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Contents

ARKANSAS ANTI-LOITERING LAW

Rodgers v. Bryant
CA8, No. 17-3219, 11/6/19

Michael Andrew Rodgers and Glynn Dilbeck, who have been begging for a long time, challenge an Arkansas anti-loitering law that bans begging in a manner that is harassing, causes alarm, or impedes traffic. The United States District Court granted a statewide preliminary injunction preventing Arkansas from enforcing the ban while Rodgers and Dilbeck pursue their claim that the law violates the First Amendment.

The Eighth Circuit Court of Appeals affirmed the district court's grant of a statewide preliminary injunction preventing Arkansas from enforcing the ban while plaintiffs pursue their claim that the law violates the First Amendment.

The Court held that plaintiffs had standing to seek a preliminary injunction where plaintiff's chilled speech amounted to a constitutional injury, the injury was fairly traceable to the potential enforcement of the anti-loitering law, and the injury would be redressable by an injunction. The Court held that plaintiffs were likely to prevail on their First Amendment claim, because Arkansas failed to establish that the law was narrowly tailored to achieve a compelling interest. Furthermore, plaintiffs have established that the law likely violates the First Amendment. Finally, the Court held that the district court did not abuse its discretion in applying the preliminary injunction statewide rather than limiting its application to plaintiffs.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/11/173219P.pdf

CIVIL RIGHTS: Entry into Home to Make Warrantless Arrest
Bailey v. Swindle
CA11, No.18-13572, 10/16/19

Santa Rosa County Sheriff's Deputy Shawn Swindell showed up at Kennth Bailey's parents' home requesting to speak with Bailey about an earlier incident involving his estranged wife. When Bailey came to the door, Swindell asked to talk to him alone, but Bailey declined. After the two argued briefly, Bailey went back inside the house. Then, presumably fed up with Bailey's unwillingness to cooperate, Swindell pursued him across the threshold and (as Bailey describes it) tackled him into the living room and arrested him.

Bailey sued, arguing that his arrest violated the Fourth Amendment. Bailey contends Swindell unlawfully arrested him inside his parents' home without a warrant.

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

"Even assuming that Swindell had probable cause, he crossed what has been called a 'firm' and 'bright' constitutional line, and thereby violated the Fourth Amendment, when he stepped over the doorstep of Bailey's parents' home to make a warrantless arrest. When it comes to warrantless arrests, the Supreme Court has drawn a 'firm line at the entrance to the house.' *Payton v. New York*, 445 U.S. 573, 590 (1980). Accordingly, while police don't need a warrant to make an arrest in a public place, the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to arrest him.

"Swindell doesn't dispute *Payton's* rule as a general matter, but he insists that this case is controlled by the Court's pre-*Payton* decision in *United States v. Santana*, 427 U.S. 38 (1976)—which, he says, holds that 'standing in a doorway or on a porch is considered a public place, wherein there is no expectation of privacy or need to obtain a warrant to initiate an arrest.' Although the facts of this case do bear some superficial similarity to those in *Santana*, we find ourselves constrained to reject Swindell's argument.
In *Santana*, officers who had just conducted a sting operation and arrested a heroin dealer returned to arrest the dealer's supplier. As the officers approached, they saw the suspect, Dominga Santana, in her doorway roughly 15 feet away holding a brown paper bag. The officers got out of their van, shouting 'police,' and displaying their identification. Santana retreated through the door and into her house, but the officers followed and took her into custody. The Supreme Court approved the warrantless arrest because it was supported by probable cause and, importantly here, because it began in a 'public place.' For the Court, the fact that the arrest continued into Santana's home after beginning on the threshold presented no difficulty because the police there were engaged in a case of 'true hot pursuit'—an exigent circumstance that justifies a departure from the usual warrant requirement.

"While this case similarly involves an arrest in or around a doorway, *Santana* does not stand for the proposition that the Fourth Amendment authorizes any warrantless arrest that begins near an open door. Santana's arrest was initiated while she was standing—at least partly—outside her house, and she only subsequently retreated within it. Bailey, by contrast, was—again, taking the facts in the light most favorable to him—completely inside his parents' home before Swindell arrested him. Swindell neither physically nor verbally, and neither explicitly nor implicitly, initiated the arrest until Bailey had retreated fully into the house.

"*Payton* involved two consolidated cases. In the first, officers showed up at Theodore Payton's apartment to arrest him the day after they had assembled evidence sufficient to establish probable cause that he had murdered a man. When Payton didn't answer his door, the officers broke in with the intention of arresting him. Although they determined that Payton wasn't home, they discovered evidence of his crime in plain view, and Payton later turned himself in. In the second case, officers obtained the address of Obie Riddick, whose robbery victims had identified as their assailant. Without obtaining a warrant, the officers knocked on Riddick's door, saw him when his young son opened it, and entered the house and arrested him on the spot. Both Payton and Riddick were convicted based on evidence discovered in the course of the officers' warrantless entries into their homes, and the New York Court of Appeals affirmed both convictions. The Supreme Court reversed both, holding that 'absent exigent circumstances—and even assuming the existence of probable cause—the threshold of the home may not reasonably be crossed without a warrant.'

"Because Swindell can point to no exigency, he violated the Fourth Amendment when he crossed the threshold to effectuate a warrantless, in-home arrest. Because Swindell violated clearly established Fourth Amendment law, he is not entitled to qualified immunity."

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201813572.pdf

CIVIL RIGHTS: Entry into Home to Make Warrantless Arrest; Consent

Gill v. Judd
CA11, No. 17-14525, 10/21/19

A twelve-year-old girl, R.S., deliberately ended her young life. Members of the Polk County, Florida Sheriff's Department thought that R.S. took her life because she had been harassed and bullied by some of her sixth-grade classmates. Following an investigation, a deputy arrested one of those classmates, K.C.R. She had once been R.S.'s best friend, but she found herself charged with having committed the crime of aggravated stalking, a felony, which includes harassing a child under sixteen years of age. The warrantless arrest took place inside K.C.R's home.

While the charges were eventually dismissed, K.C.R.'s name and photograph had already been released to the media and she was publicly blamed for the death. On appeal, one of the issues was K.C.R.'s challenge to the jury's verdict that Deputy Jonathan McKinney had consent to enter her home to make the arrest.

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

"The jury was free to conclude that, by opening the door and stepping back, the plaintiff's father was giving the deputies his consent to enter the home. The deputies arrived at the house in unmarked vehicles. They wore plain clothes, and bulletproof vests with 'SHERIFF' emblazoned across the front, and their weapons were holstered. McKinney approached the house to the front door. Then McKinney knocked and announced in a loud voice: 'Polk County Sheriff's Department.' K.C.R.'s father answered the door. McKinney told him they were there to arrest K.C.R.

"According to McKinney's and Hamilton's trial testimony, K.C.R.'s father told the deputies that he needed to put up his dog. He then shut the door. Sheriff Rudd joined the other deputies while they were waiting for K.C.R.'s father to return. A few minutes later he opened the door and the deputies entered.

"The Fourth Amendment provides that the right of the people to be secure in their houses against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Constitution, Amendment IV. Because the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, it is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, (1980). That also means that law enforcement officers are prohibited from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. But if a warrantless search is authorized by voluntary consent, the search is wholly valid. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

"Because McKinney did not have a warrant to enter K.C.R.'s home, the sole question for the jury was whether he had consent to enter the house. Whether consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While we have explained that this determination is not susceptible to neat talismanic definitions, we have identified some factors that are relevant for the factfinder to consider. See *United States v. Chemaly*, 741 F.2d 1346 (11th Cir. 1984). Those factors include: (1) the voluntariness of the person's custodial status, (2) the presence of coercive police procedure, (3) the extent of the person's cooperation with law enforcement, (4) whether the person knew that he could refuse consent, and (5) the person's education and intelligence. See also *Schneckloth*, 412 U.S. at 249 (explaining that while the subject's knowledge of a right to refuse is a factor to be taken into account, it is not a prerequisite to establishing a voluntary consent).

"The jury heard evidence that the deputies made no show of authority to coerce K.C.R.'s father into consenting to their entry. All of the deputies testified that they did not have their guns drawn. All of them testified that they didn't use or threaten to use any kind of force. And there is no evidence that any of them claimed to have a warrant. That distinguishes the present case from those in which we have held that the law enforcement officers' claim of authority coerced the occupant into letting them in.

It is not the task of the Court of Appeals to answer the question of consent in the first instance. That task fell to the jury. Our only task is to determine whether the district court abused its discretion when it concluded that the jury's verdict was not against the great weight of the evidence and did not result in a miscarriage of justice. It did not."

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201714525.pdf

CIVIL LIABILITY:

Excessive Force; Handcuffing
Cugini v. City of New York
CA2, No. 18-1378, 10/25/19

On June 26, 2014, Donna Cugini voluntarily surrendered to police custody at the 121st Precinct in connection with a misdemeanor complaint of domestic stalking and harassment filed by her estranged sister.

When Cugini arrived at the precinct, Palazzola handcuffed her, processed her arrest, and led her to a holding cell, where he removed her handcuffs. Some two hours later, Palazzola returned to Cugini's holding cell to move her to Staten Island Central Booking located inside the 120th Precinct stationhouse ("Central Booking"). He instructed her to step out of her cell and place her hands behind her back. Although she readily complied, Palazzola grabbed her arms, twisted her wrists into a weird position, and handcuffed her very tight. She said ouch, and her body shuddered. In response, Palazzola threatened her—"Don't make me hurt you"—and tightened her handcuffs further. Cugini again reacted, either exclaiming "ow" or uttering a "cry."

Once Cugini was handcuffed, Palazzola moved her to the rear of a police car and drove her to Central Booking. Approximately 40 minutes elapsed between the time Palazzola handcuffed Cugini and their arrival at Central Booking. During that time, Cugini did not otherwise inform Palazzola that her handcuffs were causing her pain or ask that they be adjusted, refraining from doing so, she testified, because she was "too scared."

Once they arrived at Central Booking, Palazzola attempted to remove Cugini's handcuffs. She felt Palazzola "rip the cuffs" and continue to tighten, rather than loosen, them. A nearby officer saw that Palazzola had put the handcuffs on backwards. Palazzola continued to fiddle around with them" and to make the handcuffs tighter and tighter. The other officer called for someone else to remove them. Immediately upon removal of her handcuffs, Cugini felt pain in her wrists.

When she was released from custody later that day, she went directly to the emergency room at Richmond University Medical Center. Soon thereafter, she nevertheless began experiencing pain, numbness, and twitching in her arms. She continues to suffer from what has been diagnosed as permanent nerve damage to her right wrist, and has lost the ability to perform many basic household functions as a result.

Cugini brought a civil rights action in the United States District Court for the Eastern District of New York against the City of New York and Officer Christopher Palazzola in his individual capacity. She alleged a federal claim for excessive force against Palazzola, under the Fourth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983. The district court assumed without deciding that Cugini had established her constitutional claim. It granted the defendants' motion for summary judgment, however, on the ground that Palazzola was entitled to qualified immunity because his behavior did not constitute a violation of a clearly established constitutional right.

