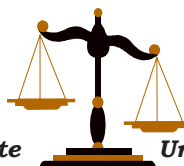




CJI Legal Briefs

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 **APPOINTED COUNSEL:**
"You Don't Get Clarence Darrow"
- 2 **CIVIL LIABILITY:**
Miranda Violation as Basis
for Civil Rights Action
- 2 **CIVIL LIABILITY:**
Seizure of Person; Officer Shoots to
Disable Vehicle but Hits Passenger
- 3 **CIVIL LIABILITY:**
Strip Searches in Connection with
Search Warrant Execution
- 4 **CIVIL LIABILITY:**
Use of Police Dog to Bite and Hold
- 5 **CIVIL LIABILITY:**
Videotapes of Arrests and Release
of Videotapes to Media
- 6 **CONFESSIONS:**
False Promises of Leniency
- 8 **EQUAL PROTECTION:**
Racially Selective Law Enforcement
- 12 **EVIDENCE:**
Security Camera Videotape
of Robbery
- 12 **GAME AND FISH:**
Nonconsensual Search
of Open Boat
- 12 **JAILS AND PRISONS**
- 13 **SEARCH AND SEIZURE:**
Curtilage; Plain View
Observation in Driveway
- 14 **SEARCH AND SEIZURE:**
Emergency Search
- 17 **SEARCH AND SEIZURE:**
Reasonable Suspicion
- 18 **SEARCH AND SEIZURE:**
Warrant Needed to Seize
Suspect's Clothing from Hospital
Clothing Storeroom
- 21 **VIENNA CONVENTION OF
CONSULAR RELATIONS:**
Rights of Detained Foreign Nationals

APPOINTED COUNSEL: "You Don't Get Clarence Darrow"

In *Yarborough v. Gentry*, No. 02-1597, 10/20/03, the United States Supreme Court addressed the issue of ineffective defense counsels. During the trial in question, Lionel Gentry was convicted of assaulting his girlfriend with a deadly weapon. In closing arguments, Gentry's defense attorney made the following statement: "If he's lying and you think he's lying, then you have to convict him. If you don't think he's lying—bad person, lousy drug addict, stinking thief, jail bird—all that to the contrary, he's not guilty. It's as simple as that. I don't care if he's been in prison."

Gentry argued that his trial counsel's closing argument deprived him of his right to effective assistance of counsel. The Ninth Circuit Court of Appeals agreed and ordered a new trial.

On further review, the United States Supreme Court reversed the judgment of the Ninth Circuit. The Court noted that the Sixth Amendment guarantees criminal defendants the effective assistance of counsel, stating "that right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense. *Strickland v. Washington*, 466 U. S. 668, 687 (1984). The right to effective assistance extends to closing arguments." See *Bell v. Cone*, 535 U. S. 685, 701-702 (2002).

However, the Court concluded: "To be sure, Gentry's lawyer was no Aristotle or even Clarence Darrow. But the Ninth Circuit's conclusion—not only that his performance was deficient, but that any disagreement with that conclusion would be objectively unreasonable—gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials."

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.

**CIVIL LIABILITY:
Miranda Violation as Basis
for Civil Rights Action**

In *Renda v. King*, CA3, No. 01-2421, 10/16/03, the Third Circuit Court of Appeals held that failure to administer the *Miranda* warnings before conducting a custodial interrogation does not provide a basis for a civil rights action alleging a violation of the Fifth Amendment privilege against self-incrimination.

**CIVIL LIABILITY:
Seizure of Person; Officer Shoots
to Disable Vehicle but Hits Passenger**

The issue presented in *Vaughn v. Cox*, CA11, No. 00-14380, 8/29/03, is whether Deputy Fred Lawrence Cox is entitled to qualified immunity and, consequently, is shielded from Vaughan's suit seeking damages under 42 U.S.C. § 1983 for alleged violations of his Fourth Amendment rights arising out of a police chase. This case is before the U.S. Court of Appeals for the Eleventh Circuit on remand from the Supreme Court.

In the early morning of January 5, 1998, the Sheriff's Department of Coweta County, Georgia received a report that a pickup truck had been stolen from a service station along I-85 south of Atlanta. In response to the report, Deputy Cox and Deputy Jeff Looney headed to the northbound lanes of I-85 in separate vehicles. Upon their arrival, they spotted a pick-up truck that matched the description of the stolen vehicle. The driver also matched the description of the suspect.

Deputy Cox and Deputy Lawrence decided to use a "rolling roadblock" to stop the vehicle, which involves officers blocking a suspect vehicle with their police cars and reducing speed, in the hope that the suspect car will slow down as well. Deputy Looney positioned his cruiser directly behind the pickup. Deputy Cox moved in front of the truck. As soon as he had positioned his vehicle in front of the truck,

Deputy Cox applied his brakes. The truck rammed into the back of Cox's cruiser.

The driver did not pull over following the collision, but instead accelerated while staying in the same lane of traffic. As soon as his cruiser was even with the pickup, Deputy Cox turned on his rooftop lights. The driver responded by accelerating to eighty or eighty-five miles per hour. Cox then fired three rounds into the truck. The third bullet fired from Cox's weapon instead punctured Vaughan's spine, paralyzing him instantly below the chest.

Cox testified that he fired because the pickup swerved as if to smash into his cruiser. The passenger, Vaughan, maintains that the truck, while increasing its speed, made no motion in the direction of Cox's vehicle and the shooting was unprovoked.

On remand, the U.S. Court of Appeals for the Eleventh Circuit observed that the first step in reviewing an excessive force claim is to determine whether the plaintiff was subjected to the "intentional acquisition of physical control" by a government actor—that is, whether there was a "seizure" within the meaning of the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593, (1989). In its ruling, the Court found as follows:

"It is clear that 'apprehension by the use of deadly force' is a seizure *Tennessee v. Garner*, 471 U.S. 1, (1985). However, the Supreme Court has held that a seizure occurs 'only when there is a governmental termination of freedom of movement *through means intentionally applied.*' *Brower*, 489 U.S. at 597, 109 S. Ct. at 1381. The question remains whether Cox's action in firing his weapon at the truck and its driver can be deemed 'means intentionally applied' to seize Vaughan.

"The district court concluded, and Deputy Cox contends here, that Vaughan was not seized by the bullet because Cox did not intend to hit Vaughan when he fired his pistol. Instead, Cox planned to seize both Rayson and Vaughan by disabling either the truck or Rayson with a volley of bullets and then ramming the pickup off the road. Cox argues that Vaughan was not seized because Cox, while intending to apprehend Vaughan, did not intend to stop him by shooting him. In Deputy Cox's view, because he did not intend to shoot Vaughan, he contends that Vaughan did not suffer a Fourth Amendment seizure. We disagree.

“The Supreme Court has cautioned against a too finely drawn reading of ‘means intentionally applied.’ *Brower*, 489 U.S. at 598. It is not necessary for the means by which a suspect is seized to conform exactly to the means intended by the officer; otherwise courts could be compelled to conclude that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. Instead, the Supreme Court has held that ‘it is enough that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.’ That standard has been met in this case. Cox fired his weapon to stop Vaughan and Rayson, and one of those bullets struck Vaughan. Because Vaughan was hit by a bullet that was meant to stop him, he was subjected to a Fourth Amendment seizure.”

CIVIL LIABILITY:
**Strip Searches in Connection
 With Search Warrant Execution**

In *Williams v. Kaufman County*, CA5, No. 02-10500, 9/8/03, the Fifth Circuit Court of Appeals addressed the practice of strip searches in connection with the execution of a search warrant.

In April of 1995, Sheriff Harris obtained a search warrant, based on information he received from a confidential informant, for a night club called the “Classic Club” in Terrell, Texas. At about 9:45 p.m. the same day, Harris led a contingent of approximately 40 officers to the club to execute the warrant. Officers detained approximately 100 people inside the club for about three hours. During that time, officers conducted a pat-down search, strip search, and warrants check on each individual there. Although strip searches were not part of any written policy concerning the execution of hazardous warrants, Harris testified that it was his standard policy to conduct a strip search on each person within the search area, with or without individualized probable cause. Also, pursuant to this “policy,” the officers re-handcuffed plaintiffs and continued to detain them after the strip searches until the entire search had been completed.

Seventeen individuals brought suit under § 1983, claiming that Harris and the County violated their Fourth Amendment rights by engaging in an illegal strip search, unlawful detention, and oral harassment. Four plaintiffs were dismissed, and ten others settled their claims. The three remaining plaintiffs went to trial and were awarded \$100 each in nominal damages and \$15,000 each in punitive damages against Harris in his individual capacity.

In a lengthy opinion, the Fifth Circuit Court of Appeals first discussed the strip searches of patrons at the Classic Club: “Although *Terry v. Ohio* created an exception to the probable cause requirement (allowing police officers to protect themselves by conducting a pat-down of a suspect), in *Ybarra v. Illinois* 448 U.S. 85 (1979) the Court held that the narrow scope of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place. *Ybarra* squarely held that in premises searches like this one, police must have either articulable reasonable suspicion to frisk an individual or probable cause to search him. As a result, the strip searches were unreasonably intrusive.

