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ARREST-STANDARD FOR ENTRY INTO A RESIDENCE TO ARREST

Barrett v. Commonwealth of Kentucky,
No. 2014-SC-000048, 9/24/15

Covington Police received a tip from an anonymous caller that Ricky Barrett, Jr. was currently located at 2721 Rosina Avenue. Dispatch confirmed that multiple arrest warrants had been issued for Barrett and directed officers to the residence. Dispatch also informed the officers that the last police contact with Barrett had occurred at that address and that Barrett was listed as the homeowner.

Officer Edwards arrived first and walked around the house to identify the exit points. During his look around, Officer Edwards heard voices and the sound of clinking glasses or dishes from inside. Shortly thereafter, Officer Isaacs arrived and stayed at the back of the house while Officer Edwards returned to the front. When Officer Edwards first knocked on the front door and announced himself, the voices inside stopped, but no one answered the door. Officer Christian then arrived, and he replaced Officer Isaacs at the back door, and Officer Isaacs joined Officer Edwards at the front door.

Officer Edwards continued to knock on the door using his flashlight to knock louder. Without touching the handle or the lock, this added force caused the door to open. With this, the officers became concerned that a crime was being

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committed inside, so, acting according to common yet unwritten department practice, they again announced their presence and, hearing no response, entered.

Once inside, Officer Edwards positioned himself at the bottom of a staircase just inside the door, and Officer Isaacs searched the downstairs rooms. After Officer Edwards again announced the officers' presence inside the house, he heard a woman's voice call out from the second floor. Officer Edwards asked her to come downstairs, which she did. The woman told the officers that she was Deborah Barrett and that she owned the house. When asked if Ricky Barrett was inside the house, Mrs. Barrett replied that he was hiding upstairs in a closet. Officer Edwards remained downstairs with Mrs. Barrett, and Officers Isaacs and Christian proceeded up the stairs to locate Barrett.

The officers found a hallway closet at the top of the stairs, and Officer Christian remained outside of it while Officer Isaacs searched the other rooms on the second floor. While searching one bedroom, Officer Isaacs observed syringes and other drug paraphernalia in plain view. Officer Christian then heard noise from inside the hallway closet and called out for assistance. Officer Isaacs immediately returned and both officers found Barrett hiding inside and arrested him. Officer Isaacs then collected three syringes and a spoon and filter containing possible heroin residue from the bedroom, which Mrs. Barrett later identified as Ricky Barrett's.

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

"…For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within. Payton v. New York,* 445 U.S. 573, 603 (1980).

"This Court has cited this rule in two prior decisions, but we have never had occasion to interpret the 'reason to believe' standard set forth in *Payton.* See *Kerr v. Commonwealth*, 400 S.W.3d 250, 265 (Ky. 2013) and *Farris v.Commonwealth*, No. 2001-SC-0300-MR, 2003 WL 1938730, at *2 (Ky. Apr. 24, 2003). We continue to follow the *Payton rule*; nonetheless, before we apply it here, we must clarify the scope of the standard.

"Despite what appears to be clear language, courts are split over the meaning of the phrase 'reason to believe.' The majority of courts that have considered the standard have held that it is less exacting than probable cause. See *United States v. Pruitt*, 458 F.3d 477, 484 (6th Cir. 2006); *United States v.Route,* 104 F.3d 59, 62-63 (5th Cir. 1997); *United States v. Risse,* 83 F.3d 212, 216-17 (8th Cir. 1996); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995). Other courts have held that the contrast between reason to believe and probable cause is a distinction without a difference. See *United States v. Gorman,* 314 F.3d 1105, 1114 (9th Cir. 2002) and *United States v. Barrera*, 464 F.3d 496, 501 n.5 (5th Cir. 2006) (noting that the distinction between probable cause and reason to

believe is 'more about semantics than substance'). A third group of courts have declined to interpret the standard because they found the police entry in question was not justified under any interpretation. See *United States v. Hill*, 649 F.3d 258, 263 (4th Cir. 2011) and *United States v. Hardin,* 539 F.3d 404 (6th Cir. 2008).

"The Sixth Circuit's line of decisions on this question is noteworthy. In *Pruitt*, police arrested Pruitt in his home for possession of contraband. The Sixth Circuit held that the search warrant used by police to enter the residence was procedurally invalid; however, the Court denied Pruitt's motion to suppress because there was already a warrant outstanding for his arrest and police entered the residence with a reasonable belief that Pruitt was inside. The Court held, reasonable belief is a lesser standard than probable cause, and that reasonable belief that a suspect is within the residence, based on common sense factors and the totality of the circumstances, is required to enter a residence to enforce an arrest warrant.

"Two years later, a different panel of the Court decided *Hardin*. There, police, acting pursuant to an arrest warrant and multiple informants, arrested Hardin in his girlfriend's apartment and charged him with possession of contraband found during the arrest. The government argued that *Pruitt*'s "lesser reasonable belief standard" and not probable cause should have applied. However, the Court declined to follow *Pruitt,* labeling its holding as dicta because the Court found the police clearly had probable cause to believe that Pruitt was inside the residence. Therefore, the choice of one standard over the other was not necessary to the outcome of the case. The Court then held that the information the police possessed failed to establish even a reasonable belief that Hardin was inside the apartment, so the Court declined to adopt either standard.

"In full consideration of the diversity of legal authority and the reasoning supporting that authority, we expressly adopt the plain language reason to believe standard from *Payton* and reject the probable cause standard. Thus, police executing a valid arrest warrant may lawfully enter a residence if they have reason to believe that the suspect lives there and is presently inside. Reason to believe is established by looking at common sense factors and evaluating the totality of the circumstances and requires less proof than does the probable cause standard. *Pruitt*, 458 F.3d at 482.

"We adopt this rule for three key reasons. First and foremost, a plain reading of *Payton* requires reason to believe and not probable cause. In the words of one federal district court, 'when the Court wishes to use the term *probable cause,* it knows how to do so.' *Smith v. Tolley,* 960 F. Supp. 977, 987 (E.D. Va. 1997). In setting forth the rule in *Payton*, the Supreme Court required the arrest warrant to be 'founded on probable cause,' yet set reason to believe as the standard to justify entry. 445 U.S. at 603. Therefore, the Court was clearly aware of the differences and chose to require separate standards. As the *Pruitt* Court noted:

> *By way of example, in* ***Maryland v. Buie****, 494 U.S. 325 (1990) the Supreme Court held:*
>
> *By requiring a protective sweep to be justified by "probable cause" to believe that a serious and demonstrable potentiality for danger existed, the Court of Appeals of Maryland applied an unnecessarily strict Fourth Amendment standard. The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.*
>
> *While* ***Buie*** *addressed the standard to be applied by police for conducting protective sweeps, it is evident that the Supreme Court does not use the terms probable cause and reasonable belief interchangeably, but rather that it considers reasonable belief to be a less stringent standard than probable cause.*

"Second, the rights of suspects will be adequately protected by using this standard. When police execute a valid arrest warrant, a neutral and detached magistrate has already made a probable cause evaluation that the suspect has committed a crime. *Commonwealth v. Marshall*, 319 S.W.3d 352, 356 (Ky. 2010). It would be overly burdensome for police to make a second probable cause determination when executing a valid arrest warrant. Furthermore, a third party's rights are not infringed because a search warrant is required to enter into a third-party's residence to arrest a non-resident suspect. *Steagald v. United States*, 451 U.S. 204, 205-06 (1981).

"Third, with this holding we join the majority of other courts in adopting the reason to believe standard. Although not controlling, we are persuaded by the reasoning of the overwhelming majority of federal circuit and state courts that have held that the 'reason to believe' language is a less exacting standard than probable cause.

"As applied here, the police had a reason to believe, according to common sense factors and evaluating the totality of the circumstances, that Barrett lived at 2721 Rosina Avenue and was currently located inside. The unidentified caller clearly stated that Barrett was present at the address. The dispatcher confirmed that the last police contact with Barrett occurred at that address and reported that Barrett was the homeowner. Although this latter fact turned out to be false (Ricky Barrett, Sr. was the actual homeowner), it is undisputed that Barrett lived in the house and there is no evidence that police acted in bad faith. Once police arrived at the house, the sound of voices and movement inside perpetuated the belief that Barrett was inside. See *Route,* 104 F.3d at 62-63 (holding that the sound of a television on the inside of the house and the presence of a car in the driveway were sufficient to form the basis of the reasonable belief that the suspect was in the home). Finally, the fact that the voices and sounds from within the house stopped when Officer Edwards knocked and announced his presence bolstered

the belief that someone wishing to avoid police contact was inside. Armed with this reasonable belief, police were constitutionally permitted to proceed inside the house to arrest Barrett when no one answered the door.

"In sum, we continue to follow a plain reading of the *Payton* rule which allows police to enter a suspect's residence with a valid arrest warrant when they have a reason to believe that the suspect lives in the residence and can currently be found inside. Reason to believe requires less proof than probable cause and is established by evaluating the totality of the circumstances and common sense factors. Because we find that the police satisfied the appropriate standard, we discern no error in the trial court's denial of Barrett's motion to suppress as to the initial police entry.

"Officer Isaacs was lawfully in a position to view the drug paraphernalia and there is no dispute that the items were in plain view and their incriminating nature was immediately apparent. *Hazel v. Commonwealth,* 833 S.W.2d 831, 833 (Ky. 1992). Thus, the plain view doctrine applies, and the evidence was lawfully seized."

CIVIL LIABILITY:
Qualified Immunity; Deadly Force

Mullins v. Cyranek
CA6, No. 14-3817, 11/9/15

In this case, Cincinnati officers, assigned to provide security outside a family reunion at Sawyer Point, were informed that young African American males were throwing guns over the fence to individuals who were inside. After Cyranek and other officers approached, those individuals ran toward downtown. The officers were then told to provide extra security at Government Square and Fountain Square.

Cyranek saw 16-year-old Mullins walking from Fountain Square and recognized two individuals with Mullins from Sawyer Point. Cyranek observed Mullins holding and trying to conceal his right side, which led Cyranek to suspect that Mullins possessed a weapon. Cyranek followed him, but did not alert other officers or radio in his concerns. During a confrontation that lasted two minutes, Cyranek held Mullins to the ground, Mullins brandished a gun and gained enough freedom from Cyranek's grip to throw his weapon 10-15 feet behind Cyranek. As Mullins threw his gun, Cyranek rose from his crouched position and fired twice. Video footage shows that, at most, five seconds elapsed between when Mullins threw his firearm and when Cyranek fired his final shot. Cyranek retrieved Mullins's gun and placed it near Mullins's feet. Mullins was pronounced dead at a hospital.

In a suit under 42 U.S.C. 1983, the Sixth Circuit affirmed summary judgment based on qualified immunity, calling the shooting a "tragedy," but finding Cyranek's split-second decision to use deadly force "not objectively unreasonable."

CIVIL LIABILITY: New York Police Department Surveillance Program

Hassan v. City of New York
CA3, No. 14-1688, 10/13/15

In this case, plaintiffs claim that since January 2002 the New York City Police Department has conducted a secret program "to monitor the lives of Muslims, their businesses, houses of worship, organizations, and schools in New York City and surrounding states, particularly New Jersey." The claim that NYPD mounts remotely-controlled surveillance cameras on light poles, aimed at mosques and sends "undercover officers" into mosques, student organizations, businesses, and neighborhoods that "it believes to be heavily Muslim." Plaintiffs allege that the program is based on the false and stigmatizing premise that Muslim religious identity "is a permissible proxy for criminality, and that Muslim individuals, businesses, and institutions can therefore be subject to pervasive surveillance not visited upon individuals, businesses, and institutions of any other religious faith or the public at large."

The district court dismissed their suit under 42 U.S.C. 1983 for lack of standing and failure to state a claim. The Third Circuit reversed, stating, "The allegations tell a story in which there is standing to complain and which present constitutional concerns that must be addressed and, if true, redressed."

The court analogized the situation to that faced by Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II.

CIVIL LIABILITY: Mistake of Fact

New v. Denver, CA8, No. 13-3330, 5/29/15

Sergeant Dale Denver of the Benton County Sheriff's Office arrested David New in 2009 for possession of marijuana after two leaves were found during a consensual search of New's car following a traffic stop. When the Arkansas State Crime Laboratory tested the leaves and reported they did not contain detectible amounts of Tetrahydrocannabinol (THC), the prosecutor dropped a criminal charge. New filed a 42 U.S.C. 1983 action against Denver, alleging he was arrested without probable cause. Denver moved for summary judgment on the merits and based on qualified immunity.

The district court denied the motion, concluding that it could not make "a credibility determination crediting Mr. Denver's assertions as true in the face of contrary evidence—a negative lab result and the contrary averments of Mr. New."

The Eighth Circuit reversed, stating "an objectively reasonable police officer with Denver's training and experience could have reasonably believed that the leaves he found in New's car were marijuana, giving Denver probable cause to arrest and have the leaves tested for THC. More than evidence of a mistake is required to deny a public official qualified immunity from section 1983 damage liability."

