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Contents

CIVIL LIABILITY: Aerial Surveillance Program

Leaders of A Beautiful Struggle v. Baltimore Police Department

CA4, No. 20-1495, 11/5/20

Baltimore has experienced a serious recent rise in homicides. For each of the past five years, Baltimore has been victimized by at least three hundred murders. In 2017, Baltimore experienced a higher absolute number of murders than New York City, a city with fourteen times Baltimore's population. Moreover, the Baltimore Police Department (BPD) has struggled to respond effectively to this increase in murders. In 2019, it cleared just 32.1% of homicide investigations, its lowest rate in several decades.

One step taken by the BPD to strengthen its hand against violent crime is the Aerial Investigative Research program (AIR). It is a carefully limited program of aerial observations of public movements presented as dots, and it is important at the outset to say all the things the program does not do. It does not search a person's home, car, personal information or effects. It does not photograph a person's features. The program has been progressively circumscribed to meet the thoughtful objections of civil libertarians, though not sufficiently in plaintiffs' view.

To implement and test this program, the BPD has partnered with a private company, Persistent Surveillance Systems (PSS). The program operates by flying three small planes over Baltimore during daytime hours, weather permitting. The planes are equipped with cameras that cover about ninety percent of the city at any given time. The cameras employ a resolution that reduces each individual on the ground to a pixelated dot, thus making the cameras unable to capture identifying characteristics of people or automobiles.

The resulting photographs are transmitted to a control room, staffed by fifteen to twenty-five analysts employed by PSS along with BPD officers. The control room can access the photographs only when specific violent crimes—shootings, robberies, and carjackings—are reported in a particular location. Upon receiving a notification, analysts can "tag" the dots photographed around the crime scene and track those dots' public movements in the hours leading up to and following the crime. The process takes about eighteen hours and provides the BPD with a report that includes the location and timing of the crime, the observable actions at the crime scene, the tracks of people and vehicles to and from the crime scene, and the locations the individuals at the crime scene visited before and after the crime. Using that data, the police can employ existing surveillance tools, such as on-the-ground surveillance cameras and license-plate readers, to identify witnesses and suspects. Within seventy-two hours, analysts can give the police a more detailed report about those present at the crime scene that potentially includes identifying information.

The BPD has also adopted several limitations on the collection, use, and retention of photographs obtained through AIR surveillance in its contract with PSS. Those limitations are as follows:

• AIR's planes fly only the daytime hours, weather permitting, and never at night.

• AIR uses limited resolution cameras that identify individuals only as pixelated dots in a photograph. Analysts examining these photographs are not able to identify an individual's race, gender, or clothing.

• If a dot is seen entering a building in a photograph, analysts cannot know if the same person is leaving the building when they see a dot leave the building without the use of other surveillance tools. • The cameras do not utilize zoom, infrared, or telephoto technologies.

• Analysts cannot access photographs until they receive a notification related to the investigation of a specific murder, non-fatal shooting, armed robbery, or carjacking.

• There will be no live tracking of individuals. Analysts can only use AIR's photographs to look at past movements.

• If an arrest is made using the AIR technology, the photos related to the arrest will be given to the prosecutor and defense counsel. Otherwise, all photographs collected by AIR will be deleted after forty-five days.

On April 9, 2020, Leaders of A Beautiful Struggle (LBS) sued the BPD and Commissioner Harrison under 42 U.S.C. § 1983 challenging the constitutionality of the AIR program under the First and Fourth Amendments. They alleged that the program would infringe on their reasonable expectations of privacy because the police were likely to generate activity reports about them, that it would hinder their work in the community by making people afraid to talk to them on the streets for fear of being surveilled, and that it would chill their First Amendment rights by making them more hesitant to associate with people for fear of being observed. They sought a preliminary injunction.

The Fourth Circuit concluded that the district court did not abuse its discretion in denying LBS' request for a preliminary injunction against Baltimore's aerial surveillance (AIR) program. The court concluded that LBS would be unlikely to succeed on the merits of their Fourth Amendment

claim because the AIR program does not infringe on a reasonable expectation of privacy. The court explained that the AIR program has built-in limitations designed to minimize invasions of individual privacy. Furthermore, the program seeks to meet a serious law enforcement need without unduly burdening constitutional rights.

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/201495.P.pdf

CIVIL LIABILITY: False Arrest; Independent-Intermediary Doctrine
Mayfield v. Curry
CA5, No. 19-60331, 9/22/20

Mark Mayfield, a lawyer, was a founder of the Mississippi Tea Party. In 2014, he supported State Senator Chris McDaniel's primary challenge to then-sitting U.S. Senator Thad Cochran.

The facts underlying this case involve four other supporters of Mr. McDaniel: John Mary; Rick Sager; Clayton Kelly; and Richard Wilbourn III (collectively, "the conspirators").

As the district court describes it, the conspirators "thought Cochran was a hypocrite and an adulterer who lived with his longtime aide in Washington, D.C. while his aging wife, Rose, was left alone in a Madison, Mississippi assisted living facility called St. Catherine's Village." They therefore planned to take a photo of Mrs. Cochran in her room at St. Catherine's and use it in an attack ad against her husband. The conspirators sought the assistance of Mayfield, whose mother lived in the same facility. Mayfield refused to photograph Mrs. Cochran himself but agreed to show the conspirators the location of her room. In late March or early April of 2014, Mayfield met one of the conspirators at St. Catherine's and pointed "down the hall" to the location of Mrs. Cochran's room. On April 20, 2014, one of the conspirators went to Mrs. Cochran's room and took a video of her lying in bed. He posted an attack ad on YouTube six days later. The ad, which contained a still photo of Mrs. Cochran in her bed, went viral before being taken down in a matter of hours.

About one month later, the Madison Police Department arrested Mayfield and two of the conspirators. The basis for Mayfield's arrest warrant was the affidavit of Officer Vickie Currie, who stated that Mayfield had communicated with the conspirators and assisted them in their effort to photograph Mrs. Cochran. The police, based on an affidavit from Officer Chuck Harrison, also executed search warrants at Mayfield's home and office. Mayfield's largest client left him the next day, causing the "complete collapse of his law practice." Mayfield became depressed and was prescribed medication for sleep, depression, and anxiety. On June 27, 2014, Robin Mayfield ("Mrs. Mayfield") found her husband dead of a gunshot wound to the head. The coroner ruled the death a suicide.

This Section 1983 claim against Officer Currie is rooted in the Fourth Amendment. Mrs. Mayfield alleges that Officer Vickie Currie violated Mr. Mayfield's constitutional rights when she "submitted to a municipal judge a warrant-application affidavit that was completely devoid of facts showing the elements of any crime, much less the crime cited in the warrant." Officer Currie responds that there was no constitutional violation because the issuance of the arrest warrant broke the causal chain, immunizing her from liability.

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

"It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party. But that shield against liability, known in this circuit as the independent-intermediary doctrine, is not absolute. There are two ways to overcome the doctrine relevant here. First, in *Malley v. Briggs*, 475 U.S. 335 (1986) the Supreme Court held that an officer can be held liable for a search authorized by a warrant when the affidavit presented to the magistrate was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." The *Malley* wrong is not the presentment of false evidence, but the obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant. And second, under *Franks v. Delaware*, 438 U.S. 154 (1978), officers who deliberately or recklessly provide false, material information for use in an affidavit or who make knowing and intentional omissions that result in a warrant being issued without probable cause may be held liable.

"The question to be asked, under *Malley*, is whether a reasonably well trained officer in Officer Currie's position would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant. Officer Currie argues that the information she and other investigators provided to the magistrate throughout the course of their investigation clearly was sufficient to establish probable cause to issue a warrant for Mayfield's arrest." The Court of Appeals for the Fifth Circuit agreed.

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/19/19-60331-CV0.pdf

CIVIL LIABILITY:

Emergency Vehicle Involved in Accident

Dean v. McKinney

CA4, No. 19-1383, 10/2/20

Anderson County, South Carolina Deputy Sheriff Stephen B. "Brent" McKinney was on patrol on October 16, 2016, in his government-owned SUV. At approximately 10:30 p.m., fellow Deputy Sheriff Kenneth Lollis radioed a request for assistance with a traffic stop. Believing that Lollis's voice sounded as if he was "shaken," Shift Supervisor Lieutenant Scott Hamby issued a "Code 3" for available officers to assist Lollis. Per Sheriff's Office policy governing "Emergency Vehicle Operations" and state law, a "Code 3" represents an "emergency response where human life or safety is threatened." A Code 3 is the only time officers are permitted to exceed posted speed limits or otherwise disregard traffic regulations. Other than with respect to certain exemptions—none of which apply here—officers are required to use emergency lights and sirens for every Code 3 response.

McKinney activated his emergency lights and siren and proceeded to Lollis' location. A few seconds later, Lollis radioed that units could back down on emergency response but continue to him "priority." Hamby cancelled the Code 3 but advised responding officers to continue to Lollis's location. McKinney acknowledged Hamby's cancellation of the Code 3 and cut back to normal run, a non-emergency response where officers must abide by all traffic laws. McKinney deactivated his emergency lights and siren and began to reduce the speed of his vehicle. As he continued along the road to assist Lollis, McKinney passed Hamby, who was travelling in the opposite direction.

Approximately two minutes after Hamby cancelled the Code 3, McKinney lost control of his vehicle on a curved and unlit section of the road. He crossed the center line and struck Janel Harkness's sedan nearly head-on. Harkness sustained extensive and severe orthopedic and neurological injuries. Accident reconstruction determined that McKinney was travelling at least 83 miles per hour when he began to skid around the curve—at least 38 miles per hour over the 45 mile-per-hour speed limit. The Traffic Collision Report indicates, and McKinney does not contest, that he contributed to the collision and was driving too fast for conditions.

As a sheriff's deputy, McKinney received training on the operation of a police vehicle, including when department policy and state law required him to use his emergency lights and siren, and when and under what circumstances he could exceed the speed limit. His training also included instruction on the risks of night driving. The rules regarding safe vehicle operations were reinforced during remedial counseling McKinney received following his involvement in a series of incidents involving his operation of police vehicles.

In a suit under 42 U.S.C. 1983 alleging that McKinney violated Harkness's substantive due process rights by exhibiting conscience-shocking deliberate indifference to Harkness's life and safety, McKinney moved for summary judgment, asserting qualified immunity. The Fourth Circuit affirmed the denial of McKinney's motion. "A reasonable jury could conclude that McKinney violated Harkness's clearly established substantive due process right."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/191383.P.pdf

CIVIL LIABILITY: Excessive Deadly Force
Lam v. City of Los Banos
CA9, No. 18-17404, 9/25/20

Sonny Lam died after he was shot twice inside his home by a City of Los Banos police officer. A jury specifically found that Sonny had stabbed the officer in the forearm with a pair of scissors prior to the first shot, that the officer had retreated after firing the first shot, and that Sonny did not approach the officer with scissors before the officer fired the fatal second shot. Sonny's father, Tan Lam, filed a complaint alleging violations of constitutional rights under 42 U.S.C. § 1983 and state law negligence claims. The officer appeals the jury verdict in Lam's favor on those claims.

A three judge panel of the Ninth Circuit Court of Appeals panel held that viewing the evidence in the light most favorable to plaintiff, as it was required to do at this juncture, the evidence sufficiently supported the jury's special findings that Sonny did not approach Officer Acosta with scissors prior to Acosta firing the second shot.

"The panel held that the law was clearly established at the time of the shooting that an officer could not constitutionally kill a person who did not pose an immediate threat. The law was also clearly established at the time of the incident that firing a second shot at a person who had previously been aggressive, but posed no threat to the officer at the time of the second shot, would violate the victim's rights. In sum, the trial evidence, construed in the light most favorable to plaintiff, did not compel the conclusion that Acosta was entitled to qualified immunity."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/25/18-17404.pdf

CIVIL LIABILITY: Justified Use of Force
Ventura v. Rutledge
CA9, No. 19-16626, 10/22/20

On December 24, 2015, Martha Andrade, the mother of Omar Ventura's children, called 911 and reported that Omar had hit Andrade and his mother, Maria Ventura, and had smashed Andrade's vehicle's window. Officer Rutledge responded to the 911 call, which was classified as a violent domestic disturbance. When Officer Rutledge arrived at the home, Omar was not present. While Officer Rutledge interviewed Andrade, Omar started walking up the street toward the home. Andrade identified Omar to Officer Rutledge, pointing to him and exclaiming "that's him." Andrade moved behind trash cans in the driveway as Omar continued to approach. Officer Rutledge issued several orders for Omar to "stop." Despite these orders, Omar continued to advance toward Andrade and took out a knife from his pocket. Continuing to approach Andrade with knife in hand, Omar asked, "Is this what you wanted?" Officer Rutledge then shouted a warning to Omar to "[s]top or I'll shoot." When Omar did not stop, Officer Rutledge fired two shots at him. The shots killed Omar. At oral argument before the district court, the parties agreed that Omar got within 10–15 feet of Andrade before Officer Rutledge fired.

In an action brought pursuant to 42 U.S.C. § 1983 alleging that the officer used excessive deadly force when she shot Omar, the district court granted summary judgment to the police officer on the basis of qualified immunity. The Ninth Circuit Court of Appeals agreed.

