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CRIMINAL JUSTICE INSTITUTE

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## Contents



## CIVIL LIABILITY:

### Failure to Provide Medical Care of Arrested Individual

*Thomas v. City of Harrisburg*, CA3, No. 21-2963, 12/6/23

On behalf of the estate of Terelle Thomas, Sherelle Thomas sued the City of Harrisburg, PrimeCare Medical, Inc., and several individual law enforcement officers alleging that they failed to provide medical care and to intervene in the prevention of a violation of Thomas's right to medical care. The Officers moved to dismiss the care on grounds of qualified immunity, but the United States District Court denied the motion.

On December 14, 2019, Harrisburg Police Officer Daril Foose was partnered with Adult Probation Officer Dan Kinsinger. At approximately 6:15 p.m., Foose observed Thomas and another man walk from a bar and enter a vehicle as passengers. Foose followed the vehicle and made a traffic stop. Foose then noted that Thomas "spoke to her as if he had 'cotton mouth' and a large amount of an unknown item inside his mouth." She also observed "strands in his mouth that were almost like gum and paste," that his lips were "pasty white," and that his "face was covered with a white powdery substance." She believed that Thomas had ingested something and was concealing it in his mouth. As a result, Probation Officer Kinsinger detained Thomas, during which time Thomas "spit out a white liquid." Officer Foose then concluded that Thomas had "ingested a large amount of cocaine." However, Thomas told Officer Foose "that the only drugs on his person was a small amount of marijuana and that his lips were white because he had consumed a candy cigarette." Officer Foose quickly concluded this was a lie because she "observed cocaine rocks fall out of Thomas's shirt and she failed to find any candy cigarettes."

During Thomas's detention, four additional officers (Corporal Johnsen and Officers Salazar, Banning, and Carriere) arrived at the scene. Probation Officer Kinsinger and Officer Foose informed each officer that they believed that Thomas had ingested cocaine. Officer Salazar independently arrived at the same conclusion after observing a white powdery substance covering Thomas's lips, and informed Thomas that ingesting cocaine could have an "ill effect" on Thomas's health. Corporal Johnsen "acknowledged the seriousness of ingesting cocaine by warning…Thomas that he could possibly die from ingesting drugs." Officer Banning also observed a "large amount of white residue around and on…Thomas' lips," and did not find any evidence of candy cigarettes. Based on their observations, the Officers filed police reports indicating Thomas's cocaine ingestion, and Officer Foose prepared and signed an Affidavit of Probable Cause noting that she had observed Thomas consume "crack cocaine in order to conceal it from police."

The Officers jointly determined that Thomas should be transferred to Dauphin County Booking Center at the Dauphin County Prison for detention and processing. Dauphin County contracts with PrimeCare to provide limited medical care to individuals at Dauphin County Prison. PrimeCare does not have hospital features such as x-ray or CT machines but instead transfers individuals to a nearby hospital for testing and treatment. In addition, Harrisburg Police Department policy dictates that officers take arrestees to the hospital if the arrestees have "consumed illegal narcotics in a way that could jeopardize their health and welfare." Despite this policy and the observations noted above, the Officers did not take Thomas to the hospital. Instead, Officer Carriere arrested Thomas and transported him to Dauphin County Booking Center. En route, Thomas told Officer Carriere that he was hot despite an outdoor temperature of 46 degrees. Officer Carriere opened the window.

Upon arrival at the Dauphin County Booking Center, Officer Carriere informed prison officials and medical staff there that Thomas "may have swallowed crack cocaine." The officials and PrimeCare staff noted that Thomas had white powder covering his lips, but they also failed to send Thomas to a hospital. Instead, the officials placed Thomas in a cell without any medical care or observation. Less than two hours after Thomas's arrest, surveillance video showed Thomas falling backwards onto the floor, hitting his head, and suffering cardiac arrest. Only then did officials transport Thomas to UPMC Pinnacle Harrisburg Hospital, where he died three days later. His cause of death was "cocaine and fentanyl toxicity.

The United States Court of Appeals for the Third Circuit found that the Officers, based on their observations and knowledge, should have recognized that Thomas had ingested a significant amount of cocaine, presenting a serious medical need. The Officers' decision not to take Thomas to the hospital amounted to deliberate indifference to that need.

However, the Court of Appeals reversed the District Court's recognition of a claim of failure to intervene. The court explained that neither the Supreme Court not the Third Circuit have recognized a right to intervene in the context of rendering medical care. The officers were entitled to qualified immunity.

The case was remanded to the District Court with instructions to dismiss the claim regarding the Officers' failure to intervene.

**READ THE COURT OPINION HERE:**
https://www2.ca3.uscourts.gov/opinarch/212963p.pdf

**CIVIL LIABILITY: First Amendment Rights; Retaliation; Qualified Immunity**
*De Mian v. City of St. Louis*, CA8, No. 22-3000, 11/16/23

Heather De Mian was filming a protest when Officer William Olsten pepper sprayed the crowd. She sued Officer Olsten, Commissioner John Hayden, and the City of St. Louis for violating her First Amendment rights, among other things. The district court granted summary judgment on De Mian's claims.

On September 29, 2017, a crowd gathered outside of Busch Stadium in downtown St. Louis during a Cardinals game to protest a police officer's acquittal on first-degree murder charges. As police were waiving traffic through the crowd, there was an altercation. Police arrested two protestors and used a taser on one of them. As officers escorted the arrestees away, a crowd of protestors followed, yelling and screaming.

De Mian takes photographs and videos of newsworthy events, often protests. Several news outlets have featured her videos, which she films from a powered wheelchair. De Mian was livestreaming as she and other protestors followed the officers. Among the shouts of the crowd, De Mian's audio captures herself yelling: "You tase him? Why are you using a potentially lethal weapon on people? Okay, now you're pissing people off really badly. Why would you use a potentially lethal weapon?"

One of the officers escorting the arrestee was Officer Olsten. He and a protestor, Amir Brandy, had a heated exchange that continued even after Officer Olsten transferred the arrestee to another officer. Officer Olsten was soon face-to-face with Brandy, and he deployed his pepper spray, hitting Brandy and others in the crowd. Officer Olsten continued to spray for several seconds as he walked toward the crowd of protestors.

De Mian was more than 20 feet away, off to Officer Olsten's side when he was spraying. He never faced her, but she was near the edge of the arc that he sprayed over the crowd. Videos of the incident do not show whether she was hit by the spray, but she yelled soon after: "There was no dispersal order. Why did you spray me?"

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

"Officer Olsten gets qualified immunity unless (1) the facts demonstrate the deprivation of a constitutional or statutory right, and (2) the right was clearly established at the time of the deprivation. De Mian argues that Officer Olsten deprived her of her First Amendment rights by pepper spraying her in retaliation for filming and protesting. To show retaliation, she must demonstrate that (1) she engaged in protected expression, (2) Officer Olsten took an adverse action that would chill a person of ordinary firmness from continuing the activity, and (3) there was a but-for causal connection between Officer Olsten's retaliatory animus and her injury.

"Peacefully protesting and reporting are generally protected forms of First Amendment expression. And a person of ordinary firmness would be chilled from continuing to report or protest after being pepper sprayed. So the last question standing is whether there is a but-for causal connection between De Mian filming or protesting and Officer Olsten's decision to spray her.

"But more than a temporal connection is required to present a genuine factual issue on retaliation. So we have repeatedly held that a plaintiff must demonstrate that she was 'singled out' due to her protected expression, whether as an individual or as part of a group. Because De Mian has not pointed to any facts showing that Officer Olsten singled her out, either individually or as part of a particular group, her claim fails. Nothing in the record shows that Officer Olsten directed his actions toward De Mian.

"De Mian argues that she is a well-known reporter and is readily identifiable because she is in a wheelchair. But this fact, without more, is insufficient for a jury to infer that Officer Olsten knew or recognized her. She also speculates that Officer Olsten may have been retaliating against her for filming. But there is no evidence Officer Olsten observed her filming or deployed pepper spray in retaliation for her doing so. Finally, she argues that she was yelling and screaming, so a reasonable jury could find that Officer Olsten heard her. Nothing in the record indicates that Officer Olsten heard anyone other than Brandy. To the contrary, in a video recorded close to Officer Olsten and Brandy, De Mian's shouts cannot be heard.

"There is no evidence from which a reasonable jury could infer that De Mian's actions motivated Officer Olsten to spray in her direction. So the lack of a causal connection is so free from doubt as to justify taking this question from the jury. The district courts grant of summary judgment is affirmed."

**READ THE COURT OPINION HERE:**
https://ecf.ca8.uscourts.gov/opndir/23/11/223000P.pdf

## CIVIL LIABILITY: Officer Incorrectly Administers Field Sobriety Tests; Misreads Breathalyzer

*Akima v. Peca*, CA6, No. 22-2058, 10/26/23

On February 19, 2020, Officer Peca arrested Ryohei Akima in Fowlerville, Michigan. Akima was in the U.S. on a work visa as an employee of a Michigan-based technology company. Officer Peca was in her first six months as a member of the Fowlerville Police Department.

The Officer pulled Akima over for driving with an inoperative headlight, and after effecting the stop, approached his vehicle from the driver's side. Akima greeted her with his window down, and she explained that she was stopping him because of a broken headlight. In an accented voice, Akima replied, "What?" The question prompted Officer Peca to reiterate her explanation, this time speaking more slowly and gesturing to the front of the car. Akima then opened his door and exited the vehicle to inspect the issue she had flagged. Seeing the defunct headlight, Akima expressed comprehension, exclaiming "oh, okay," before returning to the driver's seat. As he reentered the vehicle, Akima spoke briefly in a foreign language, apparently explaining the situation to a colleague in the passenger's seat.

Officer Peca requested Akima's license and registration, continuing in the same methodical tone and using her hands to punctuate her orders. After a little over a minute, Akima produced a handful of documents and stated simply, "international driver's license." As Akima handed Officer Peca his materials, she asked if he had been drinking. He acknowledged he had been. When Officer Peca asked how much, Akima said, "just a little bit out of the bottle." The Officer ended the inquiry there, directing Akima to look for his insurance and registration while she returned to her vehicle with his paperwork.

Officer Peca began processing the stop by radioing a colleague, Deputy Sheriff Adam Jaime, for advice. She said that Akima could "barely speak English" and was "not going to understand anything"; had given her his Japanese passport and U.S. visa; and had apparently been drinking. She expressed frustration at the situation throughout the call, repeatedly stating, "I don't know," "I don't know." Ultimately, Officer Peca explained that Akima smelled like vodka, had eyes consistent with alcohol consumption, had been drinking, quote, "from the bottle," and had acted erratically during their interaction. The consultation concluded with the officers agreeing that she should run field sobriety tests.

Officer Peca put Akima through a three-part evaluation, starting with an eye exam known as a "horizontal gaze nystagmus" test, a process that "involves moving a stimulus from side to side while the subject follows it with" their eyes. *Green v. Throckmorton*, 681 F.3d 853, 857 (6th Cir. 2012). The administrator watches for "involuntary jerking of the eye," a reflex that becomes more pronounced with intoxication. Officer Peca testified in her deposition that Akima's performance on this exam was "consistent with an individual being under the influence of alcohol or drugs," though the video is not clear enough to confirm this result. Deputy Jaime reviewed the video and later testified that Officer Peca ran the exam improperly. Next, Officer Peca conducted a walk-and-turn test, instructing Akima to take nine steps heel-to-toe in one direction before turning and retracing his steps. The video shows Akima swaying moderately as he prepares to start the task, holding both arms out for balance as he walks, and tilting sideways unevenly when he makes the turn. Deputy Jaime testified that each of these behaviors indicated intoxication, and Officer Peca testified that Akima failed the exam.

Last, Officer Peca administered a one-legged-stand test, instructing Akima to stand on one foot while holding his other foot six inches above the ground. Akima held the position with relative stability, though with some wobbling, for around twenty-five seconds before teetering sideways in a near fall. Officer Peca testified that Akima's performance was "consistent with him not completing that task." Deputy Jaime agreed, but also acknowledged that a subject's medical conditions, disabilities, and communication difficulties may affect the results of the onelegged-stand test, just as they may interfere with the walk-and-turn test.

Determining that Akima's performance on these three initial tests suggested intoxication, Peca conducted a preliminary breathalyzer test. She instructed Akima to blow into the breathalyzer, which required four attempts before Akima registered a reading. Officer Peca interpreted the test as showing an alcohol content of 0.22, well above Michigan's legal limit of 0.08. In reality, however, the breathalyzer had reported 0.02, well under the legal limit. Upon making the mistaken reading, the Officer placed Akima under arrest for operating while intoxicated and detained him in the back of her police unit.