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

"In *Graham v. Connor,* 490 U.S. 386 (1989), the Supreme Court concluded that where a claim for excessive force arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment. It is therefore analyzed under the Fourth

Amendment's 'reasonableness' standard, rather than under the subjective 'substantive due process' approach, which requires consideration of whether the individual officers acted in good faith or maliciously and sadistically for the very purpose of causing harm. Because the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it, determining whether the amount of force an officer used is reasonable requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.

"A plaintiff asserting a claim for excessive force need not always establish that she alerted an officer to the fact that her handcuffs were too tight or causing pain. The question is more broadly whether an officer reasonably should have known during handcuffing that his use of force was excessive. A plaintiff satisfies this requirement if either the unreasonableness of the force used was apparent under the circumstances, or the plaintiff signaled her distress, verbally or otherwise, such that a reasonable officer would have been aware of her pain, or both. In some cases, the fact that an act will cause pain or injury will be clear from the nature of the act itself. And, as with all aspects of a Fourth Amendment inquiry, an officer's awareness is judged from the perspective of a reasonable officer on the scene.

"Where an officer's use of force in handcuffing is plainly unreasonable under the circumstances or where a plaintiff manifests clear signs of her distress—verbally or otherwise—a fact finder may decide that the officer reasonably should have known that his use of force was excessive for purposes of establishing a Fourth Amendment violation.

"At the time of the plaintiff's arrest, the use of excessive force in handcuffing was prohibited by clearly established constitutional law. While we had yet to formally hold that a defendant may violate a plaintiff's Fourth Amendment rights in a handcuffing-based excessive force claim, we had long rejected the principle that handcuffing is per se reasonable. And a consensus existed among our sister circuits that unduly tight handcuffing can constitute excessive force in violation of the Fourth Amendment. That was enough to clearly establish in this Circuit that an officer's use of excessive force during handcuffing could give rise to a Fourth Amendment claim for excessive force.

"Even assuming that the right to be free from excessive force during handcuffing was then clearly established, however, we cannot rest our ultimate conclusion as to immunity on a right that was clearly established only at a high level of generality. Our analysis must instead be particularized to the facts of the case. *Anderson v. Creighton*, 483 U.S. 635 (1987). We must therefore focus more narrowly on whether, at the time of Cugini's arrest, clearly established law required an officer to respond to a complaint by a person under arrest where, as here, that person exhibited only non-verbal aural and physical manifestations of her discomfort.

"We conclude that at the time of the plaintiff's arrest, there was no such clearly established law. It remained an open question in this Circuit whether a plaintiff asserting an excessive force claim was required to show evidence that an officer was made reasonably aware of her pain by means of an explicit verbal complaint. And our limited case law on the subject appeared to look to the presence or absence of such a complaint as a significant factor, if not a prerequisite to liability, in our Fourth Amendment analysis. Similarly, there was no such consensus in federal circuits outside ours whether a verbal complaint was

necessary, so we need not—we cannot—come to a conclusion as to the consequences of any such consensus had indeed there been one.

"Before today, then, the law at least left room for reasonable debate as to whether the plaintiff was required to alert the defendant to her pain, and, if so, whether her non-verbal behavior was sufficient to do so. Although the plaintiff has persuasively argued that the defendant used undue force in handcuffing her, a reasonable officer under these circumstances could have concluded at the time of her arrest that he was not required to respond to her non-verbal indications of discomfort and pain. We therefore conclude that the plaintiff has failed to establish that the defendant violated a clearly established constitutional right and that the district court therefore correctly granted the defendants' motion for summary judgment on that basis. We also conclude, however, that officers can no longer claim, as the defendant did here, that they are immune from liability for using plainly unreasonable force in handcuffing a person or using force that they should know is unreasonable based on the arrestee's manifestation of signs of distress on the grounds that the law is not clearly established."

READ THE COURT OPINION HERE:
https://bit.ly/2Vb2BeK

CIVIL RIGHTS: Excessive Force; Unpredictable Individual Armed with a Dangerous Weapon

Garza v. Briones
CA5, No 18-40982, 11/25/19

On August 14, 2014, at about 1:43 a.m., several officers, including Fidencio Briones, responded to a 911 call from a truck stop. The caller informed the officers that a man—later identified as Garza—was sitting alone in front of the truck stop's bar playing with a pistol and holding what appeared to be a wine bottle and a plastic bag.

Santiago Martinez arrived first on the scene and observed Garza holding a black handgun. Martinez drew his service weapon, slowly advanced toward Garza, and repeatedly ordered him to drop the gun. Garza did not do so and instead continued to move the firearm around in different directions while making facial gestures at Martinez. At that time, Garza did not have his finger on the trigger and was not pointing the gun at anyone. Martinez took cover, readied his rifle, and radioed the other responding officers to advise them of the situation.

Shortly thereafter, several other officers—including the remaining defendants—arrived. They observed Martinez continue to give Garza commands to put down the firearm. Garza still did not comply. The remaining officers took cover, forming a semi-circle around Garza with their weapons drawn. Several patrol vehicles had their lights flashing.

At 1:49 a.m., Julio Gonzalez approached Estaban Martinez, a private citizen completing a "ride along" with Guajardo. Gonzalez was a security guard at the truck stop but was dressed in shorts and a sleeveless T-shirt. Estaban directed Gonzalez to a nearby officer, Lieutenant Gabriel Rodman.

Gonzalez told Rodman that Garza's pistol was actually a BB gun, which Gonzalez knew because he had held the gun earlier that day. Rodman did not communicate that information to the other officers because he was not able to verify it. Defendants did not speak to Gonzalez, and all believed that Garza's gun was a real firearm.

At 1:50 a.m., Garza raised his weapon and pointed it in Santiago Martinez's direction. Martinez yelled at Garza to stop, but he did not do so. Martinez fired his weapon at Garza. The other defendants, fearing that Garza was shooting at Martinez, also fired. They continued to fire until Garza fell to the ground and stopped moving. The shooting lasted about eight seconds. Each defendant fired at least one shot, and sixty-one shots were fired in total. Eighteen shots struck Garza, who died from his wounds.

The administrator of Garza's estate sued them under 42 U.S.C. § 1983, alleging the officers had used excessive force. The district court granted summary judgment to the defendants, finding that they were entitled to qualified immunity. The Fifth Circuit Court of Appeals affirmed, finding as follows:

"The reasonableness of deadly force is measured at the time of the incident. Even though Garza was holding only a BB gun, that wasn't evident to defendants in the moment: The gun's appearance was almost indistinguishable from a handgun. Just before the shooting, Garza was behaving erratically, refusing to comply with direct police orders, and waving around what the officers presumed to be a deadly weapon. The video evidence from the dashcams of two patrol vehicles confirms that, just before defendants fired, Garza raised the gun above the tabletop, pointed the barrel in Martinez's direction, and lowered his eyeline seemingly to aim the firearm. It was then that Martinez fired his weapon, and the others fired only after they heard a gunshot.

"Based on those facts—which suggest that the officers thought they were confronting an unpredictable man armed with a dangerous weapon—defendants had probable cause to conclude that Garza posed them a serious threat of physical injury or death. Police officers may use deadly force in those circumstances without violating the Fourth Amendment.

"The interaction between Gonzalez and Rodman doesn't change that calculus. Even though Gonzalez told Rodman that Garza was holding a BB gun, Rodman did not communicate that information to the other officers because he was not able to verify or corroborate Gonzalez's account. That makes sense. The stakes were high should Gonzalez prove to be incorrect—Rodman's mistakenly notifying his colleagues that Garza's gun was only a BB gun could greatly increase the dangerousness, or even deadliness, of the encounter. And Rodman's failure to corroborate the information is understandable, given that less than a minute passed between when Gonzalez first approached him and when the shooting began.

"The evidence on which plaintiff relies does not raise a genuine dispute as to any fact material to whether defendants' use of deadly force violated Garza's Fourth Amendment rights. Because defendants are entitled to qualified immunity the summary judgment is affirmed."

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/18/18-40982-CV0.pdf

CONSTITUTIONAL LAW:
Double Jeopardy
United States v. Russell
CA8, No. 18-2591, 9/25/19

The Court of Appeals for the Eighth Circuit stated the same conduct can result in both a revocation of a defendant's supervised release and a separate criminal conviction without raising double jeopardy concerns. See also *United States v. Dang*, 907 F.3d 561, 567 (8th Cir. 2018).

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/09/182591P.pdf

NCIC: Stolen Firearms Report; Change in Stolen Designation
United States v. Gray
CA3, No. 18-3663, 11/8/19

Officer Thorne heard gunshots during York City, Pennsylvania's New Year's Eve fireworks festivities. He observed Gray carrying a firearm, walking down a pathway between row homes at 721 and 723 Wallace Street. Thorne gave chase with his firearm drawn, identified himself as police, and ordered Gray to drop the firearm. Gray saw that Thorne was pointing a firearm and ran toward Wallace Street. Thorne saw Gray toss his gun and run onto the porch of 725 Wallace, next to Gray's home. Thorne followed and restrained Gray. Officer Davis arrived and Gray was taken into custody. Thorne found the firearm in front of 731 Wallace, with one round chambered and six in the magazine.

The National Criminal Information Center listed the firearm as stolen in Manchester, New Hampshire, in 1995. A month later Manchester Police notified Thorne: OUR DETECTIVES HAVE BEEN UNABLE TO LOCATE THE ORIGINAL VICTIM … THE FIREARM IS NOT CONSIDERED STOLEN AT THIS POINT.

The Third Circuit affirmed Gray's conviction for unlawful possession of a firearm by a felon and stated that the change in designation by the Manchester Police did not change the fact that the gun had been reported stolen and appeared on the NCIC list until recovered in Gray's possession.

"Although we have not previously addressed the issue in a precedential opinion, at least one of our sister circuits has found that the introduction of a police report regarding the theft of a firearm is sufficient to meet the Government's evidentiary burden with respect to the 'stolen' status of a firearm. See *United States v. Sanchez*, 507 F.3d 532, 538-39 (7th Cir. 2007). We agree and therefore conclude that the introduction of the reliable NCIC report was sufficient to meet the Government's burden with respect to the stolen status of the firearm. Moreover, Gray presented no evidence to rebut the NCIC report. See *United States v. Napolitan,* 762 F.3d 297, 309 (3d Cir. 2014) (holding that burden shifts to defendant once Government has made out a prima facie case for a sentencing. Because the NCIC report was a reliable authority to establish the firearm's status at the time Gray possessed it, and Gray produced no evidence to rebut it, this Court cannot conclude that the District Court committed clear error in finding that the Government had established by a preponderance of the evidence that the firearm was stolen."

