UNIVERSITY OF ARKANSAS SYSTEM
CRIMINAL JUSTICE INSTITUTE

CJI Legal Briefs

Volume 23, Issue 3
Spring 2019

A Publication of the Criminal Justice Institute–University of Arkansas System

Contents

CIVIL LIABILITY: Affidavit Containing Lies and Omitting Exculpatory Evidence

Rainsberger v. Benner
CA7, No. 17-2521, 1/15/19

William Rainsberger was charged with murdering his elderly mother and was held for two months. He claims that the detective who built the case against him, Charles Benner, submitted a probable cause affidavit that contained lies and omitted exculpatory evidence. When the prosecutor dismissed the case because of evidentiary problems, Rainsberger sued Benner under 42 U.S.C. 1983. The district court denied Benner's motion, in which he argued qualified immunity. Benner conceded, for purposes of his appeal, that he knowingly or recklessly made false statements in the probable cause affidavit, arguing that knowingly or recklessly misleading the magistrate in a probable cause affidavit only violates the Fourth Amendment if the omissions and lies were material to probable cause.

The Seventh Circuit rejected that argument. "Materiality depends on whether the affidavit demonstrates probable cause when the lies are taken out and the exculpatory evidence is added in. When that is done in this case, Benner's affidavit fails to establish probable cause to believe that Rainsberger murdered his mother. Because it is clearly established that it violates the Fourth Amendment 'to use deliberately falsified allegations to demonstrate probable cause,' Benner is not entitled to qualified immunity."

READ THE COURT OPINION HERE:
https://bit.ly/2KW9H3o

DISCLAIMER

The Criminal Justice Institute publishes CJI Legal Briefs as a research service for the law enforcement and criminal justice system. Although Legal Briefs is taken from sources believed to be accurate, readers should not rely exclusively on the contents of this publication. While a professional effort is made to ensure the accuracy of the contents of this publication, no warranty, expressed or implied, is made. Readers should always consult competent legal advisors for current and independent advice.

CIVIL LIABILITY: Excessive Force Claims Must Be Clearly Defined

Escondido v. Emmons
USSC, No. 17-1660, 1/7/19

In April 2013, Escondido police responded to a 911 call from Maggie Emmons about domestic violence at the apartment where she lived with her husband, her children, and a roommate, Douglas. The officers arrested her husband. He was later released. In May 2013, Escondido police received a 911 call from Douglas's mother (Trina) about another disturbance at Emmons' apartment. Trina had been on the phone with her daughter, who was at the apartment. Trina heard her daughter and Emmons yelling and heard Douglas screaming for help before the call disconnected. Officers Houchin and Craig responded, having been notified that children could be present and that calls to the apartment had gone unanswered. There is a body-camera video of the response. No one answered the door. Officers spoke with Emmons through an open window. A man in the apartment told Emmons to back away from the window. Sergeant Toth and two officers arrived as backup. Minutes later, a man opened the door and came outside. Officer Craig said not to close the door. The man closed the door and tried to brush past Craig, who took the man quickly to the ground and handcuffed him without hitting the man or displaying any weapon. The man was not in observable pain. Within minutes, officers helped him up and arrested him for misdemeanor resisting and delaying a police officer. The man, Emmons' father, Marty, sued under 42 U. S. C. 1983, claiming excessive force.

The Ninth Circuit agreed that the officers had probable cause to arrest Marty but remanded the excessive force claims.

The Supreme Court reversed as to Sergeant Toth and vacated as to Craig: "The decision concerning Toth was 'quite puzzling' in light of the district court's conclusion that only Craig was involved in the excessive force claim. As to Craig, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remand for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. The Ninth Circuit's formulation of the clearly established right was far too general; the court made no effort to explain how case law prohibited Craig's actions in this case."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/18pdf/17-1660_5ifl.pdf

****

CIVIL LIABILITY:
Use of Taser; Gaining Control of Suspect

Dockery v. Blackburn
CA7, No. 17-1881, 12/19/18

Patrick Dockery was arrested after a domestic dispute at his girlfriend's Joliet, Illinois apartment. Sergeant Sherrie Blackburn and Officer Terry Higgins took him to the police station for booking on charges of trespass and criminal damage to property. Dockery grew confrontational while being fingerprinted. The officers stated that he would be handcuffed to a bench for the rest of the booking process. Dockery pulled away, fell over, and kicked wildly at the officers. Before the officers handcuffed him, Blackburn used her Taser four times. A security camera recorded

the incident. Dockery sought damages under 42 U.S.C. 1983, alleging excessive force. The officers moved for summary judgment, claiming qualified immunity based on the incontrovertible facts captured on the recording.

The Seventh Circuit reversed the denial of the motion. "An excessive-force claim requires assessment of whether the officer's use of force was objectively reasonable under the circumstances; based on the irrefutable facts preserved on the video, the officers are entitled to qualified immunity. The video shows that Blackburn deployed the Taser when Dockery was flailing and kicking and actively resisting being handcuffed; she used it three more times to subdue and gain control over Dockery as he kicked, attempted to stand up, and resisted commands to submit to authority. No case clearly establishes that an officer may not use a Taser under these circumstances."

READ THE COURT OPINION HERE:
https://bit.ly/2GAMTC0

****

CIVIL LIABILITY:

Use of Taser; Mental Suspect
Gray v. Cummins
CA1, No. 18-1303,2/22/19

57-year-old Judith Gray (who suffers from bipolar disorder) experienced a manic episode and called 911. Athol police officers arrived at Gray's home and transported her to the hospital. She was admitted to the hospital at 4:00 a.m., pursuant to Mass. Gen. Laws ch. 123, § 12 (authorizing involuntary "emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness"). Six hours later, Gray absconded from the hospital on foot. Hospital staff called the Athol Police Department, asking that Gray — "a section 12 patient" — be "picked up and brought back." Officer Thomas Cummings responded to the call and quickly located Gray, walking barefoot along the sidewalk less than a quarter-mile from the hospital. Cummings got out of his police cruiser. Gray swore at him, and Cummings told her that she "had to go back to the hospital." Gray again used profanity, declared that she was not going back, and continued to walk away. In response, Cummings radioed for backup and followed Gray on foot. He repeatedly implored Gray to return to the hospital, but was greeted only by more profanity. Initially, Cummings followed Gray at a distance of roughly one hundred feet. Within twenty-five to thirty seconds, he closed to within five feet. At that point, Gray stopped, turned around, "clenched her fists, clenched her teeth, flexed her body and stared at Cummings as if she was looking right through him]" She again swore at Cummings and started walking toward him. Cummings grabbed Gray's shirt but he could feel Gray moving her body forward, so he "took her to the ground." It is undisputed that Cummings had a distinct height and weight advantage: he was six feet, three inches tall and weighed 215 pounds, whereas Gray was five feet, ten inches tall and weighed 140 pounds.

Cummings testified that once on the ground, he repeatedly instructed Gray to place her hands behind her back. She did not comply. Instead, she "tucked her arms underneath her chest and flexed tightly," swearing all the while. Cummings warned Gray that she was "going to get tased" if she did not place her hands behind her back. Gray did not heed this warning but, rather, swore at Cummings again and told him to "do it." Cummings made "one last final demand for Gray to stop resisting" and when "Gray refused to listen," he removed the cartridge from his Taser, placed it in drive-

stun mode, and tased Gray's back for four to six seconds. Gray then allowed him to handcuff her. Cummings helped Gray to her feet and called an ambulance, which transported Gray to the hospital. According to Gray, she felt "pain all over" at the moment she was tased, but she "must have passed out because [she] woke up in Emergency." Charges were subsequently filed against Gray for assault on a police officer, resisting arrest, disturbing the peace, and disorderly conduct, but were eventually dropped.

Gray sued the officer and the Town of Athol, Massachusetts asserting causes of action under 42 U.S.C. 1983 and Title II of the Americans with Disabilities Act (ADA). The magistrate judge found no violation of the Fourth Amendment under section 1983 and no viable state-law claims, that the officer was entitled to qualified immunity, and that there was no violation of the ADA.

The First Circuit affirmed, holding that an objectively reasonable police officer in May 2013 could have concluded that a single use of a Taser to quell a nonviolent, mentally ill person who was resisting arrest did not violate the Fourth amendment and that, in any case, the officer here was shielded by qualified immunity.

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/18-1303P-01A.pdf

****

CIVIL LIABILITY:

Use of Taser; Qualified Immunity
Muschette v. Gionfriddo
CA2, No. CV-18-264, 12/7/18

Audley and Judith Muschette are the parents of A.M., a 12-year-old boy who is profoundly deaf and communicates primarily in American Sign Language (ASL). On April 30, 2013, A.M. got into a confrontation over a takeout food order with a teacher at his school. A.M. became angry, ran from the dorm, and entered a nearby, fenced-off construction area. The teacher, Christopher Hammond, followed. When Hammond approached, A.M. picked up a stick and hit Hammond. A.M. also threw rocks at Hammond, hitting him at least once. After A.M. picked up a large rock in the construction area, Hammond and the other faculty who were gathered at the scene left the construction area, leaving A.M. sitting alone and holding the rock.

The Dean, Ron Davis, called 911 and reported a student was "out of control" and "making the situation dangerous." Officer Gionfriddo went to the school and was soon joined by a second officer, Christopher Lyth. Dean Davis advised Officer Gionfriddo that A.M. had gotten into a disagreement with Hammond, and had been throwing things at staff members.

After the briefing, Officers Gionfriddo and Lyth approached the construction area with Hammond and Dean Davis, where A.M. remained sitting with a large rock in his hands. Dean Davis, Officer Gionfriddo, and Officer Lyth positioned themselves behind A.M., while Hammond stood approximately 15 feet in front of A.M., facing A.M., Dean Davis, and the officers. Officer Gionfriddo gave verbal instructions to put down the rock. Dean Davis translated the instructions into ASL, and Hammond, who was facing A.M.,

signed in A.M.'s direction. When A.M. did not let go of the rock, Officer Gionfriddo verbally warned A.M. that he would use the taser if A.M. did not put down the rock, and Davis again translated this message to Hammond, who signed toward A.M. When A.M. again appeared to ignore the warning, Officer Gionfriddo tased A.M., and Officer Lyth unsuccessfully attempted to get A.M. into handcuffs. After Officer Gionfriddo deployed the taser a second time, Officer Lyth was able to secure the handcuffs.