Officer Peca then took her place in the front of her vehicle to process the arrest, and Deputy Jaime soon joined her. After several minutes of reviewing Akima's information, the officers reengaged with him, asking how long he would be in the country and whether he had any form of U.S. identification. Akima explained the details of his visa, that he had an international, not a U.S., driver's license, and that the license should be in his vehicle but that he had not had time to locate it at the beginning of the encounter. Akima then sought permission to retrieve his international license from his car, but the officers said it was

now "irrelevant." It is undisputed that Akima's international license was, in fact, in his vehicle during the arrest. Officer Peca spent the next half-hour on paperwork, requesting a warrant to draw Akima's blood. During that time, she made several comments about her ability to complete the arrest. At the beginning, she chastised herself for being "so unprepared." Later, she told a colleague over the radio, "I have no idea what I'm doing." At the end, she thanked the same colleague for his help, reiterating, "I literally had no idea what I was doing."

Officer Peca eventually completed the paperwork, obtained a search warrant, and transported Akima to the hospital for a blood draw before booking him at the county jail. The blood draw took place around an hour-and-a-half after the initial stop. When the results came back a week later, they revealed a blood alcohol content of 0.014, which, like Akima's breathalyzer score, falls well below Michigan's legal limit. Soon after, the charges against Akima for operating while intoxicated were dismissed.

Akima sued Officer Peca for false arrest, false imprisonment, and intentional infliction of emotional distress in the U.S. District Court for the Eastern District of Michigan. He alleged that, as a result of the arrest and notwithstanding the ultimate dismissal of charges against him, his U.S. visa was revoked and he was deported to Japan. According to the complaint, Akima was required to complete substance abuse courses in Japan before he could renew his visa, and the process interrupted his ability to work in the United States for several months. Peca moved to dismiss, citing qualified immunity.

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

"An official's qualified immunity defense is analyzed under a two-prong framework, asking whether the official violated a constitutional right, and, if so, whether the right was clearly established at the time. For the constitutional violation prong, we determine whether the plaintiff has established a constitutional deprivation—here, regarding false arrest and false imprisonment in violation of the Fourth Amendment. An officer commits these constitutional violations when the officer effects a warrantless arrest without probable cause.

"A reasonable jury could find the facts as follows. While driving without any apparent difficulty, Akima was stopped for a broken headlight. Early on in the stop, perhaps due to evident communication barriers, Akima took the atypical step of exiting his vehicle. Thereafter, Akima acknowledged he had been drinking 'just a little bit,' registered 0.02 on a breathalyzer, exhibited a temperate and responsive demeanor, and maintained a steady speech and gait. He also completed three field sobriety tests, which a jury could determine he performed adequately, or which it could choose to assign little weight given Officer Peca's errors in administering them.

"On this set of findings, it would be evident to a reasonable officer that Akima was, quite apparently, sober. So a reasonable jury could conclude that Akima's arrest was not supported by probable cause and that Officer Peca was not entitled to qualified immunity. On this record, the district court properly denied Officer Peca's motion to dismiss and motion for summary judgment."

**READ THE COURT OPINION HERE:**
https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0235p-06.pdf

**CIVIL LIABILITY: Officers Objective Reasonable Belief His Life was in Danger**

*Tousis v. Billet*, CA7, No. 22-2211, 10/18/23

DEA placed a tracking device on Gus Tousis's car. On June 2, agents believed that Tousis would go to Vernon Turner's Aurora home to procure drugs. They watched Tousis enter Turner's garage carrying a bag, and then leave carrying the bag, which had changed in appearance, suggesting a drug transaction. The Sheriff's Department attempted a traffic stop. Tousis fled. The tracking device showed Tousis driving at 115.2 miles per hour on I-88. Law enforcement terminated the pursuit because of danger to themselves and the public. Agent Keith Billiot, driving an unmarked car, followed Tousis off the highway. Tousis was then driving at normal speeds, but taking evasive actions. At a red light, Billiot activated his emergency lights and siren, and pulled in front of Tousis's car which was 10-25 feet away. Billiot grabbed his firearm, exited his car wearing a DEA vest, and ran toward Tousis's car, shouting commands.

As Tousis moved the car forward, with nothing between Billiot and Tousis's car, Billiot fired a single shot. The bullet struck the steering wheel; a fragment hit Tousis in the neck as he was maneuvering his vehicle away from Billiot. Tousis's car then accelerated and struck a light pole. Tousis died. Officers recovered 300 grams of cocaine from Tousis's car.

In a suit under 42 U.S.C. 1983, the district court denied Billiot qualified immunity. The Seventh Circuit reversed. The Court stated that for the purposes of the qualified immunity analysis, the material undisputed facts demonstrate that Agent Billiot pulled in front of Tousis shortly after Tousis engaged in a reckless, high-speed flight from police officers after leaving a suspected drug house; that Billiot exited his car and ran toward Tousis, placing himself fewer than two car lengths from the front of Tousis's car, shouting commands to turn off and exit the vehicle; that Tousis, turning his wheels to the right, began to move forward; and that Billiot then fired the fatal shot, fearing both for his own safety and for that of the public if Tousis resumed his reckless flight.

"In the circumstances presented here, Billiot had an objectively reasonable belief that his own life and the lives of the public were at risk when he fired the shot that killed Tousis. The Court stated that there was no case law warning Billiot that his actions under those circumstances amounted to excessive force in violation of the Fourth Amendment. Billiot was therefore entitled to summary judgment on his claim of qualified immunity. The Seven Circuit reversed and remanded with instructions to enter judgment in favor of Agent Billiot on the basis of qualified immunity for the claim of excessive force."

**READ THE COURT OPINION HERE:**
https://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2023/D10-18/C:22-2211:J:Rovner:aut:T:fnOp:N:3118487:S:0

**CIVIL LIABILITY: Officers Required Muslim Female to Remove her Hijab for Booking Photographs**

*Omeish v. Kincaid*, CA4, No. 22-1878, 11/15/23

On the evening of March 5, 2019, Fairfax County Police Officer Justun Patrick stopped Abrar Omeish for failing to stop at a red light before turning right. During the traffic stop, Ms. Omeish failed to comply with Officer Patrick's numerous commands, and Patrick then attempted to arrest her. As Omeish resisted, Officer Patrick deployed

a burst of pepper spray to her forehead, which enabled him to take her into custody. While booking her at the Fairfax County Adult Detention Center, Sheriff Stacey Kincaid's officers required Omeish, a Muslim who wears a hijab, to remove it against her will for the purpose of taking booking photographs, as was prescribed by the Sherriff Office's standard operating procedures.

Omeish commenced this action, claiming that Officer Patrick used excessive force in arresting her, in violation of her Fourth and Fourteenth Amendment rights, and that Sheriff Kincaid was liable for her office's policy that disregarded Omeish's religious beliefs and practices by requiring her to remove her hijab, in violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000. Omeish sought, among other relief, damages for her excessive force claim and an injunction against Sheriff Kincaid, requiring her to destroy and have destroyed all photographs taken of Omeish without her hijab.

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

"The district court dismissed Omeish's claim against Officer Patrick on the basis of qualified immunity, but it granted Omeish a permanent injunction, requiring Sheriff Kincaid to destroy and use her best efforts to have destroyed all copies of the booking photographs of Omeish without her hijab. Thereafter, all photographs were in fact destroyed, prompting the court to conclude that the injunction's requirements had been fulfilled. Finally, the court denied Omeish's motion for attorneys fees.

"As to Sheriff Kincaid's appeal, the court dismissed it as moot. As to Plaintiff's appeal of the dismissal of her claim against Officer Patrick, the court affirmed the dismissal on the basis of qualified immunity. As to the appeal of the district court's order denying her motion for attorneys fees, the court vacated and remanded. The court explained that a prevailing party should ordinarily be awarded reasonable attorneys fees unless special circumstances would render them unjust. By addressing Plaintiff's motion under the incorrect legal standard, the district court erred."

**READ THE COURT OPINION HERE:**
https://www.ca4.uscourts.gov/opinions/221826.p.pdf

## CRIMINAL LIABILITY: Jury Instruction on Negligent Homicide by a Law Enforcement Officer Based on GRAHAM V. CONNER

*Davis v. State*, ACA, No. CR-22-377, 2023 Ark. App. 403, 9/27/23

A Lonoke County jury convicted Michael Davis of negligent homicide, and he was sentenced to serve one year in the county jail and ordered to pay a $1,000 fine. On appeal, Davis argues that the trial court erred in refusing to give non-model jury instructions on the definition of "negligently" and on the so-called *Graham v. Connor* standard.

On June 22, 2021, seventeen-year-old Hunter Brittain and two of his friends were replacing the transmission in Brittain's pickup truck at Mahoney's Body Shop in Cabot. Around 3:00 a.m., Brittain and one of his friends took the truck for a test drive while the second friend stayed at the shop. Among other problems, the truck would not shift into "park," which prompted Brittain to place a jug of coolant behind the truck's tire while they added some transmission fluid. They were on their way back to the body shop when Davis, then a sergeant with the Lonoke County Sheriff's Office, noticed that the truck was smoking and making

a "loud racket." Davis suspected that the truck might have been stolen, but he "ran the plates" and there was no such report. Davis activated his blue lights to conduct a stop after an improper lane change. Davis initially thought that Brittain was going to flee because he heard the truck's engine being revved, but then Brittain turned left into Mahoney's driveway. Davis radioed dispatch that he was pulling into Mahoney's for a traffic stop. Twenty-three seconds later, Davis radioed, "Shots fired."

According to Davis, before he could put his patrol truck into "park," Brittain had opened the driver's door and begun reaching into the bed of the truck. Also, Davis saw that Brittain's truck was rolling backward toward his patrol truck. Davis said that he fired one shot and that Brittain's hands flew out of the bed of his truck. Davis then saw that Brittain had been holding a blue jug of what was later determined to be coolant. Davis testified that he thought Brittain had been reaching for a rifle. Davis also claimed that he had been shouting commands that Brittain remain in the truck and then that he show his hands, but that Brittain did not acknowledge his directives. According to the passenger in Brittain's truck, Davis did not yell any commands until after the shot had been fired.

The jury was instructed on both manslaughter and negligent homicide as well as on the defense of justification with respect to the charge of manslaughter. The jury acquitted Davis of manslaughter but found him guilty of negligent homicide.

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

"Davis first argues that the trial court erred in refusing his proffered definition of 'negligently' in connection with the charge of negligent homicide. A person commits negligent homicide if he negligently causes the death of another person. Ark. Code Ann. § 5-10-105(b)(1) (Repl. 2013). The statutory definition of 'negligently' provides that a person acts negligently with respect to attendant circumstances or a result of his conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or that the result will occur. Ark. Code Ann. § 5-2-202(4)(A) (Repl. 2013). The risk must be of such a nature and degree that the actor's failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation considering the nature and purpose of the actor's conduct and the circumstances known to the actor. Ark. Code Ann. § 5-2-202(4)(B). In his proffered instruction, Davis substituted the term 'a reasonable Law Enforcement Officer' for 'a reasonable person.'

"The model jury instruction on negligent homicide that was read to the jury provides, in relevant part, the following:

> *The term 'negligently' as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show beyond a reasonable doubt that Michael Davis should have been aware of a substantial and unjustifiable risk that the death would occur. The risk must have been of such a nature and degree that his failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involved a gross deviation from the standard of care that a reasonable person would have observed in his situation.*

"Because the model instruction tracked the language of the statute, it was a correct

statement of the law. The Court noted that there is no special section in the Criminal Code on negligent homicide when it is committed by a law enforcement officer and that there is no separate definition for the state of mind 'negligently' when a law enforcement officer is involved. We cannot say that the trial court abused its discretion in refusing to give Davis's proffered instruction when the instruction that was given accurately stated the law.

"In a footnote, the court explained that *Graham v. Conner*, 390 U.S. 386 (1989) was a § 1983 civil-rights action, in which the United States Supreme Court held that all claims that law enforcement have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard rather than under a substantive-due-process standard. The Supreme Court also said that the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

https://opinions.arcourts.gov/ark/courtofappeals/en/item/522104/index.do

## MIRANDA:

**Spontaneous and Unsolicited Admission**

*State of New Jersey v. Tiwana*
SCNJ, No. A-36-22 (087919), 11/20/23

On April 28, 2020, Amandeep Tiwana, while driving in Jersey City, struck a police officer and collided with two police cruisers. Tiwana and three injured officers were transported to Jersey City Medical Center. Tiwana's blood alcohol content was 0.268%, three times the legal limit.

