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ARREST LAW: **Booking Procedure; DNA Swab**

Maryland v. King, No. 12-207, 6/3/13

After his arrest on first- and second-degree assault charges, Alonzo J. King, Jr. was processed through a Wicomico County, Maryland, facility, where personnel used a cheek swab to take a DNA sample pursuant to the Maryland DNA Collection Act (Act), which authorizes officers to collect DNA samples from persons charged with violent crimes. A sample may not be added to a database before an individual is arraigned, and it must be destroyed if he is not convicted. Only identity information may be added to the database.

King's swab was matched to an unsolved 2003 rape. He unsuccessfully moved to suppress the DNA match. The Maryland Court of Appeals set aside his conviction, finding portions of the Act authorizing DNA collection from felony arrestees unconstitutional. The Supreme Court reversed, finding in part as follows:

"Taking and analyzing a cheek swab of the arrestee's DNA is like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment when officers make an arrest supported by probable cause to hold and bring the suspect to the station to be detained in custody for a serious offense. DNA testing involves minimal intrusion that may significantly improve both the criminal justice system and police investigative practices; it is quick and painless and

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requires no intrusion beneath the skin. When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving interests in properly identifying who has been arrested, ensuring that the custody of an arrestee does not create inordinate risks for staff, for the existing detainee population, and for a new detainee, and in ensuring that persons accused of crimes are available for trials. Identifying an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned."

The Court noted that the test does not reveal an arrestee's genetic traits and is unlikely to reveal any private medical information.

ARREST LAW:
Foreign Police Cooperation; Admissibility of Their Evidence

United States v. Lee, CA2, No. 12-88, 6/7/13

Stephen Lee, an American citizen, appealed his convictions for conspiring to distribute 1,000 kilograms or more of marijuana knowing that it would be unlawfully imported into the United States and conspiring to import 1,000 kilograms or more of marijuana.

Prior to his trial, Lee was the subject of parallel investigations in the United States and Jamaica. It is undisputed that significant, formalized law enforcement cooperation existed between the two countries in the pursuit of drug trafficking investigations. The two nations signed a Memorandum of Understanding ("MOU") in 2004 to establish a program in which Jamaican law enforcement officers, inter alia, "would monitor intercepted phone conversations authorized by Jamaican court orders for purposes of both countries gathering evidence or leads to obtain evidence in narcotics investigations." To this end, the United States agreed to provide surveillance equipment and training to officers for a Jamaica Constabulary Force Narcotics Division Vetted Unit ("VU"). The MOU likewise contemplated that the Jamaican government would provide the fruits of wiretaps to the United States in a format (i.e., on a disc) that the Drug Enforcement Agency ("DEA") could use as evidence in American courts.

In May 2006, the VU began investigating shipments by an international marijuana trafficking organization of which Lee was a member, and eventually seized a large shipment of the drug bound for the United States in September 2006. The VU notified the DEA of this seizure, and the DEA began investigating the same organization as well. In the months that followed, the VU and DEA ran parallel investigations of this organized marijuana trafficking activity, which included shipments originating in Jamaica and arriving at destinations in the New York area. Lee arranged for the clearance of these shipments—which generally attempted to cloak and intersperse thousands of pounds of marijuana among common items of Jamaican produce—through customs, and for their distribution within the United States.

During the course of a subsequent investigation, which took place from October 2006 to February 2009, Jamaican authorities, with authorization from that country's Supreme Court, intercepted wire

communications on several telephones in Jamaica. Lee was not a target of this surveillance, but he was captured speaking about drug shipments to individuals in Jamaica who were targets. Some conversations intercepted by Jamaican authorities were used to obtain further electronic surveillance warrants in the United States directed at other members of the marijuana trafficking organization; intercepted conversations were also presented to the grand jury in the proceedings that led to indictments against Lee. Lee sought to suppress the government's recordings of the intercepted conversations at his trial in the Eastern District of New York, claiming that Jamaican authorities had acted as "virtual agents" of the DEA. Relying on the decision in *United States v. Maturo*, 982 F.2d 57, 60 (2d Cir. 1992), the District Court denied Lee's suppression motion, reasoning that "the mere fact that an MOU existed, information was shared and the DEA provided money, training and equipment does not warrant a finding of agency" between the DEA and Jamaican law enforcement.

Lee also moved to compel the government to disclose the application materials submitted by Jamaican law enforcement to courts in that country requesting authority to conduct electronic surveillance. Specifically, Lee sought these materials for the purpose of demonstrating that an agency relationship existed between American law enforcement and its Jamaican counterparts. The government averred that the materials were not in its possession and that, despite diligent efforts, it had been unable to obtain them. Relying on the decision in *United States v. Paternina-Vergara*, 749 F.2d 993, 997-98 (2d Cir. 1984), the District Court reasoned that, even if American and Jamaican law enforcement officials had jointly investigated Lee, American law enforcement officials would still only be required to make a "good faith" effort to obtain items in the possession of a foreign government and that, on the facts of this case, the government had fulfilled that obligation. Based on its finding of good-faith efforts, the District Court denied Lee's motion to compel the documentation underlying the Jamaican wiretap applications.

Upon appeal, the U.S. Court of Appeals for the Second Court held that ongoing, formalized collaboration between an American law enforcement agency and its foreign counterpart did not, by itself, give rise to an "agency" relationship between the two entities sufficient to implicate the Fourth Amendment abroad; the Fourth Amendment's exclusionary rule did not impose a duty upon American law enforcement officials to review the legality, under foreign law, of applications for surveillance authority considered by foreign courts; Lee was not entitled to discovery of the wiretap application materials, submitted by Jamaican law enforcement to courts in that nation, underlying the electronic surveillance abroad; the district court correctly denied Lee's motion to suppress the fruits of the foreign wiretaps and his motion to compel the documentation underlying the foreign wiretap orders. Accordingly, the Second Circuit Court of Appeals affirmed the district court's judgment.

CIVIL LIABILITY: **Burden of Proof**

Schneider v. City of Grand Junction
CA10, No. 12-1086, 6/5/13

Glenn Coyne, a Grand Junction Police Department (GJPD) police officer, answered Misti Lee Schneider 's 911 call about an altercation with her teenage son and, during a visit to her home late the next night, raped her. Shortly thereafter, Officer Coyne was arrested and fired, and a few days later committed suicide.

Schneider sued the GJPD under 42 U.S.C. 1983, alleging violation of her substantive due process right to bodily integrity. She alleged that inadequate hiring and training of Officer Coyne, inadequate investigation of a prior sexual assault complaint against him, and inadequate discipline and supervision of him caused her to be raped.

In district court, the GJPD did not contest Schneider's allegations about Officer Coyne's conduct. They moved for summary judgment on the grounds that Officer Coyne did not act under color of state law and that Schneider could not prove that they caused the rape or were deliberately indifferent to the risk that it would happen.

The district court denied summary judgment on the first ground, holding that a reasonable jury could conclude that Officer Coyne acted under color of state law. It granted summary judgment on the second ground, concluding that Schneider could not prove essential facts to establish 1983 liability. Schneider appealed that ruling; the GJPD cross-appealed the color of state law ruling.

Upon review, the Tenth Circuit Court of Appeals stated: "The events alleged in this case are tragic, and Officer Coyne's alleged conduct was a terrible crime. The state cannot prosecute Officer Coyne because he is dead, and Ms. Schneider is left with suing his supervisors and employer…to hold [defendants] liable for Officer Coyne's actions, she faces stringent proof requirements under 1983 law, proof she is unable to muster."

Accordingly, the Tenth Circuit affirmed the district court's grant of summary judgment in favor of the GJPD. The Court dismissed the GJPD's cross-appeal as moot.

CIVIL LIABILITY: **Entry of Home Without An Arrest Warrant**

Hogan v. City of Corpus Christi, TX
CA5, No. 11-41029, 7/15/13

Officer Robert Cunningham was dispatched in connection with a child custody matter. He was instructed to meet John Michael Hogan's ex-wife at a convenience store, and by the time he arrived, Officer Potter was already speaking to Hogan's ex-wife and examining some paperwork. Officer Cunningham explained:

> *Officer Potter walked to my unit and let me know where we were going to, and explained to me that [Hogan's ex-wife] had court paperwork, child custody paperwork that appeared to be in order for what we looked for, and that we were going to go ahead and follow her over to [Hogan's] apartment.*

The Hogan divorce decree included a standard possession order, which entitled Hogan's ex-wife to possession of their

minor son at that time. According to Officer Cunningham, he and Officer Potter were going to "try and resolve the issue of the child custody."

Officer Cunningham indicated that, after arriving at Hogan's apartment, he did not receive an answer to his initial knocks on Hogan's door, but eventually the door was opened by Hogan's roommate, Kevin Loudin. When the door opened, Officer Cunningham placed his foot in the doorway so as to get a better view of the inside of the apartment. After Loudin informed Officer Cunningham that he was not Hogan, Officer Cunningham asked him to wake Hogan, and Loudin agreed. Loudin attempted to close the apartment door as he left to summon Hogan, but he was prevented from doing so because Officer Cunningham had his foot in the doorway. Hogan eventually came to the door and identified himself. The parties presented different versions of what happened next.

According to Officer Cunningham, when Hogan approached the door, he explained to Hogan that he and Officer Potter "were there in reference to his son," and in response, Hogan told him that his son was in the apartment. Officer Cunningham said that he then explained that Hogan's ex-wife was with them and wanted to enforce the custody arrangement contained in the divorce decree. Officer Cunningham asserted that as soon as he explained to Hogan that he and Officer Potter were there to retrieve Hogan's son, "the door was forcefully trying to be closed." Officer Cunningham asserted that the door first hit him in the leg. He explained that once the door hit him in the leg, "I put my hands up to try and stop the door, and at that point a—just a sudden burst of force pushed me back with the door, and at that point the door hit me in the forehead."

The Officers subsequently entered Hogan's apartment and arrested him for assault on a peace officer. According to the district court, Officer Potter's version of the events comported with that of Officer Cunningham. Officer Potter alleged that "Mr. Hogan grabbed the door and attempted to slam it shut on us. While slamming the door Mr. Hogan hit Officer Cunningham in the head with the door."

According to Hogan, when he approached the door, he told the Officers that they could not come inside the apartment. He could not remember if the Officers said anything to him, but he indicated that he attempted to close the door. At his deposition, Hogan was asked whether the door hit one of the Officers. He stated, "I don't remember because I got tackled immediately as soon as I tried to close it." When asked if it was possible, he said, "I don't know." Based on the conflicting evidence, the district court determined that there was "a genuine issue of material fact as to whether [Hogan] did in fact hit Officer Cunningham with the door." What happened inside the apartment was also disputed. Officer Cunningham asserted that he attempted to perform a "controlled take-down."

After the door hit him, he "pushed the door back to get it open to attempt to arrest Mr. Hogan." Officer Cunningham asserted that Hogan "started stepping backwards into his apartment" and that he instructed Hogan "to turn around, put his hands behind his back because he was being placed under arrest." According to Officer Cunningham, Hogan

rejected his instructions, which eventually prompted Officer Cunningham to attempt the controlled take-down. Officer Cunningham stated:

> *While I was trying—while Mr. Hogan was in the process of losing his balance and going down to the floor, he grabbed on to my arms as well, and that caused me to lose my balance and I fell on the ground with Mr. Hogan as he went down.*

Hogan claimed that "as soon as [he] attempted to close the door [he] got tackled." Hogan related that two officers tackled him, causing him to fall on his back. Hogan initially said the Officers fell on top of him, but when asked if both fell on him, he responded, "To the best of my knowledge. I mean, I don't know for sure." Hogan could not remember how long the Officers were on top of him.

Hogan suffered two broken ribs. The district court noted that the parties did not contest that Hogan suffered an injury, but the court determined that there was a factual dispute as to whether the Officers purposefully tackled Hogan or Officer Cunningham accidentally fell on Hogan while attempting a controlled take-down.

On appeal, the Fifth Circuit Court of Appeals concluded that the officers were "not entitled to qualified immunity and summary judgment on Hogan's unlawful arrest claim where the officers' entry into plaintiff's apartment to effectuate his arrest violated the Fourth Amendment, in light of the lack of exigent circumstances and where, at the time of the officers' conduct, the Supreme Court and this court had made it abundantly clear that either a warrant or probable cause and exigent circumstances was required to arrest an individual in his home." The court concluded, however, that the officers were entitled to qualified immunity and summary judgment on Hogan's excessive-force claim.

CIVIL LIABILITY: **Jails; Inmate Injured by Fellow Inmate**

Goodman v. Kimbrough, CA11, No. 12-10732

In January 2008, Bruce Goodman suffered a stroke. In the months that followed, his cognitive functioning deteriorated rapidly, and by September he presented symptoms of early onset dementia, including occasional confusion, disorientation, and wandering. Goodman has been married to his wife, Mary Goodman, for over 30 years. On September 9, Mary Goodman awoke to find that her husband was not in bed and had left the couple's trailer. He had apparently taken a walk, become confused, and attempted to gain entry to another trailer. When the trailer's occupants called the police, Goodman was arrested for loitering and brought to the Jail.

Upon phoning 911 and learning that her husband had been arrested, Mary Goodman went to the Jail. She showed the officer at the second-floor desk her husband's medical records, explained that he was cognitively impaired and showing signs of dementia, and asked the officer to ensure that her husband received his medication and that he be placed either in the infirmary or in isolation so that he would not unintentionally insult another inmate and thereby come in harm's way.

Goodman was assigned to Housing Unit 7, an orientation unit in the Jail. He was specifically placed in Section 6 of Unit 7, the administrative segregation (or "admin") section, where inmates are placed out of concern for their own safety or the safety of others. Though administrators at the Jail generally endeavor to place only one prisoner per cell in the admin section, Goodman was housed with another inmate, Antonio Raspberry.

Officers Robyn Boland and Herbert Feemster were the officers assigned to Unit 7 on the night in question. Boland worked in the control tower and Feemster served as the "runner," orienting new detainees and—or so it was thought—performing "head counts" and "cell checks" of all the inmates in the unit. Clayton County Sheriff's Department (Sheriff's Department) policy required that Officers Boland and Feemster perform a "head count," which involves entering the cells and physically looking at the inmates' faces and arm bands, at 6 p.m. and midnight each night. Policy also required the officers to walk by each cell and look into the window (known as a "cell check") once per hour after midnight. Although Feemster reported having completed the 6 p.m. head count, he only checked the cells in the admin section through the cell window and failed to enter the cells as required. Neither officer conducted the required head count at midnight, nor did they conduct a single cell check on the night Goodman was injured.

The officers claim that the night of September 9 was extraordinarily busy, and that 42 detainees were awaiting orientation when the officers arrived to start their shift. They contend that they asked for additional manpower to assist them in their duties, but a supervisor denied their request. They also claim that during the 6 p.m. head count, an inmate had reported a desire to harm himself, a contingency that required Feemster to escort the troubled inmate to the infirmary and prepare a report about the incident. Despite the officers' protestations that they were too busy to complete the required head counts and cell checks, Officer Boland made a long visit to another section of the Jail and took two lunch breaks rather than the one lunch break to which she was entitled.

At around 5 a.m. the next morning, Officer Feemster entered Goodman and Raspberry's cell to deliver breakfast. Goodman was sitting on his bunk, covered in blood. He had contusions about his face. His eyes were swollen shut. The cell was laden with blood. Feemster called a supervisor, who asked Goodman what had caused his injuries. Goodman, clearly bewildered, lifted up his hands and said, "These two right here." When asked why he had harmed himself, Goodman responded, "They told me to." Despite Goodman's statements, a Sheriff's Department investigative report subsequently found that Raspberry, Goodman's cellmate, had inflicted the beating on Goodman. Goodman's injuries were severe: he was taken to the intensive care unit at the local hospital and held there for seven days, and he spent two to three weeks in the Jail infirmary after being released from the hospital.

