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

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The Informer – January 2018

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FLETC Informer Webinar Schedule

1. **Use of Force: Articulation (1-hour)**

Presented by Michelle M. Heldmyer, Attorney Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico

Knowing when to use force is vital, but if an officer cannot clearly explain later why he or she used force, the officer risks losing the legal battle that may follow. This 1-hour webinar will help law enforcement officers better articulate facts and understand the legal principles that drive the ever-growing area of concern for the law enforcement community.

Wednesday February 7, 2018 – 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: <https://share.dhs.gov/informer>



2. **109A Felonies (1-hour)**

Presented by Robert Duncan, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico

In the criminal justice system, sexually based offenses are considered especially heinous. When committed in areas of federal jurisdiction, these offenses are known as 109A Felonies (Title 18 United States Code Chapter 109, which includes Sections 2231-2237.) This 1-hour webinar will outline the elements of federal sexual offenses and distinguish between acts and contact as defined by 18 U.S.C. Section 2246.

Wednesday February 21, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

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CASE SUMMARIES

United States Supreme Court

District of Columbia v. Wesby, 2018 U.S. LEXIS 760 (Jan. 22, 2018)

District of Columbia police officers responded to a complaint about loud music and illegal activities in a vacant house. When the officers entered the house they smelled marijuana and saw beer bottles and cups of liquor on the floor. The officers found a makeshift strip club in the living room, and a naked woman and several men in an upstairs bedroom. Many of the individuals ran when they saw the officers; however, those that remained gave the officers inconsistent stories. Two women identified “Peaches” as the house’s tenant and told the officers that she had invited them to a party at the house. Peaches was not at the house, but the officers were able to contact her by phone. Peaches initially told the officers she was renting the house and that she had given the others permission to be there. Peaches eventually told the officers that she did not have permission to use the house. The officers contacted the homeowner who confirmed that he had not given anyone permission to be in his house. The officers arrested everyone in the house for unlawful entry.

Sixteen arrestees sued the officers for false arrest. The district court found that the officers lacked probable cause to arrest the partygoers for unlawful entry. The District of Columbia Circuit Court of Appeals affirmed the district court. The officers appealed to the United States Supreme Court.

The Court held that the officers had probable cause to arrest the partygoers for unlawful entry. First, multiple neighbors told the officers that the house had been vacant for several months, and the house had no furniture except for a few padded metal chairs and a bare mattress. Second, when the officers arrived after 1:00 a.m., the officers could hear loud music coming from inside the house. Third, after the officers entered the house, they smelled marijuana and discovered the living room had been converted into a makeshift strip club. Fourth, when the officers entered the house many partygoers fled while one hid in a closet and another in a bathroom. Finally, when the officers asked who had given them permission to be in the house, the partygoers gave the officers vague and implausible responses. Based on the totality of the circumstances, the Court found that the officers made an “entirely reasonable inference” that the partygoers were knowingly taking advantage of a vacant house as a venue to their late-night party and did not have permission to be in the house. Consequently, the Court held that a reasonable officer could conclude that there was probable cause to arrest the partygoers for unlawful entry.

The Court further held that even if the officers lacked probable cause to arrest the partygoers, they were still entitled to qualified immunity. The Court concluded that existing circuit precedent did not require the officers to accept the partygoers’ belief that they had permission to be inside the house before they could be arrested for unlawful entry. Instead, the court found that a reasonable officer could have interpreted the law as permitting the arrests under the circumstances faced by the officers.

For the Court’s opinion: https://www.supremecourt.gov/opinions/17pdf/15-1485_new_8n59.pdf

Circuit Courts of Appeal

First Circuit

United States v. Aiken, 877 F.3d 451 (1st Cir. ME 2017)

Police officers received a tip that the occupants of room 216 of a Super 8 Motel possessed illegal drugs. At approximately 9:00 a.m., officers went to room 216 and knocked on the door. No one from room 216 responded to the officers' repeated knocks; however, an unidentified man partially opened the door to room 218. Although room 218 smelled of marijuana, the officers told the man they were not there for him. A few minutes later, the door to room 218 opened again, and a man, later identified as Joshua Bonnett, stood by the door while another man, later identified as Marquis Aiken, stood five to ten feet behind him. One of the officers recognized Aiken, who was barefoot and only wearing shorts, from a recent heroin trafficking arrest. The officers also noticed that one of the beds looked like someone had slept in it. Suspecting that Bonnett and Aiken were involved in illegal drug activity, the officers entered room 218 and conducted a security sweep. During the sweep, officers saw what appeared to be a bag containing marijuana on one of the beds and a digital scale containing a white powdery residue on a nightstand between the beds. One of the officers opened the top drawer of the nightstand and found a bag containing a substance that appeared to be cocaine. The officers subsequently obtained a search warrant, and as a result of the evidence seized in the search, the government charged Bonnett and Aiken with several drug-related offenses.

