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Contents

ARREST: Probable Cause

United States v. Cherry
CA7, No. 17-3018, 4/8/19

Deandre Cherry drove into a Markham, Illinois parking lot to obtain cocaine that his supplier had just picked up at O'Hare airport. Unbeknownst to Cherry, his supplier had been arrested picking up the cocaine and was cooperating with DEA agents. Cherry was arrested mid-deal, convicted, and eventually sentenced to 240 months' imprisonment.

Cherry appealed to the Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed, rejecting Cherry's arguments that the agents lacked probable cause to arrest him and search his vehicle. The informant did not have any history of cooperation but was not an anonymous tipster. He was implicating himself in a drug deal and was motivated to cooperate. Agents obtained significant detailed information that was corroborated as events unfolded. With respect to the car search, the court upheld a finding that the drugs were in plain view after Cherry opened the door while trying to flee. In any case, agents were entitled to open the door to conduct a limited protective sweep, so the drugs were admissible under the inevitable discovery doctrine.

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

CIVIL LIABILITY:

Deliberate Indifference to Medical Needs

Taylor v. Hughes

CA11, No. 17-14772, 4/4/19

On November 16, 2013, Covington County Deputy Kyle Adams found Almus Taylor in a battered pickup truck that was stopped in the middle of the road. The driver-side door of the truck was in the truck's bed. Almus was lying across the seat, had scratches on his arms, and was unable to walk on his own. Deputy Adams called Emergency Medical Services (EMS) and the Alabama Highway Patrol.

An EMS team and Alabama State Trooper Chase Amis came to the scene. The parties dispute whether EMS performed a medical evaluation. Although Almus said that he had been in an accident, Trooper Amis claimed to have seen no evidence that an accident had actually occurred. Almus refused to take an ambulance to the hospital unless he could bring his dogs. The EMS team refused to accommodate Almus's request, so they asked him to sign a release stating that he did not want to go to the hospital. Almus was unable to sign the release, but the EMS team accepted Almus making a mark on the form. Trooper Amis then arrested Almus for driving under the influence and took him to the Covington County Jail.

Ben Hunter, Bill Blue, and Roy Parker were the jail guards on duty. Almus arrived at 9:33 p.m., appeared highly intoxicated, and had to be assisted while walking to the holding cell. According to the guards, Trooper Amis said that Almus was "medically cleared" and "just drunk." But the Booking Medical Log reflects Almus's statement that he was all busted up from a car wreck.

Also in dispute is whether Almus cried out for help during the night and whether the guards heard it. According to several of Almus's fellow detainees, Almus spent several hours moaning and crying out in pain. They said that Almus told the guards that he had been in an accident and was "dying" and "broke up" inside. The record further contains evidence that Almus begged for medical attention, but was told by the guards to "shut up." None of the guards called for medical help.

According to jail guard Hunter, however, he checked on Almus at 5:00 a.m. and asked if Almus needed medical attention. Almus purportedly replied that he was in pain but could wait until the nurse arrived a little later. Hunter's deposition testimony, however, is inconsistent with that from one of Almus's fellow detainees and is not corroborated by other evidence.

The jail's nurse arrived at around 6:00 or 6:30 a.m. that morning. When the nurse tried to assess Almus's condition, he slid onto the ground and spit up blood. An officer called 911 and Almus was taken away in an ambulance. Almus died on his way to the hospital from internal bleeding.

The Court of Appeals for the Eleventh Circuit held that qualified immunity did not shield the guards from deliberate indifference claims where a reasonable jury could conclude that the guards were not entitled to rely on a trooper's statement that Almus was just drunk, particularly because Almus reported injuries from a car accident. Furthermore, a reasonable jury could conclude that the guard's willful disregard of what they heard and observed during the night made them deliberately indifferent to Almus's serious medical needs.

READ THE COURT OPINION HERE:

https://bit.ly/2T8wGsc

CIVIL LIABILITY:

Excessive Force Claim; Police Shooting

Shepherd v. City of Shreveport

CA5, No. 18-30528, 4/3/19

On October 15, 2013, Corporal Tucker was dispatched to Mr. Shepherd's home to assist the Shreveport Fire Department with a 911 call. Corporal Tucker was informed by dispatch that there was a potentially violent male who had possibly suffered a stroke and who the female caller feared might hurt her.

While Corporal Tucker was en route, firefighters entered Mr. Shepherd's home, encountered Mr. Shepherd with a knife in his hand, and fled the home. Mr. Shepherd followed them out into the yard but stopped at the sidewalk. The knife was later determined to be eight inches long with a four-inch blade. Dispatch updated Corporal Tucker that the subject was armed with a knife and directed that he expedite. During this time, a neighbor called 911 to erroneously report that shots had been fired, and dispatch then notified Corporal Tucker that there were reports of shots fired in the area.

Shortly after receiving the report of possible shots fired, Corporal Tucker arrived at Mr. Shepherd's home. He was the first police officer at the scene and the dash-mounted camera in his patrol car captured much of what followed in the next two minutes. Corporal Tucker retrieved his shotgun and approached the firetruck around which the firefighters had gathered. At that time, Mr. Shepherd was standing in the yard with a knife in his hand, positioned between the firetruck and the house. The firefighters identified Mr. Shepherd as the person with a knife and informed Corporal Tucker there was at least one person—the female caller—inside the home.

Corporal Tucker made multiple commands for Mr. Shepherd to "get down" and "lay down." Mr. Shepherd did not comply with those commands. During the entire encounter, Mr. Shepherd did not directly engage in dialogue with Corporal Tucker, but he cursed aloud at multiple times, stating "f--k you." After approximately thirty seconds of ignoring commands to get down in the yard, Mr. Shepherd began moving back towards the residence—where the female caller was believed to be—and Corporal Tucker commanded him to "come to me now." That was the only time during the encounter that Corporal Tucker directed Mr. Shepherd to move towards him. Mr. Shepherd did not comply with that command and walked into the residence's garage. Mr. Shepherd was in the garage for approximately a minute. During that time, Corporal Tucker proceeded partially up the driveway to keep a visual on Mr. Shepherd and gave him multiple commands to put his hands up. Mr. Shepherd disregarded those commands as well. Mr. Shepherd then exited the garage and began moving down the inclined driveway towards Corporal Tucker. At approximately 19:53:45 on the videotape captured by the patrol car's dash-mounted camera, Corporal Tucker can be seen backing down the driveway's incline.

At approximately 19:53:49, Mr. Shepherd comes into the video frame and can be seen moving down the driveway towards Corporal Tucker. At the same time, Corporal Tucker can be heard commanding Mr. Shepherd to "get back." However, Mr. Shepherd continued to move towards Corporal Tucker at a relatively quick speed, while Corporal Tucker continued to move backwards. The parties dispute whether Mr. Shepherd had the knife raised over his head or at his side at this point. The parties also dispute whether Mr. Shepherd was accelerating or "stumbling" toward Corporal Tucker.

On appeal, there is a dispute over whether Mr. Shepherd and Corporal Tucker were ten feet or ten yards apart. But what is undisputed is that Mr. Shepherd continued to move towards Corporal Tucker with a knife in his hand, disregarded a command to get back, and Corporal Tucker shot him once with his shotgun at approximately 19:53:51 on the videotape. Mr. Shepherd died from the injury. He was fifty years old at the time.

Ms. Shepherd argues that the district court erred in determining that there was no genuine dispute as to whether Corporal Tucker's use of force was unreasonably excessive. She argues that genuine disputes of material facts exist as to: (1) the distance between Mr. Shepherd and Corporal Tucker at the time the shot was fired; (2) the manner in which Mr. Shepherd approached when he was shot; and (3) the level of threat Mr. Shepherd presented with the knife when he was shot.

The Court of Appeals for the Fifth Circuit stated that all of the alleged disputes raised by Ms. Shepherd in this appeal are either immaterial or discredited by the videotape, and affirmed the district court's judgment that Corporal Tucker's use of force was neither excessive nor unreasonable under the Fourth Amendment. The Court further stated that even if Corporal Tucker's use of force was unreasonably excessive based on the totality of circumstances in this case (which they held it was not), they also affirmed the district court's alternate determination that Corporal Tucker is entitled to qualified immunity.

READ THE COURT OPINION HERE:
https://bit.ly/2M5CGS0

CIVIL LIABILITY:

Handcuffing; Excessive Force
Sebastian v. Ortiz
CA11, No. 17-14751, 3/14/19

Lieutenant Javier Ortiz of the Miami Police Department challenges the district court's denial of his motion to dismiss this civil rights excessive force case arising out of a routine traffic stop.

Ruben Sebastian alleges that during the course of the stop and his subsequent arrest, Ortiz restrained him with handcuffs for more than five hours "in a manner purposely intended to cause pain and injury." On account of the officer's misconduct, Sebastian claims to have suffered nerve damage and the permanent loss of sensation in his hands and wrists. This case presents the question whether a police officer is entitled to qualified immunity when he intentionally applies unnecessarily tight handcuffs to an arrestee who is neither resisting arrest nor attempting to flee, thereby causing serious and permanent injuries.

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

"We do not mean to give law enforcement officers pause each time they employ handcuffs in the heat of an arrest, and only the most exceptional circumstances will permit an excessive force claim on the basis of handcuffing alone. The peculiar facts of this case, not least the reapplication of excessively tightened cuffs after Sebastian first complained and the five-hour period Sebastian spent restrained in the cuffs at the station after his arrest, cross over 'the hazy border between excessive and acceptable force' such that any reasonable officer would know he had violated the Constitution. Taking the allegations in the complaint as true, the district court did not err by

refusing to dismiss the complaint and in holding that Lieutenant Ortiz was not entitled to qualified immunity."

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

CIVIL LIABILITY:

Retaliatory Arrest Claim
Nieves v. Bartlett
USSC, No. 17-1174, 587 U.S. ___ (2019), 5/28/19

Russell Bartlett was arrested for disorderly conduct and resisting arrest during a winter sports festival held in Alaska. Officer Nieves claimed he was speaking with a group when a seemingly-intoxicated Bartlett started shouting not to talk to the police. When Nieves approached him, Bartlett began yelling at the officer to leave. Nieves left. Bartlett claims that he was not drunk and did not yell at Nieves. Minutes later, Trooper Weight claimed, Bartlett approached him in an aggressive manner while he was questioning a minor, stood between Weight and the teenager, and yelled with slurred speech that Weight should not speak with the minor.

When Bartlett stepped toward Weight, the officer pushed him back. Nieves initiated an arrest. When Bartlett was slow to comply, the officers forced him to the ground. Bartlett denies being aggressive and claims that he was slow because of a back injury. Bartlett claims that Nieves said, "Bet you wish you would have talked to me." Bartlett sued under 42 U.S.C. 1983, claiming that the arrest was retaliation for his speech. The Ninth circuit agreed.

The United States Supreme Court reversed the Ninth Circuit:

"Because there was probable cause to arrest Bartlett, his retaliatory arrest claim failed as a matter of law. Plaintiffs in retaliatory prosecution cases must prove that the decision to press charges was objectively unreasonable because it was not supported by probable cause. First Amendment retaliatory arrest claims are subject to the same no-probable-cause requirement. The inquiry is complex because protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest. A purely subjective approach would compromise the even-handed application of the law and would encourage officers to minimize communication during arrests. The common law torts of false imprisonment and malicious prosecution, in existence at the time of 42 U.S.C. 1983's enactment suggest that the presence of probable cause should generally defeat a First Amendment retaliatory arrest claim. The no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/18pdf/17-1174_m5o1.pdf

CIVIL LIABILITY:
Sex Reassignment Surgery
Gibson v. Collier
CA5, No. 16-51148, 3/29/19

The Court of Appeals for the Fifth Circuit held that a state does not inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate.

