Reviving Search and Seizure Litigation: Taking the Fourth Amendment Off Life Support

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Sometimes it appears that the protections afforded under the Fourth Amendment are dead, and if not dead, virtually non-existent. This presentation and outline will explore challenges that criminal defense attorneys should look out for in hopes of revitalizing their Fourth Amendment practice.

Fleeing as Reasonable Suspicion of Criminal Activity

***United States v. Brown*, ---F.3d---, No. 17-30191 (9th Cir. 2019)**: The opinion begins, "David Derek Brown, who is a black man, had the misfortune of deciding to avoid contact with the police. Following an anonymous tip that a black man was carrying a gun—which is not a criminal offense in Washington State—police spotted Brown, who was on foot, activated their lights, and pursued him by car, going the wrong direction down a one-way street. Before flashing their lights, the officers did not order or otherwise signal Brown to stop. Brown reacted by running for about a block before the officers stopped him at gunpoint.

With no reliable tip, no reported criminal activity, no threat of harm, no suggestion that the area was known for high crime or narcotics, no command to stop, and no requirement to even speak with the police, we are left with little more than Brown's flight from the officers, which is not enough under the circumstances. In today's world, Justice Stevens' observations some twenty years ago are particularly prescient:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., concurring in part and dissenting in part).

Without more specific, articulable facts supporting their actions, we conclude that the officers lacked the requisite reasonable suspicion that criminal activity was afoot before stopping Brown. Accordingly, we reverse the district court's order denying Brown's motion to suppress."

The Court also notes:

- "In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race."
- "Given that racial dynamics in our society—along with a simple desire not to interact with police—offer an "innocent" explanation of flight, when every other fact posited by the government weighs so weakly in support of reasonable suspicion, we are particularly hesitant to allow flight to carry the day in authorizing a stop."

***Commonwealth of Massachusetts vs. Jimmy Warren*, 58 N.E. 3d 333 (Mass. 2016)**: May consider whether defendant was member of racially targeted group with reason to flee from police: "Such an individual, when approached by police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus."

The court held that investigatory stop was not justified by reasonable suspicion that defendant committed breaking and entering, specifically noting that where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston.

Pretextual Stops

***United States v. Warfield,* 727 Fed.Appx. 182, (6th Cir. 2018)**: Driver was pulled over for suspicion of driving drunk driving. He initially attracted law enforcement for driving with his hands in the proper position. After passing the field sobriety tests, they continued question him about the cigarettes in his car. Unsatisfied with his answer, they called the drug dog to conduct an air sniff. There were no drugs. They then asked whether they could search the car and driver "consented."

"While the law allows pretextual stops based on minor traffic violations, no traffic law prohibits driving while black. The protections of the Fourth Amendment are not so weak as to give officers the power to overpolice people of color under a broad definition of suspicious behavior."

The court further noted, "A different result in this case would neglect our duty and would allow the police to stop you, demand your identification, check for outstanding warrants, and call for a drug dog—even if you are doing nothing wrong."

***United States v. Orozco*, 858 F.3d 1204 (9th Cir. 2017)**: The defendant's truck was pulled over because the police received a tip that he was hauling drugs. There was insufficient basis under *Terry* to stop the truck, so the government relied on the administrative warrant exception to support the legality of the stop (which led to a consent search). The Ninth Circuit held that the evidence was clear that the police did not pull the truck over on the basis of the administrative search provisions, but solely based on the tip. This was a classic "pretextual" stop and therefore the stop was not legitimate and the resulting consent to search was invalid. The Court emphasized that in the context of administrative searches (and roadblocks), the actual motive of the police does matter.

Whether a Person Has Been Seized or is in Custody

***United States v. Monsivais*, 848 F.3d 353 (5th Cir. 2017):** The police encountered the defendant on the side of the Interstate, apparently walking away from a disabled truck. The defendant acted nervous, gave an inconsistent answer about his destination and initially walked away from the police when they activated their blue lights. None of these factors justified frisking the defendant, which amounted to a seizure.

***United States v. Hernandez*, 847 F.3d 1257 (10th Cir. 2017):** The police were patrolling in a high crime area and saw the defendant who they thought was suspicious. They pulled alongside him and started asking questions; he answered the questions while continuing to walk. At one point the police asked him to stop so they could continue to talk to him. During the ensuing conversation, the defendant provided his name and a false birthdate and the police determined that he had an outstanding warrant. The Tenth Circuit held that requesting the defendant to stop so they could continue to ask him questions was a seizure that was not supported by an articulable suspicion. The appellate court affirmed the district court's decision that focused on the fact that this occurred at night, there were no other people present and the police never told the defendant that he was free to decline the request to stop. The court suppressed the evidence found during the search that followed his arrest. (Note the result might be different under *Utah v. Strieff*, based on the attenuation doctrine; but the court held that the government waived this argument by not raising it earlier).

***United States v. Mendenhall*, 446 U.S. 544, 558 (1980)**: When determining whether defendant was seized when she was asked to accompany DEA agents to their airport office, it was "not irrelevant" that as a black female the defendant may have felt unusually threatened by white male officers.

***United States v. Smith*, 794 F.3d 681, 687-88 (7th Cir. 2015)**: Court found that defendant had been seized based on other factors, and declining to address Smith's argument that "no reasonable person in [defendant's] 'position'—as a young black

male confronted in a high-crime, high-poverty, minority-dominated urban area where police-citizen relations are strained-would have felt free to walk away" from the officers. Court states: "We do not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system," while ultimately following Mendenhall.

***United States v. Randy Johnson*, 874 F.3d 571 (7th Cir. 2015)**: Court found that there was no Fourth Amendment violation, as the car was parked illegally. Following his scathing dissent in the initial appellate decision, Judge Hamilton dissented again when the case was presented en banc.

