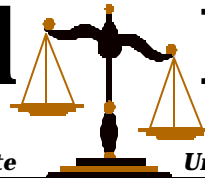




# CJI Legal Briefs



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## ARREST LAW

In *Holland v. Harrington*, CA10, No. 99-1373, 10/19/01, a civil rights action was filed alleging the La Plata County Sheriff’s Department SWAT Team used excessive force in violation of the Fourth Amendment’s guarantee that persons be free from unreasonable searches and seizures. While the Tenth Circuit Court of Appeals found that members of the Sheriff’s Department were entitled to qualified immunity on the decision to utilize the SWAT Team, the Court had difficulty with other aspects of the case.

### Seizure of Person

On April 14, 1996, at approximately 2:00 A.M., an altercation occurred outside Virginia’s Steakhouse, a restaurant located in La Plata County, Colorado. According to the victims and some witnesses, several men assaulted a group of patrons, throwing them to the ground where they were kicked and beaten, often by several men at once. During their investigation of the incident, officers of the La Plata County Sheriff’s Department learned the names of several suspects, including Samuel “Sammy” Allen Heflin. The Sheriff’s Department obtained a warrant for Heflin’s arrest on misdemeanor assault and reckless endangerment charges. They also obtained a warrant to search his residence and other buildings located on his property to search for a black cowboy hat, Marlboro cigarette packages, a bloody shirt, restaurant receipts, and other items believed to be evidence tying Heflin and others to the assaults. The search warrant authorized a search “at any time, day or night,” but did not contain language authorizing a “no knock” entry.

Several hours beforehand, Sheriff Duke Schirard authorized the use of the SWAT Team, which was comprised of ten deputy sheriffs led by Lieutenant Kelly Davis, to serve the warrants on the evening of April 16, 1996. Undersheriff Robin Harrington accompanied Sheriff Schirard to the Heflin residence, bringing with her copies of the warrants.

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At approximately 8:30 P.M., the SWAT Team executed the warrants. Seven SWAT Team members, who were dressed in green camouflage with no identifying markings and hoods that showed only their eyes, approached the residence along with Lieutenant Davis. Three uniformed deputies were also present.

Randy Joe Holland, 18, Marty Shane Holland, 8, and Ray Walker, 24, were playing basketball in the driveway. Three SWAT Team deputies approached rapidly, brandishing weapons. One of them pointed his weapon at the three young men, ordered them to lie face down on the ground, and continued pointing his weapon at them as they lay there.

Three SWAT deputies next encountered Anthony “Scotty” Holland, 14, near the bunkhouse and, at gunpoint, ordered him to lie on the ground. He was kept in a prone position for nearly 10 minutes.

Also outdoors when the SWAT Team arrived was four-year-old Shelby Paige Holland, who upon seeing the armed deputies in their combat costumes, ran screaming into the residence pursued by SWAT deputies. According to the plaintiffs, one SWAT deputy pursued the child inside the house while aiming his laser-sighted weapon on the child’s back as evidenced by the tell-tale glowing red dot.

The SWAT deputies then entered the residence, but it remains in dispute whether they knocked and announced their presence or in any way identified themselves as law enforcement

officers. At the time that the SWAT Team entered, there were five persons inside: “Sammy” Heflin and his wife Tonie were seated at the dining room table; Kristi Holland Dane was in the kitchen; and Tessa Sliter (Shelby Holland’s mother) and Helen Kennedy were in a back bedroom.

SWAT deputies ordered Sammy Heflin, Tonie Heflin, and Kristi Dane at gunpoint to lie face down on the living room floor. SWAT deputies also followed Shelby Holland into the back bedroom and held Tessa Sliter and Helen Kennedy at gunpoint, moving them from the back bedroom into the living room.

All persons found outdoors or inside the residence were held in the living room by SWAT deputies until a “wants and warrants” check was completed on each one. Meanwhile, the deputies conducted a search of the Heflin property. When the check was completed, the deputies told them they could leave, with the exception of Sammy Heflin, who was placed under arrest pursuant to the warrant. Everyone else then left the residence and went to the home of Mike Beatty (Tonie Heflin’s brother).

Several empty packs of Marlboro Light cigarettes were found in vehicles on the Heflin property, but no bloody clothing was discovered. Plaintiffs allege that nothing found at the Heflin residence on April 16 was offered as evidence at the subsequent trial of Sammy Heflin. Sammy Heflin was acquitted of the misdemeanor charges.

In a lengthy opinion, the Tenth Circuit Court of Appeals discussed

several aspects of the law and the application of the law to the facts of this case. The Court concluded that the initial decision to use the SWAT Team was reasonable but was clearly concerned about some of the other conduct incident to the deployment of the team.

**Supervisory Liability**

Lieutenant Davis was supervisor of the SWAT Team and was present at the scene throughout the April 16th raid. He may be held liable for the alleged unconstitutional acts of his subordinates if plaintiffs demonstrate an “affirmative link” through facts showing that he actively participated or acquiesced in the constitutional violation. See *Winters v. Board of County Comm’rs*, 4 F.3d 848, 855 (10th Cir. 1993) [citing *Rizzo v. Goode*, 423 U.S. 362 (1976)]; *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990).

**Whether Individuals Not Arrested Were Seized Within the Meaning of the Fourth Amendment**

Violation of the Fourth Amendment requires an intentional acquisition of physical control. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). One need not be the target of a search or be the person named in an arrest warrant to be “seized” within the meaning of the Fourth Amendment. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful. Thus, each of the plaintiffs was “seized” during the April 16th raid if there is a governmental termination of their

freedom of movement through means intentionally applied, regardless of whether he or she was the subject of an arrest warrant or was ultimately placed under arrest.

The Court was satisfied that the uncontroverted facts before the district court show that each of the plaintiffs was “seized” within the meaning of the Fourth Amendment during the April 16th raid. Physical force was intentionally applied by the Sheriff’s Department SWAT Team, and each of the plaintiffs submitted to that show of authority until Lieutenant Davis informed them that they were free to leave.

#### **Decision to Utilize SWAT Team**

When a plaintiff claims that the use of a SWAT Team to effect a seizure itself amounted to excessive force, a court reviews the decision to use that degree of force by balancing the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. *Tennessee v. Garner*, 471 U.S. 1 (1985).

In this case, Schirard, Harrington, and Davis assert that several considerations counseled in favor of deploying the SWAT Team to execute the Heflin warrants. The situation at plaintiff Sammy Heflin’s compound that day was potentially very dangerous to all parties on the scene, officers and civilians alike. Members of the SWAT Team knew there would probably be children there and were concerned about their safety. They knew that plaintiff Sammy Heflin had a history of violence and

that several other individuals who resided in the 60-acre compound had histories of criminal violence. The SWAT Team was unsure of the total number of adults who resided at the compound but suspected there were as many as seven or eight. The SWAT Team suspected there would be firearms in the residence. Their goal was to effect the arrest and search warrant quickly, without injury, and to preserve evidence. The SWAT Team was successful—no shots were fired, and no one was injured. The plaintiffs strongly dispute the accuracy of this characterization of the facts, pointing out that the raid involved a misdemeanor warrant, that the officers “knew that Sam Heflin had no criminal record, and that none of the suspects lived at the Heflin home.” Furthermore, the officers “had no reason to believe that anyone they believed lived at the Heflin home would physically resist arrest” or “to believe that Sam Heflin would physically resist arrest. In fact, they knew him to be cooperative in his previous dealings with them to the point of being ‘polite.’” They argue that the decision to use the SWAT Team was made—in Undersheriff Robin Harrington’s words—to “teach this piece of sh\*\* a lesson.”

