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Contents

CIVIL LIABILITY: Arrest Lawful Even When Lawful Even When Probable Cause Exists for Another Offense

Vanegas v. City of Pasadena, CA9, No. 21-55478, 8/31/22

This lawsuit stems from events immediately following Javier Vanegas's 2019 divorce proceedings at the Superior Courthouse in Pasadena, California. Vanegas appeared at the family court hearing, along with his ex-wife, Sandra Kerguelen, and her attorney, Karen Suri. According to Suri, Vanegas raised his voice and yelled at Suri and the judge during the hearing. As a result, the judge admonished Vanegas to control himself or face sanctions. After the hearing, Suri asked a court bailiff to help her and Kerguelen leave without Vanegas following them. The bailiff stood in front of Vanegas, blocking the way so that Suri and Kerguelen could exit.

After Suri and Kerguelen left the courthouse, Vanegas followed them. Vanegas started yelling aggressively at Suri. Suri and Kerguelen tried to walk away, but Vanegas continued to follow while calling Suri a "scumbag" and "liar." Vanegas eventually came within arm's reach of Suri. Feeling threatened, Suri told Vanegas that she would call the police. But he still didn't leave. Suri then dialed 911. Suri told the operator that there was a man following her, yelling at her on the street, and that she was afraid and needed help.

At that point, Suri saw a Pasadena Police Department Community Service Officer and flagged him down. Suri told the officer that Vanegas was following her and that she did not feel safe. The officer asked Suri to walk to the police station across the street to file a report. Suri and Kerguelen did so.

Pasadena Police Officer Philip Klotz was at the courthouse on other business. While there, he heard an alert over the police radio about a 911 caller being followed outside the courthouse. So Officer Klotz exited the Courthouse and headed toward the southeast corner of Garfield Avenue and Walnut Street. As he walked to the intersection, Officer Klotz received an update, advising that the suspect, named "Javier Vanegas," was walking northbound on Garfield Avenue. After Officer Klotz reached the intersection, he observed only one man, later identified as Vanegas, heading north on Garfield Avenue.

Officer Klotz asked Vanegas whether his name was "Javier." Vanegas responded by asking Officer Klotz who he was. Officer Klotz identified himself as a law enforcement officer and asked Vanegas for his identification. Despite at least three requests for identification, Vanegas did not comply and instead took out his cell phone to record the interaction. Officer Klotz then gave Vanegas the option of either producing his identification or being placed in handcuffs. Vanegas still refused to identify himself.

After several other officers arrived, Officer Klotz placed Vanegas in handcuffs for officer safety. Afterward, Officer Klotz received a radio call that Vanegas violated California Penal Code § 415—a disturbing-the-peace ordinance. Officer Klotz asked other officers to have Suri identify Vanegas. Officer Klotz received confirmation over the radio that Suri positively identified Vanegas as the person who was following her.

While other officers remained with Vanegas, Officer Klotz walked across the street to speak with Suri. Officer Klotz saw Suri almost crying and visibly shaking. Suri relayed that Vanegas began following her and Kerguelen after the family court hearing. After interviewing Suri, Officer Klotz walked back to Vanegas and advised him that he was under arrest. The officers then took Vanegas to the Pasadena police station for booking. Vanegas was eventually released with a citation for violating California Penal Code § 148(a)(1), which punishes obstructing a peace officer. The Office of the City Attorney for Pasadena declined to pursue charges and Vanegas was never convicted of any offense stemming from his arrest.

A few months later, Vanegas sued the police officers involved and the City of Pasadena alleging, among other claims, violation of his Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983.

Upon review, the Court stated that "it was well-established that if the facts support probable cause for one offense, an arrest may be lawful even if the officer invoked, as the basis for the arrest, a different offense which lacked probable cause."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/31/21-55478.pdf

CIVIL LIABILITY: Bail Hearings

Mitchell v. Doherty, CA7, No. 21-1764, 6/22/22

Police arrested seven demonstrators in Rockford, Illinois, on Friday and one on Saturday. Winnebago County does not hold bail hearings over the weekend. All eight waited until Monday at 1:30 p.m. to receive a bail hearing, seven were then released either on their own recognizance or on bond. The charges against three have been dismissed, amd the court sentenced three to probation or conditional discharge.

The Friday detainees were held for about 68 hours. The Saturday detainee was held for slightly over 48 hours. Three missed work, one lost her job, and one could not seek medical attention for an open wound and bruised ribs while in jail. One endured three days of solitary confinement and was not allowed to take her prescription medication, and one was denied medical attention for a concussion and a bleeding head wound.

The detainees filed suit, 42 U.S.C. 1983 against the Chief Judge and the Sheriff, in their official capacities, and Winnebago County, arguing that the County violated the Fourth Amendment by denying them a bail hearing within 48 hours after detention even though a probable-cause determination had been made within that period. The district court dismissed the suit.

The Seventh Circuit affirmed. "Precedent dictates that only a probable-cause determination must be held within 48 hours, As a matter of first impression, the court held that the Fourth Amendment does not require a bail hearing within 48 hours after arrest."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2022/D06-22/C:21-1764:J:St__Eve:aut:T:fnOp:N:2893581:S:0

CIVIL LIABILITY: Canine Handler Not Required to Shout Warning to Fleeing Suspect

Jarvela v. Wastenaw County
CA6, No. 21-2820, 7/22/22

Cory Jarvela was bitten by a police dog after leading an officer on a high-speed chase and eventually fleeing on foot into a darkened, wooded area. Jarvela later brought this suit against Deputy Richard Houk, the dog's handler. The district court denied summary judgment to Houk, holding that he had a constitutional duty to shout out a warning to Jarvela before searching for him with the dog. The Court of Appeals for the Sixth Circuit held that Houk had no such duty, and reversed the decision of the district court.

One night in August 2017, Cory Jarvela drank a half-dozen rum-and-cokes in his home near Clinton, Michigan, a small town about 20 miles southwest of Ann Arbor. Around 1 a.m., he drove his Chevy Silverado to a Shell station to buy cigarettes. Afterward, the store clerk called the police to report that "a drunk guy" wearing a white t-shirt had just left driving a black Silverado. In a nearby police cruiser, Officer Robert Trevino spotted the Silverado almost immediately, speeding and drifting over the road's center line. Trevino lit his rollers and began to pursue the truck. Jarvela sped up outside of town, leading Trevino on an extended chase. After about five minutes, the road turned to gravel and the Silverado struck a tree head-on, hard enough to deploy its airbags. Jarvela then fled on foot into a darkened area of trees, bushes, and chest-high weeds and grass. Rather than pursue into the darkness, Trevino called for backup. Washtenaw County Sheriff's Deputy Richard Houk and his service dog, Argo, arrived thirteen minutes later.

Most of what followed was recorded on Houk's body camera. Houk choked up on Argo's 15-foot leash, keeping the dog within five or ten feet. Then he and Argo began searching the area, with Houk shining his flashlight as they went. After about five minutes, Argo found a shoe and a white t-shirt in the grass; a few seconds later, the grass around Argo (who was not then visible) began to move around. Moments later—around 6:14 on the video—Jarvela was visible in the weeds as he wrestled with Argo, who was clinging to Jarvela's

right arm. Houk began yelling at Argo to "packen" (a command meaning "grip" or "apprehend" in German) and "hold 'im." At 6:24 on the video, Jarvela begins to roll his body (over 200 pounds) on top of Argo's body (about 65 pounds), as Houk yelled at Jarvela, "Get on your stomach right now. Get down on the ground right now. On your stomach now." (Whether the roll preceded the command is not clear from the video.) At 6:30 on the video, Jarvela was on his knees with his chest against Argo and his arms bent near Argo's head. At 6:37, Houk steps forward and delivers seven blows to the back of Jarvela's body, yelling "Let go of the f&*$g dog now. Let go of the dog." Trevino shot his taser at Jarvela, who rolled onto his back. Trevino then deployed his taser again, and Jarvela complied with commands to "get on your stomach." By 7:02 the officers have him cuffed.

The Court found as follows:

"We begin with the question whether Houk violated Jarvela's constitutional rights in the tracking phase, in which the only force he used was a bite (or bite and hold, to be precise) from a well-trained police dog, namely Argo. Among the various forms of force available to law enforcement, that is a comparatively measured application of force, which does not carry with it a substantial risk of causing death or serious bodily harm.

"Our cases do not support the proposition that an officer must always shout a verbal warning before tracking a suspect with a dog that the officer keeps on a leash. We see no reason to think that the warn-then-unleash approach is on balance less forceful than the approach Houk employed here—which was to omit the warning and to keep Argo on a fairly tight leash. There is a vast difference between those two approaches; each has its pros and cons, depending on the circumstances. And the warn-then-unleash approach can elevate risk for officer and suspect alike: for the officer, because the shouted warning reveals the officer's location; and for the suspect, because the dog will be beyond the officer's control when the dog finds him. Both approaches, however, fall within accepted police practice; and we would seriously overstep our judicial role if we were to hold that officers in every instance must adopt one approach or the other.

"We therefore hold that the Constitution does not require a canine handler always to shout out a warning to a fleeing suspect. And we hold that, under the circumstances facing the officers here, Houk did not violate the Constitution when he chose not to shout a verbal warning while tracking Jarvela with Argo on a leash. If Jarvela had wanted to surrender, he should not have fled on foot. We also hold that Houk is entitled to qualified immunity for his actions during what we call the contact phase. That phase is notable above all for its confusion, as Jarvela wrestled with Argo as the dog bit his arm, and Houk shouted commands with which Jarvela did not promptly comply. When a person resists arrest—say, by swinging his arms in the officer's direction, balling up, and refusing to comply with verbal commands—the officers can use the amount of force necessary to ensure submission. Here, Houk ceased to use any force once Jarvela complied with Houk's commands to roll onto his stomach. And Jarvela has not identified any binding precedent that would have made clear to Houk that any of the force he used before then was unnecessary to ensure Jarvela's submission. Houk is therefore entitled to judgment on all of Jarvela's claims against him."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0161p-06.pdf

CIVIL LIABILITY: Cause of Actions Against Federal Law Enforcement in Bivens Cases Limited by the Court

Egbert v. Boule, USSC, No. 21-147, 6/8/22

Robert Boule's business, "Smuggler's Inn," abuts the Canadian border. Boule sometimes helped federal agents identify and apprehend persons engaged in unlawful cross-border activities but also provided transportation and lodging to illegal border crossers. Boule informed U.S. Border Patrol agent Erik Egbert that a Turkish national had scheduled transportation to Smuggler's Inn. Egbert followed Boule's vehicle to the Inn. Boule claims he asked Egbert to leave, but Egbert refused, threw Boule to the ground, checked the immigration paperwork for Boule's guest, then left.

Boule filed an unsuccessful grievance with Egbert's supervisors and an unsuccessful administrative claim. Egbert allegedly retaliated by reporting Boule's license plate to the state for referencing illegal activity, and by prompting an IRS audit. Boule sued Egbert, alleging Fourth Amendment excessive force and First Amendment retaliation.

Reversing the Ninth Circuit, The Supreme Court held that Bivens does not extend to Boule's claims.

"In *Bivens*, the Court created a damages action against federal agents for violating a plaintiff's Fourth Amendment rights. The Court subsequently fashioned new causes of action under the Fifth and Eighth Amendments.

