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CIVIL LIABILITY: Condition of Probation

Smith v. City of Santa Clara, CA9, No. 14-15103, 11/30/17

Josephine Smith and A.S, her minor granddaughter, alleged that their constitutional rights were violated when officers conducted a search of her home. The officers were searching for Smith's daughter, Justine Smith, who was on probation in connection with a theft of a vehicle and the stabbing of its owner. The terms of the probation allowed warrantless searches of her person and residence. The Ninth Circuit affirmed the district court's judgment in favor of police officers and the city in a 42 U.S.C. 1983 action and held that the warrantless search of the home over Smith's objection was reasonable as a matter of law, finding in part as follows:

"…Once the government has probable cause to believe that a probationer has actually reoffended by participating in a violent felony, the government's need to locate the probationer and protect the public is heightened. The panel held that this heightened interest in locating the probationer was sufficient to outweigh a third party's privacy interest in the home that she shared with the probationer.

"The question was whether a warrantless probation search that affects the rights of a third party is reasonable under the totality of the circumstances. Under the totality of the circumstances, and the undisputed facts of this case, the

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warrantless search of plaintiff's home, over her objection, was reasonable as a matter of law."

They further held that there was sufficient evidence at trial to permit the jury to find that officers had probable cause to believe that plaintiff's daughter lived at the residence.

CIVIL LIABILITY: Excessive Force

Zion v. County of Orange
CA9, No. 15-56705, 11/1/17

Connor Zion suffered several seizures. He then had a seemingly related episode where he bit his mother and cut her and his roommate with a kitchen knife. Police were called. Deputy Juan Lopez arrived at Zion's apartment complex. As Lopez exited his police car, Zion ran at him and stabbed him in the arms. Deputy Michael Higgins drove up separately and witnessed the attack on Lopez.

What happened next is captured in two videos taken by cameras mounted on the dashboards of the two police cruisers. Zion is seen running toward the apartment complex. Higgins shoots at him from about fifteen feet away. Nine shots are heard and Zion falls to the ground. Higgins then runs to where Zion has fallen and fires nine more rounds at Zion's body from a distance of about four feet, emptying his weapon. Zion curls up on his side. Higgins pauses and walks in a circle. Zion is still moving. Higgins then takes a running start and stomps on Zion's head three times.

Zion died at the scene. His mother brought suit under 42 U.S.C. § 1983, claiming Higgins used excessive force. She also claims Higgins deprived her of her child without due process. She raised a separate substantive due process claim on Zion's behalf, municipal liability claims and various state law claims. The district court granted summary judgment to defendants on all claims.

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

"When police confront a suspect who poses an immediate threat, they may use deadly force against him. But they must stop using deadly force when the suspect no longer poses a threat.

"Police use of force is excessive and violates the Fourth Amendment if it's objectively unreasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 388 (1989); *Scott v. Harris*, 550 U.S. 372, 383 (2007). Courts assess reasonableness using the non-exhaustive Graham factors: 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' The most important factor is whether the suspect posed an immediate threat. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011). If the evidence, viewed in the light most favorable to plaintiff, could support a jury finding of excessive force, defendants aren't entitled to summary judgment. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005).

"Plaintiff doesn't challenge Higgins's initial nine-round volley, but does challenge the second volley (fired at close range while Zion was lying on the ground) and the head stomping. By the time of the second volley, Higgins had shot at Zion nine times at relatively close range and Zion had dropped to the ground. In the video, Zion appears to have been wounded and is making no threatening gestures. While Higgins couldn't be sure that Zion wasn't bluffing or only temporarily subdued, Zion was lying on the ground and so was not in a position where he could easily harm anyone or flee. A reasonable jury could find that Zion was no longer an immediate threat, and that Higgins should have held his fire unless and until Zion showed signs of danger or flight. Or, a jury could find that the second round of bullets was justified, but not the head-stomping.

"Defendants argue that Higgins's continued use of deadly force was reasonable because Zion was still moving. They quote *Plumhoff v. Rickard*: If police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. 134 S. Ct. 2012, 2022 (2014). But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting. This is particularly true when the suspect wields a knife rather than a firearm. In our case, a jury could reasonably conclude that Higgins could have sufficiently protected himself and others after Zion fell by pointing his gun at Zion and pulling the trigger only if Zion attempted to flee or attack.

"Higgins testified that Zion was trying to get up. But we 'may not simply accept what may be a self-serving account by the police officer.' *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). This is especially so where there is contrary evidence. In the video, Zion shows no signs of getting up. This is a dispute of fact that must be resolved by a jury. The Fourth Amendment right here was 'clearly established.' *White v. Pauly*, 137 S. Ct. 548, 552 (2017). If a jury determines that Zion no longer posed an immediate threat, any deadly force Higgins used after that time violated long-settled Fourth Amendment law. We have cases holding that the use of deadly force against a nonthreatening suspect is unreasonable. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985); *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997). We've also held that continued force against a suspect who has been brought to the ground can violate the Fourth Amendment. In *Drummond v. City of Anaheim*, we found that officers used excessive force by sitting on a prone suspect's back, asphyxiating him. 343 F.3d 1052, 1057–58 (9th Cir. 2003). And in *Davis v. City of Las Vegas*, we held that an officer violated the Fourth Amendment by punching a handcuffed suspect in the face while the suspect lay on the floor. 478 F.3d 1048, 1053 (9th Cir. 2007). If a jury were to find that Higgins shot and/or stomped on Zion's head after Zion no longer posed an immediate threat, Higgins would have been 'on notice that his conduct would

be clearly unlawful.' *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Defendants therefore aren't entitled to qualified immunity."

CIVIL LIABILITY:
Expert Testimony; Police Standards

United States v. Brown
CA7, No. 16-1603, 9/8/17

While investigating a tip that illegal drugs were being sold from a south-side convenience store, Chicago Police Officer Aldo Brown sucker-punched a store employee for no apparent reason. As the dazed employee attempted to stagger away, Brown continued to beat and kick him for about two minutes. The beating was caught on the store's surveillance camera.

At his trial for willfully depriving the employee of his Fourth Amendment right to be free from excessive force inflicted by a law-enforcement officer, Brown sought to introduce expert testimony from a former Chicago police officer that Brown's actions were consistent with departmental standards. The judge excluded the expert witness, reasoning that departmental policy was immaterial to the Fourth Amendment inquiry and that the expert's proposed testimony might include an improper opinion about Brown's state of mind. The jury found Brown guilty.

The Seventh Circuit affirmed: "Expert testimony about police standards may appropriately assist the jury in resolving some excessive-force questions, but sometimes evidence of this type is unhelpful and irrelevant, particularly when no specialized knowledge is needed to determine whether the officer's conduct was objectively unreasonable. The misconduct alleged here was easily within the grasp of a lay jury."

CIVIL LIABILITY:
Mental Illness; Excited Delirium

Roell v. Hamilton County Board of Commissioners, CA6, No. 16-4045, 9/5/17

Gary Roell suffered from schizoaffective disorder and paranoid delusions. Roell's symptoms could be controlled by medication but he stopped taking his medication in June 2013 and began exhibiting signs of mental decompensation. On the night of August 12-13, 2013, Roell entered a state of excited delirium. His wife was out of town. Roell damaged their condominium, then went to the condominium of his neighbor, Agarwal, and threw a flower pot through her window.

Agarwal called 911, stating that her neighbor was "acting crazy." Agarwal testified that Roell appeared angry, his face was red and his eyes were bulging, as he muttered unintelligible things, while pacing in front of Agarwal's broken window and peering into her condominium. Deputies arrived and saw Roell holding a garden hose with a metal nozzle in one hand and a garden basket in the other, wearing a t-shirt, but otherwise naked. Roell was screaming "no" and something about water. While attempting to subdue Roell, the deputies physically struggled with him and unsuccessfully

tased him multiple times. Roell stopped breathing during the encounter and was pronounced dead shortly thereafter. His death was documented by the coroner as natural, resulting from his excited delirium.

The Sixth Circuit affirmed summary judgment in favor of the deputies on Mrs. Roell's claim under 42 U.S.C. 1983, and in favor of Hamilton County on her claims under section 1983 and the Americans with Disabilities Act.

CIVIL LIABILITY: Shooting of a Dog

Hansen v. Black
CA8, No. 16-4162, 9/8/17

On Sunday morning, May 20, 2012, Trooper Thomas Black was dispatched to respond to calls regarding a dog on or near the I-29 roadway near busy Frederick Avenue exit ramps into St. Joseph, where the speed limit was 65 miles per hour. After accessing the southbound lanes, Trooper Black saw a collared, unleashed German Shepherd-Conan-running loose in the roadway. Trooper Black did not see anyone attempting to catch the dog, and southbound vehicles were swerving onto the right shoulder or rapidly changing lanes to avoid hitting the dog. To reduce the obvious traffic hazard, Trooper Black positioned his patrol car across the center stripe, shutting down both southbound lanes, while he attempted to capture the dog.

