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CAPITAL MURDER AND KIDNAPPING

Lewis v. State, ASC, No. CR-16-413, 2017 Ark. 211, 6/8/17

Aaron Michael Lewis appeals an order of the Pulaski County Circuit Court convicting him of capital murder and kidnapping Beverly Carter, a real estate agent.

Carter's phone records indicated that she had placed a call to an unidentified cell phone number that was returned to TextMe, Inc., a company that assigns phone numbers and provides smartphone users with free text and voice messaging. Pursuant to an exigent circumstances request, TextMe provided a report to the Pulaski County Sheriff's Office stating that the unidentified number on Carter's phone belonged to Lowery, who lived in Jacksonville.

On September 28, 2014, Lieutenant Mark Swaggerty conducted surveillance on Lowery's home, where he observed Lewis get into a black Ford Fusion and drive away. Both Lewis and the vehicle matched a description of a person and a car seen at the Scott residence when Carter was present. Lieutenant Swaggerty followed Lewis for approximately three miles. As Lewis drove around a curve, he lost control of the vehicle and crashed into a ditch. Lewis's car landed on the passenger side in a concrete culvert. The lieutenant approached Lewis, who told the officer that he needed to go to the hospital. Emergency

personnel arrived and examined Lewis. When Lewis was inside the ambulance, Lieutenant Swaggerty asked for his telephone number. Lewis responded with a number that was one digit off from the number that was connected to the text messages received by the victim via the TextMe app. When the lieutenant asked Lewis a second time, he gave the correct number. The lieutenant then seized Lewis's phone. According to Swaggerty, Lewis had not been taken into custody at that time. EMTs transported Lewis to the hospital, but he left the hospital during testing that day without notifying any medical staff.

Lewis contends that the police officer illegally seized Lewis's phone as the product of an illegal encounter and that it should have been suppressed pursuant to Rule 2.2 of the Arkansas Rules of Criminal Procedure.

Upon review, the Arkansas Supreme Court found as follows:

"A non-seizure encounter pursuant to Rule 2.2 is permissible 'only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime.' *Stewart v. State*, 332 Ark. 138, 146, 964 S.W.2d 793, 797 (1998). This court has stated that the approach of a citizen pursuant to a police officer's investigative law-enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935 (1982). To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter.

"Here, the circuit court denied Lewis's motion to suppress, ruled that the officer's questioning was proper under Rule 2.2, and found that the cell phone had been properly seized pursuant Rule 10.2. Specifically, the circuit court provided the following rationale as the basis for its ruling:

> *Swaggerty was not approaching a random individual standing on a street corner 'in the wrong place at the wrong time.' There was a specific investigation going on in which the defendant was considered a person of interest. Furthermore, the defendant had been involved in a vehicle accident, and to suggest that the lieutenant's approach of the defendant, injured and climbing out of an upended vehicle, was analogous to stopping and requesting information of someone standing on the street is unconvincing. Knowing that an individual matching the defendant's description was seen in a vehicle matching the defendant's near the victim's vehicle around the time of her disappearance, Swaggerty also had reasonable suspicion to think that questioning the defendant might assist in the investigation or prevention of crime. The facts known to Swaggerty in the present case, combined with the absence of a custodial seizure or stop of the defendant, and the defendant's non-coerced volunteering of a phone number known to the investigators distinguishes*

it from any case cited by the defendant. Once Swaggerty had initiated law contact and questioning of the defendant under Rule 2.2, his seizure of the defendant's phone was proper under Arkansas Rule of Criminal Procedure 10.2, which states that 'evidence of other information except privileged information concerning the commission of a criminal offense or other violation of law' are subject to seizure.

"We agree with the circuit court's ruling. Swaggerty knew that Carter had been missing for three days. He knew that Lewis and his car matched the description of the man and vehicle seen at the home where Carter had disappeared. He also knew that the TextMe account had been registered to Lowery. After Lewis was involved in the car accident, the lieutenant approached him to determine whether he needed medical assistance and to inquire about his cell phone. The lieutenant's request that Lewis respond to questions about Carter's disappearance comports with the requirements of Rule 2.2. Thus, we hold that the circuit court properly denied his motion to suppress.

"For the second point on appeal, Lewis argues that the circuit court abused its discretion in admitting into evidence a recording of Carter's voice on his cell phone that Lewis played for law enforcement during his first custodial statement.

"The following facts are relevant to this court's analysis. The circuit court suppressed Lewis's first statement and found that Lewis had invoked his right to counsel before making his statement to police. During that statement, the officers provided Lewis with his cell phone that had been seized. To the interrogating officers, Lewis stated, *I'm gonna show you something. Show you something while you're sitting right there and while he's on the other side. Well, actually, I'll let you listen to something. Then, as soon as I let you listen to it, then you'll know that I'm serious, and I said that you're running out of time.*

"Lewis then played a recording of Carter's voice that was saved onto his cell phone. During the recording, the victim stated, *Carl, it's Beverly. I just want to let you know I'm okay. I haven't been hurt. Just do what he says, and please don't call the police. If you call the police, it could be bad. I just want you to know I love you very much.*

The circuit court suppressed Lewis's custodial statement, and Lewis later filed a motion to suppress the phone recording. Subsequently, the circuit court ruled that the recording would remain admissible. In its January 5, 2016, order, the circuit court stated,

A previous order suppressed various statements made by the defendant because the defendant had been questioned after he had expressed a desire to have an attorney present. The order did not suppress a statement allegedly made by the victim in the case, Beverly Carter, which the defendant had recorded on a cell phone and played to the investigators during the interrogation. The court reasoned, in light of United States v. Patane, 542 U.S. 630 (2004), that

> *introduction of the recording, though a result of illegal questioning, did not violate the defendant's Miranda rights. The recording of the victim was not testimonial, so under Patane, the court found that it violated neither his right to have an attorney present during interrogation nor the U.S. Constitution's right against self-incrimination.*

"In the case at bar, the circuit court relied on the holding of *Patane*, 542 U.S. 630, in denying Lewis's motion to suppress the recorded statement. The Eighth Circuit succinctly discussed the Supreme Court's holding in *Patane*:

> *In Patane, the defendant was lawfully arrested for violating a restraining order. After his arrest, a police officer attempted to read the defendant his Miranda rights, but was interrupted. Responding to a question by the police officer, the defendant admitted there was a firearm in his bedroom. The police officer seized the firearm. The Court held that although the defendant's statement about the location of the gun must be suppressed, the gun itself was admissible. In so doing, the Court announced a rule that the lack of a Miranda warning does not justify the suppression of the physical evidence seized pursuant to a search warrant derived from a voluntary 'un-warned' statement.*

"*United States v. Villa-Gonzalez*, 623 F.3d 526, 534–35 (8th Cir. 2010). Because the Arkansas constitution mirrors the federal constitution, and because this court has not been provided any reason why it should interpret the provisions differently, this court adopts the holding in *Patane*. In this instance, we conclude that the recording of the victim was not a testimonial statement made by Lewis and was admissible into evidence. Thus, we hold that the circuit court properly denied Lewis's motion to suppress the recorded statement.

"For the third point on appeal, Lewis argues that the circuit court erred in denying his motion to suppress certain evidence obtained through prosecutorial subpoenas.

"Prosecuting attorneys have an affirmative duty to investigate crime. *Gulley v. State*, 2012 Ark. 368, 423 S.W.3d 569. The prosecutor's power to subpoena must be used only for a prosecutor's investigation. *State v. Hamzy*, 288 Ark. 561, 709 S.W.2d 397 (1986). The police do not have the authority to issue subpoenas. Id., 709 S.W.2d 397. The prosecutor's power to subpoena must only be used as an investigatory tool and not as a tool for a police investigation. We will reverse a conviction when a prosecutor has abused his or her subpoena power, and the appellant has been prejudiced. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

"The circuit court, in support of its denial of Lewis's motion to suppress, cited *Hamzy*, 288 Ark. 561, 709 S.W.2d 397, for the proposition that Lewis did not have standing to challenge the subpoenas. In *Hamzy*, the police used a subpoena signed by a prosecutor to obtain information from a telephone company. We declared

that the information from the telephone company had been unlawfully seized because that information, in turn, was used to obtain warrants to search the defendants' homes. We then concluded the defendants had not suffered a Fourth Amendment violation because they had no standing to challenge the search because they did not have an expectation of privacy in the records of a telephone company.

"We agree with the circuit court's ruling to deny Lewis's motion to suppress because he did not have standing to challenge the subpoenas. Like the accused in *Hamzy*, Lewis cannot complain that the subpoenas violated his constitutional rights because those subpoenas were issued to third parties. For these reasons, we cannot say that the court erred in denying Lewis's motion to suppress.

"For the fourth point on appeal, Lewis contends that the circuit court erred in admitting Lewis's second custodial statement. Specifically, Lewis argues that the statement should have been suppressed because it was the involuntary product of false promises by law enforcement. The State responds that this argument is not preserved for appellate review, and alternatively, that any error in admitting the statement was harmless.

"The relevant facts are that the circuit court suppressed Lewis's first statement and denied Lewis's second statement because he reinitiated contact with law enforcement by requesting to speak to a federal agent. After speaking with FBI Special Agent Steve Burroughs, who assisted in interviewing Lewis, Lewis stated that he would 'throw in the towel' if he could be prosecuted in federal court. Burroughs stated that he would 'take the stuff' to the United States Attorney's Office but that he could not guarantee that Lewis would be prosecuted in federal court. Lewis stopped the interview and later stated, 'I want to talk to that FBI guy.' The officers returned with Lewis to the interview room, advised Lewis that his Miranda rights were still valid, and Lewis indicated that he understood. After some questioning, Lewis confessed that the victim's body 'was at Argos [the cement plant] in a mixer' and requested an attorney.

"Lewis contended in his motion to suppress that any statements taken during said custodial interrogation were the result of unauthorized promises of leniency by members of the arresting police agency, and are therefore involuntary and inadmissible for any purpose. Subsequently, the circuit court ruled:

> *The court finds that the introduction of any statements the defendant made after he invoked his right to counsel in the presence of Officer Roy would be a violation of his right to an attorney under Edwards v. Arizona, 451 U.S. 477 (1981). The court finds further that the defendant's yelling for the investigators to return was a voluntary re-initiation of communication with the investigators.*

"For the final point on appeal, Lewis argues that the circuit court erred in admitting certain items found in an

inventory search of Lewis's car. Lewis maintains that the police officers lacked good cause to impound his vehicle and that the purpose of the inventory search was to obtain evidence instead of to protect his property.

"In the case at bar, the circuit court found that as the investigators were left with no option other than to tow the vehicle, that initial inventory done at the scene was, therefore, legal. Where a vehicle storage report has been completed at an accident scene prior to towing, as was done here, those items in the inventory search are properly admitted as the result of an inventory search. We agree with the circuit court's ruling on this issue.

"Here, Lewis had wrecked his vehicle and had been transported to the hospital. Under these circumstances, the officers' policies mandated the impoundment of the vehicle and an inventory of its contents. It is permissible for an officer to impound and inventory a vehicle when the driver is physically unable to drive the car and when leaving it on the side of the road would create a safety hazard. *Thompson*, 333 Ark. 92, 966 S.W.2d 901. From an objective standpoint, the officer had a legitimate reason to impound the vehicle and inventory its contents. Further, the inventory search was conducted in accordance with the officers' established procedures. Thus, we hold that the inventory search was not an 'unreasonable search' under the Fourth Amendment, and we affirm the circuit court's ruling to deny Lewis's motion to suppress."