READ THE COURT OPINION HERE:
http://www2.ca3.uscourts.gov/opinarch/183663p.pdf

MIRANDA: Computer Password Protected by Fifth Amendment

Pennsylvania v. Davis
SCP, No. 56 MAP 2018, 11/20/19

In 2014, Agents of the Pennsylvania Office of Attorney General ("OAG"), as part of their investigation of the electronic dissemination of child pornography, discovered that a computer at an identified Internet Protocol (IP) address registered with Comcast Cable Communications, repeatedly utilized a peer-to-peer file-sharing network, eMule, to share child pornography. The OAG applied for, received, and executed a search warrant at Joseph Davis's apartment. After being Mirandized, Davis informed agents that he lived alone, that he was the sole user of the computer, and that he used hardwired Internet services which were password protected, and, thus, not accessible by the public, such as through Wifi. The agents arrested Davis for the eMule distributions and seized his computer. Joseph Davis was asked for the password to this computer and refused to give it. He was charged with two counts of disseminating child pornography, and two counts of criminal use of a communication facility. The Commonwealth filed with the Luzerne County Court of Common Pleas a pre-trial motion to compel Appellant to divulge the password to his HP 700 computer. Appellant responded by invoking his right against self-incrimination.

The Pennsylvania Supreme Court consider an issue of first impression: Whether a defendant may be compelled to disclose a password to allow the Commonwealth access to the defendant's lawfully-seized, but encrypted, computer.

The Court stated that we appreciate the significant and ever-increasing difficulties faced by law enforcement in light of rapidly changing technology, including encryption, to obtain evidence. However, unlike requests or demands for physical evidence such as blood, or handwriting or voice exemplars, information in one's mind to "unlock the safe" to potentially incriminating information does not easily fall within this exception. Indeed, we conclude the compulsion of a password to a computer cannot fit within this exception.

Thus, we hold that the compelled recollection of Appellant's password is testimonial in nature, and, consequently, privileged under the Fifth Amendment to the United States Constitution.

READ THE COURT OPINION HERE:
http://www.pacourts.us/assets/opinions/Supreme/out/j-42-2019mo%20-%20104229407877756 33.pdf#search=%22Davis%20%27Supreme%2bCourt%27%22

MIRANDA: Jail House Informant

State of California vs. Rodriguez, California
Court of Appeals, No. B291137, 9/23/19

Rodriguez was in a gang. He and a fellow gang member followed a man to Monterey Park, where Rodriguez shot and wounded the man. Eight months later, Rodriguez was in jail on an unrelated matter. Police put an informant in his holding cell. The informant dressed and acted like an inmate. Rodriguez was not Mirandized.

The informant asked Rodriguez, "What happened fool?" Rodriguez replied, "F@*#n, uh, they know everything fool." After talking some more, Rodriguez said to the informant, "Look, here's what happened. I can have a little bit of trust in you." Rodriguez proceeded to tell the informant the details of the shooting. This second recorded conversation — after Rodriguez returned from speaking with the detective — lasted 20 minutes.

The trial court denied Rodriguez's motion to exclude his conversations with the undercover informant. The prosecution played the recording for the jury.

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

"The government was not required to Mirandize Rodriguez before his conversation with the informant. Miranda held that, under the Fifth Amendment, courts may admit statements made by suspects during a custodial interrogation only if police first warn suspects of their rights. But Miranda warnings are not required when suspects give voluntary statements to a person they do not know is a police officer. (*Illinois v. Perkins* (1990) 496 U.S. 292.

"Rodriguez did not know he was speaking to the police when he talked to the undercover informant, so no Miranda warning was required. Rodriguez claims he 'felt coerced' because the informant posed as 'an older, well-connected gang member.' Rodriguez says that coercion was especially strong because he was confined to the same cell as the informant for around two hours.

"The coercion identified by Rodriguez is not the sort that concerned the Miranda court. Miranda does not protect suspects when they describe criminal activities to people they think are cellmates. Rather, Miranda addressed concerns that a 'police-dominated atmosphere' generates 'inherently compelling pressures' that undermine the individual's will to resist questioning. Those concerns evaporate when, as here, an inmate speaks freely to someone he believes is a fellow inmate."

READ THE COURT OPINION HERE:
http://www.courts.ca.gov/opinions/archive/B291137.PDF

MIRANDA:

Termination of Interview; Admissibility

Price v. State

No. CR-18-839, 2019 Ark. 334, 11/14/19

On May 14, 2016, Detective Keith Banks of the Pine Bluff Police Department received a call to investigate a possible homicide at approximately 1:00 a.m. When the detective arrived, he found the victim, Andre Eason, unresponsive and lying on the floor. He met five eyewitnesses—Foster, Tyler, Surratt, Luckett, and Pridgeon—and interviewed them at the scene. Travis Price was subsequently arrested, taken into custody, and interviewed. During the detective's testimony, the State played for the jury Price's recorded interview during which he denied his involvement in the murder but admitted his presence at Foster's home that night.

Price argues that the circuit court erred in denying his motion to suppress and that the admission of his statement violates his rights pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Specifically, Price contends that the circuit court erred in allowing the jury to hear a portion of his taped statement during which he requested an attorney and then an officer terminating the interview. Price asserts that the circuit court abused its discretion in refusing to redact that portion of his statement to police.

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

"Prior to trial, Price filed a motion to suppress a statement made during his custodial interrogation by the Pine Bluff Police Department. On May 15, 2018, the circuit court held a hearing on Price's motion to suppress. Detective Banks testified that he met Price at the Pulaski County Detention Center, Mirandized him, took a statement,

and recorded the interview. Toward the end of the interview, the following colloquy occurred between Detective Banks and Price:

> *DETECTIVE BANKS: How did you get to Little Rock?*
>
> *PRICE: I had—let me see, man. I just need—I want to [sic] my lawyer cause I see—I don't know want to implement nobody in this cause they didn't know, man. You know what I'm saying. They didn't know.*
>
> *DETECTIVE BANKS: All right. The time is 18:10. This concludes the interview.*

"During Banks's testimony, the circuit court admitted into evidence the recorded interview with Price and the Miranda-rights form that Price signed during the interview. Banks testified that Price did not appear to be intoxicated or under the influence of any drugs and that he did not threaten or coerce Price in any way. The circuit court denied his motion to suppress the statement.

"While Price couches the argument as a suppression issue, it actually involves the circuit court's decision to redact a portion of Price's taped statement. The decision to admit or exclude evidence is within the sound discretion of the circuit court, and we will not reverse a circuit court's decision regarding the admission of evidence absent a manifest abuse of discretion. *MacKool v. State,* 365 Ark. 416, 443, 231 S.W.3d 676, 697 (2006) (citing *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005)).

"In this instance, Price requested an attorney and exercised his right to remain silent, which the detective acknowledged by terminating the interview. We find no prejudice in this instance, and absent a showing of prejudice, we will not reverse. See MacKool, 365 Ark. 416, 231 S.W.3d 676. Thus, we hold that the circuit court properly denied Price's motion to suppress his statement. Accordingly, we affirm."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/supremecourt/en/item/424406/index.do

MIRANDA: Totality of Circumstances Reflect Valid Waiver

Pree v. State, ASC, No. CR-17-954, 2019 Ark. 258, 10/3/19

Zavier Pree appeals from his conviction by a Pulaski County Circuit Court jury of capital murder, aggravated robbery, and a firearm enhancement, for which he received, respectively, a sentence of life without parole, a concurrent term of 40 years, and a consecutive term of ten years in the Arkansas Department of Correction. On appeal, he argues that the circuit court erred when it denied his motion to suppress his statements to Detective Dane Pedersen of the Little Rock Police Department.

The Arkansas Supreme Court rejected Pree's argument that he was especially vulnerable to police interrogation finding, in part, as follows:

"While he was only nineteen, he was a high school graduate and had prior dealings with police as a juvenile offender. We are mindful that the interview lasted from 4:24 p.m. until 9:10 p.m., but Pree was not subjected to intense questioning during that time. Pree gave the essence of his confession after about only forty-five minutes. Much of the rest of the time was spent waiting for Detective Pedersen to retrieve the murder weapon from Pree's apartment.

"Finally, the Court rejected Pree's argument that Detective Pedersen 'downplayed' the significance of the Miranda warnings. In the first place, Pree was given the warnings upon arrest as well as at the start of the interview. We know from the video that while Detective Pedersen's tone was low-key and conversational, each of the rights was thoroughly explained to Pree. After each right was read to Pree, Detective Pedersen told him that if he understood the right, Pree was to initial next to it, which Pree did. Further, Pree asked Detective Pedersen to clarify what was meant by 'I can stop the questioning at any time.'

"Detective Pedersen explained that if at any time he did not want to talk anymore then the questioning would stop. Under the totality of the circumstances, we hold that the circuit court did not clearly err in rejecting Pree's argument that the issuance of Miranda warnings was rendered ineffective."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/supremecourt/en/item/422571/index.do?q=Pree+v.+State

SEARCH AND SEIZURE:

Affidavits; Inferences
United States v. Jones
CA4, No 18-4671, 11/6/19

In July 2017, Martinsburg Police Corporal E.C. Neely arrested Gary Owen Jones for driving while his license was suspended. The next day, in statements made on Facebook, Jones announced that he was "on a cop manhunt" for Neely, and requested information from "anybody out there" regarding Neely's whereabouts.

About six months later, Jones escalated his threat. In a series of four Facebook posts in January 2018, Jones declared that he was on a "manhunt" for three law enforcement officers, all of whom he identified by name. Jones asked for information regarding where the officers lived, stated his "need" to find them, and promised that he had "something" for them when he did. Addressing Officer Neely in particular, Jones wrote: "Eric Neely I feel sorry for you…when I find ya…I got something really interesting for you."

In February 2018, Jones expanded his online threats to include all police officers, whom he collectively referred to as "pigs." Writing again on Facebook, Jones stated that no "pigs" should "come to my house at all" and that he was "going to pull this trigger, bang, bye." He also explicitly warned: "If pigs come here here [sic] be careful."

Jones' rhetoric escalated still further the following day in response to an online article reporting a nightclub shooting involving local police. Commenting on the article in an online post, Jones lamented the fact that the officers responding to the scene had not "got shot," expressed his "hope" that "all cops" would "burn in hell," and stated that he would have tried to "whack the pigs" if he had been the shooter. In additional comments, Jones also admitted that he previously had vandalized a police officer's vehicle, and that he owned a .45-caliber handgun he had used to shoot a man at a "strip club" during a failed drug deal.

Three days after Jones made the above online post, law enforcement officers conducted surveillance of Jones' residence based on the totality of his online behavior. The officers later obtained a warrant to search his home for evidence of terrorist threats, in violation of W. Va. Code § 61-6-24. Upon executing the warrant, officers found hundreds of rounds of ammunition and ammunition components.

Jones was indicted in federal court for possession of ammunition by a felon, in violation of 18 U.S.C. § 922(g). He filed a suppression motion arguing that the search warrant facially lacked probable cause, and that the warrant affidavit failed to contain certain material information. The district court denied Jones' motion, holding that his online statements established probable cause for the search warrant. The court also held that Jones failed to make a preliminary showing that material facts had been intentionally omitted from the warrant affidavit, and therefore denied Jones' request for a hearing pursuant to *Franks v. Delaware,* 438 U.S. 154 (1978). Jones entered a conditional guilty plea to the Section 922(g) offense, preserving his right to file the present appeal.

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

"The warrant affidavit established a 'fair probability' that evidence of Jones' terrorist threats would be found at his residence. At the outset, the Court observed that Jones' threats expressly included a warning that 'pigs' should not 'come to my house at all.' This statement suggests that Jones may have planned to carry out one or more of his threats from his home, and therefore provides some direct evidence linking his crime to his residence. Moreover, we long have held that an affidavit need not directly link the evidence sought with the place to be searched. Instead, the nexus requirement also may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.

