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### **CIVIL FORFEITURE: Items Seized Pursuant to the Arkansas Uniform Controlled Substance Act**

*Simmons v. State*, ACA, No. CV-23-80, 2024 Ark. App. 42, 1/24/24, 2022

Police officers seized \$4,260 in U.S. currency and a Ford Ranger pickup truck on February 26, 2022, after they stopped a vehicle for expired tags. Detraevone Simmons was the driver and sole occupant. On March 10, 2022, the State filed its complaint for civil forfeiture of the currency and the truck. A separate criminal case involved six grams of cocaine that was seized along with the other items. Simmons pled guilty to possessing methamphetamine or cocaine with purpose to deliver. At the conclusion of a forfeiture hearing on October 25, 2022, the circuit court ordered forfeiture of the \$4,260 in U.S. currency. Simmons, who is incarcerated, brings this appeal from the order for civil forfeiture of \$4,260.

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

“The court stated that Property is subject to forfeiture if it was used, or intended to be used, to facilitate any violation of the Uniform Controlled Substances Act. Any money found in close proximity to a forfeitable controlled substance is presumed to be forfeitable. A party claiming the property has the burden of proof to rebut this presumption by a preponderance of the evidence.

“Forfeiture is an in rem civil proceeding independent of any pending criminal charge, to be decided by a preponderance of the evidence. *King v. State*, 2014 Ark. App. 554. The circuit court’s decision to grant forfeiture will not be set aside unless it is clearly erroneous. A decision is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with a

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definite and firm conviction that a mistake has been made. Credibility determinations are left to the circuit court and will not be reweighed on appeal.

“The court noted Simmons’s recent guilty plea and conviction for possession with purpose to deliver cocaine connected to the incident of February 26 as well as his testimony to the court that he had purchased the six grams of cocaine on that date. It viewed his admission that he had purchased crack cocaine and his conviction as evidence that the drugs and money were in close proximity to each other, facts to which the officers testified. The circuit court held that Simmons did not overcome the rebuttable presumption that the cocaine and money were in close proximity to each other.

“Simmons’s arguments go to the credibility and weight of the evidence, which are not matters for this court. The circuit court’s determination was not clearly erroneous. That decision is affirmed.”

**READ THE COURT OPINION HERE:**

<https://opinions.arcourts.gov/ark/courtofappeals/en/item/522420/index.do?q=Simmons>

**CIVIL LIABILITY:**

**Alleged Lack of Probable Cause**

*Sylvester v. Barnett*, CA11, No. 22-13258, 3/11/24

Keith Sylvester alleged that Detective James Barnett violated his Fourth Amendment rights by causing his arrest and detention without probable cause. Sylvester’s parents were murdered and their house set on fire. Detective Barnett led the investigation and suspected Sylvester was the culprit, ultimately obtaining an arrest warrant for him. Sylvester spent over a year in jail until the charges were dropped.

Sylvester claimed that Barnett lacked probable cause when he applied for the arrest warrant, arguing that key exonerating evidence was omitted from the affidavit. The district court granted Detective Barnett summary judgment, stating that the record did not establish that Barnett knew about the exonerating information when he wrote the warrant affidavit.

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the lower court’s decision. The appellate court found that there were material facts omitted from the warrant affidavit. When those omissions were corrected, the affidavit failed to establish even arguable probable cause for Sylvester’s arrest. The court further held that a reasonable jury could find that Barnett intentionally or recklessly left out information that exonerated Sylvester. If a jury finds such misconduct, qualified immunity would not shield Barnett from liability. Therefore, the case was remanded for further proceedings.

The Court noted that when a police officer intentionally lies or recklessly misleads a judge to obtain an arrest warrant, the resulting arrest violates the Fourth Amendment to the United States Constitution.

**READ THE COURT OPINION HERE:**

<https://media.ca11.uscourts.gov/opinions/pub/files/202213258.pdf>

**CIVIL LIABILITY:****False Arrest and Malicious Prosecution**

*Pinkney v. Meadville*, Pennsylvania, CA3, No. 23-1095, 3/12/24,

Kobe Pinkney sued Officer Jared Frum and others for false arrest and malicious prosecution. Officer Frum, in an investigation into an assault, had obtained an arrest warrant for Pinkney based on a witness statement. However, the court found that Officer Frum had misrepresented information in the warrant application, overstating the certainty of the witness, ignoring inconsistencies, and omitting key facts. The court found that Officer Frum had recklessly disregarded the truth, and the misrepresentations and omissions were deemed material to the finding of probable cause.

The court concluded that the single witness identification, without more, must have at least basic signs of reliability to amount to probable cause. The court noted that this bar is not high; either corroboration or an appropriate witness interview may suffice. But based on the facts alleged, neither happened in Pinkney's case. Thus, Officer Frum was found to have violated Pinkney's Fourth Amendment rights by arresting him without probable cause.

Further, the court ruled that Pinkney's right not to be arrested without probable cause was clearly established, as was his right not to be prosecuted without probable cause. Hence, a reasonable officer would have known that Officer Frum's alleged conduct was unlawful. Therefore, the court affirmed the lower court's decision and allowed the case to proceed.

**READ THE COURT OPINION HERE:**

<https://www2.ca3.uscourts.gov/opinarch/231095p.pdf>

**EVIDENCE: Constructive Possession**

*Lema v. State*, ACA, No. CR-22-787, 2024 Ark. App, 140, 2/28/24

Glenn Robert Lema was locked out of his apartment in the early morning hours of April 16, 2021. Residents of the apartment complex had been notified previously that monthly pest-control treatments were scheduled for that day. Around 2:00 a.m., hoping to get his door unlocked, Lema knocked and yelled at the apartment manager's front door and window. He got no response from the manager, Efrain Ramos, or Ramos's wife. Around 8:30 a.m., Lema approached Ramos while he was accompanying Paul Newport, who had come to perform the pest-control treatment. Ramos said he would not unlock Lema's door until he and Newport got to that apartment. Ramos, perceiving that Lema was threatening him, called the police.

When Ramos opened Lema's apartment door, Newport saw a glass pipe and white residue. Newport believed the items to be drugs and drug paraphernalia because of his experience with his brother's drug addiction. Lieutenant Tommy Broadstock and Chief Rick Padgett of the Danville Police Department had arrived at the apartment complex by that time. Broadstock arrested Lema for making threats and put him in a patrol car. Padgett went to Lema's apartment at his request to get his blood-pressure medication. Newport directed Padgett's attention to the items he had seen. Lema signed a consent to search, writing on the form, "I don't know what the manager put in my APT." Lema denied ownership of the drugs and paraphernalia, claiming that someone else had put them there. Subsequent testing revealed the presence and quantity of methamphetamine and marijuana found in his apartment.

Lema moved for a directed verdict at the close of the State's case and renewed his motion at the close of all the evidence. He contended that the State had not introduced sufficient evidence of actual or constructive possession of methamphetamine, marijuana, or drug paraphernalia. He argued that he did not have exclusive possession of the apartment and noted that he was not there when the drugs were found. The circuit court denied each motion for directed verdict.

Upon review, the Arkansas Court of Appeals stated:

"The State is not required to prove literal physical possession of the contraband; the Court looks to see whether the contraband was located in a place under the accused's dominion and control. *Terry v. State*, 2018 Ark. App. 435. Constructive possession can be implied when the contraband was found in a place immediately and exclusively accessible to the accused and subject to the accused's control. To prove constructive possession, the State must establish that the accused exercised 'care, control, and management over the contraband.' Additionally, there must be some evidence that the accused had knowledge of the presence of the contraband.

"Constructive possession may be established by circumstantial evidence. Control over and knowledge of the contraband can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, the ownership of the property where the contraband is found, and the accused's suspicious behavior. Location of the contraband in close proximity to the accused can be a sufficient linking factor to support constructive possession, and the improbable nature of the accused's explanations can be considered."

**READ THE COURT OPINION HERE:**

<https://opinions.arcourts.gov/ark/courtofappeals/en/item/522541/index.do?q=Lema+v.+State>

**EVIDENCE: Constructive Possession**

*United States v. White*, CA7, No. 23-1315, 3/15/24

Shamone White was arrested after a vehicle he was a passenger in was pulled over. Inside the vehicle, the police found two bags, one of which White admitted to owning. This bag contained cash and cannabis, while the other bag, which White denied ownership of, contained a firearm, ammunition, scales with cannabis residue, and other items.

The court found that the evidence was sufficient for conviction. The court highlighted that possession could be either actual or constructive. The court determined that a reasonable jury could infer that White constructively possessed the firearm due to its proximity, the presence of scales with drug residue in the same bag, and the fact that the contents of the two bags collectively formed a complete set of drug trafficking tools. The judgement of the district court was thus affirmed.

**READ THE COURT OPINION HERE:**

[https://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2024/D03-15/C:23-1315:J:St\\_Eve:aut:T:fnOp:N:3182260:S:0](https://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2024/D03-15/C:23-1315:J:St_Eve:aut:T:fnOp:N:3182260:S:0)

**EVIDENCE: DWI; Testimony About Preliminary Breath Test**

*Franklin v. State*, ASC, No. CR-22-452, 2024 Ark. 9, 2/1/24

On the evening of November 17, 2020, Deputy James Oswald responded to a dispatch call that reported an individual “passed out” in a parked car on the side of the road. Upon his arrival at the scene, Deputy Oswald discovered Rhys Franklin asleep in the driver’s seat with the car lights on, the passenger-side window rolled down, and the engine running. After Deputy Oswald’s initial attempts to wake Franklin were unsuccessful, he reached through the window and turned off the vehicle. After several more attempts, Franklin finally awakened. Deputy Oswald asked him for his name, to which Franklin twice replied “mom.” Not only could Deputy Oswald smell the odor of intoxicants on Franklin’s breath, he also observed Franklin’s eyes to be red, watery, and bloodshot, and his speech to be slurred. Deputy Oswald asked Franklin if he had been drinking, and Franklin admitted consuming several beers.

After Deputy Oswald instructed Franklin to step out of the vehicle, he noticed Franklin’s balance was poor and wobbly—in fact, he was unable to walk without the assistance of Deputy Oswald. When Deputy Oswald asked Franklin if he was willing to submit to a field sobriety test, Franklin refused, stating, “I’m not doing that. I’m just not doing that. Do whatever you have to do, I’m not doing that.” At that time, Deputy Oswald informed Franklin that he was under arrest on suspicion of DWI and placed him in the back of his patrol car. Upon a search of Franklin’s vehicle, Deputy Oswald found an empty beer can in the passenger-side floorboard, an opened thirty-pack of beer, and more cans of beer in an ice chest. Franklin was transported to the detention center where he refused to submit to any chemical tests

to determine his degree of intoxication. Deputy Oswald ultimately issued Franklin citations for both DWI and refusal to submit.

At his jury trial, Franklin’s defense counsel moved for a mistrial twice, first when Deputy Oswald mentioned a portable breath test (PBT) result in response to the defense’s questioning and second when another officer, Omar Gonzales, voluntarily mentioned that a PBT was administered. Both motions were denied by the Scott County Circuit Court. Franklin was convicted of DWI and refusal to submit to a chemical test.

The Court of Appeals reversed the convictions, but the Supreme Court of Arkansas granted the State’s petition for review.

