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ARKANSAS FREEDOM OF INFORMATION ACT

Arkansas State Police v. Wren, ASC, No. CV-15-828, 2016 Ark. 188, 4/28/16

Daniel Wren, an attorney, requested unredacted access to certain accident reports under the Freedom of Information Act (FOIA) from the Arkansas State Police (ASP). His reason for requesting the accident reports was to search for and solicit potential clients for his law practice. ASP contended that its policy of redacting personal information from accident reports was permitted under FOIA because disclosure is prohibited by the federal Driver's Privacy Protection Act (DPPA). The circuit court ruled in favor of Wren and enjoined the policy of the ASP regarding redactions of accident reports. The Supreme Court affirmed, holding that the DPPA does not prohibit disclosure of personal information in accident reports, which are public records within the meaning of FOIA.

CIVIL LIABILITY: Conviction Must Be Set Aside Before Civil Suit

Tolliver v. City of Chicago, CA7, No. 15-1924, 4/12/16

In 2009, Darnell Tolliver agreed to deliver drugs for Kenyata Tyson. Tolliver left Tyson's house with cocaine. A confidential informant had described Tolliver's car and a drug packaging operation at Tyson's

house. Two officers, in plain clothes, stopped Tolliver, exited their unmarked car, and pointed a gun at Tolliver. According to Tolliver, he backed up about a car length. Tolliver, who was unarmed, then realized that he was dealing with police. He claims that he did not want the officer to think that he was reaching for a gun, so he sat motionless, with his hands on the steering wheel, and his foot on the brake. He claims that the officer shot him while he was in that position and that he became unable to control the car, which rolled toward the officers. The officers fired 14 times and Tolliver was struck by seven bullets.

Tolliver pled guilty to aggravated battery of a peace officer and possession of a controlled substance with intent to deliver, but then sued for excessive force. The Seventh Circuit affirmed summary judgment in favor of the officers. "A convicted criminal may not bring a civil suit questioning his conviction until the conviction has been set aside. Tolliver's suit rests on a version of the event that completely negates the basis for his conviction."

CIVIL LIABILITY: Excessive Force; Police Warning Before Shooting

Cordova v. City of Albuquerque
CA10, No. 14-2083, 3/18/16

Three Albuquerque police officers shot Stephan Cordova after he raised a gun in their direction. Cordova survived and was charged with assault, although the charges were later dismissed on speedy trial grounds. Cordova then brought this action under 42 U.S.C. 1983, claiming the police used excessive force by firing on him without an adequate warning. The district court allowed the Fourth Amendment excessive-force claims to go to trial, where a jury returned a verdict for the officers.

The Tenth Circuit Court of Appeals stated that the dismissal of the assault charges under the Speedy Trial Act is not indicative of Cordova's innocence:

"Where feasible, an officer is required to warn a suspect that he is going to shoot before doing so. See *Tennessee v. Garner*, 471 U.S. at 11–12. The district court did not abuse its discretion or misstate the law in instructing the jury that a command to 'drop the weapon' is a sufficient warning where events are unfolding quickly. The testimony at trial showed that one of the officers ordered Cordova to 'drop the gun' before firing. This was a sufficient warning, given that events were unfolding quickly and Cordova posed an active threat to the officers throughout the encounter."

The Court found no error in the district court's conclusions.

CIVIL LIABILITY: Free Speech Rights

Heffernan v. City of Patterson
USSC, No. 14-1280, 4/26/16

Heffernan was a police officer working in the office of Paterson, New Jersey's chief of police. Both the chief of police and Heffernan's supervisor had been appointed by Paterson's incumbent mayor, who was running for re-election against Lawrence Spagnola, a good friend of Heffernan's. Heffernan was not involved in Spagnola's campaign in any capacity. As a favor to his bedridden mother, Heffernan agreed to pick up and deliver to her a Spagnola campaign yard sign. Other police officers observed Heffernan speaking to staff at a Spagnola distribution point while holding the yard sign. Word quickly spread throughout the force. The next day, Heffernan's supervisors demoted him from detective to patrol officer as punishment for his "overt involvement" in Spagnola's campaign. Heffernan filed suit, claiming that the police chief and the other respondents had demoted him because, in their mistaken view, he had engaged in conduct that constituted protected speech.

Affirming the district court, the Third Circuit concluded that Heffernan's claim was actionable under Section 1983 only if his employer's action was prompted by Heffernan's actual, rather than his perceived, exercise of free-speech rights. The Supreme Court reversed, finding in part as follows:

"When an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment and Section 1983 even if the employer's actions are based on a factual mistake. An employer's motive, and the facts as the employer reasonably understood them, matter in determining violation of the First Amendment. The harm— discouraging employees from engaging in protected speech or association—is the same, regardless of factual mistake. The lower courts should decide whether the employer may have acted under a neutral policy prohibiting police officers from overt involvement in any political campaign and whether such a policy would comply with constitutional standards."

CIVIL LIABILITY: Excessive Force; Taser; Qualified Immunity

Perea v. Baca, CA10, No. 14-2214, 4/4/16

Jerry Perea died in 2011 after an incident involving Officers David Baca and Andrew Jaramillo. Merlinda Perea called 911 and told the operator that her son, Perea, was on "very bad drugs" and that she was afraid of what he might do. Baca and Jaramillo were sent to perform a welfare check. The officers were informed that they were responding to a verbal fight and that no weapons were involved. They were also informed that Perea suffered from mental illness and may have been on drugs. The officers located Perea pedaling his bicycle. The officers used their patrol cars to force

Perea to pedal into a parking lot. Jaramillo left his vehicle to pursue Perea on foot. After a brief chase, Jaramillo pushed Perea off his bicycle. The officers did not tell Perea why they were following him or why he was being seized, and they never asked Perea to halt or stop. After pushing Perea off his bicycle, Jaramillo reached for Perea's hands in an attempt to detain him. Perea struggled and thrashed while holding a crucifix. After Perea began to struggle, Baca told Jaramillo to use his taser against Perea. The district court denied Baca and Jaramillo qualified immunity against a Fourth Amendment excessive force claim, and they appealed. After reviewing the district court record in this matter, the Tenth Circuit held that the officers' repeated tasering of Perea after he was subdued constituted excessive force, and that it was clearly established at the time of the taserings that such conduct was unconstitutional. The Court affirmed the denial of the officers request for qualified immunity.

The Court of Appeals for the Tenth Circuit stated that the officers tasered Perea once in "probe mode" and nine times in "stun mode" within the span of two minutes, continuing after Perea had been effectively subdued. "Even if Perea initially posed a threat to the officers that justified tasering him, the justification disappeared when Perea was under the officers' control. It is not reasonable for an officer to repeatedly use a taser against a subdued arrestee they know to be mentally ill, whose crime is minor, and who poses no threat to the officers or others."

CIVIL LIABILITY:
Force Used on Passively Resisting Subject

Becker v. Elfreich
CA7, No. 15-1363, 5/12/16

On March 11, 2011, four Evansville Police Department officers went to the home of Brinda Becker in order to execute an arrest warrant for her son, Jamie Becker, who was staying at her house at that time. The arrest warrant alleged that three weeks earlier Becker had held a knife to his brother-in-law's neck and threatened to kill him. One of the officers dispatched was Officer Zachary Elfreich, who was a police dog handler. Officer Elfreich initially guarded the back door of the house with his German Shepherd, Axel, while other officers went to the front of the house. While at the rear of the house, Officer Elfreich saw an individual named Brian Mortis leaving the home. Mortis told Officer Elfreich that Becker was inside the house with his mother and her sister, Delores Pfister.

Meanwhile, at the front of the house officers spoke with Brinda Becker and Pfister, informing them that they had a warrant for Becker's arrest. Brinda Becker called upstairs to her son that the police were there to arrest him, and then she and Pfister waited on the front porch. Brinda Becker also told officers that Becker was alone in the house. The officers called Officer Elfreich to the front of the house with Axel. After waiting about 30 seconds and not seeing or hearing Jamie, Officer Elfreich released Axel inside the house and directed the dog to "find him."

Officer Elfreich testified that Axel is trained, upon hearing the command "find him," to use the "bite-and-hold" technique. Officer Elfreich explained that using this technique, Axel will bite the first person he finds, even if that person is not the target of the search and even if the person has surrendered, and hold that person until Officer Elfreich commands him to release. Officer Elfreich further testified that Axel is capable of inflicting "lethal force" and that there is a probability of him doing so.

According to Officer Elfreich, prior to releasing Axel he gave a loud, clear warning: "Police department K-9, come out now or I will release my dog and you will get bit." Officer Elfreich claimed that he listened for a moment and heard nothing so he repeated the warning but after hearing nothing again, he released Axel. Officer Elfreich explained that he unleashed Axel about 30 seconds after he issued the first warning. Jamie Becker and Brinda Becker both testified that Officer Elfreich did not give a warning. Brinda Becker was on the front porch near the door at the time Officer Elfreich entered and Jamie Becker explained that he would have heard the warning had one been given because there was a vent in his second-floor room which was directly above the front door.

Jamie Becker testified in his deposition that at the time the police arrived he was sleeping upstairs in his bedroom, and upon hearing his mother's announcement that the police were there to arrest him, he replied he was getting dressed and would be down. He further explained that within two minutes of his mother's announcement, he began descending the stairs with his hands on top of his head so officers knew he was surrendering. Becker's girlfriend followed.1 As they were descending the stairs, Officer Elfreich released Axel. Axel immediately ran from the front door through the house to the stairway and began heading up the stairs which the duo were then descending. Axel encountered Becker as he reached a landing on the stairs, about three steps from the bottom, and Axel bit Becker's left ankle. At that point Becker shouted, "Call the dog off. I'm coming towards you." Officer Elfreich, who had lost sight of Axel for the two seconds it took Axel to run from the front door to the stairs, then ran to the stairs, following Becker's voice. He saw that Axel had bitten Becker's leg and that Becker had his hands on his head, but did not command Axel to release Becker. Rather, Officer Elfreich ordered Becker to get on the floor.

Becker claims he could not hear the command because his girlfriend was screaming. Officer Elfreich then grabbed Becker by his shirt collar and yanked him down the last few steps onto the floor, where he landed hard on his chest and head. Becker claims that as Officer Elfreich pulled him down the steps Axel lost his grip on his leg, but upon hitting the ground Axel bit him again harder and then continued to bite him while violently shaking his head. Becker testified in his deposition that he lay still on the ground with his hands behind his back, while Officer Elfreich continued to allow Axel to bite his leg. Becker further explained that Officer Elfreich told him that he could

not have the dog release him until he was handcuffed. Officer Elfreich placed his knee in Becker's back, handcuffed him, and only then ordered Axel to release his grip. Becker was not sure how long Axel bit him, but his girlfriend estimated a few minutes. Either way, Axel severely injured Becker, with Becker's calf "torn out completely." Officers transported Becker to a local hospital for treatment. At the hospital, a member of the medical staff told Becker it was the worst dog bite they had seen in twenty-three years. Becker required surgery and remained hospitalized for two or three days. Becker suffered permanent muscle and nerve damage and continues to suffer daily with pain.

Becker later filed suit against both Officer Elfreich and the City of Evansville. While he alleged several federal and state law claims against the defendants, the only issue on appeal is Becker's Fourth Amendment excessive force claim against Officer Elfreich.

Officer Elfreich argued he was entitled to qualified immunity because his conduct did not constitute excessive force or, alternatively, that it did not violate clearly established constitutional law. The Seventh Circuit affirmed denial of Elfreich's motion for summary judgment stating, "A jury could reasonably find the force was excessive; it was clearly established at the time of Becker's arrest that no more than minimal force was permissible to arrest a non-resisting, or passively resisting, suspect."

CIVIL LIABILITY:
False Imprisonment; Immunity for Negligence; Arkansas Code § 21-9-301

Trammel v. Wright, ASC, No. CV-15-179, 2016 Ark. 147, 4/7/16

Officer Travis Trammell is a police officer with the Bella Vista Police Department. The record reflects that on May 14, 2012, Officer Trammell received a report that shots had been fired in the area known as the "Grosvenor Gravel Pits," an area that is off-limits for shooting. While investigating the area, Officer Trammell approached Linda Wright, her co-worker, her daughter, and her daughter's friend. Officer Trammell spoke to Wright and asked for her driver's license, which she gave him. Upon running Wright's identification, the Arkansas Crime Information Center ("ACIC") showed that Wright had an outstanding warrant for her arrest for failing to appear in Elkins District Court in Washington County. ACIC indicated the same name, date of birth, driver's license number and picture belonging to Wright.

Wright denied being the subject of the warrant. Officer Trammell then returned to his car and called Washington County dispatch on the radio and asked dispatch to confirm the warrant. Dispatch confirmed that the warrant was valid. Officer Trammell arrested Wright and transported her to the Benton County Sheriff's Office, which held her until Washington County Sheriff's Office could pick her up. After arriving at the

Washington County Sheriff's Office, Wright bonded out of jail. Wright was ultimately cleared of wrongdoing. The warrant had been issued against "Linda M. Wright," a person having a different home address, date of birth, and driver's license number than Wright.

Officer Trammell testified in his deposition that he never saw the warrant at the scene of the arrest. It was not the police department's practice for an officer to call the agency to have someone look at the warrant and read the identifying information. The individual who entered the warrant into the ACIC system assigned it to Wright's name, driver's license number, date of birth, and photograph.

