryland v. Garrison,* 480 U.S. 79, 84 (1987).

"The Supreme Court does not demand exact precision in a search warrant's description of the targeted premises. Instead, it has found the particularity requirement to be satisfied if the warrant's description 'is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended.' *Steele v. United States*, 267 U.S. 498, 503 (1925). Our own precedent confirms that minor technical errors or omissions do not automatically invalidate a warrant so long as there is no danger that the officers might inadvertently search the wrong place. In *United States v. Johnson,* a warrant to search both the upper and lower units of a two-story residence identified the address as '2958 N. 23rd Street.' 26 F.3d 669, 692 (7th Cir. 1994). While this was the correct address for the lower unit, the upper unit's address was technically 2958A. Despite this error, we upheld the search warrant with respect to both units:

> *We note that the warrant did describe the place to be searched with particularity stating that the house was "a two-family residence with beige siding and brown trim; the number 2958 appearing on the west side." The only problem with the description was that it did not include the fact that 2958A is the address of the upper unit. This omission, however, is not fatal for the warrant accurately described the house to be searched and there was no risk that the officers executing the warrant would search some other house.*

"While *Johnson* dealt with the omission of the upper unit's address rather than a misstatement regarding the layout of the targeted residence, its reasoning is applicable here. Detective Jimenez knew that the target of his search was the unit—be it the 'upper' unit or the 'rear' unit—to which the rear door of 1522 Clifton led. And because Kelly's apartment was the only unit accessible from the rear door of the building, the mislabeling presented 'no risk that the officers executing the warrant would search some other house.'

"The Supreme Court has upheld the validity of warrants in far closer cases. In *Maryland v. Garrison*, the Court upheld an overbroad warrant that described the apartment to be searched as '2036 Park Avenue third floor.' 480 U.S. at 80. What police officers did not realize prior to the warrant's execution was that the third floor of 2036 Park Avenue in fact contained two apartments. After acknowledging that the warrant's description was 'broader than appropriate because it was based on the mistaken belief that there was only one apartment on the third floor,' the Court nevertheless concluded that the factual mistake did not invalidate a 'warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding of the building's floor plan.' The Court emphasized that its finding of validity depended on the information available to the officers at the time they applied for the warrant—those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. As in *Garrison,* the warrant to search Kelly's apartment would 'undoubtedly' have been valid if it had identified the unit to be searched as a 'rear,' as opposed to an 'upper,' apartment. The fact that the building's layout differed from what the officers were able to discern without having been inside is insufficient to render the warrant invalid.

"Our conclusion that the warrant was valid based on the information available to the officers at the time of its issuance does not, however, address the independent inquiry of whether it was executed in a reasonable manner. Kelly argues that the Fourth Amendment required the officers to halt their search upon the realization that they were in a 'rear' apartment—or, at a minimum, to search only the 'upper' level identified in the warrant. He cites *Garrison* for this proposition because there, the Supreme Court obliged the officers to discontinue their search when they learned that the layout of the building differed from the warrant's description—that is, that the third floor contained two apartments instead of one.

"Yet although *Garrison* also presented a situation of mistaken floor plans, the parallels with the instant case end there. In *Garrison*, the officers sought a warrant to search the apartment of Lawrence McWebb, which they reasonably believed to occupy the entire third floor of 2036 Park Avenue. However, they inadvertently searched—and found contraband in—the apartment of Garrison, which was also located on the third floor but was not the intended target of their search. The Supreme Court concluded that the Fourth Amendment compelled the officers to suspend their search upon realization of their mistake not because they had misunderstood the building's layout but rather because they had been searching the *wrong* apartment—a search concededly unsupported by probable cause. And notably, even despite this grievous mistake, the Court permitted the

government to prosecute Garrison based on incriminating evidence found in his apartment before the officers discovered their error.

"The *Garrison* Court nowhere suggested that if, after discovering the mistaken layout, the officers had been able to confirm that they were in the targeted apartment (McWebb's), a continued search of that apartment would have been improper. In fact, the Court concluded that if the officers had known, or should have known, that the third floor contained two apartments and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. Therefore, contrary to Kelly's contention, Garrison supports the reasonableness of the search conducted here.

"The officers limited their search to the targeted apartment and, because only one apartment was accessible from the door through which they entered the building, there was no risk that they might inadvertently have searched the wrong unit. As a result, Detective Jimenez was not constitutionally required to seek a modified warrant before continuing his search of all three levels of Kelly's residence."

