Department of Homeland Security
Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

January 2017

The Federal Law Enforcement -Informer-

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting https://www.fletc.gov/legal-resources.

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The Informer – January 2017

Case Summaries

United States Supreme Court

Circuit Courts of Appeals

First Circuit

Second Circuit

Third Circuit

Fifth Circuit

Sixth Circuit

Eighth Circuit

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FLETC Informer Webinar Series

1. **Fourth Amendment Fundamentals**
   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   Date and Time: Monday February 6, 2017, 12:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

2. **Case Law Update**
   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   Date and Time: Tuesday February 7, 2017, 12:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

3. **The Bill of Rights and Law Enforcement**
   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   Date and Time: Thursday February 9, 2017, 12:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

4. **The Knock and Talk Exception**
   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   Date and Time: Friday February 10, 2017, 12:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

5. **Electronic Surveillance Law Overview**
   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   Date and Time: Friday February 17, 2017, 2:00 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

6. **The Stored Communications Act: More Holes in the Big Cheese**
   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   Date and Time: Friday February 24, 2017, 1:00 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

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Bruce's Brownbag Webinar

Each week, Bruce-Alan Barnard selects a recent Federal case that is "hot off the press" and discusses the impact and possible lessons learned for law enforcement officers. This webinar series is offered intentionally over the lunch break, so pack your lunch on Wednesday, eat at your desk, and join us for an interesting discussion on cases involving the legal aspects of law enforcement. **The site is always running and you can download slides and recordings of previous webinars in the archives on the site.** We hope to see you every Wednesday!

1. **Wednesday February 1, 2017 - 11:45 a.m. to 12:15 p.m. (EST)**
2. **Wednesday February 8, 2017 - 11:45 a.m. to 12:15 p.m. (EST)**
3. **Wednesday February 15, 2017 - 11:45 a.m. to 12:15 p.m. (EST)**
4. **Wednesday February 22, 2017 - 11:45 a.m. to 12:15 p.m. (EST)**
5. **Wednesday March 1, 2017 – 11:45 a.m. to 12:15 p.m. (EST)**

To join Bruce's Brown Bag Webinar: https://share.dhs.gov/bbw

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FLETC Informer Rewinds

When the training schedule does not allow us to provide a "live" webinar, please join us for the broadcast of a previously aired webinar.

1. **Wednesday February 1, 2017:**
   Federal Criminal Discovery - **12:15 p.m. to 1:15 p.m. (EST)**
   Detentions under the *Summers* Doctrine – **2:30 p.m. to 3:30 p.m. (EST)**

2. **Wednesday February 8, 2017 - 12:15 p.m. to 1:15 p.m. (EST)**
   Detentions under the *Summers* Doctrine

3. **Tuesday February 14, 2017 – 1:30 p.m. to 4:30 p.m. (EST)**
   NPS Legal Update

4. **Wednesday February 15, 2017 - 12:15 p.m. to 2:15 p.m. (EST)**
   Case Law Update

5. **Tuesday February 21, 2017 - 1:30 p.m. to 2:30 p.m. (EST)**
   Self-Incrimination and *Miranda*

6. **Wednesday February 22, 2017 – 12:15 p.m. to 2:15 p.m. (EST)**
   Electronic Surveillance Law Overview

7. **Monday February 27, 2017, - 12:00 p.m. to 2:00 p.m. (EST)**
   Fourth Amendment Fundamentals

8. **Wednesday March 1, 2017 – 12:15 p.m. to 2:15 p.m. (EST)**
   The Stored Communications Act: More Holes in the Big Cheese

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4. Enter your name and click the "Enter" button.
5. You will now be in the meeting room and will be able to participate in the webinar.
6. Even though meeting rooms may be accessed before a webinar, there may be times when a meeting room is closed while an instructor is setting up the room.
7. Training certificates will be provided at the conclusion of each webinar.

CASE SUMMARIES

United States Supreme Court

White v. Pauly, 2017 U.S. LEXIS 5 (U.S. Jan. 9, 2017)

Two police officers went to Daniel Pauly's house to investigate a road-rage incident that had occurred earlier that night. The officers made verbal contact with Daniel Pauly and his brother, Samuel, who remained inside the house. A third officer, Ray White, arrived at Pauly's house several minutes later. As Officer White approached the house, someone from inside yelled, "We have guns," and then Daniel Pauly stepped out the back door and fired two shotgun blasts. A few seconds later, Samuel Pauly opened a window and pointed a handgun in Officer White's direction. Officer White shot and killed Samuel Pauly.

Pauly's estate filed a lawsuit against the officers, claiming the officers violated the *Fourth Amendment* by using excessive force against him.

The District Court and the Tenth Circuit Court of Appeals denied the officers qualified immunity. The officers appealed to the United States Supreme Court.

The Court, which decided the case without oral arguments from the parties, vacated the Tenth Circuit Court of Appeals' judgment and remanded the case.

