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ACA, No. CV-19-344, 2020 Ark. App. 308, 5/15/20

The Arkansas Court of Appeals reversed a circuit court order and ruled that the FOIA provides for using a cell phone to take a photograph of an accident report.

READ THE COURT OPINION HERE:
https://cases.justia.com/arkansas/court-of-appeals/2020-cv-19-344.pdf?ts=1589382432

CIVIL RIGHTS: Community Caretaking
Castagna v. Jean
CA1, No. 19-1677, 4/10/20

This appeal raises the issue of whether the three defendant Boston police officers were entitled to qualified immunity for entering through the open door of a house under the community caretaking exception to the Fourth Amendment's warrant requirement.

On March 17, 2013, brothers Christopher and Gavin Castagna hosted a St. Patrick's Day party for their friends at Christopher's apartment, located on the first floor of a three-story building at the intersection of East 6th Street and O Street in South Boston. The party was large enough that Christopher and Gavin moved furniture in advance of the party's start to accommodate the number of guests and purchased a keg of beer. One of the police officers later estimated that when he arrived at the scene there were as many as thirty guests there. As one guest testified, St. Patrick's Day in Boston is basically "a big party throughout the entire city."

By early evening, many of the guests at the Castagnas' party were intoxicated. Different guests estimated that they drank "between [twelve] and [fifteen] beers," eleven to thirteen beers, "ten beers," and "seven or eight beers" that day, respectively.

At 5:54 p.m., someone called 911 to report a loud party at the intersection of East 6th Street and O Street, the intersection where Christopher's apartment was located. At 7:29 p.m., police dispatch directed a group of officers to respond to the call.

The seven officers arrived at the scene at approximately 7:38 p.m. At that point in the evening, Christopher's apartment was the only one near the intersection with any observable signs of a party.

When Kaplan arrived on the scene, he heard screaming, music, and talking coming from Christopher's apartment. As he approached the apartment, Kaplan saw two or three guests leave the party. He thought one may have turned around and gone back inside, possibly to warn the others. In Kaplan's opinion, "[t]hey looked like they were underage." When he got close to the apartment, Kaplan could see into it because the "door was wide open." He also could see through the top of the window that there were people drinking inside. He testified that his first objective after arriving at the apartment was "to make contact with the owners."

Edwards gave a similar account. When he arrived, he also heard loud music and, through an open window, saw people drinking, some of whom he believed to be underage.

Jean arrived slightly after his fellow officers. He also heard music, saw that the front door was open, and noticed through the window that the people inside were drinking. He, too, believed that some of the guests were underage. As he approached the apartment, Jean "saw a young male come stumbling outside" onto the public sidewalk. Jean testified that the young man "walked around like—you know, like a circle or half-circle, and then he hurled over, vomiting, and he did that twice. And then he stumbled back into the address that we were looking at."

Kaplan reached the apartment door and yelled "hello" several times and then "Boston Police." No one answered. According to Kaplan, when no one answered, "We kind of walked in."

At that point, none of the officers were intending to arrest anyone at the party, for underage drinking or any other crime. Kaplan explained that this response was in line with the police department's normal practice for responding to noise complaints: "Typically, we would just knock on the door, try to see who the owners are and tenants and have them turn the music down, shut the doors, keep the windows up and keep everything inside."

The officers explained at trial that there were two reasons for entering the home that evening: (1) to respond to the noise complaint by finding the homeowners and having them lower the volume of their music and (2) to make sure that any underage drinkers were safe, including the young-looking man who had vomited outside the home and returned inside.

The guests were in the middle of a dance competition when the police entered through the open door, and they did not, immediately respond. Eventually, when they noticed the officers, the guests turned off the music. Kaplan explained that there had been a complaint of

underage drinking and asked for the homeowners. There was a lull in which no one answered. Eventually some of the guests told the police that the owner's name was "Chris," but he was not in the room and was "in the back or the bathroom or something to that effect." Jean and another officer went to look for Christopher while the others stayed in the kitchen.

As Jean and the other officer made their way down the back hall, one of the guests heard them remark that they smelled drugs. The two officers knocked on the door of what they thought was the bathroom but was in fact Christopher's bedroom. According to Jean, the officers thought, "We're going to let this guy use the bathroom, and then we'll talk to him, you know. We were patient. We had no problem."

Jean eventually realized that the room they were waiting outside of was probably not a bathroom when he heard multiple voices coming from inside it, so he knocked on the door again. That was when Christopher and Gavin, who were inside with two other guests, heard the knocking at the door. Christopher opened the door for the officers. Christopher testified that this was the first time he realized police were in the apartment.

After Christopher opened the door for Jean, Jean announced himself as "Boston Police." Jean observed that Christopher appeared to have been drinking and noticed that there was marijuana in the bedroom. Christopher saw Jean looking at the marijuana, and in response he pushed Jean, slammed the door on Jean's foot, and held the door there. Jean pushed the door back open, freeing his foot, and walked into the room. In the bedroom, Christopher shoved Jean a second time and the conflict between the officers and the party guests escalated. Other officers were called as back-up. Eventually, several of the guests and both brothers were arrested on various charges.

The First Circuit reversed the judgment for the Castagna brothers, holding that the officers were entitled to qualified immunity for entering through the open door of a house under the community care taking exception to the Fourth Amendment's warrant requirement.

"When determining whether the officers' actions are protected by the community caretaking exception, we look at the function performed by the police officer. The function performed must be distinct from 'the normal work of criminal investigation to be within the heartland of the community caretaking exception. Actions within that heartland include actions taken to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety.

"Here, the function being performed by Edwards, Jean, and Kaplan was a community caretaking one. When the officers arrived at the scene, they saw intoxicated guests who appeared to be underage entering and exiting a party freely through an open door. Jean saw a guest that looked underage leave the house, throw up twice outside, and then reenter the apartment. The party was loud enough to be heard from the street. In their efforts to have the music turned down and make sure any underage guests were safe, they were aiding people who were potentially in distress, preventing hazards from materializing, and protecting community safety."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/19-1677P-01A.pdf

CIVIL RIGHTS: Deadly Force Justified
King v. Hendrick County Commissioner
CA7, No. 19-2119, 3/31/20

Two Hendricks County reserve deputies went to the King home after Bradley, age 29 and suffering from paranoid schizophrenia, called 9-1-1 and requested help. Deputies Hays and Thomas testified that upon their arrival, Bradley came outside, walked toward them, and pulled a 10-inch knife out of his pocket. The deputies drew their service firearms and yelled at Bradley to stop and drop the knife. Bradley disregarded their commands and ran toward Hays with the knife in his left hand, his left arm raised. When Bradley was approximately eight feet away, Hays fired one shot. It was fatal. A knife, which Bradley's father identified as from the Kings' kitchen, was recovered from near Bradley's left hand.

An examination of the knife did not reveal any latent fingerprints. Bradley's father filed suit under 42 U.S.C. 1983, asserting that Bradley was never violent and argued that the bullet trajectory, the lack of fingerprints, and the fact that Bradley was right-handed, undermined the deputies' account.

The Seventh Circuit affirmed the rejection of the claims on summary judgment. Substantial testimonial and physical evidence supported Hays's version of events, with no concrete evidence rebutting it.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D03-31/C:19-2119:J:Wood:aut:T:fnOp:N:2495068:S:0

CIVIL RIGHTS: Deadly Force Justified
James v. New Jersey State Police
CA3, No. 18-1432, 4/21/20

Angel Stephens called 911 and reported that Willie Gibbons hit her and had a gun in his truck. The police responded. Stephens obtained a temporary restraining order, prohibiting Gibbons from possessing firearms and from returning to Stephens's house.

The next day, Gibbons went to Stephens's house. Stephens was talking on the phone and the individual to whom she was talked called the police. Gibbons left Stephens's house. Trooper Conza arrived. Stephens stated that Gibbons had waved a gun throughout their argument. Conza told Stephens to go to the police barracks and reported over the radio that Gibbons had brandished a firearm.

Conza, with Troopers Bartelt and Korejko, visited the nearby home of Gibbons's mother, Arlane James. James stated that she did not know where Gibbons was and that he might be off his schizophrenia medication. While driving to the barracks, Stephens saw Gibbons walking alongside the road and called 911. The Troopers responded. Bartelt parked his car and, exiting, observed that Gibbons was pointing a gun at his own head. Bartelt drew his weapon, stood behind his car door, and twice told Gibbons to drop his weapon. Gibbons did not comply. Bartelt shot Gibbons twice within seconds of stopping his car. Gibbons died that night.

In James' suit under 42 U.S.C. 1983, the Third Circuit held that Bartelt is entitled to qualified immunity because he did not violate Gibbons's clearly established rights.

The Court stated that (1) Gibbons was armed with a gun; (2) Gibbons ignored Trooper Bartelt's orders to drop his gun; (3) Gibbons was easily within range to shoot Troopers Bartelt or Conza; and (4) the situation unfolded in "seconds." Bartelt could reasonably conclude that Gibbons posed a threat to others.

READ THE COURT OPINION HERE:
http://www2.ca3.uscourts.gov/opinarch/181432p.pdf

CIVIL RIGHTS: Deadly Force Justified
Siles v. City of Kenosha
CA7, No. 19-1855, 4/29/20

Kenosha Officer Paul Torres, on patrol, received a call requesting assistance in apprehending Aaron Siler. The dispatcher stated that Siler was wanted on a warrant for strangulation and suffocation, had taken a vehicle without consent, and was known to have violent tendencies. Siler did not actually have a warrant for strangulation and suffocation but was wanted for violating probation.

When Torres spotted Siler, he activated his lights and siren. Siler did not stop, resulting in a three-minute chase. Siler crashed his car and fled on foot.

Torres followed him to an auto body shop. Bystanders indicated that Siler was in the back room. Siler again attempted to flee. Torres blocked the exit. Within seconds, Torres and Siler were on opposite sides of an SUV and began to move in "cat and mouse" fashion. Torres pointed his service revolver at Siler, ordering him to the ground. Siler responded, "F*@k you" and "Shoot me." Siler bent over and, when he stood up, Torres saw a black cylindrical object pressed against Siler's forearm. Torres yelled, "Drop it." Siler responded, "F*@k you," "No," and "Shoot me." Torres still could not see Siler's hands. Officer Torres began shooting at Siler, firing seven times successively without pausing between shots. Six bullets struck Siler's upper torso and he died from the gunshot wounds.

In a suit under 42 U.S.C. 1983 by Siler's estate, the Seventh Circuit affirmed summary judgment in favor of Torres, citing qualified immunity. Torres's action conformed to constitutional standards. The Court stated that when an officer believes that a suspect's actions place him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D04-29/C:19-1855:J:Ripple:aut:T:fnOp:N:2508597:S:0

CIVIL RIGHTS: Excessive Force; Officer's Perspective of Use of Force was not Unreasonable
Ashford v Raby
CA6, No. 19-1677, 3/5/20

Keyonte Ashford was driving while intoxicated, speeding at over 100 miles per hour and changing lanes without a turn signal. An officer followed him, using his lights to indicate that Ashford should pull over. Ashford did not comply. Backup cruisers arrived and forced him to stop. Ashford complied with instructions to show his hands but ignored instructions to turn his engine off.

Officer Raby and his police dog, Ruger, arrived. Raby reached through the window, unlocked Ashford's door, and pulled it open. The officers

told Ashford to step out of the vehicle. He did not comply. Ashford's SUV was in drive and his foot on the brake was the only thing stopping it from lurching forward into a police cruiser. Ashford claims he was afraid to retract a hand into the passenger compartment to turn the key. Ashford tried to explain this to the officers.

Officers warned him that Raby would use the dog. Raby commanded Ruger to attack. Raby stepped in, grabbing Ashford's arm and lowering it for Ruger to bite. Raby and Ruger pulled Ashford out of the car. At a hospital, Ashford was treated for puncture wounds and superficial injuries to his forearm. Ashford sued Raby under 42 U.S.C. 1983, claiming excessive force. The Sixth Circuit affirmed summary judgment for Raby based on qualified immunity.

The Court of Appeals for the Sixth Circuit stated: "This case comes down to a matter of perspective. After a car chase, law enforcement used a police dog to remove a driver from his vehicle. From the driver's perspective, this was an unprovoked attack on a cooperating suspect. From the officer's perspective, it was the best way to gain control of the situation."

The district court granted the officer qualified immunity. Because existing law did not clearly establish that the officer's perspective was unreasonable, The Sixth affirmed the district court's decision.

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0071p-06.pdf

CIVIL RIGHTS: Excessive Force; Subject Patted Down for Weapon

Goffin v. Ashcraft

CA8, No. 18-1430, 4/24/20

Davdrin Goffin, who was shot but survived the gunshot wound, brought a 1983 action against Officer Ashcraft, the city, and several other municipal employees, claiming that Officer Ashcraft used excessive force against him and that the other defendants had failed to properly train and supervise her.

Officer Ashcraft tried to arrest Davdrin Goffin for burglary and stealing handguns, bullets, and prescription pain medication. Prior to the arrest, multiple witnesses told her that Goffin was armed, possibly intoxicated, and dangerous. When Goffin broke free from arrest, fled toward a group of bystanders, and moved as though he was reaching into his waistband, she shot him once in the back.