CIVIL LIABILITY:
Bivens Remedies Will Not Be Extended To Conditions of Confinement

Ziglar v. Abbvasi
USSC, No. 15-1358, 6/19/17

In the immediate aftermath of the September 11 terrorist attacks, the Federal Government ordered hundreds of illegal aliens to be taken into custody and held pending a determination whether a particular detainee had connections to terrorism. Respondents, six men of Arab or South Asian descent, were detained for periods of three to six months in a federal facility in Brooklyn. After their release, they were removed from the United States.

They then filed this putative class action against two groups of federal officials. The first group consisted of former Attorney General John Ashcroft, former Federal Bureau of Investigation Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar (Executive Officials). The second group consisted of the facility's warden and assistant warden Dennis Hasty and James Sherman (Wardens). Respondents sought damages for constitutional violations under the implied cause of action theory adopted in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 , alleging that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the Fifth Amendment; that petitioners did so because of their actual or apparent race, religion, or national origin, in

violation of the Fifth Amendment; that the Wardens subjected them to punitive strip searches, in violation of the Fourth and Fifth Amendments; and that the Wardens knowingly allowed the guards to abuse them, in violation of the Fifth Amendment. Respondents also brought a claim under 42 U. S. C. §1985(3), which forbids certain conspiracies to violate equal protection rights.

The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Second Circuit affirmed in most respects as to the Wardens but reversed as to the Executive Officials, reinstating respondents' claims and finding, in part, as follows:

"In 42 U.S.C. 1983, Congress provided a damages remedy for plaintiffs whose constitutional rights were violated by state officials. There was no corresponding remedy for constitutional violations by federal agents. In 1971, the Supreme Court recognized (in *Bivens v. Six Unknown Federal Narcotics Agents*) an implied damages action for violations of the Fourth Amendment's prohibition against unreasonable searches and seizures by federal agents. The Court later allowed Bivens-type remedies in Fifth Amendment gender-discrimination and Eighth Amendment Cruel and Unusual Punishments cases.

"The United States Supreme Court stated that Bivens will not be extended to a new context if there are 'special factors counseling hesitation in the absence of affirmative action by Congress.' To avoid interference with sensitive Executive Branch functions or any inquiry into national-security issues, a *Bivens* remedy should not be extended to the claims concerning confinement conditions."

CIVIL LIABILITY:
Inaction in the Face of Private Violence

Wilson-Trattner v. Campbell
CA7, No. 16-2509, 7/11/17

Jennifer Wilson-Trattner began dating Scott Roeger (then a deputy with the Hancock County Sherriff's Department) in 2010. By 2012, the couple's relationship had become combative. The allegations in this case center on four incidents that followed. First, on June 17, 2012, Roeger locked Wilson-Trattner out of her house by stealing her house key and reprogramming her garage door opener. When she called the police, officers from both Hancock County and another agency, the McCordsville, Indiana Police Department, responded. Lieutenant Jeff Rasche of Hancock County asked Roeger to return the key to Wilson-Trattner, but Roeger refused. Wilson-Trattner also showed Rasche a text message she had received from Roeger that said "you have f*&$%d with the wrong person," though Rasche did not find that message inappropriate. Rasche later told Wilson-Trattner "we can't help you; this is between you and him." He also instructed Roeger that, though Roeger's personal life is not typically a department issue, it becomes a department issue when Wilson-Trattner contacts the police. Rasche drafted an internal memorandum regarding this

incident, though no disciplinary action was taken against Roeger.

On June 29, 2012, Roeger became angry after learning that Wilson-Trattner had made plans on his night off. He yelled at her, threw her against a wall and choked her to the point she couldn't speak. Wilson-Trattner wanted to avoid an official police response, so she called an officer she believed to be off duty to get Roeger out of her house. That officer then called his supervisor and four or five officers ultimately arrived at Wilson-Trattner's home from both the Hancock County and McCordsville departments. They first spoke with Roeger downstairs, who told them that Wilson-Trattner had hit him and that he pushed her away to defend himself. They then met with Wilson-Trattner, who was upstairs in her bedroom, and told her that she could go to jail based on what Roeger had said. Wilson-Trattner felt intimidated and was too scared to fully provide her side of the story. Rather, she denied Roeger's account, stated that she did not hit Roeger until he slammed her head into the wall and declined to talk further. A McCordsville officer encouraged her to speak when she was ready to do so and left her with a domestic violence handout and a business card.

Following this incident, Hancock County Deputy Jarrod Bradbury drafted a memorandum to Captain Bobby Campbell, which stated that Roeger had been ordered to not return to Wilson-Trattner's house or contact her. Hancock County Sheriff Mike Shepherd also assigned Detective Ted Munden to draft a report. Munden spoke with Wilson-Trattner, but she was unwilling to discuss the incident and said that she did not want Roeger to get in trouble. Munden also interviewed Roeger, who said that he had acted in self-defense. Munden concluded that Roeger had violated departmental regulations, though did not specifically recommend any personnel action. While Munden delivered his report to Shepherd on or before July 23, 2012, Shepherd does not remember receiving it. He later found it in a filing cabinet, though does not recall putting it there.

On July 8, 2013, Roeger became angry after seeing Wilson-Trattner get a phone call from another man. He sent that man and Wilson-Trattner numerous lewd and threatening text messages, including sexually explicit photos and videos of Wilson-Trattner. He also told Wilson-Trattner that she had "f*&%$d with the wrong person" and wished she would die. This prompted Wilson-Trattner to file a formal complaint with Campbell. Campbell said he did not see anything threatening about the text messages, that he was "sick of dealing with this shit" and that she "shouldn't call [Hancock County] for this personal shit." He then advised her to obtain a protective order. There is no evidence that she ever did so. Campbell also told Roeger that his conduct was inappropriate and instructed him not to contact Wilson-Trattner. Campbell initiated an internal investigation, though says he misplaced the investigation paperwork in the trunk of his car. He never delivered the findings of his investigation to Shepherd.

Things culminated on October 6, 2013, when Roeger broke into Wilson-Trattner's house while he was extremely intoxicated. When Wilson-Trattner confronted him, he pushed her out of the way. He then saw a male friend of Wilson-Trattner's and became enraged. He screamed and punched a hole in a door and knocked three pictures off of the wall. He left the house briefly, only to return and threaten Wilson-Trattner and her friend. Wilson-Trattner's friend then called 911 and Roeger left before the police arrived. Hancock County Deputy Gary Achor responded and told Wilson-Trattner "we're sick of getting these calls from you" and "if you keep crying wolf, we're just going to stop responding." The McCordsville Department subsequently arrested Roeger. He pled guilty to criminal charges and resigned from the Hancock County Sherriff's Department following the initiation of termination proceedings against him.

Wilson-Trattner filed this lawsuit on June 27, 2014 against Roeger, Shepherd, Campbell and Munden, as well as Hancock County Officer Brad Burkhart. She alleged a substantive due process claim under 42 U.S.C. § 1983, a failure to train claim under 42 U.S.C. § 1983 and an intentional infliction of emotional distress claim under Indiana law. Each of these is based on allegations that officers of the Hancock County, Indiana Sherriff's Department improperly responded to the Plaintiff's complaints of domestic abuse.

The district court granted judgment in favor of the defendants and the Sixth Circuit Court of Appeals affirmed that judgment, stating "Roeger was not serving as a state actor in his interactions with Wilson-Trattner. None of the defendants' conduct was sufficiently outrageous to give rise to a cognizable claim; there was no evidence that they created or increased a danger to Wilson-Trattner. Mere indifference or inaction in the face of private violence cannot support a substantive due process claim."

CIVIL LIABILITY: Photographing or Videotaping Law Enforcement

Fields v. City of Philadelphia
CA3, No. 16-1650, 7/7/17

Amanda Geraci, part of a police watchdog group, attended an anti-fracking protest at the Philadelphia Convention Center, carrying her camera and a pink bandana that identified her as a legal observer. When the police acted to arrest a protestor, Geraci moved to record the arrest without interfering. An officer pinned Geraci against a pillar for a few minutes, preventing her from observing or recording the arrest. Richard Fields, a Temple University sophomore, was on a public sidewalk where he observed officers across the street breaking up a party. He took a photograph. An officer ordered him to leave. Fields refused; the officer arrested him, confiscated and searched Fields' phone, and opened several photos. The officer released Fields with a citation for "Obstructing Highway and Other Public Passages." The charge was later withdrawn.

Fields and Geraci brought 42 U.S.C. 1983 claims, alleging First Amendment

retaliation. Although the Police Department's official policies recognized their First Amendment right, the district court granted the defendants summary judgment on those claims, finding no evidence that plaintiffs' "conduct may be construed as expression of a belief or criticism of police activity."

The Third Circuit reversed finding, in part, as follows:

"…In 1991, George Holliday recorded video of the Los Angeles Police Department officers beating Rodney King and submitted it to the local news. Filming police on the job was rare then but common now. With advances in technology and the widespread ownership of smartphones, 'civilian recording of police officers is ubiquitous.' Jocelyn Simonson, Copwatching, 104 Cal. L. Rev. 391, 408 (2016); see Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 337 (2011). These recordings have both exposed police misconduct and exonerated officers from errant charges. However, despite the growing frequency of private citizens recording police activity and its importance to all involved, some jurisdictions have attempted to regulate the extent of this practice. Individuals making recordings have also faced retaliation by officers, such as arrests on false criminal charges and even violence.

"This case involves retaliation. Richard Fields and Amanda Geraci attempted to record Philadelphia police officers carrying out official duties in public and were retaliated against even though the Philadelphia Police Department's official policies recognized that private individuals have a First Amendment right to observe and record police officers engaged in the public discharge of their duties. No party contested the existence of the First Amendment right. Yet the District Court concluded that neither Plaintiff had engaged in First Amendment activity because the conduct—the act of recording—was not sufficiently expressive. However, this case is not about whether Plaintiffs expressed themselves through conduct. It is whether they have a First Amendment right of access to information about how our public servants operate in public.

"Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public. See *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). Today we join this growing consensus. Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.

"The First Amendment protects the public's right of access to information about their officials' public activities.

It goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. *First Nat'l. Bank of Bos. v. Bellotti,* 435 U.S. 765, 783 (1978). Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983)); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (recognizing the paramount public interest in a free flow of information to the people concerning public officials, their servants).

"To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately. Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media. Accordingly, recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public. See *PG Publ'g. Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

"Bystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture. Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public. See Nat'l Police Accountability Project *Amicus* Br. 7 (noting that a recent survey of 50 major police departments' policies on body cameras revealed that many policies either failed to make clear when officers must turn on their body cameras, gave officers too much discretion when to record, or failed to require explanations when officers did not record.)

"The public's creation of this content also complements the role of the news media. Indeed, citizens' gathering and disseminating newsworthy information occur with an ease that rivals that of the traditional news media. 2012 U.S. D.O.J. Letter to Baltimore Police Department; J.A. 1684. See also *Glik*, 655 F.3d at 78 ('The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.') In addition to complementing the role of the traditional press, private recordings have improved professional reporting, as video content generated by witnesses and bystanders has become a common component of news programming. The Reporters Committee for Freedom of the Press and 31 Media Organizations *Amicus* Br. 11. (Today, the first source of information from the scene of a newsworthy event is frequently an ordinary citizen with a smart phone.) And the inclusion of bystander video enriches the stories

journalists tell, routinely adding a distinct, first-person perspective to news coverage.

"Moreover, the proliferation of bystander videos has spurred action at all levels of government to address police misconduct and to protect civil rights. See Nat'l Police Accountability Proj. *Amicus* Br. 1. These videos have helped police departments identify and discipline problem officers. They have also assisted civil rights investigations and aided in the Department of Justice's work with local police departments. And just the act of recording, regardless what is recorded, may improve policing. See *Glik*, 655 F.3d at 82-83. Important to police is that these recordings help them carry out their work. They, every bit as much as we, are concerned with gathering facts that support further investigation or confirm a dead-end. And of particular personal concern to police is that bystander recordings can 'exonerate an officer charged with wrongdoing.' *Turner*, 848 F.3d at 689.

