UNIVERSITY OF ARKANSAS SYSTEM
CRIMINAL JUSTICE INSTITUTE

CJI Legal Briefs

Volume 26, Issue 2
WINTER 2022

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

Contents

Arkansas Freedom of Information Act

Burgie v. State

ASC, No. CR-20-520, 2021 Ark. 157, 9/16/21

A jury convicted Eric C. Burgie of capital murder and aggravated robbery in 2021 and sentenced him to life imprisonment without parole. The Arkansas Supreme Court affirmed the conviction. Burgie now contends that he was entitled to materials from the prosecutor and the Hot Springs Police Deparment because the requested material pertained exclusively to the investigation surrounding his conviction for capital murder. Burgie requested investigative materials from local authorities in accordance with the Arkansas Freedom of Information Act (FOIA) which request was denied.

Upon review, the Arkansas Supreme Court found "that pursuant to FOIA, 'undisclosed investigations by law enforcement agencies of suspected criminal activities…shall not be deemed to be made open to the public.' *Berger v. Bryant*, 2020 Ark. 157, 598 S.W.3d 36 (citing Ark. Code Ann. § 25-19-105(b)(6)). Moreover, FOIA further prohibits access to any public record to a 'person who at the time of the request has pleaded guilty to or been found guilty of a felony and is incarcerated in a correctional facility.

"In view of the above, Burgie fails to show that he has an established legal right to access investigative materials from local authorities. The circuit court did not abuse its discretion when it denied Burgie's petition."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/supremecourt/en/513018/1/document.do

CIVIL RIGHTS: Civil Rights Suit Cannot Imply the Invalidity of a Conviction
Sanders v. City of Pittsburg
CA9, No. 19-16920, 9/23/21

After being spotted in a stolen car, Morgan Sanders fled from the police. He led them on a car chase, then on a foot chase. An officer eventually caught up to Sanders, who continued to struggle. An officer then commanded a police dog to bite Sanders's leg. Sanders was finally subdued and charged with resisting arrest. Sanders ultimately pled guilty.

Subsequently he filed a civil rights action alleging the use of the police dog was excessive force.

The Ninth Circuit affirmed the dismissal of his claims:

"A 42 U.S.C. 1983 claim must be dismissed if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence unless the conviction or sentence has already been invalidated. While a defendant cannot be convicted of resisting arrest if an officer used excessive force at the time of the acts resulting in the conviction, Sanders could not stipulate to the lawfulness of the dog bite as part of his plea and then use the same act to allege an excessive force claim under section 1983."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/23/19-16920.pdf

CIVIL RIGHTS: Claim of Recklessness; Vehicle Accident
Fritz vs. Henningar
CA8, No. 20-3582, 9/23/21

An emergency gave way to tragedy when Bryson Henningar's police cruiser crashed into Willy Fritz's truck. The Eighth Circuit Court of Appeals had to determine whether a jury should decide whether Henningar drove recklessly that day, or whether, as the district court concluded, he was entitled to summary judgment.

Before the accident, Henningar spoke to the manager of a nearby apartment complex, who reported a "fight in progress" between two tenants. After the call ended, Henningar left his house, activated his emergency lights, and headed down a two-lane Iowa highway toward the complex. Just moments later, with other vehicles already pulled over to the side of the road, he accelerated from 47 to 60 miles per hour as he crossed a four-way intersection.

On the other side of the intersection, just 270 feet away, was Fritz's truck, which was idling at a stop sign. As Henningar's police cruiser approached, the truck pulled out into the highway and tried to cross. The result was a violent broadside collision that led to Fritz's death.

The Eighth Circuit Court of Appeals found as follows:

"In Iowa, special rules apply to the operators of emergency vehicles. See Iowa Code § 321.231. While responding to emergency calls, they can proceed past a red light or stop sign after slowing down and can exceed the maximum speed limits if it does not endanger life or property. Certain traffic laws are relaxed, in other words, when a police officer like Henningar is responding to an

emergency. This so-called privilege, however, has its limits. For one thing, traffic laws are relaxed only when an audible or visual signaling device is used, such as flashing lights or a siren. Even then, Iowa law does not relieve the driver from the duty to drive with due regard for the safety of others. And perhaps most importantly, it does not protect the driver from the consequences of the driver's reckless disregard for the safety of others.

"The estate must show that Henningar 'intentionally committed an act of an unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it.' And even then, Henningar is only liable if the dangerous act was so great as to make it highly probable that harm would follow.

"The evidence in this case does not even get past the first of these two steps. As Henningar's police cruiser approached the intersection, traffic had stopped, the road was straight, and the lane ahead was clear. Multiple witnesses reported hearing a siren or seeing flashing lights. No danger would have been apparent because the road was straight, all surrounding traffic had stopped, and witnesses clearly saw or heard, or both a siren or flashing lights. Under these circumstances, the driver could not have known that someone else would attempt to cross in front of him.

"Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The decision of the district court is affirmed."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/12/203582P.pdf

CIVIL RIGHTS: Deadly Force; Shooting from Vehicle Running Board

Harmon v. City of Arlington, Texas
CA5, No. 20-10830, 10/26/21

Officer Bau Tran fatally shot O'Shea Terry, who was trying to drive his SUV away while Tran stood on the vehicle's running board. Terry's estate and Terrance Harmon, a passenger in the car, sued Tran under 42 U.S.C. § 1983 for using excessive force. Tran moved to dismiss the case based on qualified immunity. His defense hinges on whether he reasonably perceived an imminent threat of personal physical harm in the short interval between Terry starting the engine and when Tran began shooting.

The district court upheld Tran's defense, dismissing the claims against him and the City of Arlington, a codefendant. The Court of Appeals for the Fifth Circuit agreed that plaintiffs did not plausibly allege an unconstitutional use of excessive force by Tran, did not rebut his qualified immunity, and therefore had no claim for municipal liability.

"In evaluating whether the officer used excessive force, courts consider the 'severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The threat-of-harm factor typically predominates the analysis when deadly force has been deployed.' Accordingly, this court's cases hold that an officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others. *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009). A court must be cautious about second-guessing the police officer's assessment

of the threat level. *Ryburn v. Huff,* 565 U.S. 469, 477, (2012). The question for this court is whether Tran could reasonably believe that Terry posed a serious threat of harm.

"The reasonableness inquiry is inherently fact bound, making the video of this ten-second event critical. While Tran was waiting with Terry and Harmon, Terry abruptly rolled up the windows and reached for his keys. Tran immediately shouted 'hey, hey, hey, hey' and 'hey stop,' grabbed onto the SUV's passenger window, and stepped onto the running board (a narrow ledge at the base of the SUV doors designed to assist passengers climbing into the car). Ignoring Tran's commands to stop what he was doing, Terry started the car, put it in gear, and started to drive off—with Tran hanging onto the passenger window, perched on the narrow running board. Before Terry accelerated, Tran kept his pistol holstered. But about a second after the car lurched forward, Tran drew his pistol and shot Terry four times.

"That brief interval—when Tran is clinging to the accelerating SUV and draws his pistol on the driver—is what the court must consider to determine whether Tran reasonably believed he was at risk of serious physical harm.

"Indeed, what came next illustrates the danger Tran faced. Several seconds after Tran shot Terry, while the SUV was still moving, Tran fell off the running board and into the busy street. Common sense confirms that falling off a moving car onto the street can result in serious physical injuries. Moreover, as Tran tumbled across the asphalt, the car's rear tires nearly overran his limbs. That this near miss occurred after Tran had shot Terry is of no moment; it confirms that Tran could reasonably perceive a serious threat of harm as Terry drove away with Tran holding onto the SUV.

"The plaintiffs have cited no case in which a law enforcement officer, holding onto a suspect's car as it drove away, has been held to have used unconstitutionally excessive force to restrain the driver. In sum, taking the facts in the light most favorable to the plaintiff and drawing every reasonable inference in plaintiff's favor, Tran's use of deadly force was not excessive under the circumstances because he could reasonably apprehend serious physical harm to himself as an unwilling passenger on the side of Terry's fleeing vehicle."

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/20/20-10830-CV0.pdf

CIVIL RIGHTS: Deadly Force; Totality of the Circumstances
Estate of Dillon Taylor v. Salt Lake City
CA10, No. 19-4085, 10/26/21

This case arose from the death of Dillon Taylor, who was shot and killed by Salt Lake City Police Officer Bron Cruz.

Officer Cruz and two fellow officers were following up on a 9-1-1 call reporting that a man had flashed a gun. The caller described the man and noted that he was accompanied by another male whom the caller also described. The officers attempted to stop Taylor and two male companions because two of the three men matched the caller's descriptions. While Taylor's companions immediately complied with the responding officers' commands to stop and show their hands, Taylor did not. Instead, he made a 180-turn and walked away. Firearms in hand, but not pointed at Taylor, Officer Cruz and another responding officer followed Taylor.

At some point, Taylor turned to face Officer Cruz, continuing to walk backwards with his hands in his waistband, "appeared to be digging there, as if Mr. Taylor was manipulating something." Then, without any verbal warning, Taylor quickly lifted his shirt with his left hand - exposing his lower torso -and virtually simultaneously withdrew his right hand from his waistband. The motion took less than one second and was consistent with the drawing of a gun. Reacting to Taylor's rapid movement, Officer Cruz shot Taylor twice—firing in quick succession. Taylor died at the scene. When he was searched, Taylor was unarmed.

The district court granted Officer Cruz and Salt Lake City's motion for summary judgment.

Taylor's estate and family members filed this lawsuit under 42 U.S.C. 1983, asserting claims against Salt Lake City and Officer Cruz (and others). The question this appeal presented for the Tenth Circuit's review was whether Officer Cruz's decision to shoot Taylor was reasonable based on the totality of the circumstances. Concluding that it was, the Tenth Circuit affirmed the district court's judgment.

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/20/20-10830-CV0.pdf

EDITOR'S NOTE: On October 18, 2021, the Supreme Court sided with police in two cases in which plaintiffs claimed officers used excessive force, overturning separate lower court rulings that had allowed the officers to be sued for civil rights violations.

In two unsigned opinions, the court stressed police are entitled to be shielded from liability unless it is "clear to a reasonable officer" that their actions are unlawful. In both cases, the court ruled that the officers were entitled to qualified immunity, the legal doctrine that protects police from liability for civil rights violations in many circumstances. There was no dissent in either case.

The decisions, of importance to law enforcement officers, are set forth below:

https://www.supremecourt.gov/opinions/21pdf/20-1668_new_n7io.pdf

https://www.supremecourt.gov/opinions/21pdf/20-1539_09m1.pdf

CIVIL RIGHTS:

Deadly Force; Qualified Immunity
City of Tahlequah, Oklahoma v. Bond
USSC, No. 20-1668, 595 U.S. ____, 10/18/21

Dominic Rollice's ex-wife, Joy, called 911 on August 12, 2016. Rollice was in her garage, she explained, and he was intoxicated and would not leave. Joy requested police assistance; otherwise, "It's going to get ugly real quick." The dispatcher asked whether Rollice lived at the residence. Joy said he did not but explained that he kept tools in her garage.

Officers Josh Girdner, Chase Reed, and Brandon Vick responded to the call. All three knew that Rollice was Joy's ex-husband, was intoxicated, and would not leave her home.

Joy met the officers out front and led them to the side entrance of the garage. There the officers encountered Rollice and began speaking with him in the doorway. Rollice expressed concern that the officers intended to take him to jail; Officer Girdner told him that they were simply trying

to get him a ride. Rollice began fidgeting with something in his hands and the officers noticed that he appeared nervous. Officer Girdner asked if he could pat Rollice down for weapons. Rollice refused.

Police body-camera video captured what happened next. As the conversation continued, Officer Girdner gestured with his hands and took one step toward the doorway, causing Rollice to take one step back. Rollice, still conversing with the officers, turned around and walked toward the back of the garage where his tools were hanging over a workbench. Officer Girdner followed, the others close behind. No officer was within six feet of Rollice. The video is silent, but the officers stated that they ordered Rollice to stop. Rollice kept walking. He then grabbed a hammer from the back wall over the workbench and turned around to face the officers. Rollice grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level. The officers backed up, drawing their guns. At this point, the video is no longer silent, and the officers can be heard yelling at Rollice to drop the hammer.