Initially, Black exited his patrol car and tried calling and running at the dog, but it ran away, down the center stripe of the southbound lanes. Black re-entered his patrol car and drove after the dog, then positioned the car to again block traffic, got out, and tried to capture the dog by "yelling, shouting, and running towards him." The dog again ran away. When Black activated his patrol car sirens to scare the dog off the road, it looped north and circled his patrol car. Black again got out and tried to scare the dog off the road by shouting and raising his hands. The dog ran away at a "full sprint," heading south on the southbound lanes of the interstate. By this time, Trooper Black could see hundreds of southbound vehicles backed up a quarter mile, which in his experience created a serious risk of "secondary" crashes.

Trooper Black reentered his patrol car and drove as close to the running dog as he could. He exited and fired a shot at the dog from fifty to seventy feet away. The dog fell down. As Trooper Black approached from the north, the dog continued south down the center of the southbound lanes, using his front paws because his back legs were injured. Trooper Black shot the dog a second time in the torso or chest. The dog dragged itself onto the grass median between the southbound and northbound lanes. Observing the dog was now in pain and gravely wounded, Black fired two more shots to humanely kill the dog.

Morgan Hansen filed this 42 U.S.C. § 1983 damage action against Black in his individual capacity, arguing Black unreasonably seized her dog in violation of the Fourth Amendment.

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

"To defeat summary judgment based on qualified immunity, Hansen must point to facts showing both that she suffered a violation of a constitutional or statutory right and that the right was clearly established at the time of Black's alleged violation.

"The Court stated that Trooper Black unquestionably had the authority, indeed a public duty, to seize a large, unleashed dog running unrestrained down a busy high-speed interstate highway, causing vehicles to swerve, change lanes, and seek safety on the shoulder. Thus, it is not the seizure that is in question, it is the degree of force Black employed to accomplish a necessary seizure.

"An officer's use of deadly force is always tragic, but the actions of Trooper Black were objectively reasonable under the circumstances, and he is therefore entitled to qualified immunity."

CIVIL LIABILITY: Shooting of a Suspect in a Vehicle

Vann v. City of Southaven, Mississippi
CA5, No. 16-60561, 11/22/17

The City of Southaven, Mississippi, used prior arrestees as confidential informants to buy small amounts of drugs from non-residents who agreed to sell them. When the drug sale was intercepted by police, the police would seize cash and property from the would-be drug sellers.

Around 6:00 a.m. on May 28, 2014, Teon Katchens agreed through an online chat system to sell one ounce of marijuana for $150 to someone in Southaven, Mississippi. Later that morning, Katchens's friend, Jeremy W. Vann, drove Katchens and Katchens's three-year-old son from Memphis, Tennessee, to a parking lot in Southaven for the exchange. Neither Vann nor Katchens was armed.

Shortly after Vann arrived at the lot, his car was boxed in by unmarked civilian cars driven by undercover Southaven police officers. The officers exited their cars, and Vann reversed his car, trying to escape the cars that surrounded him. During Vann's escape attempt, Vann's car moved forward toward Sergeant Jeff Logan, who shot Vann before being knocked to the ground by Vann's car. While Logan was on the ground, and as Vann's car approached him for a second time, Lieutenant Jordan Jones fired a second shot at Vann. Vann died as a result of the shots fired by Logan and Jones. Katchens and his son survived.

The parties agree that Vann maneuvered his car in an attempt to escape, was shot first by Logan, and was shot second by Jones. The parties disagree, however, on the precise sequence and intent behind certain events between Vann's arrival at the parking lot and the moment Logan fired his weapon. The parties also disagree on whether the police officers used lights and sirens, wore police vests or badges, and shouted, "Police!" thus informing Vann of their status as officers.

According to the officers, in the course of Vann's efforts to escape the cars boxing him in, Vann's car slammed into Logan's and another officer's cars multiple times. As Logan was running between his own car and Jones's car away from Vann, Vann's car struck him, causing Logan to shoot in self-defense before rolling over the hood of the car and falling to the ground. In contrast, the plaintiff, who is Vann's representative, argues that rather than Vann's car striking Logan and causing him to shoot, Logan moved in front of the car and shot Vann as Vann attempted to escape through a gap between the cars. It was only then that Vann's car hit Logan. As the plaintiff puts it, the disputed central fact is therefore whether Logan ran to the opening and shot Vann to prevent him from fleeing or whether, instead, Logan was hit as he ran out of the way of Vann's car.

The plaintiff supports his account by noting that investigators found no evidence of tire tracks or burnt rubber on the pavement and the fact that any damage to the officers' cars was either minimal or pre-existent. The plaintiff also points to the testimony of Logan and Jones, both of whom agree that Vann was trying to escape. In the plaintiff's view, this concession forecloses the notion that Vann intentionally drove toward Logan and instead suggests Logan purposefully placed himself between Vann's car and his escape route.

The plaintiff sued the officers and the City of Southaven under 42 U.S.C. § 1983. The district court granted the officers' and the City's summary-judgment motion.

With respect to the officers, the district court concluded that the plaintiff failed to show the violation of a clearly established right under either factual scenario: Logan attempting to dodge Vann's oncoming car or Logan attempting to stop Vann from fleeing.

On appeal, the Court of Appeals for the Fifth Circuit found, in part, as follows:

"Because there are genuine disputed issues of material fact regarding Logan's actions, they vacated the district court's grant of summary judgment to Logan. The central disputed fact is whether Logan ran to the opening and shot Vann to stop him from fleeing or whether Logan ran between the cars to get out of Vann's way and then shot Vann because Vann was going to hit him. Viewing the evidence in the light most favorable to Plaintiff, this fact is in dispute.

"It has long been settled that where a fleeing suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Put simply, a police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. The district court here rejected Garner's application, determining instead that a more particularized, and hence more relevant example is required to guarantee that the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. This court has held, however, that Garner's proposition holds

as both a general matter and in the more specific context of shooting a suspect fleeing in a motor vehicle. *Lytle v. Bexar Cty.*, 560 F.3d 404, 417–18 (5th Cir. 2009). The outcome in the present case therefore depends on the facts. On the one hand, if Logan was running away from Vann's moving car and thus being threatened by it at the time he shot Vann, this case could fall in line with other car-related cases where courts have determined that a reasonable officer would have resorted to deadly force. See, e.g., *Mullenix*, 136 S. Ct. at 311–12 (holding the officer acted reasonably where the suspect 'was speeding towards a confrontation with officers he had threatened to kill'); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021–22 (2014) (holding the officer acted reasonably where the suspect's reckless driving 'posed a grave public safety risk'); *Scott v. Harris*, 550 U.S. 372, 385–86 (2007) (holding the officer acted reasonably where the car chase 'posed a substantial and immediate risk of serious physical injury to others'); *Brosseau*, 543 U.S. at 197–201 (holding the officer did not violate clearly established law when faced with the following situation: 'whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight').

"On the other hand, this case could fall into a group of 'factually distinct' cases involving 'suspects who may have done little more than flee at relatively low speeds.' *Mullenix,* 136 S. Ct. at 312 (citing *Walker v. Davis*, 649 F.3d 502, 503 (6th Cir. 2011); *Kirby v. Duva*, 530 F.3d 475, 479–80 (6th Cir. 2008); *Adams v. Speers*, 473 F.3d 989, 991 (9th Cir. 2007); *Vaughan v. Cox*, 343 F.3d 1323, 1330–31, 1330 n.7 (11th Cir. 2003)). As this court has noted, even if a suspect is in a car, the Supreme Court has not declared 'open season on suspects fleeing in motor vehicles.' *Lytle*, 560 F.3d at 414. Courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions. *Tolan*, 134 S. Ct. at 1866. Here, we take such care. While it is possible that Logan fired at Vann because Vann's accelerating car posed a threat to him and the other officers, evidence also supports the possibility that, absent a threat, Logan ran into the way of Vann's car and shot Vann to prevent him from successfully fleeing. Our case law establishes that a reasonable officer would not shoot a fleeing suspect where the suspect poses no threat to the officer or others. Thus, resolving this disputed fact is crucial to the summary-judgment analysis."

CIVIL LIABILITY: Qualified Immunity Defense Denied By Court

Hensley v. Price
CA4, No. 16-1294, 11/17/17

Deputies Michael Price and Keith Beasley—both employed by the Haywood County, North Carolina, Sheriff's Department—shot and killed David Hensley outside his home on the morning of August 9, 2012. The plaintiffs—Hensley's widow and two daughters—brought suit against the deputies in both their individual and official capacities under 42 U.S.C. § 1983 in the United States District Court for the Western District of North Carolina.

