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Affidavit Writing Made Easy: Create an Outstanding Warrant Application Every Time

By Michelle M. Heldmyer
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Even for the most experienced law enforcement officers, writing an affidavit can be a daunting task. Ensuring your affidavit is legally sufficient, organized, easy to read, and even interesting, is challenging in the best of circumstances. The undertaking is often compounded by time constraints and the demands of prosecutors and judges. But with simple guidelines and a few easily accessible tools, every prospective affiant can create an impressive warrant application.

The Basics

Every search and arrest warrant application is governed by rules. The primary rule is found in the Fourth Amendment to the U.S. Constitution: each warrant requires probable cause, supported by oath or affirmation, and particularity. More specific rules governing warrants are located within each jurisdiction's rules of criminal procedure. Affiants need to be familiar with those rules, as they govern every stage of the process, from content to issuance to service of warrants.

To satisfy Constitutional and procedural requirements, warrant applications are accompanied by affidavits, designed to satisfy the court that the evidence in the case is sufficient to establish probable cause. The affiant swears or affirms the provided information is true and correct. Affidavits can, and usually do, contain hearsay information, because generally the rules of evidence do not apply. They can, and usually do, contain supportive information from multiple sources, including other officers and agents, documents, forensic examinations, expert analysis, witnesses, victims, and the affiant's training and experience. Affidavits do *not* need to contain all information known by the affiant – they need only reach the level of probable cause to support the request. Probable cause only requires a fair probability, given all the facts and circumstances provided in the affidavit, along with the training and experience of those contributing to the affidavit, that evidence will be found (for a search warrant) or the subject committed a crime (for an arrest warrant).¹

Every request for a warrant is made in furtherance of a criminal case, which means criminal statutes are involved. Because an affidavit must contain proof of the violation of at least one particular statute, knowledge of that statute is imperative. Do not assume knowledge of what the statute says. Read it.

After reading the statute, the affiant will need to know its elements. The best source of this information is the criminal jury instructions book in your jurisdiction. Most are available online. They are written plainly, for an audience with no legal experience, and are easy to understand. More importantly, the elements specified in the jury instructions tells the affiant what evidence is relevant and necessary to support a finding of probable cause.

Building the Affidavit

Having identified your offense elements and verified you have enough evidence in support of each and every element to obtain a warrant, outline the affidavit. Arrest warrant affidavits are

¹ *Illinois v. Gates*, 462 US 213 (1983).

commonly more concise and less detailed than search warrant affidavits because they are usually followed by an additional probable cause finding, like a preliminary hearing or grand jury presentment. But both types of affidavits require the affiant to establish probable cause, so the basic purpose and structure are the same.

Each paragraph should be numbered and the document formatted to your court's specifications, if any. A solid basic structure can look like this:

1. *Affiant's name, title, experience, jurisdictional authority.* Emphasize training, experience and knowledge relevant to the type of crime named in the warrant. Remember, training and experience add to probable cause.
2. *Statutory violations involved in investigation and other relevant legal citations* (i.e., definition statutes, regulations, authority).
3. *Statement of purpose of affidavit.* "This application is submitted in support of my request for the issuance of a search warrant for the residence located at 1234 Main Street, Anytown, State."
4. *Overview/summary of investigation.* The more complex the investigation, the more important this "executive summary" section becomes.
5. *Statement of probable cause.* "This affidavit establishes probable cause to believe evidence of controlled substance distribution, in violation of 21 USC 841(a)(1)&(b), will be found at the residence located at 1234 Main Street, Anytown, State" or "there is probable cause to believe James Blow committed the offense of controlled substance distribution, in violation of..."
6. *Statement of limited presentation of facts.* "This affidavit does not include all of the facts known to me, but only those facts relevant and sufficient to establish probable cause."
7. *Definition section, if necessary.* Include definitions if you need to use special terminology in the affidavit.
8. *Facts,* to include support for each and every element of the offense or item to be seized (addressed next).
9. *Conclusion.* Tie the facts together, and ask for what you want.

Much of the content of most affidavits is standard ("boilerplate") language and can be reused in multiple affidavits. For example, affiants can create one basic paragraph about themselves and their training, experience, and jurisdictional authority, then simply tailor it for each case. Also, certain types of affidavits should contain specialized information which can be taken from other similar affidavits. Computer searches, child pornography investigations, and complex fraud cases, for instance, contain established language which the affiant can obtain and insert into the affidavit. The prosecutor will have access to much of this standard language. The Department of Justice (DOJ) is another resource. The Computer Crimes and Intellectual Property (CCIPS) and Child Exploitation and Obscenity (CEOS) Sections of the DOJ, along with several other special DOJ sections, can provide advice and warrant language.

The Facts Section

Armed with knowledge of the applicable statutes and an outline of the affidavit, build the facts section. Most are written chronologically, but this style is not required if another is more effective. Background information offered prior to the pertinent facts can be helpful for context, but less is

better. Do not presume knowledge of any fact or technical subject, and even some legal issues should be spelled out clearly.

If you have exculpatory information or information discrediting any of your sources of facts, consult with the prosecutor about whether to include it in the affidavit.

Facts included in an affidavit must be attributed to their source. The court must determine the credibility of the information, and cannot do so without knowing from where it came. If using informants, names can be withheld, but information about their credibility and the basis of their knowledge is important. Also, if you are “cutting and pasting” from other reports, proofread carefully to smooth out transitions and to remove repetitive or sensitive information.

Active voice is usually preferred over passive voice. Say, “Officer Jones interviewed witness Cheryl Adams” rather than, “Cheryl Adams was interviewed by Officer Jones.”

The use of the term “Your Affiant” to refer to the writer is common but archaic. Consider the simpler version; just call yourself “I” instead.

Certain types of information should be avoided in the facts section:

1. *Discredited information.* If information or its source has been found to be unreliable, do not include it.
2. *Argument.* Affiants should appear objective throughout the fact section.
3. *Conclusory statements.* Avoid references such as, “we investigated, and determined this...” or “a confrontation occurred and a struggle ensued.” Include factual descriptions and attribution instead: “According to witness Smith, Jones ran toward Harris and demanded money. Immediately thereafter, Harris grabbed Jones’ arm and pulled Jones to the ground.”
4. *Repetitive statements.* Say it once and move on.
5. *Police jargon.* For example, avoid use of military time or terms like “BOLO.”
6. *Technical terminology.* If you must use it, define it accurately.
7. *PII.* Personally identifiable information (“*PII*”) could potentially become part of the public record, so avoid it if possible. Courts are becoming accustomed to references such as “year of birth 1985” or “date of birth x/x/1985.” If PII must be used, be prepared to redact it prior to any disclosure of the affidavit. Courts usually have redaction procedures in place.