CIVIL LIABILITY: Qualified Immunity; Shooting Fleeing Motorist

Mullenix v. Luna, No. 14-1143, 1111/9/15

On the night of March 23, 2010, Sergeant Randy Baker of the Tulia, Texas Police Department followed Israel Leija, Jr., to a drive-in restaurant, with a warrant for his arrest. When Baker approached Leija's car and informed him that he was under arrest, Leija sped off, headed for Interstate 27. Baker gave chase and was quickly joined by Trooper Gabriel Rodriguez of the Texas Department of Public Safety (DPS). Leija entered the interstate and led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour. Twice during the chase, Leija called the Tulia Police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats, together with a report that Leija might be intoxicated, to all concerned officers.

As Baker and Rodriguez maintained their pursuit, other law enforcement officers set up tire spikes at three locations. Officer Troy Ducheneaux of the Canyon Police Department manned the spike strip at the first location Leija was expected to reach, beneath the overpass at Cemetery Road. Ducheneaux and the other officers had received training on the deployment of spike strips, including on how to take a defensive position so as to minimize the risk posed by the passing driver.

DPS Trooper Chadrin Mullenix also responded. He drove to the Cemetery Road overpass, initially intending to set up a spike strip there. Upon learning of the other spike strip positions, however, Mullenix began to consider another tactic: shooting at Leija's car in order to disable it. Mullenix had not received training in this tactic and had not attempted it before, but he radioed the idea to Rodriguez. Rodriguez responded "10–4," gave Mullenix his position, and said that Leija had slowed to 85 miles per hour. Mullenix then asked the DPS dispatcher to inform his supervisor, Sergeant Byrd, of his plan and ask if Byrd thought it was "worth doing." Before receiving Byrd's response, Mullenix exited his vehicle and, armed with his service rifle, took a shooting position on the overpass, 20 feet above I–27. Respondents allege that from this position, Mullenix still could hear Byrd's response to "stand by" and "see if the spikes work first."

Mullenix waited for Leija to arrive, he and another officer, Randall County Sheriff's Deputy Tom Shipman, discussed whether Mullenix's plan would work and how and where to shoot the vehicle to best carry it out. Shipman also informed Mullenix that another officer was located beneath the overpass.

Approximately three minutes after Mullenix took up his shooting position, he spotted Leija's vehicle, with Rodriguez in pursuit. As Leija approached the overpass, Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper

body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block.

Respondents sued Mullenix under Rev. Stat. §1979, 42 U. S. C. §1983, alleging that he had violated the Fourth Amendment by using excessive force against Leija. Mullenix moved for summary judgment on the ground of qualified immunity, but the District Court denied his motion, finding that there are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances.

Mullenix appealed, and the Court of Appeals for the Fifth Circuit affirmed, finding in part as follows"

"…the immediacy of the risk posed by Leija is a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor, precluding us from concluding that Mullenix acted objectively reasonably as a matter of law.

"In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances beyond debate. The general principle that deadly force requires a sufficient threat hardly settles this matter. See *Pasco v. Knoblauch*, 566 F. 3d 572, 580 (CA5 2009) (It would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase.)

"Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted. In *Haugen v. Brosseau v. Haugen*, 543 U.S. 194 (2004) itself, the Court held that an officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered other officers on foot who she *believed* were in the immediate area, the occupied vehicles in his path, and any other citizens who *might* be in the area. The threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders. By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location.

"This Court has considered excessive force claims in connection with high-speed chases on only two occasions since *Brosseau*. In *Scott v. Harris*, 550 U. S. 372, the Court held that an officer did not violate the Fourth Amendment by ramming the car of a fugitive whose reckless driving 'posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.' And in *Plumhoff v. Rickard*, 572 U. S. ___ (2014), the Court reaffirmed *Scott* by holding

that an officer acted reasonably when he fatally shot a fugitive who was intent on resuming a chase that posed a deadly threat for others on the road. The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity.

"Leija in his flight did not pass as many cars as the drivers in *Scott* or *Plumhoff;* traffic was light on I–27. At the same time, the fleeing fugitives in *Scott* and *Plumhoff* had not verbally threatened to kill any officers in their path, nor were they about to come upon such officers. In any event, none of our precedents 'squarely governs' the facts here. Given Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violates the law' would have perceived a sufficient threat and acted as Mullenix did.

"The constitutional rule applied by the Fifth Circuit was not beyond debate, we grant Mullenix's petition for certiorari and reverse the Fifth Circuit's determination that Mullenix is not entitled to qualified immunity."

GAME AND FISH ENFORCEMENT: Unlawful Detention; Reasonable Suspicion

Pickle v. State, CR-15-3,
2015 Ark. 286, 6/25/15

Sergeant Brian Aston, a law enforcement officer with the Arkansas Game and Fish Commission, testified that on November 18, 2012, he and another officer, Jeff McMullin, came into contact with Pickle and his duck-hunting party while the officers were working a section of the Cache River.

According to Aston, the officers made their way to within fifty yards of Pickle's duck hunting party and observed them for approximately two hours. Aston admitted that during the two hours that he observed Pickle's hunting party, he did not see any hunting violations. He and McMullin decided to make contact with them and check for compliance with state and federal regulations pertaining to the harvest of waterfowl. In order not to be observed, they maneuvered to a point where the Cache River met an oxbow lake. McMullin used binoculars to 'maintain a visual' to ensure that the hunting party did not hide or discard any waterfowl or other items while he attempted to approach. Aston recalled that the grass was waist high and that he was able to 'belly crawl' to a point where he was in thicker cover. When he got to within sight of Pickle's hunting party, he identified himself as a game warden and signaled for McMullin to join him.

Pickle's hunting party consisted of three individuals. At the time Aston made contact with them, however, they were preparing to eat breakfast, and their guns were leaning against trees. The parties' guns were then inspected for compliance with federal hunting regulations, and Pickle's gun was found to be in compliance. During the inspection, which lasted for twenty to twenty-five minutes, Aston looked inside any bags,

opening them up to inspect their contents. According to Aston, after writing a citation for one member of the party, he stepped away, telling the hunting party to "have a safe day." McMullin told Aston that Pickle had said that he had left his license in his truck. "For officer's safety reasons," they stepped back to a point where they could not be observed by the hunting party and made a telephone call to Little Rock dispatch. Aston ran a "10-26 Hunting and Fishing License check" and confirmed that Pickle's license was valid.

He also ran a "10-51 check through NCIC" to find out if Pickle had any outstanding warrants. According to Aston, it was his "personal protocol" to run a hunting-license check and a warrant check when a hunter does not have a hunting license on his person. He further stated that he would not have done so if Pickle had a hunting license on his person. He was advised that Pickle was a convicted felon. The officers made their way back to Pickle and arrested Pickle for being a felon in possession of a firearm. When he searched Pickle, he found on Pickle's person a small quantity of methamphetamine and a glass pipe. He turned Pickle over to the custody of a deputy sheriff from Craighead County.

In denying Pickle's motion to suppress, the circuit court found that Pickle did not have a reasonable expectation of privacy because he was engaged in the "highly regulated activity of hunting waterfowl." The court also found that Arkansas's "compelling interest in preserving the wildlife of the State of Arkansas and regulating its exploitation for the benefit of all citizens" weighed in favor of allowing the warrantless searches and seizures by game wardens because "the State's compelling and special objectives cannot be achieved through means significantly less restrictive of privacy freedoms and that the intrusion upon the defendant was slight."

Pickle argues on appeal that he was unlawfully detained and unlawfully searched in violation of his rights under the Fourth Amendment to the United States Constitution and article 2, section 15, of the Arkansas Constitution because the game wardens had neither a warrant nor a reasonable suspicion of any violation of law.

Upon review, the Arkansas Supreme Court found as follows:

"The evidence used to charge Pickle of possession of a firearm, possession of a controlled substance, and possession of drug paraphernalia, was adduced by the officers after they had completed any inquiry into Pickle's compliance with state and federal regulations pertaining to the harvest of waterfowl. In fact, Aston admitted that it was his 'personal protocol' to conduct a warrant check. Thus, Aston's exploration of Pickle's criminal past and the subsequent search of his person went far beyond the scope of any administrative search conducted for the purpose of investigating Pickle's compliance with hunting laws. See *State v. Baldwin*, 475 A.2d 522 (N.H. 1984) (holding that even if fish and game officers had requisite power to conduct road check to determine compliance with

fish and game laws, questioning driver about whether she had any weapons clearly exceeded scope of any permissible road check to determine compliance with fish and game laws). In this sense, the case is similar to those in which we have observed that an officer's continued detention of a motorist's vehicle after the legitimate purpose for the initial traffic stop has terminated requires the officer to possess reasonable suspicion that the person is committing, has committed, or is about to commit a felony or a misdemeanor involving danger to persons or property, as the officer must develop reasonable suspicion to detain before the legitimate purpose of the traffic stop has ended. *Lilley v. State,* 362 Ark. 436, 208 S.W.3d 785 (2005).

"Pickle has argued on appeal that he was unlawfully detained and unlawfully searched in violation of his rights under the Fourth Amendment to the United States Constitution and article 2, section 15, of the Arkansas Constitution because the game wardens had neither a warrant nor a reasonable suspicion of any violation of law. Here, even assuming that the officers properly conducted an investigation into Pickle's compliance with hunting laws, that investigation had concluded. Nevertheless, the officers began a criminal investigation, seeking information to determine whether Pickle was felon, a matter unrelated to Pickle's compliance with hunting laws, and on discovering that he was a felon, returned to the area and arrested and searched Pickle. On these facts, we cannot say that, prior to the completion of their investigation into Pickle's compliance with hunting laws, the officers developed reasonable suspicion that Pickle had committed a crime. Thus, we agree with Pickle's argument and hold that, on our de novo review based on the totality of the circumstances, the facts presented in this case did not give rise to reasonable suspicion allowing officers to conduct a criminal investigation."

EVIDENCE: Photographs

Green v. State, No. CR-15-273,
2015 Ark. 359, 10/8/15

On July 7, 2013, at approximately 8:30 p.m., Blytheville Police Department Officer Jeff Culp arrived at 524 East Cherry Street in Blytheville after receiving a possible homicide call. He and other officers met an individual at the scene who advised them that someone had died inside the residence. Officer Culp attempted to gain access to the residence, looked inside a bedroom window, and saw a white male lying face-down on a bed. Once inside the home, the officers discovered a padlock on the bedroom door and forced entry into the bedroom where they discovered the deceased victim, Daniel Goodwin, Jr.

Sergeant Earnest Frye of the Blytheville Police Department testified that, upon entering the room, he saw a young white male lying across the bed face-down with a plastic bag ducttaped around his head. Sergeant Frye stated that the victim appeared to have been playing a video game because cords and game controllers were strewn on the floor. Sergeant Frye testified that the victim's pockets had

been turned out and that blankets had been placed on top of him.

Manual Jones stated that he arrived at the residence around 3:00 p.m. on the afternoon of July 7, 2013. Jones observed the victim playing video games, and a friend, nicknamed Shorty Mac, checking Facebook on a computer. Jones also noticed Tevarius Tevon Green walking around the house. Jones stated that, while checking his phone, he heard one gunshot and then saw Green exit the bedroom holding a gun in his hand. Green turned to Jones and asked, “Are we straight?” Jones stated, “I told him I was straight. I was like, yeah, I’m good.”

According to Jones, Green then sat down, ate, talked for a short time, and left the residence. United States Marshals apprehended Green in Elkhart, Indiana, where Blytheville police officers later interviewed and arrested him.

On December 8, 2014, the State filed an amended felony information charging Green as a habitual offender with capital murder and possession of a firearm. On December 16–17, 2014, the case proceeded to trial, and the jury convicted Green of capital murder and sentenced him to life imprisonment without the possibility of parole.

Green timely filed his notice of appeal. For his sole point on appeal, Green argues that the circuit court abused its discretion in admitting State’s Exhibit No. 9, a crime-scene photograph of the victim’s body as he was found by police. Green asserts that the photograph should have been excluded, pursuant to Arkansas Rule of Evidence 403 (2015), because it was unduly gruesome and was more prejudicial than probative in value. The State responds that the circuit court properly overruled Green’s objection to State’s Exhibit No. 9. Alternatively, the State contends that any error in admitting Exhibit No. 9 was harmless.

Upon review, the Arkansas Supreme Court found as follows:

“The admission of photographs is a matter left to the sound discretion of the circuit court, and we will not reverse absent an abuse of that discretion. *Evans v. State*, 2015 Ark. 240, 464 S.W.3d 916. When photographs are helpful to explain testimony, they are ordinarily admissible. The mere fact that a photograph is inflammatory or cumulative is not, standing alone, sufficient reason to exclude it. Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: (1) by shedding light on some issue; (2) by proving a necessary element of the case; (3) by enabling a witness to testify more effectively; (4) by corroborating testimony; or (5) by enabling jurors to better understand the testimony. Other acceptable purposes include showing the condition of the victim’s body, the probable type or location of the injuries, and the position in which the body was discovered.

