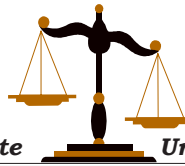




CJI Legal Briefs



Criminal Justice Institute University of Arkansas System

**Criminal Justice Institute
University of Arkansas System**
7723 Colonel Glenn Road
Little Rock, Arkansas 72204
501-570-8000
1-800-635-6310

Edited by Don Kidd

Contents

- 1 **CIVIL LIABILITY:**
Claims Regarding Access to
Legal Materials and
Government Appointed Council
- 1 **CIVIL LIABILITY:**
Sting Operations; Cooperating
Witness Engages in Oral Sex with
Defendant at Police Request
- 3 **CIVIL LIABILITY:**
Supervisory Liability
- 4 **EVIDENCE:**
Informant Privilege
- 6 **EVIDENCE:**
Voice Identification
- 7 **FIFTH AMENDMENT:**
Miranda Rights
- 9 **PROBABLE CAUSE:**
Handwriting Analysis
- 11 **SEARCH AND SEIZURE:**
Entry into Residence
by Estranged Wife
- 14 **SEARCH AND SEIZURE:**
Entry into Residence by Consent of
Individuals with Lesser Possessory
Interest After Owner Refuses
Search by Consent
- 16 **SEARCH AND SEIZURE:**
Installation of GPS Tracking
Device on Vehicle
- 17 **SEARCH AND SEIZURE:**
Officer's Trespass in Open Field
to Make Observations into
the Curtilage Area
- 22 **SEARCH AND SEIZURE:**
Ordering Detainees to Re-enter an
Automobile to Protect Officer Safety

CIVIL LIABILITY: Claims Regarding Access to Legal Materials and Government Appointed Council

In *Conklin v. Walters*, CA10, No. 03-7013, 7/7/03, David Mark Conklin filed a 42 U.S.C. § 1983 action against Sheriff Don Walters for purported constitutional violations during his incarceration at the Carter County Jail in Ardmore, Oklahoma. Conklin alleged he was denied access to a law library, various legal materials, and was forced to accept appointed council instead of exercising his right to self-representation. Conklin sought damages for the infringement of his right to access the courts.

In its ruling, the Tenth Circuit Court of Appeals found that claims involving an alleged waiver of appointed defense counsel, an ineffectiveness of appointed defense counsel, and an unlawfully obtained guilty plea all related to Conklin's criminal conviction and cannot be raised in a § 1983 action.

CIVIL LIABILITY: Sting Operations; Cooperating Witness Engages in Oral Sex with Defendant at Police Request

In *Alexander v. DeAngelo*, CA7, No. 02-3124, 5/22/03, Nathan Alexander, a Fort Wayne police officer, was suspected by fellow officers of committing a variety of fraudulent acts. To validate their suspicions, officers planned a sting operation soliciting the cooperation of Amy Gepfert, who was under investigation for a drug offense.

DISCLAIMER

The Criminal Justice Institute publishes Legal Briefs as a research service for the law enforcement and criminal justice system. Although Legal Briefs is taken from sources believed to be accurate, readers should not rely exclusively on the contents of this publication. While a professional effort is made to ensure the accuracy of the contents of this publication, no warranty, expressed or implied, is made. Readers should always consult competent legal advisors for current and independent advice.

You are encouraged to make copies of this publication and distribute them to others in your agency.

Officers, including Officer Joseph DeAngelo, approached Gepfert and asked her whether she knew Alexander. She did. In fact, she had had a sexual relationship with him, though it had ended a month earlier. Officers told Gepfert she was facing 40 years in prison on the cocaine charge unless she agreed to help them nail him. She asked to consult a lawyer, and although they did not forbid her to do so, they discouraged her, telling her that *they* were “the attorneys.”

In a second meeting with Gepfert, officers asked her whether she had ever received money from Alexander after having sex with him. She said she had, once, to get her nails done. They asked her whether she’d be willing to have oral sex with him for money so that they could charge him with soliciting a prostitute. She agreed. They wired her for the encounter and also gave her a napkin and instructed her to spit Alexander’s semen into it to provide physical evidence of the sex act. She duly performed oral sex on him in his patrol car and asked for and received \$17 to do her nails. She preserved the semen in the napkin and gave it to the officers.

Alexander was arrested and charged with various offenses, including soliciting a prostitute, but the charges were dropped, apparently because the state’s witnesses, including Gepfert, refused to cooperate further. Alexander claims that the charges were baseless, but this is very doubtful in view of the evidence. After a hearing that provided him with due process, the police department fired him for his various offenses. Gepfert, who had no criminal record, was not charged with any offense, either prostitution or sale of cocaine. Officer DeAngelo was not disciplined for his unusual investigative tactics.

Alexander and Gepfert filed an appeal based on 42 U.S.C. § 1983, charging violations of their civil rights. The Seventh Circuit Court of Appeals found as follows:

“We can deal quickly with Alexander’s appeal. Stings are not illegal or even disreputable, see *United States v. Murphy*, 768 F.2d 1518, 1528-29 (7th Cir. 1985). There was reason to believe that Alexander had paid Gepfert for sex in the past, and there was probable cause to arrest him on the basis of the recording of his encounter with her in the patrol car, the semen in the napkin being a gratuitous addition

to the evidence. The fact that Gepfert asked him for money for her nails is irrelevant. Prostitutes, like other people, seek income in order to purchase goods and services. It is not a defense to prostitution for the prostitute to say, ‘My fee is \$100 and I plan to use it to buy milk for my children.’ The evidence is clear that the reason the department was out to get Alexander was a well-founded suspicion that he had engaged in a variety of illegal acts, most of them more serious than paying for oral sex. He would not have had sex with Gepfert had he known she was trying to set him up for an arrest, but the fact that he was tricked into having sex is not a defense. *United States v. Simpson*, 813 F.2d 1462, (9th Cir. 1987). Nothing is more common in the investigation of victimless crimes, such as prostitution, than to pose a police officer (or, as here, a cooperating witness) as a prostitute. Such trickery does not violate any constitutional right of criminals.

“Coercing Gepfert to have sex with Alexander, if that is the proper characterization of what happened here, is a more serious matter. But even if that violated *her* rights, it would not help him; he cannot complain about an infringement of the constitutional rights of another person. *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997); *United States v. Santana*, 6 F.3d 1, 8-9 (1st Cir. 1993). Since, however, she is also a plaintiff, we must consider whether her rights were violated.

“Gepfert’s battery claim, committed under color of law, is actionable under the due process clause of the Fourteenth Amendment. The liberty protected by that clause includes bodily integrity and is infringed by a serious, as distinct from a nominal or trivial, battery. Rape, however, is not only a battery, but a very serious battery, and a rape committed under color of state law is therefore actionable under 42 U.S.C. § 1983 as a deprivation of liberty without due process of law. *Rogers v. City of Little Rock*, 152 F.3d 790, 793-96, 798 (8th Cir. 1998).

“Sex procured by threats that the threatener has no legal right to make is a common form of rape, and this is a permissible characterization of the facts of this case. On Gepfert’s construal of the facts, she was induced by DeAngelo and his fellow officers to perform oral sex on Alexander by their threat to put her away for 40 years if she refused to cooperate with them. Given that Gepfert had no criminal record

and never was prosecuted for the cocaine offense, even after she refused to play ball with the prosecution of Alexander and given also the effort to discourage her from consulting a lawyer before she decided whether to participate in the sting against Alexander, the threat may have been fraudulent. The suggestion that she was facing a prison term of 40 years was extravagant. Because of the small quantity of cocaine that she was alleged to have sold, the absence of conspiracy or aggravating circumstances, and her lack of a criminal record, she would have been guilty only of a felony for which the sentence is 10 years with a possible reduction to 6 years if there are mitigating circumstances.

“That Gepfert had a prior sexual relationship with Alexander, that she may think oral sex no big deal, that she did not consult a lawyer in order to obtain a realistic assessment of her exposure to criminal punishment, and that she did not express indignation at being asked to engage in sex for an ulterior purpose, are circumstances that neither singly nor in combination constitute a defense to battery, though they may be relevant to damages—as may, on the other side, the fact that Gepfert’s agreeing to act as a prostitute “got out” and received media attention. We want to emphasize, however, a point that we made earlier in discussing Alexander’s claim—that the use of trickery is an accepted tool of criminal law enforcement and does not in itself give rise to liability under section 1983. Trickery is the essence of the sting, and the sting is an indispensable method for detecting certain types of crime, such as public corruption. But there are limits to the principle that condones deceit in law enforcement just as there are limits to most other legal principles.

“If Gepfert’s evidence is believed (an essential qualification, given the procedural posture of the case), the elements of a serious battery committed by means of a fraud are present, and this distinguishes the present case from one of permissible police trickery. We also emphasize, as further marking the limits of this opinion, that inducing a confidential informant to engage in sex as part of a sting operation does not always give rise to a claim under section 1983. This is so even though it differs from the usual situation in which a confidential informant or government undercover agent commits a crime, such as buying or selling illegal drugs, as part of a sting.

For in such a case, the crime is nominal—the stinger is neither benefited nor harmed by his participation in it. Gepfert engaged in a sexual act, and not for pleasure. But confidential informants often agree to engage in risky undercover work in exchange for leniency, and we cannot think of any reason, especially any reason rooted in constitutional text or doctrine, for creating a categorical prohibition against the informant’s incurring a cost that takes a different form from the usual risk of being beaten up or for that matter bumped off by a drug dealer with whom one is negotiating a purchase or sale of drugs in the hope of obtaining lenient treatment from the government. The rub here is that Gepfert was intentionally and indeed grossly deceived about the benefits and costs of the distasteful act in which she was asked to engage.

“We must also consider the defense of qualified immunity. Although the principle is well established that battery under color of law is actionable under section 1983 (*Rogers v. City of Little Rock, supra*, 152 F.3d at 798; *Jones v. Wellham, supra*, 104 F.3d at 628), a plaintiff does not defeat the immunity defense ‘simply by alleging violation of extremely abstract rights. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. In the light of pre-existing law, the unlawfulness must be apparent.’ *Anderson v. Creighton*, 483 U.S. 635, (1987). We cannot say that it would have been obvious to the average officer that the deceit employed in this case rose to the level of a constitutional violation. Hence DeAngelo is protected from liability.”