"We do not say that all recording is protected or desirable. The right to record police is not absolute. It is subject to reasonable time, place, and manner restrictions. *Kelly*, 622 F.3d at 262. But in public places these restrictions are restrained.

"We need not, however, address at length the limits of this constitutional right. Defendants offer nothing to justify their actions. Fields took a photograph across the street from where the police were breaking up a party. Geraci moved to a vantage point where she could record a protestor's arrest, but did so without getting in the officers' way. If a person's recording interferes with police activity, that activity might not be protected. For instance, recording a police conversation with a confidential informant may interfere with an investigation and put a life at stake. But here there are no countervailing concerns.

"In sum, under the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas."

CIVIL LIABILITY: Strip Searches

Sumpter v. Wayne County
CA6, No. 16-2102, 8/18/17

Amanda Sumpter spent a month in the Wayne County Jail in Detroit and underwent four strip searches that she alleges violated her Fourth Amendment rights. Three searches occurred in the jail's Registry, where inmates are routinely strip-searched when first arriving or returning to jail. Corporal Graham conducted the three Registry searches; no male deputies were present. Each time, Graham escorted Sumpter into the Registry with as many as five other women. The room's window was covered, preventing anyone outside the Registry from observing the searches. Inside, Graham instructed the inmates to undress and to shake their hair, open their mouths, lift their breasts, and squat and cough, while Graham visually inspected for hidden contraband.

The fourth search occurred in Sumpter's cellblock. After searching the cells for contraband, an unidentified female guard gathered the inmates in the common area and conducted a group strip search. According to Sumpter, the strip search took place in view of the guards' central command post inside the cellblock, called the "Bubble." During this search, Sumpter purportedly saw male guards inside the Bubble.

The Sixth Circuit affirmed the summary judgment rejection of Sumpter's purported class action suit, stating: "Periodically conducting group strip searches when the number of inmates waiting to be processed makes individual searches imprudent does not violate clearly established Fourth Amendment law."

CIVIL LIABILITY:
Qualified Immunity; Deadly Force

Mitchell v. Schlabach
CA6, No. 16-1522, 7/19/17

The Alger County, Michigan dispatch center received a report that Tim Mitchell had assaulted "Kevin," had been drinking, and was "swerving all over the road." Officer Justin Schlabach identified Mitchell's car, followed it into a parking lot, and stopped alongside. Mitchell sped back onto the highway. Schlabach pursued Mitchell through residential neighborhoods, around cars, and through stop signs, often in excess of 100 miles per hour in pouring rain.

Minutes later, Mitchell ran his car into a ditch in a national forest. Schlabach parked 63.6 feet from Mitchell's car. Mitchell exited the car, looked toward Schlabach, then turned away and crouched toward the ground. Mitchell appeared to be unarmed. Schlabach drew his handgun and slowly approached Mitchell. Mitchell walked toward Schlabach with "clenched fists, wide eyes, coming directly towards me, refusing to listen to any of my direct commands." The dash-cam video did not clearly show Mitchell's facial expressions but left "little room to doubt the hostility of Mitchell's approach" even after Schlabach began backing away in fear. Mitchell pressed Schlabach all the way across the road. Schlabach fired a shot. Mitchell hunched over slightly but continued moving purposefully toward Schlabach. Schlabach fired again. Mitchell collapsed and died.

The Sixth Circuit affirmed summary judgment of qualified immunity in favor of Schlabach, noting that the confrontation took less than 20 seconds. The Court found, in part, as follows:

"Courts must make an 'allowance for the fact that police officers are often forced to make split-second judgments.'

"The doctrine of qualified immunity protects government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Miller v. Sanilac Cty.*, 606 F.3d 240, 247 (6th Cir. 2010) (quoting *Harlow v. Fitzgerald*,

457 U.S. 800, 818 (1982)). To determine if a defendant is entitled to qualified immunity, we ask two questions: First, viewing the facts in the light most favorable to the plaintiff, has the plaintiff shown that a constitutional violation has occurred? Second, was the right clearly established at the time of the violation? Government officials are protected by the doctrine of qualified immunity unless the answer to both questions is yes.

"We first ask whether, viewing the facts in the light most favorable to the Plaintiff, Schlabach's use of deadly force violated the Fourth Amendment's requirement of reasonableness. We hold that it did not.

"While the ultimate determination of reasonableness must be based on the totality of the circumstances, this court has repeatedly found three factors to be helpful in excessive force cases: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. We are admonished not to assess those factors from a distance, but rather to consider that 'police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.' (quoting *Graham v. Conner*, 490 U.S. at 386 (1989)).

"Mitchell's crimes were severe. He was first reported to the police for driving drunk after provoking an altercation with another individual. The severity of his crimes increased once Schlabach arrived on the scene. Mitchell immediately—and presumably still under the influence—began to flee from Schlabach. During the course of the ten-minute-long chase, Mitchell traveled through residential neighborhoods at dangerous speeds far exceeding posted limits and passed several vehicles on the highway at speeds in excess of 100 miles per hour. In doing so, Mitchell knowingly placed himself, Schlabach, and the public at risk of severe injury or death. Had Mitchell survived, he likely would have been charged with several serious crimes under Michigan law. Thus, we find that the severity factor weighs in favor of a finding of reasonableness.

"While it is beyond question that a police officer may not seize an unarmed, non-dangerous suspect by shooting him dead, it is also clear that Mitchell was something more than a non-dangerous suspect. The available evidence readily establishes that Schlabach reasonably believed that he was in danger of serious physical harm when he shot Mitchell. We therefore will not second-guess Schlabach's assessment, made on the scene, of the danger presented by Mitchell's approach. Accordingly, we find that the seriousness-of-the-threat factor also weighs in favor of a finding of reasonableness here.

"Finally, Mitchell was resisting arrest when he was shot. After crashing his car at the conclusion of a high-speed car chase, Mitchell began to charge an officer who was pointing a firearm at him. These circumstances alone support the conclusion that Mitchell was resisting

arrest. And while it is true that we cannot see Mitchell's facial expression as he approached or whether his fists were clenched, the only reasonable inference from the available evidence is that Mitchell did not intend to submit to arrest peacefully. Even drawing all available inferences in favor of the plaintiff, we conclude that Mitchell was actively resisting arrest at the time he was shot. Accordingly, the third factor also supports a finding of reasonableness here.

"The confrontation in this case was not a typical encounter between a police officer and a defiant suspect. Schlabach, the lone available officer at the time, shot Mitchell during a confrontation in the middle of an unpopulated national forest after Mitchell charged toward him in direct defiance of orders to drop to the ground. The extended, 100-mile-per-hour car chase in the rain that preceded the shooting would have heightened the heart rate, anxiety, and fear of any normal person, police officer or not. The available video evidence makes clear that Mitchell was close enough to pose a substantial threat to Schlabach's safety at the time he was shot. We hold that Schlabach did not violate Mitchell's right to be free from excessive force because his decision to shoot was reasonable under the totality of the circumstances.

"We also consider the second prong of the qualified immunity analysis: whether Schlabach's actions were contrary to 'clearly established' law at the time he acted. We hold that they were not.

"It is settled law that an unarmed defendant has a right not to be shot dead when he does not pose a risk of danger to police or the public. However, even viewing the facts in the light most favorable to the Plaintiff, we hold that the record evidence, including the video, show that Schlabach had probable cause to believe that Mitchell posed an immediate threat to his safety. The Plaintiff is unable to point to a case holding that it is unconstitutional for an officer to shoot a criminal suspect under similar circumstances. Since Schlabach did not violate any of Mitchell's 'clearly established' rights, the second prong of the qualified immunity analysis also supports our decision to affirm the district court's award of summary judgment."

EMPLOYMENT LAW: Drug Policy; Termination of Employment

City of Little Rock, Little Rock Civil Service Commission, and Little Rock Fire Department v. Muncy
ACA, No. CV-16-471,
2018 Ark. App. 412, 8/30/17

In 2012, the Little Rock Fire Department (LRFD) issued a policy memorandum declaring that any uniformed employee of the LRFD who tested positive for illegal or controlled drugs would be terminated. Specifically, the policy provided as follows:

> *Uniformed members of the Little Rock Fire Department can most easily describe this policy statement as the standard regarding the use of*

alcohol or illegal or controlled drugs. Illegal or controlled drugs include but are not limited to: anabolic steroids, amphetamines, barbiturates, benzodiazepine, metabolites, cocaine metabolite, methadone, methaqualone, opiates, PCP, propoxyphene and THC metabolite. This list is not all inclusive; employees may be screened for additional substances as determined by the Fire Chief and could include drugs designated as controlled substances in the Arkansas Criminal Code as may be amended from time to time.

A uniformed Little Rock Fire Department employee with a verified positive drug result confirmed by a Medical Review Officer (MRO) shall be terminated.

After the policy was issued, the LRFD developed a protocol for its implementation. Each month, the LRFD chooses seventeen employees at random to be drug-screened. The selected employees each provide a urine sample. On July 22, 2014, Muncy was randomly selected to be drug-tested. On the initial test, his urine sample was positive for amphetamine and methamphetamine. Because of the positive result, the LRFD followed its protocol and requested a confirmatory screening. Based on the results of Muncy's drug screen, the LRFD terminated his employment.

Muncy appealed his termination to the Commission, which voted to uphold Muncy's termination. Muncy then appealed the Commission's decision to the Pulaski County Circuit Court.

At the conclusion of the trial, the court ruled from the bench that Muncy's positive drug test was pretty obvious and it's conclusive. The court questioned, however, whether the situation was so severe that the zero tolerance policy is justified. The court stated that it understood the purpose of the policy, but given Muncy's history and good character, it concluded that the sanction of termination was too severe. The court therefore determined that a thirty-day suspension and demotion from the rank of apparatus engineer to that of firefighter would be appropriate.

The Arkansas Court of Appeals stated that the LRFD has the authority to govern and regulate its employees. The LRFD provided legitimate public-policy reasons behind its zero-tolerance policy on drug usage and the necessity for consistency in the application of that policy. Muncy, despite his good reputation, clearly violated the policy. The Court of Appeals reversed the circuit court's reversal of Muncy's termination.

FREEDOM OF SPEECH:
Restricting Access to Internet

Packingham v. North Carolina
USSC, No. 15-1194, 6/19/17

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking website where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages." N. C. Gen. Stat. Ann. §§14–202.5(a),

(e). The State of North Carolina has prosecuted over 1,000 people for violating this law, including Packingham, who was indicted after posting a statement on his personal Facebook profile about a positive experience in traffic court. The trial court denied Packingham's motion to dismiss the indictment on the ground that the law violated the First Amendment. He was convicted and given a suspended prison sentence. On appeal, the State Court of Appeals struck down the statute on First Amendment grounds, but the State Supreme Court reversed.

The United States Supreme Court held that the States may not prohibit a sex offender from accessing social media if they know that minor children may be members or have personal web pages on the site, since this law is unconstitutionally overly broad under the First Amendment and does not withstand strict scrutiny.

The Court stated, in part, as follows:

"…a fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers 'relatively unlimited, low-cost capacity for communication of all kinds,' *Reno v. American Civil Liberties Union*, 521 U. S. 844 , to users engaged in a wide array of protected First Amendment activity on any number of diverse topics. The Internet's forces and directions are so new, so protean, and so far reaching that courts must be conscious that what they say today may be obsolete tomorrow. Here, in one of the first cases the Court has taken to address the relationship between the First Amendment and the modern Internet, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

"Like other inventions heralded as advances in human progress, the Internet and social media will be exploited by the criminal mind. It is also clear that 'sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people,' *Ashcroft v. Free Speech Coalition*, 535 U. S. 234, and that a legislature 'may pass valid laws to protect children' and other sexual assault victims. However, the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections.' *Stanley v. Georgia*, 394 U. S. 557.

