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## CIVIL RIGHTS: Actions Fail to Shock the Conscience; Americans with Disability Act

*Haberle v. Troxell,* CA3, No. 16-2074, 3/20/18

Timothy Nixon suffered from mental health problems. He sometimes lived with his long-time partner, Haberle, and their children. On May 20, 2013, he had "a serious mental health episode," told Haberle that he was suicidal, broke into a friend's home and took a handgun, then went to his cousin's apartment. Haberle contacted Nazareth Police.

Officer Daniel Troxell obtained a warrant for Nixon's arrest and went to the apartment with other officers, who suggested getting Pennsylvania State Police crisis negotiators or asking Haberle to communicate with Nixon. Troxell called the other officers "a bunch of f[---] ing pussies." He knocked and identified himself as a police officer. Nixon promptly shot himself.

Haberle sued, on her own behalf and also as the administrator of Nixon's estate, claiming that Officer Troxell and other law enforcement officers, and the Borough, violated the Constitution as well as a variety of federal and state statutes. All of her claims were dismissed by the District Court. Upon appeal, her primary argument is that Troxell unconstitutionally seized Nixon and that Nixon's suicide was the foreseeable result of a danger that Troxell created, and violation of the Americans with

Disabilities Act, 42 U.S.C. 12101-213 by failing to modify Borough policies and procedures to ensure that disabled individuals would have their needs met during police interactions.

The Third Circuit affirmed, in part, the dismissal of Haberle's suit, finding that "Troxell merely knocked on the door and announced his presence, which is not enough to violate the Fourth Amendment. Even if there had been a seizure, it would have been pursuant to a valid warrant and not unlawful. Troxell's actions do not 'shock the conscience.'"

The Court remanded to allow Haberle to amend her ADA claim.

### CIVIL RIGHTS: Deadly Force

*Rogers v. King*, CA8, No. 16-4209, 3/23/18

Officer Aaron King went to Marilyn Denise Ambrose-Boyd's home after receiving a 911 call report that she was home alone, suicidal, and had a gun. Ambrose-Boyd failed to respond to commands to drop her weapon and raised her gun to another officer's shin level. Officer King shot and killed Ambrose-Boyd. Her son, Skip Rogers, and her husband, Michael Boyd, brought this action under 42 U.S.C. § 1983, alleging that Officer King had violated her Fourth Amendment rights and several state laws. Their complaint also named Police Chief Gary Mikulec and the City of Ankeny as defendants, alleging liability for inadequate training and supervision of police officers.

Upon review, the Eighth Circuit affirmed the district court's grant of summary judgment, holding that the officer was entitled to qualified immunity on the 42 U.S.C. 1983 claims where the officer's use of deadly force was objectively reasonable. When she appeared unresponsive to their commands and raised the gun to one of the officer's shin level, a reasonable officer would had probable cause to believe she posed a threat of serious physical harm and that the use of deadly force was objectively reasonable. The court also held that the police chief and the city could not be liable because the officer acted reasonably.

### CIVIL RIGHTS: Deadly Force

*Romero v. Grapevine, Texas*
CA5, No. 17-10083, 4/20/18

Ruben Garcia-Villalpando was shot and killed by Officer Robert Clark. Given the tense and evolving factual circumstances, the court held that Clark reasonably believed that Garcia-Villalpando posed a threat of serious harm. In this case, Garcia-Villalpando fled the scene of a serious crime, drove recklessly and endangered others, refused to obey roughly thirty commands, and aggressively approached Clark on a narrow highway shoulder directly adjacent to speeding traffic. The court explained that the fact that Garcia-Villalpando was ultimately found to have been unarmed was immaterial.

The Fifth Circuit affirmed the district court's grant of a motion to dismiss plaintiff's claims against the City and

Eddie Salame, Chief of the Grapevine Police Department (GPD). The court also affirmed the district court's grant of summary judgment for Officer Robert Clark on plaintiff's remaining excessive force claim under 42 U.S.C. 1983 on the basis of qualified immunity.

"Because Romero failed to demonstrate that Garcia-Villalpando's Fourth Amendment rights were violated, her claims against the City and Salame for failure to train and inadequate screening/hiring failed as well."

### CIVIL RIGHTS: Entry of Home That Was Being Burglarized

*Montanez v. Carvajal*
CA11, No. 16-17639, 5/9/18

On an afternoon in 2011, Officer Todd Raible of the Volusia (Florida) County Sheriff's Office was driving his unmarked patrol car through a neighborhood that had been experiencing a rash of daytime burglaries. As he drove, Raible, a property-crimes investigator who knew all about the recent uptick in theft, took note of a young man—later identified as William Rivera—who was standing on the sidewalk in front of the residence at 1127 West New York Avenue and who appeared to be looking around nervously while talking on a cell phone. Raible became suspicious of Rivera, who "seemed anxious" and "kind of hunched" as he paced in front of the house. Raible's suspicions deepened when, as he watched, Rivera walked down a side street toward the back of the dwelling.

As Raible observed Rivera approach the back door, he saw another young man—later identified as Troy Copeland—"huddling" nearby. Based on his experience, Raible was convinced that Copeland was positioning himself to act as a "lookout" while Rivera broke into the house. Given everything he had seen, Raible radioed for backup, describing the unfolding situation as a "burglary in progress."

Driving his own patrol car, Officer Jorge Carvajal heard and responded to Raible's request for backup. Raible and Carvajal met at a nearby gas station and quickly formulated a plan for approaching the suspects. After talking to Carvajal, Raible returned to the house, where Rivera and Copeland remained near the back door; Raible parked his car and exited with his gun drawn. Carvajal soon joined Raible and drew his weapon as well, and the two officers ordered Rivera and Copeland to the ground, where they placed them in handcuffs.

Once Rivera and Copeland were cuffed, Raible entered the home's back door and stepped through a small vestibule to a second door, which led to the home's interior and was slightly ajar. Without crossing the threshold, Raible leaned through the second door and shouted, "Sheriff's office, come out if anybody's in there, sheriff's office." Hearing no answer after about 10 seconds, Raible went back outside.

Raible and Carvajal then searched Rivera and Copeland and discovered that Rivera had two kitchen knives in his pants

pockets. The knives were significant, Raible thought, because near the handle on the house's back door he also observed pry marks, which he believed to be both fresh and consistent with having been made by knives. The officers asked Rivera and Copeland for identification; neither ID listed 1127 West New York Avenue as a home address. Given the indications that the back door had recently been pried open using tools like the knives found on Rivera and that each of the suspects' IDs listed another home address, Raible and Carvajal concluded that they had interrupted an ongoing burglary. At that point, the officers formally arrested Rivera and Copeland.

Additional officers soon arrived on the scene. Once they gathered in sufficient number, Carvajal entered the home's main structure along with Officers Kyle Bainbridge, Edward Hart, and Julio Rodriguez to check (as each of the officers explained) "for additional perpetrators or potential victims." This second entry—which was the first into the home's interior and which the officers described as a "sweep"—lasted about four minutes. Importantly for our purposes, during the second entry, the officers saw in plain view what they believed to be marijuana and associated drug paraphernalia.

Almost immediately thereafter, Officers Carvajal, Bainbridge, and Hart took their supervisor, Lieutenant Brian Henderson, into the house to show him the marijuana and paraphernalia. This third entry lasted about two minutes. After viewing the suspected contraband, Henderson called the West Volusia Narcotics Task Force to determine whether a search warrant should be obtained for the remainder of the dwelling. Henderson, Carvajal, Bainbridge, and Hart then reentered the house once again—for a fourth time—staying for a little more than two minutes.

Half an hour later, Cecelia Gregory, Montanez's mother and co-owner of the house, showed up and (fifth entry) was escorted inside by Henderson. An hour after that, task-force investigators David Clay and David McNamara arrived and (sixth) went into the home with Raible to view the marijuana and drug paraphernalia.

Based on the contraband shown to him during the sixth entry, McNamara swore out an affidavit in support of a search warrant, which an assistant state attorney approved and a circuit court judge then signed. Warrant in hand, the officers subsequently conducted a full search of the house, which yielded $18,500 in U.S. currency as well as miscellaneous drugs and drug paraphernalia.

As it turns out, the authorities never filed any charges against Rivera, Copeland, or Montanez pertaining to the drugs or the associated paraphernalia— apparently because they couldn't figure out whose they were. It was later determined, as well, that the money lawfully belonged to Montanez

The Eleventh Circuit held that the suspected burglary presented an exigent circumstance that justified a warrantless entry and search. Accordingly, the officers in this case did not violate the Fourth

Amendment, and the court reversed the district court's denial of summary judgment and remanded with instructions to grant the officers' motion for summary judgment. The Court found, in part, as follows:

"In this case, the officers made two entries into the home one of which was to apprehend the perpetrators and one to search for additional individuals in the home. When entry was made the officers observed drugs. The officers contend that the first two warrantless entries into Montanez's residence—Raible's initial 10-second entry announcing the police's presence and the officers' ensuing four-minute sweep of the house—were justified by 'exigent circumstances,' or at the very least that no binding precedent 'clearly established' (for qualified-immunity purposes) that those searches were invalid.

"The officers further contend that if the first two entries into the house were lawful, then the remaining entries—to observe the marijuana and associated paraphernalia spotted in plain view during the second entry—were likewise permissible on the ground that they didn't violate any surviving privacy interest.

"The officers' first two entries—during which they spotted the marijuana and paraphernalia—were justified under the exigent circumstances doctrine. Once those entries occurred, Montanez lost any reasonable expectation of privacy in the areas already searched. The officers could thereafter enter and re-enter the residence to observe the contraband without violating the Fourth Amendment."