The Internal Affairs Division of the Sheriff's Department subsequently conducted an investigation, which revealed that one inmate, El Hadji Toure, had pushed the emergency call button in his cell several times during the night in question. Toure would later tell a

Sheriff's Department investigator that he had pushed the button in order to notify officers that he heard a fight going on in Goodman's cell. Boland and Feemster both admitted that—contrary to Sheriff's Department policy—they had deactivated Toure's call button because they believed he was pushing the button so that he could request free time to use the telephone. Boland further testified that she sent an inmate worker to ask Toure what he wanted, and the inmate worker reported back that Toure wanted to use the telephone.

The Sheriff's Department investigative report also included the statements of two other inmates, Darin Slocum and Calandra Carmichael, who both reported that they heard sounds of a man being beaten coming from Goodman's cell throughout the night. Boland and Feemster both adamantly deny having been aware of any violence or anything out of the ordinary in Goodman's cell on the night of the incident. Both officers testified that they neither saw nor heard anything that would have made them aware of any risk to Goodman that night. Goodman did not depose any of the inmates who heard the melee in Goodman's cell that night, nor did Goodman depose the inmate worker regarding what message he received from Toure or what he in turn relayed to Boland or Feemster.

Based in part on the investigative report, the Sheriff's Department obtained a criminal arrest warrant charging Raspberry with Goodman's beating. Upon the conclusion of the Internal Affairs investigation, the Sheriff's Department recommended that Officers Boland and Feemster be permanently terminated because they had been "neglectful in [their] duties…which allowed Goodman to become injured." Nonetheless, after further review, the Sheriff's Department reduced Boland and Feemster's suspensions to 30 days, and these 30-day suspensions were later shortened to 14 days.

Mary Goodman claims that ever since the violent episode at the Jail, her husband has been permanently altered and that, due to the advancement of his dementia, he is now indefinitely confined to a nursing home.

Acting as next friend to her husband, Mary Goodman sued Boland and Feemster in their individual capacities for violating Goodman's Fourteenth Amendment rights by demonstrating a deliberate indifference to a substantial risk that he would be seriously injured at the Jail. She also sued Sheriff Kimbrough in his official capacity for her husband's injuries and, lastly, sued on her own behalf for loss of support and consortium. The district court granted summary judgment as to all claims, and Goodman appealed to the Court of Appeals for the Eleventh Circuit.

Upon review, the Court concluded that the district court did not err in granting the defendants' motion for summary judgment where nothing in the record created a genuine issue of fact as to whether the prison officers were subjectively aware of a substantial risk of serious harm to Goodman and the complaint failed to allege that the Sheriff's Department policy or custom actually caused Goodman's injuries.

CIVIL LIABILITY: **Probable Cause to Arrest; Summary Judgment**

Stansbury v. Wertman
CA2, No. 12-713, 6/26/13

At 8:30 p.m. on April 4, 2006, a woman shoplifted approximately $800 of goods from a Stop & Shop supermarket in Somers, New York. Mary Sue Cirrincione ("Cirrincione"), the store detective who was trained "to focus on distinctive facial characteristics," observed the crime on the store's 1 three-inch by five-inch monitor. Cirrincione alerted co-worker Mark John ("John"), who physically observed the perpetrator and watched her open tightly-folded, crisp, new Old Navy bags and place items from the shelves into the bags and then in her shopping cart. When she tried to leave, John attempted to block the perpetrator's exit and asked to see her receipt; she ran around him, exited the building, and jumped into a white van. John noted the van's license plate number as it drove away.

Cirrincione and John reported the incident to the police, and New York State Trooper Chad Wertman arrived to investigate. Wertman recovered a bus receipt from an Old Navy bag the perpetrator had left behind. He watched the videotape of the theft and took the tape as evidence.

Cirrincione and John both described the perpetrator as a "black female wearing blue jeans and a maroon windbreaker." John added that she was "about 5'5"." The bus ticket and license plate number did not yield any additional leads. Noting that the perpetrator's Old Navy bags were in mint condition, Wertman traveled to one of the two nearby Old Navy stores. The Old Navy manager reported that a middle-aged black woman had attempted to buy some clothing at the store at 8:08 p.m. that evening, but that her credit card was declined. The manager reported that new bags, typically stored in the rear of the store, were discovered strewn on the ground near the door around the same time.

Wertman traced the credit card receipt to a card belonging to Nicole Stansbury ("Nicole"), Linda Stansbury's daughter. After repeated attempts, Wertman was able to contact Nicole by telephone; she alleged that she had been in Old Navy on April 4 before visiting an A&P supermarket and returning to her mother's house.

Wertman went to Stansbury's house on May 22 to interview Nicole. Wertman asserts that on his arrival, "he recognized Linda Stansbury as the perpetrator he had seen on the videotape." He interviewed both women, but his "notes of the interview reflect that Linda was nervous, that she would not answer his questions directly, and that Nicole answered many of the questions he asked of her mother." After the interview, Wertman reviewed Stansbury's criminal history and discovered an arrest for grand larceny. He then obtained a DMV photograph of Stansbury and asked another trooper to prepare a photo array. Before the array was complete, Wertman and two senior officers reviewed the videotape, compared it to the DMV photograph and confirmed their collective belief that Stansbury was the perpetrator.

Wertman scheduled a follow-up interview with Linda and Nicole Stansbury at the police barracks in Somers. He planned to have Cirrincione and John come to the station and view Linda Stansbury to see if they could identify her as the shoplifter; the Stansburys never arrived.

Because the photo array was not yet ready, Wertman showed Stansbury's DMV photograph to Cirrincione and John without any control photographs, in violation of the New York State Police Field Manual ("Field Manual").1 Both Cirrincione and John identified Stansbury as the perpetrator and signed a sworn statement under penalty of perjury to that effect.

Cirrincione confirmed "without any doubt or reservation" that Stansbury was the perpetrator, and John "was positively without a doubt able to identify" her as the thief. After Wertman spoke with her attorney, Stansbury turned herself in the next day; she was listed as 5'9" tall upon arrest.

Stansbury was tried for petit larceny in Somers Town Court. After a two-day bench trial including testimony by Cirrincione and John, Stansbury was acquitted. Two years later, she
brought this action against Officer Wertman under 42 U.S.C. 1983 alleging false arrest and malicious prosecution.

On appeal, Officer Wertman challenged the district court's denial of his motion for summary judgment. The Court of Appeals for the Second Circuit concluded that the record established uncontroverted facts that, taken together, provided probable cause for the arrest and prosecution of Stansbury. Therefore, Wertman was entitled to judgment as a matter of law. Accordingly, the court reversed and remanded with instructions for the district court to grant Officer Wertman's motion for summary judgment.

CIVIL LIABILITY:
Qualified Immunity; Carry License

Rabin v. Flynn, CA7, No. 11-3904, 7/9/13

In this case, police noticed Scott Rabin carrying a holstered gun on his hip in public. He was handcuffed and detained for about one and-a-half hours while the officers sought to confirm the validity of his carrying license. None of the three detaining officers were familiar with the unique license Rabin had on hand, one carried primarily by private detectives and security officers. When it was final confirmed that Rabin's license was legitimate, he was released. Rabin then sued the individual officers for unlawful arrest and excessive force, arguing that the officers should have known what that license was and should have released him as soon as he presented it. The district court denied the officers' motion for summary judgment to the extent that it sought qualified immunity for both claims.

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

"The officers are entitled to qualified immunity on the unlawful arrest claim because even if the officers had known what that type of license was, it still would have been reasonable under clearly established law for them to detain Rabin while they verified the legitimacy of a license to carry a deadly weapon. Though the length of Rabin's

detention was unfortunate, it was largely caused by the government's failure to have an efficient system of license verification. As for Rabin's excessive force claims, which allege that the unnecessary tightness of the handcuffs exacerbated his preexisting medical conditions, the evidence shows that Rabin only told Deputy Sheriff Todd Knepper about his medical issues. So while Knepper is not entitled to qualified immunity on that claim, the other two officers are."

The court affirmed the district court's denial of qualified immunity for Knepper on the excessive force claim, but reversed the district court's denial of qualified immunity for the rest of the claims.

EMPLOYMENT LAW:
FOIA; At Will Employment

Sullivan v. Coney, CV-12-1094, 5/23/13

In 2008, Mary Coney was hired as the chief of police for the City of McRae. The Mayor terminated Coney's employment in 2009 for allegedly falsifying fire department records and for insubordination. The city council voted not to overturn the Mayor's decision to terminate Coney. Coney filed a complaint in 2009 against the City, the Mayor, and City aldermen, asserting (1) the defendants failed to comply with the provisions of the Arkansas Freedom of Information Act because they did not give sufficient notice of the city council meeting; (2) Coney's due process rights were violated; (3) the Mayor's termination of Coney's employment violated her rights under the Arkansas Whistle-Blower Act; and (4) Coney's termination without just cause violated her rights under the Arkansas Civil Rights Act. The defendants filed a motion for summary judgment on each of Coney's claims, asserting that they were entitled to qualified immunity. The circuit court denied the summary judgment motion. The Mayor appealed.

The Arkansas Supreme Court reversed, holding that the circuit court erred in not granting the Mayor qualified immunity on the claims brought by Coney noting, among other issues, that Coney had no property interest in her employment as an at-will employee and was not owed any procedural due process with regard to her termination.

EMPLOYMENT LAW:
Harassment; Employee or Supervisor

Vance v. Ball State University
No. 11-556, 6/24/13

In this case, the United States Supreme Court dealt with Title VII (42 U.S.C. 2000e–2(a)(1)), under which an employer's liability for workplace harassment may depend on the status of the harasser.

If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. If the harasser is a "supervisor," however, and the harassment culminates in a tangible employment action, the employer is strictly liable. If there was no tangible employment action, the employer may escape liability by establishing that the employer exercised reasonable care to prevent and correct harassing behavior and that the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer.

Vance, an African-American woman, sued her employer, Ball State University (BSU), alleging that a fellow employee, Davis, created a racially hostile work environment in violation of Title VII. The district court entered summary judgment, holding that BSU was not vicariously liable for Davis' alleged actions because Davis, who could not take tangible employment actions against Vance, was not a supervisor.

The Seventh Circuit and the United States Supreme Court affirmed finding, in part, as follows:

"An employee is a 'supervisor' for purposes of vicarious liability under Title VII only if empowered by the employer to take tangible employment actions against the victim. A definition that draws a sharp line between co-workers and supervisors, with the authority to take tangible employment actions as the defining characteristic of a supervisor, can be readily applied. Supervisor status will often be discerned before or soon after litigation commences and is likely to be resolved as a matter of law before trial. This definition will not leave employees unprotected against harassment by co-workers who possess some authority to assign daily tasks and accounts for the fact that many modern organizations have abandoned a hierarchical management structure in favor of giving employees overlapping authority with respect to assignments."

EMPLOYMENT LAW: **Harassment; Retaliation Standard of Proof**

University of Texas SW Medical Center v. Nassar, No. 12-484, 6/24/13

The University of Texas Southwest Medical Center has an agreement with Parkland Memorial Hospital that requires the Hospital to offer vacant staff physician posts to University faculty members. A physician of Middle Eastern descent, both a University faculty member and a Hospital staff physician, claimed that Levine, one of his University supervisors, was biased against him because of his religion and ethnic heritage. He complained to Fitz, Levine's supervisor. He wanted to continue working at the Hospital without also being on the University faculty. He resigned his teaching post and sent a letter to Fitz and others, stating that he was leaving because of Levine's harassment. Fitz, wanting public exoneration for Levine, objected to the Hospital's job offer, which was then withdrawn. The doctor sued, claiming that Levine's harassment resulted in his constructive discharge from the University, in violation of 42 U.S.C. 2000e–2(a), and that Fitz's efforts to prevent his hiring were in retaliation for complaining about that harassment, in violation of section 2000e–3(a). A jury agreed on both claims.

The Fifth Circuit vacated as to the constructive-discharge claim, but affirmed with respect to retaliation, reasoning that retaliation claims under 2000e–3(a) require only a showing that retaliation was a motivating factor for the adverse employment

action, not its but-for cause. The U.S. Supreme Court vacated and remanded finding, in part, as follows:

"Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in section 2000e–2(m). Title VII's anti-retaliation provision appears in a different section from its status-based discrimination ban and uses the term 'because,' indicating that retaliation claims require proof that desire to retaliate was the but-for cause of the challenged employment action. The Court noted that retaliation claims are made with 'ever increasing frequency' and that lessening the standard could contribute to the filing of frivolous claims."

EVIDENCE: **Expert Testimony; Methamphetamine Distribution**

United States v. Schwarck
CA8, No. 12-2054, 6/28/13

In this case, the government called Sergeant William Koepke of the Lincoln/Lancaster County, Nebraska, Drug Unit as an expert to discuss the distribution of methamphetamine in the Lincoln area and the *modus operandi* of drug dealers.

Koepke was a twenty-year officer with ten years of experience in the narcotics unit, where he supervised other officers, interviewed more than 1,000 drug traffickers, and conducted surveillance of undercover narcotics operations. Koepke also attended training seminars and was a certified instructor on drug investigations.

Koepke testified that drug traffickers may try to insulate themselves from law enforcement by enlisting a trusted helper to deliver drugs or to collect money when dealing with unfamiliar buyers. Drug dealers also use security cameras to protect their business from law enforcement or dangerous individuals, and radio frequency detectors to determine whether a person is wearing a wireless transmitter that may be monitored by law enforcement. According to Koepke, the use of a radio frequency detector and the refusal to sell drugs to an individual who sets off the detector is consistent with the behavior of those who distribute methamphetamine. Koepke testified that he had never encountered a mere user of methamphetamine who employed residential security cameras and a radio frequency detector.

Koepke explained that drug dealers who have been arrested previously for drug crimes tend to take greater precautions. A trafficker with that experience, he explained, may limit the quantity of drugs that he keeps on his person or at his residence, in order to limit potential liability in the case of a seizure. He testified that dealers sometimes keep larger quantities at other locations and send others to retrieve the drugs from those locations when they make a larger sale. A dealer commonly sells only smaller quantities of a gram or less to a new buyer until the parties develop mutual trust.

Koepke recounted that drug dealers commonly carry large amounts of currency that represent the proceeds of their sales. A dealer who handles larger amounts of drugs would carry one-hundred dollar bills, while dealers in smaller quantities or users

typically would have five-, ten-, and twenty-dollar bills. Koepke explained that he would not expect a mere user of methamphetamine to pay for drugs using one hundred dollar bills. He opined that potential benefits of distributing methamphetamine, in addition to financial gain, could include acquiring methamphetamine for personal use at a reduced price or for free, trading vehicle parts, securing free transportation, obtaining sexual favors, and making new friends.

The Court of Appeals for the Eighth Circuit stated that a court may admit expert testimony if the witness's specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. *United States v. Spencer,* 700 F.3d 317, 321 (8th Cir. 2012). A district court may permit law enforcement officers to give expert testimony concerning the *modus operandi* of drug dealers, because most jurors are not familiar with the trade. *United States v. Molina,* 172 F.3d 1048, 1056 (8th Cir. 1999). A district court must balance the probative value of such testimony against its possible prejudicial effects.

The Court stated Koepke's testimony was relevant to rebut Schwarck's defense that he was merely a drug user and not a trafficker. The testimony permissibly explained the significance of evidence that would not be familiar to average jurors with no previous exposure to the drug trafficking business. See *United States v. Jeanetta*, 533 F.3d 651, 657-58 (8th Cir. 2008); *United States v. Ortega,* 150 F.3d 937, 943 (8th Cir. 1998); *United States v. Brown*, 110 F.3d 605, 610-11 (8th Cir. 1997). Accordingly, the Court could discern no abuse of discretion in the district court's decision to permit Koepke's expert testimony. The evidence was relevant, and Schwarck has not demonstrated that the testimony caused unfair prejudice that substantially outweighed its probative value.

EVIDENCE: **GPS Tracking Data**

United States v. Brooks, Jr.
CA8, No. 12-3152, 5/28/13

On May 13, 2011, a man entered the Tradesman Community Credit Union in Des Moines, Iowa, approached the teller, and handed her a note stating that he had a firearm and directing her to put money in an envelope. Upon reading the note, the teller placed approximately $5,900 inside one of the credit union's envelopes. Along with the money, the teller included a Global Positioning System ("GPS") tracking device that was concealed in a stack of twenty-dollar bills.

