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Contents

AFFIRMATIVE DEFENSE: Entrapment

United States v. Lasley, CA8, No. 22-1248, 8/23/23

Darren Lasley was convicted by a jury of enticing a minor to engage in sexual activity. The charge arose from Lasley's response to an online advertisement and his dialogue with an undercover detective who posed as a fourteen-year-old girl. At trial, the district court declined Lasley's request to instruct the jury on the affirmative defense of entrapment, and Lasley appeals that decision.

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

"The Court stated that the government legitimately may investigate criminal activity through the use of undercover agents who provide an offender with an opportunity to commit an offense. *Jacobson v. United States*, 503 U.S. 540, 548 (1992). Artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Sorrells v. United States*, 287 U.S. 435, 441 (1932). But the government may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime. The affirmative defense of government entrapment guards against such overzealous prosecutions. The defense consists of two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. *Mathews v. United States*, 485 U.S. 58, 63 (1988).

"Viewed as a whole, the evidence here shows that the government presented Lasley with an opportunity to entice an arguably sexually precocious minor whose appearance was arguably more mature than average. Lasley responded to an advertisement, and broached the topic of unlawful sexual activity with a fourteen year-old girl. The

detective posing as a minor carried on a lengthy dialogue with Lasley, but did not employ the tactics most likely to warrant an entrapment instruction: pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. Without more, there was not sufficient evidence from which a reasonable jury could find that the government impermissibly induced Lasley to commit the offense. The district court therefore did not err in declining to instruct the jury on entrapment."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/08/221248P.pdf

CIVIL LIABILITY:
Attempting Ordinance; Homeless Persons

Johnson v. City of Grant Pass
CA9, No. 20-45752, 7/5/23

This case is an action challenging City of Grants Pass, Oregon, ordinances which, among other things, preclude homeless persons from using a blanket, pillow, or cardboard box for protection from the elements while sleeping within City limits.

The five municipal ordinances, described as an "anti-sleeping" ordinance, two "anti-camping" ordinances, a "park exclusion" ordinance, and a "park exclusion appeals" ordinance, result in civil fines up to several hundred dollars per violation. Persons found to violate ordinances multiple times could be barred from all City property. If a homeless person is found on City property after receiving an exclusion order, they are subject to criminal prosecution for trespass.

The Ninth Circuit affirmed the district court's ruling that the City of Grants Pass could not enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements or for sleeping in their car at night when there was no other place in the City for them to go.

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/28/20-35752.pdf

CIVIL LIABILITY:
Claim of Inadequate Investigation

Pratt v. Helms, CA8, No. 27-3002, 7/12/23

Jeffery Pratt alleged he was assaulted by his daughter's ex-boyfriend and the ex-boyfriend's cousin outside his house in Camden County, Missouri, in December 2011. He reported the assault to the Camden County Sheriff's Department the following May. After no charges were brought, Plaintiff filed a civil suit against the alleged assailants.

While pursuing his civil suit, Pratt claimed he discovered that the sheriff's department refused to investigate the assault because the assailants were related to the county's clerk of court. This refusal meant that Pratt could obtain very little evidence of the assault.

Pratt then filed an action against officials in the sheriff's department for claims under 42 U.S.C. Section 1983. He claimed that the defendants' inadequate investigation deprived him of his equal protection and due process rights. The defendants moved to dismiss Pratt's complaint for lack of standing. They also moved for summary judgment. The district court granted summary

judgment to the defendants and denied their motion to dismiss as moot. Pratt appealed.

The Eighth Circuit vacated the district court's grant of summary judgment as to Pratt's federal claims and remanded with instructions to dismiss these claims for lack of standing. The court explained that it has not yet addressed whether a crime victim has standing to sue a government official for an inadequate investigation. However, the court has held that a crime victim cannot sue a government official for failing to prosecute his assailant.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/07/223002P.pdf

CIVIL LIABILITY: Deadly Force; Officer's Insufficient Time to Observe and Process the Circumstances

Ching v. Walsh, CA8, No. 27-3157, 7/13/23

Law enforcement was dispatched to Travis Matthew Jordan's mother's residence on November 9, 2018, following a report that Jordan was present at the home, suicidal, emotionally disturbed, and interested in acquiring a gun. When the officers made contact with Jordan who was inside the house, Jordan indicated he did not want to speak with the officers and told them to leave. A few minutes later, Jordan moved through the house, entering an enclosed front porch with a knife. The officers drew their weapons and repeatedly commanded Jordan to drop the knife. Jordan, undeterred, opened the front door, stepped into the doorway, and repeatedly shouted, "Let's do this" and, "Come on, just do it."

Ignoring the officers' commands to drop the knife, Jordan came outside and began to deliberately walk toward Walsh while shouting, "Let's do this" and, "Just do it." Jordan walked toward Walsh with the knife at his side. As Jordan approached the officers, they continued to order Jordan to drop the knife. As the distance between Jordan and Walsh closed, Walsh began to back away from Jordan. Jordan kept coming and continued to refuse to stop or drop the knife. When Jordan was approximately six to twelve feet from Walsh, Walsh began shooting at Jordan. He shot without pause seven times over the course of approximately two seconds. In quick succession and without any discernible pause, Walsh fired three shots while Jordan was standing and four shots while Jordan was on the ground. Jordan subsequently succumbed to his wounds.

Ching filed this § 1983 action, alleging, among other claims, an excessive force claim against Walsh. Walsh moved for judgment on the pleadings based on qualified immunity. The district court found Walsh was entitled to qualified immunity with regard to the initial use of force but not as to the continued firing. The district court reasoned that Walsh had sufficient time and situational awareness to adjust his aim downward after Jordan fell to the ground and, based on this determination, concluded a reasonable jury could find Walsh had time to reassess the threat posed by Jordan. Walsh appeals.

Upon review, the Eighth Circuit of Appeals found:

"Our review of the videos of the incident establishes that Walsh never paused during the shooting that lasted less than two seconds, and he continued shooting for only approximately one second after Jordan fell to the ground, dropping the knife. Given the swift and continuous progression of the incident and Walsh's limited time to observe and process the circumstances,

a jury could not find Walsh had sufficient time to reassess the threat Jordan presented before he stopped firing."

The Court reversed the denial of qualified immunity and remand for entry of judgment in favor of defendant.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/07/223157P.pdf

CIVIL LIABILITY: Deadly Force; Officer's Reasonable Use of Force

Quinones v. City of Edina, MN
CA8, No. 22-2818, 8/16/23

Quinones-Rosario drove away from his home in Edina, Minnesota, on a rainy night in September 2019. Officer Nicholas Pedersen was on patrol, and he observed Quinones-Rosario driving above the speed limit and turning at a red light without signaling or stopping. Pedersen activated his siren to effect a traffic stop, but Quinones-Rosario kept driving. Pedersen called for assistance.

Quinones-Rosario drove into the neighboring city of Richfield, and several Richfield officers joined the pursuit. Quinones-Rosario continued to drive erratically, and almost crashed into another vehicle at an intersection. Officer Pedersen witnessed this near collision, and he tried unsuccessfully to stop Quinones-Rosario by bumping the back of his car. Quinones-Rosario then braked abruptly, and Pedersen stopped his car next to Quinones-Rosario's vehicle.

Quinones-Rosario got out of his car and brandished a large kitchen knife. Officer Pedersen exited his car and drew his firearm. Quinones-Rosario raised the knife above his shoulder, pointed its blade at Pedersen, and approached Pedersen.

Pedersen quickly contacted other officers by radio. He first said that QuinonesRosario had a gun, but promptly corrected himself to identify the weapon as a knife. Pedersen kept his firearm aimed at Quinones-Rosario, repeatedly directed him to drop the knife, and backpedaled away to a median in the road.

Within seconds, Officers Stariha and Schultz of Richfield arrived on the scene. They raced toward the encounter and heard Pedersen tell Quinones-Rosario to drop his knife. Quinones-Rosario put his head down and sprinted toward the officers with the raised knife.

Officer Schultz shot his taser at Quinones-Rosario with no effect. When Quinones-Rosario was approximately thirteen feet from Officer Pedersen, Pedersen and Stariha fired their guns at him. When the first shot was fired, Quinones-Rosario was running toward the officers at a speed of about 7.4 miles per hour, more than twice an average walking pace.

Meanwhile, Officer Carroll of Richfield and Officer Wenande of Edina arrived on the scene. After Officers Pedersen and Stariha fired at Quinones-Rosario, he slowed his pace, but did not drop the knife. He kept moving toward the officers, and approximately two seconds later, Officers Stariha, Schultz, Carroll, and Wenande fired their guns at him. In a period of about four seconds, the officers fired eighteen shots. Seven shots hit Quinones-Rosario, and he died from his injuries.

His widow, as trustee, sued the officers and their employing municipalities. She alleged an excessive use of force that resulted in an unreasonable seizure under the Fourth and Fourteenth

Amendments. The district court concluded that the officers did not commit a constitutional violation and granted judgment for the officers.

The Eighth Circuit affirmed.

"The 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.' Applying those principles, and viewing the facts in the light most favorable to Quinones, the officers' use of force was objectively reasonable.

"Quinones-Rosario posed an imminent threat of death or serious physical injury to the officers. He aggressively wielded a knife that he refused to drop despite repeated commands to do so. He then charged at the officers with the knife. One officer deployed a non-lethal taser against him, but it had no effect. The officers reasonably believed that Quinones-Rosario posed a serious threat to their safety. The officers fired more rounds when Quinones-Rosario survived the first round of shots and continued to approach the officers with the knife."

The court concluded that their actions were a reasonable defensive response under the circumstances.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/08/222818P.pdf

CIVIL LIABILITY:
Deadly Force; Violent Altercation
Smith v. Adgeppa, CA9, No. 20-56254, 8/30/23

Around 9:00 a.m. on the morning of October 29, 2018, Officers Edward Agdeppa and Perla Rodriguez were called to a 24-Hour Fitness gym on Sunset Boulevard in Hollywood to investigate an apparent trespasser who was causing a disturbance. Both officers activated their body cameras before entering the gym.

Once inside, an employee immediately approached the officers and reported, "We have a gentleman who's a little bit irate, and he's not listening, and he's already threatened a few members, and he's assaulted security as well." The employee led the officers to the men's locker room where the suspect, later identified as Albert Dorsey, was located. Once inside, the officers encountered Dorsey, who was standing naked near a shower area and playing music from his phone aloud. Dorsey was a very large man, approximately 6'1" tall and weighing 280 pounds. Agdeppa and Rodriguez were 5'1" and 5'5," respectively, and each weighed approximately 145 pounds. The officers repeatedly ordered Dorsey to turn off his music, put on his clothes, and leave the gym. Dorsey did not comply.

After two minutes had passed, Dorsey walked across the room, away from his clothes, to look at himself in the mirror. Both officers again instructed Dorsey to get dressed, but Dorsey continued to refuse, appearing to taunt the officers. As the officers waited, Dorsey began dancing to the music while raising his middle finger in Agdeppa's direction. At various points in the videos, two private security guards are seen in the locker room with the officers.

After more than four minutes had passed since the officers first told Dorsey he needed to leave, Agdeppa approached Dorsey to handcuff him from behind. Dorsey resisted Agdeppa's attempts to control his arms, at which point Rodriguez stepped in to help. Agdeppa eventually managed to place a handcuff on Dorsey's right wrist while Rodriguez attempted to control Dorsey's left wrist and elbow. Dorsey continued to struggle, so the officers tried various tactical maneuvers to secure Dorsey's hands. This included attempting to secure Dorsey against the wall, switching sides, and using arm, finger, and wrist locks. Despite these efforts, the officers could not get Dorsey under control.

During the struggle, Agdeppa and Rodriguez attempted to use Rodriguez's handcuffs to form a "daisy chain," which involves connecting two or more sets of handcuffs together to restrain suspects who are too combative or large to be restrained by a single set of cuffs. As the officers attempted to attach the handcuffs together, Dorsey forcefully pulled his left arm away from Rodriguez and managed to break free of her grip. The officers directed Dorsey to calm down and stop resisting, but he continued to defy them. The officers then maneuvered Dorsey against a wall while using their body weight to force his hands behind his back.

After initially pinning Dorsey to the wall, Agdeppa was able to broadcast a request for additional police units. As Dorsey became more combative, Agdeppa radioed in a request for backup units, which is a more urgent call for assistance. Approximately one minute after going "hands on" with Dorsey, Rodriguez's body camera was knocked to the ground in the struggle. Agdeppa's camera was knocked to the ground shortly thereafter, and the cameras captured minimal video of the rest of the events in question. But they continued to record audio, which included frequent bangs, crashes, shouts of pain, and other indicia of a violent confrontation.