On May 10, 2013, Wright filed a complaint against Officer Trammell in his personal capacity, alleging that he committed the state-law torts of false arrest and false imprisonment.

On appeal, Officer Trammell argues that he did not commit the torts of false arrest or false imprisonment and that if the proof does demonstrate negligence, he is entitled to immunity pursuant to section 21-9-301. Wright asserts that the circuit court was correct in denying immunity because Officer Trammell's acts were not negligent, but intentional, and officials are not immune from intentional acts. Specifically, she argues that Officer Trammell committed the torts of false arrest and false imprisonment by intentionally refusing to verify the identifying information on the warrant. She contends that if Officer Trammell had asked someone to look at the face of the warrant, he would have known that she was not the subject of the warrant and she would not have been arrested.

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

"'False arrest' is a name sometimes given to the tort more generally known as 'false imprisonment.' *Headrick v. Wal-Mart Stores, Inc.*, 293 Ark. 433, 435, 738 S.W.2d 418, 420 (1987) (citing W. Prosser & W. Keeton, *The Law of Torts* 47 (5th ed. 1984)). False imprisonment is the unlawful violation of the personal liberty of another consisting of detention without sufficient legal authority. See *Grandjean v. Grandjean,* 315 Ark. 620, 869 S.W.2d 709 (1994); *Headrick,* 293 Ark. 433, 738 S.W.2d 418; *Moon v. Sperry & Hutchinson Co.*, 250 Ark. 453, 465 S.W.2d 330 (1971).

"The facts are undisputed. The actual warrant was not for Wright, but for a different person with the same name. Officer Trammell was not in possession of the actual warrant at the time of the arrest, but followed the police department's practice and relied on the information provided by ACIC. When Wright stated that she was not the subject of the warrant, Officer Trammell sought verification of that information from dispatch in Washington County. All of the information that Officer Trammell had in his possession, which was verified by dispatch, indicated that Wright was the subject of the warrant.

"Wright has provided no facts to support her argument that Officer Trammell

committed the intentional torts of false arrest or false imprisonment. Therefore we hold as a matter of law that Officer Trammell did not commit the intentional torts of false arrest or false imprisonment.

"Officer Trammell asserts that, to the extent the proof demonstrates negligence on his behalf, he is immune from suit pursuant to section 21-9-301. This court has consistently held that section 21-9-301 provides city employees with immunity from civil liability for negligent acts, but not for intentional acts. See *Romine*, 373 Ark. 318, 284 S.W.3d 10; *Brt*, 363 Ark. 126, 211 S.W.3d 485; *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992). Wright has not alleged any acts of negligence against Officer Trammell, only intentional torts. Because we hold that Officer Trammell has not committed any intentional torts, we find that the circuit court erred by denying summary judgment based on immunity."

DUE PROCESS:
Failure to Disclose Material Evidence

Wearry v. Cain
USSC, No. 14-10008, 3/7/16

Sometime between 8:20 and 9:30 on the evening of April 4, 1998, Eric Walber was brutally murdered. Nearly two years after the murder, Sam Scott, at the time incarcerated, contacted authorities and implicated Michael Wearry. Scott initially reported that he had been friends with the victim; that he was at work the night of the murder; that the victim had come looking for him but had instead run into Wearry and four others; and that Wearry and the others had later confessed to shooting and driving over the victim before leaving his body on Blahut Road. In fact, the victim had not been shot, and his body had been found on Crisp Road.

Scott changed his account of the crime over the course of four later statements, each of which differed from the others in material ways. By the time Scott testified as the State's star witness at Wearry's trial, his story bore little resemblance to his original account. According to the version Scott told the jury, he had been playing dice with Wearry and others when the victim drove past. Wearry, who had been losing, decided to rob the victim. After Wearry and an acquaintance, Randy Hutchinson, stopped the victim's car, Hutchinson shoved the victim into the cargo area. Five men, including Scott, Hutchinson, and Wearry, proceeded to drive around, at one point encountering Eric Brown—the State's other main witness—and pausing intermittently to assault the victim. Finally, Scott related, Wearry and two others killed the victim by running him over.

On cross-examination, Scott admitted that he had changed his account several times. Consistent with Scott's testimony, Brown testified that on the night of the murder he had seen Wearry and others with a man who looked like the victim. Incarcerated on unrelated charges at the time of Wearry's trial, Brown acknowledged that he had made a prior inconsistent statement to the police, but had recanted and agreed to testify against Wearry, not for any prosecutorial favor,

but solely because his sister knew the victim's sister. The State commented during its opening argument that Brown "is doing 15 years on a drug charge right now, [but] hasn't asked for a thing." 7 Record 1723 (Tr., Mar. 2, 2002).

During closing argument, the State reiterated that Brown "has no deal on the table" and was testifying because the victim's "family deserves to know." Pet. for Cert. 19. Although the State presented no physical evidence at trial, it did offer additional circumstantial evidence linking Wearry to the victim. One witness testified that he saw Wearry in the victim's car on the night of the murder and, later, holding the victim's class ring. Another witness said he saw Wearry throwing away the victim's cologne. In some respects, however, these witnesses contradicted Scott's account. For example, the witness who reported seeing Wearry in the victim's car did not place Scott in the car. Wearry's defense at trial rested on an alibi. He claimed that, at the time of the murder, he had been at a wedding reception in Baton Rouge, 40 miles away. Wearry's girlfriend, her sister, and her aunt corroborated Wearry's account.

In closing argument, the State stressed that all three witnesses had personal relationships with Wearry. The State also presented two rebuttal witnesses: the bride at the wedding, who reported that the reception had ended by 8:30 or 9:00 (potentially leaving sufficient time for Wearry to have committed the crime); and three jail employees, who testified that they had overheard Wearry say that he was a bystander when the crime occurred.

The jury convicted Wearry of capital murder and sentenced him to death. His conviction and sentence were affirmed on direct appeal.

After unsuccessful direct appeal, it emerged that the prosecution had withheld police records showing that two inmates had made statements that cast doubt on Scott's credibility and that, contrary to the prosecution's assertions, Brown wanted a deal for testifying. Police had told Brown that they would "talk to the D. A." Collateral-review counsel found many witnesses lacking any personal relationship with Wearry to corroborate his alibi until 11 pm.

The lower courts and the Louisiana Supreme Court denied relief. The U.S. Supreme Court reversed on the *Brady v. Maryland,* 373 U.S. 83 (1963) due process claim, finding that the state withheld material evidence.

EMPLOYMENT LAW:
Public Employment; Promotion Testing

Lopez v. City of Lawrence, Massachusetts
No. 14-1952, 5/18/16

To select police officers for promotion to the position of sergeant in 2005 and 2008, the City of Boston and other Massachusetts communities and state employers adapted a test developed by a Massachusetts state agency. The test was the result of an effort to eliminate the use of race and other improper considerations in decisions involving public employment. Some of the Black and Hispanic applicants who were

not selected for promotion filed suit, claiming that the use of the test resulted in an unjustified "disparate impact" in violation of Title VII. The district court entered judgment in favor of Defendants, concluding that the test was a valid selection tool and that Plaintiffs failed to prove that there was an alternative valid selection tool available that would have resulted in the promotion of a higher percentage of Black and Hispanic officers. The First Circuit affirmed, holding that the district court applied correct legal standards and that the record contained sufficient support for the court's findings. Their finding is, in part, as follows:

"The examinations at issue in this case allowed no room for the subjective grading of applications. The total score of a test-taker who sat for the promotional examination in 2005 or 2008 was determined by two components: an 80-question written examination scored on a 100-point scale and an 'education and experience' (E&E) rating, also scored on a 100-point scale. The written examination counted for 80% of an applicant's final score and the E&E rating comprised the remaining 20%. Applicants needed an overall score of seventy to be considered for promotion. On top of the raw score from these two components, Massachusetts law affords special consideration for certain military veterans and individuals who have long records of service with the state.

"The subject matter tested on the 2005 and 2008 examinations can be traced back to a 1991 'validation study' or 'job analysis report' performed by the state agency responsible for compiling the exam. That 1991 report was prepared by the Massachusetts Department of Personnel Administration (DPA), the predecessor to the Human Resource Division. In preparing the report, DPA surveyed police officers in thirty-four jurisdictions nationwide, issuing a questionnaire that sought to ascertain the kinds of "knowledge, skills, abilities and personnel characteristics" that police officers across the country deemed critical to the performance of a police sergeant's responsibilities. The report's authors distilled the initial results from this survey and their own knowledge regarding professional best practices into a list of critical police supervisory traits. They then distributed this list in a second survey to high-ranking police officers in Massachusetts, who were asked to rank these traits according to how important they felt each was to a Massachusetts police sergeant's performance of her duties. DPA further refined the ranking of key skills and traits through focused small-group discussions with police sergeants and conducted a 'testability analysis' of which skills could likely be measured through the written examination or the E&E component. In 2000, HRD engaged outside consultants to refresh the findings of the 1991 examination through a process similar to, though less thorough than, DPA's approach in 1991.

"The written question and answer component of the examination consisted of multiple choice questions that covered many topic areas, including the rules governing custodial interrogation,

juvenile issues, community policing, and firearm issues, to name a few. The text of individual questions was often closely drawn from the text of materials identified in a reading list provided by the Boston Police Department (BPD) to test takers in advance of the exams.

"In addition to completing the question and answer component of the examination, applicants listed on the E&E rating sheet their relevant work experience, their degrees and certifications in certain areas, their teaching experience, and any licenses they held. Points were assigned based on the listed education and experience. For example, applicants could receive up to fifteen points in recognition of their educational attainment, with an associate's degree providing up to three points and a doctorate providing up to twelve.

"After collecting and scoring the exams, HRD provided the municipalities with a list of passing test-takers eligible for promotion, ranked in order of their test scores. Each of the municipal defendants in this case selected candidates in strict rank order based on the list they received from HRD.

"The City presented the testimony of Dr. James Outtz. Outtz is an industrial organizational psychologist with twenty years of experience testing and measuring employee selection systems. He has served as a consultant to numerous American municipalities and federal agencies and has assisted in the development of employment selection devices used by many public employers. Outtz has published approximately twenty academic publications in the field of industrial organizational psychology. He has worked for both plaintiffs and defendants in challenges to the validity of exams.

"Outtz concluded that 'at the end of the day,' the combined 'package' of the written examination and the E&E as administered tested a 'representative sample' of the key supervisory skills and was acceptable under the Guidelines. He testified that the representativeness of the skills tested by the two components and the linkage of these skills to the validation reports were in line with Guidelines' technical standards for constructing a content-valid selection device.

"This is not to say that Outtz's testimony trumpeted a wholehearted endorsement of the scheme used by Boston to identify candidates for promotion. He agreed with the Officers that the validity of the Boston examination could have been improved, perhaps by incorporating a 'well-developed assessment center' to evaluate an officer's interpersonal skills through observed social interaction, or some kind of device for measuring an applicant's oral communication skills. Outtz was clear that his opinion solely concerned the selection device's compliance with his profession's minimum standards as translated into the EEOC's Guidelines.

"The record contains detailed, professionally buttressed and elaborately explained support for the district court's

finding that persons who perform better under the test method are likely to perform better on the job. Given that plainly supported finding, it makes little sense to debate in the abstract how much better the exam might have been. Given our finding that the district court applied the correct law and committed no clear error in finding persuasive the expert evidence tendered by Boston, we affirm the district court's order finding that the exams Boston used in 2005 and 2008 did not violate Title VII and we therefore affirm as well the entry of judgment in favor of all defendants."

EVIDENCE: Expert Testimony; Historical Analysis of Cellular Telephone Sites

United States v. Hill
CA7, No. 14-2019, 3/21/16

On November 19, 2011, Wayne Hill walked into the Illiana Financial Credit Union in Naperville, Illinois, pointed a pistol at the teller, and ordered her to give him money. While Hill threatened repeatedly to shoot her, another teller handed over roughly $134,000 in cash. Hill fled the scene with a bag full of stacks of wrapped bills. A jury convicted Hill on April 7, 2014, and he was sentenced to 360 months' imprisonment. One of the issues on appeal was his attempt to exclude expert testimony regarding historical cell site analysis.

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

"Historical cell-site analysis uses cell phone records and cell tower locations to determine, within some range of error, a cell phone's location at a particular time. A cell phone is essentially a two-way radio that uses a cellular network to communicate. Aaron Blank, *The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of A Cellular Phone*, 18 RICH. J.L. & TECH. 3, 5 (2011). Each cell tower covers a certain geographic area. That geographic area depends upon the number of antennas operating on the cell site, the height of the antennas, topography of the surrounding land, and obstructions (both natural and manmade). In urban areas, cell towers may be located every one-half to one mile, while cell sites in rural areas may be three to five miles apart. When a cell phone user makes a call, the phone generally connects to the cell site with the strongest signal, although adjoining cell towers provide some overlap in coverage. While the proximity of the user is a significant factor in determining the cell tower with which the cell phone connects, it is not the only one. Other factors include the towers' technical aspects, including geography and topography, the angle, number, and directions of the antennas on the sites, the technical characteristics of the relevant phone, and environmental and geographical factors.