## CIVIL RIGHTS: Legal Claim of Injury

*Byrd v. Phoenix Police Department*
CA9, No. 16-16152, 3/16/18

In this case, the Ninth Circuit Court of Appeals reversed the district court's dismissal of a complaint seeking damages under 42 U.S.C. 1983 for alleged violations of plaintiff's constitutional rights by police officers during a traffic stop. The panel disagreed with the district court that plaintiff's allegation that the officers "beat the crap out of him" was too vague and conclusory to support a legally cognizable claim.

The panel explained that plaintiff's use of a colloquial, shorthand phrase makes plain that plaintiff was alleging that the officers' use of force was unreasonably excessive.

## CIVIL RIGHTS: Qualified Immunity; Excessive Force

*Kisela v. Hughes,* USSC, No. 17-467, 4/2/18

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the

woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she wanted her to use the knife on the dog. The officers knew none of this, though. Chadwick went outside to get $20 from her car, which is when the officers first saw her. In her affidavit, Chadwick said that she did not feel endangered at any time. Ibid. Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention."

Hughes sued Kisela under Rev. Stat. §1979, 42 U. S. C. §1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. The Court of Appeals first held that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment. The court next held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous. Kisela filed a petition

for rehearing en banc. Over the dissent of seven judges, the Court of Appeals denied it.

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

"In one of the first cases on this general subject, *Tennessee v. Garner*, 471 U. S. 1 (1985), the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.

"In *Graham v. Connor*, 490 U. S. 386, 396 (1989), the Court held that the question whether an officer has used excessive force 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. And the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

"Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 'Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.' *Brosseau v. Haugen*, 543 U. S. 194, 198 (2004) (per curiam).

"Although this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law. This Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.' *City and County of San Francisco v. Sheehan*, 575 U. S. ___, ___ (2015) (slip op., at 13) (quoting *Ashcroft v. al-Kidd*, 563 U. S. 731, 742 (2011)); see also *Brosseau*, supra, at 198–199.

"Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how

the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful. Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers. But the general rules set forth in Garner and Graham do not by themselves create clearly established law outside an 'obvious case.' Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.' *Plumhoff v. Rickard*, 572 U. S. ___, ___ (2014) (slip op., at 12). That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

"Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

"The Court of Appeals made additional errors in concluding that its own precedent clearly established that Kisela used excessive force. To begin with, 'even if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here.' In fact, the most analogous Circuit precedent favors Kisela. See Blanford v. Sacramento County, 406 F. 3d 1110 (CA9 2005). In Blanford, the police responded to a report that a man was walking through a residential neighborhood carrying a sword and acting in an erratic manner. There, as here, the police shot the man after he refused their commands to drop his weapon (there, as here, the man might not have heard the commands). There, as here, the police believed (perhaps mistakenly), that the man posed an immediate threat to others. There the

Court of Appeals determined that the use of deadly force did not violate the Fourth Amendment. Based on that decision, a reasonable officer could have believed the same thing was true in the instant case.

"In contrast, not one of the decisions relied on by the Court of Appeals—*Deorle v. Rutherford*, 272 F. 3d 1272 (CA9 2001), *Glenn v. Washington County*, 673 F. 3d 864 (CA9 2011), and *Harris v. Roderick*, 126 F. 3d 1189 (CA9 1997)—supports denying Kisela qualified immunity. As for *Deorle*, this Court has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law. *Sheehan*, 572 U. S., at ___–___ (slip op., at 13–14). *Deorle* involved a police officer who shot an unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been 'physically compliant and generally followed all the officers' instructions'; and he had been under police observation for roughly 40 minutes. 272 F. 3d, at 1276, 1281–1282. In this case, by contrast, Hughes was armed with a large knife; was within striking distance of Chadwick; ignored the officers' orders to drop the weapon; and the situation unfolded in less than a minute. 'Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page.' *Sheehan*, supra, at ___ (slip op., at 14). *Glenn*, which the panel described as the most analogous Ninth Circuit case, 862 F. 3d, at 783, was decided after the shooting at issue here. Thus, *Glenn* 'could not have given fair notice to Kisela' because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious. *Brosseau*, 543 U. S., at 200, n. 4. *Glenn* was therefore 'of no use in the clearly established inquiry.' *Brosseau*, supra, at 200, n. 4. Other judges brought this mistaken or misleading citation to the panel's attention while Kisela's petition for rehearing en banc was pending before the Court of Appeals. 862 F.3d, at 795, n. 2 (Ikuta, J., dissenting from denial of rehearing en banc). The panel then amended its opinion, but nevertheless still attempted to 'rely on *Glenn* as illustrative, not as indicative of the clearly established law in 2010.' Id., at 784, n. 2 (majority opinion). The panel failed to explain the difference between 'illustrative' and 'indicative' precedent, and none is apparent.

"The amended opinion also asserted, for the first time and without explanation, that the Court of Appeals' decision in *Harris* clearly established that the shooting here was unconstitutional. The new mention of *Harris* replaced a reference in the panel's first opinion to *Glenn*—the case that postdated the shooting at issue here. Compare 841 F. 3d 1081, 1090 (CA9 2016) ('As indicated by *Glenn* and *Deorle*,…that right was clearly established'), with 862 F. 3d, at 785 ('As indicated by *Deorle* and *Harris*,…that right was clearly established').

"The panel's reliance on *Harris* 'does not pass the straight-face test.' 862 F. 3d, at 797 (opinion of Ikuta, J.). In *Harris*, the Court of Appeals determined that an

FBI sniper, who was positioned safely on a hilltop, used excessive force when he shot a man in the back while the man was retreating to a cabin during what has been referred to as the Ruby Ridge standoff. 126 F. 3d, at 1202–1203. Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard.

"For these reasons, the United States Supreme Court stated that the petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion."

### CIVIL RIGHTS: Qualified Immunity; Paranoid Schizophrenic

*Cravener v. Schuster*
CA8, No. 17-1971, 3/27/18

Terry Cravener has paranoid schizophrenia. In May 2013, his father called Jasper County Emergency Services. He requested help getting Cravener a medical evaluation for erratic behavior and medication issues. He said Cravener was "talking to the walls" and "not in the right state of mind." He reported Cravener had not been violent that day, but "could possibly become violent." Emergency Services dispatched deputies and EMS to the father's house.

Deputy Shuster arrived first. The father said he wanted Cravener to get "a 48- hour observation." Once inside the house, Deputy Shuster heard Cravener repeating "I love Satan." Deputy Maggard arrived next. With Deputy Shuster, he found Cravener in a bedroom. Entering the room, they told Cravener he was not in trouble and asked him to sit on the mattress, on the floor. Deputy Calvin then arrived, joining them in the bedroom. When asked, Cravener said he had not taken his schizophrenia medicine in two days. Deputy Shuster explained that his parents were worried about his behavior. Cravener responded with comments about chemical burns on his skin and "two planets that collided into the earth, causing the earth to blow up." Deputy Shuster told him that based on his behavior, they were going to take him to the hospital. Cravener responded that he did not want to go; he began making hand gestures like he was shooting himself in the head. The deputies asked him to roll onto his stomach so they could restrain him. He refused, saying he did not want to go to the hospital. Several times, he laid down, holding his arms and legs in a defensive posture, and then sat back up.

After asking him about 20 times to roll to his stomach, Deputy Shuster took Cravener's left wrist and walked around him trying to get him to lie on his stomach. Cravener pulled his arms away, and Deputy Shuster placed him in a modified bent arm lock. Cravener continued to resist. Deputy Calvin advised Cravener he would tase him if he continued resisting. Deputy Shuster tried to guide Cravener to his stomach. Cravener suddenly leaned backward. His left arm broke. Deputy Shuster immediately released his hold, but

continued to guide Cravener to the floor. Cravener continued resisting and yelling "just shoot me." According to Deputy Maggard, Cravener was unfazed by his broken arm and continued resisting. Despite repeated commands to show his hands, Cravener kept both arms under him. Deputy Shuster unsuccessfully used nun chucks on his right elbow to get him to release. Deputy Calvin again warned him to stop resisting and release his arms, or be tased. Cravener refused. Deputy Calvin employed a five-second taser cycle (in drive-stun mode 1 ) to Cravener's back. When the cycle ended, Cravener resumed cursing and resisting. Four more times, Deputy Calvin warned Cravener to stop resisting or be tased. Each time he refused, resulting in another drive-stun taser cycle on his back. Deputy Maggard observed that the taser did not appear to affect Cravener, and he "kept fighting like nothing." Eventually, using nun chucks, Deputies Shuster and Maggard were able to restrain his right hand and apply a belly chain and leg shackles.

Once secured, the deputies called EMS (waiting outside the door) to inspect his broken arm. Cravener was still resisting. EMS gave him a sedative. Once that took effect, they placed him on a body board and took him to the hospital. Cravener remembers nothing from the day of the incident.

Cravener sued the deputies for excessive force and Jasper County for failure to train and unconstitutional policies, customs, and practices. The district court granted summary judgment to Jasper County. In two short paragraphs with little explanation, however, the district court found genuine issues of material fact precluding summary judgment for the deputies on the basis of qualified immunity. The district court failed to identify any disputed facts.

Upon review, the Eighth Circuit Court of Appeals reversed and remanded the Joplin, Missouri district court's denial of qualified immunity to the deputies.

"In this case, each of the deputies knew that plaintiff was a paranoid schizophrenic who had not taken his antipsychotic medication, could potentially be dangerous, refused repeated requests to go to the hospital or lie on his stomach, pretended to shoot himself in the head, took a defensive position lying on the ground with his hands and feet up, and yelled 'just shoot me.' Therefore, the deputies knew there was a reasonable expectation of aggression and a resistant subject."

The court held that Deputy Maggard acted reasonably in cuffing and shackling plaintiff; Deputy Shuster acted reasonably in applying an arm lock that broke plaintiff's arm and by using nun chucks to obtain plaintiff's compliance; Deputy Calvin acted reasonably by tasing plaintiff five times after giving warnings to plaintiff and attempting less intrusive methods; and, even if Deputy Calvin did not act reasonably, he was entitled to qualified immunity because the plaintiff could not show that a reasonable officer would have been on notice that his conduct violated a clearly established right.