Officer Gionfriddo moved for summary judgment on the ground of qualified immunity. The district court denied the motion, finding that "Gionfriddo's entitlement to immunity depends on factual disputes that will hinge on credibility determinations, which must be made by the jury." Officer Gionfriddo argues that he is entitled to qualified immunity because his use of force in this case did not violate any clearly established right or, alternatively, that it was objectively reasonable for him to believe that his conduct was lawful.

The Second Circuit Court of Appeals found that Officer Gionfriddo was entitled to qualified immunity. "'The focus is on the sequence of events from the perspective of a reasonable officer at the scene.'" *Tracy v. Freshwater*, 623 F.3d at 97. (From the officer's perspective, Tracy appeared to fail to comply with a direct order and to instead actively resist arrest, thus necessitating a forceful response.) Under these circumstances, we cannot say that no reasonable officer would have believed that the use of the taser to subdue A.M. was lawful. We have repeatedly concluded in summary orders that it is not unreasonable for an officer to use a taser in analogous circumstances. Accordingly, because it was objectively reasonable for Officer Gionfriddo to believe that his conduct was lawful, he is entitled to qualified immunity."

READ THE COURT OPINION HERE:
https://cases.justia.com/federal/appellate-courts/ca2/17-3817/17-3817-2018-12-07.pdf?ts=1544196610

****

CHILD PORNOGRAPHY:

Double Jeopardy Claim
Pelletier v. Kelley
ASC, No. CV-18-264, 2018 Ark. 347, 12/6/18

Dereck Pelletier sent an email to an undercover police officer with an attachment containing thirty photographs depicting child pornography. Pelletier pleaded guilty to thirty counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child. Pelletier later filed a petition for writ of habeas corpus alleging that his convictions on twenty-nine of the thirty counts violated double jeopardy because he sent only one email with one attachment. The circuit court denied relief.

The Arkansas Supreme Court affirmed, holding that each photograph that was distributed could support a separate charge, and the fact that the thirty photographs were attached to the email in a single file was not relevant in this case.

READ THE COURT OPINION HERE:
https://law.justia.com/cases/arkansas/supreme-court/2018/cv-18-264.html

EVIDENCE: Expert Testimony; Eyewitness Identification
United States v. Nickelous
CA8, No. 17-3750, 2/26/19

Darius Nickelous was convicted of unlawfully possessing a firearm after a shooting at a fraternity party.

The government produced as evidence of possession:
(1) Nickelous admitted attending a fraternity party and having an altercation there;
(2) His former classmate testified she heard a gunshot at the party and then saw Nickelous, wearing a red sweatshirt, waving a silver revolver;
(3) Two other people at the party—one a security guard and the other a member of the Army National Guard—testified the shooter was wearing a red sweatshirt;
(4) A police officer testified that multiple partygoers reported a shooting by a man wearing a red sweatshirt;
(5) Another officer, who found Nickelous 200 feet from the party (wearing a red sweatshirt), testified that he saw Nickelous drop a metal object next to a pickup truck;
(6) The officer testified that Nickelous refused to stop when ordered;
(7) The officer found a silver revolver in the spot where Nickelous dropped the object; and
(8) When officers apprehended Nickelous, his hand was bleeding, and he said he had "gotten his ass kicked at the party."

Nickelous argues the district court erred in excluding expert testimony on eyewitness identification.

Upon review, the Court of Appeals for the Eighth Circuit stated that "expert testimony is admissible only if the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993). The district court has broad discretion in balancing the reliability and probative value of evidence against its prejudicial effect.

"The district court excluded the proposed testimony because it would not assist the trier of fact. The evaluation of eyewitness testimony is for the jury alone. It is the exclusive province of the jury to determine the believability of a witness. An expert is not permitted to offer an opinion as to the believability or truthfulness of a victim's story. Defense counsel is capable of exposing to the jury any potentially unreliable bases underlying the eyewitness identification through cross examination."

READ THE COURT OPINION HERE:
https://law.justia.com/cases/federal/appellate-courts/ca8/17-3750/17-3750-2019-02-26.html

****

EVIDENCE: Facebook Videos Constituting Intrinsic Evidence
United States v. Jackson
CA8, No. 18-1482, 1/22/19

In this case, the Eighth Circuit affirmed Jackson's conviction for crimes related to his role in a bank robbery. The court held that the district court did not abuse its discretion by admitting three Facebook videos into evidence where the videos were sent to Jackson's friends in the days leading up to the robbery.

The first video, sent to "EBK Rich," showed Jackson driving through a residential area and twice telling Centeno to fire the revolver toward the houses. Centeno complied. EBK Rich and

Jackson also had a conversation through Facebook Messenger. Jackson said that he was "bout to do some real shit." EBK Rich then asked Jackson, "What you about to do?" Jackson responded with two words: "Bank" and "Robbing."

The second video showed Centeno firing two rounds from the revolver into an abandoned building while wearing the same jacket he wore during the robbery. Centeno then passed the gun to Jackson, who also fired two rounds.

The third video showed Jackson displaying twenty rounds of ammunition and stating, "Get what you want. I went to the store and got bullets with no, no ID." He picked up a black .38 special revolver and said, "I got this pretty baby." He then pointed the gun at the camera and dry fired it.

The Eighth Circuit Court of Appeals held the videos constituted intrinsic evidence and the district court did not abuse its discretion by admitting the videos based on the high probative value in comparison to the potential prejudice.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/01/181482P.pdf

****

FORFEITURE: Eighth Amendment; Excessive Fines
Timbs v. Indiana
USSC, No. 17-1091, 2/20/19

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause.

The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal

action and is inapplicable to state impositions. The United States Supreme Court granted certiorari.

The Court stated that the issue is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause.

"Under the Eighth Amendment, excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Taken together, these Clauses place 'parallel limitations' on 'the power of those entrusted with the criminal-law function of government.' *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257, 263 (1989) (quoting *Ingraham v. Wright*, 430 U. S. 651, 664 (1977)). Directly at issue here is the phrase nor excessive fines imposed, which 'limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.' *United States v. Bajakajian*, 524 U. S. 321, 327–328 (1998). The Fourteenth Amendment, we hold, incorporates this protection.

"For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies. See *Browning-Ferris*, 492 U. S., at 267. Even absent a political motive, fines may be employed in a measure out of accord with the penal goals of retribution and deterrence, for 'fines are a source of revenue, while other forms of punishment cost a State money.'

"In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/18pdf/17-1091_5536.pdf

EDITOR'S NOTE: *This Supreme Court's unanimous decision affects state and local law enforcement agencies as it gives criminal defendants a means to challenge civil forfeitures charged against them by asserting forfeitures are grossly disproportionate to their offenses.*

****

MIRANDA:

Volunteered Statements; Parole Officer

Pitts v. State

ACA, CR-18-424, 2019 Ark. App. 107, 2/20/19

A Garland County jury convicted Benjamin Pitts of second-degree murder, two counts of first-degree battery, possession of a firearm by certain persons, and aggravated residential burglary. He argues that the trial court erred in denying his motion to suppress custodial statements made to his parole officer.

At the suppression hearing, Courtney Henry, Pitt's Parole Officer, testified that on May 12, 2014, she went to the jail to serve Pitts with a parole-violation report. When Henry informed Pitts that he had been charged with capital murder, he said, "Why do they not have an accessory law in Arkansas?" Henry asked Pitts if he was an accessory, to which he responded, "Well, I'm not a capital murderer." According to Henry, Pitts said

that he should not have been charged with capital murder and that no motive could be proved. She said that Pitts had initially used the pronoun "we," before stopping midsentence to instead say "they," when referring to the police's lack of understanding why the perpetrators committed the crime. Henry said that Pitts had stated that the police did not know whether the suspects had gone to the home to rob the place, talk with someone, or "deal with a prior situation between people." Henry said that Pitts—not in response to questioning—discussed the lack of evidence against him. For example, he stated that he knew that his face was not shown on camera. Henry testified that she saw Pitts again the following day, May 13, to notify him of his right to a hearing. She said that Pitts again spoke of the evidence against him and what he had told investigators without any questioning by her, aside from asking whether he wished to waive the hearing. Henry admitted that, although Pitts was in custody, she did not read him *Miranda* warnings before speaking with him on either day. She explained that she had been "acting under the scope of a parole officer, not an investigator."

The trial court denied Pitts's motion to suppress and found that he had made spontaneous statements to Henry that were not in response to questioning or interrogation.

Upon review, the Arkansas Court of Appeals found as follows:

"The United States Constitution's Fifth Amendment prohibition against compelled self-incrimination requires that an accused be given a series of warnings, including that the accused has the right to remain silent and the right to the presence of an attorney, before he or she is subjected to 'custodial interrogation.' *Miranda v. Arizona*, 384 U.S. 446 (1966). A suspect's spontaneous statement while in police custody is admissible, and it is irrelevant whether the statement was made before or after *Miranda* warnings because a spontaneous statement is not compelled or the result of coercion under the Fifth Amendment's privilege against self-incrimination. *Fricks v. State*, 2016 Ark. App. 415, 501 S.W.3d 853. Moreover, a voluntary custodial statement does not become the product of an interrogation simply because an officer asks a defendant to explain or clarify something he or she already said voluntarily. *Anderson v. State*, 2011 Ark. 461, 385 S.W.3d 214.

"While we reject Pitts's assertion that Henry's reading of a parole-violation report was the functional equivalent of an interrogation, Henry's question whether Pitts was an accessory to capital murder is more troubling. Although Henry confidently testified at trial that, as Pitts's parole officer, she was not required to give him *Miranda* warnings, we point out that there is a growing trend toward accepting that probation and parole officers must advise probationers and parolees in police custody of *Miranda* warnings before any questioning. In *Minnesota v. Murphy*, 465 U.S. 420 (1984), the United States Supreme Court suggested in a footnote that a parolee in police custody being interviewed by a parole officer may be entitled to *Miranda* warnings. See also *Fowler v. State*, 2010 Ark. App. 23, vacated and affirmed on other grounds, 2010 Ark. 431, 371 S.W.3d 677; *Beavers v. State*, 2015 Ark. App. 124, 456 S.W.3d 783.