The following exchange, in pertinent part, took place:

*DEFENSE: And based upon that suspicion, you removed him to the police station for a formal test, a scientific or a test that could be admitted into evidence. Now, he didn’t take a test, right?*

*OSWALD: Correct.*

*DEFENSE: You testified that you took him to the police station -- for a certified test because you had a suspicion that he was intoxicated.*

*OSWALD: Correct.*

*DEFENSE: Now, what happened at the station that changed your suspicion to a firm conviction, enough that you wrote him a citation for DWI? That is a simple question, son.*

*OSWALD: I mean, it’s not admissible, but it was .17 the PBT.*

At this point, both counsel for the State and the defense approached the bench where the defense moved for a mistrial. The court denied the motion, stating, “In consideration of the totality of the circumstances looking at the entire line of questioning, I am going to find that it was in response to the questioning of the Defense.” Although the court offered to give the jury a curative instruction, it was declined.

The jury trial continued with the State’s next witness, Omar Gonzales. After the State inquired about his involvement in assisting Deputy Oswald on the night in question, Gonzales voluntarily stated, “When I arrived, Deputy Oswald advised me of what was going on. He had Mr. Franklin in the back of the truck. And he asked me if I could administer a PBT, which I did.” Counsel, again, approached the bench. The prosecutor ensured the court that both Gonzales and Oswald were instructed not to get into the PBT and apologized to the court. Defense counsel again moved for a mistrial that was denied on the grounds that Gonzales only mentioned that a PBT was given but made no insinuation as to the results of that test, which case law is clear that is acceptable. Defense counsel, again, stated he did not want to further emphasize the PBT by giving a cautionary instruction. The trial resumed with no cross-examination of Gonzales. After the State rested, the defense alike rested without any presentation of evidence.

The jury found Franklin guilty of both DWI and refusal to submit to a chemical test. After the court of appeals reversed the convictions, the Arkansas Supreme Court granted the State’s petition for review.

Upon review, the Arkansas Supreme Court found as follows:

“Here, the first motion for a mistrial was based on Deputy Oswald’s response to questions posed by the defense, not by the prosecutor. In reviewing the transcript, defense counsel ‘opened the door’ and clearly invited the response that he received. We have repeatedly held under the invited-error rule that one who is responsible for error cannot be heard to complain of that for which he was responsible. *Britton v. State*, 2014 Ark. 192, 433 S.W.3d 856. It would be abundantly unjust to permit counsel for either party to intentionally elicit improper evidence only to vehemently object upon its utterance and demand a new trial because of error. That is precisely what happened here. Defense counsel’s line of questioning to Deputy Oswald, as emphasized above, reveals that he was well aware that the only test results obtained were via the PBT given at the scene—which results were unquestionably inadmissible as evidence. Although the defense attempted to argue at trial that his questions in no way led to Deputy Oswald’s answer, we agree with the circuit court that Deputy Oswald’s testimony was a legitimate response to the door opened by defense counsel via the distinct questions asked on cross-examination.

“Next, we turn to the statement of Gonzales. While this statement differs from that of Deputy Oswald in that it was a spontaneous response to a question by the State, not the defense, Gonzales’s answer was not a foreseeable response to the prosecution’s question and cannot be said to have been deliberately induced by the prosecution. Additionally, and more importantly, the utterance that a PBT was given without mention of the actual results is a harmless error, if an error at all. See *Massengale v. State*, 319 Ark. 743, 746, 894 S.W.2d 594, 595 (1995). Just as in *Massengale*, there was already ample evidence before the jury that supported Franklin’s guilt of DWI regardless of the mention of the PBT. Franklin admitted

that he had been drinking, smelled like alcohol, exhibited physical indicators of intoxication, and had both open and closed containers of beer in his car. The mention of the PBT was not so prejudicial that justice could not be served by continuing the trial.

“Finally, any alleged prejudicial effect of Deputy Oswald’s or Gonzales’s statements could have been alleviated by an immediate curative instruction—one that the court offered, but the defense refused. Defense argues that this trial decision resulted from his opinion that a limiting instruction would only emphasize the PBT ‘even more.’ While the defense was well within his rights to make such a decision, he cannot now claim that it was an abuse of discretion warranting reversal. This court has found no abuse of discretion in denying a mistrial where defense clearly opened the door to the allegedly prejudicial statements or where the possible prejudice could have been cured by the circuit court’s admonition to the jury, and defense counsel refused the offer of such a curative instruction. See *Dillon v. State*, 317 Ark. 384, 391, 877 S.W.2d 915, 919 (1994); see also *Ferguson v. State*, 343 Ark. 159, 177, 33 S.W.3d 115, 126 (2000).

Based on the foregoing reasons, the circuit court’s denial of a mistrial was not an abuse of discretion as the drastic remedy of a mistrial was not warranted.

Affirmed; court of appeals opinion vacated.

**READ THE COURT OPINION HERE:**

<https://opinions.arcourts.gov/ark/supremecourt/en/item/522458/index.do?q=Franklin>

**EVIDENCE: Expert Testimony in Drug Case**

*United States v. Martinez*, CA10, No. 22-1167, 12/20/23

A confidential informant visited Domingo Martinez, Jr.’s autobody shop to consummate a drug transaction. Law enforcement searched the informant before the transaction occurred. Initially, Martinez was away when the informant arrived and the informant left. When the informant returned, Martinez was at the shop and told the informant the “product” was not ready yet and he should return later. Upon the informant’s third visit, Martinez sold him 443 grams of methamphetamine. Following the purchase, agents executed a search warrant at the shop, finding several digital scales, baggies, firearms, ammunition, and a shrine to Santa Muerte (known as the patron saint of drug traffickers). Agents arrested Martinez and charged him.

At trial, the government introduced the expert testimony of Detective Brian Jeffers, a law enforcement officer with 22 years’ experience and expertise in drug trafficking. Detective Jeffers testified that only someone involved in drug trafficking could access the quantity of drugs sold by Martinez. He also testified that drug traffickers typically carry the type of scales found at the shop and the type and number of bags found at the shop. Based on his investigative experience, the officer further testified that Santa Muerte is a saint that drug traffickers pray to for protection and that he would expect someone in possession of a shrine to be associated with drug trafficking. When asked whether he had “ever seen a Santa Muerte shrine at someone’s house who wasn’t associated with drug trafficking,” Detective Jeffers responded, “No, sir.” Martinez did not object.

Martinez raised an entrapment defense, testifying that the informant “continuously” visited his autobody shop — at least ten times. The informant gave contrary testimony that he had only visited Martinez once before the transaction occurred. Martinez stated that, while at his shop, the informant twice displayed a gun and portrayed himself as a cartel member. According to Martinez, the informant made him fear for the safety of his wife and children. Wanting the informant gone, Martinez testified that he sold the methamphetamine to get him out of his shop.

Martinez was convicted of possession with intent to distribute and distribution of 50 grams or more of methamphetamine. On appeal, he challenges the admission of a narcotics detective’s testimony about Santa Muerte shrines.

The Court of Appeals for the Tenth Circuit stated that law enforcement officers can testify as experts based on their experience and expertise.

“This testimony is helpful to the jury because the average juror is often innocent of the ways of the criminal underworld, and it provides jurors a context for the actions of defendants. The reliability of expert testimony from law enforcement officers stems from specialized knowledge gained through experience and training.

“Detective Jeffers’s testimony was based solely on his 22 years of law-enforcement experience, with approximately 18 years focused on narcotics, not personal self-study. He testified that he had witnessed thousands of drug deals, personally carried out hundreds of undercover drug deals, and was asked to train others on handling undercover drug transactions with confidential informants. Detective Jeffers did not improperly characterize Santa Muerte worship as a ‘tool of

the trade.’ He testified that from his experience in drug investigations, he learned traffickers pray to Santa Muerte and usually erect a shrine with alcohol or narcotics offerings at the base to pay homage and request protection. Confirming this point, the Santa Muerte shrine found in Mr. Martinez’s office had a glass of wine at the base. Detective Jeffers’s testimony in this case was based on ‘knowledge derived from previous professional experience.’

**READ THE COURT OPINION HERE:**

<https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110971762.pdf>

**EVIDENCE: Historical Cell Site Location Analysis in Arkansas**

*McCullon v. State*, ASC, No. CR-22-619, 2023 Ark. 190, 12/14/23

On March 11, 2022, a Craighead County Circuit Court jury convicted Corey McCullon of first-degree murder, aggravated residential burglary, terroristic act, and first degree terroristic threatening. On appeal, McCullon alleges numerous reasons that there was insufficient evidence to support his convictions, including admitting historical cell site location information analysis.

Prior to trial, the circuit court held an initial hearing on several pretrial motions. Regarding his motion to exclude evidence of cell phone location, McCullon argued that the use of historical cell site location information (CSLI) analysis did not satisfy the requirements for the admission of scientific evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but it relied upon speculation, lacked the proper foundation, and was more prejudicial than probative.

The analysis performed by the FBI placed McCullon's cell phone in the general vicinity of the crime scene around the time law enforcement believed the shots were fired at Criglar's home according to surveillance footage from a nearby business. on, lacked the proper foundation, and was more prejudicial than probative.

A "ping" warrant was obtained for McCullon's cell phone number in an attempt to locate him, and a search warrant was also obtained to access the records of that cell phone. Using cell phone location information, police were able to create a map of McCullon's movements and determine that his cell phone had stopped moving in Caruthersville, Missouri.

At trial, the State called Special Agent Blake Downing with the FBI's Cellular Analysis Survey Team (CAST) to discuss historical cell site location information (CSLI) analysis and his conclusions regarding McCullon's cell phone records. Agent Downing testified that after reviewing McCullon's cell phone records, he was able to determine the following: that, between 11:06 p.m. and 11:18 p.m. on November 19, McCullon's cell phone was traveling closer to Criglar's home on 603 Meadowbrook. Agent Downing's historical CSLI analysis report demonstrated that from 11:28 p.m. on November 19 to approximately 12:24 a.m. on November 20, McCullon's cell phone was located in the general area around 603 Meadowbrook, and by 12:33 a.m., it was away from the address. The report further demonstrated that McCullon's cell phone traveled away from the area of the crime scene heading south on I-555 and arrived in the Trumann area at 1:27 a.m., and the travel ultimately stopped in the Caruthersville area at approximately 2:39 a.m.

At the pretrial hearing during which the circuit court heard arguments on McCullon's motion in

limine, Agent Downing testified that he had been a member of the FBI's CAST unit since 2018. Agent Downing described his extensive experience, education, and training, and stated that he had performed historical cell site analysis hundreds of times in his official capacity. Agent Downing explained that historical CSLI can only provide a general location of a cell phone based on its connection to nearby cell phone towers, but with the use of timing-advanced data, which existed in the present case, he was provided a distance measurement between the cell phone and the tower that allowed him to narrow down the possible location of the cell phone even further.

The Arkansas Supreme Court concluded that the circuit court did not abuse its discretion when it admitted Agent Downing's testimony regarding historical CSLI analysis.

"The circuit court closely considered Downing's testimony in accordance with the Daubert factors, concluding that the evidence was reliable because the underlying methodology had been tested by law enforcement, both civilian and military, and by the cell phone providers themselves. The circuit court further concluded that participation of professors at the Florida Institute of Technology, an entity that is presumably unaffiliated with the FBI, as well as cell phone engineers, in trainings provided to the CAST unit supported the reliability of the methodology. The circuit court had wide latitude in determining whether any of the Daubert factors were, or were not, reasonable measures of reliability in this particular case, and we cannot say that it exercised its discretion thoughtlessly. Accordingly, we affirm the circuit court on this point."

**READ THE COURT OPINION HERE:**

<https://opinions.arcourts.gov/ark/supremecourt/en/item/522370/index.do?q=McCullon>

**EVIDENCE: Conviction of Passenger in Vehicle Containing Drugs**

*United States v. Rodriguez*, CA10, No. 22-6194, 2/21/24

The United States Court of Appeals for the Tenth Circuit reversed the convictions of Juanita Viridiana Garcia Rodriguez, the defendant, on charges of conspiracy to possess methamphetamine with the intent to distribute. The case stemmed from a cross-country car trip where secret compartments containing methamphetamine were found in the car driven by Tony Garcia, with Ms. Garcia-Rodriguez as a passenger in the vehicle.