SEARCH AND SEIZURE:
Stop and Frisk; Vehicle Search

United States v. Brown
CA3, No. 13-2214, 8/27/14

Four Pittsburgh Police Detectives—Judd Emery, Mark Adametz, Calvin Kennedy, and Thomas Gault—in the early morning hours of March 23, 2011, were patrolling Pittsburgh's Hill District in an unmarked police cruiser. As the detectives approached the intersection of Wylie Avenue and Duff Street, they observed a 2002 maroon Chevy Impala driven by Ebon Brown park near the intersection across the street from the Flamingo Bar, a nuisance bar where drug dealing and shootings regularly occur. All four detectives believed the Impala had been parked too close to the intersection in violation of Pennsylvania traffic code.

The detectives stopped their cruiser in the middle of the street and watched as Brown and three other passengers exited the Impala. As Brown was stepping out, he looked in the detectives' direction and appeared to recognize their unmarked cruiser. Brown then sat back down in the Impala and made a motion which appeared consistent with removing an object from his waistband and placing it beneath the driver's seat. Brown then stepped out of the vehicle, closed the door, and walked in the direction of the Flamingo Bar. All four detectives testified that, based on their experience, they believed Brown had removed a gun from his person and attempted to conceal it under the driver's seat.

The detectives exited the police cruiser and approached Brown and the other passengers. The detectives' badges were visible and they identified themselves as Pittsburgh police officers. Detective Gault began speaking with Brown and informed him that the Impala was parked in an illegal location. As this exchange was taking place, Detective Emery walked around to the passenger side of the Impala and shined his flashlight through the windshield. With the inside of the vehicle illuminated, Detective Emery observed the grip and rear slide portion of a semi-automatic firearm sticking out from underneath the driver's seat. Detective Emery immediately

gestured to Detective Gault (by extending his thumb and index finger) that there was a gun in the vehicle. After seeing Detective Emery's gesture, Detective Gault grabbed Brown to prevent him from fleeing. The detectives then asked Brown whether he had a permit to carry the firearm. When Brown answered that he did not, they placed him under arrest.

Detective Emery retrieved the gun from the Impala, cleared a round from the chamber, and placed it in the trunk of the detectives' cruiser. The detectives then performed pat-down searches of the other passengers, but found no weapons and did not place anyone else under arrest. At Brown's request, the detectives gave the keys to the Impala to another passenger, James Cole. Cole moved the Impala to a legal parking space, and then he and the others proceeded to the Flamingo Bar.

The Government charged Brown in a single-count indictment for being a felon in possession of a firearm. Prior to trial, Brown filed a motion to suppress the evidence of the gun retrieved from underneath the Impala's seat. He argued that the police conducted an unlawful *Terry* stop and that they did not have a lawful basis to search the vehicle.

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

"The Fourth Amendment prohibits 'unreasonable searches and seizures.' U.S. Const. Amend. IV. Brown contends that both his seizure by police and the seizure of the firearm and ammunition from the Impala were violative of his Fourth Amendment rights. We disagree.

"Police encounters with citizens fall into one of three broad categories, each with varying degrees of constitutional scrutiny: (1) police-citizen exchanges involving no coercion or detention; (2) brief seizures or investigatory detentions; and (3) full-scale arrests. *United States v. Perez,* 443 F.3d 772, 777 (11th Cir. 2006). The first type of encounter does not implicate the Fourth Amendment. *United States v. Williams,* 413 F.3d 347, 352 (3d Cir. 2005) (stating that officers do not violate the Fourth Amendment merely by approaching individuals on the street or in other public places); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991). The second category (i.e., brief seizures or *Terry* stops) requires a showing that the officer acted with reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (stating that an officer may conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot) (citing *Terry v. Ohio,* 392 U.S. 1, 30 (1968)). And the third category (i.e., full-scale arrests) is proper only when an officer has probable cause. *Beck v. Ohio,* 379 U.S. 89, 91 (1964) (Whether an arrest was constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it.) Here, the detectives' brief interaction with Brown touched on all three but was valid under each.

"The initial step in our suppression analysis is to determine whether a seizure has taken place and, if so, when the seizure occurred. *United States v. Torres*, 534 F.3d 207, 210 (3d Cir. 2008); *Johnson v. Campbell,* 332 F.3d 199, 205 (3d Cir. 2003) (stating that in conducting a suppression analysis, the court 'must first determine at what moment the defendant was seized'). As already noted, a Fourth Amendment seizure 'does not occur simply because a police officer

approaches an individual and asks a few questions.' *Bostick,* 501 U.S. at 434. Rather, 'a seizure occurs only when a police officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' *United States v. Crandell,* 554 F.3d 79, 84 (3d Cir. 2009) (quoting *Terry,* 392 U.S. at 19–20 n.16).

