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CIVIL LIABILITY: Burglary Suspect Running Toward Officer with Weapon in Hand

Thomas v. City of Columbus, CA6, No. 16-3375, 4/19/17

In 2012, Destin Thomas lived in an apartment complex near Columbus, Ohio. His front door opened to a breezeway. On one end, the breezeway led to a parking lot that Destin's building shared with the others in the complex. On the other end, it led to a grassy area that separated Destin's building from other developments and a nearby road.

At around 8:45 a.m. on a July morning, two men broke through Destin's front door. Destin called 911 from inside his bedroom and spoke quietly to avoid drawing the burglars' attention. After a few minutes, however, the men tried to force their way into Destin's room. A struggle ensued. As Destin confronted the intruders, the 911 dispatcher sent out a burglary alert. The Columbus Police Department considers a burglary in progress a "priority one" call—a designation reserved for "ongoing life-threatening crimes, and situations likely to result in serious physical harm to any person."

Normally, the Department requires that two officers respond to these calls. "However, if the circumstances indicate a present or an imminent threat to a citizen's safety," the Department's procedures state that "the first

available sworn personnel shall respond directly and immediately to the scene." Five officers in the area responded to the alert. Officer William Kaufman was the first to arrive on the scene. On his way to the apartment complex, Officer Kaufman received updates from the dispatcher that let him know that the caller was inside a bedroom, that multiple suspects were in the apartment, and that the dispatcher heard yelling and crashing noises in the background.

When Officer Kaufman pulled into the complex's parking lot, he stopped his cruiser a few spaces down from the breezeway's entrance. He ran from his car toward the breezeway, approaching it from between a parked car and truck. Officer Kaufman says that as he ran, he could hear a commotion coming from the breezeway. The complex was in a high-crime area and Officer Kaufman says that he expected a gun might be involved. Officer Kaufman had his weapon unholstered.

When Officer Kaufman approached the breezeway's entrance, two men exited Destin's apartment and ran toward him. The first had a gun in his hand. Officer Kaufman stopped at the parking lot's edge, about 40 feet from Destin's front door. He shouted and then fired two shots at the person with the gun, who had closed the distance to what Officer Kaufman later estimated to be ten feet. The second suspect fled. Officer Kaufman chased him for a few steps before stopping. He then radioed out "shots fired" and requested an ambulance. Officer Kaufman never administered aid to the suspect that he shot, later saying that he considered it unsafe to do so with an active crime scene. He also says that the suspect appeared to be dead.

The person that Officer Kaufman shot was not a burglar. Rather, it was Destin, who had managed to disarm a burglar before fleeing his apartment. Unbeknownst to Officer Kaufman, and perhaps Destin, the gun that Destin had wrestled away was unloaded. Tragically, Destin died from the two gunshot wounds. When the next officer arrived on the scene a few minutes later, he entered the breezeway from behind the building. He found Officer Kaufman facing toward Destin's apartment door with his gun drawn. Between the officers lay Destin's body, clothed only in the gym shorts that he had slept in. The officer asked Officer Kaufman if he was okay. Officer Kaufman responded, "I think this was the homeowner."

After more officers arrived and secured the scene, a sergeant transported Officer Kaufman to a nearby police station. There, he met with his union-retained attorney. Officer Kaufman then returned to the scene for initial questioning but declined to comment. Nine days later, he submitted a statement through his attorney claiming that Destin had pointed the gun at him.

Destin's father, William Thomas, finds this implausible because Destin had called the police. Further, Mr. Thomas notes that Destin's bedroom faced the parking lot, meaning that he might have left his room specifically to run to Officer

Kaufman. Officer Kaufman stuck by his story during his deposition, even agreeing when the opposing lawyer suggested that the only thing that would make his firing a weapon reasonable would be Destin lifting the gun towards him. Besides Officer Kaufman, only one other living person witnessed the shooting—the burglar that followed Destin out of the apartment. Police captured him, but he refuses to testify. Currently, he is pursuing relief for his felony murder conviction based on Destin's death.

The Sixth Circuit affirmed the summary judgment rejection of Destin's estate's claims under 42 U.S.C. 1983, alleging excessive force and deliberate indifference to serious medical needs.

The Court of Appeals for the Sixth Circuit stated, in part, as follows:

"We analyze an officer's decision to use force 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' *Graham v. O'Conner*, 490 U.S. at 396 (1989). We do so mindful that police officers face 'tense, uncertain, and rapidly evolving' situations that require split-second judgments. The Fourth Amendment only requires officers to act reasonably on the information they have; it does not require them to perceive a situation accurately.

"…We must consider the circumstances that Officer Kaufman faced in the moment he decided to use force. Officer Kaufman had responded to a dangerous call in a high-crime area. He was alone. He ran towards the breezeway between two vehicles and then stopped at the parking lot's edge. Meanwhile, two people exited an apartment and then ran towards him, the first with a gun. About 40 feet initially separated Officer Kaufman from that person, and the distance only shrank as the person closed in on him. At this range, a suspect could raise and fire a gun with little or no time for an officer to react. Given these facts, a reasonable officer would perceive a significant threat to his life in that moment. Thus, Officer Kaufman's decision to fire his gun—even if Destin never raised his—was objectively reasonable."

CIVIL LIABILITY:
Claim of Excessive Force

Moore v. City of Memphis
CA6, No. 16-5552, 4/10/17

On September 5, 2012, Memphis Animal Services received its third complaint regarding potential animal cruelty at Donald Moore's home. The following month, an animal-control officer, Carol Lynch, went to Moore's residence to investigate. Moore did not come to the door initially, but Lynch spoke to Moore's neighbor, Tammy Hillis, who said that Moore had threatened her and that she was "terrified" of him. Lynch then called the Memphis Police Department for support, and two officers joined her at the scene.

This time, Moore came to the front door and gestured with his hand behind his back as if he had a weapon. The police officers asked to see Moore's hands, at which point Moore cursed, backed into

the house, and shut the door. One of the officers tried to tell Moore through the door that they just wanted to talk to him about his animals, but Moore responded with more curses.

Soon thereafter, Lynch and John Morgret, a criminal investigator with the Memphis Humane Society, met with Lieutenant Martin Kula and Officer Scott Edwards of the Memphis Police Department. Based on Lynch's statement, Lieutenant Kula thought that Moore might be unstable. But Officer Edwards—who was trained in dealing with people with mental illness—saw nothing in Moore's records to indicate that he had a history of violence or was mentally ill.

On January 8, 2013, Officer Edwards and Lynch went to Moore's home. Moore refused to open the door, but through it Officer Edwards told Moore that Animal Services merely wanted to ensure that his animals were healthy. Moore kept his door closed, ordered them off his property, and called 911. His call was directed to Lieutenant Kula, who tried unsuccessfully to get Moore to cooperate. After their interactions with Moore that day, both Officer Edwards and Lieutenant Kula thought that Moore was angry but not mentally ill.

The next day, Hillis told Lynch that, after the officers had left the day before, Moore came out of his house with a gun and said he would kill Lynch if she returned. According to Hillis, Moore added that he would "shoot first and then ask questions later" if the officers came back. On January 10, 2013, Morgret got a warrant to search Moore's home. Lynch and Morgret presented the warrant to Lieutenant Colonel Marcus Worthy, who was in charge of the precinct. Lynch and Morgret told Lieutenant Colonel Worthy that Moore had threatened Lynch and Memphis police officers and that Moore was likely armed. Based on that information, Lieutenant Colonel Worthy decided that TACT (the Memphis Police Department's version of SWAT) should assist in serving the warrant.

TACT uses what it calls a "dynamic entry" when it has probable cause to think that the officers who execute a search warrant will encounter a person armed and dangerous to them. During dynamic entries, TACT often deploys "flash-bangs," which are small, grenade-like devices that disorient persons around them with a sudden loud noise and a very bright light.

After dark on January 11, 2013, Penny led the TACT team to Moore's home. When they arrived, the officers split into two groups—one posted at Moore's front door, and one at the back. At the front door, an officer announced "police department, search warrant," and then broke the living-room window and threw a flash-bang inside. At the rear, Penny then announced "police department, search warrant," entered through the back door, and tossed in another flashbang.

One of the TACT officers saw Moore go down a hallway and enter his bedroom, where Moore called 911. Penny and his team approached the bedroom and called out "Memphis Police" and "we have a

search warrant, Don." The officers can be heard doing so on the 911 call. Moore yelled back, "I ain't committed a crime," and "a search warrant, big shit, . . . nothing criminal happened here."

Penny decided to secure the bedroom so that Moore could not barricade himself there. One of the officers threw a flash-bang into the bedroom; Penny followed close behind. Once in the room, according to Penny, he saw Moore several feet in front of him. Moore was facing Penny and holding a semi-automatic pistol in his hand—pointed at Penny. On the 911 tape, after the flash-bang goes off, Penny can be heard yelling, "Hands, Don! Hands, hands, hands!"

A couple of seconds later, Penny fired three shots at Moore, killing him. Another officer entered the bedroom and secured Moore's gun, which was fully loaded with a round in the chamber and still in Moore's hand. Moore had another pistol in a holster on his belt. Officers also found a rifle next to the front door and axes next to each door into the house.

Moore's children sued under 42 U.S.C. 1983, claiming excessive force. The Sixth Circuit affirmed summary judgment in favor of the defendants, finding no violation of Moore's constitutional rights.

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

"As a matter of law, the law enforcement use of force was not excessive under the Fourth Amendment. But that does not mean the dynamic entry, in particular, was wise. The warrant here concerned evidence only of a misdemeanor; and yet the defendants chose a course of action that, though constitutional, unavoidably jeopardized the officers' lives along with Moore's. In the end Moore was shot, though it just as easily could have been Penny—as the defendants themselves emphasize here. Meanwhile, the officers plainly had available to them other options that did not involve an immediate physical confrontation. The officers would have done well to consider them more seriously than they apparently did."

CIVIL LIABILITY: Claim of Excessive Force; Pepper Spray; Choking

Tatum v. Robinson
CA8, No. 16-1908, 5/30/17

On April 29, 2014, a security camera operator at a Dillard's department store in Little Rock saw Tatum grab eight pairs of shorts from a display and walk toward nearby exit doors. The camera operator remotely locked the doors. Tatum tried to exit without paying. Finding the doors locked, he put down the shorts, walked around the store, told Dillard's staff the doors were locked, and returned to the area near the display. The camera operator alerted an assistant store manager and mall security. She also contacted Willie Robinson, Sr. who was working off-duty as a security officer, and told him about Tatum's actions. Another mall security officer and at least two Dillard's employees waited near Tatum for Robinson to arrive.

Robinson, in plain clothes, walked up to the smaller Tatum. He said he was a law enforcement officer. He told Tatum he was under arrest and to put his hands on a clothes rack. Tatum argued with Robinson and did not comply. According to the other security officer at the scene, Robinson told Tatum that he would pepper spray him if he did not calm down.

About 14 seconds after walking up to Tatum, Robinson pepper sprayed his face for one second. The two then crashed into a display table. Tatum says he did not fight or resist. Robinson, however, says Tatum "began wrestling and fighting with him into a table." They struggled, and Robinson's hands got injured.

With the other security officer's assistance, Robinson handcuffed Tatum. Tatum says Robinson was choking him to the point he could not breathe. Robinson then walked Tatum to the store's security room with his arm around Tatum's neck. Tatum says he was choked the entire way.

Robinson says he did not choke Tatum and Tatum was resisting. Once in the security room, Tatum says, Robinson repeatedly stomped, kicked, and slammed him, and called him "n****r m***f***r." Robinson denies all this, saying that, because Tatum kept getting up from his seat, he pushed Tatum back into his seat several times and then kicked his feet out from under him.

Video from Dillard's security cameras shows some of Tatum's acts before Robinson approached him, and some of their interactions before entering the security room. No video or audio was recorded inside the security room.

Tatum later pled guilty to felony robbery and misdemeanor resisting arrest and theft of property. Tatum sued Robinson for using excessive force. He submitted affidavits describing the events of April 29. Robinson moved for summary judgment on the basis of qualified immunity, citing witness affidavits, Tatum's guilty pleas, and the security footage. The district court denied qualified immunity on Tatum's claims that Robinson used excessive force by pepper spraying and choking him. Robinson appeals.

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

"…Objective reasonableness of Robinson's use of pepper spray turns on all the facts and circumstances, from the perspective of a reasonable officer on the scene. *Graham v. Conner*, 490 U.S. 386 (1989) directs this court's attention to three factors: the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. By these factors and other facts and circumstances, a reasonable jury could find that Robinson's use of pepper spray was objectively unreasonable.

"First, Tatum's suspected crime at the time of pepper-spraying—theft of eight pairs of shorts—was not severe.

Tatum was, as the district court found, a 'nonviolent, suspected misdemeanant.' See *Peterson*, 754 F.3d at 600; *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009). Second, a reasonable officer would not have thought Tatum posed an 'immediate' threat to anyone's safety. There is no dispute that Tatum argued angrily with the larger Robinson and did not comply with an order. This court has found it may be unreasonable to pepper spray someone who refuses to comply with an officer's orders to leave a bus stop, calls the officer 'rude,' asks for his badge number, and tells the officer 'you can't handle me like that.' *Peterson*, 754 F.3d at 597, 599-601. Here, a reasonable officer might have thought that Tatum's angry arguing could eventually escalate to physical violence. But a reasonable officer would not think Tatum—who was angrily arguing but made no verbal threats or physical movements indicating a threat—posed an 'immediate' safety threat. See *Johnson v. Carroll*, 658 F.3d 819, 827 (8th Cir. 2011) (finding use of force against person interjecting her body between arrestee and the officers unreasonable because there was no evidence that she actively pushed the officers away from arrestee, threatened them, or took any other action against them); *Brown*, 574 F.3d at 497 (finding no threat posed by suspect, despite officer's stated belief that she might have used glass tumblers as weapons, because she did not reach for them, and she did not threaten the officers, verbally or physically). Cf. *Cook v. City of Bella Villa*, 582 F.3d 840, 849 (8th Cir. 2009) (finding officer, alone and outnumbered by unpredictable intoxicated people, reasonably tased individual who yelled at and stepped toward him).

"Third, a reasonable officer would not believe Tatum was 'actively' resisting arrest. True, witness affidavits describe Tatum as fighting and resisting Robinson. But the district court found these statements inconsistent with the security footage. Noncompliance and arguing do not amount to active resistance. See Ark. Code Ann. § 5-54-103(a) (defining 'resisting arrest' to require 'using or threatening to use physical force or any other means that creates a substantial risk of physical injury to any person'). Viewing the facts most favorably to Tatum, a reasonable officer would not think he was 'actively' resisting arrest.

"It was not reasonable for Robinson to immediately use pepper spray. Pepper spray can cause more than temporary pain. See *Peterson*, 754 F.3d at 601; Brown, 574 F.3d at 500 n.6 (citing testimony that 'taser and pepper spray are coequals on the use of force continuum'). Robinson presents no evidence he attempted to use other force to secure compliance—no evidence he tried to grab Tatum's hands and place them on the clothes rack, for example. See *Hollingsworth*, 800 F.3d at 990 (The issue in this case is whether the officer, having justification to use some force violated plaintiff's clearly established rights by deploying the Taser rather than employing other means.). Instead, he proceeded to pepper spray Tatum 14 seconds after he encountered him, and necessarily fewer seconds after Tatum failed to comply with his command.

"Given the limited justification for using force against Tatum, a jury could find that Robinson used an unreasonable amount of force when he pepper sprayed Tatum.

"To determine whether Robinson violated clearly established law by pepper spraying Tatum, this court looks to the law at the time he used force. See *Peterson*, 754 F.3d at 601. As of April 29, 2014, the question that Robinson faced was not 'beyond debate.' The district court, relying on *Brown*, found otherwise. *Brown* clearly established it was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders to end her phone call to a 911 operator. *Brown*, 574 F.3d at 499. But the situation Robinson faced differed in significant ways from the situation the officer faced in *Brown.* Tatum was angrily arguing; Brown was sitting quietly. Robinson warned Tatum before he used the pepper spray; the officer did not warn Brown before tasing her. Other cases decided before April 29, 2014, indicated an officer might be justified in using pepper spray (or similar force) on an angrily arguing individual after giving a warning. See *Johnson*, 658 F.3d at 827 (emphasizing lack of warning before spraying mace); *Cook*, 582 F.3d at 849 (finding officer reasonably tased individual who was yelling at officer and took step toward him, where other facts indicated force was reasonable).

"Tatum's right to be free from the use of pepper spray under these facts was not sufficiently definite. A reasonable officer in Robinson's shoes could have believed he was not violating Tatum's rights by pepper spraying him because Tatum was angrily arguing and was warned before the pepper spray was used. The district court erred in concluding Tatum's right to not be pepper sprayed was clearly established.

"Viewing the evidence most favorably to Tatum, Robinson choked him for an extended period of time although he was restrained and not resisting. A reasonable jury could find that Robinson's use of force was objectively unreasonable. As explained, Robinson pepper sprayed Tatum when the Graham factors 'least justified' use of force. After Robinson used the pepper spray, there was no justification for choking a restrained, non-fighting, non-resisting Tatum. Suspects' Fourth Amendment rights to be free from excessive force are violated if officers choke, kick, or punch them when they are restrained, not fighting, and not resisting. *Chambers v. Pennycook*, 641 F.3d 898, 902, 907-08 (8th Cir. 2011) (choking and kicking); *Krout v. Goemmer*, 583 F.3d 557, 566 (8th Cir. 2009) (kicking and punching); *Henderson v. Munn*, 439 F.3d 497, 502-03 (8th Cir. 2006) (pepper spraying and kneeing).

"Arguing his use of force was reasonable, Robinson says he was not choking Tatum and Tatum was resisting. These contentions are directly contradicted by Tatum's affidavit. This court may not resolve genuine disputes of material

fact in Robinson's favor at the summary judgment stage. Viewing the evidence most favorably to Tatum, Robinson unreasonably used excessive force by choking him.

"As of April 29, 2014, it was clearly established that a suspect's Fourth Amendment rights were violated by uses of force like Robinson's. See *Chambers,* 641 F.3d at 907-08 (establishing it violates Fourth Amendment to kick and choke restrained, non-resisting suspect even if the kicking and choking causes only de minimis injuries); *Krout*, 583 F.3d at 566 ('It was clearly established that the use of this type of gratuitous force against a suspect who is handcuffed, not resisting, and fully subdued is objectively unreasonable under the Fourth Amendment.'); *Henderson*, 439 F.3d at 503 (holding use of pepper spray on a suspect who was 'subdued and restrained with handcuffs' 'may have been a gratuitous and completely unnecessary act of violence and thus violated Henderson's Fourth Amendment rights.' These cases put the question of the constitutionality of choking Tatum beyond debate because they clearly establish that it violates the Fourth Amendment to choke a suspect who is handcuffed and not resisting. The district court correctly denied qualified immunity on the choking claim."

CIVIL LIABILITY:

Minimum Force to Control

Estate of Hill v. Miracle
CA6, No. 16-1818, 4/4/17

Corey Hill suffered a diabetic emergency. Paramedics, including Streeter, found Hill very disoriented and combative. Streeter tested Hill's blood-sugar level, which was extremely low at 38. As blood sugar falls, a person may lose consciousness, become combative and confused, or suffer a seizure. A blood-sugar level of 38 is a medical emergency and, untreated, can lead to death.

Deputy Miracle arrived as paramedics were attempting to intravenously administer dextrose to raise Hill's blood-sugar level. Hill ripped the catheter from his arm, causing blood to spray, and continued to kick, swing, and swear as the paramedics tried to restrain him. Miracle eventually deployed his taser to Hill's thigh, quieting Hill long enough for Streeter to reestablish the IV catheter and administer dextrose. Hill's blood-sugar levels stabilized. Hill denied being in pain, but was taken to the hospital. No treatment was rendered for the taser wound. Hill claimed that he suffered burns and that his diabetes worsened. Hill filed suit under 42 U.S.C. 1983, alleging excessive force, with state-law claims of assault and battery and intentional infliction of emotional distress. Hill subsequently died from complications of diabetes. The district court denied Miracle's claim of qualified immunity.

The Sixth Circuit reversed, with instructions to dismiss. "Miracle acted in an objectively reasonable manner with the minimum force necessary to bring Hill under control, and his actions enabled the paramedics to save Hill's life."

CIVIL LIABILITY:

Ninth Circuit's Provocation Rule

County of Los Angeles, California v. Mendez
USSC, No. 16-369, 5/20/17

The Los Angeles County Sheriff's Department received word from a confidential informant that a potentially armed and dangerous parolee-at-large had been seen at a certain residence. While other officers searched the main house, Deputies Conley and Pederson searched the back of the property where, unbeknownst to the deputies, Mendez and Garcia were napping inside a shack where they lived. Without a search warrant and without announcing their presence, the deputies opened the door of the shack. Mendez rose from the bed, holding a BB gun that he used to kill pests. Deputy Conley yelled, "Gun!" and the deputies immediately opened fire, shooting Mendez and Garcia multiple times. Officers did not find the parolee in the shack or elsewhere on the property.

Mendez and Garcia sued Deputies Conley and Pederson and the County under 42 U. S. C. §1983, pressing three Fourth Amendment claims: a warrantless entry claim, a knock-and-announce claim, and an excessive force claim. On the first two claims, the District Court awarded Mendez and Garcia nominal damages. On the excessive force claim, the court found that the deputies' use of force was reasonable under *Graham v. Connor*, 490 U. S. 386, but held them liable nonetheless under the Ninth Circuit's provocation rule, which makes an officer's otherwise reasonable use of force unreasonable if (1) the officer "intentionally or recklessly provokes a violent confrontation" and (2) "the provocation is an independent Fourth Amendment violation," *Billington v. Smith*, 292 F. 3d 1177, 1189.

On appeal, the Ninth Circuit held that the officers were entitled to qualified immunity on the knock-and-announce claim and that the warrantless entry violated clearly established law. It also affirmed the District Court's application of the provocation rule, and held, in the alternative, that basic notions of proximate cause would support liability even without the provocation rule.

Upon review, the United States Supreme Court found, in part, as follows…

"The Fourth Amendment provides no basis for the Ninth Circuit's 'provocation rule.' The provocation rule is incompatible with this Court's excessive force jurisprudence, which sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment. See *Graham*. The operative question in such cases is whether the totality of the circumstances justifies a particular sort of search or seizure. *Tennessee v. Garner*, 471 U. S. 1 –9. When an officer carries out a seizure

that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim. The provocation rule, however, instructs courts to look back in time to see if a different Fourth Amendment violation was somehow tied to the eventual use of force, an approach that mistakenly conflates distinct Fourth Amendment claims. The proper framework is set out in *Graham*. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately.

"There is no need to distort the excessive force inquiry in order to hold law enforcement officers liable for the foreseeable consequences of all their constitutional torts. Plaintiffs can, subject to qualified immunity, generally recover damages that are proximately caused by any Fourth Amendment violation. See, e.g., *Heck v. Humphrey,* 512 U. S. 477. Here, if respondents cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused by the warrantless entry.

"On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their injuries based on the deputies' failure to secure a warrant at the outset."

CIVIL LIABILITY:

Pretrial Detention Absent Probable Cause

Manuel v. City of Joliet
USSC, No. 14-9496, 3/21/17

During a traffic stop, officers searched Elijah Manuel and found a vitamin bottle containing pills. Suspecting the pills were illegal drugs, officers conducted a field test, which came back negative for any controlled substance. They arrested Manuel. At the police station, an evidence technician tested the pills and got a negative result, but claimed that one pill tested "positive for the probable presence of ecstasy." An arresting officer reported that, based on his "training and experience," he "knew the pills to be ecstasy." Another officer charged Manuel with unlawful possession of a controlled substance. Relying exclusively on that complaint, a judge found probable cause to detain Manuel pending trial.

The Illinois police laboratory tested the pills and reported that they contained no controlled substances. Manuel spent 48 days in pretrial detention. More than two years after his arrest, but less than two years after his case was dismissed, Manuel filed a 42 U.S.C. 1983 lawsuit against the City of Joliet and the officers. The district court dismissed, holding that the two-year statute of limitations barred his unlawful arrest claim and that pretrial detention following the start of legal process could not give rise to a Fourth Amendment claim. The Seventh Circuit affirmed.

The Supreme Court reversed, finding in part as follows:

"Pretrial detention can violate the Fourth Amendment when it precedes or when it follows, the start of the legal process. The Fourth Amendment prohibits government officials from detaining a person absent probable cause. Where legal process has begun but has done nothing to satisfy the probable-cause requirement, it cannot extinguish a detainee's Fourth Amendment claim. Because the judge's determination of probable cause was based solely on fabricated evidence, it did not expunge Manuel's Fourth Amendment claim. On remand, the Seventh Circuit should determine the claim's accrual date, unless it finds that the city waived its timeliness argument."

CIVIL LIABILITY: Qualified Immunity; Applying Force to Someone Believed to Have Something in Their Mouth

Surratt v. McClarin
CA5, No. 16-40486, 3/14/17

On August 20, 2013, Officer Tom Caver of the Sherman Police Department effected a traffic stop, pulling over Lesa Ann Surratt for signaling one direction but then turning the other. The stop was pretextual. Earlier that day, Caver had been informed that Surratt was in possession of narcotics.

Once Officer Trevor Stevens arrived as backup, the officers arrested Surratt for the traffic violation. They also arrested Surratt's only passenger, Monica Garza, on some outstanding traffic warrants. The officers handcuffed both women and placed them in the backseat of Caver's patrol car, securing them with seatbelts. The patrol car was equipped with an in-car video surveillance system that recorded most of the remaining events at issue.

The officers returned to Surratt's vehicle to retrieve the women's personal effects, briefly leaving the women alone and unsupervised in the backseat of the patrol car. During this time, Surratt managed to free her right hand from her handcuffs, pull a small baggy of narcotics from underneath her skirt, and place it in her mouth. When Stevens returned to the patrol car a few moments later, he opened the back door nearest to Surratt and heard what sounded like an object hitting the floor. He asked, "What did you do? What did you drop?" When the women stated that they had not dropped anything, Stevens ordered Caver—who had just returned to the vehicle himself and opened Garza's side door—to "get 'em out, one by one. They were trying to hide something."

Stevens then noticed Surratt's skirt and observed, "She's got her britches pulled up, it's in her, it's in her pants." Caver reached across Garza and grabbed Surratt's right arm which was behind her back. He then shined his flashlight in Surratt's face and ordered her to open her mouth up. Less than four seconds later, Stevens pressed his forearm against Surratt's left jawline and neck while Caver pressed his thumb into the back of her right jawline to try and force her to open her mouth. Surratt fought back, grabbing

at Caver's arms as he continued to apply what the police department called "soft hands techniques." She also kept ignoring the officers' instructions to open her mouth. After several seconds of struggle, Caver grabbed Surratt's right hand and attempted to pull her over Garza and out the door. Because Surratt's seatbelt was still buckled, this took nearly a minute. By the time she was completely out of the patrol car, Surratt was unresponsive and having a seizure.

The officers noted that Surratt was not breathing and radioed for an ambulance. By this time, several other officers had arrived on the scene as backup. The officers assumed that Surratt was choking. Detective Brian McClaran1 administered the Heimlich maneuver in an effort to dislodge the obstruction in her throat, but was unsuccessful. Eventually, the fire department arrived and used forceps to remove the plastic baggie from Surratt's throat. She was transported to the hospital and placed on life support but died thirteen days later as a "result of complications of asphyxia due to airway obstruction by plastic bag."

Surratt's sister, Linda Surratt then filed the instant lawsuit. She asserted claims against Caver, Stevens, McClaran, and the City of Sherman for excessive force and unreasonable search and seizure. The defendants filed a motion for summary judgment. The district court granted the motion, partly because it concluded that the officers were entitled to qualified immunity. While the district court concluded that the officers had violated Surratt's Fourth Amendment right to be free from excessive force, it held that the officers' actions were not objectively unreasonable in light of clearly established law at the time of the incident. Linda appealed.

Upon review, the Fifth Circuit Court of Appeal found, in part, as follows:

"Section 1983 enables persons who have been deprived of any rights, privileges, or immunities secured by the Constitution and laws of the United States by the actions of a person or entity operating under color of state law to seek redress from those state actors responsible for the deprivations. 42 U.S.C. § 1983. But qualified immunity insulates those government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Courts use a two-prong analysis to determine whether a defendant is entitled to qualified immunity in a given case. The court must decide both whether the plaintiff has alleged a violation of a constitutional right and whether the government official acted objectively unreasonably in light of 'clearly established' law at the time of the incident.

"Assuming without deciding that the officers' conduct violated Surratt's constitutional rights, Linda has failed to demonstrate that the officers acted objectively unreasonably in light of clearly established law at the time of the incident. For a law to be clearly established,

existing precedent must have placed the statutory or constitutional question beyond debate. *White v. Pauly*, 137 S. Ct. 548, 551 (2017). This is done only when we can identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment.

"Linda has failed to meet this burden. Fifth Circuit precedent actually supports the conclusion that the officers' conduct was not objectively unreasonable in light of clearly established law. In *Espinoza v. United States,* 278 F.2d 801 (5th Cir. 1960) a suspect—when confronted by police officers—attempted to swallow and destroy what to the officers appeared to be a quantity of narcotics. The officers responded by choking the suspect and attempting to pry open his mouth by placing pressure against his jaw and nose. The panel concluded that no more force was used than was necessary under the circumstances.

"As the district court noted, 'previous law has provided no guidance regarding what is precisely reasonable and what is unreasonable regarding the use of force to an individual's throat where the individual appears to be concealing something in their mouth.' Accordingly, we cannot say that the officers acted objectively unreasonably in light of clearly established law."

CIVIL LIABILITY:

Qualified Immunity; Cardiac Arrest During Physical Altercation; Bipolar Disease

Arrington-Bey v. City of Bedford Heights, Ohio, CA 6, No. 16-3317, 2/24/17

Anita Arrington-Bey went with her son, Omar, to Lowe's to pick up his last paycheck. When the assistant manager approached, Omar "started talking a lot of gibberish" and eventually began throwing paint cans. Officers, responding to a 911 call, stopped Anita's car. Omar was evasive but compliant. During the pat-down, officers discovered pills in a container, which they returned to Omar's pocket after handcuffing him. Omar stated that he had not taken his medication, for a psychiatric condition, for weeks. Anita stated that Omar, who began ranting incoherently, was bipolar, that the pills were Seroquel, and that he had not taken his medication.

At the jail, Omar would calm down periodically, then return to rambling, talking to himself, and engaging in strange behavior. Released without handcuffs to make a phone call, Omar threw an officer to the floor and began choking him. Officers rushed into the jail and pulled Omar into the restraint chair and noticed something wrong. Omar's pulse was weak. They tried to resuscitate him and called the rescue squad. At the hospital, Omar was pronounced dead "as a result of a sudden cardiac event during a physical altercation in association with bipolar disease."

In Anita's suit, alleging deliberate indifference, the court denied the officers qualified immunity. The Sixth Circuit reversed, stating "there was no violation of a clearly established constitutional right. The officers did not act with recklessness that would permit them to be liable under the law."

EDITOR'S NOTE: *This case was originally filed as an unpublished opinion but was now designated for a full-text publication on 5/27/17.*

CIVIL LIABILITY: Qualified Immunity; Focused Deterrence Program

Alston v. City of Madison
CA7, No. 16-1034, 4/10/17

The Madison Police Department established a focused deterrence program to increase surveillance of repeat violent offenders. Alston, one of 10 repeat violent offenders originally selected for the program, filed suit under 42 U.S.C. 1983, claiming that he was selected for the program because of his race, and arguing that his inclusion in the program deprived him of liberty without due process of law and that he was stigmatized and subjected to increased surveillance, penalties, and reporting requirements. Alston presented evidence that blacks accounted for only 4.5 percent of the Madison population but 37.6 percent of arrests and 86 percent of the program; four candidates associated with allegedly black gangs were selected while the one candidate associated with an allegedly white gang was not. The district court granted the defendants summary judgment.

The Seventh Circuit affirmed, finding in part as follows:

"Alston failed to produce evidence that would allow a reasonable trier of fact to conclude that the program had a discriminatory effect or purpose or that Alston's legal rights were altered by inclusion in the program. Alston's statistics did not address whether black, repeat violent offenders were treated differently from white, repeat violent offenders and were not evidence of discriminatory effect."

CIVIL LIABILITY: Qualified Immunity; Handcuffing a High Risk Threat

Howell v. Smith, CA7, No. 16-1988, 4/10/17

Thomas D. Howell, a veteran and school teacher in his early sixties, has had multiple shoulder surgeries, including complete replacement of his right shoulder. He was able to stretch his right arm, to write on a blackboard, and to lift up to six pounds with his right arm. His left shoulder was in better condition.

Highland Police Officer Shawn Smith received a call from his dispatcher, alerting him to a road rage incident involving the discharge of a firearm. He later came upon a car matching the description and conducted a "high risk traffic stop." Smith placed Howell, the car's occupant, in handcuffs and detained him until other officers brought the alleged victim to the scene. The victim identified Howell and his vehicle as

involved in the road rage incident. The officers, finding no weapon, decided to release Howell. The stop lasted approximately 30 minutes.

Howell claims that the officers' treatment aggravated his preexisting shoulder condition, which required multiple surgeries.

The Seventh Circuit reversed the district court's decision to deny Smith's qualified immunity claim, finding "Smith's decision to place Howell, then implicated in a serious crime involving the discharge of a weapon, in handcuffs and to keep him in handcuffs until satisfied that he was not a threat did not violate the Fourth Amendment."

CIVIL LIABILITY: Qualified Immunity; Police Canine Inflicting Serious Injury

Jones v. Officer S. Fransen
CA11, No 16-10715, 5/19/17

The trouble in this case began when Jones and his girlfriend broke up. Following the split, on July 6, 2013, Jones's ex-girlfriend called 911 to report that Jones had broken into her apartment and was carrying a television to his car, which was parked at her apartment complex.

Two of the officers who responded to the call included Gwinnett County Police Department Officers Brandon Towler and Richard Ross. Towler and Ross searched the apartment-complex area for Jones. Meanwhile, another officer claimed to have seen Jones carrying a bag and a television near the apartment pool.

At some point, the officers believed that Jones had fled to a "steep ravine pond area with high concert walls, boulders and vegetation." Officer Scott Fransen, who worked with police-canine Draco, arrived on the scene to look for Jones and issued what are known as K-9 warnings. After hearing no response, Fransen and Draco entered the ravine to find Jones. Ross and another officer provided backup.

During the search for Jones, Fransen saw Jones motionless, at the bottom of the ravine. But Fransen had already released Draco, and Draco ran loose and savagely attacked and tore Jones's left arm, even though Jones lay motionless during the attack. Ross, who was also present, did nothing to protect Jones from the attack.

After "a while" passed, which Jones described as "seeming like a lifetime," Fransen tried to pull Draco from Jones's arm, but Draco refused to yield. Finally, however, Fransen was able to separate Draco from Jones. But unfortunately, the damage was done. This incident permanently disfigured and limited the use of Jones's arm.

Jones filed suit against Fransen, Ross, Towler, Draco, Gwinett County, and Gwinnett County Police Chief A.A. Ayers. The defendants moved to dismiss the case for failure to state a claim, invoking qualified immunity. The district court denied the motion. The defendants appealed this denial of qualified immunity.

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

"Jones sued Draco, among others, for negligence. Georgia law by its terms, however, does not provide for negligence actions directly against dogs. We therefore hold as much today and reverse the district court's denial of Defendant-Appellants' motion to dismiss Draco.

"But while Georgia law does not allow for a negligence suit against a dog, it does permit negligence claims against a state officer who is not entitled to official immunity. Title 42, United States Code, Section 1983 likewise authorizes an action against a police officer who employs a dog in an exercise of excessive force. And Jones also sued the officers responsible for Draco's encounter with Jones. In response, the Officers invoked official and qualified immunity and moved to dismiss. The district court summarily denied the motion. Today we must reverse that denial and dismiss the claims. Jones has failed to allege facts establishing that the officer acted with malice, so the officers are entitled to official immunity. Nor does binding precedent allow for the conclusion that Defendant Officers' employment of Draco in the circumstances of this case violated Jones's clearly established rights, so the officers have qualified immunity."

CIVIL LIABILITY:

Qualified Immunity; Unreasonable Lengthy and Degrading Detention

Davis v. United States
CA9, No. 15-55671, 4/13/17

In this case, the Court of Appeals for the Ninth Circuit considered whether a federal agent is entitled to qualified immunity from suit for detaining an elderly woman in a public parking lot for two hours, while she stood in urine-soaked pants, to question her, incident to a search, about her possession of a paperweight containing a rice-grain-sized bit of lunar material. The Court concluded he is not entitled to qualified immunity.

Joann Davis, and her late husband Robert, worked together at North American Rockwell, which had a contract with the National Aeronautics and Space Administration ("NASA") in connection with the nation's space program. By all accounts, Robert was a brilliant engineer, and he ultimately became a manager of North American Rockwell's Apollo project. While working on the space program, he received many items of memorabilia, including two lucite paperweights. One contained a rice-grain-sized fragment of lunar material, or "moon rock;" the other contained a small piece of the Apollo 11 heat shield. According to unverified family lore, the paperweights were given to Robert by Neil Armstrong in recognition of Robert's service to NASA.

When Robert died in 1986, Joann retained possession of the paperweights. She married her current husband, Paul Cilley, in 1991. Davis began experiencing financial hardship in 2011. Her son was severely ill, having had over 20 surgeries and requiring expensive medical care. In addition, she unexpectedly had to raise several grandchildren when their mother, Davis's youngest daughter, died.

Her son suggested that the paperweights might have value, so Davis began contemplating selling them to cover some of his medical costs. She contacted some public auction houses, without success, so she then contacted NASA via email for assistance in finding a buyer for 2 rare Apollo 11 space artifacts. She explained that both of these items were given to her late husband by Neil Armstrong, and that he was very instrumental in all of the space programs right up until his death in February of 1986.

Davis's email was forwarded to the NASA Office of Inspector General at the Kennedy Space Center in Florida, where Norman Conley was a special agent and criminal investigator. Conley's supervisor instructed him to investigate whether Davis indeed possessed a moon rock and to obtain a Registered Confidential Source to initiate telephone contact with her. A few hours after Davis sent the email, Conley's source called her, posing as a broker named "Jeff" who previously worked on the "space-shuttle program," was well-known at NASA, learned of Davis's email to NASA, and would help her sell the paperweights.

Over the course of seven phone calls with "Jeff," all of which were recorded but the first, Davis expressed concern that the paperweights would be confiscated by NASA unless she could somehow prove they were actually a gift to her late husband; she told "Jeff" that she had spoken with her accountant regarding her tax liability for the sale because she could not "hide stuff" and was "not that kind of person;" and she explained that she wanted to "do things legally" because she is "just not an illegal person." "Jeff" responded, agreeing that "you and I are both legal people," but "the sale of a moon rock can't be done publicly."

In a later call, Davis told "Jeff" that she heard of someone serving a prison sentence for selling lunar material, but she understood her situation to be different because her late husband received the paperweights as a gift. At no point did "Jeff" or Conley inform Davis that all lunar material is property of the U.S. government or that her possession of the paperweights was illegal. Davis also mentioned that, because her former husband worked for the Bureau of Alcohol, Tobacco, Firearms, and Explosives, she had several firearms in her home that she was trying to sell.

Based on these phone calls, Conley obtained a warrant to search Davis and seize the moon rock paperweight. In his affidavit supporting the warrant, Conley stated that he believed Davis was "in possession of contraband, evidence of the crime, fruits, and instrumentalities of the crime concerning a violation of 18 U.S.C. § 641."

To execute the warrant, "Jeff" made arrangements with Davis to meet around noon on May 19, 2011, at a Denny's Restaurant located in Lake Elsinore, California. Davis believed the purpose of this meeting was to finalize the sale of the paperweights. In fact, it was a government sting operation to seize the moon rock paperweight.

Davis proceeded to meet with "Jeff" at the restaurant. She was accompanied by Cilley, who was approximately 70 years old. At the time of the incident, Davis was 74 and 4'11" tall. Three armed federal agents and three Riverside County Sheriff's personnel were present, but not visible.

Once Davis, Cilley, and "Jeff" were seated in a booth inside the restaurant and exchanged pleasantries, Davis placed the paperweights on the table. "Jeff" said he thought the heat shield was worth about $2,000. Shortly thereafter, Conley announced himself as a "special agent," and another officer's hand reached over Davis, grabbed her hand, and took the moon rock paperweight. Simultaneously, a different officer grabbed Cilley by the back of the neck and restrained him by holding his arm behind his back in a bent-over position. Then, an officer grabbed Davis by the arm, pulling her from the booth. At this time, Davis claims that she felt like she was beginning to lose control of her bladder. One of the officers took her purse. Both Cilley and Davis were compliant. Four officers escorted them to the restaurant parking lot for questioning after patting them down to ensure that neither was armed. At some point before the escort, Conley left the restaurant and went to the parking lot.

Davis claims that she told officers twice during the escort that she needed to use the restroom, but that they did not answer and continued walking her toward an SUV where Conley was waiting. Davis subsequently urinated in her clothing. Although their accounts differ in some respects, Conley and Davis agree that he knew she was wearing urine soaked pants as he interrogated her in the restaurant parking lot. Davis claims that she was not allowed an opportunity to clean herself or change her clothing, despite communicating to Conley several times that she was "very uncomfortable."

An officer read the search warrant aloud, and Conley then read Davis her Miranda rights. Conley asked Davis to sit inside the SUV, but Davis declined. Conley then proceeded to question Davis for one-and-a-half to two hours, during which time Davis remained standing in the same place. Davis was never handcuffed that day. Nonetheless, while Conley questioned her, another officer wearing a flack jacket stood behind her and pushed her each time she shifted her weight or stepped backwards. During the questioning, Conley kept Davis's purse and car keys and told her repeatedly that "they still really want to take you in," and that she needed to give him more information before he could release her. She was kept from going to her car. At least ninety minutes had passed when Conley told Davis she was free to leave.

After the sting operation was complete and NASA lunar experts were able to confirm the moon rock's authenticity, Conley opened a full investigation. The investigation was closed when the U.S. Attorney in Orlando, Florida, formally declined to prosecute Davis. Davis's son died seven months after the incident.

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

"The Fourth Amendment proscribes 'unreasonable' searches and seizures. U.S. Constitution, Amend. IV. A detention can be unreasonable either because the detention itself is improper or because it is carried out in an unreasonable manner. We must determine reasonableness from the perspective of a reasonable officer on the scene. See *Graham v. Connor*, 490 U.S. 386, 396 (1989). Davis argues that Conley violated the Fourth Amendment because his detention of her was unreasonably prolonged and degrading, particularly given that she is elderly, her clothing was urine soaked, the detention took place in a public parking lot, and the moon rock paperweight had already been seized.

"Here, Conley does not dispute that he detained Davis in the parking lot for up to two hours. At the time of the detention, Conley was aware of several facts that color the reasonableness of his actions. First, Conley knew that Davis was a slight, elderly woman, who was then nearly seventy five years old and less than five feet tall. Second, he knew that Davis lost control of her bladder during the search and was wearing visibly wet pants. Third, he knew that Davis and Cilley were unarmed and that the search warrant had been fully executed by the time Davis was escorted to the parking lot. Fourth, Conley knew that Davis had not concealed possession of the paperweights, but rather had reached out to NASA for help in selling the paperweights. Finally, because all but the first of the phone calls between Davis and 'Jeff' were recorded, Conley knew the exact content of most of those conversations, including that Davis was experiencing financial distress as a result of having to raise grandchildren after her daughter died, her son was severely ill and required expensive medical care, and Davis needed a transplant. Those conversations also revealed Davis's desire to sell the paperweights in a legal manner and her belief that she possessed them legally because they were a gift to her late husband.

"Because the moon rock paperweight had been seized and both Davis and Cilley had already been searched for other weapons and contraband, Conley had no law enforcement interest in detaining Davis for two hours while she stood wearing urine-soaked pants in a restaurant's parking lot during the lunch rush. This is precisely the type of 'unusual case' involving 'special circumstances' that leads us to conclude that a detention is unreasonable. Conley's detention of Davis, an elderly woman, was unreasonably prolonged and unnecessarily degrading.

"Considering these facts in the light most favorable to Davis, as well as the facts Conley knew at the time of the

detention, Davis has raised genuine issues of material fact as to whether Conley's detention of Davis was unreasonably prolonged and degrading and that Conley is not entitled to qualified immunity as a matter of law."

CIVIL LIABILITY: Reasonable Suspicion to Extend a Traffic Stop

De La Rosa v. White
CA8, No. 15-3399, 3/27/17

In March 2012, Nebraska state trooper Mark White stopped a Ford Ranger pickup truck on Interstate 80 in Seward County for following another vehicle too closely. After the driver, Raul De La Rosa, provided his Arizona license, Trooper White issued a warning and completed the traffic stop in less than fifteen minutes. However, when De La Rosa refused to consent to a search of the pickup, Trooper White called for a drug detection dog and detained De La Rosa for fifty minutes before the dog arrived from Omaha. The dog alerted to De La Rosa's vehicle; an interior search uncovered a small amount of marijuana and three concealed firearms. De La Rosa was arrested and charged in state court with carrying concealed firearms. The charges were dismissed after the state trial court granted De La Rosa's motion to suppress the firearms.

De La Rosa then filed a 42 U.S.C. § 1983 damage action alleging that Trooper White unconstitutionally initiated a traffic stop and questioned, detained, and arrested De La Rosa without reasonable suspicion or probable cause. The United States District Court for the District of Nebraska denied White's motion for summary judgment based on qualified immunity.

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

"The court identified the following facts as the basis for Trooper White's suspicion of criminal activity:

> De La Rosa allegedly lied about having a criminal history because he said he had not 'been in trouble with guns, drugs, or anything else' but he had been charged, in 2005, with destruction of property.
>
> De La Rosa said he was going from Phoenix to visit friends in Illinois; according to White, Arizona is a source state for contraband and Illinois is a destination site.
>
> De La Rosa had a spare tire in the bed of his pickup truck, which White found 'interesting' because it was not in a storage area under the bed of the truck, and sometimes contraband is transported in a spare tire.
>
> De La Rosa stated that he was unemployed and had earned money for his trip by working odd jobs, which to White 'sounded like a cover story.'
>
> De La Rosa's demeanor was 'extremely laid back and relaxed,' to the point that Trooper White

> felt like De La Rosa was being deceptive or 'stand offish.' According to White, people that he contacts are usually conversational during the stop, but De La Rosa was 'closed off' and non-conversational.

"After carefully assessing each of these factors at length, the district court concluded that the circumstances identified here, whether viewed individually or in combination, do not generate reasonable suspicion for De La Rosa's continued detention.

"Trooper White is entitled to qualified immunity if a reasonable officer could have believed that he had a reasonable suspicion; in other words, if he had arguable reasonable suspicion.

"Rather than 'a robust consensus of cases of persuasive authority' favoring the district court's resolution of this difficult issue, our prior cases have found reasonable suspicion upholding the extension of traffic stops by officers relying on similar facts:

-- In *Riley*, 684 F.3d at 764, we concluded that a Missouri trooper acquired reasonable suspicion to extend a traffic stop pending arrival of a drug dog based on the traveler's undue nervousness, 'difficulty in answering basic questions about his itinerary,' and 'failure to be forthright about his criminal history relating to drugs.'

-- In *United States v. Lyons,* 486 F.3d 367, 372 (8th Cir. 2007), we concluded that an experienced Nebraska trooper trained in highway drug interdiction acquired reasonable suspicion to summon a drug dog when she learned, during the traffic stop, of the traveler's 'unusual travel itinerary' between Phoenix and Chicago, the traveler gave 'contradictory descriptions of the friends that he had just visited,' and the van contained a large amount of luggage for a short trip.

-- In *Fuse*, 391 F.3d at 929, we concluded that a Kansas trooper acquired reasonable suspicion to summon a drug dog from a number of factors including the driver's unusual explanation for traveling to Kansas City, and the travelers' continued, unusual nervousness even after being told only a warning citation would be issued.

-- In November 2009, after completing a traffic stop on I-80, an experienced Nebraska trooper detained the traveler an additional twenty minutes to summon a drug dog. Though the dog alerted, no criminal charges were filed, and the motorist filed a 42 U.S.C. § 1983 damage action against the trooper and others. On March 9, 2012, the day after Trooper White stopped De La Rosa, a District of Nebraska district judge granted the trooper qualified immunity from the Fourth Amendment claim of extended detention, concluding the trooper had reasonable suspicion for further detention based on the officer's training and experience, the motorist's vague responses about his travel that 'did not make sense,' and the officer's perception that the motorist appeared 'uncomfortable, stand-offish and would not maintain eye contact.' *Barton v.*

Heineman, 2012 WL 786347, at *6 (D. Neb. March 9, 2012), summarily aff'd, No. 13-2010 (8th Cir. Aug. 22, 2013). Inexplicably, White cited this prior decision on appeal but not to the district court. While Barton is not controlling authority, its timing and substantial factual similarity are strong evidence that, at the time Trooper White made the decision to extend his detention of De La Rosa, existing precedent did not place the constitutional question beyond debate.

"In the district court, Trooper White pointed to objective, particular facts and explained why these facts led him to conclude he had reasonable suspicion to briefly extend De La Rosa's detention to determine if a drug dog would alert to the exterior of a pickup truck traveling from Arizona to Illinois on Interstate 80. To be sure, on the merits, the existence of reasonable suspicion was a close question, because the facts on which Trooper White relied, taken together, did not raise as strong a suspicion of interstate drug trafficking as in prior cases such as Riley and Lebrun. But White relied on facts presenting substantial similarities with prior cases in which reasonable suspicion of drug trafficking was found and extension of a traffic stop was upheld.

"To avoid qualified immunity, De La Rosa must show a robust consensus of cases of persuasive authority. Here, there is no consensus to be found in the prior decisions that have resolved a fact intensive Fourth Amendment issue under a governing standard that requires judges to allow officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. Trooper White is therefore entitled to qualified immunity from De La Rosa's damage claims."

EVIDENCE: Encrypted Hard Drives; Self-Incrimination; Civil Contempt

United States v. Apple Macpro Computer
CA3, No 15-3537, 3/20/17

While investigating Doe concerning online child pornography, agents executed a warrant and seized iPhones and a computer with attached hard drives, all protected with encryption software. Forensic analysts discovered the password for the computer and found an image of a pubescent girl in a sexually provocative position, logs showing that it had been used to visit sites with titles common in child exploitation, and that Doe had downloaded thousands of known child pornography files, which were stored on the encrypted external drives and could not be accessed. Doe's sister related that Doe had shown her hundreds of child pornography images on those drives.

A magistrate, acting under the All Writs Act, ordered Doe to produce his devices and drives in an unencrypted state. Doe did not appeal the order but unsuccessfully moved to quash, arguing that his decrypting the devices would violate his Fifth Amendment privilege. The magistrate held that, because the government possessed Doe's devices and knew the contents included child

pornography, the decryption would not be testimonial. Doe did not appeal. Doe produced the unencrypted iPhone, which contained adult pornography, a video of Doe's four-year-old niece wearing only underwear, and approximately 20 photographs focused on the genitals of Doe's six-year-old niece. Doe stated that he could not remember the hard drive passwords and entered incorrect passwords during the examination. The court held Doe in civil contempt and ordered his incarceration.

The Third Circuit affirmed, noting that Doe bore the burden of proving that he could not produce the passwords and had waived his Fifth Amendment arguments.

EVIDENCE: Facebook Video

United States v. Rembert
CA8, No. 16-2695, 3/23/17

While responding to a complaint of disorderly conduct in June 2015, Waterloo Police recognized Rembert at the scene as a passenger in an SUV. An officer arrested Rembert on an active warrant, and a search of the SUV revealed a firearm. There were two latent prints on the firearm, one of which matched Rembert's left index finger and was located on the left side of the firearm above the front edge of the trigger guard.

As part of the investigation, police examined Rembert's Facebook page and obtained a video, posted by Rembert in January 2013, depicting Rembert holding a firearm in his left hand with his left index finger on the trigger guard (almost identical positioning to the left index fingerprint recovered from the pistol), rapping, and smoking what looks like a marijuana blunt. The video included a caption that read "Real thugz 'bout dat, get at me. Bang, bang!!!!!!!!!!!!" The government filed a pretrial motion seeking the admission of this video, claiming it went to "knowledge, intent, absence of mistake, and lack of accident."

Rembert challenges what he claims to be the government's "all or nothing" approach with the admission of the Facebook video. He claims that the imagery presented to the jury was highly prejudicial and had no probative value at trial, focusing especially on the prejudice he claims occurred by playing the entire video. The government indicated prior to trial that it intended to introduce the Facebook video to establish that Rembert's touching of the firearm discovered in the vehicle was not accidental, as the placing of the fingerprint was consistent with how Rembert generally (and uniquely) held a firearm. Rembert agrees that the video might show how he holds a firearm but claims the other aspects of the video were highly prejudicial and irrelevant, including the foul language he uses and the caption of the video. It is the latter two aspects–the sound and the caption–that Rembert claims the government should have omitted. He claims only images from the video were necessary to establish the government's point and that he should not be prejudiced because of the government's technical inability to remove the caption separate from the date stamp on the video.

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

"The video at issue was relevant on many fronts, and the potential prejudice of the video does not substantially outweigh its probative value. In order to convict Rembert, the government had to show that he possessed the firearm because he either knowingly had direct physical control over the firearm, or because he had both the power and the intention at a given time to exercise dominion or control over the firearm Here, the video images are additionally probative of Rembert's knowing and intentional possession of the firearm found in the vehicle. The handling of the firearm in the video was nearly identical to the manner in which Rembert would have handled the firearm found in the vehicle based upon the placement of his prints. His left index fingerprint was found in a specific place, the same area where he is previously seen holding a firearm (or firearm-like object) in the video.

"Rembert does not articulate how his use of foul language and the video's caption make the video unfairly prejudicial. The words used on the video are to a rap song, not his own, and the caption does not otherwise associate Rembert with any specific category of behavior. It is also important to note that the government offered to omit the caption of the video if Rembert had stipulated that he was the one who posted it, and that he was the one depicted in the video, but Rembert did not stipulate to those conditions. Finally, the district court also gave a limiting instruction regarding the video, which serves as a protection against unfair prejudice. Certainly the government could have isolated images from the video to show the key images of Rembert needed to prove his knowing and intentional possession of the firearm, and possibly, in hindsight, the playing of the entire video was surplus age. No matter, however, the viewing of the Facebook video in its entirety was not unfairly prejudicial and the district court did not abuse its discretion in allowing the video in evidence."

MIRANDA: Custody; Interview in Hospital Room

Stechauner v. Smith
CA7, No. 16-1079, 3/31/17

While riding in a car, Matthew Stechauner's sawed-off shotgun accidentally fired and hit Stechauner in the leg. At the hospital, a nurse reported that he had a bag of bullets. Officers entered Stechauner's hospital room, where he was awaiting discharge. Eventually Stechauner produced the bullets and stated that the gun was at a friend's house. The questioning lasted about 90 minutes. Stechauner "seemed lucid, and … was able to answer." Stechauner was not given Miranda warnings.

Stechauner accompanied officers to his friend's house, where the gun was found under outdoor steps. Detective Kolatski thought that Stechauner may have been involved in recent robberies and other crimes involving such a weapon. Stechauner went with Kolatski to the

station. Hours later, Stechauner was given Miranda warnings and was interrogated. Over the course of nine hours, Stechauner admitted to several crimes.

The Wisconsin court denied a motion to suppress, finding that Stechauner was not in custody and the Miranda's warning requirement was not triggered. Stechauner pleaded no contest to second-degree reckless homicide and armed robbery. After unsuccessful efforts to obtain state post-conviction relief, Stechauner sought habeas corpus under 28 U.S.C. 2254.

The Seventh Circuit affirmed denial, rejecting arguments that the state court admitted Stechauner's statements and shotgun in violation of Miranda and that Stechauner had received ineffective assistance of appellate counsel by failure to argue that trial counsel had been ineffective at the suppression hearing. The Court found, in part, as follows:

"…Under *Miranda v. Arizona,* the government may not use in a prosecution any 'statements' that stemmed from custodial interrogation of the defendant unless the government has first given the familiar Miranda warnings and the defendant has voluntarily waived his rights. 384 U.S. at 444–45. This warning requirement obtains when the defendant is interrogated while in custody. Police interrogation includes both express questioning and 'words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.' *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980). A person is 'in custody' for Miranda purposes when one's 'freedom of action is curtailed to a degree associated with formal arrest.' *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). Custody is an objective, totality-of-the-circumstances test: whether 'a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.' *Howes v. Fields,* 565 U.S. 499, 509 (2012); see also *Florida v. Bostick,* 501 U.S. 429, 436 (1991). Factors to consider in assessing custody 'include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.' *Howes,* 565 U.S. at 509. Because custody is determined by an objective standard, the subjective beliefs of the suspect and police officers are irrelevant. *Stansbury v. California*, 511 U.S. 318, 323–26 (1994).

"The trial court heard testimony from Stechauner and Detective Kolatski about the hospital-room interrogation. The trial court discounted the former's testimony and credited the latter's. According to that testimony, the circumstances of the hospital interrogation were as follows: The officers arrived at the request of the treating nurse—not Stechauner—to investigate the shooting and bag of bullets. Stechauner was at the hospital because he had shot himself and wanted medical attention. The questioning took place in a hospital room (the record does not indicate the room's size) over the course of about ninety minutes, while Stechauner was lying in his hospital bed in a gown and connected to an

intravenous drip. Stechauner appeared awake and lucid, and had already been treated for the gunshot wound. Stechauner resisted answering some of the questions about who else had been in the car when the gun had gone off, but generally answered questions about where the gun was. There were up to three officers in the room at a time, and one of them was in full police uniform.

"Though the officers did not use physical restraints at the hospital, they also did not mention either that Stechauner was not under arrest or that he was free to end the conversation. After the questioning, Stechauner walked out on crutches with the officers and was then placed in handcuffs and into the cruiser. After hearing this testimony, the trial court concluded, "I don't find any factual circumstances which would indicate that while Stechauner was at St. Francis Hospital he was in custody." The police testified that Stechauner was not in custody at the hospital, that he was not handcuffed or restrained in any way, and that he was not considered a suspect at that time. Stechauner contradicted that testimony, claiming he was handcuffed and believed he was in custody. In reviewing the trial court's findings, we conclude that they are not clearly erroneous. The testimony of the police supports the trial court's findings that Stechauner was not in custody when he spoke with police at the hospital. On these facts, reasonable jurists could conclude that Stechauner was not in custody at the hospital. Though some of the interrogation circumstances suggest that Stechauner's freedom of movement was restricted, the duration of the questioning was relatively short, Stechauner was not placed in handcuffs or other restraints, and there is no indication of coercion, deception, or use of force on the part of the police. As the Fourth Circuit noted in assessing a similar hospital-questioning case, there has been no police custody when a suspect was primarily restrained not by the might of the police, but by his self-inflicted gunshot wound and the medical exigencies it created. *United States v. Jamison*, 509 F.3d 623, 632 (4th Cir. 2007)."

SEARCH AND SEIZURE:

Consensual Encounter

United States v. Radford
CA7, No. 16-3768, 5/22/17

Regina Radford boarded a train in Flagstaff, AZ, to deliver heroin to Toledo, OH. The train stopped in Galesburg, IL. Officer Mings, who goes to the station daily to study passengers, noted indicators of drug trafficking. Radford had purchased a one-way ticket two days earlier, paying a premium for a roomette, and was traveling between locations associated with illegal drugs. Radford had been arrested seven years earlier for assisting undocumented aliens and possessing marijuana. Mings, in uniform, knocked on her door and stated that he was doing "security checks" for illegal narcotics. She answered Ming's questions. He asked to search her luggage. Radford responded, "I guess so. You're just doing your job." He never advised her that she could refuse his requests. The search revealed heroin.

Radford argues that she was intimidated by Mings, primarily because the roomette was small, Mings weighed 170 pounds and was fully uniformed and equipped (he was wearing a holster with a gun in it), he was white and she was black, he was standing and she was sitting, he said he was investigating drug trafficking but didn't tell her she had a right to refuse to answer his questions or consent to a search of her handbags.

The Seventh Circuit affirmed denial of her motion to suppress, finding that the encounter was consensual, not a seizure, and that Radford voluntarily consented to the search. "Even with no basis for suspecting a particular individual, officers may pose questions, request identification, and request consent to search—'provided they do not induce cooperation by coercive means.' No seizure occurs if a reasonable person would feel free to terminate the encounter. Rejecting claims of intimidation, the court noted Mings did not enter Radford's roomette before her consent, told her why he wanted to search, and did not threaten Radford; there cannot be a rule that an officer is forbidden to speak to a person of another race."

SEARCH AND SEIZURE: Criminal Proceeding Orders Not Appealable

In Re 381 Search Warrants Directed to Facebook, Inc.
NYCA, 2017 NY Slip Op. 02586, 4/4/17

In July 2013, A New York Supreme Court issued 381 warrants directed at Facebook upon a warrant application by the New York County District Attorney's Office that was supported by an investigator's affidavit. The warrants, based upon a finding of probable cause, sought subscriber information and content from numerous user accounts in connection with a pending criminal investigation into allegations of widespread Social Security Disability fraud involving the crimes of larceny and filing a false instrument. The warrants directed Facebook to retrieve, enter, examine, copy, analyze, and search each Target Facebook Account for the specified evidence and property, and to bring it before the court without unnecessary delay. The specified evidence included, among other things, each target account holder's profile information, contact and financial account information, groups, photos and videos posted, historical login information, and any public or private messages. The warrants prohibited Facebook from notifying its subscribers or otherwise disclosing the existence or execution of the warrants, in order to prevent interference with the investigation.

Facebook moved to quash the warrants, arguing that they were constitutionally defective because they were overbroad

and lacked particularity; Facebook also challenged the nondisclosure component of the warrants. The New York Supreme Court denied the motion, holding that Facebook lacked standing to assert any expectation of privacy or Fourth Amendment challenge on behalf of the individual account holders and that, in any event, the warrants were supported by probable cause and were not unconstitutionally overbroad. The New York Supreme Court also rejected Facebook's challenge to the nondisclosure clauses of the warrants, concluding that disclosure of the warrants to the subscribers would risk jeopardizing the ongoing criminal investigation. The court directed Facebook to immediately comply with the warrants.

Facebook appealed Supreme Court's order, and sought a stay thereof pending resolution of its appeal. After the Appellate Division denied Facebook's application for a stay, Facebook complied with the warrants and furnished the requested digital data.

While Facebook's appeal was still pending, some of the targeted Facebook users were indicted for crimes stemming from the disability fraud investigation. The warrants and the investigator's supporting affidavit were eventually unsealed by orders of Supreme Court, and Facebook was then permitted to notify the targeted individuals of the existence of the warrants. Despite the unsealing orders, however, the District Attorney's Office refused to disclose the supporting affidavit to Facebook or the general public. Facebook, therefore, moved for an order compelling disclosure of the affidavit. The District Attorney's Office opposed the motion, arguing that the unsealing orders did not render the affidavit available to the public, and asserting that the affidavit had not yet been provided to the targeted individuals who were being criminally prosecuted. The New York Supreme Court denied Facebook's motion to compel disclosure of the affidavit, and Facebook appealed that order, as well.

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

"In a single order, the Appellate Division dismissed both of Facebook's appeals on the ground that they were taken from nonappealable orders. As relevant here, the Appellate Division explained that direct appellate review of interlocutory orders issued in a criminal proceeding is not available absent statutory authority. Inasmuch as neither Criminal Procedure Law (CPL) article 690, governing warrants, nor CPL article 450, which sets forth when a criminal appeal can be taken, provides a mechanism for a motion to quash a search warrant, or for taking an appeal from a denial of such a motion, the Appellate Division concluded that the orders denying Facebook's motions were not appealable. In so holding, the Appellate Division rejected Facebook's request that the court treat the warrants as civil subpoenas for appeal purposes. This Court granted Facebook leave to appeal.

"The warrants in question were issued pursuant to Title II of the Electronic Communications Privacy Act of 1986,

officially entitled the 'Stored Wire and Electronic Communications and Transactional Records Access' and commonly referred to as the Stored Communications Act or the SCA (see Electronic Communications Privacy Act, Pub L 99—508, 100 Stat 1848 [1986] [codified as amended at 18 USC §§ 2701 et seq.]). Section 2703 sets forth three primary methods by which a governmental entity may obtain disclosure: (1) a warrant issued in accordance with state or federal criminal procedure by a court of competent jurisdiction; an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or (3) a court order granted under section 2703 (d) upon a showing of specific and articulable facts demonstrating reasonable grounds to believe that the information sought is relevant and material to an ongoing criminal investigation.

"That the SCA draws a distinction between warrants and subpoenas, and the content that may be obtained therewith, is of critical significance with respect to a determination of appellate jurisdiction over the appeal from the denial of Facebook's motion to quash. It is a fundamental precept of the jurisdiction of our appellate courts that no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute.

"In the instant matter, Facebook concedes that an order addressing a motion to quash a warrant is not appealable, but Facebook contends— and the dissent agrees — that, despite being denominated as warrants, SCA warrants are more analogous to subpoenas than to traditional search warrants involving tangible property because they compel third parties to disclose digital data. Thus, Facebook and the dissent urge us to treat Supreme Court's first order denying its motion to quash the warrants as an appealable order denying a motion to quash subpoenas. The New York Court of appeals stated that this argument is unpersuasive.

"Inasmuch as there is no statutory predicate for Facebook's appeal from the order denying its motion to quash the SCA warrants that were issued in a criminal proceeding (see CPL art 450; CPL 470.60), nor any other legal basis for such appeal, we must affirm the Appellate Division's dismissal of Facebook's appeal insofar as taken from that order. Supreme Court's order denying Facebook's motion to compel disclosure of the affidavit is, likewise, not appealable."

EDITOR'S NOTE: *Unlike most other states, in New York the Supreme Court is a trial court and not the highest court in the state. The Supreme Court is trial level court of general jurisdiction in New York's unified court system.*

SEARCH AND SEIZURE:

Emergency Search; Entry of Apartment on Probable Cause Without a Warrant

United States v. Almonte-Baez
CA1, No. 15-2367, 5/12/17

In the summer of 2013, DEA agents, working with state and local police officers, were investigating a drug-trafficking ring based in Lawrence, Massachusetts. During the course of this investigation, the agents intercepted telephone calls between two persons (the targets) thought to be part of the ring. Through these intercepted calls, the agents learned that the targets were planning to rob an associate, one José Medina-López (Medina), whom the targets had reason to believe was receiving bulk drug shipments on a weekly basis.

The targets hatched a plot that contemplated attaching a GPS unit to Medina's car in the hope that it would lead them to his cache of drugs and cash. The agents decided that it was time for them to act. They began by canvassing the streets in search of Medina's car. On the morning of July 26, 2013, they hit the jackpot: they observed Medina leaving a multi-family residential building on Cedar Street, carrying a large trash bag that was so heavy that he needed both hands to lift it. He hoisted the trash bag into his car and drove away.

The agents followed Medina and — with the aid of state and local police — pulled him over after they had observed him committing traffic infractions. When the agents reached his car window, Medina was trembling and appeared to be very nervous. The agents questioned him about where he had come from and where he was heading, and Medina provided answers the agents knew to be false.

At that point, the agents asked Medina for permission to search his car. Medina acquiesced. Preliminary to the search, Medina got out of the car and, as he disembarked, the agents spotted a large wad of cash sticking out of his pants pocket. They seized the cash and arrested Medina for his participation in the March heroin transaction.

The agents then proceeded to search the car. In the trash bag that Medina had lugged from the building on Cedar Street, they found more than $370,000 in cash. They discovered more cash within the car, stashed in a box and various bags. When questioned, Medina offered no credible explanation for the oceans of cash (all of which the agents seized). Spurred on by what they had discovered, the agents returned to the building on Cedar Street. Once there, they encountered the landlord, who confirmed that Medina rented the second-floor apartment. At that juncture, the agents could have stopped their ongoing investigation and sought a search warrant for the apartment. Instead, they went to that apartment and knocked on the front door. A voice from within the apartment responded, "Hello, who is it?" The agents announced their presence and immediately heard the sound of someone inside running away, that is, toward the back of the apartment. The front door

was sealed over, so the agents moved to a side door. Concerned that the occupant was either trying to escape or destroy evidence, the agents broke down the side door and forcibly entered the premises. Once inside, they saw a man, later identified as defendant, Ygoa Almonte-Báez, trying to remove a barricade and escape through the back door. They immediately took him into custody.

A protective sweep of the apartment followed. During that sweep, the agents observed in plain view heroin and paraphernalia associated with the heroin trade, including scales and packaging materials. They also observed notes and records pertaining to heroin sales.

Relying partly on what they had seen in plain view, the agents obtained a search warrant later the same day. Returning to the apartment, they seized about 20 kilograms of heroin and an assortment of drug-processing tools.

Ygoa Almonte-Báez moved to suppress the evidence gathered from the Cedar Street apartment. He maintained that, because the agents' initial entry into the apartment was unlawful, both the protective sweep and the subsequently issued search warrant (which relied in material part on information gleaned during the initial entry) were invalid and any evidence seized as a result was inadmissible as the fruit of a poisonous tree. See *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).

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

"Our analysis begins with bedrock: the Fourth Amendment protects individuals 'against unreasonable searches and seizures.' U.S. Constitution, Amendment IV. Under this standard, warrantless searches of private premises are presumptively unreasonable. See *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). To secure the admission of evidence obtained without a warrant, the government must show that the warrantless search fell within one of a handful of narrowly defined exceptions.

"One such exception to the Fourth Amendment's Warrant Clause is for exigent circumstances. See *Kentucky v. King*, 563 U.S. 452, 459-60 (2011); *United States v. Curzi,* 867 F.2d 36, 41 (1st Cir. 1989). That exception generally requires a threshold showing that law enforcement officers had probable cause to enter the premises. Pertinently, probable cause exists when the totality of the circumstances create 'a fair probability that contraband or evidence of a crime will be found in a particular place.' *United States v. Tanguay*, 787 F.3d 44, 50 (1st Cir. 2015) (quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983)).

"Probable cause is a necessary, but not a sufficient, precondition for invoking the exigent circumstances doctrine. Even when armed with probable cause, the government still must show that an exigency existed sufficient to justify the warrantless entry. Exigent circumstances are present when there is such a

compelling necessity for immediate action as will not brook the delay of obtaining a warrant. *Matalon v. Hynnes,* 806 F.3d 627, 636 (1st Cir. 2015).

"The exigent circumstances doctrine reflects an understanding and appreciation of how events occur in the real world. Police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving. *King,* 563 U.S. at 466 (quoting *Graham v. Connor,* 490 U.S. 386, 396-97 (1989)). The reasonableness of those judgments is normally the keystone of whether an officer's actions can find shelter under the exigent circumstances doctrine. Consequently, the government ordinarily may invoke the exigent circumstances exception when it can identify an objectively reasonable basis for concluding that, absent some immediate action, the loss or destruction of evidence is likely.

"In this instance, the agents knew that Medina rented the apartment and, based on the intercepted telephone calls, they reasonably suspected that he received weekly heroin shipments at that address. Just that morning, they had observed Medina carrying a large trash bag, stuffed with several hundred thousand dollars in cash, out of the apartment. In light of Medina's false answers to the agents' queries during the traffic stop and his failure credibly to explain the provenance of the cash, the agents had convincing reasons to believe that the cash had not been obtained legally. To cinch the matter, Medina (a previously convicted drug dealer) was known to be currently involved in the drug trade. The agents knew that he had been described in the wiretap intercepts as receiving weekly drug shipments. They also knew that he had sold heroin to a cooperating witness a few months earlier.

"As soon as the agents knocked on the front door of the apartment and identified themselves, they heard someone inside the apartment running away from the door. They noticed that the door was sealed shut. Given the totality of what they knew and what they reasonably suspected, the agents had reason to think—as the district court found—that the unseen individual was trying to destroy evidence. The agents knew that drugs can be flushed down a toilet or washed down a drain in the blink of an eye. See *King,* 563 U.S. at 461. Furthermore, the fact that the front door was sealed shut was itself suspicious.

"Weighing these facts, the district court found that the agents were confronted by exigent circumstances. Moreover, the agents did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. *King*, 563 U.S. at 462. Thus, the court reasoned, the exigency—combined with the existence of probable cause--justified the agents' warrantless entry into the apartment. We agree: when entry into private premises is reasonably necessary to head off the imminent loss of evidence, a law enforcement officer armed with probable cause normally may enter the premises without a warrant. See, *King,* 563 U.S. at 460.

"In sum, the record solidly supports the district court's determination that probable cause and exigent circumstances coalesced to justify the agents' warrantless entry into the Cedar Street apartment. Consequently, the evidence found in plain sight at the time of that entry, together with the evidence gathered as a result of the ensuing warrant-backed search, was admissible at trial. It follows inexorably, as night follows day, that the district court did not err in denying the motion to suppress."

SEARCH AND SEIZURE:
Probationer Search Without Knowledge of Status
United States v. Job
CA9, No. 14-50472, 3/14/17

The Court of Appeals for the Ninth Circuit held evidence found during a search of his person and vehicle solely on the basis that the defendant, who was on probation for a nonviolent offense, was not the subject to a Fourth Amendment search waiver at the time of the searches. The panel explained that a Fourth Amendment search waiver cannot provide a justification for a search of a probationer where the officers were unaware of the waiver before they undertook the search.

SEARCH AND SEIZURE: Stop and Frisk; Must an Officer Consider Possible Innocent Explanations Before Making a Stop
State of Colorado v. Reyes-Valenzuela
CSC, No. 16SA245, 2017 Co. 31, 4/24/17

Around 11:30 p.m., a concerned citizen ("the caller") called El Paso County law enforcement because the caller witnessed a possible break-in in a partially developed residential neighborhood. The caller said he saw a person, later identified as Gonzalo V. Reyes-Valenzuela, enter several unfinished houses, leave one of the houses carrying a black bag, and use a light-colored, boxy van to travel between houses. There had been several previous reports in the same vicinity of people entering unfinished houses and stealing copper. It was also known to police that contractors occasionally worked late at night in the area.

An officer and her partner arrived on the scene around midnight. The caller was standing near the van and identified himself to the deputies. The deputies began speaking to Reyes-Valenzuela, who was inside the van. Reyes-Valenzuela spoke limited English but provided the officers with his name and birth date. The deputies checked his name, which revealed an outstanding arrest warrant. The deputies then arrested Reyes-Valenzuela, properly conducted a search incident to arrest, and found drug paraphernalia and a black bag. He was charged with first-degree criminal trespass and possession of drug paraphernalia.

Reyes-Valenzuela moved to suppress the fruits of the officers' investigatory stop, arguing that the officers did not have a reasonable, articulable suspicion for initially stopping him and talking to him. Reyes-Valenzuela never disputed that he was the person that the caller saw driving from unfinished house to unfinished house.

At the hearing on the motion to suppress, the only witness—one of the deputies—testified that (1) she did not know whether Reyes-Valenzuela was authorized to enter the houses; (2) she did not know if the black bag belonged to him; (3) she knew that contractors sometimes worked late at night on the unfinished houses; (4) she would not have had a reasonable, articulable suspicion to stop Reyes-Valenzuela if there had only been a report of someone driving around in the area; and (5) there had been past reports of burglaries in the area. Reyes-Valenzuela argued not that the caller had misidentified him, but merely that the police did not consider the possible innocent reasons for his entry of several unfinished houses late at night.

The trial court granted Reyes-Valenzuela's motion to suppress for two reasons. First, the caller had not given details about the size of the black bag or how long Reyes-Valenzuela had been in the houses, and legitimate construction activity sometimes occurred at night. Second, Reyes-Valenzuela did not attempt to flee from the deputies when they arrived on the scene.

Upon review, the Colorado Supreme Court reversed the trial court, stating as follows:

"An officer's investigatory stop complies with the Fourth Amendment if three criteria exist: (1) the officer must have an articulable and specific basis in fact for suspecting (i.e., a reasonable suspicion) that criminal activity has taken place, is in progress, or is about to occur; (2) the intrusion's purpose must be reasonable; and (3) the character and scope of the intrusion must be reasonably related to its purpose. In this case, only the first prong—i.e., whether the officer had a reasonable, articulable suspicion—is at issue.

"In determining whether an officer had a reasonable, articulable suspicion, this court focuses upon whether there were specific and articulable facts known to the officer, which taken together with reasonable inferences from these facts, created a reasonable suspicion of criminal activity to justify the intrusion into the defendant's personal security. Our inquiry focuses on an objective analysis of whether a reasonable, articulable suspicion exists and not on the subjective intent of the officer.

"Nor do we focus on plausible innocent explanations for behavior that may be suspicious. The U.S. Supreme Court has held that 'innocent behavior will frequently provide the basis for a showing of probable cause.' *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 243–44 (1983)). When determining whether reasonable,

articulable suspicion exists, the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts. Id. (quoting *Gates*, 462 U.S. at 243–44). Therefore, several acts that may appear innocent in isolation may add up to a reasonable, articulable suspicion of criminal activity.

"A reasonable, articulable suspicion 'may exist even where innocent explanations are offered for conduct.' See *People v. Castaneda*, 249 P.3d 1119, 1122 (Colo. 2011) (holding that an even higher standard, probable cause, may exist when several otherwise-innocent acts appear, in the aggregate, to be indicative of criminal activity). The fact that innocent explanations may be imagined does not defeat a probable cause showing. Instead, the police are entitled to draw appropriate inferences from circumstantial evidence, even though such evidence might also support other inferences. Courts should not engage in a 'divide-and-conquer analysis' in which courts dismiss individual factors that have plausible innocent explanations. *United States v. Arvizu*, 534 U.S. 266, 274–75 (2002). A series of innocent factors, when taken together, may warrant further investigation by police.

"Here, we know the following facts: (1) the caller, who was willing to identify himself, called law enforcement around 11:30 p.m. to report a possible break-in in a partially developed residential area; (2) there had been several recent break-ins in the area in which people stole copper from unfinished houses; (3) the caller said that a person driving a boxy van was going in and out of unfinished houses; (4) the caller saw that person leave one of the houses with a black bag and get into the van; and (5) contractors sometimes worked late at night on the unfinished houses.

"Adding up those factors that could support a reasonable, articulable suspicion that criminal activity had occurred leads to only one result: The officer had a reasonable, articulable suspicion to perform an investigatory stop of the van driver. A person going from unfinished house to unfinished house, carrying a black bag and driving a van, late at night, in an area in which someone had been breaking into unfinished houses late at night, supports a reasonable officer's reasonable, articulable suspicion that the person may be up to no good. The trial court, however, gave impermissible weight to the possible innocent explanations for Reyes-Valenzuela's behavior—i.e., that contractors sometimes worked late at night. But an officer is not required to consider innocent explanations for behavior that otherwise would support reasonable, articulable suspicion.

"The trial court also gave impermissible weight to the fact that Reyes-Valenzuela did not flee. There is no case law from this court or the U.S. Supreme Court suggesting that a lack of flight overcomes an otherwise reasonable, articulable suspicion of criminal activity—or that a lack of flight should be given any weight at all.

"Therefore, the officers that stopped Reyes-Valenzuela had a reasonable,

articulable suspicion to do so, and the trial court erred when it suppressed the evidence derived from that stop."

SEARCH AND SEIZURE: Traffic Stops

United States v. Hill
CA4, No. 15-4639, 3/30/17

In this case, the Court of Appeals for the Fourth Circuit discussed the legal aspects of a traffic stop, stating in part as follows:

"A traffic stop constitutes a 'seizure' under the Fourth Amendment and is subject to review for reasonableness. To satisfy the reasonableness requirements for an investigative detention, a traffic stop must be legitimate at its inception, and the officers' actions during the stop must be 'reasonably related in scope' to the basis for the stop. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

"If a traffic stop is extended in time beyond the period that the officers are completing tasks related to the traffic infractions, the officers must either obtain consent from the individuals detained or identify reasonable suspicion of criminal activity to support the extension of the stop. *Williams,* 808 F.3d at 245-46. The authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. *Rodriguez,* 135 S. Ct. at 1614. The Supreme Court recently has clarified that extending a stop by even a minimum length of time violates the Fourth Amendment.

"The acceptable length of a routine traffic stop, however, cannot be stated with mathematical precision. In evaluating the reasonableness of a stop, we consider what the police in fact do, and whether the officers acted reasonably under the totality of the circumstances presented to them. Thus, an officer need not employ the least intrusive means conceivable in executing a stop, but he still must be reasonably diligent and must use the least intrusive means reasonably available.

"An officer may engage in certain safety measures during a traffic stop, but generally must focus his attention on the initial basis for the stop. An officer may engage in ordinary inquiries incident to the traffic stop, such as inspecting a driver's identification and license to operate a vehicle, verifying the registration of a vehicle and existing insurance coverage, and determining whether the driver is subject to outstanding warrants. While diligently pursuing the purpose of a traffic stop, officers also may engage in other investigative techniques unrelated to the underlying traffic infraction or the safety of the officers. Such unrelated activity is permitted under the Fourth Amendment only as long as that activity does not prolong the roadside detention for the traffic infraction. For example, an officer may question the occupants of a car on unrelated topics without impermissibly expanding the scope of a traffic stop. An officer also may engage a K-9 unit to conduct a 'dog sniff' around a vehicle during a lawful traffic stop in an attempt to identify potential narcotics. However, because such a 'sniff' or investigative questioning is intended to detect ordinary

criminal wrongdoing, these actions may not prolong the duration of the traffic stop absent consent of those detained or reasonable suspicion of criminal activity."

SEARCH AND SEIZURE: Traffic Stop; Computerized Database

United States v. Broca-Martinez
CA5, No. 16-40817, 4/28/17

While on patrol in December 2015, Officer Juan Leal began following Broca-Martinez's vehicle because it matched a description Homeland Security agents had provided the Laredo Police Department ("LPD"). Officer Leal stopped Broca-Martinez after a computer search indicated the vehicle's insurance status was "unconfirmed." The stop led to the discovery that Broca-Martinez was in the country illegally and that he was harboring undocumented immigrants at his residence. Broca-Martinez entered a conditional guilty plea to one count of conspiracy to transport undocumented aliens. On appeal, he contends that there was no reasonable suspicion justifying the initial stop.

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

"They had not yet addressed whether a state computer database indication of insurance status may establish reasonable suspicion. However, several other circuits have found that such information may give rise to reasonable suspicion as long as there is either some evidence suggesting the database is reliable or at least an absence of evidence that it is unreliable. "Cases from the Seventh, Sixth, and Eighth Circuits confronting similar fact patterns are generally consistent with finding reasonable suspicion established when the database showed no vehicle registration record, at least in the absence of evidence that the officer could not reasonably rely on the absence of a registration record to support an investigative stop); *United States v. Sandridge*, 385 F.3d 1032, 1036 (6th Cir. 2004) (concluding there was reasonable suspicion for a stop when license plate check three weeks prior had indicated the driver was driving without a valid license); *United States v. Stephens,* 350 F.3d 778, 779 (8th Cir. 2003) (holding that when database check showed license plates were 'not on file,' there was reasonable suspicion to stop the vehicle).

"A state computer database indication of insurance status may establish reasonable suspicion when the officer is familiar with the database and the system itself is reliable. If that is the case, a seemingly inconclusive report such as 'unconfirmed' will be a specific and articulable fact that supports a traffic stop. *Lopez-Moreno,* 420 F.3d at 430. Viewed in the light most favorable to the government, Officer Leal's testimony provides sufficient support for the reliability of the database. Officer Leal explained the process for inputting license plate information, described how records in the database are kept, and noted that he was familiar with these records. He explained that 'with the knowledge and experience of working,' he knows the vehicle is uninsured when an 'unconfirmed' status appears because the computer system will either return an 'insurance confirmed' or 'unconfirmed'

response. When Broca-Martinez's attorney questioned the system's reliability, Officer Leal confirmed that it was usually accurate.

"Even if Officer Leal was not positive Broca-Martinez was uninsured, he cleared the bar for reasonable suspicion. An officer does not have to be certain a violation has occurred. See *Castillo*, 804 F.3d at 366. This would raise the standard for reasonable suspicion far above probable cause or even a preponderance of the evidence, in contravention of the Supreme Court's instructions."

SEARCH AND SEIZURE: Traffic Stop; Ordering a Person to Step Off a Bicycle

United States v. Morgan
CA10, No. 16-5015, 5/2/17

While patrolling a high-crime area in Tulsa, Oklahoma, Officer Brent Barnhart saw a man riding a bicycle against traffic and not using a bicycle headlight, in violation of Tulsa's traffic law. Unknown to the officer, the bicyclist was Phillip Morgan, who had a string of felony convictions: (1) unlawful possession of a firearm and ammunition, (2) accessory after the fact to first-degree murder, (3) unlawful possession of a controlled drug, and (4) unlawful possession with intent to distribute a controlled drug. After a lawful traffic stop, an officer has authority to order a driver and passengers from a car. The issue presented here was whether an officer has authority to order a person to step off his bicycle after a lawful traffic stop.

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

"Morgan argues that Officer Barnhart exceeded the scope of the traffic stop by ordering him to get off his bicycle. At the outset, we note one significant difference between Morgan and the defendants in the cases he cites. In *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) the defendants complied with the officers' orders to get out of the car, resulting in an incremental increase in their seizures. In contrast, Morgan disobeyed Officer Barnhart's order to get off his bicycle. Morgan cites no cases concluding that officers violate the Fourth Amendment during an otherwise-lawful seizure when they order a suspect to do something, and the suspect does not comply.

"Further, even had Morgan complied and stepped off his bicycle, he still could not show that Officer Barnhart violated his Fourth Amendment rights. 'The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' *Mimms*, 434 U.S. at 108–09 (quoting *Terry,* 392 U.S. at 19). Reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.

"In *Mimms*, the Supreme Court held that a police officer may, as a matter of course, order a driver of a lawfully stopped car to get out of it. The Court explained that this additional intrusion is 'de minimis' because the driver is being asked to expose

to view very little more of his person than is already exposed. In *Wilson,* the Supreme Court extended Mimms to passengers in lawfully stopped automobiles. 519 U.S. at 410. Here, we see little difference between Officer Barnhart's ordering Morgan off his bicycle and an officer's asking a driver to step out of an automobile. In fact, in our view, stepping off a bicycle is less intrusive than stepping out of a car.

"Morgan argues that Officer Barnhart was unjustified in ordering him off the bicycle because Officer Barnhart could already see him. But consistent with *Mimms*, Officer Barnhart's ordering Morgan off his bicycle was at most a mere inconvenience. And we conclude that public-interest concerns outweighed any personal-liberty intrusion or inconvenience. After all, Officer Barnhart had reason to believe Morgan posed a flight risk on his bicycle. We cannot fault the police for trying to minimize flight risks and the safety concerns that flight and pursuit would entail. Thus, we conclude that after lawfully stopping Morgan, Officer Barnhart did not violate the Fourth Amendment by ordering him to get off the bicycle."

SEARCH AND SEIZURE:
Vehicle Black Box Data

State of Florida v. Worsham, Jr.
FDCA, No. 4D15-2733, 3/29/17

Charles W. Worsham, Jr., was the driver of a vehicle involved in a high speed accident that killed his passenger. The vehicle was impounded. Twelve days after the crash, on October 18, 2013, law enforcement downloaded the information retained on the vehicle's event data recorder. The police did not apply for a warrant until October 22, 2013. The warrant application was denied because the desired search had already occurred.

Worsham was later arrested and charged with DUI manslaughter and vehicular homicide. He moved to suppress the downloaded information, arguing the police could not access this data without first obtaining his consent or a search warrant. The state defended the search on the sole ground that Worsham had no privacy interest in the downloaded information, so that no Fourth Amendment search occurred. The trial court granted Worsham's motion.

Upon review, Florida's Fourth District Court of Appeals found, in part, as follows:

"A car's black box is analogous to other electronic storage devices for which courts have recognized a reasonable expectation of privacy. Modern technology facilitates the storage of large quantities of information on small, portable devices. The emerging trend is to require a warrant

to search these devices. See *Riley v. California,* 134 S. Ct. 2473 (2014) (requiring warrant to search cell phone seized incident to arrest); *Smallwood*, 113 So. 3d 724 (requiring warrant to search cell phone in search incident to arrest); *State v. K.C.,* 207 So. 3d 951 (requiring warrant to search an "abandoned" but locked cell phone).

"Noting that cell phones can access or contain the most private and secret personal information, *Smallwood*, 113 So. 3d at 732, the Florida Supreme Court has distinguished these computer-like electronic storage devices from other inanimate objects.

"Analogizing computers to other physical objects when applying Fourth Amendment law is not an exact fit because computers hold so much personal and sensitive information touching on many private aspects of life. There is a far greater potential for the 'inter-mingling' of documents and a consequent invasion of privacy when police execute a search for evidence on a computer.

"It is an issue of first impression in Florida whether a warrant is required to search an impounded vehicle's electronic data recorder or black box. An event data recorder is a device installed in a vehicle to record 'crash data' or technical vehicle and occupant information for a period of time before, during, and after a crash. NHTSA, Event Data Recorders, 49 C.F.R. § 563.5 (2015). Approximately 96% of cars manufactured since 2013 are equipped with event data recorders.

"The National Highway Traffic Safety Administration has standardized the minimum requirements for electronic data recorders, mandating that the devices record 15 specific data inputs, including braking, stability control engagement, ignition cycle, engine rpm, steering, and the severity and duration of a crash. 49 C.F.R. § 563.7. Along with these required data inputs, the devices may record additional information like location or cruise control status and some devices can even perform diagnostic examinations to determine whether the vehicle's systems are operating properly.

"The information contained in a vehicle's black box is fairly difficult to obtain. The data retrieval kit necessary to extract the information is expensive and each manufacturer's data recorder requires a different type of cable to connect with the diagnostic port. The downloaded data must then be interpreted by a specialist with extensive training.

"The record reflects that the black box in Worsham's vehicle recorded speed and braking data, the car's change in velocity, steering input, yaw rate, angular rate, safety belt status, system voltage, and airbag warning lamp information. "Extracting and interpreting the information from a car's black box is not like putting a car on a lift and examining the brakes or tires. Because the recorded data is not exposed to the public, and because the stored data is so difficult to extract and interpret, we hold there is a reasonable expectation of privacy in that information, protected by the Fourth Amendment, which required law

enforcement in the absence of exigent circumstances to obtain a warrant before extracting the information.

"Considering that the data is difficult to access and not all of the recorded information is exposed to the public, Worsham had a reasonable expectation of privacy, and we agree with the trial court that a warrant was required before police could search the black box."

EDITOR'S NOTE: *In People v. Diaz, 153 Cal. Rptr. 3d 90 (Cal. Ct. App. 2013) the California Court concluded that the defendant failed to demonstrate a subjective expectation of privacy in the vehicle's recorded data because she was driving on the public roadway, and others could observe her vehicle's movements, braking, and speed, either directly or through the use of technology such as radar guns or automated cameras. Since the diagnostic module merely captured information defendant knowingly exposed to the public, downloading that information without a warrant was not a violation of the Fourth Amendment.*

The Florida Court concluded that Diaz is not persuasive or controlling. The Florida Court disagreed with Diaz that all black box data is exposed to the public.

SEARCH AND SEIZURE:

Vehicle Search; Probable Cause to Believe Vehicle Contained Evidence of a Crime

United States v. Stegall
CA8, No. 16-2549, 3/13/17

On September 9, 2013, an Arkansas State Trooper responded to a 911 call placed with the Benton, Arkansas police department regarding a road rage incident where the driver of a silver sport utility vehicle (SUV) pulling a jet ski brandished a gun at the 911 caller. Observing a vehicle matching the description, the state trooper informed the Benton and Bryant police departments of the SUV's location and heading. After temporarily losing track of the SUV, two Benton police officers found the vehicle parked and unoccupied at a shopping center in front of a hair salon and a deli. While the officers were searching the parking lot and surrounding businesses for the driver of the vehicle, a witness told them she saw a gentleman get out of the vehicle, go to the back and seemingly put something up underneath something in the back of the vehicle and then go towards the deli.

After obtaining a description of the driver's clothing, the officers searched the deli, but did not find anyone matching the witness's information. The officers returned to the deli with the witness and she promptly identified the driver of the SUV by pointing at Stegall. Stegall admitted he was the driver of the SUV and involved in a road rage incident earlier that day with a vehicle similar to the one driven by the 911 caller. Although Stegall denied brandishing a firearm during the road rage incident, he told the officers he "probably" had a firearm in his vehicle. Stegall did not consent to a search of his vehicle.

The officers detained Stegall and contacted the 911 caller, who came to the scene. The 911 caller immediately identified Stegall as the driver of the SUV who brandished

a firearm at him. The officers arrested Stegall for terroristic threatening and placed him in restraints in the back of a patrol vehicle. With Stegall in custody, the officers began to inventory the contents of Stegall's vehicle before towing it. While searching the rear hatch of Stegall's SUV, the officers discovered a handgun lodged between the back row of seats and the rear cargo floorboard and also an AR15 rifle with an unusually short barrel. Recognizing the handgun matched the 911 caller's description of the firearm used in the road rage incident and the possession of a short-barreled rifle could be an independent crime, the officers stopped inventorying Stegall's SUV and prepared an application for a search warrant.

Stegall was charged with one count of possessing an unregistered short barreled rifle in violation of the United States Criminal Code. Stegall moved to suppress evidence obtained from the search of his SUV, arguing the search by officers was constitutionally unreasonable.

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

"Under the search incident to arrest exception to the warrant requirement of the Fourth Amendment of the United States Constitution, officers may search a vehicle incident to an arrest only if (1) the arrestee is unrestrained and within reaching distance of the passenger compartment when the search begins or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Arizona v. Gant*, 556 U.S. 332 (2009). The district court determined the warrantless search of Stegall's SUV was constitutionally reasonable under Gant's second exception because the officers had a reasonable basis to believe Stegall's SUV contained evidence relevant to the crime of his arrest. We agree. Under the second Gant exception, officers may conduct a warrantless search of a vehicle incident to arrest—even after the arrestee is restrained in the back of a patrol vehicle—when officers have a reasonable basis to believe the vehicle contains evidence related to the crime of arrest. See *Gant;* see *United States v. Allen*, 713 F.3d 382, 387 (8th Cir. 2013).

"Officers reasonably believed Stegall's vehicle might contain evidence relevant to Stegall's arrest for terroristic threatening because (1) Stegall confirmed he was the driver of the SUV and involved in an earlier road rage incident, (2) Stegall told the officers he 'probably' had a firearm in his vehicle, (3) the 911 caller positively identified Stegall as the driver who brandished a gun at him during the reported road rage incident, and (4) a witness observed Stegall concealing something in the rear hatch of his SUV. Because these facts created a reasonable basis for the officers to believe Stegall's SUV contained evidence relevant to the terroristic threat charge—the gun, the Eighth Circuit Court of Appeals affirmed the district court's ruling that the officers' warrantless search of Stegall's SUV was reasonable."

SUBSTANTIVE LAW:
Security Cameras as Communication Devices Within Arkansas Code § 5-64-404

Harjo v. State, ACA, No. CR-16-931, 2017 Ark. App. 337, 5/24/17

On January 5, 2016, members of the 18th West Judicial District Task Force and the Polk County Sheriff's Department executed a search warrant at Lance Harjo's home. At trial, the evidence established that the officers were familiar with Harjo and knew that he occupied the residence. When officers arrived to search the home, Harjo was inside an adjacent shop building with two other individuals. Xabrina Kahn Cunningham, who officers also knew to be living with Harjo, was asleep in the master bedroom. As Cunningham was being led away by the officers, Harjo stated that anything they found in their search was his.

The search of Harjo's home focused largely on the master bedroom that, based on the clothing found there, appeared to be shared by Harjo and Cunningham. The bedroom was described in the trial testimony as having a shallow closet with doors that had been removed, in which a desk had been placed. In plain sight on the desk or beside it were various bills addressed to Harjo indicating that he resided in the home), firearms (assault rifles, a shotgun, and a handgun), ammunition, a digital scale, night vision goggles, small quantities of packaged marijuana, various pills, and "a lot of methamphetamine" packaged in a Ziploc bag and in red Solo cups. Inside the desk, they found a plastic bag containing a substance that appeared to be marijuana, another scale, devices used to smoke methamphetamine or marijuana, and a Ruger P-95 semiautomatic pistol with identifying serial numbers that had been drilled out.

Inside the adjacent shop building, officers found a safe, which they seized. After obtaining a second search warrant to open the safe, they found cash, a firearm, and marijuana and methamphetamine in small plastic bags.

Liza Wilcox, a forensic chemist with the Arkansas State Crime Laboratory, testified that she tested various items seized during the search of Harjo's residence. Wilcox testified that the materials tested were positively identified as marijuana and methamphetamine. Moreover, a waxy substance obtained in the search contained THC, and the pills contained hydrocodone and oxycodone. Once she had established the presence of methamphetamine in an aggregate quantity of over approximately 300 grams, she did not test the remaining drug.

Harjo's second point on appeal challenges the sufficiency of the evidence for his conviction for using a communication device to facilitate drug-related activity pursuant to Arkansas Code Annotated section 5-64-404. The only communication devices alleged to have been used were several security cameras positioned around the home that transmitted images to a multiplex video monitor located on the desk in the master bedroom. Harjo claims that the video cameras do

not meet the statutory definition of a "communication device."

The Arkansas Court of Appeals disagreed. Arkansas Code Annotated section 5-64-404, states, in part:

(a)(1) As used in this section, "communication device" means any public or private instrumentality used or useful in the transmission of a writing, sign, signal, picture, or sound of any kind.

(2) "Communication device" includes mail, telephone, wire, radio, and any other means of communication.

(b) A person commits the offense of unlawful use of a communication device if he or she knowingly uses any communication device in committing or in causing or facilitating the commission of any act constituting a:

(1) Felony under this chapter.]

The Court stated that there can be no dispute that the cameras positioned around the home were used or useful in the transmission of a picture back to the monitor. The fact that they are not specifically listed in section (a) (2) is not dispositive because that section includes the catchall phrase "or any other means of communication." Under the plain language of the statute, security cameras that transmit images to a monitor qualify as communication devices.