First, the court noted that qualified immunity is appropriate when an officer's conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. Qualified immunity was designed to protect "all but the plainly incompetent or those who knowingly violate the law." Second, the court reiterated that "clearly established law" should not be defined "at a high level of generality," but instead it must be "particularized" to the facts of the case. Third, the Court stated that the lower court failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the *Fourth Amendment*. Instead, the Court found that the lower court relied upon *Graham v. Connor*, *Tennessee v. Garner*, and other use of force cases, which only outline excessive force principles at a general level. The court added that this was not a case where it was obvious that there was a violation of clearly established law under *Garner* and *Graham*. Finally, the court found that Officer White arrived to scene late, and it was not clearly established that the *Fourth Amendment* requires an officer to second-guess the earlier steps already taken by fellow officers in situations like the one Officer White faced here.

While the Court vacated the Tenth Circuit's judgment, the Court recognized that Pauly's estate could still prevail after the case was remanded. Specifically, the Court commented that Pauly's estate could claim that Officer White witnessed deficient performance by the other officers and should have realized that corrective action was necessary before he used deadly force. The Court took no position on this potential claim, as neither the District Court nor the Tenth Circuit had addressed the issue.

For the Court's opinion: https://www.supremecourt.gov/opinions/16pdf/16-67_2c8f.pdf

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Circuit Courts of Appeal

First Circuit

Corado-Arriaza v. Lynch, 2016 U.S. App. LEXIS 22501 (1st Cir. Dec. 19, 2016)

Immigration and Customs Enforcement (ICE) agents went to a restaurant to apprehend Gustavo Gomez. While searching for Gomez, the agents encountered the defendant, whom they believed to be Gomez. The defendant gave the agents a Guatemalan driver's license that instead identified him as Gustavo Corado-Arriaza. The agents handcuffed the defendant while they questioned him about his identify. The agents also searched the defendant's pockets and his wallet. When the agents asked the defendant whether he had a green card, the defendant answered, "No." At some point, the defendant told the agents his passport was in his jacket. After the agents retrieved the jacket, they asked the defendant how he had come to the United States. The defendant told the agents he had arrived on a visa. The agents eventually learned the defendant had overstayed his visa and arrested him.

The Department of Homeland Security (DHS) served the defendant with a Notice to Appear that charged him with removability on the basis that he had remained in the United States beyond the six months permitted by his B-2 visa. The government submitted a copy of the defendant's passport and an Arrival/Departure Form (Form I-94), to support its position.

The defendant filed a motion to suppress his passport and the Form I-94, claiming that the ICE agents subjected him to an unlawful arrest, search, and interrogation when they encountered him at the restaurant.

The Immigration Judge (IJ) denied the defendant's motion to suppress. After the Board of Immigration Appeals (BIA) affirmed the IJ's ruling, the defendant appealed to the First Circuit Court of Appeals.

The Supreme Court has held that the exclusionary rule generally does not apply in removal proceedings unless the alien can show "egregious violations of the *Fourth Amendment*." In this case, without deciding whether the ICE agents violated the *Fourth Amendment*, the court noted that even if they had, the agents' conduct was not "egregious." The court agreed with the BIA, which rejected the defendant's argument that he had established egregiousness because he felt intimidated, not free to leave, and the agents were visibly armed. The court did not articulate the precise conduct that would rise to the level of an egregious violation, but explained the agents' conduct in this case fell short of that standard.

The court also rejected the defendant's argument that suppression was warranted because the ICE agents allegedly violated two DHS regulations when they arrested him. As before, while not deciding whether the agents violated the regulations, even if they had, the court concluded that such regulatory violations do not provide aliens a right to suppress evidence in removal proceedings.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-2227/15-2227-2016-12-19.pdf?ts=1482181209

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Second Circuit

United States v. Gilliam, 842 F.3d 801 (2d Cir. N.Y. 2016)

Jasmin, a sixteen-year old minor, worked for Gilliam as a prostitute in Maryland. Jasmin traveled with Gilliam to New York City to work as a prostitute after Gilliam threatened to require her fifteen-year old sister to work as a prostitute if Jasmin refused.

When Jasmin did not return home, her foster mother reported her missing to the police in Maryland. An investigator interviewed Jasmin's social worker who expressed concern that Jasmin was being forced into prostitution by Gilliam. The social worker based her concern on conversations with Jasmin's biological mother. The investigator then spoke with Jasmin's biological mother who told the investigator she had recently communicated with Gilliam. According to Jasmin's biological mother, Gilliam told her that he was planning to take Jasmin to New York City to work as a prostitute.

Later that day, the investigator contacted Sprint, Gilliam's cell phone service provider. The investigator told Sprint that he was investigating a missing child who was being prostituted and requested GPS location information for Gilliam's cell phone. Sprint complied with the investigator's request and provided real-time GPS location on Gilliam to the investigator. The investigator passed this information on to law enforcement officers in New York City who located and arrested Gilliam while he was walking down the street with Jasmin.