He did not. Instead, Rollice took a few steps to his right, coming out from behind a piece of furniture so that he had an unobstructed path to Officer Girdner. He then raised the hammer higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers. In response, Officers Girdner and Vick fired their weapons, killing Rollice.

Rollice's estate filed suit against, among others, Officers Girdner and Vick, alleging that the officers were liable under 42 U. S. C. §1983, for violating Rollice's Fourth Amendment right to be free from excessive force. The officers moved for summary judgment, both on the merits and on qualified immunity grounds. The District Court granted their motion. The officers' use of force was reasonable, it concluded, and even if not, qualified immunity prevented the case from going further.

A panel of the Court of Appeals for the Tenth Circuit reversed. The Court began by explaining that Tenth Circuit precedent allows an officer to be held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force. Applying that rule, the Court concluded that a jury could find that Officer Girdner's initial step toward Rollice and the officers' subsequent "cornering" of him in the back of the garage recklessly created the situation that led to the fatal shooting, such that their ultimate use of deadly force was unconstitutional. As to qualified immunity, the Court concluded that several cases, most notably *Allen v. Muskogee,* 119 F.3d 837 (CA10 1997), clearly established that the officers' conduct was unlawful. This petition followed.

The Supreme Court stated that they need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment. On this record, the officers plainly did not violate any clearly established law.

"The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). As we have explained, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' *District of Columbia v. Wesby,* 583 U. S. ___, ___ –___ (2018)

(slip op., at 13–14) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"We have repeatedly told courts not to define clearly established law at too high a level of generality. See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). It is not enough that a rule be suggested by then-existing precedent; the 'rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' *Wesby*, 583 U. S., at ___ (slip op., at 14) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Such specificity is 'especially important in the Fourth Amendment context,' where it is 'sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.' *Mullenix v. Luna,* 577 U.S. 7, 12 (2015).

The Tenth Circuit contravened those settled principles here. Not one of the decisions relied upon by the Court of Appeals—*Estate of Ceballos v. Husk*, 919 F.3d 1204 (CA10 2019), *Hastings v. Barnes,* 252 Fed. Appx. 197 (CA10 2007), *Allen*, 119 F.3d 837, and *Sevier v. Lawrence*, 60 F.3d 695 (CA10 1995)—comes close to establishing that the officers' conduct was unlawful. The other decisions relied upon by the Court of Appeals are even less relevant. Neither the panel majority nor the respondent have identified a single precedent finding a Fourth Amendment violation under similar circumstances. The officers were thus entitled to qualified immunity."

The United States Supreme Court then reversed the judgment of the Court of Appeals.

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/21pdf/20-1668_19m2.pdf

CIVIL RIGHTS: Deadly Force; Qualified Immunity

Rivis-Villegas v. Cortesluna
USSC, No. 20-1539, 595 U.S. ____, 10/18/21

The undisputed facts are as follows. A 911 operator received a call from a crying 12-year-old girl reporting that she, her mother, and her 15-year-old sister had shut themselves into a room at their home because her mother's boyfriend, Ramon Cortesluna, was trying to hurt them and had a chainsaw. The girl told the operator that Cortesluna was "always drinking," had "anger issues," was "really mad," and was using the chainsaw to "break something in the house." A police dispatcher relayed this information along with a description of Cortesluna in a request for officers to respond.

Police Officer Daniel Rivas-Villegas heard the broadcast and responded to the scene along with four other officers. The officers spent several minutes observing the home and reported seeing through a window a man matching Cortesluna's description. One officer asked whether the girl and her family could exit the house. Dispatch responded that they "were unable to get out" and confirmed that the 911 operator had "heard sawing in the background" and thought that Cortesluna might be trying to saw down the door.

After receiving this information, Rivas-Villegas knocked on the door and stated loudly, "police department, come to the front door, Union City police, come to the front door." Another officer yelled, "he's coming and has a weapon." A different officer then stated, "use less-lethal," referring to a beanbag shotgun. When Rivas-Villegas ordered Cortesluna to "drop it," Cortesluna dropped the "weapon," later identified as a metal tool.

Rivas-Villegas then commanded, "come out, put your hands up, walk out towards me." Cortesluna put his hands up and Rivas-Villegas told him to "keep coming." As Cortesluna walked out of the house and toward the officers, Rivas-Villegas said, "Stop. Get on your knees." He stopped 10 to 11 feet from the officers. Another officer then saw a knife sticking out from the front left pocket of Cortesluna's pants and shouted, "he has a knife in his left pocket, knife in his pocket," and directed Cortesluna, "don't put your hands down," "hands up." Cortesluna turned his head toward the instructing officer but then lowered his head and his hands in contravention of the officer's orders. Another officer twice shot Cortesluna with a beanbag round from his shotgun, once in the lower stomach and once in the left hip.

After the second shot, Cortesluna raised his hands over his head. The officers shouted for him to "get down," which he did. Another officer stated, "left pocket, he's got a knife." Rivas-Villegas then straddled Cortesluna. He placed his right foot on the ground next to Cortesluna's right side with his right leg bent at the knee. He placed his left knee on the left side of Cortesluna's back, near where Cortesluna had a knife in his pocket. He raised both of Cortesluna's arms up behind his back. Rivas-Villegas was in this position for no more than eight seconds before standing up while continuing to hold Cortesluna's arms. Another officer, who had just removed the knife from Cortesluna's pocket and tossed it away, came and handcuffed Cortesluna. Rivas-Villegas lifted him up and moved him away from the door.

Cortesluna brought suit under 42 U. S. C. §1983, claiming that Rivas-Villegas used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Rivas-Villegas, but the Court of Appeals for the Ninth Circuit reversed.

The Court of Appeals held that "Rivas-Villegas is not entitled to qualified immunity because existing precedent put him on notice that his conduct constituted excessive force." In reaching this conclusion, the Court of Appeals relied solely on *LaLonde v. County of Riverside*, 204 F.3d 947 (CA9 2000). The court acknowledged that "the officers here responded to a more volatile situation than did the officers in *LaLonde*." Nevertheless, it reasoned: "Both *LaLonde* and this case involve suspects who were lying face-down on the ground and were not resisting either physically or verbally, on whose back the defendant officer leaned with a knee, causing allegedly significant injury."

Judge Collins dissented, arguing that the facts of LaLonde are materially distinguishable from this case and therefore insufficient to have made clear to every reasonable officer that the force Rivas-Villegas used here was excessive.

Upon review, the U.S. Supreme Court agreed with Judge Collins and reversed:

"Even assuming that controlling Circuit precedent clearly establishes law for purposes of §1983, *LaLonde* did not give fair notice to Rivas-Villegas. He is thus entitled to qualified immunity. Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *White v. Pauly*, 580 U. S. ___, ___ (2017) (slip op., at 6). A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). Although this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. White,

580 U. S., at ___ (slip op., at 6). This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

"Specificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Whether an officer has used excessive force depends on the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor,* 490 U.S. 386, 396 (1989); see also *Tennessee v. Garner,* 471 U.S. 1, 11 (1985) (Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force). However, *Graham's* and *Garner's* standards are cast 'at a high level of generality.' *Brosseau*, 543 U. S., at 199. In an obvious case, these standards can clearly establish the answer, even without a body of relevant case law. But this is not an obvious case. Thus, to show a violation of clearly established law, Cortesluna must identify a case that put Rivas-Villegas on notice that his specific conduct was unlawful.

"Cortesluna has not done so. Neither Cortesluna nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here. Instead, the Court of Appeals relied solely on its precedent in *LaLonde.* Even assuming that Circuit precedent can clearly establish law for purposes of §1983, *LaLonde* is materially distinguishable and thus does not govern the facts of this case.

"In *LaLonde*, officers were responding to a neighbor's complaint that LaLonde had been making too much noise in his apartment. When they knocked on LaLonde's door, he appeared in his underwear and a T-shirt, holding a sandwich in his hand. LaLonde testified that, after he refused to let the officers enter his home, they did so anyway and informed him he would be arrested for obstruction of justice. One officer then knocked the sandwich from LaLonde's hand and grabbed LaLonde by his ponytail and knocked him backwards to the ground. After a short scuffle, the officer sprayed LaLonde in the face with pepper spray. At that point, LaLonde ceased resisting and another officer, while handcuffing LaLonde, deliberately dug his knee into LaLonde's back with a force that caused him long-term if not permanent back injury.

"The situation in *LaLonde* and the situation at issue here diverge in several respects. In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. In addition, LaLonde was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, in this case, video evidence shows, and Cortesluna does not dispute, that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. LaLonde, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police. These facts, considered together in the context of this particular arrest, materially distinguish this case from *LaLonde*.

"Precedent involving similar facts can help move a case beyond the otherwise hazy borders

between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful. *Kisela v. Hughes*, 584 U. S. ___, ___ (2018). On the facts of this case, neither *LaLonde* nor any decision of this Court is sufficiently similar. For that reason, we grant Rivas-Villegas' petition for certiorari and reverse the Ninth Circuit's determination that Rivas-Villegas is not entitled to qualified immunity."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/21pdf/20-1539_09m1.pdf

CIVIL RIGHTS: Deadly Force; Qualified Immunity

Gordon v. Bierenga
CA6, No. 20-2013, 12/14/21

Around 6:00 p.m. on April 10, 2018, Police Officer Keith Bierenga turned left onto 13 Mile Road out of a residential neighborhood in Royal Oak, Michigan. He then witnessed a BMW driven by Antonino Gordon merge quickly from the center turn lane into a westbound lane, forcing an oncoming car in this lane to quickly slow to avoid a collision. Bierenga then attempted to initiate a traffic stop. He pursued Gordon for a couple of blocks with police lights activated. Dash cam video shows many cars traveling down 13 Mile Road as Bierenga and Gordon drove by houses and apartment buildings on either side of the road. After failing to pull over for several blocks, Gordon came upon a red light at a busy intersection surrounded by businesses and restaurants. He stopped his car behind several cars waiting at the light, with Bierenga directly behind him. Bierenga then exited his cruiser, approached Gordon's car, and began speaking to him through the driver's window. Bierenga testified that, through Gordon's partially open window, he perceived that Gordon's skin was pale, his eyes were glassy, and that he was exhibiting signs of being under the influence of something.

Bierenga spoke to Gordon for approximately ten seconds at the driver's side of Gordon's vehicle while the traffic light remained red. When the light turned green and the traffic ahead of him moved forward, Gordon accelerated away from Bierenga. Bierenga then ran back to his car and told dispatch that the driver fled. Dash cam video shows Gordon turning from the westbound lane into the center turn lane and braking. From the turn lane, Gordon then made a sharp left turn in front of oncoming traffic into a White Castle parking lot, causing the oncoming vehicles to brake. On the dash cam, Gordon can be seen turning left into the parking lot, opposite the designated flow of the drive-thru, and accelerating out of frame as if to drive the wrong way around the parking lot. Bierenga, at this point back in his police car, followed Gordon into the White Castle parking lot. Bierenga circled the parking lot once but could not find Gordon. He then drove through the streets immediately surrounding the White Castle. Bierenga's dash cam showed heavy traffic on either side of the White Castle parking lot. He did not immediately locate Gordon.

After losing track of Gordon, Bierenga provided dispatch with a physical description of Gordon and a description of the make and color of Gordon's car. Approximately fifteen minutes later, Bierenga spotted a BMW in line at the White Castle drive-thru that looked like Gordon's. At this time, Gordon was at the drive-thru window paying for his order. Another car was parked in line about three feet behind him.

The following events are visible on the White Castle drive-thru surveillance camera located

inside the kitchen pointing toward the window. At approximately 6:24 p.m., Gordon can be seen pulling into the White Castle drive-thru window. During this time, Gordon engaged in a transaction with the cashier and appeared to be acting normally. The video is not clear enough to see whether Gordon is exhibiting signs of intoxication.