Conclusion

Writing an affidavit need not be difficult. Once you have read the statutes and rules, and become familiar with all the facts of the case, the pieces will fall into place. Get organized, find time to write uninterrupted and get to work. Remember your best resource is always your prosecutor.

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CASE SUMMARIES

Circuit Courts of Appeal

Second Circuit

Brown v. City of New York, 2017 U.S. App. LEXIS 11937 (2d Cir. N.Y. July 5, 2017)

Two police officers attempted to arrest Imani Brown for disorderly conduct. After Brown refused to place her hands behind her back to be handcuffed, one of the officers kicked Brown's legs out from under her, causing her to fall to the ground. While Brown was on the ground, one of the officers used his hand to push Brown's face onto the pavement as she continued to struggle with the officers. After the officer twice administered a burst of pepper spray directly into Brown's face, the officers were able to handcuff Brown. The officer warned Brown before each application of the pepper spray.

Brown sued the officers, claiming that they used excessive force in violation of the Fourth Amendment.

The court disagreed, holding that the officers were entitled to qualified immunity. Qualified immunity protects government officials from civil liability unless the official violated a statutory or constitutional right that was clearly established. To be clearly established, a right must be sufficiently clear that any reasonable official would have known that what he is doing violates that right. In addition, the Supreme Court has held that lower courts are "not to define clearly established law at a high level of generality." Instead, the courts must consider the particular circumstances in which the force was applied. In this case, the officers' use of force against Brown occurred after Brown repeatedly refused to follow the officers' instructions to place her hands behind her back for handcuffing. Following the guidance provided by the Supreme Court, the court held that no precedential decision of the Supreme Court or the Second Circuit Court of Appeals clearly established that the officers' use of force, viewed in the circumstances in which they were taken, violated the Fourth Amendment.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/16-1258/16-1258-2017-07-05.pdf?ts=1499265006>

United States v. Conti, 2017 U.S. App. LEXIS 12942 (2d Cir. July 19, 2017)

Law enforcement officers in the United Kingdom (U.K.) interviewed Anthony Conti and Anthony Allen, each of whom was a U.K. citizen and resident. During these interviews, Conti and Allen were compelled to give testimony. Although Conti and Allen were provided limited immunity from criminal prosecution, under U.K. law, their refusal to testify could have resulted in imprisonment.

The United States government subsequently charged Conti and Allen with wire fraud and bank fraud. At trial, the government used Conti and Allen's previous compelled testimony against them. The issue before the court was whether testimony compelled by a foreign government,

which is later used in a criminal prosecution in the United States, is prohibited by the Fifth Amendment.

The right to be free from self-incrimination, guaranteed by the Fifth Amendment, is a personal trial right of the accused in any American criminal prosecution. A violation of that right occurs when a compelled statement is offered at trial against the defendant, even when the statement was compelled by a foreign government in accordance with its own law. In this case, the court found that there was no question that the defendants' statements were compelled by law enforcement officers in the U.K. As a result, the court concluded that the Fifth Amendment prohibited the government from using the defendants' compelled statements against them at trial in the United States.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/16-898/16-898-2017-07-19.pdf?ts=1500471007>

United States v. Huertas, 2017 U.S. App. LEXIS 13260 (2d Cir. Conn. July 24, 2017)

A woman told a patrol officer that a man named "Branden" was down the street with a gun. The officer drove in the direction indicated by the woman looking for an armed man. A few minutes later, the officer saw Huertas standing on a street corner holding a black bag. As the officer approached, he turned on his cruiser's spotlight and illuminated Huertas. Through the cruiser's window, the officer asked Huertas a few questions. Huertas answered the officer's questions. After approximately thirty to sixty seconds, the officer exited his cruiser and Huertas ran away. A search of Huertas' route turned up a bag similar to the one Huertas had been holding, which contained a firearm. Other officers later found and arrested Huertas.

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

Huertas filed a motion to suppress the firearm. Huertas argued that he was unlawfully seized for Fourth Amendment purposes when he "submitted" to police authority by standing still as the officer approached in his cruiser and answering the officer's questions.

The court disagreed. A Fourth Amendment seizure requires either physical force or submission to the assertion of police authority. Because it was undisputed that the officer did not use physical force, Huertas could only be seized if he submitted to the officer's assertion of authority.

The court noted that if Huertas had run when he was illuminated by the officer's spotlight, he could have expected the officer to chase him. However, by staying and answering the officer's questions, Huertas had a chance to dispel the officer's suspicions and hope the officer would drive away after being satisfied with Huertas' answers to his questions. Under these circumstances, the court concluded that Huertas' behavior was "evasive," in that Huertas only answered the officer's questions because he was trying to maximize his chance of avoiding arrest. The court held that Huertas never submitted to the officer's assertion of authority; therefore, the officer never seized Huertas for Fourth Amendment purposes.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/15-4014/15-4014-2017-07-24.pdf?ts=1500906605>

Third Circuit

Fields v. City of Philadelphia, 2017 U.S. App. LEXIS 12159 (3d Cir. Pa. July 7, 2017)

In September 2012, Amanda Geraci, a member of a police watchdog group, attended an anti-fracking protest at the Philadelphia Convention Center. Approximately thirty minutes into the protest, police officers arrested a protestor. Geraci moved to a better vantage point to record the arrest with her camera and did so without interfering with the officers. An officer then pushed Geraci and pinned her against a pillar for one to three minutes, which prevented Geraci from observing or recording the arrest. The officer did not arrest or cite Geraci.

In September 2013, Richard Fields was on a public sidewalk where he observed police officers breaking up a party at a house across the street.

The nearest officer was fifteen feet away from him. Fields took a photograph of the scene with his cell phone. An officer saw Fields taking the photograph and ordered him to leave. After Fields refused, the officer detained Fields and seized his phone. The officer searched Fields' phone and opened several videos and other photographs. The officer eventually released Fields after he issued him a citation for "Obstructing Highway or Other Public Passages."

Geraci and Fields brought *42 U.S.C. § 1983* claims against the City of Philadelphia and several police officers. The plaintiffs alleged that the officers illegally retaliated against them for exercising their First Amendment right to record public police activity.¹

The court consolidated the cases, holding that the First Amendment's right to access to information gives the public the right to photograph, film, or audio record police officers conducting official police activity in public places.² While the right to record police is not absolute, the officers offered no reasons to justify their actions in either case. In the first instance, Geraci moved to a vantage point where she could record a protestor's arrest, but did so without getting in the officers' way, whereas Fields took a photograph across the street from where the police were breaking up a party.