Bonnett and Aiken filed a motion to suppress the evidence seized from room 218. The district court determined that Jahrael Browne and Joshua Bonnet had rented room 218 and that Aiken had stayed in the room with Bonnett's permission. Consequently, the district court held that Bonnett and Aiken had a reasonable expectation of privacy in room 218; therefore, they could challenge the search. The court further held that the search violated the Fourth Amendment and granted Bonnett and Aiken's motions to suppress.

The government appealed the district court's ruling that Aiken had a reasonable expectation of privacy in Room 218.

The First Circuit Court of Appeals recognized that an invitation to be present in a location does not automatically provide Fourth Amendment privacy protection. As a result, although Aiken was Bonnett's guest in room 218, and may have slept there, the court found these facts alone did not establish that Aiken had an objectively reasonable expectation of privacy in the room. The court further found that Aiken was not registered as a guest for room 218, he did not have a key to the room, and he did not have any possessions in the room besides the sneakers and t-shirt he was trying to put on when the officers entered. Based on these facts, the court could not determine what purpose Aiken had in room 218, how long he stayed in the room, how long he slept in the room, and how well he knew the other occupants. Consequently, the court held that sleeping in a motel room for "longer than a brief period of time," without more, is insufficient to provide Fourth Amendment protection; therefore, Aiken failed to establish that he had a reasonable expectation of privacy in room 218.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/17-1036/17-1036-2017-12-18.pdf?ts=1513634404>

Second Circuit

United States v. Familetti, 878 F.3d 53 (2d Cir. N.Y. 2017)

Familetti participated in online chat sessions with Thompson, an undercover federal agent. During these sessions, Familetti sent Agent Thompson child pornography videos and expressed an interest in having a sexual experience with a minor. In response, Agent Thompson offered to arrange an encounter with an eleven-year-old. A different undercover agent, posing as Agent Thompson's online persona, met with Familetti in person, and the agent agreed to deliver a child to Familetti's apartment for \$500. At the conclusion of the meeting, Familetti gave the agent \$100 as a down payment. However, at the agreed time, Agent Thompson and eight other federal agents went to Familetti's apartment and executed a search warrant.

As the agents entered his apartment, Familetti suffered an extreme panic attack, and two agents pushed Familetti against a wall and handcuffed him. The agents brought Familetti a glass of water and waited for him to calm down. Agent Thompson told Familetti that he was not under arrest and was free to leave, but that the agents had a warrant to search the apartment. When Familetti's panic subsided, the handcuffs were removed, and Familetti was led into his bedroom where he was told again that he was not under arrest. Agent Thompson told Familetti the agents' main goal was to find people who were "raping children" and making child pornography videos. Agent Thompson asked for Familetti's help with the investigation, and Familetti immediately agreed to cooperate. Agent Thompson then advised Familetti of his Miranda rights orally and in writing. Familetti waived his rights and confessed to using an online account to trade child pornography, storing child pornography on an SD card hidden in his apartment, and giving the undercover agent a \$100 down payment for sex with a minor.

The government charged Familetti with sex trafficking of a minor and the possession, distribution, and transportation of child pornography. Familetti argued that his pre-Miranda statement concerning his willingness to cooperate with the investigation was inadmissible because it was the result of a custodial interrogation. Familetti further argued that his subsequent Miranda waiver and confession was invalid because of the initial Miranda violation.

A person must both be "in custody" and subject to "interrogation" before law enforcement officers are required to inform him of his Miranda rights. An interrogation occurs when a person "is subjected to express questioning or its functional equivalent," and his statements are "the product of words or actions on the part of the police" that "were reasonably likely to elicit an incriminating response."

Here, after entering Familetti's apartment to execute a search warrant, the agents told him that they were looking for perpetrators of child pornography, and asked Familetti for information. The court found the agents left no doubt that Familetti was suspected of criminal involvement and that his response would more than likely confirm the agents' suspicions. As a result, the court held that the agent's request for Familetti to help them investigate child pornography constituted interrogation.

However, the court further held that Familetti was not in custody during this pre-Miranda interrogation. A person is in custody for Miranda purposes after he is formally arrested or if police officers restrain his freedom of movement to "the degree associated with a formal arrest." First, Familetti had not been placed under arrest when he made the pre-Miranda statements concerning

his willingness to cooperate. Second, the court found that the agents did not restrain Familetti comparable to that of a formal arrest.

To evaluate whether the degree of restraint rises to the level of that associated with a formal arrest, the court has to determine “whether a reasonable person in the suspect’s shoes would not have felt free to leave under the circumstances.” Here, after Familetti recovered from his initial distress, two agents spoke to him in a non-confrontational tone after removing his handcuffs. The agents never drew their weapons, and they told Familetti several times that he was not under arrest and was free to leave. Finally, Familetti was in the familiar surroundings of his own home and the interrogation lasted, at most, only several minutes.