A few seconds after Gordon handed money to the cashier, Bierenga pulled into the White Castle and parked at a diagonal angle directly in front of Gordon's BMW, leaving a few feet between the two cars. The angle at which Bierenga pulled in effectively blocked Gordon's car in between Bierenga's car and the car behind Gordon in the drive-thru line. Bierenga exited his vehicle and walked toward the passenger side of Gordon's vehicle, with Gordon watching him. Bierenga then walked back around to the front of Gordon's car with his weapon drawn, in the few feet of space between his vehicle and Gordon's car.

As Bierenga walked back directly in front of Gordon's car, Gordon looked back over his right shoulder and reversed his car quickly. Gordon's car jolted as it bumped the car behind him in the drive thru. Bierenga positioned himself between the front of Gordon's car and the driverside rear door of his police vehicle. Gordon then began to accelerate forward with his wheels turned toward the rear of Bierenga's vehicle. As Gordon started driving forward toward Bierenga, Bierenga moved to his right and out of the direct path of Gordon's vehicle. Bierenga can be heard repeatedly yelling, "stop!" as Gordon moved forward. The front of Gordon's car then crashed into the back left wheel of Bierenga's car while Bierenga stood to the driver's side of Gordon's car—stuck between Gordon's car, his police car, and the White Castle wall.

Gordon then began to back up again as if to complete a three-point turn to maneuver around Bierenga's vehicle. He positioned the front of his car toward the opening behind Bierenga's vehicle. Bierenga then walked directly up to Gordon's rolled-down driver window, his left foot level with the driver door, pointing his gun directly at Gordon. Gordon backed up several feet more and turned his wheels to the right, away from Bierenga. As Gordon backed up, Bierenga stayed to the side of the vehicle and walked closer to Gordon's driver's side window with his gun pointed. Gordon then pulled forward, heading away from the White Castle and toward the opening behind Bierenga's vehicle to flee around it. As Gordon accelerated forward, Bierenga yelled "stop" and fired four shots at Gordon through the driver's side of the car.

Bierenga's dash cam captured Gordon's car driving around the White Castle and toward the street after he was shot. Once Gordon drove around Bierenga's car, Bierenga got back in his vehicle and followed Gordon out of the White Castle and onto the street, headed back toward the direction of the original traffic stop. As Bierenga followed, Gordon picked up speed and then began to slow down after a block. Gordon then presumably began to lose consciousness, drifted across the center lane, and crashed into a car travelling the opposite direction. Gordon was subsequently transported to the hospital, where he died. Gordon suffered two gunshot wounds, one to his left arm and chest and another to his right arm. Gordon's toxicology report indicated that he had a blood alcohol content of .27 at the time of death. Bierenga testified that he shot Gordon "to stop [him] from hitting and killing me or hurting me," and that he believed he was "in direct line of harm at the time that [Bierenga] discharged [his] gun."

In a suit under 42 U.S.C. 1983, the district court denied Bierenga's for summary judgment asserting qualified immunity.

The Sixth Circuit reversed:

"Precedent cited by the district court is not similar enough to this case to define 'clearly established' law. The plaintiff is unable to point to a case that would place every reasonable officer in Bierenga's position on notice that his use of force in this specific situation was unlawful."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0282p-06.pdf

CIVIL RIGHTS: False Arrest; Delayed Investigation to Resolve
Sosa v. Martin County
CA11, No. 29-12781, 9/20/21

When an officer ran David Sosa's name during a traffic stop, the computer indicated an outstanding Harris County, Texas, warrant from 1992 for a different David Sosa (the "wanted Sosa"). Though some of the identifying details for the wanted Sosa and Sosa differed, the deputy arrested Sosa and took him back to the station. There, deputies fingerprinted Sosa, and he spent three hours in jail before they determined that he was not the wanted Sosa.

Three-and-a-half years later, it happened again! On April 20, 2018, the same Martin County Sheriff's Department (though a different deputy) stopped Sosa as he drove. Once again, the deputy checked Sosa's name in the computer system and found the same outstanding warrant for the wanted David Sosa. Sosa told the deputy about his mistaken 2014 arrest on that warrant and advised the deputy of differences between himself and the wanted Sosa. But once again, the deputy arrested him and took him back to the station. This time, though, Sosa had to spend three days and nights in jail before the Department acknowledged that he was not the wanted Sosa and finally released him.

David Sosa filed a 42 U.S.C. 1983 action against the Martin County, Florida, Sheriff's Department and the deputies involved in his arrest, alleging violation of his Fourth and Fourteenth Amendment rights by falsely arresting him, over detaining him, and failing to institute policies and train deputies to prevent these things from happening.

The Eleventh Circuit affirmed the district court's rulings on the false arrest claim. The court concluded that the mistaken arrest of Sosa on the wanted warrant of someone by the same name was reasonable within the bounds of the Fourth Amendment, and the deputies are entitled to qualified immunity on the false arrest claim. However, the court vacated the district court's dismissal of the over detention claim because Sosa sufficiently alleged facts establishing that they failed to take any action for three days and nights after they learned of information that raised significant doubts about Sosa's identity. The court remanded for further proceedings.

READ THE COURT OPINION HERE:
https://media.ca11.uscourts.gov/opinions/pub/files/202012781.pdf

CIVIL RIGHTS: Serious Medical Need; Overdose
J.J. v. City of San Diego
CA8, No. 20-55622, 11/15/21

San Diego officers stopped a Cadillac with an expired registration. Aleah Jenkins, a passenger, showed no signs of distress. When the officers discovered that Jenkins was subject to an arrest warrant involving a prior methamphetamine offense, they handcuffed her and put her in a cruiser, where Jenkins vomited. Officers called for paramedics and asked Jenkins if she was detoxing. Jenkins responded: "No…I'm pregnant." The call for paramedics was then canceled. During transport, Jenkins groaned and screamed for help. After fingerprinting Jenkins at the police station, officers returned her to the cruiser. Several minutes later they found her unconscious, called for paramedics, and began CPR. Jenkins fell into a coma and died from an overdose nine days later.

The Ninth Circuit affirmed the dismissal of a 42 U.S.C. 1983 lawsuit.

"The complaint failed to establish either objective unreasonableness or objective deliberate indifference by individual officers. The alleged violative nature of their conduct, in failing to recognize and respond to Jenkins' serious medical need, was not clearly established in the specific context of this case, so the officers were entitled to qualified immunity."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2021/11/15/20-55622.pdf

CIVIL RIGHTS: Shooting of Two Dogs
LeMay v. Mays
CA8, No. 20-2632, 11/15/21

Jennifer LeMay and Courtney Livingston live together in a home in Minneapolis with LeMay's two children and two five-year-old American Staffordshire Terriers (commonly referred to as pit bulls) named Ciroc and Rocko. Livingston suffers from severe anxiety disorder that causes panic attacks and "pseudoseizures," and one of LeMay's children suffers from multiple emotional-behavioral disorders and is considered disabled. Ciroc, a brown-and-white, 60- pound male, served as the child's service animal. Rocko, a grey-and-white, 130- pound male, served as Livingston's "emotional service and seizure alert animal."

One evening, Livingston accidentally set off the burglar alarm in the home. The home security alarm company notified the police department, and Officers Mays and Daniel Ledman responded to the call. Before the officers arrived at the home, LeMay called the security company to report the alarm had been accidentally triggered. It is unclear whether the security company relayed that information to police.

Upon arrival at the home, Mays jumped over the six-foot privacy fence surrounding the backyard while Ledman knocked on the front door. Livingston answered the front door with Rocko at her side and told Ledman that she accidentally set off the alarm. Ledman never told Livingston that another officer was in the backyard.

While in the backyard, Mays encountered Ciroc who, according to the pleadings, "walked toward Mays wagging his tail in a friendly manner to greet Mays." Mays then shot Ciroc in the face. After the shots were fired, Rocko entered the backyard and is alleged to have "presented himself to Mays in a

non-threatening manner." Mays then "shot Rocko multiple times in his body." Neither dog was killed, but both were severely injured, rendering them unable to perform their tasks as service animals.

LeMay and Livingston sued Mays and the City of Minneapolis under 42 U.S.C. § 1983, alleging Mays unlawfully searched their home and seized their dogs in violation of the Fourth and Fourteenth Amendments of the United States Constitution and the City was liable under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Mays and the City moved to dismiss the seizure and *Monell* counts under Fed. R. Civ. P. 12(b)(6), arguing Mays was entitled to qualified immunity and the *Monell* claim had not been sufficiently pled. To support dismissal, they offered video footage from a home security camera and Mays's body camera, still-frame images from both videos, a police report, and training materials for police–dog encounters.

The Eighth Circuit Court of Appeals affirmed the district court's denial of qualified immunity to Mays.

"Accepting the complaint's allegations as true, the court concluded that the officer did not act reasonably in shooting the dogs. In this case, defendant shot both dogs when they presented no imminent danger and were not acting aggressively. Furthermore, it was clearly established that an officer cannot shoot a dog in the absence of an objectively legitimate and imminent threat of harm to himself or others."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/11/202632P.pdf

CIVIL RIGHTS: Stop and Frisk; Handcuffing; Objective Safety Standard

Haynes v. Minnehan
CA8, No. 20-1777, 9/21/21

On a well-lit summer evening in a Des Moines neighborhood with community-reported drug crimes, police officers Brian Minnehan and Ryan Steinkamp lawfully stopped Dejuan Haynes for suspected (yet mistaken) involvement in a drug deal. Beyond that suspicion, the exceedingly polite and cooperative exchange between the three did not make either officer view Haynes as a safety risk. But when Haynes could not find his driver's license (yet shared three separate cards bearing his name), Steinkamp handcuffed him. While the polite interaction continued, the cuffs stayed on. They also stayed on after a clean frisk and a consensual pocket search.

Haynes told the officers about an inside pocket and gave them consent to check it. Neither did so. Steinkamp later testified that he chose not to search that pocket because he "had no reason to believe there was more evidence at that time." With Steinkamp back at the cruiser, Minnehan watched over Haynes, who stood in the road in full public view in handcuffs with his belt unbuckled and his pants unzipped. Minnehan again asked if Haynes had anything illegal in the car. As Haynes said that he did not, he invited Minnehan to search the car. Minnehan declined.

Haynes filed suit under 42 USC. § 1983 against the officers, the City, and Police Chief Dana Wingert . The district court granted summary judgment on his Fourth Amendment claims.

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

"An officer can conduct a brief, investigatory stop—what we call a 'Terry stop'—when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v. Wardlow*, 528 U.S. 119, (2000) (quoting *Terry*, 392 U.S. at 19–20). A lawful Terry stop may nonetheless violate the Fourth Amendment if it is excessively intrusive in its scope or manner of execution. *El Ghazzawy v. Berthiaume,* 636 F.3d 452, 457 (8th Cir. 2011) (affirming qualified immunity denial).

"The Terry analysis examines whether: (1) the stop began lawfully; and (2) the way officers conducted the stop was reasonably related in scope to the circumstances which justified the interference in the first place. Because Haynes does not contest the first Terry prong, we only consider the second. Under the second prong, officers may use handcuffs as a reasonable precaution to protect the officers' safety and maintain the status quo during the Terry stop. *El-Ghazzawy,* 636 F.3d at 457.

"But because handcuffs constitute greater than a minim intrusion, their use requires the officer to demonstrate that the facts available to the officer would warrant a man of reasonable caution in believing that the action taken was appropriate. In particular, Terry requires some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other legitimate purpose, evaluated on the facts of each case. We have already held that handcuffing absent any concern for safety violates the second Terry prong.

"Given these circumstances, the officers failed to point to specific facts supporting an objective safety concern during the encounter. See *El-Ghazzawy,* 636 F.3d at 458–59}. As a result, we conclude that their conduct was not reasonably necessary to protect their personal safety or maintain the status quo during the investigatory stop.

"We have said that it was well established that if suspects are cooperative and officers have no objective concerns for safety, the officers may not use intrusive tactics such as handcuffing absent any extraordinary circumstances. *El-Ghazzawy*, 636 F.3d at 460. We concluded that the prior case law provided fair warning to an officer at the time of the incident that a reasonable officer in her place could not have believed it was lawful to handcuff and frisk a suspect absent any concern for safety. And even earlier, we rejected an argument that reasonable suspicion justified handcuffing a suspect after a frisk confirmed that the suspect lacked a weapon or contraband. *Tovar-Valdivia*, 193 F.3d at 1028 n.1; *Manzanares*, 575 F.3d at 1150. Any reasonable officer would understand that it is unconstitutional to handcuff someone absent probable cause or an articulable basis to suspect a threat to officer safety combined with reasonable suspicion.