## CIVIL RIGHTS: Requiring Identification Absent Reasonable Suspicion or Probable Cause

*Johnson v. Thibodaux City*
CA5, No 17-3088, 4/17/18

Jackalene Johnson, Dawan Every, Kelly Green, and Latisha Robertson were riding in a truck. Thibodaux City Officer Amador recognized Robertson and knew she had an outstanding warrant. He stopped the truck, asked Robertson to exit, and handcuffed her.

Every opened her door. Amador told her to get back in; she complied. More officers arrived and asked the passengers for identification. Green said she did not have any, but provided her name. She was not arrested. Johnson and Every refused to identify themselves. The officers arrested them for resisting an officer by refusing to identify themselves during a supposedly lawful detention (Louisiana Revised Statute 14:108) and pulled the women from the truck. Every ran; an officer used his Taser. The officers took the women to jail.

They brought 42 U.S.C. 1983 claims. The court generally denied motions seeking to exclude the testimony of the city's experts on orthopedic surgery and on arrest techniques, police procedures, police training, and use of force, but prohibited testimony as to plaintiffs' drug use, prior incidents with doctors or law enforcement, or the facts. A jury returned a verdict for the officers.

The Fifth Circuit reversed as to Johnson's unlawful arrest claims against four officers but otherwise affirmed. Under the Fourth Amendment, officers may not require identification absent an otherwise lawful detention based on reasonable suspicion or probable cause. Johnson's detention lasted longer than necessary to effect the purpose of the stop, without any evidence that would support a finding of reasonable suspicion.

The Court found, in part, as follows:

"Under the Fourth Amendment, police officers may not require identification absent an otherwise lawful detention or arrest based on reasonable suspicion or probable cause. See *Brown v. Texas*, 443 U.S. 47, 52–53 (1979). While officers are free to demand identification in the circumstances of a lawful stop or arrest, they 'may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop.' *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 188–89 (2004). Under both Louisiana law and the Constitution, Johnson was required to provide identification only if she was otherwise lawfully stopped. The officers would have no probable cause to arrest if the request for identification came during an illegal seizure.

"Even in the light most favorable to the verdict, the evidence shows that Johnson's detention lasted longer than necessary to effect the purpose of the stop. Amador testified that he stopped the truck because he recognized Robertson, knew that she had an outstanding warrant,

and planned to arrest her. And Amador quickly effected that purpose. He advised Robertson that she had an outstanding warrant, handcuffed her, and placed her into custody.

"Additional units responded, and Amador handed Robertson off to another patrol unit. But Johnson's detention continued. According to Amador, the passengers were not free to leave until they were identified. He testified that, because 'they were inside of a vehicle on a traffic stop,' 'they needed to be ID'd.' The other officers agreed. But the officers were not permitted to continue Johnson's detention solely to obtain identification. See *Brown*, 443 U.S. at 53. Instead, they must have developed 'reasonable suspicion, supported by articulable facts' during the justified portion of the stop or must have made the request because of the circumstances that justified the stop. The evidence supports neither conclusion. The purpose of the stop was to arrest Robertson, who was known to have an outstanding warrant. The identification of Johnson had nothing to do with that purpose; none of the officers suspected Johnson of having a warrant or being connected to Robertson. Nor was there any evidence that would support a finding of reasonable suspicion.

"The officers tried to identify Johnson merely because she was a passenger. Yet once the officers had effected their purpose for stopping the truck and discovered nothing establishing a reasonable suspicion that Johnson were involved in criminal activity, she should have been free to go.

"Therefore, the verdict was predicated upon an erroneous legal conclusion: that Johnson was lawfully stopped when the officers asked for identification. Because she was not lawfully stopped, she committed no crime by refusing. The officers could not have had probable cause to arrest, and the verdict 'cannot in law be supported' by the evidence."

### CIVIL RIGHTS: Seizure of Cell Phone; Qualified Immunity Denied

*Crocker v. Beatty*
CA11, No. 17-13526, 4/2/18

On the afternoon of May 20, 2012, James Crocker was driving northbound on Interstate 95 in Martin County, Florida when he observed an overturned SUV in the interstate median that had recently been involved in an accident. Crocker pulled over on the left shoulder and ran toward the SUV. About fifteen other motorists also stopped to assist. Soon after, a road ranger arrived and assured the bystanders that emergency personnel were nearby. Upon their arrival, Crocker stepped away to make room, but he remained in the interstate median about fifty feet from the SUV.

Crocker noticed some of the other bystanders were taking photographs and videos of the crash scene with their cell phones. Crocker took out his own cell phone, an iPhone, and proceeded to take photos and videos of the scene. He captured images of empty beer bottles, the overturned vehicle, and firemen, but no images of any persons involved in

the accident. About thirty seconds after Crocker had started using his iPhone camera, Deputy Sheriff Eric Beatty walked over toward him, reached out from behind him without warning or explanation, and took the iPhone out of his hand.

Beatty asked Crocker why he was on the scene. Crocker explained that he stopped to assist before first responders had arrived. Beatty told Crocker to leave. Crocker agreed to do so, but said that he needed his iPhone back. Beatty replied that the photographs and videos on the iPhone were evidence of the state, and Crocker would need to drive to the nearest weigh station to wait for instructions about the return of his phone after the evidence could be obtained from it. Crocker indicated he would leave the scene immediately if Beatty would return his iPhone, and he offered to delete the photographs and videos in an attempt to secure its return. Beatty refused to hand over the phone, and in turn, Crocker refused to leave. Beatty then arrested Crocker for resisting an officer without violence.

Crocker brought suit under 42 U.S.C. § 1983, asserting that his Fourth Amendment rights were violated when Beatty seized his iPhone after Crocker took photos and videos of a car accident crash scene from an interstate grass median. The District Court determined that this seizure constituted a Fourth Amendment violation and that Beatty was not entitled to qualified immunity. Steven Beatty appeals this decision.

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

"Without an applicable exception to the rule that the warrantless seizure of personal property is per se unreasonable, we conclude that the District Court did not err in determining a Fourth Amendment violation occurred. We now turn to the question of whether Beatty is nonetheless entitled to summary judgment on the basis of qualified immunity.

"Under these facts (viewed in the light most favorable to Crocker), we determine that Beatty violated Crocker's Fourth Amendment rights when he seized the iPhone. We further determine that these rights were clearly established at the time of the seizure such that Beatty is not entitled to qualified immunity. Therefore, Beatty is not entitled to judgment as a matter of law on Crowder's phone seizure claim. The District Court did not err in denying Beatty's summary judgment motion as to that claim."

**EMPLOYMENT LAW: First Amendment; Refusal to Revise Report**

*Davis v. City of Chicago*
CA7, No. 16-1430, 5/8/18

Chicago's Independent Police Review Authority (IPRA) investigated complaints against police, including domestic violence, excessive force, and death in custody, and made disciplinary recommendations: allegations were "sustained," "not sustained," "exonerated," or "unfounded." Investigators interviewed witnesses and procured evidence to draft reports. IPRA's Administrator retained final responsibility for making recommendations and establishing "rules, regulations and procedures for the conduct of investigations."

Lorenzo Davis became an IPRA investigator in 2008. Davis alleges that in 2014-2015, his supervisors ordered Davis to change "sustained" findings and make his reports more favorable to the accused officers. Davis refused and was allegedly threatened with termination. Davis alleges that they requested Word versions of Davis's reports to alter them to look like Davis had made the changes. The administrator then implemented a policy requiring his approval for all "sustained" findings: if an investigator refused to make a recommended change, he would be disciplined for insubordination. Davis again refused to change "sustained" findings and was fired.

The Seventh Circuit affirmed the dismissal of his First Amendment claims. "That an employee may have good reasons to refuse an order, does 'not necessarily mean the employee has a cause of action under the First Amendment when he contravenes that order.' Because IPRA required Davis to draft and revise reports, his refusal to revise those reports was speech pursuant to his official duties. He spoke as a public employee, not a private citizen. The First Amendment does not protect this speech."

**EMPLOYMENT LAW: Sexual Harassment**

*Mys v. Michigan Department of State Police*,
CA6, No. 17-1445, 3/28/18

In this case, a jury found that the Michigan Department of State Police had retaliated against Linda Mys, a former desk sergeant with the Department, by transferring her from her longtime post in Newaygo, Michigan, to a post in Detroit. Department officials initiated the process that culminated in Sgt. Mys's transfer shortly after she had filed the second of two complaints alleging sexual assault and sexual harassment by her coworker, Sergeant Richard Miller. Mys was awarded $350,000 in compensatory damages.

Upon review, the Sixth Circuit affirmed, rejecting the Department's claim that the trial record contains no evidence from which a reasonable jury could have found in Mys's favor or upon which the jury's award could be justified. The court noted several misstatements of facts by the Department's attorney. The Department conceded that the long distance of the Detroit post from Mys's home made her

transfer there an adverse employment action; her supervisor initiated the transfer process with explicit reference to Mys's complaints, explaining to both his superior and the Human Resources Department that Mys's transfer was necessary for one reason and one reason only: her sexual-harassment complaints. An "unbroken chain" connects Mys's supervisor to her transfer.

## MIRANDA:
### Clearly Expressing a Desire for an Attorney

*United States v. Hampton*
CA7, No. 16-4094, 3/21/18

On January 24, 2015, Walker Hampton robbed a post office in Taylor Ridge, Illinois, at gunpoint. The employees handed over $34 and seven books of stamps. Hampton also took the employees' wallets. A month later, he was arrested after breaking into Mack Trucking in Viola, Illinois. When sheriff's deputies searched Hampton's home, they found three firearms that he was not allowed to possess because of a prior felony conviction. Two of the guns had been stolen.