Although the court held that the public has the right to record officers conducting official police activity in public areas, the court held the officers were nonetheless entitled to qualified immunity. The court concluded that at the time of the incidents in 2012 and 2013 the right to record public activity was not clearly established in the Third Circuit.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca3/16-1650/16-1650-2017-07-07.pdf?ts=1499446805>

¹ The plaintiffs pointed out that in 2011 the Philadelphia Police Department published a memorandum advising officers not to interfere with a private citizen's recording of police activities because it was protected by the First Amendment. In 2012, the Department published an official directive reiterating that this right existed. In 2014, the Department instituted a formal training program to ensure that officers ceased retaliating against bystanders who record their activities.

² Every Circuit Court of Appeals to address this issue (First, Fifth, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public.

United States v. Stimler, 2017 U.S. App. LEXIS 12158 (3d Cir. N.J. July 7, 2017)

The government charged three Orthodox Jewish rabbis, Stimler, Goldstein and Epstein, with various kidnapping-related offenses. The charges stemmed from their involvement in a scheme in which they, along with others, sought to assist Orthodox Jewish women to obtain divorces from uncooperative husbands.

Prior to trial, the government obtained a court order pursuant to *Section 2703(d) of the Stored Communications Act (SCA)*, compelling AT&T to provide historic cell site location information (CSLI) generated by Goldstein's phone. While not as accurate as traditional GPS systems, historic CSLI records can generate an approximate profile of a person's movements based on the phone calls that person makes over a period of time. The *2703(d)* order obtained by the government covered fifty-seven days of Goldstein's location history.

Goldstein filed a motion to suppress the CSLI provided by AT&T. Goldstein argued that cell phone users have a reasonable expectation of privacy in their historical CSLI; therefore, § 2703 (d) violates the Fourth Amendment because it authorizes the government to obtain this information without first obtaining a warrant.

The court disagreed. The government can obtain an order pursuant to § 2703 (d) of the *SCA* upon a showing that there are "reasonable grounds to believe" that records, such as historical CSLI, "are relevant and material to an ongoing criminal investigation." The court noted that this "reasonable grounds" requirement is a lesser burden than the "probable cause" requirement of the Fourth Amendment. However, the court concluded that § 2703 (d) did not violate the Fourth Amendment because individuals do not have a reasonable expectation of privacy in their historic CSLI.

The court further held that the government established reasonable grounds to believe that Goldstein's CSLI were relevant and material to an ongoing criminal investigation. First, the government provided information about the kidnapping ring, the charged kidnappings, and the alleged involvement of each defendant. Second, the government stated that a co-conspirator had implicated the defendants in statements that he provided to investigators. Finally, the government explained that its request was limited to CSLI records during the periods when kidnappings occurred in an attempt to identify the location of the alleged participants.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca3/15-4053/15-4053-2017-07-17-0.pdf?ts=1500332405>

Sixth Circuit

United States v. Perry, 2017 U.S. App. LEXIS 12976 (6th Cir. Tenn. July 19, 2017)

In October 2014, an officer received several complaints that Perry was selling drugs from his apartment. From October 15 to December 3, 2014, the officer intermittently conducted surveillance of Perry's apartment. During this surveillance, the officer observed heavy car and foot traffic into Perry's apartment, with visitors typically leaving within one to two minutes. On one occasion, the officer saw Perry exchange money and packages, which appeared to contain marijuana. On another occasion, the officer saw a man exit Perry's apartment, remove from his pants pocket a clear plastic bag, remove a package of marijuana from the plastic bag, give the marijuana to a person in a car, and then go back into Perry's apartment. Based on these

observations, among others, the officer obtained a warrant to search Perry's apartment for evidence related to drug distribution on December 5, 2014. The officer executed the warrant on Perry's apartment four days later. The government subsequently charged Perry with several drug-related offenses.

Perry filed a motion to suppress the evidence seized from his apartment. Perry argued that the officer's observations over the seven-week period before the judge issued the warrant constituted stale evidence because the officer did not provide the individual dates when he conducted surveillance. In addition, Perry argued that the officer's observations did not establish continuous criminal activity in his apartment; therefore, the search warrant was not supported by probable cause.

The court disagreed. Even though the officer did not specify in his affidavit the dates on which he observed particular transactions, and while "stale" information cannot be used to establish probable cause, the court concluded that the officer's observations were not stale. First, the officer stated that his observations occurred between October 15 and December 3, a period of two to fifty one days before the judge issued the search warrant. The court held that evidence of drug sales two to fifty one days before the issuance of the search warrant provided probable cause to believe that Perry's apartment contained evidence related to drug distribution. Second, the officer's observations of heavy car and foot traffic along with the various transactions he witnessed, suggested that Perry's apartment was home to an ongoing drug business. While the court held that the officer's observations were sufficient to establish probable cause, the court noted that it would have been preferable for the officer to indicate the specific dates of his observations in his affidavit.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/16-6285/16-6285-2017-07-19.pdf?ts=1500485535>

Seventh Circuit

United States v. Mojica, 2017 U.S. App. LEXIS 12662 (7th Cir. July 14, 2017)

Federal agents went to Mojica's house and arrested him for several drug-related offenses. After arresting Mojica agents placed him in police car, which was parked in front of the house. In the meantime, other agents executed a search warrant for Mojica's house. During the search, the agents interviewed Mojica's wife, Sonia, and learned that Mojica possessed the only keys to the detached garage located near the rear of the property. After agents obtained the keys to the garage from Mojica, Sonia gave the agents consent to search the detached garage. Inside the garage, the agents found evidence related to drug distribution.

Mojica filed a motion to suppress, arguing that Sonia lacked the authority to consent to the search of the garage.

Consent may be obtained from a person whose property is searched, a third party who shares common authority over the property, or a co-occupant who possesses apparent authority. Apparent authority exists if the facts known to an officer at the time of the search would allow a reasonable person to believe that the consenting party had authority over the property to be searched.

Mojica argued that Sonia lacked apparent authority because the facts known to the agents at the time of the search would not have led a reasonable person to believe that Sonia had authority over the detached garage. Specifically, Mojica claimed that the agents' belief that Sonia had authority over the garage was unreasonable because she told agents that she did not have a key and that she had not been in the garage for a month and a half.

The court disagreed. Sonia told the agents that she had been married to Mojica for twenty-one years and that they have been living at their current residence for ten years. Even though the agents knew that Sonia rarely entered the garage, they could reasonably believe that she, as a spouse, had access to the garage but chose not to enter regularly. In addition, while Sonia did not possess a key to the garage, neither she nor Mojica told the agents that she was denied access to it. Instead, after the agents obtained the keys from Mojica, Sonia signed the consent form to allow the agents to search the garage. Without information to the contrary, the court concluded that the agents reasonably relied on Sonia's apparent authority to consent to a search of the garage.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/16-2985/16-2985-2017-07-14.pdf?ts=1500067843>

Eighth Circuit

United States v. Alatorre, 2017 U.S. App. LEXIS 12409 (8th Cir. Neb. July 12, 2017)

Police officers obtained an arrest warrant for Alatorre for assaulting a person with a baton and planned to go to his house to arrest him. At a pre-arrest briefing, officers were informed that Alatorre's past criminal history included carrying and concealing firearms.