Detective Anthony Espaillat of the Regional Collision Investigation Unit of the Hudson County Prosecutor's Office arrived at the hospital and spoke first to the injured officers in the emergency room. Two uniformed police officers were stationed outside the curtain separating Tiwana's bed from other patients. Detective Espaillat walked up to Tiwana's bed, introduced himself as a detective with the Prosecutor's Office, and explained that he was assigned to investigate the accident. Espaillat testified that, as soon as he had spoken, Tiwana immediately complained of chest pain and said "she only had two shots prior to the crash." Espaillat directed Tiwana not to make any other statements. He clarified that he did not come to the hospital to ask her questions and that he wanted to interview her at a later date at the Prosecutor's Office. The entire interaction lasted "less than five minutes." The next day, Tiwana went to the Prosecutor's Office and invoked her Miranda rights.

The issue this case presented for the New Jersey Supreme Court consideration was whether the detective's self-introduction to Tiwana at her bedside in the hospital initiated a custodial interrogation or its functional equivalent warranting the administration of Miranda warnings.

The State moved to admit Tiwana's statement at the hospital. The trial court denied the State's motion and the Appellate Division affirmed. Both courts found that a custodial interrogation occurred at the hospital and the detective's failure to give Miranda warnings rendered Tiwana's statement inadmissible.

The New Jersey Supreme Court reversed. "Tiwana was in custody at the hospital in light of the police presence around her bed area. But no interrogation or its functional equivalent occurred before her spontaneous and unsolicited admission. Miranda warnings were therefore not required, and defendant's statement -- that she 'only had two shots prior to the crash' -- was admissible at trial."

**READ THE COURT OPINION HERE:**
https://www.njcourts.gov/system/files/court-opinions/2023/a_36_22.pdf

## SEARCH AND SEIZURE:

**Consent Search of Wallet**
*United States v. Tellez*
CA6, No. 22-5902, 11/17/23

A highway patrol officer observed Yanier Tellez drift out of his lane. During the traffic stop that followed, the officer asked Tellez if he could search his car. Tellez agreed and exited the vehicle. When the officer finished the search, he asked Tellez, "Do you have your wallet?" Tellez initially asked him to repeat the question but then began removing his billfold from his back pocket. The officer said, "Let me see it for a moment." Tellez handed over the wallet as the officer reached for it. Inside, the officer discovered three Visa gift cards, each with five-digit numbers written on the back, which the officer believed was indicative of credit card fraud.

The officer asked Tellez if he could swipe the cards. Tellez agreed. As the officer prepared to swipe one of the cards, Tellez changed his mind and said, "I don't give you permission." The officer nevertheless swiped the cards, and the numbers on the magnetic strips did not match the cards, indicating they had been altered. The officer then arrested Tellez.

Tellez moved to suppress all evidence derived from the search of his wallet on the grounds that he did not voluntarily consent to the search. Notably, Tellez did not challenge the officer's decision to swipe the cards despite Tellez's apparent withdrawal of consent for that activity. *Cf. United States v. Bah*, 794 F.3d 617, 630 (6th Cir. 2015) (holding that swiping a card is not a search under the Fourth Amendment).

After reviewing a video recording of the traffic stop and considering the officer's testimony, the district court denied Tellez's motion. To the district court's eye, Tellez's gesture of handing over his wallet reflected his nonverbal, voluntary consent to a search. Other relevant considerations, the court noted, included that Tellez maintained a cooperative demeanor, appeared to communicate effectively with the officer, was not threatened or coerced by the officer, had previously consented to a search of his vehicle, and later consented to the officer scanning the gift cards and searching his phone. Following the denial of his motion, Tellez entered a guilty plea as to all charges conditioned on his ability to challenge the suppression ruling on appeal.

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

"The Fourth Amendment establishes a right against unreasonable searches and seizures. U.S. CONST. Amend. IV. A person may waive this right,

however, by freely and voluntarily consenting to a search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). The district court concluded that Tellez so consented here, and on that basis denied his motion to suppress.

"Whether Tellez's consent was given freely and voluntarily is a question of fact to be determined from the totality of all the circumstances. Numerous data points may inform a voluntariness inquiry. The analysis is fact-specific, and there is no magic formula or equation for determining consent in the abstract. We thus look to factors such as the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police. And consent, it bears adding, need not be verbal; it can be communicated through gestures or conduct.

"We see no clear error in the district court finding that Tellez voluntarily consented to the search of his wallet when he handed it to the officer. Tellez acknowledges that he agreed to a search of his vehicle. Following the search, the officer asked Tellez if he had his wallet. Tellez indicated that he did, first by reaching for it, and then by handing the item over to the officer— telltale signs of a consented-to search.

"True, the officer's precise wording—'Let me see [the wallet] for a moment'—could, in some contexts, perhaps be viewed as a command. But in the circumstances here, it was not clear error for the district court to find otherwise. Consider the evidence before the court. Dashcam video of the encounter demonstrated that Tellez was calm and cooperative throughout the traffic stop. There was nothing coercive or threatening about the officer's actions. And the stop occurred during the day on a public street, lasting just fifteen minutes before Tellez turned over his wallet. That Tellez later tried to revoke his consent, if anything, demonstrates his appreciation of his right to refuse a police search to begin with. See *United States v. Mendenhall*, 446 U.S. 544, 558–59 (1980) (holding that knowledge of a right to refuse is 'highly relevant to the determination that there had been consent').

"Nor do we agree with Tellez that the question, 'Do you have your wallet,' and ensuing instruction, 'Let me see it for a moment,' failed to reflect the officer's intent to search the item. There is no particular script for seeking consent. Any words, when viewed in context, that objectively communicate to a reasonable individual that the officer is requesting permission to conduct a search constitute a valid search request. And the record here fairly demonstrates that the officer's question implied a request for consent. Tellez's own actions confirm the point. By reaching for his wallet and then holding it out towards the officer, Tellez demonstrated his understanding of the officer's desire to search the item. An understandable conclusion to reach, to be sure. Why else, after all, would the officer ask Tellez if he could see Tellez's wallet other than to express his interest in searching the item?

"Tellez's conviction and sentence is affirmed."

**READ THE COURT OPINION HERE:**
https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0250p-06.pdf

## SEARCH AND SEIZURE:

### Emergency Search of Apartment

*United States v. Maxwell*
CA7, No. 22-2135, 11/13/23

On an August afternoon in 2019, two men approached a secured apartment building in Springfield, Illinois, buzzed a neighboring unit, and explained they were trying to contact Apartment 7's resident. Neighbors let them in but moments later heard gunshots. The two men fled and neighbors called 9-1-1. When police officers arrived, they saw bullet holes in Apartment 7's front door, shell casings on the stairs, and an empty gun holster.

Considering whether someone may be inside Apartment 7 who was injured or needed assistance, the officers called an ambulance and tried to make contact with anyone inside. Hearing no response, they attempted to open the door manually. When that was unsuccessful, they used a sledgehammer. That implement dented the doorknob, fractured the door, splintered the doorjamb, and overcame the deadbolt, allowing entry. From the officers' arrival to this point, ten minutes had passed.

Police opened the door and immediately smelled raw cannabis and saw loose cannabis. Springfield Police Sergeant Grant Barksdale, the responding officer in charge, turned left down a hallway which led to a bedroom. He entered the room and saw a closet large enough to fit a person. When he opened the closet door he found more cannabis. Returning to the living room, he found another large closet. He opened that door, pushed aside some hanging clothes, and found a rifle. Police also saw a money counter sitting on a living room table.

The search lasted no more than ninety seconds. After some time, Tyrone Maxwell arrived and police determined that it was his apartment. The officers sought and received a search warrant based on what they found in and outside the apartment. During the subsequent search, they found a total of two guns, more than ten pounds of marijuana, and more than $75,000 in cash.

A grand jury indicted Maxwell on three crimes: possession of marijuana with intent to distribute, possession of firearms in furtherance of a drug trafficking crime, and possession of firearms as a felon. He moved to suppress the evidence seized during the searches before and after the warrant was issued. Maxwell argued the police did not face an emergency justifying a warrantless entry.

The district court ruled against Maxwell. Maxwell entered a conditional guilty plea pursuant to the Federal Rules of Criminal Procedure preserving his objection to the suppression ruling.

"The Fourth Amendment requires all searches to be reasonable. See, e.g., *Katz v. United States*, 389 U.S. 347, 353 (1967). Maxwell offers three arguments for why and how the officers acted unreasonably: First, they had no reason to believe someone was injured inside his apartment and in need of aid. Second, it was unreasonable to use a sledgehammer to gain entry to his home. Third, any exigent circumstances evaporated when the officers first looked inside, or alternatively, once inside, the officers could not look beyond the immediate vicinity of the door.

"The Fourth Amendment has indeed drawn a firm line at the entrance to the house, and absent exigent circumstances, a warrantless entry is unreasonable. *Payton v. New York*, 445 U.S. 573, 590 (1980). One such exigent circumstance justifying warrantless entry is the need to render emergency assistance to an injured occupant. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

To enter a home on an exigency alone, police need an objectively reasonable basis for believing that someone is in need of aid and there is a compelling need to act.

"Here, police knew that shots had been fired into Apartment 7, and they saw shell casings and a gun holster nearby. The bullet holes were in Maxwell's door, indicating to police that any victim would be inside the apartment. All of this warranted further inquiry into whether there might have been a gunshot victim somewhere behind the door. It thus was not unreasonable for the police to enter.

"Once police are inside a home, the Fourth Amendment requires police to limit their search to the circumstances that justified it. Where the circumstance justifying entry is a need to render emergency aid, police can look only in those places where an injured person might be found. Of course, officers do not have to avert their eyes from any evidence in plain view when they are looking in those places. The police were searching for persons who may be injured or in need of assistance. They looked for no more than 90 seconds. They looked in two closets large enough to fit a person. Then they left. Given those events over that short time frame, the exigency did not evaporate when the officers opened the front door, and they appropriately tailored their search to that exigency.

"The Springfield police had an objectively reasonable basis for believing someone was inside Maxwell's home and in need of medical attention. They announced their presence before breaching the deadbolted door, and once inside they looked only in areas where an injured person in need of assistance may have been hiding. The search was reasonable under the Fourth Amendment and the district court properly admitted the evidence police obtained."

**READ THE COURT OPINION HERE:**
https://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2023/D11-13/C:22-2135:J:Brennan:aut:T:fnOp:N:3130190:S:0

## SEARCH AND SEIZURE: Film Crew Present at Search; Rule 37 Attack on Sentence

*Harmon v. State*, ASC, No. CR-23-160, 2023 Ark. 179, 12/7/23

Rodney Dale Harmon was convicted of multiple drug-related felonies and sentenced to forty years in prison. On direct appeal, Harmon challenged several rulings, including an issue about the presence of an HBO documentary film crew during the execution of a search warrant at his home. We affirmed. Harmon filed a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37. The circuit court denied the petition in a written order without a hearing. Harmon appeals and the Arkansas Supreme Court affirmed the circuit court.

Details of this case can be found in the opinion from Harmon's direct appeal. *Harmon v. State*, 2020 Ark. 217, 600 S.W.3d 586. Briefly, in 2015, law enforcement officers obtained a search warrant for Harmon's residence. Present during the search was an HBO film crew making a documentary called *Meth Storm*. Law enforcement seized drugs, paraphernalia, and 2 firearms. Harmon was charged with a series of drug-related offenses. Well into the case, the State informed defense counsel about the film crew's presence at the search. This began an extended discovery dispute about who was responsible—the State or defense—for obtaining the footage of the search. Ultimately, the footage could not be obtained, nor was it included in the documentary. Harmon was tried, convicted,

and sentenced to forty years' imprisonment. His sentence was affirmed on direct appeal.

Harmon argues that the presence of the HBO documentary film crew during the search of his home violated his Fourth Amendment rights as explained in *Wilson v. Layne*, 526 U.S. 603 (1999). In *Wilson*, police invited a reporter and a photographer to accompany them while executing an arrest warrant in a private home. Id. The residents of the home sued the officers in their personal capacities under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983, arguing that the officers violated their Fourth Amendment rights. *Wilson*¸ 526 U.S. at 608. The United States Supreme Court held that the "media ride-along" indeed violated the Wilsons' Fourth Amendment rights, but that the officers had qualified immunity because the illegality of such conduct was not clearly established at the time of the search.

Harmon contends that the filmmakers' similar presence at the search of his home violated his Fourth Amendment rights and article 2, section 15 of the Arkansas Constitution. He believes this is a fundamental trial error that mandates his convictions be reversed.

Upon review, the Supreme Court of Arkansas stated:

"A constitutional violation is not in itself enough to trigger application of Rule 37. *Cotton v. State*, 293 Ark. 338, 339, 738 S.W.2d 90, 91 (1987). Despite his argument, this court has consistently held that evidentiary issues, including claims that evidence may have been obtained by illegal search or seizure, are not errors of such a fundamental nature as to void the judgment. Thus, the circuit court did not clearly err by denying Harmon's petition for postconviction relief on this issue."