It is undisputed that a violent struggle ensued in the locker room. Despite their further efforts, the officers were unable to control Dorsey, who became increasingly aggressive. At multiple points during the audio recordings, the officers are repeatedly heard yelling at Dorsey to "Stop!" and "Stop resisting!" Dorsey eventually managed to break free of the officers' grips, and, in response, Agdeppa unholstered his taser and held it to Dorsey's chest. Agdeppa maintains that he warned Dorsey he would use the taser if Dorsey continued to resist. When Dorsey refused to stop his violent struggling, Agdeppa cycled the taser twice into Dorsey's body. After this failed to subdue Dorsey, Rodriguez fired her taser dart into Dorsey's back and activated it for approximately five seconds. After the first attempt failed, Rodriguez activated her taser twice more without success.

The audio recordings confirm that the struggle escalated after the taser deployments. Rodriguez can be heard repeatedly demanding that Dorsey "turn around" after the tasers were cycled. The officers are then heard shouting, groaning, and crying out in pain as the sounds of banging and thrashing increase in volume and intensity. Just before Agdeppa fired the fatal shots, we hear the most intense shouts of pain from the officers amidst loud crashing noises.

The officers' accounts of this part of the story are consistent with each other. Agdeppa indicated that Dorsey did not attempt to flee but instead advanced upon the officers, punching at their heads and faces while the handcuff attached to his wrist also swung around and struck them. During the struggle, Dorsey landed blows on

Agdeppa's head and face area. Agdeppa recalled that one blow was extremely forceful and knocked him backwards into a wall, momentarily disorienting him and causing him to drop his taser on the locker room floor. After Rodriguez fired her taser for the third time, Dorsey pivoted and struck her, knocking her to the ground. The officers claim that Dorsey then straddled Rodriguez, striking her repeatedly and gaining control of her taser.

Agdeppa remembered Dorsey pummeling Rodriguez with a flurry of punches as she laid in the fetal position, trying to protect her face and head. Rodriguez believed that her life was at risk, and Agdeppa too feared that Dorsey would kill Rodriguez. It was at this point that Agdeppa fired the fatal shots. After he was shot, Dorsey was still holding one of the officers' tasers in his hand. Agdeppa claimed he warned Dorsey before shooting him, but this part of the audio recording is chaotic. One can hear a man's voice shouting something just before the shots were fired, though what is said is unclear. Whether a final warning was given is disputed and cannot be readily ascertained from the audio recordings. Immediately thereafter, Agdeppa announced over his police radio that shots had been fired and that an officer and suspect were down.

Agdeppa and Rodriguez were treated at the emergency room following the incident. Agdeppa was given sutures on the bridge of his nose and later reported being diagnosed with a concussion, which left him unable to work for six months and had further longer-lasting effects. Rodriguez recalled having a swollen left check and right jaw, abrasions on her ear and hands, and a pulled muscle behind her knee.

The Ninth Circuit held that Agdeppa's use of deadly force, including his failure to give a warning that he would be using such force, did not violate clearly established law given the specific circumstances he encountered.

In evaluating whether Dorsey posed an immediate threat to safety that would justify the use of deadly force, the court noted that it was undisputed that Agdeppa and another officer repeatedly warned Dorsey to stand down; unsuccessfully tried to use non-lethal force; and engaged in a lengthy, violent struggle in a confined space with Dorsey, who dominated the officers in size and stature and who had gained control of a taser. There was no basis to conclude that Agdeppa's use of force here was obviously constitutionally excessive. Moreover, past precedent would not have caused Agdeppa to believe that he was required to issue a further warning in the middle of an increasingly violent altercation.

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2023/08/30/20-56254.pdf

CIVIL LIABILITY: Failure to Warn; Canine Trained to Bite and Hold

A.H. v. City of Cedar Rapids
CA8, No. 22-3234, 7/24/23

Just before midnight, on August 11, 2020, a convenience store was burglarized in Cedar Rapids. Police began looking for suspects. About an hour later, they saw a Mazda parked within a mile of the robbed store. When police approached, it sped off. Police pursued it until it crashed into a tree. Five male passengers fled on foot.

Police arrested one passenger, who had a firearm. He identified two of the other passengers, who police knew often carried guns. Other officers,

including Officer Trimble, learned of the armed suspect and his identification of two other suspects. K–9 units were called to search for the remaining suspects. 2 About 1:00 a.m., Officers Bergen and Carton, both canine handlers, began searching. Five minutes later, Officer Trimble and his police dog, Ace, began searching. Ace was trained to physically apprehend an individual during a track or search by "biting and holding" until the officer instructs him to release. Cedar Rapids Police Department policy requires canine handlers to issue a verbal warning when releasing a K–9 dog, and before searching a structure or enclosure, to notify suspects that the dog will bite unless they make their presence known and surrender.

Officer Trimble did not issue any warnings. Officers Bergen and Carton each issued two warnings during their search:

> • *At 1:03 a.m., Officer Bergen, over the squad car's PA system, announced: "Cedar Rapids Police K–9, subjects in the area surrender yourself now, you will be found and bit by the dog. Cedar Rapids Police K–9, subjects in the area surrender yourself now, you will be found and bit by the dog. This is your last and final warning to surrender yourself." [Issued from about 1124 Ellis Blvd. NW]*
>
> • *At 1:03 a.m., Officer Carton gave a similar K–9 warning over his squad car's PA system. [Issued from about the intersection of I Ave. and 4th Street NW]*
>
> • *At 1:12 a.m., Officer Carton gave a similar K–9 warning over his squad car's PA system. [Issued from about I Ave. and 9th St. NW]*
>
> • *At 1:12 a.m., Officer Bergen saw an identified suspect under a car in the driveway of a residence at 1117 9th St. NW. Officer Bergen shouted a K–9 warning at the suspect. The suspect surrendered and was arrested.*

While the other officers were apprehending that suspect, Officer Trimble and Ace walked east toward 8th St. NW. Ace alerted to "fresh human odor." Ace led Officer Trimble down an alley toward the backyard of a residence at 1108 8th St. NW. At 1:13 a.m., Ace approached a metal trailer in the backyard. The trailer was about 191 feet from where the last suspect was arrested. Ace located a person—later determined to be A.H.—underneath the trailer. As trained, Ace bit A.H.'s upper arm. A.H. was arrested and transported to a hospital for treatment of his bite wounds. The hospital treated the wounds with antibiotic ointment and released A.H.

Individually and on behalf of her son A.H., Tonya Marie Adams sued Officer Nathan A. Trimble under 42 U.S.C. § 1983, alleging he used excessive force by not giving a warning while searching with a canine trained to "bite and hold." Trimble moved for summary judgment. The district court denied qualified immunity on the excessive force claim. Trimble appeals. The Eighth Circuit Court of Appeals affirmed the denial of qualified immunity.

"There is no dispute that Nathan A. Trimble did not provide a warning when he deployed Ace or when Ace alerted to fresh human odor during the search. The parties dispute whether A.H. heard the warnings from the other officers. A.H., lying underneath a trailer, testified he did not hear any warnings. Assuming the facts most favorably to A.H., he did not hear the other officers' warnings and did not have the opportunity to surrender. Defendant had fair notice from the court's

precedent that the failure to give a warning and an opportunity to surrender violated clearly established law."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/07/223234P.pdf

CIVIL LIABILITY: Off Duty Officer; Reckless and Deliberate Conduct

Rosales v. Bradshaw, CA10, No. 22-2027, 7/5/23

This case arose from events involving David Bradshaw, a sheriff's deputy who was off duty, out of uniform, and driving his personal vehicle with his child in the front passenger seat. After a vehicle being driven by Mario Rosales legally passed Bradshaw, Bradshaw decided to follow Rosales. He then declined backup assistance from another deputy, followed Rosales all the way home, blocked Rosales in his driveway, and began shouting and yelling at Rosales, all before identifying himself as law enforcement.

In response, Rosales became afraid and exited his vehicle with a legal and openly carried gun in his pants pocket, intending to protect himself and his property but also to deescalate the situation. Bradshaw, however, continued to shout and pointed his gun at Rosales. Though Rosales feared being shot, he remained calm and nonthreatening throughout the encounter. When Bradshaw eventually identified himself as law enforcement and told Rosales to put his gun back in his vehicle, Rosales complied, and the encounter wound down from there.

As a result of this incident, Bradshaw's employment was terminated, and he was convicted in state court of aggravated assault and child endangerment. Rosales then filed this action under 42 U.S.C. § 1983, alleging in part that Bradshaw violated his Fourth Amendment right to be free from unreasonable seizures. The district court granted Bradshaw's motion to dismiss, ruling that he was entitled to qualified immunity because he did not violate clearly established law when he unreasonably pointed his gun at Rosales. The critical distinguishing fact, for the district court, was that Rosales was armed.

The Tenth Circuit Court of Appeals reversed.

"Under the facts as alleged in the complaint, Bradshaw violated Rosales's constitutional right to be free from unreasonable seizures, and his egregious and unlawful conduct was obviously unconstitutional. Bradshaw is therefore not entitled to qualified immunity, and Rosales's § 1983 claim against him may proceed."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110882398.pdf

CIVIL LIABILITY: Officers Shoot Dog; Perceived as an Imminent Threat

Buschman v. Kansas City Police Department
CA8, No. 22-2815, 8/10/23

Officers John Beck and Jeffrey Lagud were dispatched to the residence of Brandee Buschmann and William Morrison on July 30, 2016. A neighbor had called police to report noises that led him to believe that a domestic disturbance was occurring at the Buschmann-Morrison home. At the scene, the neighbor told officers that he heard yelling, fighting, and breaking glass at the house next door.

To approach the suspect house, the officers walked through a dark, wooded area. The

neighbor had informed the officers that there was a dog on the property, but expressed his opinion that the dog was not likely to attack.

Given the nature of the call and the description of the property, the officers were concerned that they could be in danger. As they approached the house, Beck drew his firearm, and Lagud took out his taser.

Lagud knocked on the door. Beck was behind Lagud, approximately five feet from the door. As soon as Lagud knocked, Beck heard a dog's paws approaching the door, along with barking and growling noises. Moments later, the door opened, and a dog ran directly toward Beck.

Beck fired a shot at the dog, and the dog turned left in the direction of Lagud. Beck fired a second shot that killed the dog. Buschmann was near the door at the time, but the officers did not see her until later. On further investigation, the officers determined that the noises reported by the neighbor had come from elsewhere, so they departed the residence.

The dog owners sued and alleged that Beck committed an unreasonable seizure by shooting their dog. They also claimed that the Board's policies and customs caused Beck's allegedly unconstitutional conduct.

The district court granted summary judgment for the defendants. The court ruled that Beck was entitled to qualified immunity, and dismissed the claim against the Board on the ground that no individual officer was liable.

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

"The dog owners contend that Beck's actions violated their rights under the Fourth Amendment. Shooting a dog is a seizure of a person's effect, so the constitutional standard is reasonableness. *Andrews v. City of West Branch*, 454 F.3d 914, 918 (8th Cir. 2006). Even if an officer's actions are deemed unreasonable under the Fourth Amendment, he is entitled to qualified immunity if a reasonable officer could have believed, mistakenly, that the seizure was permissible.

"At the time of the shooting, Andrews was this court's most prominent case on the reasonableness of a dog seizure. There, this court held that an officer's alleged conduct violated the Fourth Amendment when, in the course of searching for a loose dog, he approached a backyard and shot a passive dog in an enclosed area without warning. The dog was not growling, acting fiercely, or harassing anyone. The court reasoned that an officer may not destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody.

"The situation in Andrews differs starkly from the circumstances confronted by Beck. Beck and Lagud responded to a report of a domestic disturbance that suggested violence. After Lagud knocked on the door, Beck heard sounds of a dog barking, growling, and running toward the door. Moments later the door opened, and a dog ran directly toward Beck. Given the behavior of the dog, and the failure of the owner to control the animal at the doorway, a reasonable officer could have perceived the dog as an imminent threat. Beck's firing of a first shot was reasonable. See *Bailey v. Schmidt*, 239 F. App'x 306, (8th Cir. 2007) (ruling that officers did not act unreasonably by killing dogs that either advanced on or acted aggressively toward the officers).

"The dog then turned left toward Lagud. Beck was presented with a split-second decision whether to fire again in order to protect his colleague. A video recording of the incident may suggest in hindsight that the dog was bound for the doorway of the house rather than for Lagud's body, but Beck did not have the luxury of a slow-motion replay. In the brief moment that was available for Beck to react, it was reasonable for him to conclude that the dog posed a threat to Officer Lagud. At a minimum, it was a necessarily quick decision in a gray area where officers are protected by qualified immunity."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/08/222815P.pdf

CIVIL LIABILITY: Reasonable Use of Deadly Force

Estate of De'Angelo Brown v. West
CA8, No. 22-1763, 8/10/23

De'Angelo Brown was a passenger in a car that led West Memphis Police Department (WMPD) officers on a dangerous chase. He was shot and killed when officers tried to stop the car, and his estate sued them under 42 U.S.C. § 1983 for excessive force.