Although viewed most favorably to those claiming injury, the facts alleged by plaintiffs nevertheless do not show that, by itself, the display of force inherent in the deployment of the SWAT team—the force invoked by the *decision* to deploy—was excessive under Fourth Amendment standards. Nor can it fairly be said that Schirard, Harrington, and Davis lacked any plausible basis for

believing that “dynamic entry” was warranted in this situation. As they had anticipated, the deputies executing the warrants encountered several persons besides Sam Heflin both inside and outside the house on the Heflin property, and firearms were found at the residence. There existed the possibility of an altercation, but given the SWAT team’s swift action, no such incident actually occurred. In hindsight, plaintiffs argue that an altercation was highly unlikely to occur, but the Court is not prepared to conclude that the sheriff’s concerns prior to the April 16th raid were so unwarranted as to render “dynamic entry” by itself an excessive use of force.

#### **Pointing Weapons at Minors**

The sheriff deployed the SWAT Team on April 16 to conduct a search and to arrest one individual at a residence pursuant to lawful warrants. The officers knew in advance that other persons, including children, would be present. In conducting the search and effecting the seizure of Sammy Heflin, the SWAT deputies held each of the plaintiffs at gunpoint, initially forcing several of them to lie down on the ground for ten to fifteen minutes, and ultimately gathering all of them in the living room of the residence where they were held until all but Sammy Heflin were released.

The district court acknowledged that “the right to arrest an individual carries with it the right to use some physical coercion to effect the arrest” and that it is “not unreasonable for officers to carry weapons or to take control of a

situation by displaying their weapons.” *Thompson v. City of Lawrence, Kansas*, 58 F.3d 1511, 1516 (10th Cir. 1995). However, the district court concluded that “the undisputed testimony that the SWAT team pointed weapons at young children during the entry” raised a triable issue as to reasonableness and denied the defendants’ motion for summary judgment.

Taken in the light most favorable to the plaintiffs, the alleged facts concerning the pointing of firearms at the child bystanders found at the Heflin residence on April 16, 1996, show the officers’ conduct creates an issue on whether or not they violated a constitutional right. While the SWAT Team’s initial show of force may have been reasonable under the circumstances, continuing to hold the children directly at gunpoint after the officers had gained complete control of the situation outside the residence was not justified under the circumstances at that point. This rendered the seizure of the children unreasonable.

#### **Failure to Knock and Announce**

Whether the SWAT deputies announced their identity before entering the Heflin residence on April 16 remains in genuine dispute. The witnesses recall events differently, and a jury would have to decide whose testimony is to be believed. Even where issues of material fact exist, however, an appellate court will review the legal question of whether a defendant’s conduct, as alleged by the plaintiff, violates clearly established law.

Taking the facts alleged by plaintiffs as true and considering the totality of the circumstances thus alleged, those facts show a violation of clearly established constitutional rights. *See Wilson v. Arkansas*, 514 U.S. 927, 936 (1995). Though the Fourth Amendment “should not be read to mandate a rigid rule of announcement,” *Wilson* squarely holds that “an officer’s unannounced entry into a home might be unreasonable under the Fourth Amendment,” at least absent a sufficient showing of countervailing law enforcement interests.

The genuine factual dispute concerning whether the officers announced their presence as they entered the Heflin residence has a direct bearing upon the Fourth Amendment reasonableness of the ensuing search. Other alleged facts, such as the officers’ demeanor, bear upon Fourth Amendment reasonableness as well.

#### **Harsh Language**

The district court rejected the plaintiffs’ claim that the SWAT deputies’ use of foul and abusive language during the April 16th raid violated their Fourth Amendment rights. This allegation, too, may not be treated in isolation from the totality of the circumstances.

Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment. *Graham v. Conner*, 490 U.S. at 386 (1989). However, pushes and shoves, like other police conduct, must be judged under the Fourth Amendment standard of reasonableness. The whole course of

conduct of an officer in making an arrest or other seizure—including verbal exchanges with a subject—must be evaluated for Fourth Amendment reasonableness in light of the totality of the circumstances.

Of course, in conducting a search or making a seizure, “the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.” *Michigan v. Summers*, 452 U.S. 692, 702 (1981). Simple instructions spoken in a firm, commanding tone of voice communicate clearly what an officer wants a subject to do and likely would be most effective, particularly in dealing with bystanders and children.

In contrast, expletives communicate very little of substance beyond the officer’s own personal animosity, hostility, or belligerence. Such animus would be entirely misplaced in dealing with bystanders or children, particularly where they have offered no resistance to the officers’ initial show of force.

One can be firm and direct without being foul and abusive.

#### **Violation Of Fourth Amendment Rights**

Outfitting sheriff’s deputies in hooded combat fatigues, arming them with laser-sighted weapons, and ordering them to conduct the “dynamic entry” of a private home does not exempt their conduct from Fourth Amendment standards of reasonableness. The “SWAT” designation does not grant license to law enforcement officers to abuse suspects or bystanders or to

vent in an unprofessional manner their own pent-up aggression, personal frustration, or animosity toward others.

If anything, the special circumstances and greater risks that warrant “dynamic entry” by a SWAT team call for *more* discipline, control, mindfulness, and restraint on the part of law enforcement, *not less*. SWAT officers are specially trained and equipped to deal with a variety of difficult situations, including those requiring a swift and overwhelming show of force. At all times, SWAT officers—dressed in camouflage or not—must keep it clearly in mind that we are *not* at war with our own people. Nor does the fact that none of the plaintiffs suffered physical injury during the raid foreclose a finding of excessive force.

in Des Moines in the early morning hours of March 28, 1998. Officers Peak and McBride were dispatched to the residence. Upon arrival, they encountered a young woman who appeared to be injured. She told them that the two males who assaulted her had fled to the apartment on the top floor of the building. After proceeding to the

the officers clearly violated any of Clark’s established rights; therefore, the officers were entitled to qualified immunity. The court also dismissed Sinclair’s claims based on negligence, negligence per se, and assault and battery on the merits. Summary judgment was granted to the City because summary judgment had been granted to the officers.

The district court properly granted summary judgment to the officers after considering the qualified immunity question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? See *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001) (holding that in excessive force cases, the question of qualified immunity must be the initial inquiry and, in resolving this question, the

“...the special circumstances and greater risks that warrant “dynamic entry” by a SWAT team call for *more* discipline, control, mindfulness, and restraint on the part of law enforcement, *not less*.”

**CIVIL LIABILITY –  
Deadly Force**

In *Sinclair v. City of Des Moines*, CA8, No. 01-1050, 10/11/01, Mary Elaine (Kirsch) Sinclair, as administrator of the estate of Adam Lawrence Clark, brought a 42 U.S.C. § 1983 action against the City of Des Moines and two police officers, Michael McBride and Timothy Peak, based on an alleged use of excessive force. Sinclair contends that Officers Peak and McBride shot and killed her son in violation of the Fourth Amendment during a routine investigation of a reported assault and battery.