Two surveillance cameras from the credit union captured images of the robber. One video showed the man waiting in line, approaching the teller, handing her a note from an envelope, putting the envelope back in his pocket, and receiving money from her in another envelope. The other video showed the same individual entering the credit union. Both surveillance videos showed that the robber was an African American man wearing a bright orange hat, white earphones, a dark jacket, a black shirt with a design on the front under the jacket, blue jeans, and white tennis shoes. At trial, the credit union teller identified the individual in the two videos as the robber.

Immediately after the robbery, Risha Booker, who lived near the credit union, saw a man

matching the description of the robber run up the street from the direction of the credit union to a waiting vehicle. Booker testified that the man was running with one hand holding his midsection near his waistband. Booker also testified that when the wind hit the man, she could see a bulge at his midsection. The man then entered the rear driver's side door of a white, four-door sedan that the witness said resembled an older model Buick. The car immediately drove away.

At about the same time, police and the credit union's security company, 3SI Security Systems ("3SI"), began tracking the GPS device that the teller had placed inside the envelope along with the money. The device was activated at 12:15 p.m. and the signal indicated that it initially traveled down Third Street, where Booker saw the individual leave in the white sedan. After traveling south for several blocks, the signal from the GPS device reported that the suspect was heading east through eastern Des Moines. At approximately 12:26 p.m., the GPS device signal was lost for approximately five minutes before the connection was reacquired. The signal then indicated that the device continued moving east before it stopped about two to three miles from the credit union. At about the same time, police received a report from Tonya Haskins that someone had stolen her white van. Haskins, who lived on the east side of Des Moines, testified that on the day of the robbery she went to her van to run an errand and discovered an individual bent down outside the door of the van. The individual offered her $1,000 to allow him to hide in the van. She refused and ran back to her apartment, where she called police. The individual drove away in her van.

Meanwhile, Des Moines Police Officer Chris Curtis was involved in a traffic stop with several other officers when dispatch reported a vehicle theft one block away at East 15th Street and Grand A venue. While Officer Curtis was on his way to that location, he heard another radio call describing the stolen van. As Officer Curtis looked down the street ahead of him, he saw a van matching the description and pursued it. Officer Curtis saw the van pull into a parking lot several blocks ahead and parked behind it. As Officer Curtis approached the van with his weapon drawn, a second officer arrived and ran across the parking lot. The van suddenly accelerated, prompting the officers at the scene to fire several shots. The van collided with one of the patrol cars at the scene and stopped moving. The officers removed the driver, who was the only person in the van. The suspect appeared to have been shot, and the officer administering first aid noted that the man was wearing white tennis shoes, blue jeans, and a black shirt with a design on the front. Another officer, Officer David Seybert, asked the suspect his name, and the man replied that his name was "Robin."

Officer Seybert rode with the suspect in an ambulance to the hospital and observed $3,300 fall out of the suspect's pants when medical personnel removed the pants. After arriving at the hospital, the suspect stated that his last name was "Brooks." When medical staff removed the rest of Brooks' clothing, Officer Seybert observed that Brooks had a nylon belt around his chest. At the hospital, Officer Seybert recovered Brooks' clothing and discovered another $2,000 in a pocket of his pants. The remaining items of clothing included a black shirt with a design on the front, white tennis shoes, and a plain white

envelope. At trial, Officer Seybert identified the defendant as the person he knew as Robin Brooks from the hospital.

Haskins also identified her van at the parking lot where police arrested Brooks, and she identified Brooks as the person who stole it. When a police officer examined the area near the van theft, he found a handgun in front of where the van had been parked. Later, police also located a white, four door Buick LaSabre in a parking lot about two miles from the credit union. They found a bright orange hat on the rear floorboard of the car and a black trash bag in the back seat. Inside the trash bag was a dark jacket that matched the jacket worn by the robber in the surveillance video, along with a black polo shirt. Police also found a pair of eyeglasses in the backseat that matched eyeglasses worn by the robber as well as a cell phone charger. Police also recovered several items from Haskins' van, - including a cell phone, white headphones, and a bundle of money. The bundle contained four intact twenty-dollar bills-two on the top and two on the bottom-and sixty twenty-dollar bills with the center portions removed and a GPS device placed inside. The GPS device was the same one that was taken from the credit union and tracked by the security company. The police also determined that the cell phone was compatible with the cell phone charger found in the white sedan. During a warrantless search of the cell phone, Des Moines police and the FBI also discovered some photos and a video, which showed a man who resembled Brooks posing with a firearm matching the one recovered from the area where Haskins's van was stolen.

In the images, the man is wearing a shirt that matches the black polo shirt police found inside the white sedan. Eight days before trial, law enforcement obtained a warrant to conduct a more thorough search of the cell phone. Brooks was charged with bank robbery, possession of a firearm in furtherance of a crime of violence, and being a felon in possession of a firearm. He moved to suppress the photos and video recovered from the cell phone and challenged their admissibility at trial as well as the admissibility of the GPS evidence-all of which the district court denied. The court also denied Brooks' motion for a mistrial based on an alleged violation of the court's sequestration order. A jury returned guilty verdicts on all counts, and the district court denied Brooks' motion for a judgment of acquittal and sentenced him to twenty-five years' imprisonment. Brooks appeals the denial of his motion to suppress, the evidentiary rulings, and the denial of his motions for a mistrial and judgment of acquittal. He challenges the district court's admission of evidence from the GPS tracking device. He disputes both the overall accuracy and reliability of GPS evidence generally as well as the foundation presented at trial to admit evidence from the specific device in this case. He also contends that the GPS tracking reports constituted hearsay to which no exception applied and that the admission of the GPS tracking reports and related testimony violated his rights under the Confrontation Clause.

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

"We cannot conclude that the district court abused its discretion in taking judicial notice of the accuracy and reliability of GPS technology. Commercial GPS units

are widely available, and most modern cell phones have GPS tracking capabilities. Courts routinely rely on GPS technology to supervise individuals on probation or supervised release, and, in assessing the Fourth Amendment constraints associated with GPS tracking, courts generally have assumed the technology's accuracy. See, e.g., *United States v. Jones*, 565 U.S. ---, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring) (noting that newer 'smart phones' equipped with GPS devices permit more precise tracking than older devices); *United States v. Maynard*, 615 F.3d 544, 562-64 (D.C. Cir. 2012) (discussing how prolonged GPS surveillance can provide a detailed record of a person's movements); *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 533 (D. Md. 2011) (Current GPS technology would almost certainly enable law enforcement to locate the subject cellular telephone with a significantly greater degree of accuracy—possibly within ten meters or less.) Further, Brooks provides no reason to undermine the district court's conclusion beyond his mere assertion that GPS technology is 'relatively new.' Courts, however, have addressed the use of GPS technology for more than a decade. See, e.g., *United States v. Lopez-Lopez*, 282 F.3d 1 (1st Cir. 2002).

"Second, Brooks argues that the Government's witness, a 3SI account executive, lacked sufficient scientific background to lay the proper foundation for the GPS evidence from the particular device used in this case. However, the Government's witness, Mike Boecher, had been a senior account executive with 3SI for eighteen years. He had been trained by the company, he knew how the device worked, and he had demonstrated the device for customers dozens of times. See *United States v. Thompson*, 393 F. App'x 852, 857-59 (3d Cir. 2010) (holding that the district court did not err in allowing a 3SI account executive who was trained in, experienced in, and had verified the functioning of GPS devices to provide lay testimony concerning the operation of the GPS device used in that case). Further, other evidence corroborated the accuracy of this GPS tracking device. The device was activated near the credit union just seconds after the robbery.

"The signal indicated that it then moved to the apartment parking lot where physical evidence and Haskins' testimony place Brooks at the time he allegedly stole the white van. Then, the signal reported that the device traveled along the same route where Officer Curtis saw the stolen van. Finally, police tracked the device and recovered it from inside a stack of money from the credit union at the same parking lot where they found Brooks. Brooks points to the brief lapse in the device's transmission as evidence of malfunction. However, as Boecher testified, objects such as tall buildings or tunnels could temporarily block the signal. Thus, we conclude that the district court did not abuse its discretion in concluding that the foundation laid in this case was sufficient.

"Brooks also argues that the GPS tracking reports are inadmissible hearsay. The district court, however, did not abuse its discretion in overruling Brooks' hearsay objection as the GPS tracking reports fell under the business records exception. In this case, Boecher testified that as part of 3SI's regular course of business, when one of its customers activates a 3SI GPS device, the company routinely

keeps the GPS data on the company server. Therefore, the court properly admitted the GPS evidence under the business records exception. See *United States v. Wood*, No. 08-CR-92A, 2009 WL 2157128, at *4 (W.D.N.Y. July 15, 2009 (holding that GPS records satisfied the requirements of the business records exception).

"Finally, Brooks argues that the admission of the GPS tracking reports violated his rights under the Sixth Amendment's Confrontation Clause in light of *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico,* 564 U.S. ---, 131 S. Ct. 2705 (2011). Reviewing Brooks's Confrontation Clause challenge *de novo, United States v. Thompson*, 686 F.3d 575, 580-81 (8th Cir. 2012), we conclude that the district court did not err in admitting the reports. As a general matter, we have held that most business records are non-testimonial statements to which the Confrontation Clause does not apply. *United States v. Mashek*, 606 F.3d 922, 930 (8th Cir. 2010) (citing *Crawford*, 541 U.S. at 56); see also *Melendez-Diaz*, 557 U.S. at 324. However, following the Supreme Court's decision in *Bullcoming*, we explained that certain business records still may run afoul of the Confrontation Clause if they are testimonial in nature. See *Thompson,* 686 F.3d at 581. Thus, in the Confrontation Clause context, the threshold issue is whether the record being proffered is testimonial.

"Brooks argues the reports were testimonial because 'they were developed primarily for a law enforcement purpose.' However, this misunderstands the Supreme Court's Confrontation Clause jurisprudence. In determining whether a statement implicates the Confrontation Clause, the crucial inquiry is whether the record was created for the purpose of establishing or proving some fact *at trial. Melendez-Diaz,* 557 U.S. at 324; see also *Bullcoming*, 131 S. Ct. at 2720 ('To determine if a statement is testimonial, we must decide whether it has a primary purpose of creating an out-of-court substitute for trial testimony.') Moreover, the Court has specifically held that certain statements obtained in the course of a law enforcement investigation may nonetheless be nontestimonial. See *Bryant,* 131 S. Ct. at 1166 (holding that shooting victim's statements to police regarding his shooting were non-testimonial statements because police 'solicited the information necessary to enable them to meet an ongoing emergency.' *Davis v. Washington*, 547 U.S. 813, 826-27 (2006) (holding that victim's statements to a 9-1-1 operator were nontestimonial as they were necessary to be able to resolve the present emergency. Tracking reports similarly were used to track Brooks in an ongoing pursuit. Although the reports ultimately were used to link him to the bank robbery, they were not *created* for this purpose as Brooks contends.

"In other words, unlike the chemical analysis report in *Melendez-Diaz* or the blood alcohol report in *Bullcoming,* the GPS reports were not created to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money. Therefore, the GPS reports were non-testimonial, and their admission did not violate Brooks' Confrontation Clause rights."

MIRANDA: **Witness Must Assert Privilege in Order To Claim It**

Salinas v. Texas, No. 12-246, 6/17/13

Two brothers were shot and killed in their Houston home on the morning of December 18, 1992. There were no witnesses to the murders, but a neighbor who heard gunshots saw someone run out of the house and speed away in a dark-colored car. Police recovered six shotgun shell casings at the scene. The investigation led police to Genovevo Salinas, who had been a guest at a party the victims hosted the night before they were killed. Police visited Salinas at his home, where they saw a dark blue car in the driveway. He agreed to hand over his shotgun for ballistics testing and to accompany police to the station for questioning. Salinas' interview with the police lasted approximately one hour. All agree that the interview was noncustodial, and the parties litigated this case on the assumption that he was not read *Miranda* warnings. See *Miranda v. Arizona,* 384 U. S. 436 (1966).

For most of the interview, Salinas answered the officer's questions. But when asked whether his shotgun "would match the shells recovered at the scene of the murder," Salinas declined to answer. Instead, he "looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began to tighten up." After a few moments of silence, the officer asked additional questions, which Salinas answered. Following the interview, police arrested Salinas on outstanding traffic warrants. Prosecutors soon concluded that there was insufficient evidence to charge him with the murders, and he was released.

A few days later, police obtained a statement from a man who said he had heard Salinas confess to the killings. On the strength of that additional evidence, prosecutors decided to charge Salinas, but by this time he had absconded. In 2007, police discovered Salinas living in the Houston area under an assumed name.

Salinas did not testify at trial. Over his objection, prosecutors used his reaction to the officer's question during the 1993 interview as evidence of his guilt. The jury found Salinas guilty, and he received a 20-year sentence. On direct appeal to the Court of Appeals of Texas, Salinas argued that prosecutors' use of his silence as part of their case in chief violated the Fifth Amendment. The Court of Appeals rejected that argument, reasoning that Salinas' prearrest, pre-*Miranda* silence was not "compelled" within the meaning of the Fifth Amendment. The Texas Court of Criminal Appeals took up this case and affirmed on the same ground, finding in part as follows:

"We granted certiorari to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief. But because petitioner did not invoke the privilege during his interview, we find it unnecessary to reach that question.

"The privilege against self-incrimination 'is an exception to the general principle that the Government has the right to everyone's testimony.' *Garner v. United States*, 424 U. S. 648, 658, n. 11 (1976). To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who desires the protection of the

privilege must claim it at the time he relies on it. That requirement ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating, see *Hoffman v. United States*, 341 U. S. 479, 486 (1951), or cure any potential self-incrimination through a grant of immunity, see *Kastigar v. United States*, 406 U. S. 441, 448 (1972). The express invocation requirement also gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer.

"We have previously recognized two exceptions to the requirement that witnesses invoke the privilege, but neither applies here. First, we held in *Griffin v. California*, 380 U. S. 609, 613–615 (1965), that a criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an 'absolute right not to testify.' Since a defendant's reasons for remaining silent at trial are irrelevant to his constitutional right to do so, requiring that he expressly invoke the privilege would serve no purpose; neither a showing that his testimony would not be self-incriminating nor a grant of immunity could force him to speak. Because petitioner had no comparable unqualified right during his interview with police, his silence falls outside the *Griffin* exception.

"Second, we have held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. Thus, in *Miranda*, we said that a suspect who is subjected to the 'inherently compelling pressures' of an unwarned custodial interrogation need not invoke the privilege. Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege unless he fails to claim it after being suitably warned. For similar reasons, we have held that threats to withdraw a governmental benefit such as public employment sometimes make exercise of the privilege so costly that it need not be affirmatively asserted. *Garrity v. New Jersey*, 385 U. S. 493, 497 (1967) (public employment). See also *Lefkowitz v. Cunningham*, 431 U. S. 801, 802–804 (1977) (public office); *Lefkowitz v. Turley*, 414 U. S. 70, 84–85 (1973) (public contracts). And where assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence. See, e.g., *Leary v. United States*, 395 U. S. 6, 28–29 (1969) (no requirement that taxpayer complete tax form where doing so would have revealed income from illegal activities); *Albertson v. Subversive Activities Control Bd.*, 382 U. S. 70, 77–79 (1965) (members of the Communist Party not required to complete registration form where response to any of the form's questions might involve them in the admission of a crucial element of a crime). The principle that unites all of those cases is that a witness need not expressly invoke the privilege where some form of official compulsion denies him 'a free choice to admit, to deny, or to refuse to answer.' *Garner*, 424 U. S., at 656–657 (quoting *Lisenba v. California*, 314 U. S. 219, 241 (1941)).

"Petitioner cannot benefit from that principle because it is undisputed that his interview with police was voluntary. As petitioner himself acknowledges, he agreed to accompany the officers to the station and 'was free to leave at any time during the

interview.' That places petitioner's situation outside the scope of *Miranda* and other cases in which we have held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege. The critical question is whether, under the 'circumstances' of this case, petitioner was deprived of the ability to voluntarily invoke the Fifth Amendment. He was not. We have before us no allegation that petitioner's failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment.