**EDITOR'S NOTE:** *Rule 37 pf the Arkansas Rules of Criminal Procedure allows an individual to seek a new trial or have a sentence modified if the sentence was imposed in violation of the Constitution or laws of the United States or the state of Arkansas; or that the court imposing the sentence was without jurisdiction to do so; or that the sentence was in excess of the maximum sentence authorized by law; or that the sentence is otherwise subject to collateral attack.*

**READ THE COURT OPINION HERE:**
https://casetext.com/case/harmon-v-state-2067

## SEARCH AND SEIZURE:

**Informant's Tip; Probable Cause**

*State of Minnesota v. Mosley*
SCM, No. A22-1073, 9/6/23

The Minnesota Supreme Court stated that the question in this case is whether police had probable cause to search the vehicle that respondent Mark Michael Mosley was driving. Police initiated a traffic stop after receiving a tip from an informant that a man had a firearm in the vehicle. During their search, police found a firearm in the vehicle, and the State charged Mosley with being a prohibited person in possession of a firearm. The district court granted Mosley's motion to suppress the evidence discovered in the vehicle, including the firearm, holding that police did not have probable cause to search. The court of appeals affirmed. The Minnesota Supreme Court granted the State's petition for review.

This case arises from a tip police received that a man had a firearm in a vehicle. Specifically, on March 9, 2021, an Informant reported to the Minneapolis Police Department that "he or she had personally observed a male in possession of

a firearm inside a vehicle." The Informant also reported that "this person was selling marijuana and possessing a firearm with an extended magazine." Thirty minutes after the Informant contacted the Department, police conducted a traffic stop on the vehicle the Informant described. Police ordered the driver, respondent Mosley, out of the vehicle and searched it. During the search, police found a firearm in the vehicle.

At the hearing, Sergeant Schroeder of the Minneapolis Police Department's gun unit testified. Schroeder discussed the Department's use of informants generally. He explained that an informant becomes a Confidential Reliable Informant (CRI) if they have "a proven track record of providing reliable information" to law enforcement. This "track record" differentiates a CRI from other types of informers. The Department contracts with CRI's, and CRI's are typically paid or given charging or sentencing leniency in exchange for providing information to police. And if a CRI provides false information to police, the Department terminates the relationship.

Schroeder explained that the Informant in this case was a CRI, under contract with the Minneapolis Police Department. The Department paid the Informant $300 for the information that led to Mosley's arrest. Schroeder testified that he had worked with the Informant multiple times before, and that the information from the Informant was always accurate, always timely, and reliable. Moreover, as a result of [the Informant's prior information, Schroeder explained that there were dozens of investigations, and that the information led to arrests, charges, and convictions.

Schroeder also testified to his exchange with the Informant that led to Mosley's arrest. Schroeder testified that the Informant contacted him at approximately 7:00 p.m. on March 9, 2021, and provided a contemporaneous account of what the Informant was observing. Schroeder explained that the Informant told him that the Informant "personally observed a male in possession of a firearm inside a vehicle" and that "this person was selling marijuana and possessing a firearm with an extended magazine." The Informant further described the person he or she observed as a "black male in their mid-20s," alone in a vehicle. The Informant described the vehicle to Schroeder as a "tan SUV," included the vehicle's license plate number, and gave Schroeder the address of the vehicle's location, noting that it was at the "Winner Gas Station." The vehicle's description sounded familiar to Schroeder because he had seen the vehicle at the same location days prior. Schroeder also emphasized that the location from where the Informant reported is an area known for gang activity, shootings, stabbings, assaults, and shots fired. The Informant did not provide a description of the person's clothes and did not give a height or weight estimate.

When Mosley's counsel asked Schroeder how the Informant had personal knowledge, Schroeder declined to say more, explaining that such "information would potentially disclose the informant's identity. Mosley's counsel pressed, asking, "so you won't tell us how they had that knowledge?" Schroeder replied, "that's right."

On appeal, the State contends that it established probable cause to search the vehicle that Mosley was driving under the automobile exception to the warrant requirement. Police may conduct a warrantless search of a vehicle if police have "probable cause to believe the search will result in a discovery of evidence or contraband. Probable cause is not a high standard; it requires

something more than mere suspicion but less than the evidence necessary for conviction.

Upon review, the State of Minnesota Supreme Court stated:

"The Supreme Court has described probable cause as a fluid concept—turning on the assessment of probabilities in particular factual contexts—not a neat set of legal rules. *Illinois v. Gates*, 462 U.S. 213, 232 (1983). This extends to the consideration of informant tips as part of the probable cause inquiry. And the totality-of the-circumstances analysis that traditionally has informed probable cause determinations likewise governs the analysis when an informant is at issue. Ultimately, probable cause to search exists if, given all the circumstances—including the veracity and basis of knowledge of the informant—there is a fair probability that contraband or evidence of a crime will be found in a particular place.

"Sergeant Schroeder testified that The Informant described two different actions—selling drugs and possession of a firearm. The Informant did not connect the alleged drug sales to the vehicle. For example, the Informant did not say that the Informant personally observed drugs being sold from the vehicle. But the Informant did say that the Informant personally saw the person with a firearm inside the vehicle. The possession of a firearm in a vehicle is, for probable cause purposes, sufficient to create some probability that unlawful activity is occurring. See *State v. Williams*, 794 N.W.2d 867, 872–73, 875 (Minn. 2011) (holding that a firearm exposed in a public place can give rise to an 'honest and strong suspicion' of unlawful activity, and upholding a warrantless search despite defendant's unknown permit status). The Informant's statement to Sergeant Schroeder that the Informant personally observed a male in possession of a firearm inside a vehicle therefore sufficiently connects the vehicle to potential unlawful activity.

"Officer Schroeder testified that he had worked with the Informant multiple times before, and that the Informant's information was always accurate, always timely, and reliable. Moreover, he explained that the Informant's prior information resulted in arrests, charges, and convictions. Further, this testimony is bolstered by Officer Schroeder's additional testimony that if a contracted informant, like the Informant in this case, provides information later determined to be false, the police end the relationship. Based on the Informant's track record, we hold that the Informant is reliable for our probable cause analysis.

"In this case, the Informant personally observed the potentially unlawful conduct. Sergeant Schroeder testified that the informant contacted me and told me that he or she had personally observed a male in possession of a firearm inside a vehicle. When an informant gives police information based on the informant's personal knowledge, police do not need to corroborate significant details in the tip for the tip to be sufficient to support probable cause. Corroboration of minor details is enough to 'lend credence' to an informant's tip based on personal knowledge.

"In sum, the reliability factor weighs toward probable cause in our totality of the circumstances analysis. Specifically, the Informant's personal observations, along with police corroboration of some details in the tip, support the conclusion that both the Informant and the source of the Informant's knowledge were reliable.

"Ultimately, in our totality of the circumstances analysis, we are deciding whether 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.' *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The Informant's past reliability, personal observations, and police corroboration of some of the details in the tip, when considered together, convince us that the State met its burden and established probable cause to search the vehicle that Mosley was driving."

**READ THE COURT OPINION HERE:**
https://mn.gov/law-library-stat/archive/supct/2023/OPA221073-090623.pdf

## SEARCH AND SEIZURE:

**Probable Cause; Canine Alert; Illinois Change to Cannabis Legislation**
*People v. Webb*
SCI, No. 128957, 2023 IL 128957, 11/30/23

Sergeant Jonathan Albee saw a truck pulling a partially loaded car hauler semitrailer with no driver's side markings indicating the company name or the DOT number required by federal regulations. The hauler was only partially loaded, which Albee found unusual. No registration was displayed on the trailer. During the subsequent traffic stop, Webb displayed "a state of panic" and had no organized documentation. He volunteered that he had been stopped several times and that the vehicle had been checked for drugs. Albee found that statement "bizarre." Webb gave Albee a cab card that was Illinois apportioned, but the displayed license plate was from California. Albee performed a free air sniff test with his canine partner. After a positive alert on the trailer, a search revealed an unlicensed firearm and 2736 grams of cannabis–street value $40,000.

On appeal, defendant argued that his trial counsel was ineffective for failing to move to suppress the cannabis on the basis that the positive canine alert, without more, was not sufficient to establish probable cause following changes to cannabis legislation in Illinois. Specifically, the legislature had enacted the Compassionate Use of Medical Cannabis Pilot Program Act (Act) in 2014, legalizing possession of cannabis for those licensed by the State to use it for medical purposes (410 ILCS 130/1 et seq. (West 2014)). In 2016, the legislature decriminalized the possession of less than 10 grams of cannabis (720 ILCS 550/4(a) (West 2016)). Based upon the 2014 and 2016 legislation, defendant claimed that all adult Illinoisans were allowed to possess less than 10 grams of cannabis, so that the canine alert to his semitrailer indicated only that the vehicle might contain a substance that defendant was allowed to possess. Defendant maintained that this was not sufficient to establish probable cause.

The Illinois Supreme Court affirmed Webb's conviction. "Albee relied on more than the dog sniff. The totality of the facts and circumstances justified a reasonable person in believing that the vehicle contained contraband or evidence of criminal activity."

**READ THE COURT OPINION HERE:**
https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/d00eab75-c8b7-4f82-ba9c-ecf9a658e372/People%20v.%20Webb,%202023%20IL%20128957.pdf

**SEARCH AND SEIZURE: Protective Sweep**

**United States v. Ackerman**, CA8, No. 23-1298, 12/8/23

The United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of Darren J. Ackerman's motion to suppress evidence of firearms discovered in his basement. The police had entered his home on the information that Ackerman had tried to choke his girlfriend, was possibly on drugs, and might be holding their infant daughter hostage. They found him at the bottom of the basement stairs, holding his daughter, and upon arresting and handcuffing him, they performed a protective sweep of the basement, during which they found firearms in a room adjoining the area of his arrest.

The Court stated under the "protective sweep" exception to the Fourth Amendment, officers may conduct a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. *Maryland v. Buie*, 494 U.S. 325, 327 (1990). In *Buie*, the Supreme Court established a two-prong test for determining whether a protective sweep incident to an arrest was constitutionally permissible. As an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Officers may also search areas where articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

In the *Buie* case, the Supreme Court denied suppressing evidence, due to the protective sweep exception. Officers there discovered evidence while searching a basement after the defendant surrendered at the bottom of the basement stairs, emerged from the basement, and was searched and handcuffed on the first floor. The facts here are nearly identical. The district court found that Ackerman surrendered and was arrested at the bottom of the basement stairs, walked up the stairs, and was searched and handcuffed at the top of the stairs. The officers then entered the basement, discovering firearms in a room immediately adjoining the area at the bottom of the stairs. These findings are not clearly erroneous.

The district court properly concluded that the arrest occurred at the bottom of the stairs, where Ackerman first submitted to their authority. See *United States v. Flores-Lagonas*, 993 F.3d 550, 559 (8th Cir. 2021) ("A Fourth Amendment seizure occurs 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'"), quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (an arrest occurs where there is either physical force or, where that is absent, submission to the assertion of authority.). The room with the firearms immediately adjoined the area at the bottom of the stairs. The protective sweep complied with the Fourth Amendment.

**READ THE COURT OPINION HERE:**
https://ecf.ca8.uscourts.gov/opndir/23/12/231298P.pdf

## SEARCH AND SEIZURE:

**Search by a Private Person**

*United States v. Hudson*
CA7, No. 23-1108, 11/16/23

Early in the morning on January 23, 2022, Javares Hudson walked into the Carle BroMenn Medical Center seeking emergency treatment for a gunshot wound. While an officer investigating the shooting stood outside Hudson's hospital room, medical staff discovered Hudson was concealing "something plastic" in his mouth. Medical staff spent nearly twenty minutes admonishing Hudson to spit out the item before he finally complied, revealing a device used to convert a firearm into a fully automatic weapon.

Under federal law, the Glock component that Hudson had in his mouth constitutes a "machinegun" because it is used to convert a Glock firearm into a fully automatic weapon. Hudson moved to suppress the Glock component, arguing that medical staff acted as government agents when they directed him to spit it out, thereby conducting a warrantless search in violation of the Fourth Amendment. After a hearing, the district court held that medical staff did not act as government agents. The court found that medical staff acted with the purpose of providing medical treatment to Hudson and that Smith neither induced nor encouraged medical staff to act. The court alternatively held that even if medical staff had acted as government agents, the emergency-aid exception to the warrant requirement applied. The court therefore found that suppression was not warranted and denied Hudson's motion. Hudson plead guilty but reserved the right to appeal the denial of the motion to suppress.