“*Ybarra* and our case law on strip searches provided fair warning to Harris that his conduct was unlawful. *Ybarra* addressed a situation substantially similar to the one here and explicitly held that officers must have reasonable suspicion to conduct a frisk or individualized probable cause to conduct a lawful search. Even accepting that there were aspects of this warrant’s search that made it more hazardous than the one conducted in *Ybarra*, or made it more likely that multiple persons would be in possession of drugs, none of these extenuating circumstances created probable cause or reasonable suspicion particularized with respect to plaintiffs. And even if hazardous circumstances had given rise to reasonable suspicion that plaintiffs, by being present, might have possessed weapons or contraband, Harris should have known that his officers were limited to a pat-down of each plaintiff. Thus, to the extent this case differs factually from *Ybarra*, it still fits comfortably under the general rule promulgated by the Supreme Court in that case. Indeed, Harris’s declaration that we did have probable cause to believe that everyone

in the Club may have had drugs on them demonstrates his unjustified disregard or deliberate ignorance of the rule articulated by the *Ybarra* court.

“The *Ybarra* decision, along with our own decisions, clearly indicate that strip searching individuals, about whom the police had no individualized probable cause of weapon or drug possession, was unlawful. This in turn precludes Harris’s entitlement to qualified immunity. Although Harris had a valid warrant to search the Club, he went well beyond the limits of that warrant, conducting highly intrusive strip searches of plaintiffs.

“The law is well-established that a municipality such as the County can be held liable for its policies and customs that engender constitutional deprivation, but that it cannot be held liable for the actions of its non-policy-making employees under a theory of respondeat superior. In *Webster v. City of Houston* 735 F.2d 838 (5th Cir. 1984), we concluded that an official policy consists of, among other things, ‘a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality’s lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority.’ We have also held that sheriffs in Texas are final policymakers in the area of law enforcement. Therefore, it is clear that the County can be held liable for Harris’s intentional conduct, to the extent it constitutes the ‘moving force’ behind the alleged injury.

“Harris testified that he is the final policymaker for law enforcement matters in the County. Harris and others have testified as well that both the strip search and lengthy detention of the plaintiffs were conducted according to the Sheriff Department’s unwritten policy for executing ‘hazardous’ warrants. As a result, Harris’s actions as policymaker were undeniably the moving force behind, and the direct cause of, the violation of plaintiffs’ constitutional rights, thereby establishing the County’s municipal liability.

“We conclude that ignoring the limited scope of search authorized by the warrant, and disregarding the Fourth Amendment rights of plaintiffs as long-established by the Supreme Court and recognized by this Court, constitutes reckless indifference to such rights. In addition, in light of the testimony detailing the atmosphere of questionable privacy

during the strip searches and the use of racial slurs, we cannot fault the district court’s ruling that Harris was not acting in legal good faith. Even though Harris is no longer Sheriff, punitive damages not only punish him for his conduct; they serve as instructive warnings to his successors.”

**CIVIL LIABILITY:
Use of Police Dog to Bite and Hold**

In *Miller v. Clark County*, CA9, No. 02-35558, 8/21/03, the Ninth Circuit Court of Appeals considered whether a sheriff’s deputy violated a criminal suspect’s Fourth Amendment right to be free from unreasonable seizures by ordering a trained police dog to “bite and hold” the suspect until officers arrived on the scene less than a minute later. The Ninth Circuit Court of Appeals concluded that the officer’s use of the dog here did not violate the suspect’s Fourth Amendment rights. Their ruling included the following:

“Under the circumstances confronting Deputy Bylsma, use of the police dog was well suited to the task of safely arresting Miller. Deputy Bylsma knew that a trained police dog could be trusted to neutralize the many strategic advantages that Miller had obtained by crouching in the darkness in a remote and unbounded landscape familiar only to Miller and treacherous to others who might enter. Deputy Bylsma knew of the keen nose, acute vision, stealthy speed, natural courage, and lupine strength of the German Shepherd—qualities at the service of the dog’s fine instincts and careful training. Deputy Bylsma knew that, despite the darkness, the dog was trained to find, seize, and hold Miller, careful not to hurt Miller more than necessary to disarm, disorient, and restrain him until deputies arrived on the scene seconds later. Deputy Bylsma knew that the dog, trained to obey, would release Miller as soon as Deputy Bylsma determined it was safe and gave the command. He knew that the dog was trained to effect Miller’s arrest as safely as possible under the circumstances. In sum, Deputy Bylsma knew that a police dog’s excellent canine qualities were well suited to the important task of capturing a fleeing felon in this ominous setting, a threatening landscape

that might have filled even staunch human hearts with dread.

“Under the totality of the circumstances, the government’s several strong interests in effecting Miller’s seizure through the means chosen outweighed Miller’s legitimate interest in not being bitten by a dog. We conclude that Deputy Bylsma’s use of a police dog to bite and hold Miller until deputies arrived on the scene less than a minute later was a reasonable seizure that did not violate Miller’s Fourth Amendment rights. *Accord Mendoza v. Block*, 27 F.3d 1357, 1362-63 (9th Cir. 1994) (holding that police did not violate a suspect’s Fourth Amendment rights under the circumstances by ordering a police dog to bite him). Notwithstanding the serious injuries to Miller, there was no use of excessive force under the circumstances.”

**CIVIL LIABILITY:
Videotaping of Arrests and
Release of Videotapes to Media**

In *Caldarola v. Westchester County*, CA2, No. 01-7457, 9/9/03, several corrections officers were arrested as a result of a County investigation of corrections officers suspected of receiving disability benefits on the basis of fraudulent job injury claims.

A Department of Corrections (DOC) surveillance effort yielded incriminating evidence regarding certain corrections officers, all of whom were on paid disability leave. An employee from DOC’s Special Investigations Unit telephoned those corrections officers and directed them to report to DOC headquarters on Monday, July 12, 1999. Upon arrival, each summoned corrections officer was placed in a separate room. Sometime thereafter, each was placed under arrest by officers from the Department of Public Safety (“DPS”), handcuffed, and then transported to the police station. A County employee videotaped the arrestees walking through the DOC parking lot as they were escorted from the DOC building, where they were arrested, to the cars in which they were transported to the police station for booking.

On the same day, the County held a press conference to publicize its investigation of and

crackdown on fraudulent job injury claims by corrections officers. County Executive Spano announced the arrests and played the videotape made by the County employee of the arrested corrections officers as they were escorted from the DOC building to waiting cars. Copies of the videotape were distributed to the media.

One of the arrested corrections officers brought suit against Westchester County, the Westchester County Executive, and the Westchester County Commissioner of the Department of Corrections under 42 U.S.C. § 6 1983 for alleged violations of his Fourth Amendment rights. The Second Circuit Court of Appeals founds as follows in this case:

“In *Lauro v. Charles* 219 F.3d 202 (2nd. 2000), *Lauro* brought a section 1983 suit against the New York City Police Department for violating his Fourth Amendment rights by subjecting him to a staged perp walk. Approximately two hours after *Lauro* was arrested and brought to the police station, a police detective staged a perp walk in response to media interest in the arrest. A detective handcuffed *Lauro*, escorted him outside of the police station, drove him around the block in a police car, and then escorted him from the car back into the station. A television crew filmed the staged walk from the car back into the station.

“This Court found that *Lauro* was seized within the meaning of the Fourth Amendment, regardless of whether the seizure is viewed as (1) a separate seizure that occurred when *Lauro* was forcibly removed from the station and brought back in, or (2) a continuation and aggravation of the seizure that occurred when he was arrested. The staged ‘perp walk’ implicated *Lauro*’s protected privacy interest in not being ‘displayed to the world, against his will, in handcuffs, and in a posture connoting guilt.’ No government purpose was served by the staged perp walk. This Court noted that any legitimate state interest in accurate reporting of police activity is not well served by an inherently fictional dramatization of an event that transpired hours earlier. This Court therefore concluded that the staged perp walk violated *Lauro*’s constitutional right to be free from unreasonable seizures.

“The County’s purposes in making the videotape were the same as its purposes in distributing the videotape to the media: the County created and

distributed the videotape to inform the public about its efforts to stop the abuse of disability benefits by its employees. The fact that corrections officers—public employees—were arrested on suspicion of grand larceny is highly newsworthy and of great interest to the public at large. Divulging the arrests also enhances the transparency of the criminal justice system, and it may deter others from attempting similar crimes. Furthermore, allowing the public to view images of an arrestee informs and enables members of the public who may come forward with additional information relevant to the law enforcement investigation. *Detroit Free Press, Inc., v. U.S. Department of Justice*, 73 F.3d 96 (6th Cir. 1996).

“Whether the government purposes served by creating and distributing the videotape would have alternatively been served or served as well by a press conference without the controversial videotape are questions we need not answer. It is unnecessary for us to inquire into the alternative means by which the police could achieve the same goals, so long as the method used is constitutional, as it is here.

“We do not suggest that government actors have free reign to use videotape or other potentially overly intrusive means to achieve the government purposes. As we have previously held, it is possible for government actors to overstep the bounds of reasonableness in the course of a search or seizure, even when serving important government interests. Because there was a minimal expectation of privacy in the government parking lot, and the conduct of the arresting officers did not unreasonably exceed the scope of what was necessary to effectuate the arrest and to otherwise serve legitimate government purposes, this is not such a case.