An officer tried to stop a car for having improperly lit high beams. Instead of pulling over, the driver led police on a lengthy and dangerous high-speed chase. Police tried to end the pursuit using stop sticks and multiple vehicle maneuvers but were unsuccessful. Finally, after hitting a police car head on, the car stopped.

Brown sat in the passenger seat with his hands up. As an officer pulled the passenger door handle, the driver put the car in reverse. The officer's hand got stuck in the door, causing him to get dragged alongside the car. The driver then backed into a police car and rolled forward over the officer's legs. The officer on the ground started shooting at the driver, and as the car moved toward other officers, they also started to shoot. Ultimately, 14 bullets hit the driver and 3 hit Brown, killing both.

Upon review, the Eighth Circuit Court of Appeals stated:

"It is undisputed that Brown had his hands up. And we have no doubt that shooting into the car posed a substantial risk of serious bodily harm to him. But the driver had just led police on a reckless, high-speed chase, which involved swerving into oncoming traffic, hitting a police car, and resisting efforts to stop the car by other means. By the time officers started shooting, the car had run over one officer's legs and was headed toward others. All things considered, officers acted reasonably in using deadly force, and the district court didn't err in granting summary judgment."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/08/221763P.pdf

CIVIL LIABILITY: Unreasonable Use of Force; Failure to Intervene

United States v. Thau, CA8, No. 22-2701, 8/4/23

Tou Thau is one of four former Minneapolis Police Department (MPD) officers involved in the death of George Floyd. He was convicted of two counts of deprivation of rights under color of law resulting in bodily injury and death. He appealed the district court's denial of his motions for acquittal and a mistrial. On appeal, Thau argued

that there was insufficient evidence to convict him and that prosecutorial misconduct deprived him of his right to a fair trial.

The Eighth Circuit affirmed.

"The court explained that Defendant specifically argued that no reasonable jury could have found that he had the requisite mens rea to commit the crimes. The court wrote that to prove Defendant acted willfully, the Government produced evidence that Defendant knew from his training that (1) Chauvin's use of force on Floyd was unreasonable and (2) he had a duty to intervene in another officer's use of unreasonable force. The court concluded that viewing the evidence in the light most favorable to the Government, there was sufficient evidence that Defendant acted willfully on this charge.

"In regards to Defendant's second charge: his deliberate indifference to Floyd's serious medical needs, the court held that it agreed with the district court that the evidence on this count is 'not overwhelming,' but nonetheless, a reasonable jury could find that Defendant acted willfully. Ultimately, the court concluded that there was sufficient evidence for the jury to find that Defendant acted willfully on both counts and that any prosecutorial conduct did not deprive Defendant of his right to a fair trial."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/08/222701P.pdf

CONFESSIONS: Joint Trial; Non-Testifying Defendant's Confession Implicates his Co-Defendants

Samia v. United States
USSC, No. 22-196, 599 U.S. _____, 6/23/23

Adam Samia traveled to the Philippines in 2012 to work for crime lord Paul LeRoux. While there, LeRoux tasked Samia, Joseph Hunter, and Carl Stillwell with killing Catherine Lee, a local real-estate broker who LeRoux believed had stolen money from him. Lee was found dead shortly thereafter, shot twice in the face at close range.

Later that year, LeRoux was arrested by the U. S. Drug Enforcement Administration (DEA) and became a cooperating witness for the Government. Hunter, Samia, and Stillwell were arrested thereafter. During a search of Samia's home, law enforcement found a camera containing surveillance photographs of Lee's home as well as a key to the van in which Lee had been murdered. And, during Stillwell's arrest, law enforcement found a cell phone containing thumbnail images of Lee's dead body. Later, during a post arrest interview with DEA agents, Stillwell waived his rights under *Miranda v. Arizona*, 384 U.S. 436, (1966) and gave a confession. Stillwell admitted that he had been in the van when Lee was killed, but he claimed that he was only the driver and that Samia had shot Lee.

Samia, along with Joseph Hunter and Carl Stillwell, were arrested by the U. S. Drug Enforcement Administration and charged with a variety of offenses related to the murder-for-hire of Catherine Lee. The Government tried all three defendants jointly in the Southern District of New York. Prior to trial, the Government moved to admit Stillwell's post-arrest confession in which he admitted that he had been in the van in which

Lee was killed, but he claimed that Samia had shot Lee. Since Stillwell would not be testifying on his own behalf and the full confession implicated Samia, the Government proposed that the confession be introduced through the testimony of a DEA agent, who would testify to the content of Stillwell's confession in a way that eliminated Samia's name while avoiding any obvious indications of redaction. The District Court granted the Government's motion with additional alterations to conform to its understanding of this Court's Confrontation Clause precedents.

At trial, the Government's theory of the case was that Hunter had hired Samia and Stillwell to pose as real-estate buyers and visit properties with Lee and that Samia, Stillwell, and Lee were in a van driven by Stillwell when Samia shot Lee. As part of the Government's case in chief, a DEA agent testified that Stillwell had confessed to "a time when the other person he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving." Other portions of the agent's testimony recounting Stillwell's confession used the "other person" descriptor to refer to someone with whom Stillwell had traveled and lived and who carried a particular firearm. Both before the agent's testimony and again prior to deliberations, the District Court instructed the jury that the agent's testimony about Stillwell's confession was admissible only as to Stillwell and should not be considered as to Samia or Hunter.

The Government charged all three men in a multicount indictment. Samia and Stillwell were each charged with conspiracy to commit murder-for-hire; conspiracy to murder and kidnap in a foreign country; causing death with a firearm during and in relation to a crime of violence; and conspiracy to launder money. Hunter was charged with all but the money-laundering count. Thereafter, the Government tried all three men jointly in the Southern District of New York. While Hunter and Stillwell admitted that they had participated in the murder, Samia maintained his innocence.

The jury convicted Samia and his co-defendants on all counts, and the District Court subsequently denied Samia's post-trial motions. The District Court then sentenced Samia to life plus 10 years' imprisonment. Samia appealed to the Second Circuit. On appeal, and as relevant here, he argued that the admission of Stillwell's confession—even as altered and with a limiting instruction—was constitutional error because other evidence and statements at trial enabled the jury to immediately infer that the "other person" described in the confession was Samia himself.

The Second Circuit, pointing to the established practice of replacing a defendant's name with a neutral noun or pronoun in a non-testifying codefendant's confession, held that the admission of Stillwell's confession did not violate Samia's Confrontation Clause rights.

Upon review, U.S. Supreme Court Justice Clarence Thomas wrote the following:

"Prosecutors have long tried criminal defendants jointly in cases where the defendants are alleged to have engaged in a common criminal scheme. However, when prosecutors seek to introduce a non-testifying defendant's confession implicating his codefendants, a constitutional concern may arise. The Confrontation Clause of the Sixth Amendment states that, 'in all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him.' And, in *Bruton v. United States*, 391 U.S. 123 (1968), this Court 'held that a defendant is deprived of his rights under the Confrontation

Clause when his non-testifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant.' *Richardson v. Marsh*, 481 U.S. 200, 201–202 (1987).

"In this case the court must determine whether the Confrontation Clause bars the admission of a non-testifying codefendant's confession where (1) the confession has been modified to avoid directly identifying the non-confessing codefendant and (2) the court offers a limiting instruction that jurors may consider the confession only with respect to the confessing codefendant.

"Samia's position is to mandate severance whenever the prosecution wishes to introduce the confession of a non-testifying codefendant in a joint trial. But, as this Court has observed, that is 'too high' a price to pay. Joint trials have long played a vital role in the criminal justice system, preserving government resources and allowing victims to avoid repeatedly reliving trauma.

"Samia offers that the Government forgo use of the confession entirely, thereby avoiding the need for severance. But, this ignores the fact that confessions are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. And, as described above, Samia's proposal is not compelled by the Confrontation Clause.

"The Confrontation Clause ensures that defendants have the opportunity to confront witnesses against them, but it does not provide a freestanding guarantee against the risk of potential prejudice that may arise inferentially in a joint trial. Here, the Clause was not violated by the admission of a non-testifying codefendant's confession that did not directly inculpate the defendant and was subject to a proper limiting instruction."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/22pdf/22-196_p8k0.pdf

FIRST AMENDMENT:
"True Threat" of Unlawful Violence

Counterman v. Colorado
USSC, No. 27-138, 600 U.S., 6/27/23

From 2014 to 2016, Billy Counterman sent hundreds of Facebook messages to C.W., a local singer and musician. The two had never met, and C.W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts.

Some of his messages were utterly prosaic ("Good morning sweetheart;" "I am going to the store would you like anything?")—except that they were coming from a total stranger. Others suggested that Counterman might be surveilling C.W. He asked, "Was that you in the white Jeep?" and referenced "a fine display with your partner," and noted a couple of physical sightings. And most critically, a number of messages expressed anger at C.W. and envisaged harm befalling her: "Fuck off permanently." "Staying in cyber life is going to kill you." "You're not being good for human relations. Die."

The messages put C.W. in fear and upended her daily existence. She believed that Counterman was "threatening her life," "was very fearful that he was following" her, and was "afraid she would get hurt." As a result, she had trouble sleeping and suffered from severe anxiety. She stopped walking alone, declined social engagements, and canceled some of her performances, though

doing so caused her financial strain. Eventually, C.W. decided that she had to contact the authorities.

Counterman was charged under a Colorado statute making it unlawful to repeatedly make any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress, that does cause that person to suffer serious emotional distress. Colorado courts rejected Counterman's First Amendment argument. The Supreme Court vacated.

"In true-threat cases, the prosecution must prove that the defendant had some subjective understanding of his statements' threatening nature."

"The First Amendment permits restrictions upon the content of speech in a few areas, including true threats—serious expressions conveying that a speaker means to commit an act of unlawful violence. The existence of a threat depends on what the statement conveys to the person receiving it but the First Amendment may demand a subjective mental-state requirement shielding some true threats because bans on speech have the potential to deter speech outside their boundaries.

"In this context, a recklessness standard, a showing that a person consciously disregarded a substantial and unjustifiable risk that his conduct will cause harm to another, is the appropriate mental state. Requiring purpose or knowledge would make it harder for states to counter true threats, with diminished returns for protected expression."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/22pdf/22-138_43j7.pdf

MIRANDA: Claim that Individual was too Intoxicated to Waive his Miranda Rights

United States v. Outland
CA7, No. 22-1485, 7/11/23

On November 21, 2017, after confidential sources informed law enforcement officers that Jeremy Outland was involved in drug trafficking, Springfield Police Officer Daniel Weiss obtained a warrant to search Outland's person and residence for heroin and drug paraphernalia. Around 10:00 a.m., another Springfield police officer conducted a traffic stop and search of Outland. The officer discovered drug paraphernalia, read Outland his Miranda rights, and began transporting him to a Drug Enforcement Administration facility. During the drive, the officer noticed white powder in the back seat of his squad car and saw Outland collapse. Outland's face and coat were covered in a white substance, which later tested positive as heroin. The officer changed course and drove Outland to the emergency room.

Outland was unresponsive when triaged at approximately 10:46 a.m. Hospital staff began administering medications to counter the effects of his heroin overdose. A nurse noted at 10:51 a.m. that Outland was "responsive" and "alert" after receiving Narcan and Zofran. At 11:07 a.m., he passed swallowing tests for water and applesauce but was unable to swallow a cracker. Outland's condition deteriorated at 11:10 a.m. He was "very hard to arouse" and exhibited slurred speech and poor eye contact. His condition remained unchanged at 11:20 a.m. But around 11:30 a.m., Outland passed swallowing tests for water, applesauce, and a cracker. Although he continued to appear drowsy and was having apneic episodes, hospital staff noted that he was alert, awake, and oriented and that his "mentation" was "improved significantly."

At 12:13 p.m., hospital staff again described Outland as alert, awake, and oriented. They noted that he could follow commands and that his behavior was appropriate, calm, and cooperative. Hospital records reveal that he was speaking with a police officer at that time. Nonetheless, Outland remained subject to close medical observation. He was placed on a Narcan drip and awaited a bed in the intensive care unit for closer monitoring. In notes at 12:59 p.m., 1:45 p.m., and 2:30 p.m., staff continued to describe Outland as alert, awake, and oriented.