Because Familetti was not subjected to custodial interrogation before the agents advised him of his Miranda warnings, the court found it unnecessary to address Familetti’s challenge to his Miranda waiver and subsequent confession.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca2/16-2334/16-2334-2017-12-20.pdf?ts=1513783811>

Third Circuit

United States v. Graves, 877 F.3d 494 (3d Cir. PA 2017)

An undercover police officer conducting surveillance in an unmarked vehicle, in a high-crime area, heard a radio dispatch about possible gunshots in an area near his location. The dispatch described two potential suspects wearing dark-colored hooded sweatshirts who were seen walking away from the location of the gunshots. Less than five minutes later, the officer saw two men in dark-colored hooded sweatshirts walking toward his vehicle. The officer noticed that one of the men, later identified as Graves, was walking with a “pronounced, labored” gait, which suggested that he might have concealed something heavy in his waistband or pocket on his right side. As Graves and the other man passed the officer’s vehicle, Graves made eye contact with the officer and raised his hands over his head. Based on his experience the officer knew this behavior “was consistent with a drug dealer or someone who sells something illegal on the street.” The officer drove one block ahead of the men and waited for them to approach his vehicle again. At this point, Graves left the other man and walked directly toward the officer’s vehicle at a quickened pace. The officer exited his vehicle, identified himself as a police officer, and handcuffed Graves.

Believing that Graves might be armed, the officer conducted a frisk. During the frisk, the officer felt “multiple hard objects” in both of Graves’ front pockets. The feel of these objects was consistent with that of crack cocaine. The officer removed the objects from Graves’ pockets, which turned out to be multiple packets of the antidepressant Depakote and one live .22 caliber bullet. During questioning, Graves told the officer that he planned to sell the Depakote as crack cocaine and admitted that he had a loaded .380 pistol in his boot, where it had fallen from his waistband. The government charged Graves with several firearm-related offenses.

Graves filed a motion to suppress all physical evidence and statements obtained at the time of his arrest, arguing that the officer lacked reasonable suspicion to justify stopping and frisking him.

The court disagreed. First, the officer was parked in a high-crime area. Second, the officer saw Graves and another man dressed in similar clothing as the suspects described in the radio dispatch

coming from the area where gunshots had been reported a few minutes earlier. Third, the officer saw Graves walking in a manner indicating, in the officer's experience, that Graves was armed. Fourth, Graves raised his arms over his head in a manner consistent that of an individual seeking to sell drugs or otherwise challenge the officer. Finally, Graves departed from the other man to approach the officer's vehicle at a quick pace. The court concluded that the combination of these facts gave the officer reasonable suspicion to believe that Graves was engaged in unlawful conduct which justified stopping and then frisking Graves.

Graves further argued that the officer exceeded the scope of a valid frisk. Specifically, Graves claimed that the officer was not permitted to conduct any further search of his person once the officer realized that the objects in his pockets were not weapons.

While the purpose of a frisk is to locate weapons and not evidence of a crime, the Supreme Court has held that an officer may seize contraband discovered during a lawful frisk under the "plain-feel doctrine." The plain-feel doctrine provides that when an officer conducting a lawful frisk feels something that is "immediately apparent" as contraband, the officer may lawfully seize the item. The term "immediately apparent" has been equated with probable cause, and the incriminating nature of the item must be immediately apparent to the officer the moment the officer touches it.

In this case, the officer testified that while frisking Graves' pockets, he knew the objects in Graves' pockets were consistent in feeling with crack cocaine. The court held that the feel of these objects, in light of the officer's experience with narcotics investigations, gave rise to probable cause justifying removal of the objects from Graves' pockets. In addition, the court held that because the officer had yet to determine whether Graves was armed at the time he felt the objects, the frisk was lawful. As a result, the court held that the officer did not exceed the scope of a valid frisk by removing the Depakote and bullet from Graves' pockets.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca3/16-3995/16-3995-2017-12-13.pdf?ts=1513188005>

Fifth Circuit

United States v. Wise, 877 F.3d 209 (5th Cir. TX 2017)

Police officers went to a Greyhound bus stop to conduct bus interdictions. After a bus stopped, the driver disembarked, and the officers approached him and asked for consent to search the bus's passenger cabin. After the driver gave consent, two plainclothes officers with narcotics interdiction experience boarded the bus. Without blocking the aisle, one officer walked to the back of the bus while the other officer remained at the front. The officer at the front of the bus noticed Wise, who was pretending to be asleep. The officer found this suspicious, because in his experience, criminals on buses often pretended to be asleep to avoid police contact. The officer walked past Wise and turned around. After Wise turned to look back at him, the officer approached Wise and asked to see his ticket. Wise gave the officer a bus ticket, which had the name "James Smith" on it. The officer's suspicions were aroused because it was a "very generic name" that he believed might be fake. The officer then asked Wise if he had any luggage. Wise said yes and motioned to the luggage rack above his head.