In the dissent, Judge Hamilton notes the difference between the low-income, minority dominated neighborhood Johnson was arrested in and the affluent, primarily white east side. He writes, "[t]he majority's treatment of the loading-and-unloading proviso bears no practical relationship to reality or to what happened here on the streets of Milwaukee. Imagine that the police tried these tactics in Milwaukee's affluent east side. Citizens would be up in arms, and rightly so. No police officer could expect to keep his job if he treated a car standing in front of a store as worthy of such an intrusive Terry stop. The government's theory—that the seizure of a stopped car by the police would be justified because the occupants could always explain in court that they had merely stopped the car to make a purchase—invites intolerable intrusions on people just going about their business."

He ends his emphatic dissent with the following: "What made the officers decide so fast to swoop in to seize this car? On this record, the only explanation is the neighborhood, and the correlation with race is obvious. It is true that Johnson has not made an issue of race, but we should not close our eyes to the fact that this seizure and these tactics would never be tolerated in other communities and neighborhoods. If we tolerate these heavy-handed tactics here, we enable tactics that breed anger and resentment, and perhaps worse, toward the police.

Defendant Johnson is not a sympathetic champion of the Fourth Amendment, of course. That is not unusual in Fourth Amendment litigation. But the practical dangers of the majority's extension of *Terry* and *Whren* to suspected parking violations will sweep broadly. Who among us can say we have never overstayed a parking meter or parked a little too close to a crosswalk? We enforce the Fourth Amendment not for the sake of criminals but for the sake of everyone else who might be swept up by such intrusive and unjustified police tactics. I respectfully dissent."

***United States v. Easley*, 293 F.Supp.3d 1288 (N.M.), rev'd, 911 F.3d 1074 (10th Cir. 2018)(cert denied)**: The Court must faithfully apply the Fourth Amendment

in order to ensure equal protection for all. Ignoring the fear-infused racial dynamics in a police encounter weakens if not eviscerates Fourth Amendment protections for people of color. Because the Tenth Circuit instructs courts to consider the totality of the circumstances, so long as it does not rely on the subjective perspective of the defendant, the Court must consider race as one of numerous contextual factors in the same way that the Supreme Court has considered age.

***United States v. Easley*, 17-cr-200, SDOH April 19, 2018**: "The original sin of this investigation was that two citizens were stopped based not on specific facts available to police before contact was initiated, but instead based purely on an individual law enforcement officer's determination that two citizens looked suspicious."

Abandonment of Property

***United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017):** The police had reason to believe that the defendant had participated (perhaps as the getaway driver) in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant's current apartment (where he had moved after the homicide and a brief stint in jail). The warrant only sought authority to seize cell phones, because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the "abandonment" of the gun was the fruit of the execution of the defective search warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule. *Abandonment that is occasioned by an illegal arrest or search is not voluntary abandonment.* (emphasis added)

Automobile Stops

***Kansas v. Glover*, 139 S. Ct. ___ (cert. granted Apr. 1, 2019); decision below at 422 P.3d 64 (Kan. 2018)**: While on routine patrol, a Kansas police officer ran a registration check on a pickup truck with a Kansas license plate. The Kansas Department of Revenue's electronic database indicated the truck was registered to Charles Glover, Jr. and that Glover's Kansas driver's license had been revoked. The officer stopped the truck to investigate whether the driver had a valid license because he "assumed the registered owner of the truck was also the driver." The stop was based only on the information that Glover's license had been revoked; the

deputy did not observe any traffic infractions and did not identify the driver. Glover was in fact the driver, and was charged as a habitual violator for driving while his license was revoked. Though Glover admitted he "did not have a valid driver's license," he moved to suppress all evidence from the stop, claiming the stop violated the Fourth Amendment, as interpreted in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Delaware v. Prouse*, 440 U.S. 648 (1979), because the deputy lacked reasonable suspicion to pull him over. The trial court granted the motion to suppress based only on the judge's anecdotal personal experience that it is not reasonable for an officer to infer that the registered owner of a vehicle is the driver of the vehicle. The first state court of appeal reversed, but the state supreme court granted review and reinstated the order of suppression – Although it expressly rejected reliance on just "common sense," it held that an officer lacks reasonable suspicion to stop a vehicle when the stop is based on the officer's suspicion that the registered owner of a vehicle is driving the vehicle unless the officer has "more evidence" that the owner actually is the driver. The state petitioned for cert, contending: (1) The Kansas decision conflicts with state and federal precedent involving "12 other state supreme courts, 13 intermediate state appellate courts, and 4 federal circuit courts, including the Tenth Circuit, which covers Kansas. *See, e.g., United States v. Pyles*, 904 F.3d 422, 425 (6th Cir. 2018) (noting the split); *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1207-08 (10th Cir. 2007) (Gorsuch, J.)"; (2) The Kansas ruling adopted a more demanding standard than the "minimal" suspicion set forth in *United States v. Sokolow*, 490 U.S. 1, 7 (1989); and (3) The Kansas ruling defies common sense on an important and recurring Fourth Amendment question about "judgments and inferences" that law enforcement officers make every day. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)." The Supreme Court granted cert to determine: "[W]hether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary."

***Collins v. Virginia*, ---S. Ct. ---(2018):** Even if the police have probable cause to search an automobile (or, as in this case, a motorcycle), the police may not enter the curtilage of a house to search the vehicle without a warrant. The automobile exception does not authorize the search of an automobile at all times and at all places, without a warrant. In this case, the police walked up the defendant's driveway, invading the curtilage of the property, to search the motorcycle.

***United States v. Beene*, ---F.3d ---(5th Cir. 2016):** If a car is parked in the driveway of a home (even if outside the curtilage), despite the existence of probable cause to search the vehicle (such as a dog alert), the police must obtain a warrant unless there are particularized exigent circumstances.