The Court of Appeals for the Eighth Circuit stated that his would be a relatively straightforward qualified immunity case if those were all the facts.

"An officer may constitutionally use deadly force when she reasonably believes a fleeing suspect poses a threat of serious harm to herself or others. But Goffin claims that he was patted down by another officer just before he broke free and fled. The pat down removed nothing from Goffin and was later shown to have been unusually ineffective. The officer failed to discover that Goffin was carrying a loaded magazine and extra bullets."

The Court of Appeals concluded that Officer Ashcraft was entitled to qualified immunity on these facts because it was not clearly established at the time of the shooting that a pat down that

removes nothing from a suspect eliminates an officer's probable cause that the suspect poses a threat of serious physical harm.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/04/181430P.pdf

CIVIL RIGHTS: First Amendment; Unlawful Retaliation
Nagel v. City of Jamestown, North Dakota
CA8, No. 18-2842, 3/9/20

James Nagel, a former police officer, filed a 42 U.S.C. 1983 action against the city and the chief of police, alleging unlawful retaliation for exercising his First Amendment right to participate in a media interview, deprivation of his right to pre-termination process, and violation of his rights under the North Dakota Constitution.

The Eighth Circuit affirmed the district court's grant of defendants' motion for summary judgment. The court held that the district court properly granted summary judgment on the First Amendment claim where Nagel failed to prove his speech as a public employee was protected by the First Amendment.

"In this case, the district court found that plaintiff was not speaking as a citizen in a local news interview; plaintiff's speech during the interview was not on a matter of public concern because his asserted desire was to clear the name of his Facebook alias, which was a purely private interest; and even assuming plaintiff was a citizen commenting on a matter of public concern, his speech at the interview was not First Amendment protected, because it created great disharmony in the workplace, interfered with plaintiff's ability to perform his duties, and impaired his working relationships with other employees. The court also held that plaintiff was not deprived of his right to due process, and declined to exercise supplemental jurisdiction over the state law claims."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/03/182842P.pdf

CIVIL RIGHTS: First Amendment; Malicious Prosecution
Lunn v. City of Rockford, Illinois
CA7, No. 19-1945, 4/20/20

William Lunn, a reporter, heard, by police scanner, of multiple traffic stops in Midtown. He did not have a driver's license, so he rode a motorized bicycle to Midtown to take photographs. He suspected a prostitution sting operation.

An officer noticed Lund and radioed the team. Officers Welsh and Campbell knew of Lund's previous anti-police speech. They directed Lund to "move on." Lund asked if he was breaking any laws. Campbell informed him that he was not, but that his continued presence would constitute obstruction of a police detail and result in arrest. Lund started his bicycle and called out, loudly, "goodbye officers."

Concerned that Lund might post pictures on social media while the sting operation was ongoing and create a danger for unarmed undercover officers, the officers followed Lund and arrested him for driving the wrong way on a one-way street, operating a vehicle without insurance, obstructing a police officer, felony aggravated driving on a revoked license, and operating a motor vehicle without a valid drivers' license.

News stories listed Lund's name as an arrestee in the prostitution sting. The charges against Lund were dismissed. Lund sued the officers and the city under 42 U.S.C. 1983.

The Seventh Circuit affirmed summary judgment for the defendants on First Amendment retaliation and malicious prosecution under Illinois law, citing the Supreme Court's holding in *Nieves v. Barnett*, 139 S.Ct. 1715 (2019), that, in most cases, probable cause to arrest defeats a claim of retaliatory arrest. There was probable cause to arrest Lund.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D04-20/C:19-1945:J:Rovner:aut:T:fnOp:N:2504353:S:0

CIVIL RIGHTS: Law Enforcement Officer Performing Community Caretaking Function

Canigila v. Strom

CA1, No. 19-1764, 2/13/20

On August 20, 2015, marital discord erupted at the Caniglia residence. During the disagreement, Edward Canigila retrieved a handgun from the bedroom — a handgun that (unbeknownst to Kim Canigila in that moment) was unloaded. Throwing the gun onto the dining room table, Canigila said something like "shoot me now and get it over with." Although Canigila suggests that this outburst was merely a "dramatic gesture," Kim took it seriously. Worried about her husband's state of mind after he had left to "go for a ride," she returned the gun to its customary place and hid the magazine. Kim also decided that she would stay at a hotel for the night if her husband had not calmed down when he returned. She began to pack a bag.

Canigila's return sparked a second spat. This time, Kim departed to spend the night at a nearby hotel. When Kim spoke to Canigila by telephone that evening, he sounded upset and a little angry.

The next morning, Kim was unable to reach her husband by telephone. Concerned that he might have committed suicide or otherwise harmed himself, she called the Cranston Police Department (CPD) on a non-emergency line and asked that an officer accompany her to the residence. She said that her husband was depressed and that she was "worried for him." She also said that she was concerned about what she would find" when she returned home.

Soon thereafter, Officer Mastrati rendezvoused with Kim. She recounted her arguments with the plaintiff the previous day, his disturbing behavior and statements, and her subsequent concealment of the magazine. Although Kim made clear that she was not concerned for her own safety, she stressed that, based on her fear that her husband might have committed suicide.

Officer Mastrati then called Canigila, who said that he was willing to speak with the police in person. By this time, Sergeant Barth and Officers Russell and Smith had arrived on the scene. The four officers went to the residence and spoke with Canigila on the back porch while Kim waited in her car. Canigila corroborated Kim's account, stating that he brought out the firearm and asked his wife to shoot him because he was "sick of the arguments" and "couldn't take it anymore." When the officers asked him about his mental health, he told them "that was none of their business" but denied that he was suicidal.

The ranking officer at the scene (Sergeant Barth) determined, based on the totality of the circumstances, that Canigila was imminently dangerous to himself and others. After expressing

some uncertainty, Canigila agreed to be transported by ambulance to a nearby hospital for a psychiatric evaluation. Canigila claims that he only agreed to be transported because the officers told him that his firearms would not be confiscated if he assented to go to the hospital for an evaluation.

After Canigila departed by ambulance for the hospital, unaccompanied by any police officer, Sergeant Barth decided to seize these two firearms. A superior officer (Captain Henry) approved that decision by telephone. Accompanied by Kim, one or more of the officers entered the house and garage, seizing two firearms, magazines for both guns, and ammunition.

Canigila was evaluated at Kent Hospital but not admitted as an inpatient. In October of 2015—after several unsuccessful attempts to retrieve Canigila firearms from the CPD — Canigila's attorney formally requested their return. The firearms were returned in December. The CPD never prevented Canigila from obtaining other firearms at any time. Nor did the events at issue involve any criminal offense or investigation.

Canigila filed suit against the officers under 42 U.S.C. § 1983. The centerpiece of Canigila's assertion is his contention that the officers offended the Fourth Amendment both by transporting him involuntarily to the hospital for a psychiatric evaluation and by seizing two firearms after a warrantless entry into his home. The district court granted summary judgment in Canigila's favor.

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

"There are widely varied circumstances, ranging from helping little children to cross busy streets to navigating the sometimes stormy seas of neighborhood disturbances, in which police officers demonstrate, over and over again, the importance of the roles that they play in preserving and protecting communities. Given this reality, it is unsurprising that in *Cady v. Dombrowski,* 413 U.S. 433 (1973), the Supreme Court determined, in the motor vehicle context, that police officers performing community caretaking functions are entitled to a special measure of constitutional protection. See id. at 446-48 (holding that warrantless search of disabled vehicle's trunk to preserve public safety did not violate Fourth Amendment).

"We hold today—as a matter of first impression in this circuit—that this measure of protection extends to police officers performing community caretaking functions on private premises (including homes). Based on this holding and on our other conclusions, the court affirmed the district court's entry of summary judgment for the defendants in this case."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/19-1764P-01A.pdf

CIVIL RIGHTS: Leg Sweep
Patel v. City of Madison
CA11, No. 18-12061, 5/27/20

On the morning of February 6, 2015, Jacob Maples thought he spotted an unfamiliar man roaming his street—Hardiman Place Lane—and possibly casing houses. Maples phoned the Police Department of the City of Madison, Alabama. He gave the dispatcher his name, address, and phone number and said he saw a skinny black man wearing a white or light-colored sweater, jeans, and a toboggan hat, in the driveway at 148 Hardiman Place Lane. Maples also advised the dispatcher that the man was "walking around close to the garage." Then Maples asked the dispatcher to send somebody to talk to the unidentified man.

Patel was going about his business, enjoying the cooler weather with a morning walk around the Hardiman Place Lane neighborhood. Patel had recently moved to his son's house at 148 Hardiman Place Lane after retiring from farming in his native Gujarati, India. Then 57 years old, Patel had immigrated to Madison about a week earlier to help raise his grandchildren. He spoke almost no English, having been raised in an area of India that primarily spoke Gujarati.

Two officers responded to the check subject call. Officer Eric Parker contends Patel's alleged resistance prompted him to sweep Patel's legs out from under him and throw him to the ground, ultimately permanently partially paralyzing him.

The Court of Appeals for the Eleventh Circuit held that the law had clearly established that Patel's force was unconstitutional where no reasonable officer could have thought that sweeping Patel's legs out from under him and throwing him to the ground headfirst was a reasonable use of force. Patel was somewhat frail and was not resisting or attempting to flee, and thus the law clearly forbade the officer's forceful takedown under the circumstances. Finally, the court held that the officer is not entitled to immunity under Alabama's immunity doctrine.

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201812061.pdf

CIVIL RIGHTS: Off Duty Officer; Accidental Discharge of Weapon at a Bar
Park v. City and County of Honolulu
CA9, No. 18-16692, 3/13/20

Hyun Ju Park was working as a bartender at a sports bar in Honolulu, Hawaii. Late one night, while Park was working, three off-duty police officers employed by the Honolulu Police Department stopped at the bar for drinks. After consuming seven beers over the course of two hours, one of the officers, Anson Kimura, decided to inspect his personal revolver, which the department had authorized him to carry. He apparently did so to ensure that it was loaded. The other two officers, Sterling Naki and Joshua Omoso, watched as their intoxicated colleague recklessly attempted to load his already-loaded firearm. Kimura's revolver accidentally discharged, and a single bullet struck Park. She suffered serious, life-threatening injuries as a result.

Upon review, the Ninth Circuit Court of Appeals affirmed the dismissal of a 42 U.S.C. 1983 action against the police officers and the City and County of Honolulu, alleging that they violated Park's substantive due process right to bodily integrity under the Fourteenth Amendment.

The panel held that Officers Naki and Omoso, the two officers that were with Kimura, did not act or purport to act in the performance of their official duties, and thus they were not acting under color of state law. Therefore, the district court properly dismissed Park's claim against Naki and Omoso. The panel agreed with the district court that Park's Monell claim must be dismissed because she has not plausibly alleged that the County's inaction reflected deliberate indifference to her Fourteenth Amendment right to bodily integrity.

"In this case, Park has not plausibly alleged that the Chief of Police was aware of prior, similar incidents in which off-duty officers mishandled their firearms while drinking."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/13/18-16692.pdf

CIVIL RIGHTS: Sexual Assault by County Officer
J.K.J. v. Christensen
CA7, No. 18-2177, 5/15/20

Two female jail inmates endured repeated sexual assaults by correctional officer Darryl Christensen. The County's written policy prohibited sexual contact between inmates and guards but failed to address the prevention and detection of such conduct. The County did not provide meaningful training on the topic. Near the beginning of the relevant period, the County learned that another guard made predatory sexual advances toward a different female inmate. The County imposed minor discipline on the guard but made no institutional response—no review of its policy, no training, and no communication with inmates on how to report such abuse. In a civil rights suit, the jury returned verdicts for the inmates.

The Seventh Circuit affirmed the verdicts against both Christensen and Polk County.

"While the standard for municipal liability is demanding, the evidence was sufficient to support the verdict. The evidence did not require the jury to accept as inevitable that Christensen's conduct was unpreventable, undetectable, and incapable of giving rise to Monell liability. Nor was the jury compelled to conclude that the sexual abuse had only one cause. The law allowed the jury to consider the evidence in its entirety, use its common sense, and draw inferences to decide for itself."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D06-26/C:18-1498:J:Brennan:aut:T:fnOp:N:2361273:S:0

CIVIL RIGHTS: Sexual Assault by Deputy; Sheriff Entitled to Qualified Immunity
McGuire v. Cooper
CA8, No. 18-2809, 3/6/20

Megan McGuire was sexually assaulted by a deputy (Cooper) acting within the scope of his employment with the sheriff's office, she filed claims of unreasonable search and seizure, equal protection, due process, supervisory liability, and municipal liability under the Civil Rights Act, 42 U.S.C. 1983.

In June 2013, Cooper was charged with first degree sexual assault. Cooper pled no contest on April 14, 2015, and was found guilty of third degree assault and attempted tampering with evidence, class I misdemeanors. On June 10, 2015, a state district judge in Douglas County sentenced Cooper to consecutive terms of six months in jail on each count.