Officer Weiss arrived at the hospital around 1:00 p.m. to interview Outland. Weiss and another officer began the interview around 1:16 p.m., while Outland was still in an emergency room bed. Outland stated his name and date of birth, and Weiss read him his Miranda rights and confirmed that he understood his rights. During the interview, Outland proceeded to make several incriminating statements about trafficking in heroin. Outland was discharged two days later against medical advice.

Outland was subsequently charged with distributing and conspiring to distribute heroin. He moved to suppress his statements from the hospital interview based on the twofold contention that he was so intoxicated as to render his statement involuntary and that he was unable to voluntarily and knowingly waive his Miranda rights based upon a long list of medications he was under at the time.

The district court rejected his arguments that he was so intoxicated as to render his statement involuntary and was unable to voluntarily and knowingly waive his Miranda rights because of the medications. The Seventh Circuit affirmed the denial of his motion to suppress.

READ THE COURT OPINION HERE:
https://cases.justia.com/federal/appellate-courts/ca7/22-1485/22-1485-2023-07-11.pdf?ts=1689094968

MIRANDA: Custody; Factors

United States v. Monson
CA1, No. 21-1612, 6/26/23

The Court stated that statements made by a defendant during a custodial interrogation are inadmissible at trial unless, in advance of the interrogation, the defendant was advised that he "has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" and the defendant knowingly and voluntarily waived those rights.

"Accordingly, the need for a Miranda warning turns on whether a suspect is in custody. A two-step inquiry is used to determine whether a suspect is in custody. See *Howes v. Fields*, 565 U.S. 499, (2012). First, it must be determined whether, based on the objective circumstances surrounding the interrogation, a reasonable person would have felt free to terminate the interrogation and leave. Second, if it is determined that a reasonable person would not feel free to do so, it must then be determined whether the environment in which the interrogation occurred presented the same inherently coercive pressures as the type of station house questioning at issue in Miranda.

"Factors that we have identified previously as relevant to the custody inquiry include the setting of the interrogation, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the

suspect, and the duration and character of the interrogation. However, this is by no means an exhaustive list and a court must consider the totality of circumstances surrounding the interrogation to determine whether it was custodial. Further, those circumstances are to be evaluated objectively, not based on the subjective views harbored by either the interrogating officers or the person being questioned. Stansbury v. California, 511 U.S. 318, (1994)."

READ THE COURT OPINION HERE:
https://www.ca1.uscourts.gov/sites/ca1/files/opnfiles/21-1612P-01A.pdf

MIRANDA: Custody; Factors

United States v. Duggar, CA8, No. 22-2178, 8/7/23

Joshua Duggar challenges his conviction for receiving child pornography. He seeks to suppress incriminating statements and get a new trial.

Duggar used a computer to download hundreds of child-pornography images. Law enforcement tracked the images to a used-car dealership he owned by identifying the internet-protocol address of the computer.

Not long after, a team of federal agents arrived with a search warrant. Two walked "directly" up to Duggar, who pulled out a cell phone and said he "wanted to call his attorney." But before he could complete the call, they seized it because it "was considered evidence."

When asked whether he would like "to discuss further details" about the warrant, he said yes.

Without waiting for an explanation, Duggar blurted out, "what is this about? Has somebody been downloading child pornography?" He then let it slip that he was "familiar with" file-sharing software and had installed it on "all of" his electronic devices, including "the computer in the office."

Those statements took on a critical role at trial. And so did the metadata from his iPhone, which placed it at the dealership when the child pornography was downloaded.

Duggar wanted the statements suppressed on the ground that the agents violated his right to counsel, which he tried to invoke by mentioning a lawyer and then attempting to call one.

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

"The right to counsel at issue relates to the Fifth Amendment guarantee against self-incrimination. *McNeil v. Wisconsin*, 501 U.S. 171, (1991); see *U.S. Const. amend. V* ("No person…shall be compelled in any criminal case to be a witness against himself"). Under Miranda, certain protections attach, including a right to counsel, the moment a suspect is in custody. Here, the government argues that, even if the agents interrogated Duggar, they did not take him into custody before he incriminated himself.

"Custody includes more than just formal arrest. It also covers situations in which 'a reasonable person' in the suspect's shoes 'would consider his freedom of movement restricted to the degree associated with formal arrest.' *United States v. Muhlenbruch*, 634 F.3d 987, 995–96 (8th Cir. 2011). Everyone agrees that there was no arrest that day, but we must still consider if someone in Duggar's shoes might have reasonably thought otherwise.

Six factors guide our analysis:

> *(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest;*
>
> *(2) whether the suspect possessed unrestrained freedom of movement during questioning;*
>
> *(3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions;*
>
> *(4) whether strong-arm tactics or deceptive stratagems were employed during questioning;*
>
> *(5) whether the atmosphere of the questioning was police dominated; or,*
>
> *(6) whether the suspect was placed under arrest at the termination of the questioning.*

"The first factor, which is the most obvious and effective means of demonstrating that a suspect has not been taken into custody, weighs heavily in the government's favor. When the agents arrived, they told Duggar that they had a federal search warrant, not an arrest warrant, and that he was free to leave if he chose to do so. Later, when the agents invited Duggar to speak with them, they reiterated that he had the right to stop the questioning at any time. The agents, in other words, clearly informed Duggar that he was free to leave or decline questioning.

"It is true that the agents read him his Miranda rights, which ordinarily might leave someone with the impression they are in custody. But when Duggar signed a form acknowledging his rights, he had the agents scratch out the portion saying that he was being taken into custody. Modifying the form made it clear he was free to leave.

"The second and third factors also favor the government. Duggar sat in the front passenger seat of the agents' truck during the interview. They did not handcuff him, the doors remained unlocked, and he entered and exited the front seat of the vehicle on his own, which means he retained freedom of movement throughout the encounter. And although the agents initiated contact with Duggar, he still 'voluntarily acquiesced' to the questioning. *United States v. Griffin*, 922 F.2d at 134 (8th Cir. 1990). Indeed, he began the interview with a question of his own—has somebody been downloading child pornography?—and continued to converse with them for about an hour.

"The fourth and fifth factors, by contrast, do not move the needle much in either direction. It is true that the agents failed to follow through on their promise to 'alert' Duggar's lawyer to the search. Even so, it would not have prevented a reasonable person from terminating the interview. Nor does the fact that law enforcement assumed control of the dealership necessarily mean the interview was police dominated. *Griffin*, 922 F.2d at 1352. At least not here, when Duggar and the agents were engaged in consensual, two-way questioning.

"Finally, Duggar was not arrested at the termination of the questioning. *Griffin*, 922 F.2d at 1349. To the contrary, he ended the interview on his own and then left the dealership—hardly an option available to someone in custody.

"Viewed through Griffin's lens, we conclude that a reasonable person in Duggar's position would not have thought his freedom of movement was restricted. It follows that the admission of his statements did not violate Miranda."

READ THE COURT OPINION HERE:
http://media.ca8.uscourts.gov/opndir/23/08/222178P.pdf

SEARCH AND SEIZURE:
Affidavit Fails to Set Forth Probable Cause

United States v. Lewis, CA6, No. 22-5593, 9/1/23

Kentucky State Police officers searched Edward Lewis's laptop, cell phone, and thumb drive and found evidence of child pornography. Lewis moved to suppress the evidence, arguing that it was obtained through an unlawful search and seizure of his electronic devices. Kentucky State Police Detective Anthony Gatson's affidavit "detailed his considerable experience investigating child sexual exploitation crimes and included boilerplate language concerning such investigations." The affidavit then "set forth only the facts that" Detective Gatson believed were necessary to establish probable cause to believe that evidence, fruits and instrumentalities of violations of Kentucky's child sexual-exploitation laws were present at Lewis's home.

Those facts were: A Homeland Special Investigator (HIS) identified Edward L Lewis as a person of interest. HSI SA Minnick requested assistance with interviewing Lewis. Lewis was located at his residence. Lewis gave consent to search his laptop and cell phone. During the search, it became apparent that Lewis had used his laptop to view images of child sexual exploitation. The search based on consent was stopped and Lewis was arrested.

Based on Gatson's knowledge, experience and training, Lewis has demonstrated a pattern of criminal activity related to child pornography, and there is a reasonable likelihood that the user treats child pornography as a valuable commodity to be retained and collected, a characteristic common to many people interested in child pornography. It is, therefore, likely that evidence of the contraband remains in the user's possession.

Detective Gatson provided the state judge only one fact in support of the existence of probable cause: that a search of Lewis's laptop and cell phone had occurred. Absent additional information, such as a description of the evidence uncovered during that search, Detective Gatson's affidavit merely stated his belief that Lewis had viewed child pornography. That conclusory statement was too vague and insubstantial to establish probable cause to search Lewis's electronic devices. The search warrant that was issued based on Detective Gatson's affidavit therefore violated the Fourth Amendment's probable-cause require men

The Court concluded that conclude that the good-faith exception is inapplicable here.

"A search-warrant affidavit that states only the affiant's conclusory belief that a suspect committed a crime is a bare-bones affidavit that cannot establish probable cause to search and that precludes application of the good-faith exception to the exclusionary rule. Because the search warrant here was supported by only Detective Gatson's bare-bones affidavit, the warrant did not authorize law-enforcement officers to search or seize Lewis's electronic devices and the fruits of those searches must be excluded."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0206p-06.pdf

SEARCH AND SEIZURE: Affidavits; Probable Cause; Credibility of Waitnesses; Staleness

United States v. Alqahtani
CA10, No. 22-2007, 6/21/23

Hassan Alqahtani was convicted for illegally possessing a firearm and sentenced to 30 months in prison. The gun was discovered after Special Agent Jonathan Labuhn received a tip that Alqahtani was unlawfully in possession of a firearm, prompting Labuhn to begin an investigation. Labuhn received a search warrant and discovered the firearm at Alqahtani's home.

Alqahtani now appeals his conviction and sentence. Alqahtani argues that the warrant application failed to establish probable cause to search his residence.

In 2019, Special Agent Jonathan Labuhn received an anonymous tip from one of Alqahtani's classmates, informing Labuhn that Alqahtani was in possession of a gun. Labuhn then interviewed the tipster—a man named Randolph Vasquez, or "R.V." in written reports—who told Labuhn that Alqahtani had shown him a colored firearm that Alqahtani owned.

According to R.V., Alqahtani was "aware that he should not have a firearm" and he said that, if he were ever to get in trouble with the firearm, his girlfriend "would take possession of it and hide it for him." R.V. also stated that Alqahtani had created a list of people he wanted to kill before leaving the U.S., which included R.V. R.V. additionally claimed that he and Alqahtani went shooting together on numerous occasions, and that Alqahtani had asked R.V. if he would be willing to hold his gun during transport. Despite this request, R.V. never actually saw Alqahtani bring this firearm on one of the shooting trips.

In addition to interviewing R.V. after the tip, Labuhn investigated the residence where Alqahtani appeared to be living (referred to as the "Target Residence"). During this investigation, Labuhn spotted a car registered to Alqahtani parked in the driveway of the Target Residence, and then saw an individual who bore a resemblance to Alqahtani's driver's license photo exit the Target Residence and lock the door. Labuhn also spoke to the property management company responsible for the Target Residence and received a lease for the Target Residence, which confirmed that Alqahtani lived there with a woman later learned to be his wife, S.S.

During his investigation, Labuhn also interviewed Alqahtani's former teaching assistant, Anthony Menicucci (who went by the initials "A.M." in the reports). A.M. stated that he met Alqahtani at the Target Residence in July 2019, and while he was there, Alqahtani brought out a firearm with a colored coating. A.M. unloaded the firearm and saw that it had 9mm rounds. According to A.M., Alqahtani said that if he was ever caught with the firearm, he would claim it belonged to his wife. Finally, A.M. later told Labuhn that Alqahtani had approached him in November 2019 and expressed interest in buying an AK-47. By the time of this last incident, A.M. had received confidential human source status, and was therefore referred to as "CHS" in reference to the AK-47 discussion (rather than A.M.).

The Tenth Circuit Court of Appeals discussed the issues raised about the search warrant affidavit:

The Warrant was Based on Probable Cause
"We first consider whether the warrant application established probable cause. 'A search warrant can issue only upon a showing of probable cause,' meaning that the supporting affidavit must provide a substantial basis to

conclude that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Long*, 774 F.3d 653, 658 (10th Cir. 2014). To make this determination, the judge issuing the warrant must consider the 'veracity' and 'basis of knowledge' of persons supplying hearsay information supporting the warrant. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Moreover, the warrant application must establish a nexus between the contraband to be seized or suspected criminal activity and the place to be searched. *United States v. Rowland*, 145 F.3d 1194, 1203 (10th Cir. 1998). A magistrate judge's decision to issue a warrant is entitled to great deference from the reviewing court. *United States v. Tuter,* 240 F.3d 1292, 1295 (10th Cir. 2001). Alqahtani argues that the warrant application was insufficient because it neither established the credibility or reliability of the unnamed sources, nor established a nexus between the firearm and the Target Residence. We reject these arguments and conclude that the warrant application established probable cause that a firearm possessed by Alqahtani would be found at the Target Residence."