"The parties here do not dispute that testimony about historical cell-site analysis is expert testimony. That proposition is not, however, universally applied, and perhaps not even universally accepted. Some circuits have treated

some kinds of historical cell-site analysis as lay testimony. See, e.g., *United States v. Graham*, 796 F.3d 332, 364 (4th Cir. 2015) (finding no abuse of discretion in admitting Sprint/Nextel employee's lay testimony that cell phones connect to the tower emitting the strongest signal and cell towers in urban areas have a two-mile maximum range, and law enforcement officer's lay testimony and maps regarding the defendant's location based on cell phone records and cell sites); *United States v. Henderson*, 564 F. App'x 352, 364 (10th Cir. 2014) (nonprecedential) (law enforcement agent's plotting of the defendant's locations through historical cell-site analysis was proper lay testimony so long as the agent did not testify about how cell towers operate.), Agent Raschke's testimony in this case included statements about how cell phone towers operate. In our view, this fits easily into the category of expert testimony. *United States v. YeleyDavis*, 632 F.3d 673, 684 (10th Cir. 2011) (Testimony concerning how cell phone towers operate constituted expert testimony because it involved specialized knowledge not readily accessible to any ordinary person.). When evaluating whether an expert's testimony should be admitted, a court must consider whether the expert's testimony is supported by appropriate validation and will assist the trier of fact to understand or determine a fact in issue. The Supreme Court emphasized the importance of carefully vetting expert testimony, noting that it can be both powerful and quite misleading because of the difficulty in evaluating it. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. at 579.

"District courts that have been called upon to decide whether to admit historical cell-site analysis have almost universally done so. The government argues that the numerous district court decisions to admit historical cell-site analysis constitute general acceptance of the technique. But judicial acceptance is not relevant; what matters is general acceptance in the relevant expert (scientific or otherwise) community. See *Daubert*, 509 U.S. at 594; *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 148 (1997) (Breyer, J., concurring) (Judges are not scientists and do not have the scientific training that can facilitate the making of such decisions.).

"No federal court of appeals has yet said authoritatively that historical cell-site analysis is admissible to prove the location of a cell phone user. The Sixth Circuit gave the technique an unfavorable appraisal recently in *United States v. Reynolds*, 626 F. App'x 610, 616–17 (6th Cir. 2015) (nonprecedential). Because the government there used historical cell-site analysis to prove that certain people were not in a certain area at a particular time, the court did not need to rule on the technique's reliability for proving where a person was at a given time. The Fifth Circuit, in contrast, has affirmed the admission of historical cell-site analysis to prove an individual's location. See *United States v. Schaffer*, 439 F. App'x 344, 347 (5th Cir. 2011) (nonprecedential). But the Sixth Circuit singled out *Schaffer* for criticism in Reynolds. 626 F. App'x at 616–17. And even the Fifth Circuit only remarked that testimony established that the field is neither untested nor unestablished. This is hardly a ringing endorsement.

"The contested cell-site analysis in Hill's case covers two days. The first is November 14, 2011. Agent Raschke testified that Hill's cell phone records and the locations of relevant cell towers indicated that on that day, Hill's T-Mobile cell phone used a tower that was roughly a mile and half from the Credit Union that was later robbed. Agent Raschke also used historical cell-site analysis to trace the whereabouts of Hill's phone on November 19, 2011, the day of the robbery. Most significantly, Agent Raschke testified that at 11:54 am— 16 minutes after the robber fled the Credit Union—Hill's Nextel phone engaged a tower in Naperville, Illinois, that was located approximately 11 miles east of the Credit Union and 35 miles south of Hill's residence. Agent Raschke then traced connections between Hill's cell phone and towers moving north along the interstate. The clear implication of the testimony was that Hill's cell phone was in the general area of the Credit Union shortly after the robbery, and then moved rapidly northward along the highway immediately afterward. It wound up near his residence at 12:28 pm before moving north again at 1:08 pm and ending at his work address at 1:33 pm.

"In his trial testimony, Agent Raschke emphasized that Hill's cell phone's use of a cell site did not mean that Hill was right at that tower or at any particular spot near that tower. This disclaimer saves his testimony. Historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. It shows the cell sites with which the person's cell phone connected, and the science is well understood. *United States v. Evans,* 892 F. Supp. 2d 949 (N. D. Ill.) (noting that methods of historical cell site analysis can be and have been tested by scientists). The technique requires specialized training, which Agent Raschke has and has employed successfully on hundreds of occasions. A mathematical error rate has not been calculated, but the technique has been subjected to publication and peer criticism, if not peer review. See, *e.g.,* Matthew Tart *et al., Historical Cell Site Analysis – Overview of Principles and Survey Methodologies,* 8 DIGITAL INVESTIGATION 185–86 (2012); Blank, 18 RICH. J.L. & TECH. at 3–5; Herbert B. Dixon Jr., *Scientific Fact or Junk Science? Tracking A Cell Phone Without GPS,* 53 JUDGES' J. 37 (2014). The advantages, drawbacks, confounds, and limitations of historical cell-site analysis are well known by experts in the law enforcement and academic communities. Agent Raschke described many of them at trial. Nonetheless we have some concerns about Agent Raschke's testimony. On cross-examination, he admitted that he did not know any of the particular characteristics of the cell tower with which Hill's phone connected at 11:54 am, including its power or the direction its antennae were facing. He did not perform any tests of that cell tower's area of signal coverage. Based on his experience, he disputed defense counsel's suggestion that a cell phone could connect from 20 or 10 miles away from a particular cell site, but he admitted that it could travel 'over 5 miles.' On re-direct he stated that his experience was that the range of Chicago area towers was 'very limited,' and that he

had never, in hundreds of investigations in Chicago, seen a cell phone 'jump' to connect with a cell tower 20 miles away. Based on this testimony, the jury could reasonably and reliably infer that at 11:54 am on November 19, 2011, Hill was within a five-mile radius of the cell tower located 11 miles east of the Credit Union. The testimony is relevant and probative, and therefore somewhat helpful to the trier of fact—even if not that helpful.

"Our concern is that the jury may overestimate the quality of the information provided by this analysis. We therefore caution the government not to present historical cell-site evidence without clearly indicating the level of precision—or imprecision—with which that particular evidence pinpoints a person's location at a given time. The admission of historical cell-site evidence that overpromises on the technique's precision—or fails to account adequately for its potential flaws—may well be an abuse of discretion. In this case, however, Agent Raschke's testimony on both direct and cross examination made the jury aware not only of the technique's potential pitfalls, but also of the relative imprecision of the information he gleaned from employing it in this case. The science and methods upon which the technique is based are understood and well documented. Admitting Agent Raschke's testimony was therefore not an abuse of the district court's considerable discretion under the rules of Federal evidence."

EYEWITNESS IDENTIFICATION:
Photography Identification; Unduly Suggestive

United States v. House
CA8, No. 15-1175, 5/23/16

On July 26, 2013, Logan Engelbrecht and Taylor Hruska were driving near Lowell Elementary School in Sioux Falls, South Dakota, when they saw a man pointing a handgun at another man. Engelbrecht, who was driving, called 911 and described the gunman as wearing a red shirt, black pants, and a black hat, and having a "fro" with a ponytail. She indicated that he was holding a small, black handgun. After Engelbrecht stopped the car, Hruska got out of the vehicle and walked toward the area where they had spotted the man with the gun. Hruska observed the gunman walking away from the scene.

At about the same time, construction workers Shawn Jaminet and Jason Diamond were replacing a door at Lowell Elementary School and saw a man with a gun approach a group of people across the street from the school. The man pointed the gun in another man's face. Jaminet called 911 to report the incident and watched the gunman run away from the group. He described the gunman as having a ponytail and wearing a red shirt and black hat. Two Sioux Falls Police Department ("SFPD") officers, Officer Chris Bauman and Reserve Officer Steve Schumacher, responded to the 911 calls. When the officers arrived on the scene, they discovered House walking down the street with another individual.

Both officers observed that House was wearing a red shirt, black pants, and a hat. The officers pulled their patrol car over to the curb, exited the vehicle, and drew their firearms. They told House and the other man to freeze and put their hands up, but House ran away from the scene. Officers Bauman and Schumacher ran after House. Hruska continued to observe House as the officers pursued him. Then, after the officers caught House, Hruska approached the police.

By the time Hruska got to the police, the officers had already placed House in the back of their patrol car. Hruska identified House as the man she saw with the gun. Engelbrecht was not asked to identify House.

Emmet Warkenthien, a special agent with the Bureau of Alcohol, Tobacco, and Firearms and Explosives, became involved with the investigation of House after House's arrest. Agent Warkenthien developed a photographic lineup to show Hruska. He met with an SFPD intelligence analyst to use a computer program that compared House's Minnehaha County jail booking photograph to photographs of other individuals booked into the same jail. They entered House's physical characteristics into the program to find individuals with similar features, and created a photographic lineup with color booking photographs of six individuals.

On August 20, 2013, Agent Warkenthien met with Hruska and showed her the photographic lineup. He told her that the person she observed on July 26, 2013 may or may not be in the photographic lineup, and if the person she observed was pictured in the lineup, she should identify the person by placing her initials next to the photograph. Agent Warkenthien did not suggest to Hruska which person may have been the person she observed. Hruska immediately identified photograph number two, which was the photograph of House. Hruska had never seen House prior to July 26, 2013 and did not know his name at the time of the photographic lineup.

In this case, Lance House argues that because he was the only individual in the photographic lineup with long hair and a pony tail, the lineup was impermissibly suggestive.

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

"The Supreme Court has established a two-step inquiry into photographic lineups. *Schawitsch v. Burt*, 491 F.3d 798, 802 (8th Cir. 2007). First, we must determine whether the lineup was impermissibly suggestive. If we find that the lineup is impermissibly suggestive, then we must examine whether under the totality of the circumstances the lineup created a substantial likelihood of misidentification at trial.

"The photographic lineup displayed six photographs of men wearing black-and-white striped jail clothing. The photographs are all proportional in size, and the background color and lighting is consistent. All of the men have dark brown hair, and brown eyes. Their complexions are similar but not identical.

Three of the six have neck tattoos. The men appear to be roughly the same age. All but one have facial hair of some sort, and three have goatees. Their hair varies in length: two have short hair, three have 'afro-style' hair, and one man, House, appears to have a ponytail.

"The Court of Appeals for the Eighth Circuit stated that although the district court's rationale for denying House's motion to suppress–that Hruska did not identify the ponytail as one of House's distinguishing characteristics–was undermined by evidence produced at trial, the photographic lineup was not impermissibly suggestive. All of the men have brown eyes, darker complexions, and dark brown hair. The ponytail is not prominently displayed in House's picture, and even appears as though it could be a shadow. Three of the other men have 'afro-style' hair that is not in a ponytail. In a photographic lineup, reasonable variations in hair length or style are not impermissibly suggestive, 'especially as they can vary on any given person at different times.' Thus, the mere fact that House is the only individual pictured with a ponytail does not render the photographic lineup unduly suggestive. Therefore, the district court's factual findings were not clearly erroneous, and the court did not err in denying House's motion to suppress Hruska's identification of House in the photographic lineup."

MIRANDA: Custodial Interrogation

Matar v. State
ACA, No. CR-15-741,
2016 Ark. App.243, 5/4/16

Detective Moss left a message for Ali Martin Matar, Jr. to call him, which he did. Detective Moss explained that there was an investigation involving Matar and that Detective Moss would like for Matar to come to the police department to speak with him. Matar voluntarily drove to the police station, where Detective Moss took him to an interview room. On the way to the room, Detective Moss explained to Matar how to get out of the station when he was leaving. Detective Moss did not arrest Matar, did not take his keys or cell phone, and did not handcuff or restrain Matar in any way. The door to the interview room automatically locks when the door closes. It is not clear whether Matar knew this at the time of the interview.

The two men began with small talk about sports. The conversation then turned to Matar's work and the specifics of the allegations. After Matar admitted that he had "accidentally" touched the victim inappropriately, Detective Moss took a break, spoke with fellow officers about additional techniques to elicit pertinent information from Matar, and returned to the interview room. He then read Matar his Miranda rights who signed the waiver-of-rights form. The audio revealed that, while Detective Moss was consulting his colleagues, he said that he "f***** up." Matar argues that Detective Moss was referring to his failure to read appellant

his rights earlier; Detective Moss claims that he was referring to his failure to obtain the necessary evidence against Matar. In any case, Matar continued talking with Detective Moss and another detective after he signed his waiver form, at which point he admitted that he had committed the act due to his curiosity.

The trial court found that Matar was not "in custody" before the *Miranda* warning was given and thus denied his motion to suppress. The court reasoned that Matar returned Detective Moss's phone call, voluntarily drove to the police station for the interview, and was allowed to keep his keys and cell phone during the interview. Also, the court noted that Detective Moss testified that Matar would have been allowed to leave at any time.

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

"*Miranda* warnings are required only in the context of a custodial interrogation. *Breeden v. State*, 2014 Ark. 159, at 7, 432 S.W.3d 618, 624. A person is in custody for purposes of *Miranda* warnings when he or she is 'deprived of his freedom of action by formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' *Solomon v. State*, 323 Ark. 178, 186, 913 S.W.2d 288, 292 (1996). *Miranda* warnings are not required simply because the questioning takes place in the police station or because the questioned person is one whom the police suspect. See *State v. Spencer*, 319 Ark. 454, 457, 892 S.W.2d 484, 485 (1995). In resolving the question of whether a suspect was in custody at a particular time, the only relevant inquiry is how a reasonable person in the suspect's shoes would have understood the situation. *Breeden*, 2014 Ark. 159, at 8, 432 S.W.3d at 625.