"Recognizing a *Bivens* cause of action is 'a disfavored judicial activity.' Boule's Fourth Amendment claim presented a new *Bivens* context, not akin to a 'conventional' excessive-force claim. Concerns about undermining border security foreclose *Bivens* relief. Congress has provided alternative remedies: Border Patrol must investigate alleged violations and accept grievances. The Court has never held that a *Bivens* alternative must provide for judicial review. Boule's First Amendment retaliation claim also presents a new *Bivens* context. Congress is better suited to authorize a damages remedy. Extending *Bivens* to alleged First Amendment violations would pose an acute 'risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'"

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/21pdf/21-147_g31h.pdf

CIVIL LIABILITY: Excessive Force; Knee Applied to Shoulder and Lower Back/Hip Area

Wiley v. City of Columbus
CA6, No. 21-3615, 6/2/22

Jaron Thomas called 911, stating that he believed he was overdosing from cocaine. Law enforcement officers customarily secure suspected drug overdose scenes before paramedics enter. Officer Pinkerman knocked on the door, which burst open. Thomas ran into the lawn, disobeying officers' commands. When Thomas fell, Pinkerman fell on top of him. Thomas actively resisted. Four officers handcuffed Thomas and signaled to paramedics to approach.

Thomas was kicking and dropping his weight, so the officers laid him down and called for a hobble strap to prevent him from kicking paramedics. Officer Shaffner applied his knee to Thomas's lower back/hip area. Stephens had his knees

against Thomas's shoulder. Thomas was kept in this position for approximately 90 seconds while waiting for a hobble strap. Officers noticed that his breathing slowed and rolled Thomas onto his side. Paramedics administered Narcan to increase his respiratory rate and deemed Thomas to be in stable, non-life-threatening condition; minutes later he went into cardiac arrest. Thomas arrived at the hospital in critical condition. A drug screen detected marijuana, cocaine, and opiates. Thomas died of "anoxic encephalopathy" resulting from cardiac arrest.

Thomas's estate alleged that his cardiac arrest was caused by "forcible restraint that precluded adequate breathing." The Sixth Circuit affirmed the summary judgment rejection of the estate's 42 U.S.C. 1983 claims. The estate cannot establish that Thomas had a clearly established right against the type of force that was used. The officers are entitled to qualified immunity.

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0117p-06.pdf

CIVIL LIABILITY: Excessive Force; Non-Resisting Suspect

Andrews v. City of Henderson, Nevada
CA9, No. 20-17053, 5/23/22

After a series of armed robberies at various businesses in Henderson, Nevada, detectives with the Henderson Police Department (HPD) began surveilling a woman suspected of assisting a man with a recent robbery. On January 3, 2017, the woman left a gas station in a car driven by an unidentified man, and several plainclothes detectives followed behind. The detectives learned from the lead detective on the case that the driver was Daniel Andrews and that they had probable cause to arrest him for the armed robberies. The detectives followed the pair to the Henderson Justice Facility parking lot and watched as they exited the vehicle.

The detectives observed Andrews and the woman walk into the Henderson Municipal Courthouse. To enter the courthouse, the pair had to pass through a security checkpoint that included a metal detector and x-ray scanner. One detective followed Andrews and the woman into the courthouse and tracked their location. The other detectives waited outside so they could arrest Andrews after he exited the courthouse because they knew he would be unarmed at that point, having passed through the courthouse's metal detectors. All of the detectives were in plain clothes.

Twenty minutes after entering the courthouse, Andrews and the woman reemerged, and Detectives Phillip Watford and Karl Lippisch walked slowly toward them without identifying themselves. When Detective Watford was approximately a foot away from Andrews, he lunged and tackled him to the ground. Detective Lippisch also jumped toward Andrews and Detective Watford and landed on top of them as they fell. Detective Lippisch kept his weight on Detective Watford's back as Detective Watford handcuffed Andrews's arms behind his back. The detectives' takedown resulted in an acetabular fracture of Andrews's hip, which required two surgeries.

Andrews sued the detectives and the City of Henderson under 42 U.S.C. Section 1983 for excessive force in violation of the Fourth Amendment. The detectives moved for summary judgment arguing that they are protected by qualified immunity, and the City moved for summary judgment arguing Plaintiff could not

establish municipal liability. The district court denied the motions.

The Ninth Circuit affirmed.

"The use of force was substantial. Although Andrews was suspected of a serious crime, the detectives knew that he was not armed and was not posing an immediate threat to anyone as he exited the courthouse. Under these circumstances, a reasonable jury could find that the degree of force used against Andrews violated his Fourth Amendment right against excessive force, and the detectives were not entitled to summary judgment on the question of whether they committed a constitutional violation.

"The court held that *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007) clearly established, that an officer violates the Fourth Amendment by tackling and piling on top of a relatively calm, non-resisting suspect who posed little threat of safety without any prior warning and without attempting a less violent means of effecting an arrest."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/23/20-17053.pdf

CIVIL LIABILITY:
Failure to Give Miranda Warnings

Vega v. Tekoh, USSC, No. 21-499, 6/23/22, 597 U.S. ____ (2022)

This case arose out of the interrogation of Terence Tekoh by Los Angeles County Sheriff 's Deputy Carlos Vega. Deputy Vega questioned Tekoh at the medical center where Tekoh worked regarding the reported sexual assault of a patient. Vega did not inform Tekoh of his rights under *Miranda v. Arizona*, 384 U. S. 436. Tekoh eventually provided a written statement apologizing for inappropriately touching the patient's genitals. Tekoh was prosecuted for unlawful sexual penetration. His written statement was admitted against him at trial.

After the jury returned a verdict of not guilty, Tekoh sued Vega under 42 U. S. C. §1983, seeking damages for alleged violations of his constitutional rights. The Ninth Circuit held that the use of an un-Mirandized statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a §1983 claim against the officer who obtained the statement.

The United States Supreme Court found, in part, as follows:

"Section 1983 provides a cause of action against any person acting under color of state law who subjects a person or causes a person to be subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. The question we must decide is whether a violation of the Miranda rules provides a basis for a claim under §1983. We hold that it does not.

"In Miranda, the Court concluded that additional procedural protections were necessary to prevent the violation of the Fifth Amendment right against self-incrimination when suspects who are in custody are interrogated by the police. Miranda imposed a set of prophylactic rules requiring that custodial interrogation be preceded by now-familiar warnings and disallowing the use of statements obtained in violation of these new rules by the prosecution in its case-in chief. Miranda did not hold that a violation of the rules it established necessarily constitute a Fifth Amendment violation. A violation of Miranda

does not necessarily constitute a violation of the Constitution, and therefore such a violation does not constitute the deprivation of a right secured by the Constitution for purposes of §1983."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/21pdf/21-499_gfbh.pdf

CIVIL LIABILITY: Fair Notice that the Conduct is Unlawful

N.S. v. Kansas City Board of Police Commissioners, CA8, No. 20-1526, 5/31/22

Kansas City Police Officer William Thompson shot and killed Ryan Stokes during a foot chase.

Seconds after receiving a police dispatch about a suspected cellphone theft and an ensuing foot chase, Officer Thompson saw Stokes run into a parking lot. His destination was a red car, and once he reached it, he opened and shut the driver's side door. He then turned to face the officer who had been chasing him.

What happened next is hotly disputed, but the family's side of the story is what matters at this point. Officer Thompson, who was standing behind Stokes at the time, saw him raise his hands to his waist. Misinterpreting the gesture as threatening, Officer Thompson fired without warning at Stokes, who was trying to surrender. Stokes later died from his injuries. Although a search revealed a gun in the car, the car's owner said that it had been in there all night. So even if Officer Thompson insists that he saw a gun in Stokes's hand during the chase, we must assume that he did not have one.

The district court concluded that Officer Thompson was entitled to both qualified and official immunity. The Eighth Circuit Court of Appeals affirmed, finding as follows:

"The district court determined that there had been no constitutional violation at all, clearly established or otherwise. Its conclusion on official immunity was similar: Officer Thompson had been negligent at most, meaning that Stokes's family could not recover for wrongful death.
Seconds after receiving a police dispatch about a suspected cellphone theft and an ensuing foot chase, Officer Thompson saw Stokes run into a parking lot. His destination was a red car, and once he reached it, he opened and shut the driver's side door. He then turned to face the officer who had been chasing him. What happened next is hotly disputed, but the family's side of the story is what matters at this point.

"Officer Thompson, who was standing behind Stokes at the time, saw him raise his hands to his waist. Misinterpreting the gesture as threatening, Officer Thompson fired without warning at Stokes, who was trying to surrender. Stokes later died from his injuries.

"Although a search revealed a gun in the car, the car's owner said that it had been in there all night. So even if Officer Thompson insists that he saw a gun in Stokes's hand during the chase, we must assume that he did not have one.

"The court's task is to evaluate the family's excessive-force claim against Officer Thompson. See 42 U.S.C. § 1983. The key issue is whether he is entitled to qualified immunity, which depends on how we answer two questions. First, did his actions violate a constitutional right? Second, was the right clearly established? If the answer to either question is no, Officer Thompson gets immunity.

"We can skip directly to the second question. The Supreme Court has explained that the focus of the clearly-established-right inquiry 'is on whether the officer had fair notice that [his] conduct was unlawful.' *Kisela v. Hughes*, 138 S. Ct. 1148, (2018). Here, judged against the backdrop of the law at the time of the conduct, a reasonable officer would not have had fair notice that shooting Stokes in these circumstances violated the Fourth Amendment.

"Central to our conclusion is *Thompson v. Hubbard*, 257 F.3d 896, 898 (8th Cir. 2001). Critical to our decision was the idea that an officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun.

"Even under the plaintiff-friendly version of the facts, Officer Thompson faced a similar choice here: use deadly force or face the possibility that Stokes might shoot a fellow officer. And just like in Hubbard, Officer Thompson could only see the suspect from behind, which obscured his view and required a split-second judgment—in circumstances that were tense, uncertain, and rapidly evolving. (*Graham v. Connor*, 490 U.S. 386, (1989)).

"To prevail the family had to establish that the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. *Kisela*, 138 S. Ct. at 1153. Existing precedent, in other words, must have placed the statutory or constitutional question beyond debate. In light of Hubbard, it did not.

"Nor has the family shown that Officer Thompson acted in bad faith or with malice. Official immunity shields Missouri police officers from liability for their discretionary decisions, including when they draw and fire a weapon, even if they are negligent. But immunity ends where bad faith or malice begins.

"Both are forms of wrongful intent. The former requires a dishonest purpose, moral obliquity, conscious wrongdoing, or breach of a known duty through some ulterior motive. And the latter involves actions that are so reckless or wantonly and willfully in disregard of one's rights that a trier of fact could infer from such conduct bad faith or an improper or wrongful motive. There is no evidence of either here."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/05/201526P.pdf

CIVIL LIABILITY: Filming of Police Actions

Irizarry v. Yehia, CA10, No. 21-1247, 7/11/22

Abade Irizarry, a YouTube journalist and blogger, was filming a DUI traffic stop in Lakewood, Colorado. Officer Ahmed Yehia arrived on the scene and stood in front of Irizarry, obstructing his filming of the stop. When Irizarry and a fellow journalist objected, Officer Yehia shined a flashlight into Irizarry's camera and then drove his police cruiser at the two journalists. Irizarry sued under 42 U.S.C. § 1983, alleging that Officer Yehia violated his First Amendment rights. The district court granted the motion, concluding that the complaint alleged a First Amendment constitutional violation.

Although the Tenth Circuit had not previously recognized a First Amendment right to record police officers performing their official duties in public, the district court, relying on out-of-circuit decisions, held that the First Amendment

guaranteed such a right, subject to reasonable time, place, and manner restrictions. The district court nonetheless held that Officer Yehia was entitled to qualified immunity because Irizarry had not shown a violation of clearly established law. The Tenth Circuit found the complaint alleged a First Amendment retaliation claim under clearly established law, so Officer Yehia was not entitled to qualified immunity. Accordingly, judgment was reversed.