The undisputed facts show that a possible altercation or fight occurred at a specified residence

apartment, the officers claim they announced their presence and, for their safety, covered the peephole so the occupants of the apartment could not see them. Officer Peak testified that when the door opened, he saw Clark holding what he believed to be a long barrel rifle. Officer Peak fired four times at Clark. Three bullets hit Clark, and he was killed. Officer McBride did not fire his gun, although he stated in his deposition that he would have fired if the opportunity had arisen and had Peak not been between Clark and him.

The district court granted the individual officers’ motions for summary judgment because Sinclair failed to demonstrate that

district court must specifically consider the facts alleged). Here the district court properly concluded that no constitutional or statutory right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon. As the Supreme Court has explicitly said, use of deadly force is permissible when the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, (1985). Accordingly, the district court did not err.

Because the police officers are absolved of liability, the City cannot

be held liable for their actions. See *Veneklase v. City of Fargo*, 248 F.3d 738, 748 (8th Cir. 2001) (en banc). See also *Olinger v. Larson*, 134 F.3d 1362, 1367 (8th Cir. 1998) (The City cannot be liable... whether on a failure to train theory or a municipal custom or policy theory, unless an officer is found liable on the underlying substantive claim. [quoting *Abbott v. City of Crocker*, 30 F.3d 994, 998 (8th Cir. 1994)]). The district court did not err in granting summary judgment for the City.

It has been further concluded that the district court did not err in dismissing Sinclair's negligence, negligence per se, and assault claims against the officers on the merits. There is nothing in the record to support the contention that Officer McBride caused Clark's death. Officer McBride did not fire the gun nor did any of his actions lead to Clark's death. With regard to Officer Peak, the record indicates that reasonable jurors would conclude that Officer Peak acted as a reasonable, prudent officer under the circumstances that faced him as Clark opened the door to the apartment with a weapon in his hands. See *Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000) (citing *Tennessee v. Garner*, 471 U.S. at 3). For the foregoing reasons, the Eighth Circuit Court of Appeals affirmed the district court's grant of summary judgment to officers Michael McBride, Timothy Peak, and the City of Des Moines.



**CIVIL LIABILITY –  
Deputies in Courtroom  
Have Qualified and not  
Absolute Immunity**

In *Richman v. Sheahan*, CA7, No. 00-2173, 10/16/01, Marcella Richman appeared in the Circuit Court of Cook County, Illinois, to challenge a traffic citation. She was accompanied by her son, Jack Richman, who planned to testify as a witness. The Richmans waited in the courtroom for several hours before their case was called and then the judge continued the hearing to a future date. The Richmans attempted to ask a question, but the judge quieted them and when Jack continued to speak, the judge ordered him restrained. Two Cook County sheriff's deputies began to take him into custody, and twelve more deputies then entered the courtroom. According to the complaint, the fourteen deputies attacked Jack, forced him to the floor, sat on and handcuffed him. Jack, who was physically disabled and required the use of a cane, did not resist the deputies' attempt to restrain him, nor did his mother, who was restrained by four other deputies. While Jack was handcuffed and on the floor, he emptied his bladder and bowels, and he appeared to have stopped breathing. Paramedics rendered emergency assistance at the scene and then transported him to a hospital, where he was pronounced dead.

The deputies involved argued that the rule of qualified immunity does not apply in this case because they were required to execute the judge's order, and that quasi-judicial immunity, a form of absolute

immunity derived from judicial immunity, is appropriate for officers providing courtroom security.

The Seventh Circuit disagreed stating that a secure courtroom is necessary to protect the judicial function from interference or intimidation. This function is adequately protected by immunizing a judge's order to restrain a person and by barring lawsuits that challenge a judge's decision through claims aimed at officers who do nothing more than implement it. It is not necessary to the judicial function, in our judgment, to also deny a remedy to plaintiffs who were harmed, not by the judge's order, but by alleged unlawful conduct by those who enforce it.

**CIVIL LIABILITY –  
Officer Not Entitled  
to Qualified Immunity  
in Alleged Unprovoked  
Killing of a Dog**

In *Brown v. Muhlenberg Township*, CA3, No. 00-1846, 10/11/01, the Browns lived in a residential section of Reading, Pennsylvania. On the morning of April 28, 1998, they were in the process of moving. Kim was upstairs packing, while David was loading the car. Immi, their three-year-old Rottweiler pet, had been placed in the Browns' fenced yard. Although the Browns had not secured a dog license for her, Immi wore a bright pink, one-inch wide collar with many tags: her rabies tag, her microchip tag, a guardian angel tag, an identification tag with the Browns' address and telephone number, and the Browns' prior Rottweiler's lifetime license.

Unbeknownst to the Browns, the latch on the back gate of their fence had failed, and Immi had wandered into the adjacent parking lot beyond the fence.

A stranger parked in the lot observed Immi as she wandered about in it. After three or four minutes of sniffing and casually walking near the fence, Immi approached the sidewalk along the street on which the Browns lived. As she reached the curb, Officer Eberly was passing in his patrol car. Seeing Immi, he pulled over, parked across the street, and approached her. He clapped his hands and called to her. Immi barked several times and then withdrew, circling around a vehicle in the parking lot that was approximately twenty feet from the curb. Having crossed the street and entered the parking lot, Officer Eberly walked to a position ten to twelve feet from Immi. Immi was stationary and not growling or barking. According to the stranger observing from his car, Immi “did not display any aggressive behavior towards Officer Eberly and never tried to attack him.”

At this point, Kim Brown looked out of an open, screened window of her house. She saw Officer Eberly not more than fifty feet away. He and Immi were facing one another. Officer Eberly reached for his gun. Kim screamed as loudly as she could, “That’s my dog, don’t shoot!” Her husband heard her and came running from the back of the house. Officer Eberly hesitated a few seconds and then pointed his gun at Immi. Kim tried to break through the window’s screen and screamed, “No!”

Officer Eberly then fired five shots at Immi. Immi fell to the

ground immediately after the first shot, and Officer Eberly continued firing as she tried to crawl away. One bullet entered Immi’s right mid-neck region; three or four bullets entered Immi’s hind end.

Immi had lived with the Browns’ pre-school-aged children for most of her three years and had not previously been violent or aggressive towards anyone. The Browns’ claim that Officer Eberly violated their constitutionally secured right to be free from unreasonable governmental seizures of their property. The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated...the people’s effects include their personal property. See *United States v. Place*, 462 U.S. 696, 701 (1983) (detention of luggage held to be a Fourth Amendment seizure). A Fourth Amendment seizure of personal property occurs when “there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Destroying property meaningfully interferes with an individual’s possessory interest in that property. The destruction of property by state officials poses as much of a threat, if not more, to people’s right to be secure...in their effects as does the physical taking of them. *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994).

The Browns had a possessory interest in their pet. In Penn-

sylvania, by statute, “All dogs are...declared to be personal property and subjects of theft.” 3 Pa. Cons. Stat. Ann. S 459-601(a). See *Miller v. Peraino*, 626 A.2d 637, 640 (Pa. Super. Ct. 1993); *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1988). It necessarily follows that Immi was property protected by the Fourth Amendment, and Officer Eberly’s destruction of her constituted a Fourth Amendment seizure. Accordingly, we (the Court) join two of our sister courts of appeals in holding that the killing of a person’s dog by a law enforcement officer constitutes a seizure under the Fourth Amendment. *Fuller*, 36 F.3d at 68; *Leshner v. Reed*, 12 F.3d 148, 150-51 (8th Cir. 1994).