“We affirm the district court’s grant of summary judgment in favor of the defendants. Although the arrested correctional officers possessed a privacy interest in not having their “perp walk” broadcast to the public, that privacy interest was outweighed by the County’s legitimate government purposes. Therefore, there was no actionable Fourth Amendment injury.”

CONFESSIONS: False Promise of Leniency

In *Brown v. State*, No. CR01-1196, 9/18/03, Joshua Brown appeals from his convictions for first-degree murder and rape. Brown’s sole point for reversal is that the trial court erred in denying his motion to suppress two custodial statements he gave to police shortly after the murder.

At about 4:50 a.m. on the morning of September 26, 1999, police responded to a 911 call from an apartment located at 1207 Sunset Drive in Rogers, Arkansas. Upon arriving, officers encountered a middle-aged man yelling, “He’s not breathing, he’s not breathing,” and a second, younger man who was entirely naked and holding a flashlight and a telephone. An adolescent was found on the floor of the apartment’s bedroom; the boy was naked and not breathing. Officers noted that the boy had some duct tape wrapped around one hand, and there were feces on his abdomen and genitals. An empty pill bottle was on the mattress next to the child. The boy, thirteen-year-old Jesse Dirkhising, was taken to St. Mary’s Hospital where he was pronounced dead. The cause of death was later determined to be suffocation and positional asphyxia, with acute amitriptyline intoxication.

Brown was convicted of rape and first-degree murder and was sentenced to life imprisonment. Brown’s argument for reversal centers on two statements he gave to investigating officers Jared Mason and Hayes Minor. These two statements were the last of four statements Brown gave during the thirty-six hours following Jesse’s death. Brown argues that the trial court erroneously ruled that these statements, given to officers Minor and Mason, were not the result of false promises of leniency.

The Arkansas Supreme Court stated that if a police official makes a false promise which misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been voluntarily, knowingly and intelligently made. Part of their ruling is as follows:

“In determining whether there has been a misleading promise of reward we look at the totality of the circumstances. The totality is subdivided into

two main components: first, the statement of the officer and secondly, the vulnerability of the defendant. Because these two factors create such a multitude of variable facts, it has been impossible for us to draw bright lines of substantive distinction.

“If, during the first step, this Court decides that the officer’s statements are unambiguous false promises of leniency, there is no need to proceed to the second step because the defendant’s statement is clearly involuntary. *See Pyles v. State*, 329 Ark. 457, 947 S.W. 2d 754 (1998); *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995); *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988). If, however, the officer’s statement is ambiguous, making it difficult for us to determine if it was truly a false promise of leniency, we must proceed to the second step of examining the vulnerability of the defendant. Factors to be considered in determining vulnerability include: 1) the age, education, and intelligence of the accused; 2) how long it took to obtain the statement; 3) the defendant’s experience, if any, with the criminal-justice system; and 4) the delay between the *Miranda* warnings and the confession.

“Brown argued that the statements he gave to Minor and Mason were the result of the officers’ false promise of leniency. Specifically, he points out Mason’s testimony from the suppression hearing that Mason told Brown ‘that this was his chance to help himself.’ Although Brown’s statement was tape-recorded, Mason made this statement to him prior to turning the tape recorder on. At the suppression hearing, Mason agreed that ‘help’ could mean ‘benefit,’ but he asserted that he did not intend for his remarks to be construed by Brown ‘in a way of giving him hope of a benefit.’ Mason denied making Brown any promises or threatening him in any way, and he stated that he ‘did not convey to (Brown) how he was to help himself if he was to cooperate.’

“Brown also argues that Minor made false promises to him and asserts that it was Minor’s intent

“The Arkansas Supreme Court stated that if a police official makes a false promise which misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been voluntarily, knowingly and intelligently made.”

to make Brown believe that by continuing to give statements, he would be helping himself. Brown argues that, by using this tactic, Minor intentionally created in Brown the false hope that he would receive some benefit in exchange for his cooperation. Minor’s testimony at the suppression hearing reflected that he ‘told (Brown) that this wasn’t a

deal-making process, that we really had no say in what would happen to him in the future.’ Minor also testified that he did not recall that he specifically advised Brown that he had an opportunity to help himself, but agreed that it was ‘not something I wouldn’t say.’ Minor said that he told Brown that he ‘needed all the help you can get right now,’ but Minor averred that he ‘made no specifics on how (Brown) could help himself out.’ Minor also testified he told Brown that he could not ‘make...any promises what is going to happen yet.’

“In the instant case, Mason testified that, by telling Brown he had the opportunity to help himself, he meant that Brown had an opportunity to not be the only person charged with the crime. Mason denied, however, that he was trying to give Brown any hope that there would be an exchange of leniency. Likewise, Minor testified that he told Brown that he needed all the help he could get, and that he ‘had an opportunity to help himself by giving [Minor] a statement,’ but denied that he made any specifics about what the word ‘help’ meant. Clearly, these were, at best, ambiguous promises.

“Because the statements were ambiguous, the court must then examine Brown’s vulnerability. The factors to consider, as noted above, are 1) the age, education, and intelligence of the accused; 2) how long it took to obtain the statement; 3) the defendant’s experience, if any, with the criminal-justice system; and 4) the delay between the *Miranda* warnings and the confession. Here, the trial court pointed out that Brown’s first two inculpatory statements were unquestionably proper, and the officers taking those statements had made

Brown ‘as comfortable as he could be.’ The trial court also noted that, at the time he gave the latter two statements, Brown already knew that he was going to be charged with murder, that he had voluntarily gone to the hospital to give a DNA sample, and that he was much calmer at the time he gave the two challenged statements. Considering the context of the entire exchange leading up to Brown’s third statement, the court found that Brown was not so vulnerable at that point in time that the suggestions that he would be helping himself overrode his free will and turned an otherwise voluntary statement into something that was involuntary. With respect to the fourth statement, the court highlighted the fact that Brown had been given the chance to sleep overnight and that he had been aware for nearly twenty-four hours that he was under suspicion of murder. The trial court concluded that there was ‘no way’ it could find that anything Brown had said was in response to or in reliance upon some sort of promise by the police to help him.

“At the time of the murder, Brown was twenty-two years old and his forensic mental evaluation revealed that he had a full-scale IQ of 114. Dr. Michael Simon, who conducted the evaluation, indicated that this score meant Brown was “presently functioning in the high average range of intelligence.” The first of Brown’s two statements was given at 10:51 p.m. on the same day the murder took place, and the second occurred at 9:18 the following morning. With respect to Brown’s experience with the criminal justice system, he had been arrested at least three times before and had been to jail briefly. Brown had been advised of his *Miranda* rights prior to each of his earlier statements, and both Detective Mason and Sergeant Minor reminded him of those rights just before the two statements in question. Based on these factors, we cannot say that Brown was so vulnerable that his statements were involuntary, and it is apparent that the trial court did not err in denying Brown’s motion to suppress these statements.”

EQUAL PROTECTION: Racially Selective Law Enforcement

In *Marshall v. Columbia Lea Regional Hospital*, CA10, No. 02-2184, 09/29/03, police officer Rodney Porter stopped Jimmie Marshall, an African-American resident of Hobbs, New Mexico, for an alleged traffic violation. Officer Porter arrested Marshall, administered field sobriety tests, and took him to the Columbia Lea Regional Hospital for a blood test.

Among other legal claims, Marshall alleges that the traffic stop and arrest were made on account of his race and without probable cause, in violation of the Fourth Amendment and the Equal Protection Clause, and that the coerced blood test violated his rights under the Fourth Amendment and state tort law. The defendants are Officer Porter, who conducted the traffic stop and arrest, and Sergeant Walter Roye, who ordered the blood test. Additionally, Marshall contends that Hobbs Police Chief Tony Knott and the City of Hobbs are liable for those actions under supervisory and municipal liability theories respectively. Other defendants include nurse Iris Goad and her employer, Columbia Lea Regional Hospital, on account of their involvement in the blood test. Wilson seeks damages and other appropriate relief under 42 U. S. C. § 1983. A summary of the case and the ruling of the Tenth Circuit Court of Appeals is as follows:

“Officer Porter was forced to resign from the Midland, Texas, police force after an internal investigation uncovered evidence of serious misconduct. In response to a subpoena, Midland Police Chief John Urby provided documents from his department’s internal investigation showing an extensive pattern of misconduct and violation of citizens’ constitutional rights by Officer Porter when he was on the Midland force.

“If admissible, the Midland documents provide evidence that in more than thirty cases, Officer Porter falsely charged arrestees with possession of narcotics, seriously mishandled narcotics evidence, or both. Further, in other cases, Officer Porter was accused of planting evidence on arrestees, as well as using evidence to barter for sexual favors. According to the documents, Officer Porter denied

the charges until after failing a polygraph test, when he admitted mishandling evidence. As a result of his misconduct, Officer Porter was terminated from the Midland Police Department.

“According to Marshall, a review of Officer Porter’s arrest reports on cases where he had not logged in drug evidence shows that an overwhelming number of the suspects were black. Most of the rest were Hispanic surnamed. Virtually all were stopped for minor traffic violations such as seat belts, failing to signal a turn, failing to stop at a stop sign, or making a wide turn so as to touch the stripe of the other lane. Also, in many cases, Officer Porter either claimed to have secured consent or went ahead and conducted searches anyway.

“Marshall claims that this pattern closely resembles the facts of his own case, and establishes a modus operandi under which Officer Porter targets individuals on the basis of their race and subjects them to traffic stops, arrests, and searches for pretextual drug violations not based on any evidence.