"Omar was advancing with a knife toward a woman whom he had reportedly just assaulted. He ignored Officer Rutledge's repeated commands to stop and a warning that she would shoot. None of the cases plaintiff cited involved an officer acting under similar circumstances as Officer Rutledge, and therefore, plaintiff failed to show that it was clearly established that Officer Rutledge's actions amounted to constitutionally excessive force."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/10/22/19-16626.pdf

CIVIL LIABILITY: Mental Health Seizure
Turner v. City of Champaign
CA7, No. 19-3446, 11/20

Richard Turner died during an encounter with police officers in Champaign, Illinois. Officers found Turner, a homeless man well-known to the police, on the ground, rolling around with his pants down, flailing his arms, and babbling unintelligibly, then walking back and forth across the street. Turner responded to the officers incoherently. They decided to detain Turner for mental health treatment. While waiting for the ambulance, Turner ran away. The officers gave chase. An officer grabbed Turner's shoulder. A struggle ensued. Officers pulled Turner to the ground and turned him on his stomach. Struggling to restrain Turner, the officers determined that Turner was not breathing and rushed to get a portable defibrillator. Once the defibrillator was activated, they were advised officers not to administer a shock but to begin CPR. Around this time, the ambulance arrived and the paramedics took over. Less than three minutes elapsed from the moment the officers noticed that Turner was not breathing until the paramedics arrived. The paramedics had the officers remove the handcuffs and hobble, and they rushed Turner to the hospital. They tried to revive him in the ambulance, but he never regained a pulse.

An autopsy later determined that Turner died from cardiac arrhythmia—his heart gave out after beating too fast during the encounter--likely caused by an underlying condition. Turner had an enlarged heart and insufficient blood supply to his heart's chambers. There were no signs of suffocation or trauma to Turner's body.

After Turner's death, his sister Chandra Turner filed this lawsuit as administrator of his estate. Seeking relief under 42 U.S.C. § 1983, the estate alleged Fourth Amendment violations by Officers Young, Wilson, and Talbott for using excessive force against Turner and by Officer Talbott and Sergeant Frost for failing to intervene.

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

"The estate argues that Turner's death might have been avoided if the officers had instead continued to monitor him from a distance and wait until the ambulance arrived. With the benefit of hindsight, one can say that perhaps such an approach might have saved Turner's life. But police training policies and best practices, while relevant, do not define what is reasonable under the Fourth Amendment. Here, once the officers had probable cause to detain Turner, they had the constitutional power to do so. The officers' decision to detain Turner did not violate the Fourth Amendment. The district court found that undisputed facts, including a coroner's findings that Mr. Turner suffered no physical trauma but died of a cardiac arrhythmia, showed that the officers did not use excessive force."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D11-03/C:19-3446:J:Hamilton:aut:T:fnOp:N:2607473:S:0

CIVIL LIABILITY: Seizure of a Vehicle as an Instrument of Crime
United States v. Rountree
CA5, No. 20-30111, 10/2/20

On February 6, 2019, Mary Rountree drove her son's car—a Saturn— to a doctor's appointment at Ochsner Hospital. She returned to the car after the appointment, dismayed to find it blocked into its parking space by an SUV. Undeterred, she backed the Saturn out of the parking spot, running into the SUV as she did. She got out briefly to check for damage and then drove away. The incident was caught on video, and a complaint was filed with the Sheriff's Office.

While inspecting the parking lot of an apartment complex, Deputy Sheriff Jerome Green came across the Saturn. He noted damage to the driver's-side rear bumper—consistent with where he expected damage to be after reviewing the surveillance tape. Green called a wrecker and had the Saturn towed. He returned to the apartment occupied by the vehicle owner and knocked on the door, but no one answered. Green left a notice at the door and exited the apartment complex.

James Rountree sued, asserting that the seizure was unlawful and seeking damages. Sheriff Lopinto moved for summary judgment. He asserted that the seizure was lawful and, in the alternative, that he was entitled to qualified immunity ("QI"). After a hearing, the district court held that the seizure was lawful and, even if it wasn't, Lopinto was protected by QI. On that reasoning, the court granted summary judgment and dismissed plaintiff's claim. Rountree appealed.

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

"Under the Fourth Amendment, warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions. *United States v. Kelly*, 302 F.3d 291, 293 (5th Cir. 2002). Among those exceptions, relevant here, is the so-called 'automobile exception.' That exception to the warrant requirement recognizes a distinction between the warrantless search and seizure of automobiles and the search of a home or office. *Cardwell v. Lewis,* 417 U.S. 583, 589 (1974). Justified by the mobility of vehicles and occupants' reduced expectations of privacy while traveling on public roads, the exception permits the police to search a vehicle if they have probable cause to believe that the vehicle contains contraband, *United States v. Fields*, 456 F.3d 519, 523 (5th Cir. 2006). Under the automobile exception, the police may seize a car from a public place without a warrant when they have probable cause to believe that the car itself is an instrument or evidence of crime. *United States v. Cooper*, 949 F.2d 737, 747 (5th Cir. 1991). That is so because it would make little sense to permit a warrantless seizure of a car when the police have probable cause to believe that the car contains evidence, while simultaneously requiring a warrant before seizing a car when the police have probable cause to believe the car itself is such evidence or is an instrument of crime.

"Because there was probable cause to believe the car was an instrument or evidence of crime, a warrant was not required to seize it. The seizure did not violate the Fourth Amendment, so Lopinto is entitled to Qualified Immunity."

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/20/20-30111-CV0.pdf

CIVIL LIABILITY: Shooting of a Dog
Bletz v. Corrie
CA3, No. 19-1957, 9/9/20

On May 1, 2014, Jeffrey W. Bletz was living in York County, Pennsylvania with his daughter, Lindsey J. Bletz, and young grandson. That morning, they were all at home with their pet dog, Ace, a Rottweiler/Labrador Retriever mix who was seven years old. Jeffrey opened the back door to let Ace outside. He was unaware that, at that moment, Trooper Corrie and other officers from multiple law enforcement agencies were swarming his property to serve an arrest warrant on an armed robbery suspect believed to be living there.

Trooper Corrie approached the house from the left side (facing the front), along with Trooper Richard T. Drum. As they approached, Trooper Corrie heard Trooper Drum yell "whoa" several times from behind, his voice becoming increasingly "more excited," prompting Trooper Corrie to turn around. As he turned, he saw a large dog coming toward him, "already mid-leap, within an arm's reach," at about chest height. Ace was showing his teeth, and growling in an aggressive manner," making a low-pitched noise, like a combination of a "growl and a bark."

Trooper Corrie says he "backpedaled to create distance," and Ace circled around him to his right, attempting to attack him from that direction. Trooper Corrie believes there was another snarl, and then he fired a shot. Ace began to come after him again from his right side, then abruptly changed directions, turned its body and charged him again. The dog did not jump a second time before Trooper Corrie fired a second shot—and then a third. The third shot struck Ace on his right side. The dog yelped, ran to Jeffrey, who was then near the garage, laid down at his feet, and died within minutes.

A civil rights action was filed over the shooting of the family's pet dog. The District Court granted summary judgment to Pennsylvania State Trooper Jeremy W. Corrie on the Bletzes' two claims, a 42 U.S.C. § 1983 claim for unlawful seizure under the Fourth Amendment and an intentional infliction of emotional distress claim under Pennsylvania law. The Bletzes appeal the District Court's Fourth Amendment ruling.

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

"The state had an important interest in protecting the safety of its officers while they undertook a coordinated effort to serve an arrest warrant on an armed robbery suspect. To be sure, it was an 'extreme intrusion' for Trooper Corrie to fatally shoot the Bletzes' pet dog. Dogs have aptly been labeled 'Man's Best Friend,' and certainly the bond between a dog owner and his pet can be strong and enduring. The Court must balance these considerations to determine whether Trooper Corrie's actions were objectively reasonable under the circumstances.

"Trooper Corrie, while participating in a coordinated effort to serve an arrest warrant on an armed robbery suspect, reasonably used lethal force against a dog who, unrebutted testimony shows, aggressively charged at him, growled, and showed his teeth, as though about to attack. The District Court's order granting summary judgment is affirmed."

READ THE COURT OPINION HERE:
http://www2.ca3.uscourts.gov/opinarch/191957p.pdf

CIVIL LIABILITY: Unreasonable Seizure; Excessive Force
Emmett v. Armstrong
CA10, No. 18-8078, 9/1/20

While responding to reports of a fight at an Elks Club in Greybull, Wyoming, Officer Shannon Armstrong arrested Morgan Emmett for interfering with a peace officer.

In October 2013, Morgan Emmett was attending a wedding and reception at the Elks Club in Greybull, Wyoming. Two 911 calls were placed after a misunderstanding led to the belief that there was a fight; no fight had, in fact, occurred. Several police officers, including Officer Shannon Armstrong, responded to the call, in uniform and in marked police vehicles—the police vehicles had blue and white lights flashing throughout the incident. Officer Armstrong observed a group of people standing behind a large planter in the parking lot and next to a pickup truck. Officer Armstrong directed the group to "shut up and stand there." One of the men, Roger Lancaster, responded, "That's not appropriate," after which Officer Armstrong directed Lancaster to "spin around," and he handcuffed Lancaster and put him in the backseat of the police car, which was parked approximately fifteen yards from the pickup truck.

After placing Lancaster in the police car, Officer Armstrong spoke to a group of people in front of the Elks Club and asked who had been fighting. A woman answered "Morgan Emmett," and Officer Armstrong returned to the group of men at the pickup. One of the men began moving away from the pickup as Officer Armstrong approached, and Officer Armstrong directed him to move back to the pickup; the man complied.

As Officer Armstrong approached the front of the pickup, Emmett, who was standing by the back, began to walk away from the pickup. Officer Armstrong called after him, yelling "Morgan, Morgan. Come here." Emmett glanced back behind him and continued walking away. Officer Armstrong was moving towards Emmett and, at that point, Emmett began running. Officer Armstrong chased Emmett for a short distance, yelling "stop" once before catching up with Emmett, and then yelling "stop" once more as he tackled Emmett to the ground. Once Officer Armstrong regained his footing, he stood over Emmett, who lay on his back on the ground. Once Emmett was on his back, he became visibly relaxed, and he made no further movements indicating an attempt to run or fight back. Officer Armstrong attempted to grab one of Emmett's arms, and Emmett asked, "What the f&*k are you doing?" Officer Armstrong responded, "When I tell you to stop, you stop! Roll over!" Emmett giggled while looking at Officer Armstrong, but he did not roll over. Officer Armstrong then said, "You're going to get TASE'd!" and immediately tased Emmett in the abdomen for a single, five-second taser cycle. Approximately ten seconds had elapsed from the time Officer Armstrong tackled Emmett to the time he tased Emmett.

Emmett brought a 42 U.S.C. § 1983 suit, claiming that Officer Armstrong violated his Fourth Amendment rights by unreasonably seizing him when arresting him without probable cause and by using excessive force when using his taser to effectuate the arrest. The appeal before the Tenth Circuit arises from the district court's order granting summary judgment to Officer Armstrong on the basis of qualified immunity on all claims.

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

"Emmett's unreasonable seizure claim is based entirely on Officer Armstrong's failure verbally to identify himself as a police officer before seizing Emmett, thus precluding probable cause to believe Emmett knowingly interfered with a peace officer. Because there were significant indicia from the circumstances that Officer Armstrong was a police officer, it was objectively reasonable for Officer Armstrong to believe that Emmett knew he was a police officer. Officer Armstrong arrived on scene in a marked police vehicle, wearing his uniform, with his car's lights on and flashing. There were multiple police vehicles in front of the Elks Club, all of which had their lights activated and flashing. Thus, because the arrest was not a constitutional violation, Officer Armstrong is entitled to qualified immunity. Consequently, the district court's grant of summary judgment as to Emmett's unreasonable seizure claim is affirmed.

"Emmett's second claim alleges that Officer Armstrong's use of his taser constituted excessive force when it was used without adequate warning and after Emmet has ceased actively resisting. A jury could find that such conduct constitutes excessive force. Moreover, it was clearly established at the time of these events that using a taser without adequate warning against a misdemeanant who has ceased actively resisting is unreasonable. Because Emmett's excessive force claim alleges a clearly established violation of the Fourth Amendment, Officer Armstrong is not entitled to qualified immunity on that claim. Thus, the district court's grant of summary judgment as to Emmett's excessive force claim is reversed."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/opinions/18/18-8078.pdf

CIVIL LIABILITY: Unreasonable Seizure Without Probable Cause
Bell v. Neukirch
CA8, No. 19-1713, 10/28/20

About seven minutes after a black juvenile male with a gun fled from police in Kansas City, Missouri, officers arrested Tyree Bell a mile away from the scene. Bell and the suspect shared only generic characteristics in common: black, juvenile, and male. Bell, however, had several characteristics distinct from the suspect: he was taller than the suspect; had distinguishable hair from the suspect; and wore shorts, shoes, and socks that differed from those donned by the suspect. These distinctions are depicted on a police video recording that the arresting officers reviewed.

Three weeks later, with Bell still in custody, a detective reviewed the video and concluded that Bell was not the offender. Authorities promptly released Bell and dismissed all charges. Bell then sued the arresting officers, alleging that they seized him without probable cause. He also raised claims against the detective and a sergeant who authorized the detention, and he named the sergeant, the police chief, and members of the Board of Police Commissioners of Kansas City as defendants in their official capacities based on alleged failures to train and supervise the arresting officers.