"Under the circumstances presented, however, we need not decide whether Henry's failure to give Pitts Miranda warnings before asking him the question whether he was an accessory rendered his statements inadmissible. This is because Pitts does not challenge the trial court's ruling that he was aware of his rights when he made statements

to Henry given that he had received *Miranda* warnings five days before her visit. There is no constitutional requirement that a suspect be warned of his or her *Miranda* rights each time the suspect is questioned. *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005). There is likewise no mechanical formula for measuring the longest permissible interval between the last warning and the confession. *Miranda* warnings need only be repeated when the circumstances have changed so seriously that the accused's answers are no longer voluntary, or the accused is no longer making a knowing and intelligent relinquishment or abandonment of his or her rights.

"Pitts does not argue that the prior *Miranda* warnings were insufficient to advise him of his rights; rather, he focuses on Henry's failure to readvise him of those rights. Given Pitts's failure to acknowledge, much less attack, what is an independent and alternative basis for the trial court's ruling, we must affirm the denial of Pitts's motion to suppress the custodial statements he made to his parole officer. *Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002)."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/courtofappeals/en/363477/1/document.do

****

SEARCH AND SEIZURE:

Bus Passenger; Phantom Passenger
United States v. Easley
CA10, No.18-2020, 12/26/18

Ollisha Easley was onboard a Greyhound bus from Claremont, California, to her hometown of Louisville, Kentucky, when the bus made a scheduled stop in Albuquerque, New Mexico. The Greyhound passenger list showed that Easley's reservation included a second woman identified as "Denise Moore" - both Easley and Denise Moore had one checked bag and both tickets were purchased with cash. No one named Denise Moore boarded the bus in California, but her suitcase was stowed in the luggage hold of the Greyhound and was identified with the same reservation number and telephone number as Easley's luggage. While the bus was stopped in Albuquerque, Special Agent Jarrell Perry of the Drug Enforcement Agency (DEA) and his partner that day, Special Agent Scott Godier, observed the luggage in the bus's cargo hold. Agent Perry later testified that the use of a so-called "phantom passenger" is a common method of narcotics trafficking. Ultimately, the agents identified the bags traveling with Easley, searched them and found small bags of methamphetamine in the Denise Moore bag. Easley denied ownership of the bag, denied knowing the bag's owner, and denied ever having seen the bag before.

She would be indicted for possession with intent to distribute 500 grams or more of methamphetamine. Easley moved to suppress the evidence seized from the bag. The District Court held that: (1) Easley had not established her bags were illegally searched while the bus was in the wash bay; (2) nor had she established that the bus was subject to an unreasonable investigatory detention; however, (3) under the totality of the circumstances, Easley had been illegally seized. The court found that Easley's abandonment of the Denise Moore suitcase was the product of a Fourth Amendment violation, so it suppressed the evidence seized from the suitcase.

In reversing the district court's judgment, the Tenth Circuit concluded the agents' search of the Denise Moore suitcase was a valid search of abandoned property:

"It is clear from Ms. Easley's words and actions that she relinquished any expectation of privacy in the Denise Moore suitcase. In response to Agent Perry's questions she responded that she did not own the bag, did not know who the bag belonged to, did not have any interest in what happened to the bag, and even claimed that she had never seen the bag before. Ms. Easley's responses to Agent Perry's questions were the product of her own free will and would have led a reasonable law enforcement officer to believe she had relinquished any expectation of privacy in the suitcase. We conclude the agents' search of the Denise Moore suitcase was a valid search of abandoned property; suppression of the evidence the suitcase contained was error."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/opinions/18/18-2020.pdf

****

SEARCH AND SEIZURE:

Consent Search; Authority to Consent
United States v. Terry
CA7, No. 18-1305, 2/14/19

A team of agents from the Drug Enforcement Agency (DEA) executed an arrest warrant for Dimitris Terry related to his role in a conspiracy to possess and distribute heroin. The agents didn't want others to know that Terry had been arrested because they hoped to secure his cooperation in the broader investigation; thus, they planned a quick and quiet arrest. They waited for him to return home from taking his son to school, arrested him when he got out of his car, and took him to the field office for questioning.

A few agents remained behind. Two of them knocked on the door of Terry's apartment, and a woman answered, wearing a bathrobe and looking sleepy. The agents identified themselves, explained that they had just arrested Terry, and asked to come inside. They didn't ask the woman who she was, how she was related to Terry, or whether she lived at the apartment.

Without hesitation, the woman let the agents in, and they immediately presented her with a consent-to-search form. After she both read the form and had it read aloud to her, she signed it, and the search began. Only then, after the search was underway, did the agents ask the woman who she was. She identified herself as Ena Carson, the mother of Terry's son. She explained that her son lived at Terry's apartment, but she did not. Nevertheless, the agents continued the search for roughly the next hour. They recovered letters addressed to Terry showing proof of residence, four cell phones, and a suspected drug ledger.

The Court of Appeals for the Seventh Circuit questioned whether it was it reasonable for officers to assume that a woman who answers the door in a bathrobe has authority to consent to a search of a male suspect's residence? They held that the answer is no. The officers could reasonably assume that the woman had spent the night at the apartment, but that's about as far as a bathrobe could take them. Without more, it was unreasonable for them to conclude that she and the suspect shared access to or control over the property.

"The Fourth Amendment requires the government to get a warrant before searching someone's property. *U.S. Constitution. Amendment IV;* see also *United States v. Basinski,* 226 F.3d 829, 833 (7th Cir. 2000). But the warrant requirement is subject to several 'carefully defined' exceptions. See *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971). One is consent from a person with actual

or apparent authority to give it. When a person allows a third party to exercise authority over his property, he assumes the risk that the third party might permit access to others, including government agents.

"When the search began, the agents had four facts: Terry left Carson alone in the apartment for about forty-five minutes, Carson was wearing a bathrobe, she appeared sleepy, and she consented to the search without hesitation. They did not know who she was, what her relationship to Terry was, why she was in the apartment, how long she had been in the apartment, or whether she lived there. At that point, the agents did not know that Carson was the mother of Terry's child.

"The facts that the agents had made it reasonable for them to conclude that Carson had spent the night at Terry's apartment. That might have been an indication that she lived with him, but there are multiple other possibilities. She could have been a one-time guest, a periodic guest, a friend or relative visiting for a couple of days—or she may have had some other relationship to Terry. And the existence of so many other equally plausible possibilities should have prompted the agents to inquire further.

"But they did not. Instead, they thought that it was safe to assume that Carson had spent the night in the apartment, therefore lived in the apartment, therefore had joint access to or control over the apartment for most purposes, and therefore had the authority to consent to the search. This kind of inferential pileup falls short of the reasonableness required by the Fourth Amendment. A bathrobe alone does not clothe someone with apparent authority over a residence, even at 10:00 in the morning.

"Because the government has failed to demonstrate that an exception to the warrant requirement applies, the evidence discovered as a result of the search must be suppressed."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D02-14/C:18-1305:J:Barrett:aut:T:fnOp:N:2293819:S:0

****

SEARCH AND SEIZURE: Description of Items to be Seized on Cell Phone

United States v. Bishop
CA7, No. 18-2019, 12/7/18

A drug deal went wrong. After receiving a dose of pepper spray from his customer, Edward Bishop shot her in the arm. A jury convicted him of discharging a firearm during a drug transaction. He presents one contention on appeal: that the warrant authorizing a search of his cell phone—a search that turned up incriminating evidence—violated the Fourth Amendment's requirement that every warrant particularly describe the place to be searched, and the persons or things to be seized.

This warrant described the "place to be searched" as the cell phone Bishop carried during the attempted sale, and it described the things to be seized as:

> *any evidence (including all photos, videos, and/or any other digital files, including removable memory cards) of suspect identity, motive, scheme/plan along with DNA evidence of the crime of Criminal Recklessness with a deadly weapon which is hidden or secreted in the cellphone or related to the offense of Dealing illegal drugs.*

That is too general, Bishop asserts, because it authorized the police to rummage through every application and file on the phone and left to the officers' judgment the decision which files met the description. The district court found the warrant valid, however, and denied the motion to suppress.

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

"Bishop is right about the facts. This warrant does permit the police to look at every file on his phone and decide which files satisfy the description. But he is wrong to think that this makes a warrant too general. Criminals don't advertise where they keep evidence. A warrant authorizing a search of a house for drugs permits the police to search everywhere in the house, because 'everywhere' is where the contraband may be hidden. *United States v. Ross*, 456 U.S. 798, 820–21 (1982); *Steele v. United States*, 267 U.S. 498, 503 (1925). And a warrant authorizing a search for documents that will prove a crime may authorize a search of every document the suspect has, because any of them might supply evidence. To see this, it isn't necessary to look beyond *Andresen v. Maryland*, 427 U.S. 463 (1976), in which the Court considered a warrant that permitted a search of every document in a lawyer's files. Agents were authorized to search for:

> *title notes, title abstracts, title rundowns; contracts of sale and/or assignments from Raffaele Antonelli and Rocco Caniglia to Mount Vernon Development Corporation and/or others; lien payoff correspondence and lien pay-off memoranda to and from lienholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lenders instructions for a construction loan or construction and permanent loan; disbursement sheets and disbursement memoranda; checks, check stubs and ledger sheets indicating disbursement upon settlement; correspondence and memoranda concerning disbursements upon settlement; settlement statements and settlement memoranda; fully or partially prepared deed of trust releases, whether or not executed and whether or not recorded; books, records, documents, papers, memoranda and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland, 1957 Edition, as amended and revised, together with other fruits, instrumentalities and evidence of crime at this unknown.*

"Andresen accepted the propriety of looking at every document in his possession but maintained that the italicized phrase entitled the agents to seize anything they wanted. The Justices concluded, however, that, when read in context, the contested language did no more than permit the seizure of any other evidence pertaining to real-estate fraud, the subject of the warrant.