"Although no ritualistic formula is necessary in order to invoke the privilege, *Quinn v. United States*, 349 U. S. 155, 164 (1955), a witness does not do so by simply standing mute. Because petitioner was required to assert the privilege in order to benefit from it, the judgment of the Texas Court of Criminal Appeals rejecting petitioner's Fifth Amendment claim is affirmed."

RAPE SHIELD LAW

State v. Kindall, CA 12-792, 6/20/13

In this case, Kindall was charged with second-degree sexual assault of K.J., a person less than fourteen years old. Prior to trial, Kindall filed a motion under Ark. Code Ann. 16-42-101(c), Arkansas's rape-shield statute, seeking to introduce at trial evidence of specific instances of sexual conduct of K.J. Specifically, Kindall sought to introduce a specific instance of sexual conduct that occurred between K.J. and her cousin, D.R., when K.J. was nine or ten years old. The circuit court granted the motion.

The State brought this interlocutory appeal. The Arkansas Supreme Court reversed, finding in part as follows:

"Under our rape-shield statute, evidence of a victim's prior sexual conduct is not admissible by the defendant to attack the credibility of the victim. *Bond v. State,* 374 Ark. 332, 335, 288 S.W.3d 206, 209 (2008). The statute specifically precludes the admissibility of evidence of a victim's prior allegation of sexual conduct if the victim asserts that the allegation is true. In this instance, K.J. asserted that the prior allegation of sexual conduct with D.R. is true, so the rape-shield statute would preclude the admissibility of the evidence surrounding the allegation to attack K.J.'s credibility. See *Butler v. State*, 349 Ark. 252, 265–67, 82 S.W.3d 152, 160–61 (2002) (holding that the rape-shield statute is violated by undermining the victim's credibility with testimony about the victim's prior inconsistent statement).

"The statute further provides, however, that the circuit court may admit evidence of the victim's prior sexual conduct with any other person if, following a hearing, 'the court determines that the offered proof is relevant to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature.' Ark. Code Ann. § 16-42-101(c)(2)(C). Thus, the statute is not a total bar to evidence of a victim's sexual conduct but instead makes its admissibility discretionary with the circuit court pursuant to the procedures set out in the statute. *Gaines v. State,* 313 Ark. 561, 566–67, 855 S.W.2d 956, 958 (1993). Although the introduction of prior episodes of sexual conduct to attack the credibility of the victim

is not absolutely barred by the rape-shield statute, it has been treated unfavorably by this court. *State v. Townsend*, 366 Ark. 152, 159, 233 S.W.3d 680, 685 (2006). In determining whether the evidence is relevant, the circuit court is vested with a great deal of discretion, and we will not overturn the circuit court's decision unless it constituted clear error or a manifest abuse of discretion. *Bond*, 374 Ark. at 336, 288 S.W.3d at 209.

"In considering our previous decisions, we observe that in *Butler*, 349 Ark. at 265–67, 82 S.W.3d at 160–61, Butler argued that the circuit court erred in denying his motion to introduce evidence under the rape-shield statute. The circuit court conducted a rape-shield hearing to determine the admissibility of Butler's proffered testimony that was related to the victim's prior sexual conduct. The victim testified that she told Butler's daughter that the victim's stepfather had sexually abused her, and she further testified that she never recanted her statement concerning her stepfather. Butler, however, testified that, during his visit with the victim, the victim recanted the allegation. The circuit court rejected Butler's proffer, finding Butler's testimony regarding the victim having had sexual contact with other persons was covered by and should be excluded under the rape-shield statute. On appeal, this court noted that Butler proffered the testimony as evidence of the victim's prior inconsistent statements to undermine her credibility. This court concluded that the proffered testimony violated the rape-shield statute; thus, the circuit court did not abuse its discretion by ruling that the proffered testimony was inadmissible pursuant to the rape-shield statute. Though Butler involved the affirmance of the circuit court's rejection of evidence, the case is nevertheless instructive in that we approved the circuit court's preclusion of evidence of a victim's prior inconsistent statement to undermine her credibility because the proffered testimony violated the rape-shield statute.

"Here, K.J.'s admission of making a prior inconsistent statement to her mother about D.R. is impeachment evidence on a matter collateral to the allegation against Kindall, and the circuit court's ruling broadly allows impeachment by the introduction of extrinsic evidence. See generally *Nevada v. Jackson*, 569 U.S. ___, 133 S. Ct. 1990 (2013)(per curiam). The order permits Kindall at his trial to question K.J. regarding her previous allegation of sexual conduct involving D.R. and her subsequent denial of the conduct to her mother. The order also allows testimony from D.R. that he was charged in juvenile court with committing a sexual offense against K.J., that he appeared as a defendant in juvenile court to answer for the allegation, that neither K.J. nor any member of her family attended D.R.'s juvenile-court hearings, and that the case was dismissed by the State. It also permits D.R. to testify that K.J.'s allegation against him is false.

"Although this testimony is not relevant to the case at bar, the jury, in hearing this testimony, would have to consider whether they believed K.J.'s allegation that D.R. engaged in sexual conduct with her or whether they believed D.R.'s denial of the allegation. The admission of the evidence would require the jury to assess K.J.'s explanation of why she gave the conflicting statement to her mother and her explanation as to why neither she nor her family attended D.R.'s hearing. In essence, Kindall's trial would turn into a trial within a

trial on whether K.J.'s allegation against D.R. is true, pitting K.J.'s version of the events and her credibility against D.R.'s version and his credibility.

"We have previously approved the disallowance of similar testimony. See *Butler* supra. Further, in this case, the circuit court's order permits impeachment on a matter that is collateral to the charge Kindall faces and allows impeachment with extrinsic evidence. Given this, we conclude that the circuit court abused its discretion in ruling that the evidence is admissible, as the probative value of the testimony relating to K.J.'s inconsistent statement to her mother is slight and is substantially outweighed by the prejudicial and inflammatory nature of the testimony. Accordingly, we reverse the circuit court's determination and remand the case for trial."

SEARCH AND SEIZURE:
Abandoned Property; Trash Pull

United States v. Jackson
CA4, No. 12-4559, 8/26/13

On May 26, 2011, before dawn, Richmond, Virginia police officers pulled two bags of trash from a trash can located behind the apartment that Sierra Cox had rented from the Richmond Redevelopment and Housing Authority. The officers were looking to corroborate a tip from confidential informants that Dana Jackson was selling drugs from the apartment. Jackson, who was Cox's boyfriend and the father of her children, regularly stayed at the apartment.

After recovering items from the bags that were consistent with drug trafficking, the police officers obtained a warrant to search Cox's apartment. The subsequent search uncovered evidence that ultimately led to Jackson's conviction for drug trafficking.

Jackson contends that the trash pull violated his Fourth Amendment rights because, as he argues, the police officers physically intruded upon a constitutionally protected area when they walked up to the trash can located near the rear patio of Cox's apartment to remove trash. See *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (holding that officers conduct a Fourth Amendment search when they make an unlicensed physical intrusion into a home's curtilage to gather information). Jackson also argues that the officers violated his reasonable expectation of privacy in the contents of the trash can, relying primarily on the fact that the trash can was not waiting for collection on the curb of a public street, as was the case in *California v. Greenwood*, 486 U.S. 35, 41 (1988) (holding that there was no reasonable "expectation of privacy in trash left for collection in an area accessible to the public").

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

"We reject both arguments. The district court found as fact that at the time of the trash pull, the trash can was sitting on common property of the apartment complex, rather than next to the apartment's rear door, and we conclude that this finding was not clearly erroneous. We also hold that in this location, the trash can was situated and the trash pull was accomplished beyond the apartment's curtilage. We conclude further that in the circumstances of this case, Jackson also lacked a reasonable expectation of privacy in the trash can's contents.

"We conclude that *Greenwood*'s rule controls here. To be sure, there are some factual differences, key among them being that Greenwood's trash had been left on the curb of a public street for collection, whereas Jackson and Cox had not yet taken their trash can to Magnolia Street, where the garbage collector regularly collected it. But the critical inquiry driving the Court's decision in Greenwood was the extent to which the defendants had 'exposed their garbage to the public,' thus eliminating any 'reasonable expectation of privacy in the inculpatory items that they discarded.' By that measure, Jackson's claim to Fourth Amendment protection for the trash can fails. For rather than being locked to the laundry pole closest to the residence's back door, where it was normally located, the trash can was sitting in the common area of the apartment complex courtyard, which included the grass areas and common sidewalks, readily accessible to all who passed by. Moreover, as Cox testified, the trash can contained stuff she wanted to get rid of, stuff she didn't want anymore. Put simply, having left the trash can outside the curtilage of their home, in a common area shared by the other residents of the apartment complex and their guests, Jackson cannot now claim to have had a reasonable expectation of privacy in its contents. As in *Greenwood*, the trash can containing Jackson's discarded refuse was readily accessible to animals, children, scavengers, snoops, and other members of the public.

"For these reasons, we conclude that the trash pull that the Richmond Police conducted on May 26, 2011, was a lawful investigatory procedure and accordingly affirm the district court's order denying Jackson's motion to suppress."

SEARCH AND SEIZURE: **Affidavits; Discrepancies and Omissions**

United States v. Arnold
CA8, No. 12-3082, 8/5/13

In this case, Arnold appealed the district court's denial of his motion to suppress evidence from a search that led to his arrest for drug and firearm possession charges, and motion for a hearing to challenge the truthfulness of the factual statements in the application for the search warrant.

Upon review, the Eighth Circuit Court of Appeals agreed with the district court that many of Arnold's challenges highlight, at most, minor discrepancies or omissions that do not establish deliberate or reckless falsehood. Even for those few instances where the district court agreed with Arnold that the affidavit contained a misrepresentation, Arnold provided no evidence suggesting that the misrepresentations were deliberate or reckless. Finally, even if the court were to assume the challenged affidavit contained deliberate or reckless falsehoods, Arnold's arguments for a *Franks v. Delaware* hearing would still fail because the affidavit established probable cause even absent any misrepresentations and including the omitted information at issue. Accordingly, the court affirmed the judgment.

SEARCH AND SEIZURE:
Affidavits; Informant Information
Kirby v. State, No. CR-12-866
2013 Ark. App. 393, 6/19/13

On October 11, 2010, Officer Jonathon Knight with the Springdale Police Department was on foot patrol at the Springdale Public Library when he was approached by an unidentified man who claimed to have information relating to drug trafficking. The informant told Officer Knight that Douglas W. Kirby was a habitual drug user who kept a large amount of narcotics in his residence. The informant further claimed that Kirby had recently purchased stolen firearms. According to the informant, Kirby always carried cocaine for personal use in a metal container with a screw-on cap in the right front pocket of his pants.

The informant told Officer Knight where Kirby lived and described to the officer the truck that Kirby drove. After speaking with the informant, Officer Knight set up surveillance a short distance from Kirby's house and observed Kirby go back and forth between the house and the truck described by the informant. When Kirby left the residence and drove in front of Officer Knight's location, the officer noticed that the truck's side windows were excessively tinted. Officer Knight stopped Kirby for violating Arkansas window-tinting restrictions.

When Officer Knight tested the tint level of the windows, the level was in excess of that allowed by state law. Officer Knight requested and received permission from Kirby to search the vehicle. He also requested and received permission to perform a search of Kirby's person for officer safety. During the search of Kirby's person, Officer Knight felt a small metal container in Kirby's right front pocket. When he retrieved the container, he saw that it had a screw-on cap. The container contained a white, powdery substance that tested positive for cocaine. Kirby was then arrested for possession of a controlled substance. During a subsequent inventory search of Kirby's vehicle, Officer Knight found two pieces of a red straw that contained the residue of a white, powdery substance.

Officer Knight then contacted Detective Chris Moist with the Springdale Police Department, who interviewed Kirby. After the interview, Detective Moist requested and obtained a search warrant for Kirby's residence. In the affidavit in support of the request for the warrant, Detective Moist recounted the information given to Officer Knight by the informant as well as the traffic stop of Kirby and the search of his person and vehicle. The ensuing search of Kirby's residence resulted in the seizure of firearms, cocaine, marijuana, various pharmaceuticals, and drug paraphernalia.

Prior to his trial, Kirby filed a motion to suppress the items seized from his person, his truck, and his home, arguing that the traffic stop of his vehicle was invalid due to lack of probable cause and that the search warrant was invalid because the affidavit submitted in support of the request for the warrant failed to establish the reliability of the informant. During the hearing on the motion to suppress, the State produced testimony from several witnesses, including Officer Knight and Detective Moist. Kirby produced testimony from Kenneth Martin,

who performed the tinting work on Kirby's vehicle and who testified that the tinting was legal. Following the testimony, the trial court ruled that the information from the informant became reliable when it was verified during the stop and search of Kirby. The trial court also ruled that the stop of Kirby was valid because the tinting of his windows was in excess of the amount allowed by state law. The trial court denied Kirby's motion to suppress.

Upon review, the Arkansas Court of Appeals dealt with informant information in an affidavit, finding in part as follows:

"The reliability of an informant is determined by a totality-of-the-circumstances analysis that is based on a three-factored approach our supreme court adopted in *Frette v. City of Springdale,* 331 Ark. 103, 959 S.W.2d 734 (1998). The factors are 1) whether the informant was exposed to possible criminal or civil prosecution if the report is false; 2) whether the report is based on the personal observations of the informant; and 3) whether the officer's personal observations corroborated the informant's observations.

"Regarding the satisfaction of these factors, the *Frette* court stated that the first factor is satisfied whenever the informant gives his or her name to authorities or if the person gives the information to the authorities in person. With regard to the second factor, an officer may infer that the information is based on the informant's personal observation if the information contains sufficient detail that it is apparent that the informant had not been fabricating the report and the report is of the sort which in common experience may be recognized as having been obtained in a reliable way. The third and final element may be satisfied if the officer observes the illegal activity or finds the person, the vehicle, and the location as substantially described by the informant.

"In this case, the informant gave the information to Officer Knight in person. The information given to Officer Knight contained very specific details. Officer Knight investigated Kirby based upon the information obtained from the informant and personally verified substantial parts of the information from the informant, including such specific details as where Kirby kept his cocaine for personal use and the type of container in which the cocaine was stored. All of this information was included in the affidavit submitted by Detective Moist. Based upon the foregoing analysis and the totality of the circumstances presented, we hold that the trial court did not err by determining that the affidavit submitted in support of the request for the search warrant sufficiently established the reliability of the informant."

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

United States v. Donnell
CA8, No. 12-3520, 8/13/13

A federal grand jury indicted Keith Brian Donnell for possession with intent to distribute marijuana and possession of a firearm in furtherance of a drug trafficking offense. See 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(c)(1)(A). The charges stemmed from the execution of an anticipatory search warrant of Donnell's residence on the Red Lake Indian Reservation. ("An anticipatory warrant is a warrant based upon an affidavit showing

probable cause that at some future time-but not presently-certain evidence of crime will be located at a specified place." *United States v. Grubbs*, 547 U.S. 90, 94, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006)). The evidence seized from the search included, among other things, approximately five pounds of marijuana, $12,622 in U.S. currency and five firearms. After the search, Donnell received his Miranda warnings but proceeded to make some incriminating statements.

Donnell moved to suppress the evidence and his statements arising from the search. The district court denied the motions and Donnell pleaded guilty to the charges. The district court sentenced Donnell to a total term of 60 months (five years) and 1 day in prison. Donnell appeals the denial of his suppression motions.