“This court rejects the admission of inflammatory pictures when claims of relevance are tenuous and prejudice is great and expects the trial court to

carefully weigh the probative value of photographs against their prejudicial nature. *Camargo v. State,* 327 Ark. 631, 940 S.W.2d 464 (1997). We require the trial court to first consider whether such evidence, although relevant, creates a danger of unfair prejudice, and then to determine whether the danger of unfair prejudice substantially outweighs its probative value. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

"We turn to the present case. During Sergeant Frye's testimony, the State sought to introduce a series of photographs depicting the victim as the officers found him at the scene. The circuit court conducted a bench conference during which Green's counsel argued that State's Exhibit No. 9 was unduly gruesome and more prejudicial than probative. The State responded that the photograph depicted the position of the victim's body, particularly his right hand, which indicated that he had been playing video games at the time of his death. The State asserted that the photograph revealed a closer view of the victim's head with the plastic bag, but, with little blood shown, the photograph was not prejudicial. The Circuit Court admitted the photograph into evidence.

"Once the circuit court admitted the photograph into evidence, Sergeant Frye testified that he took the picture and that it showed a full shot of the victim laying across the bed with his arms forward. Here, the photograph corroborated Sergeant Frye's testimony about the victim's state and enabled the jurors to better understand his testimony about the crime scene. See *Evans*, 2015 Ark. 240, 464 S.W.3d 916. Specifically, as the circuit court noted, the photograph assisted the trier of fact by showing the condition of the victim's body, the location of the victim's injury, and the position in which the body of the victim was discovered. Thus, we hold that the circuit court did not abuse its discretion in admitting State's Exhibit No. 9."

JAILS AND PRISONS: Use of Force; Objectively Unreasonable Standard

Kingsley v. Hendrickson
No. 14-6368, 6/22/15

Michael Kingsley was arrested on a drug charge and detained in a Wisconsin county jail prior to trial. On the evening of May 20, 2010, an officer performing a cell check noticed a piece of paper covering the light fixture above Kingsley's bed. The officer told Kingsley to remove it; Kingsley refused; subsequently other officers told Kingsley to remove the paper; and each time Kingsley refused. The next morning, the jail administrator, Lieutenant Robert Conroy, ordered Kingsley to remove the paper. Kingsley once again refused. Conroy then told Kingsley that officers would remove the paper and that he would be moved to a receiving cell in the interim. Shortly thereafter, four officers, including respondents Sergeant Stan Hendrickson and Deputy Sheriff Fritz Degner, approached the cell and ordered Kingsley to stand, back up to the door, and keep his hands behind him. When

Kingsley refused to comply, the officers handcuffed him, forcibly removed him from the cell, carried him to a receiving cell, and placed him face down on a bunk with his hands handcuffed behind his back.

The parties' views about what happened next differ. The officers testified that Kingsley resisted their efforts to remove his handcuffs. Kingsley testified that he did not resist. All agree that Sergeant Hendrickson placed his knee in Kingsley's back and Kingsley told him in impolite language to get off. Kingsley testified that Hendrickson and Degner then slammed his head into the concrete bunk—an allegation the officers deny. The parties agree, however, about what happened next: Hendrickson directed Degner to stun Kingsley with a Taser; Degner applied a Taser to Kingsley's back for approximately five seconds; the officers then left the handcuffed Kingsley alone in the receiving cell; and officers returned to the cell 15 minutes later and removed Kingsley's handcuffs.

Kingsley filed a complaint claiming that two of the officers used excessive force. The district court instructed the jury that Kingsley was required to prove that the officers "recklessly disregarded Kingsley's safety" and "acted with reckless disregard of his rights." The jury found in the officers' favor. The Seventh Circuit affirmed, upholding a subjective inquiry into the officers' state of mind, i.e., whether the officers actually intended to violate, or recklessly disregarded, Kingsley's rights.

The Supreme Court vacated. The Court stated that under 42 U.S.C. 1983, a pretrial detainee need only show that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim. The determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time, and must account for the legitimate interests stemming from the need to manage the facility, appropriately deferring to policies and practices that in the judgment" of jail officials are needed to preserve internal order and discipline and to maintain institutional security.

The Supreme Court stated that the objective standard is workable. It is consistent with the pattern jury instructions used in several Circuits, and many facilities train officers to interact with detainees as if the officers' conduct is subject to objective reasonableness. Use of an objective standard adequately protects an officer who acts in good faith, by acknowledging that judging the reasonableness of the force used from the perspective and with the knowledge of that officer is an appropriate part of the analysis. Applying the proper standard, the jury instruction was erroneous.

JAILS AND PRISONS: Suicide Protocol

Taylor v. Barkes, No. 14-939, 6/1/15

Christopher Barkes, an individual with a long history of mental health and drug abuse problems, was arrested in 2004 for violating probation and was taken to a Wilmington Delaware Correctional Institution. During intake, a nurse who worked for the contractor providing healthcare at the Institution conducted a suicide screening, based on a model form developed by the National Commission on Correctional Health Care in 1997. Barkes disclosed that he had a history of psychiatric treatment and was on medication and that he had attempted suicide in 2003, but stated that he was not currently thinking about killing himself.

Because only two risk factors were apparent, the nurse gave Barkes a "routine" referral to mental health services and did not initiate special suicide prevention measures. Barkes was placed in a cell by himself. He called his wife and told her that he was going to kill himself; she did not inform the Institution of this call.

The next morning, correctional officers observed Barkes behaving normally at 10:45, 10:50, and 11:00 a.m. At 11:35 a.m., an officer discovered that Barkes had hanged himself with a sheet.

His wife sued officials, alleging violation of Barkes's constitutional right to be free from cruel and unusual punishment, by failing to supervise and monitor the private contractor.

The Third Circuit held that it was clearly established that an incarcerated individual had an Eighth Amendment "right to the proper implementation of adequate suicide prevention protocols" and that there were material factual disputes. There was evidence that the screening process did not comply with NCCHC's latest standards, as required by contract.

The United States Supreme Court unanimously reversed, finding that the officials were entitled to qualified immunity.

"No Supreme Court precedent establishes a right to proper implementation of adequate suicide prevention protocols; appellate authority in 2004 suggested that such a right did not exist. Even if the Institution's suicide screening and prevention measures had the alleged shortcomings, no precedent would have made clear to the officials that they were overseeing a system that violated the Constitution."

SEARCH AND SEIZURE: Affidavit; Discrepancy Between Criminal Conduct and Items To Be Seized

United States v. Monell

CA1, No. 14-1617, 9/2/15

On February 16, 2012, police officers of the Fall River, Massachusetts, Police Department executed a warrant to search an apartment suspected of belonging to a man known to the officers only as "Ness." Inside the apartment, officers found Monell, who matched the

physical description of "Ness." One of the officers witnessed Monell placing a handgun on top of a refrigerator as the officers broke down the apartment door. After arresting Monell, officers seized the loaded handgun on the refrigerator, along with a dismantled shotgun, two shotgun rounds, 37 small bags of crack cocaine, digital scales, and materials used as drug packaging.

Officers also found, among other items, a Massachusetts driver's license for Ernesto Monell, envelopes addressed to "Ernesto" but containing letters written to "Ness," photographs of Monell with members of the Bloods street gang, and three cell phones.

A grand jury issued an indictment charging Monell with being a felon in possession of a firearm and ammunition and possession of cocaine base with intent to distribute. Monell filed a motion to suppress evidence seized from the apartment. After his conviction, Monell on appeal renews his challenge to the search warrant. His argument relies primarily on a discrepancy between the criminal conduct described in the supporting affidavit (illegal use of a firearm) and the items to be searched for (evidence of illegally possessed firearms).

On February 16, 2012, Detective William Falandys applied for and received a no-knock warrant
to search apartment number four in a multi-unit dwelling at 696 North Main Street in Fall River. The primary evidence in support of probable cause for the search came from two confidential informants, whose information was set forth in Detective Falandys's attached and incorporated affidavit. The first confidential informant ("CI-1") had previously provided information that led to at least two arrests and the seizure of marijuana and cocaine. In the week before the warrant application, CI-1 had given Detective Falandys the following information about the resident of apartment four at 696 North Main Street (known to CI-1 only as "Ness"):

- Ness "is a member of the Bloods street gang";

- Ness "has threatened individuals in the area to further his gang's activity";

- Ness "was involved in an incident where 'Ness' struck an individual with a firearm";

- Ness possessed a shotgun, rifle, and bulletproof vest;

- Within the previous 72 hours, CI-1 had seen "two rifle type firearms against a wall in the apartment."

CI-1 also showed Detective Falandys the apartment building and described the location of apartment four within the building, which was later confirmed by another officer.

The second confidential informant ("CI-2") had spoken to another police officer, who relayed CI-2's information to Detective Falandys. The affidavit provided no information about CI-2's track record as an informant. Within

the prior week, CI-2 had seen someone named "Ness" "point a firearm at an individual in the area of 696 North Main Street." Both CI-1 and CI-2 gave similar physical descriptions of "Ness," though they did not provide his full name. Detective Falandys stated that he had "exhausted all means necessary to identify the identity of 'Ness' without compromising this investigation."

Detective Falandys also listed his law enforcement training and experience, primarily as a narcotics investigator, including experience "cultivating confidential informants" and "participating in the execution of numerous (no less than two hundred) search warrants." Based on his training and experience, and the information from the CIs, Detective Falandys believed firearms are being stored in apartment 4."

The Court of Appeals for the First Circuit began their analysis by rejecting Monell's contention that the warrant affidavit did not adequately establish the reliability of the information supplied by the two confidential informants. The Court found, in part, as follows:

"CI-1 had previously provided information found to be accurate in at least two other arrests. See *United States v. Schaefer*, 87 F.3d 562, 566 (1st Cir. 1996) (Such an indicium of reliability may itself be sufficient to bulwark an informant's report.). Though the officer's affidavit did not provide a track record for CI-2, the mutual corroboration of the two CIs' stories—the location of the events, the physical description of 'Ness,' and the firearm-involved nature of the activity—served to bolster the reliability of the information provided by each of them. Consistency between the reports of two independent informants helps to validate both accounts.

"That brings us to the substance of the facts collectively supplied by the two informants. As the district court observed, those facts supplied probable cause to believe that a person named 'Ness' residing in apartment four at 696 North Main Street had committed assault with a firearm. Accordingly, a magistrate would have had a substantial basis to think that the affidavit supported probable cause to search for evidence of assault with a dangerous weapon in apartment four. And such evidence would plainly include guns—whether legally possessed or not—and evidence of access to guns.

"The warrant as issued did indeed authorize a search for guns 'used as the means of committing a crime.' The complication that gives rise to the main thrust of this appeal is that the warrant authorized a search only for 'illegally possessed' weapons and evidence that would show 'Ness' had such weapons. In this respect, the warrant was less broad than it might have been. That diminished breadth, moreover, was a product of Detective Falandys's apparent—and mistaken—belief that the facts reported by the confidential informants established probable cause to believe that 'Ness' committed the crime of illegally possessing a gun. That apparent belief was clearly wrong because there was no evidence at the

time that 'Ness' had no right to possess a gun, a necessary element of the crime. In short, the detective had probable cause to search 'Ness's' apartment for firearms that might bolster a charge of assault or battery with a firearm, but he crafted the warrant application to search for evidence of another crime (illegal possession of firearms) for which the detective lacked any evidence of an essential element (that 'Ness' was unable to lawfully possess a gun).

"It is difficult to see why such an error in identifying the criminal law that is violated by the conduct described in the affidavit necessarily renders the warrant invalid. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (arrest is valid if supported by probable cause of offense X, even if the officer made the arrest with the goal of finding evidence of offense Y). In assessing the validity of a warrant, we generally apply an objective test, asking whether the facts constitute probable cause of a crime, rather than whether the officer thought they did. It is even more difficult to see why the officer's limitation on the types of guns and gun related evidence to be searched for should render the warrant invalid. Nothing in the Fourth Amendment requires that a search be conducted as broadly as possible.

"In any event, we need not decide finally whether the detective's error rendered the warrant invalid and the search unlawful. Instead, we hold that, assuming the warrant was invalid, the nature, effect, and cause of this particular type of assumed invalidity are such as to render the exclusionary rule inapplicable.

"The exclusionary rule does not exist to punish such negligent, harmless mistakes by law enforcement. Similarly, our holding gives no other officer any incentive to describe inaccurately a crime for which there is probable cause so as to obtain a warrant that casts no more broadly than would a properly targeted warrant. In short, were we to invoke the exclusionary rule in this case, we would neither deter culpable conduct nor reduce the incidence of intrusions that should not occur. Exclusion of the evidence found in such a case would therefore impose a price on the justice system in return for no meaningful gain in deterring the occurrence of searches that should not be conducted.