The district court, describing it as a 'difficult case," ruled that the arresting officers were entitled to qualified immunity, because a reasonable officer could have believed that there was probable cause to arrest Bell. *Bell v. Neukirch*, 376 F. Supp. 3d 989, 1004 (W.D. Mo. 2019). The Court of Appeals for the Eighth Circuit concluded, however, that the evidence, viewed in the light most favorable to Bell, would support a finding that the arresting officers violated Bell's clearly established right to be free from an unreasonable seizure without probable cause under the circumstances.

The Court reversed the dismissal of the claims against those officers but affirmed the district court's grant of summary judgment in favor of the other defendants.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/10/191713P.pdf

EVIDENCE: Autopsy Photographs
Collins v. State
ASC, 220 Ark. 371, 11/12/20

On December 4, 2017, Michael Collins and his half-brother, Alexander, broke into Mariah Cunningham's apartment in search of money they believed to be in her possession. Unable to locate the money, the two men waited for Cunningham to return home. Cunningham returned approximately two hours later with her children, four-year-old Elijah Fisher and five-year-old Aleyah Fisher. Upon entering the apartment, Elijah and Aleyah were repeatedly stabbed by Collins to coerce Cunningham into revealing the money's location. When Cunningham failed to disclose the money's whereabouts, Collins cut her throat and left her and the children dead in the apartment. Collins and Alexander stole a television, video-game console, and Cunningham's white Honda Accord. Shortly thereafter, Collins abandoned the Honda and took a bus to Chicago to stay with his aunt. On December 8, 2017, U.S. Marshals arrested Collins at his aunt's home in Chicago. With Collins were a pair of bloody shoes. DNA testing later established that the blood found on the shoes matched that of all three victims.

While in a federal holding facility in Colorado, Collins confessed the murders to his cellmate, Marino Scott. He told Scott he went to Cunningham's apartment to get money from her. Because Cunningham did not give him money, Collins said he made Cunningham watch as he cut her children's heads off with a knife. Collins also expressed concern that the blood found on his shoes would link him to the murders.

Collins made two subsequent confessions. First, at the Pulaski County Regional Detention Facility, he threatened jail officials who were attempting to remove him from his cell by telling them he had killed three people so he could handle them. Second, Collins confessed to his girlfriend on a recorded phone call made from jail. He told her "the whole thing happened" and went on to say he "did everything. Did this whole nine."

At trial, the State presented a felony-murder theory, with aggravated robbery as the underlying felony. The jury found Collins guilty of three counts of capital murder and one count of aggravated robbery. He was sentenced to life imprisonment on each of the three capital-murder counts. Collins waived jury sentencing on the aggravated-robbery count, and the court sentenced him to an additional 360 months' imprisonment.

On appeal, he argued that the circuit court erred in denying his motion for directed verdict and in admitting autopsy photographs after he offered to stipulate the cause of death.

The Arkansas Supreme Court affirmed his convictions, holding the circuit court did not abuse its discretion by admitting the autopsy photographs to aid the jury in understanding the nature and degree of the injuries the victims sustained and corroborated witness testimony.

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/supremecourt/en/item/488367/index.do

EVIDENCE: Crime Scene Photographs
Bennett v. State
CR-19-870, 2020 Ark. 225, 10/1/20

In this case, the Arkansas Supreme Court was again faced with the issue of admitting photographs that Harold Bennett claimed were more prejudicial than probative.

On June 20, 2018, a utility worker called 911 after discovering the body of Bianca Rainer in some brush in front of a house in Blytheville. Detectives noted that there were flies and maggots on her body and that the decomposition stage had begun. They observed that Rainer appeared to have suffered extensive injuries to her head and that a blanket was wrapped around her, a cord was around her neck, and several puzzle pieces were stuck to her body. The forensic pathologist determined that Rainer had been shot in the head three times and had at least nineteen lacerations to her face and scalp.

During the police investigation, detectives interviewed Bennett in his residence across the street from where Rainer's body had been found and at the police station. In the interviews, Bennett at first denied killing Rainer but eventually admitted that he had beaten her to death with a metal bar. Bennett claimed that Rainer had attempted multiple times to attack him with a knife and that he was defending himself when he hit her with the bar.

In Bennett's residence, detectives found puzzle pieces scattered on the floor and blood splatters in various rooms. There was a bleach bottle in

the hallway with a toothbrush. Bennett assisted the detectives in locating the metal bar and a .32-caliber revolver, which was hidden under the sink. A firearms examiner identified the bullets recovered from Rainer's body as having been fired from that revolver.

On July 10, 2018, Bennett was charged with first-degree murder, possession of a firearm by certain persons, and obstruction of governmental operations. A jury found Bennett guilty of first-degree murder. He was sentenced as a habitual offender to life imprisonment plus a fifteen-year sentencing enhancement for using a firearm in the commission of the murder.

Specifically, several of the State's trial exhibits were crime-scene photographs of the victim. In moving to exclude these photographs, his trial counsel described them as grotesque, grisly, and capable of being described through testimony without being shown to the jury. He made similar assertions about State's trial exhibits which were autopsy photographs introduced during the forensic pathologist's testimony.

The circuit court separately ruled on the admissibility of each photograph, giving specific reasons for its admission or exclusion. It admitted all eight of the State's proposed crime-scene photographs of the victim's body, finding that they helped explain and corroborate the investigating officer's testimony, the nature and extent of the victim's injuries, and the puzzle pieces found on the victim's body. The circuit court excluded several autopsy photographs. On the eight autopsy photographs that it admitted, it found that they supported the forensic pathologist's testimony, helped explain the autopsy process, and illustrated the victim's injuries and her manner of death.

The Arkansas Supreme Court held that the circuit court did not abuse its discretion in admitting the photographs.

"When photographs are helpful to explain testimony, they are ordinarily admissible. The mere fact that a photograph is inflammatory or cumulative is not, standing alone, sufficient reason to exclude it. Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: (1) by shedding light on some issue; (2) by proving a necessary element of the case; (3) by enabling a witness to testify more effectively; (4) by corroborating testimony; or (5) by enabling jurors to better understand the testimony. Other acceptable purposes include showing the condition of the victim's body, the probable type or location of the injuries, and the position in which the body was discovered."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/supremecourt/en/486149/1/document.do

EVIDENCE: Expert Forensic Testimony; Photograph of Handcuffed Defendant at Scene of Search

United States v. Jefferson
CA8, No. 19-3159, 9/17/20

Des Moines police executed a warrant to search a residence where they had probable cause to suspect marijuana distribution, and where a gold GMC Yukon registered to Demetrius Jefferson had been seen. Jefferson, his girlfriend, Wendy Stark, and their infant child were in the home. In the bedroom, officers found a loaded .22- caliber handgun on a night stand; eighty grams of loose and baggied marijuana in two mason jars and in a blue tote; plastic sandwich bags; and digital scales.

Each baggie contained 3.5 grams of marijuana, a quantity commonly used for individual sales. Officers also found articles of male clothing, letters addressed to Jefferson, and a pay stub for Jefferson. In another room called the "smoke room," they found 270 grams of marijuana, plastic sandwich bags, .22-caliber ammunition, .40-caliber ammunition, a digital scale, and an empty box for the .22-caliber handgun. The government introduced photographs of the rooms and their contents as the officers found them.

Jefferson argues the evidence was insufficient to convict him of the firearm counts, because Stark's testimony that he possessed the .22-caliber handgun found on the night stand was not credible; there is no fingerprint or other tangible evidence that he possessed the firearm or ammunition.

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

"Jefferson argues a new trial is warranted because forensic evidence testimony by the government's expert witnesses—Ryan Petruccelli and Benjamin Campbell—was irrelevant, prejudicial, and not helpful to the jury. Petruccelli testified he did not find Jefferson's DNA on the .22- caliber firearm. Campbell testified he did not find fingerprints on it. Both explained that, in their experience, it is rare to find forensic evidence on firearms or ammunition, testimony consistent with that of experts in other firearm possession cases. See *United States v. Porter*, 687 F.3d 918 (86h Cir. 2012). Jefferson does not discredit their qualifications nor identify unfair prejudice. Jefferson's emphasis during trial on the lack of forensic evidence made the testimony relevant and helpful to the jury. The district court did not abuse its discretion in admitting it.

"Jefferson also argues it was unduly prejudicial to admit into evidence over his objection a photograph of him sitting handcuffed on a sofa during the warrant search. The photograph was relevant to proving that Jefferson was at the home when officers executed the search warrant, a fact to which Jefferson refused to stipulate. In identifying the photograph, a Des Moines police officer testified it is standard practice to secure individuals during a search warrant. The district court immediately gave the jury a cautionary instruction to minimize prejudice: The mere fact that for officer safety the defendant was handcuffed isn't evidence of anything, other than it's a plan for officer safety. Admission of the photograph was not an abuse of discretion and does not warrant a new trial."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/09/193159P.pdf

EVIDENCE:

Recording of a Voicemail Message
Gonzales v. State of Colorado
CSC, 2020 CO 71, 9/14/20

After the victim's murder in this case, his sister-in-law discovered a peculiar microcassette among his belongings. On that cassette was a recording of a potentially incriminating voicemail message. A police detective later testified at trial that the message featured a voice like that of defendant Daniel Gonzales, whom the detective had interviewed while investigating the murder.

Over Gonzales's objection, the court admitted the recorded message into evidence at Gonzales's trial. The detective was not present when the recorded statements were made, and neither he nor anyone else testified about the reliability of

the recording process. Even so, after considering the recording and other evidence, a jury found Gonzales guilty of, among other things, first degree murder.

After review of Gonzales' arguments on appeal, the Colorado Supreme Court held that in the absence of evidence suggesting that a proffered voice recording has been altered or fabricated, a proponent may authenticate a recording by presenting evidence sufficient to support a finding that it is what the proponent claims.

"Once this prima facie burden is met, authenticity becomes a question for the factfinder, in this instance, the jury."

The Court concluded the trial court did not abuse its discretion in admitting the voicemail, and therefore affirmed the court of appeals.

READ THE COURT OPINION HERE:
https://cases.justia.com/colorado/supreme-court/2020-19sc292.pdf?ts=1600097473

MIRANDA: Booking Questions
People v. J.W.
CCA, 2nd District, No B303310, 10/23/20

On November 15, 2019, 16-year-old J.W. took off running after he made eye contact with two Los Angeles Police Department officers who encountered him on the street. The officers gave chase. As he fled, J.W. discarded a backpack he had been wearing. After catching up to J.W. in a laundromat, the officers retrieved the backpack. The backpack contained a loaded, semi-automatic handgun, with one round in the chamber. As he was being handcuffed, J.W. spontaneously told the officers that he was carrying the gun for protection. The officers transported J.W. to the station house to be booked. As part of the booking process, J.W. was asked his age and date of birth. He replied that he was 16 and provided his birthdate. J.W. was read his Miranda rights, waived them, and repeated that he was carrying the gun for protection.

The California Court of Appeals, Second Appellate Division, dealt with booking questions in a juvenile criminal case. They found, in part, as follows:

"Under the 'routine booking question' exception to *Miranda v. Arizona* (1966) 384 U.S. 436, *Miranda* warnings need not be given before a suspect being booked into custody is asked about his 'name, address, height, weight, eye color, date of birth, and current age.' (*Pennsylvania v. Muniz*, 496 U.S. 582, (1990.).) But what if any of these core 'booking questions'—in this case, the suspect's age and date of birth—is an element of the crime with which he is ultimately charged? Does the routine booking question exception still apply, or is the suspect's answer subject to exclusion because asking the question in that particular case was 'reasonably likely to elicit an incriminating response from the suspect' (*Rhode Island v. Innis*, 446 U.S. 291, (1980).? Consistent with our Supreme Court's recent decision in *People v. Elizalde* Cal.4th 523 (2015), we that the routine booking question exception categorically applies to all of the core 'booking questions' enumerated in Muniz and authorizes the admission of the defendant's answers to those specific questions into evidence without the need to assess those questions' incriminatory nature on a case-by-case basis." Accordingly, the court affirmed the juvenile adjudication in this case.

READ THE COURT OPINION HERE:
https://www.courts.ca.gov/opinions/archive/B303310.PDF

SEARCH AND SEIZURE:

Affidavit; Informant Information

Hamilton v. State, ACA, No. CR-20-199, 2020 Ark. App. 482, 10/21/20

The Eighth North Task Force used a confidential informant to conduct controlled buys of methamphetamine from Tommy Hamilton in December 2018. On three separate occasions, the confidential informant arranged to purchase methamphetamine from Tommy Hamilton at his home located at 709 Harris Street in Hope, Arkansas. On each occasion, Task Force Agents Brown and Rowe met the informant, conducted a personal and vehicular search of the informant, equipped the informant with recording equipment and purchase money, and conducted visual surveillance of the informant's travel to, and exit from, Harris Street.

After the confidential informant's exit from Harris Street, the agents met the informant at a staging area where they retrieved the methamphetamine and the recording equipment from the informant. On each occasion, the informant advised that the methamphetamine was purchased from Hamilton, and the agents were able to verify this by viewing the video recording of the event. The agents, however, were not able to conduct visual surveillance of Hamilton's home at 709 Harris Street on any of the three occasions because Harris Street is a dead end.