At the time of the incident with McGuire, the Douglas County Sheriff's Office did not have a policy of reviewing employees' behavior to determine those at risk for sexual misconduct and it did not have a comprehensive policy addressing sexual misconduct. The Sheriff's Office had implemented, however, a citizen complaint process where citizens could submit complaints for review. Since Sheriff Dunning's appointment in 1995, there had been at least fifteen complaints of sexual misconduct by deputies employed by the Douglas County Sheriff's Office.

As to the claims against Sheriff Dunning and his potential liability, the district court found: (1) because Sheriff Dunning was notified of every citizen complaint regarding deputies under his supervision and he had actual notice of at least eleven complaints of sexual misconduct in his department, a jury could find there was a pattern and practice of Douglas County sheriff deputies involved in inappropriate sexual misconduct; (2) the lack of policies and training on sexual misconduct, the lack of investigation into allegations of sexual misconduct by deputies, and the alleged "cavalier attitude" by the Sheriff was sufficient evidence to give rise to a jury question regarding deliberate indifference; and (3) there was sufficient evidence of a causal link between Sheriff Dunning's failure to train or supervise his employees and Cooper's assaultive behavior such that he is not immune from McGuire's due process, equal protection, and Fourth Amendment claims.

The Eighth Circuit reversed the district court's denial of qualified immunity and summary judgment in favor of the sheriff. The court held that the sheriff was entitled to qualified immunity, because "prior instances of sexual misconduct were not similar in kind or sufficiently egregious in nature to demonstrate a pattern of sexual assault against members of the public by deputies. Therefore, a reasonable officer in the sheriff's position would not have known that he needed to more closely supervise his deputies, including defendant, or they might sexually assault a member of the public. Furthermore, a reasonable supervisor in the sheriff's position would not know that a failure to specifically train defendant not to sexually assault a woman would cause defendant to engage in that behavior."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/03/182809P.pdf

CIVIL RIGHTS:

Subduing an Erratic Jail Inmate

Lombardo v. City of St. Louis

CA8, No. 19-1469, 4/20/20

On December 8, 2015, SLMPD officers arrested Nicholas Gilbert on suspicion of trespassing and occupying a condemned building and for failing to appear in court for an outstanding traffic ticket. Arresting officers brought Gilbert to the "holdover," a secure holding facility within the SLMPD's central patrol station, and placed him in an individual cell.

Gilbert was cooperative throughout the booking process and checked "no" to a question asking whether he had a medical condition of which the officers should be aware. While Gilbert was in the cell, the officers observed him engaging in unusual behavior, including waving his hands in the air, rattling the bars of his cell, throwing his shoe, and bobbing up and down. Officer Jason King then observed Gilbert tie an article of clothing around the bars of his cell and his neck. Officer King stated out loud that Gilbert appeared to be trying to hang himself. After overhearing Officer King's

statement, Officer Joe Stuckey entered Gilbert's cell but found Gilbert without any clothing tied to his neck. Officer Stuckey cuffed Gilbert's left wrist but before he could cuff Gilbert's right wrist, Gilbert began to struggle with Officer Stuckey as well as Officer Ronald DeGregorio and Sergeant Ronald Bergmann, who had entered the cell after Officer Stuckey. The officers brought Gilbert to a kneeling position over a concrete bench inside the cell and cuffed his right wrist. Gilbert began to struggle again and thrashed his head on the concrete bench, causing a gash on his forehead. Gilbert also kicked Officer Stuckey, after which Officer Stuckey left the cell and Sergeant Bergmann called for someone to bring in leg shackles.

Officer Paul Wactor brought the leg shackles to Gilbert's cell and assisted Officer King in shackling Gilbert's legs. Pursuant to a request made by Sergeant Bergmann, Officer King left the cell and radioed the dispatcher to request emergency medical services. Officer Stuckey left the holdover and yelled into the hallway, requesting assistance with a combative subject. The holdover alarm was also activated, which broadcasted that an officer was in need of assistance in the holdover. Officer Kyle Mack, one of the officers who responded to the alarm, entered the cell to find the officers struggling to control Gilbert, who was still crouched over the bench. Officer Mack relieved Officer DeGregorio by taking control of Gilbert's left arm. Exhausted, Officer DeGregorio left the cell to catch his breath. To better control Gilbert's movements, Officer Mack assisted the other officers in moving Gilbert from the bench to the prone position on the floor.

After Gilbert was moved to the prone position, Officer Zachary Opel relieved Sergeant Bergmann by taking control of Gilbert's right side. Feeling winded from the struggle, Sergeant Bergmann left the cell. Officers Michael Cognasso, Bryan Lemons, and Erich vonNida also responded to Gilbert's cell to assist in bringing Gilbert under control as Gilbert continued to kick his shackled legs and thrash his body. Officer Cognasso put his knees on the back of Gilbert's calves, Officer Lemons placed his knee on Gilbert's leg, and Officer vonNida held Gilbert's arm or leg to prevent Gilbert from thrashing his body. Throughout the altercation, the officers controlled Gilbert's limbs at his shoulders, biceps, legs, and lower or middle torso. While continuing to resist, Gilbert tried to raise his chest up and told the officers to stop because they were hurting him. After fifteen minutes of struggle in the prone position, Gilbert stopped resisting and the officers rolled him from his stomach onto his side. By this point, each of the named officers had participated in the effort to physically control Gilbert.

At some point while in the prone position, Gilbert had stopped breathing. Officer Mack rolled Gilbert onto his back and initially found a pulse in his neck but eventually was unable to find one. Gilbert was transported to the hospital where he was pronounced dead. Post mortem testing showed Gilbert had a large amount of methamphetamine in his system and significant heart disease. The St. Louis City Medical Examiner's autopsy report stated that the manner of death was accidental and that the cause of death was arteriosclerotic heart disease exacerbated by methamphetamine and forcible restraint. Jody Lombardo (Gilbert's mother) presented a conflicting expert report, alleging that Gilbert's cause of death was forcible restraint inducing asphyxia.

The Eighth Circuit affirmed the magistrate judge's grant of summary judgment in favor of law enforcement officers and the City. The court held that the officers' actions did not amount to constitutionally excessive force.

"In this case, the undisputed facts show that the officers discovered the son acting erratically, and even though the son was held in a secure cell, it was objectively reasonable for the officers to fear that he would intentionally or inadvertently physically harm himself. Furthermore, the son actively resisted the officers' attempts to subdue him, and officers held him in the prone position only until he stopped actively fighting against the restraints and the officers.

"This Court has previously held that the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directives and efforts to subdue the detainee. In this case, the St. Louis City Medical Examiner's autopsy report stated that the manner of death was accidental and that the cause of death was arteriosclerotic heart disease exacerbated by methamphetamine and forcible restraint. Therefore, the court held that the officers are entitled to qualified immunity on plaintiff's excessive force claim."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/04/191469P.pdf

EVIDENCE: Dying Declaration
Woods v. Cook
CA6, No. 19-3254, 5/22/20

James Spears drove William Smith and David Chandler to buy drugs on October 27. Chandler left the car and returned, stating "his man was coming." The men then heard a voice: "Chandler, where's my money?" Smith saw a bearded African American man of average build. Bullets ripped through the side window, hitting Chandler's spinal cord. Spears rushed Chandler to the hospital, where doctors placed him on life support.

Days later, Chandler regained consciousness. He could control movement only in his eyes. Doctors worked out a system of communicating by blinking. Chandler answered questions from his doctors and communicated with Father Seher, a priest and long-time friend. Chandler communicated that he understood his "likelihood of death" and requested Last Rites rather than the Sacrament of the Sick.

Chandler later communicated to police that he knew his shooter; he blinked the letter "O." Police showed him a photo of Ricardo Woods, a dealer known on the streets as "O." Chandler confirmed that Woods shot him.

Woods had sold Chandler drugs many times. Chandler owed him money; Woods warned Chandler that "something was going to happen." The shooting happened 100 feet from Woods' house. Chandler subsequently suffered an aneurysm. On November 12, he died.

Police arrested Woods 200 miles away from his home. In jail, Woods told his cellmate (an informant) that he shot someone over a drug debt. At trial, the court admitted Chandler's identification of Woods as a dying declaration. The jury convicted Woods.

The Sixth Circuit rejecting Woods' claims that the admission of Chandler's deathbed identification violated the Confrontation Clause.

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0160p-06.pdf

EYEWITNESS IDENTIFICATION:

Show Up

United States v. Heard

CA8, No. 18-3411, 3/3/20

On the evening of July 30, 2017, Justin Summers was a passenger in the front seat of an SUV driven by his wife on Redbud Road. Around 7:20 pm, he called 911 reporting he had just seen a parked car with "substantial front-end damage." Next to the driver's side of the car was a man Summers described as a "black male," "anywhere from maybe 5'9'' to 6-foot," with a white hat and dark clothes. Summers saw the man throw something "small" into "the weeds" on the side of Redbud Road.

Concerned, Summers and his wife "came really slow up on the car looking to see if he needed some help or if there was anybody else in the car that needed help." The man "tipped his head back so Summers could see his face really good" and "very clearly." He was "looking for something in his passenger side" and "was very agitated, more so than what you would be if you were in an accident." Summers and his wife "slowed down almost to a stop next to his car and he basically through a facial expression made it very clear that he didn't want us there." As Summers and his wife drove away, Summers saw the man throw "a semiautomatic pistol into the weeds or the ditch there." Summers said no one else was in the car or "around at all."

Arriving at the scene, police found David Tachay Heard, who is five-foot-eight-inches tall, wearing a black t-shirt and blue jeans. They searched the wooded area near the car and found a bag of marijuana and a fully loaded "extremely clean" firearm with "no dirt or debris on it." They arrested Heard. Around 8:45 pm, officers asked Summers to return to the scene. He arrived at dusk. Officers positioned Heard (handcuffed with a spotlight shining on him) 20 to 25 feet from Summers. Officers told Summers "to have an open mind, and to tell them if it was or was not the person that he saw." Summers "didn't hesitate," saying that "everything was exactly the same about him, in the evening.

Before trial, the district court denied Heard's motion to suppress Summers' eyewitness identification. A jury convicted Heard who appealed, challenging the conviction arguing the district court erred in admitting eyewitness-identification evidence.

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

"Police officers are not limited to station house line-ups if there is an opportunity for a quick, on-the-scene identification. Show-up identifications are essential to free innocent suspects and to inform the police if further investigation is necessary. Thus, even if the line-up is inherently suggestive, the line-up will be admissible as long as it is not impermissibly suggestive and unreliable. *United States v. Mitchell*, 726 F. Appx. 498, 501 (8th Cir. 2018). See generally *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018) ('To be impermissibly suggestive, the procedure must give rise to a very substantial likelihood of irreparable misidentification.'

"The show-up identification here was not impermissibly suggestive. 'Necessary incidents of on-the-scene identifications, such as the suspects being handcuffed and in police custody' or having a light shone on their face 'do not render the identification procedure impermissibly suggestive.' *United States v. House*, 823 F.3d 482, 488 (8th Cir. 2016). See *United States v. Pickar*, 616 F.3d 821, 828 (8th Cir. 2010) (holding that a

show-up identification was not unduly suggestive where the defendant 'was handcuffed and standing in front of a marked police cruiser,' 'stood between an officer in uniform and an officer in plainclothes,' and 'one of the officers was shining a small flashlight in the defendant's face').

"An identification is unreliable if the circumstances allow for 'a very substantial likelihood of irreparable misidentification.' *House*, 823 F.3d at 487. The factors affecting reliability include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Here, Summers paid close attention to Heard due to the severe damage to his car. Summers observed him at a close distance, in good light, and 'could see his face really good.' Summers testified that Heard gave him 'a threatening hard look' and 'made it very clear that he didn't want us there.' Only about an hour and a half passed between when Summers first saw Heard and when he made the identification.

"The district court did not err in admitting the eyewitness identification."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/03/183411P.pdf

MIRANDA:

Questioning During a Routine Traffic Stop

United States v. Johnston, Jr.
CA8, No. 18-2929, 4/2/20

On June 21, 2016, Douglas County Deputy Sheriff Eric Olson stopped a van traveling near Omaha, Nebraska, for following too closely to another vehicle. The van's driver was Sarkis Labachyan. Sherman Johnson, Jr. was in the front passenger seat. After Labachyan handed Deputy Olson the rental agreement for the van and his driver's license, Deputy Olson escorted Labachyan back to the patrol car, where Deputy Olson conducted a record check.

Deputy Olson asked Labachyan where the men were heading. Labachyan told Deputy Olson that he and Johnson were traveling straight through from California to East Moline, Illinois, to visit Johnson's Aunt Dorothy, who had just been discharged from the hospital. Deputy Olson then returned to the van to speak to Johnson, whose name was on the van's rental agreement. Johnson gave a different version of the men's itinerary, stating the two planned to stop in Lincoln, Nebraska, en route to Illinois, and that they were to visit his Aunt Jeannette there.

Growing suspicious, Deputy Olson returned to his patrol car to complete his record check. During the record check, Deputy Olson discovered that Labachyan and Johnson had two months prior been stopped in a vehicle in Nebraska. During that stop, an officer had searched the vehicle and found a blowup mattress, a small amount of marijuana, and $19,000 cash sorted into three envelopes with names written on them. With no other indicia of criminal activity, the two were allowed to leave.