The deputies asserted federal qualified immunity and related state defenses in a motion for summary judgment, which the district court denied.

The Court of Appeals for the Fourth Circuit affirmed the denial of qualified immunity, finding as follows:

"On an appeal raising the issue of qualified immunity, the Court must view the facts in the light most favorable to the plaintiffs. Pegg v. Herrnberger, 845 F.3d 112, 117 (4th Cir. 2017). We summarize the facts viewed in that light as follows, recognizing the deputies' forecast of evidence is markedly to the contrary.

"In August 2012, the deputies responded to a domestic disturbance call at Hensley's home around 6:15 a.m. When the pair arrived, they parked their cars in the front yard and remained in the vehicles facing the home's porch. Shortly thereafter, Hensley; his older daughter, Rachelle Ferguson; and his minor daughter, H.H., walked out of the home and onto the porch together. Hensley held a handgun.

"The deputies noticed the handgun, but took no action—they neither announced their presence nor asked Hensley to drop the gun. Instead, they watched as Hensley briefly struggled with both Ferguson and H.H., striking Ferguson with the handgun.

"After that altercation ended, the deputies watched as Hensley walked off the porch and into the yard toward them. When he reached the yard, Hensley looked back at his daughters on the porch. According to plaintiffs' pleadings and proffer of evidence, Hensley still held the handgun with its muzzle pointed at the ground as he descended the porch stairs and walked toward the deputies.

"Throughout this series of events, Hensley and the deputies did not acknowledge each other's presence. Hensley never raised the gun toward the deputies or made any overt threats toward them. For their part, the deputies never ordered him to stop, to drop the gun or issued any type of warning. The deputies concede that neither of them ever spoke to Hensley.

"Shortly after Hensley descended the porch and walked into the yard, the deputies exited their vehicles and shot and killed him.

"In reviewing a denial of summary judgment based on qualified immunity, we may only consider whether, on the undisputed facts and the facts considered in the light most favorable to the plaintiffs, the defendants violated clearly established law. See *Iko v. Shreve*, 535 F.3d 225, 233–35 (4th Cir. 2008). In this procedural posture, we may not credit defendant's evidence, weigh the evidence, or resolve factual disputes in the defendants' favor. For example, we may not take as true the deputies' assertion that once Hensley stepped off the porch he had the muzzle of the gun pointed toward them in a 'shoot-from-the-hip' position. Similarly, we may not accept their contention that when Hensley stepped onto the porch he initially pointed the gun at them. While a jury

could well believe the evidence forecast by the deputies, we take the facts in the light most favorable to the plaintiffs to determine the applicable questions of law and ignore any contrary factual claims.

"We turn first to the deputies' qualified immunity argument related to the plaintiffs' § 1983 claim.

"Section 1983 'creates a cause of action against any person who, acting under color of state law, abridges a right arising under the Constitution or laws of the United States.' *Cooper v. Sheehan*, 735 F.3d 153, 158 (4th Cir. 2013). In the case at bar, the plaintiffs have alleged that the deputies violated Hensley's Fourth Amendment right to be free from unreasonable seizures. Even though the plaintiffs have alleged a constitutional violation, the deputies are entitled to invoke qualified immunity, which is more than a mere defense to liability; it is immunity from suit itself, if they meet the requirements. Qualified immunity protects officers who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful.

"When viewing the facts in the light most favorable to the plaintiffs, did the deputies violate Hensley's Fourth Amendment right to be free from unreasonable seizures when deadly force was exercised against him? The use of deadly force is a seizure subject to the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). A reasonable officer is entitled to use deadly force where he has probable cause to believe that a suspect poses a threat of serious physical harm, either to himself or to others. To determine whether such probable cause existed here, we ask whether the deputies' use of deadly force was 'objectively reasonable in light of the facts and circumstances confronting them, [viewed in the light most favorable to the plaintiffs,] without regard to [the deputies'] underlying intent or motivation.' *Graham v. Connor*, 490 U.S. 386, 397 (1989). We assess the reasonableness of their conduct based on the totality of the circumstances, and based on the information available to the deputies immediately prior to and at the very moment they fired the fatal shots.

"The deputies contend that the district court erred in denying their motion for summary judgment on the plaintiffs' § 1983 claim because their use of deadly force against Hensley was reasonable under the circumstances. To support their argument, the deputies maintain that, even viewing the facts in the light most favorable to the plaintiffs, it is clear that Hensley emerged from his home with gun in hand, that Hensley hit Ferguson shortly before coming off the porch and advancing toward them, and that the entire series of events took only a brief time. The deputies posit that their use of deadly force against Hensley in such circumstances was clearly reasonable because he both demonstrated a propensity for violence and came toward them with a gun.

"In rejoinder, the plaintiffs contend that the deputies acted unreasonably for

two reasons. First, the plaintiffs point out that under their version of the facts, when the deputies killed Hensley, he was pointing the gun at the ground and was threatening neither the deputies nor his daughters. As the plaintiffs proffer, Hensley's altercation with Ferguson had concluded by the time he walked off the porch; therefore, because he never raised his weapon toward the deputies, he was not immediately threatening to anyone at the scene. Second, the plaintiffs argue that the deputies' actions were all the more unreasonable here because they shot without warning Hensley to drop the gun or communicating with him in any way.

"At this stage of the proceedings, we must agree with the plaintiffs. If a jury credited the plaintiffs' evidence, it could conclude that the deputies shot Hensley only because he was holding a gun, although he never raised the gun to threaten the deputies. Indeed, he never pointed the gun at anyone. Moreover, the deputies had ample time, under the plaintiffs' evidence, to warn Hensley to drop his gun or stop before shooting him, but they concede they never gave any such warning. Because the use of force in such circumstances would be objectively unreasonable, we must affirm the district court's summary judgment order denying the deputies qualified immunity on the § 1983 claim.

"First, if we assume, as we must, the credibility of the plaintiffs' evidence, we cannot say that Hensley posed a threat of serious physical harm to either the deputies or his daughters at the time the deputies fired the fatal shot. The lawful possession of a firearm by a suspect at his home, without more, is an insufficient reason to justify the use of deadly force. Indeed, it is unreasonable for an officer to believe that a suspect poses a threat of serious physical harm, either to himself or to others, merely because that suspect possesses a firearm. An officer does not possess the unfettered authority to shoot a member of the public simply because that person is carrying a weapon.

"The deputies responded to a domestic disturbance at Hensley's home, but had no specific information about the situation. When they arrived shortly after dawn, Hensley and his daughters stepped out of the home and onto the porch. Hensley had a handgun, but never raised it toward the deputies. According to the plaintiffs' evidence, if believed by a jury, Hensley made no threatening statements or actions toward anyone in the moments immediately preceding the shooting. Instead, Hensley stepped off the porch and into the yard, keeping the handgun pointed toward the ground at all times. Nevertheless, almost immediately after he stepped into the yard, the deputies opened fire on Hensley and killed him without warning. If a jury credited the plaintiffs' version of the facts, it could reasonably conclude that because Hensley never raised the gun to the officers, and because he never otherwise threatened them, the deputies shot Hensley simply because he had possession of a firearm. Such conduct violates the Fourth Amendment.

"Moreover, although the plaintiffs admit that Hensley and Ferguson were engaged

in a brief altercation on the porch, that fact does not change our calculus. The short struggle between Hensley and Ferguson had little bearing on whether Hensley was prepared to take the substantial step of escalating a domestic disturbance into a potentially deadly confrontation with two armed police officers. Thus, under the plaintiffs' version of the facts, no reasonable officer could have believed that Hensley posed a threat of serious physical harm to the deputies at the time they used deadly force against him. Nor are we persuaded that Hensley's attack on Ferguson made the deputies' use of deadly force imperative to protect her from serious physical injury.

"When the deputies fired on Hensley, his physical conflict with Ferguson had ended. Hensley had ventured off the porch, away from Ferguson, and out into the yard. Whether the deputies could have used deadly force during Hensley's altercation with Ferguson is not at issue here. But assuming the deputies could have done so, by the time Hensley made it down the steps and into the yard, any justification for the initial force had been eliminated.

"In any event, even if the Deputies reasonably could have believed that Hensley posed a threat of serious physical harm, their failure to warn him—or to order him to drop the gun—before employing deadly force creates an additional impediment. Before an officer may use deadly force, he should give a warning if it is feasible. See *Garner*, 471 U.S. at 11–12 ('If the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.'

"We have reasoned that a warning is not feasible if 'the hesitation involved in giving a warning could readily cause such a warning to be the officer's last.' *McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994). More simply put, an officer should give a warning before using deadly force unless there is an immediate threatened danger.