"Two assumptions are made in resolving this case. First, while the Court need not decide the statute's precise scope, it is enough to assume that the law applies to commonplace social networking sites like Facebook, LinkedIn, and Twitter. Second, the Court assumes that the First Amendment permits a State to enact specific, narrowly-tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.

"Even with these assumptions, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another on any subject that might come to mind. With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives.

"The State has not met its burden to show that this sweeping law is necessary or legitimate to serve its purpose of keeping convicted sex offenders away from vulnerable victims. No case or holding of this Court has approved of a statute as broad in its reach. The State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of modern society and culture.

SEARCH AND SEIZURE:
Affidavits; Franks Hearing; Claim of Omitted Material from Affidavit

United States v. Gater
CA8, No. 16-1836, 8/17/17

Jerry Gater was convicted of possession with intent to distribute cocaine base. On appeal, he argues that the district court erred when it denied his request for a hearing on his claim that police officers secured a search warrant by omitting material information from the affidavit submitted to the issuing judge.

In December 2014, Officer Bobby Sullivan of the Sikeston, Missouri Department of Public Safety served as a task force officer with the Drug Enforcement Administration. On December 16, Sullivan prepared an affidavit and application for a search warrant to search Gater's residence. In the affidavit, Sullivan provided information that he said was disclosed to him by two confidential sources on three separate days.

According to the affidavit, the first source explained to Sullivan on December 9 that during the previous two weeks, the source had witnessed Gater selling more than an ounce of powder and crack cocaine from his truck in Sikeston. The next day, Sullivan averred, a second source told him that the source had visited Gater's residence several times with others while they purchased cocaine. On each occasion, said the source, Gater had more than an ounce of crack cocaine

in his possession. The same source, on December 16, told Sullivan that the source had just seen Gater at his residence with approximately five ounces of cocaine, over two pounds of marijuana, and three rolls of one-hundred-dollar bills that totaled more than $20,000.

After the search warrant was issued, Sullivan and other officers searched Gater's residence. They found crack cocaine, drug paraphernalia, and $4,600 in cash.

Gater filed a motion to suppress evidence arguing that Officer Sullivan omitted from his affidavit negative information about the two confidential sources that would have undermined the reliability of their statements. Gater claimed that if it had included the omitted information, then the affidavit would not have supported a finding of probable cause.

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

"In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court held that 'where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause,' a hearing must be held at the defendant's request. Gater does not allege that Officer Sullivan made a false statement. This court, however, has extended Franks to allow challenges to affidavits based on deliberate or reckless omissions. *United States v. Reivich*, 793 F.2d 957, 960-61 (8th Cir. 1986). Others have followed Reivich, while noting that the extension of Franks to alleged omissions 'potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit.' *United States v. Colkley*, 899 F.2d 297, 300-01 (4th Cir. 1990); see *United States v. Fowler*, 535 F.3d 408, 415-16 (6th Cir. 2008) (applying a 'higher bar' for obtaining a hearing based on an allegedly material omission because of the 'potential for endless rounds of Franks hearings'). Gater relies on this extension of Franks and contends that Sullivan omitted information that would have undermined the reliability of a confidential source.

"Under our decisions, the Fourth Amendment requires a hearing where the defendant makes a substantial preliminary showing that (1) the affiant omitted facts with the intent to mislead the issuing judge, or omitted the facts in reckless disregard of the fact that the omissions would mislead, and (2) the affidavit, if supplemented by the omitted information, could not support a finding of probable cause. *United States v. Conant*, 799 F.3d 1195, 1200 (8th Cir. 2015). Gater focuses exclusively on Sullivan's alleged omission of information about the second confidential source. Gater argues that Sullivan recklessly omitted that the source had a history of drug use, had recently used drugs, and was paid for information about Gater.

"Gater made no substantial preliminary showing that including more information about the confidential source would have precluded a determination of probable cause to search Gater's house. Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). As with any witness, drug use or compensation might be used to impeach credibility, but these factors do not necessarily establish that the source's information is unreliable. See *United States v. Scott*, 610 F.3d 1009, 1015 (8th Cir. 2010); *United States v. Williams*, 477 F.3d 554, 558 (8th Cir. 2007).

"Here, the affidavit included information that corroborated the source's statements about Gater. Law enforcement had received information for months that Gater and his associates were obtaining large quantities of cocaine and marijuana from California and distributing the drugs in the Sikeston area. Another confidential source recently saw Gater distributing narcotics in Sikeston. Sullivan explained that the challenged source had a track record of providing reliable information to law enforcement that led to state and federal prosecutions. Disclosing explicitly that the source had a history of drug use and that police paid the source for information would not have prevented the issuing judge from finding probable cause to search Gater's house."

SEARCH AND SEIZURE:
Affidavits; Probable Cause; Newly Arrested Confidential Informant

United States v. Hansmerer
CA7, No. 16-3070, 8/14/17

Illinois law-enforcement officers arrested Jason Walker after making two controlled buys of methamphetamine from him. During an interview the night of his arrest, Walker told West Central Illinois Agent Nicholas Hiland that Hansmeier was his drug source; that Hansmeier lived in Missouri; and that Hansmeier dealt large quantities of methamphetamine, heroin, and marijuana.

At about 1:15 in the morning, after Walker was arrested, Agent Hiland called Special Agent Michael Murphy of the Northeast Missouri Narcotics Task Force. Agent Murphy and Agent Austin Snow (another member of the Task Force) then drove to Illinois to talk to Walker. They were familiar with Hansmeier and were interested in any information that Walker could give them.

Walker told Agent Murphy and Agent Snow that he had bought large quantities of methamphetamine from Hansmeier over the past several months. Walker agreed to show the agents where Hansmeier lived and successfully directed the officers to Hansmeier's house. The agents then dropped off Walker back at the Illinois police station and returned to their offices in Missouri.

There, Agent Murphy continued his investigation by running background checks on Walker and Hansmeier on a website called case.net. Although case.net provides only a "snapshot" of a person's criminal history, Agent Murphy learned that both men were on parole and that Hansmeier had several criminal convictions, including one for a drug-distribution related offense. Agent Murphy then began drafting an affidavit in support of a no-knock search warrant for Hansmeier's house, relying heavily on the information that Walker had provided.

In the affidavit, Agent Murphy included the following facts:

• Walker had directed the agents to Hansmeier's house;

• Walker had been to Hansmeier's house eighteen times over the previous six months and had been buying methamphetamine from Hansmeier for several months;

• Walker had been buying four ounces of methamphetamine from Hansmeier at least once and usually twice a week and had bought methamphetamine from Hansmeier just a few days earlier;

• Walker knew the prices that Hansmeier charged, including that Hansmeier would occasionally front the drugs;

• Hansmeier kept a supply of methamphetamine, marijuana, and heroin in his house and always had methamphetamine for Walker;

• Hansmeier had a large stack of drug money at his house the last time that Walker was there; and

• Hansmeier recently told Walker that he had received a large shipment of methamphetamine because he was going on vacation in a few weeks.

Agent Murphy also noted that he was familiar with Hansmeier from previous investigations and that another confidential informant had told him about Hansmeier's drug-dealing scheme. Finally, Agent Murphy included in the affidavit the little information that he had on Hansmeier's criminal history.

In support of the no-knock aspect of the warrant, Agent Murphy informed the court that Walker had told the agents that Hansmeier had video surveillance at his house. Agent Murphy also reported that, during a previous investigation, Hansmeier had flushed drugs down the toilet when officers knocked and announced their intent to search his home. A Missouri state-court judge signed the warrant at 9:05 the morning after Walker had been arrested. When executing the warrant, officers found a loaded gun, marijuana, a large amount of cash, drug paraphernalia, and about 200 grams of a powdery substance that they believed to be either a cutting agent or methamphetamine mixed with a cutting agent. Officers subsequently arrested Hansmeier.

Hansmeier claimed that the affidavit did not support probable cause because Agent Murphy had relied on an untested,

newly arrested confidential informant's uncorroborated statements. The district court denied the motion, holding that the affidavit supported probable cause.

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

"We address Hansmeier's claim that the affidavit did not support probable cause to search his home. Hansmeier argues that Agent Murphy relied on information from Walker—an untested, newly arrested confidential informant—without adequately corroborating his story. That lack of corroboration, Hansmeier contends, dooms the search warrant. In cases where a warrant has issued, as here, we give great deference to the issuing judge's decision that 'the facts add up to probable cause.' *United States v. McIntire*, 516 F.3d 576, 578 (7th Cir. 2008); see also *Illinois v. Gates*, 462 U.S. 213, 239 (1983) ('An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause.') We will affirm if substantial evidence in the record supports the issuing judge's conclusion.

"When an informant serves as the source of information in an affidavit, the probable-cause determination turns on the informant's credibility. To evaluate an informant's credibility, we consider the level of detail, the extent of firsthand observation, the degree of corroboration, the time between the events reported and the warrant application, and whether the informant appeared or testified before the magistrate. *United States v. Glover*, 755 F.3d 811, 816 (7th Cir. 2014).

"To start, Agent Murphy corroborated more of Walker's story than Hansmeier is willing to admit. For instance, Walker told the officers that he had bought methamphetamine from Hansmeier at Hansmeier's house. Walker then successfully directed the officers to where Hansmeier lived. This did not verify Walker's claim that Hansmeier was dealing drugs, but it is important in gauging Walker's overall credibility as an informant.

"Agent Murphy also corroborated Walker's story in three other ways. First, Agent Murphy stated that he was familiar with Hansmeier from previous investigations. Second, Agent Murphy's background check on Hansmeier uncovered that Hansmeier had been convicted of at least one drug-distribution-related offense in the past; although the record check does not corroborate Walker's story alone, 'it does retain some corroborative value.' *United States v. Olson*, 408 F.3d 366, 372 (7th Cir. 2005). And third, Agent Murphy included in the affidavit a detailed recollection of Hansmeier's drug dealing from an unnamed confidential informant, which counts as 'slight' corroboration.

"Admittedly, those facts are not enough alone to find Walker credible. But they are, to an extent, indicators of credibility. And any additional steps that Agent Murphy could have taken to corroborate Walker's story do 'not in any way detract from what was done.' *United States v. Jones*, 208 F.3d 603, 607 (7th Cir. 2000). In any event, Hansmeier's emphasis on corroboration alone is misplaced: no

one factor is determinative in weighing an informant's credibility. A weakness in one may be offset by the strength of others. And here, the other factors strongly support Walker's credibility. Walker's information was detailed: he knew the type of drugs that Hansmeier dealt, the quantity that he could get from Hansmeier, and the price that Hansmeier charged.

"Walker's information was based on firsthand knowledge. And Walker's information was based on recent observation: he had seen drugs and drug money in Hansmeier's house and bought methamphetamine from Hansmeier just a few days before he spoke with Agent Murphy (to say nothing of the fact that Walker bought drugs from Hansmeier weekly, who always had a supply). Still more facts bolster Walker's credibility. His statements were unimmunized and against his penal interest: he admitted buying 4 ounces of methamphetamine twice a week from Hansmeier, far more than the sixty-eight grams that police caught him with. *United States v. Leidner*, 99 F.3d 1423, 1429– 30 (7th Cir. 1996). And although Walker was a newly arrested informant, which subjects him to greater scrutiny, the issuing judge was entitled to conclude that Walker's recent arrest gave him an incentive to supply the police with accurate information in hopes of receiving lenient punishment for his own crimes. Finally, the issuing judge was aware that the officers knew who Walker was (that is, he was a confidential informant as opposed to an anonymous tipster), meaning that the officers could find him and hold him responsible if he gave misleading information—yet another check on credibility.