“In further support of his equal protection claim, Marshall presented evidence regarding several lawsuits alleging civil rights violations against African-American citizens of Hobbs pending at the time his complaint was filed. Marshall also provided newspaper articles dealing with the racial tensions between the Hobbs Police Department and its African-American citizens, including an incident involving Officer Porter in which an allegedly racially motivated arrest at a high school football game resulted in a riot.

“That Marshall’s stop and arrest were based on probable cause does not resolve his more troubling claim that he was targeted by Officer Porter on account of his race. In *Whren v. United States*, 517 U. S. 806, 813 (1996), the Supreme Court held that claims asserting selective enforcement of a law on the basis of race are properly brought under the Equal

“In *Whren v. United States*, 517 U. S. 806, 813 (1996), the Supreme Court held that claims asserting selective enforcement of a law on the basis of race are properly brought under the Equal Protection Clause, and that the right to equal protection may be violated even if the actions of the police are acceptable under the Fourth Amendment.”

Protection Clause, and that the right to equal protection may be violated even if the actions of the police are acceptable under the Fourth Amendment. As the court noted in *United States v. Avery*, 137 F.3d 343, 352 (6th Cir. 1997), the Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures.

“Racially selective law enforcement violates this nation’s constitutional values at the most fundamental level; indeed, unequal application of criminal law to white and black persons was one of the central evils addressed by the framers of the Fourteenth Amendment. See generally William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 43-48 (1988); John Frank & Robert Munro, *The Original Understanding of “Equal Protection of the Laws,”* 1972 Wash. U. L.Q. 421, 445-46. In its modern form, however, racially selective law enforcement has only recently come to public attention, and state and federal law enforcement authorities are struggling to develop practical means for distinguishing between legitimate and illegitimate uses of race in the investigation and prevention of crime. See generally Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 Colum. L. Rev. 1413 (2002); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. Chi. Legal F. 163 (2002). Recently at the behest of President Bush, the Department of Justice promulgated guidelines designed to end racial profiling in federal law enforcement.

“It is one thing for law enforcement administrators to identify the problem and to undertake administrative steps to eliminate the improper use of racial and ethnic stereotypes in law enforcement. It is more difficult to craft judicially manageable standards for determining liability under

§ 1983. Broad discretion has been vested in executive branch officials to determine when to prosecute, *United States v. Armstrong*, 517 U. S. 456, 464 (1996), and by analogy, when to conduct a traffic stop or initiate an arrest. Police officers and departments should not lightly be put to the expense and risk of trial on charges of racial discrimination that may be easy to make and difficult to disprove. Not only does litigation divert prosecutorial resources and threaten an excessive judicial interference with executive discretion, but it could induce police officers to protect themselves against false accusations in ways that are counterproductive to fair and effective enforcement of the laws. For example, police may be induced to direct their law enforcement efforts in race-conscious ways by focusing law enforcement on neighborhoods with relatively few low-income, minority persons. Perhaps for these reasons, the Supreme Court has held that ‘to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary.’ *Id.* at 465 (quoting *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 14-15 (1926)). Claims of racially discriminatory traffic stops and arrests should be held to a similarly high standard.

“Neither this Court nor the Supreme Court has set forth the standards of proof needed for a plaintiff to withstand a motion for summary judgment in a case of an alleged racially discriminatory stop and arrest by a single officer. In analogous contexts, however, the Court has ‘taken great pains to explain that the standard is a demanding one.’ See *Armstrong*, 517 U. S. at 463. In *Wade v. United States*, 504 U. S. 181, 186 (1992), the Court held that a defendant is not entitled to an evidentiary hearing on a claim of a prosecutor’s racially discriminatory refusal to request a downward departure on the basis of ‘generalized allegations of improper motive.’ He must ‘make...a substantial threshold showing.’ In *Armstrong*, the Court held that a defendant is not entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race unless he can show ‘that similarly situated individuals of a different race were not prosecuted.’

“The requirements for a claim of racially selective law enforcement draw on what the Supreme

Court has called ‘ordinary equal protection standards.’ *Armstrong*, 517 U. S. at 465. The plaintiff must demonstrate that the defendant’s actions had a discriminatory effect and were motivated by a discriminatory purpose, *Armstrong*, 517 U. S. at 465. These standards have been applied to traffic stops challenged on equal protection grounds. *Chavez v. Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533-36 (6th Cir. 2002). The discriminatory purpose need not be the only purpose, but it must be a motivating factor in the decision. *Villanueva v. Carere*, 85 F.3d 481, 485 (10th Cir. 1996). To withstand a motion for summary judgment, a plaintiff in a § 1983 suit challenging alleged racial discrimination in traffic stops and arrests must present evidence from which a jury could reasonably infer that the law enforcement officials involved were motivated by a discriminatory purpose and their actions had a discriminatory effect.

“In general, the absence of an overtly discriminatory policy or of direct evidence of police motivation results in most claims being based on statistical comparisons between the number of black or other minority Americans stopped or arrested and their percentage in some measure of the relevant population. See, e.g., *Chavez*, 251 F.3d at 626. This requires a reliable measure of the demographics of the relevant population, a means of telling whether the data represent similarly situated individuals, and a point of comparison to the actual incidence of crime among different racial or ethnic segments of the population. *Armstrong*, 517 U. S. at 469-70. This case, however, is different, and perhaps more susceptible to traditional modes of proof before a jury. Here, Marshall seeks to prove the racially selective nature of his stop and arrest not by means of statistical inference but by direct evidence of Officer Porter’s behavior during the events in question, Officer Porter’s own statements and testimony (the credibility of which can be evaluated by a jury), and Officer Porter’s alleged record of racially selective stops and arrests in drug cases under similar circumstances in Midland, Texas.

“A challenge to the specific acts of a particular police officer bears some resemblance to a claim of racial discrimination in the use of peremptory jury challenges, which also involves the acts of a single

state actor (the prosecutor) in the course of a single incident (the selection of the jury). In such cases, the Supreme Court has instructed that the court should consider all relevant circumstances, including the prosecutor's pattern of strikes against black jurors, and the prosecutor's questions and statements, which may support or refute an inference of discriminatory purpose. *Batson v. Kentucky*, 476 U. S. 79, 96-97 (1986). Similarly, a police officer's pattern of traffic stops and arrests, his questions and statements to the person involved, and other relevant circumstances may support an inference of discriminatory purpose in this context.

"Marshall testified that he did not fail to stop at the stop sign or commit any other traffic violation in Officer Porter's presence. This testimony was not sufficient to establish lack of probable cause for the ultimate stop and arrest two miles down the road, but if accepted as true by the trier of fact, would be evidence that the officer's initial decision to pull Marshall over was pretextual. Moreover, Marshall testified—and Officer Porter did not dispute—that he was aware of the police car following him for several blocks before he came to the intersection where the alleged traffic violation occurred. Since drivers aware of being observed by the police tend to be particularly cautious about traffic regulations, this lends credence to his account of the events.

"Second, Marshall testified, and Officer Porter did not deny, that the officer made eye contact with him while stopped at the intersection prior to activating his emergency lights. From these facts it might reasonably be inferred that Officer Porter was ascertaining Marshall's race. The Hobbs Defendants have pointed to no testimony by Officer Porter or other evidence in the record that would supply a nondiscriminatory explanation for this behavior. The sequence of events is potentially significant, since this was the same intersection at which Officer Porter alleges that Marshall committed the traffic violation (presumably failure to stop at a stop sign). If, as it appears, Officer Porter took steps to determine Marshall's race after he committed the violation but before the police officer activated his emergency lights, it might reasonably be inferred that Marshall's race played a part in the decision to initiate the stop.

"The first words out of Officer Porter's mouth when he confronted Marshall after the stop were a cryptic accusation that Marshall was on crack. ('Is a few rocks worth all that?') Officer Porter reiterated this accusation during interrogation at the station house and again at the hospital. Neither Officer Porter nor the other Hobbs Defendants deny that these exchanges took place or dispute Marshall's description of their content. Further, Defendants failed to offer any evidence explaining why Officer Porter made the accusations. We refer to these exchanges as 'accusations' rather than an 'interrogation' because, as reported by Marshall, the tone and content was accusatory and conclusory rather than interrogative. We do not suggest that a police officer requires probable cause, or even reasonable suspicion, before asking a suspect who has been arrested for probable cause questions about possible criminal activity, but in the context of this case as a whole, a jury might reasonably infer from these exchanges that Officer Porter was acting on the basis of stereotype or prejudice rather than evidence.

"The record also reflects that on the citation form, in the box designated for the gender of the cited driver, Officer Porter wrote 'B/M,' making a racial designation where none was called for. Possibly, this reflects unwritten police policy or has some other nondiscriminatory explanation, but the Hobbs Defendants have not suggested one. A jury might also think it significant—at least as it bears on Officer Porter's credibility—that the officer wrote on the original criminal complaint that Marshall accelerated to 100 miles per hour, drove through a four-way stop, and weaved from lane to lane, but later made no mention of these remarkable corroborating facts in his sworn affidavit in this case about what happened that day. Cf. *McGarry v. Board of County Com'rs*, 175 F.3d 1193, 1200 (10th Cir. 1999) (in employment discrimination context, change of story tends to show pretext); *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1382 (10th Cir. 1994) (same).