"Just so with this warrant. It permits the search of every document on the cell phone, which (like a computer) serves the same function as the filing cabinets in Andresen's office. See *Riley v. California*, 134 S. Ct. 2473, 2489 (2014). And as with filing cabinets, the incriminating evidence may be in any file or folder. That's why courts routinely conclude that warrants with wording similar to the one at issue here are valid. See, e.g., *Archer v. Chisholm,* 870 F.3d 603, 616 (7th Cir. 2017); *United States v. Hall,* 142 F.3d 988, 996–97 (7th Cir. 1998); *Wayne R. LaFave, Search & Seizure §4.6(d)* (5th ed. 2012 & Supp. 2018). It is enough,

these decisions hold, if the warrant cabins the things being looked for by stating what crime is under investigation.

"In Andresen, the police did not know how the target organized his files, so the best they could do was the broad language the warrant used. Likewise here: the police did not know where on his phone Bishop kept his drug ledgers and gun videos—and, if he had told them, they would have been fools to believe him, for criminals often try to throw investigators off the trail. This warrant was as specific as circumstances allowed. The Constitution does not require more."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2018/D12-07/C:18-2019:J:Easterbrook:aut:T:fnOp:N:2261498:S:0

****

SEARCH AND SEIZURE: Exclusionary Rule; Supervised Release Revocations
United States v. Phillips
CA7, No. 18-1372, 1/28/19

In 2010, Derrick Phillips began serving an eight-year term of supervised release stemming from a 2003 conviction for possession of cocaine base with intent to distribute. In October 2017, Quincy police officers stopped him as he drove out of the parking lot of the Amtrak station. A dog alerted that drugs might be present in the car. The officer conducted a search, discovered approximately 196 grams of heroin, and arrested Phillips for possession with intent to distribute. Phillips moved to suppress the evidence, arguing that there was no violation of any traffic law, so the police lacked probable cause for the stop.

The district court concluded that the exclusionary rule does not apply to supervised-release-revocation hearings. The Seventh Circuit affirmed.

"Two of the Supreme Court's rationales for declining to extend the exclusionary rule to the parole context equally apply to hearings for the revocation of supervised release. The exclusionary rule would 'alter the traditionally flexible, administrative nature of parole revocation proceedings.'

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D01-28/C:18-1372:J:Wood:aut:T:fnOp:N:2284894:S:0

****

SEARCH AND SEIZURE: GSP Tracking Device; Movement Beyond the Area Authorized for Tracking
United States v. Brewer
CA7, No. 18-2035, 2/4/19

Artez Brewer and his girlfriend, Robin Pawlak, traveled the country robbing banks, à la Bonnie and Clyde. Agents today, however, have investigative tools that their Great Depression predecessors lacked. A task-force officer sought a warrant from a state-court magistrate to monitor the Brewer's Volvo with GPS tracking. The officer's supporting affidavit referenced eleven bank robberies, in Indiana, Illinois, and Ohio. The magistrate issued the warrant, which permitted the use of a "tracking device … in any public or private area in any jurisdiction, within the State of Indiana, for a period of 45 days."

With a warrant for real-time, Global-Positioning-System (GPS) vehicle monitoring, a task force tracked Brewer's car to California where he and

Pawlak committed another robbery. Brewer was arrested and essentially confessed to the crime spree. The government charged him with three counts of bank robbery, and a jury convicted him on each count. Brewer appeals. He argues that the government violated the Fourth Amendment by tracking him to California when the warrant only permitted monitoring in Indiana.

The Court of Appeals for the Seventh Circuit found as follows:

"In *United States v. Castetter*, 865 F.3d 977, 978–79 (7th Cir. 2017), they put it simply: 'The Fourth Amendment does not concern state borders.' Other courts have applied these Fourth Amendment principles to cases like this one. In *United States v. Faulkner*, 826 F.3d 1139 (8th Cir. 2016), cert. denied, 137 S. Ct. 2092 (2017), for example, the Eighth Circuit held that the installation of a GPS tracker outside of the county where the warrant authorized the installation to occur did not implicate the Fourth Amendment. That the installation violated the warrant and state law was irrelevant, according to *Faulkner*, because the Fourth Amendment's requirements of probable cause and particularity were satisfied. 826 F.3d at 1145–46. Even more on point is *United States v. Simms*, 385 F.3d 1347 (11th Cir. 2004). In *Simms*, the Eleventh Circuit held that the GPS tracking of a vehicle into Alabama, even though the authorizing court order only allowed tracking in Texas, did not violate the Fourth Amendment. The Fourth Amendment's requirements were met, and the warrant's in-state limitation was, at most, a state-law problem.

"We hold the same. Upon a good-faith affidavit, the warrant to track Brewer's car issued from (1) an independent magistrate, (2) based on probable cause, (3) with a particular description of the place or thing (the Volvo) to be searched. Brewer therefore received all he was entitled to under the Fourth Amendment. E.g., *Dalia*, 441 U.S. at 255; *Archer v. Chisholm*, 870 F.3d 603, 614 (7th Cir. 2017). Brewer nevertheless submits that the task force should have obeyed the in-state limitation. Yet he does not argue that it reflected a constitutional requirement—that is, a probable-cause determination or a description of the particular search authorized. For good reason: Judges must describe the specific person, phone, or vehicle to be tracked to satisfy the Fourth Amendment's particularity requirement. They need not specify (or limit) the tracking to a geographic location. *United States v. SanchezJara*, 889 F.3d 418, 421 (7th Cir. 2018), cert. denied, 139 S. Ct. 282 (2018); *Wayne R. LaFave*, 2 SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.5(e) (5th ed. 2018). Nor was there any reason to do so here. The affidavit supporting the warrant in this case described a multistate bank robbery spree, and we do not see how such evidence could justify monitoring only within Indiana. Brewer may have had a constitutionally protected privacy interest in his whereabouts, see *Carpenter v. United States*, 138 S. Ct. 2206, 2215–17 (2018), but that interest was no greater on Indiana roads than it was on Illinois or California roads.

READ THE COURT OPINION HERE:

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D02-04/C:18-2035:J:St__Eve:aut:T:fnOp:N:2287714:S:0

SEARCH AND SEIZURE:
Privacy in Rental Space at a Parking Lot
United States v. Vargas
CA7, No 18-1250, 2/5/19

Josue Vargas rented a parking place for his truck in a lot that lacked assigned spaces. Agents in Ohio arrested Luis Hueter as he transported three kilograms of cocaine that, Hueter asserted, he had purchased from Vargas the day before at his parked truck. Hueter described Vargas, the truck, and the lot. They immediately called agents in Illinois, who entered the lot by following someone through the gate. Approaching a truck that met Hueter's description, the agents in Chicago sent a photo to the agents in Ohio; Hueter identified the truck as Vargas's. A dog was called in and alerted to the odor of drugs. Agents then broke a window of the truck, opened the door, and found eight more kilos of cocaine.

Vargas contends that the agents' and the dog's entry into the lot violated his rights. He does not say that it was improper to break into the truck without a warrant; by the time the agents did this they had probable cause, based on Hueter's statements plus confirmation (from the photo and the dog) that they had the right truck. But, citing *Florida v. Jardines*, 569 U.S. 1 (2013), and *United States v. Jones*, 565 U.S. 400 (2012), Vargas observes that an invasion of property is as much within the Fourth Amendment as an invasion of privacy, and he insists that when the agents entered the lot, they lacked probable cause—and a parking lot is not a vehicle, so the agents could not benefit from the automobile exception to the warrant requirement.

Upon review, the Seventh Court of Appeals found, "The argument is a dud, because Vargas neither owned the parking lot nor had a leasehold interest in any particular part of it. Vargas was entitled to park his truck in any open space but not to exclude anyone else. Many other people also parked there, and each could admit third parties. This is why agents normally do not need probable cause or a warrant to enter the vestibule of a multi-tenant building. See *United States v. Correa*, 908 F.3d 208, 221–22 (7th Cir. 2018).

"The only person whose property interest the agents invaded was the lot's owner, who isn't complaining—and at all events an invasion of the owner's property (or privacy) rights would not entitle Vargas to any remedy. Rights under the Fourth Amendment are personal; only someone whose own rights have been transgressed is entitled to relief. See, e.g., *United States v. Payner*, 447 U.S. 727 (1980); *United States v. Sweeney*, 821 F.3d 893, 900 (7th Cir. 2016). No more need be said about the search and seizure."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D02-05/C:18-1250:J:Easterbrook:aut:T:fnOp:N:2288595:S:0

****

SEARCH AND SEIZURE: Probable Cause for Vehicle Search; Search of Locked Box Inside Vehicle
Carter v. Parris
CA6, No. 17-5498, 12/10/18

Deputies responding to a call about a disturbance on county property peered into the car in which Maurice Edward Carter was sitting with C.C. and saw "a bag containing green leafy substance" and rolling papers. Believing the bag contained marijuana, and learning that C.C. was just 13, the deputies obtained Carter's consent to search the car and found another bag of marijuana.

Carter had an apparent anxiety attack. After an ambulance took Carter away, deputies resumed searching; one picked up what looked like a dictionary, shook it, and realized it was a disguised lockbox. The deputy broke the lock and found sexually explicit photographs of C.C. and DVDs. Carter consented to searches of his apartment and his computer, where more images of C.C. were found. Carter admitted to taking pictures of C.C. and knowingly exposing him to HIV. Carter used the pictures as blackmail to force C.C. into sexual acts. Tennessee charged Carter with child rape, criminal exposure to HIV, sexual exploitation of a minor, and possession of marijuana.

After denial of motions to suppress, Carter pled guilty. The Tennessee Court of Criminal Appeals declined to consider whether Carter had consented to the lockbox search. The Sixth Circuit affirmed the denial of federal habeas relief. Seeing a bag of marijuana gave officers probable cause to search the vehicle. The Supreme Court makes no distinction between searching a vehicle and searching a container within a vehicle.