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110708555.pdf

CIVIL LIABILITY: Information Omitted from Arrest Warrant

Hartman v. Bowles, CA8, No. 21-1365, 7/5/22

Someone shot a St. Louis fire captain and his passenger. The fire captain described the shooter as a "black male," once on a 911 call right after the shooting, again when responding officers arrived on the scene, and again to an officer at the hospital. He did not give that description to Detective Beary Bowles, who investigated the case.

Bowles focused his attention on the Hartman brothers, who are white. Nearby cameras had captured them driving in the area and then stopping shortly before the shooting. Based on this evidence, Detective Bowles requested multiple search and arrest warrants. The paperwork Bowles submitted omitted the fact that the fire captain had described the shooter as black.

The brothers were eventually released and sued Bowles, citing the Fourth Amendment, 42 U.S.C. 1983.

The Court of Appeals for the Eighth Circuit stated that the issue is does a detective violate a clearly established constitutional right by omitting information from a warrant application that he does not actually know, even if the reason is his own reckless investigation? The Eighth Circuit affirmed the dismissal of the suit.

"A detective does not violate a clearly established constitutional right by omitting information from a warrant application that he does not actually know, even if the reason is his own reckless investigation. To succeed, the Hartmans had to show that Bowles omitted facts 'with the intent to make, or in reckless disregard of whether they make, the affidavit misleading.' Bowles is entitled to qualified immunity."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/07/211365P.pdf

CIVIL LIABILITY: Innocent Hostage, Forced to Drive Log Truck, Shot by Law Enforcement Officers

Davis v. Waller, C11, No. 21-11333, 8/12/22

Paul Donald Davis was taken hostage by a fleeing felon in rural Georgia. At the felon's behest Plaintiff drove an 84,000-pound truck loaded with timber toward seven officers gathered at the scene and showed no signs of stopping. As the logging truck struck the police vehicles lining the dirt road, several of the officers opened fire on the cab of the truck, even though they allegedly knew Davis—an innocent hostage—was being forced to drive.

Davis survived but was shot in his hand, his fingers, his hip, and his shoulder. He sued both Georgia State Patrol Lieutenants in their

individual capacities for violating his Fourth and Fourteenth Amendment Rights. The Defendants moved for summary judgment, arguing that they were entitled to qualified immunity. The district court agreed and granted summary judgment because their actions were reasonable and, even if they were not, they did not violate any clearly established law.

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

"There is no question that the officers were acting in their discretionary capacities when they fired at the cab of the moving logging truck. We begin, then, with whether the officers' actions were reasonable. If they were, the officers did not violate Davis's constitutional rights under the Fourth Amendment. See *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821 (11th Cir. 2010). Because Davis and Arnold posed an imminent risk of serious physical harm or death to the officers and to the public, we are satisfied that Defendants' decisions to shoot at a moving, 84,000-pound logging truck were reasonable.

"William Arnold put Donald Davis, the officers, and the public in grave and imminent danger. Police officers like Browder and Waller may use deadly force to dispel a threat (and, here, an imminent one) of serious physical harm or death or to prevent the escape of a very dangerous suspect who threatens that harm. Browder and Waller made the difficult, but altogether reasonable, decision that Arnold and the logging truck had to be stopped -- and, tragically, that meant stopping Davis, too."

READ THE COURT OPINION HERE:
https://media.ca11.uscourts.gov/opinions/pub/files/202111333.pdf

CIVIL LIABILITY:
Justifiable Shooting of a Dog

White v. City of Detroit, CA6, No. 21-1746, 6/17/22

In the early afternoon of August 3, 2020, Detroit police officers apprehended a fleeing suspect who had run across several yards. One of those yards belonged to Rosemary White. Believing that the suspect had disposed of a weapon nearby, officers called in a canine unit to search for it.

Bodycam and security camera footage captured the events that followed. Officer Shirlene Cherry arrived at the scene with her trained canine, Roky. The White family had two dogs outside, Chino, a pit bull, and Twix, a Yorkie Terrier. Officer Cherry asked White's daughter, Mi-Chol, to secure the dogs during the search for the weapon. Mi-Chol grabbed Chino to put him inside their home, but he escaped and ran to the front yard. Mi-Chol went inside to grab a leash. With Chino still roaming the fenced-in yard, Officer Cherry decided to take Roky to a neighboring yard to search there first. They walked along the perimeter of the wrought-iron fence toward the next yard while Chino followed them from the other side of the fence.

Then the unexpected happened. As Officer Cherry and Roky reached the corner of the yard, Chino lurched through the fence's vertical spires and bit down on Roky's snout. Roky yelped. Cherry turned and saw Roky trapped up against the fence with his nose in Chino's mouth. Cherry tugged at Roky's leash and yelled at Chino to "let go." Nothing changed. Chino began "thrashing," "swaying back and forth in an effort to tear" what he was holding. Unable to free Roky and afraid for the dog's life, Cherry unholstered her gun and shot Chino once. Six seconds passed between Chino's attack and Cherry's shot. After the shot, Chino

released the now-bloodied Roky. Chino died from the shot. Rosemary and Mi-Chol White sued the officer and the City of Detroit. They alleged that Cherry violated the Fourth Amendment when she shot Chino. They also claimed that Detroit failed to train its employees adequately to deal with this kind of encounter. The district court granted summary judgment for the defendants on the federal constitutional claims.

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

"The constitutional right at issue—the Fourth Amendment as incorporated via the Fourteenth Amendment—protects the 'people' and their 'effects' from 'unreasonable' 'seizures.' All agree that Officer Cherry 'seized' Chino. And neither party disputes that an individual's dog, unsentimental and ungrateful though the characterization may seem, counts as an 'effect.' That leaves reasonableness, the reasonableness or not of Officer Cherry's decision to shoot the dog.

Whether viewed from the perspective of a child or a parent, only the most cold-hearted, or allergy-ridden, individual could deny the 'attachment between a dog and an owner' or deny that individuals experience a traumatic and lasting loss when the police kill their pet. All considerations accounted for, we ask: Was the seizure 'more intrusive than necessary'? *Florida v. Royer*, 460 U.S. 491, 504 (1983).

"Shooting a pet, while always unfortunate, is not always unreasonable. An officer may reasonably use lethal force against a pet that poses an imminent threat. The perceived likelihood, nature, and severity of the threat inform this analysis. In gauging that officers frequently make split-second judgments about their use of force in 'tense, uncertain, and rapidly evolving' circumstances. *Graham v. Connor,* 490 U.S. 386, 397 (1989). All of this prompts us to look at the confrontation through the lens of a 'reasonable officer on the scene,' not sanitized judicial hindsight.

"Officer Cherry acted reasonably at each turn. The threat had imminence written all over it. Cherry immediately and sensibly reacted to Roky's yelp and its cause, a pit bull's clenched down grip on his nose. The threat also appeared severe and unrelenting. Within seconds, as the video footage confirms, Chino began 'thrashing' back and forth, pivoting solely on Roky's hapless snout. Thrashing of this sort, as the record and common sense confirm, means a dog has 'a good hold of something.' Officer Cherry fairly believed that Roky faced serious, if not deadly, consequences if she did not act.

"What of the alternatives? What of other reasonable options short of Officer Cherry's lethal use of force? Commands for Chino to 'let go' did not do the trick. Several forceful pulls on the leash still left Roky at Chino's unmistakable beck and unrelenting call. Only the ignorant peace of a judge's chamber would prompt the passing thought that the officer should use her hands to remove the one dog from the other. That of course would replace one hazard with another, and in the process insert the officer, never a judge, into harm's path. Officer Cherry, it is true, had a taser, and perhaps a taser might have spared Roky and Chino. But Officer Cherry believed that the taser would serve only as a 'muscle stimulant' and further 'lock Chino's jaw,' leaving Roky in continuing peril. Maybe; maybe not. But there were enough maybes in this unnerving situation to permit Officer Cherry to respond to these 'tense, uncertain, and rapidly evolving' circumstances, with decisive action that increased the likelihood of saving Roky: shooting

the source of the peril. Shooting an attacking dog to save a behaving police dog is not unreasonable. The problem in this case is not the law's lack of appreciation for the Whites' love of their dog. It is that the lives of two dogs were at risk. Officer Cherry permissibly considered that reality in killing one and saving the other.

"The opinion of the district court is affirmed."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0132p-06.pdf

CIVIL LIABILITY: Justifiable Shooting of Individual Who Led Officers to Believe He Was Armed

Doxtetor v. O'Brien, CA7, No. 21-2101, 7/12/22

Green Bay Police Department officers arrested Jonathan Tubby and transported him to jail for booking. In the jail's secure entryway, Tubby became non-compliant, refusing to exit the squad car and concealing one hand under his shirt while threatening to "do it" if officers came any closer. The officers called for backup. Tubby was eventually forced out of the car with pepper spray. He kept one hand under his shirt in a manner that, to officers, indicated he had a weapon. Exiting the squad car, Tubby refused to surrender but instead rushed toward the exit in an apparent escape attempt. An officer heard a "pop" that he believed to be a gunshot coming from the weapon he presumed Tubby was hiding and discharged his firearm eight times, hitting Tubby with five shots.

Tubby's estate filed suit under 42 U.S.C. 1983. The Seventh Circuit affirmed summary judgment in favor of the defendants:

"The officer's conduct did not violate Tubby's constitutional rights to be free from unreasonable seizures. Qualified immunity shields the officer from liability. The officer's conduct was reasonable, given that Tubby intentionally led the officers to believe he was armed and ready to 'do it.'

"Tubby intentionally led the officers to believe he was armed by keeping his hand concealed under his shirt in a manner that imitated the shape of a gun, and he threatened repeatedly to 'do it' as officers attempted to persuade him to surrender. By doing so, he effectively escalated the situation into an armed standoff between himself and police.

"Furthermore, even when he eventually did exit the squad car after being forced out with pepper spray, Tubby did not surrender. Instead, even after he was hit with a bean bag round, he stood up and ran towards the exit and the group of officers standing thereby. Given that Tubby was undeterred by the officers' attempts to subdue him via less forceful means and given that Tubby himself seemed to be intentionally communicating to the officers that he was armed and not afraid to 'do it,' it was reasonable for O'Brien to deploy deadly force as Tubby rushed towards the exit and the nearby officers."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2022/D07-12/C:21-2101:J:Flaum:aut:T:fnOp:N:2902523:S:0

CIVIL LIABILITY: Potential Evidence Seized by Warrant, Can't be Retained Forever

Frein v. Pennsylvania State Police
CA3, No. 21-1830, 8/30/22

In 2014, Eric Matthrew Frein ambushed Pennsylvania State Troopers, killing one and injuring the other. Knowing he had used a .308-caliber rifle, police got a warrant to search the home that he shared with his parents and seize that type of rifle and ammunition. They did not find a .308-caliber rifle but found 46 guns belonging to the parents. The officers got a second warrant and seized them. Frein was eventually arrested, tried, convicted, and sentenced to death.

The government never used the parents' guns at trial, sentencing, or on appeal. The parents were not charged nor was it alleged that any of their guns were involved in the crime. The parents went to Pennsylvania state court and unsuccessfully asked to get their guns back, raising Second Amendment, takings, due process, excessive fines, and state-law objections.

The parents then sued under 42 U.S.C.1983, arguing that by keeping the guns, the government is violating the Takings Clause and the Second Amendment's right to "keep" arms and that the state's procedure for letting them reclaim their property violated procedural due process. The district court dismissed.