The officer saw a duffle bag and a backpack in the luggage rack above Wise's head, with no other bags nearby. Wise claimed the duffle bag and gave the officer consent to search it. After the officer found nothing of interest in the duffle bag, he asked Wise if the backpack belonged to him. Wise denied ownership of the backpack. After no other passengers on the bus claimed ownership of the backpack, the officers removed it at the driver's request.

Outside the bus, a canine officer directed his dog to sniff the backpack. After the dog alerted to the presence of narcotics, officers cut a small lock off the backpack, searched it, and found seven brick-type packages. The officers cut one of the packages open and discovered a white powder they believed to be cocaine.

After discovering the packages inside the backpack, the officer who initially spoke to Wise went back onto the bus and asked Wise if he would mind getting off the bus to speak to the officers. Wise complied and got off the bus. Once off the bus, the officer told Wise the backpack contained a substance believed to be cocaine and asked Wise if he had any weapons. After Wise denied that he had any weapons, the officer asked Wise to empty his pockets and Wise complied. Among other items, Wise gave the officer an identification card with the name "Morris Wise" and a lanyard with several keys attached. The officer used a key on the lanyard to activate the locking mechanism on the lock the officers had cut from the backpack. The officer arrested Wise, and the government charged him with several drug-related offenses.

Wise filed a motion to suppress the evidence the officers obtained after he was asked to exit the bus. Although neither Wise nor the government briefed the issue before the suppression hearing or raised it during hearing, the district court concluded that the officers' conduct constituted an unconstitutional checkpoint stop. In addition, the district court held that the bus driver did not voluntarily consent to the officers' search of the luggage compartment where the backpack was located. As a result, the district court suppressed all evidence the officers seized after the stop. The government appealed to the Fifth Circuit Court of Appeals.

First, the court held that the district court incorrectly characterized the officers' bus interdiction as an unconstitutional checkpoint. The court noted that the Supreme Court's cases involving checkpoints involve roadblocks or other types of conduct where the government initiates a stop to interact with motorists. In this case, the officers did not require the bus driver to stop at the station. Instead, the driver made the scheduled stop as required by his employer, Greyhound. In addition, the officers only approached the driver after he had disembarked from the bus, and the driver voluntarily agreed to speak with them. The court concluded that the interaction between the officers and the driver was better characterized as a "bus interdiction."

Second, although Wise had a reasonable expectation of privacy in his luggage, the court held that as a passenger, Wise did not have a reasonable expectation of privacy in the luggage compartment of the commercial bus. As a result, the court concluded that Wise had no standing to challenge the officers' search of that compartment, to which the bus driver consented.

Third, the court held that the officers did not seize Wise, within the meaning of the Fourth Amendment, when they approached him, asked to see his identification, and requested his consent to search his luggage. Instead, the court concluded that Wise's interaction with the officers was a consensual encounter because a reasonable person in Wise's position would have felt free to decline the officers' requests or otherwise terminate the encounter.

Finally, the court held that Wise voluntarily answered the officer's questions, voluntarily emptied his pockets, and voluntarily gave the officer his identification and keys.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/16-20808/16-20808-2017-12-06.pdf?ts=1512585038>

Eighth Circuit

United States v. Quarterman, 877 F.3d 794 (8th Cir. IA 2017)

At 7:16 a.m., Carol Bak called 911 and reported that she was helping her daughter, Christina move out of Quarterman's apartment. Bak stated that she had a "heated" argument with Quarterman, who was Christina's boyfriend, and that Quarterman "had a gun on his waist." After the argument, Bak left, leaving her daughter inside the apartment.

Dispatch radioed a "domestic with a weapon involved" and three officers responded to Quarterman's apartment. The officers met Bak outside and she repeated what she told the 911 operator. Bak also told the officers that Quarterman was "making Christina get out" of his apartment.

When the officers knocked, Christina answered the door. Through the open door, one of the officers saw Quarterman sitting on the couch, moving his hands as if he was reaching for something. The officer told Quarterman not to move and asked Christina about the presence of a gun. Christina did not respond and Quarterman denied having a gun. At that point, the officers entered the apartment, approached Quarterman, and ordered him to stand up and turn around. The officers saw a handgun in a holster on Quarterman's right side and seized it. One of the officers told Quarterman they would return the handgun once they were finished talking. However, after the officers discovered the handgun was stolen, they arrested Quarterman. The government charged Quarterman with being a felon in possession of a firearm.

Quarterman filed a motion to suppress the handgun, arguing that the officers' warrantless entry into his apartment violated the Fourth Amendment. The district court agreed. The government appealed to the Eighth Circuit Court of Appeals.