"Because Minnehan and Steinkamp had fair notice that they could not handcuff Haynes without an objective safety concern, we conclude that the district court erred in granting qualified immunity. For these reasons, we reverse the summary-judgment grant and remand for proceedings consistent with this opinion."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/09/201777P.pdf

CONSTITUTIONAL LAW: Second Amendment; Large Capacity Magazines
Duncan v. Bonta
CA9, No. 19-55376, 11/30/21

In 2020, the Ninth Circuit held that California Government Code 32310, which bans possession of large-capacity magazines that hold more than 10 rounds of ammunition, violated the Second Amendment. On rehearing, the entire court reversed. The court assumed, without deciding, that California's law implicates the Second Amendment and applied intermediate scrutiny because the ban imposed only a minimal burden on the core Second Amendment right to keep and bear arms. Section 32310 is a reasonable fit for the important government interest in reducing gun violence.

The statute outlaws no weapon, but only limits the size of the magazine that may be used. That limitation interferes only minimally with the core right of self-defense; there is no evidence that anyone ever has been unable to defend his home and family due to the lack of a large-capacity magazine. The limitation saves lives; in the past half-century, large-capacity magazines have been used in about three-quarters of gun massacres with 10 or more deaths and in 100 percent of gun massacres with 20 or more deaths. Section 32310 does not, on its face, result in a taking. The government acquires nothing by virtue of the limitation. Owners may modify or sell their nonconforming magazines; the law does not deprive owners of all economic use.

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2021/11/30/19-55376.pdf

EVIDENCE: DNA Comparison Analysis; Expert Testimony
Molina v. State of Texas
TCCA, No. PD-1079-1, 10/20/21

This case presents the question of whether the admission of expert testimony about a DNA-comparison analysis violates the Confrontation Clause when the analysis is based on computer-generated data from the expert's laboratory and data from another laboratory.

In early 2000, the victim and four of her friends traveled from Port Arthur to Houston to go to the rodeo. They checked into their hotel around 10:00 p.m. and decided to ride around the Richmond/Westheimer area. The group drove around until about 2:30 a.m., at which point they stopped at a 24-hour diner so some of them could go to the restroom before going back to the hotel. When the victim returned and started to get into her car, a man in a hooded sweatshirt approached her and asked for a cigarette. Before she could respond that she did not smoke, the man told her, "Let me have your car," and she felt something pushing against her side. It was a gun. The man pushed her into the car and across the center console into the passenger seat. After a second man entered the car and sat down in the backseat, the first man drove the car away.

While they were driving, the victim was forced into the backseat, and the man in the backseat sexually assaulted her. The victim testified that the two people who kidnapped her met up with two more people, and three of them sexually assaulted her at gun point while she was blindfolded. Eventually they stopped and drove away, leaving her in an empty field.

The victim walked to a nearby business and asked someone to call the police. When police arrived,

they took her to the hospital where a nurse performed an examination, collected samples, and took the victim's clothes. The evidence was outsourced to Reliagene for genetic testing, and the DNA profile it developed was entered into CODIS,

The police were not able to identify a suspect until 2017 when Wilber Molina voluntarily gave a cheek swab to the Houston Police Department. Molina was subsequently indicted for aggravated sexual assault and convicted based on a DNA analyst's testimony that the profile developed from the victim's clothing by Reliagene was probably his because the chances that a random person other than Molina was the contributor were in the trillions and quadrillions. Molina objected to the introduction of the expert DNA testimony.

Molina was indicted for and convicted of aggravated sexual assault. He was sentenced to 55 years' confinement. The Texas Court of Criminal Appeals stated there was no Confrontation Clause violation and affirmed the judgment.

READ THE COURT OPINION HERE:
https://cases.justia.com/texas/seventh-court-of-appeals/07-00-00029-cr.pdf?ts=1396147253

EVIDENCE: Expert Testimony by Law Enforcement Officer

United States v. Perry
CA11, No. 16-11358, 9/29/21

The government, through the testimony of its case agent, DEA task force officer Kevin Lee, introduced testimony about overheard drug conversations. On appeal, Eddie Lee Perry focuses primarily on agent Lee's testimony, arguing that the district court erroneously admitted it because Lee was not properly qualified as an expert, and that, in any event, the opinion testimony improperly blurred the line between expert and lay witness testimony and drew impermissible inferences for the jury

The Eleventh Circuit Court of Appeals found as follows:

"In *United States v. Holt*, we affirmed the admission of expert testimony by law enforcement officers interpreting drug codes and jargon. 777 F.3d 1234, 1265 (11th Cir. 2015). In that case, the defendant lodged a similar objection to the qualification of the government's lead agent as an expert witness offering opinion testimony about coded drug language. We held that the district court did not err in admitting the agent's expert testimony because the court found she was qualified based on, most notably, her extensive involvement in this particular investigation as well as her training, experience in previous wiretaps, and general investigative experience during her six years as a DEA Agent. The agent formed her opinions based on her training, experience, discussions with cooperating co-conspirators, general knowledge of common drug prices and quantities, review of nearly all of the communications in this case, and the context of each particular communication.

"So too here. Like the lead agent in Holt, agent Lee had substantial experience in narcotics investigations he worked in law enforcement for 19 years and participated in thousands of narcotics investigations. He interviewed thousands of defendants and confidential informants, and assisted in numerous wiretap investigations which led him to review literally thousands of recorded conversations. And like the agent in Holt, agent Lee formed his opinions using reliable methods and based on a combination of experience, general knowledge, and familiarity

with the intercepted communications and their context. Finally, Lee reviewed all of the germane conversations about the distribution of drugs drawn from the Perry wiretaps.

"It is well established that deciphering of coded language is helpful to the jury and therefore permissible. *United States v. Hawkins*, 934 F.3d 1251, 1264 (11th Cir. 2019). Throughout his testimony, agent Lee offered an opinion on a variety of terms that were code words for drugs, including 'lulu,' 'teenager,' 'best girl in town,' 'biscuit head,' 'something for the nose,' 'gator,' 'zip,' and 'zone.' He also testified about the meaning of terms that referred to the quantity of drugs and their price, such as 'dubs,' 'a G,' 'a little two-dollar lick,' 'a cookie,' and a 'ticket,' as well as terms that referred to a drug's quality, such as 'loud,' 'French fries,' and 'straight,' and even terms related to drug sales, such as 'coke jewel.' This testimony was well within the scope of his expertise and was properly admitted."

READ THE COURT OPINION HERE:
https://media.ca11.uscourts.gov/opinions/pub/files/201611358.pdf

EVIDENCE: Testimony Regarding Value of Vehicle

State of California v. Jenkins
CCA. 4th Appellate Division,
No. G059110, 10/12/21

Tyrus Jenkins was convicted by jury of first-degree burglary of a residence with a person present, second degree burglary of a car, attempted unlawful taking of the car, and misdemeanor possession of burglary tools. The court sentenced him to a total of 13 years. Jenkins appealed, contending his conviction for attempted unlawful taking of a vehicle should have been reversed because the court permitted, over his objection, a police detective to testify to the car's estimated value obtained from the Kelley Blue Book's Website. Jenkins claimed this was hearsay evidence that should have been excluded, and absent this testimony, there was no evidence establishing the car was worth more than $950, an element of the felony offense.

The California Court of Appeal concluded the trial court properly admitted the Blue Book evidence under the published compilation exception to the hearsay rule.

READ THE COURT OPINION HERE:
https://cases.justia.com/california/court-of-appeal/2021-g059110.pdf?ts=1634076088

FIRST AMENDMENT: Ordinance Allegedly for Traffic Control Deemed to Violate First Amendment

Martin v. City of Albuquerque
CA10, No. 19-2140, 11/24/21

The City of Albuquerque, New Mexico, enacted a citywide ordinance that, in pertinent part, prohibited pedestrians from: (1) congregating within six feet of a highway entrance or exit ramp; (2) occupying any median deemed unsuitable for pedestrian use; and (3) engaging in any kind of exchange with occupants of a vehicle in a travel lane.

Plaintiffs-Appellees, residents of Albuquerque who engaged in a variety of expressive activities (like panhandling, protesting, or passing out items to the needy), sued the City in federal court, alleging that the Ordinance impermissibly burdened the exercise of their First Amendment rights. The City argued the Ordinance was necessary to address persistent and troubling pedestrian safety concerns

stemming from high rates of vehicular accidents throughout Albuquerque, and, in relation to this pressing interest, the Ordinance was narrowly tailored and did not burden substantially more speech than necessary.

The district court disagreed, finding that those provisions of the Ordinance violated Plaintiffs' First Amendment rights because they were not narrowly tailored to the City's interest in increasing pedestrian safety and, more specifically, reducing pedestrian-vehicle collisions.

On appeal, the City argued the district court erred in concluding the Ordinance did not pass First Amendment muster, and it specifically focused on the question of narrow tailoring, arguing that the City did, indeed, appropriately tailor the Ordinance.

After review, the Tenth Circuit rejected the City's position, holding that the Ordinance was not narrowly tailored and, therefore, violated the First Amendment.

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110610058.pdf

MIRANDA: Volunteered Statements
United States v. Prigmore
CA6, No. 20-3989, 10/12/21

A Xenia Police Department dispatcher contacted Officer Chris Reed about a double-parked vehicle with the person in the backseat allegedly "shooting up." Reed observed a vehicle straddling the line between a standard parking spot and a handicap-only space; it was not displaying a handicap placard or license plate and was illegally parked.

William Prigmore began to exit the rear passenger door of the vehicle. Reed saw what appeared to be a handgun in the pocket of the door; he activated his body camera, unholstered his firearm, and secured the gun. With Prigmore out of the vehicle, Reed observed another firearm (a BB gun) on the seat where Prigmore had been sitting. Days later, federal agents arrested Prigmore for drug trafficking. The agents did not interview or Mirandize Prigmore immediately because he appeared to be "under the influence." When he arrived at booking, Prigmore appeared coherent and stated—unprompted—"that gun was mine."

Miranda plays no part in the analysis because Prigmore's spontaneous statement was unprompted and volunteered.

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0238p-06.pdf

POLICE SUPERVISION: Retaliation
Breiterman v. United States Capitol Police
DCC, No. 20-5295, 10/15/21

Jodi Breiterman was subjected to three disciplinary actions imposed by her employer, the U.S. Capitol Police. She was suspended after commenting to fellow employees that women had to "sleep with someone" to get ahead. She was later placed on administrative leave and ultimately demoted for leaking a picture of an unattended police firearm to the press. Although Breiterman admitted to this misconduct, she sued the Police, alleging sex discrimination retaliation.

The D.C. Circuit affirmed summary judgment in favor of the Police.

"The Police provided legitimate, nondiscriminatory reasons for suspending Breiterman, placing her on administrative leave during an investigation into the media leak, and demoting her from a supervisory position. There is nothing in the record would allow a reasonable jury to conclude that those reasons were a pretext for discrimination or retaliation. Supervisors are entrusted with greater authority than officers, held to a higher standard, and disciplined more severely than officers for similar violations. Breiterman's nonsupervisory comparators are too dissimilar to draw any inference of discriminatory treatment."

READ THE COURT OPINION HERE:
https://www.cadc.uscourts.gov/internet/opinions.nsf/CB28154CA7A3051B8525876F004E0343/$file/20-5295-1918241.pdf

SEARCH AND SEIZURE:

Affidavits; Adverse Facts

State of Colorado v. McKay

SCC, No. 21SA238, 2021 CO 72, 10/25/21

The Colorado Supreme Court stated that both the United States and the Colorado constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Colo. Const. art. II, § 7.

"To protect this right, 'a search warrant may only be issued upon a showing of probable cause, supported by oath or affirmation, particularly describing the place to be searched and the things to be seized.' *People v. Cox*, 2018 CO 88.