To be constitutionally permissible, then, Officer Eberly’s seizure must have been “reasonable.” Where a pet is found at large, the state undoubtedly has an interest in restraining it so that it will pose no danger to the person or property of others. The dogcatcher thus does not violate the Fourth Amendment when he or she takes a stray into custody. Moreover, the state’s interest in protecting life and property may be implicated when there is reason to believe the pet poses an imminent danger. In the latter case, the state’s interest may even justify the extreme intrusion occasioned by the destruction of the pet in the owner’s presence. This does not mean, however, that the state may, consistent with the Fourth Amendment, destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody. Striking the balance required by

*Place*, we (the Court) hold that Officer Eberly’s destruction of Immi could be found to be an unreasonable seizure within the meaning of the Fourth Amendment.

This brings us to Officer Eberly’s qualified immunity defense. Qualified immunity absolves Officer Eberly from liability and, indeed, from the burdens of defending this suit if he can show that a reasonable officer with the information he possessed at the time could have believed that his conduct was lawful in light of the law that was clearly established on April 28, 1998. *Anderson v. Creighton*, 483 U.S. 635 (1987). In order for a right to be “clearly established,” the right must be sufficiently clear that a reasonable officer would have knowledge of it.

As we (the Court) have previously noted, the Supreme Court’s 1984 decision in *United States v. Jacobson* reaffirmed the well established proposition that a Fourth Amendment seizure of property occurs whenever there is some meaningful intrusion with an individual’s possessory interest in that property, and destruction of that property thus constitutes a seizure under the Fourth Amendment. Moreover, we believe that a reasonable law enforcement officer in Officer Eberly’s position would have realized that a person’s dog is his personal property under Pennsylvania law. Finally, we believe that, based on *Place* and the cases there reviewed, a reasonable officer would have understood that it was unlawful for him to destroy a citizen’s personal property in the absence of a

substantial public interest that would be served by the destruction.

If the facts asserted by the Browns are found to be true, we conclude that a reasonable officer in Officer Eberly’s position could not have applied these well established principles to the situation before him and have concluded that he could not lawfully destroy a pet who posed no imminent danger and whose owners were known, available, and desirous of assuming custody. In other words, it would have been apparent to a reasonable officer that shooting Immi would be unlawful. Accordingly, Officer Eberly has not established that he is entitled to qualified immunity.

**CIVIL LIABILITY –  
Warrantless Entry  
Into Home to Arrest  
Individual Who Answers  
Knock on the Door**

In *Sparing v. Village of Olympia Fields*, CA7, No. 00-1021, 9/19/01, the issue before the Seventh Circuit Court of Appeals was an alleged violation of Eugene Sparing’s Fourth Amendment rights stemming from Officer James Keith going to Sparing’s house and knocking on the door. Sparing answered the door, and Officer Keith asked that he identify himself, which he did. At that moment, Sparing was still standing inside his home behind his closed screen door, and Officer Keith was standing outside. Officer Keith then advised Sparing that he was under arrest, to which Sparing inquired whether he had a warrant. Officer Keith stated that he did not but, rather, that he had probable

cause. Sparing asked whether he could place something down, then turned and walked away from the screen door further into his home. Officer Keith entered the residence, taking several steps inside. Sparing came back to Officer Keith, was placed under arrest, and they both left the house.

Sparing filed suit seeking damages under 42 U.S.C. § 1983. Specifically, Sparing complained that Officer Keith arrested him in his home without a warrant. Sparing argues that Officer Keith entered his home without a warrant or his consent to effectuate an arrest, which constituted an unreasonable search in violation of the Fourth Amendment and, in particular, the Supreme Court’s holding in *Payton v. New York*, 445 U.S. 573 (1980). Officer Keith responds that Sparing acquiesced to his slight entry to complete the arrest after he announced it outside Sparing’s home. The Seventh Circuit Court of Appeals believed that the entry into Sparing’s home without a warrant to effectuate or complete the arrest (although with probable cause) was unreasonable and therefore a violation of the Fourth Amendment.

Two Fourth Amendment principles set the backdrop against which we analyze this case. First, police officers may constitutionally arrest an individual in a public place (e.g., outside) without a warrant, if they have probable cause. *United States v. Watson*, 423 U.S. 411, (1976). Second, police officers may not constitutionally enter a home without a warrant to effectuate an arrest, absent consent or exigent circumstances, even if they have probable cause. *Payton*,

445 U.S. at 585-90. A search of the home without a warrant is a well-settled violation of the Fourth Amendment, and the Supreme Court in *Payton* simply made clear that it is no less so when the search is conducted in order to seize (i.e., by an arrest) a person rather than property.

At first glance, then, the lines appear clear. Intrusion into the home without a warrant “by even a fraction of an inch” is too much. *Kyllo v. United States*, 121 S. Ct. 2038 (2001). The lines are not so clear, however, because exactly where outside ends and where the home begins is not a point immediately obvious. Splitting fractions of an inch can be a very treacherous endeavor, producing arbitrary results. But we need not pull out our rulers and begin to measure. Under the Fourth Amendment, the point must be

identified by inquiry into reasonable expectations of privacy. *United States v. Santana*, 427 U.S. 38, 42 (1976); *Katz v. United States*, 389 U.S. 347 (1967).

The Supreme Court has already considered the question of dividing outside from inside when the home is involved, although not completely resolving the question, in *United States v. Santana*, supra. In *Santana*, the Court held that an individual voluntarily standing in the threshold of her home (i.e., in the middle of an open doorway) is outside rather than inside the home for purposes of the Fourth Amendment. *Santana*, 427 U.S. at 42. The Court reasoned that an individual voluntarily standing in an

open doorway has knowingly exposed herself to “public view, speech, hearing, and touch” just as if she were standing outside in a public place. In those places, and thus in an open doorway, under those circumstances, the *Watson* rule, rather than the *Payton* rule, applies.

But what if the individual is not voluntarily standing in an open doorway, but answers a knock at

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“ When time permits, officers who elect *not* to obtain a warrant unnecessarily risk the type of constitutional violation involved in this case. ”

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the door standing “a fraction of an inch” behind an open doorway? We (the Court) still apply *Santana*-type “public view, speech, hearing, and touch” analysis to aid in the determination of whether a reasonable expectation of privacy exists. To answer this question with *Payton*, which established “a firm line at the entrance to the house”—*Payton*, 445 U.S. at 590—is to ignore an unmistakable circularity. The question is where is the “entrance to the house,” which in these circumstances must be answered by consideration of reasonable expectations of privacy.

What is most critical here is that Sparing stood inside his home

behind his closed screen door. As a consequence, we apply *Payton*—Sparing did not surrender any reasonable expectations of privacy in his home. Without a warrant, this arrest could only be completed if Sparing opened his screen door and stepped outside of his home, or acquiesced to a slight entry to complete the arrest. For Officer Keith to enter the home without a warrant, as he did in this case, he

first needed Sparing’s consent. Because Sparing did not consent to Officer Keith’s entry into his home, Officer Keith’s entry without a warrant to effectuate or complete the arrest in Sparing’s home was unreasonable and a violation of the Fourth Amendment. There was no reason in this case not to get a warrant and every reason to obtain one. See *United States v. Berkowitz*, 927 F.2d at 1388 (7<sup>th</sup> Cir. 1991). (Obtaining a

warrant in the first place would have prevented these potential problems, to say nothing of the time it would have saved at trial and on appeal litigating the legality of the arrest.) When time permits, officers who elect not to obtain a warrant unnecessarily risk the type of constitutional violation involved in this case.