"We apply an objective test when evaluating whether an officer's 'show of authority' would have led a reasonable person to believe they were not free to leave. *Crandell,* 554 F.3d at 84 (stating that the test is whether a reasonable person in light of all the circumstances would have perceived the officer's actions as restrictive). The Supreme Court has articulated several factors to be considered as part of this objective inquiry, including, *inter alia*, 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.' *United States v. Mendenhall,* 446 U.S. 544, 554–55 (1980); see also *United States v. Drayton,* 536 U.S. 194, 204 (2002).

"Considering these factors, we agree with the learned District Judge that no seizure occurred prior to the moment Detective Gault physically grabbed Brown to prevent him from fleeing the scene. There was nothing about the detectives' brief initial approach that constituted a Fourth Amendment seizure. The evidence at the suppression hearing shows that the detectives did not activate their lights or sirens, brandish their weapons, block Brown's path, physically touch Brown, or make any threats or intimidating movements. Instead, the detectives merely exited their cruiser and approached Brown in a public space to discuss their concerns about where the Impala was parked.

"Brown argues that the detectives demonstrated their authority by approaching in a group of four, displaying their badges, and identifying themselves as Pittsburgh police officers. These facts are not enough to tilt the balance in Brown's favor. A Fourth Amendment seizure does not occur merely because police officers identify themselves when engaging a citizen in conversation. And although the detectives approached in a group, as the District Court found, there was no threatening presence, since the number of detectives evenly matched the number of individuals who had exited the Impala. We agree with the District Court that the totality of the circumstances suggests that the detectives' approach and initial contact with Brown was a mere encounter that did not implicate the Fourth Amendment.

"Although the detectives' initial interaction with Brown did not implicate the Fourth Amendment, the encounter ripened into a *Terry* stop at the moment Detective Gault grabbed Brown's waistband to prevent him from fleeing. Although this conduct constituted a Fourth Amendment seizure, it is well-established that officers do not need to obtain a warrant to 'conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity afoot.' *Wardlow*, 528 U.S. at 123 (citing *Terry,* 392 U.S. at 30).

"Reasonable suspicion is 'a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' *Wardlow,*

528 U.S. at 123 (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). The officer must simply have some objective justification for the stop and must be able to articulate more than an 'unparticularized suspicion or hunch' that the suspect is engaged in criminal activity. *Wardlow*, 528 U.S. at 124 (citing *Terry*, 392 U.S. at 27). When making reasonable suspicion determinations, reviewing courts 'must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.' *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. *Id.* (quoting *Cortez*, 449 U.S. at 418). We give considerable deference to police officers' 'determinations of reasonable suspicion.' *United States v. Mosley*, 454 F.3d 249, 252 (3d Cir. 2006).

"We agree with the District Court that Detective Gault's brief seizure of Brown was supported by reasonable suspicion. Detective Gault grabbed Brown after Detective Emery had legally observed the firearm under the Impala's driver's seat and communicated his discovery by making a hand gesture. Although there may be some circumstances where simple knowledge of a firearm does not provide reasonable suspicion for a *Terry* stop, see *United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir. 2000), here the observation of the firearm is considered in conjunction with the fact that the officers witnessed Brown make furtive movements consistent with an attempt to conceal the weapon and the fact that the encounter occurred in a 'high crime area.' *Wardlow*, 528 U.S. at 124; see id. ('Officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.'); *United States v. Valentine*, 232 F.3d 350, 356 (3d Cir. 2000) (noting the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis). Viewing these circumstances as a whole, we find that the brief detention of Brown was justified by reasonable suspicion.

"We also find no constitutional infirmity with Brown's subsequent custodial arrest. Immediately after seizing Brown, the detectives inquired whether he had a permit to carry the firearm. When Brown answered that he did not, the officers placed him under arrest. Brown's admission that he lacked a permit to carry the firearm provided probable cause to support his arrest.

"The detectives also did not violate the Fourth Amendment when they recovered the gun from the Impala. Officers may conduct a warrantless search of a vehicle incident to arrest in two instances: (1) if the arrestee is within reaching distances of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. *Davis v. United States*, 131 S. Ct. 2419, 2425 (2011) (quoting *Arizona v. Gant*, 332 U.S. 332, 344 (2009)). This case fits squarely within the second exception because unlawful firearm possession was the crime for which Brown was arrested.