"Here, for example, the magistrate reasonably could have inferred that Jones had made his online threats from a computer located at his home. The magistrate likewise was entitled to draw an inference that other relevant evidence, including the .45-caliber handgun that Jones had referenced in one of his online statements, would be stored at his residence. Finally, the affiant established through law enforcement surveillance that the address specified in the warrant application was Jones' residence."

The Court concluded that the above evidence and reasonable inferences that could be drawn from the evidence were sufficient to establish the required nexus with Jones' residence for the purpose of establishing probable cause. Accordingly, the Court held that the warrant affidavit provided the magistrate with a substantial basis to conclude that Jones made terrorist threats and that evidence of this crime would be found in his home.

READ THE COURT OPINION HERE:
http://www.ca4.uscourts.gov/opinions/184671.P.pdf

SEARCH AND SEIZURE:

Affidavits; Informant Reliability
United States v. Crawford
CA6, No. 18-6239, 11/18/19

Officer Eric Nelson of the Blue Ash, Ohio, Police Department learned from Jerry Heard, who was previously unknown to Nelson, that Richard Crawford was dealing cocaine. Heard identified Crawford's driver's license photograph and provided Crawford's telephone number.

Nelson contacted the Drug Abuse Reduction Task Force and the Hamilton County Heroin Coalition Task Force about Heard. These agencies both confirmed Heard's reliability as an informant. Nelson then reviewed Crawford's drug-trafficking convictions. Subsequently, Heard showed Nelson text messages between Crawford and Heard

detailing that Crawford had twenty ounces of cocaine he was going to sell.

Nelson next obtained a state court warrant to electronically track Crawford's cellphone. Heard told Nelson that Crawford drove a silver 2003 BMW X5 and, using the license plate number provided by Heard, Nelson learned that the vehicle was registered to Crawford at a Cincinnati residence. Cellphone data placed Crawford near a Florence, Kentucky apartment, leased to Crawford's wife.

Nelson surveilled the apartment. He saw Crawford exit the apartment and leave in the BMW. A warrant was issued, authorizing officers to use GPS tracking on that vehicle. Weeks later, Heard completed a controlled drug buy from Crawford. Another search warrant was issued for Crawford's apartment, where officers found cocaine and $1,390 in tagged bills used in the controlled buy. Mirandized, Crawford incriminated himself, admitting that he sold the cocaine on consignment and that he had placed the cocaine under his sink.

Crawford was convicted in United States District Court and appeals his conviction challenging the reliability of the informant, Jerry Heard.

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

"Confidential informants play an important role in combatting drug trafficking. Reflecting as much, our criminal cases reveal numerous examples of confidential informants providing critical information to support search warrants targeting drug crimes.

"These same issues were at play in the investigation that resulted in Richard Crawford's drug trafficking conviction. Almost all the evidence used to justify the search warrants that resulted in Crawford's arrest was provided by a confidential informant. Challenging that practice, Crawford contends that the officers who sought the warrants did not verify sufficiently the informant's reliability.

Crawford is correct to emphasize the point—informants must be trustworthy and credible. But he is wrong in his conclusion. Here, the informant's reliability was confirmed both by law enforcement agencies and through the affiant officer's own research. Adding in the fact that the key information disclosed by the informant proved to be credible, there were many reasons to deem the informant reliable, thereby justifying the warrants. Accordingly, Crawford conviction is affirmed."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/19a0282p-06.pdf

SEARCH AND SEIZURE: Affidavits; Particularity Requirement

Jemison v. State, ACA, No. CR-19-140, 2019 Ark. App. 475, 10/23/19

On January 9, 2017, two incidents of aggravated robbery and commercial burglary involving two suspects occurred at two different convenience-store locations in Texarkana. Chavel Terrell Jemison and another young man were arrested. Jemison does not challenge the sufficiency of the evidence supporting his two convictions. However, he contends the trial court erred in denying his motion to suppress evidence obtained from his vehicle, specifically two packages of Newport cigarettes.

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

"In *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (quoting *Massachusetts v. Sheppard*, 468 U.S. 981 (1984)), the Supreme Court explained the Constitution's particularity requirement for search warrants:

> *The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. That rule is in keeping with the well-established principle that "except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant."*

"Rule 13.2 of the Arkansas Rules of Criminal Procedure provides, in part: (b) The warrant shall state, or describe with particularity:..(iv) the persons or things constituting the object of the search and authorized to be seized. While both the Constitution and Rule 13.2 (b)(iv) require that a warrant describe objects with particularity, highly technical attacks on search warrants are not favored lest police officers are discouraged from obtaining them. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987). The tension therefore lies between the constitutional requirement for particularity and the judicial recognition that reviewing courts should not be hypertechnical in assessing the validity of a search warrant.

"Here, the search warrant provided in pertinent part:

> *There is now being concealed, conducted, or possessed, namely guns, ammunition, clothing, currency, ammunition (live and spent shells), cellular phone, electronic devices, blood, and trace evidence as well as any other items that may contain blood transfer or trace evidence, as well as paraphernalia associated with the possession of evidence of Attempted Capital Murder and Aggravated Robbery, and any articles thereof, including, but not limited to, books, records, currency, electronic devices, and articles of identification, which are being possessed… and as I am satisfied that there is probable cause to believe that the property so described is being concealed in the vehicle above described [white 2000 Lincoln Town Car four door passenger vehicle bearing Texas license plate # GZG-3933] and that the foregoing grounds for application for the issuance of the search warrant exist.*

"It is undisputed that the search warrant did not specifically list cigarettes, much less Newport cigarettes. To be covered by the search warrant, therefore, the cigarettes would have to fall within the emphasized language. Jemison contends the search warrant was so generalized that it encouraged the officers executing it to use their discretion and 'effectively seize anything they desired,' thereby rendering the entire warrant invalid. Detective Kirkland candidly acknowledged that 'trace evidence' could mean nearly anything that had or was believed to have fibers or DNA and that 'paraphernalia associated with the possession of evidence of Attempted Capital Murder and Aggravated Robbery' was up to him to decide and fully within his sole discretion or the discretion of the officer executing the warrant.

"The emphasized portions of the search warrant, especially when coupled with Kirkland's

testimony, are problematic at best. They do not model the particularity envisioned by the framers because they undeniably leave a great deal of discretion with the officers—a fact candidly confirmed by Officer Kirkland. Our review of the warrant and surrounding circumstances convinces us that the designated portions of the warrant do not satisfy the constitutional requirements for particularity, and that is the only language within the warrant that could arguably cover the cigarettes. Consequently, we hold that the seizure of the cigarettes was not justified by the search warrant's language."

The Arkansas Court of Appeals held that the error in failing to suppress the cigarettes in this case was slight compared to the overwhelming evidence supporting Jemison's convictions for aggravated robbery and commercial burglary.

"We hold beyond a reasonable doubt that this error did not contribute to the jury's verdicts."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/courtofappeals/en/item/423372/index.do

SEARCH AND SEIZURE:

Border Searches

United States v. Williams

CA10, No. 18-1299, 11/14/19

Derrick Williams, an American citizen, boarded an international flight bound for Denver International Airport (DIA). Once on the ground, he proceeded to customs where his passport triggered multiple "lookout" alerts in the U.S. Customs and Border Patrol (CBP) enforcement system. The alerts instructed CBP officers to escort Williams to DIA's secondary screening area where he was met by a Homeland Security Special Agent. Authorities had not linked Williams to any terrorist activity; he was known to them for previous felony convictions involving weapons possession charges, trespass and fraud.

At the close of the interview, the Agent Allen explained to Williams that his electronic devices, a laptop and a smartphone, would be searched. He asked for the devices' passwords, which Williams refused to give. His electronics were taken to be returned to Williams later. In bypassing the device passwords, investigators discovered a folder containing child pornography. A search warrant was issued authorizing a full forensic search. The search ultimately yielded thousands of images and videos of child pornography.

Williams was indicted and moved to suppress the evidence obtained from his laptop on grounds that it was tainted by the search conducted prior to the issuance of the search warrant. He argued that the agents needed reasonable suspicion for this kind of search and that, because they did not have it, his Fourth Amendment rights were violated. The government countered that the Fourth Amendment allowed for suspicionless searches at the border and that, even if reasonable suspicion were required, they had ample reason to suspect that Williams was involved in criminal activity.

The district court held a hearing on the matter and subsequently denied the suppression motion. Williams raised multiple issues on appeal to the Tenth Circuit, but finding no reversible errors, the Tenth Circuit affirmed denial of the motion.

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/opinions/18/18-1299.pdf

SEARCH AND SEIZURE:

Emergency Search; Explosives

United States v. Haldoson

CA7, No. 18-2279, 10/23/19

Michael Haldorson is a self-proclaimed fireworks enthusiast. But he was also a drug dealer. Haldorson was arrested on his way to a second controlled buy and, along with drugs, officers found three pipe bombs in his car. Officers interviewed Haldorson multiple times the evening of his arrest and carrying over into the early morning hours of the next day, June 24, 2015. The officers read Haldorson his Miranda rights on at least two separate occasions over the course of the interview. Haldorson told the officers that he was homeless. He eventually claimed that he lived in Joliet at his parents' house and provided an address.

With this information, CPAT officers and ATF agents left the police station and went to the Joliet address. They arrived at Haldorson's parents' home at approximately 2:45 a.m. After speaking with Haldorson's father, the officers learned that Haldorson did in fact reside at an apartment in downtown Plainfield, on Lockport Street. His father did not know the exact address but gave a general description of the area and Haldorson's apartment. Officers immediately went to that location.

Now on Lockport Street, at approximately four o'clock in the morning, the officers—without a precise address—proceeded to knock on the street-level doors of the buildings (the buildings were retail business on the first floor and apartments on the second), and eventually located and gained access to Haldorson's apartment building.

Once inside the apartment building, the officers knocked on Haldorson's unit's front door. A woman answered the door (and gave the same name as the name of the woman Haldorson said he was dating), who told the officers that Haldorson lived there. She gave the officers consent to enter and search the common areas of the apartment, and even signed a written consent form. Haldorson had a separate bedroom in the apartment, which was locked. The officers used Haldorson's keys that were taken during his arrest to open his bedroom door. According to the Plainfield police sergeant on the scene, the officers made the decision to enter Haldorson's locked bedroom to search for explosives because they were concerned for the safety of his roommate and the other residents and businesses on Lockport Street if there were, indeed, explosives in the bedroom. The officers did not have a search warrant at the time.

In Haldorson's bedroom officers founds fireworks and explosives. They removed the explosives from the bedroom and secured them in a steel box on ATF trucks. At that moment the officers did not seize anything else from Haldorson's bedroom except for the explosives. In fact, the officers testified that they only conducted a "plain view" search for explosives and then stopped their search. Instead, the officers then applied for and received a search warrant for the apartment. The second search did not produce any additional explosives, but officers did seize narcotics-related items and two laptop computers.