"The only factor that doesn't favor Walker's credibility is that he didn't appear before the issuing judge. But that is the absence of just one of many factors used to evaluate an informant's credibility; the others all tend to favor Walker. Thus, substantial evidence in the record supports the issuing judge's probable-cause determination."

SEARCH AND SEIZURE:
Cell Telephone GPS Tracking

United States v. Riley
CA6, No. 16-6149, 6/5/17

A state court in Kent County, Michigan, issued an arrest warrant for Montai Riley, having found probable cause to believe that he had committed armed robbery of a local store. Days later, Riley purchased a cell phone serviced by AT&T. A member of Riley's family gave that phone's telephone number to Riley's girlfriend, who disclosed the number to the U.S. Marshal Service Grand Rapids Apprehension Team. Deputy Bowman obtained a state court order, compelling AT&T to produce telecommunications records of Riley's cell phone under federal electronic-surveillance laws, 18 U.S.C. 2703, 3123, 3124. The government used Riley's GPS location data to learn that Riley was hiding out at the Airport Inn in Memphis, Tennessee and arrested him about seven hours later, only after inquiring of the front-desk clerk to ascertain Riley's specific room number.

The Sixth Circuit affirmed denial of a motion to suppress: "The GPS tracking provided no greater insight into Riley's whereabouts than what Riley exposed to public view as he traveled 'along public thoroughfares' to the hotel lobby. Riley has no reasonable expectation of privacy against such tracking and the tracking did not amount to a Fourth Amendment search."

SEARCH AND SEIZURE:
Cell Telephone; Search of Cell Phone Based on Search of Residence

United States v. Griffith
DCC, No. 13-3061, 8/18/17

In this case, the Court of Appeals for the District of Columbia dealt with the search of a telephone in a residence. The Court noted that most of us, nowadays, carry a cell phone. And our phones frequently contain information chronicling our daily lives—where we go, whom we see, what we say to our friends, and the like. When a person is suspected of a crime, his phone thus can serve as a fruitful source of evidence, especially if he committed the offense in concert with others with whom he might communicate about it. Does this mean that, whenever officers have reason to suspect a person of involvement in a crime, they have probable cause to search his home for cell phones because he might own one and it might contain relevant evidence? That, in essence, is the central issue raised by this case.

Ezra Griffith was charged with unlawful possession of a firearm by a convicted felon. He moved to suppress the firearm, arguing that police discovered it while executing an invalid warrant to search his home. The district court denied the motion, and a jury convicted Griffith at trial. Griffith now challenges the denial of his motion to suppress.

Upon review, the Court of Appeals for the District of Columbia found, in part, as follows:

"The warrant authorized officers to search for and seize all cell phones and other electronic devices in Griffith's residence. The supporting affidavit, however, offered almost no reason to suspect that Griffith in fact owned a cell phone, or that any phone or other device containing incriminating information would be found in his apartment. In our view, the fact that most people now carry a cell phone was not enough to justify an intrusive search of a place lying at the center of the Fourth Amendment's protections—a home—for any phone Griffith might own.

"We therefore agree with Griffith that the warrant to search his residence was unsupported by probable cause. We also reject the government's arguments that, even if the warrant was invalid, the firearm still need not have been excluded from the evidence against him. Consequently, we vacate Griffith's conviction."

SEARCH AND SEIZURE:
Community Caretaking Exception

United States v. Lewis
CA6, No. 16-5181, 8/25/17

Officer Greg Turner responded to reports that a woman was intoxicated at Wal-Mart. Turner found the woman, Lakes, who was "clearly under the influence." Lakes stated that she was with Lewis, who was in his truck and would drive her home. Officers approached Lewis's truck. It was dark outside and the windows were tinted. Turner looked inside and saw Lewis asleep on the passenger side. Officer Cloyd and Lakes went to the front-passenger side; either Cloyd or Lakes opened the door. The interior light went on, causing Lewis to startle and enabling Turner to see that Lewis had a clear plastic baggie on his lap. Lewis tossed the baggie over the console onto the back floorboard. Turner suspected that the baggie contained marijuana, shined his flashlight onto it, and observed that it contained "like a bluish color stuff." Turner opened the door, inspected the bag closely, and saw that it contained pills. Lewis appeared to be under the influence. Lewis and Lake were arrested. The bag was tested; it contained 493 oxycodone and 5 Xanax pills. Four Xanax pills were found on Lewis's person. Lewis was indicted.

The Sixth Circuit affirmed denial of Lewis's motion to suppress. "The officers' purpose was to find Lakes a safe ride home, they were not investigating a crime. Lewis's subsequent behavior gave Turner probable cause to search the truck under the automobile exception to the warrant requirement."

SEARCH AND SEIZURE:
Consent Search; Deception by Law Enforcement

United States v. Spivey
CA11, No. 15-15025, 6/28/17

Chenequa Austin and Eric Spivey shared a home and a penchant for credit-card fraud. And they both became crime victims. Their home was twice burgled, which each time they reported to the police. Two officers, one posing as a crime-scene technician, came to their house on the pretense of following up on the burglaries, but mainly, unbeknownst to them, to investigate them for suspected fraud. The police had already caught the burglar who, in turn, had informed the police that Austin and Spivey's house contained evidence of credit-card fraud.

Spivey hid some incriminating evidence in the oven before Austin invited the officers inside. The couple then provided the officers video footage of the burglary and led the officers through their home. After the officers saw a card-embossing machines, stacks of cards, and a lot of high-end merchandise in plain view, they informed Spivey that they investigated credit-card fraud. Spivey then consented to a full search that turned up a weapon, drugs, and additional evidence of fraud.

Austin and Spivey moved to suppress all evidence obtained as a result of the officers' "ruse." The district court denied

the motion to suppress because it found that, Austin's consent to the initial search was voluntary and, alternatively, that Spivey's later consent cured any violation. Austin and Spivey each pleaded guilty to several offenses, conditioned on the right to pursue this appeal of the denial of their motion to suppress.

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

"…this case presents the question whether deception by law enforcement necessarily renders a suspect's consent to a search of a home involuntary.

"A consensual search is constitutional if it is voluntary; if it is the product of an 'essentially free and unconstrained choice.' *United States v. Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001). Voluntariness is 'not susceptible to neat talismanic definitions; rather, the inquiry must be conducted on a case-by-case analysis' that is based on 'the totality of the circumstances.' *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989). Relevant factors include the voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found.

"Deceit can also be relevant to voluntariness. Because we require that the consent was not a function of acquiescence to a claim of lawful authority, deception invalidates consent when police claim authority they lack. For example, when an officer falsely professes to have a warrant, the consent to search is invalid because the officer announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). And when an officer lies about the existence of exigent circumstances, he also suggests that the occupant has no right to resist and may face immediate danger if he tries. See, e.g., *United States v. Harrison*, 639 F.3d 1273 (10th Cir. 2011) (agents falsely implied that a bomb was planted in the apartment they sought to search). Deception is also likely problematic for consent if police make false promises. See *United States v. Watson*, 423 U.S. 411, 424 (1976).

"After it considered the totality of the circumstances, the district court correctly determined that Austin's consent was voluntary. The factors other than deceit all point in favor of voluntariness. Austin was not handcuffed or under arrest when she gave her consent. See *Garcia*, 890 F.2d at 360–62. She invited the officers inside the home and volunteered video footage of the burglary. The encounter was polite and cooperative, and the officers used no signs of force, physical coercion, or threats. See *United States v. Espinosa-Orlando*, 704 F.2d 507, 513 (11th Cir. 1983). The officers did not inform Austin that she had the right to refuse consent, but they were not required to do so under federal search and seizure law. And a warning is even less relevant in this context because

it is easier to refuse consent when the police are offering to help than when they initiate an adversarial relationship. The district court found that the consent was 'intelligently given.' And significantly, Austin believed that no incriminating evidence would be found—or at least, nothing she and Spivey had not prepared to explain away.

"The 'ruse' did not prevent Austin from making a voluntary decision. Austin and Spivey informed the police of the burglaries and invited their interaction. The officers did not invent a false report of a burglary, nor claim any authority that they lacked. Agent Iwaskewycz testified that he and Lanfersiek never promised Austin that we're just here to investigate a burglary; anything else we see, we're gonna ignore. Austin knew that she was interacting with criminal investigators who had the authority to act upon evidence of illegal behavior. There is no evidence that Austin felt that she was required to help with the burglary investigation or that she needed to consent to avoid her inevitable prosecution. From Austin's perspective, her ability to consent to the search of an area where she knew there was evidence of illegal activity was not dependent on whether the officers provided no explanation or a partial explanation of their intentions. "Motivated solely by the desire to retrieve her stolen property, Austin consented to the officers' entry and search at her own peril.

"And perhaps most significant of all, Austin and Spivey engaged in intentional, strategic behavior, which strongly suggests voluntariness. Although Austin and Spivey were victims of one crime and suspects of another, the district court reasoned, thieves usually don't report that the property that they stole has been stolen. The district court found that Austin and Spivey enlisted the officers' assistance to recover their property. Austin 'wanted to cooperate' because 'expensive shoes had been stolen,' and Spivey was 'willing to risk exposure to credit-card prosecution to get his property back.' Before allowing the officers into their home, they hid the most damning piece of evidence in the oven. And Austin and Spivey gave a rehearsed story to explain the device that remained visible. This prior planning proves that Austin and Spivey understood that asking for the officers' assistance came with the risk that their own crimes would be discovered. Austin's behavior does not evoke fear or good-faith reliance, but instead suggests that she sought to gain the benefit of police assistance without suffering potential costs. The more Austin behaved strategically, the more her behavior looked like a voluntary, rational gamble, and less like an unwitting, trusting beguilement. Although the plan to involve police to recover their stolen goods may not have been the best one, voluntariness does not require that criminals have perfect knowledge of every fact that might change their strategic calculus. Nor does it require that consent be in their best interest. *United States v. Berry*, 636 F.2d 1075, 1081 (5th Cir. Unit B 1981).

"When we view the evidence in the light most favorable to the judgment, Austin's consent was not granted only in

submission to a claim of lawful authority. We agree with the district court that under the totality of the circumstances, the government has shown by clear and positive testimony that the consents were voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion."

Editor's Note: *In State v. Brown, 356 Ark. 460, 156 S.W.3d 722 92004) the Arkansas Supreme Court adopted the following rule: that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.*

In the foregoing case under Arkansas case law the deception of the law enforcement officers in entering the home would be acceptable. Based on their observations, they should leave the home, obtain a search warrant, and then return to seize the evidence which they had observed.

SEARCH AND SEIZURE:
Mandatory Supervision Searches; Submission to Warrantless Suspicion Searches

United States v. Cervantes
CA9, No. 15-50459, 6/19/17

Steven Cervantes, serving the last year of his sentence on mandatory supervision, agreed to submit to warrantless, suspicionless searches of his person, his residence, and any premises under his control. At issue was whether a warrantless, suspicionless search of a hotel room he rented with his girlfriend violated the Fourth Amendment.

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

"For Fourth Amendment purposes, mandatory supervision is more akin to parole than probation, and that the search was authorized under the search condition because the officers had probable cause to believe that the hotel room constituted 'premises' under the defendant's control. Rejecting Cervantes contention that the officers violated California's prohibition against arbitrary, capricious, or harassing searches, the Court noted that, without something more, a suspicionless search is lawful if authorized by a parolee's search condition. Concluding that no Fourth Amendment violation was shown, the Court held that the district court properly denied the defendant's motion to suppress the evidence found in his hotel room.

"The Court held that the defendant had adequate notice of a suspicionless search condition of supervised release imposed in connection with his federal sentence, and that the facts of the case justified the district court's belief that the condition would be necessary to mitigate the exceptionally The panel held that for Fourth Amendment purposes, mandatory supervision is more akin to parole than probation, and that the search was authorized under the search condition because the officers had probable cause to believe that the hotel room constituted 'premises' under the defendant's control. Rejecting the defendant's contention that the officers violated California's prohibition against arbitrary, capricious, or harassing searches, the panel noted that, without something more, a suspicionless search is lawful if authorized by a parolee's search condition.