Scott Lynn Gibson, a transgender Texas prison inmate in the custody of the Texas Department of Criminal Justice (TDCJ), filed suit challenging TDCJ Policy G-51.11 as unconstitutional under the Eighth Amendment, both facially and as applied. Gibson contended that Policy G-51.11 amounted to systematic deliberate indifference to his medical needs, because it prevented TDCJ from even considering whether sex reassignment surgery was medically necessary for him. The district court granted summary judgment for the Director of TDCJ based on the merits of Gibson's Eighth Amendment claim.

The Fifth Circuit held that Gibson failed to present a genuine dispute of material fact concerning TDCJ's deliberate indifference to his serious medical needs under the Eighth Amendment where, as here, the claim concerned treatment over which there exists on-going controversy within the medical community. As the First Circuit concluded in *Kosilek v. Spencer*, 774 F.3d 63, 76–78, 87–89, 96 (1st Cir. 2014) there was no consensus in the medical community about the necessity and efficacy of sex reassignment surgery as a treatment for gender dysphoria. The court also held that Gibson could not state a claim for cruel and unusual punishment under the plain text and original meaning of the Eighth Amendment, regardless of any facts he might have presented in the event of remand. The court held that it could not be cruel and unusual to deny treatment that no other prison has ever provided.

READ THE COURT OPINION HERE:
https://bit.ly/2uC4Qt7

CIVIL LIABILITY: Terminating a Dangerous High Speed Pursuit; Qualified Immunity
Morrow v. Meachum
CA5, No. 17-11243, 3/8/19

Jonathan Meachum was patrolling I-20 in a marked police SUV. At around 5:30 p.m., Meachum observed motorcyclist Austin Moon speeding at 85 mph and weaving through traffic. Meachum turned on his lights to stop the motorcycle. Moon sped away. Meachum radioed for help. Having shaken the police SUV from his tail, Moon exited I-20. He stopped at a gas station and hid behind a gas pump. Eastland County Deputy Sheriff Ben Yarbrough drove by the gas station and spotted Moon. Moon likewise spotted Yarbrough. So Moon again sped away—this time performing a "wheelie." Yarbrough turned on his lights and gave chase. Moon again escaped.

Yarbrough radioed that Moon was now headed south on US-183. Meanwhile, Meachum had also exited I-20 onto southbound US-183. But given Moon's pit stop, Meachum was now in front of him. The relevant stretch of US-183 is a two-lane undivided road with rolling hills. Videos in the record show light but consistent traffic going both directions. Videos also show Meachum was driving approximately 100 mph; motorcyclist Moon was clocked at 150 mph and closing quickly behind Meachum. As Meachum reached the top of a gentle hill, he spotted two vehicles in the oncoming (northbound) lane of US-183. Meachum also spotted Moon approaching from behind.

Thus began the fateful seven seconds at the heart of this case. According to the dashcam on Meachum's police SUV and Moon's expert report, the officer was going approximately 100 mph when he spotted Moon approaching from behind. The dashcam at that moment is timestamped 17:46 and 41 seconds. At 42.3 seconds, Meachum slowed to 93 mph and moved to the right side of his lane. At 43.0 seconds, Meachum slowed to 87 mph. At 44.7 seconds, Meachum slowed to 71 mph. Then, over the next 2.3 seconds— from 44.7 to 47.0—Meachum slowed to 56 mph and moved his SUV leftward and over the center line of US-183. At 47.7 seconds, Moon crashed into the back of Meachum's SUV. The dashcam shows Meachum was traveling 51 mph at impact. Moon died. He was 22.

Moon's survivors and estate sued Meachum under 42 U.S.C. § 1983 for seizing Moon in violation of the Fourth Amendment. They argued Meachum intentionally positioned his SUV to surprise Moon, to prevent him from eluding arrest a third time, and under the circumstances, to kill him. Meachum described his actions as a "rolling block." Meachum testified he performed a rolling block because he wanted to (1) discourage Moon from passing in the oncoming traffic lane and (2) warn the oncoming traffic of the pursuit. Videos corroborated Meachum's testimony there was northbound traffic on the highway. The only dispute was whether that traffic was in the northbound lane or on the shoulder. Either way, a witness stated Moon's motorcycle was already in the northbound lane when Meachum crossed the center line.

The district court held Meachum was entitled to qualified immunity and entered summary judgment. It held the law is clear that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. Moon's estate and survivors appealed.

The Court of Appeals for the Fifth Circuit stated that qualified immunity includes two inquiries. The first question is whether the officer violated a constitutional right. The second question is whether the right at issue was clearly established at the time of the alleged misconduct.

"The second question—whether the officer violated clearly established law—is a doozy. The § 1983 plaintiff bears the burden of proof. And the burden is heavy: A right is clearly established only if relevant precedent has placed the constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The dispositive question is whether the violative nature of particular conduct is clearly established. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). That is because qualified immunity is inappropriate only where the officer had fair notice—in light of the specific context of the case, not as a broad general proposition—that his particular conduct was unlawful. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). While officers are charged with knowing the results of our cases—at least when they are so numerous and pellucid as to put the relevant question 'beyond debate,' *al-Kidd*, 563 U.S. at 741—officers are not charged with memorizing every jot and tittle we write to explain them.

"Third, overcoming qualified immunity is especially difficult in excessive force cases. This is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. *Kisela v. Hughes*, 138 S. Ct. 1148. And as this case illustrates, excessive-force

claims often turn on 'split-second decisions' to use lethal force. *Pasco v. Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009). That means the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately.

"The fourth and final commandment is we must think twice before denying qualified immunity. Because of the importance of qualified immunity to society as a whole, the Supreme Court often corrects lower courts when they wrongly subject individual officers to liability. We'd be ill advised to misunderstand the message and deny qualified immunity to anyone 'but the plainly incompetent or those who knowingly violate the law.' *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

"Appellants are seeking an extraordinary remedy. To get it, they must make an extraordinary showing. They have fallen far short. They have not identified a controlling precedent that squarely governs the specific facts at issue. Nor have they identified a controlling precedent rendering it 'beyond debate'—such that any reasonable officer would know, even in only seven seconds, and even in the midst of a high-speed chase—that Meachum's rolling block violated the Fourth Amendment.

"To the extent we can identify clearly established law in excessive-force cases, it supports Meachum, not Moon. In at least three recent cases, the Supreme Court has decided whether officers are entitled to qualified immunity for using deadly force to end high-speed chases. In all three cases, the Court said yes. In *Plumhoff v. Rickard*, 572 U.S. 765 (2014) the Court held officers were entitled to qualified immunity after firing 15 shots that killed two men who fled a traffic stop at speeds over 100 mph. In *Mullenix v. Luna*, 136 S.Ct. 305 (2015) the Court held an officer was entitled to qualified immunity after firing six shots and killing a man who evaded arrest at speeds between 85 and 110 mph. And in Scott v. Harris, 550 U.S. 372 (2007) the Court held an officer was entitled to qualified immunity after ending an 85-mph chase by ramming the suspect's car off the road and paralyzing him. Indeed, in *Scott,* the Court held there was no constitutional violation at all. Appellants argue these cases are distinguishable in various ways. True. All that matters here, however, is that three cases affording qualified immunity to officers who used deadly force to end police chases do nothing to foreclose using deadly force to end police chases."

"Finally, Appellants argue it is unconstitutional for officers to perform a rolling block where a fleeing motorcyclist posed no immediate danger to anyone. There is no binding precedent saying so. Under Appellants' view, Meachum should be forced to decide—with life-or-death consequences for innocent motorists, in less than seven seconds, and upon pain of personal liability—whether his chase is more like *Abney* and *Mullenix*, or more like a slow-moving motorcycle pursuit 'across an empty field in the middle of the night in rural Kentucky,' *Walker,* 649 F.3d at 503. Section 1983 does not put Meachum to that choice. Nor do we. The judgment of the district court is affirmed."

READ THE COURT OPINION HERE:
https://bit.ly/2F7mon1

EDITOR'S NOTE: *The Court of Appeals for the Fifth Circuit cited the case Plumhoff v. Rickard, 572 U.S. 765 (2014). In that case, around midnight on July 18, 1994, a West Memphis police officer stopped a white Honda Accord for a broken headlight. Donald Rickard was the driver of the Honda and Kelly Allen, the passenger. After*

noticing an indentation in the windshield and Rickard's erratic behavior, Forthman requested that Rickard step out of the vehicle. Rickard instead fled, leading to a high-speed pursuit by several officers across state lines into Memphis, Tennessee. After crashing into several vehicles, Rickard's Honda was shot at fifteen times as he was driving away from the officers in a final attempt to escape. Rickard lost control and hit a building resulting in fatal injuries to both driver and passenger. The District Court for the Western District of Tennessee denied the police officers' motion for summary judgment based on qualified immunity. The Court of Appeals for the Sixth Circuit affirmed the judgment.

In a unanimous decision, the justices concluded that the officers' conduct did not violate the Fourth Amendment. With regard to the use of deadly force, the court concluded that the officers' actions were reasonable, citing Scott v. Harris in which the Court held that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."

CIVIL LIABILITY:

Unconstitutional Seizure; Retalation

Cruise-Gulyas v. Minard

CA6, No. 18-2196, 3/13/19

Officer Mathew Minard pulled over Debra Lee Cruise-Gulyas in Taylor, Michigan, for speeding. He wrote her a ticket for a lesser, non-moving violation. As she drove away, she made a vulgar gesture at Minard, who then stopped her again and changed the ticket to a speeding offense.

The Sixth Circuit affirmed the denial of Minard's motion for dismissal of Cruise-Gulyas's 42 U.S.C. 1983 suit, in which she alleged unconstitutional seizure, restriction of her liberty, and retaliation.

"Cruise-Gulyas did not break any law that would justify the second stop and at most was exercising her free speech rights. Qualified immunity protects police from personal liability unless they violate a person's clearly established constitutional or statutory rights; the rights asserted by Cruise-Gulyas meet that standard. Minard's authority to seize her in connection with the driving infraction ended when the first stop concluded. Cruise-Gulyas's crude gesture could not provide that new justification. Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment. An officer who seizes a person for Fourth Amendment purposes without proper justification and issues her a more severe ticket clearly commits an adverse action that would deter her from repeating that conduct in the future."

READ THE COURT OPINION HERE:

http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0043p-06.pdf

CIVIL LIABILITY: Using Deadly Force Against a Vehicle; The Vehicle's Trajectory

Williams v. Strickland
CA4, No. 18-6219, 3/5/19, 2012

On June 29, 2012, Johnnie Williams drove from Georgia to South Carolina to visit a relative. His six-year-old son was with him. When Williams and his son arrived in South Carolina, they stopped at a gas station. There, Williams ran into an acquaintance, Anthony Ancrum, who needed a ride to his apartment. Ancrum's apartment complex was nearby, and Williams offered to drive him. On the way to the apartment complex, Williams crossed paths with Officer Heroux, who was on duty in a patrol car. Heroux ran Williams's license plate through dispatch and learned that the plate had been stolen. He followed Williams into the parking lot of the apartment complex, where he turned on his blue lights. In response, Williams pulled into a parking space. Heroux got out to approach him. Two other officers, Kyle Strickland and Walter Criddle, arrived on the scene.