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

"When the police officers entered Haldorson's bedroom and searched it for explosives, they did not have a search warrant or consent. Warrantless searches and seizures within a home are considered presumptively unreasonable and a

violation of the Fourth Amendment. *United States v. Huddleston*, 593 F.3d 596, 600 (7th Cir. 2010). There are, however, certain narrowly proscribed exceptions. *United States v. Bell*, 500 F.3d 609, 612 (7th Cir. 2007). One such exception is where exigent circumstances require officers to step in to prevent serious injury and restore order. Under the exigent circumstances exception, a warrantless entry into a dwelling may be lawful when there is a pressing need for the police to enter but no time for them to secure a warrant. *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 557 (7th Cir. 2014). The test is whether an officer had an objectively reasonable belief that there was a compelling need to act and no time to obtain a warrant.

"The exigent circumstances exception is frequently invoked in cases involving explosives. *United States v. Witzlib*, 796 F.3d 799, 802 (7th Cir. 2015). Explosives are, by their very nature, inherently dangerous. Homemade explosive devices even more so because the persons manufacturing them often lack the needed technical knowledge and skills. Therefore, even though Haldorson enjoyed a strong expectation of privacy in his locked bedroom, that expectation must be balanced against the need to protect the public from serious harm where explosive materials may be present in a residential complex with close neighbors. *United States v. Boettger,* 71 F.3d 1410, (8th Cir. 1995)

"The following objective facts, found by the district court and not clearly erroneous, were known to the officers before they entered into Haldorson's bedroom: Explosive materials, including pipe bombs, were found in Haldorson's car; pipe bombs, according to the Cook County Sheriff's Police Bomb Squad and ATF agents, are very volatile and dangerous; Haldorson admitted that more explosives could be at his residence; Haldorson falsely told officers that he lived at his parents' house, and a search of that house uncovered no explosives; and Haldorson actually resided at an apartment in downtown Plainfield, which was surrounded by residential neighbors and businesses. Moreover, the district court found that an ATF agent credibly testified that there was a 'legitimate concern' that other homemade explosives were 'potentially unstable and therefore dangerous to others.' Based on these facts, the officers reasonably believed that there was a justifiable and urgent need to act to prevent serious harm. Because of the acute concern and the hour at which the officers and agents were urgently proceeding, around three and four o'clock in the morning, there was no time to obtain a warrant.

"Given the facts and information known at the time of the search, from the perspective of the officers at the scene, there was a legitimate concern that other homemade explosive devices were in Haldorson's bedroom that were potentially unstable and therefore dangerous to others. The warrantless search fell within the exigent circumstances exception to the Fourth Amendment's warrant requirement."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D05-13/C:18-1559:J:Brennan:aut:T:fnOp:N:2339494:S:0

SEARCH AND SEIZURE: Emergency Search; No Evidence of Medical Distress

State of Idaho v. Sessions
SCI, No. 46229, 10/7/19

On August 19, 2016, at approximately 10:00 p.m., Patrol Sergeant Scott Smith of the Mountain Home Police Department responded to an emergency call to find Steven Miller lying on a lawn. Smith observed that Miller could talk and move his head, but was unable to move the rest of his body. Miller told Smith that he had recently consumed some alcohol and marijuana. Smith believed the cause of Miller's paralysis was tainted marijuana. When Smith asked where Miller obtained the marijuana, he said he bought it from Sessions.

An ambulance arrived and transported Miller and Smith to St. Luke's Elmore Medical Center. Smith began to ask other officers, including Detective Kent Ogaard and Officer Hurly, whether there had been other reports similar to Miller's. Ogaard testified that he was informed that a couple of people had ended up at the hospital.

Around midnight, Smith, Ogaard, and Hurly drove to Sessions' residence, the location where Miller said he had purchased the marijuana. The officers never attempted to obtain a warrant to search Sessions' home. Smith and Hurly were in police uniforms; Ogaard was in plain clothes. Ogaard knocked on the door. A woman answered the knock. After the woman opened the door, officers testified that they detected a strong odor of marijuana.

The officers testified that this was not a normal marijuana investigation, due to reports that a few people in the community had possibly been affected by tainted drugs. Officers testified that they were operating under the belief that Sessions was selling tainted marijuana that could harm the user. After officers detected the odor of marijuana, they believed it possible that someone in the house might have consumed the marijuana and therefore needed help. The officers entered the home without obtaining permission or a search warrant. The woman who answered the door did not consent to the officers entering the home.

Upon entering the home, the officers noticed drug paraphernalia in the living room. Ogaard's questioning of the woman led him to believe that weapons might be inside the home. However, there was no evidence that the officers conducted a protective sweep to see if anyone was in medical distress. Nevertheless, the officers testified that had they not been concerned for the physical safety of the inhabitants, they would not have entered the home.

Ogaard asked the woman if the homeowner, Sessions, was available. Sessions came from down a hallway and spoke with the officers. Only after the conversation with Sessions did the officers search the residence. The officers located marijuana. No one at the home was found to be in any medical distress.

The State charged Sessions with manufacturing marijuana, delivery of marijuana, and possession of drug paraphernalia. Sessions moved to suppress the evidence based on the officers' warrantless entry into his home. The State responded to the motion to suppress, acknowledging that the officers entered Sessions' home without a warrant, but arguing that the warrantless entry was justified by exigent circumstances.

The Supreme Court of Idaho found as follows:

"Warrantless searches and seizures within a home are presumptively unreasonable. *Kentucky v. King*, 563 U.S. 452, 459 (2011) (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). The State may overcome this presumption by proving one of the exceptions to the warrant requirement. One such exception is exigent circumstances. Warrants are generally required to search a person's home unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. *Mincey v. Arizona,* 437 U.S. 385, (1978)).

"One exigent circumstance is to provide emergency aid: Law enforcement may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. The police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). Thus, this Court must consider whether the district court correctly concluded there was no compelling need for official action in this case.

"Here, the officers had little evidence that would cause a reasonable officer to believe it necessary to enter the home to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. The only facts the officers had knowledge of when they arrived at Sessions' home were that a few individuals had possibly been treated for unusual symptoms, and that Miller had allegedly purchased potentially tainted marijuana from Sessions. However, there was no evidence that anyone at or inside Sessions' home was suffering any medical distress or any imminent threat that something similar was likely to occur.

"The State has a heavy burden under these facts to justify entry into a person's home without a warrant. The State did not meet its burden. Therefore, the district court did not err in suppressing the evidence seized when the officers entered Sessions' home without a warrant."

READ THE COURT OPINION HERE:
https://www.isc.idaho.gov/opinions/46229.pdf

SEARCH AND SEIZURE: Entry with Arrest Warrant into Motel Room; Checkout Time as Abandonment of Room

United States v. Ross
CA11, No. 18-11679, 10/29/19

On July 21, 2017, a joint state-federal task force gathered outside a Pensacola motel to arrest Wali Ross on three outstanding felony warrants—for trafficking hydrocodone, failure to appear on a battery charge, and failure to appear on a controlled-substances charge. Although the officers had information that Ross was staying at the motel, he wasn't a registered guest, so they set up surveillance around the building and waited for him to make an appearance. The officers knew that Ross was a fugitive who had a history of violence and drug crimes.

Sometime between 9:00 and 9:30 a.m., Special Agent Jeremy England saw Ross leave Room 113, head for a truck, return to his room briefly, and then approach the truck again. When Ross spotted the officers, he made a break for it, scaling a chain-link fence and running toward the adjacent Interstate 10. The officers went after Ross, but when they reached the opposite side of the interstate to intercept him, he wasn't there. In the meantime, it dawned on Agent England that none of the officers had stayed behind at the motel, and he feared that Ross might have

doubled back to the room unnoticed. So, about ten minutes after the chase began, Agent England and Detective William Wheeler returned to the motel to see if Ross had snuck back into his room. The door to Room 113 was closed, and Ross's truck remained in the parking lot.

Detective Wheeler obtained a room key and a copy of the room's registration from the front desk—the latter showed that the room was rented for one night to a woman named Donicia Wilson. (Although the name meant nothing to the officers at the time, they later learned that Ross was "a friend of a friend" of Wilson's husband; she had rented the room after she and her husband refused Ross's request to spend the night at their home because they had children and didn't know him very well.) Using the key, Agent England and Detective Wheeler entered Room 113 to execute the warrants and arrest Ross; they entered without knocking, as they believed that someone inside—Ross, a third party, or both—might pose a threat to them. Agent England testified that because Ross had a history of violence it was "just protocol" to operate on the premise that there would "possibly [be] someone [in the motel room] to hurt" them—in light of that risk, he said, the officers "made a tactical entry into the room." Once inside, they conducted a quick protective sweep, and on their way out Agent England saw in plain view a grocery bag in which the outline of a firearm was clearly visible. Agent England seized the gun, touched nothing else, and left.

Deputy U.S. Marshal Nicole Dugan notified ATF about the gun while Agent England and Detective Wheeler continued to surveil the motel. ATF Special Agent Kimberly Suhi arrived at the motel around 10:45 a.m. to retrieve the firearm. The motel's manager, Karen Nelson, told Agent Suhi that she could search Room 113 after the motel's standard 11:00 a.m. checkout time; up until that point, Suhi testified, Nelson "st[ood] in the doorway of the room" to "mak[e] sure no one was entering." Nelson explained that if it looked like a guest was still using his room at checkout time, she might place a courtesy call to ask if he wanted to stay longer; otherwise, she said, motel management assumed that every guest had departed by 11:00 a.m., at which point housekeepers would enter the room to clean it. Nelson also explained that it was the motel's policy to inventory and store any items that guests left in their rooms and to notify law enforcement if they found any weapons or contraband.

At 11:00 a.m., Agent Suhi again sought and received Nelson's permission to search Room 113. When ATF agents entered the room, they found a cell phone and a Crown Royal bag filled with packets of different controlled substances—including around 12 grams of a heroin-laced mixture—cigars, and a digital scale.

Ross was charged with one count of being a felon in possession of a firearm and ammunition, one count of knowingly possessing heroin with intent to distribute, one count of firearms-related forfeiture, and one count of forfeiture related to the property and proceeds obtained by a controlled-substances violation. He moved to suppress the evidence found in both searches of his motel room.

The Eleventh Circuit held that Ross did not abandon his motel room when he ran and thus he had Fourth Amendment standing to challenge the officers' initial entry and the ensuing protective sweep, which they conducted within 10 minutes of his flight. However, Ross's constitutional challenge to the officers' entry and sweep failed on the merits, because the officers reasonably

believed that Ross was in the room and thus they had authority to enter the room to execute the arrest warrants, to conduct a limited protective sweep, and to seize the gun found in plain view. In regard to the second search, which officers carried out with the consent of hotel management after 11:00 a.m., the court held that Ross lost any reasonable expectation of privacy in his room at checkout time. Therefore, he did not have Fourth Amendment standing to contest the search. Accordingly, the court affirmed the district court's judgment.

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201811679.pdf

SEARCH AND SEIZURE:

Motel Records Inspection
United States v. Samaan
CA8, No. 18-1979, 9/11/19

While Momodu Babu Samaan was registered at a motel in August 2012, officers inspected the registry and used the information to check for outstanding warrants. While performing this work, officers determined that Samaan had presented a fraudulent identification card to the motel.