Following these controlled buys, Agent Brown completed an affidavit for search warrant. In his affidavit, Agent Brown outlined the events surrounding the three separate controlled buys, described the house at 709 Harris Street, and stated that there was reasonable cause to believe that controlled substances and other contraband materials were concealed therein.

On the basis of this affidavit, a Hempstead County circuit judge signed a search-and-seizure warrant authorizing the search of 709 Harris Street. Agent Brown executed the warrant and submitted a search-warrant return listing an inventory of property taken pursuant to the search. The Hempstead County Prosecuting Attorney's Office then filed a criminal information against Hamilton.

Hamilton filed a motion to suppress the evidence seized as a result of the execution of the search warrant. In his motion, Hamilton argued that the search of his home and seizure of evidence was clearly illegal in that the Affidavit for Search and Seizure Warrant fails to set forth any facts to establish probable cause for a search or for issuance of the warrant. Moreover, he asserted that the facts listed to establish probable cause for the search warrant are tainted as they rely on confidential-informant knowledge and that informant's veracity, reliability, and basis of knowledge have not been factored into the information into the information obtained to get the search warrant.

The circuit court held a hearing on Hamilton's suppression motion. The court thereafter denied Hamilton's motion to suppress in a ruling from the bench. The matter proceeded to a jury trial the next day. The jury convicted Hamilton who now appeals. On appeal, Hamilton contends that there is nothing in the affidavit showing the reliability of the confidential informant because the informant did not link Hamilton or the drug buys to the place to be searched—specifically, 709 Harris Street.

The Arkansas Court of Appeals found, in part, as follows:

"Hamilton attacks the confidential informant's reliability and veracity. Our court has held that a search warrant is flawed if there is no indicia of the confidential informant's reliability. *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001). Determining indicia of reliability is not an exact science, and we have held that there is no fixed formula for determining an informant's reliability. *Haley v. State*, 2017 Ark. App. 18, at 4, 509 S.W.3d 692, 694 (citing *Heaslet v. State*, 77 Ark. App. 333, 345, 74 S.W.3d 242, 249 (2002)). While there is no fixed formula, however, we have set forth factors to be considered in making such a determination, including whether the informant's statements are (1) incriminating, (2) based on personal observations of recent criminal activity, and (3) corroborated by other information. We have further held that the conclusory statement, "reliable informant," is not sufficient to satisfy the indicia requirement. A failure to establish the veracity and bases of knowledge of the informant is not a fatal defect, however, if the affidavit viewed as a whole provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

"In the circuit court, Hamilton filed a motion to suppress arguing that the facts listed to establish probable cause for the search warrant are tainted as they rely on confidential informant knowledge and that informant's veracity, reliability, and basis of knowledge have not been factored into the information obtained to get the search warrant. At the hearing on his motion, Hamilton argued that the validity of the controlled buys could not be substantiated because the reliability of the informant was unknown. The State responded that Agent Brown reviewed the videos from each transaction, and the contents of the videos corroborated what the informant described; therefore, the State argued, the informant's reliability and veracity could be established. The court agreed with the State. The court noted that the affidavit for the warrant necessarily addresses what an officer knows about a particular situation and sworn under oath to present the affidavit so the court may issue a search warrant, which occurred here. Part of any affidavit includes what the officer observed, can be observed by what they have watched live, video, wherever, according to what type of case it is.

"On appeal, Hamilton argues that the affidavit in this case was insufficient because the affiant did not watch the informant go into any specific house on Harris Street in any of the three controlled buys but only watched the informant drive onto Harris Street. He contends that the lack of an actual visual of the confidential informant entering or leaving the target address, compounded by the lack of proof of reliability of the informant, renders the affidavit fundamentally flawed. Thus, Hamilton's argument regarding the reliability of the informant is intertwined with his complaint about the lack of visual surveillance from the agents.

"It is difficult to discern whether this specific argument concerning the informant's veracity was made below. At the hearing on the motion to suppress, Hamilton noted that the officers did not watch the confidential informant actually enter the house described in the affidavit; therefore, he contended, probable cause for the warrant was lacking. Regardless, when viewed as a whole, Agent Brown's affidavit provided a substantial basis to believe that drugs and other contraband would be found at Hamilton's residence. We acknowledge that the affidavit does contain the conclusory phrase 'reliable informant,' but it goes further and presents information that satisfies the factors set forth above to be utilized in determining the reliability of the informant.

"First, the informant provided a clearly incriminating statement: he or she purchased methamphetamine from Hamilton. See, e.g., *Wagner v. State*, 2010 Ark. 389, 368 S.W.3d 914 (informant admitted to affiant that he or she had bought drugs from the defendant in the past). Second, the informant provided a statement based on personal observations—in fact, not merely observations of, but participation in, recent criminal activity. See, e.g., *Tankersley v. State*, 2015 Ark. App. 37, 453 S.W.3d 699 (informant's statement to police was reliable because he personally observed the illegal activity). And third, Agent Brown was able to corroborate the information provided by the video recording, which recorded the actual transaction on all three occasions. See, e.g., *Weatherford v. State*, 93 Ark. App. 30, 216 S.W.3d 150 (2005) (holding that the third factor was satisfied when the informant's information is corroborated by a law enforcement officer). Accordingly, we conclude that there was enough evidence to provide sufficient indicia of the reliability of the informant even though the officers did not observe the informant walk into the house at 709 Harris Street."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/courtofappeals/en/487213/1/document.do

SEARCH AND SEIZURE: Arrest Warrant; Probable Cause to Believe an Individual is at that residence

United States v. Brinkley
CA4, No. 18-4455, 11/13/20

To execute an arrest warrant for Kendrick Brinkley, police officers entered a private home. They had neither consent to do so nor a search warrant. Brinkley appeals the district court's denial of his motion to suppress evidence obtained in the home, arguing that the officers lacked the necessary reason to believe both that he (1) resided in the home and (2) would be present when they entered. The Fourth Circuit agreed and so must reverse.

"The warrant requirement carries special force when police seek to enter a private home, which is afforded the most stringent Fourth Amendment protection. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. *Kyllo v. United States,* 533 U.S. 27, 31 (2001). But a valid search warrant of course authorizes police to enter a home.

"In some circumstances, an arrest warrant can also allow officers to enter a home in order to apprehend a suspect. But the Supreme Court has held that when police officers seek to enter a home pursuant to an arrest warrant, the Fourth Amendment imposes specific and different requirements for entry based on whether the home is the suspect's own residence or someone else's.

"When police armed with an arrest warrant seek to enter a suspect's own home, *Payton v. New York*, 445 U.S. 573 (1980), controls. There the Court concluded that for Fourth Amendment purposes,

an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. The Payton Court reasoned that an arrest warrant will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen, so it is not constitutionally necessary for officers to seek additional judicial authorization before entering a suspect's own home to arrest him.

"But one year later, in *Steagald v. United States*, 451 U.S. 204, the Court decided that an arrest warrant alone did not authorize police to enter a third party's home. The Court explained that in this situation, unlike in *Payton*, two distinct interests protected by the Fourth Amendment are at stake: not only the suspect's interest in being free from an unreasonable seizure, but also the third party's interest in being free from an unreasonable search. While an arrest warrant may adequately protect the former interest, it does absolutely nothing to protect the third party's privacy interest in being free from an unreasonable invasion and search of her home. Consequently, the *Steagald* Court held that, absent exigent circumstances or consent, the Fourth Amendment requires police to obtain a search warrant before trying to apprehend the subject of an arrest warrant in a third party's home.

"Because the officers in this case believed that Brinkley resided in the Stoney Trace apartment — and entered it pursuant solely to the authority of the arrest warrant— *Payton*'s framework applies. Before entering the Stoney Trace apartment without a search warrant, the police needed to have probable cause to believe that Brinkley resided there and would be present when they entered.

"Pursuant to *Payton* and *Steagald*, the officers needed to establish reason to believe not just that Brinkley was staying in the Stoney Trace apartment but that he resided there. If Brinkley was merely staying as a guest in someone else's home, *Steagald* would require the officers to obtain a search warrant before they could enter it. Detective Stark's discovery that Brinkley was involved with Chisholm, an apparent girlfriend, and that Chisholm was associated with the Stoney Trace apartment, certainly provided additional evidence that Brinkley might well have stayed at Chisholm's home, but it did not speak to whether he did so as a resident or as Chisholm's overnight guest. See *United States v. Werra*, 638 F.3d 326, 338 (1st Cir. 2011). Further investigation was necessary to establish probable cause that Brinkley resided there.

"Even if the available information were enough to give police reason to believe that Brinkley resided in the Stoney Trace apartment and so satisfy *Payton*'s first prong, the evidence here falls far short of satisfying *Payton*'s second; that is, the officers failed to establish probable cause that Brinkley would be present in the home when they entered.

"Though the officers developed a well-founded suspicion that Brinkley might have stayed in the apartment at times, they failed to establish probable cause that he resided there. Because they entered the apartment pursuant solely to the authority of the arrest warrant, their entry was unlawful. When police have limited reason to believe a suspect resides in a home, generic signs of life inside and understandably nervous reactions from residents, without more, do not amount to probable cause that the suspect is present within."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/184455.P.pdf

SEARCH AND SEIZURE:

Consent Search of Vehicle

United States v. Soriano

CA5, No. 19-50832, 9/18/20

Andres Soriano was arrested in August 2018 during a traffic stop after a search of his vehicle revealed a suitcase that contained nine bundles of a substance later determined to be cocaine having a total weight of 10,715 grams. He was charged with possession with the intent to distribute five kilograms or more of cocaine.

Soriano moved to suppress the discovery of the cocaine. He contended that the police officers who conducted the traffic stop, Carla Rodriguez-Montelongo and Javier Ramirez, "unjustifiably prolonged his detention beyond the amount of time needed to complete the purpose of the traffic stop" in violation of his Fourth Amendment rights. He also argued that his consent to search his vehicle was involuntary under this court's six-part test for determining whether consent was given freely and voluntarily.

Officer Rodriguez testified at the hearing that on the day in question, she was traveling eastbound on Interstate 10 with her partner, Officer Ramirez, performing routine traffic patrol. Soriano was travelling in his vehicle eastbound and passed Officer Rodriguez's patrol car. The speed limit was 80 miles per hour and Officer Rodriguez clocked Soriano driving at 90 miles per hour. She also observed that the vehicle's window tint appeared to exceed the legal limit. She activated her emergency lights to make a traffic stop, which automatically activated the patrol car's dash-cam video and the officers' body cameras.

Officer Rodriguez approached Soriano's vehicle on the passenger side and speaking in Spanish, informed Soriano of the reason for the traffic stop: "speed and the window tint." She ran a "tint meter" on Soriano's windows, which confirmed that his window tint exceeded the legal limit. Soriano then volunteered that his driver's license had been suspended for approximately two years due to his prior receipt of tickets for speeding and driving without insurance.

Officer Rodriguez asked Soriano where he was going, and he responded that he was traveling from El Paso to Odessa to see his mother and brother and that he planned to return that day, that night, or the next day. According to Officer Rodriguez, it was rare for people to make such a trip on a Sunday. In her experience, people would typically leave on Friday and return the following Sunday or Monday, particularly if they planned to visit family. Soriano's story did not seem credible to her and raised her suspicion that he was not being truthful.

Officer Rodriguez asked for Soriano's registration and he handed it to her. She asked him when was the last time that he had been pulled over, and he responded that it had been a while because he usually drove cautiously. She asked if Soriano had ever been arrested and he asked her to repeat the question, which raised "red flags" with her because she believed that he was stalling to come up with an answer. Soriano stated that he had been arrested a year and a half prior "for tickets."

Based on her observation of a suitcase on the back seat along with other factors, Officer Rodriguez then asked if Soriano had anything illegal in the vehicle such as cocaine, marijuana, ecstasy, or large amounts of money. He replied "Nothing, nothing" but she observed that he appeared to grow more nervous. She then asked, "Do you give me permission to check the car?" and Soriano responded, "Check it." She continued, "If I call the dog right now from the checkpoint, do

you think it will alert?" Soriano replied, "No, you can bring him." She then informed him that he would receive a citation for not having a license and for speeding and a warning for the tint. Both officers put on their gloves in anticipation of searching Soriano's vehicle. She asked him to empty his pockets, which revealed $2,000 in his wallet. He explained that the money was from his work as a cook and manager.

Officer Rodriguez testified that she searched Soriano's vehicle based on his voluntary consent and that she was detaining him based on her reasonable suspicion. She did not place him under arrest or put him in her patrol car. She then discovered nine "kilo sized bundles" of cocaine in the suitcase and placed Soriano under arrest. After considering the testimony, the district court denied Soriano's motion to suppress.

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

"A warrantless search is presumptively unreasonable, subject to certain exceptions, such as voluntary consent. The voluntariness of consent is a question of fact to be determined from a totality of the circumstances. To evaluate the voluntariness of consent, we consider the following six factors: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

"Three factors weighed against a finding of voluntariness: Soriano was involuntarily detained; Officer Rodriguez did not inform him of his right to refuse consent; and Soriano likely believed that incriminating evidence would be found. It also found that three factors favored a finding of voluntariness: the lack of coercive police procedures; the extent of Soriano's cooperation; and Soriano's education and intelligence. Although the factors were essentially even on both sides, the district court concluded that, based on the totality of the circumstances, Soriano's consent was voluntary.