CIVIL LIABILITY: Supervisory Liability

In *McGrath v. Scott*, 250 F.Supp 1218 (2003), Barbara B. McGrath alleges that she received substantial personal injuries when Derek A. Scott, an officer with the Arizona Department of Public Safety, subjected her to an unprovoked assault during a routine traffic stop. She filed a complaint requesting damages against Scott, the State of Arizona, and several of Scott’s supervisors.

The United States District Court for the District of Arizona stated that supervisory officials may be held liable under 42 U.S.C. § 1983 only for their own wrongful behavior. To establish Section 1983 supervisory liability, the plaintiff must show that a state official participated in creating a dangerous condition and acted with the deliberate indifference to the known or obvious danger in subjecting the plaintiff to it. The relevant inquiry is whether the supervisory official was “deliberately indifferent” in supervising subordinates and, if so, whether that deliberate indifference actually caused a deprivation of the plaintiff’s federal rights.

McGrath’s complaint alleges personal involvement of each of the supervisors in her deprivation of constitutional rights. The complaint alleges specific instances of prior misconduct involving Trooper Scott during his employment with the U.S. Marines, the Colorado State Patrol, and the Arizona Department of Public Safety. Moreover, the complaint cites a particular Internal Affairs Investigation that resulted in Scott receiving counseling. While these allegations fail to contain exhaustive details of the alleged instances of prior misconduct, McGrath is not required to know such details of the internal operations of the U.S. Marines or police departments prior to discovery. The complaint goes on to allege, by name, that each supervisor knew of these prior instances of misconduct yet “failed to take sufficient action in terms of training, hiring, retaining and supervising to prevent Scott from using excessive force against her.” Next, the complaint provides details of the investigation into McGrath’s alleged assault by Scott, conducted under the supervisors’ direction. Finally, the complaint alleges that the defendants were deliberately indifferent, reckless, knew about and acquiesced, gave tacit authorization and/or ratified or condoned the violations. Taken as a whole, these allegations provide a claim for supervisory liability

“A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.”

under § 1983 against each of the State Defendants. The Court found as follows:

“A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others. Barbara

B. McGrath has met the burden of establishing that the alleged violation involves clearly established law. Therefore, the burden of persuasion now switches back to the defendants to prove their conduct reasonable.”

EVIDENCE: Informant Privilege

In *Smith v. City of Detroit*, 212 F.R.D. 507 (2003), Joseph and Barbara Smith, an elderly husband and wife who reside in a single family home in a residential neighborhood on Detroit’s east side had a drug raid executed on their home by Detroit Police Officers. The incursion was based on a search warrant predicated on information which the affiant swore he had obtained from a confidential informant known as SOI # 403 (the “CI”). The Smiths are alleging assault and battery, deprivation of civil rights under 42 U.S.C. § 1983, and false arrest and imprisonment in the lawsuit they have filed.

Ms. Anna Diggs Taylor, United States District Judge, United States District Court, EDM, made the following observations about the informant privilege in her opinion:

“The informant’s privilege is well recognized. See *Roviaro v. United States*, 353 U.S. 53, (1957). This privilege is applicable in both civil and criminal proceedings. *Holman v. Cayce*, 873 F.2d 944, (6th Cir. 1989); *Bergman v. United States*, 565 F. Supp.

1353, (W.D. Mich. 1983). In *Rovario*, a criminal defendant was convicted of selling heroin to a confidential informant. The confidential informant was the only witness to the crime and a material participant in it. The defendant wanted the informant to testify at trial as part of his defense. The government asserted a privilege to keep the identity of the informant secret.

“The United States Supreme Court stated that what is usually referred to as the informant’s privilege is in reality the Government’s privilege to withhold from disclosure the identity of a person who provides information of violations of the law to officers charged with enforcement of that law. The purpose of that privilege is the furtherance and protection of the public interest in effective law enforcement. A limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer’s identity is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way.

“Accordingly, a defendant is not required to disclose the identity of a confidential informant unless it is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. The determination of whether a confidential informant’s identity is essential is a question of law for the trial judge and must be determined by balancing the need of the plaintiff for the information with the defendant’s interest in non-disclosure.

“Upon assertion by the Government, the informant’s privilege is subject to close scrutiny. A court should be mindful of ‘the public interest in protecting the flow of information,’ *Rovario*, supra, 353 U.S. at 62, but should also ‘be aware of the need to maintain the integrity of and confidence in the criminal justice system.’ *Bergman*, 565 F. Supp. at 1364. Therefore, the assertion of the informant’s privilege by a law enforcement official defending against a civil suit for damages based on his own alleged misconduct should be scrutinized closely.

“If under the weight of the necessary level of scrutiny the Government cannot prove that the CI is living, then the privilege crumbles. It is clear that the death of the informant effectively extinguishes the very limited informant privilege. *Bergman v. U.S.*, 844 F.2d 353, 363 (6th Cir. 1988). Therefore, as a

condition precedent for invoking the informant’s privilege, the government must produce evidence of the live informant. Here, the Defendants [the City of Detroit] have stated that, after extensive efforts, they are unable to locate the CI. If this is the case, then the Defendants cannot invoke the informer’s privilege.

“With the privilege dissolved, the Government must produce its formerly privileged information. If the Defendants can prove the CI is alive, then necessarily it follows that the Defendants know the CI’s location. Likewise, if the Defendants cannot locate the CI, then they cannot prove that the CI is alive. Therefore, to allow the Defendants to claim the privilege and to simultaneously state that they cannot find the CI would fly in the face of simple logic. Justice simply does not allow the government to claim a policy so pregnant with mischief. If it were otherwise, the government could selectively produce informants—that is selectively produce information, and selective information is misinformation.

“If the Defendants cannot produce the CI, then they must be precluded from presenting any evidence at trial based on, or flowing from, the alleged existence of the CI. The more direct question presented is whether a court can order disclosure of the identity of the informant where the informant is unavailable for the in-camera hearing. In the present case, the CI is alleged to be in danger because of his/ her status. According to the Defendants, the CI has been shot many times. He has had killings in his family and a lot of people want this man or woman dead.

“Under circumstances where the safety of the informant is in question and the party seeking disclosure claims that disclosure is material to their case, courts have ordered an in-camera hearing to determine if the identity of the informant had to be disclosed. See *United States v. Lloyd*, 400 F.2d 414, (6th Cir. 1968); *United States v. Savage*, 969 F. Supp. 450, (E.D. Mich. 1997). Therefore, in addition to ordering an in-camera hearing to interview the informant, the court may order an in-camera hearing to determine whether the informant’s identity must be disclosed. Courts are afforded wide latitude in conducting an in-camera hearing of this type, and in fact, courts conduct such hearings in a variety of ways.

“In the present case, there appears to have been an in-court hearing on the issue of compelling the production of the informant for an in-camera hearing and on the issue of disclosure. It does not appear that there was an in-camera hearing conducted for the purpose of determining whether the producing the CI was ‘essential to a fair determination,’ which in turn determines whether or not disclosure is appropriate. The purpose of such a hearing is to determine if the informant’s testimony is material to the defense—only if the testimony is material, must his or her identity be disclosed. Courts look at three factors in assessing the materiality of an informant’s testimony: (1) the level of the informant’s involvement; (2) the helpfulness of the disclosure; and (3) the government’s interest in non-disclosure.

“Accordingly, this proceeding is reversed and remanded for procedures consistent with those outlined above.”

EVIDENCE: Voice Identification

In *Clifford v. Chandler*, CA6, No. 01-5926, 6/25/03, Detective William Birkenhauer of the Northern Kentucky Drug Strike Force set up a meeting with a police informant, Gary Vanover, at Vanover’s apartment in Lexington, Kentucky. The object of this meeting was to obtain cocaine base (“crack”) from Vanover’s friend, Charles Clifford.

At the time of the transaction, Birkenhauer wore a device that allowed another officer, Darrin Smith, to listen to the conversations in the apartment from a remote location. Smith testified at trial he heard four different voices in the apartment. He recognized one voice as Birkenhauer’s and identified another as a female’s voice. The other two voices he heard were male voices and one “sounded as if it was a male black.” Clifford is an African-American and Vanover is Caucasian. Smith identified the “black male” voice as belonging to the person from whom Birkenhauer negotiated the purchase of the crack. The audio tape of the conversations was ruled inaudible and was not admitted into evidence.

The issue in this case was the propriety of identifying an individual’s race by his voice. Clifford

argues that Smith’s identification of one of the voices he heard in the apartment as belonging to a black male violated his rights to due process under the 14th Amendment. He also contends any identification of an individual’s race by the sound of his voice is unconstitutionally prejudicial.

The Court stated that they while they were sensitive to the injection of racial bias in a criminal prosecution and while they believe racial voice identification can create constitutional concerns in some instances, it was concluded that its use in this case was not in error:

“The issue of racial voice identification is one of first impression in this Circuit. First, the limited research conducted on the issue of racial voice identification indicates this type of identification is extremely reliable. Thomas Purnell, William Idsardi, and John Baugh, *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. Language & Soc. Psychol., 10-30 (1999). In a study involving 421 graduate and undergraduate students at Stanford University, the participants were asked to identify the racial or ethnic background of twenty different speakers. They correctly identified the African-American males’ voices approximately 88% of the time.

“Second, the vast majority of courts that have addressed the admissibility of racial voice identification evidence have concluded it is admissible, which indicates those courts did not believe it was inherently unreliable. *See United States v. Card*, 86 F. Supp. 2d 1115 (D. Utah 2000) (testimony perpetrator of robberies sounded like African-American admissible); *State v. Smith*, 415 S.E.2d 409 (S.C. Ct. App. 1992) (allowing identification of a voice as being that of a white male); *State v. Kinard*, 696 P.2d 603 (Wash. Ct. App. 1985) (testimony a robber sounded black was admissible); *Rhea v. State*, 147 S.W. 463 (Ark. 1912) (witness allowed to testify voice he had heard in a crowd of African-Americans was a white man’s voice). Likewise, we cannot conclude the mere identification of the race of an individual by the sound of his voice would be inherently unreliable.