After learning of this incident Deputy Olson asked for and received consent from Johnson to search the van. When Johnson consented, Labachyan asked to speak with him. Deputy Olson denied the request, and along with another officer, searched the van. The officers discovered a blowup mattress, bank receipts, soiled gloves, and adult diapers. In the spare tire attached to the underside of the van, the officers found 6,000 grams of cocaine.

The jury ultimately found Labachyan and Johnson guilty of all charges, and the district court denied their motions for acquittal based on insufficiency of the evidence.

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

"It was argued that statements he gave while seated in the patrol car during Deputy Olson's record check should be suppressed because they were elicited without a Miranda warning. Police need not provide Miranda warnings before roadside questioning pursuant to a routine traffic stop because such questioning does not constitute 'custodial interrogation. *United States v. Howard*, 532 F.3d 755, 761 (8th Cir. 2008); see also *United States v. Coleman*, 700 F.3d 329, 336 (8th Cir. 2012) ('Although a motorist is technically seized during a traffic stop, Miranda warnings are not required where the motorist is not subjected to the functional equivalent of a formal arrest.' A motorist, or anyone else, is in custody for Miranda purposes when 'his freedom of action has been curtailed to a degree associated with formal arrest, and that belief is reasonable from an objective viewpoint.' *United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990).

"Deputy Olson's questioning of Labachyan did not resemble a formal arrest. Labachyan was never 'informed that his detention would not be temporary,' and he was asked only a 'modest number of questions.' *United States v. Morse*, 569 F.3d 882, 884 (8th Cir. 2009). Even if a reasonable person in Labachyan's position would not have felt free to leave, this does not amount to custody. *United States v. Pelayo-Ruelas*, 345 F.3d 589, 592 (8th Cir. 2003) (rejecting the 'broad contention that a person is in custody for Miranda purposes whenever a reasonable person would not feel free to leave'). Neither does it matter that the motivation behind Deputy Olson's questions was to discover evidence of criminality. *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) ('A policeman's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time.')

"A Miranda warning was not required during Deputy Olson's questioning because Labachyan was not in custody at the time."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/04/182929P.pdf

MIRANDA: Request for Counsel; Further Custodial Interrogation

Rickman v. State, ASC, No. CR-19-156, 2020 Ark. 138, 4/166/20

A Benton County Circuit Court jury convicted Charles Alan Rickman of two counts of rape and one count of kidnapping, aggravated residential burglary, and first degree battery. He was sentenced to consecutive life terms for the rape, kidnapping, and burglary convictions and a consecutive term of twenty years' imprisonment and a $15,000 fine for the battery conviction. For reversal, he made several arguments including

one of which was that the circuit court erred in denying his motion to suppress an October 5 custodial statement.

Specifically, Rickman contends that he did not initiate contact with law enforcement after he had requested to speak to counsel at the end of his October 3 interview, and as a result, an October 5 statement should not have been introduced into evidence.

The Arkansas Supreme Court found as follows:

"When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. Instead, an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Although the accused may initiate further contact with the police, the impetus must come from the accused, not the police.

"In the present case, the record is clear that Rickman initiated further contact with the police before giving his second statement. Sergeant McCain testified at the suppression hearing that she was sitting at one of the booking terminals, farther from the detox cell where Rickman was housed at, when he signaled his hand over to get my attention. He said that he would like to speak with somebody in CID about his case. Sergeant McCain stated that she emailed Detective Matthews that Rickman 'requested to speak with somebody' about the case.

"Detective Matthews testified that Rickman was brought to an interview room, and she began the interview by reviewing the 'Statement of Rights Form' and confirmed with Rickman that he understood his rights and agreed to speak with her. Thus, the evidence demonstrates that Rickman initiated further contact with the officers. That is to say, the impetus came from Rickman—not the Benton County police. Based on the totality of the circumstances, we conclude that Rickman initiated further contact with law enforcement, and we hold that the circuit court properly denied his motion to suppress."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/supremecourt/en/469294/1/document.do

SEARCH AND SEIZURE: Abandonment; Ownership Disclaimer

United States v Ferebee

CA4, No. 18-4266, 4/22/20

On March 23, 2017, Quenton Javon Ferebee was visiting his friend Shana Dunbar at her house in Charlotte, North Carolina. Dunbar was on probation for a state offense, although Ferebee was unaware of that fact. Ferebee was sitting on the sofa in the living room with a marijuana blunt in his hand when law enforcement officials arrived to conduct a warrantless search, as authorized by the terms of Dunbar's probation. A black backpack was on the floor, leaning against the sofa where Ferebee was sitting. Probation Officer Jason Bensavage asked Ferebee to stand up so he could check the sofa for weapons. Ferebee stood up, picked up the backpack with his left hand, and held it out as another officer patted down Ferebee.

When Officer Bensavage asked Ferebee if he had any weapons on him or in the bag, Ferebee

"stated that the bag was actually not his." Officer B.M. Sinnott arrested Ferebee for possession of marijuana and began placing Ferebee in handcuffs. As Ferebee was being handcuffed, Officer Bensavage searched the sofa and found a handgun under the cushions. Detective Thomas Grosse took the backpack from Officer Sinnott, who took Ferebee outside, leaving open the door to the house as they exited. Detective Grosse remained in the house and searched the backpack less than a minute after Officer Sinnott took Ferebee outside. Detective Grosse found Ferebee's identification card inside the backpack, along with a firearm, marijuana, and drug paraphernalia.

Ferebee was indicted on a charge of unlawful possession of a firearm by a convicted felon. He pleaded not guilty and sought to suppress the evidence recovered from the backpack.

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

"The law is well established that a person who voluntarily abandons property loses any reasonable expectation of privacy in the property and is consequently precluded from seeking to suppress evidence seized from the property. *United States v. Leshuk*, 65 F.3d 1105, 1111 (4th Cir. 1995); accord *United States v. Stevenson*, 396 F.3d 538, 546 (4th Cir. 2005). That rule makes sense, as one who abandons property would have no subjective expectation that the property would remain private, nor would society recognize any such expectation as reasonable. For purposes of challenging a search, this court and most others treat a disavowal of ownership of property as an abandonment of the property. See *United States v. Han*, 74 F.3d 537, 543 (4th Cir. 1996) (Denial of ownership constitutes abandonment.); *Leshuk*, 65 F.3d at 1107, 1111 (defendant who disavowed ownership of backpack and garbage bag found in field where marijuana was growing lacked a reasonable expectation of privacy and therefore could not challenge the warrantless search); accord *United States v. Zapata*, 18 F.3d 971, 978 (1st Cir. 1994) (One who abandons ownership forfeits any entitlement to rights of privacy in the abandoned property, and one who disclaims ownership is likely to be found to have abandoned ownership. (It is well settled that an otherwise legitimate privacy interest may be lost by disclaiming or abandoning property, especially when actions or statements disavow any expectation of privacy.); *United States v. Frazier*, 936 F.2d 262, 265 (6th Cir. 1991); *United States v. Ruiz*, 935 F.2d 982, 984 (8th Cir. 1991). That is likewise a sensible rule, as one who disavows ownership is disassociating himself from the property such that any expectation that the property would remain private would not be reasonable.

"Ferebee contends that his disavowal of ownership is insufficient to show abandonment given that he maintained physical possession of the backpack even after his statement. We disagree. Continued physical possession is certainly a fact that a district court may consider in a proper case, but the court is not precluded from finding abandonment in cases where the defendant has physical possession of the property he has disavowed.

"Because the record supports the district court's conclusion that Ferebee clearly and unequivocally disavowed ownership of the backpack, we affirm the district court's conclusion that Ferebee abandoned the backpack and any legitimate expectation of privacy in its contents."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/Opinions/184266.P.pdf

SEARCH AND SEIZURE: Community Caretaking; Domestic Violence
United States v. Sanders
CA8, No. 19-1947, 4/14/20

On February 16, 2018, N.R. contacted her grandmother just before 10:00 a.m. and said that her mother, Karina LaFrancois, and her mother's boyfriend, "Kenny" Sanders, were "fighting really bad" and that they needed someone to come. N.R. is LaFrancois' daughter, who was eleven years old at the time. N.R.'s grandmother called 911 and relayed to the operator that she had been told an altercation was occurring at LaFrancois' house. N.R.'s grandmother also told the 911 operator that she had trouble understanding N.R. and that she did not know if any weapons were involved or whether the fight was verbal or physical. Additionally, N.R.'s grandmother informed the operator that two additional minor children were inside the residence, ages seven and one.

The Dubuque Police Department dispatched officers to the LaFrancois residence on a report of a domestic disturbance. Officer Joel Cross arrived first on scene with Officer Tom Pregler close behind. Additional officers subsequently arrived as well. When Officer Cross arrived at the residence, he saw N.R. "acting excited" and gesturing through an upstairs window. After reporting his observations to Officer Pregler, the two officers knocked on the front door. LaFrancois came outside to talk to the officers. LaFrancois was visibly upset and unstable. The officers observed red marks on LaFrancois' face and neck. Despite her obvious emotional state and the visible injuries, LaFrancois told the officers that everything was okay. Officer Cross told LaFrancois that he understood that N.R. had heard the disturbance and contacted law enforcement. LaFrancois became concerned and responded, "Do not tell him that she called you guys." Officer Pregler told LaFrancois that the officers needed to talk to Sanders. LaFrancois made clear that she did not want the officers to go inside the house. She offered to have Sanders speak with the officers outside. The officers initially assented to allowing LaFrancois to go inside and get Sanders. However, when LaFrancois opened the door to the residence, the officers heard crying inside. After hearing the crying, the officers decided to enter the house to make sure that everyone was safe. They opened the door and saw Sanders and LaFrancois standing just inside the door and a crying infant located in a nearby playpen.

As soon as the officers entered the home, Sanders became noncompliant, uncooperative, and argumentative with the officers. When Officer Cross began to go upstairs to check on N.R. and N.R.'s brother, who was also upstairs, Sanders attempted to block him from going upstairs. The officers directed Sanders to sit on the couch. Officer Cross found N.R. distressed and crying. She told Officer Cross that Sanders "had a gun out," that it "was downstairs," and that she thought it was located in one of the drawers below the "big mirror." Officer Cross went back downstairs and looked through the drawers where N.R. indicated the gun might be. When he did not find a gun, Officer Cross returned upstairs to talk to N.R. again. N.R. admitted that she did not see Sanders with a gun, but during the fight with Sanders, she had heard her mother yelling, "Put the gun down! Put the gun down!" N.R. said that it sounded like LaFrancois was being choked during the fight.

During these events, LaFrancois and Sanders had been separated, with LaFrancois outside and Sanders on the couch. Officer Cross then went outside to speak to LaFrancois. LaFrancois had been texting Sanders informing him that she was telling the officers that nothing happened. Officer Cross pointedly asked LaFrancois where the gun

was located. LaFrancois initially denied there was a gun, but quickly expressed concern that Sanders would find out that she had been talking to the officers. LaFrancois asked if she could be arrested instead of Sanders. After further questioning, LaFrancois admitted that she believed Sanders had a gun while the couple were arguing and that it could be in the couch. Officer Cross went back inside the residence, asked Sanders to get off the couch where he had been directed to sit, and discovered a Smith & Wesson 38 caliber pistol in the couch cushions.

Sanders entered a conditional guilty plea to being a prohibited person in possession of a firearm. Sanders appeals the district court's denial of his motion to suppress. On appeal, he argues that law enforcement officers' initial warrantless entry into the house was not supported by the community caretaker exception and, once inside, their search for a firearm was not supported by exigent circumstances.

Upon review, the Court of Appeals for the Eighth Circuit was satisfied that the officers acted in their community caretaking function when they entered LaFrancois' house.

"The officers were dispatched to the scene of a domestic disturbance. Once at the scene, the officers learned further details indicating a serious concern for the safety of LaFrancois and the children who were inside the house. LaFrancois had visible injuries consistent with a physical altercation. LaFrancois expressed concern for her daughter and directed the officers not to tell Sanders that her daughter was the one that reported the disturbance. A child was seen in an upstairs window acting excited and gesturing at the first responding officer. The record establishes that the officers had reason to believe that a domestic violence suspect was inside the home with children. When LaFrancois opened the door to get that suspect, the officers heard crying coming from inside. The justification for the officers' warrantless entry arises from their obligation to help a child or children that could be injured inside or to ensure the safety of the children.

"We conclude that the officers reasonably believed an emergency situation existed that required their immediate attention in the form of entering LaFrancois' home to ensure that no one inside was injured or in danger. The officers' warrantless entry was permissible under the community caretaker exception.

"We further conclude that the scope of the encounter was carefully tailored to satisfy the officers' purpose for entry. Once they entered, the officers separated Sanders and LaFrancois, with LaFrancois stepping outside. Officer Cross located N.R., who told him that during the altercation she could hear her mother yelling 'Put the gun down! Put the gun down!' A warrant is not needed to search areas that may conceal a threat if officers have an objectively reasonable basis to believe an immediate act is required to preserve the safety of others or themselves. *United States v. Quarterman*, 877 F.3d 794, 800 (8th Cir. 2017).