The Third Circuit vacated in part:

"By keeping the parents' guns after the criminal case ended, the officials took their property for public use without compensating them. Because the parents lawfully owned the guns, they also have a Second Amendment claim. The police understandably seized the parents' guns in 2014 while a killer was still at large. But he has long since been captured and convicted, and his conviction has been affirmed. The judicial warrant does not authorize keeping the guns past this point. The Constitution requires the officials who are holding on to the guns to pay the parents just compensation and bars them from keeping the guns indefinitely."

READ THE COURT OPINION HERE:
http://www2.ca3.uscourts.gov/opinarch/211830p.pdf

CIVIL LIABILITY: Sobriety Checkpoints

Demarest v. City of Vallejo
CA9, No. 20-15872, 8/16/22

David Demarest brought a 42 U.S.C. Section 1983 alleging that the City of Vallejo violated the Fourth Amendment by adding license checks to what was concededly a sobriety checkpoint. The Ninth Circuit affirmed the district court's summary judgment for Defendants.

"Reviewing a line of relevant Supreme Court decisions, the court derived a 'two-step analysis' for assessing the validity of a checkpoint under the Fourth Amendment. Applying that two-step analysis to this case, the panel first held that because the City's checkpoint did not have any impermissible primary purpose of advancing the general interest in crime control, it was not per se invalid. The panel then applied the factors for assessing reasonableness and concluded that the City's systematic addition of driver's license checks to an otherwise valid sobriety checkpoint was objectively reasonable under the Fourth Amendment.

"The court held that, once Demarest refused to produce his license for examination at the checkpoint, the officer had probable cause to believe that Demarest was committing an offense in violation of California Vehicle Code, and his continued detention and arrest were therefore reasonable under the Fourth Amendment. Moreover, the officer's action of physically removing Demarest from his car by grabbing his arm was objectively reasonable as a matter of law given Demarest's lack of cooperation with her commands up to that point and the modest nature of the force used."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/16/20-15872.pdf

CIVIL LIABILITY: Tasing of Individual Committing Suicide

Ramirez v. Escajeda, CA5, No. 21-50858, 8/10/22

El Paso Police Officer Ruben Escajeda, Jr., rushing to the scene of an ongoing suicide, found Daniel Ramirez in the process of hanging himself from a basketball hoop. But it was dark, Escajeda was afraid Daniel might have a weapon, and Daniel did not respond to Escajeda's orders to show his hands. So Escajeda tased Daniel once, took down his body, and performed CPR. To no avail. Daniel soon after died in the emergency room. hanging. His parents sued Escajeda for using excessive force, the district court denied qualified immunity, and Escajeda appealed.

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

"The district court and the plaintiffs rely on our cases holding that officers may not use force against arrestees who are already subdued and in police custody. This case is markedly different. The reason Escajeda tased Daniel was that he was not in custody and Escajeda was afraid he might have a weapon. Even if that fear turned out to be groundless—something we cannot decide here—Escajeda still did not transgress any clearly established law. We therefore reverse the district court's decision and render judgment granting Escajeda qualified immunity."

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/21/21-50858-CV0.pdf

FIFTH AMENDMENT: Double Jeopardy

Denezpi v. United States, USSC, No. 20-7622, 596 U.S. ____ 6/13/22

The Bureau of Indian Affairs filed a CFR court complaint against Merle Denezpi, a member of the Navajo Nation, charging Denezpi with crimes alleged to have occurred within the Ute Mountain Ute Reservation: assault and battery, terroristic threats, and false imprisonment. The Court of Indian Affairs administer justice for Indian tribes where tribal courts have not been established. Denezpi pleaded guilty to assault and battery and was sentenced to time served.

Months later, a federal grand jury indicted Denezpi for aggravated sexual abuse in Indian country, under the federal Major Crimes Act. Denezpi unsuccessfully argued that the Double Jeopardy Clause barred the consecutive prosecution and was sentenced to 360 months' imprisonment.

The Tenth Circuit and Supreme Court affirmed:

"The Double Jeopardy Clause does not bar successive prosecutions of distinct offenses

arising from a single act, even if a single sovereign prosecutes them. Denezpi's single act transgressed two laws: the Ute Mountain Ute Code's assault and battery ordinance and the U.S. Code's proscription of aggravated sexual abuse in Indian country. The two laws—defined by separate sovereigns—proscribe separate offenses, so Denezpi's second prosecution did not place him in jeopardy again 'for the same offence.'"

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/21pdf/20-7622_ljgm.pdf

FIRST AMENDMENT: City Ordinance; Portable Signs

Lacroix v. Town of Fort Myers Beach, Florida, CA11, No. 21-10931, 6/28/22

Adam Lacroix wanted to share his religious message on the public streets and sidewalks of Fort Myers Beach, Florida. However, to reduce visual blight and increase traffic safety, the Town's Land Development Code prescribed an elaborate permitting scheme for all signs to be displayed within the Town. Among other things, the Ordinance has entirely prohibited some categories of signs, including portable signs. Lacroix carried a portable sign to spread his message and, after receiving a written warning, the Town issued him a citation.

He sued the Town and the officers who cited him in their individual and official capacities alleging violations of the First Amendment, the Equal Protection Clause, and Florida's Religious Freedom Restoration Act. The district court denied Plaintiff's motion for a preliminary injunction, concluding that the Ordinance's ban on portable signs was content-neutral and narrowly tailored to serve a significant governmental interest.

The Eleventh Circuit reversed the judgment and found that the "Town's complete ban on all portable signs carried in all locations almost surely violates the First Amendment."

The Court wrote that the most natural reading of the Ordinance leads to the conclusion that "all portable signs are banned—regardless of whether they are political, religious, advertising a garage sale, or an open house."

"The Ordinance's ban on portable signs is content-neutral. But portable, handheld signs still are a rich part of the American political tradition and are one of the most common methods of free expression. The ban on these signs leaves the residents without an effective alternative channel of communication."

READ THE COURT OPINION HERE:
https://media.ca11.uscourts.gov/opinions/pub/files/202110931.pdf

MIRANDA: Custodial Interrogation

United States v. Johnson, CA8, No. 21-3565, 7/13/22

Michael Joe Johnson was convicted of sexually abusing an incapacitated individual. Johnson appeals, challenging the district court's denial of his motion to suppress certain statement made to law enforcement. The Eighth Circuit affirmed the decision of the district court.

"Where, as here, law enforcement officers interrogated the defendant without providing him Miranda warnings, the defendant is generally entitled to suppression of his responses if the interrogation was 'custodial.' Whether the interrogation was custodial depends on 'whether a reasonable person in the defendant's shoes

would have felt free to end the interview.' *United States v. Roberts*, 975 F.3d 709, 716 (8th Cir. 2020).

"We look to the totality of the circumstances to determine whether a reasonable person would have felt free to end the interview, including: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; [and] (6) whether the suspect was placed under arrest at the termination of the questioning.

"Applying these factors here, we conclude that Johnson was not in custody during his interviews with Agents Cavanaugh and Vivier. True, the first factor weighs in Johnson's favor because the agents never informed him that he was free to leave or that he was not under arrest. And the fifth factor—whether the atmosphere of the questioning was police dominated—is mixed. On the one hand, the interviews were two-way discussions in which Johnson had an opportunity to ask questions, see *United States v. Axsom*, 289 F.3d 496, 502 (8th Cir. 2002).

"But the other factors weigh in the Government's favor. Johnson retained freedom of movement throughout the interviews: the agents did not handcuff him, the doors remained unlocked, and he entered and exited the front seat of the vehicle on his own. See *United States v. Soderman*, 983 F.3d 369, 377 (8th Cir. 2020). In addition, Johnson voluntarily acquiesced to the interview. Furthermore, the agents did not employ strong-arm or deceptive tactics but simply were candid with Johnson about the evidence against him. Finally, Johnson was not arrested at the conclusion of either interview.

"In sum, considering the Griffin factors together in light of the totality of the circumstances, we conclude that Johnson was not in custody during his interviews with Agents Cavanaugh and Vivier. Therefore, the district court properly denied Johnson's suppression motion."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/07/213565P.pdf

SEARCH AND SEIZURE:
Airplane as a Mobile Vehicle

United States v. Capelli
CA2, No. 19-4362, 6/21/22

Beginning in 2013, Robert Capelli, together with co-defendants Scott Bodnar and Terrell Givens, transported bulk quantities of marijuana from California to Connecticut. At first, the three flew on commercial flights to California, purchased marijuana there, and mailed the drugs in packages back to Connecticut for distribution. They began by mailing five-pound packages and later increased the weight of the shipments ten-fold.

As their operation grew, their transportation scheme evolved. They enlisted a pilot, Donald Burns, to fly a Piper single-engine propeller airplane between the coasts and carry purchase money on the outbound flight to California and marijuana on the return. The marijuana was packaged in vacuum-sealed bags stored in black duffle bags. Capelli coordinated the flights with

Burns and managed the finances of the operation. He tracked the marijuana shipments and enterprise profits on detailed spreadsheets saved on a thumb drive.

With Burns transporting the cash and marijuana on the plane, Capelli, Bodnar, and Givens continued to make round trips to California on commercial flights to purchase the marijuana. When Burns returned to Connecticut with a marijuana shipment, he would deliver it to Capelli and his two associates at a pre-arranged location where they would prepare the marijuana for distribution.

In 2016, Steven Hobart joined the scheme. Hobart knew marijuana suppliers and arranged for lodging for Capelli and the others when they visited California. Hobart also paid Capelli to transport Hobart's own cash and marijuana on Burns's plane.

The frequency and timing of Burns's flights and his unusual flight path caught the attention of the Federal Aviation Administration ("FAA"). Two single-engine Piper 32 aircrafts registered to Burns made at least 15 round trips to the same area in Northern California between 2015 and 2017. Instead of flying directly, Burns flew along the southern border of the United States, adding hundreds of miles and significant costs to each trip. Burns routinely returned to Connecticut shortly after arriving in California. Moreover, flying cross-country in a single-engine plane costs considerably more than commercial air-travel. After determining that Burns was living in Connecticut, where both aircrafts were registered, the FAA alerted the Drug Enforcement Administration ("DEA") that it was monitoring Burns's travel.

On June 29, 2017, after tracking one of Burns's cross-country flights, DEA agents and local police met Burns at the airport in Stratford, Connecticut as he was climbing out of the plane. Agent Carlos Penagos confirmed Burns's identity, identified himself as a member of the DEA, and explained that he "was there to conduct a ramp check." During a ramp check, a pilot must produce his credentials and other documents for inspection. The FAA has delegated the authority to conduct ramp checks to "[f]ederal, [s]tate, [and] local law enforcement." A ramp check ensures compliance with FAA regulations and does not require even suspicion of an antecedent violation for law enforcement to conduct one.

Burns asked Agent Penagos whether he needed a warrant to conduct the ramp check. The agent responded, correctly, that he did not. During this encounter, Agent Penagos observed that Burns was "evading," "expressing nervousness," and unable to sustain eye contact. Additionally, according to the DEA report of investigation, when Agent Penagos asked Burns whether there were firearms or anything illegal on board, Burns answered that there might be "some marijuana."5 The report further detailed that Agent Penagos then informed Burns of his Miranda6 rights, Burns confirmed that he understood those rights, and Agent Penagos requested consent to search the plane. According to the report, Burns both verbally consented and signed a DEA Consent to Search form.

At some point after Agent Penagos's conversation with Burns had begun, a drug sniffing canine and handler from the Stratford Police Department approached the plane. During an exterior sweep of the plane, the dog alerted to the presence of narcotics. Significantly, the DEA agents and police officers did not search the airplane until after both the canine alert and Burns's signed consent.