"The facts described in the affidavit provide probable cause to believe that a crime involving gun use had occurred, and that some evidence related to that crime was in 'Ness's' apartment.

"For these reasons, we agree with the district court that, assuming the invalidity of the warrant, the good-faith exception to the exclusionary rule applied to the evidence found in the apartment."

SEARCH AND SEIZURE: Arrest in Home; Knock and Announce; Exclusionary Rule
United States v. Weaver, DCC, 9/4/15

Federal agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives began investigating Michael Weaver in 2008, when he came to their attention during the course of a drug-related investigation targeting a different

suspect. As part of their investigation into Weaver, the agents searched through trash outside his home and found marijuana. They also learned from the target of the first investigation that Weaver had sold drugs for more than a year and trafficked in significant quantities of marijuana.

The agents executed a warrant to search Weaver's residence in late 2009 and discovered more than 500 grams of marijuana $38,000 in cash, and drug packaging materials. The agents also reviewed Weaver's bank records and identified regular, unexplained cash deposits and a balance of more than $100,000 from unknown sources.

In April 2010, the agents relied on that information to obtain a warrant for Weaver's arrest. Prosecutors indicted Weaver on 52 separate counts, including possession with intent to distribute marijuana and money laundering. The government was unable to apprehend Weaver until 2012, when the agents learned the location of his new residence.

After arriving at Weaver's building, the agents knocked on his apartment door twice. There was no answer, but the agents heard movement inside. They were not concerned that Weaver would flee out a window because the apartment was on a high floor. Less than a minute later, the agents announced "police" and immediately used a key they had obtained from the building's concierge to unlock the door. They did not inform Weaver that they had a warrant to arrest him.

As the agents attempted to open the door, someone inside tried to hold the door closed. The officers were able to push the door open, and, after a brief struggle, they subdued Weaver, arrested him, and removed him from the apartment. In the course of arresting Weaver, the officers smelled marijuana. One of the officers testified that as soon as he "came in" and "looked to the left" or "turned left" toward the kitchen, he observed "bags of marijuana" on the counter. Based on those observations, the officers obtained a search warrant for the apartment and found several kilograms of marijuana, two tablets of oxycodone, a bag of the drug methylenexdioxymethcathinone (commonly referred to as MDMC, or bath salts), and nearly $10,000 in cash. The government then charged Weaver with three additional counts: one count of possession with intent to distribute marijuana and two counts of possession of a controlled substance.

At trial, Weaver moved to suppress the evidence seized during the 2012 search of his apartment. He contended that the warrant authorizing that search derived solely from the observations agents made while executing the arrest warrants, and that the agents were not legally authorized to be in his apartment when they made those observations because they had violated the knock-and-announce rule. Weaver further argued that *Hudson* did not preclude the application of the exclusionary rule to his case.

This appeal required the District of Columbia Court of Appeals to answer a

question left unresolved by the Supreme Court in *Hudson v. Michigan*, 547 U.S. 586 (2006): Whether the exclusionary rule is applicable when law enforcement officers violate the Fourth Amendment's knock-and-announce rule while executing a warrant to arrest a suspect found at home.

The Court found, in part, as follows:

"The knock-and-announce rule requires that, before officers executing a warrant enter a home, they knock on the door and announce their identity and purpose, and then wait a reasonable time before forcibly entering. In *Hudson*, the Supreme Court held that, when officers violate that rule in executing a search warrant, exclusion of the evidence they find is not an appropriate remedy. The Court reasoned that the officers would have discovered the evidence in any event when they went through the house under the authority of the valid search warrant. As the Court emphasized, the knock and-announce rule has never protected any interest in preventing the government from seeing or taking evidence described in a warrant. Where officers armed with a search warrant have a judicially-sanctioned prerogative to invade the privacy of the home, the knock-and-announce violation does not cause the seizure of the disputed evidence. In that context, the exclusionary remedy's significant costs outweigh its minimal privacy-shielding role, and its deterrent utility is not worth a lot.

"Unlike the officers in *Hudson*, who had a warrant to search the home, the officers here acted pursuant to a warrant to arrest a person. An arrest warrant reflects no judicial determination of grounds to search the home; rather, it evidences probable cause to believe that the arrestee has committed a crime, and authorizes his arrest wherever he might be found. If an arrestee is found away from home—at work, on the street, or at someone else's home—the privacy of his home remains inviolate. So, too, if an arrestee is not at home when officers seek him there, or if he comes to the door and makes himself available for arrest, the arrest warrant does not authorize officers to enter the home. Any prerogative an arrest warrant may confer to enter a home is thus narrow and highly contingent on the particular circumstances of the arrest.

"An individual subject to an arrest warrant accordingly retains a robust privacy interest in the home's interior. That privacy interest is protected by requiring law enforcement officers executing an arrest warrant to knock, announce their identity and purpose, and provide the arrestee with the opportunity to come to the door before they barge in. And, where evidence is obtained because officers violated the knock-and-announce rule in executing an arrest warrant at the arrestee's home, the exclusionary rule retains its remedial force. Under *Hudson*'s own analytic approach, then, exclusion of the evidence may be an appropriate remedy.

"Justice Kennedy took care to underscore in his separate opinion in *Hudson* that the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. He

provided the fifth vote for the majority opinion because the knock-and-announce violation before the court was not sufficiently related to the later discovery of evidence to justify suppression. The critical inquiry was there, as it is here, whether the knock-and announce violation could properly be described as having caused the discovery of evidence, and, if so, whether its costs outweigh its benefits. Where the requirement of causation that animates the exclusionary rule has not been obviated as it was by the search warrant in *Hudson*, and where the exclusionary rule retains remedial force to protect the core Fourth Amendment privacy interest in the home we consider it our duty to apply it.

"We thus analyze the factors the Court considered in *Hudson* to determine whether the exclusionary rule applies when the knock-and-announce rule is violated in the arrest warrant context. We consider whether the violation causes the seizure of evidence such that evidentiary suppression furthers the interests underlying the knock-and-announce rule, and whether the benefits of applying the exclusionary rule outweigh its costs. Examining those factors, we conclude that exclusion was the appropriate remedy here, where officers executing a warrant for defendant Michael Weaver's arrest sought him at home, violated the knock-and-announce rule, and discovered Weaver's marijuana upon their forced entry into Weaver's apartment. Accordingly, we reverse the district court's decision to the contrary."

SEARCH AND SEIZURE: Automobile Exception; Informants; Probable Cause

United States v. White
CA1, No. 14-2165, 10/20/15

In August 2012, a confidential informant ("CI") reported to MDEA Special Agent Seth Page ("Page") that White was a largescale cocaine distributor in the Portland, Maine area, and that the CI had purchased cocaine from White "many times" in the past. This information prompted Page to begin an investigation.

Working with Page, the CI completed two controlled purchases of cocaine from White. The first took place in August 2012, and the second took place several months later in December 2012. In both instances, White drove to a prearranged location where he met the CI, and the controlled purchase took place inside White's vehicle.

In early February 2013, the CI reported to Page that White was planning to "restock" his cocaine supply. This led Page to devise a scheme to stop and search White's vehicle. Page met with the CI on February 12, 2013, and at Page's instruction, the CI placed a call to White and ordered a "full" ounce of cocaine. In a recorded telephone conversation, White assured the CI that he would be leaving "pretty soon," and that he would "definitely bring [the full] out with me."

Prior to this recorded call, the CI had told Page that he believed White had restocked his supply of cocaine. Previously, Page had placed White's home in Falmouth, Maine under surveillance.

Approximately ten minutes after the call from the CI, MDEA agents stationed at White's home reported that White and his girlfriend were leaving the premises in his black Cadillac. In addition to placing White's home under surveillance, Page had also arranged with a Maine State Police Trooper, Adam Fillebrown, and a PPD Officer, Mark Keller, to be on standby.

Trooper Fillebrown was placed on standby with Aros, his drug sniffing canine partner. As White left his home, he was followed in unmarked cruisers by several MDEA agents, including Agents Jake Hall and Andrew Haggerty. Agent Hall observed as White drove down Auburn Street in Portland, and visually estimated that White was travelling at twenty to twenty-five miles per hour in a fifteen mile-per-hour school zone. Agent Hall relayed this information to Agent Haggerty, who then passed it on to PPD Officer Keller. Officer Keller, who was in a marked PPD cruiser, stopped White's vehicle on Stevens Avenue.

Although Officer Keller had been briefed on the investigation and the reasons for the traffic stop, he informed White only that he had been pulled over for speeding in a school zone. As Officer Keller initiated the traffic stop, Trooper Fillebrown was summoned to the scene, where he arrived some seven minutes later. As Fillebrown arrived, Officer Keller told White that Fillebrown was training a new drug-sniffing dog, and that the dog was going to conduct a sniff search of White's vehicle as a training exercise. Trooper Fillebrown led Aros on a series of passes around White's vehicle. On the fourth pass by the driver's side door, Aros alerted that he had located the scent of narcotics.

Once Aros had alerted, Officer Keller asked White and his girlfriend to exit the vehicle. He conducted a pat-down and search of White's pockets, where he found three one-ounce baggies of cocaine. Officer Keller then placed White under arrest. As he did so, Trooper Fillebrown conducted a search of the vehicle, where he discovered a gun in the driver's side door and approximately one pound of cocaine in a sealed package in the trunk.

After the traffic stop, Page completed a search warrant application for White's home in Falmouth. The warrant application was approved that day, and MDEA agents promptly began their search, locating some 3,300 grams of cocaine, several bags of marijuana, a handgun, cash, and assorted drug paraphernalia.

White was indicted on one count of possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1), and one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1).

During discovery, White requested that the government provide him with information about the Maine State Police's use of drug-sniffing dogs. Specifically, he asked for training and certification records for Trooper Fillebrown and Aros. He also asked for records and video recordings of previous sniff searches that Aros had conducted in the field, as well as training and certification records for a drug-sniffing dog named Caro, with whom Trooper Fillebrown had worked prior to Caro's retirement.

The government produced the training and certification records for Trooper Fillebrown and Aros, but refused to turn over information about Aros's prior sniff searches or Caro's training. The government took the position that the records of Aros's prior sniff searches contained sensitive information about ongoing investigations, and that the records of Caro's training were simply not relevant.

White filed a motion for discovery seeking to compel the government to disclose this evidence. He maintained that the information he sought was crucial to proving that Aros's sniff search was defective, and that officers therefore lacked probable cause to search his vehicle. In support of his motion, White submitted the affidavit of a canine expert, who opined that Aros's behavior during the traffic stop - particularly his need for multiple passes around the vehicle - was indicative of inadequate training and improper handler "cueing."

Pursuant to a report and recommendation issued by a magistrate judge, the district court denied White's motion for discovery. The district court reasoned that, pursuant to a then recent Supreme Court decision, Florida v. Harris, __ U.S. __, 133 S. Ct. 1050 (2013), the government was under no obligation to disclose the information regarding either Aros's prior searches or Caro's training. Later, White filed a motion to suppress. In relevant part, he argued that Officer Keller did not have probable cause to stop his vehicle, and that Aros's alert did not provide probable cause to search his car. Therefore, he argued, the evidence in the car and at his home had been obtained illegally as fruit of the poisonous tree.

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

"The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures in the absence of a warrant supported by probable cause. U.S. Constitution Amendment IV. Under the automobile exception, however, 'police officers may seize and search an automobile prior to obtaining a warrant where they have probable cause to believe that the automobile contains contraband.' *United States v. Silva*, 742 F.3d 1, 7 (1st Cir. 2014); see also *Florida v. White,* 526 U.S. 559, 563-64 (1999) (When federal officers have probable cause to believe that an automobile contains contraband, the Fourth Amendment does not require them to obtain a warrant prior to searching the car for and seizing the contraband.)

"Probable cause exists when the facts and circumstances as to which police have reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that evidence of a crime will be found. *Silva,* 742 F.3d at 7 (quoting *Robinson v. Cook*, 706 F.3d 25, 32 (1st Cir. 2013)); see also *Harris*, 133 S. Ct. at 1055 (A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present. The test for probable cause is not reducible to precise definition or quantification. *Harris*, 133 S. Ct. at 1055 (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). Rather, the standard is satisfied when the totality of the circumstances create a fair probability that evidence of a crime will be found in a particular place. *Silva,* 742 F.3d at 7 (quoting *United States v. Hicks,* 575 F.3d 130, 136 (1st Cir. 2009)). All that is required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act. *Harris,* 133 S. Ct. at 1055 (quoting *Illinois v. Gates*, 462 U.S. 213 (1983).