“Clifford also argues that even if the voice identification was not unreliable, it was certainly unconstitutionally prejudicial. Certainly the use of a defendant’s race in his criminal trial can be

inappropriately prejudicial in some circumstances. See *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) (holding Constitution prohibits prosecution from making racially-based arguments). However, we reject the notion that the mere identification of an individual's race by his voice will always result in unconstitutional prejudice. To so hold would result in the perverse result of not allowing the best evidence to be presented to the jury when the danger of impermissible prejudice is remote. For example, under the theory propounded by Clifford, the trial court would be required to exclude a rape victim's testimony about the race of her attacker when she did not see his face but only heard his voice. See *Kinard*, 696 P.2d at 605 (woman allowed to testify the voice of her attacker sounded black). Such probative evidence should not be excluded simply because of an ambiguous concern over the possibility of racial prejudice.

"This does not mean a defendant would always be precluded from showing a racial voice identification was improper. He would simply have to demonstrate how the identification was inappropriately prejudicial in his particular case. Clifford, however, has not explained how the voice identification was used inappropriately in this case. For example, we have no evidence that the prosecutor used the voice identification to inflame the jury. There is no evidence before us the judge made inappropriate references to the identification. Indeed, in this particular case, the officer making the racial identification did not even state it was Charles Clifford he heard. He simply identified the race of the voice he heard engaging in the crime. *State v. McDaniel*, 392 S.W.2d 310, 315 (Mo. 1965) (allowing racial voice identification testimony because the identification was of the race of those who had committed the crime, not necessarily the defendant's race). Under the facts of this case, we cannot say the racial voice identification by Smith was unconstitutionally prejudicial."

FIFTH AMENDMENT: Miranda Rights

On May 16, 2001, a woman contacted the Colorado Springs Police Department to report that a man had fired shots at her house. After some preliminary investigation, the police presented the woman with an assortment of photos of possible suspects, from which she identified Rodgerick Lackey. The police department obtained an arrest warrant for Lackey on felony charges of illegal discharge of a firearm, menacing with a handgun, and possession of a weapon by a previously convicted felon. The police department then contacted an agent of the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) to obtain assistance in apprehending Lackey.

On May 23rd, two police officers and an ATF agent went to the parking lot of an apartment building where Lackey was believed to be living, hoping to arrest him as he arrived at or left the building. Shortly thereafter, the three officers saw a man approach a car matching the description of Lackey's car. The man, who resembled Lackey, opened the car's hatchback and spent about a minute "moving things around" inside the car.

The officers approached the man, displayed their badges, and identified themselves. The man took a few steps away from the hatchback. One officer asked him his name, and Lackey identified himself. He was told that he was under arrest on an outstanding warrant. Next, an officer asked him, "Do you have anything on you that would hurt me?" R, Vol. 5, at 47, 88. Lackey responded, "What is this about? What is this about?" *Id.* at 44, 88. An officer replied, "I will tell you about it in a minute," and then handcuffed him. *Id.*

Once Lackey was handcuffed, but before he was patted down, an officer asked, "Do you have any guns or sharp objects on you?" Lackey responded, "No, I don't have anything on me, but there was a gun in the car." *Id.* at 47-48, 89. The officers looked into the car's open hatchback and noticed a gun and its magazine clip, both plainly visible. When an officer asked him whether the car was his, Lackey responded that it belonged to him

and his wife. At the officers' request, he granted consent to search the car. He then was frisked, but no additional weapons were discovered.

Following the arrest, Lackey was transported to the ATF office, where he received *Miranda* warnings for the first time. Lackey signed a written waiver and gave a written statement denying his involvement in the May 16th shooting.

Lackey was later charged with possession of a firearm by a restricted person, in violation of 18 U.S.C. § 922(g)(1). He filed motions to suppress the gun and the statements he made to the police officers at the arrest scene. The district court denied the motions to suppress, finding that the officers' questions about whether Lackey had weapons or sharp objects on him were within the public-safety exception to the *Miranda* requirement, *see New York v. Quarles*, 467 U.S. 649 (1984). The court also concluded that Lackey had voluntarily consented to the search of the car and that the search of the car was proper as a search incident to a lawful arrest.

Lackey's case proceeded to trial, where he was found guilty. In *United States v. Lackey*, CA10, No. 02-1255, 7/11/03, Lackey filed an appeal. The sole issue on appeal is whether the officers violated Lackey's constitutional rights by asking him about the presence of guns or sharp objects on his person after he was in custody but before he was informed of his *Miranda* rights. The Tenth Circuit Court of Appeals held that the question was proper under the public-safety exception to *Miranda*, finding as follows:

"In *New York v. Quarles*, 467 U.S. 649 (1984), two police officers encountered a woman who informed them that she had just been raped. She told the officers that the rapist had a gun and had recently entered a nearby grocery store. The officers entered the store, where they spotted a man matching the suspect's description. Upon seeing the officers, the suspect fled. After giving pursuit, one of the officers, Frank Kraft, cornered the suspect and ordered him to stop and put up his hands. Officer Kraft frisked him, at which time he discovered that the suspect was wearing an empty shoulder holster. Officer Kraft handcuffed the suspect and asked him where the gun was. The suspect nodded to some empty cartons and stated, 'The gun is over there.' Officer Kraft proceeded to the cartons, where he

discovered a loaded .38 caliber pistol. Officer Kraft then formally placed the suspect under arrest and advised him of his *Miranda* rights.

"The state trial court suppressed the suspect's statement that 'the gun is over there,' ruling that it was obtained by a question improperly asked before the suspect was informed of his *Miranda* rights. The New York Court of Appeals affirmed. After concluding that the suspect had been in 'custody' within the meaning of *Miranda*, it 'declined to recognize an exigency exception to the usual requirements of *Miranda* because it found no indication from Officer Kraft's testimony at the suppression hearing that his subjective motivation in asking the question was to protect his own safety or the safety of the public.'

"The Supreme Court reversed, holding that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence. Observing that undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps the desire to obtain incriminating evidence from the suspect, the Court said that 'the availability of that exception does not depend upon the motivation of the individual officers involved.'"

The Court reasoned that the protection of the Fifth Amendment privilege provided by *Miranda* could not justify the risk to public safety. It wrote:

"In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in *Quarles*' position might well be deterred from responding. Procedural safeguards that deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred *Quarles* from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting *Quarles*. Officer Kraft needed an answer to his question not simply to make his case against *Quarles* but to insure that further

danger to the public did not result from the concealment of the gun in a public area.

“We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”

Although the Court noted that the public-safety exception could theoretically diminish the clarity of *Miranda*, it minimized this concern, stating, “We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.

“In our view, the reasoning of *Quarles* applies squarely to the circumstances here. The focused question of the officers—*Do you have any guns or sharp objects on you?*—addressed a real and substantial risk to the safety of the officers and the defendant: If Rodgerick Lackey was carrying such an item, he could use it against the officers, or perhaps more likely, someone could be seriously injured when Lackey, who was already under arrest, was routinely searched or frisked.

“It is irrelevant that the principal danger in this case was the risk of injury to the officers or Lackey himself, rather than ordinary members of the public. As the above-quoted passages from *Quarles* illustrate, the concern of the public-safety doctrine extends beyond safety to civilians. The exception undoubtedly extends to officers’ questions necessary to secure their own safety. See *United States v. Holt*, 264 F.3d 1215, (10th Cir. 2001) (concerns about officer safety justify routinely asking about presence of weapons during traffic stop).

“Indeed, in one significant respect, an exception to *Miranda* can be better justified in this case than in *Quarles*. Here, a responsive answer to the officers’ question would not, as a practical matter, incriminate a suspect. Because officers have the right to, and will, search the person of an arrestee, they will learn soon enough whether the arrestee is carrying a dangerous object. The purpose of the question ‘Do you have any guns or sharp objects on you?’ is not to acquire incriminating evidence; it is solely to protect the officers, as well as the arrestee, from physical injury. Thus, in this context, requiring

Miranda warnings does precious little to protect the arrestee’s privilege against self-incrimination. The risk of incrimination is limited to non-responsive answers (such as in this case, when the suspect provides more information than requested), not a risk particularly worthy of a prophylactic rule. See *Rhode Island v. Innis*, 446 U.S. 291, (1980) (*Miranda* inapplicable when suspect’s incriminating comments came in response to officers’ statements that could not have reasonably been expected to elicit an incriminating response).

“We note that in similar circumstances other circuit courts have held that the public-safety exception applies. See *United States v. Shea*, 150 F.3d 44, (1st Cir. 1998) (pre-*Miranda* question asking arrested defendant whether he had any weapons fell within the public-safety exception); *United States v. Young*, No. 02-4465, 2003 WL 283189, (4th Cir. Feb. 11, 2003) (unpublished) (officer’s pre-*Miranda* question, ‘Do you have any sharp objects, knives, needles, or guns?’ was within public-safety exception); *United States v. Webster*, 162 F.3d 308, (5th Cir. 1998) (The police acted constitutionally when they asked the defendant whether he had any needles in his pockets that could injure them during their pat down; such questioning, needed to protect the officers, does not constitute interrogation under *Miranda*.); *United States v. Edwards*, 885 F.2d 377, (7th Cir. 1989) (public-safety exception applied to pre-*Miranda* question asking arrested defendant whether he had a gun); *United States v. Carrillo*, 16 F.3d 1046, (9th Cir. 1994) (pre-*Miranda* question asking arrested defendant whether he had any needles on him was within the public-safety exception).”

PROBABLE CAUSE: Handwriting Analysis

In August 1997, Barbara Valente began work as an on-site manager for ADECCO Employment Services at a Hewlett-Packard (HP) plant in Andover, Massachusetts. The HP plant was a large one, comprising seven buildings and employing over 2,500 people. Between August 1997 and January 1999, seven anonymous bomb threats and fourteen

anonymous notes expressing spite or workplace dissatisfaction appeared at the plant.

Several of the notes were found by Valente—one purportedly signed with her first name—and twenty-one of the twenty-four notes were in the building in which she worked. After the first bomb threat in November 1997, the Andover police began an investigation. The detective then heading the case identified a suspect (not Valente) by handwriting, and Hewlett Packard retained a handwriting analysis firm with adequate credentials: McCann and Associates. McCann deemed the samples inconclusive and the investigation lapsed.