"Concluding that no Fourth Amendment violation was shown, the panel held that the district court properly denied the defendant's motion to suppress the evidence found in his hotel room. The panel held that the defendant had adequate notice of a suspicionless search condition of supervised release imposed in connection with his federal sentence, and that the facts of the case justified the district court's belief that the condition would be necessary to mitigate the exceptionally The panel held that for Fourth Amendment purposes, mandatory supervision is more akin to parole than probation, and that the search was authorized under the search condition because the officers had probable cause to believe that the hotel room constituted 'premises' under the defendant's control. Rejecting the defendant's contention that the officers violated California's prohibition against arbitrary, capricious, or harassing searches, the panel noted that, without something more, a suspicionless search is lawful if authorized by a parolee's search condition. Concluding that no Fourth Amendment violation was shown, the panel held that the district court properly denied the defendant's motion to suppress the evidence found in his hotel room.

"The panel held that the defendant had adequate notice of a suspicionless search condition of supervised release imposed in connection with his federal sentence, and that the facts of the case justified the district court's belief that the condition would be necessary to mitigate the exceptionally high risk that the defendant would re-offend during his term of supervised release."

SEARCH AND SEIZURE:
Protective Sweep; Arrest Outside of Residence

United States v. Alatorre
CA8, No. 16-4184, 7/12/17

Just after 6 a.m. on November 26, 2014, eight members of the Metro Area Fugitive Task Force ("Task Force") executed a warrant for Alatorre's arrest at his residence. The Task Force included Omaha police officers and United States Marshals.

Prior to leaving the police station that morning, the Task Force members attended a pre-arrest briefing where they were informed that Alatorre was being arrested because he allegedly assaulted someone with a baton outside an Omaha bar. They were also briefed on Alatorre's past criminal history, which included carrying and concealing firearms. The Task Force determined that Alatorre presented sufficient risk to their safety that use of a ballistic shield would be required during execution of the warrant. Officers later testified that the ballistic shield is used in high-risk operations where there is a history of gun violence, concealed weapons, or gang activity. The ballistic shield was described as a hand-held, solid, protective barrier measuring two-feet by four-feet and designed to stop handgun rounds.

During the arrest warrant execution, four officers approached Alatorre's front door with the ballistic shield in front in a formation designed to maximize officer safety. Other Task Force members covered the back and sides of the house. First, the officers just knocked on the door. In response, the officers testified that they heard and saw movements in the residence consistent with multiple people inside, but the officers could not tell how many people were moving around behind the closed door and blinds. The officers also heard voices suggesting more than one person was present to participate in a conversation or hear instructions. Someone suspiciously came to the door and then retreated.

Next, the officers knocked again and announced, "Police with a warrant. Come to your door." Alatorre did not immediately respond, so the officers knocked-and announced at least two more times after the delay. Alatorre finally opened the front door, and officers quickly placed him in handcuffs and removed him to the porch. When asked if anyone else was inside, Alatorre said, "My girlfriend." The officers could not see anyone from the front door. An officer shouted, "Anyone else inside, come to the door." The girlfriend came out of the kitchen and to the front door. She was immediately pulled outside onto the porch with the officers. She said there was no one else inside. The officers had experience with some arrestees lying to them in the past about the presence of others inside a residence.

"Officers testified that the Task Force remained concerned for their safety due to uncertainty as to the number of people inside because of the noises from inside the house heard prior to the door opening, the movements minimally visible through the blinds before the door opened, the quiet voices heard inside, and the hesitancy of the occupants to open the door. Therefore, three of the officers entered the residence behind the ballistic shield to conduct a protective sweep to locate anyone else inside who could harm the arresting officers. The officers opened two closed doors immediately adjacent to the front living area and checked the rooms where a person could hide. After the living room and the two adjacent rooms were cleared, they turned to the kitchen. Two guns were visible in plain

view on a shelf near the kitchen, along with ammunition, a line of white powder, a marijuana "joint," a bag of mushrooms, and other drug paraphernalia. Finding no one inside, the sweep ended after about two minutes, and the officers left the residence.

Based upon the officers' observations of guns and drugs in plain view during the protective sweep, the residence was secured, and a search warrant was obtained for the residence. Officer Michael Dose, who was in charge of Alatorre's case but was not a member of the Task Force, conducted the search. In addition to the items seen during the protective sweep, Dose also seized a Taurus 9 millimeter handgun from beneath a couch. Alatorre filed a conditional plea of guilty but reserving the right to appeal the dismissal of his motion to suppress.

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

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. *Maryland v. Buie*, 494 U.S. 325, 327 (1990). 'The government bears the burden of proving that the protective sweep exception to the search warrant requirement applies.' *United States v. Green*, 560 F.3d 853, 856 (8th Cir. 2009).

"The Fourth Amendment permits the protective sweep if the searching officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others. *Buie*, 494 U.S. at 327. 'Buie authorizes protective sweeps for unknown individuals in a house who may pose a threat to officers as they effectuate an arrest; Buie does not allow a protective sweep for weapons or contraband.' *Waldner*, 425 F.3d at 517.

"Alatorre contends that the Task Force's protective sweep was unreasonable because his arrest was accomplished quickly and without incident, and he was safely secured outside on the porch and could have been immediately taken off the premises.

"Our sister circuits have often upheld protective sweeps after an arrest outside of a residence. See, e.g., *United States v. Cavely*, 318 F.3d 987, 995-96 (10th Cir. 2003) (finding that officers executing an arrest warrant just outside the back door of the defendant's house were justified in making a protective sweep of his house); *United States v. Hoyos,* 892 F.2d 1387, 1396-97 (9th Cir. 1989) (finding that narcotics officers were justified in making a protective sweep of defendant's residence after arresting him outside). We have also found a protective sweep valid even though the defendant had already been handcuffed and taken to another area. *United States v. Boyd*, 180 F.3d 967, 975 (8th Cir. 1999). We have likewise found a protective sweep to be reasonable in a building that did not immediately

adjoin the place of arrest. *United States v. Davis*, 471 F.3d 938, 944-45 (8th Cir. 2006) (upholding protective sweep of defendant's barn after arrest outside of the barn). However, the inquiry as to the reasonableness and validity of a protective sweep is necessarily fact-specific. *United States v. Thompson*, 842 F.3d 1002, 1009 (7th Cir. 2016).

"Here, the protective sweep of the residence was justified by several articulable facts and rational inferences supporting the officers' reasonable beliefs that someone else could be inside posing a danger to them during or following the arrest. These facts and inferences include: (1) Alatorre's girlfriend lingered in the kitchen out of sight of the officers until she was specifically called to the door, indicating that it was easy for someone to hide just out of view of the officers inside the residence in a position from which an attack could be launched; (2) Guns or other dangerous weapons were conceivably present in the residence given Alatorre's criminal history involving concealed weapons and the alleged violent baton attack prompting the arrest, giving anyone remaining inside the residence access to weapons to use in an ambush of the officers; (3) The audible movements and behaviors (e.g., coming to the door and retreating; quietly conversing) of people behind the door and blinds after the officers knocked, along with the delays in answering the door, created a reasonable uncertainty as to how many people were inside the residence and their intentions toward the officers.

"Here, the Task Force's protective sweep lasted two minutes with officers only examining places where a person could be hiding, while incidentally noting guns and drugs in plain view. While conducting the protective sweep, the officers remained in formation behind the ballistic shield, confirming their continuing concern that a person lingered and searching only those areas where a person could hide. The officers opened two closed doors adjacent to the front living room and cleared them of people before proceeding. This search of the adjoining rooms was lawful because the rooms were large enough to harbor a person. After the living room and two adjacent rooms were cleared, the officers swept through the kitchen looking in places where a person could hide. In conducting the sweep of the kitchen, the officers saw two guns, drug paraphernalia, and ammunition in plain view. The incriminating character of the drug paraphernalia—which included a marijuana joint, a bag of mushrooms, a line of white powder, among other drug paraphernalia—was immediately apparent, so it could be secured without taint. *Green*, 560 F.3d at 856 ('During a properly limited protective sweep, the police may seize an item that is in plain view if its incriminating character is immediately apparent.') Finding no one inside, the sweep lasted only around two minutes, which was no more than was necessary to ensure the officers' safety.

"The protective sweep of Alatorre's residence passes constitutional muster, and the fruits of that valid sweep are untainted."

SEARCH AND SEIZURE:
Search By Warrant; Plain View

United States v. Minney
CA7, No. 16-4057, 6/13/17

Officers executed a search warrant at Minney's apartment. The warrant listed items to be seized: a Panasonic television, a Sony television, a Nintendo Wii, an Xbox 360, and 10 Xbox games. While searching Minney's bedroom, Detective Vasquez found ammunition in the bedside table. Minney admitted that he was on parole for dealing cocaine. Officers arrested Minney as a felon in possession of ammunition. The search resumed. Vazquez found multiple guns in Minney's bedroom. Officers recovered most of the electronics, but never found the second television.

The court denied a motion to suppress the guns. The Seventh Circuit affirmed the suppression ruling, finding in part as follows:

"When executing a search warrant that specifically lists items to be seized, officers are entitled to search anywhere those items are likely to be discovered. Officers may seize the items named in the warrant and any evidence that falls under the plain-view doctrine. Vazquez was lawfully searching under the warrant; the electronic devices could have reasonably been found in any of the places where Vazquez found Minney's guns; the guns were in plain view in those places and were immediately incriminating because Minney was on parole for a felony."

SEARCH AND SEIZURE:
Search by Warrant; Vehicle on Premises

State of Nebraska v. Hidalgo
No. S-16-660, 296 Neb. 912, 6/9/17

Robert Hidalgo was convicted of possession of a firearm by a prohibited person. He appealed with one of his arguments that the evidence against him should be suppressed because officers exceeded the scope of the search warrant when they searched a vehicle parked outside the house described in the search warrant.

The Nebraska Supreme Court found, in part, as follows:

"Hidalgo also argues that the warrant issued in this case was specific as to describing his house, but did not include his vehicle, and that as such, officers violated his Fourth Amendment rights when his white Nissan Sentra was searched. During police questioning, Hidalgo admitted that the firearm found in the vehicle belonged to him. As a general rule, vehicles located on premises described in a warrant may be searched, even if the vehicle is not specifically listed in the warrant. This includes vehicles parked in a driveway (as this one was) or in a garage. One court reasoned in part: A car parked in a garage is just another interior container, like a closet or a desk. If, as in this case, the trunk or glove compartment is not too small to hold what the search warrant authorizes the police to look for, they can search the trunk and the glove compartment. The warrant would not, however, cover a vehicle parked on a

nearby street, even if police knew that the vehicle belonged to the occupant of the described premises.

"We agree with Hidalgo that the warrant did not explicitly provide that vehicles found on the property could be searched. But we do not find that such failure requires suppression of the search of Hidalgo's vehicle. The vehicle was parked in the driveway of the house described in the warrant. During the hearing on the motion to suppress, one officer testified that the vehicle was located about 10 feet from the front steps of the house and was not separated from the house by a fence or other obstruction.

"We conclude that the vehicle search was valid under the warrant and that there is no merit to Hidalgo's second assignment of error."

SEARCH AND SEIZURE:
Seizure Warrant Affidavit; Staleness

United States v. Perry
CA6, No. 16-6825, 7/19/17

Laquinton Perry, having conditionally pled guilty to conspiring to possess narcotics with intent to distribute, appeals the preserved evidentiary issue of whether a search warrant for Perry's apartment was supported by probable cause. Perry contends that the activities indicating drug sales that were observed over the seven weeks before the issuance of the search warrant were stale evidence because the activities were not individually dated. The observations, according to Perry, may have been too old to indicate that drug evidence would probably be found in the apartment, while at the same time not concentrated or old enough to indicate continuous or entrenched criminal activity. Even without specific dates, however, the amount of suspicious activity observed within the seven weeks in connection with Perry's apartment was enough to support probable cause in this case.