The court held that the prosecution failed to show beyond a reasonable doubt that Ms. Garcia-Rodriguez had knowledge of the methamphetamine hidden in the vehicle, which was required to prove her guilt. The court found that simply being a passenger in a car carrying drugs is insufficient to implicate the passenger in a criminal conspiracy.

**READ THE COURT OPINION HERE:**

[www.ca10.uscourts.gov/sites/ca10/files/opinions/010111003348.pdf](http://www.ca10.uscourts.gov/sites/ca10/files/opinions/010111003348.pdf)

**EYEWITNESS IDENTIFICATION: Meeting with Witnesses During Trial Preparation**

*State of New Jersey v. Washington*, SCNJ, No. A-29-22, 1/8/24

The Supreme Court of New Jersey considered whether the safeguards relating to eyewitness identification evidence should apply when lawyers meet with witnesses to prepare for trial. The case involved Brandon Washington, who was charged with two counts of attempted murder after shooting two people at a “Ladies Night” event.

Brandon Washington was forcibly removed from a “Ladies Night” event after an argument with a security guard. Seconds later, someone fired shots into the event venue, striking two people.

After an investigation, Washington was charged with two counts of attempted murder. During the initial investigation, several witnesses selected Washington’s picture from a photo array. Later, during trial preparation, an assistant prosecutor showed witnesses the array they had seen before or a single photo of defendant from Facebook. The witnesses later identified Washington in court. One did so for the first time at trial.

Through questioning at trial, it emerged that the witnesses had been shown photographs of Washington. Defense counsel requested a Rule 104 hearing to develop a record as to what was shown to witnesses during trial preparation. The court held a hearing only as to a single witness whose name had not been included on the State’s witness list, and the court declined to expand that hearing beyond whether the witness should be permitted to testify.

The New Jersey Supreme Court held that witnesses who have made a prior identification should not be shown photos of the defendant during trial preparation, neither new photos of the defendant for the first time nor, absent good reason, the same photos they previously reviewed.

“If a party can demonstrate a good reason to show witnesses a photo of the defendant they previously identified, the party must prepare and disclose a written record of what occurred. If, however, a witness has not previously identified a suspect, investigators can conduct an identification procedure during pretrial preparation. A record of the procedure should be

created and disclosed to the defendant to insure the admissibility of the eyewitness identification.”

**READ THE COURT OPINION HERE:**

[https://www.njcourts.gov/system/files/court-opinions/2024/a\\_29\\_22.pdf](https://www.njcourts.gov/system/files/court-opinions/2024/a_29_22.pdf)

**Law Enforcement Officers Safety Act**

*Federal Law Enforcement Officers Association v. Attorney General*, New Jersey, CA3, No. 22-2209, 2/14/24

Retired law enforcement officers from various agencies claim that a federal statute gives them the right to carry concealed firearms in their home state of New Jersey. New Jersey argues that the federal statute does not provide that enforceable right. And even if there were such an enforceable right, New Jersey argues that the federal statute would apply only to officers who retired from federal or out-of-state law enforcement agencies—not to officers who retired from New Jersey law enforcement agencies.

The Court concluded that the federal statute does provide certain retired officers (those who meet all the statutory requirements) with an enforceable right, and that right extends equally to officers who retired from New Jersey agencies and those who retired from federal or out-of-state agencies. The federal statute also preempts contrary aspects of New Jersey law.

So they affirmed the District Court’s order granting declaratory and injunctive relief to the retired officers.

**READ THE COURT OPINION HERE:**

<https://www2.ca3.uscourts.gov/opinarch/222209p.pdf>

**MIRANDA: The Phrase “I Guess” did not Create Ambiguity in Invoking Right to Counsel**

*United States v. Cowette*, CA1, No. 22-1534, 12/12/23

In 2018, the U.S. Drug Enforcement Administration, the Somerset County Sheriff’s Office (“SCSO”), and other law enforcement agencies investigated a drug-trafficking operation in Maine headed by a man named Nicholas Culver. During that investigation, they identified Amanda Cowette as a minor participant in the conspiracy who permitted Culver to store drugs in her home. As a result of the investigation, law enforcement agencies obtained a search warrant for Cowette’s home.

On the morning of July 16, 2018, several days after Culver was arrested, law enforcement authorities executed that search warrant. Lieutenant Carl Gottardi of the SCSO arrived at the scene shortly after 10 a.m. and observed Cowette standing in the driveway with Corporal Joseph Jackson, also of the SCSO. Gottardi directed Cowette, who was handcuffed, to sit in his police truck. He then read Cowette her Miranda rights. The following colloquy occurred between Gottardi and Cowette, as recorded on Gottardi’s vehicle’s camera:

Gottardi: *And if you decide to answer any question now, with or without a lawyer present, you have a right to stop answering at any time until you can talk to a lawyer. Do you understand that?*

Cowette: *I guess my best bet would probably be to not talk until I have a lawyer –*

Cowette filed a motion to suppress the statements she made to the police. The district court held a hearing on that motion. The parties agreed that Cowette was in custody at the time of questioning

but disagreed as to whether she unambiguously invoked her right to counsel. Cowette argued that her use of the phrase “I guess” did not undermine the clarity of her invocation of her right to counsel under the circumstances.

The district court held that Cowette failed to effectively invoke her Fifth Amendment rights and denied her motion to suppress. Cowette then pled guilty reserving her right to appeal the adverse judgment on the motion to suppress. On appeal, Cowette contends that she unequivocally invoked her right to counsel during her first conversation with Gottardi, and she seeks the suppression of all statements she made to the police after that invocation.

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

“The Court stated that a request for counsel must be clear and unambiguous. Where a request, marred by ambiguity or equivocation, suggests only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. The test is an objective one—requiring that the statement be such that ‘a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *Davis v. United States*, 512 U.S. 452 (1959). We analyze a suspect’s words to be understood as ordinary people would understand them. *Connecticut v. Barrett*, 479 U.S. 523, (1987). We keep in mind that we are to give a defendant’s request for counsel a broad, rather than a narrow interpretation.

“We focus on Cowette’s use of the phrase ‘*I guess*.’ The remainder of the sentence—‘*I’ll wait until I have a lawyer*’—is, by itself, a clear invocation of Cowette’s right to counsel. Thus, we must now determine whether the initial

phrase “*I guess*” imbues ambiguity into the otherwise straight-forward request for counsel. We have little trouble in holding that, under the circumstances here, it does not.

“The crucial portions of Cowette’s statement are framed in the first person (“*I’ll wait until I have a lawyer*”) and clearly indicate a certain and present desire to consult with counsel. Consequently, given the full context of Cowette’s statements, the phrase “*I guess*” does not create any ambiguity.

An ordinary person, in hearing the entirety of Cowette’s statement to Gottardi, could only interpret Cowette’s words as plainly expressing her intent to wait for a lawyer before she spoke with the officer.

We accordingly find that Cowette clearly and unequivocally invoked her right to counsel under the circumstances when she stated, “I guess I’ll wait until I have a lawyer.”

#### **READ THE COURT OPINION HERE:**

<https://www.ca1.uscourts.gov/sites/ca1/files/openfiles/22-1534P-01A.pdf>

#### **MIRANDA: Unequivocal Invocation of the Right to Remain Silent**

*Wesley v. Hepp*, CA7, No. 22-2968, 1/5/24

Johnnie Wesley was brought in for questioning by Wisconsin police in connection with a murder investigation. Wesley invoked his right to remain silent during the initial interrogation, and the interrogation ceased.

Approximately nine hours later, at 9:27 pm, Detective Kevin Klemstein tried to interrogate Wesley a second time, but Wesley still did not wish to speak. That interrogation did not proceed.

However, he was interrogated again, during which time he made incriminating statements implicating himself in the murder.

Wesley was subsequently charged with felony murder. He moved to suppress the incriminating statements on two grounds: (1) the officers did not honor his initial invocation of his right to remain silent, and (2) he unequivocally invoked his right to remain silent during the third interrogation. The motion was denied and Wesley was convicted.

On appeal to the United States Court of Appeals for the Seventh Circuit, the court affirmed the lower court's decisions. It held that the Wisconsin Court of Appeals reasonably applied Supreme Court precedent to Wesley's case. The court determined that Wesley's right to remain silent was "scrupulously honored" after he invoked it during the first interrogation, and that he did not unequivocally invoke his right to remain silent during the third interrogation. The court reasoned that Wesley's statements during the third interrogation could reasonably be interpreted as exculpatory, rather than as an invocation of silence.

**READ THE COURT OPINION HERE:**

<https://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2024/D01-05/C:22-2968:J:Kirsch:aut:T:fnOp:N:3151897:S:0>

**SEARCH AND SEIZURE: Consent Search; Apparent Common Authority**

*United States v. Bermel*, CA8, No. 22-3092, 12/12/23

Jacob Bermel and his ex-wife lived apart but shared custody of their fourteen-year old daughter. The daughter did not keep a set visitation schedule. She was free to come and go from Bermel's house as she pleased, and she was sometimes left alone at his house. When the daughter stayed at Bermel's house, she used a particular bathroom. One day, while using the bathroom, she discovered a camera. Concerned, the daughter called her mother, reported what she had found, and asked to be picked up.

After picking up the daughter, the mother called the police and spoke with Officer Jacob Elliott of the Muscatine Police Department about what had happened. During the call, Officer Elliott learned that the daughter had found a camera affixed to a cabinet in her bathroom. The mother did not appear to believe that the camera had a memory card. During the call, Officer Elliott heard the daughter agree to speak with officers about what had happened.

Officer Elliot and another officer went to the mother's home and met with the mother and daughter. At Officer Elliot's request, the mother handed the camera to Officer Elliot and explained that they placed duct tape over the camera lens for fear that the camera might still be recording. The daughter told the officers that she found the camera on a small swivel in the bathroom that she used when she stayed at Bermel's house.

After the mother and daughter described what had happened, Officer Elliot, with the camera in hand, stated: "What's going to happen is, I'm going to take this, okay? We're going to analyze

and see if there's anything on it." Neither the mother nor the daughter objected. The officers left and reviewed videos found on a memory card within the camera. The videos showed Bermel setting up the camera, as well as the daughter getting in and out of the shower.

Following further investigation, law enforcement identified Bermel as the source of depictions of child pornography uploaded to the internet. Bermel was indicted on several child-pornography offenses. Later, Bermel filed a motion to suppress the evidence found on the camera. He argued that the warrantless seizure and subsequent warrantless search of the camera and the memory card within it violated his Fourth Amendment rights. The district court denied the motion and concluded that the seizure was justified by exigent circumstances and that the search was lawful because the daughter consented to it. Bermel conditionally pleaded guilty to producing and possessing child pornography, reserving the right to appeal the denial.

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

"Warrantless searches of a person's effects are generally prohibited under the Fourth Amendment unless an exception to the warrant requirement applies. *Horton v. California*, 496 U.S. 128, 133 (1990). One exception allows police officers to search an object without a warrant if a third party who has common authority over the object consents to the search. Indicia of a third party's common authority over property are mutual use or joint access or control. Whether or not a third party actually possessed common authority, a warrantless search is justified when an officer reasonably relies on a third party's demonstration of apparent authority. *United States v. Amratiel*, 622 F.3d 914, 915 (8th Cir.