After arresting Hampton, the deputies took him to the Mercer County Sheriff's Office. Deputy Eric Holton, Deputy Dusty Terrill, and Deputy Jessie Montez sat down to talk with Hampton. Terrill first gave an introduction and informed Hampton that they were recording the conversation. Hampton interjected and said: "Actually, I want to change that. I haven't even gotten a chance to get a lawyer or anything."

At that point, Terrill left the room to turn off the video recorder and then, according to Holton's uncontradicted testimony at the suppression hearing, went back into the room and explained to Hampton why they wished to record the *Miranda* process. Holton and Terrill left the room and discussed for five to ten minutes whether Hampton had invoked his right to counsel. They concluded that he had not. The officers then returned and, with the recorder still off, advised Hampton of his rights. At some point during that discussion, Hampton said: "Maybe I should have a lawyer." Terrill explained that Hampton had the right to have an attorney present. Holton did not recall exactly what Hampton said in response, but he testified that he and his colleagues interpreted it as permission to continue the interview and record it. Hampton does not contest that he was informed of his rights, and that he agreed to proceed with the interview without counsel.

The recording resumed. After Terrill read Hampton his *Miranda* rights, Hampton signed a form saying he understood those rights and waived them. Hampton then confirmed that he had not been threatened or received any promises while the recording was off. Hampton confessed to stealing scrap metal, copper tubing, and wires from empty houses and an old school, but he denied robbing the post office. After a laborious ninety minutes of questioning, Hampton confessed to the post office robbery.

A grand jury indicted Hampton for robbing federal property, brandishing a firearm during a crime of violence, being

a felon in possession of firearms, and possessing stolen firearms.

Hampton moved to suppress his confession. Hampton contended that he unequivocally invoked his right to counsel by saying "Actually, I want to change that, I haven't even gotten a chance to get a lawyer or anything." The district judge denied the motion because she found the statement ambiguous. Hampton entered into a plea agreement but reserved his right to appeal the denial of his motion to suppress.

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

"Hampton argues that the district judge should have suppressed his confession because he invoked his right to counsel when he said 'I haven't even gotten a chance to get a lawyer or anything.' (He does not make an argument about his later statement: 'Maybe I should have a lawyer.') Hampton says that his first statement clearly expressed that he did not want to continue his interview with law enforcement until he had a lawyer. Therefore, Hampton continues, his subsequent waiver of the right to counsel was involuntary. The government responds that the statement in question — that Hampton wanted to 'change that' — revoked his permission to record the interview but did not express a present desire for counsel. At the very least, the government contends, Hampton's statement was ambiguous, so the deputies had no obligation to stop questioning him.

"Suspects subjected to custodial interrogation must be informed that they have the right to remain silent and to have an attorney present. *Miranda v. Arizona,* 384 U.S. 436, 471 (1966); see also *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). If the suspect invokes his right to counsel, the interrogation must cease. *Miranda,* 384 U.S. at 474. But to invoke the right to counsel, the suspect must make a clear and unambiguous statement. *United States v. Shabaz*, 579 F.3d 815, 818 (7th Cir. 2009); see also *Davis v. United States*, 512 U.S. 452, 459 (1994) (a suspect must 'articulate his desire to have counsel present sufficiently clearly that a reasonable police officer … would understand the statement to be a request for an attorney'). In determining whether a suspect clearly invoked the right to counsel, this court considers the statement itself and the surrounding context. *United States v. Wysinger*, 683 F.3d 784, 793–94 (7th Cir. 2012).

"Hampton's statement did not clearly show a present desire to consult with counsel. We have found such intent only when the suspect uses specific language. See, e.g., *Wysinger,* 683 F.3d at 795–96 ('I mean, can I call [a lawyer] now?'). In *Lord v. Duckworth*, we hypothesized several statements that would be clear invocations of counsel. 29 F.3d 1216, 1221 (7th Cir. 1994). All of them request an action (or permission to act); they are more than observations. See id. ('Can I talk to a lawyer?' and 'I have to get me a good lawyer, man. Can I make a phone call?') The statement Hampton points to is, by contrast, neither specific nor action-oriented. He merely observed that

he had not gotten a lawyer. See *United States v. Lee*, 413 F.3d 622, 626 (7th Cir. 2005) (explaining that 'potential desire to consult with legal counsel' is not invocation of right to counsel).

"Apart from his words, the circumstances under which Hampton made his statement also support the view that he did not invoke his right to counsel. In the same breath as his request to stop recording, Hampton observed that he had not gotten a lawyer. A reasonable officer could have concluded that in making his statement, Hampton was explaining why he did not want to have the interview recorded. Hampton argues that by this statement he intended to invoke his right to counsel and rescind his permission to record the interview, but that there is more than one interpretation only reinforces the conclusion that his statement was ambiguous.

"If Hampton had clearly invoked his right to counsel, we then would consider whether or not he voluntarily waived his rights when he later agreed to be interviewed without counsel. A suspect can waive the right to counsel after clearly invoking it by initiating "further communication, exchanges, or conversations with the police. *Edwards*, 451 U.S. at 484–85. By contrast, responding to more police-initiated questioning is not a voluntary waiver.

"Hampton argues that his waiver of the right to counsel was involuntary because he did not initiate the conversation with police that resulted in his agreement to proceed with the interview. But because Hampton's observation about not having talked with a lawyer was ambiguous, it does not matter who initiated the conversation; the deputies could continue questioning him. *Shabaz*, 579 F.3d at 818. Here the deputies did not immediately resume questioning; they took extra precautions. They explained to Hampton his rights and tried to clarify his intent, which the Supreme Court has identified as 'good police practice.' *Davis*, 512 U.S. at 459.

"Because Hampton did not invoke his right to counsel and he voluntarily waived his rights, we affirm the district court's judgment."

## SEARCH AND SEIZURE:
### Affidavits; Inferences

*United States v. Tagg*
CA6, No. 17-1777, 3/29/18

In September 2015, police executed a warrant at Derek Tagg's residence, searching for child pornography. They found plenty of it—over 20,000 files, all stored on Tagg's computer. The search warrant was based primarily on digital evidence from an FBI operation showing that Tagg had spent over five hours browsing a website ("Playpen") that obviously contained child pornography.

After collecting identifying data on the individual users of the website, the FBI and its local task-force affiliates sought separate, individual warrants for the homes of the identified users ("Residential Warrants"). To support these warrants, officers explained to federal magistrate

judges how they cross-referenced the user's digital fingerprint with their pseudonym and IP address to connect three data points: (a) the user's identity, (b) the items the user had viewed on the website, and (c) the physical location and address of the user's computer.

The district court found that the police lacked probable cause to search Tagg's house because the search warrant did not state that Tagg actually viewed any illegal images while on the site. Further, the court held that no reasonable officer would have relied on the warrant, and therefore suppressed all the evidence seized from Tagg's home.

Upon review, the Sixth Circuit Court of Appeals reversed the order granting the motion to suppress and found the warrant valid.

"Visiting a website containing child pornography creates a reasonable inference that the user has stored child pornography on a computer; that the website contains both legal and illegal material does not automatically negate probable cause. An officer of reasonable caution would suspect that Tagg had accessed Playpen with 'intent to view' child pornography, and that evidence would be found on his home computer. Tagg browsed the site for an extended period, clicking on blatant child pornography advertisements."

## SEARCH AND SEIZURE:
### Affidavits; Totality of the Circumstances

*United States v. Hines*
CA6, No. 17-5893, 3/22/18

On December 15, 2015, Louisville Metropolitan Police Department Detective Daniel Evans submitted to Kentucky Circuit Court Judge McKay Chauvin an affidavit for a search warrant of the single-family residence at 668 Eastlawn Avenue in Louisville. The affidavit set forth the following information.

In July 2015, Louisville law enforcement officers learned from a "reliable confidential informant"—CS1—that William Hines was "selling large amounts of heroin" out of 668 Eastlawn. Surveillance of that house, owned by Hines's mother, over the ensuing months tracked Hines's regular comings and goings.

On December 14, 2015, CS1 informed Detective Evans that CS1 "had seen an amount of heroin at" 668 Eastlawn that day. Also on December 14, Detective Evans received further information about Hines "from another reliable confidential source"—referred to as CS2 in the affidavit. CS2 said Hines had contacted him that day and proposed that they meet at a club called Legends to discuss an incoming heroin shipment. After he met with Hines, CS2 informed Detective Evans that Hines wanted CS2 to meet him at 668 Eastlawn the following day, where Hines would provide CS2 with heroin. According to CS2, he had received heroin

from Hines numerous times and was always instructed to meet at 668 Eastlawn.

Owing to the information from CS1 and CS2, and prior to the meeting at Legends, officers set up surveillance around 668 Eastlawn. They saw Hines leave the house, stop briefly at a liquor store, and then drive to the club. When Hines left the liquor store, surveilling officers observed him "drive in a manner consistent with narcotics traffickers"—"he drove opposite of traffic down a one-way street before entering a dark, narrow alley" where officers believed Hines was looking for any tailing law enforcement.

Detective Evans also independently investigated Hines's history as a drug trafficker and summarized it in the affidavit. Hines had been on the Louisville DEA's radar since at least 2007, when wire intercepts identified Hines as a kilogram-quantity cocaine trafficker. Additional wiretaps in 2012 helped the Louisville DEA peg Hines as a significant heroin trafficker. That summer, officers seized $33,500 from Javier Rodriguez outside 668 Eastlawn, which they believed to be payment from Hines for a kilogram of cocaine. In a 2015 interview with officers, Rodriguez said that he had previously provided Hines with kilogram-quantities of cocaine and heroin.