"The Court stated that their review of the video, the transcript, and the complete record confirms that the district court carefully analyzed the controlling six-factor balancing test in view of the evidence presented to it. Its analysis was methodical and not skewed one way or the other. In sum, the district court's analysis of the consent factors was plausible in light of the record as a whole. Accordingly, we hold that the district court did not clearly err in concluding that Soriano voluntarily consented to the search of his vehicle. The district court's denial of Soriano's motion to suppress is affirmed."

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/19/19-50832-CV0.pdf

SEARCH AND SEIZURE:

Drugs Concealed Within the Body

United States v. Ruffin

CA6, No. 19-3599, 11/3/20

In October 2018, an unnamed informant told the DEA that Julius Ruffin planned to drive from Lorain, Ohio to Columbus to purchase heroin from unknown Mexican drug traffickers. The informant said that she and Ruffin would travel in a black SUV, provided the license plate number, and promised to stay in contact throughout the trip. She told the DEA when she and Ruffin departed from Lorain, then alerted the DEA agents when they were fifteen minutes from the address. The agents set up surveillance and saw Ruffin and the informant enter the house together. Three hours later, the agents saw two Hispanic men arrive and enter the house briefly. The informant messaged the agents from inside the house to tell them that Ruffin had purchased a plastic bag of heroin from the men who had just left. Then Ruffin told the informant that he needed to go to the bathroom before he left. She saw Ruffin holding a plastic bag as he went into the bathroom, where he stayed for about twenty minutes. From the bathroom, Ruffin went to his car. The informant apprised the agents of these events in real time. The agents then saw Ruffin drive off. They followed Ruffin until he committed a traffic infraction, then pulled him over. A drug dog alerted on the car, providing probable cause for a search. But the search of both the car and Ruffin's person yielded no evidence, leading the agents to suspect that Ruffin had concealed the drugs inside his body. They held Ruffin while they sought a search warrant for a body cavity search. An Ohio magistrate judge issued the warrant to search on the person or in a cavity or carried property of Julius Decarlos Ruffin.

The police took Ruffin to the hospital for medical staff to conduct the search. When the doctor came in, the agents suggested to him that he use his finger to search Ruffin's rectum. When the doctor declined, one DEA agent joked that he would do the search, but only after taking "a couple shots." Eventually a nurse volunteered to conduct the search, which she did with Ruffin shackled at the legs. One agent remained in the room during the examination. The parties dispute whether the nurse found anything during that examination, with the nurse's notes saying that she felt something in the anal cavity, while Ruffin claims that the nurse said "I do not feel anything." After that examination, the nurse inserted an instrument to visually examine the inside of Ruffin's rectum. Here, too, the parties disagree: Ruffin claims the nurse searched with the instrument twice and did not see anything; the nurse's notes indicate that she searched once and saw a foreign object that looked like a piece of plastic wrap. Either way, when the nurse failed to retrieve anything, the treating physician ordered an X-ray. Although the radiologist did not see any foreign bodies on the X-ray, the treating physician saw three separate circular objects, so he ordered the nurse to perform soap suds enemas until the objects came out. The parties dispute the number of enemas—Ruffin says four, the nurse's notes say two. Ultimately, Ruffin released three golf-ball-sized bags of heroin and fentanyl.

The Sixth Circuit affirmed the denial of Ruffin's motion to suppress the drugs. The facts created a "fair probability" that Ruffin had concealed the drugs in his body, so the magistrate did not arbitrarily exercise his discretion in finding probable cause. Although the search could have been handled better, the presence of a warrant, the absence of any safety risk, and the police's need for evidence make this search reasonable.

READ THE COURT OPINION HERE:

https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0351p-06.pdf

SEARCH AND SEIZURE:

Fourth Amendment Standing

United States v. Breaudion

CA5, No. 19-30635, 11/11/20

This is a case about GPS searches, Fourth Amendment standing, and the Stored Communications Act. Matthew Beaudion and his girlfriend, Jessica Davis, were drug dealers. Narcotics officers obtained a warrant for the GPS coordinates of Davis's cell phone and used the coordinates to intercept the car in which she and Beaudion were traveling. After losing a motion to suppress, Beaudion pleaded guilty to drug charges. He appealed.

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

"During a narcotics investigation by the Monroe Police Department (MPD), multiple drug dealers and cooperating witnesses identified Beaudion and Davis as their suppliers. One witness informed MPD Officer Heckard that Beaudion and Davis were planning to drive from Houston to Monroe with four pounds of meth. The witness then called Davis on her cell phone to arrange a meth deal. Heckard listened in.

"Heckard used that information and Davis's cell phone number to request a search warrant. In the warrant application, Heckard asked for the GPS coordinates of Davis's cell phone over the next sixteen hours. Louisiana District Judge Larry Jefferson found probable cause to support the request and issued the warrant. Heckard promptly faxed the warrant to Verizon's law-enforcement division. Verizon agreed to provide the longitude and latitude coordinates of Davis's phone as many times as Heckard called to request them within the sixteen-hour window. Heckard called six times. Each time he received a verbal recitation of the most recent GPS data and an estimated margin of error. The coordinates confirmed that Davis (or at least her phone) was headed east toward Monroe.

"Heckard's final call to Verizon indicated that Davis was passing through Shreveport and on her way to Monroe. So Heckard and other MPD officers spread out along the interstate and waited for Davis to arrive. The officers stopped the car, searched it, and discovered the meth. Then they arrested Davis and Beaudion and recovered Davis's phone from her purse.

"The Fourth Amendment is not a weapon that uninjured parties get to wield on behalf of others. As with the common law that preceded it, the Fourth Amendment protects individuals' security in their persons, their houses, their papers, and their effects. It does not protect individuals' security in the property of someone else.

"Modern doctrine incorporates this history in the requirement of Fourth Amendment standing. This standing concept ensures that those invoking the Amendment can vindicate only their personal security against unreasonable searches and seizures. And it requires us to reject Beaudion's claim. A defendant seeking to suppress evidence must show not only that the police committed an unreasonable search or seizure, but also that the search or seizure infringed a Fourth Amendment interest of the defendant himself."

READ THE COURT OPINION HERE:

https://www.ca5.uscourts.gov/opinions/pub/19/19-30635-CR0.pdf

SEARCH AND SEIZURE:

Emergency Search; Hot Pursuit and Evidence Destruction

United States v. Cruz

CA10, N0. 19-2127, 10/9/20

On September 5, 2017, Detective Gerald Koppman executed a search warrant on another suspect and found a large quantity of methamphetamine. The suspect agreed to cooperate as a Confidential Source (CS). The CS named "Chino" as his supplier, and when shown a photograph of Cruz, the CS said that was the person he knew as "Chino." The CS stated that he regularly conducted narcotic transactions with Cruz. The CS also showed Detective Koppman text messages on his phone from Cruz, discussing the amount of methamphetamine that the CS was ordering from Cruz and describing the methamphetamine. The CS provided three different phone numbers used by Cruz, including one that matched the number provided by another confidential informant (CI). Both the CS and Detective Koppman believed Cruz did not keep drugs at his home because, given his probation status, it was subject to search at any time.

Detective Koppman asked the CS to call Cruz and request that Cruz bring a few ounces of methamphetamine to the CS. Detective Koppman listened as the CS ordered several ounces of methamphetamine from Cruz. Cruz agreed to provide the methamphetamine after he returned from work and told the CS he would call him later. Detective Koppman, however, did not plan to conduct a controlled buy. His objective was to conduct an investigative detention with Cruz and convince Cruz to "flip" on a bigger target. Detective Koppman did not want to arrest Cruz if he was willing to flip, and he did not intend to search Cruz's home because he did not believe Cruz would store drugs there.

Detective Koppman and other officers went to Cruz's residence to conduct surveillance while waiting for the arranged drug deal between Cruz and the CS. Shortly after Detective Koppman arrived at the residence, the CS called Detective Koppman and told him that Cruz instructed the CS to meet in front of the residence in fifteen minutes. Approximately fifteen minutes later, Detective Koppman observed Cruz come out of his residence, open his gate, and walk out onto the street. According to Detective Koppman, Cruz began looking around as if he were waiting for someone, consistent with behavior expected of someone about to engage in a narcotics transaction.

At this point, Detective Koppman began to walk up to Cruz to speak with him. But when Cruz saw the law enforcement officers, he ran back onto his property. Id. Detective Koppman instructed Cruz to stop and get on the ground, but Cruz kept running.

Detective Koppman believed, based on his experience,that Cruz was going to destroy evidence. He explained, "If narcotics traffickers are running away from us, it's usually because they have evidence that they don't want to be found with, and they want to try to get rid of it. Usually flushing it. Flushing it or throwing it over a fence, throwing it on a roof. I've seen it all."

After Cruz ran, officers chased him as he ran, and then followed him as he entered his home. They saw Cruz come out of his bathroom and took him into custody. Cruz's arm was wet up to the elbow, and officers could see what appeared to be a bag of methamphetamine in the toilet. The officers detained Cruz, but they did not search anywhere else in the home at that time. After detaining Cruz, the officers read him his Miranda warnings and sat him on the couch. They offered him the

option of consenting to a search, or having the officers obtain a search warrant. Cruz cooperated and provided the officers with consent to search "whatever the officers wanted to search." Pursuant to this consent, officers searched Cruz's residence.

The bag recovered from the toilet contained ten grams of methamphetamine. Officers found two firearms in the living room; one firearm in the bedroom; fifteen ounces of methamphetamine in the trunk of a vehicle; and twenty grams of methamphetamine, twenty-three grams of heroin, and a firearm in a purse in his car. On Cruz's person, officers found bags in his pocket containing sixteen grams of methamphetamine and eight grams of heroin. The district court denied Cruz's motion to suppress, concluding that the warrantless entry into his home was supported by probable cause and justified by exigent circumstances—specifically, the destruction of evidence and the hot pursuit of a suspect. Cruz appealed and only challenges the district court's denial of his motion to suppress government.

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

"When analyzing warrantless arrests that begin outside the home and end with police chasing a suspect into his residence, we ask whether police had probable cause to make the arrest in the first place and then whether there were exigent circumstances to justify the officers' intrusion into the home. To uphold Mr. Cruz's warrantless arrest, we must determine whether the police officers had probable cause to arrest him and whether there were exigent circumstances to justify his arrest within his house.

"Here, considering all that the officers knew when they approached Mr. Cruz outside his home, they had probable cause to arrest him at that time. Detective Koppman received highly specific information from both a CI and CS that Mr. Cruz was presently trafficking narcotics. The CI provided details supporting his claim of firsthand knowledge of Mr. Cruz's drug dealing, including a description of the location of Mr. Cruz's home; providing a phone number for Mr. Cruz; and identifying him in a photograph. Moreover, the information from the CI was corroborated by the CS. The CS identified a photograph of Mr. Cruz provided one of Mr. Cruz's phone numbers that matched that provided by the CI; and showed Detective Koppman text message exchanges with Mr. Cruz describing the methamphetamine and the amount the CS was ordering from Mr. Cruz. Officers also confirmed the information from both the CI and CS through independent observation by asking the CS to set up a drug buy with Mr. Cruz while officers listened. The CS called Detective Koppman and told him that Mr. Cruz had asked to meet the CS at the intersection in front of Mr. Cruz's house in fifteen minutes. At the agreed-upon time, Mr. Cruz walked out onto the street and began looking around as if waiting to meet someone, behavior Detective Koppman believed was consistent with a drug transaction.

"Having concluded there was probable cause to support Mr. Cruz's arrest, we must next ask whether there were exigent circumstances which would justify the officers' entry into Mr. Cruz's dwelling without a warrant. We employ a four-part test to determine whether the likelihood of destruction of evidence justified the officers' warrantless entry. The test requires that an officer's entry be: (1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of the evidence is likely, (3) limited

in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.

"The officers' warrantless entry were justified under the destruction of evidence exception to the warrant requirement. The government argues—and the district court found—that the hot pursuit exception to the warrant requirement also justified the officers' entry into Mr. Cruz's home. One category of exigent circumstances is an ongoing hot pursuit of a fleeing suspect. Under this doctrine, police who attempt to arrest a felon outside her home may pursue her if she takes refuge inside. Accordingly, the hot pursuit exception, in addition to the destruction of evidence exception, justified the officers' warrantless entry into Mr. Cruz's home."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/opinions/19/19-2127.pdf

SEARCH AND SEIZURE:

Exigent Circumstances; Medical Necessity
United States v. Crutchfield
CA8, No. 19-3767, 11/2/20

Demetrius Crutchfield and another man, Taylor Cannon, were shot while standing at the front door of Crutchfield's home. Cannon drove himself to a hospital, and Crutchfield dragged himself into his bedroom and called 911. The 911 operator reported to police that someone on the call said "get the guns out." The first officer to arrive in the area of Crutchfield's home saw a man, Antonio Harris, walking away. Harris knew Crutchfield had been shot and helped the officer find Crutchfield's address, which was a home in the rear of another address. Harris accompanied the officer to Crutchfield's home. Later, additional officers and an ambulance arrived.