The next day, officers followed Samaan as he left the motel. When Samaan stopped in a parking lot, officers approached him concerning a traffic violation. After he failed to provide a legitimate form of identification, police arrested him. Officers seized a fake Minnesota identification card from Samaan's wallet and other documents from his vehicle. These materials included a resident alien card for a person with initials D.S.A., a social security card for D.S.A., and several counterfeit checks. Police then executed a search warrant at Samaan's motel room and seized a computer and a printer.

Samaan argues that the search of the motel's guest registry violated his Fourth Amendment rights, and that the evidence seized from his hotel room and during the traffic stop must be suppressed as fruit of an unlawful search.

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

"Samaan's contention fails under the so-called third-party doctrine: 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.' *Smith v. Maryland,* 442 U.S. 735, 743-44 (1979). Even where a person discloses information to a third party 'on the assumption that it will be used only for a limited purpose,' the government typically is free to obtain that information without infringing on a legitimate expectation of privacy of the person who made the original disclosure. See *United States v. Miller*, 425 U.S. 435, 443 (1976). While this doctrine does not extend to the novel phenomenon of cell phone location records, it encompasses checks and deposit slips retained by a bank, income tax returns provided to an accountant, and electricity-usage statistics tracked by a utility company. We conclude that Samaan likewise had no legitimate expectation of privacy in the identification card that he provided when registering at the motel."

Amendment standing to contest the search. Accordingly, the court affirmed the district court's judgment.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/09/181071P.pdf

SEARCH AND SEIZURE:

Stop and Frisk; Handcuffing

United States v. Eatman

CA7, No. 18-2525, 11/1/19

On August 19, 2016, at 5:09 a.m., the Chicago Police Department received a call from a security guard reporting a domestic disturbance at an apartment building located at 6425 South Lowe Avenue in the Englewood neighborhood of Chicago. Just moments before, a tenant of the building called security to report that her boyfriend had hit her and was trying to gain access to her apartment. The 911 call led to the dispatch of two Chicago Police units, each receiving this message:

> *"security officer brooks states m/b mikah beating f/b trinidad 2 children in the apartment no drinking/no drugs cs possibly may have gun cs she is req. more than 1 unit. cs he may try to leave building,. nfi"*

The 911 call reported more specific information, for instance that there was likely a gun involved but a question as to whether Eatman or his girlfriend had the gun. The security guard did not say Eatman beat his girlfriend, but responded "yes" when the dispatcher asked if Eatman "touched" her. Both units received the message in their patrol cars' computer system in the minutes prior to arrival.

Four officers entered the building and spoke with security guards before being escorted to the 19th floor. According to the two officers who testified at the suppression hearing, the guard escorting them upstairs reiterated that Eatman may have a gun. As they exited the elevator, the security guard directed the officers towards the apartment; the four officers observed Eatman pounding on the door and yelling to be let inside. Once the officers approached Eatman,they told him to back away from the door and put his hands on the wall. Officer Alvarez frisked Eatman and found a loaded handgun in waistband. Alvarez placed the gun into his pocket and handcuffed Eatman with Officer Rangel's assistance.

Eatman's girlfriend emerged from the apartment and spoke with the officers. According to the officers, she was more concerned about $300 that she wanted from Eatman; she ultimately refused to sign a criminal complaint against Eatman. The officers asked Eatman if he had a Firearm Owners Identification card or a conceal-and-carry license. Although neither Rangel nor Alvarez testified as to how Eatman re-sponded, their interviews with the United States Attorney's Office and the district court record show that Eatman claimed the gun was his girlfriend's and that he took it to keep the gun away from the children. The officers then transported Eatman to the police station, where a background check revealed his prior felony convictions. Eatman was read his Miranda rights at 8:17 a.m. and then admitted to having knowingly possessed the gun. Eatman was turned over to federal authorities and charged with one count for possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1).

Eatman unsuccessfully moved to suppress the gun. The district court found that the officers had reasonable suspicion when they found Eatman attempting to gain access to the apartment and that the officers arrested Eatman only after inquiring whether he had registration for the gun. Eatman entered a conditional guilty plea.

On appeal, Eatman conceded the officers had reasonable suspicion to conduct a frisk but argued he was arrested without probable cause when he was handcuffed, so his felon status should be suppressed.

The Seventh Circuit affirmed, finding the use of handcuffs on Eatman to be reasonable. "The use of handcuffs was not an arrest but a method to de-escalate the situation and allow the officers to investigate."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D11-01/C:18-2525:J:Bauer:aut:T:fnOp:N:2424065:S:0

SEARCH AND SEIZURE: Vehicle Stop; Passenger Reasonably Detained Could Not Challenge Vehicle Search
United States v. Davis
CA8, No. 18-2975, 11/27/19

At 9:17 p.m. on November 29, 2017, Sergeant Michael Kober of the Iowa State Patrol initiated a traffic stop of a sports utility vehicle near Onawa, Iowa for speeding. Accompanying Sgt. Kober was a civilian "ride along." Sgt. Kober approached the driver's side of the SUV and found two men inside: Noah Pope, the driver, and Dylan Davis, who was apparently asleep in the passenger seat. Sgt. Kober informed Pope and Davis that he had stopped the vehicle for speeding and asked both men for their licenses and the vehicle registration.

Pope told Sgt. Kober that they did not have a registration for the vehicle because it was a rental car. Pope also reported that the rental agreement was not in their possession and that a friend rented the car for them in Georgia. The car was due to be returned the next day and neither man was listed on the rental agreement. As Pope rummaged through his backpack in an attempt to locate his driver's license, Sgt. Kober saw several small baggies in Pope's backpack. Sgt. Kober observed that Pope was nervous, shaky, and breathing heavily and suspected that he was trying to hide a baggie from view. By now Davis was awake but did not appear to be nervous. Davis did not have a driver's license but later wrote identifying information on a piece of paper.

Sgt. Kober noticed a long gun case in the back of the SUV and asked what was inside. Davis responded, a "nine-millimeter," and gave Sgt. Kober permission to examine the weapon. Sgt. Kober opened the case and observed a loaded pistol. When asked why he was traveling with a loaded weapon, Davis said he did not want to leave it in his own car at home. Sgt. Kober took the pistol, Pope's driver's license, and Davis's information to his patrol vehicle to request a check on each item from dispatch. Retrieving these items and examining the gun took about ten minutes. It took dispatch an additional six minutes to provide Sgt. Kober with verifications.

As they waited for dispatch Sgt. Kober told the "ride along" that he suspected Pope and Davis were either trafficking drugs or robbing banks. He also said that he would have the rental company tow the vehicle so he could perform an inventory search of the SUV. Sgt. Kober called the rental company for information on the SUV and to seek a tow request. His first call to the rental company went unanswered. A few minutes later Sgt. Kober was able to reach an automated phone system and was directed to a representative. This representative took some initial information, then placed Sgt. Kober on hold. After holding, another representative picked up, gave Sgt. Kober information about the rental agreement, and requested the vehicle be towed. It took ten minutes for Sgt. Kober to finish his call to the rental company.

Sgt. Kober issued Pope a speeding ticket and informed Pope and Davis that the car would be towed at the request of the rental company.

Sgt. Kober asked Pope and Davis to exit the SUV and, with another officer, began to inventory the vehicle. Sgt. Kober found a glass pipe with methamphetamine residue under the driver's seat. He placed Pope and Davis under arrest and continued the search, which uncovered methamphetamine, marijuana, and more paraphernalia.

The Court of Appeals for the Eighth Circuit found Davis had no reasonable expectation of privacy in the vehicle.

"The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. Fourth Amendment rights are personal and may not be asserted vicariously. *Alderman v. United States*, 394 U.S. 165, 174 (1969). Only those with a reasonable expectation of privacy in the place searched may bring a Fourth Amendment challenge. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). A passenger who asserts 'neither a property nor a possessory interest' in a vehicle lacks a reasonable expectation of privacy in that vehicle. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978). Even where a search is unlawful, a passenger without such an interest in the vehicle normally cannot challenge its search or suppress resulting evidence. *United States v. Anguiano*, 795 F.3d 873, 878-79 (8th Cir. 2015).

"Davis may still challenge the search if he was unreasonably seized during the traffic stop and the seizure caused an unlawful search. The Court noted that a passenger may suppress evidence found in a vehicle when an unreasonably extended traffic stop causes the search. *United States v. Peralez*, 526 F.3d 1115, 1121 (8th Cir. 2008); see also *Brendlin v. California*, 551 U.S. 249, 251(2007) (holding a passenger can be unreasonably seized during a traffic stop). A traffic stop is constitutionally limited to the time required to complete its purpose but may be extended due to an officer's reasonable suspicion of criminal activity. *United States v. Riley*, 684 F.3d 758 (8th Cir. 2012). A reasonable suspicion is some minimal, objective justification for suspicion beyond an 'inchoate hunch.' *United States v. Fuse*, 391 F.3d 924, 929 (8th Cir. 2004). We evaluate whether police had reasonable suspicion to extend a traffic stop based on the totality of the circumstances. *United States v. Quintero-Felix*, 714 F.3d 563 (8th Cir. 2013).

"Since the officer acted on a reasonable suspicion to extend the traffic stop, Davis was not unreasonably seized in violation of the Fourth Amendment. This leaves Davis without standing to challenge the pretextual inventory search. Because Davis lacks a reasonable expectation of privacy in the SUV as a passenger, he cannot assert a Fourth Amendment challenge to the vehicle search."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/11/182975P.pdf

SEARCH AND SEIZURE: Vehicle Stop; Variance from Vehicle Records
State of Ohio v. Hawkins
OSC, 2019 Ohio 4210, 10/16/19

The Supreme Court of Ohio held that when a police officer encounters a vehicle that is painted a different color from the color listed in the vehicle registration records and the officer believes that the vehicle or its license plates may be stolen, the officer has a reasonable, articulable suspicion of criminal activity and is authorized to perform an investigative traffic stop.

READ THE COURT OPINION HERE:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2019/2019-Ohio-4210.pdf

SEARCH AND SEIZURE:
Voluntary Consent
United States v. Holly
CA7, No. 19-1216, 10/18/19

Chicago Officers, in uniform, were patrolling a public housing complex in an effort to increase police visibility in anticipation of celebratory gunfire to usher in the new year. They saw David Holly walking on a sidewalk inside a courtyard, approached, and asked Holly if he had a gun. Holly said yes. The police confiscated the gun and arrested him. Holly was charged with possessing a firearm following a prior felony conviction.

Holly moved to suppress the gun, arguing that his police encounter was an impermissible seizure. The officers testified that they did not draw their guns nor did they touch Holly. Holly claimed that they approached with guns drawn. He also moved to dismiss the indictment, contending that the police's failure to preserve video footage of his arrest violated his due process rights.

The court denied Holly's motions, reasoning that the officers' testimony made more sense than Holly's and that Holly was less credible given his criminal history and his three shifting explanations for why he had a gun. The court noted that no one who watched the video (before it was overwritten) testified that it depicted Holly's arrest. Holly had not established that the video was potentially exculpatory or that the police acted in bad faith by failing to preserve it.