Credibility and Reliability of the Witnesses

"First, the supporting affidavit established the credibility and reliability of the unnamed sources—R.V., A.M., and CHS. We have previously held that a witness is made more credible when he or she has 'personally witnessed' the event. See *United States v. Jenkins*, 313 F.3d 549, 554 (10th Cir. 2002). A witness's credibility is also bolstered when his or her "information is corroborated by other information." *United States v. Sturmoski*, 971 F.2d 452, 457 (10th Cir. 1992). And a witness is made more credible when he or she has face-to-face meetings with the police, such that the witness places his or her anonymity at risk. Starting with R.V., the affidavit detailed two interviews in which R.V. described (1) what Alqahtani's handgun looked like, (2) a time when Alqahtani showed R.V. the gun and described how he got it, and (3) times when Alqahtani and R.V. would go shooting together, during which times Mr. Alqahtani asked R.V. if he would hold Alqahtani's gun during transport (although R.V. did not see the gun on any of these occasions).

"As for A.M., the affidavit described an interview in which A.M. provided a description of a firearm that Alqahtani showed him at the Target Residence matching the description of the firearm that R.V. identified with Alqahtani. These two witnesses therefore provided information that they had 'personally witnessed,' *Jenkins*, 313 F.3d at 554. They also corroborated each other's allegations, *Sturmoski*, 971 F.2d at 457, since both men provided similar testimony consistent with the gun being a handgun and it being 'colored.' Their anonymity was also placed at risk both because R.V. and A.M were both interviewed by Labuhn and provided him with at least their initials. And the record confirms that A.M. repeatedly met with Labuhn in person. Together, these details are enough to conclude that R.V.'s and A.M.'s allegations 'bore sufficient indicia of reliability.'"

Nexus Between the Firearm and the Target Residence

"Second, as to the nexus requirement, the affidavit concretely established a nexus between Alqahtani's firearm and the Target Residence. The affidavit first sufficiently established that Alqahtani resided at the Target Residence by stating that Labuhn (1) saw a car out front that was registered to Alqahtani, (2) saw a man who resembled Alqahtani's driver's license photo exit the house and lock the door behind him, (3) received a copy of the Target Residence's lease which confirmed that Alqahtani lived there, and (4) spoke to employees of the property

management company who confirmed that he lived there. This credibly linked Alqahtani to the Target Residence. There was also evidence linking the firearm to the Target Residence, since A.M. alleged that Alqahtani retrieved a firearm from a room in the Target Residence during July 2019. Together, these facts connect the firearm to both Alqahtani and the Target Residence as of July 2019."

Stale Information

"The only issue, then, is whether the passage of time between July 2019 (the date when the firearm was last seen at the Target Residence) and December 2019 (when the search was conducted pursuant to the warrant) undercut the nexus between the Target Residence and the firearm. Probable cause cannot be established if information has grown stale, i.e., if too much time has passed between the receipt of information and the issuance of the warrant. See *United States v. Schauble*, 647 F.2d 113, 116 (10th Cir. 1981). To determine whether information is stale, the nature of the alleged criminal activity and the property to be seized must be considered. Probable cause is weakened if the property to be seized can be easily transported or consumed, but this is not an issue if the affidavit properly recites facts indicating activity of a protracted and continuous nature.

"Unlike drugs or drug proceeds which are commonly moved, see *United States v. Roach*, 582 F.3d 1192, 1201–02 (10th Cir. 2009), a personal firearm is the type of evidence likely to be kept in a suspect's residence, *United States v. Jones*, 994 F.2d 1051, 1056 (3d Cir. 1993), and is likely to remain there for an extended period of time, cf. *United States v. Lester*, 285 F. App'x 542, 546 (10th Cir. 2008) (unpublished) (noting that firearm silencers are not fluid commodities and that 'owners typically keep silencers for an extended period of time'). For this reason, the passage of five months does not undercut the connection between the likely current location of the personal firearm and the residence where it was last seen, at least where the putative owner of the handgun was currently linked with the address searched. Cf. *United States v. Myers*, 106 F.3d 936, 939 (10th Cir. 1997) (information was not stale when last indication of criminal activity was five months prior). The information provided by A.M. connecting the firearm to the Target Residence was therefore not stale at the time of the warrant application."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110876243.pdf

SEARCH AND SEIZURE: Apparent Authority to Consent; Plain View

United States v. Hayes, CA8, No. 22-3247, 7/31/23

Beginning in December 2020, Melchizedek Hayes's stepfather, Michael Richards, became concerned about Hayes's mental health. Hayes exhibited paranoid behavior, began to miss work, and eventually lost his job. In April 2021, Richards filed mental health commitment papers after Hayes expressed an intent to commit suicide, but Hayes left two mental health facilities without receiving treatment.

On May 18, 2021, Hayes expressed suicidal thoughts, stating that "I may as well just blow myself up." One day later, Richards, who lived across the street from Hayes, noticed that the front door to Hayes's house was open. Richards knew that Hayes had departed the home and was not inside. He also knew from experience that it was unusual for Hayes to leave his door open.

Richards and another son entered the house, and found three Molotov cocktails, glass bottles, gasoline, and rags under a sink in a bathroom. Richards called 911 to report what he found, and explained that he believed Hayes posed a danger to himself and others. Richards also told the dispatcher that his family owned the house. When police officers arrived on the scene, Richards told them that "[o]ur family lives across the road." Richards then led the officers into the house.

Once inside, Richards directed the officers toward the bathroom where he had discovered three Molotov cocktails, gasoline, bottles, and rags. An officer photographed the items in the bathroom. The officers then asked Richards how he had access to the house. Richards explained that he owned the property through his family business. Richards stated that he entered the house to perform a "safety inspection" after Hayes made threats to burn down the house and to kill family members.

Officers continued to look through the house, and an officer found another Molotov cocktail in the kitchen. The officers seized the Molotov cocktails found in the bathroom and kitchen. Investigators determined that all four items were explosive devices. Under federal law, the term "firearm" includes "any destructive device," which includes explosive devices. 18 U.S.C. § 921(a).

Hayes plead guilty to unlawful possession of a firearm as a prohibited person. He argued that the district court erred when it denied his motion to suppress evidence seized during a search of his home.

Upon review, the Eighth Circuit Court of Appeals affirmed, concluding that there was no error in admitting the evidence. The Court found, in part, as follows:

"That officers may seize an effect without a warrant under the 'plain view doctrine' if they are lawfully present in a place to view the object, the incriminating character of the object is immediately apparent, and the officers have a lawful right of access to the object. Here, once the officers were lawfully present in Defendant's house based on his stepfather's apparent authority to consent, the officers permissibly seized the Molotov cocktails as objects in plain view.

"Hayes suggests that even if the police officers were lawfully present in his home and the incriminating character of the explosive devices was immediately apparent, the officers were required to obtain a warrant before making a seizure. But 'where the elements of the plain view doctrine are met, the fact that the officers could have left and obtained a warrant does not invalidate the justification for seizing the property.' Accordingly, the district court did not err when it concluded that the officers lawfully seized the items from Defendant's bathroom and kitchen.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/07/223247P.pdf

SEARCH AND SEIZURE:
Domestic Violence: Exigent Circumstances

Cotton v. Miller, CA8, No. 22-2872, 7/24/23

At approximately 1:30 a.m. on May 4, 2019, officers Ryan Miller and Brian Graupner were dispatched to a duplex in South Minneapolis in response to a 911 call reporting possible domestic violence. The officers received a report summarizing the content of the call through the computer system in their vehicle.

The report stated that the call came from a neighbor regarding sounds coming from an upstairs apartment where a woman lived with her boyfriend and child. The neighbor heard yelling, screaming, and noise indicating that someone was being thrown around in the upstairs apartment.

The officers arrived at the duplex approximately ten minutes after the 911 call. As they approached the building, Miller believed he could hear children's voices that sounded playful. Graupner believed that he heard indistinguishable yelling.

Miller approached the front exterior door to the duplex, announced the officers' presence, and repeatedly kicked and knocked on the door. The downstairs resident who made the 911 call eventually opened the front door. She told the officers that she had heard screaming, screeching, and thuds coming from the upstairs apartment. She also told the officers that the voices sounded like a woman or a child, but that she could not discern what was said. At that point, the officers did not hear noise coming from upstairs.

Miller ascended the stairs to the second-floor apartment and said, "open the door, it's the police." Benedda Cotten asked from behind a closed door why Miller was there. Miller responded that "I'll force entry if I need to because I'm investigating a possible domestic." Terry Davis then yelled from behind the closed door, "a possible domestic, for what?" Miller demanded that Cotten and Davis open the door. Cotten stated that nobody inside the apartment was hurt, and Davis asked why the officers were there. Graupner then yelled at Cotten and Davis to open the door, or he would kick it in.

Nearly two minutes after the conversation began, Davis cracked open the front door. Miller commanded Davis to back up, and the officers entered the apartment. The officers then ordered Davis to face a wall in the apartment; when he did not comply, Miller placed him in handcuffs. Cotten asked the police why they had entered the apartment. She and Davis repeatedly denied any domestic violence. Graupner walked through the apartment and saw that nobody in the residence was harmed.

Cotten and Davis sued police officers Miller and Graupner under 42 U.S.C. § 1983. They claimed that the officers violated the Fourth Amendment by making a warrantless entry to the apartment occupied by Cotten and Davis. The district court granted summary judgment to Plaintiffs and Defendants appealed. The Eighth Circuit reversed.

"Warrantless searches of a home are presumptively unreasonable under the Fourth Amendment, *Michigan v. Fisher*, 558 U.S. 45, (2009), but the warrant requirement is subject to certain exceptions. One exception permits police officers to enter a home without a warrant if the officers act with probable cause to believe that a crime has been committed and an objectively reasonable basis to believe that exigent circumstances exist. *Radloff v. City of Oelwein*, 380 F.3d 344, (8th Cir. 2004). 'One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury.' *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

"Miller and Graupner argue that the 911 call and conversation with the downstairs neighbor established probable cause that domestic violence had occurred in the upstairs apartment. They maintain that exigent circumstances existed because the officers were unable to confirm the safety of potential victims who remained inside the apartment with the putative suspect.

"Probable cause exists when 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). Here, the officers were dispatched to the scene in response to a report of domestic violence. The report received by the officers explained that the 911 call came from a neighbor who thought 'abuse' was occurring, and heard a 'verbal argument,' 'someone being thrown around,' and 'yelling and screaming' in the upstairs apartment. The neighbor stated that a woman, her boyfriend, and a child lived in the apartment.

"When the officers arrived, they spoke with the downstairs neighbor, who confirmed the information in the report, and told the officers that she heard 'really, really aggressive' screaming, screeching, and thuds coming from the upstairs apartment. She also told the officers that the screaming and screeching sounded like it came from a woman or child. Although officers heard the sounds of a child acting playfully when they arrived, this innocent noise did not require them to disregard the report of a witness that she heard alarming sounds ten minutes earlier. Under the totality of the circumstances, the information presented to the officers established probable cause to believe that domestic violence recently had occurred in the apartment of Cotten and Davis.

"The circumstances also created an exigency that justified the officers' warrantless entry. Miller and Graupner arrived at the scene approximately ten minutes after the neighbor called 911. The officers had been informed that sounds of distress were coming from a woman or child. And they were told that a man occupied the apartment with a woman and child. The officers had no reliable information that anyone had departed the upstairs apartment during the short period between the 911 call and their arrival. Under those circumstances, it was reasonable for the officers to believe that a woman or child in the upstairs apartment was a victim of domestic violence, and was injured or threatened with future injury.

"The officers then spoke to Cotten and Davis through a closed door. Although Cotten told the officers that nobody inside the apartment was injured, an officer need not take a putative victim's statement at face value when assessing whether a suspect presents an ongoing threat to the victim. See *United States v. Bartelho*, 71 F.3d 436, (1st Cir. 1995).

"We have recognized that 'domestic disturbances are highly volatile and involve large risks.' *United States v. Henderson*, 553 F.3d 1163, (8th Cir. 2009). With probable cause that domestic violence recently occurred in the apartment, a reasonable officer was not required to deem a denial through a closed door sufficient to dispel the concern that a potential victim was injured or threatened with future harm.