When the officers arrived at Alatorre's house, they knocked on the front door. Although no one answered the door, the officers heard movement from inside the house as well as voices, which suggested that more than one person was present. The officers knocked again and announced, "Police with a warrant. Come to your door." When no one responded, the officers knocked and announced their presence two more times. Finally, Alatorre opened the front door and the officers placed him in handcuffs and removed him to the front porch. When asked if anyone else was inside, Alatorre said, "My girlfriend." After an officer yelled for anyone inside the house to come to the door, Alatorre's girlfriend came out of the kitchen and to the front door. The officers pulled Alatorre's girlfriend onto the porch and asked her if anyone else was inside the house. She told the officers there was no one else in the house. Because the officers had experience with prior arrestees lying to them about the presence of others inside houses, they decided to conduct a protective sweep to locate anyone else inside who could harm them. The officers checked the living area and two adjacent rooms. The officers then entered the kitchen where they saw two guns in plain view on a shelf along with ammunition and drugs. Finding no one inside, the sweep ended after approximately two minutes, and the officers left the house.

Based on their observations of guns and drugs in plain view during the protective sweep, officers secured Alatorre's house and obtained a search warrant. Officers seized the items seen during the protective sweep as well as a handgun located under a couch.

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

Alatorre filed a motion to suppress the evidence seized from his house. Alatorre argued that the officers' protective sweep was not justified because he had already been arrested and secured on the front porch. As a result, Alatorre claimed that the arresting officers could not reasonably believe there was anyone inside the house that could harm them.

A protective sweep is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers and others. The sweep is limited to a visual inspection of those places in which a person might be hiding. The Fourth Amendment allows officers to conduct a protective sweep if they have a reasonable belief based on specific and articulable facts, along with rational inferences from those facts, that the area to be swept harbors an individual posing a danger to the officer or others.

In this case, the court noted that protection of officers conducting an arrest near a defendant's home is a priority recognized by the courts and several federal circuits have upheld protective sweeps after an arrest outside of a residence.¹ In this case, the court held that the protective sweep of Alatorre's house was justified by several facts that supported the officers' reasonable belief that someone else could be inside posing a danger to them during or after the arrest.

First, Alatorre's girlfriend lingered in the kitchen out of the officers' sight until she was specifically called to the door, indicating that it was easy for someone to hide just out of the officers' view in a position from which an attack could be launched. Second, guns or other dangerous weapons were conceivably inside the house given Alatorre's criminal history and the alleged baton assault for which Alatorre was charged. Third, the audible movements and sounds from behind the front door after the officers knocked along with the delay in answering the door, created a reasonable uncertainty as to how many people were inside the house and their intentions toward the officers. Finally, the officers on the front porch dealing with Alatorre and his girlfriend were vulnerable to attack from someone inside the house. Even though hindsight established that the officers had already encountered the only two individuals in Alatorre's house, the officers were justified in conducting the protective sweep before removing Alatorre from the porch.

The court further held that the protective sweep was reasonable in scope and duration. The sweep lasted only two minutes and the officers only examined places large enough to conceal a person, while incidentally noticing guns and drugs in plain view.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-4184/16-4184-2017-07-12.pdf?ts=1499873450>

United States v. Giboney, 2017 U.S. App. LEXIS 13120 (8th Cir. Mo. July 21, 2017)

Police officers obtained a warrant to search Giboney's residence for evidence related to the receipt and possession of child pornography. While five officers searched the residence, another officer interviewed Giboney. The officer told Giboney that he was not under arrest and was free to leave. The officer did not place Giboney in handcuffs or otherwise physically restrain him, and no weapon was drawn against him. During the interview, Giboney asked to use the restroom. The officer allowed Giboney to use the restroom; however, the officer told Giboney that he needed to accompany him because the other officers were still searching the residence. Afterward, the officer accompanied Giboney to the garage where Giboney was allowed to smoke a cigarette.

¹ 8th, 9th and 10th Circuits.

During this time, the officer confirmed that Giboney was still willing to talk to him. At some point, Giboney attempted to leave the residence but the officer arrested him, telling Giboney that he had developed new information during the execution of the search warrant.

At the police station, the officer conducted a video-recorded interview of Giboney. Before the interview, the officer read Giboney his Miranda rights from a form. Giboney initialed each right after the officer read the right to him out loud. In addition, Giboney verbally acknowledged that he understood each right as it was read to him and “jokingly” asked the officer, “So does it stop now if I want to get an attorney?” The officer told Giboney that he could stop the interview at any time.

The officer then asked Giboney to read the section of the form titled, “Waiver” out loud. Giboney complied, but Giboney stated that he would not initial the waiver because the waiver stated, “I do not want a lawyer at this time.” Seeking clarification, the officer asked Giboney some follow up questions. After a short discussion, the officer believed that Giboney wanted an attorney to represent him in the criminal case, but that Giboney did not want an attorney present during the interview. When the officer asked Giboney, “So are you saying that you want a lawyer at this time?” Giboney replied, “Oh, at this time. Alright...Sorry.” Giboney then initialed the waiver section of the form and verbally agreed to be interviewed. During the interview, Giboney told the officer that he had been viewing child pornography for fifteen years.

The government charged Giboney with receipt and possession of child pornography.

Giboney filed a motion to suppress his pre-arrest statements, arguing that he was in custody for Miranda purposes when the officer interviewed him.

A person is in “custody” for Miranda purposes when there is a formal arrest or a restraint on the person’s freedom of movement to the degree associated with a formal arrest. In this case, the court held that Giboney was not in custody for Miranda purposes during the interview prior to his arrest. First, the officer repeatedly told Giboney that he was not under arrest, that he could end the interview whenever he wanted, and that he was free to leave. Second, the officer did not restrain Giboney’s movements to the degree associated with a formal arrest by joining Giboney as he moved about the house. The officer told Giboney that he could not walk around the house because of the ongoing execution of the search warrant. In addition, Giboney was not handcuffed or otherwise restrained from moving around and Giboney did not object when the officer accompanied him. Third, Giboney voluntarily agreed to speak to the officer and he understood that it was his choice to be interviewed or not. Fourth, although there were five other officers present, the officer who interviewed Giboney did not use “strong-arm” tactics during the interview. Finally, while the officer arrested Giboney at the end of the interview, this fact, by itself, does not establish that the interview was custodial.