At the probable cause hearing in Tennessee state court, Lieutenant Jason Drewery of the Fayette County Sheriff's Department swore in an affidavit as follows:

1.) Around October 10, 2014, he received the first of several complaints from concerned citizens living in an apartment complex that there were drug sales being conducted in that apartment complex and in a black Chevrolet Impala;

2.) That first complaint named Perry and his girlfriend as the drug sellers;

3.) Lt. Drewery knew Perry to be a drug dealer and to have several prior drug charges;

4.) From October 15, 2014, to December 3, 2014, Lt. Drewery intermittently surveilled the apartment complex;

5.) During the surveillance, Lt. Drewery observed heavy car and foot traffic into apartment four in the complex, and the visitors would go into the apartment and leave within one to two minutes;

6.) Lt. Drewery further observed Perry exchange money and packages, which

appeared to contain marijuana, at a chain link face on the other side of which is a parking lot;

7.) Lt. Drewery observed an unknown black man exit apartment four, remove from his right front pocket a clear plastic bag, remove from that bag a separate package of marijuana, conduct an exchange with someone in a nearby Ford Mustang, and then return to apartment four;

8.) Lt. Drewery also observed Perry walk out of apartment four and into a Ford Explorer in the apartment parking lot, exchange a package, and return to apartment four;

9.) Lt. Drewery routinely saw Perry and his girlfriend use the black Chevrolet Impala and enter apartment four with keys; and

10.) Lt. Drewery confirmed that the utilities to apartment four are paid in, and that the black Chevrolet Impala is registered in, Perry's girlfriend's name.

Based on that affidavit, the Tennessee magistrate issued a search warrant on December 5, 2014, two days after Lt. Drewery's surveillance ended and Lt. Drewery executed the warrant on December 9.

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

"Because Lt. Drewery's affidavit detailed multiple transactions involving Perry and his girlfriend that appeared to be drug transactions, and because those transactions corroborated the neighbors' complaints that Perry and his girlfriend were selling drugs, the Tennessee magistrate properly issued the search warrant under the Fourth Amendment. Lt. Drewery's affidavit provided the Tennessee magistrate with the requisite substantial basis for finding a fair probability that illegal drugs would be found in apartment four and in the Chevrolet Impala.

"Even though Lt. Drewery did not specify in his affidavit the dates on which he observed particular transactions, and while 'stale information cannot be used in a probable cause determination,' *United States v. Frechette*, 583 F.3d 374, 377 (6th Cir. 2009), Lt. Drewery's observations were not stale for two reasons. First, Lt. Drewery did state that his observations occurred between October 15 and December 3—two to fifty-one days before the probable-cause determination. While 'drugs are usually sold and consumed in a prompt fashion,' the evidence of drug sales two to fifty-one days before is recent enough here to suggest that there may be further evidence of illegality in that place. In *United States v. Greene*, 250 F.3d 471, 480–81 (6th Cir. 2001), for instance, we held that 23-month-old evidence of drug sales was not stale when paired with information regarding a drug delivery in the prior month. Second, Lt. Drewery's observations of heavy car and foot traffic, repeated transactions, and one particular transaction in which an unknown man from apartment four took out a packet of marijuana from a bigger bag, all suggested that apartment four was home

to an ongoing drug business of some size. We have recognized a 'general principle that when the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.' *United States v. Spikes*, 158 F.3d 913, 924 (6th Cir. 1998)

"It would certainly have been preferable for Lt. Drewery to have indicated the specific dates, but the fact that all of the multiple and repeated activities were observed within a defined period of less than seven weeks just prior to the date of the affidavit was sufficient to support probable cause."

SEARCH AND SEIZURE:
Stop and Frisk; Officer Displaying Firearm While Making a Stop

United States v. Windom
CA10, No. 16-1027, 7/24/17

Just before midnight one evening, a female Challengers employee contacted the Aurora Police Department ("APD") to report that an unknown male, later identified as Mr. Windom, had flashed a gun to bar patrons and claimed to be a Crips gang member. The employee indicated, however, that the individual—whom she further described as a thirty-three year-old black male, 6'2" or 6'3" tall, with braided hair, wearing jeans and a black jacket with a cobra on the back—had not threatened or injured any patron. By the time the employee called APD, Mr. Windom had left Challengers but remained in the parking lot immediately outside. As the call progressed, the employee observed him getting into one of two vehicles—either a Nissan Murano ("Murano") or an older model, light blue Cadillac sedan ("Cadillac") that was immediately next to the Murano—and stated that he appeared to have headed westbound out of the parking lot.

APD's dispatch relayed the "weapons call" to several local officers, advised them of the nature of the alleged conduct, and provided Mr. Windom's physical description. The APD officers that first arrived on the scene, however, found the Murano in the parking lot, without an individual matching Mr. Windom's description, and the en-route officers therefore turned their attention to the Cadillac.

APD Officer Jeremy McElroy was approaching Challengers in his patrol vehicle when he observed a Cadillac matching the description from the call traveling in the opposite direction approximately two miles from Challengers. Officer McElroy made a u-turn and proceeded to follow the vehicle, and after backup arrived, he initiated "a high risk traffic stop," based on his belief that the vehicle contained "a gang member" "armed with a gun," More specifically, Officer McElroy drew his weapon and pointed it at the pulled over Cadillac, wedged himself behind his door jamb for protection, and activated spotlighting to light the vehicle. Meanwhile, at least two more APD officers provided lethal cover, that is, they too had their guns drawn and pointed at the Cadillac, as well as its occupants. After the

officers assumed their covered positions, Officer McElroy yelled for the occupants to get their hands up and turn the car off, and directed them to throw the keys out of the driver's side window.

Officer McElroy then ordered all of the occupants to exit the vehicle and assume the prone position—i.e., to lie face-down on the ground with legs crossed. The driver emerged first, and while her initial response was "somewhat argumentative," she complied with the officer's instructions and assumed the prone position. Mr. Windom then emerged from the front passenger door, and Office McElroy immediately noticed that he matched the description that the Challengers employee had provided: e.g., a black man, about 6'2" tall, with braided hair wearing a black jacket and blue jeans. Mr. Windom assumed the prone position without objection. Finally, a third occupant—a pregnant female—exited from one of the rear passenger doors and was ordered to get "down on her knees" outside of the vehicle.

Some of the officers checked the Cadillac to ensure that it had no other occupants and then proceeded to handcuff and pat down each individual, while other officers kept watch, providing "lethal cover." At that point, the officers positively identified the male occupant as Mr. Windom, found a Smith & Wesson revolver in his pocket during the course of a pat-down, and arrested him for the crime of disorderly conduct based on his actions at Challengers.

A federal grand jury indicted Mr. Windom on one count of being a felon in possession of a firearm. Mr. Windom moved to suppress the firearm as fruit of an illegal seizure, arguing that "the conduct of the law enforcement officers following the traffic stop constituted an arrest of the occupants of the vehicle, including Mr. Windom, from the moment the officers drew their weapons and ordered the occupants to exit the vehicle." He contends that the officers' use of "high-risk" stop techniques was unreasonable under the circumstances, thereby converting the purported investigative detention into an arrest without probable cause in violation of the Fourth Amendment.

Mr. Windom acknowledges that the officers had reasonable suspicion to stop the vehicle. But Mr. Windom challenges the manner in which they executed the stop, arguing that their seizure involved such a heightened degree of force that it converted an investigative stop into an arrest that needed to be (but was not) justified by probable cause.

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

"…under certain circumstances, the steps officers may permissibly take to protect their safety include drawing their weapons, placing a suspect in handcuffs, or forcing a suspect to the ground. *Novitsky*, 491 F.3d at 1254. More specifically, although we have observed that, effectuating a *Terry* stop by pointing guns at a suspect may elevate a seizure to an 'arrest' in most scenarios. We have rejected a bright-line rule that the use of

guns automatically turns the stop into an arrest in favor of the better view that the use of guns in connection with a *Terry* stop is permissible where the police reasonably believe they are necessary for their protection. *United States v. Merritt*, 695 F.2d 1263, 1273 (10th Cir. 1982). Compare *Hood*, 774 F.3d at 643–44 (holding that officers were justified in drawing their firearms and ordering the defendant to the ground, because they did so to protect their own safety and maintain the status quo); *Mosley*, 743 F.3d at 1330 (concluding that an initial *Terry* stop with weapons raised was reasonable, where officers conducted the stop in a high-crime area, at around 3:00 a.m., and after receiving an anonymous tip that one of the occupants of the car in which the defendant sat had a gun in his lap); *Copening*, 506 F.3d at 1248 (finding officers' use felony takedown procedure reasonable in light of their belief that a loaded gun—by any measure an inherently dangerous weapon—was in the vehicle's passenger compartment), and *Perdue*, 8 F.3d at 1463 (finding officers justified in stopping car with weapons drawn and ordering the defendant and his fiancée to get out of the car and lie face down based solely on their knowledge that guns were found on the property where marijuana was being cultivated and where the stop was made), with *United States v. Melendez-Garcia*, 28 F.3d 1046, 1050–53 (10th Cir. 1994) (holding that 'felony stop' procedures were unreasonable as part of a *Terry* stop, where officers conducted the stop on an open highway during the day, had no tips or observations that the suspects were armed or violent, and the defendants had pulled their cars to a stop off the road and stepped out of their cars in full compliance with police orders).

"Further, the Supreme Court has repeatedly recognized the inherent danger that officers face when confronting a suspect in a vehicle. See, e.g., *Mimms*, 434 U.S. at 110 (holding that police officers may order individuals to exit a vehicle during a *Terry* traffic stop based in part on the 'inordinate risk confronting an officer as he approaches a person seated in an automobile'); *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972) (citing a study that found 'approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile'); see also *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973) (noting 'that a significant percentage of murders of police officers occur when the officers are making traffic stops'). We too have acknowledged the 'dangerous dilemma' that police officers face when executing a *Terry* stop involving suspects in an automobile, especially where, as here, the officers have a reasonable suspicion that the suspect is armed. *Merritt*, 695 F.2d at 1273 (quoting *United States v. Jackson*, 652 F.2d 244, 249 (2d Cir. 1981)). In particular, in such circumstances, where the officers' suspicion does not rise to the level of probable cause, they face an untenable dilemma:

> *If the officer approaches a suspected robber with his gun still in his holster, he increases the risk that he will be shot. If, on the other hand, he protects himself by drawing his gun, he increases the risk that a court will set the criminal free by*

construing his action as an illegal arrest.

"Indeed, when an officer has a reasonable belief that a suspect he is investigating at close range is armed, 'it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.' *Long*, 463 U.S. at 1047; see also *Perdue*, 8 F.3d at 1463 ('The Fourth Amendment does not require that officers unnecessarily risk their lives when encountering a suspect whom they reasonably believe to be armed and dangerous.').

"Notably, we have held that 'the governmental interest in the safety of police officers outweighs the individual's Fourth Amendment interest when an officer has an objective basis to believe that the person being lawfully detained is armed and dangerous.' *United States v. King*, 990 F.2d 1552, 1561 (10th Cir. 1993) (emphasis added); see also *United States v. Holt*, 264 F.3d 1215, 1222 (10th Cir. 2001) (en banc) (Ebel, J., for the court) (The Supreme Court has found it 'too plain for argument' that the government's interest in officer safety is 'both legitimate and weighty,' given the 'inordinate risks confronting an officer as he approaches a person seated in an automobile.'