"The fact that the lockbox was a locked container inside the car makes no difference. The Supreme Court long ago dispensed with any categorical distinction between cars and the containers within cars. See *California v. Acevedo*, 500 U.S. 565, 570–72 (1991); *United States v. Ross*, 456 U.S. 798, 823 (1982). So long as 'probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.'"

READ THE COURT OPINION HERE:
https://cases.justia.com/federal/appellate-courts/ca6/17-5498/17-5498-2018-12-10.pdf?ts=1544461571

SEARCH AND SEIZURE: Search Prior to but Contemporaneous with Arrest

United States v. Johnson
CA9, No. 16-10128, 1/8/19

In this case, the Court of Appeals for the Ninth Circuit reaffirmed that the search of defendant's person was constitutional based on the search incident to a lawful arrest exception to the warrant requirement. The panel reasoned that the justifications for the search incident to lawful arrest exception do not lose any of their force in the context of a search performed by an officer who has probable cause to arrest and shortly thereafter does arrest. What is important is that the search was incident to and preceding a lawful arrest—which is to say that probable cause to arrest existed and the search and arrest are roughly contemporaneous.

READ THE COURT OPINION HERE:
http://cdn.ca9.uscourts.gov/datastore/opinions/2019/01/09/17-10252.pdf

****

SEARCH AND SEIZURE: Search Warrant; Search of Individual on the Premises Being Searched

State of North Carolina v. Wilson
SCNC, No 295PA1, 12/21/18

A SWAT team was sweeping a house so that the police could execute a search warrant. Several police officers were positioned around the house to create a perimeter securing the scene. Wilson penetrated this SWAT perimeter, stating that he was going to get his moped. In so doing, he passed Officer Christian, who was stationed at the perimeter near the street. Wilson then kept going, moving up the driveway and toward the house to be searched. Officer Ayers, who was stationed

near the house, confronted Wilson. After a brief interaction, Officer Ayers searched Wilson based on his suspicion that Wilson was armed. Officer Ayers found a firearm in WIlson's pocket. Wilson, who had previously been convicted of a felony, was arrested and charged with being a felon in possession of a firearm.

Before trial, Wilson moved to suppress evidence of the firearm on the grounds that the search violated his Fourth Amendment right under the United States Constitution. The trial court found that Officer Ayers had a reasonable and articulable suspicion that Wilson might have been armed and presently dangerous" and denied the motion. Wilson appealed. The Court of Appeals held that the search was invalid because the trial court's order did not show that the search was supported by reasonable suspicion. The State petitioned the North Carolina Supreme Court for review, arguing that the Court of Appeals' reliance on the individualized suspicion standard was inconsistent with the decision of the Supreme Court of the United States in *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587 (1981).

Upon review, the North Carolina Supreme Court found as follows:

"We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search. Defendant argues that he was not an occupant of the premises being searched in the ordinary sense of the word. Given defendant's actions here, however, it was apparent to Officer Ayers that defendant was attempting to enter the area being searched—or, stated another way, defendant would have occupied the area being searched if he had not been restrained. This understanding of occupancy is necessary given the Supreme Court's recognition that officers may constitutionally mitigate the risk of someone entering the premises during a search by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door. Indeed, if such precautionary measures did not carry with them some categorical authority for police to detain individuals who attempt to circumvent them, it is not clear how officers could practically search without fear that occupants, who are on the premises and able to observe the course of the search, would become disruptive, dangerous, or otherwise frustrate the search.

"The warrantless detention and search of defendant therefore did not violate the Fourth Amendment."

READ THE COURT OPINION HERE:
https://cases.justia.com/north-carolina/supreme-court/2018-295pa17.pdf?ts=1545410482

****

SEARCH AND SEIZURE: Stop and Frisk; Concealed Weapon; Permits
United States v. Pope
CA8, No. 18-1264, 12/10/18

Around 4:00 a.m. one January morning, Des Moines police responded to a complaint about noise at an area motel. Outside the motel room in question, a police officer heard loud music and smelled marijuana, so he knocked on the door. When someone answered, the officer could see about thirty people crowded into what he agreed was "a pretty standard motel room." After receiving no answer to his question about who had rented the room, the officer, having recognized

some of the partygoers as gang members, ordered all the occupants to leave with their hands up.

Someone in the back of the room caught the officer's attention. The officer saw this man, later identified as Temarco Pope, Jr., place a black pistol in the waistband of his jeans and cover it with his shirt. The officer testified that, as Pope approached the officer to leave, he could see the outline of the gun through Pope's shirt. He then stopped Pope, who was the last partygoer to leave, and placed him in handcuffs. At that point, the officer disarmed Pope, who afterward admitted he did not have a permit for the gun.

After the government indicted Pope for being a felon in possession of a firearm, he moved to suppress the gun and any other evidence. Pope maintained that the officer lacked a reasonable, articulable suspicion that he was engaging in criminal activity since the officer had no reason to suspect that he lacked a permit to carry the gun. The district court disagreed and denied the motion to suppress. Pope appeals and the Eighth Circuit Court of Appeals affirmed the district court decision.

"The Sixth Circuit determined that reasonable suspicion did not support an investigatory detention of a person whom police had stopped for openly carrying a gun in a state that requires no permit for doing so. *Northrup v. City of Toledo Police Department*, 785 F.3d 1128, 1132–33 (6th Cir. 2015). Because carrying a gun openly was not a criminal offense, the court reasoned, there was no basis for the stop. Id.; see also *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013); *United States v. King,* 990 F.2d 1552, 1555, 1558–59 (10th Cir. 1993). But that is not the situation we face. Carrying a concealed weapon in Iowa is a criminal offense, and possession of a concealed-weapons permit is merely an affirmative defense to a charge under § 724.4(1). See *State v. Leisinger,* 364 N.W.2d 200, 202 (Iowa 1985); *State v. Bowdry,* 337 N.W.2d 216, 218 (Iowa 1983). In other words, carrying a concealed weapon in Iowa is presumptively criminal until the suspect comes forward with a permit, see *United States v. Gatlin*, 613 F.3d 374, 378–79 (3d Cir. 2010), and we see no reason why the suspect's burden to produce a permit should be any different on the street than in the courtroom. We thus think the officer had reasonable suspicion that criminal activity was afoot when he personally observed Pope place the gun in his waistband. See *United States v. Dembry*, 535 F.3d 798, 800–01 (8th Cir. 2008).

"We believe that the Supreme Court has already authorized police officers to frisk a suspect reasonably believed to be armed even where it could be that the suspect possesses the arms legally. In *Adams v. Williams*, the Court emphasized that the purpose of a *Terry* frisk is not to discover evidence of a crime 'but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.' 407 U.S. 143, 146 (1972). The Supreme Court has also intimated at least twice that being armed with a gun necessarily means that the suspect poses a risk to an officer. In *Terry,* the Court said that a suspect's being armed 'thus presented a threat to the officer's safety.' 392 U.S. at 28. In another case, the Court observed that a bulge in a suspect's jacket permitted the officer to conclude that the suspect was armed and thus posed a serious and present danger. *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977).

"We think it remains reasonable to allow an officer to frisk someone whom the officer has lawfully stopped and reasonably believes is armed. As the

Fourth Circuit recently explained, the presumptive lawfulness of an individual's gun possession in a particular State does next to nothing to negate the reasonable concern an officer has for his own safety when forcing an encounter with an individual who is armed with a gun and whose propensities are unknown. *United States v. Robinson*, 846 F.3d 694, 701 (4th Cir. 2017)."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/18/12/181264P.pdf

****

SEARCH AND SEIZURE:

Stop and Frisk; Concealed Weapon; Claim of Permit Law as a Defense

United States v Sykes

CA8, N0. 17-3221, 1/30/19

On a December evening just shy of midnight, a police officer in Waterloo, Iowa, was dispatched to a 24-hour laundromat where he met a woman in the parking lot who reported finding a loaded handgun magazine in a laundry basket. She explained that the only other people in the laundromat at the time she discovered the magazine were two men dressed in black. She stated she was unsure if they had anything to do with the magazine, but she noticed they had stood near her basket at one point. She said that the men were still in the laundromat, though other people had since arrived.

The officer entered the laundromat and began approaching the two men in question. His body camera shows that, when he entered the aisle where the men stood, one of the men, Airrington Sykes, turned and began walking away. The officer attempted to intercept Sykes at a back corner of the laundromat near an exit and a bathroom. The officer's body camera shows Sykes bypass the exit, enter the restroom, and close the door. Moments later the officer opened the restroom door and told Sykes to "give me one second" and that he needed "one second of [his] time." Sykes complied, and the officer grabbed Sykes's sleeve and guided him out of the restroom. He then patted Sykes for weapons and discovered a handgun in Sykes's pants pocket.

The Eighth Circuit Court of Appeals held that it was reasonable for the officer to stop defendant because he suspected that Sykes, his companion, or both were carrying a concealed firearm. Sykes's primary argument on appeal is that the officer lacked a reasonable suspicion that Sykes was committing a crime.

The government disagrees, responding that Iowa Code § 724.4(1), which makes it an aggravated misdemeanor for someone to go "armed with a dangerous weapon concealed on or about the person," supplied the legal basis for the stop. Sykes counters that the officer had no reason to believe that he lacked a permit for the gun or that he was anything other than a lawful gun carrier.

Since a concealed-weapons permit is merely an affirmative defense to a charge under § 724.4(1), an officer may presume that the suspect is committing a criminal offense until the suspect demonstrates otherwise. The Court rejected Sykes's contention. The Eighth Circuit affirmed the district court's denial of Sykes's motion to suppress evidence found during a stop and frisk, stating the officer could frisk him because he was lawfully stopped and the officer reasonably believed that he was armed with a gun.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/01/173221P.pdf

SEARCH AND SEIZURE:

Stop and Frisk; 911 Hangup Call; Call Provided Sufficient Indicia of Reliability

United States v. McCants

CA3, No. 17-3103, 12/18/18

A New Jersey woman dialed 911 and described an assailant on Grove Street as wearing a red hat, with braids, stating "he is beating her up really badly" and "I think he has a gun." The caller hung up. East Orange police found a man matching the description of McCants near 146 Grove Street within one minute, walking with a woman (Fulton). Officers engaged McCants and frisked him due to the "nature of the call." During the pat down, an officer found a loaded handgun inside a fanny pack McCants was wearing. Officers placed McCants under arrest and recovered distributable quantities of heroin. Written police reports indicated that Fulton showed no signs of injury. McCants was charged with unlawful possession of a firearm by a convicted felon and possession with intent to distribute heroin.