The state judge signed a search warrant for 668 Eastlawn early in the afternoon of December 15, which Detective Evans and other officers executed later that day. They recovered, among other things, 3.72 pounds of cocaine, 2.08 pounds of heroin, $16,085 in cash, and a digital scale with plastic baggies. A federal grand jury charged Hines with possession with intent to distribute at least 100 grams of heroin and at least 500 grams of cocaine. Hines moved to suppress the evidence recovered at 668 Eastlawn. His arguments supporting suppression argued that the affidavit did not establish probable cause for the search warrant.

The district court granted Hines's motion to suppress, finding "the search warrant affidavit does not establish the reliability of the confidential informants in this case, and as such, it lacks probable cause." It held that the affidavit's assertion that both CS1 and CS2 were "reliable" was "clearly insufficient" to establish the informants' reliability, noting the conclusory nature of the description and that Detective Evans neither provided the informants' identities to the state judge nor indicated in the affidavit that either informant had previously supplied reliable information. The court also found no independent police corroboration of the confidential informants' statements placing drugs at 668 Eastlawn; "the only information police were able to independently corroborate was that Hines did in fact go to the night club CS2 specified they would meet at," which, according to the court, was the "least significant part of CS2's story."

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

"The Government argues that the district court's ruling flouts the totality-of-the circumstances approach to determining the affidavit's sufficiency. We agree.

"Although the affidavit neither named the confidential informants nor offered how they previously provided accurate information, it described both informants' bases of knowledge for their tips about Hines's trafficking drugs out of 668 Eastlawn. At least as of July 2015, CS1 knew that Hines 'was actively selling large amounts of heroin from' 668 Eastlawn and informed law enforcement as much. Then, on December 14, Detective Hines learned from CS1 that CS1 saw heroin at 668 Eastlawn that very day. The basis of CS2's knowledge is even stronger. CS2 received heroin from Hines 'on numerous occasions in the past, and stated that he is always instructed to come to 668 Eastlawn.' On December 14, CS2 told Detective Evans that Hines had contacted him earlier in the day 'regarding [Hines] receiving a shipment of heroin' and to say 'that he would like to speak with CS2 at Legends Nightclub to discuss the shipment.' After CS2 met with Hines, CS2 contacted Detective Evans and informed that Hines wanted CS2 to come to his residence, 668 Eastlawn Avenue, at on December 15, where Hines will provide CS2 with a large amount of heroin.

"The district court dismissed these statements as 'merely creating a circle of speculation.' Instead, it should have credited them as illustrating CS1's and CS2's bases of knowledge regarding drug trafficking at 668 Eastlawn. For example, compare this affidavit to the one upheld in *United States v. Moore*, 661 F.3d 309 (6th Cir. 2011). The Moore affidavit contained one paragraph noting that an unnamed informant 'stated that he/she has been at the above described residence within the past five (5) days…and has seen the above described storing and selling cocaine at the above named address.' Here, the two informants had as much or more knowledge of Hines's heroin stash at 668 Eastlawn. CS1 saw heroin at 668 Eastlawn the day before the search; Hines contacted CS2 to discuss a shipment of heroin and later told him to come to 668 Eastlawn for a hand-off. The district court discredited this information as devoid of details like quantity or location in the house. But the Moore informant likewise never specified the quantity of drugs or their location within the residence to be searched. And even though CS2 did not say that he saw heroin at Hines's residence immediately before the search, he admitted that he had always picked up heroin from Hines at 668 Eastlawn in the past—the same place Hines told CS2 to visit on December 15.

"So even though the affidavit did not address in detail the reliability of CS1 and CS2, it gave appreciable attention to the bases of their knowledge. See *United States v. Coffee*, 434 F.3d 887, 895 (6th Cir. 2006) (crediting an affidavit that 'contains no averments that the informant was reliable based on prior contacts' but 'does state that the CI had made several purchases in the past from the suspect at the specified address'). We do not evaluate an informant's veracity, reliability, and basis of knowledge independently; more of one compensates for less of the others. *United States v. Ferguson*, 252 F. App'x 714, 721 (6th Cir. 2007). Fatally faulting this affidavit for failing to name the informants or explain

that they previously gave accurate information frustrates the totality-of-the-circumstances review we must conduct. See *United States v. Martin*, 526 F.3d 926, 936 (6th Cir. 2008) (explaining that we review the totality of the circumstances to make a commonsense, rather than 'hyper-technical, determination of whether probable cause is present').

"Granted, the district court didn't end its analysis there; it reviewed the affidavit for independent police corroboration of the tips. The court declared that 'the only information police were able to independently corroborate was that Hines did in fact go to the night club CS2 specified they would meet at.' Calling this 'the least significant part of CS2's story,' the court concluded that the affidavit lacked substantial independent police corroboration to support the probable-cause determination. We disagree.

"For one, given the informants' bases of knowledge, substantial independent police corroboration was unnecessary. See *Dyer*, 580 F.3d at 392 ('Only when no substantial supporting evidence exists within the four corners of the affidavit as to the informant's reliability do courts require substantial independent police corroboration.') In any event, officers independently—and sufficiently—corroborated the tips. After CS1 informed officers in July 2015 that Hines was selling large quantities of heroin out of 668 Eastlawn, DEA and police officers 'conducted surveillance at the residence on occasion' and saw Hines 'arrive and depart the residence with regularity.' Moreover, per the tips from CS1 and CS2 on December 14, officers re-established surveillance around 668 Eastlawn. They witnessed Hines leave the house and drive to Legends that evening—the club at which CS2 said Hines wanted to meet to discuss a shipment of heroin. The district court brushes this aside as mere corroboration that Hines went to a location mentioned by CS2, but that misses a key point: CS2 specified that Hines wanted to meet at Legends to discuss a shipment of heroin. And if 'an informant is right about some things, he is more probably right about other facts' regarding the suspect's illegal activity. *Gates*, 462 U.S. at 244 (quoting *Spinelli v. United States*, 393 U.S. 410, 427 (1969). True, as the district court implies, the officers did not set up a controlled buy or see drugs in the house. But our precedent does not require independent corroboration of criminal activity. Corroboration of specific nonobvious information that, although innocent on its own, meshes with an informant's tips is similarly relevant. See, e.g., *Dyer*, 580 F.3d at 392–93 (crediting police corroboration of informant's descriptions of suspect's cars and physical appearance); *May*, 399 F.3d at 825 (crediting as independent police corroboration the affidavit's averment that surveillance team saw a particular individual involved in unrelated investigation entering suspect's residence).

"In addition, Detective Evans independently investigated law enforcement's previous dealings with Hines, learning that Hines had 'a prior criminal history for narcotics possession and trafficking.' And Detective Evans

laid it out in the affidavit—that 668 Eastlawn served as a drug distribution point for Hines since 2012, that Javier Rodriguez admitted to officers that he previously provided drugs to Hines, that 'source information as recently as December of 2015' indicated Hines to be selling kilos of heroin in Louisville—thereby providing the issuing judge with further independent corroboration of the informants' leads. See *Dyer*, 580 F.3d at 392 ('Although a defendant's criminal history is not dispositive, it is relevant to the probable cause inquiry.'); *Martin*, 526 F.3d at 937 (noting that defendant's criminal history—included in the affidavit—constituted 'independent corroboration' that provided other indicia of reliability.

"At bottom, we judge an affidavit 'on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added.' *Allen*, 211 F.3d at 975. Here, the mix of ingredients passes muster. The totality of the circumstances convinces us that this affidavit demonstrated a specific and concrete nexus between 668 Eastlawn and the evidence sought, and thus established probable cause for the search."

**SEARCH AND SEIZURE: Anticipatory Search Warrant; Triggering Event**

*United States v. Perkins*
CA6, No. 17-5908, 4/4/18

A dog's sniff alerted law enforcement to a suspicious-smelling package, which contained methamphetamine. The intended recipient was "B. Perkins," at his Belvidere, Tennessee address. A trusted confidential informant had known Perkins for 20 years and had purchased methamphetamine from him within the past six months. Local law enforcement also knew Perkins to be a methamphetamine dealer. Based on this information, DEA officer Warren obtained an anticipatory warrant to search Perkins's residence. An anticipatory search only becomes effective upon the happening of some triggering condition, which establishes probable cause.

Warren proposed that DEA officer Brewer pose as a FedEx driver, knock at Perkins' door with the package in hand, and deliver the package: Delivery to Perkins was the triggering event.

Brewer went in with the erroneous impression that he simply needed to deliver the package to someone at the residence. Brewer knocked and a woman came to the door. Brewer asked her if she was expecting a package. "Yes, we are," she said. Brewer did not ask who she was nor did he confirm that "we" referred to Perkins, nor did he know whether Perkins was present. Brewer simply gave her the package. Officers executed the search.

Perkins was not present and did not arrive until an hour later.

Perkins was charged with possession with intent to distribute methamphetamine. The Sixth Circuit affirmed an order granting Perkins' motion to suppress. The "operative transaction" specified in the warrant did not occur.

## SEARCH AND SEIZURE: Border Searches

*United States v. Vergara*
CA11, No. 16-1509, 3/15/18

Hernando Javier Vergara returned to Tampa on a cruise ship from Cozumel, Mexico with three cell phones. Customs Officer Ragan searched his luggage and asked Vergara to turn a phone on and then looked through the phone for about five minutes. Ragan found a video of two topless female minors and called Department of Homeland Security investigators, who decided to have all three phones forensically examined.

A forensic examination of two phones conducted that day revealed more than 100 images and videos involving a minor engaging in sexually explicit conduct. The phones were not damaged. After being charged, Vergara unsuccessfully moved to suppress the evidence. The court rejected Vergara's argument that the Supreme Court's 2014 holding, *Riley v. California*, required the agents to obtain a warrant before conducting the forensic search. Vergara was sentenced to 96 months of imprisonment followed by supervision for life.