What happened over the next several seconds forms the heart of this appeal. When Heroux was about ten feet from Williams's car, Williams shifted the car into reverse and cut the wheel, causing the front end of the car to swivel in Heroux's direction. Heroux, believing himself to be in danger, stepped back and drew his gun. At the same time, Strickland started walking toward Williams's car. Williams then put the car in drive, straightened out, and drove toward Strickland. Heroux and Strickland opened fire on the car. Crucially, it is not clear—at this stage—how far Williams got before Heroux and Strickland started shooting. He may have been headed toward Strickland. He may have been passing by Strickland, such that Strickland was alongside the car and out of the car's trajectory. Or he may have already driven past Strickland, such that Strickland, like Heroux, was behind the car. One of Heroux's shots hit Williams in the back. Williams lost control of the car and crashed into a tree. He was airlifted to the hospital for emergency surgery, after which he was placed in a medically induced coma. Despite several subsequent surgeries, Williams has, among other things, "lost the full and proper function of his bowels, lungs, and other bodily systems."

Williams filed a § 1983 suit against Strickland and Heroux alleging that by firing on him during the course of his arrest, the officers had subjected him to excessive force, violating his rights under the Fourth Amendment.

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

"Qualified immunity protects government officials from liability for violations of constitutional rights that were not clearly established at the time of the challenged conduct. Given this standard, we must determine two things. First, if Strickland and Heroux fired on Williams after they were no longer in the path of Williams's car, did they violate Williams's Fourth Amendment right to freedom from excessive force? Second, as of June 29, 2012, was it clearly established that using deadly force against Williams after the officers were no longer in the car's trajectory would violate Williams's right to freedom from excessive force? The answer to both questions is yes.

"In *Waterman v. Batton*, 393 F.3d 474, we held that officers who used deadly force against the driver of a car had not violated the Fourth Amendment when, in the aftermath of a high-speed chase (during which the driver had reportedly tried to run an officer off the road), the officers were standing in or immediately

adjacent to the car's forward trajectory, and the car 'lurched forward' and 'began to accelerate,' such that the officers reasonably believed that the car was going to run them over in approximately one second. We also held that the same officers had violated the Fourth Amendment to the extent that they started to use deadly force, or continued to use deadly force, once the car had driven by them—i.e., once it was no longer reasonable for them to believe that the car was about to run them (or their fellow officers) over. This was true even though mere seconds separated the point at which deadly force was lawful from the point at which deadly force was unlawful. As we put it then, force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated.

"Following *Waterman*, we have no difficulty concluding that if Strickland and Heroux started or continued to fire on Williams after they were no longer in the trajectory of Williams's car, they violated Williams's Fourth Amendment right to freedom from excessive force.

"Despite having violated a plaintiff's constitutional right, defendants may be entitled to immunity from the plaintiff's suit for damages if, at the time of the violation, the plaintiff's right was not 'clearly established.' *Williamson v. Stirling*, 912 F.3d 154, 186 (4th Cir. 2018). To determine whether a right was clearly established, we typically ask whether, when the defendants violated the right, there existed either controlling authority (such as a published opinion of this Court) or a robust consensus of persuasive authority that would have given the defendants fair warning that their conduct, under the circumstances, was wrongful.

"The right that the officers allegedly violated falls well within the ambit of clearly established law. When we decided *Waterman*, in 2005, we clearly established that (1) law enforcement officers may—under certain conditions—be justified in using deadly force against the driver of a car when they are in the car's trajectory and have reason to believe that the driver will imminently and intentionally run over them, but (2) the same officers violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory. *Waterman* obviously and manifestly encompasses the facts of this case.

"In light of *Waterman*, there can be no question that the right Williams seeks to vindicate was clearly established on the day he was shot. To summarize: A reasonable jury could conclude that Strickland and Heroux acted in a way that, as a matter of law, violated Williams's clearly established federal rights— specifically, his Fourth Amendment right to freedom from excessive force. Therefore, the officers are not entitled to summary judgment on the basis of qualified immunity, and the district court correctly denied their motions."

READ THE COURT OPINION HERE:
http://www.ca4.uscourts.gov/opinions/186219.P.pdf

CONSPIRACY:

Knowingly Agreeing to Participate

United States v. Moreno

CA7, No. 17-3435, 4/25/19

In this case, Maria Moreno argued that there was insufficient evidence to support a finding that she conspired with the Guzman Drug Trafficking Organization. Rather, the evidence merely showed a buyer-seller relationship.

The Court of Appeals for the Seventh Circuit stated that while large-quantity, repeat sales alone do not support an inference of conspiracy, nor do "occasional sales on credit," Moreno and the Guzman Drug Trafficking Organization (DTO) had a year-long relationship during which Moreno regularly purchased wholesale quantities of heroin. Moreno sought to protect the Guzman DTO by warning it about potential law enforcement intervention and there is evidence the Guzman DTO and Moreno shared "tools," two vehicles with trap compartments used to transport drugs and money. The government did not need to prove Moreno was a member of the Guzman DTO to prove she knowingly agreed to participate in the conspiracy.

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

EMPLOYMENT LAW:

First Amendment; Political Association
McCaffrey v. Chapman
CA4, No. 17-2198, 4/9/19

Mark McCaffrey started working in the Loudoun County Sheriff's Office (LCSO) in 2005. In 2008, he began working as a major crimes detective serving as a lead detective in complex, high-profile cases. McCaffrey supported Sheriff Chapman when he first ran for sheriff in 2011. However, when Sheriff Chapman ran for re-election in 2015, McCaffrey supported his opponent. After Sheriff Chapman won re-election, McCaffrey received a letter informing him that his appointment as a deputy sheriff would not be renewed.

In response to Sheriff Chapman's actions, McCaffrey filed a complaint in Virginia state court. McCaffrey alleged that Sheriff Chapman's decision not to re-appoint him violated his First Amendment rights to freedom of political association and speech under both the United States and the Virginia Constitution. Appellees removed the case to federal court based on federal question jurisdiction. The federal district court dismissed McCaffrey's complaint.

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

"On appeal, McCaffrey alleges that the district court erred by dismissing his First Amendment claims. McCaffrey's appeal implicates two doctrines that provide exceptions to the First Amendment's protections.

"The first doctrine is known as the Elrod-Branti exception. Generally, the First Amendment's right to freedom of political association prohibits government officials from terminating public employees solely for supporting political opponents. However, under the Elrod-Branti exception, certain public employees can be terminated for political association in order to give effect to the democratic process. See *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

"The second doctrine is known as the Pickering-Connick doctrine. The First Amendment's right to freedom of speech generally prohibits dismissals of employees in retaliation for the exercise of protected speech. However, under the Pickering-Connick doctrine, the First Amendment does not protect public employees from termination when their free speech interests are outweighed by the government's interest in providing efficient and effective services to the public. See *Connick v. Myers*, 461 U.S. 138 (1983); Pickering v. Board of Education, 391 U.S. 563 (1968).

"A sworn deputy sheriff like McCaffrey had a special role in carrying out the law enforcement policies, goals and priorities on which Sheriff Chapman campaigned and prevailed. *Jenkins v. Medford,* 119 F.3d 1156 (4th Cir. 1997). Sheriff Chapman was entitled to carry out the policies on which he ran and won with deputy sheriffs who did not oppose his re-election. To repeat what this Court said in *Jenkins*, 'we do not believe it was ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him.'

The Court held that under the Elrod-Branti exception, Sheriff Chapman's decision not to re-appoint McCaffrey did not violate his First Amendment right to freedom of political association. They also held that Sheriff Chapman's decision not to reappoint McCaffrey did not violate his First Amendment right to freedom of speech under the Pickering-Connick doctrine.

READ THE COURT OPINION HERE:
http://www.ca4.uscourts.gov/opinions/172198.P.pdf

EMPLOYMENT LAW: Retaliation
Morgan v. Robinson
CA8, No. 17-1002, 3/29/19

Donald Morgan is a deputy in the Washington County, Nebraska Sheriff's Department. Michael Robinson is the elected sheriff. In 2014, Morgan ran against Robinson in the primary election. During the campaign, Morgan publicly made statements about the sheriff's department and his plans to improve it. Robinson won. Six days later, Robinson terminated Morgan's employment, claiming his campaign statements violated the department's rules of conduct.

Morgan sued Robinson for retaliatory discharge in violation of the First Amendment. Robinson moved for summary judgment based on qualified immunity. The district court denied the motion, finding "genuine issues of material fact regarding the constitutionality of the termination, and whether Robinson should have reasonably known the termination was unlawful.

The Eighth Circuit reversed the district court, holding that Robinson was entitled to qualified immunity because he did not violate a clearly established statutory or constitutional right of which a reasonable person would have known.

"As in *Nord v. Walsh*, 757 F.3d 734, the defendant could have reasonably believed that plaintiff's speech was at least potentially damaging to and disruptive of the discipline and harmony of and among co-workers in the sheriff's office and detrimental to the close working relationships and personal loyalties necessary for an effective and trusted local policing operation."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/03/171002P.pdf

EVIDENCE: Attorney-Client Privilege; Cooperating Witnesses
United States v. Farrell
CA4, No. 17-4488, 4/5/19

James Michael Farrell was convicted after an early 2017 jury trial in the District of Maryland for ten offenses of money laundering conspiracy, substantive money laundering, and related charges of obstruction of justice. Farrell, a former lawyer, was prosecuted for his role as the so-called "consigliere" of an elaborate multi-state marijuana trafficking organization.

Farrell moved the district court for suppression of his inculpatory recorded conversations with two Nicka Organization drug dealers: Jacob Harryman and Ryan Forman. In cooperating with federal agents, Harryman and Forman met separately with Farrell on several undercover occasions and taped their conversations with him. Farrell asserted in his suppression motion that the Tapes should be suppressed because they constituted attorney-client communications intercepted by the government in violation of the Sixth Amendment.

The district court orally denied Farrell's suppression motion. In explaining its bench ruling, the court questioned whether either Harryman or Forman — who were then cooperating witnesses of the government — had attorney-client relationships with Farrell when the Tapes were made. Assuming one or both of such relationships existed, however, the court recognized that the asserted privilege belongs to the clients, who could waive it and divulge otherwise privileged statements. The court then ruled that the federal agents were entitled to direct Harryman and Forman — in their cooperation with the federal authorities — to meet in undercover settings with Farrell and record their conversations without running afoul of the Sixth Amendment.

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

"According to Farrell, the district court erred in denying his suppression motion because the government's surreptitious recording of his conversations with Harryman and Forman ran afoul of the Sixth Amendment by invading attorney-client relationships and the corresponding privilege. That is, Farrell claims that his communications with Harryman and Forman are protected by attorney-client privilege and that he can invoke that privilege. We reject that aspect of Farrell's suppression contention, however, because it is neither factually nor legally correct. The record does not show that, at the time of the undercover recordings, Harryman and Forman were Farrell's clients or sought to become his clients. To the contrary, when the recordings were made, Harryman and Forman had both hired separate and independent lawyers to represent them — as Farrell was well aware.

"Additionally, as the district court explained, in the attorney-client privilege context, the privilege belongs to the client, not the lawyer. Accordingly, Harryman and Forman were entitled to waive any such privilege, if one had existed at the time of their taped conversations with Farrell. See *Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998) (observing that client holds attorney-client privilege and 'can waive it either expressly, or through conduct.' We are therefore satisfied that the trial court did not err in denying Farrell's motion to suppress the Tapes."