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

"We agree with the district court that Holly's encounter with the police was voluntary. It is undisputed that the police spoke to Holly in public and never stopped him, redirected his route, or otherwise obstructed his walking on the sidewalk or through the courtyard. Officer Caulfield approached Holly and put a question to him—do you have drugs or a gun?—that he immediately chose to answer. See *Florida v. Royer*, 460 U.S. 491, 497 (1983) (explaining that the police do not violate the Fourth Amendment by merely approaching a person in public and asking him questions).

"It is well established that a seizure does not occur merely because a police officer approaches an individual and asks him or her questions. The district court proceeded carefully by holding a hearing, considering the competing testimony, assessing credibility, and ultimately finding that Officer Caulfield approached Holly and asked him a question—nothing more. Under these circumstances, Holly's encounter with the police was voluntary."

The Court of Appeals agreed and stated that in the totality of circumstances, Holly's interaction with police fell on the voluntary side of the line.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D10-18/C:19-1216:J:Scudder:aut:T:fnOp:N:2415980:S:0

SEARCH AND SEIZURE: Use of Wireless Tracking Software to Detect the Signal Strength of Address of Wireless Device

United States v Norris
CA9, No. 17-10354, 11/4/19

This case originated in December 2010, when Federal Bureau of Investigation (FBI) Special Agent Nicholas G. Phirippidis initiated an investigation into the possession and distribution of child pornography through a peer-to-peer file-sharing network. Special Agent Phirippidis downloaded child pornography from username "boyforboys1," using an Internet Protocol address (IP address) of 67.172.180.130 registered to Comcast Communications (Comcast). Comcast could not determine the physical address for "boyforboys1.

In March 2011, "boyforboys1" logged into the same P2P network, using a different IP address of 64.160.118.55 registered to AT&T Internet Services (AT&T), and Special Agent Phirippidis again downloaded child pornography from"boyforboys1." In response to a subpoena, AT&T identified the subscriber associated with the IP address as residing in Apartment 242. After conducting a public records search and confirming with the apartment manager that the subscriber still resided at Apartment 242, Special Agent Phirippidis obtained a search warrant for Apartment 242.

Upon execution of the search warrant, Special Agent Phirippidis discovered that the password-protected wireless internet router (router) located in Apartment 242 used an IP address of 69.105.80.128 rather than the 64.160.118.55 IP address connected to "boyforboys1." The search revealed that no devices in Apartment 242 contained any evidence of child pornography or of the P2P file-sharing program used by "boyforboys1."

FBI agents identified all the devices that had recently connected to the router located in Apartment 242 and pinpointed two unknown devices, "bootycop" (media access control [MAC] address unknown) and "CK" (with a MAC address of 00.25:d3:d4:c4:73). Agents attempted to identify the location of the "CK" device using Moocherhunter software. With Moocherhunter in passive mode and using a wireless antenna, Special Agent Phirippidis and his colleagues captured signal strength readings to locate the 00.25:d3:d4:c4:73 MAC address. Specifically, Moocherhunter was installed on a laptop computer and connected to a directional antenna. The readings were significantly higher when the antennae was aimed in the direction of Apartment 243. As a result, the agents concluded that Apartment 243 housed the "CK" device.

Special Agent Phirippidis measured the signal strength of MAC address 00:1f:1f:49:d3:11, taking readings from Apartment 242 and from a nearby vacant apartment. He concluded that: (1) "CK" and "bootycop" exhibited similar signal strengths; (2) "CK" and "bootycop" were associated with each other; (3) Apartment 243 housed both devices; and (4) both had gained unauthorized access to the password-protected router in Apartment 242.

Based on the Moocherhunter data, Special Agent Phirippidis obtained a search warrant for Apartment 243. When Special Agent Phirippidis and his colleagues executed the search warrant, they discovered evidence of child pornography.

The government indicted Nathan Norris on one count of distribution of material involving the sexual exploitation of minors and one count of possession of material involving the sexual exploitation of minors. Norris subsequently moved to suppress the evidence obtained as a result of the search warrant, alleging that use of the Moocherhunter software amounted to a warrantless search in violation of the Fourth Amendment. The district court denied his motion and Norris appealed.

The Court of Appeals for the Ninth Circuit held that because there was no physical intrusion into the Norris's residence to detect the signal strength of his device's media-access-control (MAC) address, the district court correctly applied the factors set forth in *Katz v. United States*, 389 U.S. 347 (1967), and determined that no search occurred under the Fourth Amendment. The Court held that Norris lacked a subjective expectation of privacy in the signal strength of his MAC address emanating from his unauthorized use of a third-party's password protected wireless router. The Court stated that society is not, in any event, prepared to recognize as reasonable an expectation of privacy predicated on unauthorized use of a third-party's internet access.

READ THE COURT OPINION HERE:
http://cdn.ca9.uscourts.gov/datastore/opinions/2019/11/04/17-10354.pdf

SEARCH AND SEIZURE:

Warrantless Seizure of Data from Airbag Control Modules

Mobley v. State of Georgia

SCG, No. S18G1546, 10/21/19

Victor Mobley appealed his conviction of two vehicular homicides, claiming that the trial court erred when it denied his pretrial motion to suppress evidence of data that law enforcement officers retrieved, without a warrant, from an electronic data recording device on his vehicle.

Before the vehicles were removed from the scene of the collision, a supervisor in the Traffic Division of the Henry County, Georgia, Police Department, directed officers to retrieve any available data from the airbag control modules (ACM) on the two cars: a Charger and Corvette. An investigator entered the passenger compartments of both vehicles, attached a crash data retrieval (CDR) device to data ports in the cars, and used the CDR to download data from the ACMs. The data retrieved from the Charger indicated that, moments before the collision, Mobley was driving nearly 100 miles per hour.

In denying the motion to suppress, the trial court had concluded that, whether or not the retrieval of the data was an unlawful search and seizure, the evidence was admissible in any event under the inevitable discovery doctrine. A three-judge panel of the Court of Appeals affirmed, one judge reasoning that the retrieval of data was not a search and seizure at all, and two judges agreeing with the trial court that the inevitable discovery doctrine applied.

The Georgia Supreme Court concluded the trial court erred when it denied the motion to suppress. The Court stated that a warrant was required for the retrieval of the data and the State failed to identify any established exception to the exclusionary rule which was applicable to the facts of this case. The State also failed to lay an evidentiary foundation for the application of the inevitable discovery exception in this case. The judgment of the Court of Appeals, therefore, was reversed.

READ THE COURT OPINION HERE:
https://www.gasupreme.us/wp-content/uploads/2019/10/s18g1546.pdf

SIXTH AMENDMENT:

Massiah Claim
Thompson v. Davis
CA5, No. 17-70008, 10/29/19

In 1999, Charles Victor Thompson was convicted of murdering Glenda Dennise Hayslip and Darren Cain and sentenced to death. On direct review, the Texas Court of Criminal Appeals affirmed Thompson's conviction but ordered a retrial on punishment. At the retrial, the State called Robin Rhodes, who testified that while the two men were detained together in the Harris County Jail, Thompson had solicited him to murder a "hit list" of potential State witnesses. Rhodes also testified that no one from the State had directed him to obtain information from Thompson; he simply saw an opportunity and seized it.

On cross-examination, Rhodes explained that he had a longstanding working relationship with the State and had previously received large sums of money for his cooperation in other cases, including up to $30,000 for his testimony in a prior capital murder trial. In fact, Rhodes described himself as being a "full time informant" for the State at the time of his encounter with Thompson and stated that he informed on pretty much whatever situation he stumbled into. The jury also learned that Rhodes had testified in a 1999 drug case against his fiancée. As part of his testimony in that case, Rhodes told the jury that he had worked for Harris County law enforcement as a confidential informant in over 50 cases, more than 80 percent of which resulted in convictions; and that he had twice testified for the State, including once in a capital murder prosecution.

The trial court denied Thompson's motion to strike Rhodes's testimony, and he was again sentenced to death. After his direct appeal and three state habeas petitions proved unsuccessful, Thompson sought federal habeas relief.

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

"To establish a Massiah violation, a defendant must show: (1) a Sixth Amendment right to counsel had attached; (2) an individual seeking the information was a government agent acting without the defendant's counsel being present; and (3) that the agent deliberately elicited incriminating statements from the defendant.

"While it may be debatable whether Thompson's right to counsel had attached when he spoke to Rhodes, but it is plain that Rhodes was not acting as a government agent. To prove an agency relationship between the government and a jailhouse informant, a defendant must show that "the informant: (1) was promised, reasonably led to believe that he would receive, or actually received a benefit in exchange for soliciting information from the defendant; and (2) acted pursuant to instructions from the State, or otherwise submitted to the State's control. Thompson has not met his burden as to either element. To the contrary, the evidence supports the State's contention that although Rhodes saw an opportunity to help himself if Thompson discussed the solicitation plot, he did not elicit information from Thompson at the behest of the State. After all, an informant cannot be an agent of the State without the State's knowledge or consent, and there is no credible evidence that Rhodes had any contact with the State regarding Thompson until after he had discussed the solicitation plot with Thompson and obtained his hit list.

"A jailhouse informant is not a government agent simply because he has previously cooperated with the government and decides to capitalize on an opportunity to do so again by eliciting incriminating information from a cellmate. Moreover, the fact that Rhodes correctly expected, based on his past interactions with the State, that he would receive a benefit for his testimony does not make him a State agent. It is not enough for an informant to believe he will receive a benefit in exchange for his testimony; to be a government agent, he must be 'led to believe' he will receive that benefit.
In short, because Thompson has shown no evidence that the State controlled—or even consented to—Rhodes's informant activity, there is no valid Massiah claim that could have affected the outcome of the punishment on retrial. Accordingly, the district court's denial of habeas relief is affirmed."

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/17/17-70008-CV1.pdf

SUBSTANTIVE LAW:

Constructive Possession
Baker v. State, ACA, No. CR-19-111, 2019 Ark. App. 515, 11/6/19

The Arkansas Court of Appeals stated that it is not necessary for the State to prove literal physical possession of drugs in order to prove possession. Mings v. State, 318 Ark. 201, 884 S.W.2d 596 (1994). Possession of drugs can be proved by constructive possession. *Baltimore v. State*, 2017 Ark. App. 622, 535 S.W.3d 286.

Constructive possession requires the State to prove beyond a reasonable doubt that (1) the defendant exercised care, control, and management over the contraband and (2) the accused knew the matter possessed was contraband. Constructive possession can be inferred when the drugs are in the joint control of the accused and another. However, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession.

There must be some other factor linking the accused to the drugs. Other factors to be considered in cases involving automobiles occupied by more than one person are (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest. There is no requirement that all or even a majority of the linking factors be present to constitute constructive possession of the contraband.

READ THE COURT OPINION HERE:
https://cases.justia.com/arkansas/court-of-appeals/2019-cr-19-111.pdf?ts=1573056455

SUBSTANTIVE LAW: Driving While Intoxicated; Actual Physical Control Proved by Circumstantial Evidence
Gautreaux v. State, ACA, No. CR-19-506, 2019 Ark. App. 546, 11/20/19

Robert Gautreaux was convicted by a Garland County jury of driving while intoxicated (fourth offense) and reckless driving. Gautreaux appeals, contending that the State failed to prove that he was the driver of the vehicle.