The court reversed the district court, holding that the warrantless entry into Quarterman's apartment was justified by a legitimate and objectively reasonable concern for the safety of Christina as well as the officers. The officers had information that Quarterman was making Christina move out, that he was armed, and that he had been in a heated verbal altercation with Christina's mother that morning. In addition, after Christina opened the door, Quarterman made quick movements as if reaching towards the couch or getting up. Unable to see a gun from the doorway and aware that domestic disputes can turn violent, the court concluded that it was reasonable for the officers to enter the apartment and control the situation.

The court further held that once lawfully inside the apartment the exigencies of the situation justified ordering Quarterman to stand up and turn around. Although Quarterman denied having a gun, the court found that the officers were reasonable in not believing him, as Carol Bak told them the gun was on Quarterman's hip and because of Quarterman's reaction to the presence of the officers.

Finally, when the officers saw the gun on Quarterman's waist, the court held that it was reasonable for the officers to temporarily seize it.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/16-4519/16-4519-2017-12-12.pdf?ts=1513096226>

United States v. Scott, 876 F.3d 1140 (8th Cir. AR 2017)

Police officers responded to multiple security alarms at a residence in a rural area. After the officers drove down a long driveway and stopped at a gate, a truck pulled up on the other side of the gate, and Scott got out. Scott, who had blood on his clothes and was visibly shaken, told the officers that his wife had run him over with the truck, shot at him, and thrown the gun in the yard. Scott also told the officers that he was concerned for the safety of his young children, who were still with his wife, whom he claimed was under the influence of drugs. At this point, the officers considered Scott to be the potential victim of a domestic dispute. The officers left Scott at the gate and drove to the house.

At the house, the officers saw a woman sitting in a chair at, or just inside the threshold of an open garage. The woman was smoking, using her cell phone, and did not appear armed or threatening. As the officer approached, two little boys entered the garage from the house. The officers went into the garage and talked to the woman who identified herself as Scott's wife, Stacy. She told the officers that earlier when she tried to drive away, Scott fired four shots at her truck, ripped off the side mirror, and then jumped into the bed of the truck and broke the rear window. Stacy told the officers that she and her children got out of the truck and ran inside the house and that Scott eventually threw the gun into the yard. Several officer searched the yard, but they did not find a gun. Stacy told the officers there were other guns inside the house, and she gave the officers consent to search the house. The officers seized several firearms from the house. The government charged Scott with being a felon in possession of a firearm.

Scott filed a motion to suppress the firearms seized from his house.

The court held that exigent circumstances justified the officers' warrantless entry into the garage. When the officers approached the garage, they had just been told about a violent domestic dispute involving a firearm, by an individual covered with blood, who told them that children were present at the residence. The officers had legitimate concerns that someone might be armed and that children might be injured or in danger, so went into the garage to speak to the only person they saw. In addition, the court held that Stacy validly consented to the officers' entry into the house. Consequently, the court concluded that the officers' subsequent discovery of the firearms inside the house did not violate the Fourth Amendment.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/16-4052/16-4052-2017-12-13.pdf?ts=1513180885>

United States v. Mosley, 878 F.3d 246 (8th Cir. IA 2017)

At approximately 2:35 p.m., two individuals robbed a bank. As the robbers were leaving the bank, a witness in a truck driving by the bank saw the robbers fleeing but eventually lost sight of them. As the truck circled around the block attempting to spot the robbers again, the witness called the

bank. A bank employee called 911 and began relaying information about the robbery, including information the employee was getting from the witness on the other line. Although the witness could not locate the robbers, he reported that a gray/silver Ford Taurus was in the vicinity of the bank and was the only vehicle leaving the area moments after the robbery. The witness followed the Taurus and gave its location and direction of travel to the bank employee, who gave the information to 911 dispatch. When the witness got close enough to see inside the gray Taurus, he reported that he could only see one woman in the car, whereas he had seen two men running from the bank. At this point, the witness was no longer sure if the gray Taurus was involved in the bank robbery.

Around 2:40 p.m., a police officer received a radio dispatch that a gray Ford Taurus may have been involved in a bank robbery. A few minutes later, the officer saw a gray Taurus traveling in the direction indicated by the witness. The officer stopped the Taurus approximately 5.8 miles from the bank approximately eight minutes after the robbery occurred.

The officer determined that the Taurus was registered to Farrah Franklin but identified the driver as Katherine Pihl. The officer did not see anyone else inside the vehicle and was about to let Pihl go when another officer suggested that he check the trunk. The officer opened the trunk and found Stanley Mosley and Lance Monden, along with cash and masks. The officer arrested Pihl, Mosley, and Monden, and the government indicted them for bank robbery.

The defendants filed a motion to suppress evidence seized by the officers.