"Where, as here, the primary basis for a probable cause determination is information provided by a confidential informant, law enforcement must provide some information from which a court can credit the informant's credibility. In other words, a probable cause finding may be based on an informant's tip so long as the probability of a lying or inaccurate informer has been sufficiently reduced. *United States v. Greenburg,* 410 F.3d 63, 69 (1st Cir. 2005). The First Circuit has identified a non-exhaustive list of factors to examine in deciding on an informant's reliability: (1) the probable veracity and basis of knowledge of the informant; (2) whether an informant's statements reflect first-hand knowledge; (3) whether some or all of the informant's factual statements were corroborated wherever reasonable and practicable; and (4) whether a law enforcement officer assessed, from his professional standpoint, experience, and expertise, the probable significance of the informant's information.

"The district court found that the warrantless search and seizure of White's vehicle were justified by the automobile exception. The district court reasoned that the information gleaned from the CI and Page's subsequent investigation gave officers adequate probable cause to believe that White's car would contain evidence of drug dealing activity at the time of the traffic stop. The record soundly supports these conclusions.

"The investigation in this case began when the CI provided information to Page that White was a large-scale cocaine distributor in the Portland area. In his disclosures to Page, the CI evinced a significant basis for first-hand knowledge regarding White's activities. He reported, for example, that he had purchased cocaine from White "many times" in the past, and that White most frequently sold drugs from his vehicle. The CI also provided Page with White's home address.

"Subsequently, Page was able to corroborate much of the information

that the CI provided. For example, Page testified that he was able to confirm White's home address by cross-checking the information provided by the CI with a registry of motor vehicles database. Page also testified that, in addition to assisting in the White investigation, the CI provided information in another case that was later corroborated and used to further that investigation.

"Most significantly, Page corroborated the CI's tip that White sold drugs primarily from his vehicle. Page worked with the CI to execute two controlled purchases from White, the first taking place in August 2012, and the second taking place in December 2012. In both instances, the CI placed a call to White, requested a quantity of cocaine, and arranged a time and place to meet. Again, in both instances, White arrived in his car, the CI entered the car and completed the purchase, then exited. During the second purchase, White drove the same black Cadillac he would later be using at the time of his arrest.

"Page testified that, in early February 2013, the CI informed him that White was planning to 'restock' his cocaine supply. This prompted Page to devise the operation that eventually resulted in the stop of White's vehicle. On February 12, Page met with the CI and directed him to call White and to order a 'full' ounce of cocaine. In a recorded call, the CI placed the order, and White assured him that he would be leaving his house 'pretty soon,' and would 'definitely bring [the full] out with me.' Some ten minutes later, agents stationed at White's home observed him leaving in his Cadillac. Prior to the recorded call, the CI told Page that he believed White had restocked his supply of cocaine.

"Viewing these facts and circumstances in their totality, we conclude that, at the time of the traffic stop, officers had ample reason to believe that White was en route to conduct a sale of cocaine, and that a search of his vehicle would yield evidence of drug dealing activity. Therefore, pursuant to the automobile exception, officers had probable cause to stop and search White's vehicle, including the passenger compartment and the trunk. See *United States v. Polanco*, 634 F.3d 39, 42 (1st Cir. 2011) (The automobile exception provides that if there is probable cause to believe a vehicle contains evidence of criminal activity, agents can search without a warrant any area of the vehicle in which the evidence might be found.) (quoting *Arizona v. Gant*, 556 U.S 332, 347 (2009))."

SEARCH AND SEIZURE:
Cellular Site Location Information

United States v. Graham, CA4, No. 12-4659, 8/5/15 and *United States v. Jordan*, CA4, No. 12-4825, 8/5/15

In these cases, prosecutions arose from a series of six armed robberies of several business establishments located in Baltimore City and Baltimore County, Maryland.

The government sought cell phone information from Sprint/Nextel, the service provider for the two phones

recovered from the defendants. The government used a court order to obtain from Sprint/Nextel records.

The Court of Appeals for the Fourth Circuit decided that the testimonial and documentary evidence relating to cell site location information (CSLI) should have been obtained from the provider by search warrant. They concluded that the government's warrantless procurement of the CSLI was an unreasonable search in violation of Appellants' Fourth Amendment rights.

"Nevertheless, because the government relied in good faith on court orders issued in accordance with Title II of the Electronic Communications Privacy Act, or the Stored Communications Act ("SCA"), we hold the court's admission of the challenged evidence must be sustained."

SEARCH AND SEIZURE: Cellular Site Location Information

Commonwealth v. Estabrook
No. SJC-11833, 9/28/15

In this case, the Massachusetts Supreme Court dealt with the issue of Cellular Site Location Information (CSLI). The Court, applying Massachusetts law, held that, assuming compliance with the requirements of 18 U.S.C. § 2703, the Commonwealth may obtain historical Cellular Site Location Information (CSLI) by court order for a period of six hours or less relating to an identified person's cellular telephone from the cellular service provider without obtaining a search warrant, because such a request does not violate the person's constitutionally protected expectation of privacy. If the request is for more than six hours of CSLI, a search warrant is required to obtain the information.

SEARCH AND SEIZURE: Cellular Telephone Search; Connection Between the Telephone and the Homicide

Johnson v. State, No. CR-15-174,
2015 Ark. 387, 10/29/15

James Johnson III was convicted of capital murder and sentenced to life imprisonment without the possibility of parole. Johnson's appeal arises from the death of Charles Gaskins during the course of an aggravated robbery in Little Rock on July 30, 2012.

Johnson contended, as he does on appeal, that the circuit court erred in denying the motion to suppress because the affidavit in support of the search warrant does not provide a nexus between the phone and the homicide. The search revealed the following text message on Johnson's phone: "So ima go my own route if they ketch me on this here charge im gone fa life." The search also revealed that Johnson's phone had accessed a news article regarding the homicide entitled "Witness says fiancé fought masked man on porch, died."

The Arkansas Supreme Court stated that the record reflects that, on August 1, 2012, the phone was seized and held in custody for almost two years. On June 30, 2014, a search warrant for the phone's contents

was issued, and the warrant was returned to district court on July 14, 2014. Detective Kevin Simpson's affidavit in this case reveals the following facts relevant to probable cause:

• On July 30, 2012, at approximately 12:31 a.m., a shooting and homicide occurred at 9500 South Heights #203.

• LRPD officers responded to the scene, determined Gaskins to be deceased, and initiated an investigation.

• On July 30, 2012, LRPD homicide detectives received information identifying Johnson and Davis as suspects in the homicide.

• On July 30, 2012, LRPD located Johnson and Davis, the two men were detained in a traffic stop, arrested and taken into custody.

• On July 30, 2012, during Johnson's arrest for capital murder, a black Cricket ZTE phone in a red case with a black rubber cover was located on Johnson. Detective Simpson believes that said phone contains possible evidence regarding the Gaskins homicide at 9500 South Heights #203. The phone was seized and stored in evidence.

• On July 30, 2012, Davis and Johnson were transported to LRPD for further investigation.

• Once at the LRPD homicide office, Davis was advised and waived his *Miranda* rights and gave a taped statement implicating himself and Johnson in the Gaskins homicide.

Johnson contends that the affidavit was deficient and the circuit court erred because "the affidavit does not provide any nexus between the phone and the homicide. There are no facts included in the warrant to justify any reasonable belief that the phone contains evidence of the murder of Charles Gaskins."

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

"We disagree. The record demonstrates that Detective Simpson's affidavit creates a nexus between the homicide and the phone. First, the affidavit established that the victim had been shot and that two men were identified as suspects in the homicide. The affidavit also established that Johnson was one of the two suspects. Second, upon arrest for capital murder, approximately twenty-hours after the homicide, the phone was found on Johnson and seized and secured. Third, the affidavit established that after Johnson and Davis were arrested, during questioning at the police station, Davis implicated himself and Johnson in the homicide.

"Here, because Johnson was working with at least one other person when the homicide was committed, it is reasonable to infer that the cell phone that was in his possession was used to communicate with others regarding the shootings before, during, or after they occurred. Further, because the confidential

informant relayed information about Johnson's involvement in the homicide to Detective Simpson on the same day that the homicide occurred, it is reasonable to infer that the cell phone in Johnson's possession at the time of his arrest was used to communicate with some third party regarding his involvement in the homicide. See *United States v. Gholston*, 993 F. Supp. 2d 704, 719 (E.D. Mich. 2014) (where codefendants were charged with robbery, the court denied codefendant Gholston's motion to suppress a search warrant of the data on his cell phone and explained that a search of a cell phone was likely to reveal evidence of communication of criminal activity involving multiple participants.).

"Based on these facts, it is reasonable to conclude that the phone may have been used as a communication device regarding the homicide. Accordingly, the record demonstrates that there was a nexus between the homicide and the phone. Further, the warrant is clear that the facts asserted in Detective Simpson's affidavit were the basis for the magistrate's finding of probable cause that evidence related to the Gaskins homicide would be located on the cell phone at issue.

"Based on the facts of this case, we are satisfied that there was adequate probable cause to issue the search warrant and that the resulting search was proper. Therefore, we find no error in the circuit court's denial of Johnson's motion to suppress, and we affirm the circuit court."

SEARCH AND SEIZURE:
Cellular Telephone; Particularity Requirement in Connection with Text Messages; Plain View

People v. Matthew James Herrera
2015 CO 60. No. 14SA281

In this appeal, the State of Colorado argues that evidence of text messages between Matthew Herrera and a juvenile girl named Faith W.1 were admissible under a warrant authorizing a search of his cellphone for indicia of ownership, and, in the alternative, under the plain view exception to the warrant requirement.

The Colorado Supreme Court disagreed, affirming the trial court's suppression order and finding, in part, as follows:

"Faith W.'s mother told police that she believed Herrera was having sexual interactions with her daughter. Soon thereafter, Detective Robert Dodd started texting Herrera posing as 'Stazi,' a fourteen-year-old girl. Eventually these texts led to Herrera's arrest, at which time police seized Herrera's cell phone.

"Detective Dodd applied for and received a search warrant for the phone. The warrant allowed a search of the phone for (1) texts sent between Herrera and 'Stazi,' (2) photographs sent between Herrera and 'Stazi' that were attached to text messages, and (3) indicia of ownership to show the phone belonged to Herrera.

"Pursuant to Detective Dodd's direction, Detective Patrick Slattery performed the search of the phone. The police

department's usual practice was to search a cellphone using the Cellebrite Device, which searches the memory of the phone and lets the officers download certain data—for instance, text messages or internet history. Herrera's phone, however, was not compatible with the Cellebrite Device. Detective Slattery therefore had to search the phone by hand and photograph what he found.

"Detective Slattery first went through the phone's standard text messages. Because the standard messages were arranged chronologically rather than by name, he had to scroll through all of the messages to find the entire conversation. He discovered several messages between 'Stazi' and Herrera sent from Detective Dodd's number.

"After going through all the standard text messages, he looked through the messages on the phone's Kik application. Kik is another method of sending messages—it simply sends them over the internet rather than the cellular network. The messages in Kik were organized by name. While scrolling to find more messages between Herrera and 'Stazi,' Detective Slattery found a text message folder identified by the name 'Faith Fallout' that contained messages from a phone number other than Detective Dodd's. Detective Slattery knew the victim's name in the underlying case was Faith W. and that she and Herrera had been communicating digitally. Suspecting 'Faith Fallout' was Faith W., Detective Slattery clicked on the name and found that it was the conversation between Faith W. and Herrera.

"Herrera was charged with one count of sexual assault on a child, one count of internet sexual exploitation of a child, and one count of internet luring of a child. Herrera filed a Motion to Suppress the texts between him and Faith W. found during Detective Slattery's search of the phone.

"At the suppression hearing, Detective Slattery testified that he was given Detective Dodd's cell phone number and that he searched for texts between Herrera and 'Stazi' associated with that number. Detective Slattery further testified that the 'Faith Fallout' folder was associated with a number other than Detective Dodd's, and that he believed that the messages contained in the folder belonged to the victim in this case, Faith W. Finally, Detective Dodd testified that there was no connection between his number and the number belonging to 'Faith Fallout.'

"The trial court granted the motion and suppressed the texts between 'Faith Fallout' and Herrera. The court found that Detective Slattery could not have reasonably concluded that the 'Faith Fallout' folder would contain messages from 'Stazi' because there was no link between that folder and Detective Dodd's number. The trial court thus concluded that Detective Slattery exceeded the scope of the warrant by clicking on the name to look at the messages. It also held that none of the exceptions to the warrant requirement applied.

"The warrant in this case authorized a search of Herrera's cellphone for text messages between Herrera and 'Stazi' as

well as for 'indicia of ownership.' The State contends that the warrant thus permitted a search of the text messages contained in the 'Faith Fallout' folder because any message found there would reveal Herrera as the owner of the phone. We believe this argument proves too much, as it would authorize a general search of the entire contents of the phone. Indeed, the State argue that any piece of data on the phone, including any text message on the phone, would have the possibility of revealing Herrera's ownership of the phone. This rationale transforms the warrant into a general warrant that fails to comply with the Fourth Amendment's particularity requirement.