"To establish probable cause, an affidavit must contain sufficient facts to warrant a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched. Probable cause is a commonsense concept that requires a court to consider the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) (abandoning the rigid, two-pronged Aguilar-Spinelli test in favor of the totality of the circumstances approach). That is, to determine the sufficiency of a search warrant affidavit, courts must consider the facts of the case in combination, not in isolation.

"And when presented with a search warrant affidavit, a magistrate must evaluate whether 'the facts contained within the four corners of the affidavit and the reasonable inferences that may be drawn from those facts' are sufficient to support probable cause and the issuance of a warrant. *People v. Gutierrez*, 222 P.3d 925, 937 (Colo. 2009); see also 2 Wayne R. LaFave et al., Criminal Procedure § 3.3(a) n.29 (4th ed. 2020) (explaining that it is proper for an issuing magistrate to draw reasonable inferences from the facts of an affidavit).

"An affidavit need not describe all steps taken, information obtained, and statements made during an investigation but must contain any material adverse facts. *Colorado v. Kerst,* 181 P.3d at 1167 (Colo. 2008).An adverse fact is material in this context only if its omission would render the affidavit substantially misleading as to the existence of probable cause. Thus, although information omitted from an affidavit may be adverse and material, its omission does not rise to the level of misrepresentation if it does not cast doubt on the existence of probable cause.

"If the probable cause determination is challenged, the central question for the reviewing court is not whether it would have found probable cause in the first place, but whether the magistrate had a substantial basis for issuing the search warrant. See *Gates*, 462 U.S. at 236. A reviewing court must give the issuing magistrate's

probable cause determination great deference and resolve any doubts in its favor.

"After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. *Gates*, 462 U.S. at 236; see also *People v. Leftwich*, 869 P.2d 1260, 1266 (Colo. 1994) (explaining that de novo review falls short of the great deference to which an issuing magistrate's probable cause determination is entitled). Rather, a reviewing court should presume the affidavit is valid and confine its sufficiency review to the four corners of the affidavit.

READ THE COURT OPINION HERE:
https://cases.justia.com/colorado/supreme-court/2021-21sa238.pdf?ts=1635285699

SEARCH AND SEIZURE: Basis for Stop; Extension of Traffic Stop
United States v. Foster
CA8, No. 20-1241, 10/12/21

On March 5, 2019, Officer Johnson of the Springdale, Arkansas, Police Department stopped Charlie Foster's black Toyota Avalon for "having an unsafe windshield (several cracks)." After informing Foster of the reason for the stop, Officer Johnson asked Foster and his female companion for identification. Foster produced a driver's license but his companion denied having any identification and provided an identification that ultimately proved to be false. Officer Johnson observed that both occupants of the vehicle seemed nervous, reporting that Foster's hands were visibly shaking as he retrieved his driver's license. When Officer Johnson called in the information, dispatch informed him that Foster was on parole and an active arrest warrant existed for the passenger.

As Officer Johnson was walking back to Foster's vehicle, he observed the occupants moving around the inside of the vehicle. Officer Johnson commanded Foster to step out of the vehicle. Foster complied, but as he was exiting the vehicle he tugged his jacket down. When Officer Johnson conducted a safety pat down of Foster, he found a handgun in Foster's waistband. Methamphetamine was also found inside the car.

Foster moved to suppress the discovery of the handgun, asserting two grounds: (1) the initial traffic stop was without probable cause; and (2) the stop was unreasonably extended when Officer Johnson asked Foster and his passenger for identifying information. The district court denied the motion to suppress and this appeal followed:

"The traffic stop was initiated because Officer Johnson saw Foster's windshield was cracked and believed it may have constituted a safety defect under Arkansas law. An officer's 'incomplete initial observations may give reasonable suspicion for a traffic stop,' even if subsequent examination reveals no traffic law violation. *United States v. Hollins*, 685 F.3d 703, 706 (8th Cir. 2012. In *Hollins*, officers stopped a vehicle because they believed it did not have license plates but as they approached the vehicle they observed the presence of an in transit sticker such that there was no traffic violation. The Court in *Hollins* concluded that 'although the officers were mistaken' about the vehicle's registration status, their actions were objectively reasonable because they could not then see the In Transit sticker. See *United States v. Callarman*, 273 F.3d 1284, 1287 (10th Cir. 2001) (finding traffic stop was supported by reasonable articulable suspicion because the size of the crack was large enough for the officer to believe that the crack obstructed the driver's view).

"In light of the undisputed facts here, a reasonable officer could have believed on initial observation that the cracked windshield constituted a safety defect. While his initial observation turned out to be mistaken, Officer Johnson's mistake of fact was an objectively reasonable one, and thus Foster was not unreasonably seized when Officer Johnson conducted the traffic stop.

"Foster next contends Officer Johnson was obligated to terminate the stop and leave as soon as he observed the crack in the windshield did not, in fact, obstruct the driver's view. According to Foster, Officer Johnson's failure to do so unreasonably extended the stop. Foster's argument is foreclosed by our precedent, which binds the panel. See *Hollins*, 685 F.3d at 706–707 (noting that 'reasonable investigation following a justifiable traffic stop may include asking for the driver's license and registration'); *United States v Collier,* 419 F. App'x 682, 684 (8th Cir. 2011) (stating that although traffic stop was initiated because registered owner had an outstanding warrant and when officer discovered she was not present, officer continued to have the authority to check the driver's license and registration); *United States v. Allegree,* 175 F.3d 648 (8th Cir. 1999) (determining the traffic stop based on mistaken belief that a car was unlawfully displaying emergency blue lights was sufficient to allow license and registration check)."

The Court of Appeals for the Eighth Circuit stated that Officer Johnson did not unlawfully expand the scope or extend the stop when he asked for identification from the occupants of the vehicle.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/10/201241P.pdf

SEARCH AND SEIZURE: Basis for Stop; Reasonable Suspicion
United States v. Martin
CA8, No. 20-1511, 10/18/21

Christopher Martin robbed a Sprint Wireless Express store in Davenport, Iowa at gunpoint, making off with cell phones and tablets. Little did he know, he also left with a GPS tracker, courtesy of the store employee. The employee called police, describing the robber as "5' 7" tall, heavyset, male, African American with a grey ski mask, a blue hooded sweatshirt and grey sweatpants." The employee described the getaway car as a dark-green Pontiac Grand Am or Grand Prix driven by someone he did not see, and said the vehicle went north on Elmore Avenue. He also reported that the robber had a tiny, silver handgun.

Officers responded to the robbery within minutes. The first on the scene received a slightly more detailed description that the robber was 300 pounds or more and carrying a duffel bag. Dispatch also began receiving location reports from the GPS tracker, which updated every six seconds. The data, collected by a third-party provider, directed officers to the intersection of Kimberly and Spring streets, about 1.5 miles from the store.

At the intersection, officers saw two cars: a white one and a dark-blue, four door Ford Contour. There were two black male passengers in the dark-blue car, and police noticed that the occupants were not looking around at the multiple squad cars. When the dark-blue car pulled through the intersection and into a gas station, one officer turned on his overhead lights.

After stopping the car, officers commanded the driver to exit the vehicle with his hands in the

air and to walk backwards toward them. After the driver was secured, they did the same with Martin, who was in the passenger seat. The officers then searched the car and found the stolen cell phones and tablets.

Martin argues police did not have probable cause or reasonable suspicion to stop the car. He suggests police should not have relied on the GPS device and that the description of the vehicle by the store's clerk was not a match.

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

"The police had at least a reasonable suspicion to stop the vehicle. The GPS tracker indicated that it was at the intersection of Kimberly and Spring. Martin argues the GPS was unreliable. In support, he points to cases in which courts heard testimony about the reliability and accuracy of GPS devices. See *United States v. Brooks*, 715 F.3d 1069, 1077–78 (8th Cir. 2013); *United States v. Espinal-Almeida*, 699 F.3d 588, 610–12 (1st Cir. 2012). But those cases are about the admission of the data at trial and do not address whether officers in the field can rely on third-party GPS data while pursuing suspects. Considering the tight window of opportunity officers have to locate a fleeing suspect, we find it reasonable for police to rely on third-party GPS data.

"Other factors also supported the officers' suspicion. The intersection of Kimberly and Spring is in the general area of the crime scene. *United States v. Robinson*, 670 F.3d 874, 876 (8th Cir. 2012) (factors like the location of the parties may support an officer's decision to stop). When the five police cars arrived at the intersection, they saw two vehicles. Police could reasonably rule out one because it did not even remotely match the description given by the store employee. The Ford Contour roughly matched the description. While the employee said the vehicle was a coupe (the Ford Contour is a four-door), a Ford Contour has the same general shape as a Pontiac GrandAm and Grand Prix. Plus, the color (dark green) is close to the color of the Ford Contour (dark blue). Keeping in mind that the employee only saw the car briefly after dark, it was reasonable for officers to believe the employee made minor errors and that this was the car they were looking for. See *United States v. Quinn*, 812 F.3d 694, 699 (8th Cir. 2016) ("We have held that generic suspect descriptions and crime-scene proximity can warrant reasonable suspicion where there are few or no other potential suspects in the area who match the description.").

"Police also noticed unusual behavior by the car's occupants, who did not acknowledge an overwhelming police presence. See *Terry v. Ohio*, 392 U.S. 1 (1968) (irregular activities like repeatedly walking by the same store window can support reasonable suspicion); *United States v. Sokolow*, 490 U.S. 1, 8–9 (1989) (irregularity of purchasing $2,100 in plane tickets with a roll of $20 bills could support reasonable suspicion). The totality of the circumstances gave police at least reasonable suspicion that criminal activity was afoot, so stopping the vehicle to investigate that suspicion comported with the Fourth Amendment."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/10/201511P.pdf

SEARCH AND SEIZURE: Curtilage; Approaching a Residence to Knock on the Door; Plain View

Cox v. State

ACA, No. CR-20-735, 2021 Ark. App. 426, 11/3/21

Kevondre Williams's body was found on August 19, 2019, in a ditch by a City of Blytheville worker when the worker hit it while brush hogging the side of the road. The body was wrapped in trash bags, a comforter, and red carpeting. Williams had been tied up with shoelaces and shot in the head, and there were bleach stains on his clothing. His body was in an advanced state of decomposition.

Williams's mother, Erica Bailey, last saw her son alive on the morning of August 13, 2019, when she dropped him off at the Byrum Road Apartments in Blytheville shortly before 11:00 a.m., where Cox lived in apartment D-4. Williams texted his grandmother, Linda Bailey, later on August 13 and asked her to come pick him up at the same location; although she went to the apartments, Williams never came out to meet her. Linda returned to the Byrum Road Apartments on August 19 and knocked on the door of apartment D-4; a man she identified at trial as Cox answered the door, and when she asked if he knew Williams, he said he did not. Erica filed a missing-person report for Williams on the same day.

Blytheville police detectives went to apartment D-4 on August 23 to speak with Cox's grandmother in an attempt to obtain permission to search the residence. After knocking on the door and receiving no answer, Captain John Frazier noticed a spot of blood on the wall of the front porch. The area was secured, and a search warrant was obtained for the apartment. The search of the apartment, which smelled strongly of bleach, revealed bleach stains on an air mattress; a mop, cleaning supplies, and black trash bags with receipts for the purchases; a pillow sham matching the comforter Williams was found wrapped in; and a rubber sheet soaking in bleach water in the bathtub. There was a bullet hole in the dining area drywall. Outside in the field next to the apartment, officers found carpet similar to the carpet that had been wrapped around Williams's body. A search of the dumpster outside the apartment yielded more evidence, including black garbage bags similar to the ones found inside the apartment that contained stained, wet washcloths that smelled of bleach and had bleach stains on them and a bleach bottle. The trash bags contained flies and maggots, which, according to the testimony of the crime lab technician, were similar to the ones found on Williams's body.

The receipts found in the apartment documented purchases from Dollar General and Wal-Mart. The officers obtained August 18 surveillance video from Dollar General, which was in walking distance of Cox's apartment; and August 19 surveillance video from WalMart, which showed Cox purchasing cleaning supplies and new washcloths.