Giboney also filed a motion to suppress his post-arrest statements, arguing that the officer continued to interview him after he had invoked his Fifth Amendment right to counsel.

To validly invoke the right to counsel, a defendant must articulate the desire to have counsel present sufficiently clearly that a reasonable police officer would understand the statement to be a request for an attorney. The court held that Giboney did not clearly and unequivocally assert his right to counsel in his post-arrest interview. First, Giboney did not validly invoke his right to counsel by asking whether the interview would end if he wanted an attorney, because, by Giboney’s express admission, he was “kidding.” Second, the remaining conversation between Giboney and the officer does not establish that Giboney wanted an attorney present during the

interview. Instead, Giboney made it clear that he only wanted an attorney present if he was charged with a crime. Once Giboney realized that waiving his right to counsel only applied during the interview, he apologized for his confusion, stated that he would talk to the officer, and initialed the waiver. The court found that Giboney's statements were, at best, ambiguous as to whether he wanted to have an attorney present for the interview. As a result, Giboney failed to sufficiently invoke his right to counsel and the officer was not required to stop questioning him.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-3294/16-3294-2017-07-21.pdf?ts=1500651046>

United States v. Horton; United States v. Croghan, 2017 U.S. App. LEXIS 13333 (8th Cir. Iowa July 24, 2017)

In September 2014, the Federal Bureau of Investigation (FBI) began investigating an internet forum for sharing child pornography hosted on the Tor¹ network called "Playpen," which had more than 150,000 registered accounts. In January 2015, FBI agents gained access to Playpen servers and relocated the website content to servers in a secure government facility in the Eastern District of Virginia. The agents assumed administrative control of the site. Although FBI investigators could monitor Playpen traffic, it could not determine who was accessing Playpen because of the Tor encryption technology.

In February 2015, the FBI applied for a warrant in the Eastern District of Virginia to search computers that accessed Playpen by using a Network Investigative Technique (NIT). The warrant described the application of the NIT, which sent computer code to Playpen users' computers that instructed the computers to transmit certain information back to the government. The information sent to the government included the computer's Internet Protocol (IP) address, operating system information, operating system username, and its Media Access Control (MAC) address, which is a unique number assigned to each network modem. Although Playpen was hosted in the Eastern District of Virginia, the warrant explained that, "the NIT may cause [a defendant's] computer--wherever located--to send to a computer controlled by or known to the government, network level messages containing information that may assist in identifying the computer." A United States magistrate judge signed the warrant, and the FBI began collecting the personal data of Playpen users.

During the warrant period, Horton and Croghan accessed Playpen and the FBI located them in Iowa through information from the NIT. The government charged Horton and Croghan with child-pornography related offenses.

The defendants filed a motion to suppress the evidence obtained through the NIT.

The district court suppressed the evidence obtained through the NIT, holding that the magistrate judge in the Eastern District of Virginia exceeded her statutory authority by issuing the NIT warrant beyond her district court's jurisdictional boundaries. The government appealed.

First, the Eighth Circuit Court of Appeals held that the execution of the NIT in this case required a warrant. The FBI sent computer code to the defendants' computers that searched those computers for specific information and sent that information back to law enforcement. Even if a

¹ The Onion Router ("Tor") network exists to provide anonymity to Internet users by masking user data, hiding information by funneling it through a series of interconnected computers.

defendant has no reasonable expectation of privacy in his IP address, he has a reasonable expectation of privacy in the contents of his computer.

Next, when the NIT warrant was issued in this case, *Federal Rule of Criminal Procedure 41* authorized a magistrate judge “to issue a warrant to search for and seize a person or property located within the district.” Even though *Rule 41* provides exceptions to this jurisdictional limitation², the court concluded that none of these exceptions expressly allowed a magistrate judge in one jurisdiction to authorize a search of a computer in a different jurisdiction.³

Finally, the court held that while the search warrant was defective, the good-faith exception to the exclusionary rule applied. Consequently, the court reversed the district court’s grant of suppression.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-3976/16-3976-2017-07-24.pdf?ts=1500910259>

Vester v. Hallock, 2017 U.S. App. LEXIS 13367 (8th Cir. Neb. July 25, 2017)

Officer Hallock was dispatched to a bar in response to a report that a man had threatened to stab several patrons with a knife. The dispatcher told Hallock that the suspect had been disarmed but warned that the suspect had threatened to get another knife from his car, described as a black Chevy Camaro.

A few minutes later, Hallock arrived and saw a man matching the suspect’s description, later identified as Vester, sitting in a black Camaro outside the bar. Hallock ordered Vester to get out of the vehicle five times before Vester complied. Hallock then issued three separate commands for Vester to get either on the ground or on his knees. Vester ignored these commands and instead turned his back on Hallock and placed his hands on the car. Concerned that Vester might have a weapon, Hallock wanted to get him to the ground, because based on his experience, Hallock knew it would be safer to disarm Vester in a prone position. Hallock then approached Vester from behind, grabbed his right arm, and used the arm-bar technique to take Vester quickly to the ground. Vester was unable to brace his fall and landed face-first on the ground, sustaining contusions, abrasions, and lacerations to his head and hand.

Vester sued Officer Hallock under *42 U.S.C. § 1983* claiming that Hallock used excessive force in violation of the Fourth Amendment to arrest him.

The court held that Officer Hallock was entitled to qualified immunity. Although Vester did not visibly possess a weapon or attempt to resist arrest prior to the takedown, the court held that other factors Officer Hallock faced when he confronted Vester made his use of the arm-bar technique objectively reasonable. First, Vester previously threatened to stab bar patrons and he refused to comply with Officer Hallock’s repeated commands. Second, after exiting the vehicle, it was possible that Vester had a concealed knife on his person. Finally, Officer Hallock arrested Vester without any backup officers.

² A magistrate may issue a warrant for property moved outside of the jurisdiction, for domestic and international terrorism, for the installation of a tracking device, and for property located outside of a federal district.

³ On December 1, 2016, *Federal Rule of Criminal Procedure 41(b)(6)* was added to provide an additional exception to the magistrate’s jurisdictional limitation by allowing warrants for programs like the NIT. See https://www.law.cornell.edu/rules/frcrmp/rule_41.