"Here, Officer Cross had an objectively reasonable belief that a gun was inside the house. The search was conducted out of the officers' legitimate concern for safety and was limited to two places in the house: (1) where N.R. thought the gun might have been placed, and (2) where LaFrancois believed the gun could be located. Officer Cross found the gun in the second place. Exigent circumstances justified the officers' efforts to locate and secure the gun. *United States v. Henderson*, 553 F.3d 1163 (8th Cir. 2009) (Because domestic disturbances are highly volatile and

involve large risks and because the police officers had reason to believe that a loaded gun was in the bedroom, we think it is plain that exigent circumstances justified their effort to secure the weapon.)"

The Court of Appeals affirmed the judgment of the district court.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/04/191497P.pdf

SEARCH AND SEIZURE:
Consent Factors
United States v. Benjamin
CA11, No. 18-13091, 5/8/20

The Court of Appeals for the Eleventh Circuit stated that "a warrantless search does not violate the Fourth Amendment where there is voluntary consent given by a person with authority. *Bates v. Harvey*, 518 F.3d 1233, 1243 (11th Cir. 2008). Consent is voluntary if it is the product of an essentially free and unconstrained choice. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Where consent was the basis for a search, the government bears the burden of proving consent was freely given. See *Florida v. Royer*, 460 U.S. 491, 497 (1983). Voluntariness is factual and depends on the totality of the circumstances.

"When reviewing the totality of the circumstances, the court will consider the presence of coercive police procedures, the extent of the defendant's cooperation with the officer, the defendant's awareness of his right to refuse consent, the defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found."

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201813091.pdf

SEARCH AND SEIZURE:
Emergency Search
United States v. Evans
CA11, No. 17-15323, 5/6/20

On the morning of May 30, 2017, officers of the Homestead Police Department received multiple 911 calls reporting gunshots in the Keystone Village area of Homestead, Florida. Within minutes, officers arrived at the home of Willie Evans. Once there, they encountered Evans's girlfriend, who was outside in tears with two small children. She told the officers that she and Evans had just had an argument, and that he had threatened to shoot himself. As they were arguing, she said, Evans stormed out of the house; she heard multiple gunshots.

Between the gunfire and the arrival of the police, Evans went back into his house. At first, the officers could not get him to leave the house, but he came out after urging from his girlfriend. He locked the door behind him. At that point, police handcuffed him and placed him in a squad car. One of the officers spotted four spent shell casings in the driveway. Another officer, positioned near a window, heard noises that sounded "a little bit like footsteps" and "like somebody crying or whimpering coming from inside the house." The officer advised over his radio that he heard a crying noise coming from inside the house.

Concerned by the sounds, the officers decided to enter the house to "make sure there's nobody hurt, no other people with guns." When Evans said he did not have a key to his house, the police kicked in the door. While inside, officers noticed two firearms inside a closet. They also encountered "a couple of dogs"—the apparent source of the whimpering noise. According to police, the safety sweep lasted approximately

four or five minutes. The officers left the house and stayed outside while they wrote up a search warrant. Several hours later, after obtaining a warrant and then conducting a more thorough search, officers recovered a rifle, three handguns, and ammunition.

The major question presented on appeal is whether it was reasonable for police officers to enter Evan's home without a warrant. Given the totality of the circumstances, the Eleventh Circuit Court of Appeals said yes.

"Under the emergency exception officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. Even under ideal conditions, the court did not find it implausible that a reasonable person might sometimes mistake the sound of an animal for that of a human."

READ THE COURT OPINION HERE:
http://media.ca11.uscourts.gov/opinions/pub/files/201715323.pdf

SEARCH AND SEIZURE: Judge Fails to Understand the Affidavit
United States v. Dickerman
CA8, No. 18-3150, 3/30/20

Alden Dickerman pleaded guilty to possession of child pornography after law enforcement executed a warrant at his home and found child pornography on his computer. Dickerman entered a plea agreement, reserving his right to appeal the district court's denial of his motion to suppress.

St. Louis County Detective Michael Slaughter drafted a search warrant application and supporting affidavit to present to a state court judge. In his affidavit, Slaughter wrote that the information was based on his personal knowledge or information provided by other law enforcement officers. Slaughter outlined his professional background, including that he received specialized training in the area of computer-based investigations. He identified Special Investigator Wayne Becker as an officer who provided relevant information. He listed Becker's qualifications and experience in forensic analysis of computers used in criminal activity, including the use of peer-to-peer (P2P) and file sharing networks.

It was alleged that Dickerman used "Freenet," a decentralized, privacy-focused, peer-to-peer file sharing system, to access child pornography. Slaughter described Freenet's basic functionality in his affidavit. He wrote that someone requesting blocks of a file has taken substantial steps to install Freenet and locate a publicly available key for the desired file. He explained that Freenet's ability to hide what a user is requesting from the network has attracted persons that wish to collect and/or share child pornography files.

A user who receives a request does not know whether it came from an original requester or a relayer. Law enforcement, however, can determine which Freenet users request which files by using a statistical algorithm developed and validated by Dr. Brian Levine, an expert in networks and security at the University of Massachusetts Amherst. The algorithm allows law enforcement to distinguish between requests sent from an original requester and requests forwarded by a relayer. But Slaughter did not include any details about Dr. Levine, his algorithm, or how officers use the algorithm to determine which Freenet users requested which files. The Eighth Circuit Court of Appeals stated:

"It is true that the affidavit fails to explain how the number and timing of the requests led law enforcement to believe Dickerman was the original requester of the file. No doubt, it would have been better for Slaughter to specify how officers used Dr. Levine's algorithm to reach this conclusion. Slaughter could have noted the validity and error rate of the algorithm and explained the significance of Dickerman's computer requesting a certain number of blocks of a known child pornography file. As investigative techniques get more sophisticated, affiants should be mindful to explain their basis for probable cause in a way that is sufficiently comprehensive but still accessible to the judge reviewing the warrant application.

"Dickerman focuses his second rubber-stamp argument on the state court judge's testimony at the evidentiary hearing. There, the judge testified that he did not understand how Freenet block requests can be evaluated to determine who is an original requester and who is a relayer, and that some of the technical details in the affidavit were 'Greek' to him. Compounding this problem, according to Dickerman, the judge did not request any clarification from law enforcement before signing the warrant.

"Viewing the circumstances from the officers' perspective, they had no indication that the state court judge failed to understand the affidavit or otherwise acted as a rubber stamp. The judge reviewed the entire affidavit before signing the warrant. The judge said nothing to make Slaughter concerned that he didn't understand what he was reading. Slaughter therefore reasonably understood the judge's lack of questioning to signify he understood his affidavit. Because the officers had no evidence that the judge abandoned his judicial role, they acted in good-faith reliance on the warrant's validity.

"Accordingly, the district court properly denied Dickerman's motion to suppress based on the Leon good-faith exception."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/03/183150P.pdf

SEARCH AND SEIZURE: Knock and Talk **Virgil v. State**, ACA, No. CR-19-780, 2020 Ark. App. 314, 5/20/20

The Arkansas Court of Appeals reaffirmed the bright-line rule that law enforcement must inform citizens of their right to refuse a warrantless search of their homes before an officer may enter, not after the warrantless entry has already occurred, as happened in this case.

"When properly performed, a knock-and-talk is a consensual investigative technique police use at the home of either a suspect or an individual with information about an investigation; no probable cause or a warrant is required to initiate a knock-and-talk. See *State v. Brown*, 356 Ark. 460, 466, 156 S.W.3d 722, 726 (2004). The concern here is not with the knock-and-talk technique in and of itself. But how it is executed in a specific case warrants strict scrutiny because a fundamental constitutional protection is at stake. There is a fundamental right to privacy in our homes implicit in the Arkansas Constitution and that any violation of that fundamental right requires a strict-scrutiny review and compelling state interest. State v. Brown, supra.

"In *Brown*, our Arkansas Supreme Court, after a detailed and thoughtful analysis, applied the 'Ferrier warnings' and reversed the denial of a motion to suppress involving a knock-and-talk by a drug task force. The Ferrier warnings refer

to a knock-and-talk holding that the Washington Supreme Court issued in 1998 regarding the scope of protection that the state's constitution provided its citizens while inside their homes and engaged by law enforcement personnel who lacked a warrant. See *State v. Ferrier*, 960 P.2d 927 (Wash. 1998). In that decision, the Washington Supreme Court held as follows:

> *We, therefore, adopt the following rule: that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings prior to entering the home, vitiates any consent thereafter. Brown, 356 Ark. at 471, 156 S.W.3d at 730 (quoting Ferrier, 960 P.2d at 934).*

"Our supreme court ultimately grounded *Brown*'s holding in the Arkansas Constitution. Given the Arkansas Constitution as interpreted by the Arkansas Supreme Court, and the rules of criminal procedure, we have no hesitation in holding that law enforcement's entry into Felton's apartment for the purpose of investigating possible criminal activity was an 'intrusion' and therefore a 'search' under Arkansas law. Because the search (that is, the entry into the apartment) was initiated without a warrant, it was unconstitutional unless justified by an exception to the warrant requirement. No exception has been raised in this case other than that Felton consented. But as we have shown, the officers did not procure her consent to search the home before the search began; nor did they tell Felton that she could deny them entry before they entered. These oversights turned a potentially protected knock-and-talk into an impermissible knock-and-enter. The legal principle that a person's home is a zone of privacy is as sacrosanct as any right or principle under our state constitution and case law. *Brown*, 356 Ark. at 469, 156 S.W.3d at 729. That is why not even Felton's belated permission to search can scrub the constitutional taint.

"The State has failed to carry its heavy burden to justify the police conduct in this case. The circuit court's denial of Virgil's motion to suppress evidence is therefore reversed, and all items seized during the unconstitutional search must be suppressed."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/courtofappeals/en/471713/1/document.do

SEARCH AND SEIZURE:

Pole Camera; Curtilage

United States v. May-Shaw

CA6, No. 18-1821, 4/8/20

Grand Rapids, Michigan, police received tips from an organization that receives anonymous information from the public, describing vehicles Christopher May-Shaw was using to transport drugs and a specific bag where he kept drugs, money, and a gun. May-Shaw had one felony firearm conviction and two felony drug convictions. The Department began investigating and, for 23 days, watched a parking lot near his apartment building and a covered carport next to that building, where May-Shaw parked his BMW, one of his several vehicles. The surveillance used a camera affixed to a telephone pole on a public street and cameras in a surveillance van parked

in the parking lot. After witnessing May-Shaw engage in several suspected drug deals, the police used a drug-detecting dog to sniff the BMW. The dog indicated the presence of narcotics. Officers then obtained a search warrant for May-Shaw's apartment and all of his vehicles. They found evidence of drug distribution, including cash, wrappers, and cocaine.

May-Shaw moved the district court to suppress the evidence seized pursuant to the search warrant, arguing that the warrantless surveillance through the pole camera and the warrantless sniff by the drug-detecting dog of the BMW constituted unconstitutional warrantless searches. The district court denied the motion.

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

"Because the officers' use of the pole camera did not involve any sort of physical intrusion into a constitutionally protected area, May-Shaw must show that he had a reasonable expectation of privacy in the carport. The footage and photos only revealed what May-Shaw did in a public space—the parking lot. They captured images of May-Shaw moving things from his car to his apartment. The video showed when he arrived and left the apartment. In other words, the cameras observed only what was possible for any member of the public to have observed during the surveillance period.

"May-Shaw has not demonstrated that when the government surveilled the carport for twenty-three days, it violated his reasonable expectation of privacy and thus conducted an unconstitutional search. The Court found no error in the district court's judgment that the pole-camera surveillance did not violate May-Shaw's Fourth Amendment rights.

"May-Shaw also argues that the district court should have granted his motion to suppress because the use of the drug-detecting dog to sniff his BMW while it was parked in the carport constituted an unlawful search under the Fourth Amendment. This argument hinges on one issue: whether the carport where the vehicle was parked constitutes the curtilage of the apartment.

"The burden is on May-Shaw to establish that the carport is intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. He has not done so. May-Shaw has failed to establish that the carport constituted the curtilage of his apartment. The drug dog sniff therefore did not constitute a search."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0109p-06.pdf

SEARCH AND SEIZURE:

Routine Traffic Checkpoints

United States v. Moore

CA4, No. 18-4606, 3/4/20

In July 2014, Leroy Moore, Jr. was stopped at a routine traffic checkpoint operated by the Columbus County, North Carolina Sheriff's Office ("CCSO"). During the stop, CCSO deputies discovered that Moore was in possession of a substantial quantity of illegal drugs. He was arrested and subsequently indicted by a grand jury in the United States District Court for the Eastern District of North Carolina for possession with intent to distribute twenty-eight or more grams of crack cocaine. Moore moved to suppress all evidence obtained by CCSO officers on the grounds that the traffic checkpoint at which he was stopped was conducted in violation of the

Fourth Amendment. The district court denied the motion. Moore then pleaded guilty but reserved his right to file this appeal challenging the denial of his suppression motion.