"For these reasons, we will affirm the District Court's denial of Brown's motion to suppress the firearm."

SEARCH AND SEIZURE:
Vehicle Search; Evidence of the Crime

United States v. Edwards
CA7, No. 13-3397, 10/3/14

Justin Edwards was indicted on federal gun charges after he was pulled over on suspicion of driving a stolen vehicle and the police found a sawed-off shotgun in the car. Moments before the stop, his girlfriend had called 911to report that Edwards had just stolen her car. A nearby officer heard dispatch, spotted the car, and initiated a traffic stop. Sure enough, Edwards was behind the wheel. He did not have a valid driver's license, could not produce the vehicle's registration, and was evasive about whether he had his girlfriend's permission to drive the car, so the officer placed him under arrest. A subsequent search of the car revealed the sawed-off shotgun on the floor behind the front passenger seat. Edwards admitted the gun was his.

Edwards was charged with possession of a firearm as a felon and possession of an unregistered short-barreled shotgun. He moved to suppress the gun, arguing that the warrantless search of the car violated his rights under the Fourth Amendment. The district court granted the motion, and the government appealed. *See* 18 U.S.C. § 3731.

The Court of Appeals for the Seventh Circuit reversed, finding as follows:

"Under *Arizona v. Gant,* 556 U.S. 332, 351 (2009), a warrantless search of a vehicle incident to the arrest of one of its occupants requires reason to believe that the vehicle contains evidence of the offense of arrest. Here, Edwards was arrested for (among other possible offenses) driving a vehicle without the owner's consent; it was entirely reasonable to believe that evidence of the car's ownership—its registration or title, for example—would be found in the car. The search was likewise valid under the automobile exception because there was probable cause that evidence of a crime—again, the crime of driving a vehicle without the owner's consent—would be found in the car."

SEARCH AND SEIZURE:
Vehicle Stop and Extension of the Stop

United States v. Chartier
CA8, No. 14-1421, 11/16/14

On December 7, 2012, at approximately 11:00 p.m., Officer Erik Naaktgeboren of the Hiawatha Police Department was conducting routine patrol when he observed a blue Mercury Grand Marquis. After running the vehicle's license plate, he learned that the registered owner—a white male—did not have a currently valid driver's license.

It was dark, snowing, and misting. From his location behind the Grand Marquis, Naaktgeboren was able to see two heads above the seats' headrests, but the two-lane road he was on prevented him from pulling up next to the vehicle to determine whether the driver was the registered owner.

Naaktgeboren initiated a traffic stop and approached the vehicle. A woman was in the driver's seat. While speaking with her, Naaktgeboren noticed a bottle of muriatic acid in the backseat and a Walmart bag and package of airline tubing tucked under the front passenger's leg. Because Naaktgeboren

had been trained and certified by the Drug Enforcement Administration as a clandestine laboratory technician for dismantling and processing methamphetamine labs, he recognized the acid and tubing as items regularly used in manufacturing methamphetamine. After checking the occupants' identification cards, he identified the driver as Aubree Sivola and the passenger as Adam Chartier. Naaktgeboren testified that he remembered previously having heard Chartier's name mentioned as someone who was involved with methamphetamine manufacturing.

Naaktgeboren requested that another officer assist him at the scene. He then learned from dispatch that Sivola had a valid license to drive. When the back-up officer arrived, Naaktgeboren requested that Sivola step out of the vehicle and asked her where she and Chartier had been. She responded that they were coming from a Walmart store. Naaktgeboren asked Sivola what they had purchased at Walmart, and she replied that they had not purchased anything there.

This response seemed suspicious to Naaktgeboren, since he had seen a Walmart bag in the car, so he began to inquire about whether there were any illegal drugs in the car and indicated that he would be walking his drug-detection dog around the vehicle. Sivola then consented to a brief pat-down and showed Naaktgeboren her pockets.