"The officers also reasonably could have believed that exigent circumstances existed because the putative suspect remained in the residence with a potential victim. See *Tierney v. Davidson*, 133 F.3d 189, (2d Cir. 1998). Cotten and Davis argue that the presence of a domestic violence suspect in a residence does not by itself create exigent circumstances. To be sure, this court held in *Smith v. Kansas City Police Department*, 586 F.3d 576 (8th Cir. 2009), that officers could not enter a residence without a warrant to arrest a domestic violence suspect after the suspect had relocated to a place where the alleged victim was not present.

"The arrest of a domestic violence suspect does not create exigent circumstances justifying a warrantless entry if there is no reason to believe that the suspect presents a danger to others at the location. The officers here, however, had reasonable grounds to believe that a domestic violence suspect was still inside the home with a putative victim. Based on the 911 call and the report of the downstairs neighbor, it was reasonable to infer that the suspect posed a threat to a victim. The location of the entry was the same place where alleged abuse had occurred ten minutes earlier.

"Under the totality of the circumstances, a reasonable officer in the position of Miller and Graupner could have concluded that entry was necessary to provide assistance to a victim who was already injured, or to prevent future harm to a potential victim. The entry thus did not violate the Fourth Amendment rights of Cotten and Davis. As such, the officers were entitled to summary judgment."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/07/222872P.pdf

SEARCH AND SEIZURE:
Exigent Circumstances; Protective Sweep; Consent Search

United States v. Williams
CA8, No. 22-3023, 8/16/23

A 911 caller reported that someone in a nearby apartment had just shot a gun from a balcony. The caller said the unit number was 32 and described the shooter as a man in a wheelchair. It so happens that the occupant of that apartment was Cornell Williams, who matched the description.

Upon their arrival 20 minutes later, officers confirmed the 911 caller's account and talked to other witnesses. One implied that multiple people could be inside.

The officers approached Apartment 32 cautiously with their guns drawn. There was initially no response when they knocked on the door, but Williams answered about a minute later. Once he did, he began rolling his wheelchair backward. The officers entered the apartment to pat him down, but they found nothing. One then asked for permission to conduct a quick sweep of the unit to make sure no one else was there. Williams replied, "yes ma'am. You can do whatever you want."

Once the sweep of the surrounding rooms was complete, Williams complained about some sketchy characters that he had seen hanging out near the trash cans below his balcony. One of the officers walked over to get a better look and spotted a spent shell casing in plain view. Given the report of earlier gunfire, the discovery of the shell casing led to more questions. Williams denied having a gun and added that he could not explain how the shell casing ended up on the balcony. In the process, he admitted that, as a convicted felon, he could not possess either.

Williams finally confessed to being the shooter after the officers mentioned a search warrant. He also admitted that he hid the gun in a kitchen cabinet. At his direction, they opened the cabinet and retrieved it.

The government charged Williams with illegally possessing a firearm as a felon. After the district court denied his motion to suppress the evidence they found, he conditionally pleaded guilty. He now appeals.

Upon review, the Eighth Circuit Court of Appeals started with the pat down. Williams views it as constitutionally problematic because the officers entered his apartment without a warrant.

"Entering a home without a warrant to conduct a search is presumptively unreasonable under the Fourth Amendment. See *Kentucky v. King*, 563 U.S. 452, 459 (2011). The key word is presumptive: there are exceptions. One of them is for 'exigent circumstances,' *United States v. Vance*, 53 F.3d 220, 222 (8th Cir. 1995), which allows officers to conduct a search if they have an 'objectively reasonable' concern 'for the safety of themselves or others.'

"Consider the situation the officers faced here. There were multiple eyewitnesses who said that someone in a wheelchair in Apartment 32 had fired a gun. See *Omaha*, Neb., Mun. Code § 20-196 (prohibiting the discharge of an instrument which releases a projectile by means of an explosive charge in the city). When Williams finally answered the door, the officers were face-to-face with a man who matched the description of the shooter.

"Now consider their options. They could have stood at the door and questioned a potentially armed suspect—someone who minutes before had allegedly fired a gun from his balcony. They could have retreated and applied for a warrant, which would have left other occupants of the building and anyone inside Williams's apartment in potential danger. Or they could do what they did here: enter for the limited purpose of patting him down for a weapon before questioning him. See *United States v. Valencia*, 499 F.3d 813, 816 (8th Cir. 2007) (explaining that officers could enter an apartment after a shots-fired call to discern if the shooter remained inside). The Fourth Amendment allowed them to avoid further danger and ensure their own safety first. *Lange v. California*, 141 S. Ct. 2011, 2017 (2021); see *United States v. Vance*, 53 F.3d 220, (8th Cir. 1995), (explaining that officers are not required to alleviate danger by "leaving the area").

"Another exception to the warrant requirement covers just about everything that happened next. First, when the officers asked Williams whether they could 'look' around 'to make sure there's nobody else in the apartment,' he replied, 'yes ma'am. You can do whatever you want.' Based on that reply, he consented to at least a protective sweep of the apartment. See *Schneckloth v. Bustamonte*, 412 U.S. 218,(1973) (explaining the 'well-settled' rule that consent negates the need for a warrant under the Fourth Amendment); *United States v. Alatorre*, 863 F.3d 810,(8th Cir. 2017) (describing a protective sweep as a quick and limited search of a premises conducted to protect the safety of police officers or others (quoting *Maryland v. Buie*, 494 U.S. 325, (1990)). Second, after Williams blurted out that there had been suspicious activity outside, it was reasonable for the officers to believe that Williams had provided consent to look there.

"Particularly after he told one of the officers just moments before that she could do whatever she wanted. The officer was then free to seize the spent shell casing that was in plain view on the balcony. See *Coolidge v. New Hampshire*, 403 U.S. 443, ('Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate.') Third, consent extended to the retrieval of the gun itself after Williams confessed to 'firing the shot' and admitted that the gun was in a kitchen cabinet. After all, he said 'yes' when the officers asked him to move away 'so they could grab it,' and then told

them its exact location when they had trouble finding it. It is hard to imagine a clearer instance of consent through words and actions.

"We accordingly affirm the judgment of the district court."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/08/223023P.pdf

SEARCH AND SEIZURE:
Inventory of Vehicle; Eighth Circuit Provides Guidance in Inventory Searches

United States v. Nielsen
CA8, No. 22-2965, 7/18/23

In the early evening of December 21, 2020, Sarpy County Sheriff's Deputy Earl Johnson was conducting routine patrol in an industrial area when he observed a man standing in a dumpster outside of a closed Sherwin-Williams flooring business. Finding this suspicious, Deputy Johnson notified Sarpy County Communications and decided to investigate further.

As Deputy Johnson exited his patrol cruiser, he noticed a green Mazda pickup truck parked perpendicular to the dumpster, blocking access to it. Deputy Johnson approached the dumpster, asked the man to step out, and requested the man's identification. After exiting the dumpster, the man presented a Nebraska driver's license identifying him as Scott Joseph Nielsen. Deputy Johnson then ran Nielsen's information through Sarpy County Communications and discovered that Nielsen had an active felony-drug warrant. Deputy Johnson informed Nielsen of this discovery and asked who owned the vehicle. Nielsen told him that it belonged to a friend.

Subsequently, Deputy Johnson handcuffed Nielsen and searched his person, recovering a multi-tool flashlight and approximately $2,400 in cash. As Deputy Johnson counted the money, he called a canine handler to the scene because he "believed there was going to be illegal narcotics in the vehicle based on the arrest warrant and the large amount of cash that was found on Mr. Nielsen that was bundled in several different bundles." Deputy Johnson then placed Nielsen in his patrol cruiser.

After securing Nielsen, and while waiting for the canine handler to arrive, Deputy Johnson turned his attention to the vehicle. Deputy Johnson shined his flashlight into the windows, observing what he thought to be "burglary style tools" and other suspicious items. With other officers, Deputy Johnson then discussed the possibility of contacting the vehicle's registered owner, Jessica Moran, to pick it up. But Deputy Johnson had reservations about this given that Moran lived at an address approximately 25-30 minutes away. Eventually, Sarpy County Sherriff's Deputy Jason Jones arrived on the scene with his K-9. Deputy Jones walked the K-9 around the vehicle several times, but the dog did not alert.

At this point, Deputy Johnson heard Nielsen's cellphone ringing inside the vehicle and returned to ask Nielsen if he wanted his phone. Deputy Johnson also asked Nielsen if there were any keys he needed from his keychain because the officers were "most likely" going to tow the vehicle; however, Deputy Johnson was still considering contacting Moran. Deputy Johnson inquired as to whether Nielsen had Moran's phone number saved in his phone. Nielsen responded that he did and confirmed that he would like his phone from the vehicle. Deputy Johnson then entered the vehicle to retrieve Nielsen's phone, and, after seeing the state of the vehicle's interior, decided

to tow it per Sarpy County Sheriff's Department (SCSD) policy.

Specifically, Section III.A.2. of the policy provides, in relevant part, that "[d]eputies are required to tow motor vehicles for the following reasons: a) [t]he driver is taken into custody." The policy also contains limited exceptions, one of which allows officers to release the vehicle "to another individual [whose] name appears on the registration...provided that individual is on scene or can respond to the scene." Importantly, however, this exception is at the officer's discretion. Deputy Johnson ultimately exercised his discretion in towing the vehicle without first contacting Moran.

After deciding to tow the vehicle, Deputy Johnson began an inventory search assisted by Deputy Jones. To ensure officer safety and to guard SCSD against claims of loss, SCSD policy requires officers conducting inventory searches to search "all areas of the vehicle, including the trunk" as well as "all containers within the vehicle, open or closed…for valuable items." The officers must then document any valuable items on a "Tow/Impound Form" and any potential contraband on an "Evidence/ Property Form."

As Deputy Johnson inventoried the passenger side of the vehicle, he found a black leather binoculars case in the passenger seat. Because Deputy Johnson thought that the case contained "an item of value," he opened it and found two plastic bags containing suspected methamphetamine. The officers then continued the inventory. Pursuant to policy, Deputy Jones catalogued all potentially valuable items on the Tow/Impound Form, for example, "1 - remote start kit in box (passenger seat),…1 - ratchet straps (trunk/cargo area)," etc. Once the officers completed the inventory, an SCSD investigator arrived and documented potential contraband on the Evidence/Property Form, listing, for example, "Ziploc bag containing white crystalsuspect meth," "new box of 200 Ziploc type bags," $11,621.36 in U.S. currency, etc. Deputy Johnson then transported Nielsen to jail for booking while Deputy Jones towed the vehicle. Moran later testified that none of the officers attempted to contact her regarding the vehicle prior to towing it.

Nielsen was eventually charged with possession with intent to distribute methamphetamine. Nielsen subsequently filed a motion to suppress, alleging that: the search was not supported by probable cause; the inventory search was a pretext for an investigatory search; law enforcement lacked the authority to tow the vehicle; and Deputy Johnson exceeded the scope of any permissible inventory search when he opened the binoculars case. The government responded by arguing that the officers conducted a lawful inventory search pursuant to SCSD policy.

Upon review, the Eight Circuit Court of Appeals stated:

"The Fourth Amendment guards against unreasonable searches and seizures. U.S. Const. Amend. IV. Searches conducted without a warrant are considered per se unreasonable subject only to a few specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). Inventory searches are one such exception. The purposes of an inventory search, after all, are to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Colorado v. Bertine*, 479 U.S. 367, (1987). In this capacity, officers are not investigating a crime, but rather, are performing an administrative or caretaking function. *South Dakota v. Opperman*,

428 U.S. 364, 369 (1976). Of course, an inventory search must still be reasonable under the totality of the circumstances and may not be a ruse for a general rummaging in order to discover incriminating evidence.

"Nonetheless, the police are not precluded from conducting inventory searches when they lawfully impound the vehicle of an individual that they also happen to suspect is involved in illegal activity. As we have repeatedly stated, officers may keep their eyes open for potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime. See *United States v. Agofsky*, 20 F.3d 866, (8th Cir. 1994). (The presence of an investigatory motive, even if proven, does not invalidate an otherwise lawful inventory search). Something else must be present to suggest that the police were engaging in their criminal investigatory function, not their caretaking function, in searching the defendant's vehicle. See *United States v. Rowland*, 341 F.3d 774, (8th Cir. 2003) (concluding that inventory search was unreasonable when officers failed to follow standardized procedures, searched for and recorded only incriminating evidence, and testified that the search was partly conducted to investigate possible crimes).