In September 1998, Valente began three months of maternity leave to care for her newly adopted child. During this time, two more notes were discovered and in January 1999, the investigation resumed under the charge of Detective William Wallace. More handwriting samples were obtained, this time from nine employees, including Valente. McCann determined that for the fourteen notes as to which it could draw conclusions, only Valente could not be ruled out as a suspect, but McCann also said that she could not be “conclusively” identified based on the samples available.

More samples of Valente’s handwriting were secured, and in November 1999, McCann concluded that it was “more probable than not” that Valente was the author of three bomb notes, including two found when she was on leave and eleven of the other notes. Wallace met with McCann representatives who, with slides or similar means, displayed the similarities on which they relied and repeated their conclusion. Wallace also determined that Valente could have visited the HP building in question during her leave, although he had no proof that she had done so.

On January 5, 2000, at Wallace’s request, Valente came to the police department. In the discussion that followed, Wallace deemed Valente’s rather terse disclaimers not what he expected from an innocent person—she simply said she knew nothing about the notes; he also found her to be very nervous, her skin reddening and breaking out in hives. At the close of the interview, Wallace and his supervisor agreed that Valente should be arrested and a warrantless arrest was effected on three counts of creating a bomb scare, each of which carried a

maximum punishment of 20 years’ imprisonment under Massachusetts law. Mass. Gen. Laws. ch. 269, § 14(b)(1), (c) (2002).

Valente was never prosecuted. A criminal complaint was dismissed when the prosecutor failed to meet a discovery deadline. During the period after her arrest and when Valente was not working at the plant, yet another note was found and suspicion fell on another employee.

In July 2001, Valente brought the present civil rights action against Wallace, his supervisor, and the town, 42 U.S.C. § 1983 (2000), charging that she had been arrested without probable cause in violation of the Fourth Amendment. After discovery, the district court granted summary judgment on the merits in favor of the police, ruling from the bench that they had probable cause for the arrest, a ground that also disposed of any derivative claim against the town. In the alternative, the district court found that the two individual officers were entitled to qualified immunity. In *Valente v. Wallace*, CA1, No. 02-2549, Valente filed an appeal. The U.S. District Court of Appeals for the First Circuit found as follows:

“...The Fourth Amendment requires ‘probable cause,’ *Wong Sun v. United States*, 371 U.S. 471, 479 (1963), and the broad outlines of the concept are familiar. But the case law on probable cause harbors one central ambiguity and a host of smaller issues. The ambiguity exists because the Supreme Court has told us that probable cause means more than bare suspicion but less than what would be needed to justify conviction. *Brinegar v. United States*, 338 U.S. 160, 175 (1949). A good deal of territory lies in between.

“Within this territory, the Supreme Court has said that the question is whether the evidence would warrant a man of reasonable caution in believing that a crime has been committed and committed by the person to be arrested. *Beck v. Ohio*, 379 U.S. 89, 96 (1964). The emphasis is on calculating likelihoods. See *Brinegar*, 338 U.S. at 175. Whether this excludes all other factors and whether the likelihood must be ‘more likely than not’ are questions arguably unsettled; but, centrally, the phrase ‘probable cause’ means a reasonable likelihood. *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

“In this case, the bomb threats constituted a crime so the only question is whether the police had

probable cause to believe that Valente was the culprit. The test is objective and turns on what a reasonable police officer would conclude based on the evidence actually available at the time (and not on unknown facts or subsequent events). On the facts known to Wallace at the time, we hold that a reasonable police officer would be warranted in the belief that Valente had sent some of the notes.

“The main reason for this conclusion is that a seemingly qualified expert handwriting examiner had said that the notes were more likely than not written by Valente. This is not conclusive as to probable cause (for reasons to which we will return) but it is a powerful start. *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d at 249 (1996) (voice identification). And it is worth noting that Wallace did not just take the expert’s summary conclusion; he met with the McCann representatives and watched them explain graphically why they were persuaded.

“If Valente’s fingerprints had been found inside a threat letter first opened by the police, it could hardly be doubted that probable cause would exist. Handwriting analysis is a less rigorous means of identification, e.g., Mnookin, *Scripting Expertise*, 87 Va. L. Rev. 1723, 1726-27 (2001), depending on how distinctive the handwriting might be, the number and type of samples, and the competence of the examiner. See *United States v. Mooney*, 315 F.3d 54, 62-63 (1st Cir. 2002). Normally, the examiner can do no more than speak of probabilities. But here the examiner did say, ‘more likely than not,’ which is the most that the Fourth Amendment requires.

“This is not the end of the story. Plenty of other evidence might be available to the police to reinforce—or to rebut—an expert’s view that the suspect more likely than not wrote a threat note. Suppose the note contained information almost certainly known only to the suspect or, conversely, information that the suspect would be most unlikely to know. Or there might be information about motive and access, two staples of criminal investigation. The initial expert judgment might have to be adjusted; conceivably, ‘probable cause’ could vanish based on new data.

“Here, the notes had begun not long after Valente joined the company, and most were found in the building where she worked. See *United States v. Brown*, 457 F.2d 731, (1st Cir. 1972). All of this is

mildly helpful to Wallace, although how far depends in part on the size of the workforce, turnover, and similar data. Some of the facts, and what the police knew on these points, are obscure. The police do appear to have checked to see whether Valente could have had access during her three-month leave and found that this could not be ruled out.

“There is also Valente’s behavior during the interview at the police station. According to Wallace, she was both reluctant to talk (he said that the usual innocent person protests much more strongly when wrongly accused) and extremely nervous. Frankly, to a layman, neither of these symptoms seems very revealing. However, the case law does give some weight both to demeanor evidence, e.g., *United States v. One Lot of U.S. Currency*, 103 F.3d 1048, 1055 (1st Cir. 1997), and to the experience of the police. See *United States v. Ortiz*, 422 U.S. 891, 897 (1975). In fairness to Wallace, he said that the interview was primarily to see if Valente could counter the inference he had already drawn.

“Thus, at the time of the arrest, the police had expert evidence that Valente was more probably than not the note writer—she had apparent access to the site throughout the period before her arrest; most of the notes were discovered near or not far from where she worked; there was no specific motive attributable to her but disgruntled employees are not unknown; and there was apparently no other then-current suspect against whom a strong case existed. This, in our view, is probable cause for an arrest.”

SEARCH AND SEIZURE: Entry into Residence by Estranged Wife

After six years of marriage, Cheryl Shelton abruptly left the home that she shared with her husband, Jimmy Doug Shelton, after learning of an affair Shelton was allegedly having with his secretary. When she left, Cheryl took some of her clothes and other possessions with her, but she left behind many other personal belongings, including, among other things, clothes, jewelry, photographs, and furniture. With Shelton’s knowledge and assent, she also kept her house key and her personal security access code for the house alarm system. Although

Cheryl never moved back into the house, she and Shelton were not legally separated during the period in question and neither party filed for divorce.

A few days after she moved out, Cheryl, together with her daughter, Camile, returned to the former marital residence so that Cheryl could retrieve some more of her belongings. Camile videotaped boxes of bingo cards while she was in the house. At about the same time, Cheryl's sister, Debbie, who had been cooperating with a government investigation of Shelton since the previous month, informed Cheryl of the on-going investigation of Shelton's bingo operations and encouraged her to speak with the government. Cheryl agreed and met with an IRS agent and an Assistant U.S. Attorney a week after she had vacated her marital home.

At that meeting, Cheryl volunteered to help the government with its criminal investigation of Shelton, testifying later that she "wanted to do the right thing" and that she "didn't want to get in trouble." The agents orally assured Cheryl that if she would assist in the investigation, she would not be prosecuted for her role in the alleged conspiracy and indicated that she would be compensated financially in some way.

Cheryl informed the government agents that there were items in Shelton's home that might further their investigation, including bingo cards in an upstairs bedroom and a notebook with records of the alleged skimming operation on top of a grandfather clock in the front hallway of the house. The government agents advised Cheryl of their interest in the notebook and any other items that she could obtain relative to the skimming operation, and Cheryl subsequently gave the government the videotape that Camile had made during their first visit to Shelton's residence together. After that initial visit, Cheryl returned to Shelton's house many more times, both on her own accord and at the specific direction of the government. She did so to obtain particular items of evidence for the benefit of the government's investigation, as well as to pick up her mail and personal belongings. She continued making visits to the house over a period of at least four months.

After Shelton was charged, he filed a motion to suppress, challenging nine specific visits to his house by Cheryl and the items she had taken. In recommending that the district court grant the motion to suppress, the magistrate judge acknowledged that

Shelton had made no attempt to limit Cheryl's access to the home and noted that the items that Cheryl had taken from the home after she moved out were located in areas to which she had free access. Emphasizing that Cheryl maintained no ownership interest in the home, however, the magistrate judge concluded that Cheryl's permission from Shelton to enter the home, although not limited spacially, was limited functionally to picking up her mail and personal belongings. This, concluded the magistrate judge, limited the purpose of her authorized access. Although she was entitled to retrieve personal items, ruled the magistrate judge, Cheryl's principal purpose in entering the home was not to pick up her mail and personal items, but to collect evidence against her husband at the direction of the government. Consequently, reasoned the magistrate judge, her activities exceeded the limited purpose for which she was allowed into the home by Shelton, and thus constituted unlawful searches.

Despite the recommendation of the magistrate judge, the district court denied Shelton's motion to suppress. The court found that Shelton had neither attempted to limit Cheryl's access to the home nor attempted to exclude Cheryl in any way from access to the evidence that she obtained and turned over to the government. The court held that Cheryl had actual common authority to permit a search by agents of the government and to deal directly with the contents of the house.

After the court denied his motion to suppress, Shelton agreed to plead guilty to one count of the superseding indictment, viz., filing a false tax return for his bingo operation. As part of the agreement, Shelton consented to the forfeiture of the bingo building and \$303,718.73, subject to pending forfeiture actions, but reserved the right to appeal the denial of his motion to suppress evidence and, if successful, to withdraw his guilty plea. Shelton was sentenced to nine months imprisonment, one year of supervised release, and a fine of \$20,000. He timely filed a notice of appeal.