2010). Apparent authority exists if the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the property. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

"Bermel argues that the daughter lacked apparent authority to consent to the search. The daughter had apparent authority over the camera and its memory card. Officer Elliot knew that the daughter lived part-time at Bermel's house, that she was empowered to come and go as she pleased, and that she was sometimes left alone at the house. Officer Elliot knew that the daughter removed the camera from 'her' bathroom and deduced from this fact that this must be the bathroom that she primarily used when she stayed at the home and the one where she kept her belongings. The camera that she found in her bathroom was not locked or otherwise fixed in place. Nor was it, as the district court found, 'even completely concealed from view, as the daughter noticed its light while exiting the shower.' The district court did not clearly err in determining that these facts established joint access to and control of the bathroom, the camera, and the memory card it contained. And we further conclude that these facts sufficed to lead a person of reasonable caution in the officers' situation to believe that the daughter had authority over the camera and its memory card and that she could validly consent to a search of it.

"Having established the daughter's apparent authority to consent to the search of the camera and memory card, we address Bermel's last argument that the evidence does not establish that she actually consented to the search. Here, Officer Elliott, who had been summoned by the daughter and mother, stated his intention to 'analyze' the camera to 'see if there's anything on it,' and the daughter did not object. The

circumstances were sufficient for Officer Elliott to infer consent.

“The district court did not clearly err in its finding that the daughter’s consent to search encompassed both the camera and its internal memory card. The permissible scope of a consent search is limited by the scope of the consent given. See *Walter v. United States*, 447 U.S. 649, 656 (1980). And we measure the scope of the consent given by a standard of objective reasonableness. Consent to a search of an object generally includes that object’s component parts. Here, the daughter raised no objection to Officer Elliott’s stated intention to ‘see if there’s anything on’ the camera. Because one cannot see if there’s anything on a digital camera without searching the camera’s memory device, the scope of the daughter’s consent ‘would reasonably be understood to extend to’ the camera’s memory card, whether or not the daughter affirmatively knew of the memory card’s existence. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).”

The Eighth Circuit Court of Appeals affirmed the denial of the motion to suppress.

**READ THE COURT OPINION HERE:**

<https://ecf.ca8.uscourts.gov/opndir/23/12/223092P.pdf>

**SEARCH AND SEIZURE:**

**Consent of a Co-Tenant**

*United States v. Parkins*, CA9, No. 22-50186, 2/14/24

The Court of Appeals for the Ninth Circuit dealt with the decision of the United States Supreme Court in *Georgia v. Randolph*, 547 U.S. 103 (2006). In that case, the court held that a warrantless search of a shared apartment dwelling cannot

be justified over the express refusal of consent by a physically present resident. That decision does not squarely answer the question in this case—whether a defendant must be standing at the doorway to object to a warrantless search to which his co-tenant consented.

Brett Wayne Parkins was convicted of aiming a laser pointer at a police helicopter. Police officers searched Parkins’s apartment without a warrant after obtaining consent from his girlfriend. As Parkins’s girlfriend was executing the consent form, Parkins, who had been detained outside by the police, yelled to her, “Don’t let the cops in, and don’t talk to them.” Both Officer Smith and Parkins’s girlfriend heard Parkins loud and clear—the body camera shows both turning their heads toward Parkins’s voice. About a minute later, Parkins yelled, “Don’t talk to them, talk to them outside.” He then followed up with, “Don’t tell them anything.” Officer Smith returned downstairs and ordered Parkins removed from the mailbox area in handcuffs and placed in a squad car because he was running his mouth and obstructing the investigation. Up to this point, Parkins had been detained outside for roughly twenty minutes. With Parkins secured in the squad car, where he would sit for another half hour, officers searched the nearby area, including his girlfriend’s vehicle. (Officer Smith had determined that this vehicle was the same one that Officer Garwood had observed Parkins open.) During the search, Officer Rivas encountered two men who resided in the same complex. One of them referred to Parkins as “the laser pointer guy.” The officers then proceeded to search the apartment. After about twenty minutes, they found a laser pointer with the name “Brett” etched on it.

The Court held that physical presence does not require the defendant to stand at the doorway —

presence on the premises, including its immediate vicinity, is sufficient. The court ruled that Parkins was physically present on the premises and had expressly refused consent, so the search of his apartment violated his Fourth Amendment rights.

**READ THE COURT OPINION HERE:**

<https://cdn.ca9.uscourts.gov/datastore/opinions/2024/02/14/22-50186.pdf>

**SEARCH AND SEIZURE:**

**Curtilage; Detached Garage**

*United States v. Rouquillo*, CA10, No. 22-1247, 3/7/24

The Denver Police Department (DPD) received information from a confidential informant (CI) that an individual was selling methamphetamine at 836 North Linley Court. While conducting surveillance, the DPD observed various people enter the residence, stay for around five to ten minutes, and then leave. The DPD used its CI to conduct two separate controlled buys. Both times, the CI entered the residence and bought methamphetamine. Based on this information, the DPD obtained a search warrant for the place described as

*“836 North Linley Court, a single family structure with green siding and trim on the east side of North Linley Court with a black metal security door with the numbers ‘836’ to the right of the door in black.”*

The property at 836 North Linley Court contained two structures: the main residence and a detached garage. A brick and wrought iron fence lined the property’s front perimeter and a chain link fence extended from the sides of the detached garage and lined the property’s

back perimeter. The detached garage stood about twenty-five feet away from the residence with a walkway connecting the two structures. The detached garage had two boarded-up windows and a door facing the backyard and the residence. A sealed and inoperable garage door faced the alley.

On October 24, 2018, the DPD Special Weapons and Tactics (SWAT) team executed the warrant, securing the residence, the occupants, and the backyard. At the time of the raid, the SWAT team had no visibility into the detached garage because of the boarded-up windows. The SWAT team breached the detached garage to secure the interior. The SWAT team found Richard Ronquillo sleeping on a bed and ordered him to exit. Ronquillo arose from the bed, shoved a plastic bag into his rear pocket, and exited the detached garage where the SWAT team detained Ronquillo. Officers performed two pat downs on Ronquillo and found cocaine, methamphetamine, and heroin.

Rouquillo moved to suppress the evidence found on his person. The district court denied the motion and a jury convicted him of possession with intent to distribute methamphetamine, cocaine, and heroin. He now appeals the district court’s denial of his motion to suppress.

Upon appeal, the Tenth Circuit Court of Appeals found as follows”

“Courts have agonized over the parameters of curtilage since Justice Holmes first hinted at the idea nearly a century ago in *Hester v. United States*, 265 U.S. 57, 59 (1924). Once again, we find ourselves confronting this complex matter in a series of events that led officers to find Defendant Richard Ronquillo sleeping in a detached garage.

“The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. The Fourth Amendment requires that warrants particularly describe the place to be searched, and the persons or things to be seized. The particularity requirement ensures that the search will be carefully tailored to its justification. *United States v. Otero*, 563 F.3d 1127 (10th Cir. 2009) (quoting *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)). Practical accuracy rather than technical precision controls the determination of whether a search warrant adequately describes the place to be searched.

“Defendant argues that the warrant did not authorize the DPD’s search of the detached garage because the warrant and supporting affidavit contained no reference to the detached structure. But police may search a detached structure not directly referenced in a warrant if the curtilage contains the detached structure. We have consistently held that a search warrant authorizing a search of a certain place includes any detached structures and vehicles located within its curtilage. For example, in *United States v. Earls*, we held that a search warrant authorized the search of a detached garage, shed, and office because the detached structures fell within the curtilage, even though the search warrant did not describe them. 42 F.3d 1321, 1327 (10th Cir. 1994); see also *United States v. Sturmoski*, 971 F.2d 452, 458 (10th Cir. 1992) (upholding the search of a horse trailer in the curtilage of a residence even though the warrant did not specifically state it); *United States v. Gottschalk*, 915 F.2d 1459, 1461 (10th Cir. 1990) (upholding the search of vehicles in the curtilage of residence.

“The curtilage and the home receive the same Fourth Amendment protections because the curtilage is the area to which extends the intimate activity associated with the sanctity of a man’s home and the privacies of life. *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

“To determine the curtilage of the residence, we consider four factors: (1) “the proximity of the area claimed to be curtilage to the home;” (2) “whether the area is included within an enclosure surrounding the home;” (3) “the nature of the uses to which the area is put;” and (4) “the steps taken by the resident to protect the area from observation by people passing by.” *United States v. Dunn*, 480 U.S. 294, 301 (1987). The Dunn factors are useful analytical tools that bear upon our primary inquiry of whether the area in question is so intimately tied to the home itself that it should be placed under the home’s umbrella’ of Fourth Amendment protection.

“**Proximity.** The close proximity of the detached garage to the residence suggests that it falls within the curtilage of the residence. The detached garage was about twenty-five feet from the main residence, and a walkway through the backyard connected the detached garage to the main residence.

“**Enclosure.** The fence enclosure supports that the curtilage includes the detached garage. A chain link fence surrounded the backyard and connected to the detached garage. The fence did not enclose the entire building of the detached garage, but the fence started and ended at the detached garage and the garage door was inoperable—creating a full enclosure and requiring anyone wishing to enter the detached garage to do so from inside the fence. Thus, the fence and the detached garage served to demark a specific area of land immediately adjacent to

the house that is readily identifiable as part and parcel of the house.

**“Nature of the use of the area.** The third factor requires us to examine the nature of the uses to which the area is put. A detached garage is the type of building which is ordinarily a part of residential property as the activity of storing a vehicle in a detached garage is intimately tied to home life. Here, the overhead garage door was sealed, inoperable, and prevented the storage of a vehicle. Even with this information, the officers had no objective data indicating the use of the garage. But intimate activities of the home occurred in this detached garage. Defendant used the detached garage as a living quarter. The detached garage had clothes, mouthwash, multiple chairs, a mirror, lamps, and drinks. Officers also found Defendant sleeping in a bed. Defendant used the detached garage as a bedroom, and the activities that occur in a bedroom are the type of private intimate activities that occur in the home.

**“Shielding from public view.** The public could not observe the interior of the detached garage, which weighs in favor of the notion that the detached garage existed within the curtilage. The detached garage had two windows and one door, all of which faced the main residence and not the public alley. The sealed inoperable overhead garage door was the only entrance facing the public alley. The two boarded up windows protected the interior from public observation. After reviewing the Dunn factors, we conclude that the curtilage included the detached garage. Thus, the search warrant authorized the search of the detached garage.”

**READ THE COURT OPINION HERE:**

<https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010111011614.pdf>

**SEARCH AND SEIZURE:**

**Dominion Over An Apartment**

*United States v. Blair*, CA8, No. 22-3573, 2/23/24

Kenneth Blair’s troubles began with another man’s arrest outside a Mexican restaurant in Lincoln, Nebraska. Police found the remnants of a recent half-pound meth deal in the man’s car. Staring down the barrel of another drug charge, he flipped on his source and agreed to become a confidential informant. The now-CI told the police that he regularly bought meth from someone called “Fats,” whom he later confirmed was Blair. The controlled interactions that followed ended with Blair’s arrest and conviction.

The CI said that he regularly met Blair at a parking lot in an Omaha apartment complex to buy meth. While preparing for a controlled meeting in Lincoln, police learned that Blair drove a Lexus registered to a woman who lived in the complex.

Investigators set up a controlled buy. As the CI travelled to Omaha, a detective watched the woman’s apartment. He saw Blair drive up in the Lexus, enter the apartment, and leave with a grocery bag. Blair drove to the parking lot and waited until the CI and an undercover officer arrived. Wearing a wire, the CI got in the Lexus, gave Blair \$1,000 in marked buy money, and returned with the grocery bag. Inside was about two pounds of meth.