The government charged Gilliam with sex trafficking and prostitution-related offenses.

Gilliam argued that the law enforcement officers violated the *Stored Communications Act (SCA), 18 U.S.C. § 2702(c)(4)* by obtaining his GPS location information without a warrant.

The court disagreed, holding that exigent circumstances existed that allowed the investigator to obtain Gilliam's GPS location information without a warrant. *Section 2702(c)(4)* provides:

> A provider . . . may divulge a record or other information pertaining to a subscriber . . . (not including the contents of communications covered by other subsections);
>
> (4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.

First, the court held that Sprint's disclosure of Gilliam's GPS location information constituted "other information" within the meaning of *§ 2702(c)(4)*.

Second, the court held it was reasonable for the Maryland investigator to obtain Gilliam's cell phone location information without a warrant because exigent circumstances existed. Based on the investigator's discussions with Jasmin's foster mother, social worker, and biological mother, the investigator had a substantial basis to believe that Gilliam had compelled Jasmin to travel to New York City to work as a prostitute. The court cited several cases from various federal circuits, which have held that exploitation of a minor for prostitution poses a significant risk of serious bodily injury.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-387/15-387-2016-12-01.pdf?ts=1480606210

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Third Circuit

United States v. Robinson, 2016 U.S. App. LEXIS 22458 (3d Cir. Pa. Dec. 19, 2016)

A police officer prepared a photo array[1] that included Robinson's photograph and showed it to the victim of an armed robbery. The witness identified Robinson from the photo array, and the government charged Robinson with robbery.

Robinson argued the photo array that was used to identify him violated the *Due Process Clause* of the *Fifth Amendment* because it was unduly suggestive. Specifically, Robinson claimed that his photograph was noticeably lighter than the others, and that he was the only one wearing a shirt with a collar.

The suggestiveness of a photo array depends on several factors, to include whether the defendant's photograph is so different from the other photographs that it suggests the defendant is the one who committed the crime. The Court of Appeals agreed with the District Court, which held that the differences in the photographs were "slight," and were not unduly suggestive. The court found that the difference in lighting was "within the range of variation of all the photographs, some of which are darker than the others," while the presence of a collar did not stand out among the "variation in necklines of the shirts" in the array's other photographs.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca3/15-1402/15-1402-2016-12-19.pdf?ts=1482175812

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Fifth Circuit

Cooper v. Brown, 2016 U.S. App. LEXIS 23314 (5th Cir. Miss. Dec. 27, 2016)

An officer stopped Cooper on suspicion of driving under the influence (DUI). During the stop, Cooper fled on foot into a residential neighborhood. The officer did not pursue Cooper because there was a passenger in his patrol car, and because DUI is a misdemeanor offense. Instead, the officer requested backup, provided Cooper's description, and explained that Cooper was a DUI suspect on foot.

A short time later, Officer Brown arrived with his police dog, Sunny, a Belgian Malinois. Sunny quickly located Cooper hiding between two houses. Although the parties disputed whether Sunny initiated the attack on his own, or whether Officer Brown directed Sunny to attack Cooper, the following facts were not disputed after Sunny initially bit Cooper: Sunny continued biting Cooper for one to two minutes. During that time, Cooper did not attempt to flee or to strike Sunny. Officer Brown ordered Cooper to show his hands and to submit to him. When Officer Brown issued that

[1] On January 6, 2017, the United States Department of Justice, Office of the Deputy Attorney General issued a memorandum entitled, Eyewitness Identification: Procedures for Conducting Photo Arrays. For the DOJ memo: https://www.justice.gov/opa/press-release/file/923201/download

order, Cooper's hands were on Sunny's head. Officer Brown saw Cooper's hands and knew that Cooper had no weapon. Officer Brown then ordered Cooper to roll onto his stomach, and Cooper complied. However, Officer Brown did not order Sunny to release the bite until after he had finished handcuffing Cooper. As a result of the bite, Cooper suffered severe injuries to his lower leg.

Cooper sued Officer Brown claiming that Brown's use of force was objectively unreasonable under the *Fourth Amendment*.

Officer Brown argued that he was entitled to qualified immunity, claiming his application of force against Cooper was objectively reasonable under the circumstances.

The court applied the factors outlined in *Graham v. Connor* to the facts in this case and held that it was objectively unreasonable for Officer Brown to allow Sunny to continue biting Cooper because Cooper was a compliant, non-threatening arrestee.

In *Graham*, the U.S. Supreme Court concluded the reasonableness of an officer's use of force depends upon the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

While the court found that DUI is a serious offense, which favored Officer Brown, the court held that the other factors weighted heavily in Cooper's favor.

First, no reasonable officer could conclude that Cooper posed an immediate threat to Officer Brown or others. Cooper was not suspected of committing a violent offense, and Officer Brown testified that the original officer, when calling for backup, had not warned that Cooper might be violent. In addition, Officer Brown could see Cooper's hands and knew he had no weapon. Finally, Brown's own expert testified that there was no evidence that would have led a reasonable officer to believe that Cooper was a threat.