McCants filed a pretrial motion to suppress the firearm and drugs and requested an evidentiary hearing on the motion, arguing the officers did not have reasonable suspicion that he was engaged in criminal activity before they frisked him. The Government opposed the motion, and the District Court denied it without oral argument.

The Third Circuit affirmed the denial of a motion to suppress. The Court stated that viewing all the circumstances, the anonymous tip bore sufficient indicia of reliability and provided the officers with reasonable suspicion that justified the *Terry* stop. The caller used the 911 system to report an eyewitness account of domestic violence and provided the officers with a detailed description of the suspect and location, which were confirmed by the police.

READ THE COURT OPINION HERE:

https://www2.ca3.uscourts.gov/opinarch/173103p.pdf

****

SEARCH AND SEIZURE:

Stop and Frisk; Reasonable Suspicion Dissipates After Initial Valid Stop

United States v. Bey

CA3, No. 17-2945, 12/21/18

Philadelphia officers stopped a car for a traffic violation. The driver, a front passenger, Amir Robinson, and a rear passenger, Lionel Burke, produced ID. Officers noticed the smell of marijuana, saw marijuana residue and decided to search for drugs. Burke was removed and frisked first. A gun was recovered on the floor where Burke had been sitting. Burke and Robinson fled. Burke was quickly apprehended.

Officer John Madara broadcast that Robinson was a Black male, approximately 6'0"-6'1", 160-170 pounds, wearing dark blue pants and a red hoodie. The description did not mention any facial hair. Officers Powell and Cherry responded. Powell viewed a photograph of Robinson on the patrol car's computer screen. Less than one minute later, the officers saw an individual, Muadhdhim Bey. Bey was a 32-year-old, dark-skinned African-American man with a long beard, weighing about 200 pounds and wearing black sweatpants and a hooded red puffer jacket. Robinson was a 21-year-old, light-skinned African American man with very little hair under his chin and a tattoo on his neck, weighing 160-170 pounds. The officers approached Bey, who had his back to them, and ordered him to show his hands. Bey complied and turned around. Officers recovered a gun and Bey was charged as a felon in possession of a firearm He unsuccessfully moved to suppress the gun at the district court level.

The Third Circuit reversed. "While the initial stop was supported by reasonable suspicion, the continuation of that stop, after Bey turned around and police should have realized that Bey did not resemble Robinson, violated the Fourth Amendment."

READ THE COURT OPINION HERE:
https://www2.ca3.uscourts.gov/opinarch/172945p.pdf

****

SEARCH AND SEIZURE:

Vehicle Impoundment; Inventory Search
United States v. Morris
CA8, No. 18-1810, 2/8/19

Deputy Taylor of the Clay County Sheriff's Office ("CCSO") stopped a recreational vehicle driven by Alauna Gaye Morris to execute an arrest warrant. After the arrest, Deputy Taylor and another deputy impounded the RV. During an inventory search, they found marijuana, two glass pipes, and a digital scale. They did not complete the inventory, testifying it "didn't seem reasonable to continue searching" because parts of the RV were "inaccessible." The next day, with a search warrant, they found 69.5 grams of meth at her residence. The next week, with a search warrant, they found 138 grams of meth and $9,500 in cash in the RV.Morris conditionally pled guilty to conspiracy to distribute methamphetamine. Morris moved to suppress all evidence and "fruits of the poisonous tree" obtained as a result of the unlawful seizure and search of her RV. After a suppression hearing, the magistrate judge recommended denying the motion. The district court adopted the magistrate's findings and recommendation. Morris appeals, arguing the inventory search was unlawful.

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

"Morris argues the government failed to prove the CCSO had a standardized policy for impounding and inventorying vehicles. The record does not contain a copy of the written policy because Morris objected to its admission at trial. However, Deputy Taylor testified about it. According to him, since August 2015, the CCSO has had a written policy about impounding and inventorying vehicles. It designates four times a deputy may impound a vehicle: (1) abandonment; (2) accident; (3) driver arrest; or (4) traffic hazard. The policy allows, but does not require, deputies to release a vehicle to a registered, insured driver. It is CCSO practice to release vehicles only to drivers present at the time of the stop. Once impounded, the policy requires deputies to inventory a vehicle's contents, including the trunk, for items valued at $25 or more. Although not written in the policy, it is CCSO practice to inventory containers if deputies believe they may have items valued at $25 or more. The policy requires deputies to complete a full inventory unless unreasonable to do so. The absence of the written policy in the record does not preclude establishing its content. "While a written policy may be preferable, testimony can be sufficient to establish police impoundment procedures." *United States v. Betterton*, 417 F.3d 826, 830 (8th Cir. 2005).

"Morris next contends that either the deputies did not follow the policy or the policy contained impermissible, unfettered discretion. An impoundment policy may allow some latitude and exercise of judgment by a police officer when those decisions are based on legitimate concerns related to the purposes of an impoundment. The exercise of police discretion is not prohibited 'so long as that discretion is exercised according to

standard criteria and on the basis of something other than suspicion of evidence of criminal activity.' *Colorado v. Bertine,* 479 U.S. 367, (1987). Two conditions that allow for impoundment existed in this case: the driver had been arrested and there was no other available driver, and the RV posed a hazard. Each of these conditions serve legitimate law enforcement functions of community caretaking and providing for public safety.

"Morris argues the deputies should have allowed her husband to pick up the vehicle rather than impounding it. However, nothing in the Fourth Amendment requires a police department to allow an arrested person to arrange for another person to pick up his car to avoid impoundment and inventory. *United States v. Agofsky*, 20 F.3d 866, 873 (8th Cir. 1994). 'Police may take protective custody of a vehicle when they have arrested its occupants, even if it is lawfully parked and poses no public safety hazard.' *United States v. Arrocha*, 713 F.3d 1159, 1163 (8thCir. 2013). While the deputies could have allowed Morris's husband to pick up the RV, they were not required to do so.

"Inventory searches are one of the well-defined exceptions to the warrant requirement of the Fourth Amendment. *United States v. Frasher*, 632 F.3d 450, 454 (8thCir. 2011). Inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Bertine,* 479 U.S. at 372. 'The search must be reasonable in light of the totality of the circumstances.' *United States v. Beal*, 430 F.3d 950, 954 (8th Cir. 2005).

"Once impounded, the policy requires deputies to inventory the contents of the vehicle, including its trunk, for items valued at $25 or more. Consistent with the policy, two deputies inventoried the RV, compiling a list of items. During the inventory, they found marijuana and pipes in a closed sunglasses case, and a digital scale in a purse. Morris believes the inventory was improper because the policy does not address closed containers. This belief has no merit. Because the policy required an inventory of the entire vehicle, it was reasonable for the deputies to open containers believed to have items valued at $25 or more. See *United States v. Wallace*, 102 F.3d 346, 349 (8th Cir. 1996) (holding that a 'policy requiring inventory of the contents of a vehicle and any containers therein covers inventory of locked trunks'); *United States v. Como,* 53 F.3d 87, 92 (5th Cir. 1995) ('Allowing an officer to exercise his judgment based on concerns related to the objectives of an inventory search does not violate the Fourth Amendment.') As the magistrate judge found, 'the deputies acted reasonably in looking inside Defendant's purse and the glasses case as both items could have likely contained items worth more than $25.00.' The district court did not err in finding the inventory search complied with policy and was not unlawful.

"The decision to terminate the inventory also complied with policy. As Deputy Taylor testified, the deputies 'completed the inventory to the best of our ability.' They terminated it not because they wanted to 'apply for a search warrant,' but because the back of the RV was a small, confined space, inaccessible due to the thorny plants, which Morris had described as 'exotic.' Rather than risk damaging the plants, they decided not to proceed. The magistrate judge found this testimony credible and 'in line with the sheriff's office inventory policy.' This was not clear error.

"The district court did not err in finding the deputies followed policy, reasonably exercising their discretion, when necessary, in impounding and inventorying the vehicle."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/02/181810P.pdf

****

SEARCH AND SEIZURE:

Vehicle Stop; Faulty Equipment
United States v. Campbell
CA11, No.16-10128, 1/8/19

At about 9:00pm on a brisk night in December 2013, Deputy Sheriff Robert McCannon was patrolling Interstate 20 in Georgia when he observed a Nissan Maxima cross the fog line. McCannon activated the camera on the dashboard of his patrol car, and after observing the Maxima cross the fog line a second time and noticing that its left turn signal blinked at an unusually rapid pace, he pulled the car over.

He approached the Maxima, introduced himself to the driver, Erickson Campbell, asked him for his driver's license, and explained why he had pulled him over. After determining that the Maxima's left turn signal was malfunctioning, McCannon decided to issue Campbell a warning for failing to comply with two Georgia traffic regulations: failure to maintain signal lights in good working condition, and failure to stay within the driving lane. McCannon asked Campbell to step out of his car and accompany him to the patrol car while he wrote the warning ticket.

While writing the ticket, McCannon asked the dispatcher to run a check on Campbell's license and engaged Campbell in conversation. He learned that Campbell was en route to Augusta to see his family, where Campbell worked, that Campbell had been arrested sixteen years ago for a DUI, and that Campbell was not traveling with a firearm. Then he asked Campbell if he had any counterfeit CDs or DVDs, illegal alcohol, marijuana, cocaine, methamphetamine, heroin, ecstasy, or dead bodies in his car. Campbell answered that he did not. At that time, McCannon asked Campbell if he could search his car for any of those items, and Campbell consented.

While McCannon continued writing the warning ticket, Deputy Patrick Paquette, who had arrived on the scene a few minutes earlier, began searching the car. McCannon finished the warning ticket and had Campbell sign it. After giving Campbell the ticket and returning his license, McCannon joined Paquette in the search. They found a 9mm semi-automatic pistol, 9mm ammunition, a black stocking cap, and a camouflage face mask in a bag hidden under the carpet in the Maxima's trunk. Confronted, Campbell admitted that he lied about not traveling with a firearm because he was a convicted felon and had done time.