Dispatch had informed Naaktgeboren that Chartier had a prior incident on his record involving assault with a weapon. Naaktgeboren requested that Chartier step out of the vehicle and noticed bulges in his pockets when Chartier did so. Although Chartier refused to consent to a protective search, Naaktgeboren proceeded to pat him down. During the pat-down, Naaktgeboren felt a package of hypodermic needles in Chartier's pocket and asked him to remove the package and place it on the trunk of the Grand Marquis. Naaktgeboren then walked his drug-detection canine, Reso, around the vehicle. Reso alerted at the passenger-side door. Naaktgeboren searched the vehicle and did not find any contraband. Naaktgeboren then searched Chartier's person, notwithstanding Chartier's renewed refusal to consent to the search. Naaktgeboren seized several small plastic baggies that contained methamphetamine, a yellow drill bit case with pseudoephedrine pills in it, and a pipe, and Chartier was arrested.

After moving to suppress evidence from the traffic stop, Chartier entered a conditional plea of guilty, preserving his right to withdraw the plea if the court suppressed the evidence and preserving his right to appeal from any denial of his suppression motion.

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

"A traffic stop is a seizure subject to the Fourth and Fourteenth Amendments' protections against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648 (1979). 'Under the Fourth Amendment, a traffic stop is reasonable if it is 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 (8th Cir. 2006). If there is an 'articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered,' a traffic stop on that basis is not

unreasonable under the Fourth Amendment. *Prouse*, 440 U.S. at 663.

"Naaktgeboren stopped the vehicle only after he ran the information from the license plate and determined that the vehicle's owner did not have a currently valid license to drive. Chartier suggests that Naaktgeboren could not conduct a traffic stop on that basis because the actual driver of the vehicle was female and easily visibly distinguishable from the male registered owner. But only the back of the driver's head was visible through the Grand Marquis's rear window. It was dark, weather conditions were poor, and there was no passing lane that Naaktgeboren could use to pull up safely alongside the vehicle to identify the driver. Given the road and weather conditions, the Fourth Amendment did not require that Naaktgeboren affirmatively identify the sex of the driver or further investigate the driver's physical appearance before initiating a traffic stop. Thus, Naaktgeboren had an articulable and objectively reasonable suspicion that a motorist without a valid license was driving the vehicle, and his decision to initiate a traffic stop did not violate the Fourth Amendment.

"Chartier contends that the duration and scope of the traffic stop were unreasonably extended beyond the range permitted by the Fourth Amendment. We disagree.

"A constitutionally permissible traffic stop can become unlawful 'if it is prolonged beyond the time reasonably required to complete' its purpose. *United States v. Peralez*, 526 F.3d 1115, 1119 (8th Cir. 2008) (quoting *Illinois v. Caballes,* 543 U.S. 405, 407 (2005)). An officer may detain the occupants of a vehicle while completing routine tasks related to the traffic violation, such as asking for license and registration or inquiring about the occupants' destination, route, and purpose. If, during the course of completing these routine tasks, 'the officer develops reasonable suspicion that other criminal activity is afoot, the officer may expand the scope of the encounter to address that suspicion.' In determining whether reasonable suspicion exists, we look at the totality of the circumstances, and this process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.

"Once Naaktgeboren saw the muriatic acid and airline tubing in the vehicle, he had the reasonable suspicion necessary to expand the scope of the traffic stop and make further inquiry to determine whether the items had been purchased for the purpose of manufacturing methamphetamine. Although the presence of these two items might not have alerted an untrained person to the possibility that criminal activity was afoot, Naaktgeboren's expertise with processing and dismantling methamphetamine laboratories allowed him to recognize that these items often were used together for criminal purposes. Furthermore, Naaktgeboren previously had heard two people mention Chartier's name as someone involved in methamphetamine manufacturing. Naaktgeboren's suspicions grew—and reasonably so—when, in response to his question regarding what they had purchased at Walmart, Sivola stated that they had not bought anything there. Considering that Naaktgeboren had seen a Walmart bag tucked under Chartier's leg, this response was peculiar, suggested a possible cover-up, and thus made it more likely that the items

purchased were intended to be used for methamphetamine manufacturing. See *United States v. Stewart*, 631 F.3d 453, 458 (8th Cir. 2011) (noting that even minor inconsistencies may heighten an officer's reasonable suspicion). These facts, taken together, gave Naaktgeboren a particularized and objective basis to extend the scope and duration of the traffic stop and to walk Reso around the vehicle that 'might well elude an untrained person.' *United States v. Arvizu,* 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez,* 449 U.S. 411, 418 (1981)).

"Chartier contends that the protective pat-down search was unlawful because it was not supported by reasonable suspicion that he was armed or dangerous. We disagree.