First, the defendants claimed the officer lacked reasonable suspicion to believe the Taurus was involved in the bank robbery; therefore, the stop violated the Fourth Amendment.

The court disagreed. Although the police were unsure of the exact role the gray Taurus may have played in the robbery, it was the only vehicle seen leaving the area right after the witness saw two hooded men flee the bank. In addition, the officer stopped the Taurus a short distance from the bank, a few minutes after the robbery, while it was traveling in the direction and on the road provided by the witness. Finally, while the driver of the Taurus did not match the description of the two men fleeing the scene of the bank robbery, it was reasonable for the officer to stop the Taurus because it matched the description of the vehicle the witness saw leave the area just after the robbery.

Second, the defendants argued that the officer lacked reasonable suspicion for the traffic stop because the tip from the witness was unreliable.

The court disagreed. Here, the witness claimed firsthand knowledge of the facts he was reporting, and he was able to predict the Taurus's direction of travel. In addition, the witness reported his observations within five minutes of the robbery and the bank employee promptly began relaying this information to a 911 operator. Finally, because the witness provided his name and telephone number, he could be held accountable for false reporting. As a result, the court concluded that the information provided by the witness gave the officer reasonable suspicion to stop the Taurus.

Third, the defendants argued that the officer unreasonably prolonged the duration of the stop after his initial conversation with Pihl. Specifically, the defendants claimed that any reasonable suspicion based on the witness's tip dissipated when the officer obtained Pihl's information and determined that she was alone in the passenger compartment of the vehicle.

The court held that reasonable suspicion did not automatically dissipate because Pihl did not match the description given by the witness or because the officer did not initially see two men inside the Taurus. The court commented that other facts corroborated the witness's tip, and there were reasonable explanations for the discrepancies concerning the number of occupants in the Taurus. Specifically, the court found it was foreseeable that bank robbers using getaway drivers would conceal themselves in the vehicle's trunk. The court concluded that the reason for the stop, to determine whether the Taurus was involved in the bank robbery, was ongoing throughout the officer's interaction with Pihl and that the officer did not unreasonably prolong the duration of the stop.

Finally, Pihl and Monden argued that the officer violated the Fourth Amendment when he searched the trunk of the Taurus.

The court held that Pihl and Monden lacked standing to challenge the officer's search of the trunk because they did not have a reasonable expectation of privacy in the Taurus. The owner of the Taurus, Farrah Franklin, told officers that she did not know Mosley, Monden, or Pihl and had not given them permission to use her car. In addition, Franklin told the officers that she called the local police department on the day of the bank robbery to report the vehicle stolen. Even though Franklin's husband testified that he borrowed the Taurus with Franklin's permission and then loaned it to Monden without her consent, this did not establish a reasonable expectation of privacy in the Taurus for Monden.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/16-4489/16-4489-2017-12-21.pdf?ts=1513873829>

United States v. Rowe, 2017 U.S. App. LEXIS 26539 (8th Cir. MN 2017)

A confidential informant (CI) told officers that Houston Oliver was going to transport a large quantity of cocaine from Arizona to Minnesota in a gray BMW with Minnesota license plates on November 30. The CI provided the approximate arrival time but did not know the identity of the person transporting the cocaine. The CI had provided accurate, timely, and verifiable information to law enforcement for years. Officers conducted a records check and discovered that Oliver was the registered owner of a BMW with Minnesota license plates. Based on the CI's information, officers issued an alert about Oliver's BMW's possible involvement in drug trafficking.

On November 30, Minnesota State Trooper Thul conducted surveillance on Interstate 35 in an effort to intercept Oliver's BMW. After being advised that other officers had located the BMW and requested that she stop it, Trooper Thul located the BMW and pulled it over. Despite the information she received from dispatch, and her knowledge that the BMW would be impounded if located, Trooper Thul developed her own probable cause to stop the vehicle and pulled the BMW over for excessive window tint. Trooper Thul approached the BMW and spoke with Rowe, the sole occupant of the vehicle. After a brief conversation, Trooper Thul went back to her vehicle to perform routine computer checks.

While Trooper Thul was completing her routine checks and paperwork, other officers arrived, and a drug-sniffing dog alerted to the presence of narcotics in the BMW. Officers handcuffed Rowe, placed him in the back of a police car, and transported him to the police station. The officers impounded the BMW, searched it, and seized six packages of cocaine. The officers did not arrest

Rowe that night, and Trooper Thul never issued him a citation for excessive window tint. The government subsequently indicted Rowe for conspiracy to distribute cocaine.

Rowe filed a motion to suppress the evidence seized from the BMW and statements he made in the police car. Rowe argued that the officers expanded the traffic stop beyond its initial purpose for the window tint violation, and that he was de facto arrested without probable cause.

