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Wednesday April 11, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

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2. **Advanced Affidavit Writing (1-hour)**

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

This webinar will review the components of search warrant and arrest warrant affidavits while providing practical tips and guidance on how law enforcement officers can work effectively with their prosecutors to draft those documents.

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Without the Vision of 20/20 Hindsight: Graham v. Connor's Rule of Relevance and the Issues with Body Cameras¹

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Stress can restrict what we see and hear, and distort what we do.² Over eighty percent of police officers experience auditory exclusion in gun fights. One officer stated, “If it hadn’t been for the recoil, I wouldn’t have known my gun was working.”³ Tunnel vision can restrict normal vision to a range of about 3 to 5 degrees. That’s like going to the theater and watching a movie through a paper towel tube.⁴

And then comes the “Invisible Gorilla,” a book about inattention blindness.⁵ Subjects of an experiment at Harvard University were asked to watch a video of two teams passing basketballs and told to count the number of passes by the team wearing white jerseys. Halfway through the video a person wearing a full-body gorilla suit walked into the middle of the court, beat its chest, and walked out. About half the subjects missed seeing the gorilla, hence the title of the book. Their attention was directed elsewhere.

But body cameras do not feel stress. These unemotional witnesses at the scene may record sights and sounds not known to the officer at the time he used force. Whether they are still relevant in an excessive force case without the officer’s knowledge depends on the legal standard by which the officer is judged.

What was known to the officer?

The assumption appears to be that an officer is judged by what he knows at the time. What the officer learns later (only by watching a video of what happened) is hindsight - not relevant. The National Consensus Policy on Use of Force adopted a *known-to* standard in January 2017 when it stated:

Objectively Reasonable: The determination that the necessity for using force and the level of force used is based upon the officer’s evaluation of the situation in light of the totality of the

¹ Tim Miller is an instructor and attorney at the Legal Division for the Federal Law Enforcement Training Centers. The opinions in this article are his own and should not be attributed to the Center or be taken as legal advice. Any information should first be shared with your agency or legal counsel.

² D. Dawes, *Body-Worn Cameras Improve Law Enforcement Officer Report Writing*, Journal of Law Enforcement (2015).

³ Alexis Artwohl, Ph.D., *Perceptual and Memory Distortions During Officer Involved Shootings*, AELE Lethal & Less Lethal Force Workshop (2008).

⁴ Force Science Institute News #145, *Do head cameras always see what you see in a force encounter?* (March 12, 2010)

⁵ Christopher F. Chambris and Daniel Simons, *The Invisible Gorilla: And Other Ways our Intuitions Deceive Us*, 2010.

circumstances *known to the officer* at the time the force is used and upon what a reasonably prudent officer would use under the same or similar circumstances.⁶



The National Consensus Policy states that reasonable force is based on the facts known to the officer.

We could call that a *sub-objective* test. (It's not totally objective.) The first question is *subjective*. What did the officer know? The answer obviously depends on the officer. Only the second question tries to be objective: Based on what the officer knew, would a reasonable officer use the same force?

Call it a sub – objective or a known-to standard, its goal is to root out subjectively bad decisions. The feeling is that police officers should not go around shooting people, unless they know the facts that justify shooting. There are downsides, however, if excessive force is based upon what the officer knows - - because if a gorilla can be invisible, so can the facts supporting a threat. Liability for excessive force would essentially depend on who *saw the gorilla*? Two officers could face the same facts and use the same force, and one be liable and the other not, depending on their ability to recount what happened. A threat could be real - - *pounding its chest* in front of the officer. No matter; if the officer did not know it at the time, it's not relevant. That it happened directly in front of the officer (and was recorded by his body camera) would not make any difference.



Do you see the gun? If you do not, the gun is not relevant under a known-to

Known-to Verses Knowable ...

Then comes *Graham v. Connor*.⁷ In *Graham*, the Supreme Court evaluated excessive force claims for objective reasonableness under the Fourth Amendment. The facts were not limited to what the officer knew at the time; rather, the Court stated that “the question is whether the *totality* of the facts and circumstances justifies a particular ... seizure.”⁸ *Graham*'s only restriction on what can be considered is in a sentence that uses a reasonable officer standard: “The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁹

⁶ National Consensus Policy on Use of Force (January 2017).

⁷ *Graham v. Connor*, 490 U.S. 386 (1989)

⁸ *Id.* at 396 citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

⁹ *Id.*

Graham suggests that this hypothetical officer is substituted for the real officer; and if so, relevance should not depend on what the officer knew, but on what a reasonable officer in his shoes *could* have known. What was *knowable*? And presumably something recorded by the officer’s body camera would be knowable, if not actually *known to* him.



Graham states that excessive force decisions are judged from the perspective of a reasonable officer on the scene.

Something recorded by a body camera - - that went unnoticed by the officer - - would only be hindsight from the officer’s perspective. But *Graham* steers away from subjective tests. The Court continued, “...the inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are objectively reasonable in light of the facts and circumstances *confronting* them [not known to them], without regard to their underlying intent or motivation.”¹⁰

Graham boils down to two questions. First, what could a reasonable officer have seen (... heard, smelled, tasted, or touched) while standing in the shoes of the real officer? The reasonable officer is obviously the court looking at the objectively manifested facts at the scene through this hypothetical lens. The officer can certainly add to the facts. His body camera may add more. Witnesses may testify, the plaintiff will probably have something to say, and expert witnesses can explain why one perspective might be different than another’s, especially in *a tense, uncertain, and rapidly evolving situation*.¹¹ But after the facts are in, it’s the reasonable officer’s perspective that counts. Considering the totality of the facts and circumstances, along with their reasonable inferences, could this hypothetical officer now believe that the force fell within the range of reasonable options?

If the purpose of a known-to standard is to root out subjectively bad decisions (by asking what the officer knew and whether it was enough to justify what he did), *Graham* protects free citizens from objectively unreasonable seizures.¹² It does so by making excessive force decisions turn on the objectively manifested facts at the scene instead of how the officer might remember them.

The issue with body cameras.

We could file the difference between known-to, and knowable under “Who Cares?” if not for body cameras. What might have gone unnoticed can be seen or heard later, which raises the question: Is it relevant? It’s not just an academic debate. Known-to believers actually admonish law enforcement agencies not to allow police officers to watch body camera footage before writing their use of force reports out of fear that they may include facts from their cameras that were not known to them at the time.¹³ The goal is to preserve the moment in each officer’s mind

¹⁰ *Id.* at 397 [emphasis added].

¹¹ *Id.* at 397 (The calculus of reasonableness must embody allowance for the fact that police officers are forced to make split-second judgments - - in circumstances that are tense, uncertain, and rapidly evolving - - about the amount of force that is necessary in a particular situation).

¹² *Id.* at 395.

¹³ See Daigle Law Group, LLC, *What happened to Perception of the Officer? Watching the Video Before Writing a Use of Force Report*, September 30, 2015 (arguing that police officers should not watch body camera footage of use

to determine what he knew, and if it was enough. A known-to standard not only dictates how that officer should prepare for trial, it makes an excessive force decision turn the officer's memory. Consider what happened to me:

Dispatch told me that there was an officer down. When I arrived on scene a crowd of people ran by pointing back, from where they had come. I walked on and saw someone lying on the ground. He or she (I couldn't tell) was dressed in a blue uniform and appeared unconscious or worse. I was focused on the man standing over the officer. He was white, male, and screaming! (I can't remember what.) I looked at him, and he looked back. He had a pistol. He pointed it at the officer on the ground and then at me. It was a semi-automatic - - like a model 1911 in a World War II movie. I think I yelled "Stop! ...!" or "Drop it ...!" (I'm not sure.) He continued to waive the gun around. I thought I was next and shot him.

Fortunately, that was only a training scenario on a simulator at the Federal Law Enforcement Training Center in Glynco, Georgia. I am an attorney-instructor in the Legal Division and never a police officer by trade - - which will take on some significance as we go on. The instructor doing the de-brief asked me what happened. I started with the call from dispatch about an "officer down" and explained that based on my experience (admittedly limited) I believed an officer had been shot. I only briefly described the crowd of people that ran by, and the instructor stopped me.

- **Instructor:** What did the crowd tell you?
- **Miller:** Nothing. They were just screaming ... a bunch of gibberish.
- **Instructor:** You didn't hear someone yell that he had a gun?
- **Miller:** No! Who said that?

And like a body camera's recording, the instructor re-played the scenario. I saw the crowd again but this time I saw and heard a woman scream, "He's got a gun!" That was not known to me, and frankly, I do not remember a warning about a gun to this day. Combat veterans and police officers have reported auditory exclusion in gunfights. I experienced some form of it in a training scenario. A little frustrated, I said:

- **Miller:** Ok, I don't remember anyone, saying anything about a gun, but I saw one. The man I shot pointed it at me.

I became defensive. I thought, "What else was *not known* to me?" Instead of articulating facts, I stepped into the judge's role and made a legal conclusion; specifically, that I was not required to wait for the gun to be pointed at me, especially after orders to drop it went unheeded.¹⁴ But from the look on the instructor's face, something else was *not known to me*.

- **Instructor:** What type of gun was it?
- **Miller:** A pistol ... like a model 1911.
- **Instructor:** That wasn't a gun.

of force incidents prior to writing their use of force reports because it influences their perspective of the event at the time force was used.)

¹⁴ *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997).

Tunnel vision is another defense mechanism. We zero in on what we perceive as the threat, sometimes to the exclusion of other important information. I believe that I tuned-out the woman in the crowd; that I tunneled-in on the suspect's face; and while seeing might be believing in most cases, under stress we sometime see what we believe is there. I saw a pistol; I still do. The replay, however, showed the man holding a hammer.

To paraphrase, my evaluation of this scenario was *probably not as good as the next guys*. Experts in this field, like Lieutenant Colonel Dave Grossman, believe that sensory deprivation can be reduced through training. He stated, "When I work with high level civilian operators, like LAPD SWAT, it's amazing to see how they've evolved. Almost all of them move between ... zooming in to eliminate a target and then back out to see everything going on."¹⁵

But I'm not SWAT; more like a rookie. And while it's true that shooting was probably still reasonable based on what I did know, continue down memory lane. What if I also tunneled in so tightly on the man's face that I did not see anything in his hands? (Which is not inconceivable if tunnel vision can be like looking through a paper towel tube.) The point is: now I'm in trouble. Without the woman's warning about a gun or seeing something in the man's hand that could be a weapon, the facts do not support deadly force. The objectively manifested facts at the scene certainly do; a reasonable officer in my shoes could find shooting reasonable based on what was knowable. Finding my use of force excessive would be based on conditions peculiar to me.



The facts in this scenario are the same. The only difference is how the student evaluates them.

A known-to standard is a subjective test, pure and simple. Calling it "sub-objective" is a misnomer ... because if the facts that go into making a decision are *peculiar to the individual*, how can the decision not be too? Two officer could face the same threat and use the same force and one deemed excessive and the other not depending on tunnel vision, auditory exclusion, or the sheer luck to be looking at the right place at the right time. That type of subjective evaluation caused my frustration when I could not remember the woman's warning. I felt that my evaluation of the scenario would fall short, and cheated that something as significant as someone screaming about a gun was lost to me because of an involuntary reaction to stress.

The irony of a known-to standard is that it tells police officers that they must know the facts in situations where they most likely will *not know them*, or at least be able to recall them accurately.¹⁶ It also creates a moral dilemma: Who can admit, "I didn't know that" - - if it helps their defense in a civil lawsuit? One side says that the law calls for such a dilemma and that the solution is for the officer to write his report before watching the video; but that does not stop the urge (after watching) to claim some sudden epiphany. It is not an enviable situation for an honest police officer, and in my opinion, it is not one the Supreme Court intended.

¹⁵ See Adam Linehan, *This is Your Brain on War*, Task and Purpose (June 2016)

¹⁶ D. Dawes, *Body-Worn Cameras Improve Law Enforcement Officer Report Writing*, Journal of Law Enforcement (2015); Force Science Institute #290, Memory is worst about most critical moment of officer involved shooting, (August 2015).

Back to *Graham*...

Graham's reasonable officer standard makes allowance "...for the fact that police officers are often forced to make split-second decisions - - in circumstances that are tense, uncertain, and rapidly evolving ..."¹⁷ The inability to recall something due to an involuntary, and natural reaction to stress would seem like a reasonable allowance, and also why the Court mandated that, "... use of force *must* be judged from the perspective of a reasonable officer on the scene ..."¹⁸ Otherwise the constitutionality of a use of force under a given set of facts will vary from one officer to the next.

Reasonable allowance for stress should actually make the officer more forthright about what he does remember, and doesn't. Prior to making a statement, the officer might be told:

Tell us what you knew when force was used. Tell us only what you remember, bearing in mind that you may not know everything. *You're not expected to*. Reasonable force is judged from the perspective of a hypothetical, reasonable officer on the scene.

In my case, the woman's warning about a gun should be relevant because a reasonable officer in my shoes could have heard her. (And she was clear as a bell on the replay.) The advisement would continue:

This reasonable officer (which is actually the court looking at everything through this hypothetical lens) considers the totality of the facts and circumstances that confronted you at the time. The issue: Could this hypothetical officer believe that what you did fell within the range of reasonable options based on everything knowable at the time?

But wait – let's change the scenario. What if the warning I did not hear was the woman shouting "He's having a heart attack!" - - now referring to the officer on the ground, and suggesting that the man I shot was only signaling for help? In other words, what if the woman made it knowable that the man was *not* a threat? The advisement might explain:

A *knowable* fact just means that it deserves consideration. There could also be a good reason for not knowing something. Auditory exclusion and tunnel vision are common reactions to stress that may restrict a reasonable officer's perception. You can certainly add-to the facts; and what you did not know may be something significant to add. The question becomes whether a reasonable officer in your shoes could miss the same thing you did, and still find the force reasonable after considering everything else.

Allowance for *reasonable* mistakes covers a third possibility: not paying attention - - texting my buddy about the ball game as I drove to the scene, for instance, instead of listening to important information from dispatch. *Graham* is about what a reasonable officer would do. The Supreme Court called it a factbound analysis.¹⁹ A known-to standard, on the other hand, is just a simple rule that says what the officer does not know is not relevant. It dismisses facts supporting a threat, and when there is none, it says *what the officer doesn't know can't hurt him*.

¹⁷ *Graham*, at 397.

¹⁸ *Id.*

¹⁹ See *Scott v. Harris*, 550 U.S. 372, 383 (2007)

The answer depends on the purpose of the Fourth Amendment ...

In *Devenpeck v. Alford*, the Supreme Court stated that whether probable cause *to arrest* exists depends upon the facts known to the arresting officer.²⁰ But it would ignore Fourth Amendment jurisprudence to claim that a known-to standard should, therefore, get the nod for excessive force cases. For one, *Devenpeck* never cites *Graham* - - probably because *Graham* establishes the framework for judging excessive force cases and not arrests.²¹ What's more, the issue in *Devenpeck* was not about the subjective knowledge of the officer or whether something recorded on a body camera could still be relevant without the officer knowing it. Indeed, Sergeant Devenpeck knew everything he needed to know to arrest Mr. Alford for impersonating a police officer. This case grabbed the Supreme Court's attention because just knowing the facts was not enough in the Ninth Circuit. The arresting officer also had to invoke a proper reason for the arrest.²² And while Sergeant Devenpeck knew the facts supporting an impersonation charge, he arrested Alford for something that was not a crime; specifically, tape recording their conversation beside the road without Sergeant Devenpeck's consent after a lower court had ruled it was not a crime to do so. (*This should sound familiar.*) Requiring the arresting officer to invoke a proper reason shortly after an arrest was intended to root out subjectively bad arrests - - that is, by making the officer articulate the reason. (*Like a known-to standard tries to root out subjectively bad force decisions - - by making the officer articulate the facts at the scene.*) The Supreme Court flatly rejected the notion that the Fourth Amendment imposed such a requirement. It was enough that Sergeant Devenpeck knew the facts.

Sergeant Devenpeck knew the facts, not the reason for the arrest. His arrest was still objectively reasonable. The significance of the *Devenpeck* case is in the common thread that runs through all Fourth Amendment searches and seizures: objective reasonableness. The issue presented by a body camera is whether a use of force can still be objectively reasonable if the officer does not know all the facts manifested at the scene. In that regard, *Devenpeck* is persuasive.

The Court stated that if officers were required to articulate a proper reason the constitutionality of an arrest under a given set of known facts would vary from place to place and time to time depending on the officer.²³ (The same would be true if the "known facts" that support a use of force must come from the officer's memory.) An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie in precisely the same circumstances would not.²⁴ (Just like a SWAT trained officer would likely avoid an excessive force charge for having the wherewithal to focus on a suspect's hands, while a rookie might not.) "We have consistently rejected a conception of the Fourth Amendment that would produce such haphazard results" the Court stated.²⁵ "Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the *subjective state of mind of the officer.*"²⁶

²⁰ *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004)

²¹ See *County of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1547 (2016).

²² *Devenpeck*, 543 U.S. at 152 (the charge for impersonating a police officer was not "closely related" to the offense invoked by Sergeant Devenpeck.)

²³ *Id.* at 154

²⁴ *Id.*

²⁵ *Id.* at 156 citing *Whren v. U.S.*, 517 U.S. 806 (1996).

²⁶ *Id.* at 143 citing *Horton v. California*, 496 U.S. 128, 138 (1990)

CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Rasberry, 882 F.3d 241 (1st Cir. ME Feb. 14, 2018)

An agent with the Drug Enforcement Administration (DEA) suspected Todd Rasberry was a major drug dealer. When the agent confronted one of Rasberry's accomplices while she was making a drug delivery, the woman surrendered the heroin she was carrying and told the agent that he would find Rasberry, along with more drugs, in a motel room she had rented. The woman gave the agent a key to the room and consented to its search. The agent knew Rasberry had a criminal history that included drug and weapons charges, and that Rasberry had been arrested a few months earlier at a party where guns were present. As a result, the agent and several other officers went to the motel room armed and wearing ballistic vests.

At the motel room, the agent tried the room key he had been given, but discovered it did not work. The agent then knocked and Rasberry opened the door. Rasberry told the agent he was a guest in the room, which had been rented by the woman with whom the agent had spoken. The agent told Rasberry the officers were there to search the room and that, although he was not under arrest, he would be detained while they conducted the search. At that point, one of the officers placed Rasberry's hands behind his back, handcuffed him, and then frisked the portion of Rasberry's lower back that Rasberry might be able to reach despite being handcuffed. Two other officers, with weapons drawn, conducted a sweep of the room to make sure no one else was present.

After the sweep, the officers searched the room for approximately twenty minutes. The officers found plastic sandwich bags, needles, and a digital scale, but no drugs. As the search was ending, Rasberry asked if the handcuffs could be removed. The agent replied that before he could remove the handcuffs, he had to make sure Rasberry did not have a weapon. As the agent frisked Rasberry, he felt a hard, round object, about the size of a softball in the groin area of Rasberry's shorts. When the agent asked Rasberry about the object, Rasberry told the agent it was part of his anatomy. Confident that the object was contraband and not part of Rasberry's anatomy, the agent arrested Rasberry. The agent then reached into Rasberry's undershorts and removed a ball of baggies containing what appeared to be controlled substances. A field test confirmed that some of the baggies contained heroin and others contained cocaine.

The government charged Rasberry with several controlled substance violations.

Rasberry filed a motion to suppress the drugs seized from his undershorts, arguing that his seizure and subsequent search violated the Fourth Amendment.

First, Rasberry claimed that by brandishing weapons, placing him in handcuffs, and searching the room for twenty minutes, the officers transformed a lawful Terry stop into a de facto arrest without probable cause.

The court disagreed. The court found the officers had a reasonable basis to suspect that Rasberry might be armed and dangerous; therefore, by entering the room with guns drawn and immediately

handcuffing Rasberry, the officers acted reasonably to ensure their safety during the search. In addition, the agent told Rasberry that he was not under arrest, but rather, simply being detained while the officers searched the room. Finally, the court concluded that Rasberry's detention was proportional to the circumstances and lasted no longer than was reasonably necessary for the officers to search the room and dispel their suspicion that illegal drug were hidden there.

Second, Rasberry argued that the agent's frisk violated the Fourth Amendment because the initial frisk, performed when he was first handcuffed, was sufficient to dispel any suspicion that he might be armed.

A police officer may frisk a suspect when the officer has reasonable suspicion that the suspect is armed and dangerous. In some situations, when the first frisk is limited, it will not automatically dispel a reasonable suspicion that the suspect may be armed; therefore, a second frisk may be justified. In this case, the court found that the initial frisk was confined to the area of Rasberry's lower back. Because the first frisk was confined to Rasberry's lower back, the court concluded the agent had reasonable suspicion to believe that Rasberry might be carrying a weapon somewhere else on his person.

Third, Rasberry argued that the removal of the contraband from his undershorts violated the Fourth Amendment.

Prior to seizing the drugs from Rasberry, the agent recovered drugs from Rasberry's accomplice, the renter of the motel room. The accomplice told the agent that Rasberry was in the room and was in possession of additional drugs. The officers searched the room, without finding any drugs, and the only place that had not yet been searched was Rasberry's person. When the agent frisked Rasberry, he felt a softball-sized object in Rasberry's undershorts that he reasonably suspected contained drugs. This suspicion was increased by the agent's knowledge that drug dealers frequently conceal drugs in their undergarments. Finally, when the agent asked Rasberry about the object, Rasberry responded with an obvious lie. The court concluded that these facts established probable cause to arrest Rasberry and to seize the softball-sized object incident to his arrest.

Finally, Rasberry argued that the search of his undershorts violated the Fourth Amendment because it was overly invasive and degrading.

The court disagreed. Although the agent described extracting the softball-sized object from Rasberry's undershorts as "awkward," there was no evidence that the extraction was conducted in a needlessly degrading or humiliating fashion. The court noted the agent and Rasberry were of the same gender and the agent extracted the drugs in the privacy of a motel room, allowing Rasberry to remain clothed as he did so. Finally, the court concluded it was Rasberry's decision to hide the drugs in such an intimate location, reiterating that the agent seized them in a reasonable manner.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/16-2465/16-2465-2018-02-14.pdf?ts=1518645604>

Hill v. Walsh, 2018 U.S. App. LEXIS 4814 (1st Cir. MA Feb. 27, 2018)

Matthew Hill overdosed on drugs, and after a violent struggle with police officers, was transported to the hospital. The next day Matthew's sister filed a petition in state court to civilly commit Matthew as a substance abuser pursuant to Mass. Gen. Law ch. 123, § 35. A state district judge determined that it was necessary to issue a warrant for Matthew's apprehension to enforce the civil commitment petition. The section 35 warrant had in the subject line, "Matthew Hill, 3 Eldridge Street." Directly below, in boldfaced text, it read "CURRENTLY AT MORTON HOSPITAL." Hill's parents lived at the Eldridge Street address.

The section 35 warrant was faxed to the police department. The police department entered 3 Eldridge Street, not Morton Hospital, into the department's dispatch system. A few minutes later, officers were directed to execute the warrant at 3 Eldridge Street. When the officers arrived, they knocked on the front door but received no response. The officers looked into the home through a glass pane on the side of the door and were startled when one of the Hills' dogs lunged against the glass. When the officers looked in the window again, they saw a curtain move and the shadow of a person inside. The officers walked around to the side of the house and discovered an unlocked door. Concerned for their safety because of the dogs inside the house, the officers waited for their chief to arrive. When the chief arrived, he directed the officers to enter the unlocked door and spray a fire extinguisher that he had retrieved from his cruiser to keep the dogs back. The officers entered through the unlocked side door, sprayed the fire extinguisher at the dogs, and conducted a sweep of the house. The officers found no one inside the house. Due to the damage caused by the fire extinguisher, the Hills vacated their home for five days and engaged in extensive cleaning to make it habitable.

The Hills sued the officers under 42 U.S.C. § 1983 claiming that the officers' entry into their house violated the Fourth Amendment.

The court held that the officers were entitled to qualified immunity. The court found that the Supreme Court has never addressed whether a section 35 warrant, or any other warrant to compel attendance at a civil commitment hearing, is sufficient to justify a law enforcement officer's warrantless entry into the home under the emergency aid exception. As a result, the court held that it was not clearly established that the officers' entry violated the Fourth Amendment.

The court went on to clarify that under the emergency aid exception, as outlined by the Supreme Court in [Michigan v. Fisher](#), the government does not need to establish probable cause, but only "an objectively reasonable basis" for believing that a person inside the home is in need of immediate aid, in order to enter the home without a warrant. The court noted that the Fifth and Sixth Circuits have also adopted the "objectively reasonable basis" standard. Under this standard, the court found that given Matthew's history of overdosing and resisting the police, the subject line of the warrant (3 Eldridge Street), and the appearance of a person inside the home, a reasonable officer could have reasonably concluded that his entry was lawful under the emergency aid exception.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/17-1669/17-1669-2018-02-27.pdf?ts=1519758006>

Third Circuit

United States v. Werdene, 2018 U.S. App. LEXIS 4089 (3d Cir. PA Feb. 21, 2018)

In 2014, the Federal Bureau of Investigation (FBI) began investigating an internet forum named “Playpen” for sharing child pornography hosted on “The Onion Router” (Tor). Tor, along with similar networks, collectively known as the Dark Web, exists to provide anonymity to Internet users by masking user data and hiding information by funneling it through a series of interconnected computers.

In February 2015, the FBI identified and arrested Playpen’s administrator, who lived in Florida. The FBI lawfully seized the server, moved it to a government facility in the Eastern District of Virginia, and obtained a wiretap order to monitor communications on it. The FBI then assumed administrative control of Playpen and allowed the website to operate while law enforcement officials tried to identify Playpen’s users.

On February 15, 2015, the FBI applied for a warrant in the Eastern District of Virginia to search computers that accessed Playpen by using a Network Investigative Technique (NIT), a form of government-created malware, which allowed the FBI to retrieve identifying information from Playpen users around the world. Whenever a user or administrator logged into Playpen by entering a username and password, the NIT was downloaded onto that person’s computer. Once downloaded, the NIT instructed the computers to transmit certain information back to the government. The information sent to the government included the computer’s Internet Protocol (IP) address, operating system information, operating system username, and its Media Access Control (MAC) address, which is a unique number assigned to each network modem. Although Playpen was hosted in the Eastern District of Virginia, the warrant explained that, “the NIT may cause [a defendant's] computer--wherever located--to send to a computer controlled by or known to the government, network level messages containing information that may assist in identifying the computer.” A United States magistrate judge signed the warrant, and the FBI began collecting the personal data of Playpen users world-wide.

Analysis of the NIT data revealed the IP address of a Playpen user, eventually identified as Werdene, living in Bensalem, Pennsylvania. The FBI obtained a separate search warrant for Werdene’s home from a magistrate judge in the Eastern District of Pennsylvania, and agents subsequently discovered child pornography on a DVD and USB drive in Werdene’s home.

The government charged Werdene with possession of child pornography. Werdene filed a motion to suppress the evidence seized during the search of his home. Werdene argued that the search warrant authorizing the NIT was invalid because the magistrate judge in the Eastern District of Virginia did not have the authority to issue a warrant to search a computer outside her district.

The Federal Magistrates Act, 28 U.S.C. § 636(a), authorizes federal magistrates to exercise the “powers and duties” conferred by the Rules of Criminal Procedure within their districts. Consequently, § 636(a) creates a jurisdictional limitation because it expressly limits where magistrate judges may exercise their powers. In February 2015, Federal Rule of Criminal Procedure 41(b) provided that a magistrate judge may “issue a warrant to search for and seize a person or property located within the district.” Rule 41 (b) also authorized four exceptions to this “territorial restriction,” however, none of these exceptions expressly allowed a magistrate judge in one district to authorize the search of a computer in a different district. As a result, the court

held that the NIT warrant was invalid because it violated § 636(a)'s jurisdictional limitations and it was not authorized by Rule 41(b).

The court further held that the Rule 41(b) violation constituted a violation of the Fourth Amendment, as the deployment of the NIT constituted a search without a warrant.

Even though a Fourth Amendment violation occurred, the court held that the good-faith exception to the exclusionary rule applied and denied Werdene's motion to suppress the child pornography evidence. The court recognized the purpose of the exclusionary rule is to deter government violations of the Fourth Amendment. In this case, the court found that a similar Rule 41(b) violation was unlikely to occur again; therefore, suppression would have no deterrent effect. The court noted that on December 1, 2016, Rule 41(b) was amended to authorize magistrate judges to issue NIT-like warrants to search computers and seize or copy electronically stored information located outside the magistrate judge's district if the district where the computer or information is located has been concealed through technological means. (Fed. Rule Crim. P. 41(b)(6)). The court also commented that the First, Fourth, Eighth, and Tenth Circuits have each applied the good-faith exception to the NIT warrant issued in this case.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca3/16-3588/16-3588-2018-02-21.pdf?ts=1519236007>

Fourth Circuit

United States v. Cowden, 882 F.3d 464 (4th Cir. WV Feb. 16, 2018)

A West Virginia state trooper stopped a vehicle for two traffic violations. During the stop, the trooper suspected the driver, Ryan Hamrick was driving under the influence of alcohol and attempted to arrest him. Hamrick resisted and engaged in a physical altercation with the trooper, but was eventually arrested. The trooper transported Hamrick to the Hancock County Sheriff's Office (HCSO) for processing. At the HCSO station, the defendant, a lieutenant with the HCSO, was waiting to process Hamrick upon his arrival. Lt. Cowden learned that Hamrick had resisted arrest and told other officers that, "[Hamrick's] not going to act that way with us, this is our house, play by our rules."

When Hamrick arrived at the station, he was restrained in handcuffs with his hands secured behind his back. Several officers observed Hamrick, who did not offer any resistance and was not threatening the officers either physically or verbally, as he was removed from the vehicle. Lt. Cowden and another officer held Hamrick by the arms and escorted him into the station. Although Hamrick displayed a loud and drunken demeanor, the officers, other than Lt. Cowden did not perceive Hamrick as a threat because he was handcuffed and surrounded by several officers.

Inside the lobby, Hamrick attempted to pull away from Lt. Cowden and the other officer. In response to Hamrick's movement, Lt. Cowden pulled Hamrick toward the elevator and threw him against the wall. While Hamrick was facing the wall, still in handcuffs and not resisting the officers, Lt. Cowden pulled Hamrick's head away from the wall and slammed his head and face back into the wall. Lt. Cowden told Hamrick that the HCSO was "our house," and that Hamrick had to "play by our rules."

After slamming Hamrick's face into the wall, Lt. Cowden moved Hamrick in front of the elevator and struck him in the back of the head with a closed fist. When the elevator doors opened, Lt. Cowden grabbed Hamrick by the throat, knocked him by the head into the corner of the elevator, and yelled at him about resisting law enforcement officers. At this point, another officer intervened and told Lt. Cowden to "back off." By now, Hamrick had a gash above his left eye and a cut above his nose. Hamrick was bleeding from his nose and mouth and there was blood on the floor and walls of the elevator and hallway. Hamrick received medical care at the HCSO station and later received additional care at a local hospital.

The government charged Cowden with, among other offenses, deprivation of rights under color of law, in violation of 18 U.S.C. § 242. The jury convicted Cowden on the § 242 charge and Cowden appealed.

To obtain a conviction for deprivation of rights under color of law in violation of 18 U.S.C. § 242, the government must show that the defendant:

1. Willfully,
2. Deprived another individual of a constitutional right,
3. While acting under the color of law.

Cowden did not challenge that the government established he acted under the color of law or that his actions qualified as excessive force, a constitutional violation under the Fourth Amendment. Instead, Cowden claimed the government failed to establish that he acted "willfully" when he used force against Hamrick.

The court disagreed, concluding the evidence was more than sufficient to support the jury's determination that Cowden acted willfully, as required under § 242. At the time Cowden repeatedly used force against Hamrick, Hamrick was fully restrained in handcuffs in the presence of six other law enforcement officers. Despite Hamrick's loud and intoxicated demeanor, Hamrick was not offering significant resistance or otherwise acting in a threatening manner. Nonetheless, Cowden grabbed Hamrick by the throat, slammed his face into the wall, and punched Hamrick in the back of the head. While engaging in these acts of gratuitous force, Cowden repeated that the HCSO was "our house" and that Hamrick had to play by "our rules," statements Cowden earlier had made in anticipation of Hamrick's arrival at the HCSO station. Finally, several of Cowden's fellow officers who witnessed the events testified that Cowden's actions were neither justified nor reasonable. From this evidence, the court held that the jury could conclude that Cowden, while acting as a law enforcement officer, willfully used unreasonable force against Hamrick.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca4/17-4046/17-4046-2018-02-16.pdf?ts=1518809490>

Sixth Circuit

United States v. Castro, 881 F.3d 961 (6th Cir. MI 2018)

In December 2014, several home invasions robberies occurred in Dallas, Texas. After one of the robberies, police officers arrested Juan Olaya and seized his cell phone. The officers obtained a warrant from a Texas state judge to search Olaya's phone, for among other things, evidence concerning the robberies. An officer reviewed the contents of Olaya's phone by hand and found potentially incriminating evidence on the phone. The officer took screen shots of the evidence and then secured Olaya's phone at an evidence storage facility.

In January 2015, the Texas officers merged their investigation with a federal investigation based in Michigan focused on a multistate criminal enterprise. Later that year, Texas officers transferred Olaya's phone to the Federal Bureau of Investigation for a more detailed analysis. The FBI searched Olaya's phone based on the Texas state court warrant.

In the meantime, Texas officers came to suspect that Chaka Castro had organized the robberies. The officers obtained a warrant to search Castro's two phones from a different Texas state judge. The officers found incriminating evidence about the robberies on both phones.

The government charged Castro and Olaya with violating the Racketeer Influenced and Corrupt Organizations Act (RICO). Castro and Olaya filed motions to suppress the evidence found on their cell phones.

Castro argued that the warrant did not satisfy the Fourth Amendment's particularity requirement. Specifically, Castro claimed that because the warrant authorized searches for evidence of "a crime," it seemingly allowing the police to look at her phone in search of evidence of any crime rather than evidence of the robberies.

The court disagreed. The search warrant affidavit established probable cause that Castro participated in several armed robberies and to that end, the warrants mentioned "violations of Texas Penal Code 29.03 (Aggravated Robbery)." The court concluded that the officer wanted the search to cover all of the robberies listed in the affidavit and his use of a general article ("a") rather than a specific one ("the") served that purpose. The court added that the rest of the language in the warrants reinforced this interpretation.

Olaya claimed that the Texas warrants did not permit federal agents to conduct a full forensic search months after the state officers conducted a cursory search.

The court found that two Fourth Amendment rules applied. The court stated the first rule relates to timing. Officers may conduct a more detailed search of an electronic device after it is lawfully seized as long as their later search does not exceed the probable cause articulated in the original warrant and the device remains secure. The court found in other cases that searches have been found lawful in instances where officers conducted an initial search after seizing a device but waited months or years to conduct a more thorough search. In this case, the court held the federal agents lawfully searched Olaya's previously seized cell phone, which was still secured, as new information established that the phone might contain evidence.

The court stated the second rule applies to federal-state investigations. Federal officers may use a state warrant to conduct a follow-up search of a seized cell phone without obtaining a second warrant as long as the search does not exceed the probable cause articulated in the original warrant.

In this case, the federal officers were looking for the same evidence that the state warrant targeted because the same evidence showed violations of state and federal law. The court concluded that the second search did not exceed the scope of the warrant, as the state warrant and its incorporated affidavit established probable cause to believe that the phone contained evidence of aggravated robbery.

Finally, Olaya claimed that the end of the state warrant's execution period and the filing of the search warrant return by the state officers prohibited the subsequent forensic search by the FBI.

The court disagreed. The court held that under Texas Code of Criminal Procedure article 18 the return of the warrant does not end an officer's authority to carry out later searches within the warrant's scope.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/17-1590/17-1590-2018-02-07.pdf?ts=1518033647>

Seventh Circuit

Avina v. Bohlen, 882 F.3d 674 (7th Cir. WI Feb. 14, 2018)

Officers Bohlen and Rohde arrested Avina for trespassing. After Avina complied with the officers' request to put his hands behind his back, the officers escorted Avina across the street to their squad car to handcuff him with each officer holding one of his arms. Once at their vehicle, the officers leaned Avina's lower body against the hood, but he remained standing upright. At that point, Officer Bolen took sole control of Avina. Officer Bolen grabbed Avina's right wrist with his right hand, and placed his left hand on Avina's upper arm. Officer Bohlen then moved Avina's right hand "halfway or like a little bit past" halfway up Avina's back. That movement caused Avina's arm to break. Avina immediately told Officer Bohlen he was in pain. Officer Bohlen let go, allowed Avina to sit on the curb, and called for medical attention.

Avina sued the officers under 18 U.S.C. § 1983 for excessive use of force. The district court held that the officers were entitled to qualified immunity and Avina appealed.

The Seventh Circuit Court of Appeals held that Officer Rohde was entitled to qualified immunity. It was undisputed that Officer Rohde's only contact with Avina came as he guided Avina across the street holding one of his arms. Officer Rohde released Avina before his arm was broken, and there was no claim that Avina suffered any other injury as a result of Officer Rohde's actions.

Regarding Officer Bohlen however, the court reversed the district court, holding that he was not entitled to qualified immunity. A claim that a law enforcement officer used excessive force when arresting a suspect is analyzed under the Fourth Amendment's objective reasonableness standard. Although there was a dispute as to exactly how Avina's injury occurred, when viewed in the light most favorable to Avina, the record established that Avina was fully cooperative when Officer Bohlen moved his arm up his back with enough force to break it. The court found those facts did not support the conclusion that Officer Bohlen was placing Avina in handcuffs in an objectively reasonable manner. The court added that the regularity with which officers place individuals in handcuffs without incident raises at least an inference that this situation involved something more. Consequently, the court found that a reasonable jury could believe Avina's version of the facts and conclude that Officer Bohlen used an unreasonable amount of force while handcuffing him.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/17-1902/17-1902-2018-02-14.pdf?ts=1518645640>

Horton v. Pobjecky, 2018 U.S. App. LEXIS 4885 (7th Cir. IL Feb. 27, 2018)

Late on a Saturday evening in 2011, Frank Pobjecky, an unarmed off-duty police officer, was in a pizzeria waiting for his order. Pobjecky, who was the only customer, was in the break area with Vincenzo Tarara, the restaurant manager, when four young men entered the front door of the restaurant. One of the men, Lamar Coates, held a revolver. Coates and Brandon Sago entered the break room while Desmond Bellmon went around the counter toward the cash register. The fourth man, Michael Sago, acting as a lookout, stood in the entrance holding the front door open. All four men wore sweatshirts with hoods up.

Coates pointed his gun at Tarara and demanded money. Tarara told Coates to get out of his restaurant, slammed Coates against a cooler, and reached for Coates' gun. While Tarara and Coates struggled for control of Coates gun, Pobjecky, who knew that Tarara carried a concealed handgun on his hip under his shirt, grabbed Tarara's gun. Brandon and Bellmon then joined the struggle while Michael, who initially remained by the door for a few seconds, approached the break area. Pobjecky gained possession of Tarara's gun, and Tarara won the struggle for Coates' gun. With Tarara's gun, Pobjecky engaged each suspect as they moved around the restaurant. Pobjecky shot Coates, Brandon, and Bellmon wounding them. Pobjecky shot Michael three times in the lower back from behind as Michael crawled away from Pobjecky and toward the door. The entire encounter lasted about 36 seconds from the time the men entered the restaurant to the moment Pobjecky shot Michael the third time as he crawled out the front door.

After Coates, Brandon, and Bellmon fled, and Michael crawled out of the restaurant where he remained prostrate on the sidewalk, Pobjecky locked the front door and told Tarara to call 911. Tarara tried but had trouble getting through, so another employee called 911, approximately 7 minutes after Pobjecky shot Michael. Paramedics arrived 4 minutes later, or 11 minutes after Pobjecky shot Michael. Michael died shortly thereafter.

Afterward, among other facts, it was determined that: Coates was the only assailant to bring a gun into the pizzeria. Pobjecky fired the only shots in the pizzeria that night. Pobjecky shot all four assailants in the back parts of their bodies. Pobjecky never identified himself as a police officer or gave any verbal warnings or commands before shooting. Tarara had Coates' gun during much of the incident but never fired it.

James Horton, representing Michael's estate, sued Pobjecky and others on a variety of federal and state claims. Among his claims, Horton alleged that Pobjecky used excessive force against Michael in violation of 42 U.S.C. § 1983.

The district court held that Pobjecky was entitled to qualified immunity and Horton appealed.

The Seventh Circuit Court of Appeals agreed. The court stated that the relevant question was "whether Pobjecky reasonably believed Michael posed a threat of death or serious bodily injury based on the information Pobjecky had during the robbery." First, the incident lasted only about 45 seconds from the moment the first assailant entered the pizzeria to the moment Pobjecky locked the front door. Second, Pobjecky had limited time to react to four assailants attempting to commit an armed robbery. Third, Pobjecky had to react to Tarara and Coates struggling over Coates' gun.

Fourth, after Coates threatened Tarara with a gun, it was reasonable for Pobjecky to assume that the other three assailants, including Michael, were armed, as all of the men wore sweatshirts, which allowed easy concealment of a gun. The court held that as long as the assailants were moving inside the pizzeria, they posed a threat. The court further held that even when considering the facts in the light most favorable to Horton, no reasonable jury could find Pobjecky's belief that Michael was armed to be unreasonable. The court noted that it could not consider the fact that it turned out Michael was unarmed because Pobjecky did not know that, and had no reasonable way to know that, at the time. Finally, given the desperate circumstances Pobjecky faced, and the limited time he had, the court held that no reasonable juror could conclude that he should have stopped to identify himself as a police officer or warn the assailants before shooting them to defend himself and others.

Horton also claimed that Pobjecky failed to provide medical care to Michael in violation of 42 U.S.C. § 1983.

The court disagreed. The court found that after exhausting his ammunition and neutralizing the assailants at least temporarily, Pobjecky locked the front door. Pobjecky did not know whether the assailants were regrouping outside or gathering reinforcements. The court held that it was objectively reasonable for Pobjecky to direct Tarara to call 911. Pobjecky also called a dispatcher on his direct line. The court stated, "The law does not require, and Horton cannot expect, Pobjecky to do anything more. It was objectively reasonable for Pobjecky to stay inside the locked pizzeria awaiting help. It is objectively unreasonable to demand him to venture into the night with an empty gun, risking further onslaught, braving the hazards Michael and the other assailants created, to administer treatment to Michael."

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/17-1757/17-1757-2018-02-27.pdf?ts=1519770627>

Eighth Circuit

United States v. Thompson, 881 F.3d 629 (8th Cir. SD 2018)

The Sioux Falls Police Department received an anonymous tip that Thompson was selling controlled substances. While conducting surveillance of Thompson's residence, officers saw a garbage container in the driveway, located between the garage door and the pedestrian door entrance to the garage. The officers contacted Thompson's garbage collection service to conduct a controlled trash pull. On a regularly-scheduled day of collection, officers watched the garbage collector retrieve Thompson's garbage container from its location in Thompson's driveway by the garage door and dump its contents into an empty collection area of the truck. Officers then retrieved the trash from the truck and searched it, finding several drug-related items. The officers conducted a similar trash pull the following week, which revealed additional drug-related items and a receipt for a storage unit.

Based on these trash pulls, as well as information from an informant, officers obtained a search warrant for Thompson's residence where they found methamphetamine, drug paraphernalia, and cash. The officers also obtained a warrant to search Thompson's storage unit where they discovered methamphetamine and cash.

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

Thompson filed a motion to suppress all evidence obtained during the searches, claiming the warrants were based on unconstitutional trash pulls. Specifically, Thompson argued that because the trash was left in a container next to his garage, rather than on a street curb, the trash was within the curtilage of the home; therefore, he retained a reasonable expectation of privacy in it.

In [California v. Greenwood](#), the United States Supreme Court held, “A warrantless search of an individual’s trash violates the Fourth Amendment only where the individual has a ‘subjective expectation of privacy in [the] garbage that society accepts as objectively reasonable.’” The Court added, “It is well established that there is no reasonable expectation of privacy in trash left for collection in an area accessible to the public.”

Even if the trash was within the curtilage of Thompson’s home, the Eighth Circuit Court of Appeals stated, “the proper focus under [Greenwood](#) [remains] whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable.” Against this standard, the court found that Thompson’s trash was placed in a location from which the garbage collectors regularly collected it at the regularly-scheduled time of collection, suggesting that Thompson placed it there “for the express purpose of having strangers take it.” Based on these facts, the court held that Thompson had no objectively reasonable expectation of privacy in the trash.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/16-4091/16-4091-2018-02-02.pdf?ts=1517589042>

United States v. Waters, 2018 U.S. App. LEXIS 4972 (8th Cir. MO Feb. 28, 2018)

Police officers obtained information that Waters, a known drug dealer with outstanding warrants for his arrest, was living at a residence with his fiancé. The officers went to Water’s residence to arrest him. While conducting surveillance, officers detained Waters’ fiancé after she exited the residence and got into a vehicle twenty to thirty yards away. The fiancé told the officers that Waters was alone inside the residence. The fiancé called Waters on the phone and asked him to come outside and surrender to the police. During this time, officers saw window blinds move on the second floor of the residence. Approximately thirty seconds later, officers saw window blinds move on the first floor of the residence.

The officers knocked, announced their presence, and instructed Waters to come outside. After the officers did not receive a response, they forcibly breached the back door, which opened into a utility room. Officers moved through the utility room and into the kitchen where they heard Waters announce that he was “coming down,” presumably from the second floor. The stairway was not visible from the kitchen. The officers encountered Waters in the living room, which was adjacent to the kitchen. The officers arrested Waters in the kitchen where he was handcuffed and searched for weapons.

After Waters was removed from the residence, the officers conducted a protective sweep of the first floor. In the living room, officers saw marijuana and drug paraphernalia in plain view as well as a large couch situated against a wall. The couch was flanked by two end tables approximately one foot away and the bottom of the couch was approximately two inches off the

floor. One of the officers bumped the couch with his hip to determine its weight. The force slid the couch on the tile floor. The officer then pushed one side of the couch away from the wall to see if anyone was hiding behind or inside it. The officer saw part of a firearm on the floor underneath the couch approximately one tile square away from the wall.

The government charged Waters with being a felon in possession of a firearm.

Waters filed a motion to suppress the evidence seized from his residence, arguing that the protective sweep violated the Fourth Amendment because the officers immediately arrested him and removed him from the premises before they conducted the sweep.

The court disagreed, stating that it has found protective sweeps to be lawful in situations where officers apprehended a suspect and removed him from the immediate area of the arrest before the sweep occurred.

Waters also argued that the officers did not have reasonable suspicion to believe the residence contained another person who posed a threat to their safety.

Again, the court disagreed. Here, the officers saw window blinds move in both an upstairs and downstairs window within a short period. Because Waters was descending the stairs when the officers entered the residence, it was reasonable for them to conclude that Waters was not the person who moved the downstairs blind. In addition, the officers announced their presence multiple times before they breached the door, which provided anyone inside the residence ample time to hide before the officers entered. The court further added that it has recognized the association between drug offenses and violence in protective sweeps of residences of known drug traffickers. In this case, the officers knew that Waters was a drug dealer and they saw marijuana and drug paraphernalia in plain view in the living room. Based on these facts, the court concluded it was reasonable for the officers to believe that there might be another person in the residence.

The court stated that because it affirmed the district court's denial of Waters' motion to suppress on the grounds above, it did not address the government's argument that the officers did not need to establish reasonable suspicion that the residence contained a person who posed a threat to their safety before they could lawfully conduct a protective sweep. The government had argued that incident to Waters' arrest, the officers could look in closets or other spaces "immediately adjoining the place of arrest from which an attack could be immediately launched" without probable cause or reasonable suspicion.

Finally, Waters argued that it was unreasonable for the officer to reasonably believe that the couch contained an individual; therefore, the officer violated the Fourth Amendment by moving it.

The officer testified that he had been involved in hundreds of arrests and received formal training on protective sweeps. The officer stated he had learned to check any place that a person could hide, including closets, behind doors, and inside and behind furniture. The officer further stated that when he bumped the couch with his hip it moved easily on the tile floor, suggesting that someone could have moved the couch to hide. Another officer testified that he had been involved in hundreds of arrests and was familiar with protective sweeps. The officer added that police had found individuals in refrigerators, stairwells, under beds, between mattresses, and in one instance, inside a couch where a folded mattress should be. The court agreed with the district court which specifically found that the couch was large enough that an individual could hide behind or inside it; therefore, it was reasonable for the officer to move it. The court added that the Ninth Circuit

has also recognized the reasonableness of an officer's belief that a couch could conceal an individual.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-1423/17-1423-2018-02-28.pdf?ts=1519835440>

United States v. Collins, 2018 U.S. App. LEXIS 4975 (8th Cir. MO Feb. 28, 2018)

At 3:30 a.m., police officers were conducting surveillance of a residence where an undercover officer had previously purchased drugs. The officers had been told that the person who lived at the residence drove a white motorcycle and sold drugs out of his garage during the late evening and early morning hours. On previous surveillance operations, and on this one, the officers had observed heavy vehicle, bicycle, and foot traffic in and out of the garage. This traffic primarily consisted of brief visits occurring in the late evening and early morning hours.

At approximately 4:30 a.m., the officers saw a car pull into the driveway. The white motorcycle was also parked in the driveway. An unknown white male, later identified as Collins, exited the car and went into the garage. Approximately ten to fifteen minutes later, Collins came out of the garage, got into the car, and drove away. The officers followed Collins for a short distance then conducted a traffic stop. After the officers ordered Collins and his passenger out of the car, they saw a magazine with live ammunition in plain view on the driver's seat. The officers searched the car and found a loaded firearm in the glovebox.

The government charged Collins with being a felon in possession of a firearm.

Collins filed a motion to suppress the evidence seized from his car. Collins argued that the officers did not have reasonable suspicion that he was involved in criminal activity; therefore, the officers were not justified in stopping him.

The court disagreed. First, the officers saw Collins enter a garage, where they knew drug had been sold, and emerge from the garage a short time later. Second, the incident occurred at approximately 4:30 a.m., and the white motorcycle was in the driveway, indicating that the person who sold the drugs was home. Third, the officers had observed a high volume of traffic at the garage, primarily during the late evening and early morning hours in the month prior to the stop. Based on these facts, the court concluded that the officers had reasonable suspicion to believe that Collins was engaged in criminal activity which justified stopping him.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-2246/17-2246-2018-02-28.pdf?ts=1519835442>

Ninth Circuit

Bonivert v. City of Clarkston, 2018 U.S. App. LEXIS 4625 (9th Cir. WA Feb. 26, 2018)

Sergeant Combs and Officer Purcell of the City of Clarkston Police Department were dispatched to a domestic dispute at Ryan Bonivert's house. When the officers arrived, they encountered five people standing in front of the house. Officer Purcell interviewed Bonivert's girlfriend, Jessie Ausman, and two other women. The women told Officer Purcell that Bonivert and Ausman had

gotten into an argument about their relationship. When Ausman told Bonivert that she was leaving with the couple's two-year old daughter, Bonivert became angry. The woman stated that Bonivert grabbed Ausman and threw her to the ground. In the meantime, Sergeant Combs interviewed the two men who were present. They told Sergeant Combs that Bonivert and Ausman had argued, but denied that Bonivert had grabbed or thrown Ausman to the ground. Bonivert remained inside the house while the officers interviewed the witnesses outside.

After discussing the discrepancies in the witnesses' statements, the officers decided to speak to Bonivert. The officers knocked on the front and back doors of the house which were locked, but received no response. When Sergeant Combs approached a side door, Bonivert engaged the deadbolt lock from the inside and refused to answer when Sergeant Combs called out to him.

The officers went back to the front of the house and spoke to Ausman again. In response to their questions, Ausman told the officers there were no weapons inside the house and that she did not believe Bonivert was a danger to himself. At this point, Sergeant Combs decided that he needed to assess Bonivert's condition, claiming he was concerned by the fact that Bonivert was not talking to the officers. Ausman, who had been living in Bonivert's home for two years, gave Sergeant Combs permission to enter the house. Sergeant Combs and Officer Purcell then requested assistance from the county sheriff's office. The officers also radioed a "Code 4" message to the County, which meant that there was no immediate danger at their location and that "no one was being injured."

When two deputies arrived, the four officers collectively developed a plan to enter Bonivert's house. Before the officers entered, they directed a flashlight through the windows and saw Bonivert retreat toward the back of the house. Sergeant Combs then went to the back door, broke a window pane, reached through the opening, and unlocked the door. Before the officers could enter, Bonivert opened the door and began shouting that the officers were going to pay for the damage to the window. At this point, the parties disputed whether Bonivert advanced toward the officers or remained at the door; however, Sergeant Combs and one of the deputies deployed their tasers in dart-mode at Bonivert. In response, Bonivert brushed off the darts, cursed at the officers, and attempted to close the door. Before Bonivert could completely close the door, Sergeant Combs shoved the door open with enough force to throw Bonivert to the other side of the room, and the officers entered the house. Once inside Bonivert's house, one of the deputies tackled Bonivert to the ground while Sergeant Combs deployed his taser against him three times in drive-stun mode. After Bonivert was handcuffed, Sergeant Combs deployed his taser one more time in drive-stun mode. The officers arrested Bonivert for assaulting an officer, resisting arrest, and domestic violence assault in the fourth degree.

Bonivert sued the City and the four officers under 42 U.S.C. § 1983 claiming the officers violated the Fourth Amendment by entering his house without a warrant and by using excessive force against him. The officers filed a motion for summary judgment based on qualified immunity which was granted by the district court. Bonivert appealed. The officers maintained that their warrantless entry into Bonivert's house was justified by three exceptions to the Fourth Amendment's warrant requirement: consent, emergency aid, and exigent circumstances.

The consent exception usually allows warrantless entry into a home when officers have obtained consent to enter from a third party who had common authority over the premises. However, in [Georgia v. Randolph](#), the Supreme Court held that an occupant's consent to a warrantless search of a residence is unreasonable as to a co-occupant who is physically present and objects to the search. Although [Randolph](#) involved the warrantless search for evidence, the court found no

distinction, for Fourth Amendment purposes, between a warrantless “entry” and a warrantless “search,” as both intrusions involve entry into an individual’s home. Applying Randolph, the court held that the consent exception did not justify the officers’ entry into Bonivert’s home. Even though the officers obtained Ausman’s consent, Bonivert was physically present inside and expressly refused to allow the officers to enter the house. Specifically, Bonivert locked the side door and then he attempted to close the back door on Officer Combs after he tased Bonivert in dart-mode.

The emergency aid exception allows law enforcement officers to “enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” An entry under the emergency aid exception is reasonable under the Fourth Amendment when the officers have an objectively reasonable basis to believe that an injury has actually occurred or is imminent.

In this case, the court held that there were no circumstances pointing to an actual or imminent injury to anyone inside Bonivert’s home. By the time the officers arrived, Ausman and the child were safely outside, surrounded by four other adults. While the officers were speaking to the witnesses and then afterward when they walked around Bonivert’s house, there was no noise coming from inside the house. In addition, Ausman told the officers there were no weapons in the house and that Bonivert did not pose a threat to himself. Ausman’s statements were confirmed when one of the officers looked into the house through a window and saw Bonivert inside with no visible injuries or weapons. Finally, the officers stated that they sent a “Code 4” message to the deputies before they arrived which indicated there was no immediate danger or threat of danger at Bonivert’s residence. While recognizing the volatile nature of domestic disputes, the court added that it has refused to find that “domestic abuse cases create a per se” emergency justifying warrantless entry.

The exigency exception allows law enforcement officers to enter a home without a warrant when the officers have probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent the destruction of relevant evidence, or the escape of the suspect. The court found that neither of these circumstances was present in this case and that the attorney for the City acknowledged this fact.

Consequently, the court held that neither consent, the emergency aid exception, nor the exigency exception justified the officers’ warrantless entry into Bonivert’s home; therefore, the city officers were not entitled to qualified immunity. The court further held that the two deputies who served as back-up to the city officers were “integral participants” in the unlawful entry and not merely bystanders; therefore, they were not entitled to qualified immunity.

Concerning Bonivert’s excessive force claim, Bonivert and the officers gave conflicting accounts regarding the incident. However, when the court considered the evidence when taken in the light most favorable to Bonivert as it was required to do at the qualified immunity stage, the court held the evidence established that: Bonivert remained inside the home at all times; that Bonivert did not threaten or advance toward the officers; that Bonivert posed no immediate threat to the officers; that Officer Combs threw Bonivert across the room; that Bonivert did not resist arrest; that Officer Combs deployed his taser in drive-stun mode even though Bonivert complied with his commands. Accordingly, the court concluded that if a jury believed Bonivert’s version of the incident, it could reasonably find that Officer Combs used excessive force against Bonivert.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/15-35292/15-35292-2018-02-26.pdf?ts=1519668080>

Tenth Circuit

United States v. Stevens, 881 F.3d 1249 (10th Cir. OK Feb. 6, 2018)

In 2016, Tulsa Police Department (TPD) Officer Betty Shelby shot and killed Terence Crutcher, an African American. The shooting made national headlines and reignited a heated debate over law enforcement's use of force against minorities.

Three days after the shooting, Stevens, a resident of Connecticut, sent the first of multiple anonymous messages to the TPD via an online forum the public could use to complain about the TPD. Stevens sent messages describing specific acts of violence directed toward Officer Shelby as well as toward TPD officers in general.

The government charged Stevens with 10 counts of interstate communication with intent to injure, in violation of 18 U.S.C. § 875 (c).

In addition to the elements specified in § 875 (c), in Elonis v. United States, the Supreme Court added a "threat element" which requires the government prove the defendant, "transmitted the communication for the purpose of issuing a threat or with the knowledge the communication would be viewed as a threat." The Court defined a threat as "a serious expression of an intent to commit an act of violence to a particular individual or group of individuals." Finally, the threat element in § 875 (c) prosecutions requires proof that a reasonable person would understand the communication to be a threat.

Stevens argued that the district court should have dismissed the charges against him, claiming the First Amendment protected his statements because they were not "true threats."

The court disagreed. The court held that the language and context of Stevens' messages were "targeted at specific people, groups of people, and their family members," and because they "repeatedly assert[ed] that the targets of the messages are going to die unless they comply with [his] wishes," a jury could conclude that a reasonable person could interpret Stevens' statements to be true threats.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/17-5044/17-5044-2018-02-06.pdf?ts=1517936452>