"Because a jury crediting the plaintiffs' version of the facts could conclude that the deputies were not in any immediate danger when they fired their weapons, the failure to warn Hensley also weighs against them. In the moments leading up to the fatal shooting, the deputies watched Hensley descend the steps from the porch into the yard. They watched him pause and look back to the house. And they briefly watched as Hensley walked toward them. While this scene played out in front of them, the deputies concede they never ordered Hensley to drop the gun or warned that they would shoot. While we have no doubt the circumstances confronting the deputies were tense and fast moving, that fact alone does not obviate Garner's warning admonition.

"In sum, we conclude that the district court correctly denied the requested grant of qualified immunity. If a jury were to credit the plaintiffs' evidence, it could

conclude that Hensley never raised the gun, never threatened the deputies, and never received a warning command. In that circumstance, the deputies were not in any immediate danger and were not entitled to shoot Hensley. Under those circumstances, the deputies are not entitled to qualified immunity."

CONSTITUTIONAL LAW: Nudity Ordinance

Tagami v. City of Chicago
CA7, No. 16-1441, 11/8/17

Sonoku Tagami supports GoTopless, a nonprofit organization that advocates for a woman's right to bare her breasts in public. She participated in the group's annual "GoTopless Day" by walking around Chicago unclothed from the waist up, having applied "opaque" body paint to her breasts.

A police officer ticketed her for violating an ordinance, which states: *Any person who shall appear…in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering, shall be fined.*

Tagami was ordered to pay a $100 fine. Tagami sued, claiming that the ordinance violated the First Amendment's guarantee of freedom of speech and discriminates on the basis of sex in violation of the Equal Protection Clause.

The Seventh Circuit affirmed the dismissal of both claims: "Being in a state of nudity is not an inherently expressive condition; Tagami did not offer any facts from which it might reasonably be inferred that onlookers would have readily understood that this was actually a political protest against the public indecency ordinance. The ordinance survives intermediate scrutiny as a sex-based classification."

EVIDENCE: Homicide Crime Scene Photographs

Williams v. State, ASC, No. 10CR-15-20, 2017 Ark. 287, 10/26/17

This case arises from the aggravated robbery and capital murder of Christopher Brown at a Caddo Valley Shell gas station and convenience store. Brown was the clerk on duty at the time. The criminal episode was captured on time-stamped surveillance videos, which were played for the jury.

On the morning of January 24, 2015, Craig Wade and James Gray, Jr., picked up Laron Edward Williams at his home in Pine Bluff. At approximately 2:00 p.m., the three left Pine Bluff and drove in Gray's car to the casino at the Oaklawn racetrack in Hot Springs. They gambled, drank alcohol, and used drugs for several hours before starting back to Pine Bluff during the early morning hours of January 25. While driving home, they realized that the car was low on fuel and that none of them had any money.

Videos show Gray's car, a silver Ford, pulling up to the store for the first time at approximately 4:25 a.m. Willams and Wade exited the vehicle and went inside the store. After buying a package of gum, the two returned to the car and drove away from the station at 04:30:50. At 04:38:11, the silver Ford returned to the Shell station and parked near the back entrance of the store. No one exited the vehicle for more than four minutes. Williams testified that, during this time, they were planning how they would steal a thirty-pack of beer so that they could sell it for gas money. Williams further testified that he attempted to conceal his identity by wrapping a jacket around his waist to cover his pants pockets and pulling a wave cap down over his face.

Videos show that at 04:42:52, Williams and Wade simultaneously exited the vehicle. They entered the store together at 04:42:56. Wade ran toward the counter, and at 04:43, he shot Brown in the forehead. Brown fell to the floor behind the counter. Wade appeared to be frantic, running inside the store and then outside to the car, falling twice as he fled. Meanwhile, Williams ran behind the counter, covered his hands with the t-shirt he was wearing, and attempted to open the cash register. Unable to open the register, Williams stepped over Brown's body and appeared to be looking for something to steal behind the counter. He then leaned over and searched Brown's pockets. Videos show that Williams stayed in the store about fifteen seconds longer than Wade.

When Williams exited the store, he left a trail of bloody footprints from behind the counter into the car, which Gray had positioned to facilitate a quick getaway. Williams denied that, during their first trip to the store, he, Wade, and Gray were "casing it" for a possible robbery. Williams maintained he did not know that Wade had a gun and that he was "shocked" when Wade shot the victim. Williams acknowledged that after the shot had been fired, he could be seen on the video attempting to open the cash register, stepping over the victim's body, and looking around behind the counter. Williams claimed, however, that he merely pretended to proceed with the crime because he feared that Wade would shoot him.

Williams contends that the circuit court abused its discretion by admitting into evidence gruesome and inflammatory photographs of the victim's body. He further contends that the photographs were inadmissible because they were cumulative to the crime-scene videos that were played for the jury. Williams objected to the photographs admitted as State's exhibits 14, 15, 16, and 18. The State argued that exhibit 14 was admissible to show the position of the victim's body behind the counter when the officers arrived at the crime scene; that exhibit 15 was admissible to show the gunshot wound to the victim's forehead; that exhibit 16 was admissible to show the proximity of a bloody footprint to the victim's body; and that exhibit 18 was admissible to show where Williams had stepped in the pool of blood surrounding the victim's head.

The circuit court agreed with the State and overruled Williams' objection. The circuit court rejected Williams' argument that the photographs were cumulative, noting that the images depicted in the photographs were not clearly visible from the videos. Finally, the circuit court ruled that the probative value of the photographs outweighed any potential prejudice. At trial, the photographs were introduced through the testimony of the criminal investigator who took pictures at the crime scene, Special Agent Neal Thomas of the Arkansas State Police.

The court found, in part, as follows:

"The admission of photographs is a matter left to the sound discretion of the circuit court, and this court will not reverse absent an abuse of that discretion. E.g., *Anderson v. State*, 2011 Ark. 461, 385 S.W.3d 214. Generally, a photograph is admissible if it serves a valid purpose and if the probative value of the photograph is not outweighed by its prejudicial effect. See *Weger v. State,* 315 Ark. 555, 869 S.W.2d 688 (1994). For example, photographs that are inflammatory in the sense that they show human gore repulsive to the jurors may be admissible if they shed light on any issue, assist witnesses in describing a crime scene, or help the jury understand the testimony. See, e.g., *Ramaker v. State*, 345 Ark. 225, 235, 46 S.W.3d 519, 526 (2001); *Harvey v. State*, 292 Ark. 267, 277, 729 S.W.2d 406, 409 (1987). In addition, photographs may be admissible to show the condition of the victim's body, the probable type or location of the injuries, and the position in which the body was discovered. See *Evans v. State*, 2015 Ark. 240, 464 S.W.3d 916.

"In this case, the photographs assisted Special Agent Thomas in describing the crime scene and helped the jury understand the testimony. The photographs also showed the victim's gunshot wound and the position in which his body was discovered. The photographs depicted images that were not clearly visible on the video and gave the jury a different perspective of the crime scene. See *Airsman v. State*, 2014 Ark. 500, 451 S.W.3d 565; *Smart v. State*, 352 Ark. 522, 104 S.W.3d 386 (2003). Here, after careful consideration, the circuit court found that each photograph served a valid purpose and that the probative value of the photographs outweighed any potential prejudice. We hold that the circuit court did not abuse its discretion in admitting exhibits 14, 15, 16, and 18."

FIELD SOBRIETY TESTS: Marijuana

Commonwealth v. Massachusetts
MSJC,No. SJC-11967, 9/19/17

In this case, the issue before the Massachusetts Supreme Judicial Court was whether police officers may testify to the administration and results of standard Field Sobriety Tests in prosecutions for operating a motor vehicle under the influence of marijuana.

The Massachusetts Court found, in part, as follows:

"In this case, we are asked to consider the admissibility of field sobriety tests

(FSTs) where a police officer suspects that a driver has been operating under the influence of marijuana. Police typically administer three FSTs—the 'horizontal gaze nystagmus test,' the 'walk and turn test' and the 'one leg stand test'—during a motor vehicle stop in order to assess motorists suspected of operating under the influence of alcohol or other drugs. These tests were developed specifically to measure alcohol consumption, and there is wide-spread scientific agreement on the existence of a strong correlation between unsatisfactory performance and a blood alcohol level of at least .08%.

"By contrast, in considering whether a driver is operating under the influence of marijuana, there is as yet no scientific agreement on whether, and, if so, to what extent, these types of tests are indicative of marijuana intoxication. The research on the efficacy of FSTs to measure marijuana impairment has produced highly disparate results. Some studies have shown no correlation between inadequate performance on FSTs and the consumption of marijuana; other studies have shown some correlation with certain FSTs, but not with others; and yet other studies have shown a correlation with all of the most frequently used FSTs. In addition, other research indicates that less frequently used FSTs in the context of alcohol consumption may be better measures of marijuana intoxication.