"If during the course of a justified traffic stop an officer has 'a reasonable, articulable suspicion that a person may be armed and presently dangerous,' then the officer is 'justified in making a limited, warrantless search for the protection of himself or others nearby in order to discover weapons.' *United States v. Roggeman*, 279 F.3d 573, 577 (8th Cir. 2002) (citing *Terry v. Ohio,* 392 U.S. 1, 30 (1968)). At the time he performed the protective search, Naaktgeboren was aware that Chartier had a prior incident involving assault with a weapon, and, as explained above, Naaktgeboren had a reasonable suspicion that Chartier was involved with drug manufacturing. These factors support the reasonableness of Naaktgeboren's decision to perform a protective search. See *Stewart*, 631 F.3d at 457 (concluding that an officer's awareness of prior violent and drug-related behavior supports reasonable suspicion for purposes of a protective search); *United States v. Brown*, 913 F.2d 570, 572 (8th Cir. 1990) ('Since weapons and violence are frequently associated with drug transactions, the officers reasonably believed that the individuals with whom they were dealing were armed and dangerous.'). Furthermore, Naaktgeboren observed a bulge in Chartier's coat pockets, and that bulge could have indicated the presence of a weapon. See *Roggeman*, 279 F.3d at 579 (noting that a bulge is a substantial factor in justifying a protective search). Considering these facts in combination, the protective search did not run afoul of the Fourth Amendment.

"Lastly, Chartier contends that there was no probable cause to search him after Reso alerted to the vehicle and the vehicle search proved fruitless. We conclude that the search was permissible.

"Under the Fourth Amendment, 'a warrantless search of the person is reasonable only if it falls within a recognized exception" to the warrant requirement. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013). 'Among the exceptions to the warrant requirement is a search incident to a lawful arrest.' *Arizona v. Gant*, 556 U.S. 332, (2009). Such a search may include a search of the arrestee's person to remove weapons and seize evidence to prevent its concealment or destruction. (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)). Whether the search of Chartier's person falls within the search-incident-to-arrest exception thus turns on whether there was probable cause for Chartier's arrest. Probable cause exists at the time of arrest if the totality of the circumstances known to the officers involved is 'sufficient to warrant a prudent person's belief that the suspect had committed or was committing an offense.' *United States v. Mendoza*, 421 F.3d 663, 667 (8th Cir. 2005)

(quoting *United States v. Cabrera-Reynoso,* 195 F.3d 1029, 1031 (8th Cir. 1999)). A dog sniff by a reliable drug dog that results in an alert on a vehicle gives an officer probable cause to believe there are drugs present. *United States v. Donnelly,* 475 F.3d 946, (8th Cir. 2007). The only question, then, is whether Reso's alert on the vehicle was sufficient to establish probable cause that Chartier himself possessed, or had possessed, illegal drugs.

"First, the fact that Reso alerted to the vehicle, coupled with the fact that a search of the vehicle revealed no obvious source of the scent to which he alerted, made it more likely that the scent had come from one of the vehicle's occupants. See *United States v. Anchondo,* 156 F.3d 1043, 1045 (10th Cir. 1998) ('Even if the subsequent fruitless search of the car diminished the probability of contraband being in the car, it increased the chances that whatever the dog had alerted to was on the defendants' bodies.') The occupants had only recently exited the vehicle. The scent of drugs can be transferred from a person's body to a vehicle, and a 'well-trained drug-detection dog *should* alert to such odors.' *Florida v. Harris,* 133 S. Ct. 1050, 1059 (2013). Naaktgeboren had already found muriatic acid and airline tubing in the car, as well as a package of needles on Chartier's person. Furthermore, given that Reso specifically alerted outside the passenger door, where Chartier had been sitting, and that Sivola had already shown Naaktgeboren the contents of her pockets, the totality of the circumstances known to Naaktgeboren was sufficient to warrant a reasonable belief that Chartier possessed or had possessed illegal drugs on his person. Naaktgeboren thus had probable cause to arrest Chartier, rendering his pre-arrest search of Chartier's person lawful.

"Chartier argues that it was not until Naaktgeboren found the drugs in his pockets that he was subject to arrest and that the drugs found after the search could not retroactively justify the search. True it is that the fruits of a search incident to arrest that precedes the arrest may not serve as the justification for the arrest. *Sibron v. New York*, 392 U.S. 40, 63 (1968). Here, however, probable cause for arrest existed even before the search, and since 'the formal arrest followed quickly on the heels of the challenged search of Chartier's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.' *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). Thus the search of Chartier's person did not violate his constitutional rights.