"In *Oregon v. Mathiason*, 429 U.S. 492 (1977), the Supreme Court held that the defendant was not 'in custody' where he agreed to meet the officer at the police station about the crime; he was not arrested; he went into a closed room with the officer; and he was advised, before he confessed to the crime, that the police believed he was involved and that his fingerprints were found at the scene [which was false]. The Court reasoned as follows:

> *Such a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda*

by its terms was made applicable, and to which it is limited.

"We hold that Matar was not 'in custody,' and we affirm the court's ruling denying his motion to suppress."

PROBABLE CAUSE:
Traffic Stop; Failure to Signal

United States v. Pittman
CA6, No. 15-5085, 3/11/16

Nashville, Tennessee, Officer Seth Ranney's confidential informant arranged to meet a suspected drug dealer to purchase cocaine. The informant parked in the lot at the expected time, with officers watching. Another car (matching the description provided) pulled next to the informant's vehicle, then pulled away. Ranney did not see anything indicating a drug sale. Officers followed the car. The driver, without signaling, turned left into an apartment complex. Ranney activated his lights, stopping the car. Ranney approached the vehicle, telling the driver to step outside and asking whether he had anything he shouldn't have in the car. The suspect, Steven Pittman, confessed that there was cocaine in the center console. Police recovered a bag of cocaine and a digital scale. They also found over $1000 in Pittman's pocket.

Pittman claims that the police violated the Fourth Amendment when they stopped him for failing to signal a left turn. The court denied a motion to suppress, reasoning that failing to signal provided probable cause for the stop. The Court of Appeals for the Sixth Circuit concluded that Pittman violated both the Nashville Municipal Code and Tennessee Code § 55-8-143(a) which provides that every driver who intends to start, stop or turn, or partly turn from a direct line shall give a signal required in this section whenever the operation of any other vehicle may be affected by such movement. Nor does it matter that the police began following Pittman because they suspected him of drug dealing. The constitutional reasonableness of traffic stops depends on objective factors—such as the violation of traffic laws—not on the actual motivations of the individual officers involved. *Whren v. United States*, 517 U.S. 806, 813 (1996).

SEARCH AND SEIZURE:
Alleged False Statements in Affidavit; Franks Hearing

United States v. Shockley
CA8, No. 15-2229, 3/23/16

In February 2012, Kansas City Police began investigating Gregory Shockley for drug trafficking. Several months later, police suspected that Shockley was involved in a homicide after learning that he was the homicide victim's pimp and drug dealer and that he had fought with the victim hours before her death. Investigating officers went to Shockley's residence to search his trash in connection with the drug-trafficking and murder investigations. Officers retrieved and examined a single bag of trash, which contained eight small, clear plastic sandwich bags with stretched and torn corners; a small amount of a green leafy substance that tested positive

for tetrahydrocannabinol ("THC"), the main active ingredient in marijuana; eleven plastic gloves; and two pieces of mail belonging to Shockley and mailed to Shockley's address. The trash also contained a torn, red-stained piece of cloth that investigators believed had come from a tank top that the homicide victim was wearing several hours before her death.

As a result of these findings, police obtained a search warrant for Shockley's residence. The magistrate judge issued the warrant based on an affidavit from Detective Leland Blank, which summarized the drug and homicide investigations of Shockley and described the items police found in his trash. During the search, police found firearms, ammunition, two digital scales, a small quantity of marijuana, and bags that contained methamphetamine and cocaine residue. A grand jury indicted Shockley for being a felon in possession of a firearm. He filed a motion to hold a Franks hearing and to suppress evidence seized during the search of his home. See *Franks v. Delaware*, 438 U.S. 154 (1978). Shockley argued that the search-warrant affidavit contained omissions and false and misleading statements regarding the homicide investigation. He claimed that the affidavit would not support finding probable cause absent Detective Blank's false statements. The magistrate judge issued a report and recommendation denying Shockley's motion, finding that Detective Blank provided sufficient facts to support probable cause based on Shockley's drug-trafficking activity. Because Shockley did not challenge any statements relating to the drug investigation, the allegedly false statements about the homicide investigation were not necessary to find probable cause to support issuing a search warrant. The district court adopted the report and recommendation over Shockley's objection.

Shockley argues that the district court erred by denying his motion to suppress and to hold a *Franks* hearing because the search-warrant affidavit contained false statements, and in the absence of those statements, the affidavit would not have supported probable cause to search his home.

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

"We review the denial of a *Franks* hearing for abuse of discretion. *United States v. Gonzalez*, 781 F.3d 422, 430 (8th Cir.), cert. denied, 577 U.S. ---, 136 S. Ct. 139 (2015). A defendant may obtain a *Franks* hearing if (1) he makes a 'substantial preliminary showing' that the affiant intentionally or recklessly included a false statement in the warrant affidavit, and (2) the false statement was 'necessary to the finding of probable cause.' *United States v. Jacobs*, 986 F.2d 1231, 1233-34 (8th Cir. 1993) (quoting *Franks*, 438 U.S. at 155-56). The district court denied Shockley's request for a *Franks* hearing after finding that the affidavit provided probable cause to issue the search warrant based on Shockley's drug-related activity. Because Shockley did not challenge any statements relating to the drug investigation, the allegedly false statements about the homicide

investigation were not necessary to find probable cause to support issuing a search warrant.

"Probable cause to issue a search warrant exists if, in light of the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Donnell*, 726 F.3d 1054, 1056 (8th Cir. 2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Many of our cases recognize that the recovery of drugs or drug paraphernalia from the garbage contributes significantly to establishing probable cause. *United States v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003); see also *United States v. Seidel*, 677 F.3d 334, 338 (8th Cir. 2012) (collecting cases). In fact, we have found probable cause based solely on evidence found in trash pulled from outside a suspect's home.

"In this case, the affidavit provided probable cause to search Shockley's home for evidence of drug trafficking. The affidavit stated that police found Shockley in possession of marijuana and cocaine during several encounters in 2012. The affidavit also stated that officers searching Shockley's trash in May 2012 found evidence connecting Shockley to drug-trafficking activity, including eight small, clear plastic sandwich bags with stretched and torn corners; a small amount of a green leafy substance that tested positive for THC; and eleven plastic gloves. This evidence was sufficient to support probable cause to search Shockley's residence for controlled substances. See, e.g., *United States v. Allebach*, 526 F.3d 385, 387 (8th Cir. 2008) (holding that two plastic bags with cocaine residue, two corners torn from plastic bags, Brillo pads, and a film canister with white residue were sufficient to establish probable cause that cocaine was being possessed and consumed in the defendant's residence). Because the unchallenged statements in the affidavit provided probable cause to search Shockley's home for evidence of drug trafficking, the district court did not err by denying Shockley's motion to hold a *Franks* hearing and to suppress evidence. *United States v. Ryan*, 293 F.3d 1059, 1061 (8th Cir. 2002) (holding that defendant is not entitled to *Franks* hearing unless false statement or omission is necessary to a finding of probable cause).

SEARCH AND SEIZURE:
Anticipatory Search Warrant

State v.Mullen, KSC, No. 110468, 4/22/16

After a bench trial, Jordan Mullen was found guilty of possession with marijuana with the intent to distribute. He appealed the denial of his motion to suppress evidence resulting from a search of a house where he was staying. The search was conducted pursuant to an anticipatory search warrant which purported to give law enforcement authority to search the house once a suspicious package was successfully delivered to a resident of the house.

The Kansas Court of Appeals affirmed, concluding that the district court did not err in finding that the search warrant was supported by probable cause and that Mullen's retrieval of the package from the front porch while under police

surveillance was sufficient to trigger execution of the search warrant. The Kansas Supreme Court affirmed, holding (1) there was a substantial basis for the district court judge's determination that probable cause supported a search warrant of the home; (2) the event triggering execution of the search warrant—a controlled delivery of the package to a resident of the home—occurred in this case; and (3) the police acted appropriately when they entered the house pursuant to the search warrant.

SEARCH AND SEIZURE: Cell Site Information for Tracking Purpose

United States v. Sanders
CA6, No. 14-1805, 4/13/16

Police arrested men suspected of committing armed robberies at Detroit-area stores. One subject confessed that the group had robbed nine stores in Michigan and Ohio in 2010-2011, supported by a shifting collection of 15 drivers and lookouts. He gave the FBI the cell phone numbers of other participants and the FBI reviewed his call records and obtained orders under the Stored Communications Act, 18 U.S.C. 2703(d), for release of records for 16 numbers, including all subscriber information, toll records and call detail records including listed and unlisted numbers dialed or otherwise transmitted to and from the phones for relevant dates and cell site information for the target telephones at call origination and at call termination to obtain evidence against Sanders, Carpenter and others. The government charged Carpenter with six, and Sanders with two counts of violations of the Hobbs Act counts, and aiding the use or carriage of a firearm during a crime of violence.

The records showed that each used his cellphone within one-half-to-two miles of several robberies while the robberies occurred. A jury convicted on all of the Hobbs Act counts and convicted Carpenter on all but one of the gun counts. The Sixth Circuit affirmed, rejecting a Fourth Amendment challenge. The content of a communication is protected by the Fourth Amendment; routing information necessary to convey it is not.

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

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Constitution. amendment. IV. For most of our history, the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *United States v. Jones,* 132 S.Ct 945, 950 (2012). Government trespasses upon those areas normally count as a search. In *Katz v. United States,* 389 U.S. 347 (1967), however, the Supreme Court moved beyond a property-based understanding of the Fourth Amendment, to protect certain expectations of privacy as well. To fall within these protections, an expectation of privacy must satisfy 'a twofold requirement': first, the person

asserting it must 'have exhibited an actual (subjective) expectation of privacy'; and second, that expectation must be one that society is prepared to recognize as 'reasonable.' *Katz v. United States,* 389 U.S. 347, 361 (1967). When an expectation of privacy meets both of these requirements, government action that invades the expectation normally counts as a search. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

"This case involves an asserted privacy interest in information related to personal communications. As to that kind of information, the federal courts have long recognized a core distinction: although the content of personal communications is private, the information necessary to get those communications from point A to point B is not. For example, in *Ex parte Jackson*, 96 U.S. 727, 733 (1878), the Court held that postal inspectors needed a search warrant to open letters and packages, but that the 'outward form and weight' of those mailings— including, of course, the recipient's name and physical address—was not constitutionally protected. That was true even though that information could sometimes bring embarrassment: In a small village, for instance, a young gentleman may not altogether desire that all the loungers around the store which contains the Post-office shall be joking about the fair object of his affections.

"In the twentieth century, the telephone call joined the letter as a standard form of communication. The law eventually followed, recognizing that police cannot eavesdrop on a phone call—even a phone call placed from a public phone booth—without a warrant. See *Katz*, 389 U.S. at 352-55. But again the Supreme Court distinguished between a communication's content and the information necessary to send it. In *Katz,* the Court held that the Government's activities in electronically listening to and recording the petitioner's words was a search under the Fourth Amendment. But in *Smith*, the Court held that the police's installation of a pen register—a device that tracked the phone numbers a person dialed from his home phone—was not a search because the caller could not reasonably expect those numbers to remain private. Although the caller's conduct may have been calculated to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed. *Smith,* 442 U.S. at 74.

"Today, the same distinction applies to internet communications. The Fourth Amendment protects the content of the modern-day letter, the email. See *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010). But courts have not (yet, at least) extended those protections to the internet analogue to envelope markings, namely the metadata used to route internet communications, like sender and recipient addresses on an email, or IP addresses. See, e.g., *United States v. Christie,* 624 F.3d 558, 574 (3d Cir. 2010); *United States v. Perrine*, 518 F.3d 1196, 1204-05 (10th Cir. 2008); *United States v. Forrester,* 512 F.3d 500, 510 (9th Cir. 2007).

"The business records here fall on the unprotected side of this line. Those records say nothing about the content

of any calls. Instead the records include routing information, which the wireless providers gathered in the ordinary course of business. Carriers necessarily track their customers' phones across different cell-site sectors to connect and maintain their customers' calls. And carriers keep records of these data to find weak spots in their network and to determine whether roaming charges apply, among other purposes. Thus, the cell-site data—like mailing addresses, phone numbers, and IP addresses—are information that facilitate personal communications, rather than part of the content of those communications themselves. The government's collection of business records containing these data therefore is not a search.

"The Supreme Court's decision in *Smith* confirms the point. At the outset, the Court observed that Smith could not claim that "his 'property' was invaded" by the State's actions, which meant he could not claim any property-based protection under the Fourth Amendment. And as to privacy, the Court hewed precisely to the content-focused distinction that we make here. The Court emphasized that the State's pen register did not acquire the contents of communications. Instead, the Court observed, the phone numbers acquired by the State had been dialed as a means of establishing communication. Moreover, the Court pointedly refused to adopt anything like a least sophisticated phone user standard in determining whether phone users know that they convey that information to the phone company.

"All telephone users realize that they must convey phone numbers to the telephone company, since it is through their switching equipment that their calls are completed. The Court likewise charged telephone users with knowledge that the phone company has facilities for recording numerical information and that the phone company does in fact record this information for a variety of legitimate business purposes. Thus, the Court held, Smith voluntarily conveyed numerical information to the telephone company and exposed that information to its equipment in the ordinary course of business. Hence the numerical information was not protected under the Fourth Amendment.