READ THE COURT OPINION HERE:
http://www.ca4.uscourts.gov/opinions/174488.P.pdf

EVIDENCE: Law Enforcement Officer Testifying to Decode Criminal Conversations

United States v. Delva
CA11, No. 16-12947, 4/29/19

Bechir Delva and Dan "Kenny" Delva are brothers who were convicted of seven crimes arising out of their identity theft and tax fraud operations. A cooperating source, McKenzie Francois, told federal agents that Bechir and Delva were conducting identity theft and tax fraud operations out of a townhouse located within a gated

community complex in Miramar, Florida. Acting on this information, the Agents set up an undercover operation with Francois, which targeted the townhouse.

Based on this investigation and after a joint jury trial, the Delvas appeal their convictions and sentences for conspiracy to possess 15 or more unauthorized access devices, in violation of 18 U.S.C. § 1029(b)(2), possession of 15 or more unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(3), and aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1).

One of the issues raised on appeal is the admission at trial of the government's expert testimony as to the terminology and jargon used in identity theft and tax fraud crimes. Upon review, the Eleventh Circuit Court of Appeals found, in part, as follows:

"In determining the admissibility of expert testimony a district court must consider whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert v. Merrell Dow Pharm. Inc.,* 509 U.S. 579 (1993); and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *United States v. Holt,* 777 F.3d 1234, 1265 (11th Cir. 2015).

"It is well-settled that experienced and qualified law enforcement agents can testify as experts to decode criminal conversations and operations that jurors might not otherwise understand. See, e.g., *Holt*, 777 F.3d at 1265 (holding the district court did not err in permitting an agent to 'testify as to the meanings of coded language used by the defendants in intercepted communications' relating to their narcotics charges because of agent's extensive involvement in this investigation and her training and experience in previous wiretaps); *United States v. Emmanuel*, 565 F.3d 1324, 1335 (11th Cir. 2009) ('The operations of narcotics dealers, including drug codes and jargon, are proper subjects of expert testimony'); *Garcia*, 447 F.3d at 1335 (recognizing well-established rule that an experienced narcotics agent may testify as an expert to interpret drug codes and terminology to help a jury understand the significance of operations unique to the drug distribution business); *United States v. Cross,* 928 F.2d 1030, 1051 n.65 (11th Cir. 1991) (noting that it was proper for an FBI agent to testify that, in communicating with one another, pedophiles use certain code words to refer to photographs of children); *United States v. Brown*, 872 F.2d 385, 392 (11th Cir. 1989) (determining that the district court did not err in allowing FBI agent to testify as to drug code words); *United States v. Masson*, 582 F.2d 961, 963–64 (5th Cir. 1978) (finding no error where FBI agent with extensive experience and knowledge of bookmaking operations and terminology gave expert testimony interpreting gambling jargon to aid the jury's understanding of recorded conversations); *United States v. Alfonso*, 552 F.2d 605, 618 (5th Cir. 1977) (upholding use of expert testimony to supply meaning to the 'cryptic nature of some recorded conversations, often framed in jargon peculiar to the gambling trade' because 'it was appropriate to present expert testimony to supply meaning to the conversations and explain the roles of the appellants').

"'Federal courts have ordinarily allowed law enforcement officials to testify as experts to establish the modus operandi of particular crimes, in order to explain the actions of the defendants.' *Cross*, 928 F.2d at 1050; see also *United States v. Burchfield*, 719 F.2d 356, 358 (11th Cir. 1983)

(concluding that an agent's testimony regarding counterfeit-bill-passing techniques helped to elucidate the actions of the defendants).

"Here, the district court did not abuse its discretion in allowing Detective Sealy to testify as an expert witness as to the meanings of the terminology used in stolen identity refund fraud generally or by the individuals recorded on the undercover video specifically. First, Detective Sealy was qualified to testify competently regarding the terminology used in this type of fraud based on his training and experience. Detective Sealy received extensive training on identity theft crimes from the IRS, U.S. Secret Service, Citibank, Homeland Security, Discover Card, Broward Community College, and the Broward College Police Academy. His IRS training specifically focused on the ways in which stolen identities are used to fraudulently request tax refunds and how to investigate those crimes.

"As to his experience, Detective Sealy had personally participated in more than 75 fraud-related investigations, sometimes in an undercover capacity, with 50 of those investigations involving tax fraud. He had listened in on over 30 jail calls placed by defendants charged with stolen identity refund fraud and debriefed over 20 such cooperating defendants. Detective Sealy had even taught classes on fraud related topics, as well as previously testified in a case in federal court as an expert in fraud investigations and terminology. Detective Sealy clearly was an experienced agent with specific and substantial exposure to 'stolen identity refund fraud.' See *Garcia,* 447 F.3d at 1334–35 (finding agent to be properly qualified as an expert because he 'had been a DEA agent for several years and had received training regarding the operation and structure of drug trafficking organizations and how those organizations transport and distribute drugs,' as well as personally participating in at least 50 drug investigations and numerous wiretap investigations, which made him familiar with the coded language that some drug trafficking organizations use); *Holt*, 777 F.3d at 1265 ('Agent Sargent was qualified based on, most notably, her extensive involvement in this particular investigation, including review of more than 99 percent of the intercepted communications in this case, as well as her training, experience in previous wiretaps, and general investigative experience during her six years as a DEA Agent.')

"Second, Detective Sealy's methodology was reliable because his opinions were based on his extensive experience working on stolen identity refund fraud cases, including investigating them, working undercover, listening in on numerous jail calls, and debriefing defendants charged with this crime. Based on these investigations, Detective Sealy was familiar with the methods by which stolen identity refund fraud is conducted and the terminology used in this type of fraud. Of the 50 tax fraud cases Detective Sealy investigated, the majority involved criminals using coded terminology.

"Third, Detective Sealy's testimony assisted the jury in understanding how the slang terms used by Bechir and Kenny related to the terminology used in this stolen identity refund fraud. For example, in his post-Miranda interview, Bechir admitted to finding the 'fos' online and using it to file fraudulent tax returns. Detective Sealy competently testified that, in South Florida, 'fos' is a common slang term used in 'stolen identity refund fraud' and means personal identifying information or Personal Identifying Information (PII), such as an individual's name, date of birth, and Social Security number. On the undercover video recording, when Kenny said that he was

going to "have these chicks buy me some plastic," Detective Sealy explained to the jury that "plastic" refers to debit cards or credit cards. This scheme involved having the tax refunds deposited in debit card accounts that were opened using the same PII that was used to file corresponding fraudulent tax returns. While a lay person might be able to guess the meanings of the code words or terminology used by Bechir and Kenny, Detective Sealy "could—based on his training and experience—interpret the meaning of the words more accurately than a lay person or the prosecutor.

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201612947.pdf

EVIDENCE:

Proof Beyond a Reasonable Doubt
United States v. Garcia
CA7, No. 18-1735, 3/20/19

Beginning in 2010, federal and state agents spent two years investigating an Illinois-based drug trafficking organization headed by Alan Cisneros, who, along with most of his co-conspirators, was affiliated with the Latin Kings street gang. The evidence against Cisneros included seizures of cocaine and cash used in drug deals, controlled buys made by both a confidential informant and an undercover agent, video footage from a camera concealed near Cisneros' two residences, live surveillance of his residences, consensually recorded telephone conversations, and judicially authorized wiretaps on three of Cisneros' telephones. The agents built a strong case against Cisneros. He ultimately pleaded guilty to possessing 500 grams or more of cocaine with intent to distribute.

Andes Garcia appeared on stage for only a few days at the end of the Cisneros investigation. Between April 17 and April 20, 2012, agents recorded eight brief conversations between Cisneros and Garcia on one of Cisneros' wiretapped telephones. Garcia and Cisneros had several cryptic exchanges, punctuated by Garcia's two brief in-person visits with Cisneros. These conversations, as interpreted at trial by an ATF agent testifying as an expert witness, formed the basis for Garcia's conviction.

Garcia was convicted of distributing a kilogram of cocaine to Cisneros. The government offered no direct evidence that Garcia possessed or controlled cocaine, drug paraphernalia, large quantities of cash, or other unexplained wealth. There was no admission of drug trafficking by Garcia, nor any testimony from witnesses that Garcia distributed cocaine. Instead, the government secured this verdict based upon a federal agent's opinion testimony purporting to interpret several cryptic intercepted phone calls between Garcia and Cisneros, a known drug dealer. In those calls, Garcia talked about "work" and a "girl" in a bar, and made statements like "the tix have already walked more that, that way."

The Seventh Circuit reversed: "This case illustrates the role trial judges have in guarding the requirement of proof beyond a reasonable doubt in criminal cases. While the government's circumstantial evidence here might have supported a search warrant or perhaps a wiretap on Garcia's telephone, it simply was not sufficient to support a verdict of guilty beyond a reasonable doubt for distributing cocaine."

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

EYEWITNESS IDENTIFICATION:

Photographic Array

United States v. Kelsey

CADC, No. 16-3125, 3/8/19

Eleven-year-old S.H. and Robert Kelsey met via Instagram. Kelsey told S.H. that his name was "Kevin" and that he was nineteen years old. (He was actually twenty-six.) S.H. told him her real name and age, and that she wanted to have sex and get pregnant. Kelsey replied that he could get her pregnant. Soon after, they made a plan to meet in person. The morning after they made their plan, on July 25, 2014, Kelsey drove to S.H.'s summer camp in Maryland and told a counselor that he was S.H.'s cousin. When S.H. said she recognized Kelsey as her cousin, the camp counselor let her leave the camp with Kelsey, who drove S.H. in a black Jeep to his father's house in the District of Columbia. At the house, Kelsey and S.H. went upstairs to a bedroom where Kelsey had sexual intercourse with S.H. Kelsey then dropped S.H. back at camp.

S.H.'s custodial father was at the camp when she returned, and he told the camp to call the police. S.H. then explained to Investigator Nicholas Collins of the Prince George's County Police Department what had happened. She said the man's name was Kevin, described him, and handed Collins her cellphone. S.H. was then taken to the Prince George's hospital, where medical personnel used a sexual assault kit to collect and preserve physical evidence from S.H.'s body.

Collins called "Kevin's" number from S.H.'s phone and Kelsey answered. At that point, Kelsey made the first of a series of exculpatory statements suggesting that his cousin "Kevin," not he, was the person the officer was looking for. Collins and Kelsey then had a series of brief phone conversations over the course of the next day, during which Kelsey said that he would ask Kevin to contact Collins. Five days later, Kelsey told Collins over the phone that he had "some information." J.A. 423. Specifically, he said that he had picked up a girl in Maryland for his cousin Kevin and driven her to D.C. Kelsey, driving a black Jeep Cherokee, met Collins in person to discuss the information Kelsey wanted to report. They met at a 7-Eleven store and drove around, with Officer Collins following in an unmarked car behind Kelsey's Jeep, to look for the place where Kelsey claimed to have dropped off S.H. for Kevin and picked her up a few hours later. Kelsey eventually identified a place about five blocks away from his father's house as the drop-off location. (S.H. later identified from photographs a specific house as the place where Kelsey had taken her, and the directory in Kelsey's phone listed that same address as his father's.) The next week, Kelsey repeated essentially the same story about "Kevin" to a friend who knew both Kelsey and S.H. When that individual testified at Kelsey's trial, she said Kelsey seemed "[a] little nervous [when he spoke to her], like he was . . . putting a story together." J.A. 564.