On appeal, Donnell contends the search of his home was not supported by probable cause because the required triggering conditions were not satisfied. Donnell also contends his incriminating statements to law enforcement must be suppressed as fruit of an illegal search. The case is as follows:

Special Agent Wambach, with the cooperation of a confidential informant, completed a number of controlled purchases of drugs from an individual named Roy. On at least one occasion, the purchase occurred at the Seven Clans Casino parking lot, near Red Lake, Minnesota. Based on his contacts with Roy and the confidential informant, Wambach had reason to suspect that Roy received the drugs from Donnell's home, located approximately 12 miles from the Seven Clans Casino.
A drug task force agent with knowledge of the underlying facts submitted an application for a search warrant. The accompanying affidavit identified the property to be searched as Donnell's "residence" and described it as a "trailer house/mobile home" and "[a]ny outbuildings and surrounding curtilage of the [trailer.]" The affidavit conditioned probable cause on the following: (1) law enforcement maintains direct visual surveillance of Roy's vehicle from the time Wambach provides the investigative funds to Roy for the purchase of marijuana until Roy's vehicle arrives at Donnell's residence; (2) law enforcement maintains direct visual surveillance of Roy's vehicle leaving Donnell's residence and until Roy meets again with Wambach; and (3) Wambach confirms receipt of some form of controlled substance from Roy. A magistrate judge issued the warrant.

Wambach again arranged to meet Roy at the Seven Clans Casino parking lot to complete another controlled purchase. Again, Roy indicated to Wambach that he needed to obtain marijuana from his source. While under surveillance, Roy drove to a driveway which led solely to Donnell's house. An unidentified vehicle suddenly appeared and turned onto the driveway ahead of Roy. Law enforcement lost sight of Roy's vehicle as it proceeded up the driveway. Six minutes later, law enforcement regained sight of Roy's vehicle as it left Donnell's driveway and continued the surveillance until Roy made contact with Wambach near the Seven Clans Casino parking lot. Roy provided Wambach with approximately two pounds of suspected marijuana.

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

"On appeal of a denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Lemon*, 590 F.3d 612, 614 (8th Cir.2010). Probable cause to issue a search warrant exits if there is 'a fair probability that contraband or evidence of a crime will be found in a particular place.' *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). 'Anticipatory warrants are no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed.' *United States v. Grubbs*, 547 U.S. 90, 96, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006).

"The dispositive issue here is whether the triggering conditions were satisfied. The district court adopted the magistrate judge's conclusion that the triggering conditions were satisfied. Specifically, the magistrate judge concluded that 'a common sense reading of the warrant only required law enforcement to observe Roy's vehicle leaving the residential property of [Donnell], which would include the driveway that exclusively led to [Donnell's] house.' *United States v. Donnell*, No. 11–365, 2012 WL 928283, at *4 (D.Minn. Feb.2, 2012). Donnell contends the loss of continuing visual contact with Roy's vehicle for six minutes violated the first and second triggering conditions.

"The conclusion that law enforcement satisfied the triggering conditions by maintaining direct visual surveillance of Roy's vehicle entering and leaving Donnell's residence rests on the view that the residence includes the driveway at which law enforcement lost sight of Roy's vehicle. The search warrant application included maps showing Donnell's house was located in a secluded area and the parties do not dispute that the driveway leads solely to Donnell's house. The district court's common sense interpretation that the residence includes the driveway leading to Donnell's house is, in our view, not error. See *United States v. Hudspeth*, 525 F.3d 667, 674 (8th Cir.2008) ('The affidavit for a search warrant should be examined using a common sense approach, and not a hypertechnical one.'); *Gates*, 462 U.S. at 238 (endorsing a practical common-sense appraisal of whether, given the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place). An argument similar to Donnell's failed in *United States v. Vesikuru*, 314 F.3d 1116, 1123 (9th Cir.2002) (approving a common-sense rather than a hypertechnical and narrow reading of a search warrant and supporting affidavit when determining whether a triggering condition occurred).

"Accordingly, we reject the appeal and affirm the conviction"

SEARCH AND SEIZURE:
Body Cavity Search; Rectal Examination

United States v. Booker
CA6, No. 11-6311, 8/26/13

Felix Booker was convicted of possession of a five ounce rock of crack cocaine, which he had hidden in his rectum. Police officers, reasonably suspecting that Booker had contraband hidden in his rectum,

took Booker to an emergency-room doctor. The doctor, using a procedure that Booker did not consent to, intubated Booker for about an hour, rendered him unconscious for twenty to thirty minutes, and paralyzed him for seven to eight minutes. Using a finger, the doctor found and removed the crack cocaine, and turned it over to the police.

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

"Dr. LaPaglia first performed the rectal examination on Booker without medication. But Booker contracted his anal and rectal muscles while LaPaglia was attempting to examine him, preventing LaPaglia from inserting a finger in Booker's anus. As Dr. LaPaglia said, "If an individual does not want you to enter their rectum, you are not going to." LaPaglia ordered a nurse to inject muscle relaxants into Booker's left buttock. On the second attempt, Booker remained uncooperative and LaPaglia could not complete the examination, but he could feel a foreign object inside Booker's rectum, convincing LaPaglia that completion of the rectal examination was imperative. Finally, LaPaglia directed an emergency room nurse, Tammy Jones, to administer a sedative and a paralytic agent to Booker intravenously, and had him intubated to control his breathing. At 4:12 p.m., Booker was intubated. He remained intubated for about an hour, unconscious for twenty to thirty minutes, and paralyzed for seven to eight minutes. While Booker was paralyzed, LaPaglia removed a rock of crack cocaine, greater than five grams, from Booker's rectum. LaPaglia then turned over the crack rock to Officer Steakley, who took it for evidence.

"A comparison of this case to *Rochin v. California,* 342 U.S. 165 (1952), and *Winston v. Lee,* 470 U.S. 753 (1985), shows that the digital rectal examination was unreasonable. In *Rochin,* three deputy sheriffs forced their way into Rochin's bedroom based on information that Rochin was selling narcotics. The deputies saw two capsules sitting on his nightstand and asked Rochin whom the capsules belonged to. In response, Rochin grabbed the capsules and swallowed them. The deputies then handcuffed Rochin and took him to the hospital where the police directed a doctor to force an emetic solution through a tube into Rochin's stomach against his will. The stomach pumping caused Rochin to vomit up the two capsules, which were found to contain morphine. The Supreme Court held that Rochin's conviction for possessing these morphine tablets was so fundamentally unfair as to violate the Due Process Clause. The Court said the deputies' conduct 'shocks the conscience' and was 'too close to the rack and screw to permit of constitutional differentiation.'

"The similarity between the present case and *Rochin* is apparent. While factual and legal differences exist, what shocked the conscience in *Rochin* was the use of the forced emetic. Forced paralysis, intubation, and digital rectal examination is at least as shocking as stomach pumping. The main legal difference is that *Rochin* analyzed the practice under the 'fundamental fairness' standard of the Due Process Clause of the Fourteenth Amendment, while Booker bases his challenge on the Fourth Amendment's prohibition of 'unreasonable searches,' which applies to the states via the Due Process Clause of the Fourteenth Amendment.

See *Wolf v. Colorado*, 338 U.S. 25, 28 (1949). However, this difference is immaterial because investigative conduct that would shock the conscience for purposes of the Due Process Clause is 'unreasonable' for purposes of the Fourth Amendment. As the Supreme Court explained in *County of Sacramento v. Lewis*, 523 U.S. 833, 849 n.9 (1998), under modern doctrine, *Rochin* 'would be treated under the Fourth Amendment, albeit with the same result.' In short, the present case cannot be distinguished from *Rochin* in any meaningful way. Booker was subjected to an unreasonable search in violation of his Fourth Amendment rights.

"This conclusion is squarely supported by the Supreme Court's holding in *Winston v. Lee*, 470 U.S. 753 (1985). In *Lee,* a shopkeeper wounded his assailant during an attempted robbery. Lee was soon found in the neighborhood with a bullet wound to his shoulder and was arrested by the police. The police went to state court to seek an order directing Lee to undergo surgery. The Supreme Court concluded that requiring Lee to undergo surgery involving general anesthesia would be an unreasonable search. In reaching the conclusion that the forced surgery would be unconstitutional, the Court found that the following three factors weighed against its substantive reasonableness: (1) 'the extent to which the procedure may threaten the safety or health of the individual,' (2) 'the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity,' and (3) 'the community's interest in fairly and accurately determining guilt or innocence.' These factors, taken together, weigh even more strongly against the reasonableness of the procedure used on Booker.

"Because the paralysis, intubation, and digital rectal examination violated Booker's Fourth Amendment rights, we vacate the conviction and sentence, and remand to the district court for further proceedings consistent with this opinion."

SEARCH AND SEIZURE:
Cell Phones; First Circuit Limits Search

United States v. Wurie
CA1, No. 11-1792, 5/17/13

The First Circuit Court of Appeals stated that this case requires us to decide whether the police, after seizing a cell phone from an individual's person as part of his lawful arrest, can search the phone's data without a warrant. The court found, in part, as follows:

"The modern search-incident-to-arrest doctrine emerged from *Chimel v. California*, 395 U.S. 752 (1969), in which the Supreme Court held that a warrantless search of the defendant's entire house was not justified by the fact that it occurred as part of his valid arrest. The Court found that the search-incident-to arrest exception permits an arresting officer 'to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction' and to search 'the area into which an arrestee might reach in order to grab a weapon or evidentiary items.' The justifications underlying the exception, as articulated in *Chimel*, were protecting officer safety and ensuring the preservation of evidence.

Four years later, in *United States v. Robinson,* 414 U.S. 218 (1973), the Supreme Court

examined how the search-incident-to arrest exception applies to searches of the person. Robinson was arrested for driving with a revoked license, and in conducting a pat down, the arresting officer felt an object that he could not identify in Robinson's coat pocket. He removed the object, which turned out to be a cigarette package, and then felt the package and determined that it contained something other than cigarettes. Upon opening the package, the officer found fourteen capsules of heroin. The Court held that the warrantless search of the cigarette package was valid, explaining that the police have the authority to conduct 'a full search of the person' incident to a lawful arrest. Robinson reiterated the principle, discussed in Chimel, that the justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial. However, the Court also said:

> *The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.*

"The following year, the Court decided *United States v. Edwards,* 415 U.S. 800 (1974). Edwards was arrested on suspicion of burglary and detained at a local jail. After his arrest, police realized that Edwards's clothing, which he was still wearing, might contain paint chips tying him to the burglary. The police seized the articles of clothing and examined them for paint fragments. The Court upheld the search, concluding that once it became apparent that the items of clothing might contain destructible evidence of a crime, 'the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered.'

"The Court again addressed the search-incident-to-arrest exception in *United States v. Chadwick,* 433 U.S. 1 (1977), abrogated on other grounds by *California v. Acevedo,* 500 U.S. 565 (1991), this time emphasizing that not all warrantless searches undertaken in the context of a custodial arrest are constitutionally reasonable. In Chadwick, the defendants were arrested immediately after having loaded a footlocker into the trunk of a car. The footlocker remained under the exclusive control of federal narcotics agents until they opened it, without a warrant and about an hour and a half after the defendants were arrested, and found marijuana in it. The Court invalidated the search, concluding that the justifications for the search-incident-to-arrest exception—the need for the arresting officer to safeguard himself and others, and to prevent the loss of evidence—were absent. The search 'was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in Custody' and therefore could not 'be viewed as incidental to the arrest or as justified by any other exigency.'

"Finally, there is the Supreme Court's recent decision in *Arizona v. Gant*, 556 U.S. 332 (2009). Gant involved the search of an arrestee's vehicle, which is governed by a distinct set of rules, but the Court began with a general summary of the search-incident-to-arrest doctrine. Once again, the Court reiterated the twin rationales underlying the exception, first articulated in *Chimel:* 'protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.' Relying on those safety and evidentiary justifications, the Court found that a search of a vehicle incident to arrest is lawful 'when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.'

"Courts have struggled to apply the Supreme Court's search-incident-to-arrest jurisprudence to the search of data on a cell phone seized from the person. The searches at issue in the cases that have arisen thus far have involved everything from simply obtaining a cell phone's number, *United States v. Flores- Lopez*, 670 F.3d 803, 804 (7th Cir. 2012), to looking through an arrestee's call records, *United States v. Finley*, 477 F.3d 250, 254 (5th Cir. 2007), text messages, or photographs, *United States v. Quintana,* 594 F. Supp. 2d 1291, 1295-96 (M.D. Fl. 2009).

"Though a majority of these courts have ultimately upheld warrantless cell phone data searches, they have used a variety of approaches. Some have concluded that, under *Robinson* and *Edwards,* a cell phone can be freely searched incident to a defendant's lawful arrest, with no justification beyond the fact of the arrest itself. E.g., *People v. Diaz,* 244 P.3d 501 (Cal. 2011). Others have, to varying degrees, relied on the need to preserve evidence on a cell phone. E.g., *United States v. Murphy,* 552 F.3d 405, 411 (4th Cir. 2009); *Finley*, 477 F.3d at 260; *Commonwealth v. Phifer,* 979 N.E.2d 210, 213-16 (Mass. 2012). The Seventh Circuit discussed the *Chimel* rationales more explicitly in *Flores-Lopez*, assuming that warrantless cell phone searches must be justified by a need to protect arresting officers or preserve destructible evidence, and finding that evidence preservation concerns outweighed the invasion of privacy at issue in that case, because the search was minimally invasive.

"A smaller number of courts have rejected warrantless cell phone searches, with similarly disparate reasoning. In *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007), for example, the court concluded that a cell phone should be viewed not as an item immediately associated with the person under *Robinson* and *Edwards* but as a possession within an arrestee's immediate control under *Chadwick*, which cannot be searched once the phone comes into the exclusive control of the police, absent exigent circumstances. In *State v. Smith,* 920 N.E.2d 949 (Ohio 2009), the Ohio Supreme Court distinguished cell phones from other 'closed containers' that have been found searchable incident to an arrest and concluded that, because an individual has a high expectation of privacy in the contents of her cell phone, any search thereof must be conducted pursuant to a warrant. And most recently, in *Smallwood v. State*, __ So. 3d __, 2013 WL 1830961 (Fla. May 2, 2013), the Florida Supreme Court held that the police cannot routinely search the data within an arrestee's cell phone without a warrant. The court read *Gant* as prohibiting a search once an arrestee's cell phone has been removed from his person,

which forecloses the ability to use the phone as a weapon or to destroy evidence contained therein.

"The First Circuit noted that in reality, a modern cell phone is a computer, and a computer is not just another purse or address book. The storage capacity of today's cell phones is immense. Apple's iPhone 5 comes with up to sixty-four gigabytes of storage, which is enough to hold about 'four million pages of Microsoft Word documents.'

"That information is, by and large, of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records. See *United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013) (en banc) ('The papers we create and maintain not only in physical but also in digital form reflect our most private thoughts and activities.') It is the kind of information one would previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest. Indeed, modern cell phones provide direct access to the home in a more literal way as well; iPhones can now connect their owners directly to a home computer's webcam, via an application called iCam, so that users can monitor the inside of their homes remotely.

"In short, individuals today store much more personal information on their cell phones than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers that the government has invoked.

"The First Circuit Court of Appeals concluded that the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person, because the government has not convinced us that such a search is ever necessary to protect arresting officers or preserve destructible evidence. Instead, warrantless cell phone data searches strike us as a convenient way for the police to obtain information related to a defendant's crime of arrest—or other, as yet undiscovered crimes—without having to secure a warrant.

"We find nothing in the Supreme Court's search-incident-to-arrest jurisprudence that sanctions such a general evidence-gathering search. There are, however, other exceptions to the warrant requirement that the government has not invoked here but that might justify a warrantless search of cell phone data under the right conditions. Most importantly, we assume that the exigent circumstances exception would allow the police to conduct an immediate, warrantless search of a cell phone's data where they have probable cause to believe that the phone contains evidence of a crime, as well as a compelling need to act quickly that makes it impracticable for them to obtain a warrant—for example, where the phone is believed to contain evidence necessary to locate a kidnapped child or to investigate a bombing plot or incident.

"Since the time of its framing, the central concern underlying the Fourth Amendment has been ensuring that law enforcement officials do not have unbridled discretion to rummage at will among a person's private effects. Today, many Americans store their most personal papers and effects in electronic format on a cell phone, carried on the person. Allowing the police to search that data without a warrant any time they conduct a

lawful arrest would, in our view, create a serious and recurring threat to the privacy of countless individuals."