In *United States v. Shelton*, CA5, No. 02-60326, 7/8/03, the issue was whether Shelton's Fourth Amendment rights were violated by the removal of evidence from his house by his estranged wife. The Fifth Circuit Court of Appeals, in a lengthy opinion, concluded that Shelton's Fourth Amendment rights

were not violated by admission of evidence obtained by the government by Cheryl as a paid informant. The Fifth Circuit Court of Appeals noted that issues such as this were very fact specific, finding as follows:

“In this case, Shelton now insists Cheryl’s access to his house was strictly limited to retrieving her belongings and picking up her mail. In light of all the facts, we disagree. Had he truly wanted to limit her access to these purposes only, Shelton could have revoked Cheryl’s security code, changed the locks, and set up an appointment for her to pick up her things while he was present at the house. Just as Shelton put aside Cheryl’s mail, he could have collected her personal belongings for her to pick up at one time. He could even have left her mail outside the house or taken it to his office and given it to her sister, who worked there.

“Rather than take any of these precautions, however, Shelton did nothing to suggest that Cheryl’s access to the house was restricted to the extent that he now contends, or that he had reestablished his expectation of privacy vis-à-vis her curtailed use of the house after she moved out. In essence, nothing changed. The great weight of the evidence supports the conclusion that Shelton never altered his position toward Cheryl’s use of the house after she moved out, and that his low expectation of privacy relative to her continued unchanged. Having been married to Cheryl and having shared his home with her for at least six years, Shelton never asked her to vacate the house in the first place; she left on her own volition because of his purported marital infidelities. He never filed for separation or divorce; he never changed the locks or revoked Cheryl’s personal security code; he was aware that Cheryl returned to the house from time to time, and he sorted her mail for her; he apparently invited her to stay at the house on one occasion when he planned to be out of town; he never changed the locations of incriminating evidence of the bingo operation from the places where they were kept while she was living at the house; and—perhaps most importantly—Shelton never ceased his efforts to involve her in the alleged skimming operation even five months after she moved out. There is practically no evidence in the record that Shelton tried to restrict Cheryl’s access to the house or to limit the reasons for which she could enter it.

By continuing to allow Cheryl free access to the house, and by continuing to involve her in the skimming operation, Shelton demonstrated that he held no subjective expectation of privacy toward her at any time, either before or after her move.

“Neither was Shelton’s expectation that Cheryl would keep the criminal operation materials private reasonable. It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities. Although Shelton might have expected that, for her own best interests, Cheryl would not divulge information or evidence about their illegal activities, the Fourth Amendment does not protect a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, as an accused philanderer, Shelton might have done well to heed the admonition of the playwright William Congreve regarding a woman scorned...

“Finally, neither Cheryl’s principal purpose of procuring evidence for the government instead of picking up personal belongings, nor the absence of her intention of returning to the marriage—even if true—precludes our concluding that she maintained common authority, because it is not her subjective intention that controls our decision. The validity of third-party consent depends in principal part on the extent to which the defendant forgoes his reasonable expectation of privacy toward that third party. Thus, although the intentions of the third party may carry some weight, it is the defendant’s treatment of his own privacy interests that predominates in the determination of the third party’s right to consent. Shelton’s decision to solicit Cheryl’s assistance in the criminal operation, and at the same time to perpetuate her essentially unrestricted access to the house, on par with the access that she had enjoyed while residing there as his spouse, is what vested Cheryl with common authority to consent to a search.

“We agree with the district court that Cheryl possessed common authority to consent to a search of Shelton’s house. That this manifested itself in her going into that house and taking evidence out of it for the government rather than allowing the government agents to enter the house themselves is of no moment. The result is the same, either way. Shelton’s Fourth Amendment rights were not violated,

so the district court's refusal to exclude those items from the evidence was not error."

**SEARCH AND SEIZURE:
Entry into Residence by Consent of
Individuals with Lesser Possessory
Interest After Owner Refuses
Search by Consent**

In *United States v. Jones*, CA6, No. 01-6036, 7/10/03, a federal task force composed of agents of the Federal Bureau of Investigation (FBI) and the Bureau of Alcohol, Tobacco and Firearms (ATF), together with officers of the Knoxville Police Department, began surveillance of Richard Jones's residence in the summer of 2000. Law enforcement officers had obtained information that Jones was residing in Knoxville, Tennessee and was in possession of firearms and drugs. The agents and officers subsequently determined that Jones was wanted on an outstanding federal arrest warrant.

On August 9, 2000, members of the task force pulled Jones over in his car and arrested him on the federal warrant. The arresting officers asked Jones for permission to search his residence, which he refused to give. Jones was then placed in custody and transported to the local police station.

As a result of the surveillance conducted prior to Jones's arrest, the officers knew that two other individuals were at his residence. The officers had observed a male working on a motor vehicle in the driveway and had seen him take off one of the door panels. A second person was observed bringing food and water to dogs that were living at the residence.

FBI Special Agent Steven Fisher testified that, after arresting Jones, he and two Knoxville police officers went back to the residence, even though they had been denied consent to search by Jones. Fisher testified that their purpose was not to seek consent for a search, but instead to determine the identity of the two individuals at the residence. He and the two Knoxville police officers ultimately went to the front door and asked to speak to the occupants. Fisher testified that, had the individual answering the door refused to speak to them, he and the police officers would have left the premises.

Officer Kenneth Gilreath of the Knoxville Police Department knocked on the door, while Fisher waited outside to ensure that the dogs did not attack. According to Gilreath, James Teasley answered the door. Gilreath identified himself and asked Teasley his identity. After Teasley gave his name, Gilreath asked him his purpose in being there. Teasley advised that he was there to clean up the house. Gilreath then asked if he could come in and talk to Teasley. The district court found that Teasley told the officer that he could come inside the door of the residence. Jones argues, however, that Teasley never gave the officer permission, but simply stepped back from the front door.

After stepping inside the residence, Gilreath observed a second male sitting to his left in the living room. Gilreath began a conversation with the male, who identified himself as Thomas Dickason. Officer Gilreath questioned Dickason about why he was working on the car and removing the door panel. He also asked Dickason about his relationship to Jones. During the course of their conversation, Gilreath recognized prison tattoos on Dickason. Dickason told Gilreath that he had served a prison sentence but was now straight.

He also advised Gilreath that his identification (ID) was in a duffel bag in the back bedroom together with his clothes and tools. Gilreath then asked Dickason for permission to look for the ID in the bedroom. Dickason told Gilreath that he could and pointed to the back bedroom where the duffel bag containing the ID was located.

Gilreath walked to the room and found the duffel bag. While there, he observed a rifle leaning up in the corner of the bedroom and what appeared to be two other firearms and a crossbow. When the duffel bag was opened, Gilreath saw a pipe apparently used to smoke crack cocaine.

The residence was then secured while the officers sought a federal search warrant. Fisher submitted an affidavit in conjunction with the application for a search warrant, expressly noting that Jones had denied permission for a consensual search of the residence. The affidavit further described the interview of Teasley conducted by Officer Gilreath in the foyer of the residence. Fisher further averred that, while in the foyer, the officers observed Dickason. After questioning Dickason, the

affidavit noted that Dickason gave Gilreath permission to retrieve his duffel bag from a bedroom that Dickason had occupied the night before.

Jones contends that after he refused consent to search, neither Teasley nor Dickason, both of whom had lesser possessory rights to the premises than Jones, could give lawful consent for the officers to enter the premises.

In order to uphold the ruling of the district court, which denied Jones's motion to suppress, the Sixth Circuit Court of Appeals had to find that Officer Gilreath was lawfully admitted to the residence by Teasley and also that his subsequent progression through the house once inside was within the bounds of the Fourth Amendment. Their finding is as follows:

"The Supreme Court has clearly stated that 'the Fourth Amendment has drawn a firm line at the entrance to the house.' *Payton v. New York*, 445 U.S. 573, 590 (1980) (holding that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest). In addition, a prior decision of this court notes that 'the Supreme Court has firmly and repeatedly rejected the proposition that the Fourth Amendment offers no protection against government entry into a home unless the entry is for the purpose of performing a traditional "search" or "seizure."' *United States v. Rohrig*, 98 F.3d 1506, 1511 (6th Cir. 1996) (holding that although police officers entered a home for the sole purpose of turning down the stereo, Fourth Amendment protections were triggered). This means that even if we were to accept the contention that Officer Gilreath entered the residence solely for the purpose of continuing his conversation with Teasley, his conduct would not be insulated from Fourth Amendment analysis.

"Although it is true that an employee does, in some instances, have sufficient authority to consent to entry into or a search of his employer's residence, the lesser interest of the employee cannot override the greater interest of the owner. When the primary occupant has denied permission to enter and conduct a search, his employee does not have the authority to override that denial."

"The district court found that Teasley affirmatively gave Gilreath permission to enter the residence. We therefore turn to the question of whether Teasley had the authority to give that permission. The question of when an employee's consent is sufficient for entry into a residence has not been treated uniformly by the courts. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §8.6(c) (3d ed. 2002). Some have relied on a theory of agency, while others depend entirely on whether the employee had

apparent authority. In general, the cases have engaged in a fact-specific analysis of the level of responsibility given to the employee. If the employee's job duties include the granting of access to the premises, authority to consent is more likely to be found. A caretaker left in charge of a home for several weeks, for example, might have authority to permit entry, while a worker who is present on a more limited basis would not.

"In this case, Teasley, a handyman, clearly lacked actual authority to permit Officer Gilreath to enter the residence. His authority, even assuming that he had any, would have ceased at the point that Jones denied consent to a search, which had to be understood by Officer Gilreath to include a denial of entry. Although it is true that an employee does in some instances have sufficient authority to consent to entry into or a search of his employer's residence, the lesser, and necessarily derivative, interest of the employee cannot override the greater interest of the owner. When the primary occupant has denied permission to enter and conduct a search, his employee does not have the authority to override that denial. See *United States v. Impink*, 728 F.2d 1228, 1234 (9th Cir.1984) (stating that 'when the police intentionally bypass a suspect who is present

and known by them to possess a superior privacy interest, the validity of third party consent is less certain'). An individual with an equal interest in the residence, such as a spouse or cotenant, would presumably have such authority, but that is not the case here. LaFave, § 8.6(c).