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

"It is well established that when police stop an automobile, even if only for a limited purpose and for a brief period, they have seized the occupants of that vehicle within the meaning of the Fourth Amendment. *United States v. Brugal,* 209 F.3d 353, 356 (4th Cir. 2000). Thus, to pass constitutional muster, such seizures must be 'reasonable.' Though a 'seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing,' *City of Indianapolis v. Edmond*, 531 U.S. 32, (2000), the Supreme Court has recognized 'certain limited circumstances where suspicionless vehicle stops are permissible.' We apply a two-step analysis to determine whether a suspicionless police checkpoint like the one at issue here was constitutional.

"First, we must decide whether the checkpoint had a valid primary purpose. The Supreme Court has recognized the constitutional legitimacy of checkpoints designed to intercept illegal aliens, apprehend drunk drivers, *Michigan Dept. of State Police v. Stiz*, 496 U.S. 444 (1990), and solicit information from the public regarding criminal activity. Of particular relevance here, the Supreme Court has suggested, and lower courts have concluded, that checkpoints conducted for the limited purpose of checking driver's licenses and motor vehicle registrations are constitutionally permissible. See *Edmond*, 531 U.S. at 37-38.

"Second, if the checkpoint had a valid primary purpose, we then proceed to judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances. The reasonableness of a given checkpoint stop is determined by balancing the gravity of the public interest sought to be advanced and the degree to which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty interests of those stopped. In conducting this balancing, we remain cognizant that the primary 'evil' to be avoided in the context of suspicionless stops is the potential for abuse that obtains when officers are entrusted with standardless and unconstrained discretion. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

"Application of the foregoing framework to the facts at hand compels the conclusion that the CCSO checkpoint, and hence the stop of Moore's automobile, were permissible under the Fourth Amendment. At the outset, there is no question that the primary purpose of the checkpoint was valid. Both the magistrate and district judges found that the roadblock was established to check licenses, automobile registrations, and compliance with motor vehicle laws in order to ensure the safe and legal operation of motor vehicles on the roadways. Courts have upheld the constitutionality of police checkpoints organized for such a purpose.

"Turning to the question of the checkpoint's overall reasonableness, Moore does not seriously dispute that the roadblock adequately advanced a significant public interest. Nor could he. As the Supreme Court has recognized, states have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, and that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. *Prouse*, 440 U.S. at 658. Likewise, there is little doubt that the type of checkpoint at issue here reasonably furthered that interest. Officers set

up on a well-travelled county road and checked the license and registration of every driver to pass through the stop. In short, the police appropriately tailored their checkpoint stop to fit their public safety objective.

"The CCSO checkpoint was minimally intrusive. For one thing, it was clearly visible. Flashing blue lights and traffic cones warned motorists of the need to slow to a stop, and officers manning the checkpoint wore uniforms and reflective vests and hats. See *United States v. Ortiz*, 422 U.S. 891, (1975) (noting that fixed checkpoints at which drivers can see visible signs of the officers' authority" are less intrusive). More importantly, the checkpoint was operated pursuant to a systematic procedure that strictly limited the discretionary authority of police officers and reduced the potential for arbitrary treatment.

"As required by CCSO policy, multiple deputies manned the checkpoint, deputies were required to stop every vehicle and were trained to look primarily for violations of motor vehicle laws, and the checkpoint itself was approved and supervised by a commanding officer. Finally, deputies did not detain drivers longer than was reasonably necessary to accomplish the purpose of checking a license and registration, except, as in Moore's case, when other facts came to light creating a reasonable suspicion of criminal activity. (citing *United States v. McFayden*, 865 F.2d 1306, 1311-12 (D.C. Cir. 1989)). In sum, far from exercising unfettered discretion, the actions of CCSO officers were plainly regulated and specifically directed toward ensuring highway safety and compliance with motor vehicle laws. Such a narrowly prescribed operation clears the hurdle of Fourth Amendment reasonableness."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/Opinions/184606.P.pdf

SEARCH AND SEIZURE: Search Warrant; Discrepancy in Street Address

Kellensworth v. State, ACA, No. CR-19-684, 2020 Ark. App. 249, 4/22/20

The charges in this case arose from the execution of a search warrant on December 30, 2016, at a mobile home that Bobby Kellensworth occupied with his daughter and her mother and where drugs and related paraphernalia also were found. The search warrant was obtained approximately two weeks after two controlled drug purchases by confidential informants from Kellensworth that occurred at the same location.

On January 9, 2018, Kellensworth filed a motion to suppress evidence seized pursuant to the search warrant listing 354 Grant 52 as the place to be searched. The State responded on January 26, and a hearing on the motion to suppress was held on February 26. After taking the motion under advisement, the circuit court entered an order denying Kellensworth's motion on March 7.

Just prior to trial, the State filed a motion in limine to preclude the defense from presenting testimony or evidence related to Kellensworth's precise numerical address and/or a mailbox listing his first initial and last name and showing the numerical address as 386 Grant 52. The State argued that because the circuit court had already ruled that the search warrant was valid and all evidence seized pursuant to it was admissible, any mention of Kellensworth's numerical address or the mailbox listing his name and numerical address would confuse the jury. The circuit court granted the State's motion and specified that defense counsel could not cross-examine the State's witnesses about inconsistent physical addresses listed throughout the law-enforcement documents.

Kellensworth filed a motion to suppress evidence seized pursuant to the search warrant listing 354 Grant 52 as the place to be searched.

The Arkansas Court of Appeals found as follows:

"The Fourth Amendment to the United States Constitution provides that no search warrants shall issue except those 'particularly describing the place to be searched.' *Walley v. State*, 353 Ark. 586, 605, 112 S.W.3d 349, 360 (2003). An application for a search warrant shall describe with particularity the places to be searched and the things to be seized. See Ark. R. Crim. P. 13.1(b) (2019). Further, a warrant shall state, or describe with particularity, the location and designation of the places to be searched. See Ark. R. Crim. P. 13.2(b)(iii). The requirement of particularity of describing the location and place to be searched exists to avoid the risk of the wrong property being searched or seized. *Beshears v. State*, 320 Ark. 573, 898 S.W.2d 49 (1995).

"Regarding the sufficiency of the description in an affidavit, it is 'sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place.' Ark. R. Crim. P. 13.1(b). A description in a warrant is sufficient if it enables the executing officer to locate and identify the premises with reasonable effort and whether there is any likelihood that another place might be mistakenly searched. *Perez v. State*, 249 Ark. 1111, 463 S.W.2d 394 (1971).

"Regardless of what Kellensworth claims his numerical street address to be, the record does not indicate that officers relied on that detail in obtaining and executing the search warrant. They focused primarily on the photos and their recollections of where the recent controlled drug buys took place. Under these circumstances, even though there was a minor discrepancy in the numerical street address noted in the affidavit and the warrant, it did not invalidate the warrant or the resulting search. See, *Ritter*, 2011 Ark 427, at 8, 385 S.W.3d at 745. Any discrepancy in the address was mitigated by the fact that Kellensworth was named in the accompanying affidavit and because photographs of the particular property to be searched were attached. *Perez,* 249 Ark. at 1117–18, 463 S.W.2d at 397. Finally, there is no dispute that the premises that were intended to be searched were, in fact, searched. Accordingly, we hold that the circuit court did not clearly err in denying Kellensworth's motion to suppress the evidence seized as a result of the execution of the search warrant."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/courtofappeals/en/469615/1/document.do

SEARCH AND SEIZURE:

Search Warrant; Staleness

United States v. Augard

CA8, No. 19-1507, 3/31/20

Joel Thomas Augard pled guilty to two counts of production of child pornography in violation of 18 U.S.C. §§ 2251(a) and (e) and one count of possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2). Augard moved to suppress evidence uncovered when police searched the home he shared with his parents. Augard makes several attacks on the search warrant in this case including the claim of staleness of the information in the supporting affidavit.

The Court of Appeals for the Eighth Circuit found that "while there is no bright-line test for determining staleness, the courts look to a

variety of factors, including the nature of the criminal activity and the type of property subject to search. *United States v. Huyck*, 849 F.3d 432, 439 (8th Cir. 2017). If the elapsed time between the criminal activity and warrant issuance in the case leaves the evidence too stale to support a finding of probable cause, the nature of the crime and evidence sought may still militate in favor of applying the good-faith exception. *United States v. Rugh*, 968 F.2d 750, 754 (8th Cir. 1992)."

"The criminal activity in this case is sexual abuse of a child and production of child pornography. The essence of these crimes involves the abuse of a trust and power relationship, which frequently delays reporting until the minor has obtained majority. G.P. eventually reported the abuse directly to Detective Lori Kelly, who independently corroborated details of the allegation. The affidavit described Augard's extensive grooming of G.P., his repeated abuse of G.P. over a one-year period, and his efforts to contact G.P. as recently as 2016. The affidavit also described Augard's prolonged unusual interest in G.P., his need to memorialize and revisit the sexual abuse by retaining and viewing videos, and his efforts to preserve the recordings on a computer for future viewing. Considering the specific nature of the crimes being investigated, the evidence supporting the warrant application was not so stale as to render the officer's reliance on the warrant entirely unreasonable."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/03/191507P.pdf

SEARCH AND SEIZURE:

Stop and Frisk; Basis for Stop

United States v. Jones

CA6, No. 19-5633, 3/23/20

Ti'Erica McKinney reported that she had returned home to find her ex-boyfriend, Jermaine Jones, inside her house, refusing to leave. Jones chased her outside, throwing items. McKinney was hit by a bottle of dish soap. McKinney saw Snipes drive Jones away in a white "Tahoe like vehicle."

Paducah Officer Parrish took steps to corroborate McKinney's story. McKinney stated that Jones had threatened to kill her and could easily obtain a gun. She repeatedly stated that she planned to get an emergency protective order and that she feared Jones would return once the officers left.

Parrish stayed in his car near the house and saw two black males in a white Chevy Suburban at the nearby intersection. Parrish stopped the vehicle. A pat-down of Jones revealed nothing. Parrish arrested him for assault and placed him in the back of his squad car. Jones yelled that the cuffs were too tight. When Parrish checked the cuffs, he spotted a firearm in the back of his cruiser that he had not seen before.

Jones, a convicted felon, was indicted for unlawful possession of a firearm. The district court suppressed the firearm, reasoning that the Fourth Amendment bars investigatory stops prompted by a completed misdemeanor.

The Sixth Circuit reversed, noting the problems inherent in requiring officers to make the bright-line distinction. The proper inquiry looks at the nature of the crime, how long ago it was committed, and the ongoing risk to public safety.

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0088p-06.pdf

SEARCH AND SEIZURE:

Stop and Frisk; Illegal Seizure

United States v. Delaney

DCC, No. 18-3093, 4/17/20

On December 31, 2017, officers Richard Willis and Jason Boockholdt were patrolling a residential area specifically for New Year's Eve celebratory gunfire or other crime. Shortly after midnight, the officers heard repeated gunfire in multiple directions, including shots that the officers believed to be close by.

After driving for approximately one minute, reversing direction, and turning a few times, they pulled into a narrow parking lot. Activating the cruiser's take-down light, a spotlight that enabled them to better observe the area, the officers encountered a line of parked cars. One, a Jeep backed-in "close to an adjacent building and/or cement block," was occupied by two individuals: Antwan Delaney, sitting in the driver's seat, and his companion, Jalisa Boler, sitting in the passenger seat.

The officers stopped their cruiser near the parking lot's entrance, more than 3 feet away from the nose of the Jeep. Although the marked police car did not completely block the Jeep from exiting, it would have taken some maneuvering, a number of turns for the Jeep to get out of the parking lot. After further investigation a handgun was found under the passenger seat and spent casings were both on the passenger seat and outside both sides of the Jeep.

The Court of Appeals for the District of Columbia Circuit stated that this case illustrates the difficulties inherent in applying the Fourth Amendment's generalized prohibition against unreasonable searches and seizures to the vagaries of everyday police activity. After being charged as a felon in possession of a firearm, Antwan Delaney moved to suppress evidence obtained during a search of his vehicle on the ground that the seizure preceding the search violated the Fourth Amendment. Finding it a close call, the district court denied the suppression motion. Although the Court of Appeals found the question close, they reached the opposite conclusion. The Court stated that when officers seized Delaney, they lacked the requisite suspicion to justify the stop, meaning the subsequent search violated the Fourth Amendment.

"The officers' conduct on entering the parking lot amounted to a 'show of authority' sufficient to effectuate a stop. In *United States v. Goddard*, 491 F.3d 457 (D.C. Cir. 2007), we explained that although the presence of a police car might be somewhat intimidating, by itself, it is an insufficient show of authority to make a reasonable, innocent person feel unfree to leave. That said, we recognized that additional circumstances can transform an otherwise consensual police-citizen encounter into a stop. Here, several such additional circumstances beyond the mere presence of the officers' car in the parking lot, would have communicated to a reasonable person in Delaney's position that he was not at liberty to ignore the police presence and go about his business.