The court further held that even if it assumed that Officer Hallock's use of the arm-bar technique constituted excessive force, at the time of the incident it was not clearly established that such force under these circumstances violated the Fourth Amendment.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-3389/16-3389-2017-07-25.pdf?ts=1500996676>

United States v. Lewis, 2017 U.S. App. LEXIS 13583 (8th Cir. Mo. July 27, 2017)

Two police officers went to a tattoo shop to look for a person of interest in an unrelated case. When the officers entered the shop no one was at the reception desk, but a customer was sitting in the common area. The officers rang a bell on the desk; however, no one answered. The customer told the officers that he was waiting while Lewis drew him a tattoo in the back of the shop. Behind the reception desk was an open doorway, with no door, that led to a work area with individual stations for tattooing customers. There were no signs telling people to stay out of the work area. The officers knocked on the doorframe for two to three minutes, identifying themselves, and asking if anyone was there. After receiving no response, the officers entered the work area and knocked on a closed door to a back room. Lewis answered the door and agreed to speak to the officers in the work area. At some point, one of the officers saw a handgun in a holster on a shelf in the work area. The officer grabbed the gun, removed it from the holster, and checked to see if it was loaded. Lewis then told the officers that he was a felon and did not need any "hassles." The officers did not know Lewis was a felon until he told them. The officers told Lewis they would keep the handgun and eventually left with it. In a subsequent interview, Lewis told the officers that he received the gun from a customer a year or two earlier.

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

Lewis filed a motion to suppress the handgun. First, Lewis argued that the officers violated the Fourth Amendment by entering the work area, which was not open to the public, without a warrant.

A government agent may enter a business in the same manner as a private person and an employee has no reasonable expectation of privacy in areas of the business where the public is invited to enter and transact business. While the work area in this case was not open to the public, as customers were welcome into the work area only if invited by an employee, that fact alone does not determine whether Lewis had an objectively reasonable expectation of privacy in the work area. Even if the public were not invited into the work area, Lewis' expectation of privacy would not be reasonable if he expected the public to enter the work area anyway.

In this case, when the officers entered the shop they found an unattended reception desk with a call bell. The officers first tried to get an employee's attention by ringing the bell and knocking on the doorframe to the work area. When that failed, the officers walked into the work area to knock on the door to the back room. The court concluded that a reasonable employee would expect members of the public to enter the work area as the officers did here. As a result, the court held that Lewis had no reasonable expectation of privacy in the work area.

Next, Lewis argued that the warrantless seizure of the handgun violated the Fourth Amendment.

The court agreed. When the officer grabbed the gun from the shelf, he did not have probable cause to associate it with a crime, as Lewis admitted to being a convicted felon after the officer had seized the gun. Because the incriminating nature of the gun was not immediately apparent when the officer seized it from the shelf, the seizure of the gun did not fall within the plain-view exception.

In addition, the court held that the officer's warrantless seizure of the gun was not justified by safety concerns. A police officer who discovers a weapon in plain view may temporarily seize that weapon if a reasonable officer would believe based on specific and articulable facts, that the weapon poses an immediate threat to the officer or public safety. In this case, however, the court found that the officer's seizure of the gun was not justified because the officers did not suspect Lewis or the customer of wrongdoing, nor did Lewis or the customer behave in a manner that suggested that they posed a threat to the officers or anyone else.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-3308/16-3308-2017-07-27.pdf?ts=1501169446>

Ninth Circuit

United States v. Zapien, 861 F.3d 971 (9th Cir. Ariz. July 3, 2017)

Zapien was arrested and transported to the local jail on drug-related charges. An officer read Zapien his Miranda rights, which Zapien stated that he understood, and agreed to speak to the officer without an attorney being present. During the interview, Zapien explicitly invoked his right to counsel and all questioning about drug trafficking stopped.

After Zapien invoked his right to counsel, the officer asked Zapien certain biographical information such as his name, birthdate, address, as well as the names of his wife, parents, and children. The officer told Zapien that he needed this information to fill out the DEA Form 202 and that he was not going to ask Zapien anything about the case. At some point while giving the officer answers to the officer's biographical questions, Zapien told the officer that he wanted to give the officer a statement regarding drug trafficking. The officer reminded Zapien of his constitutional rights and told Zapien that he did not want to question him because of Zapien's previous request for an attorney. Zapien told the officer he understood his rights, and that he wanted to waive them and talk to the officer without an attorney. Zapien then made incriminating statements to the officer.

Prior to trial, Zapien filed a motion to suppress his statements, arguing that the officer violated Miranda by questioning him after he invoked his right to counsel.

The court disagreed. When a person invokes his right to counsel during a custodial interrogation, officers must stop their interrogation. The term "interrogation" means any words or actions that the police should know are reasonably likely to elicit an incriminating response. However, under the booking exception to Miranda, questions that require a person to provide biographical information such as identity, age, and address, usually do not constitute "interrogation." In addition, the booking exception can apply even after a person has invoked his right to counsel.

Here, the court concluded that the officer's questions, after Zapien invoked his right to counsel,

did not constitute “interrogation” because they were not reasonably likely to elicit Zapien’s incriminating response. The court found that the biographical questions did not reference the crime for which Zapien had been arrested. In addition, the officer testified that he regularly asks DEA Form 202 questions to gather emergency contact information to provide to the Marshals.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca9/14-10224/14-10224-2017-07-03.pdf?ts=1499101318>

Tenth Circuit

United States v. Workman, 2017 U.S. App. LEXIS 13131 (10th Cir. Colo. July 21, 2017)

In September 2014, the Federal Bureau of Investigation (FBI) began investigating an internet forum for sharing child pornography hosted on the Tor¹ network called “Playpen,” which had more than 150,000 registered accounts. In January 2015, FBI agents gained access to Playpen servers and relocated the website content to servers in a secure government facility in the Eastern District of Virginia. The agents assumed administrative control of the site. Although FBI investigators could monitor Playpen traffic, it could not determine who was accessing Playpen because of the Tor encryption technology.

In February 2015, the FBI applied for a warrant in the Eastern District of Virginia to search computers that accessed Playpen by using a Network Investigative Technique (NIT). The warrant described the application of the NIT, which sent computer code to Playpen users’ computers that instructed the computers to transmit certain information back to the government. The information sent to the government included the computer’s Internet Protocol (IP) address, operating system information, operating system username, and its Media Access Control (MAC) address, which is a unique number assigned to each network modem. Although Playpen was hosted in the Eastern District of Virginia, the warrant explained that, “the NIT may cause [a defendant’s] computer--wherever located--to send to a computer controlled by or known to the government, network level messages containing information that may assist in identifying the computer.” A United States magistrate judge signed the warrant, and the FBI began collecting the personal data of Playpen users.

During the warrant period, Workman accessed Playpen and the FBI located him in Colorado through information from the NIT. The FBI subsequently obtained a warrant in the District of Colorado to search Workman’s computer. When the FBI executed the warrant, agents found Workman at home in the act of downloading child pornography onto his computer.

The government charged Workman with receiving and possessing child pornography.