Upon review, the Court of Appeals for the Seventh Circuit stated:

"The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. Amend. IV. The Amendment protects citizens against unreasonable searches and seizures by the government; it does not apply to searches or seizures conducted by private individuals, no matter how unreasonable. But the government may not simply enlist private individuals to do its bidding in an attempt to avoid its Fourth Amendment obligations. Fourth Amendment protections therefore apply to a search or seizure conducted by an ostensibly 'private' individual when the individual acts as an 'instrument or agent' of the government. *United States v. Crowley*, 285 F.3d 553, 558 (7th Cir. 2002).

"The defendant bears the burden of proving that a private individual acted as an instrument or agent of the government in conducting a search. To meet this burden, a defendant must prove some exercise of governmental power over the private entity, such that the private entity may be said to have acted on behalf of the government rather than for its own, private purposes.

"There is no rigid formula for making such a determination. Rather, a court should conduct the analysis on a case-by-case basis in light of all the circumstances. We have nevertheless identified 'two critical factors' to assist courts in the analysis: 1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the private party's conduct was done with the purpose of assisting law enforcement or to further its own ends. Other useful criteria are whether the private actor acted at the request of the government and whether the government offered the private actor a reward.

"We see no clear error in the district court's finding that medical staff did not act with a purpose of assisting law enforcement. As the district court found, medical staff repeatedly expressed concerns for Hudson's safety when directing him to spit out the item and emphasized the health risks posed by the item if it stayed in his mouth.

"We are unpersuaded that it was medically unnecessary for Hudson to spit out the item: medical staff operated under the assumption that he had drugs in his mouth, and repeatedly indicated that the suspected drugs could cause him to overdose if the container they were in ruptured. Although this assumption was ultimately mistaken, it does not undermine the fact that staff viewed it medically necessary for Hudson to spit out the item to prevent a second medical emergency from eclipsing the first. They also expressed concern that the item could cause Hudson to choke or occlude his throat if he needed to be intubated, further indicating that their concerns were not merely speculative, but were related to their treatment of his 'flesh wound.'

"The Fourth Amendment does not apply to the medical staff's actions, and the district court properly denied Hudson's motion to suppress on that basis."

**READ THE COURT OPINION HERE:**
https://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2023/D11-16/C:23-1108:J:St__Eve:aut:T:fnOp:N:3132432:S:0

## SEARCH AND SEIZURE:

**Search of a Stolen Automobile**

*United States v. Vittetoe*
CA8, No. 22-2930, 11/20/23

Sergeant Aaron Hazelton of the Cole County Sheriff's Office conducted surveillance of Vittetoe at a storage unit in Jefferson City, Missouri. While operating in plain clothes, Sgt. Hazelton observed Vittetoe in possession of a White Toyota Scion at the storage unit. The car had been reported stolen according to the Jefferson City Police Department Dispatch Center ("Dispatch"). Sgt. Hazelton was familiar with Vittetoe from previous narcotics and other criminal investigations. Sgt. Hazelton called for backup. Corporal Kyle Petty, who was also aware of Vittetoe's past criminal history, soon arrived and observed Vittetoe exit the storage unit. Observing a large knife holstered on Vittetoe's hip, Cpl. Petty approached Vittetoe with his gun drawn, ordered Vittetoe to get on the ground, handcuffed Vittetoe, and read his Miranda rights to him.

With Vittetoe handcuffed, Cpl. Petty then called Dispatch and confirmed what Sgt. Hazelton had told him: the Toyota Scion was reported stolen. At some point, Vittetoe asked Cpl. Petty what he had done wrong, and Cpl. Petty told Vittetoe the vehicle was reported stolen. In response, Vittetoe denied stealing the vehicle, claiming he had a bill of sale, which his mother could bring to Cpl. Petty. Vittetoe did not have any documents with him that could show he owned or had permission to use the vehicle. Cpl. Petty tried to confirm the Scion was stolen, but he could not contact the previous owner of the vehicle because she was incarcerated.

Cpl. Petty then uncuffed Vittetoe, telling Vittetoe he was free to leave, but the car needed to stay. Cpl. Petty searched the vehicle while

Vittetoe voluntarily remained in the vicinity. Cpl. Petty quickly discovered the barrel of a rifle protruding from underneath a blanket in the backseat of the vehicle and ordered officers to again arrest Vittetoe. A further search of the vehicle revealed numerous firearms, including a shotgun, two rifles, a muzzle loader, a pistol, numerous rounds of ammunition, a large amount of methamphetamine, marijuana edibles, and prescription medications. Officers later executed a search warrant on Vittetoe's storage unit where they found additional contraband.

A federal grand jury indicted Vittetoe for unlawfully possessing a firearm as a felon and possessing methamphetamine with intent to distribute. Vittetoe moved to suppress the evidence police found in the Toyota Scion and the storage unit, challenging the constitutionality of the vehicle search. The magistrate judge recommended Vittetoe's motion to suppress be denied, determining the search was justified under the automobile exception to the warrant requirement because probable cause existed to believe the Toyota Scion was stolen when Cpl. Petty searched the vehicle. The district court denied the motion to suppress. Vittetoe then pled guilty to the charged offenses, but he reserved the right to challenge the district court's denial of his suppression motion.

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

"The Fourth Amendment of the Constitution secures persons against unreasonable searches and seizures. U.S. Const. Amend. IV. Warrantless searches are per se unreasonable unless an exception to the warrant requirement applies. The automobile exception is one such exception. This exception exists because a vehicle's ready mobility creates an exigency and because individuals have a reduced expectation of privacy in an automobile, owing to its pervasive regulation. *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996)). The automobile exception permits police to conduct a warrantless search of an automobile if, at the time of the search, they have probable cause to believe that the vehicle contains contraband or other evidence of a crime.

"Under this standard, probable cause exists, when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place. The probable cause inquiry is an objective test.

"The government bears the burden of demonstrating that the officers had probable cause at the time they searched the Toyota Scion. We agree with the magistrate judge's original conclusion and the government's argument that the search was justified under the automobile exception: the officers had probable cause because the car was reported stolen to Dispatch and Vittetoe—who had a known criminal history—was unable to produce any documentation indicating he was the rightful owner. A reasonable officer in these circumstances would believe there was a fair probability that evidence of a crime, such as proof of rightful ownership, was in the car.

"Because the vehicle was reported stolen, officers could search it for evidence of it being stolen. See *United States v. Vore*, 743 F.3d 1175, 1179 (8th Cir. 2014). Likewise, officers may consider the known criminal history of a suspect in conducting the probable cause analysis. Therefore, the officers had probable cause to search the vehicle and the district court was ultimately justified in denying Vittetoe's motion to suppress. It follows that we will not exclude the evidence obtained from

the storage unit because the warrant to search the unit was based on probable cause from the evidence obtained during the valid search of the car."

**READ THE COURT OPINION HERE:**
https://ecf.ca8.uscourts.gov/opndir/23/11/222930P.pdf

**SEARCH AND SEIZURE: Search Warrant for ICloud Account; Court Guidance and Good Faith**
*United States v. McCall*
CA11, No. 21-13092, 10/17/23

Kevin McCall, while losing in a high-stakes poker game, allegedly used his cell phone to arrange an armed robbery to reclaim his losses. Because a cell phone was directly tied to the crime, no one disputes that there was probable cause to search that device. But the police went one step further. They secured a warrant to search an iCloud account that backed up the phone twelve hours before the poker game and robbery. The iCloud warrant permitted a search of almost all the account's data with no time limitation. Based on evidence secured by that warrant, the government prosecuted and a jury convicted McCall of being a felon in possession of a firearm. Given the warrant's breadth and the account's indirect link to the crime, McCall argued that the district court should have suppressed the iCloud evidence.

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

"The court found that although Fourth Amendment standards are largely settled, their application to developing areas of technology is not. Like judges, law enforcement officers operating in good faith may struggle to apply existing standards to new circumstances. That is where the exclusionary rule's good faith exception comes in. The court explained that the government concedes that the iCloud warrant fell short in certain respects, but it argues that reasonable officers could have believed it to be valid. The court wrote that it agreed that the warrant was not so deficient in probable cause, particularity, or otherwise that it would be unreasonable for an officer to rely on it in good faith.

"McCall does not contest that the officers relied on the warrant in subjective good faith—he argues that the officers' reliance on the warrant was not objectively reasonable in three ways. "First, he contends that the iCloud affidavit was so lacking in indicia of probable cause that official belief in its existence was unreasonable. Specifically, McCall argues that because there was no sign that evidence of the robbery would be on the account, and the data was last backed up hours before the crime, it was unreasonable for Detective Rosen to believe the affidavit established probable cause to search the account. Second, he argues that the warrant was so facially deficient in its particularity that the executing officers could not have reasonably presumed it to be valid. Because the warrant requested all data, unbound by subject matter or date, McCall argues that no reasonable officer would believe the warrant was sufficiently particular. Third, as a catchall, he argues that the circumstances of the warrant and search establish that a well trained officer would have known the search was unconstitutional despite the judge's approval.

"Because courts struggle to decide how probable cause and particularity apply to the information that law enforcement collects from a cloud account, it is unsurprising that police officers might struggle as well. It is against this backdrop that we consider McCall's position that the

officers were not justified in relying on this warrant to search the iCloud account.

"The parties dispute whether there was actual probable cause to search McCall's iCloud account. McCall contends the affidavit lacked any indication that officers would find evidence of the robbery on the iCloud account. Accordingly, the affidavit failed to link the iCloud account to the crime under investigation. We will therefore assume, without deciding, that the detective lacked probable cause to search McCall's iCloud account. The question before us now is whether the defects in the affidavit were so obvious that the good faith exception should not apply. That is, McCall must establish that the iCloud warrant is based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'

"The affidavit supporting the iCloud warrant provides an obvious link between McCall's cell phone and the crime. The affidavit explains that the four victims gave sworn statements to law enforcement that McCall became increasingly angry and threatened to 'do something' about his mounting losses. The victims told law enforcement that, after making that threat, McCall 'frantically' used his cell phone to communicate with some 'unknown persons' until he eventually 'stepped outside' to 'take care of something.' After McCall knocked on the door, masked gunmen rushed into the residence, shot two poker players, and stole cash and phones. The affidavit therefore supplies sufficient indicia of probable cause that McCall used his cell phone to arrange the robbery and that the phone contained information that would identify the gunmen.

"McCall argues that the link between the iCloud account and crime is obviously too attenuated because the iCloud account was backed up twelve hours before the crime occurred. We disagree. If there is probable cause to believe that McCall summoned the gunmen to the scene to commit a robbery, then there is probable cause to believe that he had a preexisting relationship with them. It is not unreasonable to believe that such a relationship would be reflected in the data stored in his iCloud account. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. *Riley v. California*, 573 U.S. 373, 401 (2014). Despite the twelve-hour delay, the affidavit provides reason to suspect that the communications data in McCall's iCloud account would help reveal the gunmen's identities.

"We turn now to whether the warrant identified the items to be searched and seized with sufficient particularity. The Fourth Amendment requires a warrant to 'particularly' describe 'the place to be searched, and the persons or things to be seized.' U.S. Const. amend. IV. The Fourth Amendment's particularity requirement sought to remedy the evils of the general warrant, which permitted officers' exploratory rummaging in colonial America. See *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (explaining that particularity does not guard against 'intrusion per se,' but against 'a general, exploratory rummaging in a person's belongings'). Still, the requirement must 'be applied with a practical margin of flexibility, depending on the type of property to be seized,' and the property description need only be 'as specific as the circumstances and nature of activity under investigation permit.'

"Although it isn't clear how an iCloud warrant should identify the target of the search with particularity, there are generally two types of limitations that can particularize such a warrant.

The first is narrowing the search based on the subject matter of the data. For example, a warrant may limit investigators' search of communications data to only communications with known or suspected co-conspirators. The second is a temporal limitation. Officers can narrow their search by requesting data only for the time when an individual is suspected of planning or participating in criminal activity.

"A subject-based limitation may not mean a category-based limitation. For example, a warrant limiting a search to communications between a suspect and his coconspirator—a subject-based limitation—does not require that the only categories of searchable data be instant messages or emails. As we've already said, communications between individuals may be stored in various data formats, including voice memos, shared notes folders, or screenshots of prior conversations in an images folder. Criminals may even change file extensions or otherwise hide files in a format different from their native format.

"Because the same content can be stored in so many different formats, a subject-based limitation may sometimes be so broad as to be meaningless. As a practical matter, 'it will often be impossible to separate relevant files or documents before the search takes place, because officers cannot readily anticipate how a suspect will store information related to the charged crimes.' *United States v. Ulbricht*, 858 F.3d 71, 102 (2d Cir. 2017). The warrant here is a good example. The warrant authorized a search of seven categories of data: the phone's registration information, its iCloud data (including all email content, photos, documents, contacts, and calendars), Find My iPhone data, communications records, iCloud backup history, Facetime communication logs, and iTunes account information. But those categories are so broad as to allow investigators to review practically all conceivable content on the cloud account. Thus, despite a putative limitation, the warrant required Apple to turn over the entirety of the account's information.