"The record thus contains evidence—disputed, to be sure—that Marshall did not commit the traffic violation for which he was initially stopped, that Officer Porter ascertained Marshall's race before initiating the stop, that he made repeated accusations that Marshall was on crack with no apparent basis,

that he made an apparently unnecessary note of Marshall's race, and that his account of the events changed dramatically between the date of the incident and the date of his affidavit. Other than to insist that Marshall committed the traffic violation and thus that there was probable cause for the stop and the arrest, the Defendants offer no nondiscriminatory explanation for these aspects of Officer Porter's conduct in this case.

"It is a close question whether this is sufficient to require the Hobbs Defendants to go to trial on the allegations of racial discrimination. But there is more. Marshall presented evidence regarding extensive alleged misconduct by Officer Porter during his prior employment as a police officer in Midland, Texas. In a memo terminating Officer Porter's employment, the Midland police chief stated that Porter had failed 'to treat people fairly and equally under the law.'

"We therefore reverse the grant of summary judgment in favor of the Hobbs Defendants on the equal protection claims, and remand to the district court to determine the admissibility of the Midland documents and to reconsider the Hobbs Defendants' motion for summary judgment in light of this opinion."

EVIDENCE:

Security Camera Videotape of Robbery

In *United States v. Curtis*, CA10, No. 02-5047, 9/17/03, Curtis was charged with committing robberies which were captured on videotape. Curtis challenged the district court's decision to admit the videotapes arguing that the tapes were murky, lacked sufficient clarity to identify any of the defendants, and were improperly suggestive when considered by the jury. Curtis contended these tapes did not help in the identification process except to suggest that the robbers were black, a fact which all the clerks testified to verbatim. As such, Curtis argues, the prejudicial impact of the tapes outweighed their probative value.

Although the videotapes certainly may have been damaging to Curtis, they were not unfairly prejudicial. The Government explained the probative value of the videotapes as follows:

"Three tapes show a masked bandit similar in build to Curtis carrying a rifle and wearing articles of clothing matching those items seized in Curtis' car on the night of his capture. In one of the tapes, one can also see co-defendant Rice carrying a hammer and wearing articles of clothing which were also found in Curtis' car on the night of his capture. The tapes are relevant because they corroborate the testimony of the robbery victims and were not unfairly prejudicial, misleading, or confusing to the jury."

The Tenth Circuit Court of Appeals found the Government's argument convincing. Nothing in the record suggests that the potentially prejudicial impact of the videotapes outweighed their probative value at trial. The district court thus did not abuse its discretion in choosing to admit them.

GAME AND FISH:

Nonconsensual Search of Open Boat

In *State v. Colosimo*, No. C7-01-2181, (Minnesota, 9/25/03), the Minnesota Supreme Court held that when a conservation officer approached an open boat, which was resting on the trailer of a parked portage truck, and asked the occupants whether they had caught any fish, it was not a seizure for the purposes of the Fourth Amendment. When the occupants of the open boat admits to having been fishing and transporting fish in the boat or other conveyance used to transport wild animals, but refuses to present the catch for inspection, a nonconsensual search of the areas of the open boat where fish are typically transported is constitutionally permissible. Refusing to allow such an inspection is a violation of the Minnesota Game and Fish laws.

JAILS AND PRISONS

Coleman *v. Parkman*, CA8, No. 03-1611, 11/12/03, presented the case of Mrs. Bobbie J. Coleman whose son, Billy Wayne Coleman, committed suicide in his jail cell. The Eighth Circuit Court of Appeals

denied qualified immunity to the sheriff, chief jailer, and other jail employees when there was evidence that they knew that Billy Wayne Coleman was a suicide risk, provided him with a sheet, and then placed him in a cell with exposed bars.

SEARCH AND SEIZURE: Curtilage; Plain View Observation in Driveway

In *McDonald v. State*, No. CR02-813, 9/25/03, the Arkansas Supreme Court dealt with Kent Edward McDonald's appeal which alleged that the White County Circuit Court erred in refusing to suppress evidence seized by police on his property without a warrant.

The White County Sheriff's Office received an anonymous report that there were stolen four-wheelers at McDonald's home. At about 9:00 a.m. on December 7, 2001, Corporal Dean Burlison and Sergeant Woodrow Jones were dispatched to investigate the report. McDonald's home is connected to the county road by a 100-foot dirt driveway, and the officers were able to see multiple four-wheelers parked in front of the house. Specifically, a mule and a green four-wheeler were parked in the driveway about ten feet from the house, and a red four-wheeler was parked in the front yard about twenty feet from McDonald's home.

When the officers arrived at about 9:30 a.m., it was raining. They knocked on McDonald's front door but there was no response. Corporal Burlison then walked to the driveway and looked at the mule and green four-wheeler while Sergeant Jones looked at the red four-wheeler in the front yard. Corporal Burlison recorded the vehicle identification numbers (VIN) stamped on the mule and the green four-wheeler, and Sergeant Jones recorded the VIN number on the red four-wheeler in the front yard. Both officers ran the VIN numbers through the National Crime Information Center, and the mule and red four-wheeler were reported as stolen. The green four-wheeler was reported as belonging to McDonald.

Officers Burlison and Jones notified the Criminal Investigation Division (CID) and then secured the area. CID Detectives Jimmy Ervin and John Slater

arrived at the scene shortly thereafter. Detective Ervin knocked on McDonald's front door, and Detective Slater looked at the mule and four-wheelers. No one answered the door, whereupon the detectives left to secure a search warrant. At about 2:00 p.m., the detectives returned with a search warrant and knocked on the door once more. Again, there was no answer. The detectives then executed a forced entry into the home by kicking in the front door and found Donald coming down the hallway from the back bedroom. They ordered him to the ground and proceeded to search the home and seize a rifle, some fishing poles, the mule, and two four-wheelers. McDonald contends that the Court should suppress evidence seized by police on his property without a warrant. The court's ruling is as follows:

"The Arkansas Supreme Court first stated that when Corporal Burlison was standing in the driveway, and thus in the curtilage of McDonald's home, he looked at the mule and took down its VIN number. McDonald, however, had no reasonable expectation of privacy in the driveway. The mule was exposed to the public and readily accessible to any person walking to the front door of his home. Nothing barred the public from walking up the driveway. As such, we hold that McDonald did not exhibit a reasonable expectation of privacy in his driveway.

"Even if the police officers were lawfully in his driveway, McDonald maintains they illegally searched the mule and seized its VIN number. A warrantless search is *per se* unreasonable unless it falls within one of the narrow and clearly defined exceptions to the warrant requirement. *Filippo v. West Virginia*, 528 U.S. 11 (1999). The plain-view doctrine is one of the well delineated and established exceptions to the warrant requirement. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Fultz v. State, supra*. We have held that a search occurs whenever something not previously in plain view becomes exposed to an investigating officer. *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999) (citing *Arizona v. Hicks*, 480 U.S. 321 (1987)). In addition, the police need not inadvertently discover evidence in order to invoke the plain-view doctrine. The Supreme Court has stated that intrusion into an area cannot result in a Fourth Amendment violation unless the area is one in which there is a 'constitutionally protected reasonable expectation of privacy.' *New*

York v. Class, 475 U.S. 106 (1986). The Court held in that case that there was no reasonable expectation of privacy in a VIN number, and, therefore, the mere viewing of a VIN number was not a violation of the Fourth Amendment. *New York v. Class*, *supra*.

“McDonald did not exhibit a reasonable expectation of privacy in his driveway. In addition, we have explained that the procedure known as a ‘knock-and-talk’ is constitutionally sound. *See, e.g., Latta v. State*, 350 Ark. 488, 88 S.W.3d 833 (2002). During a ‘knock-and-talk,’ a police officer may approach a person’s residence to ask questions related to an investigation without probable cause or reasonable suspicion. It follows that, in this case, the police were lawfully and legitimately in the driveway when they inspected the mule.

“Once the officer was in the driveway, he could see the VIN number on the mule; that is, the VIN number was in plain view. *See New York v. Class*, 475 U.S. 106, (1986). A cursory inspection, which involves merely looking at an object already exposed to view, is not a ‘search’ for Fourth Amendment purposes. *Arizona v. Hicks*, 480 U.S. 321 (1987). Here, the officer stated that the VIN number was stamped on the outside of the mule and could be viewed without touching the vehicle. Accordingly, we conclude that the inspection of the mule was not an illegal ‘search’ in contravention of the Fourth Amendment.

“When police officers are legitimately at a location and acting without a search warrant, they may seize an object in plain view if they have probable cause to believe that the object is either evidence of a crime, fruit of a crime, or an instrumentality of a crime. Because no seizure took place when Corporal Burlison recorded the mule’s VIN number, he did not need to have probable cause to believe that the mule was the fruit of a crime before recording its VIN number. We have already determined that the officers were lawfully in the driveway and that the mule’s VIN number was plainly visible. Thus, we hold that Corporal Burlison lawfully recorded the VIN number on the mule located in the driveway.

“McDonald advances a similar search-and-seizure challenge in connection with Sergeant Jones’s actions in recording the VIN number on the red four-wheeler parked in the front yard. The Arkansas Supreme Court did not address the propriety of those

warrantless activities stating that the lawful discovery that the mule was stolen would have inevitably led to the discovery that the red four-wheeler was also stolen.”