"When officers conduct an inventory search according to standardized police procedures, the reasonableness requirement is generally met. This is true even when officers are afforded discretion to release a vehicle to a registered, insured driver instead of towing it, provided this discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. (The requirement that discretion be fettered, however, has never meant that a decision to impound or inventory must be made in a totally mechanical fashion. (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

"In this case the subject contended that opening a binocular case where narcotics were found exceeded the scope of an inventory search. The Court found this contention meritless. The inventory-search policy requires officers to open all containers within the vehicle, whether open or closed, to inventory them for valuable items. Deputy Johnson followed this policy in opening the binoculars case to determine whether there were any items of value inside. Such a policy is unquestionably permissible, *Florida v. Wells*, 495 U.S. at 4, and we therefore refuse to invalidate the inventory search on this basis."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/07/222965P.pdf

SEARCH AND SEIZURE: Private Search; Acting as an Agent of the Government

United States v. Kramer, CA3, No. 22-1358, 8/1/23

John L. Kramer's then-wife, Terry Kramer, in March 2020, found a document on her husband's computer that led her to believe that Kramer may have engaged in sexual conduct with a minor child ("the victim"). Later that month, Terry found photographs on Kramer's cellphone depicting the victim engaged in sexual acts. Terry contacted the police and arranged a meeting during which she described the sexually explicit photographs to police and showed them the document that she found on Kramer's computer. Terry emailed the five photographs to her own email account, powered off the cellphone, and provided it to police.

That same day, the victim participated in a forensic interview during which she reported

that Kramer had sexually abused her for years and had used his cellphone to take pictures of her engaged in sexual conduct. Later that day, the police interviewed Kramer, who admitted to having a sexual relationship with the victim and to using his cellphone to take photographs and video of the victim engaged in sexual activity. After meeting with the police, Terry sent the five explicit photographs that she had forwarded to her own email account to a police detective's email address.

The police used the statements of Terry, the victim, and Kramer to obtain a warrant to search Kramer's cellphone. Their initial forensic examination of the cellphone yielded no sexually explicit photographs or video. They suspected problems with the forensic software, so they conducted a manual search of the cellphone and found four videos and one photograph depicting sexual acts involving the victim. The F.B.I. conducted further forensic analysis of the cellphone and found five more photographs—the same five photographs that Terry had found and sent to the police.

John Lewis Kramer was convicted of sexual exploitation of a minor. On appeal, he challenges the District Court's denial of his motion to suppress evidence that his then-wife provided to police.

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

"Kramer argues that Terry was acting as an agent of the government when she preserved explicit photographs from his cellphone and provided the photographs to police. We have not previously adopted a test for when a private party acts as an agent of the government for purposes of the Fourth Amendment, so we do so here. Although the Fourth Amendment does not protect against the independent actions of private citizens, it does protect against searches or seizures conducted by a private party acting as an agent of the government. *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 614 (1989). Whether the private party was acting as an agent of the government turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. Four of our sister Courts of Appeals assess whether a private party was an agent of the government by evaluating two factors: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private citizen performing the search intended to assist law enforcement or acted to further her or his own legitimate and independent purposes. We adopt this two-pronged inquiry, which is consistent with our previous decisions.

"Applying the inquiry here, we conclude that Terry's first search of Kramer's cellphone—conducted at her home, for her own purposes, before she contacted law enforcement—did not implicate the Fourth Amendment. Neither did Terry's second search of the cellphone—when she re-reviewed the photographs and preserved them.

"Terry searched Kramer's cell phone without the government's knowledge or acquiescence, and she did so to further her own legitimate and independent purposes. There is no state action when a private person voluntarily turns over property she discovered from legitimate private actions. *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996) ('Fourth Amendment concerns simply are not implicated when a private person voluntarily turns over property belonging to another and the government's direct or indirect participation is nonexistent or minor.)
Neither of Terry's searches of Kramer's cell phone implicated the Fourth Amendment. As a result,

Kramer's fruit-of-the-poisonous-tree argument must fail."

READ THE COURT OPINION HERE:
https://www2.ca3.uscourts.gov/opinarch/221358p.pdf

SEARCH AND SEIZURE:
Stop and Frisk; Reasonable Suspicion

United States v. Hagood
CA2, No. 22-588, 8/30/23

Around 1:00 a.m. on October 14, 2020, New York City Police Department ("NYPD") officers drove by Michael Hagood near a New York City Housing Authority ("NYCHA") complex in the Bronx. Hagood was wearing a fanny pack across his chest and standing next to a double-parked car. According to the officers, Hagood was visibly nervous when he saw them, and one officer noticed that Hagood's fanny pack appeared to contain a bulging object with a straight line on top—the same shape as a handgun. The officers stopped and frisked Hagood and found a loaded semiautomatic pistol in the fanny pack.

Hagood was arrested and charged with possessing a firearm after having been convicted of a felony. He moved to suppress the firearm, and the district court denied the motion. Hagood appealed, arguing that the stop violated his Fourth Amendment rights because the officers lacked reasonable suspicion that he was engaged in criminal activity.

The Second Circuit affirmed.

"The totality of circumstances in this case—including the officer's observations of the fanny pack (as informed by his experience recovering firearms from fanny packs), Hagood's unusual manner of wearing the fanny pack, his nervous appearance, and the late hour in a high-crime neighborhood—established reasonable suspicion."

READ THE COURT OPINION HERE:
https://ww3.ca2.uscourts.gov/decisions/isysquery/261231cd-e3d2-4a72-8788-94d37c0fd087/1/doc/22-588_complete_opn.pdf

SEARCH AND SEIZURE:
Totality of the Circumstances Lead Police to Believe Subject was in Vehicle

United States v. Smith, CA8, No. 22-2912, 8/11/23

Police seized Romelle Darryl Smith in a case of mistaken identity. The principal question on appeal is whether the seizure was nonetheless reasonable, and whether evidence discovered in the course of the seizure was admissible in Smith's prosecution.

On July 16, 2020, a man was shot in the head in Minneapolis. Officer Jason Schmitt was assigned to investigate the case. An eyewitness identified the shooter as a man whose street name was "Bam." Officer Schmitt learned that "Bam" was an alias for Jamichael Ramey.

To find Ramey, Schmitt contacted a confidential informant on the day of the shooting. Schmitt had worked with this informant on at least twenty-five occasions, and the informant had provided accurate information about Ramey's possession of guns and drugs. The informant gave Schmitt a telephone number for Ramey, and told Schmitt that he had spoken to Ramey on this phone number earlier that day.

Based on this information, Schmitt obtained a search warrant for the cellular phone that allowed him to monitor the location of the phone through

a global positioning system (GPS). On Saturday, July 18, the phone's service provider, TMobile, began to send Schmitt emails with the phone's GPS location every 15 minutes.

Schmitt developed a written operations plan for arresting Ramey. The plan included two photographs of Ramey, and described him as a black man who stood five-foot eleven-inches tall and weighed 172 pounds. Over the weekend of July 18-9, Schmitt observed that the suspect phone repeatedly returned to an apartment building on 33rd Avenue South in Minneapolis.
On Monday, July 20, Schmitt and other officers conducted surveillance at the apartment building. Throughout the surveillance, Schmitt received e-mails from TMobile showing that the phone was at the building. Schmitt parked between 100 and 125 yards away from the building, and used binoculars to observe the front door. Although his view was partially obstructed by trees, cars, and light poles, he saw a black man of approximately Ramey's age whom he believed was Ramey.

Another officer, Lepinski, later assumed the surveillance, and parked a half to three-quarters block north of the apartment building on the opposite side of the street. Lepinski did not have a clear view of the front door, but he could see the sidewalk in front of the building. He used binoculars to watch this area, although his view was partially obscured by trees and light poles. Lepinski saw the same man whom Schmitt had observed. Based on the man's build, age, and complexion, Lepinski also believed the man was Ramey.

Officer Lepinski watched this man enter the passenger seat of a red GMC Envoy automobile that drove away from the apartment building. Surveillance officers followed. An officer soon saw the car parked at a gas station on 60th Street and Portland Avenue. Meanwhile, Officer Schmitt continued to monitor the location of the suspected Ramey cell phone. The first e-mail that Schmitt received from T-Mobile after the red GMC Envoy left the apartment building showed that the phone was located at 60th Street and Portland Avenue—the address of the gas station where the car was parked. Based on this information, the officers concluded that the suspected Ramey phone was in the red GMC Envoy, and that the man they observed outside the apartment building was Ramey.

Officers stopped the car after it departed the gas station, and directed the man in the passenger seat to exit the vehicle. He identified himself as Romelle Smith, and acknowledged that he was carrying a firearm. Investigators later determined that Smith was a convicted felon.

Ramey, the suspect in the shooting, was not in the car with Smith. Officers later determined that the suspected Ramey cell phone that they had been tracking actually belonged to the driver of the red GMC Envoy. The driver was an associate of Ramey's.

A grand jury charged Smith with unlawful possession of a firearm as a felon. He moved to suppress evidence obtained as a result of the traffic stop. He argued that officers violated his rights under the Fourth Amendment by seizing him.

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

"A law enforcement officer may conduct an investigative stop of a vehicle when he has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' *United States v. Cortez*, 449 U.S. 411, (1981). Smith

does not dispute that the officers had probable cause to arrest Ramey, but argues that they lacked reasonable suspicion to believe that Ramey was in the red GMC Envoy or to stop the vehicle. In evaluating this contention, we bear in mind that to be reasonable is not to be perfect, so officers do not violate the Fourth Amendment if they reasonably, but mistakenly, believe that there are sufficient grounds to conduct an investigative stop. *Heien v. North Carolina*, 574 U.S. 54, (2014).

"We conclude that the totality of the circumstances provided the officers with a reasonable, articulable basis to believe that Ramey was in the car that they stopped. Officers had reasonable suspicion that Ramey used a particular cellular telephone. Officer Schmitt received the telephone number from a known informant. The informant had proved reliable by providing accurate information about Ramey's possession of guns and drugs in the past. The informant reported recently speaking with Ramey at the specified phone number. Officers were armed with a judicial warrant based on a finding of probable cause that Ramey used the target phone number. GPS location data showed that the phone was located at the apartment building on 33rd Avenue South on July 20. Officer Schmitt and Officer Lepinski each observed a man who appeared from a distance to match Ramey's description at the apartment building—a black man in his twenties with a medium build. After officers observed this man drive away from the building, they determined that his location continued to match the location of the suspect cell phone. This location information further suggested that the man was Ramey.

"Smith asserts that aside from age and race, the physical appearances of Ramey and Smith were not particularly close: Ramey was four inches taller and nearly 40 pounds heavier than Smith. But both officers observed Smith from a significant distance through binoculars with a view that was partially obscured. From these vantage points, and without reference points against which to measure height or weight, a reasonable officer could have perceived a 'medium build,' and was not required to exclude the possibility that the man was Ramey. When officers then determined that the man traveled the same route as the telephone associated with Ramey, a reasonable officer could have believed, mistakenly, that the man under surveillance was Ramey. Accordingly, the stop did not violate Smith's rights under the Fourth Amendment, and the district court properly denied the motion to suppress."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/08/222912P.pdf

SEARCH AND SEIZURE: Unlawful Seizure; Police Officer Bound by Promise not to Prosecute in Exchange for Cooperation

United States v. Bailey, CA4, No. 22-4134, 7/17/23

After witnessing Manley Johnson leave Maurice Bailey's home, Kannapolis, North Carolina police officer Jeremy Page discovered 0.1 grams of cocaine base during a search of Johnson's vehicle. Officer Page then confronted Bailey about the cocaine sale and instructed him to turn over any drugs still in his possession. In return, Officer Page assured Bailey that he was "going to take it and… leave," and everything would still be "squared away."

Prompted by Officer Page's offer, Bailey handed over 0.7 grams of cocaine base. Bailey then helped Officer Page locate and arrest an individual for whom the police had an outstanding warrant but did not otherwise aid in Officer Page's

investigations. Then Officer Page obtained two warrants for Defendant's arrest. On appeal, Defendant argued that the district court should have granted his suppression motion because his arrest constituted a breach of Officer Page's September 24 promise that all would be "squared away."

The Fourth Circuit Court of Appeals vacated the district court's decision denying Bailey's motion to suppress and the judgment of conviction and remanded. The court concluded that if Officer Page did breach a promise not to arrest Bailey for either quantity of drugs recovered on September 24 in exchange for his cooperation, Bailey could seek to enforce that promise against the government. Further, the court wrote that a police officer is not entitled to arbitrarily breach these agreements, which have become a central feature of the many drug-related prosecutions that occupy our criminal legal system each year.