The Eleventh Circuit affirmed. "The forensic searches occurred at the border, not as searches incident to arrest. Border searches never require a warrant or probable cause but, at most, require reasonable suspicion. Vergara has not argued that the agents lacked reasonable suspicion to conduct a forensic search of his phone."

## SEARCH AND SEIZURE: Cell-Site Simulator

*United States v. Sanchez-Jara*
CA7, No. 17-2593, 5/3/18

This appeal deals with the use of a cell-site simulator to locate someone.

A federal warrant, issued in July 2015, authorized federal agents to use pen registers, trap-and-trace devices, historical cell-call records, and "electronic investigative techniques" to capture and analyze signals emitted by the subject phones, including in response to signals sent by law enforcement officers to find two cell phones and understand the nature of their owners' apparently criminal activity. The reference to electronic investigative techniques is a description of a cell-site simulator, a device that pretends to be a cell tower and harvests identifying information, including location data, about every phone that responds to its signals.

Cell-site simulators function by transmitting as a cell tower. In response to the signals emitted by the simulator, cellular devices in the proximity of the device identify the simulator as the most

attractive cell tower in the area and thus transmit signals to the simulator that identify the device in the same way that they would with a networked tower.

A cell-site simulator receives and uses an industry standard unique identifying number assigned by a device manufacturer or cellular network provider. When used to locate a known cellular device, a cell-site simulator initially receives the unique identifying number from multiple devices in the vicinity of the simulator. Once the cell-site simulator identifies the specific cellular device for which it is looking, it will obtain the signaling information relating only to that particular phone. When used to identify an unknown device, the cell-site simulator obtains signaling information from non-target devices in the target's vicinity for the limited purpose of distinguishing the target device.

By transmitting as a cell tower, cell-site simulators acquire the identifying information from cellular devices. This identifying information is limited, however. Cell-site simulators provide only the relative signal strength and general direction of a subject cellular telephone; they do not function as a GPS locator, as they do not obtain or download any location information from the device or its application

The Court of Appeals for the Seventh Circuit stated that "a warrant authorizing police to follow an identified phone, to see where it goes and what numbers it calls, particularly describes the evidence to be acquired. It is no different in principle from a warrant authorizing a GPS device that enables police to track the location of a moving car, and none of the justices in *United States v. Jones*, 565 U.S. 400 (2012) saw any problem with such a warrant."

## SEARCH AND SEIZURE:
### Consent Search; Scope of the Consent

*United States v. Suarez Plasencia*
CA11, No. 16-16946, 4/11/18

On the morning of September 6, 2015, twenty-eight Cuban migrants were found on Loggerhead Key, Florida. Later that day, Maikel Suarez Plasencia's boat broke down on Garden Key, an island three miles east of Loggerhead Key and seventy miles west of Key West. A park ranger, David Fuellner, responded to a report of Suarez's beached boat and located Suarez and the boat. Fuellner asked Suarez for permission to search his boat, and Suarez consented orally and by signing a consent form. The signed form authorized Fuellner to perform a "complete" search of the vessel and to seize its contents for any "legitimate law enforcement purpose." Suarez then took a ferry to Key West to summon help with fixing his boat.

Fuellner conducted the search the next day and found a GPS which, once plugged into the boat's power source and turned on, showed a waypoint indicating that the boat had been just off of Cuba's shore on September 5, 2015. Fuellner then powered off the GPS, seized it, and

entered it into evidence. Later analysis of the GPS, performed by a Coast Guard analyst, revealed that Suarez left Key West around 1:30am on September 5, arrived off the coast of Cuba at about 4:30pm that day, and then reached the vicinity of Loggerhead and Garden Keys in the early morning of September 6. The trip from Cuba to the United States took about ten hours. No warrant was obtained for Fuellner's search or for this analysis.

Department of Homeland Security ("DHS") agents interviewed Suarez on September 8. Suarez claimed that he had taken his boat on a spear-fishing trip from Key West to the Dry Tortugas and that he spent a night on the vessel. He denied knowledge of a migrant landing in the area. Months later, DHS agents again interviewed Suarez. When they confronted Suarez with the GPS evidence linking him to the Cuban shore, he claimed that the agents had mixed up his GPS with someone else's. However, Suarez admitted that his wife and two of his children were among the migrants who landed on September 6, 2015.

On March 11, 2016, a federal grand jury sitting in the Southern District of Florida returned a twenty-eight-count indictment against Suarez, charging him with alien smuggling, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv), (v)(II). Suarez filed a motion on June 8, 2016 to suppress the GPS evidence. The District Court denied the motion on two grounds. First, it held that by consenting to a search of his vessel without limitation, Suarez consented to a search of his GPS found onboard. Next, and in the alternative, the Court held that Suarez had abandoned the boat and its contents by leaving it on a public shore for "three to four days" before returning to fix it.

Suarez's case continued on to a jury trial, where Suarez presented as witnesses eight of the Cuban migrants found on September 6, 2015. The migrants testified generally that a "raft" with a single engine brought them from Cuba to the United States, that the trip took two nights and one day, that the raft was destroyed or lost, and that they waded to the United States shore from between fifteen and seventy-five feet out in the ocean. All of the migrant witnesses denied that Suarez assisted their journey in any way. The Government's witnesses testified that no raft, or debris from a destroyed raft, was found and that the ocean's depth even fifteen feet from the shore at which the migrants claimed to have landed would have made wading impossible. The Government also presented testimony that the migrants did not appear hungry, dehydrated, disheveled, or wet—conditions typical of migrants who come from Cuba to the United States by raft. The jury found Suarez guilty of all twenty-eight counts of alien smuggling.

Upon review, the Eleventh Circuit affirmed Suarez's convictions and sentence for encouraging and inducing aliens to enter the United States. "The district court did not err in denying defendant's motion to suppress where a reasonable person would understand that giving 'complete' consent to a search of his boat, in this context, would include consenting to the search of a GPS device

on board that could indicate where the boat had been and shed light on why it was beached so far out in the ocean."

**SEARCH AND SEIZURE:**
**Co-Resident of a Third Party's Home;**
**Entry Without a Search Warrant**

*United States v. Ford*
CA8, No. 17-1225, 4/25/18

On January 19, 2016, Iowa Department of Corrections ("DOC") Officer Mike Evans received a tip that Randy Ford was staying at a particular Des Moines residence owned by a woman named Dawn. Evans was part of a DOC fugitive unit tasked with locating and arresting parole violators. The unit had an arrest warrant for Ford. Evans was told that Ford used a cell phone in the southeast bedroom window as a surveillance device when he was present in the residence. Evans was also told that Ford had recently been seen with a handgun, and that he may be suicidal. The DOC officers had not met the tipper before that day, but an officer verified that the home at that address was owned by a woman named Dawn. And, when four or five DOC officers and two U.S. Marshals went to the residence, they saw a cell phone in the window of the southeast bedroom.

As the officers approached the house, they encountered a woman outside. The nature of that interaction is a matter of dispute. DOC Officer Smith testified that the woman indicated that Ford was inside the home, either verbally or through a gesture. The woman testified that she told officers that she did not know whether Ford was inside. The trial court noted that the woman had known Ford for about a month and, like Ford, was on parole. It concluded that "[t]he court does not believe her" testimony. Ford argues that no credible fact finder could reach that conclusion.

Ford also disputes the trial court's conclusion that DOC Officer Kness "observed a hand in the window of the southeast bedroom before entering the residence." Ford insists that such an observation would have been impossible because the bedroom windows were covered by curtains glued tightly to the walls. He notes that several video recordings of the curtains made by the homeowner were received into evidence at the suppression hearing. Ford also says that the bed was located in front of the window, blocking anyone from walking up to it.

It is undisputed that officers entered the house without knocking or forcing entry and split up to look for Ford. The trial court found that officers methodically "cleared" each room. When Evans arrived in the southeast bedroom, he moved the bed from the wall and checked the closet for Ford. At the same time, another officer found Ford hiding in the closet of the southwest bedroom. Evans assisted with his arrest, then returned to the southeast bedroom. There, he saw a handgun in plain view. After Ford was given Miranda warnings, he admitted that the gun was his and that he had thrown it under the bed when he saw police approaching the residence.

Ford argues that his Fourth Amendment rights were violated by the officers' entry into the home without a search warrant.

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

"An arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. *Payton v. New York,* 445 U.S. 573, 603 (1980). When a suspect is a 'co-resident' of a third party's home, an arrest warrant for the suspect may allow entry into the home. *United States v. Risse*, 83 F.3d 212, 216 (8th Cir. 1996). For entry to be valid, officers must have both (1) a reasonable belief that the suspect resides at the place to be entered and (2) reason to believe that the suspect is present at the time the warrant is executed. 'Whether the officers had reasonable belief is based upon the totality of the circumstances known to the officers prior to entry.' *United States v. Glover,* 746 F.3d 369, 373 (8th Cir. 2014) (quoting *United States v. Junkman*, 160 F.3d 1191, 1193 (8th Cir. 1998)).

"In *Glover*, we held that it was reasonable for law enforcement officers to believe a suspect was a co-resident in a third party's home when they received an anonymous tip from a 9-1-1 caller that was 'consistently accurate and detailed,' including the suspect's date of birth and the building's entrance gate code. While anonymous tips are treated with some mistrust, when 'information from an informant is shown to be reliable because of independent corroboration, then it is a permissible inference that the informant is reliable and that therefore other information that the informant provides, though uncorroborated, is also reliable.' The presence requirement was met by observing the suspect's car outside and by following up with the informant, who was able to accurately describe law enforcement activity outside the house – because, she said, she was talking with the suspect about how he was watching from inside.

"Likewise, in *United States v. Boyd*, we held that it was reasonable for law enforcement officers to believe a suspect was a co-resident in a third party's home when they were told by an informant that the suspect resided there and corroborated that tip with neighbors. 180 F.3d 967, 978 (8 Cir. 1999). The presence requirement was met by corroborating the informant's follow-up tip with the fact that the suspect's car was at the home when law enforcement arrived.