Although Sparing has demonstrated a constitutional violation, he cannot show that the violation was clearly established under the second part of the standard for qualified immunity. Indeed, we are in agreement with the First Circuit in concluding that the law surrounding Fourth Amendment “doorway arrest”

questions, particularly on the facts of this case, was not sufficiently settled or defined at the time of the arrest to defeat qualified immunity in this case. See generally *Joyce v. Town of Tewksbury*, 112 F.3d 19, 22 (1st Cir. 1997) (en banc). Thus, Officer Keith was appropriately entitled to summary judgment for Spring's Fourth Amendment warrant claim under section 1983.

### **INTERROGATION – Accused Initiating Communication With Law Enforcement**

In *United States v. Michaud*, CA9, No. 99-10440, 9/25/01, during an interview with police on December 3, Michelle Michaud indicated her desire to speak to an attorney, and the interview was immediately terminated. She was not interviewed again until December 5, when Teresa Agoroastos, a cellmate, leading Michaud by the arm to the gate outside their dorm, told Deputy Conrad that Michaud wanted to speak to someone "about a murder." Michaud subsequently confirmed to Sergeant Minister from the Douglas County Sheriff's Department and FBI Agent Campion that this was true. The Ninth Circuit Court of Appeals had to decide whether Michaud may be said to have initiated communication with the police after having previously invoked her right to counsel.

Upon arriving at the interview room, Agent Campion introduced himself, told Michaud he understood she wanted to speak to someone about something she

needed to get off her chest, and asked if that was true. She responded, "I have some information about the young lady who was killed a couple of days ago. Yes." Agent Campion then showed Michaud her Miranda rights on a written form and read them to her, explaining that she had a right to consult with a lawyer for advice before questioning, a right to have a lawyer present during questioning, and a right to stop answering the detectives' questions at any time. Only after Michaud indicated that she had something she wanted to say, that she understood her rights, and signed a waiver did Sergeant Minister and Agent Campion begin to interview her.

The Ninth Circuit Court of Appeals accepted that Michaud was upset, frightened, and crying when Agoroastos suggested speaking to somebody about the murder. Although Michaud herself may not have initiated the conversation with Conrad, she went to the gate with Agoroastos, did not resist speaking to authorities, and did not contradict what Agoroastos said at any time.

Once the accused has invoked their right to counsel during interrogation, they may not be subjected to further police interrogation unless the accused themselves initiates further communication, exchanges, or conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The question then is: Can Michaud's behavior, under the totality of the circumstances, fairly be construed as an initiation by her of further communication with the police, such that the

officers' reactions thereafter did not amount to "police-initiated custodial interrogation?"

Taken together, Michaud's going with Agoroastos to the gate as Agoroastos initiated communication with Deputy Conrad, her apparent agreement with Agoroastos' assertion that Michaud had "information about a murder" she wanted to talk about and Michaud's subsequent behavior and response to Campion's initial inquiry all indicate that she wanted to talk to the authorities. The Court therefore held that the questioning of Michaud was initiated by her, not by the police.

The Court accepted that *Edwards* established a clear line preventing police initiation. By the same token, however, these cases recognize that the accused may change their mind and initiate communication. It is a factual question whether that is what occurred. On these facts, the Court concluded Michaud initiated, and the police merely reacted to her. They did not seek to speak with her until they were approached with the information that Michaud wished to speak about a murder. The Supreme Court has explained that the rule established in *Edwards* was designed to prevent police from badgering a defendant into waiving their previously asserted Miranda rights. *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). At no point did the law enforcement officials unconstitutionally attempt to coerce Michaud into speaking with them. No allegation has been made, nor does any evidence suggest that Agoroastos was acting on behalf of the police or complicity with

them when she spoke to Agent Conrad. Michaud was present when Agoroastos represented that Michaud had information about a murder she wanted to convey. If Michaud did not want to subject herself to questioning, she could have easily said so.

The officers began questioning Michaud only after receiving her affirmative response and informing her of her Miranda rights. Given the propriety of the officers' behavior, we (the Court) hold that the resumption of interrogation did not violate Michaud's constitutional rights and was fully consistent with the requirements of *Edwards*.

#### **PROBATION – Special Conditions of Supervised Release**

In *United States v. JoDon*, CA8, No. 01-1449, 9/20/10 [Unpublished], Michael T. JoDon plead guilty to transportation of obscene matter in violation of 18 U.S.C. § 1465. JoDon challenged the district court's imposition of special conditions of supervised release barring JoDon from engaging in activities providing access to children, loitering near certain areas frequented by children, or having a post office or private mail box without his probation officer's earlier approval. The Eighth Circuit Court of Appeals simply considered and rejected JoDon's claim on the merits. Contrary to JoDon's view, the challenged conditions are reasonably related to his crime and his rehabilitation, are intended to protect the public from this convicted sexual offender, and involve no greater restraint of

liberty than reasonably necessary to accomplish their purposes. See *United States v. Cooper*, 171 F.3d 582, 585 (8th Cir. 1999); *United States v. Bee*, 162 F.3d 1232, 1235 (9th Cir. 1998), cert. denied, 526 U.S. 1093 (1999).

#### **SEARCH AND SEIZURE – Affidavits; Stale Allegations**

In *United States v. Smith*, CA8, No. 01-1654EA, 9/24/01, Edward Dashan Smith argues that his motion to suppress evidence found in his home during execution of a search warrant should have been granted because the information found in the warrant affidavit was stale.

According to the Eighth Circuit Court of Appeals, Smith argues that the warrant did not establish probable cause that evidence would be found at his house because the information in the affidavit regarding drug transactions at the house was approximately three months old. He argues that the State's reliance on *United States v. Maxim*, 55 F.3d 394 (8th Cir.), cert. denied, 516 U.S. 903 (1995) is misplaced. In *Maxim*, the Eighth Circuit held that information four months old, or even three years old, may supply probable cause for a warrant to search the home of someone suspected of illegal possession of a firearm because possession is a continuing offense and because firearm enthusiasts tend to keep their weapons for long periods of time. Smith argues that *Maxim* is inapposite because it involved a firearm, which is likely to remain in one place, whereas his case involves drugs, which are not. "A warrant is proper so long

as the evidence as a whole creates a reasonable probability that the search will lead to the discovery of evidence." *United States v. Humphrey*, 140 F.3d 762, 764 (8th Cir. 1998). The Eighth Circuit Court of Appeals review de novo the trial court's ruling on a motion to suppress "evaluating only for clear error, however, any findings of fact by the trial court and giving appropriate deference to the inferences apparently drawn from those facts by law enforcement officers, the court that issued the search warrants, and the trial court." *United States v. Hall*, 171 F.3d 1133, 1142 (8th Cir. 1999), cert. denied, 529 U.S. 1027 (2000).

There is no fixed formula for determining when information has become stale. *United States v. Koelling*, 992 F.2d 817, 822 (8th Cir. 1993). The timeliness of the information supplied in an affidavit depends on the circumstances of the case, including the nature of the crime under investigation. In investigations of ongoing narcotic operations, intervals of weeks or months between the last described act and the application for a warrant does not necessarily make the information stale. *United States v. Formaro*, 152 F.3d 768, 771 (8th Cir. 1998). The Court found no error in the District Court's denial of the motion to suppress on the ground of staleness. The Court could not agree that drugs are significantly more mobile than guns.