The court disagreed. Despite Trooper Thul's explanation that she stopped the BMW because of the window tint violation, probable cause existed to believe that the BMW contained cocaine based on the information provided by the CI. As a result, the officers were authorized under the automobile exception to stop, search, and seize the BMW without a warrant. In addition, the court found that the officers had probable cause to arrest Rowe, even though he was not arrested that night.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/16-4102/16-4102-2017-12-26.pdf?ts=1514305825>

Tenth Circuit

United States v. Bagley, 877 F.3d 1151 (10th Cir. KS 2017)

The government obtained an arrest warrant for Bagley, a convicted felon, for violating the terms of his supervised release. To execute the arrest warrant, Deputy United States Marshals obtained a search warrant that allowed them to enter a house solely to locate and arrest Bagley. When the marshals arrived, Bagley was in the southeast bedroom, although he eventually surrendered and was handcuffed near the front door. The marshals then conducted a protective sweep of the entire house. In the southeast bedroom, the marshals found two rounds of ammunition and a substance that appeared to be marijuana.

Based on this discovery, the marshals obtained a second warrant to search the entire house for firearms, ammunition, and controlled substances. While executing the second search warrant, the marshals found a firearm, ammunition, marijuana, and drug paraphernalia.

After the district court denied Bagley's motion to suppress evidence seized by the marshals pursuant to the second search warrant, he appealed. Bagley argued that after he surrendered, the marshals violated the Fourth Amendment by searching the house. The government claimed that after the marshals arrested Bagley they were allowed to conduct a protective sweep of the house, to include the southeast bedroom. The government argued that during the lawful protective sweep the marshals found evidence that established probable cause to support the second search warrant.

The Tenth Circuit Court of Appeals recognized that in [Maryland v. Buie](#) the Supreme Court held that law enforcement officers are allowed to conduct protective sweeps in two situations. In the first situation, officers can look in "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." In the second situation, officers can look elsewhere in the house upon "specific, articulable facts supporting a reasonable belief that someone dangerous remains in the house."

The court held that the protective sweep in this case did not fall within the first situation outlined in [Buie](#). First, the court commented that while the record from the district court provided some relevant information, it left sizeable gaps concerning Bagley's specific location when the marshals

arrested him. Based on this limited record, the court found that Bagley was “near the front door when he was handcuffed” and that the marshals did not start the protective sweep until after they handcuffed him. Based on these facts, the court concluded that it lacked enough information in the record to characterize the southeast bedroom and the area near the front door as “adjacent.”

Next, the court held that even though Bagley announced his surrender to the marshals while he was located in the southeast bedroom, he was not “arrested” until the marshals handcuffed him near the front door. Consequently, the court concluded that in the context of Buie’s first situation, the place of arrest was “near the front” door rather than the southeast bedroom.

The court further held that the protective sweep did not fall within the second situation outlined in Buie. When the marshals conducted the protective sweep of the southeast bedroom, Bagley, his girlfriend, and her children had already left the house. While the marshals did not know whether anyone else was in the house, the court stated that this “lack of knowledge cannot constitute the specific, articulable facts required by Buie.” Specifically, the court concluded that if officers lack any information about whether someone remains inside a house, they do not have the specific, articulable facts required for a protective sweep beyond the adjacent area.

Finally, the court held that because the marshals exceeded the scope of a protective sweep, the government could not use the ammunition or suspected marijuana discovered during the sweep to justify the second search warrant. Consequently, the court concluded that the evidence discovered during the execution of the second search warrant should have been suppressed.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca10/16-3305/16-3305-2017-12-18.pdf?ts=1513616436>

Farrell v. Montoya, 2017 U.S. App. LEXIS 26620 (10th Cir. N.M. Dec. 27, 2017)

Farrell was driving a minivan with her five children when a police officer stopped her for speeding. During the stop, the officer told Farrell to turn off her engine; however, Farrell pulled onto the road and drove away.

The officer pursued Farrell, who pulled over a short distance down the road. The officer ordered Farrell to exit the vehicle as he reached into the minivan in an attempt to remove Farrell from the vehicle. At this point, Farrell’s children began screaming at the officer, and one of the children exited the vehicle to confront the officer. As the situation escalated, the officer called for backup.

Before additional officers arrived, Farrell agreed to exit her vehicle and talk to the officer. Farrell walked with the officer to the back of the minivan, but she refused the officer’s command to turn around to face the vehicle. Farrell then walked back to the driver’s side of the minivan and attempted to get in. When the officer grabbed Farrell’s wrist, her children screamed at the officer, and one of the children exited the van and tried to pull the officer’s hand off his mother.

When backup officers arrived, Farrell and her children were inside the minivan. The original officer struck the rear passenger window with his baton as Officer Montoya stood behind the minivan with his firearm drawn. Just after the officer’s baton struck the window a fourth time, breaking it, Farrell began to drive away at a moderate speed. Officer Montoya fired three shots at the minivan as it drove away. The minivan did not slow down or stop as Officer Montoya fired the shots and no bullet hit the minivan or anyone inside it.

After a four-minute chase, Farrell drove into a hotel parking lot and surrendered. During the chase, one of Farrell's children called 911 and told the operator they were looking for a police station in which to pull over because they were afraid of the three officers pursuing them.

The Farrells filed suit against Officer Montoya and the other officers under *42 U.S.C. § 1983*. Concerning Officer Montoya, the Farrells claim that Officer Montoya violated the Fourth Amendment by using excessive force against them by firing three shots at their vehicle. The district court denied Officer Montoya qualified immunity. Officer Montoya appealed.

The Tenth Circuit Court of Appeals stated that to establish a claim of excessive force, the Farrells "must show both that a 'seizure' occurred and that the seizure was unreasonable." The Supreme Court has held that a fleeing suspect is not "seized" under the Fourth Amendment until the suspect submits to the officer's show of authority. In addition, the Tenth Circuit previously held that a fleeing suspect was not "seized" even though he was struck by an officer's bullet because the suspect continued to flee and did not submit to the officers pursuing him.

In this case, the Farrells were fleeing when Officer Montoya fired his gun at their vehicle. The court concluded that the Farrells were not seized because they continued to flee and did not submit to Officer Montoya or the other officers. Because the Farrells were not seized when Officer Montoya fired his gun, the court held that there could be no excessive force claim; therefore, the district court improperly denied Officer Montoya qualified immunity.

The Farrells also argued that they submitted to the original officer when they pulled over twice before Officer Montoya arrived, creating a seizure that continued at least until Officer Montoya fired his gun.

The court declined to adopt the concept of an "ongoing seizure" under which once a person is seized, the seizure is deemed to continue even after the individual takes flight. The court noted that no other court has adopted this concept.

Finally, the Farrells argued that even if ongoing submission is required for a seizure, they continued to submit as they fled the three officers by calling 911 and looking for a police station at which to pull over.

A submission to a show of authority requires that a suspect "manifest compliance" with police orders. The court found that when the Farrells drove away from the three officers and led them on a high-speed chase they were not manifesting compliance with the officers.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/16-2216/16-2216-2017-12-27.pdf?ts=1514394043>

United States v. Saulsberry, 2017 U.S. App. LEXIS 26865 (10th Cir. OK Dec. 28, 2017)

A restaurant employee called the police and reported that a person was smoking marijuana in a black Honda with Texas license plates located in the restaurant's parking lot. Within two minutes of receiving this information, an officer located the vehicle and approached it. When Saulsberry opened the car door, the officer immediately detected the odor of burnt marijuana. While the officer spoke to Saulsberry about providing his driver's license and insurance information, he noticed that Saulsberry kept reaching over to a bag located on the passenger-side floorboard. The officer called for assistance, and after a backup officer arrived, the officer ordered Saulsberry to

exit the car. After Saulsberry got out of the car, he gave the officer consent to search the vehicle for marijuana. The officer found a marijuana cigarette in the center console and arrested Saulsberry.

While the backup officer searched Saulsberry, the officer looked inside the bag on the passenger-side floorboard of the car. Inside the bag, the officer saw a stack of cards. The officer removed the cards from the bag, examined them, and discovered that they were all Capital One credit cards and that none of the cards had Saulsberry's name on them.

The government indicted Saulsberry on one count of possession of 15 or more counterfeit or unauthorized access devices with intent to defraud.

Saulsberry filed a motion to suppress the evidence seized from his vehicle.

First, the court held that the tip from restaurant employee was reliable because it provided several details that were corroborated by the officer within a few minutes of receiving the call from dispatch. As a result, the court concluded that the officer had reasonable suspicion to detain Saulsberry to investigate the tip that someone was smoking marijuana in a car in the parking lot.

Second, the court held that the officer did not have probable cause to examine the stack of cards he found in the bag discovered in Saulsberry's vehicle. Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the vehicle contains contraband or evidence. The officer testified that he saw a "stack" of cards inside the bag. Even if the top card in the stack was a credit card, the court reasoned that the officer would need to examine each card to determine if the other cards were also credit cards rather than membership cards, library cards, gift cards, or insurance cards. The court also ruled that it would not be uncommon for someone to possess 15 plastic, wallet-sized cards. In addition, the court found it significant that the officer testified that it was only after he removed the cards from the bag and examined them that he felt "there was something . . . shady or something like that." The court concluded that a police officer's observation that a suspect possesses a number of cards, in this case 15, does not provide probable cause that the suspect has been or is committing a crime. Consequently, the court held that the government did not establish probable cause justifying the officer's examination of the cards; therefore, the evidence obtained from that examination should have been suppressed.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/16-6306/16-6306-2017-12-28.pdf?ts=1514484275>