Five days after the sexual assault, S.H. identified Kelsey from a photo array. Collins had interviewed S.H., who described the perpetrator to him. At their first interview, on the day that she met Kelsey, S.H. described him as black, with light skin and tattoos all over his body, and estimated he was nineteen or twenty years old. At the second interview (after Collins had met Kelsey in person), Collins asked S.H. about the perpetrator's tattoos, and she told him that the perpetrator had a tattoo on his ear. Based on those descriptions, Collins selected six photos to show S.H. of "individuals of similar race, age, sex,…facial features, facial hair, and skin tone," one of whom was Kelsey. Appellant's Br. 21-22. A detective with no knowledge of the case then showed S.H. the photo

array to see whether she recognized anyone as her assailant. S.H. identified Kelsey, signed and dated the back of his photo, and wrote "yes this is him." J.A. 251. It took less than four minutes for the officer to show S.H. the photographs and for S.H. to identify the photograph of Kelsey.

Ultimately, a jury convicted Robert Kelsey of transporting a minor, eleven-year-old S.H., with intent to engage in criminal sexual activity, aggravated sexual abuse of a child, and first-degree child sexual abuse with aggravating circumstances. Before trial, Kelsey moved to suppress the photo-array identification and any in-court identification by S.H. as unduly suggestive and unreliable.

Upon review, the Court of Appeals for the District of Columbia found, in part, as follows:

"The district court's decision to admit the photo identification was not error and, even if it were, the ample independent evidence identifying Kelsey rendered any such error harmless. A court assessing a challenge to identification evidence under the Due Process Clause must perform a twostep analysis. *United States v. Rattler,* 475 F.3d 408, 411 (D.C. Cir. 2007). First, the court must determine whether the identification procedure was impermissibly suggestive. If the procedure was impermissibly suggestive, the court must decide whether, under the totality of the circumstances, the identification was nonetheless sufficiently reliable to preclude a very substantial likelihood of irreparable misidentification. *Manson v. Brathwaite,* 432 U.S. 98, 116 (1977). The key factors at the second step are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. The court must weigh these factors against the corrupting effect of the suggestive identification itself.

"The photo array was not impermissibly suggestive. The only characteristic that Kelsey claims was suggestive is that his was the only photo showing someone with an ear tattoo; otherwise, the defense agreed, the individuals depicted in the photos were very, very similar. But, as the district court observed, Kelsey's ear tattoo is not clearly discernable in the photo shown to S.H. While there is some discoloration in the left ear, the court said, it's not clear exactly what the discoloration is. According to the district court, it could have been just a birthmark or a shadow. Of course, if only one photo in a photo array has a characteristic distinctive to the defendant, then the array may well be impermissibly suggestive. That is not the situation here, where the distinctive tattoo was barely visible in the photo. Nor did any other aspect of the photo array single out Kelsey. Not only did the array feature six similar-looking individuals, it was administered by someone who did not know the 'correct' result and so was in no position to influence S.H. to choose Kelsey over anyone else."

READ THE COURT OPINION HERE:
https://bit.ly/2Z3PfPJ

LAW ENFORCEMENT SAFETY ACT

Burban v. City of Neptune Beach, Florida
CA11, No. 18-11347, 4/5/19

Camille Burban, who is a retired police officer formerly employed by the Neptune Beach Police Department, sued the City of Neptune Beach, Florida seeking to have it issue her the type of identification card required by the Law Enforcement Officer Safety Act (LEOSA). The Law

Enforcement Officers Safety Act allows a qualified retired law enforcement officer who is carrying the identification required by the Act to carry a concealed firearm, notwithstanding most State or local restrictions.

The District Court dismissed Ms. Burban's complaint finding that LEOSA does not give rise to a federal right enforceable under 42 U.S.C. § 1983. The Court of Appeals for the Eleventh Circuit affirmed the decision.

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201811347.pdf

SEARCH AND SEIZURE: Administrative Search Warrant; Unreasonable Seizure

Okorie v. Crawford
CA5, No. 18-60335, 4/12/19

The Court of Appeals for the Fifth Circuit dealt with the search of a medical clinic in Hattiesburg, Mississippi. The Court first noted that *Michigan v. Summers*, 452 U.S. 692, 705 (1981), allows law enforcement to detain the occupant of a residence where a criminal search warrant is being executed. Consistent with the touchstone of the Fourth Amendment, however, the scope of such detentions must be reasonable.

The Court confronted a question that courts have rarely had to address in the nearly four decades since Summers was decided: **May the government detain the owner of a business that is being searched not because of suspected criminal activity but instead for possible civil violations?** In this case, during the search of a medical clinic that resulted in Okorie being detained for a few hours, the investigator pushed Okorie down, drew his gun multiple times, and limited Okorie's movement and access to facilities such as the restroom. The court held that Okorie's allegations established a Fourth Amendment violation based on the intrusiveness of the detention, but that the sparse case law in this area had not clearly established the unlawfulness of this type of detention. Therefore, the investigator was entitled to qualified immunity.

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/18/18-60335-CV0.pdf

SEARCH AND SEIZURE: Affidavit for Search Warrant; Veracity of Informant

King v. State
ASC, CR-18-366, 2019 Ark. 114, 4/18/19

Quenton King appeals his capital-murder conviction. One of his arguments is that the circuit court erroneously denied his motion to suppress evidence seized from his home because the affidavit did not contain sufficient grounds for the search and seizure of the evidence.

A jury convicted King of the capital murder of his pregnant girlfriend, Megan Price, and sentenced him to life imprisonment without parole. Price's body was discovered in her home on Sunday, June 28, 2015. Several days before Price was killed she had announced in a Facebook post that she and King had been together for fourteen years and that he was the father of her child. King was married to another woman. After Price's body was discovered, Detective Clint O'Kelley tried to contact King. King, who was attending a memorial service with David Kincade, returned the detective's call on Kincade's cell phone. During the call, King admitted that he had a relationship with Price and that she could have been pregnant with his child.

Unbeknownst to King or Detective O'Kelley, Kincade had installed a program on his phone that automatically recorded the telephone conversation. After speaking to Detective O'Kelley, King confessed to Kincade that he had murdered Price. King told Kincade that he had made plans to spend the weekend with Price. Before the night of the murder, he had disconnected some of his home-surveillance cameras. On the night of the murder, he left his house through the backdoor and walked across a field to the main road where an unidentified person picked him up and took him to Price's home. King used a key Price had left out for him to enter her house. Once inside, King shot and killed Price. Kincade later contacted police and reported what King had told him.

After taking Kincade's statement, Detective O'Kelley prepared an affidavit for a search warrant averring that there was reasonable cause to believe that evidence connecting King to the murder, including a surveillance system, was located in King's home. In the affidavit, Detective O'Kelley identified Kincade as "Witness 1" because Kincade feared retaliation by King. The surveillance DVR retrieved from King's home revealed that the channel connected to the camera positioned in the back of King's home had stopped recording on June 26, 2015, and began recording again on the evening of June 29, 2015.

Items seized during the search include a surveillance DVR containing video of activities at his house and photographs taken by police inside and outside his home. This evidence was admitted at trial.

The Arkansas Supreme Court found, in part, as follows:

"Arkansas Rule of Criminal Procedure 13.1(b) states that 'if an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained.' However, failure to establish the veracity and basis of knowledge of persons providing information is not a fatal defect if the affidavit viewed as a whole 'provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.' Ark. R. Crim. P. 13.1(b); see also *Wagner v. State*, 2010 Ark. 389, 368 S.W.3d 914. The task of the judge issuing a warrant 'is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him…there is a fair probability that contraband or evidence of a crime will be found in a particular place.' *Brenk v. State*, 311 Ark. 579, 588, 847 S.W.2d 1, 6 (1993) (quoting *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983)). In reviewing a trial court's denial of a motion to suppress, we make an independent examination of the issue based on the totality of the circumstances, viewing the evidence in the light most favorable to the State. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001).

"In this case, Detective O'Kelley's affidavit states that 'Witness 1,' who was later identified as Kincade, had contacted investigators and informed them that King had confessed to him that he killed Price. The affidavit identifies King as the individual already charged with the capital murder of Price. According to 'Witness 1,' King stated he killed Price because if his wife found out that Price was pregnant with his child, his wife would divorce him, and he would lose everything. 'Witness 1' also detailed how King told him that he had unplugged the surveillance cameras at his house the week before the murder and that on the night of the murder he went out of his back door and ran across a field to the main road

where someone picked him up and drove him to Price's house.

"This portion of Detective O'Kelley's affidavit was based on hearsay; therefore, it should have stated, but did not state, particular facts bearing on 'Witness 1's' reliability. Ark. R. Crim. P. 13(b). However, considering the affidavit as a whole, there was substantial basis for a finding of reasonable cause to believe that evidence of Price's murder would be found in King's home. In addition to the information provided by 'Witness 1,' the affidavit states how the visibly pregnant victim, Price, was found deceased on her bedroom floor and that a few days before her death she had publicly identified King as the father of her child on Facebook. Therefore, the affiant provided information that supported the reliability and the likelihood of reasonable cause to believe that there would be a DVR in King's home that contained evidence related to the murder. Considering the information provided in the affidavit as a whole, we cannot say that it was clearly against the preponderance of the evidence for the circuit court to deny King's motion to suppress."

READ THE COURT OPINION HERE:
https://bit.ly/33xTGFX

SEARCH AND SEIZURE: Court Ordered Probation Consent to Search

United States v. Ickes
CA6, No. 18-5708, 4/25/19

A Postal Inspector had probable cause to believe that a package being shipped from California contained drugs, obtained a search warrant, and examined its contents. It contained 1.5 pounds of crystal methamphetamine. Agents conducted a controlled delivery and arrested the recipient, who agreed to serve as a confidential informant, identified Ickes as the source of the methamphetamine, and provided evidence that correlated with Ickes's California address. Because of a prior drug-related conviction, Ickes was subject to state-court-ordered probation, with a provision requiring him to submit to search and seizure of his person, residence, or vehicle, with or without a search warrant, without regard to probable cause. Ickes was arrested. Agents conducted a warrantless search of Ickes's residence and vehicle and found U.S. Postal Service labels and tracking information that was used against Ickes at trial.

The district court denied Ickes's motion to suppress without an evidentiary hearing. Ickes was convicted and sentenced to 280 months of imprisonment.

The Sixth Circuit affirmed. "A defendant is not entitled to an evidentiary hearing if his argument is 'entirely legal.' Ickes was subject to probation that included a search provision and the officers had a reasonable suspicion that Ickes was conspiring to distribute methamphetamine. For the duration of Ickes's probation, he had diminished privacy interests and the government had a substantial interest in monitoring Ickes's activities, so the police needed no more than reasonable suspicion to search his residence and vehicle."

READ THE COURT OPINION HERE:
http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0077p-06.pdf

SEARCH AND SEIZURE:

GPS Tracking Warrant; Curtilage

United States v. Coleman, Jr.

CA6, No.18-1083, 5/3/19

During an investigation of Powell, a drug dealer, a cooperating defendant identified one of Powell's sources as Ronald Coleman. Officers observed Coleman's automobiles, a Trailblazer and an Enclave, in connection with suspected drug sales to Powell. On April 7, 2017, officers observed an individual matching Coleman's description arrive at Powell's house, exit Coleman's Enclave, enter the house, and leave three minutes later. Four days later, Coleman arrived at Powell's house in the Trailblazer and sold cocaine to the cooperating defendant. Officers determined Coleman had two felony convictions for delivery or manufacture of a controlled substance and that both vehicles were registered to Coleman's father.