As a result of the search, the agents and officers found 16 duffle bags containing approximately 400 pounds of marijuana in the interior of the plane. Burns told the agents that the drugs were to be delivered to Capelli. With Burns's cooperation, the agents arranged for a controlled delivery. At the agreed-upon location, the agents encountered Capelli, Bodnar, and a third person, Alex Maldonado. They arrested Capelli and Bodnar and recovered two cell phones and the thumb drive. Maldonado was not arrested.

The DEA later obtained a warrant to search Capelli's cell phones and the thumb drive. One phone contained records relating to the cross-country travel, including Capelli's communications with Burns. The search of the thumb drive revealed the spreadsheets detailing the finances of the operation, including the quantities, prices, and kinds of marijuana purchased, the distribution of the drugs among the members of the scheme, the expenses incurred on each trip, and the scheme's profits.

A grand jury returned a four-count superseding indictment charging Capelli with conspiracy to distribute and to possess with intent to distribute 1,000 kilograms or more of marijuana (Count 1), possession with intent to distribute 100 kilograms or more of marijuana (Count 2), conspiracy to commit money laundering (Count 3), and money laundering (Count 4). Before trial, Cappelli unsuccessfully moved to suppress the marijuana recovered from the plane.

Capelli was convicted of possessing marijuana with intent to distribute, and of conspiracy to distribute and possess with intent to distribute, 100 kilograms or more of marijuana following a jury trial.

On appeal, the defendant argued that the district court erred in denying his motion to suppress marijuana that was obtained during a warrantless search of a private single-engine airplane.

The Second Circuit of Appeal Court found as follows:

"Capelli challenges the ramp check as a pretext for the dog sniff. He may be right, but that is not impermissible. A pretextual stop and reasonable suspicion are not mutually exclusive. The government admits that the agents sought to determine not only whether the plane and pilot were fit to fly, but also whether Burns was involved in drug trafficking. Law enforcement was duly authorized to conduct the ramp check, which Capelli concedes, and could permissibly prolong the stop because they developed reasonable suspicion based on the actions of a driver or passenger either before the stop, or during traffic-related processing of the stop. The subsequent dog sniff was a reasonable and unintrusive means of detecting whether there was contraband on the aircraft.

"With the canine alert, the agents' reasonable suspicion ripened into sufficient probable cause to support the search. Probable cause exists when the totality of circumstances indicates a fair probability that contraband or evidence of a crime will be found in a particular place. Capelli has not challenged the reliability of the dog alert at any time. Nor does Capelli question that an alert can provide probable cause to search for the presence of a controlled substance. Instead, Capelli's argument is that, after the agents had what they believed to be probable cause, they were required to obtain a search warrant before entering and searching the aircraft.

"With probable cause established, we now turn to whether the 'vehicle exception' to the usual warrant requirement justified the agents warrantless search of the plane. We have not previously addressed whether this 'vehicle exception' can be applied to privately owned and operated airplanes. We hold today that it can. The two distinct lines of reasoning that explain the exception, vehicle mobility and a reduced expectation of privacy, apply to privately owned and operated aircraft. The prohibition-era case that first recognized the exception, *Carroll v. United States*, 267 U.S. 132 (1925) did so because of the impracticability of securing a warrant for a vehicle that can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. The Court distinguished between a search of a store, dwelling house, or other structure and that of a ship, motor boat, wagon, or automobile. Goods concealed in the latter category could readily be put out of reach of a search warrant. Thus, the readily mobile character of vehicles sufficiently justifies a warrantless search.

"Since Carroll, we have conceptualized the 'readily mobile' rationale to focus on whether a vehicle is inherently mobile. Inherent mobility does not mean 'immediate mobility,' and a vehicle need not literally be in motion for it to be obviously readily mobile. For that reason, the justification to conduct a warrantless search does not vanish once the car has been immobilized. In *United States v. Navas*, 597 F.3d 492 (2nd Cir. 2010) we held that the exception applied to the search of a stationary tractor-trailer that was unhitched, separated from both its cab and its driver, and parked in a warehouse. Because the tractor-trailer could be hitched and was capable of being driven away, it was considered movable. We also explained that the location of the operator of a vehicle in relation to the vehicle at the time of a search is not relevant to whether the vehicle is, for purposes of the exception, inherently mobile.

"The mobility of an airplane in flight is so obvious that it needs no elaboration. And even when a plane is on the ground, it is no less capable of being moved than, say, a non-residential unhitched tractortrailer. The fact that the search here occurred while the plane was sitting on the tarmac and the pilot was not in the pilot's seat does not alter the calculus.

"Because the agents had probable cause to conduct a warrantless search pursuant to the vehicle exception, we affirm the district court's denial of the motion to suppress."

READ THE COURT OPINION HERE:
https://www.ca2.uscourts.gov/decisions/isysquery/ba1792ed-0a56-47ae-b1a2-5437a5d950ef/1/doc/19-4362_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/ba1792ed-0a56-47ae-b1a2-5437a5d950ef/1/hilite/

SEARCH AND SEIZURE: Confidential Informant; Criminal History; Search Warrant

United States v. Sanford
No. 20-2691 (7th Cir. 2022), 9-17-21

Officer Benjamin Stringer and a confidential informant (Ashley Hinkle) appeared before a state court judge and obtained a search warrant. Following the ensuing search, Cory Sanford was charged with possession of heroin with intent to distribute, possession of a firearm in furtherance of a drug-trafficking crime, and possession of a firearm as a felon. Sanford sought to challenge the search.

As support for that challenge, Sanford presented a Declaration from Ashley Hinkle, identifying herself as the confidential informant who testified in the warrant hearing. Specifically, Sanford relied upon the statements in Hinkle's Declaration that: officers told her that if she did not cooperate they would take her one-year-old daughter away from her; Stringer told her that she would not be charged with any new offenses and that an outstanding warrant for failure to appear in a misdemeanor case would be "taken care of;" she was told to inform the judge at the hearing that she had not been promised anything for testifying; and about three weeks after the hearing she was nevertheless arrested on the outstanding warrant. Sanford argued that Hinkle's lengthy criminal record and the existence of the active warrant, and Stringer's assurance that no criminal charges would be filed and the warrant would be taken care of, were not revealed to the issuing judge, and the omission of that information relevant to Hinkle's credibility would have altered the probable cause determination.

Sanford argued that Stringer and Hinkle intentionally misrepresented key facts and omitted other material facts that would have affected the issuance of the search warrant. The government argued that because Stringer and Hinkle testified in person at the warrant hearing, the issuing judge had the opportunity to explore any such issues. The government informed the court that FBI agents had discussed Hinkle's Declaration with her and that she told them she did not prepare the Declaration and that much of it was false or twisted the actual circumstances to something essentially untrue.

Following that testimony, the district court made some factual findings. The district court's findings torpedo any argument based on the failure to reveal promises made to Hinkle that she would not be arrested for the drugs or for the outstanding warrant. The district court found that no such promises were made to Hinkle, and therefore any claim based on that allegation is meritless. The only argument that survives is the claim that Stringer failed to inform the state court judge of Hinkle's criminal history, including the outstanding warrant for the failure to appear in a misdemeanor case.

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

"The confidential informant's criminal history is not always material to the probable cause determination. That does not mean that the failure to reveal an informant's criminal history is never material to the probable cause determination. The materiality of the omission of criminal history depends on the significance of the history in light of the totality of the circumstances, including considerations of other factors relevant to the credibility determination including the level of detail, the extent of firsthand observation, the degree of corroboration, the time between the events reported and the warrant application, and whether the informant appeared or testified before the magistrate.

"There is no doubt, therefore, that the state court judge was aware that Hinkle was a person who had committed criminal conduct in the past. And given that Hinkle provided that information only after she was found in possession of methamphetamine, the issuing judge was also aware that Hinkle had an incentive to testify for the government because she had a potential pending criminal charge. The issuing judge had an opportunity to hear the information directly from the confidential informant and to assess the demeanor and ask any questions in determining credibility. Warrant-issuing judges are aware that

confidential informants in drug purchases are likely to have criminal histories, and Hinkle in fact admitted to criminal conduct.

"The district court did not err in determining that failure to discuss the criminal history, which was unremarkable in nature for a person involved in ongoing drug use, in the testimony to the issuing judge in this case, was relevant. Accordingly, the decision of the district court is affirmed."

READ THE COURT OPINION HERE:
https://cases.justia.com/federal/appellate-courts/ca7/20-2691/20-2691-2022-05-26.pdf?ts=1653588018

SEARCH AND SEIZURE:
Consent Search; Common Authority

United States v. Williams
CA8, No. 21-2066, 6/9/22

On April 1, 2019, Detective James Bain arrested Mosley Williams on a warrant for an armed kidnapping. Detective Bain searched Williams and his car but failed to locate the gun that had been used in the alleged kidnapping. Suspecting that Williams might contact someone regarding the gun, Detective Bain monitored Williams' phone calls while he was being held on pretrial detention for the armed kidnapping charge. Law enforcement recorded a telephone call between Williams and his girlfriend, Wanda Wells. During the call, Wells asked Williams if he had left "the thing" at her residence. Williams confirmed and directed her to put it "inside of the closet and forget about it." Detective Bain understood "the thing" to be a reference to a gun. Upon further investigation, Detective Bain learned that Wells was the sole lessee of a one-bedroom apartment.

The next day, Detective Bain and three officers knocked on Wells' door. Wells opened the door and answered the officers' questions. She informed them that her name was the only name on the lease but that she resided in the apartment with Williams, her boyfriend. While Wells initially denied there was a firearm in the residence, she eventually admitted that she possessed a firearm registered in her name. Wells also admitted she allowed Williams to use her gun even though she was aware Williams was a previously convicted felon. Wells eventually agreed to show the officers where the gun was in the apartment, escorting them to the bedroom and pointing out a gun located in a black bag hanging from the handle of the open bedroom door.

Detective Bain approached the bag and observed a firearm in plain view in the partially unzipped bag. Wells agreed to sign a Consent to Search, which granted the officers general permission to search the residence. Detective Bain opened the bag and found the .45 caliber handgun, a black plastic bag that he eventually determined contained about 14 grams of methamphetamine, and a letter addressed to Williams at a different address. On glass shelving in the bedroom, the officers observed in plain view a .45 caliber magazine with a live bullet inside, another .45 caliber bullet outside the magazine, a photograph of Williams, and a digital scale. Wells told the officers she had purchased the gun for Williams. Detective Bain seized the gun, the suspected methamphetamine, the letter, the magazine, the two bullets, and the scale.

Williams moved to suppress evidence obtained from the warrantless search of the bag, claiming Wells lacked authority to consent to the search. The question before the court is whether Wells had apparent authority to consent to the search of the bag.

The Eighth Circuit Court of Appeals found as follows:

"Consent is an exception to the warrant requirement, which may be given by a third party with common authority or apparent authority over the premises or effects. The government bears the burden of proving by a preponderance of the evidence that the co-occupant had sufficient authority to provide consent. See *United States v. Matlock*, 415 U.S. 164, (1974). A warrantless search is justified when officers reasonably rely on apparent authority of the third party, even if she lacked common authority. For apparent authority, we examine whether the facts available to the officer at the time of consent would lead a person of reasonable caution to believe the consenter had authority over the item searched. Common authority is determined from joint access, mutual use, and control, and its existence is a question of fact. A co-occupant has authority to consent to a search of common areas. *United States v. Tapia-Rodriguez*, 968 F.3d 891, 895 (8th Cir. 2020). However, if officers encounter circumstances that would put them on notice of limited authority, they may not ignore such signals.