On the morning of December 16, 2017, Arkansas State Trooper Ryan Wingo responded to a single-vehicle rollover accident on Mountain Pine Road in Garland County. The trooper observed a damaged pickup truck on the shoulder of the road, and Robert Gautreaux was at the rear of an ambulance. Gautreaux told the trooper in detail what happened: he was the driver and sole occupant of the pickup truck; he crossed into the opposite lane of traffic and hit a ditch; the truck began to roll and ultimately ended upright on the shoulder of the road. The trooper smelled an odor of intoxicants emanating from appellant, and his speech was slurred. After he was given a portable breath test, Gautreaux was arrested. He informed a person on the scene to take care of the pickup truck and ensure that it was towed. Gautreaux was transported to the Garland County Detention Center, and a breath test administered there indicated that appellant had a .128 percent blood-alcohol content.

The Arkansas Court of Appeals stated that the driving-while-intoxicated statute does not require law enforcement officers to actually witness an intoxicated person driving or exercising control of a vehicle. *Cooley v. State*, 2011 Ark. App. 175; *Springston v. State*, 61 Ark. App. 36, 962 S.W.2d 836 (1998). The State may prove by circumstantial evidence that a person operated or was in actual physical control of a vehicle. *Wetherington v. State,* 319 Ark. 37, 889 S.W.2d 34 (1994). One method for the State to prove that the defendant was operating a motor vehicle is a confession by the defendant that he was driving. See *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985).

The circumstantial evidence here was compelling. Gautreaux admitted to the trooper that he was the driver and sole occupant of this truck involved in a single-vehicle rollover accident, he was the only person being assessed by medical personnel at the scene, and he asked someone at the scene to ensure that the truck was towed. The jury did not have to resort to speculation and conjecture to find that Gautreaux was the driver of the vehicle.

READ THE COURT OPINION HERE:
https://cases.justia.com/arkansas/court-of-appeals/2019-cr-19-506.pdf?ts=1574266069

SUBSTANTIVE LAW: Federal Offense Involving a Minor; Sex Crime With a Pretend Child
United States v. Fortner
CA6, No. 19-3162, 11/25/19

On August 5, 2017, an undercover FBI agent working with the Bureau's Cyber Crimes Task Force posted an ad on Craigslist. Posing as a mother of three children, the officer advertised that she wanted to talk about "taboo" subjects with an "open-minded" counterpart. John Charles Fortner sent the agent an e-mail asking if he could have sex with her children. Fortner assured the officer that he was the "furthest from being a cop." He also asked the agent if she could put him in touch with others who would be open to similar conduct. The agent gave Fortner the contact details for another undercover officer. He contacted the other officer that day and asked

whether he could engage in sexual activity with the officer's daughter.

Fortner and the two officers communicated regularly for the next few weeks. He sent them links to child pornography and asked graphic questions about what he could do with their children. Fortner also requested photographs of one officer's child. The officer sent a photo of her undercover persona instead. Fortner, appreciative and confident, replied "[c]ool, you don't look too much like a cop, lol."

As his bond with the "parents" grew, Fortner asked to meet in person and to meet the children. After working out some logistics, Fortner and one officer agreed to meet at a restaurant. If the introductions went well, the officer promised, Fortner could take things further. On August 21, the officer picked Fortner up from a gas station. At the restaurant, the officer and Fortner discussed his criminal past (two prior convictions related to child sex abuse) and what he could do with the officer's child. After Fortner confirmed that he wanted to engage in sexual conduct with the child, the officer arrested him.

The government charged Fortner with two counts: attempting to coerce a minor and committing a felony offense involving a minor while required to register as a sex offender. 18 U.S.C. §§ 2422(b), 2260A. Fortner moved to dismiss the second count, arguing that he did not commit an offense involving a minor because the children he sought to coerce were not real children. The district court denied the motion.

The Sixth Circuit Court of Appeals held that a sex offender commits an "offense involving a minor" if, in the course of a sting operation, he attempts to commit a sex crime with a pretend child.

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/19a0287p-06.pdf

SUBSTANTIVE LAW: Negligent Homicide; Gross Deviation From the Standard of Care
Ledwell v. State,
No. CR-18-839, 2019 Ark. 334, 11/14/19

On May 19, 2015, Benjamin Ledwell was driving his pickup truck north on Highway 7 in Hot Spring County. Cindy Rhein, Allen Rhein, and their two sons were heading south in the opposite lane. As Ledwell approached a bend in the road, his truck crossed the center line and collided with the Rheins' vehicle. The driver and all three passengers were killed. At trial, there was no dispute that Ledwell traversed the center line and caused the wreck that resulted in these catastrophic deaths. Instead, the question was whether Ledwell's conduct was criminally negligent. The State's case hinged on two primary sources of evidence.

First, the jury heard testimony from the State's accident reconstruction coordinator, Tim Carter. Carter explained how he gathered data from an airbag control module in Ledwell's truck. The module recorded five seconds of pre-crash data. Among other things, it revealed the truck's speed and percent of accelerator depression in half-second increments. It also reported the degree of steering wheel angle at every tenth of a second. The data demonstrated that, in the five seconds before the collision, Ledwell's speed increased from 46 to 55 miles an hour. It also revealed that Ledwell did not attempt to brake before impact.

On cross-examination, Carter testified that the pre-crash data also demonstrated that Ledwell decreased his accelerator depression between 1

and .5 seconds before impact, and that Ledwell increased the degree of steering wheel angle in the last fractions of a second before the collision. Carter admitted that both of these findings were indicative of Ledwell's efforts to avoid the crash. He further noted that 1.5 seconds is the generally accepted amount of time required to physically react to a perceived danger. Consistent with these findings, Carter concluded in his report and testified at trial, that given the departure paths and finalrest locations of each vehicle, Ledwell was attempting to return "to the northbound lane, to the proper lane when the accident occurred."

Next, the State focused heavily on Ledwell's statement to hospital personnel— namely, that he leaned over to pick something up off the floor of his truck when he entered the wrong lane. Aside from this, a witness described the stretch of road as "dangerous," and various police officers described their respective roles and findings in the investigation.

Upon review, the Arkansas Supreme Court found as follows:

"A person commits negligent homicide if he negligently causes the death of another. Ark. Code Ann. § 5-10-105 (b)(1) (Repl. 2013). According to Arkansas Code Annotated section 5-2-202(4),

> *A person acts negligently with respect to attendant circumstances or a result of his or her conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.*
>
> *The risk must be of such a nature and degree that the actor's failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation considering the nature and purpose of the actor's conduct and the circumstances known to the actor.*

"Notably, criminal negligence sets a higher bar than civil negligence. It requires 'something more' than a mere failure to exercise reasonable care. The negligent conduct must constitute a 'gross deviation' from the standard of care that a reasonable person would have exercised in the actor's situation.

"Ledwell contends that the State failed to sufficiently evidence that he should have been aware of a substantial risk that the deaths would occur as a result of his conduct, and that his conduct grossly deviated from the standard of care that a reasonable person would have exercised in his situation. We agree. Substantial evidence did not support the verdict.

"Although 'gross deviation' is not defined by statute, this court has had occasion to apply it in the car-wreck context. For instance, in *Utley v. State*, we held that the defendant's actions constituted 'a gross deviation from the standard of care' when he was driving a large commercial garbage truck on a two-lane bridge, crossed seven feet into the opposing lane, and plowed into two oncoming vehicles without braking or swerving. 366 Ark. 514, 517–18, 237 S.W.3d 27, 29–30 (2006) (emphasizing the defendant's failure to brake, swerve, or do anything to avoid the collisions).

"In *Hunter v. State*, we affirmed the defendant's negligent-homicide conviction, reasoning that the defendant grossly deviated from the standard of care when he ignored the double-yellow, no-passing lines in an attempt to pass a log truck

while driving up a hill in the rain. 341 Ark. 665, 669, 19 S.W.3d 607, 610 (2000). We have likewise affirmed negligent-homicide convictions in cases where the defendant was speeding while fleeing from police, and where the defendant was speeding in the wrong lane while intoxicated. See *Lowe v. State*, 264 Ark. 205, (1978); *Baker v. State*, 237 Ark. 862, (1964).

"Conversely, in *Gill*, 2015 Ark. 421, 474 S.W.3d 77, we reversed the defendant's negligent homicide conviction. There, the defendant was convicted of negligent homicide for inexplicably failing to see the victim's vehicle as he proceeded through a stop sign. Having considered the same line of cases discussed above, we reasoned that the State filed to establish a gross deviation because there was no evidence that Gill was engaged in any criminally culpable risk creating conduct. He was not speeding, he was not driving erratically, he was not under the influence of alcohol, and he was not using a phone. In fact, Gill did not even receive a traffic citation for his conduct. The State merely established that Gill failed to see the victim's vehicle as he pulled out. We concluded that Gill's failure to see Holt's vehicle resulted in a tragic death, but that unexplained failure, without more, does not constitute criminally negligent homicide.

"Here, considering only the evidence that supports the verdict, viewed in the light most favorable to the State, the prosecution established that as Ledwell negotiated a turn, he became distracted, accelerated within the speed limit, entered the wrong lane, collided with an oncoming car, and catastrophically caused the deaths of Cindy Rhein, Allen Rhein, and their two sons. Although Ledwell attempted to swerve back and decreased his application of the accelerator in the last second, he did not apply his brakes.

"The facts here are most like the facts in Gill. The State failed to put on substantial evidence that Ledwell was engaged in criminally culpable risk creating conduct. There was no evidence that he was speeding, driving erratically, under the influence of alcohol, or using a phone. Like Gill, Ledwell did not receive a traffic citation for his conduct. Unlike Hunter, Ledwell did not make a conscious decision to illegally cross a double-yellow, no passing line, in the rain, for his benefit. And unlike Utley, the State's own expert testified that, moments before impact, Ledwell 'was trying to get back to' his lane.

"The State points to Ledwell's statement that he was leaning over to pick something up off the floor of his truck as evidence of a 'gross deviation.' But the reason why Ledwell bent over is missing. Indeed, criminal negligence is defined as a 'gross deviation from the standard of care…considering the nature and purpose of the actor's conduct.' Ark. Code Ann. § 5-2-202(4)(B). In *Hunter, Lowe,* and *Baker,* the State established the purpose of the defendants' conduct. But here, the State failed to present any evidence that Ledwell's purpose for bending over, given the situation, amounted to a gross deviation from the standard of care.
"This shortcoming is further highlighted by our standard of review. Indeed, evidence is substantial only if it compels a conclusion without resorting to speculation or conjecture, and circumstantial evidence is substantial only if it excludes every other reasonable hypothesis than the guilt of the accused. *Gill*, 2015 Ark. 421, at 3, 474 S.W.3d at 79. Here, like *Gill,* the reason for Ledwell's conduct remains unexplained. And without an explanation, the jury was forced to speculate and conjecture in reaching its conclusion."

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