"We next turn to the question of whether any reasonable person would have believed that Teasley had apparent authority to consent to Gilreath's entry into the residence. This court has previously held that when one person consents to a search of property owned by another, the consent is valid if the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises. Thus, there is no violation of the Fourth Amendment if, under the totality of the circumstances, the officer performing the search has relied in good faith on a person's apparent authority. *United States v. Campbell*, 317 F.3d 597, 608 (6th Cir. 2003).

"Officer Gilreath knew that the individual who opened the door was simply a handyman. This fact, combined with Jones's prior denial of consent to a search, made it impossible for a 'man of reasonable caution' to believe that Teasley had the authority to consent to a search of the residence or even to permit entry. Because Teasley had neither actual nor apparent authority to admit Officer Gilreath to the residence, the warrantless entry was unlawful. This means that all of Officer Gilreath's conversations and discoveries after he entered must be excluded under the 'fruit of the poisonous tree' doctrine. *Northrop v. Trippett*, 265 F.3d 372 (6th Cir. 2001) (The fruit of the poisonous tree doctrine provides that evidence discovered as the indirect result of a Fourth Amendment violation is inadmissible.)"

SEARCH AND SEIZURE: Installation of GPS Tracking Device on Vehicle

In *State of Washington v. William Bradley Jackson*, 72799-6, 9/11/03, the Washington Supreme Court, in the first such ruling in the nation, concluded that law enforcement could not

attach a Global Positioning System tracker to a suspect's vehicle without a warrant.

On October 18, 1999, William Bradley Jackson called 911 to report that his nine-year-old daughter, Valiree, was missing from their residence in the Spokane Valley. Detectives soon believed that Jackson had something to do with his daughter's disappearance. On October 23rd, police obtained a search warrant to impound and search Jackson's two vehicles. On October 26th, Detective Knechtel obtained a 10-day warrant to attach GPS devices to the two vehicles while they were still impounded. The devices were connected to the vehicle's 12-volt electrical system. The vehicles were returned to Jackson who was informed that the police believed he had hastily buried Valiree's body, that animals would likely dig her up, and that the body would be found and used as evidence against him. Knechtel obtained a second 10-day warrant to maintain the GPS devices on the vehicle.

Data from the GPS device on the truck showed that on November 6th, Jackson drove to his storage unit and then to a remote location on a logging road, (the Springdale site), where the truck was motionless for about 45 minutes. Data showed that on November 10th, Jackson made a trip to another remote location (the Vicari site) where he remained about 16 minutes. He then traveled to the Springdale site where the truck remained stopped for about 30 minutes. He then stopped at several other places, including a storage unit. Investigators discovered Valiree's body in a shallow grave at the Springdale site and found evidence at the Vicari site (two plastic bags with duct tape containing hair and blood—the duct tape edge matched duct tape later found at Jackson's residence in a search pursuant to another warrant).

Jackson raised numerous issues on appeal. The American Civil Liberties Union (ACLU) was granted leave to file an amicus brief on the installation and use of a GPS device on a suspect's vehicle.

The Washington Court stated that the intrusion into private affairs made possible with a GPS device is quite extensive as the information obtained can disclose a great deal about an individual's life. For example, the device can provide a detailed record of travel to doctors' offices, banks, gambling casinos, tanning salons, places of worship, political party

meetings, bars, grocery stores, exercise gyms, places where children are dropped off for school, play, or day care, the upper scale restaurant and the fast food restaurant, the strip club, the opera, the baseball game, the ‘wrong’ side of town, the family planning clinic, the labor rally. In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one’s life.

Use of GPS tracking devices is a particularly intrusive method of surveillance, making it possible to acquire an enormous amount of personal information about the citizen under circumstances where the individual is unaware that every single vehicle trip taken and the duration of every single stop may be recorded by the government. The Washington Supreme Court concluded that citizens of this State have a right to be free from the type of governmental intrusion that occurs when a GPS device is attached to a citizen’s vehicle, regardless of reduced privacy expectations due to advances in technology. The Court held that a warrant is required for installation of these devices.

However, the Court also concluded that the affidavits set forth sufficient facts and circumstances for a reasonable person to infer that Jackson was probably involved in a crime and that installation of the GPS devices would lead to evidence of that crime, i.e., that Jackson might use a vehicle to travel to provide for Valiree’s needs since it was reasonable to infer that she might still be alive. And, assuming she was dead, it was reasonable to infer that Jackson would use a vehicle to drive to her location to thoroughly hide the body and dispose of evidence, given the limited time that would have been available to Jackson the morning Valiree disappeared.

Jackson argues that the two warrants authorized a “fishing expedition”—a general exploratory search to see what could be found when the GPS data was downloaded. This again focuses on the generalization about criminals returning to the crime. However, to the extent this suggests a challenge to the degree of particularity regarding the place to be searched and items to be seized, we find no constitutional difficulty. As to particularity of place, the warrant was issued to authorize installation of the GPS devices on the

vehicles for stated periods of time in order to track where Jackson went. Thus, the “place” searched is the travel pattern of the vehicles after placement of the devices and the item to be seized is the location of Jackson’s movements. The routes obviously could not be identified with any greater specificity, but a description of the place to be searched and items to be seized is valid if it is as specific as the nature of the activity under investigation permits.

The Court concluded that the affidavit here described the place to be searched and the items to be seized with as much particularity as the circumstances permitted, and the warrants did not authorize a “fishing expedition.”

Requiring a warrant ensures that use of GPS technology will be limited to circumstances in which law enforcement has probable cause to believe that criminal activity had occurred or is occurring and will protect innocent citizens from unwarranted and highly intrusive police surveillance. Here, however, law enforcement officers properly obtained valid warrants. Therefore, evidence obtained through use of the device was properly admitted.

SEARCH AND SEIZURE: Officer’s Trespass in Open Field to Make Observations into the Curtilage Area

In *United States v. Hatfield*, CA10, No. 01-7151, 6/25/03, David Wayne Hatfield pled guilty to possession with intent to distribute marijuana and of maintaining a place for the purpose of manufacturing, distributing, and using methamphetamine and marijuana in violation. In an appeal, Hatfield challenged the denial of his suppression motion, arguing that evidence seized pursuant to a warrant was “fruit of the poisonous tree.” He claims that there were two poisonous trees in this case: two unconstitutional searches conducted prior to the issuance of a warrant that produced facts used by the police to obtain the warrant. The case is as follows:

In the afternoon of October 10, 2000, the Sheriff’s Department of Adair County, Oklahoma, received an anonymous tip that Hatfield was growing marijuana behind his house. Undersheriff Gary

Sinclair dispatched Lieutenant Tim McCullum and Deputy Linda Sinclair to Hatfield's home to conduct a "knock and talk" interview. The purpose of the interview was to inform Hatfield of the tip and ask his permission to search his property for marijuana.

Officers McCullum and Sinclair arrived at Hatfield's house at about 4:00 P.M. and parked their police car behind Hatfield's pickup on the east side of the house on a concrete parking pad. When they got out of their car, Sinclair went to the front door on the north side of the house to make contact with Hatfield, and McCullum walked up the parking pad approximately twenty feet until he was alongside the passenger door of the pickup truck. McCullum did not leave the parking pad or enter the back yard, which lies to the south of the house. He took his position for protective purposes, in case someone exited the house from the rear and moved toward the front of the house via the parking pad. From his position on the parking pad, McCullum could see into the back yard. As soon as McCullum heard that Hatfield had answered the door and was speaking to Sinclair, McCullum left his position alongside the pickup truck and returned to the passenger side of the patrol car where he could observe Hatfield and Sinclair.

McCullum heard Sinclair tell Hatfield about the phone call informing them that marijuana was growing on Hatfield's property and ask him if he would give them permission to search the property. Hatfield refused to consent to a search and told the officers that they could not search his property without a warrant. McCullum and Sinclair told Hatfield they would get a warrant, returned to their patrol car, and backed out onto the county road. Once they were parked on the road, they notified their superior by radio what had transpired, and he told them to wait there until he arrived.

Overhearing the conversation on the radio, Deputy Dale Harrold proceeded to Hatfield's home and arrived at the scene next. Harrold conferred with Officers McCullum and Sinclair on the county road. They told him that they had received a tip that marijuana was growing behind Hatfield's house, that they had sought Hatfield's consent to a search of the property, but that Hatfield had refused to give his consent to the search. Harrold also testified at the suppression hearing that McCullum had told him

he had seen small structures in the backyard in which marijuana might be growing.

Harrold had several years of experience and training as a marijuana spotter with the Oklahoma Bureau of Narcotics, and after he was apprized of the situation at Hatfield's residence he walked west down the county road for approximately fifty or sixty feet alongside a fenced pasture to a point from which he could look behind Hatfield's house. From his vantage point on the county road, Harrold could see a tin shed and what appeared to be a chicken coop in the back yard, and he reported to be able to see what appeared to be marijuana growing behind the tin shed and inside the chicken coop. Wanting to confirm what he had seen from the road before arresting Hatfield, Harrold walked back east along the county road to the fence separating Hatfield's yard from the pasture, crossed into the pasture, and walked south along the fence toward the back of Hatfield's house. When he reached a point along the fence across from the structures behind Hatfield's house, he confirmed that marijuana was growing there.

While Harrold was walking along the pasture-side of the fence toward the back of the house, Hatfield, too, was walking toward the back of the house, but in his yard, on the other side of the fence. Hatfield was yelling expletives at Harrold and repeatedly told him that he was trespassing and to get off of his property. Once Harrold had sighted the marijuana from inside the pasture, however, he instructed Hatfield to walk back to where the other officers were standing on the county road and Hatfield complied. When he reached the officers, Harrold instructed them to place Hatfield under arrest for cultivation of marijuana. The officers then conducted a protective sweep through the house to be sure no one else was present. The sweep lasted no more than thirty to forty-five seconds and disclosed no one else on the premises.

After the officers secured the premises, Harrold left to obtain a search warrant. Harrold swore out an affidavit in support of the issuance of a warrant in which he stated that the Sheriff's Office had received an anonymous tip that marijuana was growing at Hatfield's residence and that he had personally seen "approximately 12 marijuana plants in plain view in the yard" at Hatfield's residence. A

warrant was issued to search the house and the structures behind the house, and Harrold returned to Hatfield's property to execute the warrant. During the ensuing search, the officers seized marijuana plants growing in the chicken coop and in other locations in the back yard. They also seized marijuana plants hung for drying in another of the structures behind the house and an ice chest containing sixty-nine marijuana starter plants.