"The lack of scientific consensus regarding the use of standard FSTs in attempting to evaluate marijuana intoxication does not mean, however, that FSTs have no probative value beyond alcohol intoxication. We conclude that, to the extent that they are relevant to establish a driver's balance, coordination, mental acuity, and other skills required to safely operate a motor vehicle, FSTs are admissible at trial as observations of the police officer conducting the assessment. The introduction in evidence of the officer's observations of what will be described as 'roadside assessments' shall be without any statement as to whether the driver's performance would have been deemed a 'pass' or a 'fail,' or whether the performance indicated impairment. Because the effects of marijuana may vary greatly from one individual to another, and those effects are as yet not commonly known, neither a police officer nor a lay witness who has not been qualified as an expert may offer an opinion as to whether a driver was under the influence of marijuana.

MIRANDA: Unambigious Request For an Attorney

Perreault v. Smith
CA6, No. 16-1213, 10/27/17

Scott David Perreault was alone with his four-month-old daughter when he called 911 to report that Jenna had been injured. Police and paramedics arrived and found that Jenna had suffered a blunt-force trauma to the head. She died from her injuries. Perreault was indicted for first-degree felony murder and felony child abuse. He claimed that he had dropped Jenna, had fallen on top of her, and that she may have hit her head on an object as they fell. The state produced the testimony of the emergency room

doctor that Jenna's injuries could have been caused only by a narrow range of high-impact events, such as a high-speed car accident, a fall from several stories, or "a baseball bat to the head." Convicted, Perreault was sentenced to life in prison.

The state court rejected claims that Perreault's statement during his interrogation, "Let's call the lawyer then 'cause I gave what I could," constituted an unambiguous invocation of the right to counsel that required the police to stop questioning him. The Michigan Court of Appeals affirmed. He filed an unsuccessful state post-conviction petition, arguing ineffective assistance. The Sixth Circuit affirmed a denial of federal habeas relief finding, in part, as follows:

"Perreault argues that police failed to honor his right to counsel after he requested an attorney during the interview. A suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). If the suspect invokes that right, police must stop questioning him until his attorney arrives or the suspect reinitiates discussion. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). In determining whether a suspect has invoked his right to counsel, we apply an objective standard, asking whether a reasonable police officer would have understood the suspect to be asking for an attorney. *Davis v. United States*, 512 U.S. 452, 458–59 (1994). The request must be unequivocal. For instance, in Edwards, the Supreme Court found that the defendant's statement, 'I want an attorney before making a deal,' was an unambiguous request for counsel. Yet, in Davis, the Supreme Court found the defendant's statement, 'Maybe I should talk to a lawyer,' was not an unambiguous request for counsel.

"During Perreault's police interview, the examining officer said that his story was inconsistent, calling it 'jacked up.' Perreault responded, 'Well, then let's call the lawyer then 'cause I gave what I could.' The officer noted, 'That's fine,' before Perreault added, 'There's no reason for anybody to take me to jail.' The officer responded, 'You getting a lawyer's not going to prevent you from going to jail,' after which Perreault continued talking to the officer.

"The Michigan Court of Appeals found that Perreault did not unambiguously ask for an attorney. In its view, his statements were 'akin to negotiations.'

"That is a plausible reading of Perreault's statement. A reasonable police officer could interpret 'Well, then let's call the lawyer then 'cause I gave what I could' to mean something like 'That's all I got; take it or leave it.' Negotiation literature has a name for this tactic: threatening to resort to the 'best alternative to a negotiated agreement,' and it's recognized as one of the most commonly employed bargaining strategies. One sees something similar at car dealerships. When a would-be car purchaser threatens to walk away, that's not because he wants to leave; it's because he wants the salesman to lower the price or otherwise sweeten the deal. When a

child threatens to call Mom if his older sister refuses to return a favorite toy, the goal is not to call Mom. The goal is to convince the older sister to return the toy or at least to give it back at some point. The threat works only if Mom is never called. So too of the threat: 'Well, then, I will see you in court!' No one takes that as a request for litigation.

"The point of these examples is not to show that Perreault's statement could only be interpreted as a negotiating tactic. They merely show that the state court's interpretation of the statement was a reasonable one. Perreault's statement did not rise to an unequivocal request for counsel.

SEARCH AND SEIZURE:
Automobile Search;
Inventory of Vehicle—Probable Cause

State of California v. Zabala
CCH 6th Cir., No. HO43328, 11/13/17

Saul Zabala, driving with a suspended license, was stopped by a Santa Clara County Sheriff's deputy for a traffic infraction. The vehicle was searched following the deputy's decision to impound it. The deputy found baggies filled with a white substance in a paper bag under the driver's seat. She showed those baggies to Deputy Gant Dorsey, who thought the substance might be cocaine.

After field testing produced negative results, he concluded it was a cutting agent to be mixed with a controlled substance. Dorsey then noticed that the radio console "looked loose, like it had been manipulated." Using his pocket knife, Dorsey removed the console, which was loose, and between air conditioning ducts behind the stereo he found several bags of a white crystalline substance that he recognized as methamphetamine. Zabala was charged with possession for sale of methamphetamine, transportation of methamphetamine, and driving with a suspended license. The information alleged four prior narcotics convictions.

The court denied Zabala's motion to suppress the methamphetamine as the fruit of an unlawful inventory search. The California Court of Appeals affirmed. Removal of the console exceeded the scope of a permissible inventory search but the search was supported by probable cause and was lawful under the automobile exception to the warrant requirement.

The Court found, in part, as follows:

"Zabala does not dispute that the suspicious white powder was found within the scope of a lawful inventory search, or that the dashboard console was visible during that search. Thus the relevant inquiry here is whether, based upon the totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found' behind the dashboard console. (*People v. Farley* (2009) 46 Cal.4th 1053, 1098, quoting *Illinois v. Gates* (1983) 462 U.S. 213, 238.) A practical, 'nontechnical probability that incriminating evidence will be found is all that is required.' (*Texas v. Brown* (1983) 460 U.S. 730,

742.) Deputy Dorsey, who was trained in recognizing how illegal drugs were packaged and transported, testified that the white powder under the driver's seat was packaged consistent with contraband, and the baggies were indicia of criminal activity supporting a narcotics investigation. Based on his training and experience, he knew that people use hidden compartments to conceal contraband in vehicles. He noticed during the inventory search that the dashboard console had been tampered with, and he thought that the area behind the console was being used as a hidden compartment. At the preliminary hearing approximately two weeks earlier, Deputy Dorsey testified that he had found weapons and narcotics in hidden vehicle compartments, and given the discovery of the baggies under the seat, he believed contraband was hidden behind the dashboard. The totality of circumstances here provided probable cause to search behind the dashboard console for contraband in connection with defendant's arrest.

"Zabala contends that the baggies found under the driver's seat could not supply probable cause to search behind the dashboard console because the content of the baggies was unknown and would not have supported an arrest. But failure to immediately identify the suspicious powder did not undermine the fact of its presence relative to the probable cause inquiry—whether evidence of criminal activity would be found behind the dashboard console, not whether defendant was conclusively in possession of illegal drugs. The substance was packaged in a manner consistent with illegal narcotics activity which, together with the tampered dashboard, established probable cause to believe that contraband would be found behind the console.

SEARCH AND SEIZURE: Cell Site Information; Privacy Expectation

United States v. Pembrook
CA6, No. 16-1650, 11/15/17

FBI Agent Brian Max began his investigation of two similar Michigan jewelry-store robberies—separated by a drive of five hours and 150 miles—with a "tower dump" for the cellphone towers near the two stores. A "tower dump" is a chronological list of every phone number that used the tower for any purpose (voice call, text, internet connection, etc.) regardless of provider (e.g., Verizon, AT&T). Agent Max found that a phone number ending "1434"— assigned to a recently activated, prepaid cell phone with no name on the account—had used a tower or towers near each of the robberies at times corresponding to those robberies.

Agent Max then obtained the "call detail records" (a list of all calls to and from that number, with dates, times, and tower locations) for the #1434-phone and tracked its path from Philadelphia (April 21, 2014) to Milwaukee; to New Buffalo, Michigan, for an overnight stay; to Plainfield Township, near the Medawar Jewelry store, 40 minutes before the first robbery (about 11:50 a.m.); to West Bloomfield Township, near the Tapper's Jewelry store, 15 minutes before the second robbery (5:00 p.m.); then back to Philadelphia the next day (April 23, 2014).

Plainfield Township is less than two hours' drive north of New Buffalo; West Bloomfield Township, near Detroit, is less than three hours' drive from Plainfield Township.

Agent Max discovered three more phone numbers (ending 0033, 7819, and 1574) that followed the same pattern. These four numbers had also contacted each other repeatedly during the trip, including, for example, dozens of times in the hour before the Medawar robbery. Of particular interest, a call from the #0033-phone to Enterprise car rental made a record of "Shaheed" Calhoun's renting a white Volkswagen Passat from a location at the Philadelphia train station on April 11 and returning it there on April 23 after driving it 3,463 miles. Calhoun had provided Enterprise his Pennsylvania driver's license and paid with his credit card.

In addition to Agent Max's cell tower and phone records investigation, the FBI also had witness statements and surveillance videos from the robberies. At 12:30 p.m. on April 22, 2014, four men rushed into the Medawar Jewelry store, one suspiciously carrying a large bag. Another had a hammer and began striking the glass jewelry cases (which did not break) while a third ordered an employee at gunpoint to open a safe. There were no customers in the store. The other employees, quickly recognizing the robbery, hid in the break room with the lights out, watching on closed-circuit video while the owner retrieved his own handguns.

When the owner yelled for the robbers to leave because he was armed, one robber—armed with a handgun— instead pursued him. When that robber entered the break room, the owner shot at him, hitting him in the arm. At that, the robbers fled, one dripping blood from the gunshot wound. They were gone by the time police responded to the 911 call, but witnesses described a black, new model Chrysler Town & Country minivan. Police tracked blood drops to a location behind the store and exterior security videos had recorded the minivan parked there for an hour before the robbery with two of the robbers milling about nearby. No employee was injured in the robbery nor was anything of significant value stolen. The loss was $2,252 in damage to the store. None of the victims was able to identify any of the robbers, either immediately or later at trial.

At 5:15 p.m. that same day, three men wearing masks and gloves entered the Tapper's Jewelry store near Detroit, and ordered the employees and customers down on the ground. The first robber had a handgun and forced the security guard to the ground while the other two ordered an employee to open the case of Rolex watches. One robber held a bag while the other filled it with watches. This robbery lasted two minutes. An employee had tripped a silent alarm, but the robbers were gone before the police arrived. Exterior surveillance video, beginning an hour before the robbery, recorded the simultaneous arrival of the black Chrysler minivan and a white Volkswagen Passat. One man got out of the minivan; two exited the Passat. They separately went

into a nearby shopping mall and returned without ever acknowledging each other, but upon their return, the man from the van got into the Passat and the two from the Passat got into the van. The first man moved the Passat to park it facing the Tapper's entrance. The van moved behind the store and three men wearing hoodies and gloves got out. Moments later, the same three ran back to the van with two bags and drove off. No one was injured during the robbery. The robbers made off with 123 Rolex watches, worth $853,957. None of the victims was able to identify any of the robbers, either immediately or later at trial.

Further investigation led to a security video from a Comfort Inn in New Buffalo on April 21, the day before the robberies, which had recorded the simultaneous arrival of the Passat and the minivan at about 10:30 p.m. The driver of the Passat rented three rooms, the cars pulled around to park, and six men got out of the two cars and shared the three rooms. A few minutes after arriving, three men took the Passat and then the minivan across the street for gas at a Shell station, as recorded on the Shell station's surveillance video. The Comfort Inn video also recorded four men leaving the motel the next morning at about 9:00 a.m., and those men were recognizable in the jewelry stores' videos as the men in the hotel videos.

The cell-tower records had also placed the four suspected cell phones near this New Buffalo location and the call-detail records helped put names to three of the numbers: Calhoun to #0033 based on the aforementioned call to Enterprise as well as calls to his mother and girlfriend; Johnson to #1434 based on calls to his girlfriend (over 100 calls); and Briley to #7819 based on calls to his ex-wife, current girlfriend, daughter, and mother. The Shell station attendant, Sue Graff, later picked Calhoun and Briley from a police photo array. Johnson had given the #1434-phone to a friend in Philadelphia, who gave it to the FBI when questioned and who also identified Johnson in the videos from the Shell station and Tapper's. Briley was most evident in the videos from both the hotel and Tapper's because of a distinctive outfit.

Meanwhile, the blood drops at Medawar Jewelry produced Pembrook's name from the DNA database. Police tracked him to a Philadelphia hospital at which he had arrived at 4:00 a.m. on April 23 for removal of the bullet from his arm. He left a day or so later, but had called Briley from the phone in his hospital room before leaving. Ballistic tests matched the removed bullet to the store owner's gun. Philadelphia police arrested Pembrook and sent him back to Detroit where he declined to cooperate and instead—using another inmate's phone passcode—called his girlfriend with a covert warning to the other robbers that the police were onto them.

Police eventually arrested the other three suspects and sent them to Detroit for prosecution. When the police arrested Calhoun, he had in his wallet the credit card and driver's license used to rent the Passat. When the police arrested Briley, his cell phone had a picture of him

wearing the same outfit he was wearing in the Shell station surveillance video.

The jury convicted all four defendants on all counts and sentenced each of the four to 33 years in prison—one year each for the robbery, conspiracy, and felon-inpossession counts, to run concurrently, and 32 years for two Federal Hobbs Act violations (seven for the first and a mandatory 25 for the second, to run consecutively).

There were numerous issues raised by the defendants on appeal but one of their main arguments was that the cell-tower location information should be suppressed since Agent Max obtained and used the information in the investigation without a warrant. They argued that they had a legitimate expectation of privacy in that information under the Fourth Amendment such that its collection required probable cause or a warrant.

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

"Agent Max had no warrant, but instead used the Stored Communications Act, 18 U.S.C. § 2701, et seq.:

"A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications)…when the governmental entity…obtains a court order for such disclosure under subsection (d) of this section.

"The Court noted that such a court order shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. There is no dispute that this statutory standard is less than the probable cause standard for a search warrant.

"The district court denied the defendants' motion to suppress and held that, even if mistaken, the government had 'an objectively reasonable good-faith belief' that no warrant was required. No Supreme Court authority established by mid-2014 that obtaining cell-site data—even data that might reveal the defendants' daily travel over a six-week period or disclose their presence in a private place—was a search within the meaning of the Fourth Amendment; nor did any Sixth Circuit case establish such precedent; nor was the out-of-Circuit precedent compelling (or consistent). The district court concluded that, although it may ultimately become settled law that long-term tracking via cell phones requires a warrant supported by probable cause, that law was not established at the time the Government sought and obtained the cell-site data at issue in this case. Deterrence, therefore, will not be forwarded by suppression."

The Court of Appeals agreed with the district court and found no constitutional reason to suppress the cell-tower location evidence.

Editor's Note: *On 11/29/17, the United States Supreme Court heard oral arguments in the case captioned **Carpenter v. United States**, No. 16-402. The Court stated that at issue in this case is the government's warrantless collection of 127 days of Petitioner's cell site location information revealing his locations, movements, and associations over a long period. Petitioner argues that the collection of this information is a search, as it disturbs people's long-standing, practical expectation that their longer-term movements in public and private spaces will remain private.*

In this case there was an application to the district court for orders compelling the "tower dump" of the cell tower records, pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d). Petitioner seeks a rule that longer-term periods or aggregations of cell site location information is a search and requires a warrant.

SEARCH AND SEIZURE:
Exclusionary Rule; Law Enforcement Armed with Search Warrant Fails to Knock-and-Announce

State of Ohio v. Bembry, OSC, Slip Opinion No. 2017-8114, 10/10/17

In this case, the Ohio Supreme Court took up the issue of whether the exclusionary rule is the appropriate remedy when police executing a valid search warrant violate the requirements of the knock-and-announce statute. The Court found, in part, as follows:

"Although the exclusionary rule is undoubtedly available to remedy a violation of the Fourth Amendment, it is an entirely separate question whether the exclusionary sanction is appropriately imposed in a particular case. *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The exclusionary rule is applicable only where its deterrence benefits outweigh its substantial social costs. *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998), quoting *Leon* at 907. Those social costs sometimes include setting the guilty free and the dangerous at large. *Hudson*, 547 U.S. at 591, 126 S.Ct. 2159, 156 L.Ed.2d 56. At the very least, exclusion prevents consideration of reliable, probative evidence, which undeniably detracts from the truth finding process. And so, before a court sanctions the exclusion of evidence, it must consider whether exclusion will actually remedy the wrong and deter future wrongdoing.

"The knock-and-announce principle is much older than the exclusionary rule, finding its roots in the ancient common law. *Wilson v. Arkansas*, 514 U.S. 927, 932, 115 S. Ct. 1914, 131 L.Ed.2d 976 (1995), fn. 2. The United States Supreme Court has explained that by virtue of its place in the common law before and during the founding era, the knock-and-announce principle is an element of the reasonableness inquiry under the Fourth Amendment. The principle requires police officers executing a search warrant at a residence to first knock on the door, announce their purpose, and identify themselves before they forcibly enter the home. The knock-and announce principle becomes relevant only after a warrant has

issued, for if a warrant has not issued, a search or seizure inside the home is 'presumptively unreasonable' whether or not police give notice of their presence and purpose. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L.Ed.2d 639 (1980).