Second, Cooper was not actively resisting arrest, attempting to flee, or trying to strike Sunny. The only act of "resistance" that Officer Brown identified was Cooper's failure to show his hands. However, at the time, Cooper's hands were visible to Officer Cooper on Sunny's head. Given that Sunny was still latched onto Cooper's leg at the time, Cooper's failure to raise his hands could not be characterized as "active resistance." The court added that even if Brown offered any resistance, it ended quickly, when Officer Brown ordered Cooper to roll onto his stomach, and Cooper complied with that order. At that point, no reasonable officer could believe that Cooper was actively resisting arrest; to the contrary, Cooper was actively complying, and Brown still did not command Sunny to release the bite. Finally, Officer Brown's own expert conceded that there was no reason for Officer Brown to permit Sunny to continue attacking once Cooper was on his stomach.

The court concluded that at the time of the incident it was clearly established that it was objectively unreasonable to subject a compliant, non-threatening arrestee to a lengthy dog attack.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/16-60042/16-60042-2016-12-27.pdf?ts=1482885035

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Sixth Circuit

United States v. Abernathy, 843 F.3d 243 (6th Cir. 2016)

Officers went to Abernathy's house and searched the trashcans outside the residence looking for evidence connecting Abernathy and his girlfriend to drug trafficking. Inside the trashcans, the officers found several marijuana roaches with marijuana residue and several plastic vacuum packed heat-sealed bags consistent with those used to package marijuana. The plastic bags contained marijuana residue and were marked "T2," a known strain of marijuana.

After discovering this evidence, an officer applied for a warrant to search Abernathy's house. In the affidavit in support of the warrant, the officer referenced the evidence discovered in the trash pull. The officer also included a statement claiming he had received information that Abernathy and his girlfriend were currently engaged in illegal drug activity. Based on the facts presented in the officer's affidavit, a state judge issued the search warrant.

Officers searched Abernathy's house and seized large quantities of marijuana, cocaine, firearms and cash.

The grand jury subsequently indicted Abernathy on drug and weapons charges.

Abernathy filed a motion to suppress the evidence seized from his home.

After a hearing, the district court held that the statement in the officer's affidavit claiming that the officer had received information that Abernathy and his girlfriend were engaged in drug activity was inaccurate and misleading. As result, the district court omitted that statement from the officer's affidavit. The district court nonetheless upheld the search warrant, finding that the evidence discovered from the trash pull, by itself, established probable cause to search Abernathy's house. Abernathy appealed.

First, Abernathy argued that the warrant was overbroad because the affidavit only showed evidence suggesting he possessed marijuana, while the warrant was issued to find evidence of drug trafficking.

The Sixth Circuit Court of Appeals disagreed. It does not matter whether an affidavit establishes probable cause for marijuana possession or marijuana trafficking, as long as the affidavit shows there is a fair probability that marijuana will be found in the place to be searched. Consequently, the court held that the warrant in this case was not overbroad.

Second, Abernathy argued that the warrant was not supported by probable cause. Abernathy claimed the marijuana roaches and T2-laced plastic bags recovered by the officers from the trash pull were insufficient to create a fair probability that drugs would be found in his house.

The court agreed. After the district court omitted a portion of the search warrant affidavit because it contained misleading and inaccurate information, the only evidence the affidavit contained supporting probable cause were "several" marijuana roaches and T2-laced plastic bags the officers recovered from the trash pull at Abernathy's house.

In the Sixth Circuit, it is well established that drug paraphernalia recovered from a trash pull establishes probable cause to search a home when combined with other evidence of the resident's involvement in drug crimes. However, the court had not previously considered whether and under what circumstances trash pull evidence, standing alone, can establish probable cause to search a

home. The court concluded that the evidence recovered from the trash pull, by itself, did not create a fair probability that drugs would be found in Abernathy's home.

First, the trash pull evidence suggested that a small quantity of marijuana might have recently been in Abernathy's house. However, the court found that there was no way of knowing with certainty whether the trash pull evidence came from Abernathy's house at all, and if it did, whether it was recently inside the house. In addition, although the officer who drafted the affidavit knew that Abernathy had been involved in past drug crimes, he did not include those facts in the affidavit. As a result, the judge who issued the search warrant could not consider that information when making his probable cause determination.

Second, the court held that the connection between the small quantity of marijuana paraphernalia recovered from Abernathy's trash and his house was too attenuated to create a fair probability that more drugs were inside the house. Although the trash pull evidence suggested that someone in the residence had smoked marijuana recently, that fact alone does not create an inference that the house contained additional drugs. The court commented that drugs by their nature are usually sold and consumed promptly, so the more probable inference when finding drug refuse in a trash pull is that whatever drugs were previously in the house have been consumed and discarded. Furthermore, it was impossible to tell when the marijuana roaches and plastic bags were discarded. Depending on the household, the trash pull evidence could have been put in the garbage anywhere from one day to several weeks earlier. The inability to tell when drugs were last within Abernathy's house diminished any inference that drugs were still inside.