"The same things are true as to the locational information here. The defendants of course lack any property interest in cell-site records created and maintained by their wireless carriers. More to the point, when the government obtained those records, it did not acquire the contents of communications. Instead, the defendants' cellphones signaled the nearest cell towers—thereby giving rise to the data obtained by the government here—solely as a means of establishing communication. Moreover, any cellphone user who has seen her phone's signal strength fluctuate must know that, when she places or receives a call, her phone exposes its location to the nearest cell tower and thus to the company that operates the tower. Accord *United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015); In *re Application for Historical Cell Site Data*, 724, F.3d 600, 614 (5th Cir. 2013). And any cellphone user who has paid roaming"

(i.e., out-of-network) charges—or even cellphone users who have not— should know that wireless carriers have facilities for recording locational information and that the phone company does in fact record this information for a variety of legitimate business purposes. Thus, for the same reasons that Smith had no expectation of privacy in the numerical information at issue there, the defendants have no such expectation in the locational information here. On this point, *Smith* is binding precedent."

Editor's Note: *This a well-reasoned opinion that is favorable to law enforcement. However, other courts have ruled that in similar situations a search warrant must be obtained to obtain cell site location information. Officers seeking such information should discuss this situation with their prosecutor.*

Also see, ***Taylor v. State,*** *SCN, 132 Nev. Adv. Op. Number 27. After a jury trial, Defendant was convicted of burglary while in possession of a firearm, conspiracy to commit robbery, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. Defendant appealed, arguing that the State's warrantless access of historical cell site location data obtained from his cell phone service provider pursuant to the Stored Communications Act violated his Fourth Amendment rights. The Nevada Supreme Court affirmed, holding a defendant doesn't have a reasonable expectation of privacy in historical cell site location data because it is a part of the business records made, kept, and owned by cell phone providers, and therefore, a search warrant is not required to obtain such historical cell site location information.*

SEARCH AND SEIZURE:
Curtilage; Apartment Door

United States v. Whitaker
CA7, No. 14-290, 4/12/16

Acting on information that drugs were being sold from a certain Madison apartment, law enforcement obtained permission from the apartment property manager and brought a narcotics- detecting dog to the locked, shared hallway of the apartment building. The dog alerted to the presence of drugs at a nearby apartment door and then went to the targeted apartment where Whitaker lived. After the officers obtained a search warrant, Whitaker was arrested and charged with drug and firearm crimes based on evidence found in the apartment. After the district court denied his pretrial motions challenging the search and the dog's reliability, Whitaker entered a conditional guilty plea that preserved his right to appeal. The Seventh Circuit reversed, holding that the use of the dog was a search under the Fourth Amendment and the Supreme Court's 2013 decision, *Florida v. Jardines*. No "good faith" exception applied.

SEARCH AND SEIZURE:
Curtilage; Apartment Basement

United States v. Sweeney
CA7, No. 14-3785, 5/9/16

The manager of a Milwaukee pub arrived with cash and was followed inside by a man who drew a gun, demanded and fled with the

cash. The manager offered a confident identification of the robber as Sweeney, who had previously worked at the pub, and described the gun. Officers went to Sweeney's six-unit apartment building. Officer Wilcox covered the building's rear door. Officer Delgado and Officer Gasser entered through the front door, which was propped open, found Sweeney's second-floor apartment, and knocked. Sweeney's girlfriend responded. While talking to her, the officers received a call from Wilcox saying he had caught Sweeney trying to leave by the back door. With consent from Sweeney's girlfriend, Delgado searched the apartment. Gasser went through the apartment, out its rear door, and down the common rear staircase to the basement, where he walked to the crawl space under the stairs. There he found a bag containing a handgun, magazine, and ammunition.

Sweeney appeals both his convictions and his sentence. He asserts that the district court erred in denying his motion to suppress the firearm which was seized in a warrantless search of the common space in the basement of his apartment building.

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

"Applying the Fourth Amendment to various common spaces in apartment buildings has been a source of considerable controversy. In cases decided before *Florida v. Jardines,* 133 S.Ct. 1409 (2003) we held that warrantless police intrusions into shared spaces in apartment buildings much like the basement here did not violate the Fourth Amendment rights of tenants. *United States v. Villegas*, 495 F.3d 761, 767–68 (7th Cir. 2007) (internal duplex hallway); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (shared entrance to apartment building); cf. *United States v. Boden*, 854 F.2d 983, 990 (7th Cir. 1988) (common area of rental storage unit facility). More recently, based on the intervening Supreme Court decision in *Jardines*, we have held that bringing a police dog to sniff for drugs outside an apartment door amounts to a search of the apartment interior that requires a warrant. *United States v. Whitaker,* — F.3d —, Nos. 14-3290, 143506, 2016 WL 1426484, at *4 (7th Cir. April 12, 2016).

"In recent years, the Supreme Court has revived a 'property-based approach' to identify unconstitutional searches. Under this approach, where the government has 'physically occupied private property for the purpose of obtaining information,' its intrusion is a search subject to the Fourth Amendment. In *Jones,* police officers trespassed upon an 'effect'—a car—by attaching a GPS tracker to its chassis. In *Jardines*, officers trespassed upon a 'house'—a home's porch—by conducting a dog-sniff at the front door. To establish a Fourth Amendment violation under this approach, there must be some trespass upon one of the protected properties enumerated by the Constitution's text.

"Sweeney cannot show any trespass on his property. He did not have any form of exclusive control over the basement. The basement was a common space, used by a number of residents. His lease gave

him no exclusive property interest in any part of the area. It did not even give him the right to store items there. Nor could Sweeney have excluded someone from the basement. Suppose Sweeney had discovered a non-resident taking shelter in the basement who refused to leave. He could call his landlord for aid, but Sweeney himself could not sue the intruder for civil trespass on his property. See *State v. Dumstrey*, 859 N.W.2d 138, 144 (Wis. App. 2014), aff'd, 873 N.W.2d 502 (Wis. 2016), quoting *State v. Nguyen*, 841 N.W.2d 676, 681 (N.D. 2013), for the proposition that tenant has no right to exclude 'technical trespassers in the common hallways' of apartment building.

"Rather any such trespass would be a trespass against the building owner, not against any individual tenants. See, e.g., *Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc.,* 820 N.E.2d 158, 166 (Ind. App. 2005) (collecting cases holding that landlord can sue for trespass to common areas of multi-unit dwellings); *Commonwealth v. Thomas,* 267 N.E.2d 489, 491 (Mass. 1971) (collecting cases and affirming denial of motion to suppress under very similar circumstances); *Motchan v. STL Cablevision, Inc.*, 796 S.W.2d 896, 900 (Mo. App. 1990) (concluding that 'a landlord, who retains control of common areas in a multi-tenant building, also retains possession of those areas so as to support an action for trespass to the common areas'). Only the building owner or landlord could bring suit, so only the owner or landlord could have objected to Officer Gasser's warrantless search of the crawl space under the stairs. Accordingly, even if Officer Gasser committed a trespass, it was not Sweeney's right under long-established tort law to exclude him.

"The basement was not recognizable as curtilage of Sweeney's apartment. See *United States v. Redmon,* 138 F.3d 1109, 1128 (7th Cir. 1998) (en banc) (Evans, J., concurring) ('In a multi-unit apartment building there may in fact be no curtilage except perhaps in a separate area—like a basement storage locker—subject to one's exclusive control.'). Other courts have held, often categorically so, that common basements of multi-unit buildings or closely related spaces are not part of the individual units' curtilage. *United States v. Brooks*, 645 F.3d 971, 975–76 (8th Cir. 2011) (staircase leading to shared basement space in apartment building); *United States v. King,* 227 F.3d 732, 753 (6th Cir. 2000) (basement of a two-family dwelling); *United States v. Cruz Pagan,* 537 F.2d 554, 558 (1st Cir. 1976) (common basement garage of condominium building); *Thomas,* 267 N.E.2d at 491 (basement of three-story, six-unit apartment building, containing common space with laundry facilities); see also *Carol A. Chase, Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered,* 52 Houston L. Rev. 1289, 1303 (2015) ('Generally speaking, appellate courts that have considered whether common areas in a multi-family dwelling are part of the curtilage of a dwelling have been reluctant to recognize curtilage protection for those areas.')

"It is not necessary to decide categorically here that the basement of a multi-unit residential building is or is not always

the curtilage of individual units. It is enough to say that it was not in this case. Neither party contends that Sweeney had a reasonable expectation of privacy in the basement of the apartment building, but we address the issue briefly in light of our recent decision in *United States v. Whitaker*, — F.3d —, Nos. 14-3290, 143506, 2016 WL 1426484 (7th Cir. April 12, 2016). As the district court noted, there is generally no reasonable expectation of privacy in shared and common areas in multiple-dwelling residential buildings. *Harney v. City of Chicago*, 702 F.3d 916, 925 (7th Cir. 2012) (walkway adjacent to condominium building but behind gate), citing, for instance, *United States v. Villegas*, 495 F.3d 761, 767–68 (7th Cir. 2007) (internal duplex hallway); see also *United States v. Dillard*, 438 F.3d 675, 683 (6th Cir. 2006) (collecting cases from circuit courts establishing lack of reasonable expectation of privacy in common areas of apartment buildings).

"Here, where the basement space was 'shared by all of the tenants' of the apartment building, see *Harney*, 702 F.3d at 925, there was no individualized storage space and no door or locked entry to the basement itself, it was not objectively reasonable that the space would be assumed private. This is true even though the exterior door of the building was locked to exclude persons who are not tenants of the building; the critical factor is that multiple tenants could enter and use the space."

SEARCH AND SEIZURE:
Emergency Search

United States v. Duenas
CA7, No. 15-2637, 3/16/16

A confidential informant arranged to purchase cocaine that was being sold at Juan Duenas's garage. Trailed by federal agents at a discreet distance, the informant drove to the garage, parked outside, entered (the garage door, open when he arrived, closed after he entered), and there discussed the transaction with Duenas and William Rivera. He then left, ostensibly to get the money for the purchase of the cocaine from his car. Instead he got back into the car (which was parked nearby), drove a short distance, parked, and phoned one of the federal agents to report that there indeed was cocaine in the garage, in Rivera's truck. Agents arrived shortly, arrested Duenas outside the open garage and Rivera inside it, and then searched the garage and found and seized two kilograms of cocaine from Rivera's truck. Between the confidential informant's departure from the garage and the agents' arrival, only about three minutes had elapsed.

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

"The informant (of course not known to Duenas and Rivera to be such) had entered the garage with the consent of Duenas, the owner of the garage, and of Rivera, the owner of the truck that contained the drugs to be sold to the

informant. Although the informant had returned to his car and driven a short distance off, Duenas and Rivera had remained, the garage door was now open, and it is a fair inference that they were expecting the informant to return soon with the money. Obviously they had consented to the informant's returning, and on this basis the district judge invoked the curious, or at least curiously named, doctrine of 'consent once removed.' If an informant is invited to a place by someone who has authority to invite him and who thus consents to his presence, and the informant while on the premises discovers probable cause to make an arrest or search and immediately summons help from law enforcement officers, the occupant of the place to which they are summoned is deemed to have consented to their presence. See *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1994). On this basis the district judge rejected the defendants' Fourth Amendment claim. At first glance the doctrine of 'consent once removed' is absurd. If one thing is certain it's that Duenas and Rivera would never have consented to the entry of federal drug agents into Duenas's garage, where the drugs to be bought by the informant were stored. The doctrine thus cannot, despite its name, be based on consent. This is well recognized.

"But though misnamed, the doctrine has the following kernels of validity. First, an informant's job, especially in cases such as this that come from the frequently violent world of drug trafficking, is often risky, and likewise that of a lone undercover officer. The informant in our case may well have feared that if he returned to the garage with the money for the drugs, Rivera and Duenas would take the money but not give him the drugs—and maybe would kill him to prevent his retaliating against them for stealing his money. (He would be likely to have fared no better with them had he returned to the garage without any money—how would he have explained that to them?) It was therefore reasonable for him to arrange with the agents that when he was about to return to the garage with the money he would call them and they would enter the garage at his heels in order to protect him. *United States v. Jachimko*, supra, rightly emphasize the lawful protective purpose of the misnamed 'consent once removed' doctrine. See, e.g., *United States v. Yoon*, 398 F.3d 802, 809–10 (6th Cir. 2005). And in this case obtaining a search warrant on the basis of what the informant saw in the garage would not have been practicable. The interval between the informant's notifying the agents that he had seen drugs in the garage and the agents' swooping down on it and arresting its occupants was too short—about one minute—for the agents to have been able to obtain a warrant. But one doesn't need the opaque label "consent once removed" to justify authorizing such a response to an emergency situation. The doctrine of 'exigent circumstances' (where 'exigent' means emergency) allows such a response in this case because the interval between the informant's notifying the agents of the presence of the cocaine in the garage and the agents' arrival at the scene was so short. They could have gotten a search warrant had they delayed their arrival—but by then Rivera and Duenas, worried

by the failure of the buyer (not known to them to actually be an informant) to show up with the money, might have removed the cocaine from the truck and hid it elsewhere. The agents upon arrival in the garage could have phoned for warrants, meanwhile ordering Rivera and Duenas to remain in the garage. But the order would have been a seizure within the meaning of the Fourth Amendment—without a warrant.