"Based on the evidence, Wells had apparent authority over the bag. At the time of consent, law enforcement officers knew: (1) Williams had directed Wells to move the gun owned by and registered to her to a specific place within the apartment; (2) Wells voluntarily led the officers to the location of the gun; and (3) Wells had access to the bag and never indicated it was Williams' bag or that her ability to use or access the bag was limited. As the sole lessee, Wells had actual and common authority over the apartment and consented to the search of the entire apartment. Where the gun was located—partially visible in the unzipped bag hanging on the door handle of their shared bedroom—was in a common area. The evidence is sufficient to lead a person of reasonable caution in the officers' situation to believe Wells had authority over the bag and could consent to a search of the bag for Fourth Amendment purposes."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/06/212066P.pdf

SEARCH AND SEIZURE:
Dog Sniff in Motel Hallway; Probable Cause to Obtain Search Warrant

United States v. Lewis, CA7, No. 21-1614, 6/21/22

An FBI informant provided a cell phone number for Dewayne Lewis, a distributor in a drug-trafficking operation. Cell site location information showed that his phone was within a 1,099-meter radius of Greenwood, Indiana. From there, officers searched parking lots and hotels where a deal might take place. Officers eventually saw a woman resembling his wife enter a room at a hotel, drop off a duffel bag, and drive away in a car registered in Lewis's name. After a drug-sniffing dog alerted at the room, officers obtained and executed a search warrant. Inside the room, officers found Lewis, $2 million in cash, and 19.8 kilograms of cocaine.

The Seventh Circuit affirmed Lewis's conviction for possession with intent to distribute five kilograms or more of cocaine. The court rejected his arguments that the dog sniff violated his reasonable expectation of privacy. Lewis lacked a reasonable expectation of privacy in the hotel's exterior hallway, where the dog sniff occurred.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2022/D06-21/C:21-1614:J:St__Eve:aut:T:fnOp:N:2892648:S:0

SEARCH AND SEIZURE:
Failure to Provide a Complete Copy of Search Warrants and Attachments

United States v. Manaku
CA9, No. 20-10069, 6/14/22

The FBI discovered that a device at a particular IP address contained suspected child pornography files. After several hours of downloading files available for file sharing, an agent downloaded 308 files of horrific child pornography from the device. An administrative subpoena revealed that the IP address was the Dela Cruz residence in Waipahu, Hawai'i, where Grant Manaku resided at that time. Based on these facts, the FBI obtained a search warrant for the Dela Cruz residence from a federal magistrate judge.

When FBI agents executed the search warrant, they first met at an off-site location for briefing, and each reviewed and signed a copy of the five-page warrant. A SWAT team secured the residence, and the search followed. During the near six-hour search, Ms. Dela Cruz asked three or four times to see the warrant but was not given any paperwork until the search ended. Her husband, a retired law enforcement officer, arrived home at one point and also asked to see the warrant. He was briefly shown the warrant's first page but never given a copy. He told the agents to make sure to leave a copy of the warrant or to give one to his wife.

Agent Sherwin Chang was supposed to ensure that both the warrant and a property receipt were left at the residence or with someone at the residence. Chang prepared the property receipt that listed every item that had been seized, and at the end of the search, he reviewed that document with Ms. Dela Cruz. He left her what turned out to be an incomplete copy of the search warrant, with only the warrant's first page but not the single-page Attachment A (which described the residence to be searched) and the three page Attachment B (which described the items to be seized).This incomplete copy had been included in a "search warrant packet" that had been left for Chang on the Dela Cruz's dining room table by an unidentified agent. Before giving it to Ms. Dela Cruz, Chang turned it over and wrote down the phone number of the FBI's Hawai'i field office, so that she could call if she had any questions.

Although Chang had personally reviewed the five-page warrant hours earlier, he testified at the hearing on the motion to suppress that he gave Ms. Dela Cruz the single page copy without realizing that it was incomplete. Chang could not explain why, despite having written on the back of that single-page copy, he did not notice that it was incomplete. Chang insisted, however, that the error was simply carelessness, he did not intentionally withhold the missing pages, and he was not trying to deceive Ms. Dela Cruz.

The FBI concluded that a laptop seized during the search contained child pornography and that it had been used by Manaku rather than the others in the Dela Cruz household. Manaku was indicted for a single count of possession of child pornography involving minors. He moved to suppress the laptop and evidence obtained from it because the failure to supply a complete copy of the warrant violated Federal Rule of Criminal Procedure 41(f)(1)(C) and the Fourth Amendment.

The district court denied the motion to suppress. The court found that the agents had violated Rule 41(f)(1)(C) by failing to leave a complete copy of the warrant at the Dela Cruz residence. Despite the clear violation of Rule 41, the district court held that suppression was not warranted because Manaku had not been prejudiced by the error and because there was no "evidence that Agent Chang's failure to give Ms. Dela Cruz a complete copy of the Warrant was intentional or a part of an on-going pattern of behavior by him or other FBI agents." Chang had been "certainly negligent," the court found, but had not intentionally disregarded the rule.

After a five-day jury trial he was convicted. Manaku timely appealed. Upon review, the Ninth Circuit Court of Appeals found as follows:

"The district court properly concluded that because Manaku had not carried his burden to show a 'deliberate disregard of the rule,' the costly judicial remedy of suppression was not warranted in this case. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. *United States v. Hector*, 474 F.3d 1150, 1154–55 (9th Cir. 2007) Even assuming the failure to serve a copy of the warrant was a violation of the Fourth Amendment, the exclusionary rule should not be applied since the causal connection between the failure to serve the warrant and the evidence seized is highly attenuated and the social costs of excluding relevant evidence obtained pursuant to a valid search warrant are considerable."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/06/14/20-10069.pdf

SEARCH AND SEIZURE: Search Warrant; Model of Proper Investigation

United States v. Orozco
CA4, No. 21-4473, 7/25/22

On a summer morning in Harnett County, North Carolina, Corporal Donald Lucas and Deputy Benjamin Winstead each sat in separate patrol cars at the corner of Arrowhead and Chicken Farm Roads. As passing cars slowed down to cross the nearby railroad tracks, the officers checked license plates to identify any outstanding tickets. When a blue Lexus sedan passed, Corporal Lucas ran its plate and found that its registered owner, Pedro Lopez Gomez, had a suspended driver's license. The two officers began tailing the car and pulled it over after it swerved across the centerline twice.

When they approached the sedan, the driver explained that he did not have a driver's license but provided a Mexican consular ID card identifying himself as David Orozco. Orozco had a Samsung smartphone in his lap displaying a GPS navigation app. When asked where he was headed, Orozco abruptly exited the GPS app but could not come up with an answer to where he was going. After a bit of pressing, Orozco glanced at some nearby fields and apprehensively replied that he was looking for farm work. Lucas noticed that Orozco was "sweating profusely" despite the car's blasting A/C and was shaking nervously. He also noticed that the dashboard was not flush and bore toolmarks, suggesting someone previously pried it open.

Upon seeing all this, the officers called in a K-9 unit and asked Orozco to get out of the car. While one officer ran Orozco's ID, the other spoke with Orozco, who consented to the car's search. The K-9 arrived and, after alerting to the driver's side door, was placed inside the car. There, it again alerted to the presence of drug residue around

the dashboard, near the toolmarks. Officers opened the dashboard's secret compartment and found grocery bags filled with $111,252 in cash. When he saw the cash, Orozco volunteered that he had been paid to drive the car and that the money was not his. Because Lucas suspected that Orozco was engaged in drug-smuggling, he supplied Orozco's phone number to the DEA who advised that the number was linked to an ongoing investigation. The officers took Orozco into custody for driving without a license and failure to maintain lane control. Officers also retrieved the Samsung phone Orozco was using to navigate, along with a flip-phone that was also in the car. Later, in a "money line up," a drug-sniffing dog confirmed the presence of drug residue on the money.

At the station, Corporal Robert Kimbrough searched Orozco's person. He found a folded-up $100 bill in Orozco's shoe, and as he unfolded it, five micro-SD cards fell out onto the floor.3 Orozco quickly scooped up two of the cards and shoved them into his mouth. Kimbrough managed to recover one SD card—though chewed and inoperable— from Orozco's mouth; Orozco apparently swallowed the other.

Based on this information, officers sought a search warrant for the Samsung smartphone and the three operable SD cards. The application's affidavit included a detailed factual recitation, which told the same story that we have told here. The warrant issued, authorizing a search for records of illegal drug activities, documents, photographs, and other evidence of drug trafficking. Narcotics officers began searching one SD card and they immediately saw what they believed to be child pornography. A second warrant was then obtained for the SD cards. Two SD cards contained several hundred images and videos of child pornography. A third warrant was then issued for the Samsung smartphone and its internal temporary storage contained five child pornography images.

Orozco was indicted on one count of Possession of Child Pornography. He moved to suppress the images on several grounds, including that the first warrant to search the smartphone and SD cards lacked probable cause. The district court denied the motion, and following a jury trial Orozco was convicted and sentenced to 12 years in prison. He appealed.

The Court of Appeals for the Fourth Circuit stated that this case presents a model example of a proper investigation under the Fourth Amendment.

"The officers submitted a comprehensive affidavit with detailed facts showing drug trafficking. The magistrate combined those facts with commonsense inferences and determined that probable cause existed. And when the officers discovered evidence of other crimes, they immediately went back and obtained additional warrants to search and seize those files. The district court's denial of Orozco's motion to suppress was proper, and its judgment is affirmed."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/214473.p.pdf

SEARCH AND SEIZURE: Stop and Frisk; Basis for Stop; Frisk

United States v. Hawkins
CA2, No. 21-836, 6/23/22

New York Police received reports of a gunshot fired from the roof of a building. Officers responded to the scene within two minutes, at which point they observed Defendants exiting a building. While officers were not sure which building the shots were fired from, the building Defendants were exiting was in the immediate area. Officers noticed one of the Defendants bladed his body away from them, and both Defendants had their hands in their pockets. When asked to remove their hands from their pockets, Defendants complied. However, at this point, officers noticed a bulge in one of the Defendant's pockets. A passerby informed officers that he had seen Defendants coming down from the building's rooftop. Officers frisked one of the Defendants, recovering a firearm.

Defendants entered guilty pleas each to a single count of being a felon in possession of a firearm but preserved their right to appeal the court's adverse decision on their motion to suppress.

The Second Circuit affirmed the district court's denial of Defendants' motion to suppress, finding that the police had reasonable suspicion to initiate a pedestrian stop as well as to conduct a pat-frisk of the Defendant who had a bulge in his pocket.

READ THE COURT OPINION HERE:
https://www.ca2.uscourts.gov/decisions/isysquery/cd64c947-f46e-4ebc-b9e7-09ff6998a1af/1/doc/21-836_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/cd64c947-f46e-4ebc-b9e7-09ff6998a1af/1/hilite/

SEARCH AND SEIZURE: Stop and Frisk; Frisk of Vehicle Interior While Suspect is Outside of Vehicle

United States v. Dabney
CA8, No. 21-2111, 8/3/22

In November 2015, Officer Zach Pugh was patrolling Springfield, Missouri in a marked car. Around 1:25 a.m., Pugh noticed Randy Dabney driving a truck in a high crime area. Pugh tailed the truck, but stopped when it abruptly pulled into the parking lot of a closed motorcycle shop. Pugh "didn't think a whole lot of it," and continued with his patrol.

Minutes later, when Pugh saw the same truck, he became suspicious that Dabney had pulled over to avoid police attention. After noting that the truck had a broken taillight, Pugh turned on his emergency lights to initiate a stop. Rather than pulling over, Dabney continued driving slowly for a while, weaving within the traffic lane. Pugh thought that Dabney could be trying to conceal contraband or a weapon before pulling over.