Finally, the court held the good-faith exception to the exclusionary rule did not apply because the officer's affidavit contained information that was found to be inaccurate and misleading by the district court.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/16-5314/16-5314-2016-12-08.pdf?ts=1481216436

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Brown v. Battle Creek Police Dep't., 2016 U.S. App. LEXIS 22447 (6th Cir. December 19, 2016)

Officers obtained a warrant to search Danielle Nesbitt's residence for drugs and drug-related evidence. In the search warrant affidavit, the officer stated he had received information indicating that Vincent Jones, the father of Nesbitt's child lived at the residence and was distributing controlled substances from inside the residence. Nesbitt owned the home and allowed her mother, Cheryl Brown, and Mark Brown to stay in the basement of the residence.

Later that day, officers and members of the city's Emergency Response Team (ERT), conducted a briefing prior to executing the search warrant. At the briefing, the officers discussed Jones' extensive criminal history, which included drug, firearm, and gang-related offenses. The officers knew that Jones was a member of a close-knit, violent gang, and that Jones was rarely by himself. During the briefing, the officers had no information concerning the presence of dogs at Nesbitt's residence.

After the briefing, officers and members of the ERT went to Nesbitt's residence. On the way, the officers discovered that other officers had detained Jones at another location. When the officers arrived at Nesbitt's residence, they encountered Mark Brown in the front yard and detained him.

During this time, other officers went to the front door, where they saw two dogs through the front window standing on a couch. One dog was a large brown pit bull, weighing approximately 97 pounds, and the second dog was a smaller white pit bull, weighting approximately 53 pounds. One of the officers testified that the dogs were barking aggressively, digging, pawing, and jumping up at the window. After the officers breached the front door with a ram, the brown pit bull jumped off the couch and lunged at an officer, while the white pit bull went down the stairs into the basement. The officer shot the brown pit bull, which then retreated down the stairs to the basement. The officer went down the stairs into the basement and shot the brown pit bull as the dog stood at the bottom of the staircase, barking at the officers. The officer then shot the white pit bull while it was standing in the basement barking at the officers. After being shot, the white pit bull ran into the back corner of the basement, where another officer shot it because it started to move out of the corner in his direction. After being shot by the officers, the dog ran behind the furnace. One of the officers stated that because of the "numerous holes in the dog," and because he did not want to see it suffer, he fired one last shot to put the dog out if its misery.

The Browns sued the officers, claiming that the officers violated the *Fourth Amendment* by unlawfully killing their dogs.

First, the court held that a dog is property, and the unreasonable seizure of that property is a violation of the *Fourth Amendment*.

Second, the court held that at the time of the incident, it was clearly established that unreasonably killing a person's dog was an unconstitutional seizure of property under the *Fourth Amendment*.

Third, the court held that a police officer's use of deadly force against a dog while executing a warrant to search a home for illegal drug activity is reasonable under the *Fourth Amendment* when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer's safety. After applying this standard to the facts of the case, the court concluded that the two pit bulls posed an imminent threat to the officers; therefore, the officers acted reasonably in shooting and killing the dogs. The officer shot the first dog after it lunged at the officer after he breached the front door. Afterward, the dog went into the basement where it prevented the officers from safety sweeping the basement for any individuals that might be hiding there. The officers shot the second pit bull while it was standing in the middle of the basement, barking at the officers. The court concluded that like the first dog, the second dog prevented the officers from safely sweeping the basement for anyone that might be hiding there. In addition, the court found that Vincent Jones posed a serious threat to the officers' safety given his criminal history, known gang affiliations, possession and use of firearms, and the fact that he was known to be actively distributing cocaine and heroin from the residence. Although the officers discovered that Jones had been detained as they were en route to the residence, the officers knew it was highly likely that other members of the gang could be in the residence at the time of the search warrant execution.

The Browns also claimed the City was liable for damages because it failed to adequately train officers on how to recognize whether a dog is dangerous and how to use non-deadly methods to restrain dogs during search warrant executions.

The court disagreed. First, the court commented the Brown's claim could not succeed because the officers lawfully seized the dogs during the execution of the search warrant. Second, the Browns failed to provide any evidence demonstrating prior instances of unconstitutional dog

shootings by the City's police officers, or that the City knew about, sanctioned, or encouraged an unofficial "tally system" among the officers concerning dog shootings.

Finally, the Browns claimed the officers acted unreasonably by breaching the front door with a ram when Mark Brown was present, and offered the front door key to the officers prior to the breach.