## SEARCH AND SEIZURE – Curtilage

In *United States v. Cannon*, CA9, No. 00-10400, 9/5/01, DEA Special Agent Collette, on January 11, 1999, drafted an affidavit and a search warrant seeking authorization to search 1250 Hemlock Street in Chico, California, after obtaining incriminating evidence from a cooperating witness concerning the owner of the property, defendant Michael Cannon. Attachment “A” to the warrant describes the place to be searched as “a double story, single family dwelling, sand wooden structure with brown trim and dark gray composite style roof, further identified by the three inch black numbers ‘1250’ affixed to the house, facing Hemlock street.”

The search warrant’s Attachment “B” authorized the seizure of property that included, among other things: articles of personal property such as...vehicles, structures, storage areas, residences, or containers where marijuana or evidence may be found. At the time of the application for the search warrant, Agent Collette knew that there were two structures within the fence that surrounded 1250 Hemlock Street but failed to so inform the magistrate judge because he reasonably assumed that the second structure was a garage. Nevertheless, Agent Collette did not specify the rear building as a place to be searched.

Cannon had converted the rear building from a garage into a self-contained residential unit approximately twenty years earlier. At that time, it was common practice in Chico to convert garages into

student-type residences without obtaining the proper building permits. In its records, the City of Chico did not have the rear building registered as a lawful second unit. The rear building at 1250 Hemlock sits directly behind the main house and consists of three areas with separate entrances; one is a dwelling area with a living room, a sleeping deck, and a bathroom. The front door of the dwelling area faces the backside of the main house. The rear building’s other two areas are storage rooms, which may only be accessed through doors on the exterior of the building. The first storage room abuts the living room of the dwelling area, and its door is located a few feet from the rear building’s front door. The second storage room abuts the sleeping area and kitchen of the dwelling area. The rear building is linked to the main house by a wooden deck.

On January 13, 1999, DEA agents executed the search warrant. After entering the main house and placing Cannon under arrest, the officers searched both the main house and the rear building’s dwelling area. Inside the rear dwelling area they discovered a wood-burning stove for heat, kitchen stove, sink, refrigerator, bathroom, and bed. The officers found no incriminating evidence in the dwelling area itself. Next, they exited the rear building and tried the doors to the building’s storage rooms. Finding them locked, the officers went inside and asked Cannon for the keys. Upon opening the two storage rooms, the officers found and seized approximately four hundred marijuana plants.

At Cannon’s evidentiary

hearing on April 18, 2000, Steve Cook testified that he rented the rear building’s residential unit from Cannon between August 1998 and February 1999. His period of occupancy included the time of the search warrant in this case. Cook also testified that he used the unit as a part-time living space and that his rental pertained only to the interior dwelling area in the back building. Cook’s rental did not include the two storage rooms where the marijuana was found.

The district court determined that the rear building storage rooms were not within the scope of the warrant obtained by Agent Collette to search 1250 Hemlock Street. Accordingly, the court ordered that the marijuana found in the storage rooms be suppressed. The Ninth Circuit Court of Appeals reversed.

The district court was correct to find that the rear dwelling area that Cook rented from Cannon was outside the scope of the warrant because he had a reasonable expectation of privacy in his home. The two storage rooms, however, were not an extension of Cook’s rental unit; rather, they were within the curtilage of the main house for which the officers had a valid warrant. Therefore, the court erred in suppressing the evidence found in the two storage rooms.

“Curtilage” has been defined as “the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). For the purposes of the Fourth Amendment, curtilage is important because it expands the con-

stitutional boundaries of the home beyond the four walls of the house.

This court, other circuits, and state courts have held that the Fourth Amendment is not violated by a search of the grounds or outbuildings within a residence's curtilage where a warrant authorizes a search of the residence. In *United States v. Gorman*, we (the Court) stated:

*If a search warrant specifying only the residence permits the search of "closets, chests, drawers, and containers" therein where the object searched for might be found, so should it permit the search of similar receptacles located in the outdoor extension of the residence, i.e., the curtilage, such as the container in this case. To hold otherwise would be an exercise in pure form over substance. Gorman, 104 F.3d at 275.*

A search warrant must be read in a common sense and realistic fashion. The exclusionary rule was designed to deter police misconduct, not objectively reasonable law enforcement activity. Thus, we hold that the failure of the warrant to specifically list the storage rooms as a place to be searched does not, by itself, exclude the storage rooms from the warrant's scope.

The Supreme Court has instructed that in determining whether an area is part of the curtilage of the premises described

in a warrant, courts must employ four factors: (1) the area's proximity to the home, (2) whether the area is included within an enclosure surrounding the home, (3) whether the area is being used for the intimate activities of the home, and (4) the steps taken by the resident to protect the area from observation by passers-by. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

**“** Curtilage has been defined as ‘the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life’...For the purposes of the Fourth Amendment, curtilage is important because it expands the constitutional boundaries of the home beyond the four walls of the house. **”**

A search warrant for a residence may include all other buildings and other objects within the curtilage of that residence, even if not specifically referenced in the search warrant. The entire rear building at 1250 Hemlock qualifies as curtilage of Cannon's residence under a *Dunn* analysis. However, because Cook possessed a reasonable expectation of privacy in the rear building rooms he

rented, those spaces exceeded the scope of the search warrant for Cannon's residence.

Cook had no expectation of privacy in the two storage rooms where the DEA discovered marijuana. Cannon did have such an expectation. Therefore, there is no reason to exclude from the curtilage of Cannon's residence the storage rooms where marijuana was found.

**SEARCH AND SEIZURE – Probable Cause; Canine Sniff With 62% Accuracy**

In *United States v. Limares*, CA7, No. 00-3560, 10/16/01, it was contended that Wendy, a drug detection dog, could not reliably detect drugs. The district judge held a hearing to explore the possibility that the agents had made materially false representations about Wendy's sense of smell. He concluded that they had not done so—that Wendy can and does reliably distinguish drugs from innocuous substances. That factual finding cannot be called clearly

erroneous, given its evidentiary support. According to the record, 62% of Wendy's alerts were followed by the discovery of drugs; another 31% signaled the presence of currency. Some alerts to currency may have been false positives, but a considerable number likely resulted from currency with unusually high concentrations of drug residue, a tell-tale sign of money sent

between drug dealers to pay for inventory. Only seven percent of Wendy's "hits" are unambiguous false positives, according to the record.

The Seventh Circuit Court of Appeals stated, "It is enough if a dog is reliable in the field. The affidavits in support of the warrant said that Wendy is reliable, and the evidentiary hearing proved that out. Even if all alerts to currency are treated as false positives, Wendy has been right 62% of the time, enough to prevail on a preponderance of the evidence, and 'probable cause' is something less than a preponderance." See *Illinois v. Gates*, 462 U.S. 213, 235-36 (1983); *Illinois v. Wardlow*, 528 U.S. 119, (2000).

### **SEARCH AND SEIZURE – Traffic Stops; Asking Stopped Motorist About Weapons in the Vehicle**

In *United States v. Holt*, CA10, No. 99-7150, 9/5/01, the issue before the Tenth Circuit Court of Appeals was whether an officer conducting a traffic stop may ask the driver about the presence of loaded weapons in the vehicle, regardless of whether the officer has a particularized suspicion of the existence of such a firearm. The Tenth Circuit Court of Appeals concluded that such a question was permissible.