While posting missing-person flyers around August 15 near the Byrum Road Apartments, Ayanna Thomas saw a newer model, dark-colored four-door car with the trunk open in front of one of the apartment buildings. Detectives learned that the girlfriend of one of Cox's co-defendants had been loaned two cars from a local dealership. Upon inspection of the vehicles, DNA consistent with Williams's DNA profile was found on the inside knob in the trunk of one of the vehicles.

Detectives were able to obtain Williams's iPhone cell phone number and determined that the last live ping from Williams's cell phone, which

was not found with Williams's body, had been on August 14 around 5:30 a.m., and it had pinged off a tower directly southeast of where Williams's body was found. Cox's apartment was approximately one-eighth of a mile from where Williams's body was located, and the cell tower where Williams's phone last pinged could be seen from Cox's apartment. A non-working iPhone was found inside the apartment.

Cox argues that the circuit court erred in denying his motion to suppress. Cox asserts that the front porch of his apartment where Frazier claimed to have seen the speck of blood in plain view constituted curtilage, and Frazier violated his Fourth Amendment right against unreasonable searches and seizures when he searched the porch; the speck of blood was tiny and only a few inches off the ground, so it was not believable that Frazier saw it in passing; and blood is not contraband.

According to Captain Frazier's testimony at the suppression hearing, he went to Cox's apartment in an attempt to speak with either Cox or Cox's grandmother. He approached the apartment door, stood on the porch, and knocked. When no one answered the door, he turned to leave, and it was then that he noticed a speck of blood near the ground on the porch wall. This information regarding the blood was included in the affidavit for a search warrant for Cox's apartment, which yielded other evidence in the investigation of Williams's death.

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

"While dwellings and their curtilage are largely protected, it is generally not considered reasonable to have an expectation of privacy in driveways and walkways, which are ordinarily used by visitors to approach dwellings; what a person knowingly exposes to the public is not protected by the Fourth Amendment. There is an implicit license that typically permits a visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. A police officer who does not have a warrant may approach a home and knock on the door because that is no more than any private citizen might do. *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

"According to Frazier, the blood was in plain view on the porch. Under the plain-view doctrine, when police officers are legitimately at a location and acting without a search warrant, they may seize an object in plain view if they have probable cause to believe that the object is either evidence of a crime, fruit of a crime, or an instrumentality of a crime. The plain-view doctrine is applicable if the officer has a lawful right of access to the object and if the incriminating nature of the object is readily apparent.

"Cox argues that blood is not contraband, or in and of itself, otherwise evidence of wrongdoing. While blood itself is not contraband, the Blytheville Police Department was conducting an investigation into Williams's murder. The spot of blood found on the front porch of Cox's apartment soon after Williams's body was found could be considered as evidence of possible wrongdoing. The circuit court's denial of Cox's motion to suppress was not clearly erroneous, and the verdict is affirmed."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/courtofappeals/en/item/515374/index.do?q=Cox

SEARCH AND SEIZURE:

Delaying Package in the Mail

United States v. Beard

CA5, No. 20-20116, 10/22/21

Clarence Tramiel Beard appeals the district court's denial of his motion to suppress drugs found in a package he mailed via the United States Postal Service from Houston, Texas, to Hammond, Louisiana. Beard does not dispute that reasonable suspicion existed to detain the package when it arrived in Hammond. He argues that his Fourth Amendment rights were violated, and an unlawful seizure occurred, when the package was rerouted back to Houston, which took five days, before law enforcement took further investigative steps to confirm their suspicion. Beard argues that the drugs discovered in the package consequently should have been suppressed.

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

"The protections of the Fourth Amendment extend to packages sent via the Unites States Postal Service. Specifically, while in the mail, a package can be searched, i.e., opened and the contents examined, lawfully only if a search warrant is obtained. With respect to the seizure of a package, in *United States v. Van Leeuwen*, 397 U.S. 249 (1970) the Supreme Court, relying on the principles set forth in *Terry v. Ohio*, held that if the Government has reasonable suspicion that a package contains contraband or evidence of criminal activity, the package may be detained without a warrant while an investigation is conducted. The Court stated, however, that 'detention of mail could at some point become an unreasonable seizure of papers or effects within the meaning of the Fourth Amendment.'

"The Court did not adopt a bright-line rule regarding how long a package could be detained lawfully prior to obtaining a search warrant. It stated that it was only holding on the facts of this case a 29-hour delay between the mailings and the service of the warrant could not be said to be unreasonable within the meaning of the Fourth Amendment. Moreover, the Court stated that the significant Fourth Amendment interest was in the privacy of the first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate for a search warrant was obtained.

"Jeffrey Gordon, a Narcotics Investigator for the United States Postal Service, believed that the time it would take to obtain a warrant in Hammond versus Houston would have been about the same, and because the drugs would ultimately have to be tested in Houston, he chose to request that the package be rerouted to him in Houston. Although the transit time from Hammond to Houston was five days, the delay was beyond Gordon's control. When the package did arrive in Houston, Gordon acted on it quickly and obtained a warrant within 48 hours. Based on the foregoing, we agree with the district court that Gordon's choice to reroute the package back to Houston was reasonable and prudent under the facts of this case. We further agree that the five days the package was in transit from Hammond back to Houston, as well as the two days it took to obtain the warrant after the package returned to Houston, were not unreasonably long under the circumstances.

"The package had extensive connections to Houston: it was mailed from a post office there, the sender (Beard) used the Houston post office frequently, and the investigation of Beard's drug-trafficking activity was being conducted by Gordon in Houston. Moreover, Gordon requested that

the package be rerouted to Houston because he believed that there was no difference in the time it would take to obtain a warrant in Houston versus Hammond.

"Based on the foregoing, the district court did not err in denying Beard's motion to suppress, and his conviction and sentence are affirmed."

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/20/20-20116-CR0.pdf

SEARCH AND SEIZURE: Emergency Search; Agents did not Create the Emergency
United States v. Meyer
CA8, No. 20-2958, 12/2/21

As part of an investigation named "Operation Dark Room," federal agents discovered financial ties between William Meyer and individuals in the Philippines who were livestreaming sex acts involving children. To gather more information, two agents decided to visit Meyer at his home and knock on his door. During the course of the conversation, which took place in the agents' car, Meyer revealed a number of facts that aroused suspicion, including that he had personal and financial ties to the individuals involved in the abuse. When he further admitted that he used a computer and cellphone to contact them, the agents asked if he would be willing to turn those devices over for an examination.

Rather than categorically refusing, Meyer said he was willing to hand them over later, after he had a chance to check his email and stuff. Once the agents expressed concern that a delay would give him a chance to erase what was on them, Meyer still refused to consent, this time because his house was a mess and not in any condition to entertain people. So after further discussion, he went back inside.

At that point, the agents sprang into action. Worried that Meyer would destroy evidence if they waited any longer, one of the agents called a prosecutor for advice on whether "an exigent circumstance existed." When he was told that it did, the agents again knocked on Meyer's door, searched his home for electronic devices, and seized two computers, a cellphone and a hard drive. One of the agents then successfully applied for a search warrant.

The search revealed a hoard of child pornography. The hard drive, for example, contained videos of minors performing sex acts on Skype, with Meyer shown watching in the corner of the screen. It also contained a number of lewd messages between Meyer and a minor girl, as well as evidence that he had sent money in exchange for the videos.

Meyer moved to suppress everything the agents found. The district court denied the motion; accepted his conditional plea to one count of sexual exploitation of children, and sentenced him to 30 years in prison. On appeal, he challenges the denial of his motion.

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

"By the time the agents decided to enter Meyer's home, they had probable cause. They knew that he: (1) had ties to the individuals who were livestreaming the abuse; (2) had stayed with them when he visited the Philippines; (3) had paid thousands to them and one of the minor victims; and (4) did not tell his wife about some of the money he sent, despite claiming that the payments were tied to his humanitarian work. It

was not much of a leap from there to conclude that there was a fair probability" that he was involved. See *United States v. Horne,* 4 F.3d 579, 589 (8th Cir. 1993) (explaining that officers have 'substantial latitude' to draw 'inferences' from what they know).

"The same goes for the possibility that there would be incriminating evidence on Meyer's devices. See *United States v. Tellez*, 217 F.3d 547, 550 (8th Cir. 2000) (explaining that there must be "a nexus between the illegal activity and the place to be searched"). Meyer had already admitted to the agents that he used a computer and cellphone to communicate with the abusers and had stayed in regular contact with them. The agents also knew that his Skype username was 'prettyvirginfilipino' and that the profile he used was a variant of the first name of one of the minor victims. Given that Meyer had already admitted that the devices were in his home, there was at least 'a fair probability' that the agents would find evidence of a crime inside.

"Though a closer call, the agents also faced an exigency: they had a 'sufficient basis' to reasonably believe that Meyer would imminently destroy evidence. Meyer's suspicious answers, including his insistence that he have time alone with his devices before the agents could see them, is what led to a sense of urgency, a 'now-or-never' scenario. *Riley v. California,* 573 U.S. 373, 391 (2014).

"Consider what Meyer said and did. When asked whether he would allow an examination of his computer, he initially said no because he used it 'all the time.' Then, despite his professed need for it, he offered to let the agents examine it later, after he 'checked his email and stuff.'

"From there, Meyer's responses only became more suspicious. When the agents suggested that they accompany him inside and look at the devices together, his attention shifted to the tidiness of his house. His "house was a mess," he said, so he would need a few minutes to clean up. And then, rather than remaining outside as requested while one of the agents made a call, Meyer instead went inside.

"Knowing that data can be deleted at the touch of a button, the agents decided that they needed to act fast. Given Meyer's insistence that he have an opportunity to be alone with his devices first, they reasonably concluded that he was hiding something. And if they were to wait to conduct the search, as he had suggested, the something that he did not want them to see would be gone. So the agents reasonably determined that it was 'now or never:' 'search immediately,' or forever lose their chance.

"Long story short: probable cause existed, the exigency was real, and it was not of the agents' making. So even though the search was warrantless, it did not violate the Fourth Amendment."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/12/202958P.pdf

SEARCH AND SEIZURE: Emergency Search; Gravity of the Crime Cannot Create the Emergency
State of Hawai'i
CC1stCir., No 1CPC-20-0000887, 12/2/21

Honolulu Police Department officers entered Erik Willis's home to arrest him. They did not have permission or a warrant. The police had probable cause to believe that three days earlier, Willis had repeatedly stabbed a teenager without provocation at a Kahala area beach. The evidence supporting probable cause included several security videos showing a person of interest. One HPD officer identified Willis as the person in the videos. This officer knew Willis and where he lived; the officer had previously interacted with him as a "mentor."

After surveilling Willis for a day and a half, police made a warrantless entry into his home. Inside the home, the police happened to see shoes and a shirt that matched the suspect's footwear and upper garment. The police arrested Willis. While detained at home, Willis asked the officers about getting his shirt from his family's washing machine. About two hours later, still without a warrant, the police recovered the shoes and shirt.

A grand jury indicted Willis for attempted murder in the second degree. Willis moved to suppress the shoes, the shirt, and the statements he made when he was arrested.
Upon review, the First Circuit Court of Appeals found as follows:

"The Court stated that ordinarily police officers must get a warrant before entering a home without permission. But when exigent circumstances arise, and the police have probable cause to arrest or search, our state and federal constitutions allow warrantless home entries.

"The State invokes this 'exigent circumstances' exception to justify a warrantless home entry into Erik Willis's residence. It advances an expansive view on what creates an 'exigency': it argues a crime's random and violent nature alone can pose exigent circumstances validating a warrantless home intrusion.

"We hold that the gravity of the crime, by itself, does not establish an exigency empowering law enforcement officers to bypass the warrant requirement. To support a warrantless home intrusion under the exigency exception, the State must articulate objective facts showing an immediate law enforcement need for the entry. Those facts must be independent of the underlying offense's grave nature. And they must be present when the police enter the home.

"The police had been watching Willis for a day and a half before deciding to make a warrantless arrest. This surveillance seemingly did not reveal any information indicating that Willis would attack someone again. The officers knew Willis's identity and where he lived. They had no evidence that Willis was armed. They also didn't have any evidence that Willis was attempting to flee.

"To support a warrantless home entry under the exigency exception, the State must point to specific and articulable facts objectively showing the immediate necessity of its action. Those facts must be independent of the gravity of the underlying crime; and they must be present at the time of the entry. The State failed to meet its burden."