When Dabney eventually stopped, Pugh ran a routine warrant check. It showed that Dabney had a "Caution 2 Indicator," which meant that he was known to be armed and dangerous. The database also indicated that Dabney had recently been arrested for drugs, which Pugh thought made it more likely that he was armed. Pugh walked back to the truck and motioned for Dabney to step out. With Dabney's consent, Pugh frisked him for weapons. When that didn't turn up anything of note, Pugh asked Dabney for permission to search his truck. He refused, but Pugh searched anyway. Pugh testified that, by that point, he had already decided to let Dabney go, which meant that Dabney could return to his truck and access any weapons hidden in the cab.

While another officer stood outside with Dabney, Pugh began searching areas of the truck where a weapon could be hidden. Pugh noticed a hole in the driver's door where a speaker should be. In the dark, he couldn't make out what was inside. He shined his flashlight and discovered a "rather large bag" containing a "white crystalline substance." Pugh pulled the bag out of the hole and saw that it contained several smaller baggies. The officers arrested Dabney, who waived his Miranda rights and admitted that the bag contained heroin, meth, and cocaine. Dabney moved to suppress the drugs and his confession, arguing that Pugh's search of his truck violated the Fourth Amendment.

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

"Dabney argues that Pugh's search violated his Fourth Amendment right to be free from unreasonable searches and seizures. Typically, officers need a warrant to perform a search but there are exceptions. Relevant to this appeal, officers may search a vehicle without a warrant when they have a reasonable suspicion that a motorist is dangerous and may gain immediate control of weapons. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The district court found that Pugh had reasonable suspicion to search Dabney's truck for weapons, and the Eight Circuit Court of Appeals agreed. There were several specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted Pugh's belief that Dabney was armed and dangerous.

"Dabney was slow to pull over after Pugh turned on his emergency lights, which Pugh believed indicated that he was hiding contraband. Plus, Pugh's warrant check revealed that Dabney had a 'Caution 2 Indicator,' meaning Dabney was known to be armed and dangerous. It also revealed that Dabney had prior drug offenses, which in Pugh's experience correlated with gun possession. Given these facts, an officer could have reasonably suspected that Dabney was dangerous and had weapons in his truck.

"Dabney argues that, because he was not inside his truck at the time it was searched, there was no reasonable suspicion that he would grab a weapon. As a result, he says, Pugh had no basis to search his truck. But this argument is squarely foreclosed by Supreme Court and Eighth Circuit precedent. *United States v. Rowland*, 341 F.3d 774, 783 (8th Cir. 2003) (It is well settled that a Terry search of a vehicle's interior is permissible even after the un-arrested occupants have been removed from the vehicle.) Dabney also claims that officers could have avoided any threat he posed by leaving before he returned to his truck. But officers don't need to adopt alternate means to ensure their safety in order to avoid the intrusion involved in a Terry encounter. Pugh was entitled to search Dabney's truck, rather than flee the scene before Dabney could access a gun.

"Pugh had a reasonable suspicion that Dabney was armed and dangerous, and he never exceeded the lawful scope of his Terry frisk of Dabney's truck.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/08/212111P.pdf

SEARCH AND SEIZURE: Stop and Frisk; Handcuffing During Detention; Pat Down of Fanny Pack

United States v. Gist-Davis
CA4, No. 19-4887, 7/18/22

The Winston-Salem Police Department has a "gang unit," in which assigned officers work to collect information about ongoing gang disputes and to prevent incidents of violence. The officers in the gang unit achieve these goals, in part, by monitoring the social media activity of confirmed gang members.

Chandler Antwan Gist-Davis was identified as a member of the United Blood Nation, a violent gang whose members often carry firearms. Accordingly, the officers in the gang unit monitored Gist-Davis' activity on social media. The officers also were familiar with Gist-Davis because his residence in Winston-Salem had been a target of several "drive-by shootings" in September 2018.

On October 3, 2018, Officers James Singletary and Travis Montgomery, members of the gang unit, were on patrol at the Dixie Classic Fair. The officers were on "high alert," because a fair patron had been struck by a "gun projectile" a few days earlier. Notably, firearms were prohibited at the fair, and notice of this rule was posted at the fair entrance.

While on patrol at the fair, Officer Singletary also was monitoring the social media activity of some gang members. Officers Singletary observed a new "post" on Facebook made by Gist-Davis: "Oops see me at da fair yea I got it on me lil boy Fannie pack gang." Both Officers Singletary and Montgomery construed Gist-Davis' statement as a warning to rival gang members that he would be at the fair and would have a gun in his fanny pack for potential use against them. The officers interpreted Gist-Davis' use of the term "Oops" as a typographical error for "ops," meaning "opposition," or rival gangs. Additionally, Officer Montgomery observed a Facebook post made by Gist-Davis one day earlier showing a photograph of Gist-Davis wearing a fanny pack.

Officer Singletary alerted other officers at the fair by text message and radio about Gist-Davis' statement on Facebook, sharing a "screen-shot" of the post and informing the officers of Singletary's belief that Gist-Davis likely was at the fair carrying a concealed weapon. At that time, Officer Singletary knew that Gist-Davis was a convicted felon prohibited from possessing a firearm.

About 20 minutes after Gist-Davis posted the statement on Facebook, around 10:30 p.m., Officer Montgomery saw Gist-Davis walking at the fair, which had drawn large crowds and families with children. Gist-Davis was wearing a fanny pack secured around his waist, with the zipper-pouch positioned to the front of his body. Officer Montgomery quickly approached Gist-Davis and held his arms while another officer, Ashley Jamerson, immediately placed Gist-Davis in handcuffs, securing his arms behind his back. Jamerson conducted a "pat down" using her open hands, touching the front of Gist-Davis' pant legs and the front of the fanny pack. While patting down the fanny pack, Jamerson felt a "heavy metal object consistent with the shape" of a gun. Jamerson unzipped the pack and seized a handgun.

The officers arrested Gist-Davis and took him to the police "command post" at the fair. There, Gist-Davis volunteered the statement, "Man, you really be monitoring that social media." And later, on the way to the jail, Gist-Davis stated that

he "told on himself," apparently referencing his earlier statement on Facebook.

Gist-Davis was charged with being a felon in possession of a firearm. He filed a motion to suppress evidence of the seized firearm. After a suppression hearing, the district court denied Gist-Davis' motion. Gist-Davis later was convicted as charged and was sentenced to serve a term of 52 months' imprisonment. He timely filed this appeal.

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

"An officer executes a lawful investigatory stop when he has reasonable, articulable suspicion that criminal activity may be afoot. To establish 'reasonable suspicion,' an officer must have 'a minimal level of objective justification,' meaning that she must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity.

"The officers working at the fair knew that, as a convicted felon, Gist-Davis was prohibited from possessing a firearm, and that firearms were prohibited at the fair. The officers also knew that Gist-Davis had been verified as belonging to a violent gang whose members often carry firearms. See *United States v. Holmes*, 376 F.3d 270, 279 (4th Cir. 2004) (explaining that a suspect's prior criminal activity and violent gang affiliation are relevant factors in determining reasonable suspicion). Additionally, the officers were aware that Gist-Davis' residence had been the target of recent shootings.

"This factual context, along with the officers' experience in investigating gang activities, informed the officers' interpretation of Gist-Davis' statement on Facebook posted minutes before his detention. The officers concluded that the statement, 'Oops see me at da fair yea I got it on me lil boy Fannie pack gang,' was a warning to opposing gang members that he was present at the fair with a weapon should he have occasion to use it. Given these facts and circumstances, the district court did not clearly err in crediting the officers' understanding of Gist-Davis' statement posted on Facebook.

"Based on the totality of these circumstances, we conclude that the officers had a reasonable, particularized suspicion that Gist-Davis, a convicted felon, was at the fair in possession of a firearm. The officers were justified in concluding that Gist-Davis may have been armed and presently dangerous, given his membership in a violent gang whose members often carry weapons, his recent connection to drive-by shootings, and his statement on Facebook threatening gang rivals with the potential use of a weapon at the crowded public event. We therefore hold that the officers were justified in stopping Gist-Davis and in performing a limited, protective search for weapons.

"The officers did not exceed the scope of this permissible stop and frisk. In executing the stop, Officer Jamerson grabbed Gist-Davis' arms and placed him in handcuffs. This manner of detention, which restricted Gist-Davis' movement in the crowded, public space, did not automatically transform the investigatory detention into a custodial arrest requiring probable cause. A brief but complete restriction of liberty is permitted under Terry when the duration is no longer than necessary to verify or dispel the officer's suspicion.

"Officer Jamerson testified that she 'immediately placed Gist-Davis in handcuffs' because she was intending to conduct a Terry frisk"based on her

belief that he was armed, and that she did not want him 'to get to that gun' before she could determine whether 'he had one.' Officer Jamerson conducted the pat-down of Gist-Davis' pant legs and fanny pack without delay after he was placed in the handcuffs. Moreover, she recovered the gun fewer than 30 seconds after placing the handcuffs on Gist-Davis. Because Gist-Davis' liberty was restricted only temporarily to permit the officers to conduct the protective frisk for weapons, the officers' use of handcuffs in this crowded public space was permissible as part of the brief investigatory stop and did not transform the stop into a custodial arrest.

"Because the officers had particularized information indicating that Gist-Davis likely was carrying a firearm in the fanny pack, which was attached to his body, the act of patting down that bag was within the scope of the initial detention. An officers' suspicion that a suspect is armed and dangerous can justify the frisk of a suspect's pocket, a purse held by a suspect, or, in this instance, a bag strapped to the suspect's person.

"Based on the totality of the circumstances the officers had reasonable suspicion of criminal activity justifying the brief detention and limited, protective search, and they did not exceed the permissible scope of the Terry stop. Thus, the district court did not err in denying Gist-Davis' motion to suppress evidence of the firearm."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/194887.p.pdf

SEARCH AND SEIZURE: Stop and Frisk; Reasonable Suspicion

United States v. McCallister
CA6, No. 21-4011, 7/7/22

Akron, Ohio, Police received an anonymous call that men were smoking marijuana in Whitney Park, "a high-crime area." Several officers, including Detective Elam, went to investigate. They arrived at the park in the early evening and saw a group of 10-15 men, including Dachan McCallister. They detected the odor of marijuana and began stopping people.

Four men, including McCallister, tried to walk away. An officer instructed them to stop moving and place their hands on their heads. McCallister did so. Detective Elam saw a "little bump out on his shirt," which the detective concluded was a gun, and saw McCallister "turn his body in towards the huddle so no one would see." Elam asked McCallister if he was carrying any weapons; McCallister did not respond. As McCallister raised his hands, his shirt lifted, and Elam saw a firearm magazine tucked into McCallister's waistband. Elam retrieved the weapon.

McCallister was indicted for illegal possession of a machinegun and possessing an unregistered firearm. The Sixth Circuit affirmed the denial of his motion to suppress.

"The officers had reasonable suspicion that all of the men were smoking marijuana, justifying the detention, and reasonable suspicion that McCallister was armed and dangerous, justifying the search."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0148p-06.pdf

SEARCH AND SEIZURE:
Tasing as Seizure; Use of Force
United States v. Nyah
CA8, No. 21-1490, 5/27/22

Police Officer Nicholas Anderson clocked a car going almost twenty miles per hour over the speed limit with his radar one night and tried to initiate a stop. Despite Anderson's flashing patrol lights, the driver continued driving and eventually merged onto an interstate highway and fled from Anderson at over one hundred miles per hour. The fleeing car eventually crashed. Anderson then saw two suspects, one of whom was Meamen Nyah, running away from the wrecked car in different directions. Anderson pursued Nyah who, unbeknownst to Anderson, was the car's passenger rather than its driver.