***United States v. Noble*, 762 F.3d 509 (6th Cir. 2014):** The police were watching the interstate for a vehicle that was suspected to be involved in a methamphetamine distribution operation. When the vehicle was spotted, an officer

pulled behind it. The vehicle crossed a lane line without a proper signal. The officer activated his lights. The officer determined that the tint on the window was too dark. The driver and the passenger (the defendant) were excessively nervous. The driver consented to a search of the vehicle, at which point the passenger/defendant was asked to exit the vehicle and he was frisked. Because there was no basis to believe that he was armed or dangerous, there was no legitimate basis to frisk the defendant and the evidence derived from this frisk should have been suppressed. The facts that the driver and passenger were nervous and that the vehicle was suspected of being involved in a drug trafficking operation are not sufficient to support a reasonable belief that the passenger was armed or dangerous, even coupled with the officer's experience that drug dealers are often armed. The court ridicules the notion that any passenger in a car can be frisked if the driver or the vehicle is suspected of being involved in drugs: this would presumably include "a fourth grader, a ninety-five-year-old gentleman with Parkinson's disease, or a judge this court." The law requires individualized suspicion of the person who is to be frisked, not a general belief that someone in the vehicle might possibly be armed.

***United States v. Cervantes*, 703 F.3d 1135 (9th Cir. 2012):** A man was seen leaving what was described by the police as a stash house with a white box. That man was later observed giving the box to the defendant. The defendant's car was followed briefly and the police believed that he engaged in counter-surveillance maneuvers. Later the defendant, with the box was pulled over for a minor technical motor vehicle infraction and the officer could not confirm that he had a valid driver's license. The car was searched and the box was found to contain cocaine. The government contended that there was probable cause to search the car. The Ninth Circuit disagreed: the officer's testimony that the house was a "stash house" was worth little, because no facts were offered to support that conclusory statement. The claim that the defendant engaged in counter-surveillance was equally unhelpful. The government next argued that the car was subject to impoundment and inventory, but the Ninth Circuit rejected this theory, too, because there was insufficient information that the car was obstructing traffic, or otherwise in need of being impoundment. Moreover, the government did not show that the impoundment was appropriate under California law.

***United States v. Gaines*, 668 F.3d 170 (4th Cir. 2012):** Three police officers testified that as the car in which the defendant was a passenger drove past them, they observed a small crack in the windshield. The car was stopped and the defendant was ordered out of the car and frisked and the officer felt a gun. The defendant assaulted the police officer and fled, after which he was stopped and a gun was found in his possession. The district court found that the officers were untruthful when they said that the observed a crack in the windshield and that the stop, therefore, was illegal. The government conceded the illegality of the stop, but claimed that the assault of the officer was an intervening event that authorized the

search (incident to arrest). The Fourth Circuit rejected this argument: the gun was found during the course of the illegal stop (and the frisk) which was before the defendant engaged in the intervening assault.

Anticipatory Warrants

***United States v. Perkins*, ---F.3d ---(6th Cir. 2018):** The anticipatory search warrant stated that when the drugs were delivered to the defendant at his house, the warrant would be executed (the drugs were seized at the post office, a warrant was then obtained and the drugs were then destined to be delivered). But when the drugs were delivered, the package was given to the defendant's wife. Though there was still probable cause to search, the delivery of the drugs to the wife was not the triggering event described in the anticipatory warrant and executing the warrant was improper.

***Compare to, United States v. Grubbs*, 547 U.S. 90 (2006)**: Reversing the decision of the Ninth Circuit, the Supreme Court holds that an anticipatory search warrant is permissible under the Fourth Amendment. Moreover, the triggering event is not required to be explicitly set forth in the warrant itself, or expressly incorporated by reference to the attached search warrant affidavit. The Ninth Circuit had previously held that under *Groh v. Ramirez*, the triggering event had to be in the warrant itself, or incorporated by reference to an attached search warrant application.

Arrest Warrants

***United States v. Vasquez-Argarin*, 821 F.3d 467 (3rd Cir. 2016):** If the police have an arrest warrant for a person who resides at a certain location, all that is required to enter the premises is the arrest warrant. If the person for whom the arrest warrant was issued is simply present at a location, the police must obtain a search warrant in addition to the arrest warrant to enter the premises. The level of information known to the police that the person resides at the location must rise to the level of probable cause in order to obviate the need for a search warrant. The information known to the police in this case was insufficient to meet this threshold. The court noted that there is a wide divergence in the circuits regarding the level of knowledge that the police must have. Some courts require less than probable cause (reason to believe), others require probable cause. The Third Circuit also held that the good faith exception to the exclusionary rule did not apply in this case, because the police were not relying on binding precedent, or a search warrant when they entered the house.

***United States v. Allen*, 813 F.3d 76 (2d Cir. 2016)**: If the police are outside the door and the defendant is inside the door, this counts as an arrest "inside" the home and requires a warrant. What matters is where the defendant is, not the police. If

the police do not have a warrant and arrest the defendant across the threshold, any evidence derived from the warrantless arrest must be suppressed.

***United States v. Nora*, 765 F.3d 1049 (9th Cir. 2014)**: The police observed the defendant with a gun in his hand on the street and later on his porch. He retreated into his house. The police ordered him to come out of the house. This was improper: the police need a search warrant or an arrest warrant to enter a house or to order someone to exit the house. Possession of a loaded gun is, at most, a misdemeanor in California. The police officer had no basis for believing that the defendant posed a danger, or was committing a felony by possessing the gun.

Herring v. United States*, 129 S. Ct. 695 (2009)**: Sheriff's Deputies in one county were told by a clerk in a neighboring county that there was a warrant for the defendant's arrest. This was inaccurate. The neighboring county Sheriff personnel had negligently failed to erase the warrant from the computer system when it had been withdrawn. The question in this case is whether *Arizona v. Evans*, which applies to negligent errors by court personnel also applies in this situation, where the negligence is committed by law enforcement personnel. The Supreme Court held that the exclusionary rule would not be applied in this situation. ***Excluding the evidence derived from the improper arrest would not deter police misconduct since negligence is not deterred by "punishing" the police. There was no evidence of systematic errors by the neighboring county's sheriff's department.