Again, the court disagreed. Although Vincent Jones had already been detained, the officers did not know what other gang members might be inside the residence. In addition, the officers were not required to use keys provided by Brown because the officers would have no way of knowing if they were the correct keys. If Brown had given officers the wrong keys, the resulting delay could have given someone inside the house the opportunity to destroy evidence or time to prepare an attack on the officers.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/16-1575/16-1575-2016-12-19.pdf?ts=1482166836

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Eighth Circuit

United States v. Morgan, 842 F.3d 1070 (8th Cir. 2016)

A police officer discovered a computer that offered child pornography by peer-to-peer file sharing. Later that day, the officer identified the computer's internet protocol (IP) address. Twenty-four days later, the officer determined the IP address was assigned to Morgan. Over seven weeks later, a state judge issued a search warrant for Morgan's home, seventy-five days after the IP address was discovered and fifty-one days after the officer connected it to Morgan. Five days later, officers executed the warrant at Morgan's home. The officers also arrested Morgan on an unrelated, outstanding warrant. The arresting officer seized Morgan's cell phone, and while handcuffing him, saw a tattoo on Morgan's wrist.

At the police station, Morgan requested his cell phone so he could contact his employer and his sister, and an officer allowed Morgan to use it. As Morgan scrolled through the contact list, he did not object as the officer stood next to him and viewed the screen on his cell phone. In addition, Morgan spontaneously shared some facts about some of the contacts, and in response, the officer wrote down several names and phone numbers.

During this time, a different officer found images of child pornography on a computer seized from Morgan's home. One image showed a man with a tattooed arm touching a female child's genitalia. The officer who found the images asked Morgan to lift the sleeve of his shirt so that he could photograph his tattoos. Morgan agreed, and without objection, lifted his sleeve. The officer photographed Morgan's tattoos, which matched the tattoos in the images on his computer.

Officers later identified a child from one of the images found on Morgan's computer. Morgan's public Facebook profile led to the profile of a woman that an officer remembered was one of Morgan's cell-phone contacts. The woman's public Facebook profile included an image of her daughter, who resembled the child in the image from Morgan's computer.

The government charged Morgan with child pornography related offenses.

Morgan filed a motion to suppress the evidence discovered by the officers.

First, Morgan argued that the information in the search warrant affidavit was stale because the officers did not apply for the warrant until seventy-five days after identifying his IP address and fifty-one days after associating the IP address to him. As a result, Morgan claimed the officers did not establish probable cause to believe that evidence of a crime would be located in his home at the time of the search.

The court disagreed, finding that periods much longer than seventy-five days have not rendered information stale in computer-based child pornography cases. In addition, the affidavit in support of the warrant attested that collectors of child pornography tend to retain images and that computer programs that download these images often leave file logs, which would tend to show the possession, distribution, or origin of the files.

Second, Morgan argued that the officer violated the *Fourth Amendment* by observing the information on the screen of his cell phone while Morgan scrolled through his contact list.

Again, the court disagreed. A *Fourth Amendment* search occurs when the government intrudes upon an area where a person has a reasonable expectation of privacy. However, when a person knowingly exposes something to the public, there is no protection under the *Fourth Amendment*. Here, the court concluded that Morgan had no reasonable expectation of privacy in his cell phone screen once he made it visible to the public by displaying it in the presence of an officer. The officer allowed Morgan to use his cell phone and Morgan did not object when the officer looked at the screen while Morgan scrolled through the contact list. In addition, the court noted that while this was happening, Morgan spontaneously shared information about his contacts with the officer.

Finally, Morgan argued that the officer violated the *Fourth Amendment* by taking photographs of the tattoos on his arm without a warrant.

A warrantless search is valid if the person subject to the search knowingly and voluntarily consents to it. In this case, the district court found that the officer asked Morgan to move his shirtsleeve so he could photograph Morgan's tattoos, and that Morgan agreed to do so. Based on these facts, the district court concluded that Morgan voluntarily consented to the officer photographing his tattoos and the court of appeals agreed.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1525/16-1525-2016-12-01.pdf?ts=1480609860

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United States v. Jones, 842 F.3d 1077 (8th Cir. 2016)

Police officers responded to a fire at a house where Shalonda Clark and Charles Jones lived together on the White Earth Indian Reservation. After the fire started, Jones walked to a neighbor's house. When an officer went to the neighbor's house, he spoke with Jones who was covered in soot, smelled of smoke, and his clothes appeared to be burned. The officer asked Jones where Clark was, as she had not yet been located. Jones told the officer that Clark was on the couch. After the officer asked how the fire started, Jones said, "I started it." Another officer handcuffed Jones, and while escorting him to a police car, Jones told the officer, "You finally got me." After the officer asked Jones what he meant, Jones replied, "That's all you're getting. I hope I get the max." Although Jones appeared to be under the influence of drugs, he was alert and answered the officers' questions coherently.

The next day, an officer attempted to question Jones after advising him of his *Miranda* rights. The officer told Jones that Clark was dead and they needed to talk. Jones told the officer he had nothing to say and that he wanted to end the interview. The officer told Jones he would take him back to his cell if he did not want to talk. Jones said, "Okay," then added, "She's a wicked bitch and that's it."