The Fourth Amendment protects individuals from "unreasonable searches and seizures." U.S. Constitution, Amendment IV. "A traffic stop is a 'seizure' within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting

detention quite brief." *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998) [quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)].

The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular invasion of a citizen's personal security. Reasonableness, of course, depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); see also *Illinois v. McArthur*, 121 S. Ct. 946, 950 (2001) (We balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.); *New York v. Class*, 475 U.S. 106 (1986) [balancing "the need to search or seize against the invasion which the search or seizure entails" (quoting *Terry*, 392 U.S. at 21)]. We (the Court) generally disfavor bright-line rules in the Fourth Amendment context, relying instead on this basic balancing test. See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *United States v. Broomfield*, 201 F.3d 1270, 1274 (10th Cir. 2000), cert. denied, 531 U.S. 830 (2000). No one factor is determinative in this analysis. Instead, reasonableness is "measured in objective terms by examining the totality of the circumstances." *Robinette*, 519 U.S. at 39. In considering the individual-rights side of the balance, we consider the individual's reasonable expectations of privacy and liberty. See *Romo v. Champion*, 46 F.3d 1013, 1018

(10th Cir. 1995); *United States v. Seslar*, 996 F.2d 1058, 1063 (10th Cir. 1993); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1442 (10th Cir. 1990).

We have consistently applied the principles of *Terry v. Ohio*, 392 U.S. 1 (1968) to routine traffic stops. See, e.g., *United States v. Botero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995) (en banc). Under *Terry*, the reasonableness of a search or seizure depends on "whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. Thus, we assess the reasonableness of a traffic stop based on an observed violation by considering the scope of the officer's actions and balancing the motorist's legitimate expectation of privacy against the government's law enforcement-related interests. For example, when stopped for a traffic violation, a motorist expects "to spend a short period of time answering questions and waiting while the officer checks his license and registration." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). At the same time, the government has a strong interest in ensuring that motorists comply with traffic laws. See *Whren v. United States*, 517 U.S. 806, (1996) (noting the "usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact"). Thus, it is beyond dispute that an officer may ask questions relating to the reason for the stop. Ordinarily, this also includes questions relating to the motorist's travel plans. See, e.g.,

*United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000); *United States v. Rivera*, 867 F.2d 1261, 1263 (10th Cir. 1989); *United States v. Hill*, 195 F.3d 258, 268 (6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000); *United States v. \$404,905.00*, 182 F.3d 643, 647 (8th Cir. 1999). Travel plans typically are related to the purpose of a traffic stop because the motorist is traveling at the time of the stop. For example, a motorist's travel history and travel plans may help explain, or put into context, why the motorist was weaving (if tired) or speeding (if there was an urgency to the travel). See, e.g., *United States v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993).

It is also well established that an officer may ask about the driver's authority to operate the vehicle. Thus, we have repeatedly stated that during a routine traffic stop the officer may ask to see a driver's license and registration and check that they are valid. See, e.g., *United States v. Caro*, 248 F.3d 1240, 1244 (10th Cir. 2001).

On the other hand, motorists ordinarily expect to be allowed to continue on their way once the purposes of a stop are met. See *Berkemer*, 468 U.S. at 437. The government's general interest in criminal investigation, without more, is generally insufficient to outweigh the individual interest in ending the detention. Thus, once the motorist has "produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988), overruled on

other grounds by *Botero-Ospina*, 71 F.3d at 785. Further delay is justified only if the officer has reasonable suspicion of illegal activity or if the encounter has become consensual. *Hunnicut*, 135 F.3d at 1349.

As with questions about the observed violation and the driver's authority to operate the vehicle, a motorist expects an officer to take reasonable measures to protect officer safety during the stop. When these measures are not too intrusive, the government's strong interest in officer safety outweighs the motorist's interests. Thus, for example, the motorist may be detained for a short period while the officer runs a background check to see if there are any outstanding warrants or criminal history pertaining to the motorist even though the purpose of the stop had nothing to do with such prior criminal history. The justification for detaining a motorist to obtain a criminal history check is, in part, officer safety. See, e.g., *United States v. McRae*, 81 F.3d 1528, 1535 n.6 (10th Cir. 1996) ("Triple I checks are run largely to protect the officer. Considering the tragedy of the many officers who are shot during routine traffic stops, the almost simultaneous computer check of a person's criminal record is reasonable and hardly intrusive."); *United States v. Purcell*, 236 F.3d 1274, 1278 (11th Cir. 2001) ("The request for criminal histories as part of a routine computer check is justified for officer safety."); *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1998) ("The results of a criminal history check could indicate whether further back-up or other

safety precautions were necessary.") By determining whether a detained motorist has a criminal record or outstanding warrants, an officer will be better apprized of whether the detained motorist might engage in violent activity during the stop.

An officer also may order the driver and passengers out of the vehicle in the interest of officer safety, even in the absence of any particularized suspicion of personal danger. *Maryland v. Wilson*, 519 U.S. 408, 415 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). While a motorist retains some reasonable expectation of privacy when officer safety is at stake [cf. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (rejecting the argument that officer safety justifies a full field-type search during a routine traffic stop)], the motorist's expectations are necessarily diminished.

The individual privacy-interests side of the Fourth Amendment balancing is weaker in this context, and the governmental-interests side is much stronger. The Supreme Court has found it "too plain for argument" that the government's interest in officer safety is both "legitimate and weighty," given the "inordinate risks confronting an officer as he approaches a person seated in an automobile." *Mimms*, 434 U.S. at 110. Other courts have also recognized that law enforcement officials literally risk their lives each time they approach occupied vehicles during the course of investigative traffic stops. *United States v. Stanfield*, 109 F.3d 976, 978 (4th Cir. 1997); see also *McRae*, 81 F.3d at 1536 n.6 (noting the "tragedy of the many officers

who are shot during routine traffic stops each year”).

In *Maryland v. Wilson*, the Supreme Court noted that in 1994 alone, 5,762 officers were assaulted and 11 were killed during traffic pursuits and stops. 519 U.S. at 413 [citing Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 71, 33 (1994)].

Thirty percent of police shootings occurred when a police officer approached a suspect seated in an automobile, and a significant percentage of murders of police officers occur when the officers are making traffic stops. *Mimms*, 434 U.S. at 110 [quoting *United States v. Robinson*, 414 U.S. 218, 234 (1973)]. The most recent data reveal that in 1999, 6,048 officers were assaulted during traffic pursuits and stops and 8 were killed. See Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 82, 28 (1999). More than 34% of those assaults involved a dangerous weapon such as a gun or knife. *Id.* at 83. Firearms were used to

commit 82 of the 94 killings of law enforcement officers during traffic pursuits and stops during the 1990s. The terrifying truth is that officers face a very real risk of being assaulted with a dangerous weapon each time they stop a vehicle. The officer typically has to leave his vehicle, thereby exposing himself to potential assault by the motorist.

The officer approaches the vehicle not knowing whom the motorist is or what the motorist’s intentions might be. It is precisely during such an exposed stop that the courts have been willing to give the officers “wide latitude,” *Stanfield*, 109 F.3d at 978, to discern the threat the motorist may pose to officer safety.