Probable Cause for Arrest

***United States v. Evans*, 851 F.3d 830 (8th Cir. 2017)**: A woman called the police and said that she was raped the night before and the man was at bus stop near the apartment. She generally described the perpetrator's weight and height and explained that she was wearing red tennis shoes. She was not able to describe his face and vaguely described a scar on his abdomen. The defendant was arrested. The District Court held that the information provided by the "victim" including issues about her credibility (not revealing how she came to meet the man and agree to meet him in an apartment stairway), did not rise to the level of probable cause. The Eighth Circuit affirmed.

Attenuation

***Utah v. Strieff*, 136 S. Ct. 2056 (2016)**: If a defendant is pulled over for an investigatory stop illegally (there was no articulable suspicion or probable cause to support the stop) and the police determine that there is an outstanding arrest warrant for the defendant, a search incident to arrest is proper and the exclusionary rule does not bar the use of evidence discovered during the search incident to arrest.

The illegal stop is too attenuated from the discovery of the evidence that was the product of the legal search incident to arrest.

***United States v. Terry*, 909 F.3d 716 (4th Cir. 2018)**: The police unlawfully placed a GPS device on the defendant's car without first obtaining a warrant. They subsequently used the data from the device to determine that the defendant was speeding, and on that basis the car was pulled over and ultimately drugs were found in the car. The initial illegal "search' (placing the GPS device on the car without a warrant) was not too attenuated from the subsequent discovery of drugs and was, instead, the fruit of the poisonous tree and the evidence should have been suppressed. On the question of standing, the court held that the defendant had standing, as the driver of the car, when the GPS device was placed on the vehicle and though he was a passenger during the subsequent stop (and thus did not have standing to challenge the drugs found in the car), the search was the fruit of the poisonous tree and the lack of standing does not change that determination.

***United States v. Shrum*, 908 F.3d 1219 (10th Cir. 2018):** The defendant's 30-year old wife died at home and he called 911. The police and medical personnel arrived shortly thereafter and the wife was taken to the hospital and pronounced dead. The defendant went to the police station and was questioned. The police "secured" the house and for several hours, the defendant's access to the house was limited. During the time the house was "secured" the police entered and took several photographs, some of which revealed the presence of ammunition. The defendant was charged with possession of ammunition by a convicted felon. The Tenth Circuit held that the house was, in fact, seized; there was no probable cause, or even an articulable suspicion, to interfere with the defendant's access to the house and the seizure was therefore unlawful; the unlawful seizure resulted in the discovery of evidence; the discovery of evidence was not attenuated from the illegal seizure. There is no such thing as a "crime scene" investigation exception to the Fourth Amendment. The district court should have suppressed the evidence (discovery of the ammunition).

***United States v. Brodie*, 742 F.3d 1058 (D.C. Cir. 2014):** The police were waiting outside a house that they planned to search pursuant to a search warrant. While awaiting their colleagues, the defendant was observed leaving the house (the police were not targeting that individual; the target was already in custody). The police approached the defendant and directed him to place his hands on the car (which he did). Shortly thereafter, he fled, discarding drugs and guns while on the run. The D.C. Circuit held (1) the defendant was detained; (2) there was no basis for the detention because, pursuant to Bailey v. United States, 133 S. Ct. 1031 (2013), the police may not detain an individual in connection with the execution of a search warrant unless the detention is at the time when, and at the place where, the search is being executed; (3) the detention was not attenuated from the defendant's

flight; and (4) the evidence that the police obtained was the fruit of the unlawful detention.

***United States v. Gross*, 662 F.3d 393 (6th Cir. 2011):** The police stopped an automobile in which the defendant was a passenger. The stop was found to be improper, because there was no articulable suspicion supporting the stop. During the course of the stop, the police learned that there was an arrest warrant for the defendant. The question in the Sixth Circuit was whether the existence of an arrest warrant and the evidence found during a search incident to the arrest was the fruit of the illegal stop, and did the exclusionary rule bar the introduction of the evidence. The Sixth Circuit held that the exclusionary rule did apply and the evidence would be suppressed. Contrary authority in the Seventh Circuit in *United States v. Green*, 111 F.3d 515 (7thCir. 1997), was rejected by the Sixth Circuit.

Cell Phones

***Riley v. California*, 134 S. Ct. 2473 (2014):** The Supreme Court decided that a cell phone may not be searched incident to arrest. Neither officer safety, nor the need to preserve evidence justifies the need to dispense with the warrant requirement.

***United States v. Pratt*, 915 F.3d 246 (4th Cir. 2019):** The police seized a cell phone from the defendant when he was arrested but waited 31 days to get a search warrant to examine the contents. The Fourth Circuit held that this violated the Fourth Amendment. The initial seizure was appropriate, but the delay in seeking a warrant was unjustified by any governmental interest. The contents of the phone should have been suppressed

***United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017):** The police had reason to believe that the defendant had participated (perhaps as the getaway driver) in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant's current apartment (where he had moved after the homicide and a brief stint in jail). The warrant only sought authority to seize cell phones, because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the "abandonment" of the gun was the fruit of the execution of the defective search

warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule.

***United States v. Lustig*, 830 F.3d 1075 (9th Cir. 2016):** The police seized the defendants cell phone from his car when he was arrested. The police did not obtain a search warrant for 16 months. This was an unreasonable delay and the motion to suppress should have been granted.

***United States v. Lopez-Cruz*, 730 F.3d 803 (9th Cir. 2013):** The defendant was asked by a federal agent if he could "search" and "look in" his cell phone. The defendant consented. The phone rang and the agent answered the call. The Ninth Circuit held that answering the call exceeded the scope of consent.

Computer Searches

***United States v. Raymonda*, 780 F.3d 105 (2d Cir. 2015):** The government was aware that the defendant had viewed thumbnails of child pornography for a few seconds. This did not provide a probable cause basis to obtain a search warrant to search his computer nine months later. The testimony at the suppression hearing established that the user may have accessed a website without looking at individual images and that the images would have remained in the temporary Internet cache, but been overwritten within a few days or a month. Thus the information that the site was accessed months earlier was stale. Leon applied, however, so the evidence was not subject to the exclusionary rule.