After a jury convicted him of second-degree murder, Jones appealed the district court's refusal to suppress the incriminating statements he made to the officers.

First, the court found the district court properly admitted Jones' initial statements to the officer under the public safety exception to the *Miranda* rule. The public safety exception allows a defendant's answer to a question to be admitted into evidence even if he has not first been provided *Miranda* rights as long as the officer's question was to ensure public safety and not merely to elicit testimonial evidence. Here, officer's initial questions served two public safety purposes. First, Clark was still missing when the officer asked Jones where she was. Second, the fire was still burning when the officer asked Jones how it started. As a result, the court concluded the officer's questions addressed public safety concerns, and were not designed to obtain testimonial evidence against Jones.

Second, the court held the district court properly admitted the statements Jones made after the officer handcuffed him. Jones' first statement, "You finally got me," was admissible because it was not made in response to an officer's question. Jones' subsequent statements, "That's all you're going to get. I hope I get the max." were admissible because an officer's request for clarification of a spontaneous statement generally does not amount to interrogation under *Miranda*.

Third, the court held the district court properly found that, even though Jones was intoxicated, the officers had not overborne his will; therefore, Jones' statements were voluntary. Intoxication does not automatically render a confession involuntary. Instead, the test is whether the intoxication caused the defendant's will to be overborne by the officers. In the audio recording of his interview, Jones spoke slowly and appeared to answer some questions unresponsively; however, officers testified that Jones had been coherent for the entire interview.

Finally, the court held the district court properly ruled that Jones' statement, the day after his arrest were admissible because they were spontaneous and unprovoked. After the officer advised Jones of his *Miranda* rights, Jones told the officer he had nothing to say to the officer. The officer stopped his questioning as soon as Jones clearly stated that he wanted to end the interview. Jones' subsequent comment, "She's a wicked bitch and that's it," was spontaneous, not a result of the interrogation by the officer.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3647/15-3647-2016-12-02.pdf?ts=1480696280

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United States v. Wright, 844 F.3d 759 (8th Cir. 2016)

Officers received information from a confidential informant (CI) that Wright and Victor Brown would be driving from Iowa to Chicago to purchase crack cocaine. Officers corroborated much of the information provided by the CI and conducted surveillance on Brown's residence around the time Brown and Wright were expected to return from Chicago. When Brown and Wright arrived, Brown exited Wright's SUV, and then Wright departed.

Officers followed Wright, who arrived at the parking lot of an apartment complex. A uniformed officer positioned his squad car behind Wright's SUV and shined a spotlight onto the back window. The officer and Wright exited their vehicles and engaged in conversation. During this time, the officer smelled burnt marijuana coming from Wright's person. After placing Wright in the back seat of a squad car, the officer walked around Wright's SUV. The officer saw a marijuana cigar on the front center console and smelled marijuana emanating from the vehicle. Officers searched the SUV and seized the marijuana cigar as well as crack cocaine from the glove compartment.

The government charged Wright with possession with intent to distribute cocaine.

Wright argued the evidence seized from his SUV should have been suppressed because the officers did not have probable cause to enter the apartment complex's curtilage, reasonable suspicion to detain him, or probable cause to search his vehicle.

First, the court held that Wright did not have standing to challenge the officers' entry into the parking lot of the apartment complex because he did not have a reasonable expectation of privacy in that area. Wright did not own or live at the property, nor was he an overnight guest there. Consequently, the court concluded it did not have to determine whether the officers' entry into the parking lot was lawful.

Second, concerning the encounter in the parking lot, the court held the officer's act of shining the spotlight on Wright's car was not a *Fourth Amendment* seizure, and Wright did not claim that the officer seized him by blocking his SUV with his squad car. As a result, the court concluded no suspicion was required when Wright and the officer had their initial conversation. Once the officer smelled the odor of marijuana coming from Wright's person, the court concluded the officer had probable cause to arrest Wright. If the officer had probable cause to arrest Wright at the point, the court found that the officer clearly had reasonable suspicion to detain Wright for further investigation.

The court added that, in any event, the officers had reasonable suspicion to conduct a *Terry* stop on Wright. The CI provided detailed information concerning Brown and Wright, and the officers corroborated much of that information during their surveillance.

Finally, the court held the warrantless search of Wright's SUV was valid under the automobile exception to the warrant requirement. The officer smelled burnt marijuana and saw a marijuana cigar inside the SUV, which established probable cause that the vehicle contained drugs. Once the officer had probable cause to search the SUV for drugs, he had the right to search the glove compartment as a place where drugs could be concealed.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3237/15-3237-2016-12-23.pdf?ts=1482510657

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United States v. Fuehrer, 844 F.3d 767 (8th Cir. 2016)

Officers suspected that Fuehrer was transporting illegal drugs in his vehicle. A uniformed officer stopped Fuehrer after the officer's radar indicated that Fuehrer was driving 66 miles per hour in an area where the speed limit was 65 miles per hour. During the stop, Fuehrer could not provide a driver's license, and the officer asked Fuehrer to sit in his patrol car while he completed the paperwork for the traffic violation. During this time, another officer arrived with a drug-sniffing K-9, which alerted to the presence of drugs in Fuehrer's vehicle. After the first officer completed the tasks related to the stop, the officers searched Fuehrer's vehicle and found methamphetamine.