Officers saw bullet holes near the front door. When officers entered, Crutchfield was in his bedroom located near the front door. He was bleeding from a gunshot wound to his groin area. Officers entered the bedroom and the nearby kitchen and walked around the outside of the house. In the kitchen, an officer saw suspected drugs on a table. In the bedroom, officers saw an unfired rifle cartridge on the floor. Outside the house officers discovered assault rifles and handguns—some between Crutchfield's residence and the other residence on the property and some beyond a fence on an adjacent, abandoned property. An officer in the kitchen later stated that Harris entered the kitchen and seemed to be trying to distract the officer and retrieve the suspected drugs. Before an ambulance carrying Crutchfield departed for a hospital, officers learned that Cannon had arrived at the hospital with a gunshot wound and had stated that he was shot at Crutchfield's home. Finally, after the ambulance took Crutchfield away, an officer can be heard responding "nah" to another officer who asked if he performed a protective sweep. Officers then reentered the home. Upon reentry, an officer looked behind the bedroom door and saw more suspected narcotics on a bedside table.

Officers on the scene were familiar with Crutchfield and knew he was a felon. It was later learned that Harris had tossed the guns away from the home after the shooting. In addition, officers later learned that the actual words captured on a recording of the 911 call were "get them all out," even though the 911 operator had erroneously reported that she heard someone say "get the guns out."

Officers then obtained a search warrant stating: While on the scene Officers noticed ammunition laying around the house, and suspected narcotics. Officers securing the area noticed several assault rifles and handguns that had been thrown into some tall grass just southeast of the residence.

When executing the warrant, officers found a scale in the kitchen, over $500 cash in Crutchfield's bedroom, and additional firearms and ammunition. Tests on the suspected drugs showed 0.3948 grams of cocaine base from Crutchfield's bedside table and 2.5975 grams of methamphetamine from the kitchen.

Crutchfield appeals the United States District Court, Little Rock, Arkansas, denial of a suppression motion arguing a police entry associated with an ambulance response resulted in an unreasonable, unwarranted search of his home.

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

"Police entry into the residence in response to the call for medical aid for a shooting victim was not constitutionally objectionable. Given the fact of a shooting and the other information known to officers at the time, exigent circumstances made it permissible to look into other rooms to ensure the absence of a shooter or additional victims. See *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006) (Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.). When doing so, officers almost immediately saw ammunition and suspected narcotics in plain view. Officers were permitted to secure the exterior of the residence for the same reasons. To the extent Crutchfield takes issue with the officers looking on the adjacent property, any objects found there were abandoned. *United States v. Liu*, 180 F.3d 957, 960 (8th Cir. 1999) (abandonment of property eliminates standing to challenge search)."

The Court further stated that during a properly limited protective sweep, the police may seize an item that is in plain view if its incriminating character is "immediately apparent."

"In any event, no information gleaned through lingering in the home, or re-entering after the ambulance departed, aided in securing the search warrant. Rather, officers relied on information obtained permissibly and nearly immediately upon entry into the residence."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/11/193767P.pdf

SEARCH AND SEIZURE:

Inventory Search
United States v. Everett, Jr.
CA8, No. 18-2086, 10/9/20

James Everett, Jr. resisted arrest and directed a death threat to Federal Protective Service officers outside the Richard Bolling Federal Building in Kansas City, Missouri. A jury convicted Everett of threatening a federal law enforcement officer, forcibly resisting a federal law enforcement officer, and being a felon in possession of a firearm. Everett appeals, arguing the district court erred in denying his motion to suppress the firearm found under the driver's seat of the car he drove to the Bolling Building; abused its discretion by admitting unfairly prejudicial phone calls he made from jail while awaiting trial; the evidence was insufficient to convict him of any count; and the Supreme Court's recent decision in *Rehaif v. United States*,

139 S. Ct. 2191 (2019), requires reversal of his felon-in-possession conviction.

The Court of Appeals for the Eighth Circuit affirmed. In reference to inventory searches, they stated:

"When local police search a vehicle they are impounding for 'public safety' or 'community caretaking' functions, incriminating evidence discovered during the search need not be suppressed if the officers 'follow a routine practice of securing and inventorying the automobiles' contents.' *South Dakota v. Opperman*, 428 U.S. 364, (1976). This inventory search exception 'encompasses distinct police actions—the decision to impound or tow a vehicle, the decision to search the vehicle, and the manner and scope of the search.'

"Officers may impound and tow a vehicle without violating the Fourth Amendment so long as they exercise that discretion 'according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.' *Colorado v. Bertine*, 479 U.S. 367, 375 (1987). Officers conducting inventory searches consistent with standardized policies may 'keep their eyes open for potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime.' *United States v. Harris*, 795 F.3d 820, 822 (8th Cir. 2015). Something else must be present to suggest that the police were engaging in their criminal investigatory function, not their caretaking function."

READ THE COURT OPINION HERE:
https://www.ca8.uscourts.gov/sites/ca8/files/opinions/182806P_0.pdf

SEARCH AND SEIZURE: Officer Opens Vehicle Door and Leans Inside
United States v. Ngumezi
CA9, No. 19-10243, 11/20/20

The search at issue occurred in the early morning hours of May 6, 2018, after a San Francisco police officer, Kolby Willmes, saw Malik Ngumezi's car parked at a gas station with Ngumezi in the driver's seat. The car had no license plates, in apparent violation of the California Vehicle Code. Ngumezi had recently purchased the car, and a bill of sale was affixed to the lower passenger side corner of the windshield.

Willmes approached the car to investigate; because a gas pump blocked access to the driver side, he went to the passenger side. According to Ngumezi, Willmes then opened the passenger door, leaned into the car, and asked Ngumezi for his driver's license and vehicle registration. For his part, Willmes agrees that he asked for Ngumezi's license and registration and does not deny that he first opened the door and leaned inside. Willmes says that he does not remember whether he opened the door, or whether he instead spoke to Ngumezi through an open window.

Ngumezi produced a California identification card but not a driver's license. Willmes asked Ngumezi if his license was suspended, and Ngumezi admitted that it was. Another officer then ran a license check and confirmed that Ngumezi's license was suspended and that Ngumezi had three prior citations for driving with a suspended license. San Francisco Police Department policy requires officers to inventory and tow a vehicle when a driver lacks a valid license and has at least one prior citation for driving without a valid license.

Consistent with that policy, the officers prepared to have Ngumezi's car towed. In conducting the inventory search, they found a loaded .45 caliber handgun under the driver's seat. The officers then ran a background check and learned that Ngumezi was prohibited from possessing firearms because of a previous felony conviction.

Ngumezi was charged with one count of being a felon in possession of a firearm. He moved to suppress the firearm as fruit of an unlawful search. He conceded that Officer Willmes had articulable facts and reasonable suspicion to approach the vehicle when Willmes saw that it had no plates. But his principal argument is that whether or not Officer Willmes had reasonable suspicion at the time he opened the door, opening the door and leaning inside constituted a search that violated the Fourth Amendment.

The Ninth Circuit Court held that police officers who have reasonable suspicion sufficient to justify a traffic stop—but who lack probable cause or any other particularized justification, such as a reasonable belief that the driver poses a danger—may not open the door to a vehicle and lean inside. Because opening the car door and leaning into the car constituted an unlawful search under the Fourth Amendment, the Court considered what remedy is appropriate in this case. The panel held that the exclusionary rule applies to the loaded handgun found under the driver's seat because the government made no effort to satisfy its burden to show that the gun is not the fruit of the poisonous tree.

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/11/20/19-10243.pdf

SEARCH AND SEIZURE: Plain View
United States v. Clancy
CA6, No. 19-6367, 11/12/20

Lamar Clancy and a partner set out to rob a Boost Mobile store in Memphis, Tennessee, on December 8, 2017. Clancy wore a white hoodie and red pants with white letters, along with red shoes, a black mask, black gloves, and had a silver gun. His partner wore a black hoodie, black pants, a black mask, and carried a gun too. Entering the store, they found the store's manager standing behind the counter with two other employees. Clancy pointed his weapon and said: "You know what time it is." Within seconds, the manager heard shots ring out. He and another employee grabbed their own guns and reflexively returned fire. Bullets flew, glass shattered, the robbers fled. "By the time I hit that door," said one customer, "it was like cowboys and Indians." One employee took a shot to the knee. The manager emerged unscathed.

Not so for Clancy. Within fifteen minutes of the robbery, a car pulled up to Methodist South Hospital. Two men dressed in black got the attention of an emergency technician, who found Clancy laying across the backseat with a gunshot wound to the arm. Once hospital workers rolled him into the trauma room, the two other men left. Clancy wore a white, light color jacket, red pants with a white lettering, red" shoes, and a black glove. Once he made it to the trauma room, medical personnel stripped off his clothes and piled them on the floor.

Meanwhile, Memphis police arrived at the Boost Mobile store. They heard descriptions of the suspects, including the one who wore red jogging pants with a white stripe, a white sweatshirt, and a black ski mask. Before long, the officers learned that Methodist South had just admitted a

shooting victim. Two officers went to the hospital and walked into the emergency department, where they found Clancy and saw his clothing on the floor, out in the open and visible from the hallway outside his room. Red pants with a white stripe. Red Nikes. White sweatshirt. Black ski mask. The clothes raised suspicions.

Hospital staff airlifted Clancy to another hospital for treatment. After he left, crime scene investigators arrived at Methodist South's emergency department. They went to the trauma room and found Clancy's bloodied clothes in a plastic bag. A crime scene investigator removed the clothes from the bag, then photographed each piece and put them in a paper sack.

The Government charged Clancy with two counts: attempted Hobbs Act robbery, see 18 U.S.C. §§ 1951, 2, and use of a firearm related to a crime of violence, see id. § 924(c). Clancy moved to suppress the clothing evidence, but the district court denied his motion. The jury found Clancy guilty on both counts.

The Sixth Circuit affirmed, upholding the denial of a motion to suppress the clothing evidence, citing the plain-view doctrine.

"The hospital did not store Clancy's clothing or remove it from the trauma room while doctors attended to his gunshot wound. And the officers had lawful access because the hospital routinely called police upon receiving a gunshot victim. No doubt, someone at the hospital put Clancy's clothing into a 'plastic bag.' But that was only after officers saw the evidence in the first place from the hallway."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0355p-06.pdf

SEARCH AND SEIZURE:

Search by a Private Person

United States v. Green

CA7, No. 19-2330, 9/16/20

Rumael Green was indicted for possession of a firearm by a felon. A security guard, Sirjohn Hudson, stopped and searched Green at a Chicago Housing Authority (CHA) public housing unit. After recovering a handgun, the security guard called the Chicago Police Department. At trial, Green moved to suppress the gun arguing the private security guard was a government agent. The question on appeal is whether Hudson was a state actor who is subject to the Fourth Amendment. The Fourth Amendment is inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

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

"The Court decided this issue with regard to the actions of a Chicago Housing Authority private security guard and see no reason to depart from our precedent. In Wade v. Byles, 83 F.3d 902 (7th Cir. 1996), we held that a private security guard, even when authorized to use deadly force in self-defense and arrest trespassers pending police arrival, was not a state actor. Hudson, like the other security guards, was contracted to perform private security functions and acted without any direct government involvement. Therefore, the Fourth Amendment is inapplicable."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D09-16/C:19-2330:J:Bauer:aut:T:fnOp:N:2580284:S:0

SEARCH AND SEIZURE:

Stop and Frisk; Reasonable Suspicion

United States v. Bruce

CA11, No. 18-10969, 10/8/20

At 3:20 a.m., an unnamed 911 caller reported that men were outside arguing next to a white car. One had a gun. The caller warned that responding officers should be careful because there "might be shooting any minute from now." Minutes later officers were on scene, lights flashing, in an area of Miami-Dade County that accounted for a disproportionate number of their patrol area's 911 calls. They saw two men sitting in a car at the address the caller had specified. The officers approached cautiously, guns drawn. One of the men in the car— Toddrey Bruce, who had a prior felony conviction—tried to flee. An officer tackled him, and a loaded pistol fell from Bruce's waist. The police arrested him on a felon-in-possession charge. Bruce now argues that the police should not have stopped him because they lacked reasonable suspicion that he had engaged in criminal activity. But given the details of the 911 call, the time of day, and the high-crime area, the officers could reasonably suspect that Bruce had engaged in criminal activity.

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

"The recorded 911 call came in a little after 3:00 a.m. An unnamed man said that he saw a 'disturbance' in the front yard of a 'drug house'—and that one of the men involved had a gun. When the 911 operator asked what was happening 'as we speak right now,' the caller replied that 'they're arguing in the front yard.' The caller described the person holding the gun as a black man dressed in all black, and said that he was standing next to a white car in front of the house. Before the call ended, the tipster warned that the police should use caution because there 'might be shooting any minute.'

"Dispatch quickly relayed the key parts of this call to the police. The dispatch message told police (in shorthand) about the 'argument in front yard, and black male standing next to white vehicle, and this subject holding handgun.' Officers were also given the address in the Perrine neighborhood where the disturbance was taking place. Several officers were nearby because Perrine accounted for about half of the 911 calls for their zone, even though the neighborhood was only a small portion of the entire area they patrolled. Within five minutes, flashing police lights were at the scene.

"The approaching officers saw two men in the white car at the specified address. For safety reasons, they drew their guns as they drew near to the car. Their priority, as one officer explained, was 'officer safety' and the safety of people who might be 'gathered in the area.' When they told the men to exit the car, Bruce tried to make a break for it. One of the officers grabbed him, and in the scuffle a loaded semi-automatic pistol dropped from Bruce's waistband. Though officers soon discovered that Bruce and his associate were likely arguing with someone on the phone rather than with each other, they also found out that Bruce was a felon—meaning that it was illegal for him to carry a gun.