***United States v. Needham*, 718 F.3d 1190 (9th Cir. 2013):** Though the suppression of evidence was not required, because of the good faith exception to the exclusionary rule, the Ninth Circuit holds that evidence that the defendant has engaged in acts of child molestation does not suffice to establish probable cause to issue a search warrant to seize the defendant's computers to search for evidence of child molestation. The officer's expression of his opinion that "individuals who have sexual interest in children often possess child pornography" does not amount to probable cause.

Inventory Searches/Community Caretaking Function

***United States v. Cervantes*, 703 F.3d 1135 (9th Cir. 2012)**: Though this decision focuses more on the issue of the propriety of the impounding and inventorying of a car, the Ninth Circuit holds that a lawful impound must satisfy the requirements of the "community caretaking" doctrine. In this case, the police believed that the defendant was involved in a drug deal, but did not have sufficient information to arrest him. The police followed him until he committed a traffic violation, after which he was stopped and the police believed (incorrectly, as it turns out) that he was driving without a license. The car was pulled over next to the curb and in a

residential area. The prosecution offered no evidence that it was necessary to impound the vehicle, or to inventory its contents. The two kilos of cocaine found in the back should have been suppressed.

Consent

***United States v. Escamilla*, ---F.3d ---, 16-40333 (5th Cir. 2017):** The defendant consented to a search of his cell phone when he was initially arrested. The phone was returned to him and he was then arrested. After he was arrested and his cell phone was seized and he was placed in jail, the police searched the phone again. The Fifth Circuit held that the initial consent did not carry over to the second search.

***United States v. Spivey*, 861 F.3d 1207 (11th Cir. 2017):** The Eleventh Circuit holds that consent obtained through deception is valid consent in this case. The officers came to the defendants' house, claiming to be investigating a burglary at the house, when, in fact, they were investigating the defendants for credit card fraud. The defendants allowed the police into the house. The Eleventh Circuit holds that in this situation, the voluntary consent to allow the police into the house, who were misrepresenting their motive for wanting to come into the house, did not vitiated the consent. *A spirited dissent by Judge Martin challenged whether consent that is acquired through deception qualifies a "voluntary" consent to waive one's Fourth Amendment rights.*

***United States v. Rahman*, 805 F.3d 822 (7th Cir. 2015)**: A restaurant owner has a reasonable expectation of privacy in the business area of the restaurant and has standing to contest a warrantless search of the area. In this case, the defendant, the owner of a restaurant that burned down, consented to a search of the basement of the building "for the cause and origin" of the fire that consumed the restaurant and apartments above the restaurant. At the time the search was conducted, however, the investigators already knew that the fire's origin was upstairs, thus the "cause and origin" was not the object of the search in the basement. Rather, the investigators were looking for circumstantial evidence of the defendant's guilt, such as records, business receipts and a laptop. This search exceeded the scope of the consent that the defendant provided, and the evidence should have been suppressed.

***United States v. Robertson*, 736 F.3d 677(4th Cir. 2013):** An officer asked the defendant for permission to search his person. The defendant begrudgingly submitted to what the Fourth Circuit concluded was a "command." The Fourth Circuit held that this did not qualify as consent and the evidence should have been suppressed.

***United States v. Vazquez*, 724 F.3d 15 (1st Cir. 2013)**: The police told the defendant that with or without her consent, the police were going to search her house. They claimed to have the authority based on the fact that her boyfriend (who the police erroneously believed lived in the house, too) was on parole and subject to a warrantless search. She consented. This was not valid consent, because it amounted to nothing more than acquiescence to a show of authority (the police did not, in fact, have the authority to conduct a warrantless search), rather than free and voluntary consent. The court noted that the officers' subjective good faith that they had the authority to conduct a warrantless search did not exempt this case from the application of the exclusionary rule. Their good faith was not, according to the First Circuit, reasonable.

***United States v. Cotton*, 722 F.3d 271 (5th Cir. 2013)**: The defendant, when stopped in his car, was asked by the officer if he could search the car. The defendant clearly limited his consent to searching the luggage in the car. The officer pried back the door panel and discovered drugs. This was an unlawful search. The government argued that the police had probable cause to pry open the panel once the officer saw loose screws. However, the discovery of the loose screws did not occur during a lawful consensual examination of the luggage.

***United States v. Beauchamp*, 659 F.3d 560 (6th Cir. 2011):** The defendant was walking on the sidewalk in a "high crime area" when the police approached. The defendant was ordered to approach the officer, which he did. The defendant appeared to be nervous. The officer then frisked the defendant to look for weapons. The officer then asked for consent to conduct a search of the defendant's person and the defendant agreed. The officer found drugs inside the defendant's boxers. The Sixth Circuit held that this was a seizure, it was not based on an articulable suspicion and the consent was tainted by the illegal detention.

***United States v. Hardin*, 539 F.3d 404 (6th Cir. 2008):** The police wanted to determine if a suspect was located in a particular apartment. They asked a maintenance man to go to the apartment and inform the occupants that he needed to enter to fix a plumbing problem. He did not obtain the occupants' consent –he simply entered. He then left and told the police that the suspect was there. The Sixth Circuit held that this was not valid consent. First, there was, as a matter of fact, no consent given. Second, the use of a ruse, such as this, is not appropriate, because there was no need to use a ruse to avoid violence or danger. This is not a case in which the police already had probable cause to enter the house and used the ruse for safety purposes. Moreover, the apartment manager was acting as an agent of the police, so it triggered the exclusionary rule.

***United States v. Hicks*, 539 F.3d 566 (7th Cir. 2008):** The police may not make baseless threats that they will get a search warrant if the occupant of a house does not consent to a search. If, in fact, there is no probable cause to get a warrant (or,

more specifically, if the police do not reasonably believe that there is probable cause), this type of threat may vitiate any consent that is obtained in response. A remand to further develop the facts on this point was necessary.