A magistrate issued tracking warrants for Coleman's vehicles. An ATF agent attached the tracking devices to Coleman's vehicles on the shared driveway adjoining Coleman's condominium. There is no gate or fence at the complex entrance; anyone can drive into the complex unimpeded. On May 10, agents observed Coleman leave his condo, enter the Enclave, and exit the Enclave at Powell's home and watched the GPS tracking data showing that Coleman traveled directly from his condo to Powell's house. Agents obtained a warrant to search Coleman's condo and seized 500 grams of cocaine, a firearm, and documents and property indicating money laundering. Coleman contends the tracking warrant was not supported by probable cause and that his driveway was within the curtilage of his home.

Coleman first argues that the warrant for installing a tracking device on his Buick Enclave was not supported by probable cause. The Court of Appeals for the Sixth Circuit disagreed, finding as follows:

"A magistrate judge must issue a tracking-device warrant if a supporting affidavit establishes probable cause to believe that the device will uncover evidence, fruits, or instrumentalities of a crime. Here, the affidavit had established numerous facts supporting the notion that the use of a tracking device on Coleman's Enclave could uncover further evidence of wrongdoing:

• A confidential informant identified Coleman as a current drug supplier to Powell.

• Authorities had been investigating four drug sales at Powell's residence, one of which involved Coleman dropping off cocaine for Powell.

• A law-enforcement agent observed an individual matching Coleman's description drive to Powell's house in the Enclave, stay only four minutes, No. 18-1083 United States v. Coleman Page 5 and leave, activity that could be consistent with the driver engaging in illegal drug sales.

• Coleman had two prior felony convictions for delivery/manufacture of controlled substances.

• A Law Enforcement Information Network (LEIN) check on the vehicle identified Coleman's father as the Enclave's owner.

"Courts have upheld vehicle-tracking warrants based on much weaker factual allegations than these. See, e.g., *United States v. Faulkner*, 826 F.3d 1139, 1145 (8th Cir. 2016) (upholding a vehicle-tracking warrant where a confidential informant told police the defendant brought heroin from Chicago to Minneapolis, stayed at two addresses, and drove two vehicles, but where no one had

directly observed either vehicle involved in suspected drug activity); *United States v. McNeal*, 818 F.3d 141, 150 (4th Cir. 2016) (upholding a tracking warrant where affidavit established merely that the vehicle was registered to suspect's mother and driven to case banks, and where an informant tipped authorities the vehicle was used in bank robberies). Accordingly, we hold that the tracking warrant was supported by probable cause.

"Next, Coleman claims that authorities violated his Fourth Amendment rights when an ATF agent entered his condominium's driveway to install the GPS tracking device on his Enclave. Coleman alleges two Fourth Amendment violations resulting from the agent's actions: the first when the agent entered Coleman's condominium complex despite there being a sign reading 'PRIVATE PROPERTY,' and the second when the agent walked onto Coleman's driveway to install the GPS tracker.

"When the government gains information by physically intruding into one's home, a search within the original meaning of the Fourth Amendment has undoubtedly occurred. *Morgan v. Fairchild Cty., Ohio*, 903 F.3d 553, 561 (6th Cir. 2018). But it is not just the physical house that receives the Amendment's protection. The curtilage—the area immediately surrounding and associated with the home—is treated as part of the home itself for Fourth Amendment purposes. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. *Collins v. Virginia*, 138 S. Ct 1663, 1670 (2018). Courts have identified four factors as a guidepost to determining whether an individual has a reasonable expectation of privacy in an area, placing it within the home's curtilage: (1) proximity to the home; (2) whether the area is within an enclosure around the home; (3) uses of the area; and (4) steps taken to protect the area from observation by passersby. United States v. Dunn, 480 U.S. 294 (1987). It is a fact-intensive analysis conducted on a case-by-case basis. Morgan, 903 F.3d at 561. As the proponent of the motion to suppress, Coleman bears the burden of establishing that the challenged search violated his Fourth Amendment rights.

"Coleman first argues that the agent's entry onto the condominium complex itself violated his Fourth Amendment rights. We disagree. Though the condominium complex had a 'PRIVATE PROPERTY' sign at its entrance, anyone could drive into the complex without express permission. No gate prevented outsiders from entering, and the condo association had not taken any effort to keep non-residents out. The sign itself did not require permission to enter, prohibit outside visitors, or even state 'no trespassing.' Accordingly, the agent did not violate Coleman's Fourth Amendment rights merely by entering the condominium complex. See *United States v. Dillard,* 438 F.3d 675, 682 (6th Cir. 2006) (holding that defendant had no reasonable expectation of privacy in the common area of his building's duplex that was unlocked and open to the public because he made no effort to maintain his privacy in the common hallway and stairway and therefore did nothing to indicate to the officers that they were not welcome in the common areas).

"Whether the ATF agent intruded onto the curtilage of Coleman's building by entering his driveway, however, is a closer question. Coleman places heavy emphasis on the Supreme Court's recent decision in *Collins v. Virginia*, 138 S. Ct. 1663 (2018) in arguing that such an intrusion occurred. In Collins, police were investigating a

motorcycle thought to be stolen by the defendant, Ryan Collins. An officer tracked down the vehicle to Collins's girlfriend's residence and walked onto the property to the top of the driveway to examine the vehicle, which was under a tarp. Ibid. The officer then pulled off the tarp, ran a search of the license plate and vehicle identification numbers, and discovered that the motorcycle was stolen. The Court found that the officer had violated Collins's Fourth Amendment rights by intruding onto the building's curtilage.

"Though prior to the Collins ruling, the Sixth Circuit cases of *United States v. Galaviz*, 645 F.3d 347 (6th Cir. 2011), and *United States v. Estes*, 343 F. App'x 97 (6th Cir. 2011), survive Collins and are factually more on point. Both cases involved driveways with similar characteristics to the one here: adjacent to a home, not enclosed, abutting a sidewalk or alley, with no steps taken to obstruct the view of passersby. In both instances, this court held that the officers did not intrude upon the building's curtilage by entering the driveway. In *Estes*, we held that at least three of the factors in *Dunn* undercut a finding that the driveway represents curtilage because the area was not closed, defendant had not taken any steps to protect the area from observation by people passing by, and it was used as a point of entry into the residence. In *Galaviz*, the court found that, while the driveway was directly adjacent to the house, it was not enclosed by a fence or other barrier and was short, with the portion of the driveway where the defendant's car was parked directly abutting the public sidewalk and that no apparent steps were taken by the residents of the house to protect the driveway from observation by passersby—no hedges or bushes obstructed the view of the driveway from the sidewalk or street, for example. Those same analyses would apply to the driveway in question here. While the proximity of the driveway to the residence here may lean in favor of considering it to be curtilage, the other *Dunn* factors— whether the area is within an enclosure around the home, the uses of the area, and the steps taken to protect the area from observation by passersby—all point toward the opposite conclusion. Accordingly, we hold that the ATF agent did not intrude upon the curtilage of Coleman's residence in order to install the vehicle tracker and therefore did not run afoul of the Fourth Amendment."

READ THE COURT OPINION HERE:
http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0084p-06.pdf

SEARCH AND SEIZURE:

Search to Locate Weapon
United States v. Richmond
CA7, No. 18-1559, 5/13/19

Milwaukee officers were patrolling an area known for drug trafficking, armed robberies, and gun violence. Around midnight, they saw Richmond walking toward them with his right hand in the "kangaroo" pocket on his T-shirt and saw "a significant bulge" in that pocket. After the officers passed Richmond in their marked squad, he changed direction, quickened his pace, crossed a lawn, and moved toward a front porch. Unknown to the officers, Richmond lived in the duplex. The officers parked, followed Richmond and, from 20-25 feet away, saw Richmond open the outer screen door, bend down, and place an object on the doorframe between the screen door and front door. They suspected Richmond hid a gun. Richmond closed the screen door and turned around. Richmond stated that he did not have a gun. Officers walked onto the porch, opened the screen door, and saw a handgun. Richmond confirmed he was a convicted felon, so they arrested and charged him.

Richmond moved to suppress the gun, arguing Anthony Milone's act of opening the screen door constituted a warrantless search on the curtilage of his home without legal justification. T

The Seventh Circuit affirmed: "The officers knew specific, articulable facts which, together, fostered their reasonable suspicion of 'criminal activity.' Police may search an area strictly limited to that necessary for the discovery of weapons if they have a reasonable and articulable suspicion that the investigation's subject may be able to gain access to a weapon to harm officers or others nearby."

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

SEARCH AND SEIZURE: Search Warrant Execution by Officers Lacking Authority

United States v. Artis
CA9, No.18-10246, 3/27/19

The Court of Appeals for the Ninth Circuit held that an otherwise properly issued search warrant is not rendered void for Fourth Amendment purposes merely because it was executed by law enforcement officers who lacked warrant-executing authority under state law. In this case, federal agents may have violated California law when they executed two search warrants issued by state court judges. Although California law authorizes "peace officers" to execute search warrants, it excludes federal law enforcement officers from the definition of that term. The Court held that this violation of state law did not render the warrants invalid.

READ THE COURT OPINION HERE:
http://cdn.ca9.uscourts.gov/datastore/opinions/2019/03/27/18-10246.pdf

SEARCH AND SEIZURE:

Seizure of Property; Probable Cause

United States v. Babcock
CA11, No. 17-13678, 5/23/19

Police officers investigating a domestic disturbance confiscated a suspect's cell phone and held it for two days before eventually obtaining a warrant to search it. In the particular circumstances of this case, did the officers have probable cause to believe not only that the phone's owner had committed a crime and that the phone contained evidence of that crime, but also that the suspect would likely destroy that evidence before they could procure a warrant? The Court held that they did. Accordingly, and on that ground, the district court's order denying the motion to suppress was affirmed.

The Circuit of Appeals for the Eleventh Circuit found as follows:

"Probable cause to seize property is what it sounds like—a belief that evidence will probably be found in a particular location. See *United States v. Noriega*, 676 F.3d 1252, 1261 (11th Cir. 2012). As the Supreme Court recently reiterated, probable cause 'is not a high bar.' *District of Columbia v. Wesby,* 138 S. Ct. 577, 586 (2018). Although probable cause requires more than reasonable suspicion that criminal behavior is afoot, it doesn't entail the same 'standard of conclusiveness and probability as the facts necessary to support a conviction.' *United States v. Dunn*, 345 F.3d 1285, 1290 (11th Cir. 2003) (internal quotations omitted). Rather, it requires only 'a substantial chance' that evidence of criminal activity exists. *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). We recently explained that this 'substantial chance' exists 'where the facts within the collective knowledge of law enforcement officials' suffice to cause a person of reasonable caution to believe

that a criminal offense has been or is being committed—and here, that evidence of that offense will be found in a particular place. *Gates v. Khokar*, 884 F.3d 1290, 1298 (11th Cir. 2018).

"Babcock contends that while the officers in this case might have suspected that something was up, their collective knowledge at the time of the seizure didn't rise to the level of probable cause that a crime had been committed. At the time Detective Broughton retained Babcock's phone, the officers knew:

• that a domestic-disturbance call had reported a female at Babcock's residence yelling "Stop, stop, stop!;"

• that after Babcock had denied that anyone else was in his camper, a teenage girl emerged with cuts on her legs;

• that Babcock had accompanied the girl to a Halloween party the night before, where she had consumed alcohol and drugs, and that she was in his camper the next morning;

• that the girl had been in or on Babcock's bed and left traces of blood there;

• that the girl had been distraught, holding a knife to her own throat and saying, "I just want to die;"

• that shortly after they arrived at Babcock's residence, the girl appeared to be panicking or suffering an overdose. Finally—and perhaps most tellingly—the officers knew that, while the girl sat on Babcock's bed with the knife to her neck, Babcock called her "dumb as f***" and then complained—in the present tense—that "this is what I deal with right here . . . you gotta do drama and fighting me all over the place."