"Thus, in light of the foregoing principles, we must determine whether the totality of the circumstances known to the officers justified the nature of the particular seizure at issue here. See *Mosley*, 743 F.3d at 1328–29 (In evaluating whether the precautionary steps taken by an officer during a stop were reasonable, the standard is objective—would the facts available to the officer at the moment of the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate. We conclude that, under these circumstances, the degree of force used by the officers was reasonable and justified.

"In sum, given the particular facts of this case, we conclude that the precautionary measures of force that the officers employed in seizing Mr. Windom were reasonable, and did not cause his seizure to rise to the level of a de facto arrest, which would have required a showing of probable cause."

SEARCH AND SEIZURE:
Stop and Frisk; Seizure

United States v. Huertas
CA2, No. 15-4014-CR, 7/24/17

In May 2014, a woman pulled her car alongside a police cruiser in Bridgeport, Connecticut to ask about the process for amending a police report. After Officer Thomas Lattanzio responded, the woman drove away for a few feet, then reversed toward the police car and told Officer Lattanzio that a man named Branden was nearby with a gun. She pointed down the street, but Officer Lattanzio did not see anyone. Without giving her name, the woman drove away.

Officer Lattanzio then drove in the direction the woman pointed, searching for an armed man. He soon saw Huertas standing on a street corner holding a

black bag. Officer Lattanzio drove toward Huertas, going the wrong way on the one-way street. As the cruiser approached, Officer Lattanzio turned on the cruiser's spotlight and illuminated Huertas. Through the car's window, Officer Lattanzio asked Huertas a few questions, such as "What's going on?" and "What happened with the girl?" During Officer Lattanzio's approach and questioning, Huertas stayed in a fixed position and began answering the questions. The encounter lasted between thirty seconds and one minute. As soon as Officer Lattanzio got out of the cruiser, Huertas ran away.

Other police officers later found and arrested Huertas. A search of Huertas's route turned up a bag similar to the one Huertas had been holding. The bag contained a firearm.

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

"Because Huertas is appealing a suppression ruling, he only question on appeal is whether Huertas was seized. A seizure requires either physical force or, where that is absent, submission to the assertion of police authority. *United States v. Swindle*, 407 F.3d 562, 572 (2d Cir. 2005).

"It is undisputed that Officer Lattanzio used no physical force. Therefore, Huertas was seized only if he (1) submitted (2) to an assertion of authority. We conclude that Huertas never submitted to Officer Lattanzio and was therefore never 'seized' within the meaning of the Fourth Amendment. In light of this disposition, we need not consider whether the spotlighting of Huertas by a police car going the wrong way down a dark street constituted an assertion of authority.

"Huertas argues that he 'submitted' to police authority by standing still as Officer Lattanzio's police cruiser approached and by answering Officer Lattanzio's questions. However, we conclude that Huertas's behavior was akin to the evasive actions in *United States v. Baldwin*, 496 F.3d 215 (2d Cir. 2007) which did not constitute submission. The defendant in Baldwin pulled his car to the side of the road in response to a police cruiser's siren and flashing lights. Both police officers walked toward Baldwin's car and ordered Baldwin to show his hands. When he refused and just stared at them, the officers drew their weapons and continued to approach. As they neared, Baldwin sped off. When Baldwin was apprehended, weapons and drug paraphernalia were found in his car.

"The trial court denied Baldwin's motion to suppress the physical evidence on the ground that it was discovered after an illegal seizure. We affirmed on the ground that the temporary stop did not constitute submission to police authority. Rather, Baldwin's conduct, all circumstances considered, amounted to evasion of police authority, not submission.

"All circumstances considered, Huertas's actions were likewise evasive, and maximized his chance of avoiding arrest. If Huertas had run as soon as he was illuminated by Officer Lattanzio's spotlight, he could expect Officer

Lattanzio to give chase. By remaining still and answering questions, Huertas had a chance to quiet suspicion and hope that Officer Lattanzio would drive away after being satisfied with answers to his questions. But as soon as Huertas saw Officer Lattanzio getting out of his car, Huertas ran. Among the significant circumstances are the brevity of the interaction and the fact that Officer Lattanzio was never within reach of Huertas and able to physically restrain him. As in Baldwin, the totality of the circumstances indicate that the defendant was evading police authority, not submitting to it. Huertas was never seized, and the evidence was admissible.

SEARCH AND SEIZURE:
Suspended Release; Search of Cell Phone

United States v. Jackson
CA8, N0. 16-3807, 8/10/17

Richard Jackson appealed an order of the district court denying his motion to suppress evidence obtained during a search of his cell phone that occurred while he was serving a term of supervised release and residing at the Fort Des Moines Community Correctional Facility.

On February 27, 2015, Jackson began his term of supervised release at the Fort Des Moines Community Correctional Facility, a residential reentry program. The Facility staff provides residents with a Resident Manual that defines the rules governing their conduct. These rules prohibit possession of cell phones in the Facility. Residents may store a cell phone in a locker at the entrance, but no cell phones are permitted beyond that point. The regular practice of the Facility is for staff to read these rules to residents when they begin the reentry program. When a new resident on federal supervised release, like Jackson, first meets with his intake counselor, the counselor again notifies him of the rules. Multiple signs inside and outside the Facility notify all persons that any item brought onto the Facility's premises is subject to search.

On March 16, a probation officer confiscated Jackson's cell phone after he found Jackson with the device in violation of the Facility's rules. The officer released the cell phone to Jackson without searching it, but warned him that the cell phone would be confiscated and searched if Jackson violated the rule a second time.

Less than a week later, on March 21, a Facility staff member found Jackson's cell phone in the possession of another resident. The staff member confiscated the cell phone. A residential officer, charged with maintaining the orderly and secure operation of the Facility, then confirmed that it was Jackson's cell phone and asked him for the passcode. Jackson provided the passcode, and the officer informed Jackson that he was going to search the phone. After entering the passcode, the residential officer discovered many pornographic images and "inappropriate sites" on Jackson's Internet history. A probation officer who worked at the Facility then searched the device and discovered pornographic videos and images.

After learning of the inappropriate content found on Jackson's cell phone, Jackson's

supervising probation officer visited the Facility and searched Jackson's phone. While searching Jackson's Internet history, the probation officer found pornographic websites, including one that appeared to depict underage females. Jackson admitted that another person sent him approximately ten pictures of child pornography, which Jackson said that he deleted. The government later secured a warrant to search the cell phone. After a forensic examination, investigators discovered thirty-seven images of child pornography.

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

"In *Samson v. California*, 547 U.S. 843 (2006), the United States Supreme Court concluded that the Fourth Amendment did not forbid a police officer from conducting a suspicionless search of a parolee. In concluding that the search was reasonable, the Court assessed the degree to which the search intruded on the parolee's privacy and furthered legitimate government interests. The Court explained that parole is 'an established variation on imprisonment,' and that the essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. The parolee in Samson was unambiguously aware that one condition of his parole was that he must submit to suspicionless searches by a peace officer at any time. Under those circumstances, the Court concluded that the parolee did not have an expectation of privacy that society would recognize as legitimate. The Court further observed that the State's substantial interests in reducing recidivism, and in promoting reintegration and positive citizenship by parolees, justified intrusions on privacy that would not otherwise be allowed under the Fourth Amendment.

"It follows from Samson that the search of Jackson's cell phone was permissible under the Fourth Amendment. Supervised release is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). This punishment is meted out in addition to, not in lieu of, incarceration. *Samson*, 547 U.S. at 850. We have said that supervised release is a more severe punishment than parole and probation, and involves the most circumscribed expectation of privacy. *United States v. Makeeff*, 820 F.3d 995, 1001 (8th Cir. 2016).

"Like the parolee in Samson, Jackson was on clear notice that he was subject to the suspicionless search at issue. Although the judgment in Jackson's criminal case did not include a blanket condition that he must submit to suspicionless searches, he was required to reside at the residential facility and to follow the rules of the Facility and the reentry program. Jackson signed a form consenting to these conditions and agreeing to abide by them. Two unambiguous rules of the Facility, expressed to Jackson on multiple occasions, were that a resident cannot possess a cell phone inside the Facility, and that any property possessed within the Facility is subject to search. Given Jackson's diminished expectation

of privacy as a supervised releasee, and the clear notice that his cell phone was subject to search, Jackson did not enjoy an expectation of privacy in his cell phone that society would recognize as legitimate. The government's action here also furthered substantial interests in preventing recidivism and facilitating an offender's reentry into the community. These interests justified examining property that Jackson brought into the Facility against the rules.

"Jackson argues that *Riley v. California*, 134 S. Ct. 2473 (2014), demonstrates that the search was unconstitutional. Riley held that a warrant generally is required before an officer can lawfully search the information on a cell phone that is seized incident to an arrest. But Riley addressed privacy interests of an arrestee, not the circumscribed interests of an offender serving a term of supervised release. Riley also reasoned that the search of a cell phone did not further the government's post-arrest interests in preventing destruction of evidence and protecting officers; the decision did not address the government's interests in preventing recidivism by a supervised releasee and facilitating an offender's reentry into the community. Where a supervised releasee violates the rules of a reentry facility by possessing a cell phone despite warnings that it is subject to search, Riley is not controlling. The releasee's diminished expectation of privacy and the substantial government interests furthered by the search of the device make the intrusion permissible.

"For these reasons, we conclude that the search of Jackson's cell phone did not violate the Fourth Amendment under the circumstances presented here. The judgment of the district court is affirmed."

SEARCH AND SEIZURE:
Vehicle Search; Rental Vehicle; Standing to Object to Search

United States v. Long
CA8, No. 16-1419, 8/31/17

Rashawn Long argues that the district court should have suppressed evidence discovered during the search of his vehicle because the inventory search prior to towing his vehicle was unconstitutional. The government contends that Long lacks standing to challenge the legality of the search and, alternatively, that the inventory search was proper.

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

"The Fourth Amendment protects against unreasonable searches and seizures. In order to challenge evidence obtained in an unreasonable search, however, the defendant moving to suppress bears the burden of proving he had a legitimate expectation of privacy that was violated by the challenged search. *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995). In the rental car context, we have held that a driver of a rental vehicle does not have standing to challenge a search of the vehicle unless he can show he was the authorized driver, i.e. the renter or lessee, or had the permission of the authorized

driver. *United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998). The driver must make an affirmative showing of consensual possession to satisfy the standing requirements. *Muhammad*, 58 F.3d at 355.

"At the suppression hearing, Long presented the testimony of Latasha Phillips, the renter of the 2013 Avenger Long parked in McCoy's yard. Phillips testified that she rented the car for her friend Roger to drive. She did not, however, put Roger's name on the rental contract as an authorized driver. She further testified that she did not restrict what Roger could do with the car or who Roger could let use the car. Phillips stated Roger told her that he allowed Long to drive the car but her testimony was unclear whether she learned that Long was driving the car before or after the search at issue in this case.

"Long contends that Phillips's testimony establishes that he had consensual possession of the rental car and, thus, that he has standing to challenge the search. This case, however, is not so straightforward because, unlike this circuit's precedent, any permission Long had to drive the vehicle was not given directly from Phillips, the authorized driver. Rather, Roger, a driver not authorized by the lessor but permitted by the lessee to drive the car, gave Long permission to drive the vehicle and Phillips did not object. Stated differently, Roger acted as a 'middleman' between the authorized driver and Long.

"This circuit has not yet determined whether a defendant can make an affirmative showing of consensual possession when permission to drive a rental car is not given directly from a contractually authorized driver. We now hold that there is no reasonable expectation of privacy based on such an attenuated relationship between an authorized driver and an unauthorized driver. As a result, Long, an unauthorized-driver-once-removed, with only indirect permission from the authorized driver to drive the vehicle, does not have standing to challenge the search of the vehicle."