***United States v. Gandia*, 424 F.3d 255 (2d Cir. 2005):** The defendant consented to the police entering his kitchen to interview him. Prior to commencing the interview, the police conducted a security sweep of the house. This was improper. The consent did not authorize the police to enter other rooms of the house. A security sweep is not permissible on the basis of a limited consent search.

***United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004):** The videotape of the defendant's detention on the side of the road demonstrated that he did not speak English (e.g., Q: "Do you know how fast you were going?" A: "Chicago."). Evidence of a signed Spanish consent form did not establish the defendant's consent to search his vehicle. Because the trooper was not able to communicate with the defendant in Spanish (or ensure that the defendant could read Spanish on the form), the form, by itself, was not enough to prove a voluntary consent.

Third-Party Consent

***Georgia v. Randolph*, 126 S.Ct. 1515 (2006):** Distinguishing *United States v. Matlock*, 415 U.S. 164 (1974) and *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Supreme Court holds that when co-tenants of a house are at the front door and one consents to a search and the other objects, the police may not enter. The Court noted, however, that if there were exigent circumstances (evidence of abuse, for example), the police could enter.

***United States v. Terry*, 915 F.3d 1141 (7th Cir. 2019):** The police went to the defendant's house (knowing that he was not home, because they had recently arrested him) and a woman in a bathrobe answered the door. The police asked her for consent to search the house. She consented. In fact, she did not have authority to consent, and despite the fact that the police reasonable believed that she had spent the night there (because she answered the door in her bathrobe), that was not sufficient to demonstrate that the police reasonable believed that she had authority.

***Bonivert v. Clarkston*, 883 F.3d 865 (9th Cir. 2018):** In this civil rights case, the police went to the home where there had been a report of a domestic argument. The police called the wife, who was not at home and she consented to the officer's entrance into the house. The husband, who was at home, objected. Entering the house violated the rule announced in *Georgia v. Randolph*.

***United States v. Rush*, 808 F.3d 1007 (4th Cir. 2015):** A woman called the police and asked that they remove the defendant from her apartment where he had been staying and, according to her, dealing drugs. The woman met the police at a

location away from the apartment and gave them consent to enter the apartment and gave them a key. The police went to the apartment and went in. The defendant was asleep in the master bedroom. They woke him up and told him that they had a search warrant to search the apartment. This was not true. But the police said that in order to protect the woman –hiding the fact that she had called the police and gave them permission to enter the apartment. The Fourth Circuit held that (1) searching the apartment was not a proper consent search because the defendant, as an occupant, had the right to object to a consensual search pursuant to *Randolph*; and (2) the police could not rely on the good faith exception to the exclusionary rule, because the police did not rely on some other authority in good faith in conducting the search (such as in *Leon* or *Davis*). Deterring the police from lying about the existence of a warrant is the type of case for which the exclusionary rule is particularly appropriate.

***United States v. Peyton*, 745 F.3d 546 (D.C. Cir. 2014):** The defendant and his grandmother shared a one-room apartment. The police went to the apartment and asked the grandmother for consent to search a shoebox next to the defendant's bed. The police had been told by the grandmother that the defendant kept his personal property around his bed in the living room. Relying on the grandmother's consent was not reasonable and the search violated the defendant's rights under the Fourth Amendment.

Curtilage

***Florida v. Jardines*, 133 S. Ct. 1409 (2013):** The police, based on an unverified tip, brought a drug-sniffing dog up the sidewalk to the front door of the defendant's house. The dog alerted and the police then obtained a search warrant. The Supreme Court held that bringing the dog up to the front door was a search because it amounted to a trespass onto the defendant's property for the purpose of conducting a search. The Court held that the police entered the curtilage of the home and, unlike open fields, this is an area of the home that must remain free from unwarranted intrusions by the police that are conducted for the purpose of searching for evidence.

***Collins v. Virginia*, ---S. Ct. ---(2018):** Even if the police have probable cause to search an automobile (or, as in this case, a motorcycle), the police may not enter the curtilage of a house to search the vehicle without a warrant. The automobile exception does not authorize the search of an automobile at all times and at all places, without a warrant. In this case, the police walked up the defendant's driveway, invading the curtilage of the property, to search the motorcycle.

***United States v. Alexander*, ---F.3d ---(2d Cir. 2018):** The area near the back of the defendant's house, where he barbecued and sat with friends was within the

curtilage of the house and a warrantless entry into this area violated the Fourth Amendment.

***United States v. Lundin*, 817 F.3d 1151 (9th Cir. 2016):** Acting on the basis of a BOLO, but without an arrest warrant, the police went to the defendant's home at 4:00 a.m. and started knocking on the door. They heard a crashing noise near the rear of the home and ran around back and stopped the defendant who was in the backyard. They then looked inside the house and found two handguns. The Ninth Circuit ordered that the evidence must be suppressed: (1) the government could not rely on the exigent circumstances exception, because the police were not allowed to be where they were located when the exigent circumstances arose (i.e., they heard the crashing noise); (2) while the police may walk up to the front door of a house and engage in a "knock-and-talk," that exception to the rule that bars police from entering the curtilage of the home does not apply at 4:00 a.m. when nobody would expect visitors to appear and knock on the door; (3) in addition, walking up to the front door to make a warrantless arrest is not a permissible purpose and *Jardines* provides that the police may not enter the curtilage of the home for investigative purposes; (4) the security sweep of the house was not justified, because the defendant was already handcuffed and any further security measures in the house were not necessary; (5) the inevitable discovery doctrine did not apply, because the officers were not in the process of obtaining a search warrant when the illegal searches occurred.

***United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016):** The Seventh Circuit extends *Jardines* to the hallway of an apartment building. The police brought a dog to the apartment complex and walked the dog down a hallway. When the dog alerted to a particular apartment, the police obtained a warrant for that room. The court held that the initial use of the dog was a "search" under *Jardines* that needed a warrant.

Franks v. Delaware Issues

***United States v. Perkins*, 850 F.3d 1109 (9th Cir. 2017):** The defendant was detained by Canadian authorities and the authorities found two images of children partially clothed on his computer. The images, however, according to the Canadian police, did not qualify as child pornography, because neither appeared to be focused on the breasts or (in one picture) the partially visible vagina. The Canadian authorities released the defendant, but sent the report (including the conclusion that the images did not constitute child pornography) to American agents. In the U.S., the agent prepared a search warrant that simply said that the Canadian authorities found child pornography on the defendant's computer, which displayed naked young girls, including their breasts and in one case the vagina. The U.S. warrant did not include the other findings by the Canadian authorities, or provide a detailed description that was contained in the Canadian report. The images were

not submitted to the U.S. Magistrate in connection with the search warrant application. The Ninth Circuit reversed the district court: This was a *Franks* violation that necessitated granting the motion to suppress. Even given the fact that the defendant two prior sex offense convictions involving children, the false information provided by the agent negated the existence of probable cause.

***United States v. Ortega*, 854 F.3d 818 (5th Cir. 2017):** The search warrant stated that the informant had previously provided to the affiant credible and reliable information. This was false. The affiant had been told by another officer that the informant had previously provided credible and reliable information, but the affiant had not received any information previously from the informant. The Fifth Circuit held that a remand was necessary to determine if the affiant made the false statement in the affidavit with the necessary intent under *Franks*. If so, the evidence would be suppressed.

***United States v. Lull*, 824 F.3d 109 (4th Cir. 2016):** The confidential informant was sent into the target's house with money to make a controlled buy. When he came out, he gave some of the "change" to the police, as well as the drugs that were purchased, but $20 was unaccounted for. The police asked where the $20 was. The informant responded that he gave it to the target. He was strip-searched and $20 was found in his underpants. He was immediately "fired" as an informant. The police then prepared a search warrant application for the target's house, relying on the information from the informant, as well as the circumstances of the controlled buy –but not the $20 theft. The Fourth Circuit held that this was at least a reckless omission of fact that tainted the search warrant application and the motion to suppress should have been granted. A dissenting judge wrote that the omission was improper, but wrote that all judges know that informants are unreliable to some extent or another and thus, the omission was not material. The dissenting judge wrote: "Magistrates and judges, state and federal, know from experience and common sense that drug abusers who cooperate with law enforcement officers are notoriously unreliable human beings, burdened as they typically are with barely manageable affronts to their inherent human dignity, including but not limited to addictions, debts incurred to service those addictions, and criminal convictions, all coupled with dissolved and dissolving family and personal relationships.

Investigator Welch should have disclosed the informant's post-controlled-buy arrest and the reasons for it; as the majority opinion cogently explains, his excuse for not doing so cannot be credited. But even if he had made the disclosure, no judge with experience issuing warrants would have refused to issue the search warrant in this case."

***United States v. Glover*, 755 F.3d 811 (7th Cir. 2014):** The failure of the search warrant application to reveal any information about the informant rendered it devoid of probable cause. Though a close call, the exclusionary rule would not apply

because of *Leon*. However, because of the absence of information about the informant's credibility, a *Franks* hearing was necessary to determine whether the omission of this information would taint the search warrant. The informant, unbeknownst to the magistrate, had more than a dozen prior criminal convictions, including several while he was working as an informant. He was also a gang member and was receiving payments from the police department.

GPS Devices and Cell Site Location Information

***Carpenter v. United States*, No. 16-402, 585 U.S. ____ (2018):** United States Supreme Court case concerning the privacy of historical cellphone location records. The Court held, in a 5–4 decision authored by Chief Justice Roberts, that the government violates the Fourth Amendment to the United States Constitution by accessing historical records containing the physical locations of cellphones without a search warrant. The ruling was very narrow and did not otherwise change the third-party doctrine related to other business records that might incidentally reveal location information, nor overrule prior decisions concerning conventional surveillance techniques and tools such as security cameras. The Court did not expand its ruling on other matters related to cellphones not presented in *Carpenter*, including real-time cell site location information (CSLI) or "tower dumps" (a download of information about all the devices that connected to a particular cell site during a particular interval). The opinion also did not consider other collection techniques involving foreign affairs or national security.

***United States v. Jones*, 132 S. Ct. 945 (2012):** The Supreme Court affirmed the decision of the D.C. Circuit in *United States v. Maynard*, though on somewhat different grounds. In the majority decision, the Court held that placing a GPS device on a car (a trespass), coupled with the effort to acquire information by exploiting that trespass, constitutes a search. The Court held that placing the device on the car was a form of "trespass" and under traditional and historical Fourth Amendment jurisprudence a trespass qualifies as a search if the trespass is conducted for the purpose of acquiring information. In a concurring opinion, which also garnered five votes, Justice Alito questioned the trespass theory, but held that the continuous monitoring of the defendant's car for 28 days amounted to a search.

***Grady v. North Carolina*, 135 S. Ct. 1368 (2015):** Placing a GPS device on a probationer as part of his sex offender registry conditions is a Fourth Amendment search that requires application of the "reasonableness" requirement of the Fourth Amendment.

Highway Stop

***Rodriguez v. United States*, 135 S. Ct. 1609 (2015):** The Supreme Court emphasized that the tolerable duration of a traffic stop is determined by the

legitimate mission of the stop: a traffic stop may not be prolonged –even for a few minutes –in order to engage in a criminal investigation. In *Rodriguez*, the defendant was pulled over on the Interstate for driving on the shoulder. After concluding the traffic stop procedures (checking the license and registration and issuing a warning), the officer asked for permission to walk his dog around the car. The defendant declined this invitation. The officer detained the defendant nevertheless and deployed the dog. The time that elapsed from the issuance of the traffic warning until the dog alerted was approximately seven or eight minutes. The Supreme Court condemned the stop and ordered that the evidence be suppressed: Though the police may engage in an unrelated investigation during the course of a legitimate highway stop (such as asking questions about the defendant's itinerary), the stop may not be prolonged absent reasonable suspicion or probable cause. Whether the officer expeditiously concludes the traffic related investigation or not, the stop may not be prolonged to conduct a general criminal investigation.

***United States v. Campbell*, ---F.3d ---(11th Cir. 2019):** *Rodriguez* led the Eleventh Circuit to condemn a traffic stop in this recent Eleventh Circuit decision. The defendant in *Campbell* was stopped on I-20 in Georgia on the basis that his direction signal light was blinking too rapidly, indicating a possible malfunction of the wiring or a bulb. The police officer asked the driver a number of questions about his destination and decided to write him a warning ticket because of the malfunctioning light. The officer then asked a few questions focusing on whether the driver had any contraband in the car, including drugs, counterfeit items, or guns or "dead bodies." These questions were not normal inquiries addressing traffic safety issues. The Eleventh Circuit held that asking these questions prolonged the stop –albeit just for 25 seconds –but that any delay violated *Rodriguez*, because there is no de minimis exception to the Fourth Amendment. In *Campbell*, a total of six minutes and seven seconds elapsed from the time the stop was made until the driver consented to the search. Nevertheless, the 25-second delay caused by the questioning unrelated to the traffic stop rendered the stop illegal. (The court went on to hold that the good faith exception to the exclusionary rule applied, because Rodriguez had not been decided at the time the traffic stop was made in Campbell).

***United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018):** In a lengthy opinion, the Fourth Circuit holds that adding up numerous factors that did not establish reasonable suspicion to prolong a stop results in nothing more than an absence of reasonable suspicion. Therefore, prolonging a stop based on an anonymous tip, plus the driver's nervousness and inability to exactly recite his itinerary violated the Fourth Amendment.

***United States v. Rodriguez-Escalera*, ---F.3d ---(7th Cir. 2018):** There was insufficient information known to the trooper to prolong a traffic stop beyond the time it was necessary to accomplish the mission of the traffic stop. The driver and passenger provided inconsistent statements about the couple's travel plans. The

presence of a strong odor of air fresheners did not add to the level of reasonable suspicion.

***United States v. Gorman*, 859 F.3d 705 (9th Cir. 2017):** A police officer stopped the defendant without sufficient articulable suspicion and then prolonged the stop to the point that it amounted to an illegal detention. Finding no evidence during this encounter, the officer radioed ahead to another officer and told him to get a drug dog and stop the defendant again. The second officer had a dog ready when he stopped the car and the dog promptly alerted, providing probable cause to search the vehicle. The Ninth Circuit held that the second stop was the fruit of the initial illegal stop. The evidence was suppressed.

***United States v. Orozco*, 858 F.3d 1204 (9th Cir. 2017):** The defendant's truck was pulled over because the police received a tip that he was hauling drugs. There was insufficient basis under *Terry* to stop the truck, so the government relied on the administrative warrant exception to support the legality of the stop (which led to a consent search). The Ninth Circuit held that the evidence was clear that the police did not pull the truck over on the basis of the administrative search provisions, but solely based on the tip. This was a classic "pretextual" stop and therefore the stop was not legitimate and the resulting consent to search was invalid. The Court emphasized that in the context of administrative searches (and roadblocks), the actual motive of the police does matter.

***United States v. Lopez*, 849 F.3d 921 (10th Cir. 2017):** The police pulled the defendants' car over for speeding. After determining that the driver had a valid license and asking some questions to the driver and passenger, the officer returned the papers to the driver and began to walk away, but then turned back and asked for consent to search, which was denied. The officer then summoned a drug dog, which took twenty minutes to arrive. The government contended that there was sufficient basis to detain the driver and passenger because (1) nervousness; (2) unusual travel itinerary; (3) the passenger asked the police not to look in the backseat because it was too messy (it was not messy). The Tenth Circuit held that these factors did not rise to the level of an articulable suspicion justifying prolonging the stop. The court also held that both the driver and the passenger had standing to object to the prolonged stop and the evidence would be suppressed for both of them.

***United States v. Paniagua-Garcia*, 813 F.3d 1013 (7th Cir. 2016):** The police saw the defendant "fiddling" with a cell phone. It is a violation of Indiana state law to "text-while-driving" but it is not a violation to talk on the phone or use GPS. The Seventh Circuit holds that the officer's observation did not amount to an articulable suspicion that the defendant was violating the texting-while-driving prohibition.

***United States v. Flores*, 798 F.3d 645 (7th Cir. 2015):** In this post-*Heien v. North Carolina* decision, the Seventh Circuit held that the officer's belief that the defendant's vehicle was being operated in violation of the state license plate law was unreasonable and, therefore, the stop of the vehicle was not justifiable and the resulting search of the car was the fruit of the unlawful stop. The frame around the license plate obscured in a minimal way, one letter of the "Baja California" words on the plate. The frame was typical of the frames provided by car dealers and did not violate the state law.

***United States v. Evans*, 786 F.3d 779 (9th Cir. 2015):** After completing the normal traffic stop inquiry, the police prolonged the stop of the defendant in order to determine if he was properly registered as an ex-felon. This was an unconstitutional extension of the stop and rendered the resulting discovery of evidence subject to suppression.

Standing

***Byrd v. United States*, ---S. Ct. ---(2018):** The defendant was stopped in a rental car. The car was rented by his girlfriend, who gave him permission to drive the rental vehicle, but he was not listed on the rental papers as an authorized driver. Nevertheless, the United States Supreme Court held that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.

***Brendlin v. California*, 127 S.Ct. 2400 (2007):** When the police stop a vehicle that has a driver and passenger, the passenger is also "detained" for fourth amendment purposes. Therefore, if there was no basis for the stop, the passenger may contest the admissibility of any fruits of that stop (for which he has standing), such as a statement he made, or evidence seized from his person or personal belongings. He may also challenge the fruits of his illegal detention, which may include the search of the car in which he was a passenger.