"Collectively, these circumstances gave the officers probable cause to believe that Babcock had committed a crime against C.A. This common-sense conclusion doesn't depend on any particular fact taken in isolation; rather, as is often" the case, the whole is greater than the sum of its parts. See *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

"Here, Babcock's lies contributed to probable cause, as did his own present-tense statements clearly indicating an ongoing relationship. When the officers considered Babcock's own utterances in light of the litany of other suspicious facts the learned, they certainly could have suspected a substantial chance of criminal activity. From there, it required no leap for the officers to deduce that evidence of a crime would likely be found on Babcock's phone. The officers already knew that the phone contained one eyebrow-raising video suggesting an ongoing relationship between a grown man and a teenage girl. It was eminently reasonable for them to believe that additional evidence of that relationship—messages, texts, pictures, videos, etc.—would be found in the same place.

"Here, the officers didn't conduct a warrantless search. Instead, faced with the potential destruction of evidence, they did exactly what they should have done—they seized the phone to prevent the loss or destruction of its contents, and then obtained a warrant before searching through it. Thus, because a reasonable officer could have believed that Babcock would delete any incriminating evidence on his phone before a warrant could be obtained the exigent-circumstances exception applies in this case.

"The Court concluded that the warrantless seizure of Babcock's phone was lawful because the officers on the scene had probable cause

to believe both that evidence of a crime would be found on it and that the evidence would be destroyed before they could obtain a warrant."

READ THE COURT OPINION HERE:
https://bit.ly/2P2PDhN

SEARCH AND SEIZURE:

Stop and Frisk; Ammunition
United States v. Johnson
CA11, No. 16-15690, 4/16/19

At 4:00 a.m., an officer responded to a call about a burglary in progress in a high crime area. When the officer arrived at the scene, he saw Paul Johnson, who matched the burglar's description, standing in a dark alley. After detaining Johnson, the officer frisked him and immediately recognized that he had a round of ammunition in his pocket. The officer removed the ammunition and an empty holster covering it. He then canvassed the area and found two pistols less than a foot from where he first saw Johnson.

After a grand jury indicted Johnson for being a felon in possession of a firearm and ammunition, he moved to suppress the pistols, ammunition, and holster, but the district court denied his motion. A panel of this Court reversed. The Court of Appeals then vacated that decision and ordered a rehearing by the whole court, stating that this appeal requires them to decide whether a police officer violated the Fourth Amendment when he removed a round of live ammunition and a holster from the pocket of a suspect during a protective frisk, see *Terry v. Ohio*, 392 U.S. 1 (1968). The Court found as follows:

"We now affirm the denial of Johnson's motion to suppress because the officer was entitled to seize the ammunition to protect himself and others.

"Consider the concrete factual circumstances that Officer Williams encountered. When he received the call about a burglary in progress, he was patrolling a 'high-crime area' that receives a high volume of calls involving bodily harm done to others by guns. At the scene, Officer Williams saw Johnson, who matched the burglar's description, standing in a dark alley. And the scene was not yet secure. Officer Williams knew both that burglars in Opa-Locka were often armed and that they often worked with other perpetrators.

"When Officer Williams immediately recognized the ammunition in Johnson's pocket during the frisk, he neutralized the threat of physical harm by removing the ammunition from Johnson's pocket. As an essential part of a lethal weapon, Johnson's ammunition threatened the safety of Officer Williams and others in this circumstance. Although Johnson argues that his ammunition, by itself, posed no danger to the safety of Officer Williams or others, his argument fails to appreciate the grave injury that could have been caused by his ammunition if it had been loaded into a gun. Johnson compares ammunition to 'a pebble, marble, coin, gemstone, ball bearing, or rock of crack cocaine.' But even Johnson acknowledges a crucial difference between those other objects and a round of live ammunition: the round of ammunition is designed to become a deadly projectile. Ammunition is not a gun, but it is an integral part of what makes a gun lethal.

"Examining Johnson's ammunition also could have assisted Officer Williams's search for a .380 caliber gun that he had good reason to believe was in the vicinity of the unsecure scene of a reported burglary in a high-crime area late at night. When Officer Williams discovered ammunition in Johnson's pocket, he had reason to believe a gun was in the vicinity because common sense and logic dictate that a bullet is often associated

with a gun. *People v. Colyar*, 996 N.E.2d 575, 585 (Ill. 2013). And Officer Williams's removal of the ammunition could have informed him of what caliber or type of gun might be nearby. True, he could not use the frisk to gather evidence because a frisk must remain related to the sole justification of the search under *Terry*: the protection of the police officer and others nearby. *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993). But seizing the ammunition in Johnson's pocket did not amount to the sort of evidentiary search that *Terry* expressly refused to authorize; in this circumstance, it instead amounted to the sort of protective search that *Terry* permits because Officer Williams had to find any gun to secure the scene and protect himself and others.

"That an officer may seize ammunition when it threatens the safety of officers and others has long been the settled precedent in several jurisdictions. For example, in *United States v. Ward*, 23 F.3d 1303 (8th Cir. 1994) the Eighth Circuit ruled that an officer who believed that cylindrical objects in a suspect's pocket were shotgun shells was justified in reaching into the pocket to retrieve them. In *Scott v. State*, the Supreme Court of Nevada ruled that, after seizing a gun, an officer may remove ammunition from a suspect's pocket because it is reasonable for an officer, as a precautionary measure, to retrieve and separate from a suspect during the course of a *Terry* stop and frisk, either weapons or ammunition or both." 877 P.2d 503, 509 (Nev. 1994). In *State v. Smith*, the Supreme Court of Arizona held that an officer reasonably seized "the contents of Smith's pockets which were bulging with shotgun ammunition." 665 P.2d 995, 998 (Ariz. 1983). And in *Colyar*, the Supreme Court of Illinois ruled that an officer who saw ammunition in a car could reasonably suspect the presence of a gun, thus implicating officer safety, and could seize the ammunition. 996 N.E.2d at 585, 587.

"Officer Williams's frisk remained reasonably related in scope to the circumstances which justified the frisk in the first place. Officer Williams encountered an unsecure scene, late at night, in a high-crime area, while investigating a reported burglary. Officer Williams's removal of the ammunition and holster was reasonably related to the protection of the officers and others. We hold that Officer Williams did not violate Johnson's Fourth Amendment rights by removing the ammunition and holster from his pocket during the frisk."

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201615690.enb.pdf

SEARCH AND SEIZURE: Stop and Frisk; Reasonable Suspicion; Sex and Race

United States v. Street
CA7, No. 18-1209, 3/1/19

On October 24, 2015, law enforcement officers in Pewaukee, Wisconsin, were searching for two African-American men who moments before had committed an armed robbery. The robbers had been tracked to the parking lot of a nearby Walmart store. An officer stopped and questioned Keycie Street, the only African-American man in the crowded Walmart. Street was not arrested then, but during the stop, he provided identifying information that helped lead to his later arrest for the robbery.

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

"Street contends that the stop violated his Fourth Amendment rights because he was stopped based on just a hunch and his race and sex. We disagree. The officers stopped Street based on

much more information than his race and sex. They did not carry out a dragnet that used racial profiling. Rather, the police had the combination of Street being where he was, when he was there, and one of a handful of African-American men on the scene, thus fitting the description of the men who had committed an armed robbery just minutes before. That information gave the officers a reasonable suspicion that Street may have just been involved with an armed robbery, thus authorizing the stop. See *Terry v. Ohio*, 392 U.S. 1 (1968).

"When considering whether an officer had reasonable suspicion for a Terry stop, we look at the totality of the circumstances of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). This approach recognizes that officers may draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. *Terry* does not authorize broad dragnet also does not require perfection or precision. Without more, a description that applies to large numbers of people will not justify the seizure of a particular individual. See, e.g., *United States v. Turner*, 699 A.2d 1125, 1128–29 (D.C. 1997). This is especially true where the description is based primarily on race and sex, as important and helpful as those factors can be in describing a suspect. See *United States v. Foster*, 891 F.3d 93, 105 (3d Cir 2018). The totality of circumstances, however, may provide additional and reasonable limits, particularly with respect to place and time, so as to allow a stop based on a fairly general description.

"Here, the totality of the circumstances shows reasonable suspicion for stopping Street to investigate him. The police were searching for suspects who had committed an armed robbery only minutes before. They had more general descriptions than was ideal. That's not unusual when events unfold so quickly. But a lack of better, more detailed descriptions does not mean officers must disregard the limited information they do have.

"The order to stop Street was based on reasonable suspicion that went well beyond race and sex. As in *Arthur,* the officers had only limited physical descriptions of the suspects, but timing, location, and reliable information about the suspects' movements made it reasonable to stop Street. The officers knew the men who robbed the store were armed and had been described as African-American. They knew that the GPS in one stolen telephone had led them hot on the robbers' heels to the Walmart parking lot, where they found the abandoned getaway car with the stolen goods, cash, and a gun. The first officers on the scene saw three African-American men walking away from that vehicle, and one of the men ran in response to the police.

"If the officers had arbitrarily stopped Street on the basis of his race and sex, as Street contends, this would be a very different case. It would be a mistake to read this decision as saying such a vague description of the robbers would be enough to justify a *Terry* stop of any African-American man the police encountered. But Street was in the right place at the right time, as far as the police were concerned. They had reason to be looking—there and then—for another African-American man, and Street was the only African-American man in the crowd leaving the store.

"In sum, the totality of the circumstances known to the officers at the time of the stop rose to the level of reasonable suspicion to conduct a

brief investigatory stop of Street. Because the officers had reasonable suspicion to stop Street and identify him, they were entitled to use that information to pursue the investigation further, leading ultimately to Street's arrest and conviction."

READ THE COURT OPINION HERE:
https://bit.ly/2zat7Zq

SEARCH AND SEIZURE: Stop and Frisk; Search Incidental to Arrest

United States v. Houston
CA8, No. 18-1516, 4/10/18

On February 8, 2017, shortly after 1:00 a.m. the Davenport, Iowa, Police Department dispatched three officers in response to a neighborhood disturbance call. The Davenport Police Department had recently responded to other neighborhood disturbance calls and shots-fired calls in the area. The neighborhood to which they were called was within a 20-block-by-6-block area that accounted for nearly one third of confirmed shots-fired calls for the Davenport Police Department between January 2017 and September 2017.

When the officers arrived, they spotted Houston with their flashlights. He looked at them and then ran. One officer commanded him to "wait," but Houston kept running. Another officer observed a black pistol in Houston's hand and told the others. The officers chased Houston to the backyard of his home, drew their weapons, and again commanded him to stop. He eventually complied and was detained. One officer patted down Houston and felt something metallic in his pants pocket. Unsure what it was, the officer reached into the pocket and removed a set of brass knuckles. At that point, the officers planned to arrest Houston for possession of brass knuckles a violation of Iowa statutes. The officers then removed other things from Houston's pockets such as a "relatively small knife," a bottle of alcohol, and a cell phone.

After Houston was detained and searched, the officers found a black pistol in a ravine just beyond the property line of Houston's residence. The pistol was the same size and color as the one the officer had observed in Houston's hand. The officers placed Houston in a patrol car, checked his criminal history, and discovered that he had a prior felony conviction. Houston was indicted for being a felon in possession of a firearm. Houston moved to suppress the pistol as well as the brass knuckles and other items taken from his pocket, claiming violations of the Fourth Amendment. The district court denied the motion. Houston pleaded guilty but reserved the right to appeal the denial of his motion to suppress.