Editor's Note: There have been a variety of decisions dealing with the search of a cell telephone seized incidental to an arrest. Some federal district courts and a state court view these telephones as computers which can contain a large amount of information which should be searched by use of a traditional search warrant. See *State v. Smith*, 920 N.E.2d 949 (Ohio 2009). The federal courts of appeal that have dealt with this issue have allowed warrantless searches of cell telephones pursuant to the search incident to arrest doctrine. See *United States v. Curtis,* 635 F.3d 704 (5th Cir. 2011). Also see *People v. Diaz,* No. S166600 (CA Supreme Court, 1/13/11), at *CJI Legal Briefs*, Volume 16, Issue 2, Summer, 2011, at page 21; *United States v. Murphy,* CA4, No. 07-4607, 1/15/09, *CJI Legal Briefs*, Volume 14, Issue 1, Spring, 2009, at page 10; and *United States v. Findley*, CA5, No. 06-50160, 1/26/07, *CJI Legal Briefs,* Volume 12, Issue 4, Winter, 2008, at page 16, for decisions dealing with this issue. The United States Supreme Court will have to decide this issue based on the split in federal court decisions.

SEARCH AND SEIZURE:
Consent; Implied from Conduct

United States v. Sabo
CA7, No. 12-2700, 7/31/13

In January 2010, two Deputy U.S. Marshals knocked on Terry Sabo's trailer door hoping to locate a fugitive, Sabo's stepson. When Sabo opened the door, both deputies immediately noticed a strong odor of marijuana and heard voices coming from inside the trailer. Sabo acknowledged that his children were inside but denied that his stepson was there. The deputies asked Sabo if he was "smoking dope" with his children in the trailer, to which Sabo responded, "Get out of here." With that expletive, Sabo slammed the door shut. The deputies backed away from the trailer, moved their car out of sight, and called the local Sheriff's office for assistance. Detective Donald McCune—who knew Sabo—was among the officers that arrived.

McCune knocked on the trailer door and said, "Terry, it's the Sheriff's Department. Open the door." Sabo opened the door and stood in the doorway, physically blocking McCune's entry. McCune asked, "Terry, do you mind if I step inside and talk with you?" Sabo said nothing. Instead, he stepped back and to the side and let the door open. The conversation was casual and McCune did not force his way into the trailer.

Upon Sabo yielding the right of way, McCune entered the trailer and immediately noticed the same odor of marijuana and saw several guns leaning against a wall. Knowing that Sabo was a convicted felon, McCune had him sit on the couch while the guns were secured. McCune's fellow officers swept the trailer looking for the fugitive but found only Sabo's wife and children. McCune obtained a search warrant and seized marijuana in the subsequent search.

Sabo argues that by entering his trailer without consent, McCune violated his Fourth Amendment right to be secure in his home against unreasonable searches.

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

"The Court carefully examines the bases for a government entry into the home because unjustified entry is the 'chief evil' against which the Fourth Amendment is directed. *Payton v. New York*, 445 U.S. 573, 585 (1980). In these cases the Court presumes that a warrantless search of a home is unreasonable. But in this case we can move quickly to the well-established exception to both the warrant and the probable cause requirements of the Fourth Amendment: consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent can come in many forms, but it must always be given voluntarily. *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir. 1976).

"As the district court noted, Sabo does not challenge McCune's entry on the grounds that Sabo's nonverbal response was involuntary, nor does he offer any evidence of duress or coercion. Rather, Sabo only argues that he never consented to McCune entering his residence. As such, the crux of this appeal is whether Sabo's nonverbal response constituted implied consent for McCune to enter Sabo's residence. Whether Sabo impliedly consented to McCune's entry is a question of fact to be determined under the totality of the circumstances, and the trial court's determination will be reversed only if it is clearly erroneous. See *United States v. Risner*, 593 F.3d 692, 694 (7th Cir. 2010).

"Implied consent may be manifested verbally or nonverbally. See *Harney v. City of Chi.*, 702 F.3d 916, 925 (7th Cir. 2012). To be sure, one does not consent to the government entering his home by simply answering the door. *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004). Here, however, Sabo did not simply answer the door. He stepped back and to the side so that McCune could enter. What is more, Sabo's actions came in direct response to McCune's request to enter. In other words, McCune asked and Sabo answered, albeit nonverbally. We have recently noted that "this court, on more than one occasion, has found that the act of opening a door and stepping back to allow entry is sufficient to demonstrate consent." *Harney*, 702 F.3d at 925 (citing *United States v. Walls*, 225 F.3d 858, 862-63 (7th Cir. 2000) and *Sparing v. Vill. of Olympia Fields*, 266 F.3d 684, 690 (7th Cir. 2001)). We make the same finding here—Sabo's nonverbal cue manifested his implied consent for McCune to enter."

SEARCH AND SEIZURE:
Consent; Limitation on Consent

United States v. Cotton
CA5, No. 12-40563, 7/2/13

In this case, the issue was whether an officer's extensive search of Marvin Maurice Cotton's entire vehicle violated his Fourth Amendment right since Cotton limited his consent to a search of his luggage.

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

"Since Cotton properly *limited* his consent to a search of his luggage, that consent would permit Viator to enter the car and search those items. It is also true that if, during such a limited entry into the vehicle, Viator were to discover evidence of a hidden compartment, that discovery might provide probable cause to search the suspected compartment. The video evidence and Viator's own testimony,

however, reveal that he discovered the loose screws and tool markings on the driver's-side rear door panel *not* as he was trying to locate Cotton's luggage and *not* as he was examining the contents of such luggage. Rather, after locating and searching the luggage in the backseat area of the car, Viator expanded his search for evidence of contraband to the vehicle itself by proceeding to examine the driver's-side rear door. Authority to enter and search the car for Cotton's luggage was not authority to search discrete locations within the car where luggage could not reasonably be expected to be found. Neither was it justification for lingering in and around the vehicle for 40 minutes—much longer than a search for and of Cotton's luggage should or could conceivably last.

"*United States v. Solis* 229 F.3d 420 (5th Cir. 2002) is instructive. In Solis, an officer, with knowledge that a gun was resting on a shelf in the defendant's bedroom and with the defendant's consent to search for the gun, moved a cooler underneath the shelf to use as a step to reach the gun. Moving the cooler revealed heroin, evidence of which the defendant sought to suppress. Because the uncontroverted evidence showed that the cooler was moved only to effectuate the search for the gun, for which consent had been voluntarily given, the officer did not exceed the scope of the consent, and the heroin discovered in plain view was held admissible. Here, in contrast, Viator did not discover the hidden compartment in plain view while permissibly seeking luggage to search for drugs, but while searching for other places inside the car that he speculated might conceal drugs."

SEARCH AND SEIZURE: **Curtilage**

United States v. Bausby
CA8, No. 12-3212, 7/11/13

Eric Haase was driving home from work when he passed by Chris Bausby's residence in Kansas City, Missouri. Haase noticed a motorcycle inside the chain-link fenced front yard of the residence that resembled a motorcycle stolen from him some months earlier. The motorcycle had a "For Sale" sign next to it, bearing a phone number. Haase called the police and waited near the Bausby residence for officers to arrive.

Officers Cole Massey and Shawn Oden of the Kansas City, Missouri Police Department (KCPD) were dispatched to the Bausby residence. After they arrived, Haase pointed out the motorcycle he believed to be his. Haase explained that the motorcycle appeared to have alterations he had made, and he provided the Vehicle Identification Number (VIN) for his stolen motorcycle. The officers entered the front yard of Bausby's residence through an unlocked, unchained gate in the chain-link fence. The chain-link fence had at least one "Beware of Dog" sign, but there was no dog in the front yard at the time. The fence did not bear a "No Trespassing" sign.

The front door of the residence was only accessible after entering the fenced-in front yard. The officers knocked on the front door of the residence, but no one answered. The officers then checked the VIN number on the motorcycle in the yard, confirming that it matched the VIN number Haase had provided to them and confirming with a dispatch officer that it matched the VIN number Haase had reported two months

earlier to police. The officers then observed several automobiles in an unfenced driveway shared with a neighboring residence. Some of the automobiles had missing VIN numbers. An Oldsmobile Alero that was in the shared driveway and still had a VIN number had also been reported stolen.

In his motion to suppress, Bausby, appealing the denial of his motion to suppress, claimed that the officers' warrantless entry into the chain-link fenced front yard of his residence violated the Fourth Amendment because that area constituted the curtilage of his home and the officers had no justification for the warrantless invasion.

The Court of Appeals for the Eighth Circuit stated that at the Fourth Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Florida v. Jardines,* 133 S. Ct. 1409, 1414 (2013). The area 'immediately surrounding and associated with the home—what our cases call the curtilage—is regarded as part of the home itself for Fourth Amendment purposes.

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

"Determining whether a particular area is part of the curtilage of an individual's residence requires consideration of factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. *United States v. Dunn,* 480 U.S. 294, 300 (1987)). Although the facts of each case are unique, we resolve curtilage questions with particular reference to four factors: 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. A given *Dunn* factor may weigh in favor of finding that the area is curtilage, while another may not. These factors are not applied mechanically or in isolation.

"We agree with the district court that the area of the front yard where the motorcycle was displayed does not constitute curtilage. A couple of the factors support a finding of curtilage. For example, the front yard is in close proximity to the home, and it is enclosed with a chain-link fence. See *Boyster,* 436 F.3d 986 (8th Cir. 2006) (noting that curtilage is typically comprised of land adjoining a house, often within some type of enclosure such as a fence). However these factors are outweighed by the fact that Bausby took affirmative steps to draw the attention of the public to the front yard of his residence. Specifically, he used this area to display the motorcycle and other items he was selling to the public who passed by his residence. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz v. United States*, 389 U.S. 347, 351 (1967). Moreover, while the area was fenced, the fence was only a four or five foot chain-link fence and not a fence designed to limit the observation of those passing by. Also, a visitor who wished to approach the front door of the residence would have to enter the fenced front yard first. Cf. *Jardines,* 133 S. Ct. at 1415 (An implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then, absent invitation to linger longer, leave.). Considering the *Dunn* factors in total, the district court did not err when it

determined that the front yard of Bausby's residence where he displayed Haase's stolen motorcycle was outside the curtilage of the home, and therefore the officers could enter that area to observe the motorcycle and its VIN number more closely without violating Bausby's Fourth Amendment rights."

SEARCH AND SEIZURE:
Curtilage; Open Field

United States v. Mathias
CA8, No. 12-3092, 7/31/13

Officer Murray, on May 10, 2011, received information from an anonymous source that someone was growing marijuana plants in a back yard on the 300 block of South Jefferson Street in Mount Pleasant. Officer Murray's investigation led him to conclude the source had been referring to the only completely enclosed back yard on the block, which was associated with a house in which Mathias and his wife lived.

Mathias's back yard was enclosed by a tall fence constructed of upright wooden slats spaced approximately a quarter-inch apart. After Officer Murray's initial attempts to view the enclosed area were unsuccessful, he contacted a neighbor living on the adjacent property to the north of Mathias's residence. Officer Murray obtained the neighbor's permission to walk along the neighbor's southern property line. Officer Murray was, however, unaware Mathias's fence was set approximately eighteen inches south of the property line. As a result, when walking along the north side of the fence, Officer Murray was actually physically trespassing along an eighteen-inch strip of grass and weeds on Mathias's property.

While on the strip, Officer Murray came within an inch of the fence and, without manipulating it, looked through the gaps in the fence into the back yard. There, he saw a number of potted, sprouting marijuana plants. Officer Murray then applied for and received a search warrant for Mathias, Mathias's wife, and their residence. Upon execution of the warrant, police seized 277 marijuana plants, scales, packaging material, $1,400.00 in currency, and dried marijuana.

Mathias contends Officer Murray violated his rights under the Fourth Amendment, arguing (1) the strip of land from which Officer Murray observed his back yard was curtilage; and (2) Officer Murray's actions while on the strip constituted an unlawful search.

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

"The Fourth Amendment protects the curtilage of an individual's residence, but not surrounding open fields. *United States v. Boyster*, 436 F.3d 986, 991 (8th Cir.2006) (citing *Hester v. United States*, 265 U.S. 57, 59 (1924)). Curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and is typically comprised of land adjoining a house, often within some type of enclosure such as a fence. For the purposes of the Fourth Amendment, an open field may be any unoccupied or undeveloped area outside of the curtilage and need be neither open nor a field as those terms are used in common speech. *United States v. Dunn*, 480 U.S. 294, (1987).

"In assessing whether a particular area is curtilage, we determine whether the area in

question is so intimately tied to the home itself" that we should extend the Fourth Amendment's protection to it. We consider factors that bear on whether an individual reasonably may expect that the area in question should be treated as the home itself. These factors are 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 Supreme Court identified the central component of this inquiry as whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life.

"The balance of the *Dunn* factors weighs in favor of the area being an open field. The strip of land was close to Mathias's home, which weighs in favor of it being curtilage. The remaining factors, however, all weigh in favor of the strip being an open field. The strip of land was not included within Mathias's fence. In addition, there is no indication Mathias or his wife put the relatively undeveloped strip to uses associated with the sanctity of the home or privacies of life. Similarly, there is no indication Mathias made any efforts to protect the area from observation by passersby as the strip of land remained open to view. Mathias's only argument is that the district court should have placed more significance on the proximity factor than the others. He, however, advances no persuasive grounds for doing so. We are convinced the strip constituted an open field for the purposes of the Fourth Amendment."

SEARCH AND SEIZURE:
Franks Hearing; No Intent to Mislead

United States v. Williams
CA7, No. 11-3129, 5/20/13

Federal agents and local police executed a search warrant at Collet D. Williams' residence and found five kilograms of marijuana, a handgun, and several scales. Williams moved to suppress, arguing that the warrant was invalid because officers presented the warrant judge with an affidavit that contained false statements and misleading omissions made with at least reckless disregard for the truth. The district court held a Franks hearing and found that the officers did not recklessly disregard the truth, and that even if they had, once the errors were removed and the omitted material included, probable cause would have remained for a search warrant to issue. Williams was convicted of being an illegal alien in possession of a firearm.

The Seventh Circuit affirmed, stating that the police were rushing to draft an application and hastily omitted both favorable and unfavorable evidence from the affidavit. The court particularly noted omission of the information from monitored calls involving Williams that was "clearly sufficient to establish probable cause." That omission provides a reasonable basis to believe that the police did not intend to mislead.

SEARCH AND SEIZURE:
Stop and Frisk; Basis For Stop
United States v. Hightower
CA8, No. 12-2222, 6/17/13

In this case, the sole issue on appeal is whether there was reasonable suspicion to support the officer's investigatory stop of Carlton Hightower.

On August 26, 2011, the Paris, Arkansas Police Department received an anonymous call suggesting police were needed at the Paris Boys' and Girls' Club ("Boys' Club"). They treated the call like an emergency because the caller hung up without providing additional information. Three officers from the Paris Police Department initially responded to the call, and a fourth officer joined shortly after their arrival. Finding no problem at the Boys' Club, one of the officers noticed a group of 10 to 15 people across the street at an apartment complex. To at least one officer, the group appeared hostile and on the verge of conflict. The officers determined the emergency call was probably about this group and moved across the street to investigate.

As the officers began to cross the street, the group began to disperse. Officers observed Hightower and his girlfriend leave the area and enter his nearby car. Hightower began to back the car out of the parking lot at a slow rate of speed, and officers shouted for him to stop. One officer drew his Taser and stood in front of the car, but Hightower began to pull forward a few feet. Finally, after another officer walked alongside the slow-moving car and drew his firearm, Hightower stopped the car. The officer walking alongside the car testified the windows were down and he could smell the odor of alcoholic beverages coming from the vehicle.

Once the vehicle stopped, officers ordered Hightower to exit the vehicle. Hightower complied with the instruction, rolling up the car windows and locking the doors as he exited. Officers testified Hightower was cooperative, but also "agitated," after being stopped. Officers noticed open beer containers in the car and asked Hightower whether he had been drinking. Hightower admitted he had been drinking, and the officers subsequently arrested him for public intoxication. After his arrest, Hightower refused to consent to a search of his car. After determining the vehicle lacked insurance, the officers arranged to have it towed. An inventory search of the vehicle prior to towing yielded marijuana and a firearm.