With a successful buy and multiple informants pointing to Blair as their supplier, police got a warrant to search the Omaha apartment and had the CI arrange another buy. Only this time, when Blair got to the apartment to get the goods, he was arrested. The search turned up about five pounds of meth in the master bedroom along with drug paraphernalia and over \$19,000 cash, including all the buy money.

Blair claimed there was nothing that linked him to an apartment where drugs were found. The Court of Appeals for the Eighth Circuit stated that information independently linked him to the apartment. Blair was on a utility account for the unit and drove a car registered at the address. And police saw him enter the apartment to pick up the drugs that he sold to the CI.

**READ THE COURT OPINION HERE:**

<https://ecf.ca8.uscourts.gov/opndir/24/02/223573P.pdf>

**SEARCH AND SEIZURE:**

**Emergency Search; Entry to Assist**

*United States v. Maxwell*

CA8, No. 22-2653, 12/27/23

Lieutenant Steven Bose of the Waterloo, Iowa, Police Department initiated a traffic stop on a blue Chevrolet Trailblazer on November 4, 2020, at approximately 9:40 p.m. The Trailblazer did not stop until it came to a red light. The front-seat passenger opened the door and took off running, dropping a pair of black gloves. The passenger was a Black man wearing dark clothing and shoes. Bose pulled over, exited his patrol car, and gave chase, but lost sight of the passenger. While continuing his search on foot, Bose saw a silver Chevrolet Malibu backed into a driveway at a home on West 10th Street in Waterloo. A man sat in the driver's seat with the door open, but was not wearing dark clothes. Additional officers soon responded to the area.

Bose stopped Dennis Brown, a Black man wearing dark joggers, on West 10th Street. After Bose reviewed his dash-cam video, he realized that the fleeing passenger was leaner than Brown and wore dark blue jeans. Brown also was not out of

breath and maintained that he did not run from officers. Bose apologized for the detention and released Brown.

Officers found the Trailblazer, which was parked nearby. Bose could see two ski masks and one pair of black gloves inside the vehicle. He found another pair of black gloves in the street, where the passenger had exited the Trailblazer.

Meanwhile, dispatch reported that an armed robbery had occurred nearby and described the suspects as two Black men wearing black clothing and ski masks. One suspect was wearing black gloves, the other had hazel eyes, and both were armed with handguns. According to dispatch, the robbery had occurred approximately thirty to forty-five minutes earlier. Around the time of this report, a woman brought a set of keys to the officers, which she had found where Brown was detained. The keys belonged to the Trailblazer, which was registered to Harden.

Bose saw Brown and two others on the porch of the home on West 10th Street where the Malibu was parked. Officers detained Brown for a second time, set up a perimeter around the house, and decided to apply for a warrant. Lieutenant Kye Richter saw movement on the second floor of the home, which he believed was a person descending the stairs.

Richter spoke with the woman who was standing on the front porch. She told him that she rented the home with her boyfriend, Chavee E'Laun Harden, and that her two young children—a four-month-old infant and two-year-old toddler—were alone in the house. She said that the unclothed infant was in a swing in the living room and reiterated that Harden was not at home. She pleaded for permission to go inside to tend to the children, but was told by Richter that she

would not be allowed to enter without a police escort. She discussed the matter with Richter for approximately eleven minutes, but ultimately did not consent to the officers' entry into the residence.

Richter and Bose escorted the girlfriend into the home before the warrant application had been completed. They found Antione Deandre Maxwell and Harden in the living room and took them into custody. Officers thereafter conducted a protective sweep of the home, during which they saw a bundle of currency and a pair of black tennis shoes. The infant was seated in a swing in the living room, and the toddler was asleep upstairs.

Search warrants issued hours later. Officers seized from within the residence commercially packaged marijuana products, \$130 in currency and a black hair tie from a table in the living room, as well as \$1,741 in currency from within a bedroom. The silver-hued Malibu belonged to Maxwell and held a .22 caliber revolver and a .45 caliber pistol within, as well as a receipt for marijuana products and a variety of marijuana products in a green reusable grocery bag. Officers recovered black gloves and ski masks from within Harden's Trailblazer.

Upon appeal, Chavee E'Laun Harden argued that the officers' entry into the home violated the Fourth Amendment. The Court of Appeals for the Eighth Circuit found as follows:

"The Fourth Amendment protects the right of people to be secure in their homes against unreasonable searches and seizures. Warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively

reasonable under the Fourth Amendment. *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978). See *Payton v. New York*, 445 U.S. 573, (1980). (Searches and seizures inside a home without a warrant are presumptively unreasonable.) The Supreme Court has long considered "the need to assist persons who are seriously injured or threatened with such injury" as an exigency that justifies a warrantless search. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). The Fourth Amendment thus allows officers to enter a home if they have an objectively reasonable basis for believing that such help is needed, and if the officers' actions inside the home are reasonable under the circumstances.

"Based on the information known to the officers, they reasonably believed that Brown was involved in the robbery, that he drove the Trailblazer, and that at least one more armed robbery suspect was within the home. They reasonably decided that Harden's girlfriend could not re-enter without being escorted by officers. Both Richter and Bose knew that it would take hours before the warrant issued, and a reasonable officer would have known that it is dangerous to leave an infant and toddler alone for that amount of time. Once the officers entered, they arrested Maxwell and Harden and performed only a protective sweep to ensure that no one was hidden in the home. Officers did not seize evidence until a warrant authorized them to do so.

"We conclude that the circumstances here were sufficiently exigent to allow officers to enter, in light of the very young unattended children that were either alone (if Harden's girlfriend were to be believed) or with at least one armed robbery suspect (as Bose and Richter reasonably believed). See *United States v. Sanders*, 4 F.4th at 672 (8th Cir. 2021 (holding that officers had objectively reasonable basis to enter the house without a

warrant because the circumstances indicated a serious concern for the safety of the children inside the home); *United States v. Antwine*, 873 F.2d 1144, 1147 (8th Cir. 1989) (holding that an officer’s entry into the home, his limited search, and the seizure of firearm was reasonable because an eleven-year-old boy and small girl would be left alone at the home after the arrest of armed robbery suspect). Bose and Richter’s warrantless entry thus was reasonable and constitutional under the exigent circumstances doctrine. See *Caniglia v. Strom*, 593 U.S. 194 (2021) (explaining that the exigent circumstances doctrine permits warrantless entries in cases involving unattended young children inside a home).”

**READ THE COURT OPINION HERE:**

<https://ecf.ca8.uscourts.gov/opndir/23/12/222653P.pdf>

**SEARCH AND SEIZURE:**

**Extending the Traffic Stop**

*United States v. Betts*, CA8, No. 23-1012, 12/14/23

On June 3, 2021, at 5:50 p.m., Iowa State Patrol Trooper Spencer Baltes observed Betts narrowly pass a semi-truck without using a turn signal on I-80 in Dallas County, Iowa. Baltes initiated a traffic stop and approached Betts’s vehicle from the front passenger side, where Betts’s niece Macey Wignall was seated. Betts produced his license and registration but explained that his insurance had lapsed. Due to the noise of passing traffic, Baltes asked Betts to sit with him in his patrol vehicle, which Betts agreed to do.

During this initial encounter, Baltes observed a torch-style lighter on the floorboard of the front passenger seat. Baltes knew that torch-style lighters were often used to heat drugs like

methamphetamine. Looking through Betts’s back passenger window as he returned to the patrol car, Baltes saw several shopping bags, including new clothes and shoes. He also observed that Betts had “extremely rotting teeth,” and that, unlike Wignall, Betts was speaking quickly, sweating profusely, and was “very fidgety.” Moreover, Betts’s rapid, shallow breathing was so stark that Baltes could hear it. Based on his years of experience and training in law enforcement, Baltes knew these traits were consistent with methamphetamine use.

Once they were seated in the patrol vehicle, Baltes asked Betts about his travel plans. Betts explained that he had been driving to Las Vegas for a few days of vacation with Wignall, but that they turned around in Nebraska when he heard that pet-sitting arrangements for his pets had fallen through in Marshalltown, Iowa. Upon further questioning, Betts explained that he was unemployed and thus could not afford to insure his vehicle. During their conversation, Baltes observed that Betts’s breathing was still rapid and shallow. Betts continued to sweat, even though the patrol vehicle’s air conditioning was running.

Baltes testified that Betts’s plans made him suspicious. Baltes knew that Las Vegas was a collection point for drug trafficking, and he thought it was an unusually distant, “extremely uneconomical” destination for only a few days of vacation. He also knew that I-80 was a significant thoroughfare for drug activity. Moreover, he found it suspicious that Betts would abruptly turn around in the middle of a long drive from Iowa to Las Vegas because of pet-sitting issues without first trying to find a replacement sitter. Still in the patrol vehicle, Baltes ran Betts’s driver’s license. He discovered that Betts was on parole for possession and delivery of methamphetamine, possession of a controlled substance, and driving

while barred. According to Baltes, he now suspected that Betts was a methamphetamine user and was likely in possession of it.

Baltes then returned to Betts's vehicle to speak with Wignall. She declined to provide identification but told Baltes that she and Betts had taken a one-day trip to an outlet mall in Council Bluffs, Iowa. She made no mention of a Las Vegas vacation.

At approximately 6:00 p.m., Baltes returned to his patrol car to have Betts complete the digital paperwork for a traffic warning. Baltes inquired further about Betts's and Wignall's travel plans, at which time Betts said that he and Wignall had stopped at the Nebraska Crossing outlet mall near Omaha. After running Wignall's name, Baltes learned that she was married, lived 20 minutes from Marshalltown, and had prior drug-related convictions and an eluding charge. This raised Baltes' suspicions further: not only did Betts and Wignall give conflicting accounts of their travel plans, but it was unclear why Wignall's spouse could not watch Betts's pets, why Betts could not afford insurance but would buy new clothes and shoes, or why Betts made the pet-sitting sound like an emergency despite stopping to shop on his return.

While the traffic warning printed, Baltes asked Betts screener questions about contraband and whether a drug dog would alert to his vehicle. Betts denied the existence of any contraband but "appeared very triggered" by the drug dog question, equivocating on his answer. Around 6:05 p.m., Baltes radioed for the nearest canine unit, which arrived approximately 40 minutes later. After the drug dog alerted to Betts's vehicle, troopers searched it and recovered a loaded .380 caliber handgun, a six-round magazine, and 1.2 grams of methamphetamine with related

paraphernalia. After being read his Miranda warnings, Betts admitted the gun and drugs were his.

The United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of Betts's motion to suppress evidence obtained from the traffic stop. The Court found that the officer had reasonable suspicion to extend the stop based on a combination of factors: Betts's quick speaking, profuse sweating, and rapid, shallow breathing; his possession of a torch-style lighter, which the officer knew was often used to heat drugs like methamphetamine; Betts's unusual travel plans and his history of drug-related offenses. These factors, viewed as a whole, justified the officer's suspicion that Betts was in possession of illegal drugs.

**READ THE COURT OPINION HERE:**

<https://ecf.ca8.uscourts.gov/opndir/23/12/231012P.pdf>

**SEARCH AND SEIZURE:**

**Extending the Traffic Stop**

*United States v. Stewart*  
CA3, No. 22-3014, 2/2/24

Gilroy St. Patrick Stewart was pulled over by Trooper George Tessitore for driving a vehicle with heavily tinted windows and a partially obstructed license plate, both violations of the Pennsylvania Vehicle Code. The United States Court of Appeals for the Third Circuit had to determine whether the officer unconstitutionally prolonged the traffic stop.