"Where an individual fulfills his obligations under the agreement, settled notions of fundamental fairness may require the government to uphold its end of the bargain, too. To hold otherwise would rubberstamp a police practice that stands to undermine the honor of the government and public confidence in the fair administration of justice."

https://www.ca4.uscourts.gov/opinions/224134.p.pdf

SEARCH AND SEIZURE:
Vehicles; Community Caretaking Doctrine

United States v. Treisman
CA4, No. 21-4687, 6/23/23

Crystal Wright—a manager of the Fifth Third Bank's Kannapolis, North Carolina branch—noticed a van in the bank's lot in the same spot it was parked at the close of business the day before. Concerned, Wright called the Kannapolis Police Department (KPD) seeking assistance.

Officer Nathan Lambert responded, arriving around 11:00 am. The van had an expired California tag. Its front cabin was separated from the rear cargo area. The van had front cabin doors, rear doors and a door on the passenger side of the rear cargo area. Officer Lambert could see inside the front cabin, but the rear cargo area did not have any windows, making it impossible to look inside. It also had an air conditioning unit on top, but, since the car was turned off, it was not running.

Officer Lambert tried to electronically identify the van's owner but was unable to do so. Nor could he confirm the vehicle's identification number because it was covered by papers. From the passenger side window, Lambert observed an assault rifle, a handgun box, an ammunition box, a Tannerite container—a legal target shooting product that can also be used to make explosives—a container of pills and a suitcase.

Lambert then went inside the bank to meet with Wright. He learned that the bank's security cameras did not record activities in the area of the parking lot where the van was located.
Another officer, Brandon Wagner, arrived around noon, as Lambert was meeting with Wright inside the bank. Wagner walked around the van where he noticed the same things as Lambert. He also saw

that the assault rifle had a scope and an extended magazine and that the side door to the rear cargo area was slightly ajar.

Lambert and Wagner talked with their supervisor, Sergeant Tim Lafferty, about the situation. They all felt that, while not illegal, it was highly unusual for a van containing a high-powered rifle, a pistol, ammunition and explosives in plain view to be left overnight and unattended in a bank parking lot. And Wright expressed safety concerns to the officers about the contents of the van.

Lafferty also questioned whether there might be someone inside the van needing help. Once Lafferty raised this concern, Lambert indicated that the California tags and suitcase in the front seat suggested someone might be living in the van. He worried that if someone was in the back of the van, the heat might pose a danger since it was a hot day and the air-conditioning unit on the top of the van was not running. And the guns and ammunition in the front of the van added to Lambert and Lafferty's concerns. They both thought that unless something was wrong, the owner and occupants would not likely leave valuable and potentially dangerous items in plain view.

Lafferty noted that North Carolina law permits searches in the event of an urgent medical situation. After discussing these factors, the officers agreed that they should check to see if someone was in distress in the back of the van.

Around 12:30, without knocking or announcing their presence, Lambert and Wagner pulled the handle on the slightly ajar side door to the back of the van. The door suddenly opened. Startled, the officers drew their guns. They did not see anyone inside the van but noticed more gun cases. But combined with what they had seen in the front seat, the officers felt these additional guns in an abandoned, and unsecure, vehicle presented a public safety concern.

Soon after that, Lafferty arrived on the scene. He looked through the van to see if the others had missed someone in distress. Lafferty agreed that the van—including its contents—created public safety concerns. All the officers worried that visible firearms, ammunition and explosives might entice someone to break in and steal those items and use them to harm others. The officers also agreed that they needed to safekeep the valuable items for the owner of the van.

In the meantime, Captain Justin Smith had arrived. Wright asked Smith if the KPD could tow the van. KPD policy provided that requests to tow vehicles on private property should be referred to the city zoning administrator. The officers did not call the zoning administrator. From his experience, Smith felt that, due to the firearms, the zoning administrator would defer to the police in deciding whether to tow the van. And, according to Smith, the van needed to be moved because of the unsecured firearms. The policy also required that a vehicle be "abandoned," and that the property owner be unable to tow the vehicle "without police assistance." As for abandonment, the van was left overnight in the bank's private lot. Also, the bank was unable to tow the van because its towing company refused to tow vehicles containing firearms. The policy also required the property owner to sign a tow request form, which Wright signed. So, the officers believed that they could tow the van under KPD policy.

Before towing, the officers conducted an inventory search of the van's contents as stated by the policy. They began looking for and documenting valuables. During this inventory search, officers also found books about survival, bombmaking,

improvised weapons and Islam. Sergeant Lafferty looked at each firearm and ran the serial numbers. Additionally, they found several electronic devices, a drone and a large amount of cash banded and sealed in bank bags.

After discovering the cash in the bank bags, the officers suspected the owner of criminal activity. So, they decided to obtain a search warrant. Before obtaining the warrant, they stopped the inventory search and towed the van to a KPD storage area. After the police towed the van, Treisman returned to the bank and asked about his van. The bank manager called the police, who came and detained Treisman. KPD obtained a search warrant from a state court judge to search the van. Later, relying on evidence from the van, FBI agents obtained a federal search warrant for Treisman's cell phone. Though the phone included no evidence of criminal activity related to the guns, explosives or cash, it did contain child pornography images. And based on those images, a grand jury indicted him for possession of child pornography and for transportation of child pornography.

Before his trial on the child-pornography charges, Treisman moved to suppress evidence related to the search of his van. Treisman argued that the officers did not have an objectively reasonable belief that an emergency existed that required them to immediately enter the van without a warrant to see if anyone was in medical distress inside. He also argued that the officers did not have legal authority to tow the van. Last, he argued that the inventory search was a pretext for a warrantless criminal investigation.

After the court denied Treisman's motion, he pled guilty to possession of child pornography and transportation of child pornography. Under the plea agreement, Treisman reserved the right to appeal the adverse suppression ruling.

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

"The Fourth Amendment prohibits unreasonable searches and seizures. For that reason, the touchstone of any Fourth Amendment analysis is reasonableness. *Pennsylvania v. Mimms*, 434 U.S. 106, (1977). To evaluate reasonableness, courts must determine whether the government's interest in undertaking a search or seizure outweighs the degree to which the search invades an individual's legitimate expectations of privacy. And this balance depends on the context within which a search takes place. Police officers often need some suspicion of criminal activity to reasonably search or seize an individual or property. But even without suspicion of criminal activity, a search of a vehicle may be reasonable when police officers are exercising what the law calls community caretaking functions.

"The Supreme Court first mentioned this concept in *Cady v. Dombrowski*, 413 U.S. 433 (1973). There, the Court explained:

Some contacts between citizens and police involving automobiles will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions.

"Elaborating, the Court described community caretaking functions as conduct totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. And it also clarified that the test for evaluating whether community caretaking searches violate the Fourth Amendment is

reasonableness. In other words, is the search reasonable given the totality of the circumstances.

"Warrantless searches of vehicles carried out as part of law enforcement's community caretaking functions do not violate the Fourth Amendment if reasonable under the circumstances. The Court found no error on the district court's determination that the officers searched Treisman's van in exercising those community caretaking functions and not as a pretext for a criminal investigatory search. The Court also concluded that the district court did not err in holding the search was reasonable."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/214687.p.pdf

SEARCH AND SEIZURE:
Vehicle Stop; Protective Sweep

United States v. Canada
CA10, No. 21-3202, 8/8/23

On a rainy Wednesday night, Wichita Police Department officers Zachary Jensen and Trevor Sanders were conducting a proactive patrol in a high-crime area. They engaged their emergency lights after watching an automobile—driven by John Canada—fail to signal a right-hand turn. Canada took about fourteen seconds to come to a stop. When Officer Jensen exited the patrol car, he commented that the stop appeared to be "a little bit of a slow roll here." The officers later testified that the stop did not take "an absurd amount of time," but it was "a little bit longer than usual." Officer Jensen also testified that a "slow roll" may suggest that the driver "is attempting to hide or retrieve something inside the vehicle, maybe trying to come up with an exit plan or strategy, decide if they want to stop or don't stop."

The officers approached from both the driver and passenger sides of the vehicle. On the passenger side, Officer Jensen saw Canada strenuously arching his hips, reaching his right arm under the rear of his seat with his head "facing kind of off his shoulder." Canada possessed his wallet and identification. But his furtive movement caused Officer Jensen—without hesitation—to order him to show his hands. Officer Sanders then removed him from the vehicle. Defendant fully cooperated. The officers frisked him, found nothing, and moved him towards the trunk of his vehicle.

Officer Jensen then conducted a protective sweep under the driver's seat. He discovered a loaded .38 Special. The officers then ran a records check and discovered Canada was prohibited from possessing a firearm and had a revoked license. The officers then arrested him. Less than forty seconds elapsed from the time that Officer Sanders removed the Defendant from the vehicle to arrest. The government indicted Defendant and charged him with one count of possession of a firearm by a felon. He moved to suppress the firearm from evidence. And after a hearing, the district court denied his motion. He then entered a conditional guilty plea, reserving the right to appeal the district court's denial.

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

"Canada claims that the warrantless protective sweep—which uncovered the firearm—was unconstitutional. He argues reasonable suspicion cannot arise from furtive movements alone. While we generally require officers to have a warrant to search, a warrantless search is reasonable in some situations—including certain protective sweeps of vehicles. *Michigan v Long*, 463 U.S. at 1032 (1983). Because the exception for protective sweeps exists for officer safety, we limit

them to those areas in which a weapon may be placed or hidden. Law enforcement officers thus may take steps reasonably necessary to protect their personal safety. The sweep should not only protect officers during a stop, but also should protect officers once they release a defendant back to his vehicle.

"To lawfully conduct a protective sweep, an officer must have reasonable suspicion that a suspect poses a danger and may gain immediate access to a weapon. Reasonable suspicion demands less than probable cause. It requires the officer to act on something more than an inchoate and unparticularized suspicion or hunch.' But the officer need not be absolutely certain that the individual is armed. *Terry v. Ohio*, 392 U.S. 1, (1968). To clear the first element, the government must show that a reasonable officer would believe the suspect to be presently dangerous. The second requires the officer to have had reason to believe that weapons may be found in the vehicle.

"From siren to stop, the Defendant took about fourteen seconds to pull his car over. The officers did not believe that it was 'an absurd amount of time,' rather it was just 'a little bit longer than usual.' But it piqued their concern. When Officer Jensen exited the patrol car, he commented that the stop appeared to be 'a little bit of a slow roll here.' The comment, which the dashcam recorded, was a contemporaneous observation from a trained officer. And the circumstances under which he made it leave little room to believe the officer offered his opinion that Defendant engaged in a 'slow roll' as a post hoc rationalization for the protective sweep. Moreover, we defer to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions.

"In prior cases, we have relied on similar actions—such as a slow approach to a checkpoint or a jerking motion while stopping—as contributing to reasonable suspicion. Under our body of authority, the recognition of a slow roll by a trained officer, although not dispositive of this case, contributes to the totality of the circumstances.

"Now we must decide whether the furtive gesture when combined with the slow roll was enough to establish reasonable suspicion to conduct the protective sweep in this case.

"The furtive movement and slow roll together amount to something more than an inchoate and unparticularized suspicion or hunch. The Seventh Circuit's decision in Fryer is persuasive on this point. In Fryer, officers observed, after they engaged their emergency lights, a brief two block delay of a vehicle in stopping. *United States v. Fryer*, 974 F.2d 813 (7th Cir. 1982). During the delay, the officer observed furtive movements between the driver and the passenger, as if they were passing something between them. The defendant argued that the delayed stop and the furtive movements did not give the officers reasonable suspicion to conduct a protective sweep. The Seventh Circuit disagreed, holding that these are clearly the kind of specific, articulable facts that the standard contemplates and which warrant a search.

"The officers here could not have been sure that Defendant was dangerous or had a weapon present. But the furtive movement and slow roll provided enough for the officers to reasonably suspect that Defendant was both dangerous and had access to a weapon."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110900058.pdf

SUBSTANTIVE LAW: Aiding and Abetting

United States v. Nichols, CA8, No. 22-1254, 8/9/23

The government contends that Austin Nichols aided and abetted attempted first degree murder because he "got in a car with a gun and went looking for Latin Kings."

The Eighth Circuit stated:

"A defendant's presence at the scene of a crime or association with persons engaged in illegal activity is not sufficient to establish that he aided and abetted the crime. E.g., *United States v. Larson*, 760 F.2d 852, 858 (8th Cir. 1985). Rather, the defendant must affirmatively act in a manner 'which at least encourages the perpetrator.' *United States v. Jourdain*, 433 F.3d 652, 656 (8th Cir. 2006) So supplying a firearm used in a shooting, see *United States v. Darden*, 70 F.3d 1507, 1545 (8th Cir. 1995), or transporting a shooter to or from the scene, see *Taylor*, 322 F.3d at 1211-12, may suffice to establish aiding and abetting. But there is insufficient evidence here that Nichols's act of riding in the back seat of a vehicle to the scene of the crime facilitated the offense."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/08/221254P.pdf