In this case, the Eleventh Circuit affirmed the district court's denial of defendant's motion to suppress evidence found in the search of his vehicle. The court held that the rapidly blinking turn signal provided reasonable suspicion to stop the car where state law required turn signals to be in good working condition.

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201610128.pdf

SEARCH AND SEIZURE:

Vehicle Stop; Trooper Inspects Tire

United States v. Richmond

CA5, No 17-40299, 2/8/19

Texas State Trooper Manuel Gonzales was patrolling U.S. Highway 77 in south Texas when he saw a blue pickup Jennifer Richmond was driving. He drove alongside the truck and saw that the tires were "shaking," "wobbly," and "unbalanced." He was concerned that the tires were a potential danger to the public. After the truck drove across the fog line between the right lane and the shoulder of the highway, Gonzales initiated a traffic stop. When the vehicle came to a stop, Gonzales saw that one of the truck's brake lights was broken. He ran the license plate and learned the truck was registered two days earlier in nearby Brownsville.

When he approached the vehicle, Gonzales explained the reason for the stop—that Richmond crossed the fog line—and also told her about the brake light. Richmond apologized and, without prompting, stated that she was from Arizona. She avoided eye contact, and Gonzales noticed that her hands were "trembling," her mouth was "dry," and her lips had "a white coating."

In response to questioning, Richmond said that she was from Tucson but was traveling to Brownsville, where she was moving with her husband. Gonzales asked Richmond to exit the truck so that he could show her the broken brake light. Richmond complied.

As Gonzales walked to the rear of the truck, he looked at the passenger side rear tire and observed that the bolts had been stripped as if they had been taken off numerous times." This is when the challenged conduct occurred. Gonzales pushed on the tire with his hand. The resulting sound was not what "a normal tire with air" would produce; instead there was a "solid thumping noise" that indicated something besides air was inside. Gonzales, who already was concerned about the tires because he had seen them bouncing before the stop, became more suspicious that they might contain drugs.

After tapping the tire, Gonzales resumed asking Richmond about her personal history and itinerary. She could not readily recall her age, date of birth, or husband's name. Richmond asserted that she was traveling to Dallas to visit a friend, but did not know the friend's phone number or address. Stranger still, she said she intended to use Google to learn the friend's address and would return home if that search came up empty.

When Gonzales went back to his car to check Richmond's license and the vehicle's registration, he discovered that, contrary to her story about driving from Arizona, the truck had entered Mexico the day before. It had crossed back into the United States only a few hours before the traffic stop.

Gonzalez then obtained Richmond's consent to search the truck. After finding suspicious items inside the vehicle, Gonzales let some air out of the tires and smelled some kind of chemical cleaning odor coming out of them. At least one of the tires did not release air. Gonzales checked beneath the truck and saw "fingerprints on the inside of the rims and an atypical amount of weight placed on the tires to try to balance them. When he removed the tires, they seemed unusually heavy and solid.

Gonzales decided to take the truck to a local car dealership and have the tires examined. Technicians at the dealership discovered secret compartments that contained methamphetamine.

Richmond filed a motion to suppress that argued that Gonzales's tap of her tire was a search not supported by probable cause. The tap of the tire is the focus of this appeal. Richmond contends that it was a search within the meaning of the Fourth Amendment. That is the case, she says, because touching the tire was a trespass which counts as a search under recent Supreme Court cases. See *Florida v. Jardines*, 569 U.S. 1, 5 (2013); *United States v. Jones*, 565 U.S. 400.

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

"In 2012, the United States Supreme Court revived the property approach. In explaining why a search occurred when law enforcement placed a GPS tracking device on the undercarriage of a car, the Court relied on "the common-law trespass test.

"So whether the touching was a search comes down to whether it was a trespass. In terms of the physical intrusion, we see no difference between the Jones device touching the car and an officer touching the tire. Nor, apparently, does the government as it does not dispute that the tire tap was a trespass. Because that trespass occurred to learn what was inside the tires, it qualifies as a search.

"The government first argues that a search of the tire complied with the Fourth Amendment because Gonzales had probable cause to believe drugs were inside. Probable cause to believe a vehicle contains contraband allows a warrantless search because of the car's mobility. *Maryland v. Dyson*, 527 U.S. 465, 467 (1999).

"Did that probable cause exist before Gonzales tapped the tire? The information Gonzales had by that time—the wobbly tires, stripped bolts, Richmond's nervousness, and the new registration on an older vehicle stopped in a trafficking corridor—certainly gave him the reasonable suspicion of drug trafficking needed to justify extending the traffic stop to investigate further. *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004). But probable cause is a higher rung on the probability ladder than reasonable suspicion. Demonstrating the greater showing required for probable cause, evidence rising to that level would be enough to have supported an arrest of Richmond for drug trafficking. We doubt the information Gonzales had prior to tapping the tire rose to that level.

"If probable cause of drug trafficking did not yet exist, the government argues that the physical inspection of the tire served another interest: 'ensuring that vehicles on the road are operated safely and responsibly.' Indeed, the wobbly tires, the truck veering outside its lane, and the stripped bolts gave a reasonable officer probable cause to believe that the tire posed a safety risk. TEX. TRANSP. CODE § 547.004(a) (making it a misdemeanor to operate a vehicle that is "unsafe so as to endanger a person"). On that basis, the tapping of the tire was justified. It does not matter that Gonzales also wanted to find out if drugs were in the tire. See *Whren v. United States*, 517 U.S. 806, 813 (1996).

"Pulling back from the discrete Fourth Amendment doctrines we have examined, finding no constitutional violation makes sense in terms of the overall Fourth Amendment balance. The government's interest in making sure that a loose tire does not pose a safety threat strongly outweighs the intrusiveness of an officer's tapping the tire for a second or two."

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/17/17-40299-CR0.pdf

SEARCH AND SEIZURE:

Vehicle Stop; Lack of Reasonable Suspicion

United States v. Martinez

CA10, No. 17-4131

At 11:41 one morning, a state police dispatcher reported a robbery at a Wells Fargo in Winslow, Arizona. Christian Phillips, an Arizona State Trooper, heard this report while patrolling I-40 about an hour east of Winslow. The dispatcher identified two suspects: (1) a man wearing a Bud Light hat and (2) a man running "from the bank in the alley wearing a blue-and-white checkered shirt and blue jeans." The dispatcher didn't identify any vehicle the thieves might have used to make their escape. Nor did the dispatcher identify the race, ethnicity, or physical features of either of the two robbery suspects.

At 12:13 p.m. that same day, Phillips heard a second report of activity along the I-40 corridor, this time in Flagstaff, Arizona. This second report described an event that took place before the Winslow robbery and was far less serious; no robbery, or any other crime for that matter, occurred in Flagstaff. Instead, the second report alerted officers about a "suspicious" white Cadillac spotted outside a Wells Fargo branch earlier that morning. The report also described the Cadillac's driver: a Native American man wearing "a light blue checkered hoodie" and a Bud Light hat. And it said that the Cadillac headed east from Flagstaff at 11:00 a.m. The only other identifying detail Phillips recalled was that one of these reports (though he couldn't say which one) relayed that one of the suspects was wearing glasses.

Once he heard the second report, Phillips ventured west on I-40 toward Winslow. Fewer than fifteen minutes later, Phillips saw a white Cadillac—a rare sight on that stretch of I-40, he later testified—driving east on the other side of the highway. He turned around to pursue it and asked dispatch to run its license plate. Phillips caught up to the Cadillac and pulled alongside to look into the driver's window. Although Phillips later explained that the windows "were excessively tinted…to the point that [he] could not see into the vehicle," he testified that he "was able to make out the outline of the driver." From this outline, Phillips saw that the driver was wearing glasses and "had facial features that led [him] to believe" that the driver "was a Native American male." After conducting this reconnaissance, Phillips dropped back to tail the Cadillac and called for an additional officer.

But before Phillips's colleague could arrive and before Phillips received the result of the license-plate check, the Cadillac engaged its right turn signal, announcing its imminent exit from the highway and prompting Phillips to pull it over. In explaining his decision to stop the Cadillac, Phillips later testified that he did so solely because he believed it was involved in the Winslow robbery. Indeed, he specifically testified that the driver didn't commit any traffic violations. And he said that he stopped the Cadillac when he did because he didn't want to lose it in the dirt roads and small communities located off that part of the highway. Nor did he want to endanger innocent bystanders if the encounter took a violent turn.

The Cadillac stopped for Phillips without incident. Phillips approached and asked the driver to get out. When the driver opened the car door, Phillips noted the overwhelming scent of marijuana. He further observed that the driver was a woman who, although wearing glasses, might not have been Native American; Phillips testified that he did "not know what her nationality or ethnicity was." Martinez was seated in the front passenger seat, and Phillips detained him as well. A subsequent search of the Cadillac revealed

evidence linking Martinez to an entirely different bank robbery—one that occurred in Utah.

A federal grand jury indicted Martinez for that Utah bank robbery, and Martinez moved to suppress the evidence seized from the Cadillac. The district court conducted an evidentiary hearing at which Phillips testified as described above. It then found that Phillips had reasonable suspicion to stop the Cadillac and accordingly denied Martinez's motion to suppress. On appeal, Martinez argued that the state trooper who pulled him over lacked reasonable suspicion to do so, and the trial court erred in not suppressing evidence seized from his vehicle.

Upon review, the Tenth Circuit found that no one reported seeing a white Cadillac—or any other vehicle—at the Winslow robbery. Instead, "a suspicious vehicle" of that color and make reportedly left a parking lot of a Wells Fargo in a different city (Flagstaff) some 41 minutes before the Winslow robbery. So to reasonably suspect that the white Cadillac he stopped was carrying bank-robbery suspects, the trooper had to first infer that the reportedly suspicious white Cadillac from Flagstaff was also involved in the Winslow robbery. From this and descriptions of the robbery suspects, the arresting trooper had no basis to believe the Cadillac he pulled over 130 miles away was in fact the very same Cadillac.