Upon pulling over Stewart, Tessitore asked for his driver's license and the vehicle's registration. Stewart produced an Ohio driver's license and a vehicle that was registered to a Hazel Sparkes of

Baldwin, New York. Stewart claimed the vehicle belonged to his aunt. Tessitore then questioned Stewart about his travel plans. During the stop, Tessitore discovered that Stewart had a history of arrests, including a money laundering arrest made by the Drug Enforcement Agency. Tessitore also noted that Stewart was driving on I-80, a well-known drug trafficking corridor, and that there was an air freshener hanging from Stewart's rear-view mirror, often used to mask the smell of narcotics.

Stewart was subsequently charged with possession of five kilograms or more of cocaine with intent to distribute, after 20 kilograms of cocaine were found in a hidden compartment in his vehicle. Stewart moved to suppress the cocaine as the fruit of an unlawful search..

Upon review, the Court of Appeals held that the officer had reasonable suspicion of criminal activity when he extended the length of the stop, due to a combination of factors including Stewart's evasive and inconsistent answers, the darkly tinted car windows, the car's registration to a third party, Stewart's prior arrests, his travel along a known drug corridor, and the air freshener in his vehicle. As such, the officer did not unconstitutionally prolong the traffic stop, and Stewart's Fourth Amendment rights were not violated. The Court affirmed the District Court's order denying Stewart's motion to suppress evidence from the traffic stop.

**READ THE COURT OPINION HERE:**

<https://www2.ca3.uscourts.gov/opinarch/223014p.pdf>

**SEARCH AND SEIZURE: Extending the Traffic Stop; Checking a Rental Agreement Incident to the Stop**

*United States v. Dawson*

CA10, No. 22-8064, 1/22/24

Wyoming Highway Patrol Trooper Harley Kalb pulled over Defendant Jerry Dawson for speeding in a rental car. After issuing a speeding citation but before Defendant produced his rental agreement, Trooper Kalb discovered marijuana in plain view, searched Defendant's rental car, and seized two pounds of methamphetamine.

Upon appeal, the Tenth Circuit Court of Appeals had to consider whether the Fourth Amendment permits an officer to prolong an otherwise completed traffic stop of a rental vehicle, absent reasonable suspicion, to determine whether the driver is authorized to drive the vehicle at the time of the stop. Bound by *United States v. Cates*, 73 F.4th 795 (10th Cir. 2023), the Court held that it does in this case.

"In *United States v. Cates*, 73 F.4th 795, 807 (10th Cir. 2023), an officer stopped the defendant for speeding in a rental car. The defendant could not immediately locate his rental agreement. Much like the instant case, the officer began drafting a speeding citation while the defendant searched his phone for his rental agreement. As he worked on the citation, the officer texted another officer to arrange a dog sniff of defendant's rental car. The canine alerted to the presence of methamphetamine shortly before Defendant produced a general email confirming that he had reserved a rental vehicle. The Court held that the mission of the traffic stop remained ongoing because the defendant had not demonstrated his authority to drive the rental car before the dog alerted, and the officer therefore did not unlawfully prolong the stop.

“Bound by *Cates*, we hold that Trooper Kalb did not divert from the traffic-based mission of the stop by detaining Defendant for the purpose of determining whether he was authorized to drive his rental car by rental agreement. Checking a rental agreement is an ordinary inquiry incident to the traffic stop akin to inspecting a privately-owned vehicle’s registration. *Rodriguez v. United States*, 575 U.S. 348 (2015). The Supreme Court has noted registration requirements are essential elements of state roadway safety programs that, in conjunction with licensing requirements, ensure only those qualified to do so are permitted to operate motor vehicles. *Delaware v. Prouse*, 440 U.S. 648, 658 (1979). A rental agreement check is likewise closely tied to traffic enforcement and is properly characterized as part of an officer’s traffic mission when he conducts a stop on a rental vehicle. It follows that a rental agreement check is not the kind of unrelated investigation that offends the Fourth Amendment when conducted in a way that lengthens the stop. Thus, Trooper Kalb was justified in continuing to detain Defendant to determine whether he was authorized to drive the rental car because that inquiry was part of his mission during the traffic stop.”

**READ THE COURT OPINION HERE:**

<https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110987655.pdf>

**SEARCH AND SEIZURE:**

**Impounding Vehicle on Private Property**

*United States v. Ramos*

CA3, No. 23-6071, 12/15/23

The United States Court of Appeals for the Tenth Circuit ruled that impounding a vehicle from a private property without a reasonable, non-pretextual community-caretaking rationale

violates the Fourth Amendment. The defendant, Isaac Ramos, was arrested after an altercation at a convenience store. His truck was impounded from the store’s parking lot, and a subsequent inventory search revealed a machine gun and ammunition. Ramos was charged with unlawful possession of a machine gun and being a felon illegally in possession of ammunition. He moved to suppress the evidence, arguing that the impoundment of his truck violated the Fourth Amendment.

The district court denied his motion and he appealed. The Tenth Circuit reversed the district court’s decision, finding that the impoundment was not supported by a reasonable, non-pretextual community-caretaking rationale.

The court considered five factors: whether the vehicle was on public or private property; if on private property, whether the property owner had been consulted; whether an alternative to impoundment existed; whether the vehicle was implicated in a crime; and whether the vehicle’s owner and/or driver had consented to the impoundment. The court found that all of these factors weighed against the reasonableness of the impoundment, and thus, it violated the Fourth Amendment. The court remanded the case to the district court with instructions to grant Ramos’s suppression motion.

**READ THE COURT OPINION HERE:**

<https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110969290.pdf>

**SEARCH AND SEIZURE: Objective  
Reasonable Belief That a Traffic Violation  
Occurred; Mistake of Law**

*United States v. Marsh*, CA6, No. 22-5746, 3/12/24

On the morning of June 26, 2018, Herbert Marsh, Hakeem Mannie, and James Horton pulled up to Music City Pawn #3 in Nashville, Tennessee. They wore masks and gloves, and Horton was armed with a black pistol with an extended magazine. As the men entered the store, Horton pointed his gun at the two employees and ordered them to the ground. Marsh carried one of the employees by his belt buckle to the back of the store and ordered him to open the safe. Mannie emptied the cash registers at the front of the store. The three robbers ultimately stole eleven firearms and more than \$8,000 in cash.

The next day, Marsh, Mannie, Horton, and a fourth person were riding in Marsh's car when they caught the attention of two Nashville police officers. The officers thought that Marsh's gray BMW sedan resembled the vehicle description in a "be on the lookout" report they had received, so they began to follow the car, waiting for it to commit a traffic violation. After a few minutes, Marsh's car arrived at a red light at the intersection of 24th Avenue North and Rosa Parks Boulevard. When the light turned green, the car turned left into the outside right lane of Rosa Parks Boulevard, which has two lanes of traffic traveling in each direction. The officers believed that Tenn. Code Ann. § 55-8-140(2) required drivers turning left to enter the lane closest to the center of the road (i.e., the leftmost lane), so they initiated a traffic stop of Marsh's vehicle. While speaking with the driver, Horton, the officers determined that they had probable cause to search the vehicle for drugs. The search turned up marijuana and five firearms—three in a backpack in the trunk, and two in the

locked glovebox. Of the five firearms, four were identified as stolen in the previous day's robbery of Music City Pawn, and the fifth was identified as stolen in an unrelated incident. The latter firearm, a Springfield XD .45 caliber, was the gun brandished by Horton during the robbery. The officers arrested Marsh, Mannie, and Horton.

They were subsequently charged with Hobbs Act robbery and several firearms offenses. Marsh's co-conspirators pleaded guilty, but Marsh did not. After the district court denied his motion to suppress, Marsh proceeded to trial and was convicted by a jury on six of the seven charges against him. On appeal, Marsh challenges the denial of his suppression motion.

Marsh moved to suppress the evidence obtained from the search of his car on the ground that the traffic stop was unlawful. At the suppression hearing, Marsh argued that Horton didn't violate the law in making the left turn, so the officers lacked probable cause for the stop.

Upon review, the Sixth Circuit found as follows:

"The district court denied the suppression motion. The court noted that the parties appeared to ultimately agree that, contrary to the officers' belief, a driver is not required under Tenn. Code Ann. §55-8-140(2) to turn left into the inside lane under the circumstances of this case. But it observed that an officer's reasonable, but mistaken belief that the conduct in question is illegal, is sufficient probable cause for a traffic stop." Because the court determined that the traffic law left some room for interpretation, it concluded that the stop was based on an objectively reasonable belief that a traffic violation had occurred and so did not violate the Fourth Amendment.

“The officers’ mistake of law was objectively reasonable, so the traffic stop of Marsh’s vehicle did not violate the Fourth Amendment. The district court therefore properly denied Marsh’s motion to suppress.”

**READ THE COURT OPINION HERE:**

<https://www.opn.ca6.uscourts.gov/opinions.pdf/24a0051p-06.pdf>

**SEARCH AND SEIZURE: Probable Cause; Know Informant With Unknown Reliability**

*United States v. Davis*, CA4, No. 10, No. 22-4088, 2/23/24

On June 11, 2019, agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) were surveilling Ray’s Guns, a firearms store. ATF learned that an individual named Derrick Hough had purchased 15 firearms in the preceding year. ATF also discovered that Hough was planning to pick up three pistols he had previously purchased at Ray’s Guns. The same day he acquired those three pistols, Hough also bought an additional pistol. To complete both transactions, Hough filled out ATF Form 4473 and provided an “inaccurate address.” When purchasing the firearms, Hough drove a rental car and paid in cash, which ATF believed “to be indicative of potential firearms trafficking.” After Hough departed from Ray’s Guns, he drove to the parking lot of a Sheetz gas station. Agents saw a man “briefly” enter and then exit Hough’s vehicle. According to the search warrant affidavit, Hough drove away from Sheetz and to the residence that would later become the target of the challenged search warrant ATF agents pulled in behind Hough’s vehicle and turned on their emergency lights, at which point Hough exited the driveway and “almost” struck ATF vehicles. ATF agents followed Hough with their emergency lights and sirens on, but Hough

continued driving. Eventually, Hough struck an ATF vehicle and was stopped. Orville Darby, who had previously been convicted of a felony, was with Hough in the car. The three pistols that Hough had purchased at Ray’s Guns were behind the driver’s seat and “within arm’s reach” of Darby. Agents also discovered “approximately \$2,200 in US currency” on Darby’s person, “approximately \$100 in cash ripped to pieces on the front passenger floorboard,” and “[t]wo ripped plastic baggies” beside the driver’s seat. Agents “believe[d] this to be indicative of drug distribution.”

Hough and Darby were arrested and transported to the county sheriff’s office. While in custody, Hough consented to an interview and stated that “seven of the firearms he purchased within the last year were for other people.” In addition, he indicated that “a couple of the firearms were still present” at the residence, that they were in Darby’s possession, and that he and Darby had moved the firearms to the residence earlier that day. Hough also stated that he was moving into the residence “soon.” An inventory search of Darby’s person revealed “a handwritten receipt received by [Darby] for rent dated June 4, 2019 in the amount of \$600.00.”

The attachment to the search warrant application described several categories of items to be searched for and to be seized, including: “[f]irearms, ammunition, controlled substances and other items criminally possessed,” “[c]ellular telephones,” “[a]ny other weapons and firearms,” and “[e]lectronic devices and storage media, including desktop computers, laptop computers, mobile devices, tablets, and other internet accessible electronic communication devices.”