"First, the officers parked their cruiser a little over three feet away from the nose of the Jeep, which was backed up close to an adjacent building and/or cement block, such that the Jeep would have had to execute a number of turns to get out of the parking lot. In *United States v. Johnson*, 212 F.3d 1313 (D.C. Cir. 2000), we explained that blocking a vehicle can be the kind of application of physical force that constitutes a seizure. Here the officers parked their cruiser just a few feet away from the Jeep, impeding Delaney's movement.

"Second, upon entering the parking lot, the officers directed their cruiser's take-down light on the Jeep. Such aptly named lights are designed to illuminate the stopped car as well as to provide protection for an officer by blinding and disorienting the car's occupants if they look back at the squad car. *United States v. Shelby*, 234 F.3d 1275, (7th Cir. 2000) (unpublished). Given that a reasonable person placed in a spotlight would feel unfree to leave, the use of such lights is suggestive of a stop.

"Finally, the time and place of the encounter are indicative of a stop. As the Seventh Circuit observed, when a police encounter occurs at night and in a dark alley, a reasonable person would feel unfree to ignore the police presence. *United States v. Smith,* 794 F.3d 681, 684–85 (7th Cir. 2015). So too here: the officers encountered Delaney at night in a dimly lit, narrow parking lot— factors suggestive of a stop.
"A seizure occurred when the officers pulled into the parking lot, partially blocked Delaney's vehicle, and activated their take-down light. However, at that point, the officers possessed no specific and articulable facts to support a reasonable and articulable suspicion that Delaney was engaged in criminal activity. The officers violated the Fourth Amendment when they seized Delaney because they lacked reasonable suspicion to justify the stop."

READ THE COURT OPINION HERE:
https://www.cadc.uscourts.gov/internet/opinions.nsf/9F61ABFE4245A3538525854D004F6ED2/$file/18-3093-1838582.pdf

SEARCH AND SEIZURE: Stop and Frisk; License Plate Check Reveals Vehicle Owner has Suspended Driver's License

Kansas v. Glover

USSC, No. 18-56, 589 U.S. ___, 4/6/20

This case presents the question whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license. The Court held that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.

Kansas charged respondent Charles Glover, Jr., with driving as a habitual violator after a traffic stop revealed that he was driving with a revoked license. Glover filed a motion to suppress all evidence seized during the stop, claiming that the officer lacked reasonable suspicion.

The District Court granted Glover's motion to suppress. The Court of Appeals reversed, holding that "it was reasonable for Deputy Mehrer to infer that the driver was the owner of the vehicle because "there were specific and articulable facts from which the officer's common-sense inference gave rise to a reasonable suspicion. The Kansas Supreme Court reversed. According to the court, Deputy Mehrer did not have reasonable suspicion because his inference that Glover was behind the wheel amounted to "only a hunch" that Glover was engaging in criminal activity.

Neither Glover nor the police officer testified at the suppression hearing. Instead, the parties stipulated to the following facts:

"1. Deputy Mark Mehrer is a certified law enforcement officer employed by the Douglas County Kansas Sheriff 's Office.

2. On April 28, 2016, Deputy Mehrer was on routine patrol in Douglas County when he observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ.

3. Deputy Mehrer ran Kansas plate 295ATJ through the Kansas Department of Revenue's file service. The registration came back to a 1995 Chevrolet 1500 pickup truck.

4. Kansas Department of Revenue files indicated the truck was registered to Charles Glover Jr. The files also indicated that Mr. Glover had a revoked driver's license in the State of Kansas.

5. Deputy Mehrer assumed the registered owner of the truck was also the driver, Charles Glover Jr.

6. Deputy Mehrer did not observe any traffic infractions, and did not attempt to identify the driver of the truck. Based solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop.

7. The driver of the truck was identified as the defendant, Charles Glover Jr.

Upon review, the United States Supreme Court found as follows:

"Under this Court's precedents, the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' *United States v. Cortez*, 449 U.S. 411, 417–418 (1981); see also *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause. *Navarette v. California*, 572 U.S. 393, 397 (2014); *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

"Because it is a 'less demanding' standard, reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause. *Alabama v. White*, 496 U.S. 325, 330 (1990). The standard depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Courts cannot reasonably demand scientific certainty where none exists. Rather, they must permit officers to make commonsense judgments and inferences about human behavior.

"Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop.

"The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry falls considerably short of 51% accuracy. Empirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians.

"Although common sense suffices to justify this inference, Kansas law reinforces that it is reasonable to infer that an individual with a revoked license may continue driving. The State's license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive. The concerns motivating the State's various grounds for revocation lend further credence to the inference that a registered owner with a revoked Kansas driver's license might be the one driving the vehicle."

The United States Supreme Court reversed the judgment of the Kansas Supreme Court and remanded the case for further proceedings not inconsistent with this opinion.

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/19pdf/18-556_e1pf.pdf

SEARCH AND SEIZURE: Stop and Frisk; Name Check on Individual Stopped
Hall v. City of Chicago
CA7, No. 19-1347, 3/23/20

Police officers stopped the plaintiffs numerous times for violating an ordinance while they were panhandling on the streets of Chicago. During these stops, the officers typically asked the plaintiffs to produce identification and then used the provided ID cards to search for outstanding warrants for their arrest or investigative alerts.

The plaintiffs sued under 42 U.S.C. 1983, claiming that these checks unnecessarily prolong street stops and that the delays constitute unreasonable detentions in violation of the Fourth Amendment. They argued that Chicago maintained an unconstitutional policy or practice of performing these checks citing a Chicago Police Department Special Order regulating name-checks that purportedly omitted essential constitutional limits, arguing that the Department failed to train on these same constitutional limits, and claiming that the former Superintendent promulgated an unconstitutional policy by promoting name-checks in conjunction with every street stop.

The Seventh Circuit affirmed the dismissal of the Monell claims.

"Officers may execute a name check on an individual incidental to a proper stop under Terry v. Ohio, as long as the resulting delay is reasonable. The plaintiffs failed to establish that they suffered an underlying constitutional violation such that Chicago can be held liable."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D03-23/C:19-1347:J:St__Eve:aut:T:fnOp:N:2490838:S:0

SEARCH AND SEIZURE: Stop and Frisk; Request for Identification as a Reasonable Extension of the Stop
United States v. Williams
CA8, No. 19-1827, 4/9/20

Officers Chad Norris and Amanda Woods of the Windsor Heights, Iowa Police Department in October 2017 were dispatched to a Walmart store parking lot to assist with a 'road rage' incident. The woman who reported the incident claimed that another driver, later identified as Williams, cut off her vehicle, then exited his vehicle and hit her driver's side window while yelling at her. The reporting party stated that Williams threatened to shoot her. She described details about Williams's physical appearance, as well as the make, color, and license plate of his car.

Based on these descriptions, the officers located Williams near his vehicle. Woods approached Williams, handcuffed him, and performed a pat-down search. During this encounter, Williams admitted to telling a woman he had a gun and threatening her, but he denied having a firearm, and the pat down did not reveal a weapon. While Norris told Williams what the reporting party had said, Williams became extremely emotional and stated he was experiencing anxiety. The officers then removed the handcuffs from Williams in an attempt to calm him.

About four minutes after the officers first approached Williams, Norris asked Williams for his identification. Williams responded that his identification was in his car and asked if the officers would just run his name. Norris again requested the identification. As soon as Williams opened the driver's side door, Norris smelled the odor of marijuana coming from the vehicle. Williams handed Norris a driver's license with the name Jordan Gross and said that he had "gained a lot of weight and cut his hair." Norris did not believe that the driver's license belonged to Williams. When Norris asked Williams about the smell of marijuana and told Williams he was going to search the car, Williams started physically struggling with the officers and eventually ran from the parking lot, leaving the car unlocked and the door open. After Williams fled, the officers found a .22 caliber pistol and more than 400 grams of marijuana.

After his conviction, Williams argues on appeal that the officers impermissibly continued to detain and question him after they determined he did not have a firearm on his person and that the search of his vehicle was unlawful.

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

"The officers lawfully continued their investigation after they determined Williams was not carrying a gun because, during the pat down, Williams admitted that he had threatened to shoot a woman. Because Williams admitted to threatening the reporting party, the officers had at least a reasonable suspicion that he had committed harassment in violation of Iowa law. Given this admission, the officers had 'sufficient suspicion to justify the expansion of the investigation' by asking for Williams's identification because his identity was necessary to pursue charges should the reporting party choose to do so. See *United States v. Horton*, 611 F.3d 936, 941 (8th Cir. 2010); *United States v. Dawdy*, 46 F.3d 1427, 1430 (8th Cir. 1995). Therefore, the officers' request for Williams's identification was a reasonable and lawful extension of their initial investigatory stop.

"The officers then had probable cause to search Williams's vehicle because Norris smelled marijuana when Williams opened the car door. See *United States v. Beard,* 708 F.3d 1062, 1065 (8th Cir. 2013). During a lawful investigatory stop, officers may search a vehicle when they develop probable cause to believe it contains contraband or evidence of criminal activity. We have repeatedly held that the odor of marijuana provides probable cause for a warrantless search of a vehicle under the automobile exception. See *United States v. Brown*, 634 F.3d 435, 438 (8th Cir. 2011). Thus, the district court did not err in denying Williams's motion to suppress evidence obtained from the search of his vehicle."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/04/191827P.pdf

SEARCH AND SEIZURE: ShotSpotter's Surveillance System; Vehicle Stop in Area
United States v. Rickmon
CA7, No. 19-2054, 3/11/20

One hundred police departments use a surveillance network of GPS-enabled acoustic sensors called ShotSpotter to identify gunfire, quickly triangulate its location, and then direct officers to it. ShotSpotter's surveillance system uses microphones to record gunshots. An individual determines whether the sound is a shot. When that individual confirms a gunshot, ShotSpotter contacts local police.

At 4:40 a.m., ShotSpotter reported gunshots coming from North Ellis Street. Peoria, Illinois, Officer Ellefritz, driving toward the address, heard the dispatcher report a second ShotSpotter alert of more shots fired. Ellefritz, the first responding officer, saw headlights leaving North Ellis, coming his way. He activated his emergency lights and shouted "stop."

Within seconds, the car stopped next to Ellefritz's cruiser; its occupants pointed backward, yelling: "They are down there!" Ellefritz observed 15–20 people at the street's dead end, approximately 300 feet from him. Ellefritz kept his firearm drawn. The driver and the passenger, Rickmon, kept their hands up until backup arrived. Rickmon then stated that someone had shot him in the leg. With the driver's consent, Ellefritz searched the automobile and found a handgun under Rickmon's seat. Rickmon was charged with possession of a firearm by a felon. Ellefritz testified that there was nothing particularly unusual about this car, except leaving the area of the gunfire. The Seventh Circuit affirmed the denial of a motion to suppress.

"Altogether, the circumstances here—the reliability of the police reports, the dangerousness of the crime, the stop's temporal and physical proximity to the shots, the light traffic late at night, and the officer's experience with gun violence in that area—provided reasonable suspicion to stop Rickmon's vehicle. As in similar past challenges to automobile seizures, there is far more in this case than mere physical proximity' to the criminal activity. In isolation, any one of those circumstances might not be sufficient. But viewed collectively, they start to seem suspicious. In such a situation, it is reasonable for police to act quickly lest they lose the only opportunity they may have to solve a recent violent crime or to interrupt an advancing one."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D03-11/C:19-2054:J:Flaum:aut:T:fnOp:N:2486041:S:0

SEARCH AND SEIZURE: Vehicle Stop; Extending the Stop
United States v. Fruit
CA3, No. 19-1326, 5/29/20

Pennsylvania Trooper Kent Ramirez stopped a car for speeding after running the license plate and learning the car was owned by Enterprise. It lacked typical rental stickers. Each vent had an air freshener clipped to it.

The driver, Jerry Fruit, gave Ramirez his license and rental car agreement, identifying his passenger, Tykei Garner. The rental agreement listed Fruit as the authorized driver but limited to New York and appeared to have expired 20 days earlier. Ramirez questioned Garner; 12 minutes into the stop, Ramirez put their information into his computer and learned that neither man had

outstanding warrants, although Fruit was on supervised release. Both had extensive criminal records, including drug and weapons crimes.

Enterprise confirmed that Fruit had extended the rental beyond the listed expiration date. Ramirez resolved to ask permission to search the vehicle but waited for backup, which arrived 37 minutes into the stop. Fruit declined permission to search. Ramirez stated that he was calling for a K-9 and Fruit was not free to leave.

"Zigi" arrived 56 minutes into the stop, alerted at the car, then entered the vehicle and alerted in the back seat and trunk. A search revealed 300 grams of cocaine and 261 grams of heroin. Both men were indicted for conspiracy to possess (and possession) with intent to distribute heroin and cocaine. The district court denied their motion to suppress, ruling that Ramirez had "an escalating degree of reasonable suspicion" that justified extending the stop.

In a consolidated appeal, the Third Circuit affirmed. "Ramirez had reasonable suspicion to extend the stop based on information he obtained during the first few minutes of the traffic stop before he engaged in an unrelated investigation; no unlawful extension of the stop occurred."