SEARCH AND SEIZURE: Emergency Search

In *United States v. Williams*, CA6, No. 02-5001, 9/4/03, the charges against Geoffrey Hillman Leek, Nicholas Edward George, and Hunter Lee Williams arise out of a warrantless entry by federal agents into a residence in Knoxville, Tennessee, (the “Bluegrass residence”) on October 22, 1999. The owner of this property, Theresa Smith, leased the residence to Leek and George. Smith, an elderly widow who owns seven rental properties in the Knoxville area, testified that she had no complaints about Leek or George, and that Leek always paid the rent, \$850.00 per month, on time and in cash. Under the lease, Smith was responsible for the water bill.

On October 7, 1999, Smith received a bill for the combined water usage at four of her rental properties—the Bluegrass residence, a modular home, a trailer, and a camper. On October 22, 1999, when Smith prepared to pay the bill, she concluded that it was higher than normal. Specifically, Smith testified that the October 7 bill totaled \$39.16, while the bill for the previous month totaled \$27.86. Notably, the November 1999 bill totaled \$46.41, and Smith testified that a bill of nearly forty dollars was not unusual. However, Smith claimed that a bill of nearly forty dollars was odd for the period measured in the October 7 bill because two of the residences were vacant.

Approximately five years earlier, a water leak in the kitchen caused damage to the Bluegrass residence. Thus, suspecting a possible water leak, Smith set out to inspect each of the four properties. Smith did not call any of her tenants in advance. Smith inspected the modular home, trailer, and camper, but found no leaks. Fearing a dog that Leek and George owned, Smith asked her niece, Lucille Barnett, to accompany her to inspect the Bluegrass residence.

Around 10:30 a.m. on October 22, Smith and Barnett arrived at the Bluegrass residence. Although the gate was open, Leek, George, and the dog were not at the residence. Smith used a copy of the house key to enter the Bluegrass residence. As she and Barnett entered, Smith smelled something odd. Smith and Barnett saw leaves all over the floor and no furniture in the residence save a punching bag and trash cans. Soft music was playing. The pair walked through the living room and inspected the kitchen, finding no leaks. Although they saw no leaks nor any water or water damage, they left without checking the entire residence because it was dark, the lights did not work, and they were afraid.

After they left, Barnett called the Drug Enforcement Agency (“DEA”). Barnett explained to DEA Agent Tim Teal that Smith had received a high water bill for several rental properties that she owned, including the Bluegrass residence. She explained that she had accompanied her aunt to the Bluegrass residence to look for leaks, and based on the plant material and lack of light and furniture in the residence, they suspected drug activity. Barnett also informed Teal that Leek always paid the rent in cash. Based on this information, Agent Teal suspected that the residence was either a marijuana grow or marijuana stash house. Agent Teal agreed to meet with the women at the Bluegrass residence at 1:00 p.m. that day.

Agent Teal asked DEA Agent David Henderson accompany him. When they arrived at the Bluegrass residence at 1:20 p.m., the women explained that Smith owned the Bluegrass residence, but rented it to Leek and George. Reiterating some of the information that Barnett had relayed to Agent Teal on the telephone, Smith and Barnett showed the agents the lease, described the water bill, and explained that they had checked the three other rental properties for a leak already.

Concerned that a possible water leak might ruin the new carpeting in the Bluegrass residence, Smith and Barnett initially asked the officers to inspect the premises for a leak. The agents declined to enter the residence alone because they both agreed that they shouldn’t do that. Smith then asked the agents to accompany her into the Bluegrass residence to check for a leak, telling them that she was afraid to go in by herself. After discussing whether they could

accompany Smith into the residence, the agents decided that Agent Henderson would go with Smith in his capacity as a local law enforcement officer, rather than as a federal drug investigator. Agent Teal testified, however, that he had no “real reason” to believe that anyone was in the residence.

Smith unlocked the door to the residence, and Agent Henderson accompanied her and Barnett inside. Barnett reemerged from the residence a few minutes later to get a flashlight from Agent Teal for Agent Henderson. Agent Henderson inspected the entire house, including the room containing a washer and dryer, the master bedroom, the bathrooms, and the kitchen—even looking under the kitchen sink. Agent Henderson did not find a water leak, but he did discover many marijuana plants.

Based on Agent Henderson’s discovery of marijuana during the warrantless entry into the Bluegrass residence, the agents established surveillance there. Later in the day, Agent Henderson obtained state arrest warrants for Leek and George. The affidavit for these warrants was based entirely on information obtained from Agent Henderson’s warrantless entry into the Bluegrass residence. Relying on this information, Agent Henderson applied for and obtained a search warrant for the Bluegrass residence the same day. Meanwhile, Agent Teal learned that Leek subscribed to electrical service for the Bluegrass residence, listed 305 Meridale Drive in Johnson City, Tennessee (the “Meridale residence”) as his address on his driver’s licence, but had a vehicle registered at 1311 Clinch Avenue, Apartment Three in Knoxville (the “Clinch residence”). Agent Teal also learned that George’s driver’s license listed the Clinch residence as his address, but George had a vehicle registered at the Meridale residence. Finally, Agent Teal learned that Leek and George receive mail at the Clinch residence.

Agents Teal and Henderson executed the search warrant for the Bluegrass residence at 10:30 p.m. on October 22, 1999. The agents discovered a hydroponic marijuana-growing operation, including 164 marijuana plants. On October 26, 1999, after observing Leek’s vehicle parked outside, the officers knocked on the door of the Clinch residence to arrest him. Upon arrest, Leek consented to a search of the Clinch residence. During the search, the agents recovered marijuana, drug paraphernalia, opium, and

sixteen hundred dollars in cash. During the course of this arrest, Leek made various incriminating statements to the agents. Based on the search of the Clinch residence, the agents decided to focus on the Meridale residence. Thus, police officers from Johnson City, Tennessee, acting on information provided by Agents Teal and Henderson, eventually executed the arrest warrant

for George at the Meridale residence. The officers did not locate George in the residence, but they did see marijuana, and they arrested Hunter Williams, who was present there. The officers later sought and obtained a search warrant for the Meridale residence. Upon executing that search warrant, the officers recovered 295 marijuana plants, approximately eighty bundles of marijuana leaves, and implements used for growing marijuana, such as lights and a carbon dioxide enrichment system.

On March 8, 2000, Defendants Leek, George, and Williams, were charged in a five-count indictment (“Indictment”) with conspiring to manufacture marijuana and to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846, and aiding and abetting each other in the commission of these offenses. Subsequently, Defendants filed motions to suppress the evidence against them on the grounds that the warrantless entry into the Bluegrass residence was not justified. The Sixth Circuit Court of Appeals’ ruling is as follows:

“If the warrantless entry into the Bluegrass residence was unconstitutional, all subsequent evidence was obtained unlawfully because the subsequent searches and arrest warrants were based on evidence and information derived solely from Agent Henderson’s warrantless entry. Thus, the primary task is to assess whether the warrantless entry into the Bluegrass residence was constitutional.

“Exigent circumstances are situations where ‘real immediate and serious consequences’ will ‘certainly occur’ if a police officer postpones action

“To make a warrantless entry into a residence, exigent circumstances must exist. These include: (1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) the need to prevent a suspect’s escape; and (4) a risk of danger to the police or others.”

to obtain a warrant. *Ewolski*, 287 F.3d at 501 (quoting *O’Brien*, 23 F.3d at 997 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984))); see *Thacker v. City of Columbus*, 328 F.3d 244, 253 (6th Cir. 2003). The government bears the burden of proving that exigent circumstances existed. *Bates*, 84 F.3d at 794. This Court has explained that the following situations may give rise to

exigent circumstances: (1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) the need to prevent a suspect’s escape; and (4) a risk of danger to the police or others. *United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994) (internal citations omitted); see *Minnesota v. Olsen*, 495 U.S. 91, 100 (1990).

“Since Agent Henderson was neither faced with any true immediacy, nor confronted by any real danger that serious consequences would certainly occur to the police or others if he did not enter the Bluegrass residence, we conclude that exigent circumstances, in particular, the “risk of danger” exigency cannot justify Agent Henderson’s warrantless entry. First, it is clear that time was not of the essence in attending to the possible water leak at the Bluegrass residence. Smith had waited two weeks after receiving the October 7 water bill before opening it on October 22 and concluding that there might be a leak. At that time, she suspected a leak and set out to inspect for it. On October 22, the water could have been leaking for the four weeks covered by the bill, as well as the two weeks during which she did nothing after receiving the bill. Any damage would likely have been done, or at least noticeable, by October 22. However, Smith did not rush to the Bluegrass residence after finding no leak in any of the other three rental properties. Instead, she went to get Barnett before going into the residence. Although Smith and Barnett did not check the entire residence when they entered at 10:30 a.m., they did not see a leak or evidence of water damage.