"The State argues in the alternative that the texts contained in the 'Faith Fallout' folder could be searched under the plain view exception to the warrant requirement, which holds that officers need not 'close their eyes' to evidence of criminal activity in plain sight while they are conducting a lawful search. Here, it is argued that because Detective Slattery observed the 'Faith Fallout' folder while he was searching for the 'Stazi' texts, the folder could be opened and searched. We conclude, however, that the 'Faith Fallout' folder is analogous to a closed container that could not reasonably contain texts between 'Stazi' and Herrera, and that therefore the plain view exception does not apply."

SEARCH AND SEIZURE:
Cellular Telephone; Screen Saver Image

Sinclair v. State of Maryland,
Maryland Court of Appeals
No. 43-14, 7/27/15

In this case, Sinclair was charged with carjacking and related offenses, various firearms offenses, and possession of illicit drugs. The morning of trial, his attorney made an oral motion seeking to exclude evidence derived from a flip cell phone that was seized from Sinclair incident to his arrest. The primary evidence obtained from the cell phone was a screen saver image that matched the custom wheel rims of the stolen car. The circuit court denied the motion to suppress. After a jury trial, Sinclair was found guilty. The court of special appeals affirmed. Before the Court of Appeals, Sinclair relied on the U.S. Supreme Court's intervening decision in *Riley v. California* to argue that the arresting officer's review of photos on Sinclair's cell phone without a warrant was an unconstitutional search, and therefore, the evidence derived from the cell phone should have been suppressed.

The Maryland Court stated that a police officer who seizes a cell phone incident to a valid arrest may inspect and secure the cell phone, but may not search the data on the cell phone unless the officer secures a warrant or another exception to the warrant requirement, such as exigent circumstances, applies.

"When an officer seizes a flip phone incident to a lawful arrest, the officer

may view and photograph a screen saver image that is in plain view when the officer physically flips the phone open to inspect and secure the phone. But a warrant—or applicable exception to the warrant requirement—is necessary for the officer to view data in the phone that is not in plain view."

SEARCH AND SEIZURE: Consent Search; Scope of Consent

United States v. Rahman
CA6, No. 13-1586, 11/9/15

A building that housed the Café, other restaurants, and 10 apartments burned to the ground. The Cafe's owner, Feres Rahman, signed a consent form that allowed investigators to look for the "origin and cause" of the fire. Investigators performed a line search looking for a laptop and safe that Rahman told investigators were in the basement, but found neither. Based on the absence of the laptop, the presence of gasoline, and other evidence, investigators settled on arson as the cause of the fire.

Rahman was charged with arson and lying to investigators about the location of the laptop. He was acquitted of the arson counts, but convicted of providing false statements to the government.

The Seventh Circuit reversed, finding that evidence from the basement line search should have been suppressed as exceeding the scope of Rahman's consent.

"The investigators had already ruled out the basement as the origin of the fire when they conducted the search. Their only purpose was to find secondary and circumstantial evidence of arson, which exceeded the scope of Rahman's consent. There was insufficient evidence to prove him guilty of making false statements."

SEARCH AND SEIZURE: Curtilage; Dog Sniff

United States v. Burston
CA8, No. 14-3213, 11/23/15

On March 13, 2012, Officer John O'Brien informed Officer Al Fear, both of the Cedar Rapids Police Department, that there was potential drug use in an apartment in northeast Cedar Rapids. Burston was one of the residents in that apartment. Acting on this information, Officer Fear visited the eight unit apartment building with his drug-sniffing dog, Marco. Once there, Officer Fear released Marco off-leash to sniff the air alongside the front exterior wall of the west side of the apartment building. There are four exterior apartment doors located on the building's west side, including apartment 4 where Burston resided. His unit had a private entrance and window. A walkway led to his door from a sidewalk, but the walkway did not go directly to (or by) his window. Rather, Burston's window was approximately six feet from the walkway. A bush covered part of his window, and there was a space between the bush and the walkway, which was occupied by his cooking grill. Marco alerted to the presence of drugs six to ten inches from the window of Burston's apartment.

More specifically, Marco sat down next to the private window of Burston's apartment, past the bush that partially covered the window. Officer Fear remained six feet from the apartment. The area where Marco sniffed was not in an enclosed area. Nor was the public physically prevented from entering or looking at that area other than by the physical obstruction of the bush. Both parties presented photos into evidence showing a cooking grill between Burston's door and the space where Marco alerted to the presence of drugs. The photos also show the bush in front of Burston's window. Like Burston's apartment, the other apartments had their own door, exterior window, and grassy areas in front.

The same day Marco alerted outside Burston's window, Officer Fear submitted an application for a search warrant based on Marco's alert and Burston's criminal record. A state magistrate judge issued a search warrant. Six days later, Officers Fear and O'Brien, along with other officers, executed a search of Burston's apartment. The officers found four rifles, ammunition, and marijuana residue. Burston was arrested. Burston was later charged in an indictment for knowingly possessing firearms and ammunition as a felon and as an unlawful user of marijuana. Burston filed a timely motion to suppress on June 2, 2014, which relied on *Florida v. Jardines*, 133 S. Ct. 1409 (2013), to support his claim that the dog sniff was an illegal warrantless search.

Burston first argues the district court erred because the dog sniff violated his Fourth Amendment rights pursuant to *Jardines*; the drug-sniffing dog entered the curtilage of Burston's residence and the officers did not previously obtain a search warrant. The government counters that, although the district court did not address the issue, the evidence should not be suppressed because the dog sniff was not an illegal search under *Jardines.* The government maintains that this case is distinct from *Jardines* and no Fourth Amendment violation occurred.

The Eighth Circuit Court of Appeals found, in part, as follows:

"In *Jardines*, the United States Supreme Court held that an officer's use of a drug-sniffing dog to investigate a home and its immediate surroundings is a 'search' under the Fourth Amendment. There, police officers permitted a dog to sniff for drugs on the defendant's front porch. The dog made a positive alert at the base of the front door. After determining the area where the officers searched constituted 'curtilage' protected by the Fourth Amendment and the officers had no license to intrude on that curtilage, the Supreme Court held the dog sniff was an unreasonable search in violation of the defendant's Fourth Amendment rights. The Supreme Court explained, 'We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes.'(quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). This Court clarified that determining whether a particular area is part of the curtilage of an individual's residence requires consideration of 'factors

that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.' *United States v. Bausby*, 720 F.3d 652, 656 (8th Cir. 2013) (quoting *United States v. Boyster*, 436 F.3d 986, 991 (8th Cir. 2006)). To resolve curtilage questions, four relevant factors are considered: 'the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.' (quoting *United States v. Dunn,* 480 U.S. 294, 301 (1987)).

"Here, the factors discussed in *Dunn* support a finding of curtilage. First, the area sniffed was in close proximity to Burston's apartment—six to ten inches. That area is 'immediately surrounding' his residence. We find the first *Dunn* factor to strongly support a finding that the lawn in front of the apartment window is curtilage. Second, the record contains photographic evidence that Burston made personal use of the area by setting up a cooking grill between the door and his window. Third, there was a bush planted in the area in front of the window, which partially covered the window. One function of the bush was likely to prevent close inspection of Burston's window by passersby. Consideration of the first, third, and fourth *Dunn* factors outweighs the one *Dunn* factor that arguably militates against finding the area to be part of the home's curtilage, i.e., the area was not surrounded by an enclosure. The bush, one could argue, served as a barrier to the area sniffed. Hence, we hold the area sniffed constituted the curtilage of Burston's apartment.

"In addition, the police officers did not have license for the physical invasion of Burston's curtilage. Because the police officers had no license to invade Burston's curtilage and the area Marco sniffed was within the curtilage of Burston's apartment, we hold the dog sniff was an illegal search in violation of Burston's Fourth Amendment rights under *Jardines*."

SEARCH AND SEIZURE:
Drug Interdiction; Movement of Luggage

United States v. Hill
CA 10, No. 14-2206, 11/9/15

Kelvin Hill boarded an east-bound Amtrak train in Los Angeles, California. The train stopped in Albuquerque, New Mexico, and was boarded by Agent Kevin Small of the Drug Enforcement Agency ("DEA") to conduct drug-interdiction activities. Small proceeded to a common luggage area, noticing a black and white "Coogi" brand suitcase with no name tag.

He removed the Coogi suitcase from the common luggage area; carried it to the passenger area; and rolled it down the center aisle of the coach, asking each passenger if the bag belonged to him. All passengers present in the coach, including Hill, denied ownership of the bag. Deeming it abandoned, Small searched the bag, finding a large quantity of cocaine and items of clothing linking the bag to Hill.

A grand jury charged Hill with possessing with intent to distribute at least 500 grams of cocaine. Hill moved to suppress, arguing that Small's taking the Coogi bag from the common storage area and moving it about the coach amounted to an illegal seizure, rendering defendant's subsequent abandonment of the bag legally invalid. The district court denied the motion.

Hill's appeal of the denial of his suppression motion framed a particularly narrow legal question for the Tenth Circuit's review: *Did Small's actions in removing defendant's bag from the train's common luggage area and carrying it through the coach as he questioned passengers constitute a seizure of the bag?* The Tenth Circuit answered in the affirmative: Small's actions amounted to a meaningful interference with Hill's possessory interests in the Coogi bag.

SEARCH AND SEIZURE:
Inventory of Vehicle's Air Filter Box
United States v. Ball
CA8, No. 15-1491, 10/29/15

Frolly Maurice Ball was arrested after the car in which he was a passenger was stopped by the Illinois state police. An inventory search of the car revealed approximately 1 kilogram of cocaine inside the air filter box in the engine compartment. The district court denied Ball's motion to suppress the evidence from the search. Ball entered a conditional guilty plea to one count of conspiracy to distribute heroin, cocaine, and crack cocaine, reserving his right to appeal the denial of his suppression motion.

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

"…law enforcement officers may conduct a warrantless search when taking custody of a vehicle to inventory the vehicle's contents 'in order to protect the owner's property, to protect the police against claims of lost or stolen property, and to protect the police from potential danger.' *United States v. Hartje*, 251 F.3d 771, 775 (8th Cir. 2001). Officers may not raise the inventory-search banner in an after-the-fact attempt to justify what was purely and simply a search for incriminating evidence, but they are permitted to keep their eyes open for potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime. *United States v. Beal*, 430 F.3d 950, 954 (8th Cir. 2005). An inventory search must be reasonable in light of the totality of the circumstances.

"Ball concedes that the police were permitted to perform an inventory search, but he argues that the method by which Officer Martinez conducted the search did not follow policy and that he made an investigatory search under the pretext of taking inventory. The district court found that Martinez complied with departmental policy in conducting the search, but Ball argues that opening the air filter box was beyond the scope of an inventory search which is restricted by the policy to areas where an owner or operator would ordinarily place or store property or equipment. The state police policy

explicitly states, however, that one vehicle area that should be searched is the engine compartment, and we have previously held that as part of an inventory search it is reasonable to search the engine compartment. *United States v. Pappas,* 452 F.3d 767, 772 (8th Cir. 2006).

"Officer Martinez's testimony also supports a finding that it was standard department procedure for searching an engine compartment to open the air filter box. Martinez testified that he had conducted over a thousand inventory searches of vehicles, that he always searches the engine compartment, and that at least 90% of the time he also checks the air filter box for property where he has previously found narcotics and currency. Opening the cover of the air filter box in Ball's vehicle required him to unsnap two small tabs, but not to remove any screws or panels. The record testimony was sufficient to establish that opening the air filter box was standard procedure for an inventory search by the Illinois state police. See *United States v. Le,* 474 F.3d 511, 515 (8th Cir. 2007). The district court therefore did not clearly err in finding that the search was made according to policy and thereby satisfied the reasonableness requirement of the Fourth Amendment.

"Nothing in the record supports Ball's contention that the inventory search conducted by Officer Martinez was pretextual. In fact, Ball does not dispute that an inventory search was required. We see no evidence that Officer Martinez acted in bad faith, see *United States v. Hall,* 497 F.3d 846, 852–53 (8th Cir. 2007), and conclude that the search of the car did not violate the Fourth Amendment. We therefore affirm the district court's denial of Ball's motion to suppress the cocaine."

SEARCH AND SEIZURE: Inventory Policy

United States v. Harris
CA8, No. 14-3234, 7/29/15

A Kansas City police officer stopped Harris for speeding. Before the stop, the officer saw him reaching below the driver's seat and center console. Approaching the car, the officer smelled marijuana, but could not determine the source. Harris was driving with a revoked license, so the officer arrested him.

The officer ordered Harris out of the car and found marijuana in Harris's wallet. Because the car was parked on the left shoulder of a highway, the officer called for a tow truck. He inventoried the car, discovering a loaded 9mm semi-automatic handgun under the driver's seat. Harris admitted he was a convicted felon, knew the gun was in the car, and had handled it before. Harris plead guilty to possessing a firearm, having been convicted of three previous violent felonies.