"Just as in Glover and Boyd, it was reasonable for law enforcement officers to believe that Ford was a co-resident of the home and present at the time the warrant was executed. The informant who provided the tip that Ford was staying in the home was untested, so there would be reason for mistrust absent corroboration. However, the officers corroborated not only that the home was owned by someone named Dawn, but also the much more specific fact that Ford placed his cell phone in the southeast bedroom window for use as a surveillance device when he was present."

**SEARCH AND SEIZURE:** Curtilage

*United States v. Alexander*
CA2, No.16-3708-cr, 5/1/17

Robert Alexander lived in a narrow house on Staten Island. The front of the house faced the street, and a short set of stairs led directly from the sidewalk to the front door. The property also included an 84-foot-long driveway that ran perpendicular to the street and alongside the home. The driveway extended past the back of the house, and at the end of the driveway, in the backyard, was a shed. Alexander used the part of the drive way in front of the shed for parking, barbeques, and relaxation. There was fencing on three sides of the property, though not on the side facing the street.

One night, Alexander was standing with a woman in his front yard, a bottle of vodka in hand. A few feet away, another man and woman sat in a car that was idling in the street, blocking Alexander's driveway.

Sometime between 3:00 and 3:30 a.m., two plainclothes police officers, Genaro Barreiro and Daniel Golat, approached the group. As they neared, the officers observed the man in the passenger seat of the car attempt to put in his pants what appeared to be a baggie of drugs. The police quickly removed the two passengers from the vehicle and discovered a plastic bag containing a substance resembling cocaine in the man's hand.

The man apparently confessed that there was more cocaine in the back seat of the car, prompting Golat to search that area for additional drugs. While Golat was doing so, Alexander announced that he was "just going to put [the liquor bottle] in the back." (He later told Golat that he wanted to put the bottle away "out of respect" for the police officers.) Alexander then walked down the driveway toward the backyard, stopping along the way to pick up a bag that had been left next to the house. Alexander was out of view for less than a minute before returning to the officers. When he did, he had neither the bottle nor the bag with him.

After an additional police officer arrived on scene, Officer Barreiro decided to look for the items that Alexander had moved. Barreiro testified that his "suspicion level [was] high," but it is undisputed that he had no probable cause to search Alexander's property. Nevertheless, Barreiro proceeded to walk down the driveway and eventually found the liquor bottle around the back corner of the house, next to the home's back door. Barreiro did not see the bag at that time and returned to the front yard to frisk Alexander. Barreiro then walked down the driveway once again and "into the backyard" in order to continue searching for the bag.

Once in the backyard, Barreiro used his flashlight to scan the area and spotted the bag resting on a plastic chair by the front corner of the shed closest to the house. The chair was roughly four feet from where he had found the bottle. Barreiro

walked up to the bag and saw the butt of a gun sticking out of it. Inspecting the bag more closely, he realized that there were actually two guns inside.

Alexander was arrested and charged with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and one count of possessing a defaced firearm in violation of 18 U.S.C. § 922(k).

Before trial, Alexander moved to suppress both the guns and the vodka bottle, arguing that Officer Barreiro violated the Fourth Amendment by searching the curtilage of Alexander's home without a warrant or probable cause. The district court held a hearing at which the officers and Alexander's sister, who lived with Alexander, testified. In an oral ruling, the court granted the motion as to the bottle, and denied it as to the guns, holding that only the former was found on the curtilage of the house.

In this case, the Court of Appeals for the Second Circuit discussed the concept of "curtilage."

"At the very core of the Fourth Amendment 'stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.' *Silverman v. United States*, 365 U.S. 505, 511 (1961). The curtilage —that is, the 'area adjacent to the home and to which the activity of home life extends'— is considered part of a person's home and enjoys the same protection against unreasonable searches as the home itself. *Florida v. Jardines*, 569 U.S. 1, 7 (2013). As a result, a search of the curtilage that occurs without a warrant based on probable cause or an exception to the warrant requirement violates the Fourth Amendment. *Harris v. O'Hare*, 770 F.3d 224, 234, 240 (2d Cir. 2014). By contrast, that portion of private property that extends outside a home's curtilage — what the case law terms an 'open field'— is beyond the purview of the Fourth Amendment, and can be warrantlessly and suspicionlessly searched without constitutional impediment. *Jardines*, 569 U.S. at 6.

"In *United States v. Dunn*, 480 U.S. 294 (1987), the Court considered whether a barn located 50 yards from a fence surrounding a ranch house was part of the home's curtilage. The barn itself was surrounded by a separate fence, as was the entirety of the 198-acre property. The Court held that the barn was not part of the curtilage. It reached its decision by applying a four-factor test, which it instructed 'should' be used to resolve curtilage questions. The factors were: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

"The Court was careful to warn, however, that combining those factors does not produce a finely tuned formula that, when mechanically applied, yields a correct answer to all extent-of-curtilage questions. Instead, the factors were useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant

consideration — whether the area in question is so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection.

"The Supreme Court did not hear another curtilage case until decades later. In *Jardines v. Florida*, 569 U.S. at 7 the Court was faced with a search that occurred on the front porch of a home. Without reference to the Dunn factors, the Court held that the porch was part of the home's curtilage. It described curtilage as the area around the home that is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened, and suggested that a home's porch or side garden fell easily within that definition.

"The Court went on to recognize that the public, law enforcement included, had an implicit license to approach the front door of a home in order to 'knock promptly' and 'wait briefly to be received.' But, in bringing a drug-sniffing dog onto the porch, the police exceeded the scope of that implicit license, and their search was thus unconstitutional. That *Jardines* did not reference *Dunn* does not mean that the earlier case is no longer relevant. Indeed, in our first curtilage case post *Jardines*, we relied on the *Dunn* factors in holding that, for qualified immunity purposes, it was 'clearly established that a fenced-in side or backyard directly abutting a single-family house constitutes curtilage.' *Harris*, 770 F.3d at 240.

"At the same time, the *Dunn* factors have never been the exclusive curtilage considerations, and are relevant only insofar as they help answer the central question of whether the area in question harbors the intimate activity associated with the sanctity of a man's home and the privacies of life. *Jardines* confirms that and, further, is instructive as to the weight certain factors should receive when courts seek to answer that ultimate question. The front porch in *Jardines* was neither hidden from public view nor closed off to the public by a fence; in fact, the porch was open to the public in such a way that the public had an implicit license to enter the area. None of those facts gave the *Jardines* Court any pause in declaring the porch curtilage, suggesting that the lack of fencing (relevant to the second *Dunn* factor) and the lack of steps taken to protect an area from public observation (relevant to the fourth) may be of limited significance, at least in certain residential settings. For these reasons, and as discussed below, *Jardines* undercuts certain of this Court's precedents that suggest that public visibility or public access may definitively take an area out of the curtilage."

In this case, the Court of Appeals stated that the police do not have unlimited authority to search driveways for incriminating evidence, even if the driveway is visible from the street, even if a fence does not block pedestrian access, and even if the public is implicitly licensed to traverse a portion of the driveway in order to seek entry into the home. Here, the portion of the driveway in front of Alexander's shed formed part of the curtilage, and the search of that area ran afoul of the Fourth Amendment.

## SEARCH AND SEIZURE:
### Privacy in a Rental Vehicle

*Byrd v. United States*
USSC, No. 16-1371, 5/14/18

On September 17, 2014, Terrence Byrd and Latasha Reed drove in Byrd's Honda Accord to a Budget car-rental facility in Wayne, New Jersey. Byrd stayed in the parking lot in the Honda while Reed went to the Budget desk and rented a Ford Fusion. The agreement Reed signed required her to certify that she had a valid driver's license and had not committed certain vehicle related offenses within the previous three years. An addendum to the agreement, which Reed initialed, provides the following restriction on who may drive the rental car: "I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form. These other drivers must also be at least 25 years old and validly licensed." In filling out the paperwork for the rental agreement, Reed did not list an additional driver.

Pennsylvania State Troopers pulled over a car driven by petitioner Terrence Byrd. Byrd was the only person in the car. In the course of the traffic stop, the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin. The evidence was turned over to federal authorities, who charged Byrd with distribution and possession of heroin and possession of body armor by a prohibited person.

Byrd moved to suppress the evidence as the fruit of an unlawful search. The United States District Court for the Middle District of Pennsylvania denied the motion, and the Court of Appeals for the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. Based on this conclusion, it appears that both the District Court and Court of Appeals deemed it unnecessary to consider whether the troopers had probable cause to search the car.

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

"This Court granted certiorari to address the question whether a driver has a reasonable expectation of privacy in a rental car when he or she is not listed as an authorized driver on the rental agreement. The Court now holds that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.

"With the rental keys in hand, Reed returned to the parking lot and gave them

to Byrd. The two then left the facility in separate cars—she in his Honda, he in the rental car. Byrd returned to his home in Patterson, New Jersey, and put his personal belongings in the trunk of the rental car. Later that afternoon, he departed in the car alone and headed toward Pittsburgh, Pennsylvania.

"…a remand in this case was necessary to address, in the first instance, the Government's argument that this general rule is inapplicable because, in the circumstances here, Byrd had no greater expectation of privacy than a car thief. If that is so, our cases make clear he would lack a legitimate expectation of privacy. It is also necessary to remand as well to determine whether, even if Byrd had a right to object to the search, probable cause justified it in any event."
The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy protected by the Fourth Amendment.