“Second, any ‘risk of danger’ to ‘the police or others’ was created by the agents when they permitted Smith to reenter the Bluegrass residence. The officers testified that they entered the Bluegrass residence to protect Smith, who insisted on entering the residence. The agents did not believe anyone inside the Bluegrass residence was in need of aid. Rather, the agents were with Smith, who was safe outside the residence, but who insisted on going inside to search for a possible water leak. Thus, despite Smith’s subjective belief that she needed to inspect the Bluegrass residence quickly, she was not in need of immediate aid. Nothing in the record suggests that Agent Henderson was unable to prevent Smith from entering the residence. Insofar as Agent Henderson permitted Smith to enter the home, he essentially created the dangerous situation himself. Law enforcement officers cannot manufacture exigent circumstances. *Ewolski*, 287 F.3d at 504 (quoting *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984), for the proposition that ‘police officials . . . are not free to create exigent circumstances to justify their warrantless intrusions’).

“Accordingly, we find that any danger to human life or limb, that is, to Smith or to the agents themselves, was the result of their own doing and cannot, therefore, justify the warrantless entry into the Bluegrass residence. All subsequent evidence was obtained unlawfully because the subsequent search and arrest warrants were derived solely from evidence obtained by Agent Henderson during the warrantless entry of the Bluegrass residence.”

**SEARCH AND SEIZURE:
Reasonable Suspicion**

In *United States v. Yang*, CA8, No. 02-3238, 09/30/03, Iowa State Trooper Mark Anderson stopped a vehicle proceeding north on Interstate 35 for having excessively dark windows. At the conclusion of the traffic stop, driver Kou Yang consented to a search of the vehicle. The search yielded some suspicious items but no contraband. Yang then said he wanted to leave, but Anderson detained the vehicle until a drug dog could arrive. When the dog alerted to the presence of narcotics,

Anderson took the vehicle to a nearby truck stop for a more thorough search. The second search yielded no contraband, but Anderson could not find Yang to return the vehicle. The following day, with the vehicle still unclaimed, Anderson obtained a search warrant. The warrant search uncovered one and one-half pounds of methamphetamine hidden in the vehicle. Yang was indicted for possession with intent to distribute.

The traffic stop occurred at 11:33 a.m. on July 17, 2001. While asking Yang for his driver’s license, vehicle registration, and proof of insurance, Trooper Anderson saw numerous food items, a cell phone, and an atlas on the passenger seat, and a roll of toilet paper on the floor. Yang volunteered that he had flown to Dallas, Texas, to purchase the vehicle. The certificate of title showed a transfer of title to Yang and a handwritten odometer reading of 187,000 miles. Yang volunteered that he had made some repairs to the vehicle in Texas.

While Anderson completed the traffic stop paperwork, he questioned Yang about his travel to purchase the car. Yang said that after his wife saw the car on the internet, he paid \$5,000 for the car, sending a money order for half the purchase price before flying to Dallas. Yang said he had flown to Dallas from Minneapolis on July 11th and left Dallas on the 12th. Anderson commented that five days seemed too long to drive from Dallas to Iowa. When Yang said he was a co-owner of a temporary help agency in Minneapolis, Anderson asked if Yang was in a hurry to get home. Yang said he was but “would only drive 200 miles or so before I’d stop and rest so I wouldn’t get in a car accident.”

In this case the Eighth Circuit Court of Appeals reviewed the totality of circumstances and concluded there was reasonable suspicion. Anderson testified that his suspicion was initially aroused because (1) Yang was coming from a drug source state; (2) Yang had flown to Texas to purchase a high mileage car and to drive it back to Minneapolis; (3) Yang said he was in a hurry to get home but was driving well under the speed limit and had taken five or six days to travel from Dallas to Iowa; (4) Yang was traveling with a cell phone and with items indicating he did not want to stop; and (5) Yang gave uncommon answers to questions about crime and narcotics. During the initial consensual search, Anderson’s suspicion was

heightened when he found a new set of screwdrivers and receipts revealing tire repair in El Paso and glass repair in San Diego, California. When questioned about these items and his trip to California, Yang for the first time became agitated and “he started to pace back and forth,” paying much closer attention to Anderson and the car. Shortly thereafter, Anderson told Yang that a drug dog had been summoned. Yang immediately said they had searched long enough and he wanted to leave. See *United States v. Green*, 52 F.3d 194, 199-200 (8th Cir. 1995) (revocation of consent may contribute to reasonable suspicion).

In these circumstances, the Court concluded that the troopers had reasonable suspicion that the car might be transporting illegal drugs, which warranted a brief detention until the drug dog arrived and sniffed the vehicle. See *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (en banc) (one-hour detention was lawful), cert. denied, 514 U.S. 1013 (1995); *United States v. White*, 42 F.3d 457, 460 (8th Cir. 1994) (eighty-minute wait for a drug dog was reasonable).

**SEARCH AND SEIZURE:
Warrant Needed to Seize
Suspect’s Clothing from
Hospital Clothing Storeroom**

In *United States v. Neely*, CA5, No. 02-60561, 9/9/03, Tony Neely argues that his clothing, seized from a hospital clothing storeroom, was illegally seized.

On November 9, 2000, at 10:45 a.m., a man wearing a red and white windsuit and a ski mask over his face and carrying a .380 pistol walked into the Trustmark Bank in Southaven, Mississippi, a town situated on the state line between Tennessee and Mississippi and a suburb of Memphis, Tennessee. Upon entering the bank he shot a single round from his weapon into the ceiling and proceeded to the teller counter. He yelled to the lone teller behind the counter, Glenda Wheeler, to get down on the floor, and kicked in the gate accessing the area behind the counter. Once he was behind the counter he located Wheeler’s teller drawer and removed \$17,097 in cash. Because the robber was covered from head

to toe Wheeler was unable to identify his race or other identifying characteristics, nor were law enforcement officers who later viewed the bank’s videotape of the robbery.

After recovering the money, the robber ran out of the bank and jumped into the passenger side of a maroon Mazda 626 that had been waiting for him in the bank parking lot. As the Mazda attempted to pull out of the parking lot, a dye pack placed by the teller into the wads of stolen money exploded. Eyewitnesses reported that, after the dye pack exploded, both the driver and passenger of the vehicle opened the car doors to let the smoke escape. As they did so, the car hit a parked vehicle in the parking lot, and the jolt caused the passenger to drop currency onto the ground. As he leaned down to pick up the money, witnesses heard a pop and observed the passenger grab his chest or stomach area. Then both individuals exited the vehicle and ran across the lot to a waiting black SUV and got into that car. The SUV left the lot and headed north towards Memphis.

From the parking lot, agents recovered several thousand dollars with red stain on it. They also took samples from the interior of the Mazda, which they observed was splattered with red dye. The only evidence recovered from inside the bank was the bullet in the ceiling, a small crowbar, and a .380 casing from the spent round.

A few minutes after the robbery, a 911 call came in from the Tulane Apartments in Memphis, roughly four and a half miles from the bank. The caller reported that an individual in apartment two, a second-story apartment, had sustained a gunshot wound to his chest. An ambulance and police personnel responded to the call and arrived to find Neely wounded and lying in the kitchen of the apartment. The ambulance workers quickly secured Neely and transported him to the Regional Medical Center in Memphis, also known as “The Med.” At the foot of the rear stairs leading to the apartment, police seized a banking bag and an empty plastic ice bag both stained with red dye.

At the Med, emergency personnel rushed Neely to the Shock Trauma Unit. During treatment the medical workers found it necessary to remove Neely’s clothing, which included a royal blue t-shirt and a pair of blue jeans. They placed the clothing in a plastic bag. Kerry Kirkland, the patient care

coordinator for the Med's 7 a.m. shift, testified that when someone such as Neely is brought into the trauma unit suffering from a gunshot wound and covered with blood, and medical personnel finds it necessary to cut his clothing off of his body, it is inventoried, placed in a plastic bag, and put into the clothing storeroom at back of the unit. The clothing is maintained in the storeroom for five to six days and, if the owner does not claim it, it is thrown away. Kirkland further affirmed that the hospital considered such clothing to belong to the patient even while in the hospital's possession, and the staff at the Med does not consider the hospital to be an owner of the clothes.

While Neely was in surgery or shortly thereafter, a detective captain at the Southaven Police Department, acting on information from the Memphis Police Department, dispatched an officer to the Med to retrieve Neely's clothing. Although the officer had no warrant for the clothing and police were then in the process of procuring an arrest warrant for Neely, medical personnel gave him Neely's clothes upon the officer's request. Lab analysis of the seized clothes revealed tear gas and red dye consistent with substances deployed in a dye pack.

Neely argued that the clothing and the lab results were inadmissible products of a warrantless search and seizure subject to no exception to the warrant requirement. The Government argued that exigent circumstances—particularly the police captain's concern that the bloody evidence would deteriorate or be contaminated while in the hospital's possession—justified the seizure, and that, alternatively, Neely lost his privacy interest in the clothing by wearing them in front of hospital personnel and police officers after he was shot. The

“In *Jones v. State*, 648 So.2d 669 (Fla. 1994), the Court held that officers violated a defendant's Fourth Amendment rights by seizing clothes that were in his hospital room. *Jones* clarified that what was at issue was a seizure, not a search, and therefore it was to be measured not by whether the defendant had a reasonable expectation of privacy in these clothes, but rather by whether the seizure interfered with the defendant's constitutionally protected possessory interests.”