"Given these considerations, we think the preferred method of limiting the scope of a search warrant for a cloud account will usually be time-based. By narrowing a search to the data created or uploaded during a relevant time connected to the crime being investigated, officers can particularize their searches to avoid general rummaging. Cloud or data-based warrants with a sufficiently tailored time-based limitation can undermine any claim that they are the internet-era version of a general warrant. And because data is often created or uploaded at an ascertainable date and time, it will usually be possible to segregate that data before conducting a search. Of course, the circumstances of an investigation may not require any subject- or time-limitation on a cloud warrant or may require that a sufficiently particular warrant include a subject-matter limitation. But in the mine run of cases, we think a time-based limitation will be both practical and protective of privacy interests.

"The government concedes that the warrant here fell short of the particularity requirement because it allowed a search of all the conceivable data on the account without any meaningful limitation. Accordingly, we will assume the warrant was overbroad. The issue we must decide is whether the good faith exception applies in this case to excuse the unconstitutionally over broad warrant.

"Having rejected McCall's arguments about probable cause and particularity on the face of the affidavit and warrant, we turn to McCall's argument that the detective's reliance on the warrant was objectively unreasonable because of the surrounding circumstances.

"We cannot say the detective's reliance on the iCloud warrant was objectively unreasonable. Before acting on the warrant, he received approval from several other individuals, including lawyers, that it passed factual and constitutional muster. The detective's additional steps are indicative of objective good faith. And there was no reason to think that the judge's approval of the warrant was unusual or suspect. The supervisor of the digital forensics unit testified that the iCloud warrant looked like many other cloud warrants he had reviewed throughout his career, leading him to believe there was no reason to think it was invalid.

"Additionally, the iCloud warrant derived from the cell phone warrant, which indisputably satisfied Fourth Amendment standards. Even assuming probable cause or particularity was lacking, the error was not so obvious that any reasonably well-trained officer would question the validity of the warrant.

"We agree that the warrant was not so deficient in probable cause, particularity, or otherwise that it would be unreasonable for an officer to rely on it in good faith. Accordingly, we affirm."

**READ THE COURT OPINION HERE:**
https://media.ca11.uscourts.gov/opinions/pub/files/202113092.pdf

## SEARCH AND SEIZURE:

**Stop and Frisk; Failure to Produce a Drivers License for Identification**

*Edgar v. McCabe*, CA11, No. 21-14396, 9/26/23

Edger is a mechanic in Huntsville, Alabama, where he manages the Auto Collision Doc store. One of Edger's longtime clients is Kajal Ghosh, who owns a red Toyota Camry. The Camry is primarily driven by Mr. Ghosh's wife, who works as a teacher at Progressive Union Missionary Baptist Church. One or two days before June 10, 2019, Ghosh called Edger and reported that the Camry had broken down while his wife was working at the Church. He asked Edger to fix the car and told him the keys would be waiting for him at the Church's front office.

On June 10, around 2 p.m., Edger went to the Church to pick up the keys and to inspect the Camry. He determined something was wrong with either the car's steering or its tires, and he concluded he would need to come back later with tools to fix the car. That evening, he returned to the Church with his stepson, Justin Nuby, in tow, intending to either fix the Camry on-site or to take it back to the shop for further repairs. Edger and Nuby drove a black hatchback to the Church.

After Edger and his stepson entered the Church's lot, the Church's security guard observed them and grew concerned. From here on, the facts of this case were captured by audio and visual recording devices. At about 8:05 p.m., the security guard called 911 and told dispatch: "I have two Hispanic males, messing with an employee's car that was left on the lot." He also noted that he observed them remove a tire from the car. During the 911 call, the guard identified himself as a security guard for the Church, gave his phone number, noted his employer, and gave a description of Edger and Nuby. About 30 minutes later, at 8:36 p.m., Officer Krista McCabe arrived at the Church in her patrol car.

As Officer McCabe's body camera shows, she pulled into the Church parking lot and parked in front of where Edger and Nuby were working. As she stepped out of the squad car, Edger was laying on the ground next to the car, with the Camry's tire removed. Nuby greeted Officer McCabe as she exited her vehicle and approached the Camry.

Edger continued to work, and the following conversation began:

> Officer McCabe: *What are y'all doing?*
>
> Edger: *Getting the car fixed.*
>
> Officer McCabe: *Is this your car?*
>
> Edger: *Yeah, well, it is one of my customer's.*
>
> Officer McCabe: *One of your customer's?*
>
> Edger: *Ghosh Patel, yep. I was over here earlier.*

At this point Officer McCabe gestured towards the black hatchback.

> Officer McCabe: *Whose car is that?*
>
> Edger: *That's mine.*
>
> Officer McCabe: *The black one?*
>
> Edger: *Yeah.*

Officer McCabe then watched in silence as Edger attempted to jack the Camry up. Eventually the car slipped from the jack and slammed into the ground. Immediately after the Camry slipped, Officer Perillat arrived at the scene in a squad car. He exited his car and approached on foot, positioning himself behind Edger, out of Edger's line of vision.

From here, the interaction rapidly escalated:

> Officer McCabe: *Alright. Take a break for me real fast and do y'all have driver's license or IDs on you?*
>
> Edger: *I ain't going to submit to no ID. Listen, you call the lady right now. Listen I don't have time for this. I don't mean to be rude, or ugly, but...*
>
> Officer McCabe: *Okay. No, you need to—*
>
> Edger: *I don't mean to be—*
>
> Officer McCabe: *—give me your ID or driver's license.*
>
> Edger: *No. I don't. Listen, I don't want you to run me in for nothing.*
>
> Officer McCabe: *Are you refusing me—are you refusing to give me your ID or driver's license?*
>
> Edger: *I'm telling you that if you will call this lady that owns this car—*

In the middle of Edger's sentence, as he was attempting to explain the situation to Officer McCabe, Officer Perillat seized Edger from behind. He led Edger to the side of the Camry and started handcuffing him. As Edger protested, Officer Perillat told Edger: "We don't have time for this," and, "You don't understand the law." During this time, the video shows that Edger offered his driver's license at least three times before the officers could finish handcuffing him. Eventually, the officers managed to handcuff and search Edger, and then detain him in a squad car. Throughout this process, the officers never asked Edger or his stepson for their names or addresses.

Edger was charged with obstructing governmental operations. The City of Huntsville dropped all charges relating to this incident.

After the dismissal of the charges, Edger filed a § 1983 civil rights lawsuit, alleging a false arrest in violation of his Fourth Amendment rights against unlawful searches and seizures, as well as a state law false arrest claim. The district court found that the defendants were entitled to federal and state law immunities. It reasoned that even though Edger committed no acts giving rise to actual probable cause, a reasonable but mistaken officer could nonetheless have believed his refusal to

produce physical identification was a crime, and the officers thus had arguable probable cause to make the arrest. This appeal followed.

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

"The Court stated that Mr. Edger was charged with obstructing governmental operations in violation of Alabama Code § 13A-10-2(a)(1). A person violates this section if, by means of intimidation, physical force or interference or by any other independently unlawful act, he obstructs a governmental function. Our inquiry therefore asks whether the officers had probable cause to believe Mr. Edger obstructed governmental operations in violation of this statute.

"First, the defendants argue that Mr. Edger's noncompliance and 'aggressive demeanor' obstructed Officer McCabe's investigation and provided her probable cause to arrest Mr. Edger. But "words alone fail to provide culpability under" Alabama's obstruction statute. So, Mr. Edger's statements and noncompliance without more do not begin to provide 'facts or circumstances' to support probable cause.

"Second, the defendants suggest that Mr. Edger physically threatened Officer McCabe in the moments following the Camry slipping off the jack and hitting the ground because he 'jumped up' and 'waved his hands,' among other things. But the video evidence in this case speaks for itself. The final interaction between Mr. Edger and Officers McCabe and Perillat is depicted from four separate angles on four separate cameras—two body-worn police cameras and two dash cameras. In each video, the Camry slips off the jack, slamming into the ground in front of Mr. Edger. In each, he stands up, slapping his leg, and turns to answer Officer McCabe's questions. Though he is clearly frustrated and gesturing as he speaks, his hands are empty. He stands in one spot without walking towards Officer McCabe. Looking to all the facts within the officer's knowledge at the time of the incident, no reasonable officer could have observed Mr. Edger and believed he was using 'intimidation' or 'physical force' to intentionally obstruct. Officer McCabe's investigation. Accordingly, no reasonable police officer could believe that Mr. Edger violated this portion of the obstruction statute, and therefore there was not even arguable probable cause—much less actual probable cause—to support Mr. Edger's arrest. This theory does not support the grant of qualified immunity to the officers.

"Turning now to the defendant's theory that probable cause existed to support Mr. Edger's arrest because he violated Alabama's Stop-and-Identify statute, Alabama Code § 15-5-30. The Stop-and-Identify statute allows an Alabama police officer who 'reasonably suspects' a crime is being, has been, or is about to be committed to stop a person in public and "demand of him his name, address and an explanation of his actions.

"Mr. Edger argues that he cannot possibly have violated § 15- 5-30, because it clearly delineates three things the police may ask him for: his name, his address, and an explanation of his actions. He argues nothing in the statute requires him to produce physical identification, and that Officer McCabe's question, 'Do y'all have driver's license or IDs on you?' and repeated references to 'IDs' were clearly demands for him to produce physical identification of some kind. He notes that physical identification is not one of the three enumerated things that the police may ask for under Alabama law, and that he was never asked for his name or address.

"Section 15-5-30 does not require anyone to produce an 'ID' or 'driver's license' as Officer McCabe demanded. Indeed, it does not require anyone to produce anything. Instead, it grants Alabama police the authority to request three specific pieces of information. Here, the video evidence is clear that neither Officer McCabe nor Officer Perillat asked for Mr. Edger's name or address. Additionally, Mr. Edger's objection was clearly related to the unlawful demand that he produce physical identification. Because the Alabama statute, by its plain text, does not permit the police to demand physical identification, the officers lacked probable cause and thus violated Mr. Edger's Fourth Amendment rights by arresting him.

"Three related premises lead us to this conclusion. First, the broad background rule is that the police may ask members of the public questions and make consensual requests of them, *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991), as long as the police do not convey a message that compliance is required. But the person need not answer any question put to him; indeed, he may decline to listen to questions at all and may go on his way. *Florida v. Royer*, 460 U.S. 491, 497–98 (1983).

"Finally, as noted, the Alabama statute is clear. It lists only three things that the police may ask about. This is not an issue of 'magic words' that must be uttered. There is a difference between asking for specific information: 'What is your name? Where do you live?' and demanding a physical license or ID. The information contained in a driver's license goes beyond the information required to be revealed under § 15-5-30. Further, neither the parties nor our own research can identify any Alabama law that generally requires the public to carry physical identification—much less an Alabama law requiring them to produce it upon demand of a police officer. There simply is no state law foundation for Officer McCabe's demand that Mr. Edger produce physical identification.

"Finally, the defendants also argue that Mr. Edger violated the Alabama driver's license statute, Ala. Code § 32-6-9(a), which requires those 'driving' to 'display the license, upon demand of a peace officer. The defendants argue that because Mr. Edger admitted that the black hatchback was his, that he must have driven it there and he was therefore 'driving' and subject to the requirement to display his license. The black hatchback was approximately two parking spaces away from where Mr. Edger was, and he was engaged in working on the Camry. No reasonable person could believe that Mr. Edger had the 'present ability to operate, move, park, or direct' the black hatchback from two parking spaces away and underneath another car.

"In summary, Officers McCabe and Perillat violated Mr. Edger's clearly established Fourth Amendment rights when they arrested him with neither actual, nor arguable, probable cause. Accordingly, we reverse the district court's grant of qualified immunity to the officers and remand for further proceedings."

**READ THE COURT OPINION HERE:**
https://media.ca11.uscourts.gov/opinions/pub/files/202114396.op2.pdf

**SEARCH AND SEIZURE: Stop and Frisk; Handcuffing During an Investigative Detention**
*United States v. Bonilla*
CA8, No. 22-3006, 11/20/23

On the morning of December 16, 2020, several law enforcement officers from the Missouri Sheriff's Office and the Missouri Police Department's Drug Interdiction Unit were working interdiction at the Greyhound Bus Station in Kansas City, Missouri. Dressed in plain clothes without visible badges or weapons, they waited for the bus originating from Los Angeles, California—a bus route that had previously resulted in narcotics recoveries and related arrests. When the bus arrived at 8:00 a.m., Detective Antonio Garcia had his K-9 Zeus sniff the bus's luggage compartments, and Zeus alerted on a silver suitcase.