"Once the confidential informant alerted the agents to the fact that there was cocaine in Duenas's garage, they had probable cause to search the garage. They could have obtained a search warrant by relaying what the informant had told them to whatever magistrate was available to rule on a warrant application. But there was no time. The agents had to move fast because Rivera and Duenas might panic when they realized that the (unknown to them) informant might not be returning, and remove the drugs from the garage. The certainty that the agents could have gotten a warrant to conduct a search that would have revealed the drugs should alleviate concern with the warrantless search and arrests in this case. And if further justification is required (it isn't), there is the doctrine of harmless error, which usually refers to procedural errors in a trial but is applicable as well to searches and arrests. As explained in *United States v. Stefonek*, 179 F.3d 1030, 1035–36 (7th Cir. 1999) (citations omitted), Concern with the frequent disproportionality of the sanction of exclusion has led judges to create exceptions to the exclusionary rule, itself a rule of federal common law (that is, of judge-made law) rather than a part of the Fourth Amendment itself and so amenable to judge-made adjustment. The exception that is most pertinent to this case goes by the name of 'inevitable discovery' and refuses to suppress evidence seized in an unconstitutional search if it is shown that the evidence would ultimately have been seized legally if the constitutional violation had not occurred. In other words, just as careless or even willful behavior is not actionable as a tort unless it causes injury, so there must be a causal relation between the violation of the Fourth Amendment and the invasion of the defendant's interests for him to be entitled to the remedy of exclusion. In a case of inevitable discovery, the defendant would by definition have been no better off had the violation of his constitutional rights not occurred, because the evidence would in that event have been obtained lawfully and used lawfully against him. There is an exception for errors deemed to go to the very heart of due process, but we know that a violation of the Fourth Amendment is not such an error. In sum, the search and arrests in this case invaded no lawful interest, no protected right of privacy of the defendants; a pause to enable warrants to be obtained would have risked the disappearance of the contraband; and an attempt to obtain warrants before the informant phoned in the information that he'd found the contraband might well have been denied for lack of proof of probable cause, thus distinguishing this case from cases such as *United States v. Camou*, 773 F.3d 932, 943 (9th Cir. 2014), in which 'police had probable cause but simply did not attempt

to obtain a warrant.' The important point is that had time permitted, the agents would without question have obtained a warrant.

"Similarly, had the agent in our case followed routine procedure—which as we said he would have done notwithstanding the emergency a warrant would certainly have been issued on the basis of the informant's knowledge: he had seen the cocaine stash in Rivera's truck. If ever a warrantless search and seizure were warranted, it was in this case. It would be a miscarriage of justice to allow the defendants to go scot-free in so open and shut a case of criminal drug trafficking."

Editor's Note: With a great deal of hindsight, this fact situation would be a situation where an anticipatory search warrant could be obtained with the condition precedent that the informant report that there are drugs in the truck or the garage.

SEARCH AND SEIZURE:
Execution of Search Warrant; Locked Safe

United States v. Church
CA6, No. 15-5362, 5/17/16

In this case, David Dewayne Church, Jr. argues that the police acted unreasonably, in violation of the Fourth Amendment, when they used a prying ram to open Church's safe, thereby destroying it.

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

"Obviously the police had the right to open the safe. A warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. *United States v. Ross*, 456 U.S. 798, 821 (1982). And officers executing search warrants on occasion must damage property in order to perform their duty. *Dalia v. United States*, 441 U.S. 238, 258 (1979). For example, if a home's occupant refuses to admit an officer after he announces his authority and purpose, the officer may lawfully break open the door. See *United States v. Ciammitti*, 720 F.2d 927, 932-34 (6th Cir. 1983).

"Here, the police did not break open the safe capriciously: they had probable cause to believe there might be drugs inside; Church refused to provide the safe's combination; and thus the police had no choice but to open it by force. The district court was right to hold that the police acted reasonably when they did so."

SEARCH AND SEIZURE:
Inevitable Discovery

Jordan v. State, ACA, No. CR-15-759, 2016 Ark. App. 255, 5/11/16

Travis Wayne Jordan was convicted by a Sebastian County Circuit Court jury of possession of methamphetamine with intent to deliver and possession of marijuana. On appeal, one of Jordan's arguments is that the circuit court erred in denying his motion to suppress evidence the evidence that

was found when the police entered his motel room without a warrant.

Amanda Ibarra, the Motel 6 manager on duty on October 1, 2014, when the contraband was discovered, testified that a housekeeper told her that Jordan had been arrested on the motel property immediately after he had come to the office that morning and paid for his room through the next day. Ibarra explained that Motel 6 had a policy of immediately evicting a guest if he or she is arrested on the property. She testified that a guest's arrest voids the contract with Motel 6 and that Motel 6 immediately becomes the custodian of the room in such an event. Ibarra testified that Jordan did not sign a written contract to this effect and that guests are generally not informed of the eviction policy either verbally or in writing. In fact, Ibarra stated that there was no way Jordan would have known he had been evicted. Ibarra stated that around noon she entered the room to check to ensure it was unoccupied, to clear the room for the housekeeper, and to pack Jordan's belongings.

When she entered the room, she saw drugs and drug paraphernalia on the table, so she closed the door and immediately called police. At some point during the day, a woman came to Motel 6 to collect Jordan's belongings, and she presented Ibarra with a signed note from Jordan giving her the authority to do so. Jordan's payment for the room for that night was refunded to the woman.

Officer Travis Watkins of the Fort Smith Police Department also testified at the hearing. Officer Watkins testified that on October 1, 2014, he and Corporal Joey Boyd were at the Motel 6 for other police-related business when they saw Jordan, whom they knew had a warrant for his arrest. They took him into custody at that time. Corporal Boyd also testified. He reiterated Officer Watkins's testimony that they were already at Motel 6 on other business when they saw Jordan and arrested him on an existing warrant. Officer Boyd testified that somewhere around 2:30 p.m. or 3:00 p.m. they returned to Motel 6 after Ibarra had called and informed them that she had found drugs and paraphernalia in Jordan's room. Officer Boyd testified that he called the prosecutor's office about getting a warrant and that it was determined that he did not need a warrant based on the motel's eviction policy. Officer Boyd also testified that he confirmed with Ibarra and the guest registry that the room where they found the contraband had been Jordan's.

The State argued that Jordan had no standing to challenge the search because he had been evicted from the room pursuant to the Motel 6 eviction policy. In support of this argument, the State pointed out that Jordan's payment for the night had been refunded to him. Even if he did have standing, the State argued, the inevitable discovery doctrine applied because he had remained in jail from October 1, 2014, through the next two weeks. The State reasoned that Jordan's room would have been cleaned and emptied before he had a chance to get his things, and the contraband would have been found at that time.

Jordan argues that the motion to suppress the evidence should have been granted. The Arkansas Court of Appeals affirmed the circuit court's denial, finding in part as follows:

"Our Supreme Court has held that, where the circuit court bases its decision on two independent grounds and the appellant challenges only one ground on appeal, the appellate court will affirm without addressing either basis of the circuit court's decision. *Fuson v. State*, 2011 Ark. 374, 383 S.W.3d 848,

"In *Fuson*, the circuit court denied the motion to suppress on two grounds: it had found that the search was proper and that, even if the search was not justified by the rule, the evidence inevitably would have been discovered during the inventory search. On appeal, appellant focused his argument entirely on the first aspect of the circuit court's ruling, and did not address the court's alternative ruling applying the inevitable-discovery rule to find that the evidence would have been found during the course of the inventory search. In its denial of Jordan's motion to suppress, the court made the following comments:

> *In this situation you have an employee, who the court is of the opinion has the right to go into that room, who observed drugs and paraphernalia and they called the police. In fact, in the case you cited, they say, it is true as we said in Jeffers that when a person engages a hotel room he undoubtedly gives implied or expressed permission to such persons as maid, janitors or repairmen to enter his room in the performance of their duties. This young lady was going into room in the performance of her duties to get his belongings because he had been evicted because he had been arrested. She was doing what she was authorized and directed to do and it was her duty. Plus, he had been evicted. So there is some question as to whether or not this gentleman has standing. The third is that inevitably that a maid or somebody would have gone in there and would have discovered it, but the main point is that this woman was doing what she was asked to do when somebody gets arrested, they are evicted and they go in and get their belongings and secure them in a safe place for them and then they would refund them their money. The motion to suppress is going to be denied.*

"The circuit court in this instance denied the motion to suppress on two grounds. First, the court found that the search was proper because motel employees were authorized by implied permission to enter the room in performance of their duties. Second, the circuit court found that the inevitable-discovery exception applied, because an employee would have eventually entered the room and discovered the evidence. On appeal, Jordan addresses only the implied-permission-ground basis for the circuit court's denial of the motion to suppress.

"He does not address the court's second, inevitable-discovery basis for denial. As we set forth in Fuson when an appellant fails to challenge both grounds for the circuit court's denial, we decline to address the merits of either basis, and on this point we affirm."

SEARCH AND SEIZURE: Plain View

United States v. Campos
CA8, No. 15-1346, 3/22/16

Three Kansas City, Missouri, police officers encountered Reyes Campos after they received a report that a man might need medical attention. The officers found Campos lying on the sidewalk next to a fallen bicycle. Campos was acting incoherently. When an officer righted Campos's bicycle, an unzipped bag attached to the handlebars came open, revealing two firearms and drug paraphernalia. The officers ascertained that Campos was a convicted felon and arrested him for being a felon in possession of a firearm. Campos unsuccessfully moved to suppress the firearm and drug evidence. Campos conditionally pled guilty and was sentenced to 100 months imprisonment and three years supervised release. He now challenges the district court's denial of his motion to suppress the evidence found in the bag.

The Court of Appeals for the Eighth Circuit agreed with the government that Officer Phelps's movement of the bicycle under the unique circumstances of this case did not constitute a search and thus did not implicate Campos's Fourth Amendment rights. The Court found, in part, as follows:

"As the government explains, 'Campos's appeal on this point boils down to the discrete issue of whether the movement of his bicycle by police, in and of itself, violated Campos's Fourth Amendment rights.' As the district court explained, Officer Phelps needed to move Campos's bicycle because it was impeding pedestrian traffic, in violation of city ordinance. See Kansas City, Mo. Code of Ordinances § 70-696(b). Although Officer Phelps incidentally caused the bag to move by picking up the bicycle, the district court did not find that Officer Phelps directly manipulated the bag physically by opening it, squeezing it, or touching it in any way. Once the bicycle was righted and the unzipped bag came open, Campos's firearm was in plain view. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. Because Officer Phelps did not conduct a search, but rather saw Campos's firearm in plain view in a public area, we affirm the district court's denial of Campos's suppression motion.

SEARCH AND SEIZURE:
Police Entering Property to Knock on Door; Allegation of Trespass

United States v. Carloss
CA10, No. 13-7082, 3/11/16

Ashley Stephens, an agent with the Federal Bureau of Alcohol, Tobacco and Firearms, received several tips that Ralph Carloss, a previously convicted felon, was unlawfully in possession of a firearm, possibly a machine gun, and was selling methamphetamine. In order to investigate these tips, Agent Stephens, along with Tahlequah, Oklahoma police investigator Elden Graves, went one

afternoon to the home where Carloss was staying to talk with him. There was no evidence of any fence or other enclosure around the house or yard, but there were several "No Trespassing" signs placed in the yard and on the front door. Specifically there was a "No Trespassing" sign on an approximately three-foot-high wooden post located beside the driveway, on the side farthest from the house, and another sign tacked to a tree in the side yard, both stating "Private Property No Trespassing."

Carloss contended that the two police officers violated his Fourth Amendment rights by knocking on his front door seeking to speak with him. Ordinarily a police officer, like any citizen, has an implied license to approach a home, knock on the front door, and ask to speak with the occupants. Carloss, however, claimed that "No Trespassing" signs posted around the house and on the front door of his home revoked that implied license.

After review of this matter, the Tenth Circuit concluded, to the contrary, that under the circumstances presented here, those "No Trespassing" signs would not have conveyed to an objective officer that he could not approach the house and knock on the front door seeking to have a consensual conversation with the occupants. "Nor did the officers exceed the implied license to knock on the front door by knocking too long." The Court also upheld the district court's factual finding that Carloss voluntarily consented to the officers entering the house. Therefore, the district court's decision to deny Carloss' motion to suppress evidence that the officers discovered as a result of their consensual interaction with Carloss after he responded to their knocking, was affirmed.

SEARCH AND SEIZUE:
Protective Sweep; Camper Trailer

United States v. Pile
CA8, No. 15-1882, 4/11/16

In February 2013, Pulaski County law enforcement arranged for an undercover officer to purchase methamphetamine from Steven Pile at his camper located at the Willow Beach State Park campground near Scott, Arkansas. On the day of the arranged purchase, Lieutenant Jim Potter and other law enforcement officers set up surveillance of Pile's camper. A confidential informant introduced the undercover officer to Pile, but Pile refused to sell the undercover officer methamphetamine at that time. Instead, Pile wanted to postpone the meeting with the undercover officer and the informant.