## SEARCH AND SEIZURE:
### Search of Recreation Vehicle; Mobility

*United States v. Houck*
CA8, No. 17-3045, 4/26/18

As part of his work with a Pennsylvania computer-crimes task force, Detective Gregory Wahl located a computer that was sharing child pornography on the Ares peer-to-peer network. Wahl was able to establish the IP address of the computer, which he traced to the residence of Thomas Houck's mother in Manheim, Pennsylvania. This information led another member of the task force, Detective Keith Kreider, to conduct "basic surveillance" of the property, where he observed a pickup truck and a fifth-wheel trailer-style RV in the driveway. Kreider then applied for and obtained a search warrant. The warrant application included a request to search "any vehicles…present at the time of execution…due to the size and portability of many of today's media storage devices." Kreider later testified that he did not specifically identify the RV in the warrant application or seek a separate warrant to search the RV based on his belief that it fell within the scope of the warrant's authorization to search "any vehicles." He further testified that, had the warrant not expressly covered vehicles, he would have applied for a second warrant to search the RV.

Officers executed the search warrant on July 2, 2015. Upon arriving at the residence, the officers saw Houck's RV and pickup truck parked in the driveway. The truck had a trailer attachment, but the RV was not connected to it. The RV itself had Missouri license plates, a valid inspection tag, and a vehicle identification number. It had fully inflated tires and no permanent attachments to the ground. However, it was connected to water and electric lines, and there was a satellite dish attached to the roof. Kreider estimated that it would have taken approximately thirty minutes to prepare the RV for travel.

The officers at the residence executed the search and seized Houck's laptop, Apple iPhone 6, and Olympus XD picture

card from the RV. They then conducted a forensic preview of the devices and located files that appeared to contain child pornography. A subsequent forensic examination revealed that external data-storage devices had been connected to the laptop.

The district court granted Houck's motion to suppress, finding that the search of his RV exceeded the scope of an otherwise valid search warrant. The district court found that nearly all of the challenged evidence should be excluded. This conclusion was based primarily on an analysis of the Supreme Court's application of the "automobile exception" to the warrantless search of a motor home in *California v. Carney*, 471 U.S. 386 (1985). Despite recognizing that the officers here had a valid search warrant, the magistrate judge applied *Carney* and determined that, while Houck's RV was "readily mobile," it qualified as a residence rather than a vehicle. The district court adopted the magistrates reasoning in its entirety and granted Houck's motion to suppress all evidence obtained after he left his mother's property. The Government now appeals, arguing that the warrant's authorization to search "any vehicles" included the RV and that, even if mistaken, the officers' reading of the warrant was reasonable.

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

"The officers' interpretation of the warrant was not unreasonable, even assuming it was mistaken. Although there was some evidence that the RV was being used as a temporary residence, the officers observed the following facts supporting their conclusion that it was a vehicle: (1) the RV had fully inflated tires, could have been mobile within 30 minutes, and was parked on a driveway with ready access to a roadway; (2) the truck used to tow the RV was parked next to it; (3) the RV, which was parked at a Pennsylvania residence, had Missouri license plates, had a vehicle identification number, and was registered in Missouri; and (4) the RV was not attached to the ground or permanently affixed to any structure. Further, given that 'vehicle' is commonly defined as an instrument of transportation or conveyance, see Vehicle, Black's Law Dictionary, it was reasonable for the officers to treat it as such. Thus, under these circumstances, we conclude that it was not objectively unreasonable for the officers to believe that the RV was a vehicle within the scope of the warrant. Therefore, there is no basis for excluding the challenged evidence here."

## SEARCH AND SEIZURE:
### Traffic Stop; Further Detention After Initial Interview and Records Check

*United States v. Favreau*
CA1, No. 17-1261, 3/23/18

State Trooper Pappas was aware of Derrick Favreau's reputation as a drug dealer, and about a year before the confrontation in question in this case, he had received an informant's tip that Favreau possessed a vehicle that contained a "trap," a secret compartment in which drugs could be hidden and transported. More pressing assignments kept Pappas

from following up on the tip, but when his schedule allowed it, he decided to conduct surveillance on Favreau, with the help of Trooper Gagnon, as well as Trooper Rooney (who worked with a drug detection dog). Rooney drove a marked cruiser, but both Pappas and his unmarked car were well known in the vicinity where the relevant events took place.

On the day in question, Pappas and Gagnon drove to where Favreau's house could be seen. They saw him get in the car the tipster had mentioned, pull away, signal a turn into a cross street, nevertheless drive straight through the intersection and, at a point where Pappas and Gagnon's police car was visible, reverse direction and then turn into the cross street in the direction opposite to his original directional signal. Rooney testified that reversing direction as Favreau had done was known as a tactic by suspects trying to elude police following them. Soon after, the troopers located the car parked in the lot of a store, which Favreau entered and left multiple times. Before driving out of the lot he looked intently up and down each of the streets at the nearby intersection.

After the suspect had left the store lot and made another turn, this time without signaling, Rooney (following him) put on the blue lights and siren. In violation of Maine law, Favreau did not stop promptly, but turned down another street before pulling over. In the ensuing conversation about Favreau's driving violations, the status of his operating license and any current court involvement, Favreau accused the officers of mounting the very surveillance they had engaged in, thus indicating that his driving maneuvers had been made with the police consciously in mind. He was manifestly nervous and had difficulty following directions for a pat-down, which disclosed a wad of cash that Favreau said was $400. When asked where he was going his answer was that he was going home, a patent lie in light of his observed itinerary.

At this point, the facts warranted reasonable suspicion that Favreau's behavior before and after the stop showed a degree of concern so far beyond anything normal as to suggest that he was in fear of revealing evidence of wrongdoing. The license check having been completed, Rooney circled the car with the dog, and although the animal was initially distracted by unrelated activity nearby, the several circuits of the car took less than three minutes before the dog alerted and thus raised suspicion to the level of probable cause to justify the search that led to discovery of the trap and a commercial quantity of cocaine within it.

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

"Although the officers' initial and primary interest in observing Favreau was is possible activity in the illegal drug trade, not the bizarre driving for which they stopped him, or his unlawful failure to respond readily to the lights and siren, their ulterior motive is of no consequence under the Fourth Amendment. See *Whren v. United States,* 517 U.S. 806, 813 (1996) (Supreme Court precedent forecloses

any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved). Nor is there any question that Favreau's driving justified the stop for the license check and ensuing interview. The observations and conversation provided evidence of ostensibly erratic driving and behavior that would reasonably justify a stop and enquiry, but in this case pointed to something more than difficulty following the normal rules of the road: the apparent intent to evade known police cars, the unnatural scrutiny of roadways before driving from the store, the driver's accusation that the police had him under surveillance, and abnormal nervousness together with clear dishonesty about his immediate destination. The officers could sensibly believe that he was afraid of something that concerned the police, and the tip about the trap gave coherence to his behavior and his fear. The officers could, as they did, reasonably suspect transportation of drugs or some other contraband concealed in the car. Nor, finally, is there any basis to claim that the time consumed in the initial interview and records check up to the point of ordering the dog sniff was unusual or unreasonable.

"Because the interview during this initial period of detention was clearly lawful on the basis of traffic regulation and incidentally disclosed further reason to suspect drug crime, the reasonably justifiable time for further detention to test the growing suspicion should be measured from the end of that initial period. While there is no exact metric to measure it, the times that have passed muster in prior cases of justifiable detention on reasonable suspicion of criminal activity have generally been relatively brief. See *Terry*, 392 U.S., at 30 ('Each case of this sort will, of course, have to be decided on its own facts.'); *United States v. Pontoo*, 666 F.3d 20, 31 (1st Cir. 2011) ('The appropriate length of a *Terry* stop is gauged by whether the officer diligently pursued a reasonable investigative approach'). And brief was the period here, of about three more minutes until the dog's response raised suspicion to the point of probable cause to search.

"There is no serious question that this falls within the zone considered reasonable under the *Terry* rationale. The probable cause to search was therefore not the product of any unconstitutionally lengthy detention prior to the search that could be said to taint the validity of the search itself."

## SEARCH AND SEIZURE:
## Vehicle Stop; Reasonable Suspicion Based on Radio Dispatch Description

*United States v. Daniel*
CA8, No. 16-434, 4/4/18

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

"An officer may conduct a Fourth Amendment stop to investigate a crime only if the officer has a reasonable suspicion that that person had committed or was committing a crime. *United States v. Juvenile TK*, 134 F.3d 899, 902 (8th Cir. 1998) (citing *Terry v. Ohio*, 392 U.S. 1, 30

(1968)). The likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard. *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). In justifying the stop, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Terry*, 392 U.S. at 21. The facts are judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate? Due weight must be given, not to the officer's inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. When a traffic stop is based on a radio dispatch, factors such as the temporal and geographic proximity of the car to the scene of the crime, a matching description of the vehicle, and the time of the stop are highly relevant to a finding of a reasonable suspicion.

"The district court found the following facts in denying Daniel's motion to suppress. Farrar heard dispatch report an armed robbery at the St. Joe's General Store and that the suspect was in a white Suburban. Farrar immediately started driving towards the store, then saw a white Suburban driving in the oncoming lane on the highway. He passed it, made a U-Turn, and stopped the Suburban. The stop occurred within minutes of the dispatch. Farrar admitted that the vehicle had committed no traffic violation; rather, the stop was just based on the radio dispatch. As the district court noted, all this occurred late at night when there was very little traffic on the roadway. Based on the evidence presented at the suppression hearing, these factual findings are not clearly erroneous.

"These facts support reasonable suspicion. Considering the temporal and geographic proximity of the car to the scene of the crime, the matching description of the vehicle, and the time of the stop, we hold that an officer in Farrar's position would have reasonable suspicion to justify stopping the Suburban. See also *United States v. Farnell,* 701 F.3d 256, 258–59 (8th Cir. 2012) (holding reasonable suspicion existed for a *Terry* stop an hour after dispatch described robbery suspect's vehicle as a white van and the suspect as a heavy white male wearing certain clothing, and an officer observed a white van whose driver was a heavy white male wearing different clothing, and who held up his hand to conceal his face)."