"Brief investigative stops have long been recognized as reasonable, at least under appropriate circumstances. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Officers may briefly detain a person as part of an investigatory stop if they have a reasonable articulable suspicion based on objective facts that the person has engaged in criminal activity. *United States v. Blackman*, 66 F.3d 1572, 1576 (11th Cir. 1995). To have reasonable suspicion, an officer needs at least a

minimal level of objective justification for making the stop. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). 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). We look to the totality of the circumstances to decide if the police had reasonable suspicion. See *United States v. Lindsey,* 482 F.3d 1285, 1290 (11th Cir. 2007). This reasonable-suspicion inquiry ultimately hinges on both the content of information possessed by police and its degree of reliability. *Alabama v. White*, 496 U.S. 325, 330 (1990). The Supreme Court has been clear that an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. *Navarette,* 572 U.S. at 397. So we first review the reliability of the tip here—the 911 call—and then consider how it informs the reasonable-suspicion analysis on these facts.

"The Supreme Court in *Navarette v. California* considered a tip much like the one Bruce challenges. The unnamed 911 caller there reported that a silver pickup truck (identified by its make, model, and plate number) had just run her off the road. *Navarette*, 572 U.S. at 395. That call bore adequate indicia of reliability because the caller (1) 'claimed eyewitness knowledge' of the event, (2) provided a 'contemporaneous report,' and (3) used the 911 emergency system. Each of those factors is also present here. To start, the caller claimed eyewitness knowledge of the event. He told the 911 operator that 'the person that I see out there with a gun is a guy' wearing 'full black.' That does not necessarily mean that every 911 caller is telling the truth—we assume that some do not. But it does mean that a reasonable officer could conclude that a false tipster would think twice before calling 911. *Navarette*, 572 U.S. at 401. Law enforcement would be hamstrung if it could not ordinarily rely on information conveyed by anonymous 911 callers. *United States v. Holloway,* 290 F.3d 1331, 1339 (11th Cir. 2002). Anonymous tips standing alone seldom demonstrates the informant's basis of knowledge. By itself, a tip is not reliable if it is a 'bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information.' *Florida v. J.L.*, 529 U.S. 266, 271 (2000). But where, as here, the caller gives a first-hand account, that 'basis of knowledge lends significant support to the tip's reliability'—even where the caller's identity is unknown.

"The caller also gave a contemporaneous report, describing events as he was seeing them. He told the 911 operator that he was reporting the argument as we speak right now. The dispatch message communicated this fact to the officers by using a progressive verb tense to describe Bruce's actions: 'standing next to the white vehicle' and 'holding a handgun.' And when officers responded a few minutes later, they confirmed that two men were near (by that time, inside) the white car at the address provided, which itself suggests that the caller reported in real-time. That sort of contemporaneous report has long been treated as especially reliable.

"Finally, the fact that the tipster called 911 to report the incident proves to be another indicator of veracity under *Navarette.* A 911 call can be traced if necessary, and can also be recorded (as it was here). These tools diminish the chance that a lying tipster could hide behind the cloak of anonymity. And if that were not enough, a caller can be prosecuted for providing a false tip. That does not necessarily mean that every 911 caller

is telling the truth—we assume that some do not. But it does mean that a 'reasonable officer could conclude that a false tipster would think twice' before calling 911. Law enforcement would be hamstrung if it could not ordinarily rely on information conveyed by anonymous 911 callers.

"Sometimes tipster cases are close. But this one is not. Reasonable suspicion 'depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Navarette*, 572 U.S. at 402. Officers need not—and should not— turn a blind eye to commonsense concerns of danger when responding to an emergency 911 call. Nor should we when analyzing the circumstances. Law enforcement officers are at greatest risk when dealing with potentially armed individuals because they are the first to confront this perilous and unpredictable situation. *United States v. Gibson*, 64 F.3d 617, 624 (11th Cir. 1995). The very rationale underpinning Terry—the protection of officer safety and the safety of others nearby, especially from the dangers posed by firearms—is presented by the facts of this case The officers had reasonable suspicion to perform an investigatory stop."

READ THE COURT OPINION HERE:
https://media.ca11.uscourts.gov/opinions/pub/files/201810969.pdf

SEARCH AND SEIZURE: Stop and Frisk; Justification for Stop Existed
United States v. Slater
CA8, No. 19-2800, 11/5/20

On November 28, 2015, at 7:29 p.m., an individual called 911 to report he had just been the victim of an armed robbery in Kansas City, Missouri. The individual gave his name, telephone number, and location (E. 12th St. and Prospect Ave. in Kansas City). He also provided a description of his assailants: two black males wearing brown hoodies and dark pants, one of whom was armed with a handgun. At 7:31 p.m., dispatch relayed the description of the assailants to officers in the area. A little over a minute later, dispatch further relayed a change to the incident location (E. 12th St. and Brooklyn Ave. in Kansas City) as well as the report that the assailants stole two cell phones and a wallet and had fled the scene on foot in an unknown direction.

Officers Timothy Griddine and Charles Hill were a few blocks west of the reported locations when they heard these broadcasts. They began canvassing the area in their unmarked patrol vehicle to search for the assailants. A few minutes after the first broadcast, the officers turned left onto E. 10th St. after traveling south on Woodland Ave., an intersection still a few blocks west of the reported locations. Immediately upon turning onto E. 10th St., Officer Griddine saw two black males walking west on the sidewalk on the north side of the street. He noticed that one of them was wearing a "tan" or "brown hoodie" (it turned out to be a khaki jacket over a gray hoodie), which caught his eye. He did not identify the color of the other individual's clothing beyond perceiving it to be "dark." Thinking these two individuals could be the assailants, Officer Griddine stopped his vehicle, got out, and ordered them to stop. They complied.

Officer Griddine then explained that he was investigating a robbery, and he proceeded to frisk the individual he had observed wearing the brown hoodie. He did not find any weapon or anything incriminating. Officer Griddine then frisked the other individual, Antonio Slater. Officer Griddine discovered a gun in his right pocket, at which moment Slater "[l]owered his right arm, right on top of [Officer Griddine's] hand," as if he were going to remove Officer Griddine's hand or try to escape. Officer Griddine then attempted physically to restrain Slater, who struggled with Officer Griddine for several minutes. Slater was eventually handcuffed. His name was run through a law enforcement database, which reported that he was a convicted felon. He was then arrested. He moved to suppress evidence of the firearm, arguing that Officer Griddine's stop and frisk were not supported by reasonable suspicion.

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

"A Terry stop is justified when a police officer is able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. During a Terry stop, when an officer is justified in believing that the individual he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon. Under Terry, both the stop and the frisk for weapons during the stop must be supported by reasonable suspicion. The general reasonable suspicion standard is the same in both instances. For the stop, the officer must have reasonable suspicion that 'criminal activity may be afoot. For the frisk, the officer must have reasonable suspicion that a person with whom he is dealing might be armed and presently dangerous.

"Under Terry, both the stop and the frisk for weapons during the stop must be supported by reasonable suspicion. *United States v. Powell*, 666 F.3d 180, 186 n.5 (4th Cir. 2011) ('The general reasonable suspicion standard is the same in both instances.') For the stop, the officer must have 'reasonable suspicion that criminal activity may be afoot.' *Houston*, 920 F.3d at 1172 (quoting *Terry*, 392 U.S. at 30). For the frisk, the officer must have reasonable suspicion that a person with whom he is dealing might be armed and presently dangerous. *United States v. Green*, 946 F.3d 433, 439 (8th Cir. 2019).

"In determining whether reasonable suspicion exists, we consider the totality of the circumstances in light of the officer's experience and specialized training. We consider what the officer reasonably knew at the time rather than assessing the existence of reasonable suspicion with the vision of hindsight. Although the reasonable-suspicion standard requires more than a mere hunch the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard. In considering the totality of the circumstances, we may not view individual elements of suspicion in isolation, but rather we must view the individual elements in context, i.e., in light of one another, and give due weight to the officer's inferences when assessing the overall level of suspicion.

"The primary issue here is whether Officer Griddine had reasonable suspicion that Slater and his companion were the assailants so as to have justification to stop them in the first place. At the time of the stop, Officer Griddine knew that two black males reportedly wearing brown hoodies and dark pants were fleeing on foot from the scene of a robbery that had occurred a few blocks east just a few minutes beforehand. When he

turned onto E. 10th St., Officer Griddine observed two black males walking west, away from the scene of the robbery, and he noticed that one of these individuals was wearing a tan or brown hoodie and that the other individual's clothing was dark.

"In light of the totality of these circumstances, we conclude reasonable suspicion existed to justify the stop. Officer Griddine was on the lookout for two black males wearing brown hoodies and dark pants fleeing on foot from the scene of the robbery. When he turned onto E. 10th St. (a few blocks west of the reported locations of the crime) just minutes after the crime reportedly occurred, he observed two black males wearing clothing that resembled the description of the assailants' clothing and walking west away from the crime scene. That is, Slater and his companion were two men, they matched the generic description of the assailants, they were in close temporal and geographical proximity to the crime, their clothing partly matched the assailants' clothing, and they were walking away from the crime scene. This combination of factors supports a finding of reasonable suspicion justifying the stop.

"Having concluded that reasonable suspicion existed to justify the stop, we have no trouble concluding further that reasonable suspicion existed to justify the frisk. Officer Griddine heard a report from dispatch that one of the assailants was armed with a gun. Where nothing in the initial stages of the encounter serves to dispel the officer's reasonable fear for his own or others' safety, he is entitled to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/11/192800P.pdf

SEARCH AND SEIZURE:

Third Party Business Records

United States v. Trader

CA 11, No. 17-15611, 11/25/20

In this case, the Eleventh Circuit Court of Appeals held the government did not need a warrant for the third party's business records. In this case, Homeland Security traced an internet protocol address to the internet service provider, Comcast. Agents sent Comcast an emergency disclosure request for the subscriber records associated with the repeated internet protocol address.

"Ordinarily, a person lacks a reasonable expectation of privacy in information he has voluntarily disclosed to a third party. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976). This principle is called the third-party doctrine. In *Carpenter v. United States*, 138 S.Ct. 2206 (2018) the United State Supreme Court held that the third party doctrine does not apply to retrospective collection of cell-site location information.

"Absent *Carpenter,* the third-party doctrine would undoubtedly apply to the information the government received. So the government violated the Fourth Amendment only if *Carpenter*'s exception to the third-party doctrine applies. The third-party doctrine controls here because *Carpenter*'s "narrow" exception applies only to some cell-site location information, not to ordinary business records like email addresses and internet protocol addresses. The third-party doctrine applies, so the government did not need a warrant to obtain Trader's email address or internet protocol addresses."

READ THE COURT OPINION HERE:
https://media.ca11.uscourts.gov/opinions/pub/files/201715611.pdf

SEARCH AND SEIZURE:

Vehicle Impoundment; Inventory

United States v. Snoddy

CA6, No. 19-6089, 9/24/20

Around 1:00 a.m. on November 9, 2017, Trooper Malone stopped Craig Snoddy for speeding on the highway. During the stop, Trooper Malone learned that there were State of Georgia warrants out for Snoddy's arrest, including for drug crimes, so Trooper Malone and a back-up officer arrested Snoddy on the Georgia warrants. Trooper Malone also suspected that Snoddy might have drugs in the car. Within a minute after making the arrest, the officers asked twice for consent to search the car, but Snoddy refused. Then Trooper Malone told Snoddy, "I'm gonna have to get the car towed, 'cause it's not just gonna sit here, and we have to do an inventory on the car."

For about twelve minutes, Trooper Malone again repeatedly asked Snoddy for consent to search the car—warning Snoddy that if he did not agree to a search then the car would be inventoried, meaning that Trooper Malone would have to search the car and list out the items that he found. Snoddy repeatedly denied consent. Roughly eight minutes after the arrest, in the midst of the attempts to obtain Snoddy's consent, Trooper Malone called in the tow truck, but continued to seek consent from Snoddy to search the car. About five minutes after Trooper Malone called in the tow truck, Trooper Malone began conducting an inventory of the car. During the inventory, Trooper Malone discovered and seized approximately one pound of methamphetamine, two handguns, and a set of scales.

Snoddy was indicted for possession of methamphetamine with intent to distribute, possession of a firearm in furtherance of drug trafficking, and possession of a firearm as a convicted felon. Snoddy moved to suppress the drugs and guns seized from the car, arguing that Trooper Malone's decision to impound the car was unreasonable and that the decision to inventory the car was a pretext for an investigative search. Snoddy was convicted but in a plea agreement reserved his right to appeal the denial of his motion to suppress.

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

"Trooper Malone decided to have Snoddy's car towed and impounded after arresting Snoddy, the sole occupant of the car, on outstanding warrants. Impounding the car, Snoddy concedes, was within Trooper Malone's discretion, and conducting an inventory was required as a matter of Tennessee Department of Safety policy. Under the policy, once an officer has exercised her discretion to impound the vehicle, the officer must conduct an inventory before towing.