Notwithstanding the failed drug sale, law enforcement decided to arrest Pile on known outstanding felony warrants. When two officers approached Pile outside of his camper, he ran. Once Pile was apprehended, the officers and Pile returned to the campsite, to an area approximately 15 feet from Pile's camper. After reading Pile his Miranda rights, Lieutenant Potter asked him whether there was anyone else at the campsite. Pile said that his friend was inside the camper. Lieutenant Potter approached the side door of the camper, walked up the stairs, opened the door and announced

"Sheriff's Office," and looked through the opening of the doorway and saw an individual lying on the couch. Lieutenant Potter then opened the door further and shouted, "Sheriff's Office, hey." He asked the individual to exit the camper. As the individual was exiting, Lieutenant Potter—standing outside—noticed two glass pipes, commonly used to smoke methamphetamine, on a table inside the camper.

Subsequently, law enforcement sought a warrant based on Lieutenant Potter's observation of the pipes and Pile's postponed methamphetamine sale to the undercover officer. Law enforcement obtained a warrant to search the camper, and during the execution of the warrant, law enforcement uncovered the two glass pipes that Lieutenant Potter had seen as well as other drug paraphernalia, a handgun, and ammunition.

Pile moved to suppress the evidence obtained in the camper. The district court denied Pile's suppression motion holding that the protective sweep exception set forth in *Maryland v. Buie*, 494 U.S. 325 (1990), applied to the facts. The court concluded that the pipe and other background facts provided probable cause to support the issuance of the search warrant.

On appeal Pile argues that Lieutenant Potter's conduct violated the Fourth Amendment's prohibition of unreasonable searches and seizures.

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

"The Fourth Amendment protects 'the people . . . against unreasonable searches and seizures.' U.S. Constitution Amendment IV. Generally, a warrantless search of a home is unreasonable. *United States v. Karo*, 468 U.S. 705, 717 (1984). There are, however, several limited exceptions to this general rule. In *Buie*, the Supreme Court recognized a 'protective sweep' as one such exception. 494 U.S. at 337. A protective sweep is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. The sweep must be narrowly confined to a cursory visual inspection of those places in which a person might be hiding. And the sweep must be based on articulable facts which, taken together with the rational inferences from those facts, 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.

"Lieutenant Potter did not violate Pile's Fourth Amendment rights when he opened the door to the camper, asked the individual inside to come out, and, in the process, observed contraband. Lieutenant Potter had reasonable suspicion to conduct the sweep based upon Pile's declaration that his friend was inside the camper. Nonetheless, Pile maintains that Lieutenant Potter searched for reasons unrelated to safety, and, thus, the search fell outside the scope of the protective sweep exception. Pile's point, even if true, would be immaterial. Just as with the probable-cause analysis, we ignore subjective considerations of law enforcement and

instead objectively analyze the exception to the warrant requirement, focusing on what a reasonable, experienced police officer would believe. See *United States v. Kuenstler*, 325 F.3d 1015, 1021 (8th Cir. 2003). Given the unsecured, unknown individual inside the camper, a reasonable, experienced officer in Lieutenant Potter's position would be concerned with securing the arrest scene. Lieutenant Potter, or any other reasonable officer, would be justified in believing that the camper could harbor an individual posing a danger to those on the arrest scene.

"Pile also argues that Lieutenant Potter's conduct falls outside of *Buie* because he was already arrested and his arrest occurred outside of the camper. Neither reason undermines the lawfulness of Lieutenant Potter's search. A protective sweep may be executed after an arrest if there is a reasonable possibility that other persons may be present on the premises who pose a danger to the officers. *United States v. Davis*, 471 F.3d 938, 944 (8th Cir. 2006). As we have already concluded, Lieutenant Potter was reasonable in believing that there was an individual inside the camper based on Pile's own words. Officers could reasonably have perceived the unknown individual as a potential danger to those on the arrest scene. Finally, we have previously applied the protective sweep exception in similar situations, where an arrest occurs outside of a structure that officers subsequently search. See *United States v. Brown*, 217 F.3d 605, 607 (8th Cir. 2000) (search of a home). Indeed, in *Buie*, the Court was concerned with dangers posed to those on the arrest scene. Pile misreads *Buie*'s in-home arrest language. To be sure, the arrest in *Buie* occurred inside of a home. But the rationale supporting the Court's recognition of the protective sweep—safety of police officers and others—may extend beyond a home's four walls, depending on the facts.

"The district court did not err in applying the protective sweep exception to Lieutenant Potter's conduct and denying Pile's suppression motion."

SEARCH AND SEIZURE:
Search By Private Person; State Agent

Oregon v. Sines
OSC, No. SO62493, 4/14/16

John Sines came to the attention of law enforcement after his housekeeper anonymously called the child protective services division of the Department of Human Services (DHS) and said that she suspected that Sines might be sexually abusing his adopted daughter. The housekeeper's suspicions had been raised after finding an unusual "discharge" on several pairs of the child's underwear, and she told DHS that she had considered taking a pair for authorities to examine. In response to a question from the housekeeper, the DHS employee who handled the call said that he would be able to connect the housekeeper with someone in law enforcement who could analyze the underwear and confirm or refute her concerns. The DHS employee told the housekeeper several times that he could not tell her to take the victim's underwear.

The next day the housekeeper obtained a pair of the victim's underwear and turned it over to the police. Based on that evidence and other statements by the housekeeper, police obtained a warrant and searched Sines' house, after which Sines was arrested and charged with a number of sex crimes. Sines' motion to suppress the evidence obtained through the search and seizure of the underwear was denied, and he was convicted on four counts of first degree sexual abuse.

The Court of Appeals reversed, holding that the trial court had erred in denying Sines' motion to suppress. The issue this case raised for the Oregon Supreme Court's review was whether a private citizen's seizure of criminal evidence was subject to suppression at trial as the fruit of an unlawful government search.

The Court of Appeals concluded that, although the underwear had been procured by a private person, there was nevertheless sufficient contact between state officials and the private person that the warrantless search and seizure constituted state action, in violation of Article I, section 9, of the Oregon Constitution. The Supreme Court reversed, acknowledging that this was a close case: Contacts between private individuals and state officers before a private search always require careful examination to determine whether, given all the circumstances, the state officers provided such affirmative encouragement and authorization to the private individuals so as to render them agents of the state. In this case the Oregon Supreme Court held they did not.

SEARCH AND SEIZURE:

Time Reference in Search Warrant Affidavit

State v. Sprenger, ASC, No. CR-15-770, 2016 Ark. 177, 4/21/16

On March 14, 2013, officers from the Carroll County Sheriff's Department executed search warrants at Jason Sprenger's business and residence. The warrants were based on information acquired during a November 19, 2012, interview with a fifteen-year-old female, J.M., who claimed that Sprenger performed oral sex on her and took nude photographs of her with his cell phone. Computers, cameras, and various storage media for VHS and digital images were seized pursuant to the warrant. Examination of the devices and electronic storage media yielded ten images of persons alleged to be from ten and sixteen years old, though none of the images were of J.M. On August 21, 2013, Sprenger was charged with rape and possession of child pornography

Sprenger moved to suppress the evidence because the affidavits, which were admitted into evidence at the hearing, contained no time references regarding when the rape or the picture-taking took place. The only date references in the affidavits were the dates of the November 2012 interviews and J.M.'s age at the time of those interviews. The affidavits did not state that the incidents took place four to five years before the interviews.

The circuit court ruled in Sprenger's favor. It found that the absence of time references

to when the alleged criminal conduct occurred in the affidavits supporting the application for the warrants made the warrants invalid.

The Supreme Court stated that they will not consider an appeal filed on behalf of the state unless the correct and uniform administration of the criminal law requires review by the court. While the State attempts to characterize its appeal as a question of law, the question before the Court is essentially whether a time reference to when the alleged criminal activity took place was essential information that a magistrate would need to make a common-sense determination that the contraband sought would be on the premises when the warrant was executed. Because the decision to issue a warrant is typically, as in the case, a highly fact intensive process, the Court held that this appeal by the State was improper.

SEARCH AND SEIZURE:
Vehicle Stop; Officer Lying About Basis for the Stop to Protect Investigation

United States v. Magallon-Lopez
CA9, No. 14-30429, 3/31/16

Hector Magallon-Lopez challenges the legality of the stop of his vehicle. He contends that the stop violated the Fourth Amendment because the officer who pulled him over deliberately lied when stating the reason for the stop, and the reason the officer gave was not itself supported by reasonable suspicion.

Officers investigating an interstate drug-trafficking ring learned through wiretap intercepts that a shipment of methamphetamine would be traveling by car from Washington to Minnesota. They stopped the car en route in Montana; the car belonged to Hector Magallon-Lopez, who was driving. Officers seized the car and, after obtaining a search warrant, discovered approximately two pounds of methamphetamine hidden in an area beneath the trunk. That discovery formed the basis for Magallon-Lopez's drug-trafficking convictions following a jury trial. On appeal, he challenges only the district court's denial of his motion to suppress the drugs found in his car.

The relevant facts are not in dispute. Officers working with a Drug Enforcement Administration task force obtained authorization to wiretap a suspected drug trafficker's telephone. From the wiretap intercepts, the officers learned that: (1) on September 27, 2012, a man named Juan Sanchez would be transporting methamphetamine from the Yakima Valley in Washington to Minneapolis, Minnesota; (2) Sanchez would be accompanied by another Hispanic male who had a tattoo on his arm of a ghost, skull, or something else related to death and went by the nickname "Chaparro" (meaning short); and (3) the two men would be traveling in a green, black, or white passenger car with Washington plates. Based on cell site location information obtained from Sanchez's cell phone, the officers estimated that the car would be traveling through Bozeman, Montana, sometime between 3:00 a.m. and 4:00 a.m. on September 28.

The officers set up a surveillance operation near Bozeman on Interstate 90, the main east-west highway through Montana. Around 3:00 a.m. on September 28, they spotted a green Volkswagen Passat with Washington plates traveling eastbound. An officer dispatched to follow the car confirmed that two men were inside and that both appeared to be Hispanic and short in stature. The officer relayed the car's license plate number to another officer, who determined that the car was registered to a man named Hector Lopez at an address in Toppenish, Washington, a town in the Yakima Valley associated with the investigation.

After obtaining this information, the officers conducted an investigatory stop. The officer following the car pulled it over as if making a routine traffic stop. Although the officer had not observed any traffic violations, he told Magallon-Lopez that the reason for the stop was Magallon-Lopez's failure to signal properly before changing lanes. The officer knew this was not the real reason for the stop, but he did not want to disclose at that point the true nature of the investigation.

Officers questioned both occupants of the car. They asked for identification and confirmed that the passenger was a man named Juan Sanchez. They also confirmed that the driver was Magallon-Lopez, the registered owner of the car. After asking Magallon-Lopez to pull up his sleeves, the officers observed a tattoo of a ghost or grim reaper on his right forearm. Both Magallon-Lopez and Sanchez said they were traveling from the Yakima Valley to Minnesota to work in a restaurant.

While Magallon-Lopez and Sanchez were detained on the side of the highway, the officers summoned a drug-detection dog from a nearby sheriff's office. The dog positively alerted to the presence of drugs in the car. At that point the officers seized the car and took it to the sheriff's office for safekeeping while they obtained a search warrant. The validity of the warrant is not at issue, other than the lawfulness of the stop and subsequent seizure of the car that led to its issuance. Upon review, the Ninth Circuit Court of Appeals found, in part, as follows:

"That the officer lied about seeing Magallon-Lopez make an illegal lane change does not call into question the legality of the stop. The standard for determining whether probable cause or reasonable suspicion exists is an objective one; it does not turn either on the subjective thought processes of the officer or on whether the officer is truthful about the reason for the stop. If, for example, the facts provide probable cause or reasonable suspicion to justify a traffic stop, the stop is lawful even if the officer made the stop only because he wished to investigate a more serious offense. *Whren v. United States,* 517 U.S. 806, 812–13 (1996). Likewise, if the facts support probable cause to arrest for one offense, the arrest is lawful even if the officer invoked, as the basis for the arrest, a different offense as to which probable cause was lacking. *Devenpeck v. Alford*, 543 U.S. 146, 153–55 (2004); *United States v. Ramirez,* 473 F.3d 1026, 1030–31 & n.2 (9th Cir. 2007).

"The objective facts are controlling in this context, not what the officer said or

was thinking—applies here. So long as the facts known to the officer establish reasonable suspicion to justify an investigatory stop, the stop is lawful even if the officer falsely cites as the basis for the stop a ground that is not supported by reasonable suspicion. We emphasize, however, that although our focus is on the objectively reasonable basis for the stop, not the officers' subjective intentions or beliefs, the facts justifying the stop must be known to officers at the time of the stop. See *Moreno v. Baca*, 431 F.3d 633, 639–40 (9th Cir. 2005).

"The only remaining question is whether, in light of the information obtained during the stop, the officers had probable cause to seize Magallon-Lopez's car. We think they did. As discussed above, given the reliability of the information gleaned from the wiretap intercepts, the officers had probable cause to believe that Juan Sanchez would be transporting methamphetamine by car on the date and during the time frame in question. That, in turn, gave the officers probable cause to believe that methamphetamine would be found inside the car in which Sanchez was riding, assuming they could identify the correct car.

"As we have said, even before the officers stopped Magallon-Lopez's car, the facts known to the officers provided reasonable suspicion to believe they had identified the correct car. The investigatory stop eliminated virtually any doubt on that score, as the stop confirmed that a man named Juan Sanchez was indeed a passenger in the car. Sure, he could have been a different Juan Sanchez, not the one mentioned in the wiretap intercepts, but the likelihood of that was minuscule given all the other details that matched, including the tattoo on Magallon-Lopez's arm and the fact that both he and Sanchez admitted they were traveling to Minnesota. In light of these and the other details the officers were able to corroborate, there was 'a fair probability' that the officers had stopped the right car and that drugs would be found inside. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). That gave them probable cause to seize the car.