Several minutes later, the silver suitcase was brought to the station lobby for passenger pick-up, and the detectives saw Bonilla retrieve it. Detective Collin Love approached Bonilla, identified himself as a police officer, and explained that a drug dog had alerted on his suitcase. He asked whether Bonilla was carrying any narcotics or large sums of money, and Bonilla denied carrying either. Love then asked to search the suitcase, and Bonilla said "Yeah. Search it."

For safety reasons, Detective David Middleton approached Bonilla while Love, who now had his back to Bonilla, searched the suitcase. Middleton told Bonilla that he was also a police officer, and he asked Bonilla for identification and his bus ticket. After Bonilla provided his documents, Middleton noticed that Bonilla's hands were shaking and that he could not seem to keep still. Middleton tried to engage in conversation to get him to calm down, but Bonilla had difficulty answering simple questions, and would not make eye contact. Bonilla also asked Middleton—twice—if he could visit the bus station restroom to brush his teeth. Middleton testified that he thought this request was "random" and he sensed it was an excuse to get away and discard something or to "leave police presence." He told Bonilla that he preferred him to stay and watch while his suitcase was searched, to avoid theft accusations later. Bonilla did not leave, but he remained visibly nervous and looked around, as if seeking "an avenue of escape."

Meanwhile, Love finished searching Bonilla's suitcase. He found no narcotics or contraband. Love then reapproached Bonilla and asked him for consent to search his backpack. At that point, according to Love, "there was a dramatic shift" in Bonilla's demeanor. Bonilla started shifting his weight from left to right, playing with the zipper on his jacket, and placing his hands in and out of his pockets. In contrast to when Love asked him about the suitcase, Bonilla became very nervous when asked about the backpack. Initially, he was evasive. He responded that the officers had already searched his suitcase, and "his speech became stuttered." Eventually he refused consent. Bonilla's reaction to questions about the backpack, which appeared new, made the officers increasingly suspicious. Love believed that "when someone consents to search one bag but not another, it usually means there is some type of contraband in the other bag that the person does not want officers to find." Based on his experience, he also knew that new bags were often purchased to transport narcotics, and that people sometimes transfer drugs from one of their bags to another.

When Middleton told Bonilla that a drug dog was going to sniff his backpack, Bonilla's "stuttering became thicker," and he continued shaking and looking around. At that point, Middleton believed

"that Bonilla was getting ready to either fight or run," so he placed Bonilla in handcuffs. Love took Bonilla's backpack and a minute later, Zeus alerted to the odor of narcotics on the backpack.

Bonilla was then taken to an office at the Greyhound Bus Station with his suitcase and backpack. After officers requested and received a warrant to search his backpack for narcotics, they discovered three one-kilogram packages inside the backpack that tested positive for fentanyl.

Bonilla was charged in a one-count indictment with possession with intent to distribute fentanyl. He moved to suppress the evidence seized. The district court denied the motion. Bonilla entered a conditional guilty plea. He now appeals, arguing only that because he was arrested without probable cause when officers placed him in handcuffs during an investigative stop, the evidence seized from his backpack must be suppressed as the fruit of his unlawful arrest.

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

"A law enforcement officer may conduct a brief investigatory Terry stop when they have reasonable and articulable suspicion that criminal activity is afoot. Bonilla does not challenge the officers' reasonable suspicion for the Terry stop. Instead, Bonilla argues that the investigative stop in this case became an arrest when Middleton placed him in handcuffs. And he asserts that because the officers lacked probable cause to arrest him, any evidence seized from his backpack after the unlawful arrest must be suppressed.

"Officers may use handcuffs during a Terry stop if they have some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other legitimate purpose, evaluated on the facts of each case. We have repeatedly held that police officers may reasonably handcuff a suspect during the course of a Terry stop in order to protect their safety and maintain the status quo. There was no indication that Bonilla was armed, so the question is whether the officers had a legitimate purpose for handcuffing Bonilla under the circumstances they faced.

"Here, the officers had a legitimate concern that Bonilla might try to run from the scene. When Detective Love asked for permission to search his suitcase, Bonilla was calm and cooperative, giving the impression that it was "not a big deal." However, as an additional officer started asking him questions, he showed physical signs of nervousness. Bonilla already knew that Zeus had alerted to his suitcase. Then, as Love was searching the suitcase, Bonilla asked to go brush his teeth, which would have allowed him to leave the scene with his backpack, out of the officers' sight. Middleton was immediately struck by the oddity of the request, thinking it seemed like an attempt to escape or to throw something away. Given the change in Bonilla's demeanor over a short period of time, the perceived attempt to discard contraband outside the presence of the officers, and the other factors that aligned at least in part with drug-trafficking behavior, the officers had a legitimate concern that Bonilla might try to flee.

"Because placing Bonilla in handcuffs did not convert the investigative stop into a de facto arrest, it follows that the seizure of the evidence from his backpack was not the fruit of an unlawful arrest. The denial of the motion to suppress is affirmed."

**READ THE COURT OPINION HERE:**
https://ecf.ca8.uscourts.gov/opndir/23/11/223006P.pdf

## SEARCH AND SEIZURE:

**Stop and Frisk; Independent Reasonable Suspicion of Criminal Activity**

*United States v. Lemons*
CA8, No. 22-2753, 10/19/23

On September 13, 2021, Dubuque, Iowa police officers Benjamin Goerdt and Calvin Harridge conducted surveillance of an apartment belonging to the girlfriend of wanted fugitive Christopher Williams. Williams, who had outstanding arrest warrants, had led police on a high-speed chase the day before and crashed his vehicle. He later escaped from the hospital in a car registered to his girlfriend. Police records described Williams as a six-foot-tall African American male in his twenties with a stocky build, full head of hair, and a beard that wrapped around his face.

At 12:30 a.m., the Officers parked their unmarked police vehicle half a block away from Williams's girlfriend's apartment. The apartment was located on the second floor of the building and accessible by an outside staircase. At the beginning of the Officers' 90-minute surveillance, they noticed multiple men standing on a porch at the top of the staircase, including Lemons. Lemons is a five-foot-three African American male in his twenties with a stocky build, full head of hair, and a goatee. The Officers immediately focused on Lemons due to his build and facial hair, and because he was "acting as if…[he] didn't want to be noticed."

Around 12:47 a.m., a marked squad car drove past the apartment. Lemons reacted by going inside the apartment and turning off the lights. When the squad car left, Lemons came back outside. The Officers surveilled Lemons for another hour, watching him and his colleagues move between the porch, staircase, sidewalk, and a neighboring residence. Despite their use of binoculars, the Officers testified that their surveillance was partially obscured by the apartment porch's railing, parked cars, and the darkness of the early morning.

At 1:48 a.m., the Officers drove past Lemons and his colleagues on the sidewalk to get a better look. As they passed, Lemons peeked his head over the top of a parked van and stared at the Officers. The Officers drove around the block and, after some discussion, decided that Lemons was Williams. They approached him in their vehicle intending to detain him.

At 1:50 a.m., Officer Harridge activated the police car's emergency lights in front of the apartment and Officer Goerdt exited the vehicle. Lemons immediately began to run across the street. Officer Goerdt ran after Lemons, shouting for him to stop and get on the ground. Officer Harridge followed close behind. Lemons soon yielded, dropping to his stomach in a grassy area across from the apartment. As the Officers struggled to apprehend Lemons, he repeatedly yelled that he was not Williams and resisted being handcuffed. Lemons also pushed his waist into the ground causing the Officers to suspect that he might be hiding a weapon.

By this time, Officer Gary Pape (also a Dubuque police officer) arrived at the scene. A bystander who had been with Lemons approached Officer Pape and told him that Lemons had the bystander's legally registered gun on him. Officer Pape then pulled a handgun from the front of Lemons's waistband. The Officers finally handcuffed Lemons and got him to his feet at 1:54 a.m. Once Lemons was on his feet, the Officers were able to determine that he was not Williams. Lemons was arrested for interference with official acts.

Lorenzo Devon Lemons, Sr., was charged with possessing a firearm by a prohibited person. Lemons moved to suppress the firearm, claiming the officers' mistaken belief that he was a wanted fugitive nine inches taller than him rendered the stop unreasonable. The district court denied his motion. Because reasonable suspicion of criminal activity independent of the mistaken identification justified the detention, the Eighth Circuit Court of Appeals affirmed.

"Lemons contends the Officers' mistaken identification of him as Williams was unreasonable, rendering the stop invalid. We need not decide whether the Officers had reasonable suspicion that Lemons was Williams because the Officers had sufficient independent reasonable suspicion of criminal activity to detain Lemons.

"In evaluating whether an officer has reasonable suspicion, we consider the totality of the circumstances in light of the officer's experience. *United States v. Polite*, 910 F.3d 384, 386 (8th Cir. 2018). Relevant factors include "time of day or night, location of the suspect parties, and the parties' behavior when they become aware of the officer's presence." *United States v. Dawdy*, 46 F.3d 1427, 1429 (8th Cir. 1995). Nervous, evasive behavior, and unprovoked flight are also highly pertinent. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (determining presence in a high-crime area coupled with unprovoked flight upon seeing police constituted reasonable suspicion of criminal activity).

"Here, the Officers had sufficient evidence to establish reasonable suspicion justifying Lemons's detention. First, time of the encounter. It was 12:30 a.m. when the Officers began their surveillance, and they detained Lemons at approximately 1:50 a.m. Second, the encounter took place in a high-crime area. The Officers were aware of multiple reports of subjects in that neighborhood with firearms, and the apartment Lemons freely entered was associated with an armed and dangerous fugitive. Third, Lemons's behavior when he became aware of law enforcement's presence. Upon noticing another police car, Lemons disappeared into his girlfriend's apartment, extinguished the lights, and only returned when the vehicle left. Officer Goerdt testified to the suspicious nature of this behavior.

"Moreover, Officer Harridge described Lemons's action of staring at the Officers when they conducted their own drive-by as "hypervigilant" and indicative that Lemons was watching his back. Most important is Lemons's unprovoked flight when the Officers approached on foot. Even if it only lasted a few seconds, such flight constituted the 'consummate act of evasion,' Wardlow, 528 U.S. at 124, and Lemons provided no innocent explanation for it. In Wardlow, the Supreme Court decided that unprovoked flight and presence in a high-crime area alone were sufficient to establish reasonable suspicion. Here, we have the facts present in Wardlow plus Lemons's additional furtive behavior. The totality of the circumstances established reasonable suspicion of criminal activity sufficient to detain Lemons.

"While Lemons also argues that his continued detention was unreasonable once he was on the ground and it was obvious that he was not Williams, because Lemons's initial detention was based on independent reasonable suspicion of criminal activity, the Officers' mistaken identification does not invalidate Lemons's continued detention. Furthermore, once Lemons was on his stomach, his evasive action of pushing his waist into the ground to hide the firearm and his continued failure to cooperate with the Officers justified prolonging the stop."

The Court affirmed the district court's denial of Lemons's motion to suppress the firearm.

**READ THE COURT OPINION HERE:**
https://ecf.ca8.uscourts.gov/opndir/23/10/222753P.pdf

## SEARCH AND SEIZURE: Stop and Frisk; Lack of Reasonable Suspicion

*The People of the State of Illinois v. Lozano*
SCI, 2023 IL 128609, 9/21/23

On February 20, 2018, at approximately 1:40 p.m., Chicago police officer Eulalio Rodriguez and his partner were driving southbound on Kedzie Avenue in an unmarked car.

As Rodriguez was driving, the officers happened upon Francisco Lozano, who was "running at a fast rate of speed toward Kedzie." Rodriguez noted that Lozano appeared to be holding his front pocket. He testified that he did not see Lozano committing any crime or violating any ordinance. He also acknowledged that it was raining that day and wet outside.

Rodriguez made a U-turn on Kedzie Avenue so that the officers could stop Lozano. He testified that, after he turned the car and approached Lozano, Lozano fled up the stairs of what appeared to be an abandoned building. Rodriguez pursued Lozano. He ordered him to stop and to remove both hands from his pocket. At that point, Rodriguez saw a "big bulge" in Lozano pocket. In response to the officer's command, Lozano removed his left hand from his pocket.

Rodriguez confirmed that Lozano was already running when he encountered him; Lozano did not start running once he saw the officer. Rodriguez explained that he tried to stop Lozano before he ran up the stairs to "conduct a field interview [to] ask him why he was running." The officer also wanted "to see what was the bulge," and he later asserted that the bulge could have been a weapon. According to Rodriguez, Lozano was not free to leave at that time.