READ THE COURT OPINION HERE:
https://casetext.com/case/state-v-willis-121544

SEARCH AND SEIZURE:
Extension of Traffic Stop
United States v. Brown
CA8, No. 19-3555, 9/17/21

Detective Brown approached Steven Traylor in the parking area and stopped him on the basis of traffic violations. Traylor locked his car once Brown informed him that he was seized. When Brown asked for license, registration, and insurance, Traylor unlocked the car, retrieved documents, and then locked the car again. Traylor then began to search on his phone for proof of insurance. Traylor handed Brown a handwritten bill of sale for the Dodge Charger. Brown saw that the previous owner was a man involved in financing drug transactions. The bill of sale reflected a sale date of August 1, 2018, but Brown had seen Traylor driving the vehicle before that date—that is, when it would still have been owned by the known drug financer.

In response to questioning, Traylor acknowledged he was on probation for a drug offense. Brown asked for consent to search the vehicle; Traylor declined. Brown then requested that a police K-9 unit with a drug-sniffing dog respond to the scene. Brown provided the Charger's vehicle identification number to an officer at police dispatch, and the officer responded that the vehicle was reported as towed. Brown then began writing a ticket for failure to register the car.

While Brown was writing, he asked Traylor for consent to search his person; Traylor agreed. Brown found a second cell phone and three hundred dollars in cash during the search. After completing the ticket, Brown called the probation and parole office to inquire about Traylor. A police K-9 unit arrived while Brown was on the call, and a police dog alerted to narcotics. Brown searched the car and found a revolver and marijuana.

The Court of Appeals for the Eighth Circuit stated that "here, the totality of the circumstances—Traylor's regular use of a vehicle that was observed recently at known drug trafficking locations, his acquisition of the vehicle from a known drug financer, his criminal history involving a drug offense, his possession of items commonly associated with drug trafficking, and his determined efforts to shield the contents of his vehicle—add up to reasonable suspicion of drug related activity. The brief extension of the traffic stop to facilitate a dog sniff of the vehicle was therefore reasonable under the Fourth Amendment."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/09/193555P.pdf

SEARCH AND SEIZURE: Franks Hearing; Threshold Showing
United States v. Leonard
CA1, No. 19-1392, 11/3/21

In August 2017, Lewiston (Maine) Police Department (LPD) Patrolman Zachary Provost submitted an affidavit in support of an application for a state search warrant during the course of an investigation into suspected drug possession, furnishing, and/or trafficking by Tony Leonard. Provost had been employed for five years by the LPD. He was assigned to the plainclothes Special Enforcement Team, and he had completed several training courses related to drug enforcement and had participated in numerous drug investigations.

Provost sought a warrant to search Leonard himself and his residence located at 41 Walnut Street, Lewiston, for drugs, drug paraphernalia, firearms, and other evidence. His affidavit identified both Apartment #2 and Apartment

#3 at that location as Leonard's residence. The apartments were described as being located in an off-white multi-unit apartment building directly above the Midtown Athletic Club. In support of his warrant application, Provost provided information said to have been received from three confidential informants or "CIs."

CI-1 provided information in the hope of favorable consideration in a pending criminal case involving violation of conditions of release and drug-related offenses. CI-1 also had prior arrests for bail violations and false public alarm. Nonetheless, Provost wrote that CI-1 had "been proven reliable by providing me with information that I have deemed credible from prior investigations."

CI-1 informed Provost that a person nicknamed "TOMCAT" lived above the "Midtown" and was dealing "[c]rack." Provost knew from prior experience that Leonard used the street name "TOMCAT," had a prior conviction for drug trafficking, and had recently been released from prison. Existing internal LPD records confirmed Leonard's use of the alias and identified 41 Walnut Street #3 as his residence. Additionally, a review of his prior criminal history confirmed that Leonard had numerous convictions for drug possession and trafficking.

CI-1 reported to Provost that TOMCAT had apartments on the second and third floors. He stated that the second-floor apartment was the "TRAP" spot that was unfurnished except for a folding card table and was commonly used as a party spot. He reported that TOMCAT lived in the third-floor apartment with his girlfriend.

CI-1 further stated that TOMCAT had video monitoring devices in the hallways. TOMCAT had access to the surveillance equipment at all times and typically watched it while dealing "crack cocaine." CI-1 had seen TOMCAT in possession of a pistol and ammunition and, within a week or so before the warrant application, had observed TOMCAT packaging "crack cocaine" for distribution inside the second-floor apartment. He reported that TOMCAT kept his firearm and narcotics on the second floor, but he did not know where TOMCAT kept his drug proceeds.

During the investigation, Provost received information from another officer about another registered confidential informant, CI-2. CI-2 had prior arrests for theft, operating after a suspension, and forgery, but had previously provided information that was deemed credible by police and had led to an arrest. CI-2 claimed to be interested in reducing drug trafficking in the city because drugs had "directly affected this CI's life."

CI-2 provided information to the police that TOMCAT was staying at 41 Walnut Street and was dealing "HARD," which Provost knew from his experience was a street term for crack cocaine. CI2 stated he could purchase "crack cocaine" from TOMCAT at any time. On August 14, 2017, CI-2 reported that TOMCAT lived in the third-floor apartment, but utilized the second-floor apartment to deal "crack." CI-2 reported there was constant foot traffic coming and going from the rear door of the building and that TOMCAT was often seen standing in the rear parking lot. CI-2 also stated that the residence was equipped with video surveillance.

On August 15, 2017, Provost spoke with an agent of the Maine Drug Enforcement Agency, who informed him that agents had recently made contact with CI-3, a cooperating defendant. CI-3 reported to them that TOMCAT was the largest drug trafficker in the area. CI-3 stated that TOMCAT had apartments on the second

and third floors above the "Midtown Bar" on Walnut Street. CI-3 further stated that TOMCAT's customers typically used the rear entrance located on Bartlett Street. CI-3 had recently observed approximately 1.5 ounces of "[c]rack [c]ocaine" and 1 ounce of "cocaine HCL" in the apartment, where he had also previously observed firearms. CI-3 did not know who owned the firearms.

Shortly before Provost applied for the warrant, the LPD conducted a controlled purchase of cocaine from Leonard, utilizing one of the confidential informants.3 According to the affidavit, officers searched the CI for contraband and equipped him with an electronic recording and monitoring device. Officers followed the CI to the parking lot at 41 Walnut Street, where the CI made contact with Leonard. The CI observed Leonard enter the back door leading to both the second- and third-floor apartments and return moments later. The CI provided TOMCAT with pre-counted, recorded United States currency in exchange for a quantity of cocaine. After the buy, the CI turned over cocaine to a detective. A field test indicated the presence of Cocaine HCL.

On August 16, 2017, a state court judge issued the warrant to search Apartments #2 and #3 at 41 Walnut Street. The next day, LPD officers executed the search warrant. Officers found Leonard inside the third-floor apartment. Nearby was a jacket that contained a handgun and magazine. Officers also found cocaine, crack cocaine, more than $10,000 in U.S. currency, and a key that opened the second-floor apartment. In the second-floor apartment, officers found recently purchased furniture in Leonard's name, a bill bearing his name, a handgun case corresponding to the handgun previously seized, another loaded magazine, a digital scale with white powder residue, a box of plastic baggies, and a firearm cleaning kit.

A grand jury returned a federal indictment against Leonard charging him with one count of possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and one count of possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Prior to trial, Leonard filed a motion to suppress the results of the August 17th search of 41 Walnut Street, as well as evidence seized pursuant to subsequent search warrants predicated on the evidence from the search on August 17. He sought a hearing pursuant to Franks v. Delaware on the basis of what he claimed were two material omissions from the warrant affidavit.

The district court denied both Leonard's Franks motion and his motion to suppress in a brief written decision. The district court accepted Leonard's factual allegations as true but concluded that Leonard had not demonstrated that he was entitled to a Franks hearing.

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

"The Fourth Amendment provides that no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. This requires the judicial officer considering a warrant application to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before them, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Tanguay*, 787 F.3d 44, 50 (1st Cir. 2015) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Performance of this task must take account of the totality of the circumstances.

"Information supporting probable cause may be set out in an affidavit submitted with the application for a search warrant. An affidavit supporting a search warrant is presumptively valid. *United States v. Gifford*, 727 F.3d 92, 98 (1st Cir. 2013). However, a defendant may rebut this presumption and challenge the veracity of the affidavit in a pretrial hearing, called a Franks hearing. At a Franks hearing, if a defendant shows by the preponderance of the evidence that the affidavit contains false statements or omissions, made intentionally or with reckless disregard for the truth, and that a finding of probable cause would not have been made without those false statements or omissions, then the defendant is entitled to the suppression of evidence obtained under that warrant.

"A defendant, however, is not entitled to a Franks hearing as a matter of right. Rather, he first must make a substantial preliminary showing that a false statement or omission in the affidavit was made knowingly and intentionally or with reckless disregard for the truth and that the false statement or omission was necessary to the finding of probable cause. When a defendant claims there were material omissions from the facts asserted in an application, he must therefore show that the omission was intentional or reckless and that the omitted information, if incorporated into the affidavit is sufficient to invalidate probable cause.

"When, as here, the showing of probable cause is based primarily on information provided by CIs with some additional corroboration by police investigation, we apply a non-exhaustive list of factors to examine the affidavit's probable cause showing. These factors include, among others, (1) whether the affidavit establishes the probable veracity and basis of knowledge of persons supplying hearsay information; (2) whether an informant's statements reflect firsthand knowledge; (3) whether some or all of the informant's factual statements were corroborated wherever reasonable and practicable (e.g., through police surveillance); and (4) whether a law enforcement affiant assessed, from his professional standpoint, experience, and expertise, the probable significance of the informant's provided information.

"Because none of these factors is indispensable, a stronger showing of supporting evidence as to one or more factors may effectively counterbalance a lesser showing as to others. In this case the first Circuit affirmed, holding that the district court did not err in ruling that the defendant had failed to make a threshold hearing necessary to obtain a Franks hearing."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/19-1392P-01A.pdf

SEARCH AND SEIZURE:

Officers Touch Vehicle Hood to Determine Vehicle Involvement

State of Utah v. Speights

USC, 2021 UT 56, 9/16/21

The Supreme Court of Utah affirmed the judgment of the trial court convicting Holly Speights of driving under the influence, holding that law enforcement officers' touch of Speights' vehicle was supported by probable cause and provided an independent source of the evidence.

Upon responding to a 911 call complaining of a person trying to enter a private residence, two police officers encountered a Ford Explorer that looked to be connected to the disturbance. One officer touched the hood to assess the

temperature of the engine in order to determine how long the vehicle had been there. The other officer reached into the wheel well on two occasions, and both officers testified that the engine felt hot. Speights argued that the officers' testimony about her engine's temperature should have been excluded at trial. The Supreme Court affirmed, holding that, even if the officers' contacts with the vehicle were searches, the automobile exception applied.

READ THE COURT OPINION HERE:
https://www.utcourts.gov/opinions/supopin/State%20v.%20Speights20210916.pdf

SEARCH AND SEIZURE: Pole Camera; Recording Activity in Area Hidden by Six-Foot-High Privacy Fence
State of Colorado v. Tafoya
CSC, 2921 CO 62, 9/13/21

The police suspected Rafael Tafoya of drug trafficking. They mounted a camera on a utility pole across the street from his house without first securing a warrant. For approximately three months, the pole camera continuously recorded footage of Tafoya's property, which included the backyard, which was otherwise hidden by a six-foot-high privacy fence. The camera could pan, tilt and zoom: all features that police could control while viewing the footage live.

Based on activity they observed from the footage, police obtained a warrant to search Tafoya's property. During the subsequent search pursuant to the warrant, the police found large amounts of methamphetamine and cocaine. The State charged Tafoya with two counts of possession with intent to distribute and two counts of conspiracy.

Before trial, Tafoya moved to suppress all evidence obtained as a result of the pole camera surveillance, including the evidence seized pursuant to the search warrant, arguing that police use of the camera violated the Fourth Amendment. The trial court denied his motion and found that police use of the camera was not a "search" within the meaning of the Fourth Amendment. Tafoya was subsequently convicted on all counts. A division of the court of appeals reversed, finding that police use of the pole camera under the facts of this case was a warrantless search.