“ In addition to information about loaded weapons that the officer may obtain from visually looking in the car, shining a light around the interior of the car, or asking the motorist and occupants to step out of the car or to keep their hands raised...an officer may also obtain information about the existence of a loaded weapon by simply asking the motorist if there is a loaded weapon in the vehicle. ”

An officer in today’s reality has an objective, reasonable basis to fear for his or her life every time a motorist is stopped. Every traffic stop, after all, is a confrontation. The motorist must suspend his or her plans and anticipates receiving a fine and perhaps even a jail term. That expectation becomes even more real when the motorist or a

passenger knows there are outstanding arrest warrants or current criminal activity that may be discovered during the course of the stop. Resorting to a loaded weapon is an increasingly plausible option for many such motorists to escape those consequences, and the officer, when stopping a car on a routine traffic stop, never knows in advance which motorists have that option by virtue of possession of a loaded weapon in the car.

In balancing the interests in this case, we are guided by other situations in which federal courts have allowed considerations of officer safety to outweigh fairly intrusive conduct during a traffic stop. Thus, during a routine traffic stop, an officer may order the driver and passengers out of the vehicle, *Mimms*, 434 U.S. at 110; *Wilson*, 519 U.S. at 415; order the passengers to remain in the vehicle, *Rogala v. District of Columbia*, 161 F.3d 44, 53 (D.C. Cir. 1998); open the door of a vehicle with darkly tinted windows to check for weapons, *Stanfield*, 109 F.3d at 981; order the occupants to raise their hands during the stop, *United States v.*

*Moorefield*, 111 F.3d 10, 13 (3d Cir. 1997); and use a flashlight to check the dark interior of a car, *Texas v. Brown*, 460 U.S. 730, 739-40 (1983).

In addition to information about loaded weapons that the officer may obtain from visually looking in the car, shining a light around the interior of the car, or asking the

motorist and occupants to step out of the car or to keep their hands raised...an officer may also obtain information about the existence of a loaded weapon by simply asking the motorist if there is a loaded weapon in the vehicle. Indeed, straightforwardly asking this question is often less intrusive than many of the procedures authorized by our sister circuits.

If a motorist volunteers that there is a loaded weapon in the car, that will undeniably be an important piece of information causing the officer to proceed with greater caution. It was suggested during oral argument that a motorist with a loaded gun is unlikely to admit that fact. The facts of this case somewhat belie that argument. Here, when asked that question, Holt, the defendant, freely admitted the presence of a loaded gun. Other cases present similar situations in which defendants either volunteered or truthfully responded that they possessed weapons. *See, e.g., United States v. Cain*, 155 F.3d 840, 842 (7th Cir. 1998); *United States v. Patterson*, 140 F.3d 767, 771 (8th Cir. 1998); *United States v. Maza*, 93 F.3d 1390, 1395 (8th Cir. 1996); *United States v. Castellana*, 500 F.2d 325, 326 (5th Cir. 1974) (en banc); *Burris v. State*, 954 S.W.2d 209, 211 (Ark. 1997); *State v. Hill*, 577 N.W.2d 259, 262 (Neb. 1998).

Even in those cases where the motorist falsely denies the presence of a loaded gun, allowing the officer to ask the question may provide important clues pertaining to safety. Officers have become skilled at detecting nervous or evasive responses from which the officer may gain valuable clues

about a motorist's intentions. Therefore, even a denial may alert the officer that the denial may not be truthful and, thus, they should take greater care.

A third possibility is that the motorist may decline to answer the question. That, too, conveys information relevant to the officer's personal safety. Although nothing compels the motorist to answer such a question, when a motorist declines to answer it, the officer may draw clues from that declination that he or she should be more prudent and concerned about personal safety. The officer may not use the refusal to answer as the basis for a more intrusive search, but the officer would certainly be permitted to use that information to justify prudent safety-related measures.

Thus, any response the officer receives in response to this question will be helpful in appraising the risk presented more accurately. We therefore conclude that allowing officers to ask about the presence of loaded weapons in a lawfully stopped vehicle will promote the government's "legitimate and weighty" interest in officer safety. If a motorist offers a voluntary response to a question regarding the presence of a loaded gun, the response could be used just like any other voluntary admission made during a traffic stop. If the admission reveals a crime, the officer can act accordingly, as is always the case when the officer is aware of criminal activity. If the motorist declines to answer the question, however, the officer could not, in the absence of particularized suspicion, take any legal action (other than reasonable actions for

personal safety) based on that refusal. Because it is within a motorist's right to refuse to answer, ordinarily no inference of guilt can be drawn from that refusal and any further detention must be supported by reasonable suspicion or probable cause. Cf. *Berkemer*, 468 U.S. at 439-40 ("The detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.") *Terry*, 392 U.S. at 34 ("Of course, the person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.")

Although Holt was not in his vehicle when Officer Tucker asked about loaded weapons, this does not eviscerate the safety rationale for the question. By ordering Holt to sit in the patrol car during the stop, Officer Tucker had temporarily neutralized the risk posed by a weapon in Holt's vehicle. But with the stop nearing completion, Officer Tucker reasonably expected that Holt was about to return to his vehicle and once again would have access to any weapons in it. It was at this point that Officer Tucker asked about loaded weapons in the vehicle, and the safety rationale is plain.

The Supreme Court has held that the entire interior of a vehicle is treated as within a motorist's immediate control and therefore falls within the scope of a search incident to arrest, even after the motorist has been ordered out of the vehicle and placed under arrest.

*New York v. Belton*, 453 U.S. 454, 462 (1981). A search incident to arrest is justified in part on the basis of officer safety. If the interior of the vehicle is relevant to officer safety in a case like *Belton*, where the arrestee is unlikely to return to the vehicle, then it is all the more so relevant here, where the motorist is almost certain to return. We (the Court) emphasize also that the balance does not depend on whether the officer subjectively fears the motorist. Subjective intentions rarely play a role in Fourth Amendment analysis. See *Whren v. United States*, 517 U.S. 806, 811-13 (1996). In the context of officer safety in particular, the Supreme Court has relied on an objective view of the circumstances. See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (holding that objective circumstances during a traffic stop allow an officer to order a driver out of the car, “subjective thoughts notwithstanding”). Similarly, the availability of a “search incident to arrest” for officer safety does not

depend on the subjective mindset of the arresting officer. *United States v. Robinson*, 414 U.S. 218, 236 & n.7 (1973). As the Supreme Court has explained in the context of the “public safety” exception to *Miranda* warnings, the availability of [the public-safety] exception does not depend upon the motivation of the individual officers involved...It should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officers. Undoubtedly, most police officers...would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

Whatever the motivation of individual officers in such a position, we do not believe the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern

for the public safety. *New York v. Quarles*, 467 U.S. 649, 655-56 (1984). That one officer is braver (or more foolhardy) than another, and therefore not subjectively concerned for his or her safety, should not deprive that particular officer of a right to protect his or her safety. Even the brave officer should be allowed to minimize the ever-present risk of being attacked or killed.

Given the dangers inherent in all traffic stops, we hold that the government’s interest in officer safety outweighs a motorist’s interest in not being asked about the presence of loaded weapons. This balance tips in the government’s favor even when the officer lacks particularized suspicion that the motorist possesses loaded weapons and regardless of whether the officer subjectively fears the motorist. Accordingly, the district court erred in suppressing Holt’s response to this question.

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