A state magistrate signed the search warrant on June 12, 2019. ATF agents and other law enforcement officers executed the warrant at

the residence on the same day. After knocking on the door and announcing their presence, officers observed an individual, later identified as Davis, “come to the kitchen door then run back into the residence.” Officers breached the door, entered the residence, and observed two additional individuals whom the police identified as “two females in the back bedroom.” Officers detained all three individuals while they searched the residence. One ATF agent observed Davis, who was seated on the floor of the living room, “attempting to remove baggies of controlled deadly substances (CDS) into the HVAC return on the floor.” Agents searched Davis and discovered “two additional plastic bags containing smaller baggies of a white rocklike substance,” which later tested positive for cocaine base, and \$2,652 in “assorted U.S. Currency.”

Agents searched the residence further and identified one of the bedrooms as Davis’s “by his wallet and identification card on the dresser.” The room also contained “male clothing items.” Officers found in the room “[a] pistol grip shotgun loaded with five shotgun rounds, U.S. Currency, and a large bag of CDS to include Heroin, Cocaine Base, and Cocaine HCl.” Three cell phones were also seized. Davis indicated that one of the recovered cell phones, a black iPhone, belonged to him. ATF subsequently sought, and was granted, a warrant to search the contents of the seized devices, including Davis’s phone.

On December 3, 2019, Davis was charged with (1) conspiracy to distribute and to possess with intent to distribute heroin, cocaine hydrochloride, and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846; (2) possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); and (3) possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A).

Davis argues that the affidavit supporting the search warrant did not establish probable cause that evidence of a crime would be found at the residence. He argues that but for the uncorroborated claims of Mr. Hough, there is nothing to link the residence to any criminal activity.

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

“The court stated that the Fourth Amendment’s reasonableness clause generally requires the obtaining of a judicial warrant before law enforcement officers undertake a search. *Riley v. California*, 573 U.S. 373, 382 (2014). A warrant must be supported by probable cause, which requires a magistrate to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

“Derrick Hough was arrested and while in custody, consented to an interview. He provided information which lead to ATF obtaining a search warrant for a residence where Curtis Davis was arrested based on criminal activity at this location.

“This was not a situation where the source of information was a confidential informant, where we have recognized that corroboration often serves a critical role in establishing the anonymous informant’s reliability. Instead, this was the case of a known informant with unknown credibility engaging in a post-arrest interview. Because an informant in such circumstances exposes himself to possible criminal prosecution or other consequences for giving false

information, his reliability is enhanced, and less corroboration is required as compared to an anonymous informant.

“With this standard in mind, it is clear that Hough’s admissions were sufficiently corroborated. We note that law enforcement need not corroborate every statement an individual makes to rely on the information that individual provides—corroboration of some statements suggests that the rest were also true. See *Gates*, 462 U.S. at 244; see also, e.g., *Spinelli v. United States*, 393 U.S. 410, 427 (1969) (because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts.).

“Examining the totality of the circumstances, including Hough’s statements, we find that the magistrate had a substantial basis for finding probable cause to believe that evidence of at least firearms-related offenses would be found at the residence.”

The Court also found that Davis’s cell phone was lawfully seized as an instrumentality of drug trafficking found in plain view. The court emphasized that for a cell phone to be seized in plain view, the “additional evidence or indicators” of criminality have significant work to do to establish probable cause. In this case, Davis’s phone was found in the residence along with substantial quantities of controlled substances that were packaged for distribution, cash, firearms, and ammunition, all found on Davis’s person or in his bedroom. This evidence provided law enforcement with sufficient probable cause to seize Davis’s cell phone.

**READ THE COURT OPINION HERE:**

<https://www.ca4.uscourts.gov/opinions/224088.p.pdf>

**SEARCH AND SEIZURE:**

**Re-examination of Evidence Lawfully Seized Pursuant to a Warrant**

*United States v. Johnson*

CA2, No. 22-1086, 2/27/24

In March 2018, a North Carolina-based Homeland Security Investigations (“HSI”) Special Agent infiltrated a chat group on Kik, a smartphone messaging app, and obtained several videos of CSAM from a user named “textiles.” Upon consulting subscriber information subpoenaed from Kik and Comcast and matching that information to a public Facebook page, the special agent came to suspect that “textiles” was Johnson. Because Johnson lived in South Burlington, Vermont, the information developed in North Carolina was forwarded for further investigation to Vermont-based HSI Special Agent Caitlin Moynihan (“SA Moynihan”).

After further querying a Vermont state law enforcement database, conducting surveillance outside Johnson’s house, inspecting license plate registrations, and verifying Johnson’s identity by tracking him down at his job behind a Costco deli counter, SA Moynihan sought and obtained a warrant to search Johnson’s home for child sexual abuse material (CSAM) and evidence of crimes involving child pornography. The warrant authorized the seizure of any “records, documents, and items,” including any electronic devices, constituting, in relevant part, evidence, contraband and property relating to material involving the receipt, distribution, transportation and possession of child pornography. A subsequent forensic review of the seized material, revealed approximately 8,816 videos and 6,931 images of CSAM on multiple devices, as well as other digital evidence falling within the search warrant’s scope.

Johnson was first indicted for the distribution of child pornography but as the result of a plea agreement pled guilty to possession of child pornography. For that crime, he was sentenced to a 45-month term of imprisonment. A later review of previously seized and segregated digital data responsive to the original warrant produced evidence that Johnson had not only possessed child pornography in 2018 but had sexually assaulted his then two-and-a-half-year-old daughter and filmed the abuse. Johnson was indicted on this charge and again pled guilty, this time reserving the right to appeal the denial of his motions to suppress evidence. The Second Court of Appeals concluded that Johnson's arguments on appeal are without merit. Accordingly, they affirmed the district court judgment.

"When criminal investigators reexamine evidence that has lawfully been seized pursuant to a warrant – returning to look again at a drug ledger, for instance, or to perform lab tests on a blood-stained jacket – we do not ordinarily view such investigative steps as constituting a new Fourth Amendment event. To be sure, as this Court has said before, the seizure of electronic devices, which "can give the government possession of a vast trove of personal information about the person to whom [the devices] belong, much of which may be entirely irrelevant to the criminal investigation that led to the seizure," is very different from the seizure of a drug ledger or an item of clothing. *United States v. Ganius*, 824 F.3d 199, 217 (2d Cir. 2016). For this reason, the mere fact that digital material has been lawfully collected does not in all circumstances permit the future review of stored information. See *United States v. Hasbajrami*, 945 F.3d 641, 670 (2d Cir. 2019). That said, the general principle that law enforcement can reexamine lawfully seized material during the course of an investigation without engaging in a new search

has clear application in a case like this, where stored data responsive to a search warrant has been separated out from nonresponsive data, and investigators return to reexamine only the responsive material in pursuit of law enforcement ends."

**READ THE COURT OPINION HERE:**

[https://ww3.ca2.uscourts.gov/decisions/isysquery/df34d370-aa79-4111-b105-4aa7af04de3f/1/doc/22-1086\\_opn.pdf](https://ww3.ca2.uscourts.gov/decisions/isysquery/df34d370-aa79-4111-b105-4aa7af04de3f/1/doc/22-1086_opn.pdf)

**SEARCH AND SEIZURE:**

**Search for Drugs Under Hood of Vehicle**

*United States v. Hays*, CA7, No. 22-3294, 1/12/24

After stopping the car Charles Hays was driving, officers observed Hays's passenger possessing methamphetamine and a smoking pipe. Officers searched the car's interior, finding a screwdriver in the center console but no drugs. An officer then searched under the car's hood and found methamphetamine in the air filter.

The only issue on appeal is whether the officers had probable cause to search under the car's hood, including inside the air filter. Because the automobile exception to the Fourth Amendment's warrant requirement authorizes officers to search a car without a warrant if there is probable cause to believe it contains contraband, including all parts of the car in which there is a fair probability contraband could be concealed. The Court of Appeals for the Seventh Circuit concluded that they had probable cause to do so.

"Under the automobile exception to the Fourth Amendment's warrant requirement, officers may conduct a warrantless search of a vehicle so long as there is probable cause to believe it contains contraband or evidence of illegal activity. *United*

*States v. Washburn*, 383 F.3d 638, 641 (7th Cir. 2004) (citing *Carroll v. United States*, 267 U.S. 132, 153–56 (1925)). It is well settled that officers can search a car without a warrant where there is probable cause to believe that illegal substances are present. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 300–02 (1999) (holding that officers could conduct a warrantless search of a car where they had probable cause to believe there were illegal drugs in the car); *United States v. Johnson*, 383 F.3d 538, 545 (7th Cir. 2004) (finding probable cause to search a car, including the trunk, without a warrant where the officer discovered a controlled substance which had fallen out of the defendant’s hat).

“During the traffic stop, officers saw Wisnasky in possession of a pipe for smoking methamphetamine and methamphetamine itself, and officers knew that Hays was recently seen at a known drug trafficking location. True, as Hays argues, the officers observed Hays’s passenger, rather than Hays himself, with methamphetamine. But we previously held that under the automobile exception, an officer had the authority to conduct a warrantless search of a car when he discovered the passenger in possession of contraband. *United States v. McGuire*, 957 F.2d 310, 314 (7th Cir. 1992) (Once Trooper Newman discovered that the passenger was transporting open, alcoholic liquor he had probable cause to believe that the car contained additional contraband or evidence.); see *Houghton*, 526 U.S. at 304–05 (rejecting a driver/passenger distinction and noting that a vehicle’s driver and passenger will often be engaged in a common enterprise and have the same interest in concealing the fruits or the evidence of their wrongdoing”). Thus, the officers had probable cause to search the car’s interior.

“Further, officers may search all containers within a car where they have probable cause to believe

contraband or evidence is contained. *California v. Acevedo*, 500 U.S. 565, 580 (1991). In other words, if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search including closed compartments, containers, packages, and trunks. To justify probable cause for a search, all that is required is a fair probability of discovering contraband. This is true without qualification as to ownership of the containers searched. Once the officers began searching the car’s interior, they discovered a screwdriver in the center console but nothing else to suggest that the screwdriver was a tool of Hays’s trade.

“Based on their experience, the officers knew that the screwdriver could have been used to hide methamphetamine in the vehicle. Thus, considering the circumstances leading up to and during the stop viewed from the position of a reasonable police officer, *United States v. Hines*, 449 F.3d 808, 815 n.7 (7th Cir. 2006), the officers reasonably found a fair probability that the area under the hood, including the air filter, could contain methamphetamine. See *United States v. Eymann*, 962 F.3d 273, 286 (7th Cir. 2020) (Probable cause to search a vehicle exists if, given the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. see also *United States v. Patterson*, 65 F.3d 68, 71 (7th Cir. 1995) (finding probable cause to search behind a vehicle’s tailgate panel where officers observed missing screws from the tailgate interior and a drug sniffing dog alerted to the odor of drugs).

**READ THE COURT OPINION HERE:**

<https://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2024/D01-12/C:22-3294:J:Kirsch:aut:T:fnOp:N:3155021:S:0>

### **SEARCH AND SEIZURE: Search of Telephone Pursuant to Warrant**

*United States v. Ivey*, CA8, No. 23-1706, 1/26/24

Ki-Jana Kolajuan Ivey entered a conditional guilty plea to unlawful possession of a firearm as a felon. Ivey appeals an order of the district court denying his motion to suppress evidence.

The gun charge arose from a traffic stop in April 2022. Officers stopped a vehicle for an expired registration, smelled alcohol inside the car, and observed an open alcohol container. During a search of the vehicle, officers found a gun under the front passenger seat where Ivey was seated. Ivey was a convicted felon at the time of the incident. Ivey possessed a cell phone.

Officers applied for a warrant to search the device for evidence related to firearms, ammunition, and possession and ownership of the seized firearm. The affidavit described the circumstances of the traffic stop, and the affiant explained that he had located a Facebook social media account in Ivey's name. The account displayed recent photos of Ivey. Eleven months before the traffic stop, Ivey posted a photo of a firearm. A magistrate judge issued the search warrant.