Government also suggested that the hospital was a joint possessor of the clothing and therefore it had authority to give them to the police, and that the seizure of the clothes was incident to Neely's arrest, since it closely preceded procurement of the arrest warrant and, for all practical purposes, Neely was under arrest at the time of the seizure since he was shackled to his bed. The district court denied the motion to suppress, concluding that Neely had no reasonable expectation of privacy in his clothes. The United States Court of Appeals for the Fifth Circuit, however, reversed the decision of the lower court, stating as follows:

“The Government's contentions that Neely had no valid possessory interest in the clothing because he abandoned that interest and that the hospital was a joint possessor of the clothing are unavailing. Numerous courts have held that an emergency room patient does not forfeit his possessory rights to clothing simply by walking (or in many cases being carried) through the hospital door. As a New York court reasoned in *People v. Yaniak*, 738 N.Y.S.2d 491 (2001), once the clothing is taken from the patient and secured by the hospital, the hospital becomes a bailee and the employees have no authority to permit the police to search or test the clothes without the consent of the owner. That court, confronting a situation similar to this case, held that as a bailee the hospital was required ‘to exercise ordinary and reasonable care for defendant's clothes,’ and ‘had no authority to allow them to be taken without a warrant.’ It further explained that since the hospital had no authority to hand over the clothes, the only way the police could have legally taken them without a warrant—absent application of a recognized exception to the warrant

requirement—was if the prosecution presented evidence that the defendant determined permanently to discard his clothes. The court found no evidence supporting such a conclusion, instead noting that the placing of the garments in the green plastic bag by hospital employees evinced an objective belief on their part that the items were still the personal property of the defendant and that, when he felt better, they would be returned to him.

“The Florida Supreme Court reached the same conclusion in *Jones v. State*, 648 So.2d 669 (Fla. 1994) in which it held that officers violated a defendant’s Fourth Amendment rights by seizing clothes that were in his hospital room. *Jones* clarified that what was at issue was a seizure, not a search, and therefore it was to be measured not by whether the defendant had a reasonable expectation of privacy in these clothes, but rather by whether the seizure interfered with the defendant’s constitutionally protected possessory interests.

“We hold that Neely did not forfeit his possessory interest in his clothing by entering the Med, and the officers presumptively violated his Fourth Amendment rights in retrieving the clothes from the hospital. The Government presented no evidence indicating that Neely had done anything to suggest he had given up the possessory interest in his clothes, and the hospital’s policy of placing the clothing in a bag and putting it in a locker in the clothing storage room suggested that it was holding the clothes for him until he recovered. The Government’s theory that the hospital jointly possessed the clothing and therefore had authority to hand them over to the police upon request also fails because the patient care coordinator called at the hearing testified that the hospital considers such clothing items the patient’s possessions and does not consider itself an owner of the clothes. She further explained that clothing such as Neely’s, even when covered with blood, would be stored for the patient and only discarded if the patient or a family member did not attempt to retrieve the clothing after five to six days. The Government presented no evidence at the suppression hearing that hospital staff did not follow this procedure with regard to Neely’s clothes. Therefore we find that Neely retained a sufficient possessory interest in the clothes to complain of this seizure and that, absent application of an exception to the warrant

requirement, we must hold the seizure unreasonable under the Fourth Amendment.

“The Government asserts that we should affirm the district court’s ruling on the basis that police legally seized the clothes pursuant to the plain view doctrine. It contends that Neely’s bloody clothes, evidence of a possible crime, were in plain view of the Memphis officers who accompanied the medical personnel into Neely’s apartment, as well as to the hospital staff who treated Neely upon arrival at the Med. The argument is that the Memphis officers could not have seized the clothes while they were actually in plain view because it would have interfered with Neely’s medical treatment, so it was only reasonable for them to alert the Southaven police so that they could retrieve the clothing after Neely arrived at the hospital.

“As Neely points out, the difficulty with the Government’s argument is that the plain view doctrine requires both that the object be in plain view at the time of seizure and that the officer have a lawful right of access to the object. If accepted, the Government’s line of reasoning would permit seizure of items that, while previously in plain view, are no longer in plain view at the time of seizure, and may not even be in a place lawfully accessible to the officer. The practical implication of this argument is that the Government will be free to seize any object officers have previously seen in plain view. In Neely’s case, the Southaven officer seized the clothing after the Memphis officers saw it in plain view at the apartment, and the officer who retrieved the clothes did not have a lawful right of access to the storage room or the plastic bag in which the hospital had stored Neely’s clothing. These facts do not fit within the four corners of the plain view doctrine.

“We similarly reject the Government’s argument that the seizure of the clothes was incident to arrest. Neely contends that this was not a seizure incident to arrest because that exception applies only to a search of his person or the area immediately around him, but here the officer seized the clothing from a completely different area of the hospital than where Neely was located. The Supreme Court’s decision in *Chimel v. California*, which held that officers’ search of the defendant’s entire house during an arrest did not escape the warrant requirement, supports Neely’s argument. In that case, the Court

reasoned that during an arrest it is reasonable for the arresting officer to search the person arrested in order to remove any weapons the latter might seek to use to resist arrest or effect his escape, and to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

"Under *Chimel* and *Johnson* we cannot say that the seizure of Neely's clothing was incident to his arrest because the clothing was far removed from Neely, and there are no indications that he could have attempted to destroy the clothing, given that, at the time it was seized, he was either in surgery or shackled to his hospital bed. This exception simply does not apply to the facts of this case."

**VIENNA CONVENTION
OF CONSULAR RELATIONS:
Rights of Detained Foreign Nationals**

In *Mezquita v. State*, No. CR03-017, 10/16/03, Carlos Mezquita, a foreign national from El Salvador, was convicted of rape in Benton County, Arkansas. Mezquita raised several arguments on appeal to the Arkansas Supreme Court, including the failure by police to inform him of his rights under the Vienna Convention on Consular Relations (VCCR). The VCCR is a multinational treaty signed by the United States.

Since Mezquita neither asked for nor obtained a ruling from the trial court on the issue of "detention" for the purposes of the VCCR, the Arkansas Supreme Court stated that Mezquita could not raise this issue on appeal. An excerpt from their ruling follows:

"Several of Mr. Mezquita's points on appeal concern the failure by police to inform him of rights under the Vienna Convention on Consular Relations (VCCR). Mr. Mezquita argues that (1) the case should be remanded for a determination as to whether he was 'detained' as defined by the VCCR, (2) the VCCR grants individual rights to detained foreign nationals, (3) the case should be remanded for a showing of prejudice because of the VCCR violation, (4) the Exclusionary Rule is the proper remedy for a violation of the VCCR, (5) Mr. Mezquita did not

voluntarily waive his VCCR rights, and (6) the statements made by Mr. Mezquita and the evidence seized at his apartment should be suppressed because his VCCR rights were violated. We will address the first point regarding detention because it is dispositive of all points on appeal regarding the VCCR.

"The VCCR is a multinational treaty signed by the United States. As such, it is governed by the Supremacy Clause, under which treaties made by the United States are the 'supreme law of the land.' U.S. Const. Art. VI, Section 2. Mr. Mezquita's arguments are based in Article 36, paragraphs 1 and 2 of the VCCR, which provide:

(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this subparagraph;*

(c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or

detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State *who is in prison, custody or detention* in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national *who is in prison, custody or detention* if he expressly opposes such action.

(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws *and regulations* of the receiving State, subject to the proviso, however, that the said laws *and regulations* must enable full effect to be given to the purposes for which the rights accorded under this Article are intended. See *Vienna Convention on Consular Relations*, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. NO. 6820 (emphasis added).

“The VCCR delineates ‘in custody’ as something different than ‘detention,’ referring to a foreign national being ‘in custody’ as being ‘custody pending trial,’ with no definition at all of ‘detention.’ See *VCCR*, Art. 36, ¶ 1, *supra*. In a pretrial hearing held on June 4, 2001, defense counsel argued that Mezquita was ‘in custody,’ ‘under arrest,’ ‘locked in a room,’ and “detained in the interrogation room. . . . Instead of challenging the trial court’s ruling on the custody issue, Mezquita claims the trial court used an incorrect ‘in custody’ standard, and asks us to remand and require the trial court to perform another inquiry into whether or not he was ‘detained’ for the purposes of the VCCR.

“However, Mezquita never asked for nor obtained a ruling from the trial court as to whether or not he was ‘detained.’ It is well settled that the burden of obtaining a ruling is upon the movant, and unresolved questions and objections are waived and may not be relied upon on appeal. *State v. Montague*, 341 Ark. 144, 14 S.W.3d 867 (2000).

“Until Mezquita fell under the category of being ‘detained,’ ‘in custody,’ or ‘under arrest,’ his VCCR

rights were not triggered. Mezquita’s argument on appeal is that he was entitled to be informed of his VCCR rights prior to making his statements because he was detained at the time he made his statements. However, his failure to obtain a ruling on the issue of detention has waived this argument; thus, the remainder of his arguments regarding the scope of the VCCR and the remedy for its violation have been rendered moot.”

Editors Note: Law enforcement agencies who deal with foreign nationals should acquaint themselves with the Vienna Convention on Consular Relations, which deals with the rights of a foreign national who is in prison, custody, or detention. A copy of a booklet on this issue can be obtained by writing the Office of Public Affairs and Policy Coordination for Consular Affairs (CA/P, Room 6831, U.S. Department of State, Washington, D.C. 20520), by accessing www.travel.state.gov/consul_notify.html, or through a request to Ms. Kimberly Hendricks or Ms. Janet Harris-George at the Criminal Justice Institute.

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