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/opinions/17/17-4131.pdf

****

SECOND AMENDMENT:

Felons Barred From Owning Guns For Life

Medina v. Whitaker

CADC, No. 17-5248, 1/18/19

In this case, the Court of Appeals for the District of Columbia held that felons are not among the law-abiding, responsible citizens entitled to the protections of the Second Amendment. The DC Circuit affirmed the district court's dismissal of plaintiff's action seeking to enjoin the enforcement of federal statute, 8 U.S.C. 922(g)(1), which prohibits anyone convicted of a crime punishable by imprisonment for a term exceeding one year from owning firearms for life. The court held that, in this applied challenge, plaintiff failed to show facts about his conviction that distinguished him from other convicted felons encompassed by the section 922(g)(1) prohibition. In this case, plaintiff was convicted as a felon for falsifying his income on mortgage applications twenty-seven years ago.

READ THE COURT OPINION HERE:
https://www.cadc.uscourts.gov/internet/opinions.nsf/E6D2F5DB6D09D990852583860054 05FC/$file/17-5248.pdf

****

SECOND AMENDMENT:

Exemption for Retired Law Enforcement

Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey

CA3, No. 18-3170, 12/5/18

New Jersey, in response to the rise in active and mass shooting incidents in the United States, enacted a law that limits the amount of ammunition that may be held in a single firearm magazine to no more than 10 rounds. A magazine

is an implement that increases the ammunition capacity of a firearm and magazines that hold more than 10 rounds, allow a shooter to fire multiple shots in a matter of seconds without reloading.

Rejecting a challenge citing the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection Clause, the Third Circuit held that New Jersey's law reasonably fits the state's interest in public safety and does not unconstitutionally burden the Second Amendment's right to self-defense in the home. The law does not require gun owners to surrender their magazines but instead allows them to retain modified magazines or register firearms that have magazines that cannot be modified.

Because retired law enforcement officers have training and experience that makes them different from ordinary citizens, the law's exemption that permits them to possess magazines that can hold more than 10 rounds does not violate the Equal Protection Clause.

READ THE COURT OPINION HERE:
https://www2.ca3.uscourts.gov/opinarch/183170p.pdf

****

SECOND AMENDMENT:

Unlawful Alien
United States v. Torres
CA9, NO. 15-10492, 1/18/19

Victor Manuel Torres was born in Mexico in 1985. Approximately four years later, he, his younger sister, and his mother moved to San Jose, California, to join Torres's father, who had entered the United States a year earlier. Nothing in the record suggests that either of Torres's parents ever had an immigration status through which Torres could qualify for legal status in the United States. Torres was enrolled in the school system in San Jose from 1991 until he was expelled in 2000. This expulsion resulted from Torres's affiliation with the Sur Santos Pride gang, which he joined at age fourteen. Because of his gang involvement and attendant trouble at school, Torres's parents sent him back to live in Mexico in 2002, when he was sixteen years old. After he reached adulthood, Torres attempted to unlawfully enter the United States three times in June 2005. During each of his first two attempts, Torres was apprehended and permitted to voluntarily return to Mexico. However, he successfully entered the United States unlawfully on the third attempt. Upon this reentry, Torres joined his family in San Jose and began working with his father in landscaping. In 2012, Torres married a United States citizen in San Jose. However, Torres never applied for legal status.

In March 2014, a citizen reported to the Los Gatos Police Department that there was a suspicious pickup truck in a nearby parking lot and that its driver might be attempting to sell a stolen bicycle. When officers arrived, the driver's side door of the suspicious pickup was open. The officers found Torres working on something on the bed of the vehicle. Through the open driver's side door, officers saw a backpack and what appeared to be counterfeit license plates. The bed of the pickup contained "a newer looking Trek road bike." Torres told the officers that he owned the bicycle and that he had received it as a gift in December 2013. However, by reporting the bicycle's serial number to dispatch, officers confirmed that it had been reported stolen two days earlier. When later confronted with this information, Torres admitted he knew the bicycle was stolen. Officers requested that Torres provide identification.

Torres responded that it was in his vehicle. When Torres began to reach into the pickup to allegedly retrieve his identification, the officers stopped him out of concern for safety. An officer then looked into the vehicle and did not see any identification, but the officer asked if he could look inside Torres's backpack. Torres consented. Inside the backpack, the officer found a loaded .22 caliber revolver, bolt cutters, and what appeared to be two homemade silencers for the firearm.

Upon this discovery, officers placed Torres under arrest. In addition to the contents of Torres's backpack, the subsequent search of his vehicle revealed a small amount of methamphetamine and a glass pipe. Officers transported Torres to a holding facility where they explained his Miranda rights to him before conducting an interview. In response to questions about two of his tattoos that indicated a gang affiliation, Torres admitted to being an active member of Sur Santos Pride. According to Torres, the stolen bicycle and the backpack containing the firearm had been placed in his vehicle by a friend (a fellow gang member), whose identity Torres refused to reveal.

Subsequently, Torres was federally indicted for one count of being an unlawful alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5)(A). Torres moved to dismiss the indictment, arguing that Second Amendment protections apply to unlawful aliens and that § 922(g)(5) violates the Second Amendment.

The Ninth Circuit affirmed Torres's conviction for possessing a firearm while being an alien unlawfully in the United States. The panel assumed without deciding that unlawful aliens in the United States held some degree of rights under the Second Amendment. The Court held that the statute allowing conviction of an alien possession a firearm was constitutional. The panel held that the government's interests in controlling crime and ensuring public safety are promoted by keeping firearms out of the hands of unlawful aliens—who are subject to removal, are difficult to monitor due to an inherent incentive to falsify information and evade law enforcement, and have already shown they are unable or unwilling to conform their conduct to the laws of this country.

READ THE COURT OPINION HERE:
http://cdn.ca9.uscourts.gov/datastore/opinions/2019/01/08/15-10492.pdf

****

SUBSTANTIVE LAW: Armed Criminal Career Act; Burglary as a Violent Crime
United States v. Stitt
USSC, No. 17-765, 12/10/18

Victor J. Stitt and Jason Daniel Sims were each convicted of unlawfully possessing a firearm, 18 U.S.C. 922(g)(1); each was sentenced to the mandatory minimum 15-year prison term required by the Armed Career Criminal Act (ACCA) for section 922(g)(1) offenders who have at least three previous convictions for certain "violent" or drug-related felonies. ACCA defines "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year… that…is burglary," section 924(e)(2)(B).

Defendants' prior convictions were for violations of statutes that prohibit burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation. The Courts of Appeals vacated both sentences.

A unanimous Supreme Court held that the term "burglary" in ACCA includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation.

"Under the categorical approach, courts evaluate a prior state conviction based on the elements of the state offense, not the defendant's behavior on a particular occasion. A prior state conviction does not qualify as generic burglary where those elements are broader than those of generic burglary: 'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.' The Arkansas and Tennessee statutes satisfy those elements. When ACCA was passed, most state burglary statutes covered vehicles adapted or customarily used for lodging. Congress also viewed burglary as an inherently dangerous crime that 'creates the possibility of a violent confrontation.' An offender who breaks into a mobile home, an RV, a camping tent, or another structure or vehicle that is adapted or customarily used for lodging creates a similar risk of violent confrontation.

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/18pdf/17-765_2co3.pdf

****

SUBSTANTIVE LAW: Child Abuse;
Woman's Use of Opioids While Pregnant
In The Interest of: L.J.B., A Minor
SCPO, No. 10MAP 2018, 12/28/18

The issue presented to the Pennsylvania Supreme Court by this case was one of first impression: whether a woman's use of opioids while pregnant, which results in a child born suffering from neonatal abstinence syndrome ("NAS"), constitutes "child abuse."

In 2016, A.A.R. ("Mother") was released from incarceration, after which she relapsed into drug addiction, using opioids (pain pills) and marijuana. Mother subsequently learned that she was pregnant with L.J.B. ("Child"). She sought treatment for her addiction, first through a methadone maintenance program and then with subutex. Mother again relapsed, and in mid-January 2017 she tested positive for opiates, benzodiazepines and marijuana, none of which were prescribed for her.

Mother gave birth to Child on January 27, 2017; at the time of Child's birth, Mother tested positive for marijuana and subutex. By the third day of life, Child began exhibiting symptoms of NAS, including tremors, excessive suck, increased muscle tone and loose stools, which doctors treated with morphine. Mother reportedly left Child in the hospital and did not consistently check on her or stay with her (despite the availability of a room for her to do so). Hospital personnel communicated all of this information to the Clinton County Children and Youth Social Services Agency ("CYS"), which ultimately took emergency custody of the child.

The Pennsylvania Child Protective Services Law ("CPSL") defined child abuse, in relevant part, as "intentionally, knowingly or recklessly ... (1) causing bodily injury to a child through any recent act or failure to act, or (5) creating a reasonable likelihood of bodily injury to a child through any recent act or failure to act.

The Pennsylvania Supreme Court, construing the Pennsylvania statute, concluded, based on the relevant statutory language, a mother cannot be found to be a perpetrator of child abuse against her newly born child for drug use while pregnant.

https://www.supremecourt.gov/cketPDF/18/18-1226/91214/20190308101529109_Appendix.pdf

SUBSTANTIVE LAW:

Federal Firearms Act; Destructive Device

United States v. Musso

CA1, No. 18-1260, 1/15/19

Charges against Daniel E. Musso, Sr. arose from his act of purchasing four military M67 fragmentation grenades from an FBI agent during an undercover sting operation. Before the sale, the FBI had replaced each grenade's original, operable fuze with an inoperable one. The district court concluded that because the operable fuzes had been replaced with inoperable fuzes, the grenades were not "explosive grenades" under the National Firearms Act (NFA). Under the NFA, the definition of the term "firearm" includes a "destructive device."

The First Circuit reversed the district court, holding that, based on the admitted facts, statutory context, and Congress's intent in enacting the "explosive grenade" provision of the NFA, each grenade as purchased by Musso was an "explosive grenade" under the NFA.

READ THE COURT OPINION HERE:

http://media.ca1.uscourts.gov/pdf.opinions/18-1260P-01A.pdf