"Law enforcement officers may make an investigatory stop if they have a reasonable and articulable suspicion of criminal activity." *United States v. Bustos-Torres,* 396 F.3d 935, 942 (8th Cir. 2005) (citing *Terry,* 392 U.S. at 25-31). A reasonable suspicion is a particularized and objective basis for suspecting criminal activity by the person who is stopped. Whether the particular facts known to the officer amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances. Here, the district court identified several factors supporting reasonable suspicion: the initial emergency call, the area of the incident, the behavior of the individuals at the scene, and Hightower's own behavior. The district court concluded, based on the totality of the circumstances, that these factors supported a finding of reasonable suspicion.

Upon review, the Eighth Circuit Court of Appeals agreed, finding in part as follows: "Several police officers responded to a vague,

anonymous emergency call suggesting officers were needed at the Boys' Club. At least one officer testified the area near the Boys' Club, including the apartment complex where Hightower's stop occurred, had been the scene of fights, drug arrests, and other criminal activity. Finding no emergency at the Boys' Club, one officer noticed a group of individuals across the street posturing as if they were about to fight, or already had fought. The officer testified he heard 'raised voices and unsavory language' from the group. In sum, the officers were presented with an emergency call, in an area of town known for fighting and criminal activity, and a nearby group of individuals who appeared on the verge, or in the immediate aftermath, of unlawful behavior.

"A similar set of circumstances existed in *United States v. Dupree*, 202 F.3d 1046 (8th Cir. 2000). Police received an anonymous tip that a group of men were selling drugs in an alley. A responding officer knew drug trafficking took place in the area. As officers arrived, the group of men dispersed. Officers followed three of the men and approached them to talk. One of the men appeared to discard a small object that the officers believed was evidence of drug trafficking. We concluded reasonable suspicion existed to stop the three men. The same general circumstances supporting reasonable suspicion in *Dupree*—an anonymous emergency call, a high-crime area, and apparent unlawful behavior—also existed here.

"Hightower's own behavior during the incident also weighs in favor of finding reasonable suspicion. The parties present contrasting versions of Hightower's behavior: the Government suggests Hightower 'attempted to flee the parking lot by hurrying to his car,' while Hightower states he simply began walking away from police and did not run to his car, jump in, and attempt to drive off at a high rate of speed. The district court adopted an intermediate view of the facts, never stating Hightower hurried away from the officers but noting that from the officers' perspective, Hightower ignored repeated orders to stop, and continued to attempt to flee. This factual conclusion by the district court is not clearly erroneous and supports a finding of reasonable suspicion. Although simply ignoring the police cannot be the basis for reasonable suspicion, conduct beyond merely ignoring, such as attempting to flee, can create reasonable suspicion to support a *Terry* stop. See *United States v. Gilliam*, 520 F.3d 844, 847 (8th Cir. 2008).

"Hightower attacks the weight of each factor individually, then argues no reasonable suspicion can exist since each factor cited by the district court merits little or no weight standing alone. Even if a single factor identified by the district court, when viewed in isolation, did not support a finding of reasonable suspicion, our precedent prohibits such a fragmented approach to reasonable suspicion. When evaluating whether reasonable suspicion for a *Terry* stop exists, we view the officers' observations as a whole, rather than as discrete and disconnected occurrences. *United States v. Poitier,* 818 F.2d 679, 683 (8th Cir. 1987).

"In sum, based on the totality of the circumstances—including the emergency call, the history of criminal activity in the area, the behavior of the group, and Hightower's own behavior—the officers had reasonable suspicion to justify a *Terry* stop of Hightower."

SEARCH AND SEIZURE:
Stop and Frisk; Timing of Stop
United States v. Valerio
CA11, No. 12-12235, 6/20/13

In this case, the question is whether the officers' stop-and-frisk of Robert Valerio, one week after they had last observed him engage in any suspicious activity, was constitutional under the Fourth Amendment.

Valerio became the target of an investigation of the Drug Enforcement Administration (DEA) on July 27, 2011, after he visited Green Touch Hydroponics ("Green Touch"), a retail store selling hydroponic gardening equipment. Special Agent David Lee Hibbs of the DEA was conducting surveillance at Green Touch under the view that people who purchased hydroponic equipment were likely to be involved in growing marijuana. While conducting surveillance, Agent Hibbs saw a black Chevrolet truck enter the parking lot in the back of the store. He noticed that the truck had no license plate and that it backed into a parking space, which he surmised was an attempt to conceal the truck's missing license plate. Agent Hibbs watched the driver, later confirmed to be Mr. Valerio, walk into the store and return about fifteen to twenty minutes later with a white plastic shopping bag.

Agent Hibbs followed Mr. Valerio as he drove out of the parking lot and noted that Mr. Valerio kept looking at his rearview mirror, which Agent Hibbs interpreted as nervousness at the prospect of being followed by law enforcement. Eventually, Mr. Valerio pulled over to the side of the road and walked towards the rear of the vehicle holding what appeared to Agent Hibbs to be a license plate. As Agent Hibbs was traveling past Mr. Valerio's truck, he could not see what Mr. Valerio did with the object in his hands.

Agent Hibbs next encountered Mr. Valerio approximately two weeks later on August 17, when he was again conducting surveillance at Green Touch. He observed Mr. Valerio drive the same black truck into the parking lot without a license plate, back into a spot, and enter the store. Mr. Valerio left the store after about twenty minutes and drove away but shortly thereafter stopped at a 7-11 parking lot. Another investigating agent observed that the truck had a license plate affixed to it when it left the 7-11 parking lot. The DEA agents followed Mr. Valerio to a warehouse in Deerfield Beach, which the agents thought was suitable for a marijuana grow operation. Once there, the agents saw Mr. Valerio park near bay 15 of the warehouse and walk toward the warehouse building but did not see where he went or witness anything else of note.

The next night, August 18, DEA agents conducted surveillance of the area around bay 15 of the warehouse and observed lights emanating from a door in the area of bay 15, though they could not be sure which specific door. Nearly a week later on August 24, the Broward County Sheriff's Office brought a K-9 to the warehouse to sniff for drugs. The K-9 sniffed all of the doors on the side of the warehouse where bay 15 was located but only alerted to bay 14. Based on this information, investigating agents obtained a search warrant for bay 14, which they served that same day. Rather than corroborating their previous suspicions of Mr. Valerio, their search failed to uncover any new evidence that Mr. Valerio was running a marijuana grow operation out of one of the bays. They discovered that both

bay 14 and the adjoining bay 13 were owned by Jeremy Staska, who operated a recording studio there.1 Mr. Staska told the investigating officers that bands regularly recorded in the studio until late at night, which explained the lights coming from underneath the bay door on the night of August 18. He also estimated that a third of the bands that used his studio smoked marijuana while recording. When shown a picture of Mr. Valerio, Mr. Staska told the officers that Mr. Valerio was friends with a mechanic who worked at the warehouse and that it was possible that he rented a bay on the other side of the warehouse. After failing to find any evidence that Mr. Valerio was involved in a marijuana grow operation from the search of bays 13 and 14 and the K-9's failure to alert to the presence of drugs in bay 15, Broward County Sherriff's Office Detective Scott Ambrose directed DEA Special Agent Joseph Ahearn and Detective Joseph Lopez to go to Mr. Valerio's home to attempt a "voluntary citizen encounter," in hopes of obtaining useful evidence based on Mr. Valerio's cooperation.

The agents drove to Mr. Valerio's home but did not knock on his door and ask to speak with him, as instructed. Instead, they waited across the street until he emerged from his house and entered his truck, which was parked in his driveway. At that point, the officers blocked his exit from the driveway with their vehicle and Agent Ahearn got out of his vehicle and approached Mr. Valerio, with his gun drawn and pointed in the direction of Mr. Valerio, ordering him in a loud voice to get out of his truck. Agent Ahearn was dressed in street clothes but had on a bulletproof vest, with a black placard reading "Police" over his clothes. When Mr. Valerio stepped out of his truck, Agent Ahearn holstered his gun and immediately conducted a full-body pat-down search of Mr. Valerio's person and escorted him to the front of his truck. Detective Lopez then asked Mr. Valerio if he operated any warehouses in the area. Mr. Valerio initially stated that he did not. But following further questioning, Mr. Valerio admitted to growing marijuana inside bays 15 and 16 at the Deerfield Beach warehouse.

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

"The Fourth Amendment provides that the right of the people to be secure…against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. U.S. Const. Amend. IV. Before *Terry,* the Supreme Court interpreted the Fourth Amendment to require police officers to have probable cause or a warrant to justify any seizure of an individual. *Dunaway v. New York*, 442 U.S. 200, 207-08 (1979). But in *Terry,* the Court held for the first time that not all seizures must be supported by probable cause to comport with the Fourth Amendment. Specifically, the Court recognized that there was 'an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.' *Terry,* 392 U.S. at 20. In that limited context, the Court carved out an exception to the Fourth Amendment's default rule that all seizures must be supported by probable cause and held that officers could 'conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.' *Illinois v. Wardlow,* 528 U.S. 119, 123 (2000).

"The investigative stop contemplated by *Terry* is not a policing tool that can be constitutionally deployed in any context in which law enforcement has reasonable suspicion that an individual is involved in criminal activity. Rather, it may be used only within the 'rubric of police conduct' addressed in *Terry*, for which the timing and circumstances surrounding the investigative stop matter. The exception established in *Terry* to the general Fourth Amendment requirement that all seizures be supported by probable cause is justified by the exigencies associated with law enforcement 'dealing with…rapidly unfolding and often dangerous situations on city streets." *Terry*, 392 U.S. at 10. *Terry* stops are thus limited to situations where officers are required to take "swift action predicated upon the on-the-spot observations of the officer on the beat."

"Indeed, the Court in *Terry* emphasized that in creating a narrow exception to the probable cause requirement, it did not 'retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.' In other words, the police may not use *Terry* as an end-run around the warrant requirement in the context of a standard, on-going police investigation.

"The timing of and circumstances surrounding the officers' seizure of Valerio in this case places it well outside of the *Terry* exception to the probable cause requirement. The stop here was not responsive to the development of suspicion within a dynamic or urgent law enforcement environment. Rather, the officers went to Valerio's home nearly a week after they had last observed him do anything. Given this delay and the complete absence of any contemporaneous observations of Valerio that would necessitate 'swift' law enforcement action, to situations where officers are required to take "swift action predicated upon the on-the-spot observations of the officer on the beat.

"We cannot say that the underlying purposes behind *Terry*'s exception to the probable cause requirement were in any way present when the officers seized Valerio. The opportunity to *Terry* stop a suspect, a law enforcement power justified by and limited to the exigent circumstances of the moment, cannot be put in the bank and saved for use on a rainy day, long after any claimed exigency has expired. Thus, the seizure of Valerio did not qualify for the *Terry* exception to the Fourth Amendment's probable cause rule. Instead, the passage of time between Valerio's suspicious activity and the officers' seizure of him made it entirely practicable for law enforcement officers to proceed with their investigation in a manner consistent with the default requirements of the Fourth Amendment, which only allow for a seizure upon a warrant or probable cause accompanied by well-defined exigent circumstances.

"Moreover, no exigency emerged from the simple observation that Valerio had exited his house and entered his truck. As the government does not contend that its officers had probable cause that Valerio was involved in criminal activity at the time they seized him, the seizure of Valerio was unconstitutional under the circumstances."

SEARCH AND SEIZURE: **Vehicle Search; Consent; Failure to Give Miranda Warnings**

United States v. Capps
CA8, No. 13-1196, 6/11/13

On July 28, 2011, Sergeant Michael Carson ("Sgt.Carson") of the Missouri State Highway Patrol observed Dennis Ray Capps driving on Missouri Highway 143 in Wayne County. Sgt. Carson recognized Capps and was aware both that Capps's license was suspended and that there was an active felony warrant for his arrest. In response, Sgt. Carson initiated a traffic stop. After confirming the existence of the warrant and the license suspension, Sgt. Carson arrested Capps for both violations. During the traffic stop, Sgt. Carson also performed a license plate check on Capps's car and discovered that the plates were registered to a different person and a different car, in violation of Missouri law. Sgt. Carson then sought permission for state troopers to conduct a search of the vehicle. Capps initially told Sgt. Carson to check the trunk for a second set of license plates. Sgt. Carson clarified that he wanted to search the entire vehicle, and Capps eventually responded "just go ahead and look." During the course of the search, a trooper found a bag under the hood of Capps's vehicle. The bag held 165 grams of a substance containing 138 grams of actual methamphetamine. Capps's wife was in the car at the time, and Capps told the officer that the drugs belonged to him, not his wife.

Capps filed a motion to suppress the evidence seized from the car. He contended his Fourth Amendment rights were violated when troopers searched the entire vehicle because any consent he provided was involuntary, and even the scope of this involuntary consent was limited to a search of the trunk. The district court denied the motion. After viewing a video of the traffic stop, the district court determined that Capps had voluntarily consented to a search of the entire vehicle. The district court also concluded that, even if Capps had not consented, there was no Fourth Amendment violation because state troopers inevitably would have discovered the methamphetamine as part of an inventory search. The Government was allowed to introduce the contested evidence at trial, and a jury found Capps guilty of possession with intent to distribute at least fifty grams of methamphetamine.

At the time he committed the instant offense, Capps had two prior felony drug convictions. Section 841(b)(1)(A)(viii) requires district courts to sentence such offenders to life in prison. At the sentencing hearing, Capps objected that a life sentence would violate the Eighth Amendment's prohibition on cruel and unusual punishment. The district court determined that the congressionally mandated minimum sentence did not violate the Eighth Amendment. On appeal, Capps argued the district court erred in denying his motion to suppress. He also urged the court find that application of § 841(b)(1)(A)(viii)'s mandatory life sentence violates the Eighth Amendment because it is grossly disproportionate to the offense he committed.

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

"When reviewing the denial of a motion to suppress, we review the district court's factual findings for clear error. *United States*

v. Anderson, 688 F.3d 339, 343 (8th Cir. 2012). Capps first contends that the evidence should have been suppressed because any consent he provided was involuntary. 'The voluntariness of a consent to a search is a factual question that is reviewed for clear error.' *United States v. Saenz*, 474 F.3d 1132, 1136 (8th Cir. 2007). Courts ascertain voluntariness by analyzing the totality of the circumstances, looking both to characteristics of the defendant (such as his age, general intelligence, level of intoxication, and likely awareness of his rights based on prior encounters with law enforcement) and the circumstances surrounding the request to search (such as whether law enforcement made the request in a public location, threatened the defendant, and *Mirandized* him prior to attempting to search the vehicle).

"The district court did not clearly err because the substantial majority of these factors weigh in favor of finding that Capps voluntarily consented to the search. Capps was in his thirties at the time of the incident and does not contend to possess below average intelligence or any other barriers to effective communication. One of the troopers who spoke with Capps at the police station after the traffic stop testified that Capps appeared sober at the time, and Capps has not argued that his state of mind was otherwise. Capps had prior interactions with law enforcement and was therefore more likely to be aware of his rights. The circumstances of the request were also conducive to voluntary consent. Capps does not allege that the troopers coerced him, and the incident occurred on the side of a public highway. Because troopers never provided Capps with *Miranda* warnings before asking to search the vehicle, Capps argues that any consent he subsequently gave was involuntary. This is a relevant factor to consider, but we have not required an officer to provide *Miranda* warnings before requesting consent to search. The weight of the other factors indicates that the absence of *Miranda* warnings prior to the search does not nullify Capps's otherwise voluntary consent."

"Capps argues that even if his consent was voluntary, the troopers exceeded the scope of his partial consent when they searched beyond the trunk of the car. The boundaries of a consensual automobile search are confined to the scope of the consent. *United States v. Siwek*, 453 F.3d 1079, 1084 (8th Cir. 2006). We determine the scope of consent by considering what an objectively reasonable person would have understood the consent to include. *United States v. Urbina*, 431 F.3d 305, 310 (8th Cir. 2005). When Sgt. Carson initially asked Capps if he could search the car, Capps responded by telling Sgt. Carson he could look in the trunk for an additional set of license plates. Sgt. Carson specified, 'I just don't want to look in the trunk, I want consent to search your vehicle.' Capps reiterated that Sgt. Carson could look in the trunk, explaining he never gives consent for law enforcement to search his vehicle. Sgt. Carson persisted in clarifying that he wanted to search 'the vehicle, the passenger compartment, the driver area, the entire vehicle,' but reminded Capps that he could refuse this request if he wished. Capps then responded 'just go ahead and look.' Sgt. Carson again clarified the scope of Capps's consent by asking 'so you're giving me consent to search your vehicle?' Capps repeated the same response, 'go ahead and look.' Accordingly, the district court did not err in concluding that an objectively reasonable person would have understood Capps to have consented to a search of the entire vehicle.