The State appealed, and the Colorado Supreme Court granted certiorari review. The Supreme Court held that police use of the pole camera to continuously video surveil Tafoya's fenced-in curtilage for three months, with the footage stored indefinitely for later review, constituted a warrantless search in violation of the Fourth Amendment. Accordingly, it affirmed the judgment of the court of appeals.

READ THE COURT OPINION HERE:
https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2020/20SC9.pdf

SEARCH AND SEIZURE: Stop and Frisk; Reasonable Suspicion
United States v. Coleman
CA4, No. 20-4093, 11/89/21

As students were arriving at the high school, an administrator reported an unknown man (Devon Scott Coleman, age 39) "asleep or passed out" in his vehicle with a crossbow visible in the backseat. The vehicle, stopped but running, was primarily parked in a travel lane. Deputy David Johnson believed possession of the crossbow was illegal under Virginia law because it could fire "a projected missile on the school campus." During questioning, Coleman stated that he had a firearm in the vehicle's center console. Johnson asked Coleman to exit the vehicle. When Coleman did so, Johnson observed "a fairly large bag of a green leafy substance that appeared to be marijuana" beside the driver's seat. Another deputy searched the vehicle, finding marijuana, crystal methamphetamine, individual baggies, a scale, a .38 Special revolver, and the crossbow.

Coleman was charged in two drug counts and for using and carrying a firearm during and in relation to a drug trafficking crime. Coleman unsuccessfully moved to suppress the evidence, arguing that Johnson did not have reasonable suspicion of criminal activity to conduct an investigative Terry stop because possession of a crossbow on school grounds is not illegal in Virginia.

The Fourth Circuit affirmed his convictions and 211-month sentence. "Even if Coleman had not possessed the crossbow, Johnson would have had reasonable suspicion to conduct an investigative stop based on the totality of the circumstances."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/Opinions/204093.P.pdf

SEARCH AND SEIZURE: Vehicle Impoundment; Inventory Search
United States v. Kendall
CA10, No. 19-1465, 9/28/21

While on evening patrol duties, Wheat Ridge Police Officer Kendal Rezac spotted a Honda with only one working taillight. Officer Rezac switched on his emergency lights and attempted to pull over the Honda. But instead of pulling over, the Honda's driver, later identified as Aaron Michael Kendall, slowed to approximately ten miles per hour and continued to drive another eight blocks, passing several parking lots and other pull-off areas.

During this slow-motion pursuit, Officer Rezac saw Kendall "moving around a lot" inside the Honda, in a "very erratic and concerning" way. Another officer, arriving to provide backup, saw Kendall "moving objects around on the passenger seat, kind of in a frantic motion." Also during the chase, police dispatch informed Officer Rezac that the Honda's license plates were registered to a different vehicle (an Acura), leading Officer Rezac to believe the Honda might have been stolen.

Eventually, Kendall stopped the Honda on the side of a public road. Officer Rezac, now joined by Officer Mitchell Cotton and Officer Nathan Lovan, ordered Kendall out of the Honda, handcuffed him, and secured him in the backseat of Officer Rezac's patrol car. Officer Rezac read Kendall his Miranda rights, and Kendall waived them.

The officers then began their traffic-stop investigation, learning that Kendall did not have a valid driver's license or proof of insurance. The Honda was not reported stolen, but it was registered to someone other than Kendall. Kendall told the officers that he was in the process of buying the Honda from the registered owner. Kendall also told officers that he did not have insurance

on the car, but later claimed that his wife had it. Officers called the registered owner twice, once from Officer Rezac's phone and once from Kendall's phone (with his consent), but there was no answer. Officers also called Kendall's wife to confirm whether the vehicle was insured, but she did not answer either.

Officer Rezac decided to (1) issue Kendall a non-custodial summons for the motor vehicle violations; and (2) tow the Honda because Kendall could not drive it, it was apparently uninsured, and officers could not reach the registered owner. Pursuant to Wheat Ridge Police Department policy, Officer Rezac obtained supervisor permission to tow the vehicle. Subsequently, and also pursuant to department policy, Officer Cotten started an inventory search of the vehicle.

Officer Cotten soon found a counterfeit $20 bill in the car's visor and an empty, concealed-carry handgun holster on the front passenger seat. Officer Rezac then placed Kendall under custodial arrest for felony forgery (for the counterfeit bill), and transported him to the police station.

Meanwhile, the inventory search continued. As part of that search, Officer Cotten opened the Honda's center console and removed various sundries. After doing so, Officer Cotten noticed that the bottom of the console was "ajar" and "not flush," such that it "clearly looked as if it…was not the, in fact, bottom of the center console." Officer Cotten also saw a "small plastic bag" sticking out from beneath the panel at the bottom of the console. Using "no force at all," Officer Cotten lifted up the bottom panel and discovered an additional compartment containing one small plastic bag of methamphetamine and two bags of heroin.

After finding the drugs, Officer Cotten continued the search. In light of the empty handgun holster he had already found, he believed there was a firearm stowed somewhere in the vehicle, and so he searched places where a firearm could be stored. While searching the area of the front passenger seat, where he had found the handgun holster, Officer Cotten noticed that "the panel below the glove compartment was not flush with the other paneling, was hanging down slightly, and appeared to have been tampered with." Lightly pulling with "barely any force at all," Officer Cotten "tugged on" the bottom of the loose portion of the panel, revealing the butt of a handgun. Officer Cotten removed the rest of the panel and retrieved the gun, a Sig Sauer P226 9mm handgun with an extended magazine clip. Officers later determined that the firearm had been reported stolen.

After Officer Cotten completed the inventory search, the officers called for a tow truck to impound the vehicle. While the vehicle was being loaded onto the tow truck, the registered owner returned the officers' calls. She confirmed that the vehicle was not stolen and that Kendall was in the process of buying it from her. Officer Cotten told the registered owner that the vehicle was being towed, and the registered owner did not attempt to stop the towing or offer to come to the scene to retrieve the vehicle. The vehicle was ultimately towed to a local tow shop and impound yard.

Based on the drugs and gun found in the Honda, the United States charged Kendall with three offenses: (1) possession of a controlled substance with the intent to distribute, (2) unlawful possession of a firearm by a previously convicted felon, and (3) possession of a firearm during and in furtherance of drug trafficking. Kendall moved to suppress the physical evidence found during the inventory search, but the district court

denied the motion to suppress. Kendall then pled guilty to possessing heroin with the intent to distribute and possessing a firearm as a felon; the third charge was dismissed. The district court sentenced Kendall to ninety-five months in prison on each conviction, to run concurrently. Kendall's guilty plea permitted him to pursue a direct appeal challenging the denial of his motion to suppress, and Kendall timely appealed.

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

"The law applicable to vehicle impoundment and vehicle inventory searches based on the case law of the Tenth Circuit. That framework stems from *United States v. Sanders*, 796 F.3d 1241 (10th Cir. 2015). Sanders established a two-part inquiry for assessing police-ordered impoundment of a vehicle not impeding traffic or impairing public safety: (1) whether impoundment is guided by standardized criteria, and (2) whether impoundment is justified by a legitimate community-caretaking rationale.

"We turn to the second Sanders prong—whether impoundment was justified by a 'reasonable, non-pretextual community-caretaking rationale.' Sanders, 796 F.3d at 1248. This factor applies to all community-caretaking impoundments whether on private or public property, because protection against unreasonable impoundments, even those conducted pursuant to a standardized policy, is part and parcel of the Fourth Amendment's guarantee against unreasonable searches and seizures. This requirement guards against arbitrary impoundments and ensures that even if the police were to adopt a standardized policy of impounding all vehicles whose owners receive traffic citations, such impoundments could be invalidated as unreasonable.

"Courts use five non-exclusive factors to determine whether a reasonable, non-pretextual community-caretaking rationale justifies impoundment:

> *(1) whether the vehicle is on public or private property; (2) if on private property, whether the property owner has been consulted; (3) whether an alternative to impoundment exists (especially another person capable of driving the vehicle); (4) whether the vehicle is implicated in a crime; and (5) whether the vehicle's owner and/or driver have consented to the impoundment.*

"Here, that balance clearly weighs in favor of the reasonableness of impoundment, partly because there were no good alternatives. To start, Kendall lacked a valid driver's license, and the police were initially unable to contact the registered owner and thus unable to confirm whether Kendall had any legitimate connection to the vehicle. And even if Kendall proved ownership and some licensed driver had been available, he or she still would not have been able to drive the car away because the vehicle lacked adequate taillights and was not insured. That means that no one could have legally operated the vehicle that night.

"Nor was it a reasonable option for officers to leave the vehicle where it was. As the district court noted, the vehicle was stopped on a public street, and subject to public traffic laws, and because of its location, there was no person whom the police could consult about watching over the car. And at the time the officers made the impoundment decision they had also decided not to take Kendall into custody— meaning that had they not impounded the vehicle, he again would have been able to drive unlawfully the uninsured vehicle, threatening public safety. See *United States v. Alvarez*, 68 F.3d 1242, 1244 (10th

Cir. 1995) (Courts are to view the officer's conduct through a filter of common sense and ordinary human experience). For the same reasons, and because it was unclear whether Kendall had any legitimate connection to the vehicle, allowing Kendall to arrange a private tow was not a reasonable alternative. Moreover, when the officers did finally get in touch with the registered owner—when the officers had already decided to impound the vehicle and it was being loaded onto the tow truck—the registered owner did not object to the towing and impoundment.

"These considerations outweigh any of the Sanders factors that favor Kendall, such as that the vehicle was not implicated in any crime other than traffic offenses, or that Kendall did not consent to impoundment. Accordingly, the impoundment was reasonable under the Fourth Amendment and we affirm the district court on this issue. We next turn to Kendall's challenge to the scope of the inventory search that followed the impoundment decision.

"Specifically, Kendall argues that the inventory search was unreasonable as to (1) the search of the area underneath the center console, where Officer Cotten discovered the illegal drugs; and (2) the removal of the interior panel underneath the glove box, where Officer Cotten discovered the handgun.

"Officer Cotten's inventory search included a search of the center console, a common place for people to store things, including things of value. As Officer Cotten went through the contents of the center console, he noticed the bottom panel of the center console was loose. The district court found that the console bottom had obviously been modified so that items could be stored underneath the center console, the console's bottom was 'slightly raised' and 'not affixed,' and the officer 'could see a small plastic baggie sticking out of one side. Officer Cotten's search of the area underneath the center console was justified because, in light of the undisputed facts, it was obvious that that area was being used as a storage compartment.

"Unlike the center-console search, Officer Cotten's search of the interior panel beneath the glove box cannot be justified as an inventory search. Removing interior panels of the car simply because something might be hidden within smacks of a police search for contraband rather than an administrative search for the purpose of "protecting the car and its contents. Nonetheless, we uphold the search as reasonable because it was justified as an exercise of the officers' community-caretaking function.

"Specifically, Officer Cotten had previously found an empty, concealed-carry handgun holster on the front passenger seat. This suggests the presence of a handgun in the vehicle. See *United States v. Johnson*, 734 F.2d 503, 505 (10th Cir. 1984) (Appellant's revolver in plain view clearly justified a search of the rest of the automobile for other weapons.) Moreover, during the initial pursuit—when Kendall drove approximately eight blocks at ten miles per hour before pulling over—officers had seen him 'moving around a lot' in a 'very erratic and concerning' way and 'moving objects around on the passenger seat, kind of in a frantic motion.' This, in combination with the empty gun holster on the front passenger seat, gave rise to a reasonable belief that there was a firearm somewhere in that vicinity. And pursuant to the police department's standard procedures, the officers were required to inventory any guns in the impounded vehicle and remove them for safekeeping. It was thus objectively reasonable for the officers to search for a hidden firearm in the front-passenger-seat area.

"In sum, the officers' search of Kendall's vehicle was reasonable under the Fourth Amendment because it was made pursuant to standard police procedures and for the purposes of protecting the car and its contents and the safety of the officers and the general public."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110583011.pdf