READ THE COURT OPINION HERE:
https://cases.justia.com/federal/appellate-courts/ca3/19-1326/19-1326-2020-05-29.pdf?ts=1590786006

SEARCH AND SEIZURE: Vehicle Stop; Law Enforcement Officer May Look at Undercarriage of Vehicle Without Probable Cause

United States v. Sanchez

CA8, No. 18-1890, 4/3/20

In this case, the Eighth Circuit Court of Appeals affirmed the district court's denial of defendant's motion to suppress evidence recovered during a traffic stop. The officer saw an out-of-state truck with paper tags driving in the middle of the night. He discovered neither adult in the vehicle had a driver's license and the paper tags were expired, there was some confusion as to the name of the owner, the purported purpose for the trip was a two-to-three-day painting job, but no supplies were present other than one can of paint, He learned all of this after having his suspicion piqued by the fact that defendant and his partner gave different names. He also thought it unusual that an unlicensed driver would bring small children and an unlicensed partner/significant other with him for the midnight travel in the unlicensed vehicle for a short term out-of-state job.

The court also held that, absent a physical trespass and during an otherwise lawfully extended stop, an officer may look at the undercarriage of a vehicle without probable cause. Finally, the officer had probable cause and had a legal basis for the subsequent seizure of a black plastic bag located above a spare tire.

"Absent a physical trespass and during an otherwise lawfully extended stop, an officer may look at the undercarriage of a vehicle without probable cause. Officers commonly look through windows and glance at wheel wells when sizing up the scene of stop, often for a combination of safety and investigatory reasons. It is well established that motorists have no recognized

privacy interest in the exterior of their vehicles, or the interior spaces visible to the public. See *Texas v. Brown*, 460 U.S. 730, 740 (1983) ('There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.' And, officers may crouch and change position when conducting an exterior examination or use a flashlight to artificially illuminate the area being viewed.

"Without controlling authority, Sanchez argues the undercarriage is distinct from the rest of the exterior, or the visible interior, of a vehicle. Further, the parties cite no case in which our own circuit has distinguished the undercarriage of a vehicle as outside the scope of a permissible exterior examination. And, although the Supreme Court has relied on a theory of physical trespass to strike the warrantless mounting of a GPS tracker on a vehicle's undercarriage, the Court has not held the simple act of viewing a vehicle's undercarriage requires probable cause. See *United States v. Jones*, 565 U.S. 400, 407–08 (2012).

"At the end of the day, and as a practical matter, drawing a line between permissible and impermissible areas of a vehicle's exterior that officers may observe absent physical trespass would seem wholly unworkable. Vehicle configurations vary substantially and officers' inspections of undercarriages will involve varying levels of physical contortion. A distinction that would permit officers to look in windows, crane their necks, stand on their toes, crouch to look in wheel wells, and shine flashlights at night but that would preclude them from looking 'too far' under a vehicle is too difficult to articulate. Separating the undercarriage from the rest of the vehicle's exterior necessarily entails defining a subjective dividing line that will vary in each situation and leave officers little guidance as to the limits of their authority.

"Finally, Sanchez argues that, even if officers could view the underside of the truck, they could not seize the black plastic bundle because, without physically invading the opaque wrapping, they could not have known its contents. Upon seeing through the openings in the spare wheel and noticing something wrapped in black plastic, this new information added to the totality of the circumstances already known to officers, raising the level of suspicion they possessed. Here, before any physical trespass, officers possessed probable cause and, therefore, a legal basis for the subsequent seizure of the package. In fact, Nietert testified that he previously had encountered other motorists with contraband similarly situated. In this situation, officers did not need to know with certainty, or see, the contents of the bundle to have probable cause."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/04/181890P.pdf

SEARCH AND SEIZURE: Vehicle Stop; Unjustifiably Prolonging the Traffic Stop
United States v. Mayville
CA10, N0. 19-4008, 4/7/20

Around 1:45 a.m. on May 6, 2016, Utah Highway Patrol Trooper Jason Tripodi stopped a red Audi for traveling 71 m.p.h. in a 60-m.p.h. zone, in violation of state law. After the Audi came to a stop, Trooper Tripodi observed the driver hunched over in the vehicle as if he was "trying to stash something or hide something." Trooper Tripodi approached the Audi and spoke with John Elisha Mayville, who was the driver and sole occupant of the vehicle, about his speeding.

During this initial six-minute interaction, Mayville informed Trooper Tripodi he was traveling to Grand Junction, Colorado, from Lake Havasu, Arizona. Trooper Tripodi asked for Mayville's license, registration, and proof of insurance. While Mayville searched for these documents, Trooper Tripodi noticed Mayville had trouble finding the requested paperwork. After several minutes, Mayville provided his out-of-state driver's license to Trooper Tripodi, but he was unable to produce any registration documents for the vehicle.

According to Trooper Tripodi, Mayville "seemed confused" and "wasn't able to multitask like a normal individual would be able to" during this initial interaction. Trooper Tripodi also observed that Mayville seemed like he "was drowsy, or something was wrong, something was up." Based on these observations, Trooper Tripodi asked Mayville if he "was okay" multiple times. Trooper Tripodi asked Mayville to accompany him to the patrol car to chat while he filled out the paperwork for the stop. Mayville declined this invitation and remained in his vehicle.

Around 1:52 a.m., seven minutes after the stop began, Trooper Tripodi returned to his patrol car and began filling out paperwork for the stop. He also radioed dispatch to run a records check on Mayville, which consisted of two components. First, Trooper Tripodi asked dispatch to run Mayville's license and check for warrants. Second, the trooper requested Mayville's criminal history through the Interstate Identification Index, commonly referred to as a Triple I check. After radioing dispatch for the records, but before dispatch returned the results, Trooper Tripodi requested a narcotic detector dog. He then continued working on the citation, including "attempting to figure out whose vehicle it was because [Mayville] ha[d] no registration paperwork."

At approximately 1:59 a.m., Trooper Scott Mackleprang arrived at the scene with his narcotic detector dog, Hasso. At this point, Trooper Tripodi backed up his patrol car because he anticipated possibly "run[ning] through sobriety tests or something like that at a later point in the stop." After briefly speaking with Trooper Tripodi, who remained in his patrol car and continued to work on the citation, Trooper Mackleprang asked Mayville to exit the vehicle so he could screen it with Hasso. Because Mayville refused, Trooper Mackleprang requested Trooper Tripodi's assistance. Trooper Mackleprang observed that Mayville was "real slow to answer" and had delayed reactions, "almost like a blank stare," which caused him to suspect Mayville was impaired. Mayville ultimately exited the vehicle, and Trooper Tripodi patted him down for weapons.

Trooper Tripodi then stood with Mayville t on the side of the road while Trooper Mackleprang had Hasso conduct a free-air sniff around the car. At approximately 2:05 a.m., Hasso alerted to the odor of narcotics in the vehicle. And less than thirty seconds later, dispatch responded to Trooper Tripodi's records request with information indicating Mayville had a criminal record. The entirety of the traffic stop, from Trooper Tripodi's initial contact with Mayville to Hasso's alert, lasted approximately nineteen minutes.

The subsequent search of Mayville's vehicle revealed a methamphetamine pipe under the driver's seat and two guns, one equipped with a silencer, in the engine compartment. In the trunk, the troopers found roughly a pound of methamphetamine, an ounce of heroin, and a scale. After discovering the guns and drugs, the troopers placed Mayville under arrest.

Mayville pleaded guilty to possession of methamphetamine with intent to distribute and possession of an unregistered firearm silencer. Mayville challenges the district court's denials of his motions to suppress evidence of drugs and firearms seized from his car by Utah Highway Patrol troopers during a traffic stop. On appeal, Mayville argues the troopers violated his Fourth Amendment rights described in *Rodriguez v. United States*, 575 U.S. 348 (2015), because they unjustifiably prolonged the traffic stop beyond the time needed to complete the tasks incident to the stop's mission.

The Tenth Circuit Court of Appeals stated: "The Supreme Court's decision in Rodriguez constrains what law enforcement officers may do during a routine traffic stop in the absence of additional reasonable suspicion. But Rodriguez does not require courts to second-guess the logistical decisions of officers so long as their actions were reasonable and diligently completed within the confines of a lawful traffic stop. This is because reasonableness—rather than efficiency—is the touchstone of the Fourth Amendment. Because the traffic stop here did not exceed the time reasonably required to execute the tasks relevant to accomplishing the mission of the stop, Defendant's nineteen-minute roadside detention accorded with the Fourth Amendment's dictates. Thus, the district court did not err in denying Defendant's motions to suppress."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/opinions/19/19-4008.pdf

SECOND AMENDMENT: Prohibition Against Mentally Ill Possessing Firearms

Mial v. United States

CA9, No. 18-36071, 3/11/20

The Ninth Circuit Court of Appeals affirmed the district court's dismissal of a 42 U.S.C. 1983 action alleging an as-applied Second Amendment challenge to 18 U.S.C. 922(g)(4). Section 922(g)(4) prohibits plaintiff from possessing firearms due to his involuntary commitment in 1999 to a mental institution for more than nine months after a Washington state court found plaintiff to be both mentally ill and dangerous. Plaintiff argued that the statute's continued application to him despite his alleged return to mental health and peaceableness violates the Second Amendment.

The Court held that the prohibition on the possession of firearms by persons, like plaintiff, whom a state court has found to be both mentally ill and dangerous is a reasonable fit with the government's indisputably important interest in preventing gun violence. The Court explained that scientific evidence supports the congressional judgment that those who have been committed involuntarily to a mental institution still pose an increased risk of violence even years after their release from commitment. Therefore, in this case, the panel held that the statute's continued application to plaintiff did not violate the Second Amendment.

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/11/18-36071.pdf

SIXTH AMENDMENT:
Unanimous Verdict in a Jury Trial
Ramos v. Louisiana
USSC, No. 19-5924, 590 U.S. ____, 4/20/20

The United States Supreme Court stated that in 48 states and in federal court, a single juror's vote to acquit is enough to prevent a conviction. However, Louisiana and Oregon punish people based on 10-to-2 verdicts. Ramos was convicted in a Louisiana court by a 10-to-2 jury verdict and was sentenced to life without parole.

The Court stated that the Sixth Amendment right to a jury trial, as incorporated against the states by the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense. Juror unanimity is a vital common law right. In overturning its 1972 decisions of *Apodaca v, Oregon*, 406 U.S. 404 and *Johnson v. Louisiana*, 406 U.S. 356, the Court stated that the reasoning, in those cases, was gravely mistaken. "If the jury trial right requires a unanimous verdict in federal court, it requires no less in state court."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf

SUBSTANTIVE LAW: Insanity Defense
Kahler v. Kansas
USSC, no. 118-6135, 598 U.S. ___, 3/23/20

Kansas charged James Kahler with capital murder after he shot and killed four family members. Prior to trial, he argued that Kansas's insanity defense violates due process because it permits the State to convict a defendant whose mental illness prevented him from distinguishing right from wrong. The court disagreed and the jury returned a conviction. During the penalty phase, Kahler was free to raise any argument he wished that mental illness should mitigate his sentence, but the jury still imposed the death penalty. The Kansas Supreme Court rejected Kahler's due process argument on appeal.

Upon review, the United States Supreme Court found, in part, as follows:

"In *Clark v. Arizona*, 548 U.S. 735, this Court catalogued the diverse strains of the insanity defense that States have adopted to absolve mentally ill defendants of criminal culpability. Two—the cognitive and moral incapacity tests—appear as alternative pathways to acquittal in the landmark English ruling M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718. The moral incapacity test asks whether a defendant's illness left him unable to distinguish right from wrong with respect to his criminal conduct.

"Kansas has adopted the cognitive incapacity test, which examines whether a defendant was able to understand what he was doing when he committed a crime. Specifically, under Kansas law a defendant may raise mental illness to show that he 'lacked the culpable mental state required as an element of the offense charged,' Kan. Stat. Ann §21–5209. Kansas does not recognize any additional way that mental illness can produce

an acquittal, although a defendant may use evidence of mental illness to argue for a lessened punishment at sentencing. See §§21–6815(c)(1)(C), 21–6625(a). In particular, Kansas does not recognize a moral-incapacity defense.

"Due process does not require Kansas to adopt an insanity test that turns on a defendant's ability to recognize that his crime was morally wrong. A state rule about criminal liability violates due process only if it offends some principle of justice so rooted in the traditions and conscience our people as to be ranked as fundamental. *Leland v. Oregon*, 343 U.S. 790, 798. History is the primary guide for this analysis. The due process standard sets a high bar, and a rule of criminal responsibility is unlikely to be sufficiently entrenched to bind all States to a single approach. As this Court explained in *Powell v. Texas*, 392 U.S. 514, the scope of criminal responsibility is animated by complex and ever-changing ideas that are best left to the States to evaluate and reevaluate over time. This principle applies with particular force in the context of the insanity defense, which also involves evolving understandings of mental illness.

"This Court has thus twice declined to constitutionalize a particular version of the insanity defense, see *Leland*, 343 U.S. 790; *Clark*, 548 U.S. 735, holding instead that a State's 'insanity rule is substantially open to state choice.'"

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/19pdf/18-6135_j4ek.pdf