The Eighth Circuit affirmed denial of his motion to suppress. "Harris's car was towed pursuant to police policy. Police are not precluded from conducting inventory searches when they lawfully impound the vehicle of an individual that they also happen to suspect is involved in illegal activity, and, when police are conducting inventory searches according to standardized policies they may 'keep their eyes open.'"

SEARCH AND SEIZURE: Open Fields

United States v. Castleman
CA8, No. 14-3184, 8/5/15

Bob Sam Castleman was charged with conspiracy to manufacture methamphetamine, maintaining drug premises, and conspiracy to possess chemicals and equipment used to make methamphetamine. Some evidence came from a traffic stop in Walnut Ridge, Arkansas, and a later search of open fields on Castleman's property.

While there were numerous issues in this case, Castleman also appealed the district court's denial of his motion to suppress evidence obtained from searching tote and trash bags located on his property. The parties agree that these items were in an open field.

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

"Fourth Amendment protections for people in their persons, houses, papers, and effects do not extend to open fields, and individuals have no legitimate expectation that open fields will remain free from warrantless intrusion by government officers. *Oliver v. United States*, 466 U.S. 170, 176, 181 (1984). Police officers thus may enter and search an open field without a warrant.

"Although the trash bags and tote were visible in an open field, Castleman argues that the search of their *contents* nonetheless violated his Fourth Amendment rights. In order to have standing to challenge the search of these items, Castleman must have had a subjective expectation of privacy in these containers which was objectively reasonable. *United States v. Stallings*, 28 F.3d 58, 60 (8th Cir. 1994). Assuming that Castleman had a subjective expectation of privacy, the district court determined that this expectation was not objectively reasonable.

"In *Stallings*, the defendant had left a tote bag (zipped shut) in an open field. Nothing about the tote bag appeared suspicious, but officers found drug paraphernalia inside when they opened it. We determined that any expectation of privacy Stallings had was not objectively reasonable because animals, children, scavengers, snoops, and other members of the public had access to the tote bag and the defendant did not show he had sought to preserve the bag as private. A theoretical possibility that any such animals or persons could access the item was sufficient to make a defendant's expectation of privacy unreasonable. *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1242 (8th Cir. 1990).

"Castleman claims that *Stallings* is distinguishable because, unlike the defendant in that case, he owned the property and controlled access to it via a locked gate, fences, and signs posted at the boundaries. It is clear that the differences Castleman identifies did not create a legitimate expectation of privacy in the field itself.

"Property ownership and efforts to control access to the area are not enough to create an objectively reasonable expectation of privacy in open fields. Law enforcement

officers thus had the ability to access the open field where the tote and trash bags were found regardless of the gate, fences, and signs on Castleman's property. Other people could have also come across these items in the field. Open fields are as a practical matter accessible to the public and the police in ways that a home, an office, or commercial structure would not be and it is not generally true that fences or No Trespassing signs effectively bar the public from viewing open fields in rural areas. Since the gate, fences, and signs on the Castleman property did not afford him a reasonable expectation of privacy, they do not add significant support to his claim of a reasonable expectation of privacy in the tote and trash bags found on his property. Any differences between the open fields in this case and in Stallings are therefore not material.

"Moreover, the record here does not show that Castleman took steps to preserve the privacy of the trash bags and tote. As in Stallings, those items bore no indicia of ownership and Castleman put on no evidence of his possession or control of the bag,his historical use of the tote bag, or his ability or attempts to regulate access to it. These factors prevented a showing of an objectively reasonable expectation of privacy in Stallings despite the bag being left in an open field because the owner failed to show how he sought to preserve the tote bag as private. Here, Castleman has similarly not shown that he controlled, used, or attempted to restrict access to the tote and trash bags.

"Our decision in *United States v. Pennington*, 287 F.3d 739 (8th Cir. 2002) further supports the denial of Castleman's suppression motion. In *Pennington,* officers in an open field observed a ventilation pipe protruding from the ground and a wooden pallet covering an entryway to something underground. When they moved the pallet, they saw a ladder going down into a tunnel; inside the tunnel was equipment used to manufacture methamphetamine. We determined that a warrantless search of this underground bunker did not violate the Fourth Amendment given its location in an open field, its readily visible entryway with an unprotected ladder facilitating access to the tunnel, and no lock or door impeding access. Here, the trash bags and tote were visible in the open field and they were not inside any building or structure. Although the tote was covered with a lid, just as a wooden pallet covered the entrance to the bunker in Pennington, there was no lock or surrounding structure preventing anyone present in the field from opening it.

"Because Castleman did not show that any expectation of privacy he had in the trash bags and tote was objectively reasonable, the district court did not err in denying his motion to suppress evidence obtained from searching these items."

SEARCH AND SEIZURE: Probable Cause; Canine Reliability

United States v. Bentley
CA7, No. 13-2995, 7/28/15

In this case, the Court of Appeals for the Seventh Circuit discussed the issue of probable cause based on a dog's performance. The Court stated that a great many police departments rely on trained dogs to detect hidden drugs (or other substances, including explosives, blood, and human remains). Nagging questions remain, however, about the accuracy of the dog's performance, especially when a dog's alert provides the sole basis for a finding of probable cause to search or arrest someone.

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

"In Larry Bentley's case, a police officer initiated a traffic stop after observing Bentley's vehicle cross into another lane on an Illinois highway without signaling. After stopping Bentley, the officer decided to call for a drug-detection dog named Lex. Once on the scene, Lex alerted, and the officers found close to 15 kilograms of cocaine in the vehicle.

"But what if Lex alerts every time he is called upon? The fact that drugs are (or are not) found would have nothing to do with his behavior. That, in essence, is what Bentley is arguing here. The evidence Bentley was able to gather suggests that Lex is lucky the Canine Training Institute doesn't calculate class rank. If it did, Lex would have been at the bottom of his class.
"Nevertheless, in light of the Supreme Court's decision in *Florida v. Harris*, 133 S. Ct. 1050 (2013), which addressed the use of drug-detection dogs, we conclude that the district judge did not err when he decided that Lex's alert, along with the other evidence relating to the stop, was sufficient to support probable cause.

"The Court stated that an alert from an adequately trained and reliable dog is sufficient to give rise to a finding of probable cause. *United States v. Washburn,* 383 F.3d 638, 643 (7th Cir. 2004). The government conceded that the police lacked probable cause to search Bentley's vehicle if we disregard Lex's alert. In so doing, it may have acted too hastily: before Lex alerted, the police already knew that Bentley could not keep his story straight, that the spare tire was in an odd place, and that the search of Bentley's person (done with his permission) had turned up far more money than Bentley had admitted to having. If Bentley can show that Lex was not adequately trained and reliable, this would weaken the case for probable cause, but we nonetheless would need to con-sider the totality of the circumstances before finding that the search of the car was unconstitutional.

"In pressing his challenge to the dog's alert, Bentley makes two principal points. First, he contends that Lex's past performance in the field suggests he is particularly prone to false positives (*i.e.*, signaling to his handler that there are drugs in a vehicle when there are not). He has a point. Lex alerts 93% of the time he is called to do an open-air sniff of a vehicle, and Lex's overall accuracy rate in the field (*i.e.,* the number of times he

alerts and his human handler finds drugs) is not much better than a coin flip (59.5%). The Supreme Court, however, recently rejected a proposed rule that would have treated the dog's field record as a "gold standard." To the contrary, it said, the record is of 'relatively limited import.' *Florida v. Harris*, 133 S. Ct. 1050, 1056 (2013); see also *United States v. Funds in Amount of $100,120.00*, 730 F.3d 711, 724 (7th Cir. 2013) (recognizing that *Harris* changes the district judge's analysis). Instead, 'evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert.' *Harris*, 133 S. Ct. at 1057. In order to assess whether the police adequately trained their dog, the *Harris* Court instructed trial judges to hold a probable-cause hearing:

> *If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the re-liability of the dog overall or of a particular alert), then the court should weigh the competing evidence.*

Id. at 1058. The Court did not, however, suggest what weight courts should give to different types of evidence, nor did it offer any tie-breakers for district courts to use.

"The district judge dutifully followed the *Harris* Court's instructions: he let the government submit evidence about Lex's training. That evidence included the dog's success rates in controlled settings as well as testimony from the dog's handler and the training institute's founder. The judge also allowed Bentley to challenge those findings, to cross-examine the handler and the Canine Training Institute's (CTI) founder, and to put on his own expert witness. The judge then weighed all the evidence, decided to credit the government's experts over Bentley's, and decided that Lex's alert was reliable enough to support probable cause. Our review of a district court's choice between one version of the evidence and another is typically very deferential (even if experts are involved), and we are given no reason to deviate from that approach here.

"We acknowledge that Bentley put on a good case. He presented a fair amount of evidence that Lex was at the back of the pack. The head of CTI, the company that trained Lex, was embarrassed by Lex's 93% alert rate in the field: 'Well, I don't like to see that he indicated at that high of a rate.' He went on to testify (consistently with the government's theory) that the dog's rate is so high because there is embedded bias in his use: Lex is called only when the police already suspect that drugs may be present. He added, 'I understand that the way that they are actually deploying the dogs in Bloomington, not to do general interdiction but specifically when there is suspicion that made me feel more comfortable.' Bentley also brought out that long after the 2010 traffic stop, Lex was removed from the field for two weeks in April 2012 after he failed two simulated vehicle searches. Bentley rightly points out that Lex *is* smart. Shively testified that he

rewards Lex every time the dog alerts in the field. Presumably the dog knows he will get a 'giftee' (a rubber hose stuffed with a sock) *every* time he alerts. If Lex is motivated by the reward (behavior one would expect from any dog), he should alert every time. This giftee policy seems like a terrible way to promote accurate detection on the part of a service animal, lending credence to Bentley's argument that Lex's alert is more of a pretext for a search than an objective basis for probable cause.

"Even if we were to ignore *Harris* and focus on Lex's 59.5% field-accuracy rate, though, that rate is good enough to support a finding of his reliability and thus to allow his alert to constitute a significant piece of evidence supporting the ultimate conclusion of probable cause. In the past, we have concluded that a 62% success rate in the field is enough to prevail on a preponderance of evidence, and we have gone on to note that "'probable cause' is something less than a preponderance. *United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001) (citation omitted). Other circuits have accepted field detection rates less than Lex's 59.5%. See, *e.g.*, *United States v. Holleman*, 743 F.3d 1152, 1157 (8th Cir. 2014) (57%); *United States v. Green*, 740 F.3d 275, 283 (4th Cir. 2014) (43%). This should not become a race to the bottom, however. We hope and trust that the criminal justice establishment will work to improve the quality of training and the reliability of the animals they use, and we caution that a failure to do so can lead to suppression of evidence. We will look at all the circumstances in each case, as we must.

"Bentley's second argument that Lex is an unreliable source of probable cause hinges on the allegedly poor quality of the school that trained him and his handler. This argument cannot get off the ground. Bentley concedes that there are no national standards by which we can judge the training Lex received at CTI. Moreover, there is evidence in the record that CTI modeled its certification standards after the leading national associations in the field.

"The district judge did not err when he found Lex to be reliable for purposes of contributing to a probable cause determination based on his training records, his 59.5% field rate, and CTI's curriculum. Lex's mixed record is a matter of concern, but under *Harris*'s totality-of-the-circumstances test, we have no reason to override the district court's determination."

SEARCH AND SEIZURE:
Privacy Expectation; Magnetic Strips on Credit, Debit, and Gift Cards

United States v. Harvey
CA6, No. 14-5179, 7/24/15

In this case, the issue addressed whether an individual has a reasonable expectation of privacy in the magnetic strips on credit cards.

On May 23, 2013, Morristown Police Corporal Todd Davidson stopped a rental vehicle driven by Mamadou Bah for speeding in a construction zone. During the traffic stop, officers placed Bah under arrest for driving on a suspended

license and detained passenger Allan Harvey for "investigatory purposes" after discovering approximately 72 credit, debit, and gift cards in the rental car's glove compartment and trunk. Bah and Harvey filed motions to suppress evidence of the credit, debit, and gift cards found in the car in district court, alleging that the officers had violated their Fourth Amendment rights by scanning the magnetic strips on numerous credit, debit, and gift cards found inside the vehicle, without first obtaining a warrant.

At the police department, Special Agent Kevin Kimbrough of the Tennessee Highway Patrol, who had experience with identity theft investigations, was contacted. Kimbrough—also without a warrant—then used a magnetic card reader, or "skimmer," to read the information encoded on some of the magnetic strips of credit, debit and gift cards. A skimmer is a device similar to that used at gas stations, restaurants, and grocery stores to read the "magstripe," or magnetic strip, on cards. The magstripe of any credit, debit, or prepaid gift card typically contains limited, unique information an account number, bank identification number (the six-digit number that identifies a particular financial institution), the card expiration date, the three digit "CSC" code, and the cardholder's first and last name. With the exception of the bank identification number and a "few other additional, unique identifiers," the information stored on the magstripe mirrors that provided on the front and back of the card. The magstripe does not typically contain an individual's birth date, social security number, mailing address, blood type or other personal data. Because financial transactions may be conducted using only the data printed on the front and back of a card, accessing the information stored on the magstripe is not always necessary to make a charge. An encoding device is required to change, or re-encode, the data on a magstripe.