Hatfield claims that Officer McCullum conducted an unconstitutional search of the back yard of his home during the knock and talk interview, and that his observations of the back yard directed Officer Harrold to examine the chicken coop where the marijuana was discovered during his subsequent search. Second, Hatfield argues that Harrold's observation was an unconstitutional search because Harrold trespassed into Hatfield's adjacent pasture to see into the back yard and the chicken coop. Hatfield urges that because the warrant was issued based upon facts gleaned from these alleged unconstitutional searches, the evidence seized pursuant to the warrant was fruit of those poisonous trees and it should have been suppressed.

Hatfield claims that McCullum, while standing within the curtilage of Hatfield's home, conducted an unconstitutional search of the backyard during the knock and talk interview and passed on what he learned to Harrold. Hatfield argues that he had a reasonable expectation of privacy in his backyard and McCullum's inspection of it without a warrant constituted a search in violation of the Fourth Amendment. The Tenth Circuit Court of Appeals found as follows:

"We find this argument unavailing. Even if Officer McCullum could have observed the marijuana growing in Hatfield's back yard from his vantage point on the parking pad, it would not have amounted to an impermissible search. When the police come onto private property to conduct an investigation and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment. Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* §2.3(f), at 506-08 (3d ed. 1996); see also *United States v. Reyes*, 283 F.3d 446, 465-67 (2d Cir. 2002) (holding

that it is not a Fourth Amendment violation for officers standing on driveway to observe marijuana growing in the yard); *United States v. Smith*, 783 F.2d 648, 650-52 (6th Cir. 1986) (holding that Fourth Amendment was not violated when, before applying for a state search warrant, a detective drove seventy-five to one hundred yards up defendant's unobstructed driveway to investigate informant's tip that a large marijuana plant was growing by the house); *State v. Merrill*, 563 N.W.2d 340, 344 (Neb. 1997) (holding that because any member of the public could have entered upon Merrill's property in the same manner the officers did, the observation of marijuana in plain view from the driveway was not a search under the Fourth Amendment).

"In the instant case, Hatfield's driveway was open to the public, permitting the officers to park their patrol car directly behind Hatfield's pickup. The openness and accessibility of a driveway to the public has been an important factor that courts have used to conclude that an owner does not have a reasonable expectation of privacy and that police observations made from the driveway do not constitute a search. See, *Reyes*, 283 F.3d at 465 (noting that driveways that are readily accessible to visitors are not entitled to the same Fourth Amendment protection as are the interiors of defendants' houses); *Smith*, 783 F.2d at 651 (The fact that a driveway is within the curtilage of a house is not determinative if its accessibility and visibility from a public highway rule out any reasonable expectation of privacy.); LaFave, *supra*, § 2.3(f) at 507 n.197 (collecting cases that emphasize the public accessibility of driveways in courts' conclusions that Fourth Amendment protections did not apply). Officer McCullum did not leave the parking pad, and when he heard that Officer Sinclair was speaking to Hatfield, he retreated to a point from which he could observe their conversation while keeping in view the side of the house adjacent to the parking pad. Thus, any observations made by Officer McCullum while standing on Hatfield's driveway do not constitute a search under the Fourth Amendment.

"We turn next to Hatfield's contention that Officer Harrold's inspection of Hatfield's backyard from the pasture was an unconstitutional search. He argues that the open fields doctrine does not apply to the pasture adjacent to his yard and, accordingly, Officer

Harrold's presence in the field without a warrant violated the Fourth Amendment. We disagree that Officer Harrold's observation of the marijuana constituted an unconstitutional search.

"The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy. *California v. Ciraolo*, 476 U.S. 207, 211 (1986). Usually, we determine whether a person has a constitutionally protected reasonable expectation of privacy by making two inquiries: First, has the person exhibited a subjective expectation of privacy in the place or thing searched? Second, is the person's expectation of privacy one that society is prepared to recognize as reasonable?

"The prototypical area of protected privacy is the interior of a home. *Kyllo v. United States*, 533 U.S. 27, 35 (2001). Linked to that core area of protected privacy is a home's curtilage. At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes. *Oliver v. United States*, 466 U.S. 170, 180 (1984). In contrast, open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance, and the government's intrusion upon the open fields is not one of those unreasonable searches proscribed by the text of the Fourth Amendment. See also *Hester v. United States*, 265 U.S. 57, 59 (1924) (The special protection accorded by the Fourth Amendment to the people in their persons, houses, papers, and effects is not extended to the open fields. The distinction between the latter and the house is as old as the common law.)

"In this case, the location of the marijuana observed by Officer Harrold was in a well-defined yard behind Hatfield's residence, in and among several small structures standing close to the back of the house. The area could not be observed clearly from the street, as illustrated by the fact that Officer Harrold was not certain that he had seen marijuana when he looked into the backyard from a position west of the house on the county road. We hold that the marijuana was located in the curtilage of Hatfield's home because the area in question is so

intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection. *United States v. Dunn*, 480 U.S. 294, 301 (1987). Officer Harrold, however, never physically invaded the curtilage when he observed the marijuana. The question before us, therefore, is whether an observation of the curtilage by the police from a vantage point in an adjacent open field violates an expectation of privacy that is reasonable.

"Although privacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects, there is no reasonable expectation that a home and its curtilage will be free from ordinary visual surveillance. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. *Ciraolo*, 476 U.S. at 213. In *Ciraolo*, the Supreme Court held that it was not a search in violation of the Fourth Amendment for police officers to make naked-eye observations into a fenced yard that was within the curtilage of a home from a plane flying 1,000 feet above the property. The Court held that the homeowner did not have a reasonable expectation of privacy from such observations. The Court reasoned that although the yard was fenced and thus not visible from ground level, it was exposed to persons flying above the property or to a power company repair mechanic on a pole overlooking the yard, and what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. Thus, Hatfield would have had no expectation of privacy from Officer Harrold's observation of the marijuana had Harrold been standing on property owned by Hatfield's neighbor when he made it, for in that situation Hatfield would have exposed the marijuana to the view of his neighbors and anyone they invited onto their land.

"In the instant case, of course, Officer Harrold was not standing on a neighbor's property or on a public thoroughfare when he saw the marijuana in Hatfield's yard. The observation was made from Hatfield's own pasture, and Hatfield makes much of the fact that Officer Harrold was trespassing in the pasture, and in Oklahoma trespassing is a crime. The crux of the issue before us, then, is whether the

fact that the pasture was owned by Hatfield himself, and that persons in the field are trespassers, created a reasonable expectation of privacy from observations of Hatfield's curtilage made from the pasture. We conclude that the Supreme Court's decision in *Dunn* and our decision in *Fullbright v. United States*, 392 F.2d 432, 433-35 (10th Cir. 1968) dictate that the answer to that question is, 'No.

"In *Dunn*, the Court upheld a search by two trespassing officers in which they stood on the defendant's property outside of a barn, looked in through an open space in the main doorway of the barn, and discovered drug paraphernalia. The Court first concluded that the barn was not situated within the curtilage of the residence, which was located more than fifty yards from the barn and surrounded by its own fence. Thus, the officers were standing upon the defendant's open field and a warrant was not required to justify their presence.

"The Court then addressed the question of whether it was a Fourth Amendment violation for the officers, while standing in an open field, to search the interior space of the barn by looking into it. Assuming, but not deciding, that the interior space of the barn was protected by the Fourth Amendment, the Court held that it was nevertheless permissible for the officers to visually examine the interior of the barn without a warrant from a vantage point in an open field. The Supreme Court explained that under its precedents, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields. Therefore, that which is in plain view from an open field may be observed by the police without it being a search under the Fourth Amendment.

"Furthermore, the Court said that, the fact that the objects observed by the officers lay within an area that we have assumed was protected by the Fourth Amendment does not affect our conclusion. The Court emphasized that the officers never entered the barn, nor did they enter any other structure on respondent's premises. Instead, once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. Thus, standing as they were in the open fields, the Constitution did not forbid them to observe the drug laboratory located in respondent's barn.

"Similarly, *Fullbright* involved law enforcement officers who, while trespassing on the defendant's open fields, observed from a distance the interior of an open shed located in the property's curtilage. We held the officers' observation of an illegal distilling operation in the shed was not a search prohibited by the Fourth Amendment. We explained, however, that if the investigators had physically breached the curtilage there would be little doubt that any observations made therein would have been proscribed. But observations from outside the curtilage of activities within are not generally interdicted by the Constitution.

"Following *Dunn* and *Fullbright*, we hold that police observation of a defendant's curtilage from a vantage point in the defendant's open field is not a search under the Fourth Amendment. Even though we can conclude that Hatfield had a subjective expectation of privacy in the space immediately behind his house, this is not an expectation of privacy that society regards as reasonable, at least with respect to visual observations made from an adjoining open field. Had Officer Harrold physically invaded the curtilage to make his observation, that would have constituted a search subject to the proscriptions of the Fourth Amendment. But there is no reasonable expectation of privacy from visual observations made by the police from the open fields because an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers. Indeed, the police can enter open fields at any time for investigative purposes without violating the Fourth Amendment.

"Hatfield relies heavily on the fact that Officer Harrold's presence in the pasture violated Oklahoma's criminal trespass statute. This fact does not, however, change our analysis. The Oklahoma criminal trespass statute to which Hatfield points has been on the books in one form or another since 1913. Despite the law's longevity, we have never found it to be relevant to Fourth Amendment analysis of whether an officer was properly in an open field in cases arising in Oklahoma. For example, the relevant provision of the statute that was in force during the events of the instant case was also in force in 1993 when we decided *Pinter*. In *Pinter*, 984 F.2d 377, two DEA agents trespassed onto the defendant's oil lease in Oklahoma while surveilling him. After stating

that the open fields doctrine applied in that case, and making no mention of the fact that trespass is a crime in Oklahoma, we stated that, ‘The fact that the officers trespass onto private property does not transform their actions into a “search” within the meaning of the fourth amendment.’ Consistent with these cases, we explicitly hold that the fact that a state may have chosen to protect the property interests of its citizens by making trespass a crime under state law does not affect the analysis of a person’s Fourth Amendment interest.