"The United States Supreme Court held in *Hudson v. Michigan*, 574 U.S. 586 (2006) that suppression is categorically the wrong remedy when police armed with a valid warrant violate the knock-and-announce principle. The court gave two related reasons why 'the massive remedy of suppressing evidence of guilt is unjustified.'

"First, the knock-and-announce principle protects different interests than those protected by the warrant requirement and vindicated by the suppression remedy. The warrant requirement protects the privacy of one's home and its contents, while the suppression of evidence found during a warrantless search of the home appropriately restores the private nature of that evidence. The knock-and-announce principle, however, protects human life and limb placed in jeopardy by supposed self-defense by the surprised resident, assures the protection of property that may be destroyed during a forced entry, and safeguards elements of privacy and dignity that can be destroyed by a sudden entrance. Suppressing evidence found during a warranted search of a home will not heal a physical injury, fix a door, or undo the shock of embarrassment when police enter without notice of their presence and purpose.

"Second, suppression will not effectively deter knock-and-announce violations. There is minimal incentive to violate the knock-and-announce principle in the first place, and the rule gives way in the name of safety, investigative necessity, or futility. There is a danger that the risk of suppression would dissuade police from risking a knock-and-announce violation in exigent circumstances, when they would have the benefit of an exception to the rule anyway.

"We find the United States Supreme Court's reasoning in *Hudson* to be persuasive. The knock-and-announce principle applies only when police execute a valid warrant. To acquire a valid warrant, police must first convince a neutral magistrate that there is probable cause to believe that a crime has been committed, sufficient to justify pulling aside the veil of privacy from the contents of a home. It makes fundamental sense that we would not restore privacy to the contents of a home to remedy the violation of a rule that applies only after the interest in privacy in the home has been overridden. To do so would be to make an end run around the authority of the magistrate that issued the warrant. There is a basic conceptual disconnect between the interests protected by the knock-and-announce principle and those vindicated by the suppression remedy. Accordingly, we hold that once a search warrant has been issued, the exclusionary rule is not the appropriate remedy for a violation of the knock-and-announce rule."

SEARCH AND SEIZURE:
Key Seized Incident to Arrest and Used to Identify Suspect Apartment

United States v. Bain
CA1, No. 16-1140, 10/13/17

A key was seized from Yivens Bain during a search incident to his arrest. The police tried the key on doors to apartments inside a multi-family building outside which Bain was arrested. The key opened the door to one of the units. A search warrant was obtained and part of the probable cause consisted of information about the key opening the door to the unit. When a warrant was executed, police searched the unit and discovered a firearm and drugs. The district court denied Bain's motion to suppress.

Upon review, the First Circuit Court of Appeals found that "the turning of the key in the lock of unit D was an unreasonable, warrantless search unsupported by any clear precedent, and that without the information obtained by turning the key, there was no probable cause to issue a warrant to search unit D. Nevertheless, the officers were entitled to rely in good faith on the warrant, the information secured in executing that warrant need not have been suppressed."

SEARCH AND SEIZURE:
Visual Surveillance; Pole Camera

State of South Dakota v. Jones
SDSC, No. 27739, 9/20/17

Brookings Police Department Detective Rogers received a tip from a DCI agent in Huron that an unnamed informant had said that another person from Huron had been travelling to Brookings to obtain marijuana from Joseph A. Jones, and then transporting it back to Huron for sale. Detective Rogers was given no information about the informant—either his basis of knowledge of what he was alleging, or his credibility or track record with the Huron agent.

Rogers consulted with the DCI Agent assigned to Brookings, Agent Hawks. It was immediately decided that a pole camera, owned by the DCI, would be installed to surveill Jones' residence and the immediate area around it. Both the tip and the camera installation occurred on January 23. The camera was mounted atop a utility pole across the street from the Lamplighter mobile home park in Brookings. The camera was wired to the power in the utility pole, and was "hidden" inside a box and "not observable to the public".

The camera was aimed at Jones' residence, which was the first trailer nearest the street, as one enters the driveway/street into the mobile home park. The camera's angle allowed view of the front yard, the parking area for the trailer, the front door and that entire side of the trailer, and the end of the trailer nearest the street.

That trailer end includes the living room window of the home The camera could be remotely adjusted to pan up and down, or side to side, and could zoom in and out. The location of the trailer was illuminated at night by two lights, one of which was the pole on which the camera was installed. At night, the camera could tell whether the trailer's interior lights were on.

The camera recorded continuously (except when there were miscellaneous temporary glitches) for nearly two months, from January 23 to March 19. Police could watch a live feed on their computers or cell phones, and could also review the camera's footage later, since it was stored on a computer server in Pierre. The officer could fast forward the footage, and could get through an entire day's observations in 10-11 minutes. The officer noted when Jones' car was there, when it left, and when it returned; when visitors arrived and where they parked; pedestrians walking by and to the trailer; and when Jones left with his trash.

Eventually, police sought and obtained two search warrants—on March 11 (for installation of GPS tracking units on Jones' vehicle) and March 13 (for a search of Jones' home). The officer admitted that most of the information contained in the Affidavits was obtained from pole camera observations.

The trial court agreed and ruled that if the pole camera information was excised from the warrant affidavits, there was insufficient probable cause to support either warrant. The pole camera footage was not preserved, and could not be turned over to defense counsel or observed by the trial court. As a result of the search warrant execution on March 19, Jones was arrested and various drugs were found.

On appeal, Jones argued that the officers' use of the pole camera without a warrant violated the Fourth Amendment. The South Dakota Supreme Court held the warrantless use of the pole camera, installed to observe Jones' activities outside his residence for a two-month period, constituted a search under the Fourth Amendment, and therefore, the officer that installed the camera was required to first obtain a warrant; but (2) the officer acted reasonably based on the facts of this case, and the circuit court did not err when it denied Jones' motion to suppress based on the good faith exception to the exclusionary rule.

The Court found, in part, as follows:

"On the issue of surveillance through the use of the pole camera the State claimed Jones did not have a subjective expectation of privacy because Jones's activities were 'vividly and continuously exposed to the public.' In the State's view, the pole camera merely captured what any person standing on the street could observe with a naked eye. The State also contends that Jones did not expect his actions to be private because he took no effort to obstruct the public's view of his activities.

"Jones did not claim that he had an expectation of privacy in each individual

activity outside his home. Nor did he assert that he attempted to conceal the front of his home from public observation. Jones claims that he had a subjective expectation of privacy in the whole of his movements. In particular, he asserted that he expected to be free from 24/7 targeted, long-term observation of his comings and goings from his home, his guests' comings and goings, the types of cars coming and going from his home, etc.

"The information gathered through the use of targeted, long-term video surveillance will necessarily include a mosaic of intimate details of the person's private life and associations. At a minimum, it could reveal who enters and exits the home, the time of their arrival and departure, the license plates of their cars, the activities of the occupant's children and friends entering the home, information gleaned from items brought into the home revealing where the occupant shops, how garbage is removed, what service providers are contracted, etc.

"The indiscriminate nature in which law enforcement can intrude upon citizens with warrantless, long-term, and sustained video surveillance raises substantial privacy concerns. The pole camera is not a mere video camera and most certainly allowed law enforcement to enhance their senses. The pole camera captured Jones's activities outside his home twenty-four hours a day, sent the recording to a distant location, and allowed the officer to view it at any time and to replay moments in time. A mere video camera does not accomplish this. More importantly, this type of surveillance does not grow weary, or blink, or have family, friends, or other duties to draw its attention. Much like the tracking of public movements through GPS monitoring, long-term video surveillance of the home will generate a wealth of detail about the home occupant's familial, political, professional, religious, and sexual associations. See *Jones*, 565 U.S. at 415, 132 S. Ct. 955. The recordings could be stored indefinitely and used at will by the State to prosecute a criminal case or investigate an occupant or a visitor.

"Instead, we decide today's case on the circumstances presented—the warrantless use of a pole camera to surveil a suspect's activities outside his residence for two months. We conclude that Detective Rogers's warrantless use of a pole camera, specifically installed to chronicle and observe Jones's activities outside his residence from January 23 to March 19, constituted a search under the Fourth Amendment— its use violates an expectation of privacy that society is prepared to recognize as reasonable.

"Because Detective Rogers's use of the pole camera constituted a search, Detective Rogers was required to first obtain a warrant. The circuit court's legal conclusion to the contrary is reversed.

SUBSTANTIVE LAW:
Constructive Possession; Vehicle
Baltimore v. State
ACA, No. CR-17-159, 2017
Ark. App. 622, 11/15/17

On November 14, 2015, a North Little Rock Police Department officer initiated a traffic stop of a gray Toyota Camry after it failed to stop at an intersection and made a right turn without signaling. When the officer made contact with the driver, Baltimore, the officer smelled marijuana coming from inside the vehicle. The officer asked Baltimore to step out of the vehicle, and as he stepped out, the officer testified that he "observed…marijuana…in plain view" on Baltimore's seat.