SEARCH AND SEIZURE:
Vehicle Search; Expectation of Privacy
United States v. Castellanos
CA4, No. 12-4108, 5/29/13

On September 20, 2010, Captain Kevin Roberts of the Reeves County, Texas, Sheriff's Department was conducting a routine patrol at a truck stop near Pecos, Texas. He observed a Direct Auto Shippers ("DAS") commercial car carrier at a fuel filling station, and became suspicious that one of the vehicles being transported on the car carrier, a Ford Explorer (the "Explorer"), bore a dealership placard in lieu of a regular license plate.

Upon questioning the driver of the car carrier about the Explorer, Roberts was provided shipping documents identifying the owner of the vehicle as Wilmer Castenada. The documents also reflected a trip origin in California with a final destination for delivery of the vehicle in Greensboro, North Carolina. Roberts attempted to contact Castenada using the phone number provided to DAS, but received no answer. He then attempted to verify the origin and destination addresses provided to DAS, but the California address was not associated with anyone bearing Castenada's name, and the North Carolina address matched two unrelated businesses. When Roberts contacted those businesses, their representatives each stated they had never heard of Castenada and were not expecting delivery of a vehicle.

Unable to contact Castenada, Roberts asked the driver of the DAS car carrier for permission to search the Explorer. The driver consented, and Roberts opened the Explorer and began to search the interior of the vehicle. He immediately noticed "grass and stuff" in the utility area, which, in his view was inconsistent with the Explorer coming from a dealership. He also noticed the "strong odor of Bondo," a compound commonly used in the repair and after-market alteration of vehicles. Roberts observed fresh tool marks where the rear seats were anchored to the floor, indicating those had recently been removed or installed. When he pounded on the rear floorboard, Roberts noticed an inconsistency in the sound on the passenger side above the gas tank.

Roberts then inserted a fiber optic scope into the Explorer's gas tank in order to peer into its interior. When he did so, Roberts observed several blue bags floating in the tank. He then asked the car carrier driver if he (Roberts) could take custody of the Explorer. The driver consented and Roberts, with other officers, took possession of the Explorer and transported it to another location for further examination. When Roberts and other officers examined the Explorer in more detail, they found that the gas tank had been opened and resealed with Bondo, and recovered 23 kilogram-sized bricks of cocaine with a street value of approximately $3 million.

Subsequently, DAS informed Roberts that someone claiming to be Castenada had been calling DAS to inquire about the delivery of the Explorer. Using new contact information for Castenada received from DAS, Roberts called the telephone number claiming to be an employee of a wrecker service in Texas. Roberts falsely informed the individual claiming to be Castenada that the driver of the DAS carrier had been arrested and his cargo impounded so that Castenada would

be required to travel to Texas in order to claim the Explorer. A few days later Roberts learned that someone, later identified as Arturo Castellanos, had arrived locally and was waiting for a ride to the wrecker service to claim the Explorer.

Police located and detained Castellanos, who had in his possession the title to the Explorer, the DAS tracking number for that vehicle, and a piece of paper bearing Roberts' phone number from the earlier calls. Castellanos waived his *Miranda* rights, and told Roberts that he was in the process of purchasing the Explorer from Castenada, who lived in North Carolina. He then explained that Castenada advised him to go from Castellanos' home in California to Texas to retrieve the Explorer, then drive it to Castenada in North Carolina where Castellanos would pay Castenada for the vehicle. Castellanos would then drive the Explorer back to California. After Roberts expressed considerable skepticism at his story, Castellanos terminated the interview.

Prior to trial, Castellanos moved to suppress the items contained in the duffle bag and the cocaine found in the gas tank. The government's evidence adduced at the suppression hearing consisted entirely of testimony from Roberts, who detailed the search and seizure of the vehicle and the subsequent investigation that lead to the arrest of Castellanos.

Notably, Castellanos did not introduce any evidence to show that he owned the Explorer at the time Roberts conducted the warrantless search or had permission to use the vehicle. Although Castellanos appeared in Texas with a title document to the Explorer, he did not put the title into evidence or otherwise attempt to demonstrate any ownership or possessory interest in the vehicle. Castellanos' out-of-court statements, as relayed by Roberts, made clear that Castellanos himself maintained that Castenada was a different person, insofar as he claimed the purchase of the Explorer from Castenada was an incomplete transaction. Castellanos made no showing that he and Castenada were one and the same person or that Castenada was his alias.

After hearing argument, the district court denied Castellanos motion with regard to the automobile, which had been given over to a common carrier with addresses which were ascertained to be false addresses. The District Judge stated that there was no legitimate expectation of privacy at that point. The shipper's address was false. The person who was to receive it was a false address.

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

"When attempting to determine whether a defendant has a reasonable expectation of privacy in property that is held by another, we consider such factors as 'whether that person claims an ownership or possessory interest in the property, and whether he has established a right or taken precautions to exclude others from the property.' *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). Here, Castellanos asserted to Roberts that he was purchasing the Explorer, but his claim is not substantiated in any way by the record. Castellanos did not enter the title of the Explorer into evidence, nor did he establish that he purchased the vehicle with a bill of sale, Division of Motor Vehicles registration, or anything else. And there is no evidence that, if he purchased the Explorer at all, he did so prior to the search.

"Parties other than owners may possess a reasonable expectation of privacy in the contents of a vehicle. See, e.g., *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 949 n.2 (2012) (observing that although the defendant was not the registered owner of the searched vehicle, he was the 'exclusive driver' and the Court thus did not consider the Fourth Amendment significance of Jones's status.") However, Castellanos offered no evidence that he had any such interest, though he bore the burden of proof. For example, Castellanos presented no evidence that Castenada (or anyone else) had granted him permission to use the vehicle or act as his agent with DAS, or any other right of any kind to the vehicle. This is not a case, like *Jones*, where the defendant has established an ownership, or even a possessory interest in the vehicle.

"Accordingly, this is not the type of case where a defendant has established such a close connection to the vehicle that is subject to search that he may claim a possessory interest in it. Furthermore, although individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names, *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992), we note that Castellanos adduced no evidence at the suppression hearing demonstrating that the name 'Wilmer Castenada' was simply an alias. Instead, Castellanos' position was that he and Castenada were two separate individuals engaged in a sale transaction as testified by Roberts. Indeed, Castellanos represented to the trial court that there is no factual dispute here questioning the facts as rendered by Detective Roberts. In the absence of evidence that Castenada was Castellanos' alter ego or a fictitious name, this case is more closely aligned with *United States v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984), a case in which we held that a defendant lacked legitimate expectation of privacy in a package that was addressed to a third party.

"In sum, the evidence heard by the district court at the suppression hearing failed to support a conclusion that Castellanos had anything more than a distantly attenuated connection to the Explorer. Castellanos bore the burden to show that he had a reasonable expectation of privacy, and he has not done so. Having failed to carry his burden, Castellanos cannot challenge the warrantless search of the Explorer."

SEARCH AND SEIZURE:
Vehicle Search; Expectation of Privacy

Wilson v. State, No. CR-12-280
2013 Ark. App. 337, 5/22/13

Raymond Wilson, who is a resident of Malden, Missouri, was arrested after a canine search revealed cocaine inside a rental vehicle that he was driving on Interstate 55 in Mississippi County. Several days prior to the stop, authorities in Missouri had placed a global positioning-satellite (GPS) tracking device on the vehicle. Wilson argued at the hearing on his motion to suppress that the placement of the GPS device and the search of the vehicle were done in violation of his constitutional rights. He also argued that he was unreasonably detained following the traffic stop.

At the hearing, Marcus McKinney, the regional manager for Enterprise Rental Car, identified rental contracts for several vehicles, including the white Dodge Charger in which the drugs were found. The agreements were

between Enterprise and a woman named Billie Williams. All of the agreements expressly stated that no drivers other than Ms. Williams were permitted. Billie Williams, a resident of Jonesboro, Arkansas, testified that Wilson is the father of her eight-year-old daughter. She stated that she rented the vehicles for Wilson so that he could provide transportation for their daughter.

Pam Buchanan, a narcotics officer for the Dunklin County (Missouri) Sheriff's Department, testified that her office confirmed through buys by confidential informants that Wilson was selling crack cocaine. Mark McClendon, a sergeant with the Missouri State Highway Patrol, testified that the investigation of Wilson revealed that he was using rental vehicles to obtain cocaine from out of state. In the early morning hours of September 22, 2011, Sergeant McClendon placed a GPS tracking device on a Dodge Charger rented by Ms. Williams. Sergeant McClendon testified that, when he placed the device on the vehicle, it was parked in the side yard of 601 Gertie in Malden, Missouri. Appellant resided at 603 Gertie.

Blake Bristow, an officer with the Jonesboro Police Department, testified that he was contacted by Officer Buchanan and notified that Wilson might be coming through Jonesboro carrying cocaine. He was able to use the GPS device that had been placed by Sergeant McClendon to track Wilson. Officer Bristow contacted a state trooper and advised the trooper to find probable cause to stop the vehicle.

Arkansas State Trooper Brandon Bennett testified that he had received a call from Officer Bristow on October 2, 2011, informing him that Wilson was going to be traveling on Interstate 55 and was suspected of carrying cocaine in the vehicle. Trooper Bennett stopped Wilson, who was driving the white Dodge Charger that had been rented by Ms. Williams, for speeding and for crossing the fog line. Wilson told Trooper Bennett that he was returning to Malden from Fort Worth after helping someone move. Wilson produced the rental agreement between Enterprise and Billie Williams. According to Trooper Bennett, Wilson was nervous and would not make eye contact. Wilson gave consent for a search of the vehicle. Trooper Bennett did not locate any contraband during his search, but he did see that there were spots on the vehicle's carpeting that appeared to have been purposely pulled back. Trooper Bennett requested that a canine be brought to the scene of the stop.

The canine gave a positive alert, and the narcotics were found in the rear of the vehicle, under the speakers. Video of the stop shows that Trooper Bennett pulled Wilson over at 9:03 p.m. Trooper Bennett's search of the vehicle concluded at 9:20. The canine arrived at 9:43. The drugs were recovered at 9:59.

Raymond Wilson, Sr., Wilson's father, testified that Wilson was living at 603 Gertie on October 2, 2011. Mr. Wilson had never seen Wilson park a vehicle at 601 Gertie. Wilson also testified that he lived at 603 Gertie and that he never parked a vehicle at 601 Gertie.

The trial court found that the stop of the vehicle was lawful and that the language of the rental contract prohibited Wilson from asserting that he had a legitimate expectation of privacy in the vehicle, thus depriving him of standing to challenge the legality of the search. The trial court further found that the

detention of Wilson after the initial stop was not unreasonable in light of the totality of the circumstances presented. Regarding the placement of the GPS device, the trial court specifically credited Sergeant McClendon's testimony that the vehicle was located at 601 Gertie when the device was placed. As a result, the trial court concluded that the Fourth Amendment was not implicated with respect to Wilson's residence. An order denying Wilson's motion to suppress was entered on June 18, 2012. Wilson's conditional plea of guilty and this appeal followed with the Arkansas Court of Appeals finding, in part, as follows:

"The trial court determined that Wilson lacked standing to challenge the search of the vehicle. We agree. A defendant has no standing to challenge the search of a vehicle owned by another person unless he can show that he gained possession of the vehicle from the owner or from someone who had authority to grant possession. *Ray v. State*, 2009 Ark. 521, at 10, 357 S.W.3d 872, The vehicle in question was owned by Enterprise Rental Car and was rented by Billie Williams. The rental agreement clearly stated that Ms. Williams was the only person allowed to drive the vehicle. The case of *Littlepage v. State,* 314 Ark. 361, 863 S.W.2d 276 (1993), is on point. In that case, the defendant was driving a vehicle that was rented by someone who was not present in the vehicle. The rental agreement stated that the renter was the only authorized driver. Our supreme court held that *Littlepage* had no expectation of privacy in the vehicle and lacked standing to challenge the search. Accordingly, Wilson lacks standing to challenge the search of the vehicle in the instant case.

Wilson also lacks standing to challenge the placement of the GPS tracking device on the vehicle. As discussed above, he neither owned nor had any reasonable expectation of privacy in the vehicle itself. The trial court found, based upon the testimony of Sergeant McClendon, that the vehicle was on the property of another person when the device was placed. A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by the search of a third person's premises or property. *Davasher v. State,* 308 Ark. 154, 823 S.W.2d 863 (1992). Simply put, Wilson cannot challenge actions by the police involving someone else's vehicle that occurred while that vehicle was on someone else's property. Because Wilson lacks standing to challenge the placement of the device on the vehicle, it is unnecessary to consider the application of the "good faith" exception to the search-warrant requirement.

"Because Wilson lacked standing to challenge the search of the vehicle, we affirm."

SEARCH AND SEIZURE:
Vehicle Search; Probable Cause

United States v. Baker
CA4, No. 12-6624, 6/13/13

Mario Nathaniel Baker was convicted of multiple federal firearm and drug offenses based on evidence that police officers uncovered while searching his vehicle during a traffic stop. Baker's counsel never challenged the constitutionality of the search, either through a suppression motion or on direct appeal. After his conviction became final, Baker filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his sentence partly on the ground that his counsel

had been unconstitutionally ineffective in failing to challenge the search on direct appeal under *Arizona v. Gant*, 556 U.S. 332 (2009).

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

"The United States Supreme Court's decision in *Gant* makes it clear that the exception for searches incident to an arrest authorizes vehicle searches only in two specific circumstances. The first circumstance is when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. The second is when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. When these justifications are absent, the Court concluded, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

"It is important to recognize those aspects of Fourth Amendment doctrine that *Gant* did not change. The decision addressed only the exception to the warrant requirement for searches incident to a lawful arrest, as applied to vehicle searches. It left unaltered other exceptions that might authorize the police to search a vehicle without a warrant even when an arrestee is secured beyond reaching distance of the passenger compartment and it is unreasonable to expect to find any evidence of the crime of arrest in the vehicle. The one most relevant to this appeal is the so-called automobile exception, which permits a warrantless search of a vehicle when there is probable cause to believe the vehicle contains contraband or other evidence of criminal activity. See *Carroll v. United States*, 267 U.S. 132 (1925).

"After Officer Nelson found a gun, drugs, $980 in cash, and a digital scale on Brown's person, he had probable cause to search the passenger compartment of Baker's vehicle. Probable cause to search a vehicle exists when 'reasonable officers can conclude that what they see, in light of their experience, supports an objective belief that contraband is in the vehicle.' *United States v. Ortiz*, 669 F.3d 439, 446 (4th Cir. 2012). This standard is satisfied when a police officer lawfully searches a vehicle's recent occupant and finds contraband on his person. See *United States v. Johnson*, 383 F.3d 538, 545-46 (7th Cir. 2004) (A police officer's discovery of a banned substance (drugs) on Johnson's person clearly provided him with probable cause to search the trunk of the vehicle…since the officer had a reasonable basis for believing that more drugs or other illegal contraband may have been concealed inside.)

"Thus, having found drugs, as well as other items indicating involvement in the drug trade, on Brown's person, Nelson had probable cause to search the passenger compartment of the vehicle in which Brown had just been sitting for additional contraband. And if there were any doubt that the drugs and other items alone justified the search of the vehicle, we note that Brown also walked away from Nelson, reached back into the vehicle while being frisked, and struggled with Nelson. These facts provided further reason for Nelson to believe that there was additional contraband in the vehicle. We thus conclude that Nelson's search of Baker's vehicle was supported by probable cause and that it therefore comported with the automobile exception to the warrant requirement."