“For the foregoing reasons, we conclude that Hatfield did not have a constitutionally-protected privacy interest in being free from police observations of his curtilage made from his adjoining pasture. Officer Harrold’s sighting of the marijuana in Hatfield’s backyard therefore did not constitute a Fourth Amendment search.”

The Tenth Circuit Court of Appeals held that neither the actions of Officer McCullum nor the actions of Officer Harrold constituted an impermissible search. Accordingly, the affidavit supporting the search warrant did not contain tainted factual allegations, and the evidence seized pursuant to the warrant was not the fruit of a poisonous tree.

**SEARCH AND SEIZURE:
Ordering Detainees to
Re-enter an Automobile
to Protect Officer Safety**

In *United States v. Clark*, CA11, No. 02-14383, 7/16/03, Officer Franklin Huff was patrolling alone in a marked Atlanta Police Department vehicle at around 9:30 or 9:45 p.m. on April 12, 2000.

“...passengers pose as great a danger to police officers as do drivers during traffic stops because the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.”

In front of the MARTA train station on Ashly Street, he observed two men fighting or wrestling in the middle of the street. An automobile was stopped on the wrong side of the street with its lights on and with one door open. The engine was running. Officer Huff had patrolled that area for approximately four years. During that time he had received a “lot of calls involving violence” in that area.

Officer Huff activated his patrol car’s blue lights, alighted from his vehicle and ordered the two men to stop fighting. Officer Huff observed Mr. Clark standing on the

sidewalk watching the fight. Clark was not engaged in any criminal activity.

Clark testified at the suppression hearing that he had been a passenger in the vehicle observed by Officer Huff. Mr. Clark stated that he had alighted from the vehicle because the other two individuals that were in the car were wrestling. When Officer Huff arrived, Clark testified that he was trying to stop them from fighting.

Officer Huff asked the three men if the vehicle belonged to one of them. One of the combatants replied that it was his car. Officer Huff asked the other two men whether they had been passengers in the car. Clark admitted that he had been a passenger.

Officer Huff ordered all three men to re-enter the vehicle and told them to sit where they had previously been sitting and to keep their hands where he could see them. The three men did so without resistance. Clark seated himself in the front passenger seat.

Officer Huff testified that he ordered the three men to get into the automobile to gain control of the situation for his own safety because he was by himself, confronted by three men, at night, in an area

of the city where he had responded to a “lot of calls involving violence.” Officer Huff testified that he ordered Clark to re-enter the vehicle because he was “part of the scene.”

In order to conduct an investigation to determine why the two men appeared to be engaged in a fight, Officer Huff ordered the driver to alight from the automobile. Officer Huff placed handcuffs on the driver and directed him to sit on the curb. He next asked the passenger in the back seat to alight from the vehicle. At this time Officer J. L. Bilak of the Atlanta Police Department arrived at the scene to back up Officer Huff. Officer Bilak testified that he saw Clark “fumbling around under the seat.” Officer Bilak ordered Clark to put his hands back on the dashboard. When Officer Huff opened the passenger door to remove Clark from the vehicle, an Uzi America, Model Eagle, .40 caliber semi-automatic assault weapon fell onto the street. One of the officers seized the weapon. Clark was placed under arrest. In searching the inside of the vehicle, the officers found a weapon under the front seat and another in the back seat area.

Clark was indicted on September 4, 2001 for being a felon knowingly possessing an Uzi America, Model Eagle, .40 caliber semi-automatic assault. On April 25, 2002, Judge Scofield filed a report in which he recommended that the motion to suppress be granted. Judge Scofield found that Clark had been detained unlawfully because Officer Huff had no reason to believe that Clark was engaged in any unlawful act or criminal activity, nor were any circumstances shown that would have otherwise justified detaining him and making him return to the vehicle.

The Government appealed, seeking a reversal of the order to suppress the .40 caliber semi-automatic assault weapon. The Government claims that the district court erred in concluding that the detention of Clark was unlawful because Officer Huff had no reason to believe that Clark was involved in any criminal activity. The Government argues that the detention of Clark was lawful to protect Officer Huff’s safety while he conducted an investigation of reasonably suspicious violent conduct that occurred in his presence. The United States Court of Appeals for the Eleventh Circuit agreed with the government, vacated the motion to suppress, and

remanded the case for further proceedings regarding the merits of the indictment. The following is an excerpt from their ruling:

“The question whether an officer who is conducting a criminal investigation based on a reasonable suspicion that a driver has committed a crime may order a passenger to reenter a vehicle to protect the officer’s safety has not been addressed by the Supreme Court. In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court held that an officer may order a passenger out of a vehicle during a stop for a traffic infraction without violating the Fourth Amendment although there is no articulable reason to detain the passenger. The Court reasoned as follows:

Danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order the passengers to get out of the car pending completion of the stop.

“The Court explained that passengers pose as great a danger to police officers as do drivers during traffic stops because the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

“The Court’s approval in *Maryland v. Wilson* of officer control of passengers in a traffic stop stems from the ‘legitimate and weighty’ need for officer safety. See *Pennsylvania v. Mimms*, 434 U.S. at 110 (stating that in traffic stops ‘the safety of the officer is both legitimate and weighty).

“The District of Columbia Circuit and the Third Circuit have each relied on *Maryland v. Wilson* in holding that a police officer may detain a passenger, who is not suspected of wrongdoing, during a lawful

traffic stop. In *Rogala v. District of Columbia*, 161 F.3d 44 (D.C. Cir. 1998), a police officer ordered a passenger to return to the car while he investigated the driver. In upholding the reasonableness of the detention, the court held that in the circumstances presented, it follows from *Wilson v. Maryland* that a police officer has the power to reasonably control the situation by requiring a passenger to remain in a vehicle during a traffic stop, particularly where, as here, the officer is alone and feels threatened. *United States v. Moorefield*, 111 F.3d 10, 12-13 (3rd Cir. 1997); *United States v. White*, 648 F.2d 29, 37 (D.C. Cir. 1981)).

“In *Moorefield*, the Third Circuit held that it was constitutionally permissible for officers to order a passenger who was not suspected of criminal activity to remain in the car with his hands in the air. The Third Circuit reasoned as follows:

Just as the Court in *Wilson* found ordering a passenger out of the car to be a minimal intrusion on personal liberty, we find the imposition of having to remain in the car with raised hands equally minimal. We conclude that the benefit of added officer protection far outweighs this minor intrusion.

“We must now examine the conduct of Officer Huff to determine whether his brief detention of Clark was reasonable in light of existing Fourth Amendment jurisprudence discussed above. The district court correctly concluded that Officer Huff did not observe Clark engage in any criminal activity. The district court failed to consider, however, if the detention of Clark was reasonable under the totality of the circumstances confronting Officer Huff.

- Officer Huff observed a violent confrontation between two men fighting in the street.
- The combatants were next to an automobile that was on the wrongside of the street.
- The door to the vehicle was open, the engine was running, and the lights were on.
- Officer Huff had responded to numerous reports of violence in that vicinity.

- Mr. Clark informed Officer Huff that he had been a passenger in the automobile.
- Officer Huff was alone at night facing three men who were associates.

“The Supreme Court has recognized that street encounters put officers in danger. See *Pennsylvania v. Mimms*, 434 U.S. at 110 [‘Indeed, it appears “that a significant percentage of murders of police officers occurs when the officers are making traffic stops.’ (quoting *United States v. Robinson*, 414 U.S. at 234)]. Although Clark had alighted from the automobile in which he had been a passenger before Officer Huff arrived on the scene, his admitted relationship to the parties whom Officer Huff was investigating made him every bit as great a danger as the combatants. In *Michigan v. Summers*, 452 U.S. at 702-03, the Supreme Court held that the ‘risk of harm’ to officers is ‘minimized’ when police officers ‘exercise unquestioned command of the situation.’ In *Hudson v. Hall*, 231 F.3d at 1297, this court reasoned that an officer may ‘control’ persons not suspected of wrongdoing if they are near a street encounter with persons reasonably suspected of criminal activity. The need for an officer to take command and control persons during a criminal investigation is ‘particularly [true] where the officer is alone and feels threatened.’ *Rogala v. District of Columbia*, 161 F.3d at 53.

“While acting alone, Officer Huff observed two men engaged in violent criminal conduct. Officer Huff testified that Clark informed him that he was a passenger in the vehicle that was next to the two men who were fighting. He testified that he detained Clark and the other persons to control the situation to protect his safety. Under the circumstances, Clark’s liberty interest was outweighed by the necessity for Officer Huff to control the movement of the three associates and to detain them briefly to ensure his safety while he conducted a criminal investigation. We conclude that Officer Huff did not violate the Fourth Amendment in briefly detaining Clark after learning that he was not a mere bystander but, instead and notably, had been a passenger in the automobile and an associate of two persons being investigated for criminal activities.

“In reaching this conclusion, we observe that this is not a case where a law enforcement officer detained an individual who was in no way associated with any criminal wrongdoing, but rather was simply an unrelated bystander to a traffic violation or to an altercation between other persons. We have no occasion to address the constitutionality of detaining an unrelated bystander. Rather, the ultimate touchstone of our Fourth Amendment analysis is the objective reasonableness of Officer Huff’s particular actions, and we are satisfied that his brief detention of Clark stemmed from, and was an altogether reasonable response to, his justifiable concern for his own safety, and accordingly did not violate the Fourth Amendment.

**SEX OFFENDERS:
Internet Notification**

In *A.A. v. New Jersey*, CA3, No. 01-4363, 8/18/03, the United States Court of Appeals for the Third Circuit held that New Jersey’s Megan’s Law, which makes convicted sex offenders home addresses available to the public on Internet, does not violate the sex offenders’ constitutional privacy rights. The Court stated that while offenders have an interest in not disclosing their home addresses, that interest is substantially outweighed by the state’s compelling interest in disclosing such information to the relevant public to prevent sex offenses.

**To view past
issues of
CJI Legal Briefs,
visit us
on-line at
www.cji.net**