Nyah eventually bolted behind a house despite Anderson's persistent commands to stop and warnings of: "Taser, taser, taser." Anderson eventually deployed his taser and Nyah fell to the ground. Undeterred, Nyah quickly jumped back up, picked up a black pistol off the ground nearby, and, despite Anderson's commands to drop it, pointed the pistol at Anderson. Anderson then shot Nyah. Officers later recovered a loaded black pistol from the same driveway.

Nyah survived, and a grand jury indicted him with unlawfully possessing a firearm as a felon. Nyah moved to suppress the evidence seized after he was tased, including the black pistol. The district court denied his motion to suppress any evidence recovered after he was tased, and a jury ultimately convicted him. He now appeals.

The Court of Appeals for the Eighth Circuit stated that the Fourth Amendment protects a person from unreasonable seizures. Nyah asserts his seizure when Anderson tased him was unreasonable, so any evidence obtained must be excluded under the exclusionary rule.

"Anderson's tasing of Nyah constituted a warrantless arrest. See *Torres v. Madrid*, 141 S. Ct. 989, (2021) (The application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.)

"Here, Anderson had probable cause to arrest Nyah. The district court found Anderson clocked a car travelling in excess of the speed limit with his radar, providing probable cause for a stop. Nyah does not show how the district court's factual finding that he committed a driving violation was clearly erroneous.

"The car fled, leading to a high-speed chase at over one hundred miles per hour in the dark and resulting in the car crashing. Anderson then saw Nyah running away from the car, and Nyah ignored Anderson's verbal commands to stop. Anderson, not knowing which fleeing suspect was the driver, reasonably seized Nyah by tasing him after Nyah continually ignored orders to stop. We thus affirm the district court's denial of Nyah's motion to suppress."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/05/211490P.pdf

SEARCH AND SEIZURE: Traffic Stop; Consent Search

United States v. Gonzalez-Carmona
CA8, No. 21-1241

Veronica Gonzalez-Carmona was pulled over for speeding. She and her passenger consented to a vehicle search, which revealed 28.4 pounds of heroin. Gonzalez-Carmona filed a motion to suppress.

The Eighth Circuit affirmed Gonzalez-Carmona's conviction and sentence.

"The district court did not err in denying Defendant's motion to suppress. The officer's testimony that Defendant verbally consented was sufficient to establish consent, even without a signed consent form."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/05/211241P.pdf

SEARCH AND SEIZURE: Traffic Stop; Mistake of Law of Fact May Still Justify a Stop

United States v. Maurstad
CA8, No. 20-2936, 6/3/22

In August 2016, an officer pulled Tevin Maurstad over for driving a car with illegally tinted windows. Maurstad didn't have a valid license, and the officer smelled marijuana coming from the car. Maurstad admitted that he smoked marijuana 20 minutes before being pulled over and had some in the car. The officer asked Maurstad to get out, and searched the car. In the glove box, the officer found the marijuana; in the engine compartment, he found a gun wrapped in a t-shirt, three large packages of meth wrapped in another t-shirt, a digital scale, three cell phones, and about $1,000 in cash. Investigators found Maurstad's DNA on the gun, and Morningstar Webster, his co-defendant, confirmed that Maurstad owned the gun.
Based on this evidence, Maurstad was charged with conspiracy to possess meth with intent to distribute, possession of meth with intent to distribute, possession of a firearm in furtherance of a drug trafficking crime, and being a felon in possession of a firearm.

Maurstad was pulled over again in January 2018. This time, an officer noticed that Maurstad's car didn't have a front or rear license plate. After following him for a while, the officer's radar and a roadside speedometer showed that Maurstad was speeding, so the officer pulled him over. When the car stopped, the officer saw that the car had a temporary license taped to the window, but proceeded with the stop based on the speeding violation. Once again, Maurstad did not have a valid license, and the officer noticed that his passenger was shaking uncontrollably, so he asked Maurstad to get out of the car. The officer asked if Maurstad had any weapons. Maurstad said no and began voluntarily removing things from his pockets. He then consented to a pat-down for weapons, and the officer felt a hard object that he believed could be a weapon. It turned out to be a bag of oxycodone pills, which Maurstad admitted he did not have a prescription for. The officer searched the car and noticed that the molding and trim of the doors was broken and that there was a bulge in the driver's side door. The officer pried the door panel open and found two large packages of meth. As a result of this stop, Maurstad was charged with possession with intent to distribute meth.

Maurstad filed a motion to suppress the evidence from the two traffic stops and, after a hearing, the motion was denied. The district court held a

bench trial and found Maurstad guilty on all six counts. This appeal follows the denied of that motion.

The Eighth Circuit Court of Appeals found as follows:

"The August 2016 stop was initiated because an officer believed that the tint on Maurstad's windows violated state law. Maurstad points out that the tint was not illegal because it fell into an exception for manufacturer-tinted windows. As a result, he argues, there was no reasonable suspicion to pull him over. But the officer's observation was right—the windows were too dark under the statute. Although they were exempt and therefore lawful, there was no way for the officer to know that before pulling Maurstad over, so his mistake was objectively reasonable.
Maurstad caught an officer's attention in January 2018 because his car didn't have license plates, but he was ultimately stopped for speeding. Maurstad challenges both of these reasons for stopping him. First, he claims that because he had a temporary registration, the officer's reason for stopping him was invalid. But, as above, the officer's mistake was objectively reasonable he could not see the temporary registration when he started following Maurstad. Even if the officer's mistake was not reasonable, the speeding violation alone provided reasonable suspicion for the stop.

"The Fourth Amendment protects against unreasonable searches and seizures. A traffic stop is a seizure, so it must be supported by reasonable suspicion or probable cause. But any traffic violation, however minor, provides probable cause for a traffic stop. And objectively reasonable mistakes of law or fact justify a stop.

"The judgment of the district court is affirmed."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/06/202936P.pdf

SEARCH AND SEIZURE: Vehicle Search; Containers Within Vehicle; "Contemporaneous Search"

United States v. Farrington
CA8, No. 21-2974, 8/1/22

In October 2019, Henry County Sheriff's Office Investigator Jesse Bell was surveilling a vehicle as part of a drug investigation. He watched Shaun Michael Farrington and Stefani Goodwin leave a motel, approach the vehicle, and place several bags into the car. They entered the vehicle, and Farrington drove away. Because Farrington's driver's license was suspended, Investigator Bell asked Sergeant David Wall to conduct a traffic stop. Sergeant Wall stopped the vehicle at approximately 6:46 p.m., and his drug-detection dog, Uno, signaled that he had detected drugs. Sergeant Wall then searched the vehicle and discovered drug paraphernalia and four lockboxes. Farrington was arrested, the lockboxes were seized and transported to an evidence shed at the sheriff's office, and the vehicle was separately towed to the sheriff's office. Prior to 10:00 p.m., Sergeant Wall had Uno conduct a sniff test around the lockboxes, and Uno signaled that he detected drugs. The officers then obtained a search warrant for the lockboxes, and the search revealed methamphetamine. Sergeant Wall testified that the time between the sniff test at the sheriff's office and the issuance of the search warrant was about two hours.

Farrington was indicted for possession with intent to distribute methamphetamine and conspiracy

to distribute methamphetamine. He moved to suppress the evidence derived from the traffic stop, the seizure of the lockboxes, and the sniff test of the lockboxes. The district court denied the motion. He appeals the district court's denials of his motion to suppress arguing his motion to suppress should have been granted because the seizure, hours-long detention, and "dog sniff search" of the lockboxes violated the Fourth Amendment.

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

"The Fourth Amendment proscribes all unreasonable searches and seizures, and warrantless searches are per se unreasonable unless they fall under an exception to the warrant requirement. The automobile exception permits warrantless searches of an automobile and seizures of contraband where there is probable cause to believe that an automobile contains contraband. Such searches may lawfully reach places in which there is probable cause to believe that contraband may be found, including containers discovered within the automobile. *California v. Acevedo*, 500 U.S. 565, 579-80 (1991).

"*United States v. Johns*, 469 U.S. 478 (1985) controls this case. In Johns, customs officers smelled marijuana coming from two trucks and observed suspicious packages through the windows. The officers brought the trucks to a Drug Enforcement Administration (DEA) facility, placed the packages in a DEA warehouse rather than immediately opening them, and then DEA agents conducted a warrantless search of the packages three days after they were removed from the trucks. The Court upheld the three-day detention and the search, explaining that there is no requirement that the warrantless search of a vehicle—including the containers found within it—occur contemporaneously with the vehicle's lawful seizure. It rejected the position that warrantless searches of containers are permissible only if the search occurs immediately as part of the vehicle inspection or soon thereafter. Rather, inasmuch as the Government was entitled to seize the packages and could have searched them immediately without a warrant the warrantless search three days after the packages were placed in the DEA warehouse was reasonable.

"Substantially the same facts are present here, except that the delay was several hours—not three days—and the police obtained a warrant prior to opening and searching the lockboxes. A warrantless search would have been permissible under Johns. Therefore, the district court did not err in denying Farrington's motion to suppress."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/22/08/212974P.pdf

SEARCH AND SEIZURE:
Vehicle Inventory Search
United States v. Cohen
CA11, No. 21-10741, 7/6/22

Devon Cohen appealed his conviction for being a felon in possession of a firearm and ammunition. After pulling Defendant over in a rental vehicle for running a stop sign and arresting him for resisting, the Tampa Police Department ("Tampa PD") conducted an inventory search of the vehicle and located a loaded firearm belonging to him. Defendant challenged the constitutionality of the search in the district court and moved to suppress the gun, but the court found that ohen did not have Fourth Amendment standing to do so because his license was suspended and he was not an authorized driver on the rental car agreement.

On appeal, Cohen argued that driving with a suspended license does not prohibit him from establishing Fourth Amendment standing. He further asserted that the inventory search violated his Fourth Amendment rights because the government failed to demonstrate that the search complied with department policy.

The Eleventh Circuit concluded that Cohen has standing to challenge the inventory search. Nonetheless, it affirmed the district court's denial of his suppression motion on the basis that the inventory search was lawful. The court explained that Cohen's conduct of operating a rental vehicle without a license and without authorization from the rental company, without more, did not defeat his reasonable expectation of privacy giving rise to Fourth Amendment standing to challenge the search. However, the district court did not err in finding that the Tampa PD performed a permissible impound and inventory of Cohen's vehicle because the record supports that it was conducted in accordance with the Cohen's standard operating procedures.

READ THE COURT OPINION HERE:
https://media.ca11.uscourts.gov/opinions/pub/files/202110741.pdf

SECOND AMENDMENT: New York State Rifle & Pistol Association v. Bruen

USSC, No. 20-843
6/23/22, 597 U.S. _____ (2022)

The State of New York makes it a crime to possess a firearm without a license. An individual who wants to carry a firearm outside his home may obtain an unrestricted license to "have and carry" a concealed "pistol or revolver" if he can prove that "proper cause exists." An applicant satisfies the "proper cause" requirement if he can "demonstrate a special need for self-protection distinguishable from that of the general community." New York residents who unsuccessfully applied for unrestricted licenses to carry a handgun in public based on their generalized interest in self-defense challenged the "proper cause" requirement.

The Supreme Court reversed the dismissal of the suit:

"New York's 'proper cause' requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense. The 'historical evidence from antebellum America does demonstrate that the manner of public carry was subject to reasonable regulation, but none of these limitations on the right to bear arms operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.' The Court stated that the 'constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' The exercise of other constitutional rights does not require individuals to demonstrate to government officers some special need."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf