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The Federal Law Enforcement -Informer-

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

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1. Law Enforcement Legal Refresher Training

2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

This two-hour block of instruction focuses on *Fourth* and *Fifth Amendment* law and is designed to meet the training requirements for state and federal law enforcement officers who have mandated two-hour legal refresher training requirements.

Dates and Times: Monday August 24, 2015: 11:00 a.m. EDT and
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REASONABLENESS AND POST-RILEY SMARTPHONE SEARCHES

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Reasonableness as Touchstone

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"[1] and in so doing, "put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] forever secure[d] the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law."[2] With the remainder of the Fourth Amendment prohibiting the issuance of warrants without "probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,"[3] officers may view the law governing search and seizure as largely evidentiary or procedural but the "underlying command of the Fourth Amendment is always that searches and seizures be reasonable."[4]

The Supreme Court has clearly defined searches and seizures. A search "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed [while] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."[5] The Supreme Court has held that the "touchstone" of the Fourth Amendment is reasonableness[6] but there is "no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable."[7]

Determining Reasonableness

Determining whether a search is reasonable under the Fourth Amendment usually involves looking to "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the [Fourth Amendment's] framing"[8] or "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[9]

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[1] U.S. CONST. AMEND. IV.
[2] *Mapp v. Ohio*, 367 U.S. 643, 647, 81 S. Ct. 1684, 1687, 6 L. Ed. 2d 1081 (1961) citing *Weeks v. United States*, 232 U.S. 383, 391, 34 S. Ct. 341, 344, 58 L. Ed. 652 (1914).
[3] U.S. CONST. AMEND. IV.
[4] *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 740, 83 L.Ed.2d 720 (1985).
[5] *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984).
[6] See *United States v. Knights*, 534 U.S. 112, 112-13, 122 S. Ct. 587, 588, 151 L. Ed. 2d 497 (2001).
[7] *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S. Ct. 1492, 1496, 94 L. Ed. 2d 714 (1987).
[8] *California v. Hodari D.*, 499 U.S. 621, 624, 111 S.Ct. 1547, 1549-50, 113 L.Ed.2d 690 (1991); See e.g. *United States v. Watson*, 423 U.S. 411, 418-420, 96 S.Ct. 820, 825-26, 46 L.Ed.2d 598 (1976); *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 283-84, 69 L.Ed. 543 (1925).
[9] *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300, 143 L. Ed. 2d 408 (1999).

As neither a warrant nor probable cause is an "indispensable component of reasonableness,"[10] the Supreme Court has determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing[...]reasonableness generally requires the obtaining of a judicial warrant."[11] In the absence of a warrant, "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime,"[12] a search is reasonable only if it falls within a specific exception to the warrant requirement,[13] even if the warrantless search violates a person's reasonable expectation of privacy.[14]

The Supreme Court recognizes "few specifically established and well-delineated exceptions"[15] to the warrant requirement. Those exceptions include the plain view doctrine,[16] which allows an officer to seize evidence and contraband found in plain view during a lawful observation without a warrant;[17] the Terry stop and Terry frisk, which grants authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual;[18] certain limited searches incident to lawful arrest;[19] and searches involving exigent circumstances.[20]

A party alleging an unconstitutional search must establish "both a subjective and an objective expectation of privacy."[21] The Supreme Court has held "the subjective component requires that a person exhibit an actual expectation of privacy, while the objective component requires that the privacy expectation be one that society is prepared to recognize as reasonable."[22]

A smartphone user's expectation of privacy is viewed objectively and "must be justifiable under the circumstances".[23] With the advent of social media and smartphones, people "can post a photo or video from their phones, allowing them to share their lives instantly."[24] Until 2014, one could make a colorable argument that it is unreasonable to have an expectation of privacy when one records and instantly shares life events on a smartphone; if there is no violation of a person's "reasonable expectation of privacy" by police or government agents, then there is no Fourth Amendment search.[25] Despite the prevalence of

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[10] *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S. Ct. 1384, 1390, 103 L. Ed. 2d 685 (1989)
[11] *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).
[12] *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948).
[13] See *Kentucky v. King*, 563 U.S. ——, ——, 131 S.Ct. 1849, 1856–1857, 179 L.Ed.2d 865 (2011).
[14] See *Illinois v. Rodriguez*, 497 U.S. 177, 185, 110 S. Ct. 2793, 2799, 111 L. Ed. 2d 148 (1990).
[15] *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967).
[16] Smartphones usually have an automatic lock or passcode which prevents casual observation by law enforcement officers, making this exception of limited use in the field.
[17] See *Horton v. California*, 496 U.S. 128, 128, 110 S. Ct. 2301, 2303, 110 L. Ed. 2d 112 (1990).
[18] See *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968).
[19] See *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); see also *Chimel v. California*, 395 U.S. 752, 755, 89 S. Ct. 2034, 2036, 23 L. Ed. 2d 685 (1969).
[20] See *Payton v. New York*, 445 U.S. 573, 619, 100 S. Ct. 1371, 1397, 63 L. Ed. 2d 639 (1980).
[21] *United States v. Robinson*, 62 F.3d 1325, 1328 (11th Cir.1995) citing *United States v. Segura-Baltazar*, 448 F.3d 1281, 1286 (11th Cir. 2006).
[22] Id.
[23] *Smith v. Maryland*, 442 U.S. 735, 740–41, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).
[24] Marc Ransford, *Study: College students not embracing tablets as originally predicted*, http://cms.bsu.edu/news/articles/2014/4/students-can-live-without-tablets-but-not-smartphones (last accessed June 26, 2015.)
[25] See *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 3324, 77 L. Ed. 2d 1003 (1983).

sharing, users also routinely use passwords, thumbprint scans, or other mechanisms to prevent unwanted viewing of the device's contents. Using these features demonstrates an intention to keep a device's contents private; the remaining question is whether the privacy expectation created by using a password is one that society is prepared to recognize as reasonable.

In early 2014, the Pew Research Center conducted a study that "found more than 90 percent of Americans now own or regularly use a cellphone, and 58 percent have a more sophisticated smartphone."[26] Even though society may share some data to others, society accepts that privacy expectations are reasonable on data stored on a smartphone itself and protected by passwords. In a digital age "all of our papers and effects [are no longer] stored solely in satchels, briefcases, cabinets, and folders [but] rather…stored digitally on hard drives, flash drives, memory cards, and discs."[27] Even the Supreme Court—an institution that does not enjoy a tech-savvy reputation—has agreed that papers and effects have given way to smartphones and selfies.[28]

Riley v. California

The Supreme Court extended reasonable expectations of privacy to smartphone data in Riley v. California, 134 S. Ct. 2473, 2485, 189 L. Ed. 2d 430 (2014). Riley involved two separate arrests and searches of smartphones by police officers, demonstrates the inverse relationship between smartphone technology and reasonableness of smartphone searches. Officers attempted to search a phone as part of a Terry frisk.

As to the Terry frisk exception, the Court held that "digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape," thus significantly limiting the use of this exception for reasonable searches of smartphones.[29] The Court also noted that smartphones "place vast quantities of personal information literally in the hands of individuals [and a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered" in *previous cases involving searches incident to lawful arrest.*[30]

*As to one of the remaining exceptions, e*xigent circumstances encompass a broad array of factors considered by the courts:

> "the gravity or violent nature of the offense with which the suspect is to be charged; a reasonable belief that the suspect is armed; probable cause to believe the suspect committed the crime; strong reason to believe the suspect is in the premises being entered; the likelihood that a delay could cause the escape of the suspect or the destruction of essential Fourth Amendment evidence; and the safety of the officers or the public jeopardized by delay."[31]

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[26] Bill Mears, *Supreme Court: Police need warrant to search cell phones,* http://www.cnn.com/2014/06/25/justice/supreme-court-cell-phones/ (last accessed June 26, 2015.)
[27] Bryan Andrew Stillwagon, *Bringing an End to Warrantless Cell Phone Searches*, 42 Ga. L. Rev. 1165, 1194 (2008).
[28] See Farhad Manjoo *The Tech-Savvy Supreme Court,* http://bits.blogs.nytimes.com/2014/06/26/the-tech-savvy-supreme-court/?_php=true&_type=blogs&_r=0 (last accessed June 26, 2015).
[29] *Riley*, at 2485.
[30] *Id.*
[31] See LEGAL DIVISION HANDBOOK 367 (Fed. Law Enforcement Training Ctr. Ed. 2015).

The destruction of evidence factor was often cited in court cases through the mid-1990s through the late 2000s:

> "On a cell phone, the telephone numbers stored in the memory can be erased as a result of incoming phone calls and the deletion of text messages could be as soon as midnight the next day...[O]nce the cell phone powers down evidence can be lost. [A popular cell phone, the Motorola Razer] has an option called message clean up that wipes away text messages between 1 and 99 days. There is no way to determine by looking at the Razer cell phone's screen, if the message clean-up option has been activated. If the one-day message clean up is chosen, any messages stored on the Razer cell phone will be deleted at midnight on the following day it is received. Accordingly, this Court finds that exigent circumstances existed and the text messages retrieved from the Razer cell phones are admissible."[32]

As smartphone technology has developed, however, the Supreme Court views exigent circumstances with increasing skepticism. In 2014, the technology used in the most basic of phones was unheard of ten years ago[33] and "the current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos."[34] Advances in technology also mean that officers can prevent destruction of data by "disconnecting a phone from the network…First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an [Faraday] enclosure that isolates the phone from radio waves."[35] With these precautions in place, "there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone."[36]

Seek Warrant, Avoid Suppression of Evidence

With the Supreme Court's holding in Riley, trial courts will likely suppress smartphone evidence without a search warrant or factual information that an exception to the warrant requirement existed at the time of the search. Fortunately, officers can find model search warrant templates at the nearest Regional Computer Forensics Laboratories (RCFL) site and seek assistance from the Federal Bureau of Investigation (FBI). While other avenues exist for cell phone investigations, the RCFL and FBI are especially good resources because almost every FBI Field Office or Resident Agency has a Cell Phone Investigative Kiosk (CPIK) available for use.

According to the FBI, the CPIK "allow users to extract data from a cell phone, put it into a report, and burn the report to a CD or DVD in as little as 30 minutes."[37] Full-size kiosks are physically located in nearly all FBI Field Offices and RCFLs; portable kiosks are available at many FBI Resident Agencies. Drafting a search warrant and using the CPIK may help ensure that valuable information obtained from a smartphone may be admissible and help win convictions in a criminal case post-Riley.

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[32] See *United States v. Young*, No. CRIM.A. 505CR6301, 2006 WL 1302667, at *13 (N.D.W. Va. May 9, 2006).
[33] See *Riley* at 2484.
[34] *Id.*, at 2489.
[35] *Id.*, at 2487.
[36] *Id.*, at 2486.
[37] See Regional Computer Forensics Laboratory, Cell Phone Kiosk Brochure, https://www.rcfl.gov/downloads/documents/cpik-brochure (last accessed June 26, 2015).

CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Gamache, 2015 U.S. App. LEXIS 11586 (1st Cir. Me. July 6, 2015)

A temporary order of protection was issued against Gamache after his former wife alleged he abused her. Among other things, the order required Gamache to surrender any firearms in his possession. When the officers arrived at Gamache's apartment, Gamache answered the door and motioned for the officers to enter. Once inside, one of the officers asked Gamache if he had any firearms in the apartment. Gamache pointed to the living room wall, where two shotguns were clearly visible and prominently displayed. The officers seized the shotguns, one of which had a barrel length of less than 18 inches. The government indicted Gamache for possession of an unregistered sawed-off shotgun.

The court held the officers made a lawful plain view seizure of the sawed-off shotgun from Gamache's apartment. First, the officers were lawfully present, as Gamache voluntarily consented to the officers' entry into his apartment. Second, the sawed-off shotgun was clearly visible from the officers' lawful vantage point. Although the officers did not immediately realize the length of the shotgun's barrel was less than 18 inches, the officers had probable cause to seize it based upon the court order, which prohibited Gamache from possessing any firearms. Finally, once the officers were lawfully inside the apartment, the court order gave the officers lawful access to the clearly visible firearms.

Click **HERE** for the court's opinion.

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Second Circuit

United States v. Singletary, 2015 U.S. App. LEXIS 12083 (2d Cir. N.Y. July 14, 2015)

Officers saw Singletary walking on the sidewalk holding an object wrapped in a brown paper bag. Although she could not tell what the object was, one of the officers saw it was the size of a beer can. Based on her experience, the officer knew that individuals often concealed open containers of alcohol in brown paper bags because such possession in public was illegal. In addition, the officer saw Singletary was holding the object as if to avoid spilling its contents. When the officers approached Singletary to investigate, he tried to walk away. After one of the officers put his hand on Singletary's shoulder, Singletary pulled away, threw the brown paper bag down, and ran away. Some of the can's contents spilled on one of the officers, who could smell that it was beer. After a brief chase, the officers arrested Singletary and seized a handgun and marijuana from him incident to arrest. The government charged Singletary with drug and weapons charges.

Singletary argued the handgun and drugs seized from him should have been suppressed because the officers did not have reasonable suspicion to stop him.

The court disagreed. First, the officer saw Singletary carrying an object that appeared to be the size of a beer can. Second, the officer saw Singletary was carrying the suspected beer can inside a brown paper bag. The officer knew from her experience that persons carrying open containers of alcohol in public frequently conceal the containers in brown paper bags. Finally, the officer saw that Singletary was carrying the brown paper bag in a steady manner, so as to avoid spilling its contents. Based on these facts, the court held the officers had reasonable suspicion to conduct a *Terry* stop to determine if Singletary was violating the open-container law. Consequently, the court concluded Singletary's arrest and the evidence seized incident to arrest was lawful.

Click **HERE** for the court's opinion.

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Third Circuit

United States v. Lowe, 2015 U.S. App. LEXIS 11440 (3d Cir. Pa. July 2, 2015)

At approximately 4:00 a.m., officers received an anonymous tip reporting a black male, wearing a gray hoodie with a gun in his waistband was talking to a female in front of a house. The officers knew the house was located in a violent, high-crime area, known for drug activity. In addition, earlier that night, the officers knew that a shot had been fired at a house around the corner from the house to which they were responding. Four officers in three marked police cars responded, and as they approached, they saw a man who fit the description from the anonymous tip talking to a woman. The officers saw the man's hands were in the hoodie's pockets, not visible to the officers. However, the officers did not see a gun or anything indicating Lowe had a gun, nor did the officers see or hear any argument or disturbance when they pulled up to the house. The officers, one of whom had his firearm drawn, approached the pair and ordered them to show their hands. After Lowe did not remove his hands from his pockets, the officers frisked Lowe and seized a handgun from his waistband.

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

Lowe argued the handgun should have been suppressed because the officers did not have reasonable suspicion to conduct a *Terry* stop when they seized him.

The court agreed. First, the court had to determine when the officers seized Lowe. A *Fourth Amendment* seizure occurs when an officer applies physical force to stop a suspect, or when a suspect submits to an officer's show of authority. The court noted that a person who remains stationary can still submit to an officer's show of authority. In such a case, a court must determine whether a reasonable person would have felt free "to decline the interaction" with the law enforcement officer. In this case, three marked police cars nearly simultaneously arrived in front of the house where Lowe was standing. Four uniformed officers, one with his firearm drawn then immediately exited their patrol cars, approached Lowe and the woman, ordering them to show their hands. The court determined it was at this point Lowe was seized for *Fourth Amendment* purposes. Although Lowe remained stationary, the court held a reasonable person in his position would not have felt free to disregard the officers and walk away.

Second, after the court determined when the officers seized Lowe, it had to determine if that seizure was supported by reasonable suspicion. Here, the facts known to the officers when they seized Lowe included an anonymous tip that a man matching Lowe's description was in possession of a gun, and the house to which they were responding was located in a high crime area where a shooting had occurred an hour earlier.

The court concluded these facts did not support reasonable suspicion to believe Lowe was involved in criminal activity. While the court realized it is in the interest of public safety to determine whether individuals are armed, in this case, the anonymous tip by itself did not support the *Terry* stop of Lowe. The court noted the officers could have conducted surveillance to observe Lowe's behavior or approached him and asked him questions to corroborate information provided in the anonymous tip. As a result, the court held the evidence seized from Lowe was properly suppressed.

Click **HERE** for the court's opinion.

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Sixth Circuit

United States v. Lee, 2015 U.S. App. LEXIS 12151 (6th Cir. Ohio July 15, 2015)

Lee was on parole, living in an apartment he shared with his girlfriend. One of the conditions of Lee's parole prohibited him from possessing any firearms. After receiving a tip that Lee had weapons in the apartment, his parole officer went to the apartment to investigate. Lee's girlfriend let the officer into the apartment where he found Lee asleep in the bedroom. The officer woke Lee up and walked him back to the living room where he handcuffed and frisked Lee. After obtaining Lee's consent to search, the officer found a firearm and arrested Lee. The government indicted Lee for being a felon in possession of a firearm.

Lee argued the officer's failure to tell his girlfriend the reason for his visit to the apartment was a misrepresentation that rendered the girlfriend's consent to enter the apartment involuntary.

The court disagreed. The parole officer did not misrepresent any facts to Lee's girlfriend concerning his visit to the apartment. In addition, Lee's girlfriend, as a co-resident, was authorized to consent to the officer's entry into the apartment.

Lee further argued his consent to search the apartment was involuntary because he consented while he was handcuffed.

Again, the court disagreed. The court noted a suspect's consent to search is not automatically considered "involuntary" because the suspect is handcuffed when he gives consent. Here, there was no evidence the officer coerced Lee to obtain his consent, and the duration of Lee's detention and questioning was reasonable.

Click **HERE** for the court's opinion.

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Gradisher v. City of Akron, 2015 U.S. App. LEXIS 12814 (6th Cir. Ohio July 24, 2015)

Gradisher, a white male, called 911 from his house and reported that a black male at a bar where he had been drinking had a handgun. Gradisher refused to give the 911 operator his name and hung up abruptly. When the 911 operator called back, Gradisher, who was obviously intoxicated, was verbally abusive to the operator. As a result, officers were dispatched to the bar to investigate the man with the gun as well as to the house traced to Gradisher by the 911 call.

At the bar, officers were told a white male and a black male had an argument and the white male claimed to have a gun in his van. As a result, the officers responding to Gradisher's house believed he might be armed with a handgun. Once at Gradisher's house, officers knocked on the front door and announced themselves. After the officers heard someone inside lock the deadbolt, they went to the back door. The officers saw a man exit the back door, but when they identified themselves, the man retreated into the house and slammed the door. The officers entered the house and eventually located Gradisher in the basement. Officer Craft deployed his taser against Gradisher after Craft claimed Gradisher refused to comply with his commands to show his hands. Gradisher claimed Officer Craft deployed his taser against him after he raised his hands in compliance with Craft's commands.

Gradisher sued the officers for violating his *Fourth Amendment* rights for entering his house without a warrant as well as Officer Craft for using excessive force for tasing him.

Without deciding whether the officers unlawfully entered Gradisher's house, the court held the officers did not violate any of Gradisher's clearly established rights by entering his house without a warrant. First, the officers knew someone inside the house had placed several drunken and abusive calls to the 911 operator concerning a person at a bar who was in possession of a gun. Second, their investigation uncovered conflicting information as to who might have possessed a gun at the bar. Finally, Gradisher's erratic conduct at his house gave the officers reason to believe someone inside the house could be in danger. Because the court could not find any law that would have put the officers on notice their decision to enter Gradisher's house was unlawful, the court held they were entitled to qualified immunity.

However, the court held Officer Craft was not entitled to qualified immunity for deploying his taser against Gradisher. Gradisher and Officer Craft disputed whether Gradisher was resisting or refusing to be handcuffed when Craft tased him. Consequently, when there is a dispute concerning the facts in a case, the court stated the jury, not the judge must determine which party to believe.

Click **HERE** for the court's opinion.

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United States v. Bah, 2015 U.S. App. LEXIS 12817 (6th Cir. Tenn. July 24, 2015)

A police officer stopped a car for speeding. The officer discovered Bah driving and Harvey in the front passenger seat. Bah gave the officer his license and documentation on the car, which was a rental vehicle. While performing records checks, the officer saw Harvey "fumbling around" the passenger's side compartment as if he was trying to either conceal something or retrieve something. After the officer discovered Bah's license was suspended, he arrested Bah. Because Bah was the only driver listed on the rental agreement, the officer decided to

tow the vehicle. The officer directed Harvey to exit the vehicle and frisked him for weapons. The officer then conducted an inventory search of the vehicle and found a damaged Blackberry cell phone, three other cell phones, and sixty-eight prepaid gift, credit and debit cards in the trunk in a plastic bag. In addition, the officer found four similar cards in the glove box, which was the same area where the officer saw Harvey "fumbling around." After finding the cards, the officer detained Harvey to investigate further and transported him to the police station in the back seat of his patrol car. At the station, the officer found more cards in both Bah's and Harvey's wallets as well as several cards in the back seat of the patrol car in which Harvey had been transported.

At the police station, an investigator searched the Blackberry cell phone without a warrant and found photographs that depicted a large amount of cash, marijuana, and a magnetic card reader or skimmer. In addition, without obtaining a warrant, the officer used a skimmer to read the information encoded on the magnetic strips of all of the seized cards. As a result, the officer discovered the magnetic strips on the vast majority of the cards had been re-encoded so the financial information they contained did not match the information printed on the front and backs of the cards. The officer also discovered the re-encoded account numbers had been either stolen or compromised, and a number of the associated accounts had already incurred fraudulent charges. The officer then arrested Harvey.

Based on this information, an investigator obtained a warrant to search the three cell phones that had not been searched and discovered evidence on them. However, in drafting the affidavit to support the warrant, the officer did not refer to any of the evidence discovered in the warrantless search of the Blackberry cell phone.

The government indicted Bah and Harvey for producing, using and trafficking in counterfeit access devices.

First, Harvey claimed the evidence seized from the vehicle should have been suppressed, arguing the officer did not conduct a valid inventory search.

The court noted that passengers with no possessory interest in a rental vehicle do not have standing to object to searches of the vehicle. As a result, because Bah was the only authorized driver of the rental car, the court held Harvey did not have standing to object to the inventory search.

Second, Harvey argued his detention, after Bah's arrest, was unreasonable. Although Harvey did not have standing to object to the inventory search of the vehicle, he did have standing to object to his seizure after Bah's arrest. As a result, Harvey argued the cards found in his wallet and in the back seat of the patrol car should have been suppressed.

The court disagreed. First, after arresting Bah, the officer lawfully ordered Harvey out of the car so he could conduct the inventory search. Second, the officer lawfully frisked Harvey after he exited the car because his "fumbling around" at the beginning of the stop provided the officer reasonable suspicion Harvey could be armed or trying to hide a weapon in the vehicle. Finally, once the officer discovered the cards in the glove box and trunk, he had probable cause to arrest Harvey on suspicion of identity theft.

Third, Bah and Harvey argued the warrantless examination of the magnetic strips on the cards constituted an unlawful *Fourth Amendment* search.

The court disagreed, holding the warrantless scans of the magnetic strips on the credit, debit, and gift cards did not constitute a search under the *Fourth Amendment*. First, when law enforcement officers lawfully possess credit, debit or gift cards, scanning the cards to read the virtual data contained on the magnetic strips does not involve a physical intrusion or trespass of a constitutionally space, as outlined in *U.S. v. Jones*.

Second, the court held neither Bah nor Harvey had a reasonable expectation of privacy in the magnetic strips, as the information on the strips, for the most part, is the same as the information provided on the front and back of a physical credit, debit or gift card. In addition, the magnetic strips are routinely read by third parties at gas stations, restaurants and grocery stores to facilitate financial transactions. While Bah and Harvey might subjectively expect privacy in the information contained in the magnetic strips, the court found that such an expectation of privacy is not one that society is prepared to consider reasonable.

Finally, Bah and Harvey argued the evidence discovered on the three cell phones should have been suppressed because the search warrant was tainted by the warrantless search of the Blackberry cell phone.

Again, the court disagreed. Although the government agreed the warrantless search of the Blackberry cell phone was unconstitutional, the investigator did not include any evidence discovered on the Blackberry when he drafted the affidavit in support of the warrant to search the other three cell phones. Consequently, the unlawful search of the Blackberry did not taint the subsequent search of the other cell phones.

Click **HERE** for the court's opinion.

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Seventh Circuit

United States v. Harris, 2015 U.S. App. LEXIS 11315 (7th Cir. Ind. July 1, 2015)

Watkins went inside a bank to obtain a cash advance while Harris waited outside in his truck. The credit card Watkins used had been issued on the account of another person. A bank employee called officers after becoming suspicious of the transaction. Officers responded and arrested Watkins. When the officers searched Watkins, they found another credit card issued in someone else's name as well as a slip of paper containing personally identifiable information (PII) belonging to a different person. After the officers placed Watkins in a patrol car, she asked them to retrieve her personal belongings from Harris' truck. The officers seized a backpack, a notebook and a wallet from Harris' truck. The notebook contained PII belonging to fourteen people.

The government indicted Harris for conspiracy to commit identity theft and credit card fraud.

Harris filed a motion to suppress the notebook seized from his truck, arguing its removal from his truck violated the *Fourth Amendment*.

The court disagreed, holding the officers lawfully searched Harris' truck under the automobile exception to the *Fourth Amendment's* warrant requirement. Under the automobile exception, where there is probable cause to believe a vehicle contains contraband or evidence of a crime, officers may conduct a warrantless search of the vehicle. In this case, the court held the officers established probable cause Harris' truck contained evidence of identity theft. First,

officers had just arrested Watkins and seized from her two credit cards not issued in her name as well as a slip of paper that contained the PII of another person. Second, Watkins arrived at the bank, to commit fraud with those credit cards, in Harris' truck. Consequently, the court concluded it was reasonable for the officers to believe there would be further evidence of the identity fraud located in Harris' truck.

Click **HERE** for the court's opinion.

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United States v. Leo, 2015 U.S. App. LEXIS 11457 (7th Cir. Wis. July 2, 2015)

Two police officers stopped and handcuffed Leo and Aranda after they developed reasonable suspicion the men had just attempted a burglary, and that one of the men had a gun. One of the officers frisked Aranda, but found nothing. The other officer frisked Leo, but did not find a gun. The officer then opened and emptied Leo's backpack, which the officer had taken from Leo and placed on the ground. Inside Leo's backpack the officer found, among other things, a loaded revolver. The officers later discovered Leo had a felony conviction and arrested him for being a felon in possession of a firearm.

The sole issue on appeal was whether the officers lawfully searched Leo's backpack for weapons.

Leo conceded that under *Terry*, the officers lawfully could have patted down the backpack to search for weapons. However, Leo argued the officers' safety concerns did not justify opening and emptying the backpack because Leo was handcuffed and the backpack was out of his reach when the officers searched it.

The court agreed with Leo, holding the warrantless search of his backpack exceeded the scope of a *Terry* frisk. The court recognized a lawful *Terry* frisk of a person may include a pat-down of the suspect's effects, including a bag. The court further noted the reasonableness of such a search is evaluated on the basis of the facts as they existed at the time of the search. Here, the court found at the time of the search, Leo's hands were cuffed behind his back, the officers already had frisked Leo and Aranda and found no weapons, and the officer was in control of the backpack. Consequently, the court held that when the officer unzipped and emptied the backpack, it was inconceivable that either Leo or Aranda would have been able to lunge for the bag, unzip it, and obtain the gun inside.

Click **HERE** for the court's opinion.

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United States v. Smith, 2015 U.S. App. LEXIS 12485 (7th Cir. Wis. July 20, 2015)

Two uniformed officers were on bicycle patrol at 10:00 p.m. when they heard gunshots fired north of their location. The officers rode toward the area where they thought the shots originated, and saw Smith crossing the street. Smith had just left an alley on the east side of the street, and was preparing to enter an alley on the west side of the street. Smith was not running or engaging in any other suspicious behavior, nor was he coming from the direction where the shots were reportedly fired. The officers rode ahead of Smith into the alley, then made a U-turn to face Smith. The officers stopped approximately five feet in front of Smith, positioning their bicycles at 45-degree angles to face him. Neither officer identified himself

as an officer or asked Smith for identification. Instead, one of the officers got off his bicycle, approached Smith with his hand on his gun and asked Smith if he had any guns, knives, weapons or anything illegal on him. Smith told the officer he had a gun, but that he did not have a concealed weapon permit. The officers handcuffed Smith, seized a handgun from his pocket and arrested him. The government indicted Smith for being a felon in possession of a firearm.

Smith filed a motion to suppress the handgun, arguing the officers violated the *Fourth Amendment* because they did not have reasonable suspicion to stop him in the alley.

The district court held the officers did not seize Smith for *Fourth Amendment* purposes when they confronted him in the alley; therefore, the handgun discovered on Smith was not subject to the exclusionary rule. Smith appealed.

The Seventh Circuit Court of Appeals reversed the district court. The court recognized that a *Fourth Amendment* seizure does not occur when an officer approaches an individual and asks him questions. Instead, the test to determine if an individual has been seized is whether taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not free to ignore the police presence and go about his business.

In this case, two police officers waited for Smith to enter the alley, rode past him and then made a U-turn to face him. When they were five-feet from Smith, the officers stopped and positioned their bicycles at an angle obstructing his intended path. One of the officers approached Smith with his hand on his gun and neither officer identified himself. Instead of asking Smith whether he had heard any gunshots, the officer asked Smith in an accusatory manner if he had any weapons on his person. Given these facts, the court concluded a reasonable person in Smith's situation would not have felt free to ignore the police presence and go about his business. As a result, the court held that Smith was seized for *Fourth Amendment* purposes when the officers encountered him in the alley.

Because the government conceded at oral argument that the officers did not have reasonable suspicion to detain Smith, the court held the handgun recovered from Smith should have been suppressed.

Click **HERE** for the court's opinion.

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United States v. Bentley, 2015 U.S. App. LEXIS 13066 (7th Cir. Ill. July 28, 2015)

An officer conducted a traffic stop after he saw the car Bentley was driving crossed the fog line in violation of Illinois law. During the stop, another officer brought his drug-detection dog, Lex, to the scene. After Lex alerted to the presence of drugs in the car, the officers searched it and found nearly fifteen kilograms of cocaine in a hidden compartment. The government charged Bentley with possession with intent to distribute cocaine.

Bentley argued the drugs discovered in the car should have been suppressed because the officer did not have reasonable suspicion to support the initial stop. Alternatively, Bentley argued that Lex's alert was not sufficiently reliable to support probable cause to justify the warrantless search of the car.

The court disagreed. First, the officer's testimony was supported by video from his patrol car that clearly showed Bentley's car cross the fog line, a violation of Illinois law. As a result, the court held this evidence provided the officer with probable cause for the traffic stop. Second, the court held the district court properly held the totality of the circumstances established Lex's alert was reliable enough to support probable cause to search Bentley's car. Although Lex only had a 59.5% field accuracy rate, the government introduced other evidence, to include, Lex's success rate in controlled settings, testimony from Lex's handler, as well as testimony from the founder of the training institute Lex attended, all of which Bentley's attorney was allowed to challenge on cross-examination. In addition, Bentley's attorney was allowed to introduce evidence from his own expert witness. The district judge then weighed all the evidence and credited the government's experts over Bentley's, concluding Lex's alert was reliable enough to support probable cause.

Click **HERE** for the court's opinion.

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Eighth Circuit

Robinson v. Payton, 2015 U.S. App. LEXIS 11049 (8th Cir. Ark. June 29, 2015)

Officer Payton detained Robinson and his mother, Eva, in the back of his patrol car during a *Terry* stop. When Officer Payton directed them to get out of the car, Eva complied, but Robinson refused. After Robinson's refusal, Officer Payton tased Robinson in drive-stun mode and a struggle between the two men ensued. In the meantime, Trooper Condley was attempting to control Eva, who was standing on the other side of the patrol car. Eva, who thought Officer Payton was shooting Robinson with a handgun, broke away from Trooper Condley and ran toward Robinson and Officer Payton. Trooper Condley grabbed Eva and maintained control over her while Officer Payton eventually subdued Robinson by tasing him several more times. During this time, Eva was screaming for her husband and she told Trooper Condley that she would give her life for her son.

Robinson filed a lawsuit in which he alleged Trooper Condley violated his *Fourth Amendment* rights by failing to intervene while the other officer used excessive force against him.

The court held Trooper Condley was entitled to qualified immunity. A police officer may be liable if he does not intervene to prevent the excessive use of force by another officer against a suspect. However, the officer must observe excessive force being used and have the opportunity and the means to prevent harm to the suspect. Here, the court concluded Trooper Condley's duty to intervene was not clearly established. Specifically, the court found a reasonable police officer in Trooper Condley's position would not know that restraining a hysterical individual and then deciding to leave her unattended to intervene violated clearly established law. First, Eva became hysterical after she thought the officer had shot Robinson with his gun. Second, Eva broke away from Trooper Condley and attempted to join the altercation between Officer Payton and Robinson. Finally, Eva continued to scream for her husband and she told Trooper Condley that she was willing to give her life to protect Robinson. If Trooper Condley had left Eva, she would have likely joined the altercation, possibly causing harm to herself and others.

Click **HERE** for the court's opinion.

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Tenth Circuit

United States v. Snyder, 2015 U.S. App. LEXIS 12510 (10th Cir. Okla. July 20, 2015)

An officer stopped Snyder for a traffic violation. While standing outside Snyder's car, the officer smelled burnt marijuana emanating from inside the car. The officer searched the car and while he did not find any marijuana, he found a firearm under the driver's seat. The officer arrested Snyder for being a felon in possession of a firearm.

Snyder filed a motion to suppress the firearm, arguing the officer's warrantless search of his car violated the *Fourth Amendment*.

The court disagreed. When an officer establishes probable cause a car contains contraband, the *Fourth Amendment* does not require him to obtain a warrant before searching the car and seizing the contraband. In addition, Tenth Circuit case law provides, "the smell of burnt marijuana alone establishes probable cause to search a vehicle for the illegal substance." Consequently, once the officer smelled the odor of burnt marijuana emanating from Snyder's car, he was entitled to conduct a warrantless search of the car in an attempt to locate marijuana.

Click **HERE** for the court's opinion.

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United States v. Moore, 2015 U.S. App. LEXIS 13320 (10th Cir. Okla. July 30, 2015)

An Oklahoma Highway Patrol Trooper stopped Moore for speeding. While talking with Moore, the trooper noticed Moore seemed extremely nervous, as his hands were shaking when he gave the trooper his driver's license, he rarely made eye contact, he kept fidgeting, and he immediately asked the trooper if he could smoke a cigarette. When the trooper asked Moore why the car he was driving was registered to both Moore and a female with a different last name, Moore told the trooper he had known the female for several years and that his name had been added to the registration a week earlier. Throughout this conversation, the trooper noticed Moore still seemed to be nervous, even after the trooper told Moore he was only going to issue him a warning ticket. The trooper completed the warning ticket, returned all of Moore's documents, and told Moore to have a good day.

The trooper then asked Moore if he could speak to him for a little while longer. After Moore agreed, the trooper asked Moore if he had ever been in any trouble before. Moore told the trooper he had, but that he did not wish to talk about it. When the trooper asked Moore if he had anything illegal in his car, such as weapons or drugs, Moore said no. Finally, when the officer asked Moore for consent to search his car, Moore refused. The trooper then told Moore he was going to detain him to conduct a dog sniff of his car.

A few minutes later, another trooper arrived with his certified narcotics-detection dog, Jester. While the trooper and Jester were walking around the rear of Moore's car, Jester alerted by snapping his head around and returning to the front of Moore's car where he jumped through the driver's side window, which Moore had left open. The trooper saw Jester had his nose on the center console and that he was wagging his tail. The troopers searched Moore's car but

they did not find any drugs; however, they discovered a sawed-off shotgun and ammunition in the trunk.
The government indicted Moore for three firearms related offenses based on the evidence seized from the trunk of Moore's car.

Moore argued the evidence seized during the traffic stop should have been suppressed because the trooper unlawfully detained him without reasonable suspicion after the traffic stop had ended. Moore also argued Jester's entry into his car constituted an unlawful search.

The court disagreed. Both sides agreed the purpose of the traffic stop, to issue Moore a warning for speeding, was completed as soon as the trooper returned Moore's license, gave him a copy of the warning ticket, and told him to have a good day. However, by this time, the court held the trooper established reasonable suspicion to believe Moore was involved in criminal activity. The court found Moore's extreme nervousness, his prior criminal history and the fact that Moore's name had recently been added to the car's registration, when considered together, justified Moore's further detention and dog sniff of his car.

The court further held Jester's entry into Moore's car did not constitute an illegal search. First, Jester properly alerted outside Moore's car before he jumped into it through a window Moore left rolled down when he exited his car. Therefore, as soon as Jester alerted outside Moore's car, the court held the officers had probable cause to search it. Second, the fact that Jester gave an "alert" and not his trained "indication" was of no consequence. The Tenth Circuit has held that an alert, or change in a dog's behavior in reaction to the odor of drugs is sufficient to establish probable cause to search a vehicle, and that a final indication is not necessary. Consequently, even though Jester did not provide his final indication by sitting and staring at the source of the odor, Jester's positive alert was, by itself, enough to provide the troopers probable cause to search Moore's car.

Click **HERE** for the court's opinion.

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