"Acknowledging that this is the policy, Snoddy argues that the inventory search nevertheless was pretextual because Trooper Malone's subjective intent was to conduct an investigative search. In Snoddy's view, searching for contraband was not simply a motive for searching the vehicle—but was the principal, or true, motive. Snoddy points to several statements made by Trooper Malone as evidence of his subjective intent to investigate. After dispatch told Trooper Malone about Snoddy's warrants, Trooper Malone told dispatch that he could tell something was up and that he was going to try to search the car once backup arrived. Then, over twelve minutes, Trooper Malone repeatedly asked for Snoddy's consent to search the car, to no avail. He told Snoddy that he knew that there were drugs in the car and that he would find them anyway in an inventory search—saying thing like, Don't let me tear apart this car.

Just tell me where it's at, and guessing aloud that it was meth. Once Trooper Malone found the drugs, he said, 'I told you I was going to find it either way.' Snoddy also points out that Trooper Malone did not call in the tow truck until after seeking consent from Snoddy to search the car.

"The problem for Snoddy is that, regardless of Trooper Malone's motivations and beliefs, Trooper Malone was going to have the car towed no matter what. Snoddy was the sole occupant of the car, and the car would have been left out on the side of the highway near an intersection in the middle of the night where it could be stolen, vandalized, or hit by another vehicle. The Fourth Amendment permits impoundment decisions and inventory searches that are objectively justifiable regardless of an officer's subjective intent. In these circumstances—where the arrestee is the sole occupant of the car and the car would be left on the side of the road in the middle of the night—impounding the car reasonably could be seen as objectively justifiable.

"Though we acknowledge that some of the evidence calls into question whether the inventory search was pretextual, we are not left with the definite and firm conviction that the district court erred in finding that the inventory search was objectively justifiable. Because the district court did not clearly err in finding that the inventory search was not pretextual, we uphold its denial of Snoddy's motion to suppress."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0310p-06.pdf

VEHICLE SEARCH:

Probable Cause; Cooperating Defendant

United States v. Simpkins

CA1, No. 19-1948, 1015/20

In this case, the Court of Appeals for the First Circuit stated when the so-called "automobile exception" applies — and this is such a case — a warrantless search of an automobile may proceed so long as the authorities have probable cause to believe that contraband is within the particular vehicle. See *California v. Acevedo*, 500 U.S. 565, 580 (1991); *United States v. Silva*, 742 F.3d 1, 7 (1st Cir. 2014).

"A finding of probable cause does not demand proof beyond a reasonable doubt but, rather, may be made when the totality of the circumstances create a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Almonte-Báez*, 857 F.3d 27, 31-32 (1st Cir. 2017) (quoting *United States v. Tanguay*, 787 F.3d 44, 50 (1st Cir. 2015)). Intelligence supplied by an informant may support a finding of probable cause when the probability of a lying or inaccurate informer has been sufficiently reduced. *United States v. Gifford*, 727 F.3d 92, 99 (1st Cir. 2013) (quoting *United States v. Greenburg,* 410 F.3d 63, 69 (1st Cir. 2005)).

"In order to assist in assessing the credibility of an informant, we previously have set forth a non-exhaustive compendium of potentially relevant factors. See *United States v. White*, 804 F.3d 132, 137 (1st Cir. 2015). These include:

(1) the probable veracity and basis of knowledge of the informant; (2) whether an informant's statements reflect first-hand knowledge; (3) whether some or all of the informant's factual statements were corroborated wherever reasonable and practicable; and (4) whether

a law enforcement officer assessed, from his professional standpoint, experience, and expertise, the probable significance of the informant's information.

"Viewing the record as a whole, we have little difficulty in concluding that the authorities had probable cause to search the defendant's vehicle. Cooperating Defendant's (CD) information furnished a coherent tale: the defendant was not only the source of the oxycodone and Suboxone that was found in CD's possession but also was an ongoing supplier. Crucially, CD's account was based upon first-hand knowledge — knowledge that CD substantiated by referring the troopers to a series of text messages to and from the defendant. The district court found that experienced officers reasonably believed that the 'pinks,' 'greens,' and 'strips' that CD discussed with the defendant referred to illicit substances. See *United States v. Dunston*, 851 F.3d 91, 96-97 (1st Cir. 2017) (explaining that law enforcement officers with experience in drug-trafficking investigations may interpret jargon used in that trade); see also *United States v. Tiem Trinh*, 665 F.3d 1, 12-13 (1st Cir. 2011) (noting that court may credit the 'particular knowledge and experience' of officers in reviewing probable cause determinations). Moreover, in an exchange that occurred on the day before CD was found in possession of Suboxone strips that he professed to have purchased from the defendant, the pair discussed 'how many strips' the defendant had available for sale and whether adverse weather conditions would affect the ability of the two men to meet and 'get it over with.'

"This evidence, compelling in itself, was bolstered by what transpired after CD began to cooperate with the authorities: CD contacted the defendant on several occasions, including two telephone calls aimed at arranging another meeting. These two calls not only prompted the defendant to make what amounted to a sales trip to Maine but also corroborated CD's self-described relationship with the defendant. In the first call, CD told the defendant that he needed to get something but was unable to travel to Rhode Island. The defendant responded that he had stored 'those' in his mother's safe because he was not comfortable keeping 'them' in his own house — references that the troopers reasonably understood to be references to illicit substances.

"To cinch the matter, on the day of the defendant's planned journey to Maine, CD requested that the defendant send him a price for a total. This was followed by a text message from the defendant, which read: "Heading out about 2…3850 if it ain't short."

"At the time the defendant left for Maine, the authorities had abundant evidence supporting CD's claims to first-hand knowledge of the defendant's drug-trafficking activities. So, too, they had solid reason to believe that the defendant would be transporting to Maine illicit substances for delivery to a prospective customer (CD). And, finally, the defendant's behavior before leaving Rhode Island, witnessed at first hand by task force members, was consistent with the drug trafficking scenario. Cf. *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983) ('In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.'). It was, therefore, objectively reasonable for the authorities to believe that the defendant would have contraband in his vehicle when he arrived in Maine.

"The defendant strives to snatch victory from the jaws of defeat. He challenges CD's reliability and

veracity because of CD's felony record. The fact that an informant has a felony record belongs in the mix when analyzing the informant's reliability. See *United States v. Brown,* 500 F.3d 48, 55 (1st Cir. 2007). But probable cause determinations are typically made on the basis of the totality of the evidence, see *Almonte-Báez*, 857 F.3d at 31, and a felony record does not preclude a finding of probable cause where, as here, the informant's story reasonably appears to be reliable, Brown, And in all events, CD was known to the police and could have been held accountable if the information proved inaccurate or false.

"We hold, without serious question, that the authorities had probable cause to search the defendant's car. Consequently, the evidence seized during the vehicle search was admissible, and the district court did not err in denying the defendant's motion to suppress the fruits of that search."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/19-1948P-01A.pdf

VEHICLE STOP: Passenger Dealt with During a Lawful Stop Extended the Basis of the Stop **Rhoton v. Commonwealth of Kentucky** SCK, No. 2019-SC-0298 DG, 10/29/20

On the afternoon of October 1, 2016, Kentucky State Police Trooper Joseph Zalone was on routine patrol in the Peasticks community of Bath County. Trooper Zalone knew of the area's reputation as a high-crime area for drug trafficking and illegal possession of narcotics. Trooper Zalone observed a blue Toyota Camry with an unbelted passenger. Trooper Zalone executed a traffic stop of the vehicle which was driven by Rickey Rhoton. Trooper Zalone approached Rhoton's window and observed a small, screw-top metal canister, approximately two inches long by one-and-a-half inches wide, in the center console. The canister was of a type that, in Trooper Zalone's experience, was often used to conceal illegal narcotics. Trooper Zalone asked Rhoton if he had any drugs in the car, to which Rhoton responded negatively. Rhoton declined Trooper Zalone's request to search the vehicle.

Trooper Zalone returned to his cruiser with Rhoton's license and registration as well as the passenger's relevant information. Trooper Zalone radioed for assistance from a nearby canine unit as he began preparing the citation. Trooper Zalone testified that it ordinarily took him ten to fifteen minutes to complete a citation for a seatbelt violation. Trooper Zalone ran the ordinary records checks on Rhoton and his passenger, discovering the passenger had an unrelated active arrest warrant. Owingsville Police Officer Bud Lyons and his drug dog arrived 25 minutes after the initial traffic stop and while Trooper Zalone was still in his vehicle preparing Rhoton's citation and confirming information regarding the passenger's warrant. At this point, Officer Lyons assisted Trooper Zalone in removing Rhoton and his passenger from the vehicle.

After removing Rhoton and his passenger from the vehicle, Officer Lyons conducted an external sweep of Rhoton's car, and the dog alerted to the driver's door. Once the door was opened, the dog also alerted to the driver's seat. Trooper Zalone then searched the interior of the automobile in the area the dog alerted and found a partially zipped pouch between the driver's seat and center console. He could see the orange-capped tips of two syringes partially sticking out of the pouch. Upon further inspection of the pouch, Trooper Zalone found additional syringes and plastic wrap containing crushed and melted pills.

The metal canister in the console was empty. Rhoton accepted ownership of the bag and admitted that the pills were oxycodone. Rhoton was arrested and subsequently indicted for first-degree possession of a controlled substance, possession of a controlled substance not in original container, and possession of drug paraphernalia.

Rhoton moved the trial court to suppress the evidence seized during the traffic stop arguing that Trooper Zalone impermissibly prolonged the stop to facilitate the dog sniff search. Following an evidentiary hearing, the trial court denied Rhoton's request. The trial court found two rationales for the denial. First, the trial court found that Trooper Zalone's extension of the stop was not excessive given the need to take Rhoton's passenger into custody pursuant to his outstanding warrant. Second, even absent the need to take the passenger into custody, the trial court found that Trooper Zalone's observation of the metal canister taken in conjunction with the stop occurring in a high-drug activity area, provided reasonable articulable suspicion of ongoing criminal activity sufficient to prolong the traffic stop. The Court of Appeals affirmed the trial court. Rhoton filed a motion for discretionary review.

Upon review, the Supreme Court of Kentucky found, in part, as follows:

"It has long been considered reasonable for an officer to conduct a traffic stop if he or she has probable cause to believe that a traffic violation has occurred. Furthermore, an officer's subjective motivations for the stop are not relevant, as long as an officer has probable cause to believe a civil traffic violation has occurred. While officers may detain a vehicle and its occupants to conduct an ordinary stop, such actions may not be excessively intrusive and must be reasonably related to the circumstances justifying the initial seizure. The United States Supreme Court in *Rodriguez v. United States,* 575 U.S. 348 (2015) said that even a de minimis delay beyond the time needed to pursue the original purpose of the stop fails a constitutional test absent other circumstances.

"An officer's ordinary inquiries incident to a traffic stop do not impermissibly extend such stop. Included in such ordinary inquiries are an officer's review of the driver's information, auto insurance and registration, and the performance of criminal background checks of the driver and any passengers. In order to extend the stop beyond that required to complete its initial purpose, something must occur during the stop to create a reasonable and articulable suspicion that criminal activity is afoot.

"We have also held that an officer may ask for identification and perform criminal records checks of the driver and any passengers during a lawful traffic stop as an ordinary measure related to officer safety. Relying on the logic from *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and *Maryland v. Wilson*, 519 US. 408 (1977) we held that officers may detain passengers for the entire duration of the stop, including warrant and background checks, as a safety measure.

"In the present case, Ricky Allen Rhoton was stopped for the failure of his passenger to use a seatbelt. As part of the stop, Trooper Zalone asked for identification from both Rhoton and the passenger from which he ran an ordinary outstanding warrants search. A warrants search resulted in a notification of an outstanding arrest warrant for Rhoton's passenger, necessitating actions on Trooper Zalone's part to execute the warrant. The total encounter was twenty five minutes, approximately ten minutes longer than Trooper Zalone's estimate of what an ordinary stop for a seatbelt violation would take.

Rhoton avers that this ten-minute addition was an impermissible delay and should result in the suppression of the evidence found during this period. We disagree.

"It is true that Trooper Zalone stated an ordinary stop for a seatbelt takes ten to fifteen minutes, but this was not an ordinary stop. The routine warrants check, permitted under Rodriguez and our own precedents, returned an outstanding warrant for Rhoton's passenger. This new fact provided independent probable cause to extend the stop for an amount of time reasonably necessary to address the outstanding warrant. It would be inconsistent for the law to allow the routine check for outstanding warrants, yet not allow the officer the time or space to act when such a warrant is discovered.

"Rhoton goes on to argue, even if the outstanding warrant was new information that Trooper Zalone was privileged to act upon, he could have done so in a way that permitted Rhoton to go on his way prior to the canine unit's arrival. Perhaps Trooper Zalone could have proceeded in such a manner, but officers have an interest in securing those at the scene until the stop is complete. The same logic applies to the driver when the passenger has now become the subject of the stop. We therefore hold that discovery of an outstanding warrant as part of a traffic stop provides new probable cause for the resulting increased duration of such stop. We further hold that such increase does not impermissibly delay the individuals subjected to the stop, and, in the interest of officer safety, all those involved in the stop may be detained until the stop is complete. We reiterate, however, that this new purpose of the stop must be diligently pursued, and any prolonging of the stop must be related to this new purpose.

"We hold that actions taken to facilitate the arrest of Rhoton's passenger did not impermissibly extended his traffic stop. Therefore, his motion to suppress the evidence resulting from the subsequent use of the narcotics dog was correctly denied."

READ THE COURT OPINION HERE:
https://appellatepublic.kycourts.net/api/api/v1/publicaccessdocuments/