The government charged Fuehrer with possession with intent to distribute a controlled substance.

Fuehrer argued the evidence seized from his car should have been suppressed because the traffic stop was a pretext stop in violation of the *Fourth Amendment*.

The court disagreed. Once an officer establishes probable cause, a traffic stop is objectively reasonable, and the officer's ulterior motivation for the stop is not relevant. In addition, if an officer observes a traffic violation, no matter how minor, there is probable cause to stop the vehicle. Here, the officer established probable cause to believe Fuehrer was speeding. It was not relevant that the officer's subjective intent was to stop Fuehrer so the drug dog could conduct a sniff around Fuehrer's vehicle.

Fuehrer further argued that the officer unlawfully extended the duration of the stop while the K-9 officer directed his dog sniff the exterior of his car.

The court disagreed. As long as a traffic stop is not extended to allow officers to conduct a dog sniff, the dog sniff is lawful. Here, the K-9 officer arrived within two-minutes of the stop. Because Fuehrer did not have a driver's license, the first officer asked Fuehrer to sit in his patrol car while he completed the paperwork. The officer completed the tasks related to the stop and wrote Fuehrer a warning ticket after the dog sniff was completed and the dog had alerted to the presence of narcotics. There was no evidence that the dog sniff unlawfully prolonged the stop beyond what was necessary to complete the stop for the initial speeding offense.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/16-1248/16-1248-2016-12-28.pdf?ts=1482942655

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Ninth Circuit

United States v. Williams, 842 F.3d 1143 (9th Cir. 2016)

Antonio Gilton was arrested for murder, conspiracy to commit murder, discharge of a firearm at an occupied motor vehicle, and possession of a firearm by a convicted felon. After a San Francisco homicide inspector advised Gilton of his *Miranda* rights, Gilton invoked his right to counsel. The inspector stopped questioning Gilton and transported him to county jail, where Gilton was placed in a holding cell. Several hours later, another officer removed Gilton from the cell and asked Gilton whether he was a gang member. Gilton told the officer that he was affiliated with a local gang. Based on Gilton's statement, the officer classified him as a gang member on two jail intake forms. In classifying Gilton as a gang member, the officer also relied on Gilton's

arrest record, which contained gang-related offenses and police intelligence, indicating Gilton was a gang member.

Gilton was initially charged in state court; however, a federal grand jury later indicted Gilton and several co-defendants on a variety of federal criminal offenses. One of the offenses for which Gilton was charged, included gang membership as an element of the offense.

Gilton subsequently filed a motion to suppress the statements he made to the officer at the jail concerning his gang affiliation.

The district court granted Gilton's motion, holding that the booking-questions exception to *Miranda* did not apply because asking about Gilton's gang affiliation was reasonably likely to elicit an incriminating response. The government appealed.

The booking-questions exception to the *Miranda* requirement allows officers to obtain biographical data necessary to complete the booking process or pre-trial services. Because booking questions rarely elicit an incriminating response, routine gathering of biographical data does not constitute "interrogation" under *Miranda*. However, when a police officer has reason to know that a suspect's answer may incriminate him, routine-booking questions may constitute "interrogation" for purposes of *Miranda*.

In this case, the Ninth Circuit Court of Appeals agreed with the district court and held that the booking-questions exception to *Miranda* did not apply. The court recognized that a defendant charged with a violent crime in California, who is also a gang member, is subject to additional criminal charges or enhanced penalties under state and federal law that non-gang members do not have to face. When the officer asked Gilton about his gang membership, the officer knew that Gilton had been charged with several violent crimes. The court concluded that questions about Gilton's gang affiliation therefore were likely to elicit an incriminating response, even if the federal charges had not yet been filed.

The court added that the public-safety exception to *Miranda* did not apply. When there is an objectively reasonable need to protect the officers or others from immediate danger, officers may conduct a custodial interrogation without first advising the suspect of his *Miranda* rights. Even though the officer's questions may have been asked in the general interest of inmate safety, the court concluded that there was no urgent need to protect the officer or others against immediate danger, as Gilton had already been in jail for several hours before the officer questioned him.

In affirming the district court's suppression order, the court emphasized it was only holding that when a defendant charged with murder invokes his *Miranda* rights, the government may not in its case-in chief at trial admit the defendant's unadmonished responses about gang affiliation. The court did not prohibit jail or prison officials from inquiring about a prisoner's gang membership in the interests of inmate safety or for the purposes of inmate housing.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/15-10475/15-10475-2016-12-05.pdf?ts=1480960960

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