SEARCH AND SEIZURE:
Traffic Violation; Reasonable Suspicion

United States v. Palmer
CA4, No. 14-4736, 4/21/16

On October 15, 2013, Officer Ring of the Chesapeake police was patrolling that city's Ipswich neighborhood. During his patrol, Ring stopped Michael Palmer, who was driving a silver Nissan Altima, on Paramont Avenue. When Ring exited his patrol car and greeted Palmer through the driver-side window of the Nissan, he smelled an overwhelming odor of air freshener. He saw at least five air fresheners inside the car, some hanging in the passenger compartment and others plugged into the air-conditioning vents. Ring advised Palmer that he had been stopped because the Nissan's windows were too darkly tinted, in violation of state law, and also because the inspection sticker on the vehicle's front windshield appeared fraudulent. Ring then obtained Palmer's driver's license and the vehicle's

registration card, and returned to his patrol car to make a database check.

From the driver's license and registration, Officer Ring learned that Palmer listed a P.O. box as his address and that the Nissan was registered to a woman who was not present. Within minutes of beginning the database check, Ring also learned that Palmer was a suspected member of a gang called the Bounty Hunter Bloods, according to a "caution" notice issued by the nearby Norfolk Police Department. Ring advised his colleague, Officer Blount—who was also on the scene—of Palmer's purported gang affiliation, and asked Blount about the availability of a drug dog.

Officer Ring also sought information on Palmer from another database called LInX. Ring could not initially log into the LInX system because his former partner had changed the password. He eventually accessed LInX, however—about seven minutes into the traffic stop—by utilizing Officer Blount's login credentials. As Ring was logging into LInX and searching its database, he called about a drug dog. Ring relayed by radio the information that he had gathered: Palmer was nervous; there was an overwhelming odor of air freshener from the Nissan; there were at least five air fresheners in the car; Palmer's driver's license address was a P.O. box, as opposed to a street address; the Nissan was registered to someone other than the driver; and Palmer was a suspected member of the Bounty Hunter Bloods.

About eleven minutes into the traffic stop, Officer Ring identified Palmer in LInX. Ring learned that Palmer had a criminal record that included four arrests on drug charges plus an arrest for illegal possession of a firearm by a convicted felon. As a result, Ring radioed again about a drug dog, but was unable to confirm its availability. After completing his LInX search, Ring returned to the Nissan from his patrol car. Because he suspected the inspection sticker was fraudulent, Ring decided to verify the sticker's authenticity by looking at the back of it, which would enable him to determine whether it was legitimate. After asking Palmer to exit the Nissan, Ring leaned through the open driver-side door and examined the back of the inspection sticker. While reading the sticker—which he concluded was legitimate—Ring smelled marijuana.

Officer Ring immediately advised Palmer that he had grounds to search the Nissan. Because Ring wanted to be "110% sure" that the Nissan contained drugs before searching the vehicle, however, he again checked on the drug dog's availability. At that point—approximately seventeen minutes after the traffic stop had been initiated—Ring called Officer Duncan, who had a drug dog. About ten minutes later, Duncan arrived with the drug dog Boomer. Duncan walked Boomer around the Nissan, and the dog alerted twice.

Officers Ring and Duncan thereafter entered and searched the Nissan. They discovered a clear plastic bag containing crack cocaine in the center front console and a 40–caliber Smith & Wesson pistol wedged between the driver's seat and the console. As a result, Palmer was

arrested. After the search and arrest, Ring measured the Nissan's window tint. Those measurements confirmed Ring's initial suspicion that the Nissan's windows were illegally tinted.

In this case, Palmer appeals the United States District Court's denial of his motion to suppress drug and firearm evidence. Upon review, the Fourth District Court of Appeals found, in part, as follows:

"The Court concluded that Officer Ring had properly stopped the Nissan, based on suspicions of a window tint violation and a fraudulent inspection sticker. The Court explained that Ring also possessed the reasonable, articulable suspicion of criminal activity necessary to extend the traffic stop, identifying eight supporting factors in that regard:

• *Palmer was in a high crime area where citizens were complaining about drug dealing;*

• *Ring believed that the Nissan's windows were illegally tinted;*

• *Palmer was nervous;*

• *The Nissan emitted an "overwhelming" scent of air freshener from the multiple air fresheners;*

• *Palmer was a suspected member of a violent gang called the Bounty Hunter Bloods;*

• *Palmer's driver's license listed a P.O. box address, rather than a residence;*

• *Palmer was driving a vehicle registered in another person's name; and*

• *Palmer had a criminal record that included four previous arrests for narcotics charges as well as a charge of possession of a firearm by a convicted felon.*

"The Court explained that those factors, when taken together, gave rise to reasonable suspicion because they eliminated a substantial portion of innocent travelers and indicated that criminal activity was afoot. That is, Ring possessed the 'reasonable suspicion necessary to extend the stop beyond its original scope and duration as soon as he completed the computer checks.'

"Because he suspected the inspection sticker was fraudulent, Ring decided to verify the sticker's authenticity by looking at the back of it, which would enable him to determine whether it was legitimate. After asking Palmer to exit the Nissan, Ring leaned through the open driver-side door and examined the back of the inspection sticker. While reading the sticker — which he concluded was legitimate — Ring smelled marijuana. Officer Ring immediately advised Palmer that he had grounds to search the Nissan. Because Ring wanted to be '110% sure' that the Nissan contained drugs before searching the vehicle, however, he again checked on the drug dog's availability. At that point--approximately seventeen minutes after the traffic stop had been initiated—Ring called Officer Duncan, who had a drug dog. About ten minutes later, Duncan arrived with the drug dog Boomer. Duncan walked Boomer around the Nissan, and the dog alerted twice. Officers Ring and Duncan thereafter entered and searched the Nissan. They

discovered a clear plastic bag containing crack cocaine in the center front console and a 40-caliber Smith & Wesson pistol wedged between the driver's seat and the console. As a result, Palmer was arrested. After the search and arrest, Ring measured the Nissan's window tint. Those measurements confirmed Ring's initial suspicion that the Nissan's windows were illegally tinted.

"A traffic stop is a 'seizure' within the meaning of the Fourth Amendment and must be reasonable under the circumstances. See *Delaware v. Prouse,* 440 U.S. 648, 653-54 (1979). In that regard, the courts assess the constitutionality of a traffic stop under the two-prong standard articulated in *Terry v. Ohio,* 392 U.S. 1 (1968). We first assess whether the articulated bases for the traffic stop were legitimate. Second, we examine whether the actions of the authorities during the traffic stop were 'reasonably related in scope' to the bases for the seizure.

"As the Supreme Court has explained, *Terry*'s first prong is satisfied whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. Without question, such a violation may include failure to comply with traffic laws. See, e.g., *United States v. Green*, 740 F.3d 275, 279 n.1 (4th Cir. 2014) (concluding that windows 'illegally tinted' under Virginia law 'justified the stop').

"In assessing the legitimacy of a traffic stop, we do not attempt to discern an officer's subjective intent for stopping the vehicle. See *United States v. Branch*, 537 F.3d 328, 340 (4th Cir. 2008). We simply ask whether the circumstances, viewed objectively, justify the action. See *Whren v. United States*, 517 U.S. 806, 813 (1996); *United States v. Johnson*, 734 F.3d 270, 275 (4th Cir. 2013) (observing that a traffic stop is legitimate 'when officers observe a traffic violation, regardless of their true, subjective motives for stopping the vehicle').

"Terry's second prong restricts the range of permissible actions that a police officer may take after initiating a traffic stop. An officer is entitled to conduct safety-related checks that do not bear directly on the reasons for the stop, such as requesting a driver's license and vehicle registration, or checking for criminal records and outstanding arrest warrants. See *Rodriguez v. United States*, 135 S. Ct. 1609, 1615-16 (2015). Generally, however, an officer's focus must remain on the bases for the traffic stop, in that the stop must be 'sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.' See *United States v. Guijon-Ortiz,* 660 F.3d 757, 764 (4th Cir. 2011).

"Thus, when following up on the initial reasons for a traffic stop, the officer must employ the least intrusive means reasonably available to verify or dispel his suspicion in a short period of time. To be clear, the law does not require that the officer employ the least intrusive means conceivable. If an officer acts unreasonably in attempting to confirm his suspicions during a traffic stop, however, he runs afoul of *Terry*'s second prong.

"Relatedly, a legitimate traffic stop may 'become unlawful if it is prolonged beyond the time reasonably required' to complete its initial objectives. See *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). Put differently, an officer cannot investigate 'a matter outside the scope of the initial stop' unless he receives the motorist's consent or develops reasonable, articulable suspicion of ongoing criminal activity.

"Although an officer may extend a traffic stop when he possesses reasonable suspicion, he cannot search the stopped vehicle unless he obtains consent, secures a warrant, or develops probable cause to believe the vehicle contains evidence of criminal activity. See *United States v. Baker*, 719 F.3d 313, 319 (4th Cir. 2013). An officer's detection of marijuana odor is sufficient to establish such probable cause as is a trained drug dog's alert on the vehicle.

"Officer Ring knew that the Ipswich neighborhood was a high crime area and that the police had received complaints about illegal drug activity there. (An area's propensity toward criminal activity is something that an officer may consider in forming reasonable suspicion.) It is compelling that, when Ring approached the darkly tinted Nissan, he smelled an overwhelming odor from the air fresheners that he could see in the vehicle, suggesting an effort to conceal the scent of drugs. See *United States v. Foreman*, 369 F.3d 776, 785 (4th Cir. 2004) (concluding that air fresheners on rearview mirror supported reasonable suspicion because they are commonly used to mask the smell of narcotics). Significantly, Officer Ring learned, early in the traffic stop, that Palmer was a suspected member of the Bounty Hunter Bloods. Ring knew that the Bloods had threatened law enforcement during his service as a police officer and that such gangs are frequently involved in organized criminal activity such as narcotics distribution. Ring also ascertained that Palmer had at least four earlier arrests on drug charges and was probably a convicted felon. Indeed, he had been charged previously as a felon in possession of a firearm.

"As we explained in *United States v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997) an officer can couple knowledge of prior criminal involvement with more concrete factors in reaching a reasonable suspicion of current criminal activity. At minimum, such concrete factors in this situation included the overwhelming odor from multiple air fresheners and Palmer's apparent gang membership. Put succinctly, the factors identified by the District Court—viewed in their totality—eliminated a substantial portion of innocent travelers and demonstrated a connection to possible criminal activity. We are thus satisfied that Ring's actions prior to examining the Nissan's inspection sticker were entirely permissible under Terry's second prong, because Ring did not unreasonably expand the scope of the traffic stop.

"Because Ring had a legitimate basis for believing that the inspection sticker was fraudulent, we agree that the facts recited by the court, coupled with Officer Ring's training and experience with inspection stickers, support the "reasonable suspicion

Ring required to investigate the sticker's authenticity. Ring's means of investigating the inspection sticker were appropriate and not unreasonably intrusive. The district court correctly denied Palmer's suppression motion."

SECOND AMENDMENT: Stun Gun

Caetano v. Massachusetts
USSC, No. 14-10078, 3/21/16

After a "bad altercation" with an abusive boyfriend put her in the hospital, Jaime Caetano found herself homeless and "in fear for her life." She obtained multiple restraining orders against her abuser, but they proved futile. So when a friend offered her a stun gun for self-defense against her former boyfriend, Caetano accepted the weapon.

It is a good thing she did. One night after leaving work, Caetano found her ex-boyfriend waiting for her outside. He "started screaming" that she was "not gonna [expletive deleted] work at this place" anymore because she "should be home with the kids" they had together. Caetano's abuser towered over her by nearly a foot and outweighed her by close to 100 pounds. But she didn't need physical strength to protect herself. She stood her ground, displayed the stun gun, and announced: "I'm not gonna take this anymore… I don't wanna have to use the stun gun on you, but if you don't leave me alone, I'm gonna have to." The ex-boyfriend got scared and he left her alone.

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

"It is settled that the Second Amendment protects an individual right to keep and bear arms that applies against both the Federal Government and the States. *District of Columbia v. Heller*, 554 U. S. 570 (2008); *McDonald v. Chicago*, 561 U. S. 742 (2010).

"Caetano's encounter with her violent ex-boyfriend illustrates the connection between those fundamental rights: By arming herself, Caetano was able to protect against a physical threat that restraining orders had proved useless to prevent. And, commendably, she did so by using a weapon that posed little, if any, danger of permanently harming either herself or the father of her children. Under Massachusetts law, however, Caetano's mere possession of the stun gun that may have saved her life made her a criminal. See *Mass. Gen. Laws, ch. 140*, §131J (2014).

When police later discovered the weapon, she was arrested, tried, and convicted. The Massachusetts Supreme Judicial Court affirmed the conviction, holding that a stun gun is not the type of weapon that is eligible for Second Amendment protection because it was 'not in common use at the time of the Second Amendment's enactment.' This reasoning defies our decision in Heller, which rejected as bordering on the frivolous the argument that only those arms in existence in the 18th century are protected by the Second Amendment. The decision below also does a grave disservice to vulnerable individuals like Caetano who must defend themselves because the State will not."

The United States Supreme Court held that hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States. While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment.