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CIVIL LIABILITY: Entry of Residence Without a Warrant

Bonivert v. City of Clarkston, CA9, No. 15-35292, 2/26/18

This appeal arises out of a domestic dispute call to the police from the home of Ryan Bonivert. During an evening gathering with friends, Bonivert reportedly argued with his girlfriend, Jessie Ausman, when she attempted to leave with the couple's nine-month old daughter. By the time police arrived, the disturbance was over: Ausman, the baby, and the guests had safely departed the home, leaving Bonivert alone inside. At that point, there was no indication that Bonivert had a weapon or posed a danger to himself or others. Nor does the record suggest that Ausman intended to reenter the house or otherwise asked police to accompany her inside.

When Bonivert failed to respond to repeated requests to come to the door, the officers decided they needed to enter the house. No attempt was made to obtain a search warrant. Though Bonivert locked the door to his house and refused police entreaties to talk with them, the police broke a window to unlock and partially enter the back door. Even then, Bonivert tried to shut the door, albeit unsuccessfully. Although Ausman consented to the officers entering the house, Bonivert's actions were express—stay out. Nevertheless, the officers forced their way in, throwing Bonivert to the ground, and then drive-stunned him with a taser several times, handcuffed him, and arrested him.

Bonivert brought claims under 42 U.S.C. § 1983 against the City, the County of Asotin, Washington, and nine officers alleging warrantless entry and excessive force in violation of Bonivert's constitutional rights. The district court granted summary judgment in favor of the defendants on the basis of qualified immunity.

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

"The officers' entry into Bonivert's house—his 'castle'—requires us to invoke bedrock Fourth Amendment principles. The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Constitution, Amendment IV. It has long been recognized that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' *Payton v. New York*, 445 U.S. 573 (1980). This special protection of the home as the center of the private lives of our people reflects an ardent belief in the ancient adage that a man's house is his castle to the point that the poorest man may in his cottage bid defiance to all the forces of the Crown. For that reason, it is a basic principle of Fourth Amendment law that warrantless searches of the home or the curtilage surrounding the home are presumptively unreasonable.

"Although the consent exception ordinarily permits warrantless entry where officers have obtained consent to enter from a third party who has common authority over the premises, *Georgia v. Randolph* held that an occupant's consent to a warrantless search of a residence is unreasonable as to a co-occupant who is physically present and objects to the search. 547 U.S. at 106. Such is the situation here.

"Applying *Randolph,* we hold that the consent exception to the warrant requirement did not justify the officers' entry into Bonivert's home. Even though the officers secured Ausman's consent, Bonivert was physically present inside and expressly refused to permit the officers to enter on two different occasions.

"The emergency aid exception permits law enforcement officers to enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). An entry pursuant to the emergency aid exception is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action. However, the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests, *Welsh v. Wisconsin*, 466 U.S. 740 (1984), because the emergency exception is narrow and rigorously guarded.

"Viewing the facts in the light most favorable to Bonivert, there were simply no circumstances pointing to an actual or imminent injury inside the home. All of our decisions involving a police response to reports of domestic violence have

required an objectively reasonable basis for believing that an actual or imminent injury was unfolding in the place to be entered. The officers are not entitled to qualified immunity under the emergency aid exception.

"The exigency exception permits warrantless entry where officers have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. *Hopkins v. Bonvicino,* 573 F.3d 752, (9th Cir. 2009). Not one of these circumstances is present here, as counsel for the City candidly acknowledged at oral argument: I would agree with Mr. Bonivert that the cases indicate that if the alleged victim of the domestic violence is not in the house and is instead standing outside and in no apparent jeopardy, as long as there's nothing else going on inside the house, exigent circumstances doesn't really fit. Bonivert, who was inside his home when the alleged domestic assault occurred and remained there even after the officers broke into his back door, was never a 'fleeing suspect.' See *Kentucky v. King*, 563 U.S. 452, 460 (2011). The officers never articulated any other legitimate law enforcement justification for entry under the exigency exception.

"The officers are not entitled to qualified immunity on Bonivert's warrantless entry claim because it was clearly established law, as of 2012, that neither consent, the emergency aid exception, nor the exigency exception justified the officers' warrantless entry."

CIVIL LIABILITY:
Execution of a Search Warrant in an Unreasonable Manner

Greer v. City of Highland Park
CA6, No. 17-1281, 3/2/18

On October 29, 2014, at 4:00 a.m., 13 police officers wearing SWAT gear and face masks blew open the door of the Greers' West Bloomfield Township home with a shotgun. The officers did not knock or announce their presence. The parents and their daughters were ordered to their knees at gunpoint; officers handcuffed a nephew. The Greers repeatedly asked to see the search warrant, but the officers refused to show it and did not allow the mother to sit with her seven-year-old daughter. Officers stated that they were searching for a "dangerous Russian," who had evidently resided at the house more than a year before the search. Police found neither the suspect nor any contraband.

The Highland Park Police Department, which conducted the search, produced the underlying search warrant in response to the Greers' complaint. The warrant described the Greers' home and listed controlled substances and items connected to narcotics trafficking as items to be seized.

In the Greers' suit under 42 U.S.C. 1983, the Sixth Circuit affirmed the district court's denial of the officers' motion for

judgment on the pleadings based on qualified immunity. The complaint states a plausible claim that the officers violated the plaintiffs' clearly established Fourth Amendment rights by executing a search warrant on their home in an unreasonable manner.

CIVIL LIABILITY: False Arrest; Reasonable Inference on the Part of the Police

District of Columbia v. Wesby
USSC, No. 15-1485, 1/22/18

On March 16, 2008, around 1:00 a.m., the District's Metropolitan Police Department received a complaint about loud music and illegal activities at a house in Northeast D. C. The caller, a former neighborhood commissioner, told police that the house had been vacant for several months. When officers arrived at the scene, several neighbors confirmed that the house should have been empty. The officers approached the house and, consistent with the complaint, heard loud music playing inside.

After the officers knocked on the front door, they saw a man look out the window and then run upstairs. One of the partygoers opened the door, and the officers entered. They immediately observed that the inside of the house "was in disarray" and looked like "a vacant property." The officers smelled marijuana and saw beer bottles and cups of liquor on the floor. In fact, the floor was so dirty that one of the partygoers refused to sit on it while being questioned. Although the house had working electricity and plumbing, it had no furniture downstairs other than a few padded metal chairs. The only other signs of habitation were blinds on the windows, food in the refrigerator, and toiletries in the bathroom.

In the living room, the officers found a makeshift strip club. Several women were wearing only bras and thongs, with cash tucked into their garter belts. The women were giving lap dances while other partygoers watched. Most of the onlookers were holding cash and cups of alcohol. After seeing the uniformed officers, many partygoers scattered into other parts of the house.

The officers found more debauchery upstairs. A naked woman and several men were in the bedroom. A bare mattress—the only one in the house—was on the floor, along with some lit candles and multiple open condom wrappers. A used condom was on the windowsill. The officers found one partygoer hiding in an upstairs closet, and another who had shut himself in the bathroom and refused to come out.

The officers found a total of 21 people in the house. After interviewing all 21, the officers did not get a clear or consistent story. Many partygoers said they were there for a bachelor party, but no one could identify the bachelor. Each of the partygoers claimed that someone had invited them to the house, but no one could say who. Two of the women working the party said that a woman named "Peaches" or "Tasty" was renting the house and had given them permission to be there. One of the women explained

that the previous owner had recently passed away, and Peaches had just started renting the house from the grandson who inherited it. But the house had no boxes or moving supplies. She did not know Peaches' real name. And Peaches was not there.

An officer asked the woman to call Peaches on her phone so he could talk to her. Peaches answered and explained that she had just left the party to go to the store. When the officer asked her to return, Peaches refused because she was afraid of being arrested. The sergeant supervising the investigation also spoke with Peaches. At first, Peaches claimed to be renting the house from the owner, who was fixing it up for her. She also said that she had given the attendees permission to have the party. When the sergeant again asked her who had given her permission to use the house, Peaches became evasive and hung up. The sergeant called her back, and she began yelling and insisting that she had permission before hanging up a second time.

The officers eventually got Peaches on the phone again, and she admitted that she did not have permission to use the house. The officers then contacted the owner. He told them that he had been trying to negotiate a lease with Peaches, but they had not reached an agreement. He confirmed that he had not given Peaches (or anyone else) permission to be in the house—let alone permission to use it for a bachelor party. At that point, the officers arrested the 21 partygoers for unlawful entry. The police transported the partygoers to the police station, where the lieutenant decided to charge them with disorderly conduct. The partygoers were released, and the charges were eventually dropped.

The United States Supreme Court characterized this case as a civil suit against the District of Columbia and five of its police officers, brought by 16 individuals who were arrested for holding a raucous, late night party in a house they did not have permission to enter. The United States Court of Appeals for the District of Columbia Circuit held that there was no probable cause to arrest the partygoers, and that the officers were not entitled to qualified immunity.

The United States Supreme Court reversed on both grounds, finding as follows:

"The officers had probable cause to arrest the partygoers. Considering the 'totality of the circumstances,' *Maryland v. Pringle*, 540 U. S. 366, the officers made an 'entirely reasonable inference' that the partygoers knew they did not have permission to be in the house. Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several 'common-sense conclusions about human behavior.' *Illinois v. Gates*, 462 U. S. 213, 231. Because most homeowners do not live in such conditions or permit such activities in their homes, the officers could infer that the partygoers knew the party was not authorized. The officers also could infer that the partygoers knew that they were not supposed to be in the house because they scattered and hid when the

officers arrived. See *Illinois v. Wardlow*, 528 U. S. 119. The partygoers' vague and implausible answers to questioning also gave the officers reason to infer that the partygoers were lying and that their lies suggested a guilty mind. Peaches' lying and evasive behavior gave the officers reason to discredit everything she said. The officers also could have inferred that she lied when she said she had invited the partygoers to the house, or that she told the partygoers that she was not actually renting the house.

"The lower court panel majority failed to follow two basic and well established principles of law. First, it viewed each fact 'in isolation, rather than as a factor in the totality of the circumstances.' Second, it believed that it could dismiss outright any circumstances that were 'susceptible of innocent explanation,' *United States v. Arvizu*, 534 U. S. 266, 277. Instead, it should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a "substantial chance of criminal activity.

"Officers are entitled to qualified immunity under 42 U. S. C. §1983 unless the unlawfulness of their conduct was 'clearly established at the time,' *Reichle v. Howards*, 566 U. S. 658, 664. To be clearly established, a legal principle must be 'settled law,' *Hunter v. Bryant*, 502 U. S. 224, and it must clearly prohibit the officer's conduct in the particular circumstances before him, see *Saucier v. Katz*, 533 U. S. 194. In the warrantless arrest context, 'a body of relevant case law' is usually necessary to 'clearly establish the answer' with respect to probable cause. *Brosseau v. Haugen*, 543 U. S. 194. Even assuming that the officers lacked actual probable cause to arrest the partygoers, they are entitled to qualified immunity because, given the circumstances with which they were confronted, they reasonably but mistakenly concluded that probable cause was present." *Anderson v. Creighton*, 483 U. S. 635, 640, 641. The panel majority and the partygoers have failed to identify a single precedent finding a Fourth Amendment violation under similar circumstances.

"Instead of following this straightforward analysis, the panel majority reasoned that, under clearly established District law, a suspect's bona fide belief of a right to enter vitiates probable cause to arrest for unlawful entry. Thus, it concluded that the 'uncontroverted evidence' of an invitation in this case meant that the officers could not infer the partygoers' intent from other circumstances or disbelieve their story. But looking at the entire legal landscape at the time of the arrests, a reasonable officer could have interpreted the law as permitting the arrests here. There was no controlling case holding that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value. And several precedents suggested the opposite. The officers were entitled to summary judgment based on qualified immunity."

CIVIL LIABILITY:
Handcuffing of 10 Year Old Girl at School

E.W. v. Dodge, CA4, No. 16-1608, 2/12/18

On Tuesday, January 6, 2015, ten-year-old E.W. rode a school bus to East Salisbury Elementary School in Salisbury, Maryland. E.W. sat in an aisle seat on one side of the bus while another student, A.W., sat diagonally across from her in an aisle seat one row behind E.W. on the opposite side of the bus. The two schoolgirls both had their feet in the aisle: E.W. was facing sideways with her feet in the aisle, and A.W. was facing forward with her left leg in the aisle, extended in the direction of E.W. Video footage from the school bus's surveillance camera shows A.W. swaying her left knee from side to side in the aisle. Several seconds later, A.W. raised her left leg in the air and made a sudden, stomping motion in the direction of E.W.'s leg. E.W. later reported that A.W. had stomped on her shoe.

In response to the stomp, E.W. immediately stood up and faced A.W., who was slouched in her seat. The bus driver then asked E.W. what she was doing. E.W. sat down, took off her backpack, and removed what appeared to be two lanyards from around her neck. A few seconds later, E.W. stood up again and raised her leg towards A.W. As E.W. raised her leg, A.W., still sitting, also raised hers. Because A.W. was slouched in her seat, she was able to extend her leg further than she would have sitting fully upright. The two girls appear to trade kicks before E.W. put her leg down and A.W. slid lower into her seat. E.W. then stood over A.W. and began hitting her, swinging her arms downward because of their height difference. Although the seat in front of A.W. obscured the camera's view of the scuffle, the way A.W. was sitting suggests that E.W.'s swings likely landed on A.W.'s left arm, shoulder, and possibly her head.

After four seconds, E.W. returned to her seat. Shortly thereafter, E.W. looked at A.W., stood up, and again moved in A.W.'s direction. A.W. raised her leg in the air, and E.W. kicked at A.W.'s shoe several times while A.W. kicked back. During the exchange of kicks, A.W. appeared to laugh and say something to E.W. This exchange drew the attention of the bus driver, who called both E.W. and A.W. to the front of the bus and eventually suspended both girls from the bus for three days.

On Friday, January 9, 2015, the school contacted Rosemary Dolgos, a deputy sheriff and school resource officer ("SRO") in Wicomico County, about the scuffle. When she arrived at the school, Dolgos watched the surveillance video described above. Dolgos spoke to A.W. first, asking her if she was injured. A.W. pulled up her left pant leg, and Dolgos observed "two small, bluish bruise[s]" above the left knee and one on the side of A.W.'s leg. Notably, no other injuries, including upper body injuries, were reported. E.W. was then removed from class and placed in a closed office with Dolgos and two school administrators. Dolgos told E.W. that she was there to

discuss what took place on the bus. But, in Dolgos's estimation, "E.W. [did not] seem to care."

E.W. explained, "A.W. stepped on my shoe so I kicked her and started to hit her." Dolgos attempted to emphasize to E.W. the seriousness of the situation and possible repercussions, telling her that adults could be jailed for such behavior. Still, in Dolgos's opinion, "E.W. continued to act as if it simply was not a 'big deal.'"

Dolgos then decided to take E.W. into custody. Dolgos placed E.W. in handcuffs from behind and reseated her. Dolgos inserted two fingers between the handcuffs and E.W.'s wrists to ensure that they were not too tight. In her affidavit, Dolgos stated that she was concerned about the physical safety of herself and the school administrators because of both the incident she observed in the surveillance video and E.W.'s apathy. Dolgos expressed concern in the affidavit that E.W. might act violently against her or someone else if she attempted to walk E.W. from the school to her patrol car. Dolgos also admitted, however, that she had no idea whether E.W. had "any past or current behavioral issues or past involvements with law enforcement."

According to Dolgos, E.W. stood 4'4" and weighed about 95 pounds, while Dolgos stands 5'4" and weighs 155 pounds. Immediately after being handcuffed, E.W. began to cry. She explained that she did not want to go to jail and that she would not hit A.W. again. Dolgos kept her handcuffed for about two minutes as she cried and apologized. Dolgos averred that E.W. never complained that the handcuffs were too tight or displayed bruises to her. Rather, "[i]n response" to E.W.'s show of remorse, Dolgos decided not to arrest E.W. and removed the handcuffs.

"Based on E.W.'s remorse," Dolgos further decided to release E.W. to her parents. The school contacted E.W.'s mother, T.W., and Dolgos informed T.W. that she would refer the matter to the Wicomico County Department of Juvenile Services. T.W. responded by asking, "[f] or a kid fight?" and "[s]o you're going to put my 10 year old daughter in the system when she's 10?" Frustrated and upset by the treatment of her daughter, T.W. retrieved E.W. from the school.

On December 29, 2015, E.W., by and through T.W., filed suit against Dolgos, alleging (1) a violation of the Fourth Amendment under 42 U.S.C. § 1983 for unreasonable seizure and excessive force; (2) a violation of Article 26 of the Maryland Declaration of Rights; (3) battery; and (4) assault. Dolgos filed a motion to dismiss or, in the alternative, for summary judgment, which the district court construed as one for summary judgment and then granted. In a short paragraph, without citing any case law, the district court concluded that Dolgos's actions did not amount to excessive force because E.W. was handcuffed for only two minutes and then released to her mother. The court further concluded that Dolgos was "at least" entitled to qualified immunity as to the § 1983 claim. And as to the state law claims, the court found that E.W. failed to prove that Dolgos acted with malice or gross negligence.

Upon appeal, the Fourth Circuit held that, under the totality of the circumstances, the officer's actions were not objectively reasonable in light of the facts and circumstances where the student was a ten year old girl who was sitting calmly and compliantly in a closed office surrounded by three adults and was answering questions about the incident at issue. "Although the officer used excessive force, the student's right not to be handcuffed under the circumstances was not clearly established at the time of her seizure. Therefore, the officer was entitled to qualified immunity."

The court also held that there was insufficient evidence in the record for a reasonable jury to conclude that the officer acted maliciously or with gross negligence when she handcuffed the student.

CIVIL LIABILITY: Qualified Immunity; Submission to Authority

Farrell v. Montoya
CA10, No. 16-2216, 12/27/17

Oriana Lee Farrell and her five children claimed that Elias Montoya, while on duty as a New Mexico state police officer, violated their Fourth Amendment rights when he fired three shots at their minivan as it drove away from officers trying to effect a traffic stop.

Officer Tony DeTavis pulled Farrell over for speeding. A few minutes after initiating the stop, DeTavis approached the minivan parked on the right shoulder of the highway and explained to Farrell that he was going to give her a citation. He gave her two options: pay the penalty of $126 within 30 days or see a Taos magistrate within 30 days. After an argument with the officer, Farrell refused to make a decision because she did not know where she would be in 30 days. As the officer went back to his car to call for help, Farrell drove off.

After the officer pulled Farrell over again, things got chaotic: Farrell got in a scuffle with the officer who tried to arrest her. When the officer tried to pull Farrell out of the car, Farrell's 14-year old son tried to fight off the officer, who then pulled out his taser. The officer then bashed out the windows on Farrell's van after her family ran back into the van and locked the doors. The van began to drive away again.

As the incident unfolded, Officer Montoya showed up and fired three shots at the van as Farrell sped off. Farrell was later arrested and charged. Three officers returned to their vehicles and pursued the Farrells down Highway 518, reaching speeds of 100 mph during the chase. When Farrell approached a more congested area, she weaved through traffic, driving on the wrong side of the road on several occasions.

According to affidavits by Farrell and one of her younger children, 911 was called during the chase, and the family looked for a police station at which to pull over because they were afraid that the three officers would harm or kill them. More than four minutes after the chase began, the Farrells drove into a hotel parking

lot and surrendered. On appeal it was undisputed that no bullet hit the minivan or the Farrells inside; Montoya's affidavit states that he was aiming at the left rear tire.

The Tenth Circuit held the district court should have granted Montoya summary judgment because the shots did not halt the Farrells' departure and, because they were fleeing, they were not seized at the time Montoya fired his weapon, even if they had a subjective intent to submit to authority.

CIVIL LIABILITY: Self Defense

Shaw v. City of Selma
CA11, No. 17-11694, 3/7/18

The Eleventh Circuit affirmed the district court's grant of summary judgment for defendants in an action brought by the estate of Ananias Shaw, who was shot and killed by a police officer. Shaw was coming towards the officer with a hatchet when the officer shot him. The court held that a reasonable officer could have concluded, as the officer here did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense. Therefore, the district court did not err in granting summary judgment as to the excessive force claim.

DOMESTIC VIOLENCE: Misdemeanants Possessing Firearms

Stimmel v. Sessions
CA6, No. 15-4196, 1/4/18

Terry Lee Stimmel tried to purchase a firearm at a Walmart store in 2002. The store rejected Stimmel's offer because a mandatory national background check revealed that he had been convicted of misdemeanor domestic violence in 1997. Stimmel has not been convicted of another crime. He unsuccessfully appealed to the Federal Bureau of Investigation and challenged the law, 18 U.S.C. 922(g)(9), which prohibits *domestic violence misdemeanants from possessing firearms*.

The Sixth Circuit affirmed the dismissal of his complaint, stating, "The law survives intermediate scrutiny and does not unconstitutionally burden Stimmel's Second Amendment rights. The court noted 'the growing consensus of our sister circuits that have unanimously upheld the constitutionality of the domestic violence misdemeanant restriction to firearms possession.' The record contains sufficient evidence to reasonably conclude that disarming domestic violence misdemeanants is substantially related to the government's compelling interest of preventing gun violence and, particularly, domestic gun violence."

FILMING OF POLICE ACTIVITIES

State of Hawaii v. Russo
HSC, No. SCWC-14-0000873, 12/14/17

In this case, the Hawaii Supreme Court joined other jurisdictions who have determined there "is a constitutional right of the public to film the official activities of police officers in a public place."

Thomas Russo was arrested for interfering with government operations and other offenses while filming with his cell phone police officers conducting a traffic enforcement operation. Russo was charged with failing to comply with a lawful order of a police officer, an offense for which he had not been arrested. Russo has consistently maintained that his filming of police activity was protected by the United States and Hawaii Constitutions.

The district court dismissed both charges for lack of probable cause. The intermediate court of appeals (ICA) vacated the district court's order of dismissal and remanded the case, concluding that the district court erred in dismissing the charge of failure to comply with a lawful order of a police officer because probable cause existed to support the charge.

The Supreme Court vacated the ICA's judgment and affirmed the district court's judgment, holding (1) the record did not support a finding of probable cause that Defendant failed to comply with a police officer's order; and (2) this court need not address whether Defendant's constitutional right to access and film the traffic stop was infringed in this case.

FIRST AMENDMENT; True Threats

United States v. Stevens
CA10, No. 7-5044, 2/6/18

Jeffrey A. Stevens was indicted on 10 counts of interstate communication with intent to injure under 18 U.S.C. § 875(c) for posting 10 messages on the Tulsa Police Department's ("TPD") online "Citizen Complaint" form. The messages discussed committing violence against specific members of the TPD or TPD officers generally. Stevens moved to dismiss the indictment on First Amendment grounds, arguing his messages were not true threats.

On September 16, 2016, TPD Officer Betty Shelby shot and killed Terence Crutcher, an African-American. The shooting made national headlines and reignited a heated debate over law enforcement's use of force against minorities.

Three days after the shooting, Stevens, a Connecticut resident, sent the first of multiple anonymous messages to the TPD via an online form the public could use to complain about the TPD. This first message read:

[Message No. 1, sent on September 19, 2016, at 6:18 P.M.]
The psychotic pile of s--- who MURDERED the unarmed civilian who broke down is going to be executed, as are ALL psychotic s---bags you and other PDs hire across this Nation

who murder unarmed civilians. They are all going to be killed.

Over the next three days, Stevens submitted nine more messages. Agents with the Federal Bureau of Investigation traced the messages to Stevens's residence. They interviewed Stevens, who confessed to sending the messages.

A grand jury indicted him on 10 counts of interstate communication with intent to injure in violation of 18 U.S.C. § 875(c). He moved to dismiss the indictment, alleging the First Amendment protected his statements because they were not true threats. The district court denied Stevens's motion, finding that a reasonable jury could understand his messages to be true threats. Stevens next entered into a plea agreement. He pled guilty to five of the 10 counts, but reserved the right to appeal the district court's denial of his motion. Following the guilty plea, the district court sentenced Stevens to 12 months in prison followed by three years of supervised release. He now appeals the district court's denial of his motion to dismiss the indictment.

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

"The sole issue on appeal is whether the district court erred in concluding that a rational jury could find Mr. Stevens's statements to be true threats under the reasonable person standard. We conclude it did not.

"The district court examined the language and the context of the statements. It determined that, because Mr. Stevens's messages were 'targeted at specific people, groups of people, and their family members,' and because they repeatedly asserted that the targets of the messages are going to die unless they comply with his wishes, a jury could determine that 'a reasonable person would interpret the statements to be threats.'

"Mr. Stevens sent messages describing specific acts of violence directed toward particular individuals or groups of individuals. He targeted particular individuals in five of his 10 messages—several to Officer Shelby, the TPD Officer who shot Mr. Crutcher.

"The language and context of these messages mirror the circumstances in *United States v. Martin*, 163 F.3d 1212 (10th Cir. 1998), in which we determined a reasonable jury could construe the statements as true threats. In *Martin*, the defendant stated in a taped conversation that he would 'unload six bullets into Detective O'Rourke's brain.' Detective O'Rourke was the head of the narcotics unit that had recently investigated two of the defendant's friends. Throughout the conversation, the defendant 'repeatedly reaffirmed his plans to shoot Detective O'Rourke' and also stated his motives for doing so. We determined that a rational jury could have evaluated the statements on the tape to conclude that the threats were true threats.

"Here, Mr. Stevens sent multiple communications that Officer Shelby would be executed for shooting Mr. Crutcher. In the tenth message, for

example, he wrote: *Betty is not going to get 3 years probation and a pension, she is getting a bullet through her brain.* From the repeated statements and explicit motives that were sent to Officer Shelby's place of work, a reasonable jury, as in Martin, could conclude that Mr. Stevens's postings were true threats against Officer Shelby. It further could conclude Mr. Stevens's other messages directed at identified TPD employees were true threats.

"Mr. Stevens also directed messages at groups, including TPD officers. The language and context of these messages were similar to a message aimed at Colorado police officers in *Wheeler*, 776 F.3d at 736. In that case, the defendant held strong anti-government views and was angry at police officers in Grand Junction, Colorado, because of a DUI arrest. While in Italy, he posted messages on his Facebook account, one of which urged his religious followers to *kill cops. Drown them in the blood of their children, hunt them down and kill their entire bloodlines.* We held that a rational juror considering the language and context of these posts could consider them to be true threats because they directed specific, deadly action against a number of individuals.

"Similar to the message in Wheeler, Mr. Stevens targeted messages of deadly action at TPD officers generally. Mr. Stevens's fifth message, for example, mentioned the right to Life, Liberty & the Pursuit of Happiness and stated: *If killing every last one of you TPD officers and your families your wives your children is what it takes to drive that point home, so be it.* Because this message and the others were sent to the TPD and were specific, deadly in nature, a reasonable jury could find from their language and context that they were true threats.

"The district court examined the language of the communication and the context in which it is delivered. It properly concluded that a reasonable jury could find Mr. Stevens's messages to be true threats."

GUILTY PLEA: Challenge to Constitutionality of Statute

Class v. United States
USSC, No. 16-424, 2/21/18

A federal grand jury indicted Rodney Class for possessing firearms in his locked jeep, which was parked on the grounds of the U.S. Capitol in Washington, D. C. The statute, U.S.C. 5104(e)(1), provides that "An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm." After the court rejected his Second Amendment and Due Process claims, Class pleaded guilty. His plea agreement said nothing about the right to challenge on direct appeal the constitutionality of the statute.

The Court of Appeals held that Class, by pleading guilty, had waived his constitutional claims. The United States Supreme Court reversed holding that a guilty plea, alone, does not bar a federal criminal defendant from challenging

the constitutionality of his statute of conviction on direct appeal. Where the claim implicates "the very power of the State" to prosecute the defendant, a guilty plea cannot by itself bar it. Class's claims do not contradict the terms of the indictment or the plea agreement and can be resolved based on the record. Class challenged the government's power to criminalize his admitted conduct and to constitutionally prosecute.

IDENTIFICATION PROCEDURES

United States v. Whitewater
CA8, No. 17-1258, 1/3/18

In this case, there was a motion on appeal to exclude evidence from a photographic lineup as being unduly suggestive.

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

"The Due Process Clause protects against the admission of evidence derived from improper identification procedures. *Neil v. Biggers*, 409 U.S. 188, 196 (1972). To determine whether such evidence is admissible, the Court must first determine whether the defendant has shown that the identification procedures were impermissibly suggestive. If that showing is made, the Court examines the totality of the circumstances to determine whether the suggestive procedures created a very substantial likelihood of irreparable misidentification. Because the Court found the photo lineup was not impermissibly suggestive, they did not reach the second inquiry.

"When there are no differences in appearance tending to isolate the accused's photograph, the lineup is not impermissibly suggestive. *Schawitsch v. Burt*, 491 F.3d 798, 802 (8th Cir. 2007). To create the photo lineup at issue here, the FBI pulled five images from an online database matching the description Miller and Wolfe provided. The district court concluded that the photo lineup was not impermissibly suggestive because the individuals are all males appearing to range from about 20 years of age to as much as 50 years of age. They all are dark-skinned, olive-skinned individuals with very short black hair. And they all have neck tattoos.

"Whitewater challenges this conclusion by pointing out that he was the only confirmed Native American, the only confirmed resident of the Winnebago or Omaha Reservations, and the only party attendee included in the lineup. No doubt a photo lineup displaying persons of markedly different race or ethnicity may be unduly suggestive. *United States v. Wilson*, 787 F.2d 375, 385 (8th Cir. 1986). However, a photo lineup is not suggestive solely because the display did not depict persons of the same race or ethnic group. On appeal, Whitewater alleges only that the ethnicity of the other five men in the photo lineup was unknown. But even if Whitewater were in fact the only Native American, all of the men featured in the lineup shared similar physical characteristics such that Whitewater's ethnicity did not isolate him. Furthermore, Whitewater cites no legal authority for his proposition

that including only one local resident and party attendee made the lineup suggestive. We therefore agree with the district court that the photo lineup was not impermissibly suggestive."

MIRANDA: Custodial Interrogation; Promises by Law Enforcement

Kellon v. State, ASC, No. CR-17-303, 2018 Ark. 46, 2/15/18

Lorenzo Kellon was convicted of capital murder for killing Hardip Singh, a convenience store clerk. The state waived the death penalty, and Kellon was sentenced to life in prison without the possibility of parole plus a 40-year term for aggravated robbery and a 15-year sentencing enhancement for the use of a firearm. One of the arguments on appeal is the trial court erred in admitting the confession he made while in police custody.

Police detained Kellon after finding him driving a car identified on the surveillance footage from the scene of the crime. Kellon was taken to the Pine Bluff Police Department, where he was questioned by two detectives. During the course of approximately one hour of interrogation, Kellon confessed to killing Singh and offered to assist the police in recovering the murder weapon.

Upon review, the Arkansas Supreme Court found as follows:

"The State has the burden of demonstrating by a preponderance of the evidence that custodial statements are given voluntarily and are knowingly and intelligently made. See *Jones v. Stat*e, 344 Ark. 682, 687, 42 S.W.3d 536, 540 (2001). In reviewing the trial court's determination of voluntariness, we review the totality of the circumstances; we will reverse only if the trial court's decision was clearly erroneous. We have adopted a two stage inquiry for instances in which defendants allege that false promises by police officers induced their custodial statements. First, we look to the nature of the officer's statement. If the officer made an unambiguous, false promise of leniency, then the statement elicited from the defendant is automatically inadmissible; if the officer made no promises of leniency, the statement is admissible. See *Pyles v. State*, 329 Ark. 73, 77–78, 947 S.W.2d 754, 756 (1997). If the officer's statements were of an ambiguous nature, however, we proceed to the second step of the analysis to examine the defendant's vulnerability along a number of dimensions: age, education, intelligence, length of interrogation, experience with the justice system, and the delay between the defendant receiving Miranda warnings and the statement. See *Clark v. State*, 374 Ark. 292, 300, 287 S.W.3d 567, 573 (2008).

"The comments from the detectives that Kellon highlights in this case fall into two broad categories. First, before Kellon's confession to the murder, the officers made several comments about the desirability of telling the truth. They said that Kellon could 'get help' for any problems he was going through, that the officer could 'go and tell the judge, this man came in here. He was truthful. He was trying to be a provider for his

family. He was trying to help someone that, you know, he considered as family. I can get on the stand and say that versus saying, he came up in here and he flat out lied to me.' They indicated that they 'give opportunity' and that coming clean might allow him to 'start over again' and become a better person. Kellon confessed between this and the second group of comments in which the detectives claimed they did not want Kellon to lead them to the murder weapon for 'any other reason' than to prevent the gun from remaining on the streets and causing an unsafe situation.

"For promises to be considered unambiguous offers of leniency, we have demanded a degree of specificity lacking here. In *Teas v. State*, 266 Ark. 572, 574, 587 S.W.2d 28, 29 (1979), we reversed the trial court's decision not to suppress a confession after reviewing evidence that the detaining officers offered to reduce the defendant's bond and to make recommendations to the prosecutor up to and including dismissal of the case. These were specific promises in exchange for the defendant's confession and cooperation in other investigations. In *Freeman v. State*, 258 Ark. 617, 620–21, 527 S.W.2d 909, 911 (1975), we similarly reversed when a deputy prosecuting attorney claimed he had no authority to make promises but nevertheless speculated with undue specificity that, if the detained individual had committed a crime, it was "probably one that would not result in more than 21 years' incarceration." In contrast, the statements in this case are much closer to those in *Goodwin v. State*, 373 Ark. 53, 62, 281 S.W.3d 258, 266 (2008). There, the officers told the defendant that it was best for the defendant to be truthful and that they would convey news of the defendant's honesty to the prosecutor. We held that such general promises were, at most, ambiguous. So too here. The detectives made no specific representations to Kellon. In context, the comments read more as general exhortations to be truthful for the sake of Kellon's own conscience than as promises to exercise official authority.

"As in *Goodwin*, because the statements were plausibly ambiguous, we proceed to the second step of determining whether Kellon was particularly vulnerable to having his will overborne. Here as well, though, we find no cause for concern sufficient to reverse the judgment of the trial court. Going through the factors listed above, Kellon was 23—well into adulthood—at the time of the confession. He was Mirandized shortly before questioning began, and his confession came less than halfway in to his approximately one hour interrogation. The trial court commented on Kellon's poor articulation, but swiftly added that noticing an unfamiliar speech pattern alone was an insufficient reason to reach a conclusion about Kellon's intellect. While Kellon had no prior experience with the criminal-justice system, the test is holistic; inexperience with interrogation alone does not mandate a conclusion that the defendant is particularly vulnerable. See *Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998). Reviewing the totality of the circumstances, we cannot say that the trial court clearly erred in refusing to suppress Kellon's confession."

SEARCH AND SEIZURE:
Abandoned Property; Cell Phone

United States v. Crumble
CA8, No. 16-4308, 1/2/18

On October 21, 2014, at approximately 1:28 p.m., police received reports of shots being fired between two vehicles in St. Paul, Minnesota. Dispatch informed responding officers that one of the vehicles—a tan Buick—had crashed into a house and its two male occupants had fled on foot. Officers arrived at the scene to find the wrecked Buick with bullet holes along its passenger side and a shot-out rear window. They noticed the Buick's key in its ignition and a handgun on the driver's side floorboard. A witness informed the officers that after the crash the other vehicle's shooter continued to fire at the Buick. The witness stated that the Buick's two occupants fled the scene on foot heading west, describing one as a black male, in his early 20s, wearing a white t-shirt. Another witness also reported seeing an approximately 25-year-old black male in a white t-shirt running westward from the Buick. Officers found a man matching this description hiding behind a shed a block and a half away. That man was Prentiss Crumble.

Officers took Crumble into custody and drove him to the scene of the wrecked Buick—where he denied any knowledge of the shooting or the Buick. When an officer searched the Buick later that day, he found a cell phone on the driver's seat, which he secured into evidence. The following day, the officer applied for a search warrant to search the cell phone for "information as to the second occupant in the Buick or further information related to the crime." A county judge issued a warrant to search all electronic data (including but not limited to contacts, calenders, call records, voice messages, text messages, photo and video files) stored in the phone. In the subsequent search, the officer found a video of Crumble inside a vehicle wearing a white t-shirt and brandishing a handgun similar to that recovered from the Buick. The video was recorded shortly before the shooting on October 21, 2014 at 1:15 p.m.

Crumble moved to suppress the evidence recovered from the cell phone. The magistrate judge recommended granting Crumble's motion to suppress, finding Crumble had not abandoned his Fourth Amendment rights in the phone. The district court rejected the magistrate judge's recommendation, concluding that the evidence from the cell phone was admissible because Crumble abandoned the Buick and the phone left in it when he fled and subsequently denied any knowledge of the vehicle. The district court alternatively held that the search warrant was supported by probable cause and did not lack particularity or amount to a general warrant. Finally, even if there were no probable cause or a lack of particularity, the good-faith exception applied because it was objectively reasonable for the police to rely on the warrant. Here, the district court found that Crumble abandoned the cell phone.

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

"Based on the totality of the circumstances, we cannot say that the district court clearly erred in finding Crumble abandoned the cell phone in the Buick. After the crash, Crumble fled the scene, leaving the Buick wrecked on a stranger's lawn. The Buick's key was in the ignition and its back window was shot out—allowing for easy access to the vehicle and its contents—which included a gun on the floorboard and the cell phone on the driver's seat. Crumble claims he was not fleeing from police, but rather attempting to get away from the shooter in the other vehicle. Abandonment, however, does not turn on Crumble's subjective intent, but rather 'the objective facts available to the investigating officers.' *Nowak*, 825 F.3d at 948. Based on these objective facts, the district court did not clearly err in concluding Crumble had abandoned the vehicle and its contents, including the cell phone. See *United States v. Taylor*, 462 F.3d 1023, 1025-26 (8th Cir. 2006) (finding defendant abandoned cell phone when he dropped it on street while fleeing vehicle); see also *United States v. Smith*, 648 F.3d 654, 660 (8th Cir. 2011) (finding defendant abandoned vehicle and contents when he fled, leaving door open, key in ignition, and motor running); *United States v. Tate*, 821 F.2d 1328, 1330 (8th Cir. 1987) (finding defendant abandoned vehicle and contents when he fled, leaving vehicle unoccupied and unlocked).

"Moreover, Crumble initially denied any knowledge of the wrecked Buick, evincing his intent to abandon the vehicle and its contents. See *United States v. Nordling*, 804 F.2d 1466, 1470 (8th Cir. 1986) (finding defendant's 'denials objectively demonstrate an intent to abandon the property'). Only the following day—after police had already seized the cell phone—did Crumble admit to having been in the Buick. This admission did not constitute a reassertion of a privacy interest in the abandoned cell phone.

"Crumble urges this Court to categorically deny application of the abandonment doctrine to cell phones. We decline to do so. Crumble points to *Riley v. California*, where the Supreme Court held that the search incident to arrest exception does not apply to cell phone searches, in part because cell phones hold 'the privacies of life.' 134 S. Ct. 2473 (2014). However, Riley's holding is limited to cell phones seized incident to arrest. Riley was explicit that other case-specific exceptions may still justify a warrantless search of a particular phone. Other courts have found abandonment to be one such exception. See, e.g., *United States v. Quashie,* 162 F. Supp. 3d 135, 141-42 (E.D.N.Y. 2016) (finding Riley does not eliminate abandonment exception for cell phones).

"We conclude the district court did not clearly err in finding abandonment and denying Crumble's motion to suppress. Because we affirm the district court's holding based on abandonment, we need not consider whether the warrant was valid."

SEARCH AND SEIZURE: Automobile Search; Inventory; Probable Cause

State of California v. Zabala
CCA 6th Dist., No. HO43328, 1/11/18

Saul Zabala was stopped for a traffic infraction. The vehicle was searched following the deputy's decision to impound it. Methamphetamine was found in a hidden compartment. Zabala was charged with possession for sale and transportation of methamphetamine and driving with a suspended license, with four prior narcotics convictions.

Deputy Dorsey testified that the deputy who had initiated the stop found four blue baggies of equal size filled with a white substance in a paper bag under the driver's seat. She showed those baggies to Dorsey. After field testing for cocaine produced negative results, Dorsey concluded it was a cutting agent, then noticed that the radio console "looked loose," and suspected a hidden compartment. Using his pocket knife, Dorsey removed the loose console and between the air conditioning ducts behind the stereo, found bags of a white crystalline substance that he recognized as methamphetamine. Dorsey was trained in recognizing how illegal drugs are packaged and transported and was accepted as an expert.

The court denied the motion to suppress. Zabala pleaded no contest. The court of appeal affirmed. While removal of the console exceeded the scope of a permissible inventory search, the search was supported by probable cause, based on the discovery of the baggies, and was lawful under the automobile exception to the warrant requirement.

SEARCH AND SEIZURE: Automobile Search; Probable Cause; Plain View

United States v. Kennedy
CA1, No. 15-2298, 1/24/18

In the spring of 2014, Joseph Kennedy was on federal supervised release when a warrant was issued for his arrest based on allegations that he had violated the terms of his supervision. While several officers from the Boston Police Department and the United States Marshals Service were conducting surveillance in Charlestown, Massachusetts at the address of Kennedy's longtime girlfriend, the Quincy Police Department transmitted a "Be On the Lookout" bulletin. The bulletin explained that Kennedy was wanted for a larceny that had occurred in Quincy, Massachusetts the night before. The surveillance team learned, from a United States Marshal who communicated the information in the bulletin, that the larceny had involved the theft of a safe containing ammunition and possibly weapons, pepper spray, and drugs. The officers were also told that Kennedy might be driving a gray Honda Fit and were provided with the license plate number of that vehicle.

Later that afternoon, a gray Honda Fit matching the bulletin's description approached the surveillance location. One officer recognized Kennedy as the driver of the car from a photograph he had been

shown previously. Kennedy parked the car legally near his girlfriend's apartment and exited the vehicle. When the officers approached Kennedy to arrest him, he ran away but was quickly apprehended. He was handcuffed and removed from the scene. Once Kennedy was secured and away from the car, one of the officers approached the Honda Fit. Through the window of the vehicle, the officer could see clutter on the backseat, including duffel bags, garbage bags, backpacks, and clothing. He also saw a large, box-shaped object on the backseat mostly covered by a duffle bag. A small visible portion of the box appeared to be gray and metallic. Believing the object to be the stolen safe, the officers decided to tow the vehicle. Before doing so, they opened the car and searched it. Inside, they uncovered a forced open safe containing drug paraphernalia and the ammunition that served as the basis for Kennedy's charge in this case.

After Kennedy was indicted, he moved to suppress all evidence stemming from the warrantless search of the Honda Fit, on the grounds that the search violated the Fourth Amendment. After a one-day evidentiary hearing, at which two officers testified, the court denied the motion, finding that the automobile exception applied and, in the alternative, that the officers had probable cause to believe the car itself had been used during the theft and therefore was the proper subject of an inventory search. Kennedy subsequently entered a conditional guilty plea, reserving the right to appeal the court's denial of his motion to suppress.

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

"Under the automobile exception to the Fourth Amendment's warrant requirement, see *California v. Acevedo*, 500 U.S. 565, 579 (1991), the question before us is whether the totality of the circumstances created a fair probability that evidence of a crime would be found in the Honda Fit. *United States v. Dion,* 859 F.3d 114, 132 (1st Cir. 2017). When the officers searched the vehicle, they knew the following information: Kennedy was wanted for the theft of a safe containing ammunition and possibly other items that had occurred the previous night; there was clutter in the backseat of the vehicle he had been driving immediately before his arrest, including bags and clothing piled on top of what appeared to be a large, box-shaped item consistent with the size and shape of a safe; and the small portion of the box-shaped item that was exposed appeared gray in color and metallic. These were all facts found by the district court based on the testimony of two of the police officers involved in Kennedy's arrest, and these findings were not clearly erroneous. This factual basis—together with reasonable inferences drawn therefrom—was sufficient to establish a fair probability that evidence of the larceny would be found inside the vehicle.

"Kennedy does not dispute these facts but nevertheless argues that the district court erred in denying his motion to suppress. Kennedy's assertion that there was no evidence of the theft in plain view in the Honda is simply untrue. Although the

district court correctly found that the full safe was not in plain view, what was in plain view as established by the officers' testimony was more than enough to support a reasonable belief that the object was a safe."

SEARCH AND SEIZURE:
Bus Interdiction; Drug Seizure

United States v. Wise
CA5, No. 16-20808, 12/6/17

Morris Alexander Wise was traveling on a Greyhound bus when police officers performed a bus interdiction at a Conroe, Texas bus stop on September 15, 2011. Conroe Police Department officers were present at the Greyhound bus stop. Four officers were dressed in plainclothes—civilian clothes that do not include any markings of being a police officer—and concealed their weapons and badges. The remaining officer, a uniformed canine handler, was accompanied by a trained narcotics-detection canine.

That same day, Morris Wise traveled on Greyhound Bus #6408, which departed Houston, Texas, bound for Chicago, Illinois. At around 8:00 a.m., the bus made a scheduled stop at the Conroe station. After the bus stopped, the driver disembarked. Conroe officers approached the driver and asked for his consent to search the bus's passenger cabin.

The driver gave his consent. Detectives Randy Sanders and Juan Sauceda, veterans of the Conroe Police Department with narcotics interdiction experience, boarded the bus. The two were dressed in plainclothes. The remaining three officers waited near the bus. Detective Sauceda walked toward the back of the bus, while Detective Sanders remained at the front. The officers did not block the aisle.

Detective Sanders noticed Wise pretending to sleep, which he found suspicious. In his experience, criminals on buses often pretend to sleep to avoid police contact. Detective Sanders walked past Wise and turned around. Detective Sanders looked back at Wise, only to see that Wise had turned to look at him. Detective Sanders walked back toward Wise. The detective noticed that Wise's eyes were closed—but his eyelids were tightly clenched, and his eyes darted back and forth beneath his eyelids.

Detective Sanders, standing directly behind the seat, asked to see Wise's ticket. Wise handed Detective Sanders his ticket. The name on the ticket was "James Smith." That aroused Detective Sanders's suspicion; he thought this "very generic name" may be fake. Detective Sanders returned the ticket to Wise. He then asked whether Wise had any luggage. Wise said yes and motioned to the luggage rack above his head. Wise "appeared nervous."

Two bags sat in the luggage rack above Wise's head: a duffle bag and a backpack that were "nestled together." No other bags were nearby. Detective Sanders asked Wise if he could search his bag. Wise stood, grabbed the duffle bag, and placed the bag on his seat. Detective Sanders then asked Wise if he could look inside the bag. Wise agreed. The detective

found nothing of interest. Detective Sanders then asked Wise whether the backpack belonged to him. Wise said no. Detective Sanders said, "Dude, it was right next to your duffle bag. It's right above your head. Are you sure that's not your backpack?" Again, Wise said no. Detective Sanders thought Wise appeared nervous: "It's hard to explain, but he's not comfortable. . . . He's looking at me kind of like the deer in the headlight look, like 'Oh, crap.'"

Detective Sanders then asked in a loud voice whether the backpack belonged to anyone on the bus. No one claimed the backpack. Detective Sauceda, who had joined Detective Sanders, then asked loudly whether the backpack belonged to anyone. No one claimed the backpack. Detective Sauceda grabbed the backpack and again asked loudly whether it belonged to anyone. No one claimed the backpack. He repeated the question one final time, showing passengers the backpack while asking. Again, no one claimed the backpack.

Detective Sauceda grabbed the backpack and exited the bus. The detective asked the bus driver whether he noticed who brought the backpack onboard. The driver had not noticed. Detective Sauceda then told the bus driver that no one had claimed the backpack, and he asked what to do. The driver said he did not want any unclaimed luggage on his bus. The detectives considered the backpack abandoned, so they complied with the bus driver's request and removed the backpack. Meanwhile, Wise remained seated on the bus—even though no one had restrained him or told him to stay on the bus.

Off the bus, the detectives placed the backpack on the ground next to bags that had been removed from the bus's luggage compartment. The canine handler then directed his dog to sniff the backpack and surrounding luggage. The canine alerted to the presence of drugs in the backpack. The backpack was locked with a small "TSA lock," so the officers cut the lock to open the backpack.

The officers discovered "seven small brick-type packages that were . . . all wrapped in a white cellophane." The detectives thought the packages contained narcotics. They cut the smallest package open, and it contained white powder that they believed to be cocaine.

After discovering the packages in the backpack, Detective Sanders reentered the bus. Standing near the driver's seat, Detective Sanders motioned and asked Wise—in a tone that "was a little bit elevated"—to come speak with him off the bus. Wise "said something to the effect of, 'Who? Me?'" Detective Sanders said, "Yes, sir. Do you mind getting off the bus?" Wise complied and exited the bus. Detective Sanders did not tell Wise that he could refuse to speak to him or refuse to exit the bus.

Once off the bus, Detective Sanders identified himself to Wise. The detective said that he worked in the Conroe Police Department's narcotics division. He told Wise that the backpack above his head contained a substance believed to be

cocaine. In a conversational tone Detective Sanders asked Wise whether he had any weapons. Wise said no. Detective Sanders then asked Wise to empty his pockets. Wise complied. Among other items, Wise removed an identification card that Detective Sanders asked to see. Wise gave him the card. The card said "Morris Wise." Wise also removed a lanyard with several keys attached. Wise then put everything back in his pockets. The officers asked Wise if he could again remove the items from his pockets. The officers then asked to see Wise's keys. Wise held out his hand, and Detective Sauceda took the keys. Detective Sauceda used a key to activate the locking mechanism on the "TSA lock" that the officers had cut from the backpack. Detective Sanders then arrested Wise. On March 4, 2013, Wise filed a motion to suppress the evidence the officers obtained after he was asked to exit the bus. The district court held a suppression hearing on April 5, 2013. Detective Sanders and Detective Sauceda testified; Wise did not testify. The district court then held a pretrial hearing on October 28, 2013. During the pretrial hearing, the district court judge stated that he would suppress "the bus search evidence." On September 23, 2016—nearly three years later—the district court issued a written suppression order and opinion on suppression. The Government timely filed a motion for reconsideration, and Wise filed a response. The district court summarily denied the motion for reconsideration. The Government timely appealed.

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

"The district court incorrectly characterized the bus interdiction as an unconstitutional checkpoint. The Conroe Police Department did not establish an unconstitutional checkpoint. The police did not require the bus driver to stop at the station. The driver made the scheduled stop as required by his employer, Greyhound. The police only approached the driver after he had disembarked from the bus. The police did not order him to interact with them; after the police approached him, the driver could have declined to speak with the police. The police in no way restrained the driver. Thus, the interaction between the officers and the driver lacked the essential features of a checkpoint. No case supports a contrary conclusion. Instead, the stop is better characterized as a bus interdiction.

"Wise challenged the voluntariness of the driver's consent to permit the police to search the bus's passenger cabin. The Court stated that passengers traveling on commercial buses resemble automobile passengers who lack any property or possessory interest in the automobile. Like automobile passengers, bus passengers cannot direct the bus's route, nor can they exclude other passengers. See *United States v. Hernandez–Zuniga,* 215 F.3d 483, 487 (5th Cir. 2000). Bus passengers have no possessory interest in a bus's passenger cabin—except with regard to their personal luggage. Any reasonable expectation of privacy extends only to that luggage. Passengers have no reasonable expectation of privacy with

respect to the bus's cabin. Therefore, Wise lacks standing to challenge the driver's decision to consent to the search of the bus's interior cabin.

"Wise argues that the Conroe Police Department unreasonably seized him in violation of the Fourth Amendment when they questioned him on the Greyhound. The Supreme Court in *Florid v. Bostick*, 501 U.S. 429 (1991) evaluated a situation where uniformed police officers boarded a bus, questioned a defendant (absent suspicion), and then sought the defendant's consent to search his luggage. The Court began its analysis by clarifying that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. Instead, an encounter is 'consensual' so long as the civilian would feel free to either terminate the encounter or disregard the questioning. The police do not need reasonable suspicion to approach someone for questioning. And the encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.

"The proper inquiry for whether a bus passenger has been seized by police is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. The Court explained that no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required.

"Here, the record does not support finding that the detectives seized Wise when they approached him, asked to see his identification, and requested his consent to search his luggage. Detectives Sanders and Sauceda gave the Greyhound passengers no reason to believe that they were required to answer the detectives' questions. Detective Sanders, the primary questioning officer, did not brandish a weapon or make any intimidating movements. The officers left the aisle free for passengers to exit. Detective Sanders questioned Wise from behind his seat, leaving the aisle free. Detective Sanders spoke to Wise individually. He used a conversational tone when talking to Wise. Neither detective suggested to Wise that he was barred from leaving the bus or could not otherwise terminate the encounter.

"The factors identified by Wise—that five officers participated in the interdiction, the proximity to the canine drug search, and the fact the detectives did not inform Wise that he could refuse to answer their questions or leave the bus—are not sufficient to tip the scales in his favor. Wise does not explain why either of the first two factors would change a reasonable person's calculus for whether he could leave the bus or terminate his encounter with the officers. And police are not required to inform citizens of their right to refuse to speak with officers; that is just one factor when evaluating the totality of the circumstances surrounding the interaction. A reasonable person in Wise's position would feel free to decline the officers' requests or otherwise terminate the encounter. Thus, there is no

basis to find that the officers unreasonably seized Wise.

Wise also argues that his consent to and/or cooperation with the officer's requests to ask him questions, search his luggage, exit the bus and empty his pockets were not voluntary. The Court stated that they use a six-factor evaluation for determining the voluntariness of a defendant's consent to a search; the factors include: 1) the voluntariness of the defendant's custodial status; 2) the presence of coercive police procedures; 3) the extent and level of the defendant's cooperation with the police; 4) the defendant's awareness of his right to refuse consent; 5) the defendant's education and intelligence; and 6) the defendant's belief that no incriminating evidence will be found.

"The Court stated that the record provides no basis for finding that he did not voluntarily answer the officers' questions and consent to their requests. Thus, they concluded that Wise's interactions with the officers were consensual.

"Wise next argues that the police performed an unconstitutional Terry pat down on him. He contends that when the police asked him to leave the bus and come with them, the police had detained him. He argues that the officers' request for him to empty his pockets constituted a pat down. Additionally, Wise asserts that the detectives' decision to take his keys was outside the permissible scope of a Terry stop.

"Here, the police asked Wise to speak with them off the bus. The police did not indicate that his compliance was required. Once off the bus, the police did not restrain Wise. They also did not tell him that he must obey their requests. The police asked Wise to empty his pockets, and he complied. He also complied with the police officers' requests to show them his identification card and keys. Wise has not explained why this interaction was anything but a consensual encounter.

"Even if Wise could characterize the interaction as a Terry stop-and-frisk, the stop-and-frisk would be permissible under the Fourth Amendment. Detectives Sanders and Sauceda, drawing on their experience and specialized training, could reasonably infer from the circumstances surrounding their interaction with Wise that he may have been in the process of committing a crime. The detectives witnessed Wise pretend to sleep on the Greyhound. Wise then produced a ticket with a "very generic" name: "James Smith." He denied ownership of a backpack that was sitting next to his own duffle bag. Yet, no other passengers sat near the backpack. The officers discovered that the backpack contained a substance they believed to be cocaine. The detectives were aware that narcotics traffickers often carry weapons. Evaluating the totality of the circumstances, the detectives established requisite suspicion to detain Wise for questioning and to request that he empty his pockets."

The Court of Appeals reversed the district court's suppression order.

SEARCH AND SEIZURE:
Consent Search; Scope of the Consent

Commonwealth of Massachusetts v. Ortiz
MSJC, o. SJC-12273, 2/18/18

The Massachusetts Supreme Judicial Court held that a driver's consent to allow law enforcement officers to search for narcotics or firearms "in the vehicle" does not authorize the officer to search under the hood of the vehicle and, as part of that search, to remove the vehicle's air filter. The superior court in this case granted Ortiz's motion to suppress, concluding that the scope of Ortiz's consent for officers to search for narcotics or firearms "in the vehicle" was limited to a search for narcotics or firearms in the vehicle's interior and did not include a search under the hood beneath the air filter.

The Supreme Judicial Court affirmed, holding that the search exceeded the scope of Ortiz's consent, and therefore, the search of the air filter under the hood was unconstitutional. The court thus affirmed the motion judge's order allowing Ortiz's motion to suppress the weapons found in the air filter and Ortiz's subsequent statements to the police related to his possession of those weapons.

SEARCH AND SEIZURE:
Controlled Buy; Probable Cause

United States v. Haynes
CA7, No. 17-2044, 2/14/18

A confidential informant told Winnebago County Deputy Fred Jones that he had purchased crack cocaine from "a larger black male" who was selling drugs from his house and agreed to participate in a controlled buy, stating that the suspect would drive to meet the Confidential Informant (CI) to make the sale. Jones surveilled the address the CI had reported and, several times, saw a man fitting the description drive to meet different individuals in the car. Deputies positioned surveillance on the house and neighborhood and set up the controlled buy. Under continuous observation, the suspect drove and met the CI, then returned to the house. The CI returned with 0.7 grams of a white, rock-like substance that later tested positive for cocaine.

In a warrant affidavit, Jones described the CI's participation in the buy but said little about the CI himself, who did not appear. Executing the warrant, deputies found heroin, crack cocaine, marijuana, a loaded pistol, drug paraphernalia, and cash. Haynes admitted that everything seized was his, that he intended to distribute the drugs, and that he kept the gun for protection. Haynes was charged with possession with intent to distribute heroin and cocaine base, and possessing a firearm in furtherance of drug trafficking.

On appeal Haynes argues that the search warrant was issued without probable cause because, he says the supporting affidavit did not show that the CI was reliable.

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

"Even excluding the CI's tip, the totality of the circumstances described in the warrant support a finding of probable cause. A properly executed controlled buy can establish probable cause, even which the tip that prompted it might not have been reliable. See *United States v. Single,* 125 F.3d 1097 (7th Cir. 1997); see also *United States v. Sidwell,* 440 F.3d 865 (7th Cir. 2006) (Generally, a controlled buy, when executed properly, is a reliable indicator as to the presence of illegal drug activity.) In *United States v. Fifer,* 86 F.3d 159 (7th Cir. 2017) the affidavit at issue described two controlled buys. A confidential informant arranged a drug purchase over the phone while in the presence of the police. The officers searched the informant for drugs and money, and finding neither, they gave the informant buy money. The informant met the suspect, returned to the officer minutes later with a substance that tested positive for heroin, and reported that the defendant sold the substance to him.

"We concluded that faced with these facts, a reasonably prudent person could easily conclude that a search of the defendant's apartment would reveal contraband or evidence of a crime. In this case, Deputy Jones used the same procedure in conducting a controlled buy that we found reliable in Fifer. The surveillance and the controlled buy established a fair probability that the house contained evidence of illegal activity.

"The Seventh Circuit affirmed the denial of a motion to suppress the evidence."

SEARCH AND SEIZURE:
Exigent Circumstances; Domestic Violence; Seizure of Weapon inside Residence

United States v. Quarterman
CA8, No. 16-4519, 12/12/17

At 7:16 a.m. on a Saturday, Carol Bak called 911. She said she was helping her daughter, Christina Bak, move out of Quarterman's apartment. He was Christina's boyfriend. Carol Bak reported having been in a "heated" verbal altercation with Quarterman. Quarterman "got in her face" and "had a gun on his waist." After the altercation, she left, leaving Christina Bak inside the apartment.
Dispatch radioed a "domestic with a weapon involved" to Sergeant Robert Jackson. He, with Deputy Peter Bawden and a third officer, arrived outside the apartment building at 7:36 a.m. Carol Bak repeated what she said on the 911 call. She also said Quarterman was "making Christina get out" of his apartment.

Around 7:38 a.m., concerned for the safety of Christina Bak, Sergeant Jackson and Deputy Bawden went to the apartment. Approaching, they heard voices in normal tones. They knocked; Christina Bak answered. She said "Hello," then

"Yeah," and stepped back. Through the open door, the officers saw packed bags and boxes, and a man (later identified as Quarterman) sitting on the sofa. Sergeant Jackson asked, "Can we step in?" Deputy Bawden then saw Quarterman moving on the couch. He testified Quarterman was "moving his hands quickly and kind of scooting over or trying to stand up from the couch in a hurry." He also testified it looked like Quarterman was reaching toward the couch. Considering this "an indicator of fight or flight," he said, "No, no don't you move fast." Christina Bak said, "What's wrong? What's wrong?" The officers asked about the gun. Christina Bak did not respond. Asked if he had a gun, Quarterman said, "No." Sergeant Jackson announced, "We are going to come in for a few minutes." He entered the apartment, placing himself between Christina Bak and Quarterman. Deputy Bawden moved just inside the doorway.

Sergeant Jackson told Quarterman to keep his hands up, stand up, and turn around. Quarterman stood up, beginning to turn his body. Deputy Bawden testified he was "blading" his body, standing as a boxer does, flat-footed with a shoulder pointed toward an individual. The officers saw the handgun holstered on his right side. Deputy Bawden testified he noticed the gun when he saw Quarterman's right hand lowering toward his waist. The officers ordered him against the wall, seizing the gun. All of this, from the knock to seeing the gun, occurred in about 35 seconds.

Sergeant Jackson told Quarterman he would return the gun once they were finished talking. Another deputy discovered it was stolen. The officers arrested Quarterman.

Quarterman moved to suppress the gun and derivative evidence. He argued that the warrantless entry violated the Fourth Amendment. The district court granted the motion, concluding that the entry and search were unconstitutional.

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

"Warrantless searches inside a home are 'presumptively unreasonable,' but not if 'the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.' *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), quoting *Payton v. New York*, 445 U.S. 573, 586 (1980) and *Mincey v. Arizona*, 437 U.S. 385, 394 (1978).

"One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. This exigency justifies warrantless entry or search if officers have an objectively reasonable basis for believing that a person within the house is in need of immediate aid. Also justifying warrantless entry or search is an objectively reasonable belief of a threat to officer safety. The analysis of whether this exception to the warrant requirement has been made out is an objective one focusing on what a reasonable, experienced police officer would believe.

"The warrantless entry was justified by a legitimate and objectively reasonable concern for the safety of Christina Bak and the officers. They had information that Quarterman was making Christina Bak move out, he was armed, and he had been in a heated verbal altercation with her mother that morning. After Christina Bak opened the door, Quarterman made quick movements as if reaching toward the couch or getting up. Unable to see the gun from the doorway and aware that domestic disputes can turn violent, the officers decided to enter and control the situation. Here, the officers were responding to a potentially dangerous situation. Once the door opened, Quarterman's response to the officers' presence heightened and accelerated their concerns, both for themselves and also for Christina Bak.

"The presence of a weapon in a home does not necessarily constitute exigent circumstances. See *United States v. Murphy*, 69 F.3d 237, 243 (8th Cir. 1995) (A reasonable belief that firearms may have been within the residence, standing alone, is clearly insufficient to justify excusing the knock and announce requirement. But in this case, the officers were objectively reasonable in believing that the gun presented a danger. Although Quarterman had not used, or explicitly threatened to use, the gun, he was carrying it while evicting his girlfriend and "getting in her mother's face just after 7:00 a.m. Reasonable, experienced officers would not ignore the gun. That Carol Bak considered it relevant further indicated a potential danger.

"This court has recognized that domestic disturbances are highly volatile and involve large risks. Quarterman argues that this was not a domestic disturbance, because he argued only with Carol Bak, who did not live with him and was outside when the officers arrived. But the key is what the officers reasonably believed. Here, they reasonably believed that there was an ongoing dispute between Quarterman and his live-in girlfriend, as evidenced by his carrying a gun while making her move out and his earlier behavior toward her mother.

"Once lawfully inside the apartment, the exigencies of the situation justified ordering Quarterman to stand up and turn around. If officers legally enter based on a potential threat posed by a gun, they may do a limited search for it in order to prevent harm. Although Quarterman denied having a gun, the officers were reasonable in disbelieving him. Carol Bak told them the gun was on Quarterman's hip, and the officers could reasonably believe that the man on the couch was Quarterman. His reactions to the presence of the officers also indicated that he may have been armed.

"Finally, when the officers saw the gun on Quarterman's waist, they were reasonable in temporarily seizing it. A police officer who discovers a weapon in plain view may at least temporarily seize that weapon if a reasonable officer would believe, based on specific and articulable facts, that the weapon poses an immediate threat to officer or public safety."

The Court of Appeals stated that the district court erred in suppressing the gun and derivative evidence.

SEARCH AND SEIZURE:
Probable Cause; Collective Knowledge

United States v. Rowe
CA8, No. 16-4102, 12/26/17

Investigating officers received information from a confidential reliable source regarding the drug dealings of Houston Oliver, and others, specifically alerting them to a large shipment of drugs on November 30 coming from Arizona to Minnesota in a BMW specifically described by a Confidential Informant (CI). The CI conveyed this information on the heels of telling officers about the shipment via mail of cocaine from the same individual that resulted in a successful interception. Based on this information, the alert went out via dispatch on November 30 and thus alerted Trooper Thul to the possibility that this BMW would be on the roadway that night. Before she identified the vehicle, however, she received a call from investigators working the case that they had spotted the car and asked that she conduct a stop. Once pulled over, Rowe himself corroborated the information provided by the CI. Rowe affirmed that he was driving "Houston's" car from Arizona to Minnesota as indicated by the informant.

The district court held that despite Trooper Thul's explanation that she pulled the car over for the overly tinted windows, the probable cause that already existed from the CI's information was enough in this case. Specifically, the court held that based on this probable cause to believe that the BMW contained cocaine, the police were authorized under the automobile exception to stop, search, and seize the vehicle without a warrant.

In this case, the Court of Appeals for the Eighth Circuit found as follows:

"The stop and search of this vehicle may be based on the collective knowledge of all law enforcement officers involved in the investigation and need not be based solely upon information within knowledge of the officer(s) on the scene if there is some degree of communication. *United States v. Shackleford*, 830 F.3d 751, 753-54 (8th Cir. 2016). 'Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.' *Whren v. United States*, 517 U.S. 806, 813 (1996) (relying on years of precedent to foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved); *United States v. Morales,* 238 F.3d 952, 954 (8th Cir. 2001) (probable cause may be based on collective knowledge of all officers involved in the investigation and need not be based solely on the information within the knowledge of the officer on the scene, if there is some degree of communication).

"Given the collective knowledge of the investigating officers, including the corroborated CI tips both previously and ongoing, the alert, and the request by officers for Trooper Thul to stop the

identified vehicle, the stop itself was supported by probable cause. *United State v. Hambrick*, 630 F.3d 742, 747 (8th Cir. 2011) (To support a probable cause determination, officers may rely on an informant's tip if the informant has provided reliable information in the past or if his tip is independently corroborated.)"

The Court of Appeals for the Eighth Circuit concluded that the collective knowledge of the officers support the stop and detention of Rowe, as well as the later search of the impounded vehicle.

SEARCH AND SEIZURE:
Protective Sweep Requirement
United States v. Bagley
CA10, No. 16-3305, 12/18/17

In this case, the appeal involves a protective sweep of a house incident to the arrest of one of its occupants, Mr. Stephen Bagley. Upon review, the Court of Appeals for the Tenth Circuit found as follows:

"Our precedents limit protective sweeps to the area immediately adjacent to the place of arrest in the absence of specific, articulable information that a dangerous person remains in the house. In this case, law enforcement officials conducted a protective sweep of the entire house without any information suggesting that someone else remained inside.

"The protective sweep yielded items that allowed law enforcement officials to obtain a search warrant for the entire house. Executing this warrant, officials found incriminating evidence. Mr. Bagley moved to suppress the evidence, arguing that the protective sweep had gone too far. The district court denied the motion. The Court of Appeals reversed because the protective sweep was not permissible under the Fourth Amendment.

"The Court stated in a protective sweep, officers can search beyond adjacent areas upon 'specific and articulable facts' supporting an objective belief that someone dangerous remains in the house. *Maryland v. Buie*, 494 U.S. 325, 332-34 (1990). In *United States v. Nelson*, 868 F.3d 885 (10th Cir. 2017) the government relied on the officers' inability to know whether someone else was inside the house to conduct a protective sweep. In *Nelson* we held that lack of knowledge cannot constitute the specific, articulable facts required by *Buie*. For this holding, we reasoned that if officers lack any information about whether someone remains inside a house, they do not have the specific, articulable facts required for a protective sweep beyond the adjacent areas. See also *United States v. Carter*, 360 F.3d 1235, 1242-43 (10th Cir. 2004) (stating that a protective sweep cannot be based on the possibility that a dangerous person could be concealed without specific, articulable facts that someone was concealed). This lack of specific, articulable facts required invalidation of the search in *Nelson*, and the same is true here."

SEARCH AND SEIZURE:
Stop and Frisk; Good Citizen Informant

State of California v. Stanley
CCA, 6th District, No. HO43445, 12/12/17

On the afternoon of May 7, 2015, Deputy Brian Tanaka responded to a dispatch telling him that a bus driver had spotted the suspect in "a 288 case" (lewd act on a child) on a VTA bus in San Jose. Tanaka was aware of the "288 case" because he had seen a report on the news that included a video of the suspect. He also knew that the sheriff's department distributes "Be on the Lookout" fliers to VTA bus drivers.

Tanaka responded to the bus, which was parked, boarded the bus, and spoke with the driver. The bus driver told Tanaka that he had seen a "picture" on a "Be on the Lookout" flier, and the picture "matched" a passenger on the bus. The "Be On the Look-out (BOLO)" flier issued by the San Jose Police Department on May 7, 2015 concerned a child sexual assault that had occurred on an afternoon two days earlier in the San Jose area. The flier described the suspect as "WMA, Age: 30, 5'10", 155 lbs, dark or brown shaggy hair w/ beard, tan complexion, black shoes, black socks and a black beanie." The flier also contained three color photographs, two of which showed the suspect's face.

Tanaka had never seen the flier, but he recalled from the video he had seen on the news that the suspect was a white male. The bus driver pointed out Stanley, who was asleep on a seat halfway back on the bus, as the man matching the picture the bus driver had seen on the flier. Tanaka awakened Stanley, identified himself, handcuffed Stanley, and removed him from the bus. Tanaka had Stanley sit on a bus bench outside the bus. Stanley identified himself, and Tanaka learned from dispatch that Stanley was on parole.

Other deputies, who arrived after Tanaka had detained Stanley, had been informed by dispatch of the description given in the flier. Upon their arrival, they observed that, "just by the descriptors alone, Stanley did match." The deputies were unable to access the flier themselves due to technical problems. Stanley was subjected to a parole search, which turned up narcotics. About 10 to 15 minutes after the deputies searched Stanley, they received clear photos of the suspect on the flier and determined that Stanley was not the person depicted on the flier.

Stanley was charged with possession of heroin and possession of controlled substance paraphernalia. He moved to suppress the fruits of the search on the ground that Tanaka lacked reasonable suspicion to detain him. The trial court granted Stanley's suppression motion.

Upon review, the California Court of Appeals for the Sixth District found as follows:

"The Defendant contends that the information that the bus driver gave to Tanaka could not support a detention because this information was from a 'secondary source.' The United States Supreme Court long ago rejected the

argument that a detention 'can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability.' (*Adams v. Williams* (1972) 407 U.S. 143, 147.

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, the law recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Therefore, the bus driver's information could supply the basis for a detention.

"Defendant maintains that the bus driver's information was insufficient to support a detention because it was analogous to an anonymous tip like the one that was found insufficient to support a detention in *Florida v. J.L.* (2000) 529 U.S. 266 (J.L.). He contends that a report by an identified citizen, like the bus driver, must be treated the same as an anonymous tip because both involve reliance by law enforcement on a 'secondary source.' We disagree. Private citizens who are witnesses to or victims of a criminal act, absent some circumstance that would cast doubt upon their information, should be considered reliable. This does not, of course, dispense with the requirement that the informant—whether citizen or otherwise—furnish underlying facts sufficiently detailed to cause a reasonable person to believe that a crime had been committed and the named suspect was the perpetrator; and the rule also presupposes that the police be aware of the identity of the person providing the information and of his status as a true citizen informant. Neither a previous demonstration of reliability nor subsequent corroboration is ordinarily necessary when witnesses to or victims of criminal activities report their observations in detail to the authorities. (*People v. Ramey* (1976) 16 Cal.3d 263)

"Here, while the bus driver was not a witness to criminal activity, he was a 'true citizen informant' because he voluntarily provided Tanaka with information that appeared to link defendant to a crime. Unlike information provided by an anonymous tip, information from a true citizen informant is considered reliable because a citizen informant can be held responsible if her allegations turn out to be fabricated. Consequently, the anonymous tip cases do not provide the appropriate framework for analyzing the propriety of the detention in this case. We conclude that the information provided by the bus driver to Tanaka was sufficient to reasonably justify a brief stop of defendant to determine if he was actually the suspect sought in the '288 case.'

"Tanaka knew that pictures of the suspect in the '288 case' had been widely disseminated. The bus driver told Tanaka that he had seen a picture of the suspect

on a 'Be on the Lookout' flier and that the picture on the flier 'matched' a passenger on his bus. That flier had just been issued on the very day that the bus driver saw the passenger, so the picture must have been fresh in the bus driver's mind. Although Tanaka had only a vague recollection of the video he had seen, it was not inconsistent with the man identified by the bus driver as the suspect in the '288 case.' And Tanaka had no reason to suspect that the bus driver had any motivation other than good citizenship.

"Just because Tanaka lacked the precise level of information necessary for probable cause to arrest, he was not required to simply shrug his shoulders and allow a crime to occur or a criminal to escape. The information that Tanaka possessed was sufficient to support a brief detention. The grave risks posed by a person who appeared to be the man sought for sexually assaulting a child justified the minimal intrusion of a brief investigatory detention to determine if he in fact was the person sought."

SEARCH AND SEIZURE:
Stop and Frisk; Plain Feel

United States v. Graves
CA3, No. 16-3995, 12/13/17

On the evening of October 16, 2014, Officer Dennis Simmons of the Harrisburg Police Department was conducting an undercover surveillance operation in a high crime area of the city while dressed in plainclothes and sitting in an unmarked car. While in his car, Officer Simmons heard a radio dispatch about possible gunshots in an unspecified area east of his location. The dispatch went on to describe two potential suspects walking away from the location of the gunshots: Both men wore dark-colored hooded sweatshirts and were described as calmly walking west, away from the gunshots. Less than five minutes later, Officer Simmons observed two men—including Graves—in dark-colored hooded sweatshirts walking west towards Simmons' vehicle. Officer Simmons then drove around the block to the next street in order to intercept the two men. At this point, he noticed Graves walking with a "pronounced, labored" gait suggesting that "he may have concealed something heavy in his waistband or pocket on his right side." Officer Simmons also testified that Graves held his arms in a tense manner, further suggesting that he was armed.

As Graves and the other individual passed Officer Simmons' vehicle, Officer Simmons made eye contact with Graves; Graves raised his hands over his head in the shape of a Y, and Officer Simmons nodded. Officer Simmons testified at the suppression hearing that Graves' behavior "was consistent with a drug dealer or someone who sells something illegal in the street." Officer Simmons admitted, however, that "it could be more like a challenge, more or less someone saying what are you looking at, why are you looking at me that way." Officer Simmons then proceeded to drive one block south and wait. Graves left his companion and turned south, walking directly towards Officer Simmons' car at a quickened pace. As Graves neared the vehicle, Officer

Simmons displayed his badge, yelled "Police," and handcuffed Graves.

Believing that there was a possibility that Graves was armed, Officer Simmons conducted a pat-down search of Graves' clothing. During this pat-down, Officer Simmons felt "multiple small hard objects" in both of Graves' front pockets. The feel of these objects was consistent with that of crack cocaine. Officer Simmons proceeded to remove the objects from Graves' pockets. They turned out to be multiple packets of the antidepressant Depakote and one live .22 caliber bullet. At this point, other officers arrived. After being read his rights, Graves told Officer Simmons that he carried the bullet as a tribute to his brother, who had been killed by a .22 caliber weapon. Graves did not answer Officer Simmons' questions about whether he had a gun for the bullet. Officer Simmons then placed Graves in another officer's vehicle, and Graves was taken approximately two blocks south. Upon further questioning, Graves admitted that he had a loaded .380 pistol in his boot, where it had fallen from his waistband during his arrest. Graves maintained, however, that he was holding the gun only temporarily for his companion.

Graves was subsequently charged with one count of possession of a firearm with an obliterated serial number and one count of unlawful possession of a firearm. He filed a motion to suppress all physical evidence and statements obtained at the time of his arrest.

At the suppression hearing before the District Court, Officer Simmons testified to the above facts, as well as about his nine years of experience as a police officer, during which he had made hundreds of arrests for drug offenses and violent crimes. After crediting Officer Simmons' testimony in its entirety, the District Court denied Graves' motion to suppress. Graves appeals.

Graves advances two theories why Officer Simmons' behavior ran afoul of the Fourth Amendment. First, he argues that Officer Simmons lacked reasonable suspicion to justify stopping and frisking him. Second, he argues that Officer Simmons exceeded the proper scope of an investigatory search by searching him for drugs, rather than weapons.

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

"An officer may constitutionally conduct a brief, investigatory stop and frisk without a warrant if he has 'a reasonable, articulable suspicion that criminal activity is afoot. We review the totality of the circumstances leading up to the moment of the defendant's seizure. In doing so, however, we give considerable deference to police officers' determinations of reasonable suspicion given 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. Thus, a trained officer may find reasonable suspicion based on acts capable of innocent explanation. Here Officer Simmons testified to the above facts, as well as about his nine years of

experience as a police officer, during which he had made hundreds of arrests for drug offenses and violent crimes.

"Although Officer Simmons acted on limited information in stopping Graves, we believe that the totality of the circumstances gave rise to reasonable suspicion. First, Officer Simmons explained he was parked in a high crime area. Second, Graves was leaving the scene of gunshots dressed in similar garb to the suspects described in the police broadcast. Third, Officer Simmons observed Graves walking in a manner indicating, in Officer Simmons' experience, that Graves was armed.

"While these factors standing in isolation may not have been sufficient, together they satisfied the low threshold of reasonable suspicion—particularly in light of the close temporal proximity between the gunshots and Officer Simmons' encounter with Graves. Further, Officer Simmons' suspicions were increased when he observed Graves raise his arms over his head in a manner consistent with that of an individual seeking to sell drugs, or, in the alternative, looking at Officer Simmons in a challenging manner. Graves then departed from his companion to approach Officer Simmons' vehicle, quickening his pace. This combination of events gave rise to the reasonable inference by Officer Simmons that Graves was armed and engaged in potentially unlawful conduct.

"Accordingly, we find that Officer Simmons had reasonable suspicion that criminal activity was underway when he stopped and frisked Graves.

"However, when an officer exceeds the proper bounds of a search, an individual subject to a valid investigatory stop and frisk may nonetheless assert constitutional error. An officer may only search the outer clothing of seized persons in an attempt to discover weapons which might be used to assault him. While the purpose of this limited search is not to discover evidence of crime, the Supreme Court has held that an officer 'may seize contraband detected during the lawful execution of such a search' under the plain feel doctrine. *Minnesota v. Dickerson*, 508 U.S. 366, (1993). Once the validity of a protective frisk is established, the dispositive question is whether the officer who conducted the search was acting within lawful bounds the time he gained probable cause to believe that the lump in the defendant's pocket was contraband. We must focus on whether the officer had probable cause to believe an object was contraband before he knew it not to be a weapon and whether he acquired that knowledge in a manner consistent with a routine frisk.

"Graves argues that Officer Simmons was not entitled to conduct any further search of his person once he realized that the objects in his pockets were not weapons. In so arguing, however, Graves advances a broad theory. Graves proposes that if a police officer is conducting a protective frisk, by definition, he must determine if what he is feeling is a weapon. Graves asserts that, if Officer Simmons determined that the right front pocket did not hold a weapon, his search of the interior of the pocket was impermissible; a determination that an object is not a weapon must end the search.

"Our decision in *United States v. Yamba*, 506 F.3d 251 (3d Cir. 2007), forecloses this argument. There, an officer, conducting a protective frisk, felt a plastic bag containing a soft, 'spongy-like' substance. The officer's testimony that this 'feeling' was, in his experience, consistent with the feeling of marijuana was sufficient to create probable cause justifying removal of the bag. We held that the removal of the bag did not exceed the bounds of a protective frisk merely because the officer knew that the bag itself contained no weapons; rather, we focused on whether the officer encountered the contraband before he determined that Yamba had no gun on his person.

The same result is compelled here. In conducting the frisk of Graves' pockets, Officer Simmons testified that he knew the materials in Graves' pockets were consistent in feeling with crack cocaine. The District Court credited this testimony. Indeed, Graves did not identify any other plausible explanations for the feeling of the objects in his pockets. The feel of these objects, in light of Officer Simmons' experience with narcotics investigations, gave rise to probable cause justifying removal of the objects from Graves' pocket. Moreover, because Officer Simmons had yet to determine whether Graves was armed at the time he felt the objects, his frisk did not run afoul of the Fourth Amendment.

"Accordingly, we hold that Officer Simmons did not exceed the bounds of a valid protective frisk in removing the Depakote and bullet from Graves' pockets during the course of the search."

SEARCH AND SEIZURE:
Reasonable Suspicion; Stop of a Vehicle

United States v. Collins
CA8, No. 17-2246, 2/28/18

On June 13, 2016, at approximately 3:30 a.m., Officers Swaggart, Murphy and DuChaine of the Kansas City, Missouri Police Department were conducting surveillance of a residence at 9028 Oak Street, Kansas City, Missouri, the residence of Robert "Rob" Currie. Detective Cartwright of the Kansas City Drug Enforcement Unit advised that Currie drove a white motorcycle and sold methamphetamine out of his garage during the late evenings and early mornings.

Detective Cartwright had previously conducted two controlled buys at the Oak Street garage. Approximately two years prior to the June 13, 2016 surveillance, Detective Cartwright obtained hashish. At the second controlled buy, which occurred only two months earlier, Detective Cartwright purchased methamphetamine. While waiting in the garage for Currie to retrieve the methamphetamine from a hotel, Detective Cartwright observed approximatelyten people injecting methamphetamine. During this time, he was offered methamphetamine and marijuana. Several confidential informants had also provided Detective Cartwrightinformation regarding drug activity at the Oak Street residence.

During the approximately one month that Officer Murphy had conducted surveillance of the Oak Street residence,

including on June 13, 2016, she had observed heavy vehicle, bicycle and foot traffic in and out of the garage. This traffic primarily consisted of brief visits occurring in the late evening and early morning hours. The garage had a large floodlight above it and both the home and attached garage were equipped with multiple surveillance camerasthat appeared to be focused on the garage.

At approximately 4:30 a.m., Officer DuChaine observed a Mercury Grand Marquis pull into the driveway of the Oak Street residence. The white motorcycle was parked in the driveway. An unknown white male, who was later identified as Collins, got out of the driver's seat of the vehicle and went into the garage. Collins emerged from the garage approximately ten to fifteen minutes later, reentered the vehicle and drove away from the residence.

Officers Swaggart and Murphy followed the vehicle a short distance and turned on their lights after it was out ofsight of the garage. The vehicle made multiple turns and repeatedly tapped its brakes. The officers then initiated a traffic stop. The vehicle traveled approximately 200 yards before coming to a stop. The officers ordered both Collins and his passenger to exit the vehicle. After Collins and his passenger were detained, Officer DuChaine observed a magazine with live ammunition in plain view on the driver's seat. Officer DuChaine conducted a protective sweep of the vehicle and recovered a loaded firearm in the glove box. The officers arrested Collins for failure to yield to an emergency vehicle. Officer Murphy ran a records check and learned that Collins was a convicted felon. At that time, the officers also arrested Collins for being a felon in possession of a firearm.

A grand jury charged Collins with one count of possession of a firearm as a previously convicted felon. Collins moved to suppress all evidence obtained as a result of the warrantless seizure of his vehicle. The district court ruled that the seizure and subsequent search were lawful. Collins then entered a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2), reserving the right to appeal the denial of his motion to suppress. On appeal, Collins argues that the stop was unconstitutional because the officers lacked reasonable suspicion to stop his vehicle.

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

"A police officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *United States v. Fields,* 832 F.3d 831, 834 (8th Cir. 2016) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). This includes the right to briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity. *United States v. Winters*, 491 F.3d 918, 921 (8th Cir. 2007) (quoting *United States v. Hensley,* 469 U.S. 221, 226 (1985)).

"We consider the totality of the circumstances when determining whether

an officer has a particularized and objective basis to suspect wrongdoing. *United States v. Robinson*, 670 F.3d 874, 876 (8th Cir. 2012). We 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. *United States v. Davison,* 808 F.3d 325, 329 (8th Cir. 2015) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). When a team of law enforcement officers is involved in an investigation, the issue is whether all the information known to the team provided specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the investigative stop. *Winters,* 491 F.3d at 921 (quoting *United States v. Robinson*, 119 F.3d 663, 666 (8th Cir. 1997)). Factors that may reasonably lead an experienced officer to investigate include time of day or night, location of the suspect parties, and the parties' behavior when they become aware of the officer's presence. *United States v. Quinn*, 812 F.3d 694, 69798 (8th Cir. 2016) (quoting *United States v. Dawdy*, 46 F.3d 1427, 1429 (8th Cir. 1995)).

"Here, the officers observed Collins enter a garage where they knew that drugs had been sold. Collins emerged from the garage a short time later. The incident occurred at approximately 4:30 a.m. The white motorcycle was in the driveway, indicating that Currie, who sold drugs, was likely home. The officers had observed a high volume of traffic at the garage, primarily during the late evening and early morning hours, in the month prior to the stop. These facts gave officers ample reason to believe that the vehicle contained drugs or other evidence of drug related activity. See *United States v. Spotts*, 275 F.3d 714, 718-19 (8th Cir. 2002); *Robinson*, 119 F.3d at 667; *Buchannon*, 878 F.2d at 1067. Given all of the circumstances, the officers had reasonable suspicion that Collins was engaged in criminal activity. Therefore, the stop of Collins's vehicle was constitutionally valid."

SEARCH AND SEIZURE—STOP AND FRISK:
Tip From a Witness; Reasonable Suspicion

United States v. Mosley, Jr.
CA8, No. 16-4379, 12/21/17

On May 20, 2016, at approximately 2:35 p.m., two individuals robbed a bank in Palo, Iowa. The robbers were in the bank for about a minute. As the robbers were leaving the bank, four individuals in a truck driving by saw the robbers flee across the grass but eventually lost sight of them. As the truck circled around the block attempting to spot the robbers again, one of the individuals in the truck ("the witness") called the bank. After the bank received the call from the witness, a bank employee called 911 and began relaying information about the robbery, including information the employee was getting from the witness on the other line. Though the witness could not locate the robbers he initially saw running from the bank, he reported that a gray/silver Ford Taurus was in the vicinity of the bank and was the only vehicle leaving the area in the moments after the robbery. The witness followed the Taurus and gave its location and

direction of travel to the bank employee, who continued to relay the information to 911 dispatch. When the witness got close enough to see inside the gray Taurus, he reported that he could only see one woman in the car, whereas he had seen two men running from the bank. At this point, the witness indicated that he was no longer sure if the gray Taurus was involved in the bank robbery.

Around 2:40 p.m., Deputy Uher received a radio dispatch that a gray Ford Taurus may have been involved in a bank robbery and was seen heading southbound on Highway 94 toward Cedar Rapids. A few minutes later, he identified a vehicle matching the color, make, and model given in the description, and the vehicle was traveling in the direction indicated by the witness. At about 2:44 p.m., Deputy Uher initiated a stop of the Taurus approximately 5.8 miles from the bank and approximately eight minutes after the robbery took place.

Deputy Uher ran the Taurus's license plate number and determined that the car was registered to Farrah Franklin. As Deputy Uher prepared to approach the driver, dispatch reported that the witness was not sure if the Taurus was involved in the robbery. Deputy Uher spoke with the driver, Katherine Pihl, but did not see anyone else inside the car. Deputy Uher then told Pihl she could leave, but before she could, another officer suggested via radio that Deputy Uher obtain more information from Pihl. At about 2:47 p.m., dispatch informed Deputy Uher that they had spoken directly to the witness and that he indicated he did not actually see the two robbers get in the gray Taurus. Deputy Uher then told dispatch that he was going to let Pihl go. Another deputy suggested that Deputy Uher check the trunk. At approximately 2:48 p.m., Pihl opened the trunk. Inside and about four minutes after Deputy Uher initiated the stop, officers found Monden and Mosley, along with cash and masks. Pihl, Monden, and Mosley were arrested.

Pihl, Monden, and Mosley were indicted for bank robbery. All three filed motions to suppress evidence under the Fourth Amendment. The district court denied the motions to suppress and this appeal followed.

The appellants claim that the district court erred in two ways when finding that the vehicle stop was supported by reasonable suspicion. First, they assert that because the police officers in this case were unsure whether the gray Taurus was involved in the bank robbery, they lacked reasonable suspicion to stop a vehicle matching that description. Second, the appellants argue that the tip from the witness was unreliable and therefore insufficient to create reasonable suspicion of criminal activity.

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

"Our own precedent rejects any requirement that there must be a definite or certain connection to the criminal activity to support reasonable suspicion. In *United States v. Roberts*, a masked gunman fired shots at three people, and witnesses saw a black Chrysler quickly

leaving the area after the shooting. 787 F.3d 1204, 1207 (8th Cir. 2015). An officer saw a black Chrysler about seven blocks from the location of the shooting and stopped the vehicle. The defendant in that case argued that at the time of the stop, it was unclear what role the black Chrysler played in the shooting. The defendant also claimed that 'the clothing he was wearing when he was pulled over did not match the descriptions given by some of the witnesses.' Accordingly, he argued that the stop was unlawful because the officer lacked reasonable suspicion to believe he was involved in criminal activity. We disagreed, noting that it is not surprising that moments after the shooting, the police were unsure of the precise role the black Chrysler may have played. And in light of this brief time frame, it was reasonable for the officer to stop a car matching the description of the car that witnesses had seen fleeing the scene of the crime. We took special note of the close temporal and physical proximity of the car to the crime and ultimately concluded that the officer had reasonable suspicion justifying the investigative stop.

"Just as in Roberts, the police in this case were unsure of the precise role the gray Taurus may have played. However, the gray Taurus was the only vehicle that the witness saw leaving the area shortly after spotting two hooded men flee from the bank. Deputy Uher then identified the vehicle in close geographic and temporal proximity to the robbery, traveling in the direction and on the road provided by the witness. While the driver of the Taurus did not match the description of the two men fleeing the scene of the bank robbery, the defendant in Roberts also did not match exactly the descriptions given by witnesses. We have consistently recognized that reasonable suspicion need not rule out the possibility of innocent conduct. Thus, based on these factors and the close temporal and physical proximity of the gray Taurus to the crime, the totality of the circumstances indicates that reasonable suspicion supported the vehicle stop and rendered it constitutional.

"Second, the appellants argue that Deputy Uher lacked reasonable suspicion to stop the Taurus because the tip from the witness was unreliable.

"The Supreme Court's analysis in *Navarette v. California*, however, suggests that the witness's tip was reliable and provided reasonable suspicion to make the stop. When evaluating tips, reasonable suspicion 'is dependent upon both the content of the information possessed by the police and its degree of reliability.' *Navarette,* 134 S. Ct. at 1687. In *Navarette,* a law enforcement dispatch team received a call from another dispatcher in a neighboring county relaying a tip from a 911 caller. The tipster reported that another car ran her off the highway five minutes earlier and gave a description of the vehicle and its license plate number. In finding that the officer's reliance on the tip was justified, the Supreme Court emphasized the eyewitness knowledge of the alleged dangerous driving," the contemporaneous reporting of the incident, and the ability to hold the tipster accountable for potentially false reports.

"Here, the very same factors—eyewitness knowledge, contemporaneous reporting, and accountability—weigh in favor of the witness's reliability. The witness claimed eyewitness knowledge of the facts at hand and was able to predict the Taurus's direction of travel. Moreover, the witness reported his observations nearly contemporaneously—he called the bank within five minutes of the robbery, and a bank employee promptly began relaying information to a 911 operator. Finally, because the witness's name and telephone number were known, he could be held accountable for false reporting. As a result, based on *Navarette*, we find that the witness's tip that Deputy Uher relied upon was reliable. Therefore, the district court properly concluded that the stop was supported by reasonable suspicion under the totality of the circumstances.

"We next consider whether the stop of the Taurus was prolonged unconstitutionally after Deputy Uher's initial conversation with Pihl. Reasonable suspicion did not dissolve simply because Pihl did not match the description given by the witness or because Deputy Uher's initial investigation did not bolster his original suspicion. Discrepancies between the information provided in the tip and the facts on the ground—even inconsistencies as to the number of occupants in a vehicle do not alone undermine reasonable suspicion, especially where there are other factors corroborating the tip and reasonable explanations for the discrepancies. As the Government noted in its brief, bank robbers often use getaway drivers, so when investigating whether a vehicle was involved in such a robbery, law enforcement's mission could include determining if the driver is the getaway driver, even if she does not meet the description of the men who went into the bank. Furthermore, it is foreseeable that bank robbers using getaway drivers would conceal themselves in the vehicle's trunk. "Appellants argue, however, that Deputy Uher in fact lacked the requisite suspicion to continue the stop. Indeed, he was twice prepared to let Pihl leave. Still, their argument ignores the collective knowledge doctrine: 'collective knowledge of law enforcement officers conducting an investigation is sufficient to provide reasonable suspicion, and the collective knowledge can be imputed to the individual officer who initiated the traffic stop when there is some communication between the officers.' *United States v. Thompson*, 533 F.3d 964, 969 (8th Cir. 2008); see also *United States v. Williams*, 429 F.3d 767, 771-72 (8th Cir. 2005) (finding that the collective knowledge doctrine allowed knowledge of other officers to be imputed to an officer who received a radio request to stop the vehicle). Perhaps with this in mind, the appellants suggest that Deputy Uher 'waited to obtain input from other deputies on the radio' and that 'waiting for input from officers who aren't even at the scene is not expeditious.' We disagree. The entire stop took only four minutes and was not unconstitutionally extended by Deputy Uher conferring with other officers via radio. Indeed, the officers' communication was immediate and did not measurably extend the duration of the stop.

"The Court next considered appellants' challenge to law enforcement's search of

the trunk of the Taurus. Farrah Franklin, the owner of the gray Taurus, told officers that she did not know Mosley, Monden, or Pihl and had not given them permission to use her car. In fact, Franklin had called the Cedar Rapids Police Department on the day of the bank robbery to report the vehicle stolen, though she never completed a formal report. The car was registered in Franklin's name. Franklin's husband, Cedric Rivers, testified at the suppression hearing that he borrowed the car with Franklin's permission and then loaned it to Monden. He testified that Franklin had, in the past, specifically told him not to loan the car to Monden and generally not to let anyone else use the vehicle.

"The district court properly found that appellants lacked standing to challenge the search of the trunk because they did not have a reasonable expectation of privacy in the property to be searched."

SEARCH AND SEIZURE:
Traffic Stop; Computerized Return
Small v. State, ACA, No. CR-17-265, 2018 Ark. App. 80, 2/7/18

In this case, one of the arguments by the defendant was that a traffic stop was illegal because the computerized return erroneously reflected that his insurance was cancelled.

"In order for a police officer to make a traffic stop, he or she must have probable cause to believe that a traffic violation has occurred. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50, 56 (2007). Probable cause is defined as facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. *Lockhart v. State*, 2017 Ark. 13, 508 S.W.3d 869.

"Furthermore, whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was guilty of the violation that the officer believed to have occurred. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998). In *Travis*, the deputy stopped a truck with a Texas license plate because he mistakenly believed the truck was being operated in violation of the law. Our supreme court affirmed the trial court's denial of the motion to suppress evidence that was subsequently discovered in the truck:

"Although the deputy was erroneous, the question of whether an officer has probable cause to make a traffic stop does not depend upon whether the defendant is actually guilty of the violation that was the basis for the stop. As we said in *Burris v. State* 330 Ark. at73, 954 S.W.2d at 213, citing *Whren v. United States,* 517 U.S. 806 (1996); *State v. Jones,* 310 Ark. 585, 839 S.W.2d 184 (1992)], 'all that is required is that the officer had probable cause to believe that a traffic violation had occurred. Whether the defendant is actually guilty of the traffic violation is for a jury or a court to decide, and not an officer on the scene.'

"As part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine

tasks, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning, *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530, (2004). During this process, the officer may ask the motorist routine questions such as his or her destination, the purpose of the trip, or whether the officer may search the vehicle, and the officer may act on whatever information is volunteered.

"Here, Officer Hoegh believed that Small's car was being operated in violation of our law requiring insurance coverage. The lack of insurance information in the database was sufficient to provide Officer Hoegh with probable cause to believe that a traffic violation had occurred. Hoegh was entitled to rely on the information in his possession at the time of the initial stop, and it is irrelevant that Small may have subsequently produced documents showing that he had insurance."

SEARCH AND SEIZURE: Trash Pull

United States v. Thompson
CA8, No. 16-4091, 2/2/18

In July 2015, Sioux Falls police received an anonymous tip that Thompson was distributing controlled substances. While surveilling Thompson's residence, police noticed a garbage container in the driveway, located between the garage door and the pedestrian door entrance to the garage. Police then contacted Thompson's garbage collection service to conduct a controlled trash pull. On a regularly-scheduled day of collection, police watched the garbage collector retrieve Thompson's garbage container from its location in Thompson's driveway by the garage door and dump its contents in the empty collection area of the truck. Police then retrieved the trash from the truck and searched it, finding several drug-related items. The police conducted a similar trash pull the following week, which revealed additional drug-related items and a receipt for a storage unit. Based on these trash pulls—as well as information received from an informant—police obtained a search warrant for Thompson's residence, where they found 19 grams of methamphetamine inside a lockbox, $26,063 in cash hidden inside an ottoman, and drug paraphernalia. Police later obtained a search warrant for Thompson's storage unit in Luverne, Minnesota, which contained an additional 115.1 grams of methamphetamine and $36,950 in cash.

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

"It is well established that there is no reasonable expectation of privacy in trash left for collection in an area accessible to the public. Thompson argues that because the trash was left in a container next to his garage—rather than on a street curb—the trash was within the curtilage of his home and thus he retained a reasonable expectation of privacy in it. Yet, assuming the trash was within the curtilage of Thompson's home, the proper focus remains whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable. *United States v. Comeaux*, 955 F.2d 586, 589 (8th Cir. 1992).

"The district court found that Thompson's trash was readily accessible to the public. We agree. The trash was placed in a location from which the garbage collectors regularly collected it at the regularly-scheduled time of collection, suggesting it was placed there for the express purpose of having strangers take it. Presumably, these strangers might sort through the trash or permit others, such as the police, to do so. The garbage container was easily visible from the street, and there were no barriers preventing access to the container or its contents. See *United States v. Segura-Baltazar*, 448 F.3d 1281, 1288 (11th Cir. 2006) (finding no reasonable expectation of privacy in trash containers left next to garage where they were 'plainly visible and accessible from the street'); see also *United States v. Hedrick*, 922 F.2d 396, 400 (7th Cir. 1991) (The absence of a fence or any other barrier is one indicator that the garbage was knowingly exposed to the public). Based on these facts, we find that Thompson had no objectively reasonable expectation of privacy in the trash. We therefore conclude that Thompson's motion to suppress was properly denied."

SEARCH AND SEIZURE:
Unlawfully Extended Traffic

United States v. Rodriguez-Escalera
CA7, No. 17-2334, 3/7/18

Illinois State Trooper Kenneth Patterson observed a car abruptly switch lanes in front of a truck without using a signal on I-70. A dashboard camera recorded the traffic stop. Patterson reviewed documents from Moran, the driver, and Rodriguez, her fiance, who is from Mexico, and questioned them about their travel plans. They gave inconsistent answers. Eight minutes into the stop, Patterson discovered that Moran's California driver's license was suspended. After Patterson had everything he needed to issue citations and release them, Patterson called for a narcotics-detection dog, which was occupied with another traffic stop. Patterson took 22 minutes to issue three routine citations. The K-9 unit arrived 33 minutes after the stop. Despite an initial negative dog sniff, Patterson continued to question Moran, stating that he wanted to "make sure there is nothing illegal, is that all right? Moran nodded yes. Patterson searched Moran's vehicle. Her trunk contained 7.5 pounds of methamphetamine hidden in luggage; Moran's purse contained $28,000 in cash.

The Seventh Circuit affirmed an order suppressing the evidence, finding as follows:

"A seizure that is 'lawful at its inception' can violate the Fourth Amendment if 'prolonged beyond the time reasonably required to complete' the initial purpose. When Patterson requested the dog, he only knew that the couple was coming from Los Angeles; that Moran had air fresheners in her car; that the couple did not have concrete travel arrangements; and that Rodriguez did not look up when Patterson approached the vehicle."