Workman filed a motion to suppress the evidence obtained through the NIT.

The district court suppressed the evidence obtained through the NIT, holding that the magistrate judge in the Eastern District of Virginia exceeded her statutory authority by issuing the NIT warrant beyond her district court’s jurisdictional boundaries. The government appealed.

¹ The Onion Router (“Tor”) network exists to provide anonymity to Internet users by masking user data, hiding information by funneling it through a series of interconnected computers.

Even if the magistrate judge in the Eastern District of Virginia lacked the authority to issue the warrant to search Workman's computer², the Tenth Circuit Court of Appeals held that the good-faith exception to the exclusionary rule applied. In this case, the court found that the agents executing the warrant could reasonably rely on the magistrate judge's authority to issue a warrant authorizing installation of software and retrieval of information in the Eastern District of Virginia. The court added that if the agents executing the search warrant had "sophisticated legal training, they might have recognized the geographic constraints that had escaped the notice of the magistrate judge."

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/16-1401/16-1401-2017-07-21.pdf?ts=1500654692>

United States v. Williston, 862 F.3d 1023 (10th Cir. Okla. July 5, 2017)

An FBI agent served a grand jury subpoena on Williston in the county jail. Williston was being held in the jail on state charges unrelated to the crime that the federal grand jury was investigating. The agent also gave Williston a target letter, which informed Williston that he was the target of a federal grand jury murder investigation concerning the death of Payton Cockrell, his girlfriend's two-and-a-half-year-old daughter. The target letter also advised Williston that he could "refuse to answer any question if a truthful answer to the question would tend to incriminate you." The agent read the target letter verbatim to Williston and reiterated that Williston was the target of the investigation.

Approximately one week later, while still incarcerated, Williston appeared before the grand jury. Before the prosecutor asked Williston any questions, he confirmed on the record that Williston had received and understood the target letter. The prosecutor then reviewed the target letter with Williston, again advising Williston that he could "refuse to answer questions if a truthful answer to the question would tend to incriminate you." The prosecutor also told Williston that he had the right to counsel. After Williston indicated that he understood his rights, the prosecutor asked substantive questions related to the death of Payton Cockrell. Williston then gave his account of Cockrell's death.

Six months after Williston's testimony, the grand jury indicted him for Cockrell's murder. Williston filed a motion to suppress his grand jury testimony, some of which was introduced against him at trial.

In U.S. v. Mandujano, the Supreme Court held that grand jury witnesses are not "in custody" while testifying, and that grand jury questioning is not "interrogation;" therefore, Miranda warnings are not required. However, Williston claimed that because he was incarcerated on unrelated criminal charges, he was not merely a grand jury witness, but a person in custody being interrogated. As a result, Williston argued that the government violated his Fifth Amendment right against self-incrimination by not providing him a Miranda warning before his grand jury testimony.

² On December 1, 2016, *Federal Rule of Criminal Procedure 41(b)(6)* was added to provide an exception to the magistrate's jurisdictional limitation by allowing warrants for programs like the NIT. See https://www.law.cornell.edu/rules/frcrmp/rule_41.

The court disagreed. The court held that the rule in Mandujano, which made Miranda inapplicable to grand jury witnesses, extends to persons who are incarcerated for unrelated reasons when they are subpoenaed to appear before a grand jury.

The Fifth Amendment provides that, “No person . . . shall be compelled in any criminal case to be a witness against himself” The court noted that this protection limits a grand jury’s authority to investigate criminal matters and that the government’s treatment of Williston during its investigation of Cockrell’s murder more than complied with this protection. First, government representatives told Williston three times that he could refuse to answer any grand jury question if he felt the answer would incriminate him. Second, the target letter, which the FBI agent read to Williston verbatim, informed Williston that he could “refuse to answer any question if a truthful answer to the question would tend to incriminate you.” Finally, the prosecutor reviewed the target letter with Williston on the record before Williston’s grand jury testimony and advised Williston that he could refuse to answer any question if the truthful answer would incriminate him. The court added that a full Miranda warning requirement would be contrary to the Supreme Court’s holding in Mandujano that grand jury witnesses are not in custody while testifying, and that grand jury questioning is not interrogation.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca10/15-7080/15-7080-2017-07-05.pdf?ts=1499276021>

United States v. McNeal, 862 F.3d 1057 (10th Cir. Colo. July 10, 2017)

Ann McNeal was arrested for obstructing police officers during a confrontation with officers who were arresting her son, Phinehas, for shoplifting items from a sporting-goods store. At the police station, the officers obtained information that caused them to believe that McNeal had previously purchased a pistol, which she later gave to Phinehas, who was a convicted felon.

An officer advised McNeal of her Miranda rights and then questioned her about unlawfully purchasing a firearm for her son. McNeal admitted that she had purchased a pistol, but denied that she had given it to her son. Suspecting that McNeal was covering for her son, the officer stepped out of the room and returned a few minutes later with his sergeant. The sergeant told McNeal that she was “doing the right thing” by talking to the officer, but that she could be charged with a felony, attempting to influence a public official, if she tried “to take the fall for her son.” McNeal eventually admitted that she had purchased the pistol for Phinehas and that he had access to it.

The government charged McNeal under *18 U.S.C. § 922(d)(1)* for disposing of a firearm to a convicted felon.

McNeal filed a motion to suppress her statements to the officer. McNeal argued that the sergeant improperly coerced her to make incriminating statements by threatening her with a felony prosecution if she did not make truthful statements to the interviewing officer.

The court noted that to establish that a suspect’s statements were coerced, the suspect must show that he was subject to threats of “illegitimate action.” The court added that it is not per se coercion when an officer presents a suspect with correct information from which the suspect can make a

reasoned decision.¹ Because McNeal did not dispute that she could have been charged with a felony if she lied to the interviewing officer, the court held the sergeant's truthful statements to McNeal about facing felony charges, if she lied, did not constitute coercion.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/16-1054/16-1054-2017-07-10.pdf?ts=1499707895>

United States v. Yepa, 862 F.3d 1252 (10th Cir. N.M. July 17, 2017)

Officers arrested Yepa for murder and advised him of his Miranda rights. After Yepa told the officers that he wanted a lawyer, the officers transported him to the police station. In the meantime, other officers obtained a warrant to search Yepa's house and his body. The warrant authorized officers to photograph the defendant, seize his clothing for analysis, take a blood sample, and swab areas of his body for DNA analysis. While officers photographed Yepa and performed the other task authorized by the warrant, Yepa made several incriminating statements.

Prior to trial, Yepa filed a motion to suppress his statements. Yepa argued that during the search of his body, the officers unlawfully interrogated him after he had invoked his right to counsel.