Officers searched Ivey's phone and found a photograph and a video of Ivey in possession of a different pistol in each. A grand jury charged Ivey with two counts of unlawful possession of a firearm as a felon. Ivey moved to suppress the evidence retrieved from his cell phone. The district court denied the motion. The court concluded that the warrant was supported by probable cause and was sufficiently particular to satisfy the Fourth Amendment.

The Court concluded that the affidavit adequately established probable cause that Ivey's cell phone

would contain evidence of a firearms offense. Officers found the phone in Ivey's possession while he was located in a vehicle with a gun under his seat. The affiant explained that in his training and experience, offenders often use social media to talk about their crimes and to post images of their activities. Ivey's own Facebook account displayed a photograph of a firearm posted less than a year before the traffic stop. There was a fair probability that evidence connecting Ivey to a firearms offense would be present in his phone.

### **READ THE COURT OPINION HERE:**

<https://ecf.ca8.uscourts.gov/opndir/24/01/231706P.pdf>

### **SEARCH AND SEIZURE:**

#### **Shooting of a Dog; Seizure**

*Ray v. Roane*, CA4, No. 22-2120, 2/22/24

This case began in 2017, when four Augusta County law enforcement officers arrived at Ray's house to serve an arrest warrant and protective order. They were greeted by Tina Ray; two of Ray's friends; and Ray's dog, a 150-pound German shepherd named Jax.

The officers called Deputy Sheriff Michael Roane for investigative support, and the whole group waited at a picnic table in Ray's yard for 30 or 40 minutes until Roane arrived. Jax lounged nearby, tethered somewhat unconventionally to a 25-foot "zip line" connecting two trees in the yard. He remained tethered throughout a rapidly developing 2 episode that began when Roane arrived and ended when Roane shot Jax dead. Ray then sued for unreasonable seizure under the Fourth Amendment.

The crux of the case was the dispute over Roane's perception of the threat posed by the dog.

Roane asserted that he believed the dog was unrestrained and posed an immediate threat to his safety. However, Ray and other witnesses testified that Roane had stopped his retreat and took a step towards the dog before shooting, suggesting that he knew the dog could no longer reach him and did not pose an imminent threat.

The Court of Appeals held that this dispute over material facts was for a jury to resolve, not a court, and could not be decided prior to trial. The court also held that if a jury credits Ray's allegations and draws permissible inferences in her favor, it could infer that Roane's shooting of the dog was an unreasonable seizure under the Fourth Amendment.

**READ THE COURT OPINION HERE:**

<https://www.ca4.uscourts.gov/opinions/222120.p.pdf>

**SEARCH AND SEIZURE:**

**Submission to Show of Authority**

*United States v Amos*, CA3, No. 20-3298, 12/14/23

On September 26, 2018, police officers Hugo Lemos and Nicholas Mastroianni were working the overnight shift as patrol officers in southwest Philadelphia. At about 2:00 a.m., they received a radio call for a person screaming at the intersection of 65th Street and Dicks Avenue outside Eddie's Café and a man assaulting a woman on the highway. The officers were nearby and arrived at Eddie's Café within two minutes. No one was outside Eddie's Café.

The officers continued driving past the café on 65th Street and Officer Lemos saw one pedestrian, later discovered to be Shiheem Amos, walking alone in an alleyway across the street. Amos was walking toward 64th Street and was stomping his

feet, and kind of throwing his arms around. The officers drove around the block to cut Amos off, driving the wrong way down a one-way street with the overhead lights on. The officers parked midway in the entrance to the alleyway and Amos continued to walk toward them. Officer Lemos got out of the vehicle and told Amos to stop and put his hands up. Officer Lemos testified that Amos placed his hands at a "halfway point" and stopped for maybe a second. Amos then ran diagonally and reached about three car lengths away from the officers. Officer Mastroianni quickly caught up with Amos and handcuffed him. At that time, a handgun fell from Amos's pocket, a firearm he was not permitted to carry due to his previous conviction of a felony.

Amos was charged with one count of possession of a firearm by a felon. He filed a motion to suppress the gun and argued that he was seized pre-flight without reasonable suspicion. After an evidentiary hearing, the District Court denied the motion, finding no pre-flight seizure occurred.

Because submission would seem to require something more than a momentary pause, Amos's brief pause and halfway hand raise was not a submission to the officers' show of authority. As Amos did not submit to the show of authority, no seizure occurred at that time. Thus, reasonable suspicion is not evaluated at that point.

When Amos ran and attempted to flee, the officers caught him and put him into handcuffs—a classic seizure. Amos concedes that if he was not seized until after he fled, then there was reasonable suspicion at that point to seize him based on his headlong flight.

In sum, Amos's one- or two-second pause and halfway hand raise did not manifest submission to the officer's show of authority. Because Amos did not submit to the show of authority and was not

seized until the officers put him in handcuffs based on reasonable suspicion, the District Court did not err in denying his motion to suppress.

**READ THE COURT OPINION HERE:**

<https://www2.ca3.uscourts.gov/opinarch/203298p.pdf>

**SEARCH AND SEIZURE: Subpoena of Walmart Pay App Subscriber Information**

*United States v. Whipple*  
CA6, No. 23-5126, 2/8/24

In March 2020, three Knoxville banks were robbed. The first two robberies were committed by a “a heavy-set white male” who “wore a thin red rain poncho, light-colored shorts, white shoes, and disposable gloves.” The robber used a manila envelope to write his demand letters for each robbery. The third robbery was committed by a large white male, this time wearing “a tan jacket, a curly wig, blue jeans, and white sneakers.” But he still wrote his demand on a manila envelope.

On March 7, FBI agents contacted a nearby Walmart, asking specifically about recent purchases of red rain ponchos and tan Dickies-brand jackets. Walmart security personnel responded that a purchase was made using the “Walmart Pay app” on March 2 at 10:15 a.m. for “a red rain poncho, markers, and manila envelopes.” The agents reviewed Walmart’s security footage from that day and time, and they observed a large white male, wearing white sneakers, leave Walmart in a yellow Dodge Challenger. Agents then subpoenaed Walmart’s transactional data and subscriber information for that specific purchase and obtained information including an email copy of the specific transaction and Robert Whipple’s name, address, and telephone number that were associated with the Walmart Pay account.

Whipple argues that his Walmart-Pay-app purchasing history and subscriber information is subject to a reasonable expectation of privacy, meaning that the government needs a warrant before it can access that history.

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

“Through his conduct, Whipple did not show that he had a subjective expectation of privacy in the purchase of ‘a red rain poncho, markers, and manila envelopes,’ which were used in the bank robberies, or in his subscriber information. He went to Walmart to make his purchase, in-store. And instead of using a more private purchasing method, Whipple chose to use the Walmart Pay app after he actively and voluntarily disclosed his name, address, and payment information to the Walmart Pay app. Moreover, he was seen on Walmart surveillance video leaving the store in his not-so-subtle yellow Dodge Charger. We will not recognize Whipple’s litigation statements as demonstrating his subjective expectation of privacy in his specific purchase and subscriber information when his actions do not indicate that he tried to keep this specific purchase private. Nor do we find that society is willing to recognize as reasonable an expectation of privacy such as Whipple claims here. Walmart’s tracking of purchasing history, particularly as related to one specific purchase, is an example of a business record, which is not subject to a reasonable expectation of privacy. See, e.g., *United States v. Miller*, 425 U.S. 435, 440, 443 (1976).”

**READ THE COURT OPINION HERE:**

<https://www.opn.ca6.uscourts.gov/opinions/pdf/24a0022p-06.pdf>

**SEARCH AND SEIZURE: Undercover Agent Surreptitiously Uses Audio-Video Equipment to Record Encounter***United States v Esqueda*

CA9, No. 22-50170, 12/12/23

An informant and undercover officers conducted a controlled purchase of a firearm from Christopher Marcel Esqueda in his motel room. The undercover agents—without a search warrant— entered the motel room with the consent of Esqueda and his co-defendant. The agents surreptitiously recorded the encounter using audio-video equipment concealed on their persons. The video recordings depicted the interior of Esqueda’s motel room during the encounter and showed Esqueda handing a .22 caliber revolver to an undercover officer.

Christopher Esqueda argued that the officers’ secret recording of the encounter exceeded the scope of the “implied license” he granted when he consented to the officers’ physical entry. He therefore claimed that the officers conducted a search violative of his Fourth Amendment rights.

The Court of Appeals for the Ninth Circuit rejected this argument because longstanding Supreme Court precedent that preceded *Katz v. United States*, 389 U.S. 347 (1967), dictates that an undercover officer who physically enters a premises with express consent and secretly records only what he can see and hear by virtue of his consented entry does not trespass, physically intrude, or otherwise engage in a search violative of the Fourth Amendment. The court therefore held that no search violative of the Fourth Amendment occurred.

**READ THE COURT OPINION HERE:**

<https://cdn.ca9.uscourts.gov/datastore/opinions/2023/12/12/22-50170.pdf>

**SECOND AMENDMENT:  
Ban on High Capacity Magazines***Ocean State Tactical v. State of Rhode Island*

CA1, No. 23-1072, 3/7/24

The United States Court of Appeals for the First Circuit examined an appeal against a district court’s refusal to issue a preliminary injunction against the enforcement of a Rhode Island law banning certain large-capacity ammunition magazines. The plaintiffs, a group of gun owners and a registered firearms dealer, argued that the law infringed upon their Second Amendment rights.

The Court of Appeals, however, upheld the district court’s decision. It noted that the law did not impose a significant burden on the right of armed self-defense, as it did not prevent gun owners from owning other forms of weaponry or ammunition, and the banned magazines were rarely used in self-defense situations. Furthermore, the court found that the law was consistent with a longstanding tradition of regulating firearms in the interest of public safety.

The court also rejected the plaintiffs’ arguments that the law was retroactive and vague, violating their Fourteenth Amendment rights. It concluded that the law was not retroactive as it did not impose new liability on past actions, and it was not unconstitutionally vague as individuals of ordinary intelligence could understand what it prohibited. The court also found that the plaintiffs were unlikely to succeed on their Fifth Amendment claims, as the law did not effect a physical or regulatory taking of their property.

**READ THE COURT OPINION HERE:**

<https://www.ca1.uscourts.gov/sites/ca1/files/opnfiles/23-1072P-01A.pdf>

**SECOND AMENDMENT: Ordinance Requiring Literature Distribution**

*Maryland Shall Issue v. Anne Arundel County*  
CA4, No. 23-1351, 1/23/24

The United States Court of Appeals for the Fourth Circuit upheld a lower court's decision that an ordinance enacted by Anne Arundel County, Maryland, which required gun retailers to distribute literature relating to gun safety, suicide prevention, mental health, and conflict resolution to customers, did not violate the First Amendment rights of the gun dealers. The plaintiffs, a group of gun dealers and a corporation dedicated to the preservation and advancement of gun owners' rights, argued that the ordinance compelled them to speak on these subjects against their will.

The court found that the requirement to distribute the literature constituted commercial speech, which can be regulated under the First Amendment, as long as it is factual, uncontroversial, and not unduly burdensome. The court concluded that the literature was factual and uncontroversial because it did not suggest that firearms cause suicide, but merely identified access to firearms as a risk factor for suicide. Further, the court found that the requirement to distribute the literature was not unduly burdensome and was reasonably related to the County's interest in preventing suicide.

**READ THE COURT OPINION HERE:**

<https://www.ca4.uscourts.gov/opinions/231351.p.pdf>