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

"Houston first contends that he was seized under the Fourth Amendment when an officer commanded him to 'wait.' This alleged seizure, he claims, violated the Fourth Amendment because it was not supported by a reasonable suspicion of criminal activity. But it is well established that police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment. *United States v. Taylor*, 462 F.3d 1023, 1026 (8th Cir. 2006); see also *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Because Houston did not submit when the officer commanded him to 'wait,' there was no seizure, and the Fourth Amendment does not apply.

"Houston next argues that the seizure of items from his pockets after he was detained

was unconstitutional. Under *Terry v. Ohio*, an officer may stop an individual if the officer has reasonable suspicion that 'criminal activity may be afoot.' 392 U.S. 1, 30 (1968). A *Terry* stop is justified when a police officer is able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. We determine whether reasonable suspicion exists based on the totality of the circumstances, in light of the officer's experience. *United States v. Polite*, 910 F.3d 384, 387 (8th Cir. 2018). Houston's flight from the officers in an area known for gun-related crime was sufficient to justify a reasonable suspicion of criminal activity. That the confrontation occurred in the middle of the night and that one officer previously observed a pistol in Houston's hand further indicate that the officers had a reasonable suspicion of criminal activity and were justified in stopping Houston.

"After a suspect is lawfully stopped, an officer may conduct a pat-down search for weapons if that officer has a reasonable, articulable suspicion that the suspect is armed and dangerous. *United States v. Trogdon*, 789 F.3d 907, 910 (8th Cir. 2015). Because one officer told the others that he saw Houston holding a pistol, the officers had a reasonable, articulable suspicion that Houston was armed and dangerous. Thus, they were entitled to conduct a pat-down search. While conducting the pat-down search, one officer felt a hard, metallic object in Houston's front pocket and could not rule out the possibility that it was a weapon. The removal of that object—the brass knuckles—from Houston's pocket was therefore lawful.

"The district court determined that after the discovery of the brass knuckles, the officers had probable cause to arrest Houston for carrying a dangerous weapon—the brass knuckles. Based on this determination, the district court concluded that the seizure of other objects from Houston's pockets was lawful as a search incident to arrest.

"The Court of Appeals we affirm the denial of Houston's motion to suppress."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/04/181516P.pdf

SEARCH AND SEIZURE:

Traffic Stop; Length of Detention

United States v. Lewis

CA7, No. 17-3592, 4/3/19

Officer Sweeney pulled Arriba Lewis over for following too closely. Sweeney processed a warning while Lewis, who seemed unusually nervous, sat in the squad car. After learning Lewis was on federal supervised release for a cocaine conviction and receiving suspiciously inconsistent answers to questions, Sweeney requested a drug-sniffing dog roughly 5 minutes into the stop. About 10 minutes and 50 seconds after Lewis pulled over, Sweeney handed him a warning. About 10 seconds later, a drug-sniffing dog and its handler approached Lewis's car. The dog alerted. Sweeney searched Lewis's car and found heroin. Lewis was charged with possession with intent to distribute heroin.

The Seventh Circuit affirmed the denial of his motion to suppress. "The officer had lawful grounds to initiate the traffic stop; it is irrelevant whether Lewis actually committed a traffic offense because Sweeney had a reasonable belief that he did so. Officer Sweeney did not unjustifiably prolong the traffic stop past the time reasonably required to complete the mission of issuing a warning; any delay beyond the routine traffic

stop to allow the dog to sniff was justified by independent reasonable suspicion."

READ THE COURT OPINION HERE:
https://bit.ly/30dkVDH

SEARCH AND SEIZURE: Traffic Stop; Evaluation of Terry and Traffic Stops
United States v. Gibbs
CA11, No. 17-12474, 3/6/19

The Court of Appeals for the Eleventh Circuit discussed whether an encounter with the police was part of a lawful traffic stop.

"Under the Fourth Amendment, a police officer generally may lawfully detain an individual without a warrant if (1) there is probable cause to believe that a traffic violation has occurred (a traffic stop), or (2) there is reasonable suspicion to believe the individual has engaged or is about to engage in criminal activity (an investigative or Terry stop). See *United States v. Harris*, 526 F.3d 1334, 1337 (11th Cir. 2008). While there are obvious differences between a traffic stop and a *Terry* stop, the Supreme Court has recognized that the two are "analogous" both in their "duration and atmosphere." See *Berkemer v. McCarty,* 468 U.S. 420, (1984). Of course, a "traffic stop supported by probable cause" may exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

"In evaluating both traffic and *Terry* stops, we examine (1) whether the officer's action was justified at its inception—that is, whether the officer had probable cause or reasonable suspicion to initiate the stop, and (2) whether the stop was reasonably related in scope to the circumstances that justified it in the first place. *United States v. Acosta*, 363 F.3d 1141, (11th Cir. 2004); *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001). In a traffic-stop setting, the first of these conditions—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. *Arizona v. Johnson,* 555 U.S. 323, 327, 129 S. Ct. 781, 784 (2009). Therefore, police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity.

"The Supreme Court has held that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. *Maryland v. Wilson*, 519 U.S. 408, (1997). The Court explained in *Wilson* that traffic stops may be dangerous encounters due to the risk that evidence of a more serious crime might be uncovered during the stop, prompting the occupants of the vehicle to employ violence to prevent apprehension of such a crime. Indeed, this risk may be every bit as great from a passenger as from a driver and, thus, ordering a passenger to exit the vehicle reduces this risk by denying him access to any possible weapon that might be concealed in the interior of the passenger compartment. See also *Johnson*, 555 U.S. at 330. (The Court has recognized that traffic stops are especially fraught with danger to police officers. The risk of harm to both the police and the occupants of a stopped vehicle is minimized, we have stressed, if the officers routinely exercise unquestioned command of the situation.

"Following *Wilson*, this Court has consistently held that during a lawful traffic stop, officers also may take steps that are reasonably necessary to protect their personal safety including requiring the driver and passengers to exit the vehicle 'as a matter of course. *United States v. Spoerke*, 568 F.3d 1236, 1248 (11th Cir. 2009). We have further held that, in some circumstances, a police

officer conducting a traffic stop may properly direct passengers to walk a reasonable distance away from the officer. *Hudson v. Hall*, 231 F.3d 1289, 1297 (11th Cir. 2000). Moreover, in contexts other than traffic stops, we have cited *Wilson* for the more general proposition that an officer conducting a lawful stop or search may, in an appropriate setting, properly control the movements of persons at the scene in order to ensure officer safety. See *United States v. Holloway*, 290 F.3d 1331, 1340 (11th Cir. 2002) (citing *Wilson* in support of the principle that officers may temporarily secure persons present on a premises being searched in the interest of officer safety); see also *Lewis*, 674 F.3d at 1306–09 (holding that, in the interest of their safety, officers lawfully may detain an associate or companion of a person being investigated for criminal activities, without particularized suspicion of any wrongdoing as to that associate).

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201712474.pdf

SEARCH AND SEIZURE:

Voluntary Consent to a Pat-Down
State of Colorado v. Berdahl
No. 16SC542, 2019 Co. 29, 4/29/19

On an early January morning, a sheriff's deputy was dispatched to check on the well-being of two people whose truck broke down. The deputy saw a man walking alongside the highway about half of a mile from the reported location of the truck. The man, Berdahl, was not dressed for the weather. The deputy offered him a ride back to the truck to allow Berdahl's significant other (J.P.) in the patrol car to warm up. Prior to letting Berdahl into the back of the car, the deputy conducted a brief pat-down search for weapons. After learning that Berdahl and J.P. had been stranded for much of the evening and that no one was available to come get or offer any assistance to them, a state patrol officer who had arrived to assist the sheriff deputy, offered to transport the couple to the nearest gas station. They accepted the offer and collected their personal items from the truck. The sergeant then explained that before allowing them to get into his car, he "was just going to conduct a quick pat-down frisk for any weapons," at which point Berdahl immediately went over to the trunk of the patrol car, put his hands on the trunk, and spread his legs to allow the sergeant to conduct the pat down. During the search, the patrol officer felt a hard cylindrical object on Berdahl's ankle, which was late revealed to be a methamphetamine pipe. When they arrived at the gas station, the sergeant gave J.P. some of his own money so that she could get help, and she went into the station. The sergeant then looked inside the blue bag, where he found a small plastic baggy containing a while crystalline substance, which he believed to be methamphetamine. He then arrested Berdahl.

This case principally asked the Colorado Supreme Court to decide whether Brent Berdahl's federal and state constitutional rights were violated when the law enforcement officer required him to submit to a pat-down search before providing a consensual ride in the officer's police car. The Supreme Court concluded that when Berdahl accepted the officer's offer of a courtesy ride in the officer's car and then submitted to a brief pat down for weapons before getting into the car, he, by his conduct, voluntarily consented to the officer's limited pat-down search, and therefore, the search was constitutional.

READ THE COURT OPINION HERE:
https://bit.ly/31O2iGM

SUBSTANTIVE LAW:
Anti-Obstructing Statute
Agnew v. Government of the District of Columbia, CADC, No. 17-7114, 4/5/19

The District of Columbia is a diverse and thriving city of approximately 700,000 residents. As the nation's capital, it is the site of hundreds of mass events each year. The District also annually hosts tens of millions of tourists from around the nation and the world. To promote and protect the shared use and enjoyment of the city's public areas by residents and visitors alike, District of Columbia law makes it a misdemeanor "to crowd, obstruct, or incommode" the use of streets, sidewalks, or building entrances, and "continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease" doing so. D.C. Code § 22-1307(a) ("the anti-obstructing statute").

The plaintiffs, three District of Columbia residents who were arrested under the statute, challenge it as unconstitutionally vague on its face on the ground that it authorizes an impermissible degree of enforcement discretion.

The Court of Appeals for the District of Columbia affirmed the district court's dismissal of their complaint: "The statute conferred no sweeping power; its terms are clear enough to shield against arbitrary deployment; it bars only blocking or hindering others' use of the places it identifies; a person is not subject to arrest unless he refuses to move out of the way when an officer directs him to do so; and the statute does not criminalize inadvertent conduct, nor does it authorize the police to direct a person to move on if he is not currently or imminently in the way of anyone else's shared use of the place at issue."

READ THE COURT OPINION HERE:
https://bit.ly/33KZzzJ

SUBSTANTIVE LAW: Second Amendment; Illinois Concealed Carry Law; Non-Residents
Culp v. Raoul
CA7, No. 17-2998, 4/12/19

The Illinois Firearm Concealed Carry Act requires an applicant for a concealed-carry license to show that he is not a clear and present danger to himself or a threat to public safety and, within the past five years, has not been a patient in a mental hospital, convicted of a violent misdemeanor or two or more violations of driving under the influence of drugs or alcohol, or participated in a residential or court-ordered drug or alcohol treatment program. These standards are identical for residents and nonresidents. State police conduct an extensive background check for each applicant. During the five-year licensing period, state police check all resident licensees against the Illinois Criminal History Record Inquiry and Department of Human Services mental health system daily. The law mandates that physicians, law enforcement officials, and school administrators report persons suspected of posing a clear and present danger to themselves or others within 24 hours of that determination. Monitoring compliance of out-of-state residents is limited, so Illinois issues licenses only to nonresidents living in states with licensing standards substantially similar.

The Court upheld the law in a challenge by nonresidents who brought suits contending that Illinois law discriminates against them. The Court found that the law respects the Second Amendment without offending the anti-discrimination principle at the heart of Article IV's Privileges and Immunities Clause.

READ THE COURT OPINION HERE:
https://bit.ly/2KJ5Sfw