The officer stated that there were two other passengers in the vehicle—one in the front passenger seat and another in the rear. Based on these circumstances, the officer conducted a search of Baltimore's vehicle. The officer testified that "[d]uring the search, I located two crack rocks, I believe in the front center cup holder." The officer said that there were "also small pieces of crack cocaine on the floorboard." The officer testified that he gathered and bagged the evidence and gave it to another North Little Rock police officer he had called for assistance. A forensic chemist with the Arkansas State Crime Lab confirmed that the evidence he tested consisted of 0.1315 grams of marijuana and 0.0908 grams of cocaine.

Based on this evidence, the circuit court found Baltimore guilty of possession of marijuana and possession of cocaine. On appeal, Baltimore contends that the circuit court erred in denying his motion to dismiss the possession-of-cocaine charge because there was insufficient evidence that he constructively possessed the cocaine.

From the Arkansas Court of Appeals:

"It is not necessary for the State to prove literal physical possession of drugs in order to prove possession. *Mings v. State*, 318 Ark. 201, 207, 884 S.W.2d 596, 600 (1994). Possession of drugs can be proved by constructive possession. Id., 884 S.W.2d at 600. Constructive possession requires the State to prove beyond a reasonable doubt that (1) the defendant exercised care, control, and management over the contraband and (2) the accused knew the matter possessed was contraband. *Walker v. State*, 77 Ark. App. 122, 125, 72 S.W.3d 517, 519 (2002).

"Constructive possession can be inferred when the drugs are in the joint control of the accused and another. However, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. There must be some other factor linking the accused to the drugs. Other factors to be considered in cases involving automobiles occupied by more than one person are (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near

proximity to it; (4) whether the accused is the owner of the automobile or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest."

SUBSTANTIVE LAW: Rape Shield Law

State v. Cossio
ASC, No. CR-17-250,
2017 Ark. 297, 11/2/17

R.S. testified that she was employed as an exotic dancer in July 2015. On the evening of July 8, 2015, approximately twenty-four hours before the alleged rape occurred, R.S. indicated that Miguel Cossio and his acquaintance, Shauna Harrelson, had come over to R.S.'s apartment because Harrelson was interested in becoming an exotic dancer and wanted R.S. to teach her some dance techniques. According to R.S., the three of them drank alcohol, Harrelson tried on a few of R.S.'s outfits, and the two women gave each other lap dances. R.S. stated that Cossio was not involved in the lap dances but that she later learned that he had taken pictures of them with her phone. These pictures were also introduced at the hearing. R.S. testified that no other sexual activity occurred between her and Harrelson on the evening of July 8, and she further indicated that she did not have any sexual contact with Cossio that night.

R.S. stated that the next day, on July 9, 2015, she had a cast on her arm and stitches removed, and she indicated that she had taken oxycodone beforehand as prescribed by her doctor. Later that evening, Harrelson and Cossio again visited R.S.'s apartment. R.S. explained that Harrelson had only wanted to "drink and hang out" on the night of July 9, and R.S. stated that she did not remember giving anyone a lap dance that night. R.S. agreed that she did not remember many details from that evening and that she had told police that she had passed out from alcohol and from not enough sleep the night before.

On September 10, 2015, the State charged Cossio with the rape of R.S. in violation of Arkansas Code Annotated section 5-14-103(a)(2)(A) (Repl. 2013), which provides that a person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person who is incapable of consent because he or she is physically helpless.

Cossio argued that the evidence of what had occurred at R.S.'s apartment on the evening prior to the rape was relevant to his state of mind on the night of the rape, as well as to R.S.'s credibility. The State, however, contended that this evidence was not relevant to the offense as charged and that it was also more prejudicial than probative.

The State of Arkansas brings this interlocutory appeal from the Pulaski County Circuit Court's order ruling that testimony regarding the victim's prior sexual conduct with a third party would be admissible pursuant to the rape-shield statute, Arkansas Code Annotated section 16-42-101(c) (Repl. 1999), and Arkansas Rule of Evidence 411(c)(2)(C) (2016). For reversal, the State argues that the circuit

court erred by finding that this evidence was relevant where Cossio was charged with raping the victim while she was physically helpless.

Cossio filed a pretrial motion to admit evidence of prior sexual conduct of the victim, asserting that the victim had made similar allegations against others in the past and that this evidence was essential to demonstrate her motive and character for truthfulness.

Upon review, the Court found as follows:

"The circuit court took the issue under advisement at the conclusion of the hearing and subsequently entered an order on January 19, 2017. The court stated that the pictures of R.S. and Harrelson from the evening of July 8, 2015, would not be admissible under the rape-shield statute and Arkansas Rule of Evidence 411. However, the court ruled that Cossio would be permitted to elicit testimony concerning the events of that evening 'for the limited purpose of showing the prelude to the night of the alleged activity, as part of the res gestae of the case.' Although the circuit court stated that Cossio could not use this evidence to demonstrate that the victim consented to the charged crime, the court found that the events of July 8, 2015, were 'essential to show the relationship between the parties' and that the probative value of this evidence outweighed its inflammatory or prejudicial nature.

"The purpose of the rape-shield statute is to shield victims of rape or sexual abuse from the humiliation of having their sexual conduct, unrelated to the pending charges, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt. The circuit court is vested with a great deal of discretion in determining whether evidence is relevant, and we will not reverse the circuit court's decision as to the admissibility of rape-shield evidence unless its ruling constitutes clear error or a manifest abuse of discretion.

"As the State asserts, we have held that when consent is not an issue, the victim's sexual conduct with a third person is entirely collateral and therefore not relevant. The State argues that because Cossio is charged with raping R.S. while she was physically helpless and incapable of consent, R.S.'s sexual conduct the night before the rape is 'wholly irrelevant' and prejudicial to the prosecution of this case.

"While the circuit court correctly recognized that Cossio could not use this evidence to show that R.S. consented to the rape, the court nonetheless found that it was admissible as part of the res gestae of the case and that it was essential to show the relationship between the parties. We have described the res gestae of a criminal offense as follows:

> *Circumstances so nearly related to the main fact under consideration as to illustrate its character and the state of mind, sentiment and disposition of the actor are parts of the res gestae, which embraces not only the actual facts of the transaction and the circumstances surrounding it, but also matters*

> *immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality part of the occurrence.*

"Cossio argues that evidence of R.S.'s sexual conduct on July 8, 2015, was part of the res gestae of the offense because the events of July 9–10, 2015, the night of the alleged rape, were a continuation of, and causally related to, the events that took place the night before the alleged rape. Cossio points to R.S.'s testimony that Harrelson wanted to come over on July 9 to 'hang out and drink more.'

"We disagree that evidence of R.S.'s sexual conduct with Harrelson on July 8, 2015, was relevant and admissible under the rape-shield statute to show the res gestae of the charged offense. R.S. testified that Harrelson came over on July 8 to learn how to be an exotic dancer and that the sexual conduct on that night consisted only of lap dances between R.S. and Harrelson. There was no sexual intercourse on July 8, and there was no evidence that Cossio was directly engaged in any of the sexual conduct on that evening. After the events on the evening of July 8, Cossio and Harrelson left R.S.'s apartment. The next evening, Cossio and Harrelson returned to R.S.'s apartment for the purpose of drinking and socializing. R.S. stated that she did not remember giving anyone lap dances on the evening of July 9. The two social gatherings did not comprise a continuing sequence of events, nor was R.S.'s prior sexual conduct on July 8 intermingled or contemporaneous with the alleged rape by Cossio the next night. Thus, the circuit court clearly erred in finding that evidence of R.S.'s prior sexual conduct was relevant and admissible as part of the res gestae of the case.

"To the extent that the events on the evening of July 8 were relevant to show the relationship between the parties or why Cossio and Harrelson were at R.S.'s apartment the next day, only evidence specifically related to the prior sexual conduct of R.S. would be inadmissible pursuant to the rape-shield statute. See Ark. Code Ann. § 16-42-101(b); Ark. R. Evid. 411(b). Similarly, although Cossio argues that evidence demonstrating that R.S. had also passed out on the night of July 8 is relevant to whether she was unconscious during the alleged rape the next evening, the rape-shield statute bars only evidence of R.S.'s sexual conduct. Cossio has simply failed to demonstrate how evidence of R.S.'s sexual conduct with Harrelson on the day before the offense is probative to whether Cossio raped R.S. the next evening while she was physically helpless and incapable of consent. Furthermore, to the extent that this evidence has any relevance to the issues in this case, its probative value would be substantially outweighed by the danger of unfair prejudice. Accordingly, we conclude that the circuit court abused its discretion in admitting evidence of R.S.'s prior sexual conduct, and we reverse and remand."