Upon scanning the cards, Kimbrough found that a "majority, if not all" of the magstripes had been re-encoded so that the financial information they contained did not match the information printed on the front and backs of the cards.

Upon review of this case, the Sixth Circuit Court of Appeals found as follows:

"Every court to have addressed this question has reached the same conclusion. Some courts have stressed that there can be no reasonable expectation of privacy in an account number—and consequently, magnetic strip—that is routinely shared with cashiers every time the card is used. For instance, in *United States v. Medina,* No. 09-20717-CR, 2009 WL 3669636 (S.D. Fla. Oct. 24, 2009) (rev'd on other grounds), the court emphasized that 'the credit card holder voluntarily turns over his credit card number every time he uses the card,' and then found that there is 'no expectation of privacy in that number.' The court in *United States v. Briere de L'Isle,* No. 4:14-CR-3089, 2014 U.S. Dist. LEXIS 151078 (D. Neb. Oct. 24, 2014), likewise suggested that society is not prepared to accept as legitimate an asserted privacy interest in information that any member of the public may see.

"Similar to a drug sniff alerting the handler only to the presence of narcotics—information about illegal activity—scanning credit and debit cards to read the information contained on the magnetic strips, when law enforcement already has physical possession of the cards, will disclose 'only the presence or absence of' illegal information: either the information disclosed is the same information on the outside of the credit and debit cards, or is information about a different account, used to commit credit card fraud. Such a limited investigatory technique to quickly and obviously provide information whether the payment form is being used criminally does not violate the Defendant's right to be secure in their person, house, papers, or effects. 943 F. Supp. 2d at 1271, 1273. The question presented here lies at an intersection between the principle that there is no legitimate privacy interest in already-known information, and no legitimate privacy interest in contraband. *Briere de L'Isle*, 2014 U.S. Dist. LEXIS 151078, at 9. In light of those principles, when law enforcement has lawful physical possession of the credit, debit and gift cards—as the officers did here—there is no separate privacy interest in the magnetic strip beyond that in the cards themselves."

SEARCH AND SEIZURE:
Search Incidental to Arrest
State of Washington vs. Antoine Lamont Brock, No. 90751-0, 9/3/15

The issue this case presented for the Washington Supreme Court's review was whether, under the State Constitution, an officer may search an arrestee's backpack as a search incident to arrest when the arrestee was wearing the backpack at the moment that he was stopped by police, but not at the time he was arrested several minutes later.

When Officer Erik Olson stopped and seized Antoine Brock, he had Brock remove the backpack he was wearing and placed it where Brock could not readily access it. After a period of questioning, the officer arrested Brock and then searched the backpack. Ten minutes elapsed between the time Olson separated Brock from his backpack and the arrest.

The trial court denied Brock's motion to suppress the evidence taken from the backpack. The Court of Appeals reversed. Under the facts of this case, the Washington Supreme Court held that the backpack was a part of Brock's person at the time of arrest and that the search was valid incident to arrest.

SEARCH AND SEIZURE: Traffic Stop; Reasonable Suspicion that Violation has Occurred

United States v. Diaz
CA2, No. 14-2505, 9/8/15

On the evening of November 19, 2013, Senior Police Officer Gordon Christopher Read of the Meridian Police Department in Meridian, Mississippi, was within that city patrolling Interstate Highway ("I-20")/Interstate Highway 59 ("I-59") in his police vehicle pursuant to his ordinary traffic-monitoring duties. Sometime between 8:15 and 8:30 p.m., Read received a telephone call from a United States Department of Homeland Security ("DHS") agent, who asked that Read assist with the stop of an 18-wheel tractor-trailer that DHS believed might be involved in narcotics trafficking. The agent explained that the vehicle would be red or white, bearing a "Triple K Logistics" or "Triple Y Logistics" logo and New York license plates. The agent indicated that he had information that the truck was about an hour-and-a-half away from Read's location. The agent did not describe his basis for thinking the truck might be involved in narcotics trafficking.

By about 10:45 p.m., Read noticed that more than one-and-a-half hours had elapsed and assumed that the DHS-identified vehicle had not passed him or that he had missed it. Read began driving eastbound on I-20/I-59, a four-lane highway with two lanes running in each direction, to resume his ordinary duties. As he drove in the right eastbound lane of I-20/I-59, Read approached a black 18-wheel tractor-trailer traveling in the same direction and lane. The truck did not match the description given by the DHS agent: It was solid black, not red or white, and bore New Jersey, not New York, license plates. According to Read, as he followed the truck over the course of about three miles, he saw the right rear wheels of the tractor-trailer "cross" the solid painted white line separating the right lane of traffic from the right shoulder of the road on two occasions. According to Wellington, the vehicle did not cross the line.

Read decided to stop the tractor-trailer because he thought that the two instances in which the tractor-trailer crossed the line constituted careless driving in violation of Mississippi state traffic law. Read activated his vehicle's flashing lights in a successful effort to effect a stop of the tractor-trailer. The activation of the lights also automatically initiated the police vehicle's audio and video recording system. The driver of the tractor-trailer, later identified as Wellington, pulled the vehicle to the side of the road. Read exited his vehicle and approached the passenger side window of the tractor-trailer. He asked Wellington to produce his driver's license, registration, and insurance information and to exit the vehicle and walk with him to the rear of the vehicle in the interests of safety. Wellington complied.

Read identified himself and explained that he was "making sure [Wellington] hadn't had anything to drink, [he wasn't] falling asleep or anything, or [hadn't] dropped [his] cell phone or something." Tr. Suppression H'rg, J.A. 46. Wellington responded that he had been looking in his

side mirrors. Read returned to his vehicle and checked Wellington's license and registration. The officer's research revealed that the license was valid and there were no outstanding warrants. Read also spoke with the passenger, Felipe. Meridian Police Department officers subsequently searched the tractor-trailer. According to the government, both Wellington and Felipe consented to this search; Wellington and Felipe deny that they did. The search yielded approximately five kilograms of heroin and four kilograms of cocaine, apparently recovered from behind a speaker in the rear wall of the truck's sleeping berth.

The district court determined that the police officer who conducted the stop lacked reasonable suspicion to conclude that a traffic violation had occurred under the relevant state law.

The Court of Appeals for the Second Circuit concluded that the officer's observation of several of the defendants' vehicle's wheels twice touching or crossing the solid painted line separating the right lane of the highway from the shoulder gave rise to reasonable suspicion that a traffic violation had occurred. Accordingly, the court reversed and remanded.

SEARCH AND SEIZURE:
Vehicle Search; Probable Cause

United States v. Charles
CA7, No. 14-1530, 9/14/15

Early one spring evening, a frightened woman called 911 to report an unfolding road-rage incident on Chicago's north side. The woman reported that she was in her car in a narrow alley when another driver blocked her exit, got out of his car, and was approaching her in a menacing manner, screaming obscenities. A moment later the woman called back and said the man was now violently pounding on her car window and had displayed a gun.

A Chicago police officer responded to the scene and saw a car parked at the entrance to the alley. The driver—later identified as Erick Charles—emerged from the car. He matched the caller's description of the man with the gun, so the officer detained and frisked him. Finding nothing, the officer searched the car and discovered a loaded handgun. Charles was indicted for possessing a firearm as a felon.

The Court of Appeals for the Seventh Circuit affirmed the judgment. The suppression motion was properly denied. The officer had probable cause to search Charles's car for a gun based on the 911 caller's report and his own observations at the scene. As such, the search was permissible under the automobile exception to the Fourth Amendment's warrant requirement.

SEARCH AND SEIZURE: Vehicle Stop; Color Different from Vehicle Registration

Officer Dustin Wiens of the Rogers Police Department ran the license plate on a 1992 Chevrolet Camaro. The license plate returned as being registered to a blue 1992 Chevrolet Camaro. Officer Wiens, observing that the vehicle was red, stopped the vehicle solely on the color discrepancy. The Circuit Court denied a motion to suppress drug evidence found in the vehicle following the stop. The Arkansas Court of Appeals affirmed that decision.

The Arkansas Supreme Court reversed that decision stating that there was not reasonable suspicion to stop the vehicle because of a difference in color from the registration. The Arkansas Supreme Court noted that there is no requirement that the owner of a vehicle report the color of a vehicle if it is repainted or the color otherwise altered. It is also not prohibited in Arkansas to replace portions of a vehicle's body with new body pieces that do not match the vehicle's original color.

The Court concluded that there was no evidence before the circuit court that a color discrepancy was indicative of any criminal activity that would possibly allow otherwise innocent behavior to give rise to a reasonable suspicion of criminal activity. Thus, the stop was not based on a reasonable suspicion that Jordan Arie Schneider was engaged in criminal activity, and the circuit court erred in denying his motion to suppress the evidence.

SEARCH AND SEIZURE: Vehicle Stop; License Plate Recognition System

United States v. Williams
CA8, No. 14-3532, 8/7/15

Officer Jennifer Hendricks of the St. Louis Metropolitan Police Department was driving her patrol car when its license plate recognition ("LPR") system gave an alert about a nearby car. The LPR system scans the license plates of cars that are within range of cameras mounted on the patrol car and can generate an alert if a scanned car is connected to a wanted person.

The alert showed Officer Hendricks that a man named Otis Hicks was associated with a nearby car and was wanted by the St. Louis County Police Department, a department that neighbors Hendricks's, for first-degree domestic assault. The alert also said that Hicks may be armed and dangerous. The LPR alert did not explain how or when Hicks was associated with the car.

After pulling the car over, Officer Hendricks approached the driver's side and saw two men inside. She asked the driver for his license, which identified him as Otis Hicks. Officer Hendricks then waited for a second police officer to arrive. Upon arrival, Officer David Christensen asked the passenger, Williams, to get out of the car and present identification. According to Officer Christensen, Williams patted his waistband two times while getting out of the car and Williams's hands were shaking uncontrollably as he retrieved his identification. Officer Christensen handcuffed Williams

and conducted a pat-down search for weapons. Officer Christensen felt what he recognized to be a firearm and removed a handgun from Williams's waistband. After finding the handgun, Officer Christensen found a bag containing "a dark rock-like substance" in Williams's pocket that was later identified as heroin.

Williams argues that Officer Hendricks lacked reasonable suspicion to stop the car. According to Williams, because Officer Hendricks lacked reasonable suspicion to stop the car, the handgun and heroin were fruits of an illegal stop and should have been suppressed.

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

"Officer Hendricks relied upon the notice from the LPR system that: (1) Hicks was associated with a nearby car, (2) Hicks was wanted by the St. Louis County Police Department for first-degree domestic assault, and (3) Hicks may have been armed and dangerous. Williams nonetheless argues that Officer Hendricks did not have reasonable suspicion to conduct the traffic stop because a 'police officer who receives an alert from the LPR system has no way of knowing the extent of the person's relationship to the vehicle.' Williams and the Government seem to agree that there are no reported federal decisions that have specifically dealt with the use of an LPR system in the Fourth Amendment context. However, as we have held, if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information. *United States v. Farnell,* 701 F.3d 256 (8th Cir. 2012) Police officers may rely upon notice from another police department that a person or vehicle is wanted in connection with the investigation of a felony when making a *Terry* stop, even if the notice omits the specific articulable facts supporting reasonable suspicion. *United States v. Smith*, 648 F.3d 654 (8th Cir. 2011).

"We fail to see how the use of the LPR system makes any difference in this case. Williams does not cite any precedent holding that the mechanism through which an officer receives notice from another department matters for Fourth Amendment purposes. Indeed, the LPR system merely automates what could otherwise be accomplished by checking the license-plate number against a 'hot sheet' of numbers, inputting a given number into a patrol car's computer, or 'calling in' the number to the police station. Thus, we conclude that Officer Hendricks was entitled to 'rely upon notice from another police department,' she obtained by using a more automated process: the LPR system.

SUBSTANTIVE LAW: Introduction of a Controlled Substance into the Body of Another Person

Melissa McCann-Arms v. State of Arkansas, CR-15-124, 09/24/2015

After a jury trial, Melissa McCann Arms was convicted of the introduction of a controlled substance into the body of her newborn baby. The court of appeals affirmed. At issue on appeal was whether Defendant could be convicted of Arkansas Revised Statute 5-13-210 by otherwise introducing methamphetamine into her baby's system when the child was outside the womb but still attached to the placenta by the umbilical cord.

The Supreme Court reversed and dismissed, holding (1) the phrase "otherwise introduced" must be interpreted to refer to an active process and not to passive bodily processes that result in a mother's use of a drug entering her newborn child's system; and (2) therefore, her conviction cannot stand.