First, the court noted that when an individual who is subjected to custodial police interrogation requests an attorney, the interrogation must stop until an attorney is present. However, the court recognized that not every exchange between police officers and that individual constitutes "interrogation."

Against this backdrop, the court first held that the search of Yepa's body was not "interrogation." Second, the court found that the officers were focused on executing the warrant and did nothing to "draw out" Yepa regarding the death of the victim. Third, the court held that Yepa's statements were spontaneous, not the result of police interrogation. The court further held that the only questions the officers asked Yepa during this time were to clarify spontaneous statements he made.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/16-2060/16-2060-2017-07-17.pdf?ts=1500312710>

United States v. Pickel, 863 F.3d 1240 (10th Cir. Kan. July 18, 2017)

Police officers in Kansas developed probable cause to believe that Pickel was involved in a drug distribution network that obtained marijuana in California and distributed it in Kansas. While following Pickel's truck on Interstate 80, Kansas officers realized that Pickel deviated from the route they expected him to take. As a result, as it began to get dark, the Kansas officers became worried that they would lose sight of Pickel's truck, so they requested the Nebraska Highway Patrol to stop Pickel based on independent suspicion to avoid revealing the ongoing drug investigation. When a Nebraska state trooper saw Pickel commit a traffic violation, he conducted a traffic stop. During the stop, another officer walked his drug-sniffing dog around Pickel's truck. After the dog alerted to the presence of drugs, the Nebraska officers searched Pickel's truck and found 37 pounds of marijuana hidden in a false fuel tank.

¹ The 4th, 5th, 8th, 9th, 10th, and 11th circuits have similarly held that officers' truthful statements to suspects about the potential consequences of making false statements to law enforcement officers during interviews does not constitute coercive police conduct.

The government charged Pickel with two drug-related offenses.

Pickel filed a motion to suppress the evidence seized from his truck, arguing that the warrantless search of his truck violated the Fourth Amendment.

The court disagreed. Police officers may stop and search a vehicle without a warrant under the automobile exception to the Fourth Amendment's warrant requirement if they have probable cause to believe the vehicle is carrying contraband or other evidence that is subject to seizure under the law.

First, the court held that the Kansas police officers developed probable cause to believe that Pickel was transporting marijuana in his truck based on information obtained from monitored telephone calls and their surveillance of Pickel's truck.

The court further held that the probable cause developed by the Kansas police officers was imputed to the Nebraska state trooper under the collective knowledge doctrine. The collective knowledge doctrine provides that an officer who makes a stop or conducts a search does not need to be the one who developed the reasonable suspicion or probable cause. Instead, the reasonable suspicion or probable cause developed by another officer is imputed to the officer conducting the stop or search. In this case, when the Kansas police officers requested the Nebraska Highway Patrol to stop Pickel, the Kansas officers had probable cause to stop and search his truck. Consequently, the Kansas officers' request imputed that probable cause to the Nebraska Highway Patrol officer under the collective knowledge doctrine; therefore, the court held that the Nebraska trooper's search of Pickel's truck did not violate the Fourth Amendment.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/16-3041/16-3041-2017-07-18.pdf?ts=1500395478>

United States v. Windom, 863 F.3d 1322 (10th Cir. Colo. July 24, 2017)

At approximately 12:00 a.m., an employee of a bar called the police department and reported that a man had flashed a gun to other patrons and claimed to be a Crips gang member. The employee then stated the man had walked out of the bar and driven away in a blue Cadillac.

Police officers responding to the call saw a blue Cadillac in the vicinity of the bar and conducted a high-risk stop, in which the officers ordered the occupants out of the Cadillac at gunpoint. When Windom exited the car, the officers noticed that he fit the description of the suspect from the bar. An officer frisked Windom and found a revolver in his pocket. The officer seized the revolver and arrested Windom for disorderly conduct based on his actions at the bar.

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

Windom filed a motion to suppress the firearm. While Windom conceded that the officers had reasonable suspicion to support the stop, he argued that the stop was transformed into an unlawful arrest without probable cause when the officers drew their weapons and ordered him out of the car at gunpoint.

The court disagreed. The court commented that the use of guns does not automatically turn a Terry stop into an arrest. Instead, the court noted that the use of guns in connection with a Terry stop is "permissible where the police reasonably believe that they are necessary for their

protection.” In this case, the court found that the officers conducted a Terry stop in a high-crime area, around midnight, after receiving a tip that an occupant of the Cadillac had flashed a firearm in public while claiming membership in a notoriously dangerous street gang. Under those circumstances, the court concluded that it was reasonable for the officers to believe that Windom might be armed and dangerous. Consequently, the court concluded that ordering Windom out of the Cadillac at gunpoint was reasonable and did not transform a Terry stop into a de facto arrest, which would have required probable cause.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca10/16-1027/16-1027-2017-07-24.pdf?ts=1500924683>

District of Columbia Circuit

United States v. Eshetu, 863 F.3d 946 (D.C. Cir. July 25, 2017)

Eshetu and two other men met with undercover police officers and formulated a plan to rob a storage unit that was being used as a drug “stash house.” Prior to the robbery, Eshetu and the other men told the officers that they had access to weapons, stating that they would be armed with firearms and a machete for the robbery.

The day of the robbery, Eshetu and the other men arrived at the storage unit in a Kia where they met the officers, who had arrived in a different vehicle. When asked about placing their weapons in the officers’ vehicle, the men stated they planned to leave their weapons in the trunk of the Kia because they might need to use two vehicles in the robbery. A short time later, the officers arrested Eshetu and the other men, disclosing that the “stash house” was fictitious.

After the arrests, an officer drove the Kia to the police stations, searched the passenger compartment, and seized a bag and some black clothing. The Kia was later driven to another law enforcement facility where it was secured until a warrant could be obtained for a more thorough search.

Eshetu filed a motion to suppress the evidence seized by the officer pursuant to his warrantless search of the Kia.

The court held that the warrantless search was lawful under the automobile exception to the Fourth Amendment’s warrant requirement. Officers may conduct a warrantless search under this exception when the automobile is “readily mobile,” and the officers have probable cause to believe that it contains contraband.

For an automobile to be “readily mobile,” it must be readily capable of being driven. Here, the court concluded that the Kia was “readily mobile,” as Eshetu and the other men had driven the Kia to previous meetings with the undercover officers, and then drove the Kia to the storage facility on the day of the planned robbery.

The court then held that the officers had probable cause to search the Kia for weapons. First, Eshetu and the other men made it clear to the officers in previous meetings that they were going to be armed on the day of the robbery. Second, on the day of the robbery, the men told the officers that they planned to leave their weapons in the Kia.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/cadc/15-3020/15-3020-2017-07-25.pdf?ts=1500993102>