Rodriguez testified that, after he handcuffed Lozano, he touched his hooded sweatshirt and felt a rectangular box. He reached inside Lozano's front pocket and recovered a wallet, two screwdrivers, and a radio. The officers then arrested him. Rodriguez acknowledged that he did not have a warrant to either search or arrest Lozano.

Lozano moved to suppress evidence arguing that when the officers stopped, detained, and searched him, they neither possessed a warrant nor saw him committing any crimes and could not reasonably suspect that he had committed or was about to commit any crimes or that he was armed and dangerous.

The Illinois Supreme Court reversed the trial and appellate courts and held that the officers lacked reasonable suspicion to stop Lozano. "The act of running in the rain while holding the front of his pocket did not provide a reasonable suspicion of criminal activity to justify an investigatory stop consistent with the Fourth Amendment."

**READ THE COURT OPINION HERE:**
https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/1fce1b83-bb51-41c2-9d58-68e3b678f669/People%20v.%20Lozano,%202023%20IL%20128609.pdf

## SEARCH AND SEIZURE:

**Vehicle Impoundment; Community Caretaking Does Not Include Potential Theft or Property Damage as Basis to Impound**

*State of Idaho v. Ramos*
ISC, No. 50470, 9/29/23

While on patrol, Deputy Sheriff Brock Katseanes discovered an unattended car parked in the parking lot of a public boat launch. The car was unlocked, and its trunk and front windows were open. Katseanes learned the car was registered to April Ramos. Katseanes was eventually joined by five additional officers and a canine to search the surrounding area for Ramos, but they were unsuccessful in locating her.

Due to his previous encounters with Ramos, Katseanes believed the car likely contained illegal drugs. The canine conducted a drug sniff; the dog did not alert during its sniff of the car's exterior. The officers subsequently impounded the car and then conducted an inventory search of it prior to having the car towed. During the inventory search, the officers found methamphetamine and drug paraphernalia.

Ramos was charged with possession of a controlled substance and possession of drug paraphernalia. She moved to suppress all evidence found during the inventory search of the car. The district court denied her motion. Ramos conditionally pleaded guilty to possession of a controlled substance but retained her right to appeal the denial of her motion to suppress. As a result of the plea agreement, the State dismissed the possession of drug paraphernalia charge. Ramos timely appealed, and the Idaho Court of Appeals affirmed. The Idaho Supreme Court reversed the district court's judgment.

The Idaho Supreme Court stated:

"When the police have lawfully impounded an automobile in carrying out their community caretaking function, they are permitted to inventory its contents. Such warrantless inventory searches, when conducted in compliance with standard and established police procedures and not as a pretext for criminal investigation, do not offend Fourth Amendment strictures against unreasonable searches and seizures. *Colorado v. Bertine*, 479 U.S. 367, 374 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 374–75 (1976).

"An inventory following impoundment is a reasonable and legitimate means to safeguard the owner's property, to prevent claims against the police for lost or stolen property, and to protect the police and others from dangerous instrumentalities that may be inside the vehicle. *Bertine*, 479 U.S. at 374; *Opperman*, 428 U.S. at 372. However, the impoundment itself must be lawful. An impoundment of a vehicle constitutes a seizure and is thus subject to the limitations of the Fourth Amendment. If the impoundment violates the Fourth Amendment, the accompanying inventory is also tainted, and evidence found in the search must be suppressed."

The Idaho Supreme Court stated that absent clear instruction from the United States Supreme Court, they declined to expand Opperman's "community caretaking" rationale to include potential theft or property damage to the vehicle as an acceptable reason to impound a vehicle for two reasons. First, the community caretaking function does not allow officers to seize individuals where no serious harm is threatened merely on a belief that the individual's decisions or actions are unsound. Community caretaking justifies a detention only if there is a present need for assistance. There is no such present need for assistance if the officer

simply believes the car might be at risk of theft or damage.

"An officer's concern that the car will be subject to theft or property damage if it is not impounded—no matter how well-founded the concern may be—is irrelevant to the analysis as to whether the decision to impound the car is reasonable under the Fourth Amendment."

**READ THE COURT OPINION HERE:**
https://isc.idaho.gov/opinions/50470.pdf

## SEARCH AND SEIZURE: Vehicle Stop; Computerized Criminal History Check

*United States v. Hunter*, CA3, No. 21-3316, 12/5/23

A traffic stop, which lasted less than eight minutes in its entirety, began like many others—with a police officer spotting minor traffic violations. On December 12, 2018, Pennsylvania State Trooper Galen Clemons stopped a rented Chrysler 300 in Ridley Township, Pennsylvania. Neither the reason for the stop nor the legality of the stop at its outset is disputed. Clemons traveled alone—without a partner or backup—and approached the car to discover two occupants: the driver, Jamar Hunter, and a front seat passenger, Deshaun Davis. After Hunter and Davis provided identification, Clemons returned to his patrol car to perform a routine license and warrant check, also known as a "CLEAN N.C.I.C." check. This check revealed that both men had valid driver's licenses and no outstanding arrest warrants. It is at this point that Hunter alleges the mission of the traffic stop ended and Clemons no longer had constitutional authority to prolong the stop.

Immediately after the routine check, Clemons performed an additional check that extended the traffic stop: a computerized criminal history check, also known as a "Triple I" check. He spent around five minutes conducting both checks in his patrol car, with the Triple I check taking approximately "a minute or two." This computerized criminal history check revealed that both Hunter and the passenger had significant criminal histories, including firearm and drug trafficking convictions.

Armed with this information, Clemons returned to Hunter's car. The officer ordered Hunter out of the car so that he could perform a Terry frisk, during which he discovered a loaded Glock-45 semi-automatic handgun in Hunter's waistband. He immediately arrested Hunter. The entire traffic stop lasted less than eight minutes.

Following his arrest, a federal grand jury indicted Hunter for possession of a firearm as a convicted felon. Hunter moved to suppress the gun seized from him during the traffic stop on the basis that Clemons' use of the Triple I check impermissibly exceeded the traffic stop's mission, and thus any evidence recovered after Clemons conducted the Triple I check should be suppressed under the Fourth Amendment.

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

"The District Court granted the suppression motion based on the following determinations: (1) Clemons lacked sufficient reasonable suspicion before conducting the criminal history check; (2) the criminal history check was unrelated to the traffic stop's mission; (3) the criminal history check prolonged the traffic stop; and (4) the criminal history check therefore impermissibly exceeded the stop's mission and violated *Rodriguez v. United States*, 575 U.S. 348 (2015) and the Fourth Amendment. The Government appealed.

"We review the question of whether the use of the criminal history check in this case was objectively reasonable and proper under *Rodriguez*. To be reasonable, a traffic stop must be justified at its inception and the officer's actions during the stop must be reasonably related to the mission of the stop itself. *Rodriguez* defines a traffic stop's mission to include completing tasks tied to the traffic infraction, such as issuing a traffic ticket, checking the driver's license and any outstanding warrants, and inspecting registration and insurance.

"In this case, the parties agree that the criminal history check does not qualify as a routine task tied to the traffic infraction, and the Government concedes that Clemons had completed the tasks specifically tied to the traffic stop when he finished the computerized N.C.I.C. driver's license and warrant checks. The Government therefore argues that the check was objectively reasonable under Rodriguez because it was part of the stop's mission due to officer safety.

"Officer safety during a traffic stop has been a longstanding and recognized concern. See, e.g., *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (recognizing 'that traffic stops are especially fraught with danger to police officers.') *Rodriguez* recognized this concern and went one step further by concluding that the 'officer safety interest stems from the mission of the stop itself.' 575 U.S. at 356. Our Court has adopted this rationale. See *Clark*, 902 F.3d at 410 ('Tasks tied to officer safety are also part of the stop's mission when done out of an interest to protect officers.').

"Rodriguez explained that an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely and implied that conducting criminal record checks could be done in furtherance of officer safety. The fact that Hunter and Davis outnumbered Clemons enhances the safety concerns we must consider. See *Maryland v. Wilson*, 519 U.S. 408, 413 (1997) ('The fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer.') Viewing the circumstances as they existed at the scene of the stop, we conclude that it was reasonable for an officer to conduct this check pursuant to safety concerns.

"Post-Rodriguez, the First, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits have all concluded that a routine criminal record check during a traffic stop is lawful under the Fourth Amendment. We agree that when 'necessary in order to complete the mission of the traffic stop safely,' a criminal history check is permissible and within the bounds of the Fourth Amendment. We therefore hold that this criminal record check— which lasted approximately two minutes and was supported by objectively reasonable safety concerns—was a negligibly burdensome officer safety precaution that falls squarely within the confines of the stop's mission according to Rodriguez."

**READ THE COURT OPINION HERE:**
https://www2.ca3.uscourts.gov/opinarch/213316p.pdf

## SUBSTANTIVE LAW:

**BB Gun as a Dangerous Weapon**
*United States v. Shelton*
CA8, No. 22-3425, 10/6/23

Police officers searched a bag belonging to Robert Shelton and found methamphetamine, drug paraphernalia, and a BB gun that resembled a handgun. As a result, Shelton pleaded guilty to possessing a controlled substance with intent to distribute it.

In calculating the recommended sentencing range under the Sentencing Guidelines, the district court applied a two-level enhancement to Shelton's base offense level because he possessed a "dangerous weapon," namely, the BB gun. Shelton maintains that the court erred in applying the enhancement.

On appeal, the Eighth Circuit affirmed, finding as follows:

"The district court did not err in applying an enhancement for possession of a BB gun because the gun qualifies as a dangerous weapon as it is capable of causing serious bodily injury. The question is not whether the BB gun closely resembled an instrument that was capable of inflicting death or serious bodily injury, because the BB gun is actually capable of inflicting death or serious bodily injury.

"As the district court explained, it might be difficult to imagine a BB gun causing death, but it can certainly cause serious bodily injury. The BB gun here contains a written warning of the danger of serious injury. BB guns can cause 'protracted impairment of a function of a bodily member' such as by blinding, see *Volk v. Ace Am. Ins. Co.*, 748 F.3d 827, 828 (8th Cir. 2014), and a victim shot with a BB gun might require medical intervention such as surgery or hospitalization."

**READ THE COURT OPINION HERE:**
https://ecf.ca8.uscourts.gov/opndir/23/10/223425P.pdf

**TESTIMONY: Officer Testifies to Identifying a Weapon; Training and Experience**
*United States v. Wilder*, CA6, No. 22-2129, 12/4/23

While on patrol in Flint, Michigan, Officer Meric Whipple and his partner responded to a call reporting shots fired. While touring the scene in their police cruiser, Whipple witnessed a man walking beside the road. Whipple saw what appeared to be a gun tucked into the man's waist with a visible extended magazine attached. As the vehicle came to a stop, the man clutched his waistband and started running. Whipple exited the vehicle and gave chase. During his pursuit, Whipple saw the man drop the gun and pick it back up before running into a house.

Residents of the home agreed to let the officers search the premises. Inside, the officers encountered four individuals, including the man who had fled from Whipple, later identified as James Wilder II. The officers noticed a ceiling attic-access door ajar, broken cobwebs hanging at its side. In the attic, the officers found a handgun lying in a bed of insulation next to the attic access. The gun matched the one Whipple had seen Wilder drop while being pursued. The officers arrested Wilder, who they later discovered was serving a term of federal supervised release.

At trial, the United States called Whipple to testify. Whipple discussed his training and experience, emphasizing the instruction he received on recognizing when someone might be armed, as well as instruction on identifying types of firearms. According to Whipple, at the time of trial, he had participated in "200 or 300" stops where guns were found, about 50 of which involved a fleeing suspect.

Wilder objected to Whipple's testimony on relevancy grounds. The government responded

that Whipple's testimony explaining his training and experience better equipped the jury to evaluate his ability to "observe and respond to the events that night." The district court overruled Wilder's objection.

Upon review, the Court of Appeals for the Sixth Circuit stated:

"Whipple's training in and experience with identifying weapons was relevant to the government's case. In the context of recognizing an individual, we have held that a person's familiarity with an individual makes it more likely that the person would properly identify that individual. See *United States v. Crozier*, 259 F.3d 503, 511 n.2 (6th Cir. 2001) ('It is material whether the witness was familiar with the defendant, because the more familiar the person, the more reliable the identification.') The same logic applies to identifying firearms. An individual familiar with what a concealed weapon looks like is better able to identify one than someone who has no familiarity. And through this testimony, Whipple demonstrated his familiarity with recognizing guns. In that way, Whipple's testimony provided the jury information from which it could gauge the credibility of his identification."

**READ THE COURT OPINION HERE:**
https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0262p-06.pdf